

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 2080-2008
	:	
JOHN ULRICH,	:	CRIMINAL DIVISION
Defendant	:	APPEAL

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

On June 1, 2010, John Ulrich (Defendant) pled guilty in front of the Honorable Marc Lovecchio to Theft by Unlawful Taking, a felony of the second degree. The Defendant was placed on the Lycoming County Intermediate Punishment Program for a period of five (5) years, with twenty-seven (27) months to be served at the Lycoming County Prison/Pre-Release Facility. The sentence was to run concurrent to a federal sentence of twenty-one (21) months that the Defendant was currently serving. Upon release from the federal sentence the Defendant was to complete the remaining part of the Lycoming County sentence.

The Defendant's supervision was transferred to Northumberland County. On January 31, 2012, Northumberland County transferred the Defendant's supervision back to Lycoming County to due a violation of supervision for using controlled substances. The Defendant was released from Lycoming County Prison after serving a period of incarceration of two (2) months and six (6) days and his supervision was transferred back to Northumberland County. On October 5, 2012, the Defendant admitted to Northumberland County Adult Probation that he had used controlled substances and would test positive for Tetrahydrocannabinol (THC). On the same day, the Defendant was taken into custody by the Lycoming County Adult Probation Office.

On October 18, 2012, after a final intermediate punishment violation hearing, this Court found beyond a reasonable doubt that the Defendant violated the conditions of the Intermediate Punishment Program. The Defendant was re-sentenced on his Theft by Unlawful Taking conviction and received five (5) to ten (10) years in a State Correctional Institution. On October 25, 2012, the Defendant filed a Motion for Reconsideration of PV Sentence, which was denied on November 5, 2012. On November 14, 2012, the Defendant filed a Notice of Appeal. In response to this Court's Order requesting a concise statement of matters complained of on appeal, the Defendant alleges that this Court abused its discretion in imposing sentence and failed to consider the Defendant's treatment for controlled substances, life changes, and his understanding of the Court's authority.

The trial court abused its discretion by imposing a sentence of five (5) to ten (10) years in a State Correctional Institution and by not considering relevant sentencing factors

The Defendant claims that the sentence imposed against him was excessive and without meaningful consideration of the Defendant's rehabilitative treatment for controlled substance abuse, his life changes, and his recognition of the Court's authority. 42 Pa. C. S. A. § 9781(b) provides that:

The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

A Defendant has no absolute right to challenge the discretionary aspects of his sentence.

Commonwealth v. Petaccio, 764 A.2d 582, 586 (Pa. Super. 2000); see also Commonwealth v. Hoag, 665 A.2d 1212 (Pa. Super. 1995). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless

the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.” See Commonwealth v. Paul, 925 A.2d 825, 829 (Pa. Super. 1997) (quoting Commonwealth v. Kenner, 784 A.2d 808, 810 (Pa. Super. 2001)). Furthermore, “[u]pon sentencing following a revocation of probation, the trial court is *limited only* by the maximum sentence that it could have imposed originally at the time of the probationary sentence.” Commonwealth v. Gibbons, No. 1733 MDA 2010, slip op. at 2 (Pa. Super. June 17, 2011) (emphasis added); see also Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa. Super. 2001).

While the Defendant argues that the sentence imposed against him was an abuse of discretion, he does not argue that the sentence was beyond the maximum. The Defendant pled guilty on June 1, 2010 to Theft by Unlawful Taking, a felony of the second degree. The statutory maximum for that offense is ten (10) years. The Defendant’s sentence of five (5) to ten (10) years, which he received at his final IP violation hearing, is within the maximum sentence. As stated above, the sentencing court is only limited by the maximum sentence.

Furthermore, it is well settled that once probation has been revoked the court may impose a sentence of total confinement if any of the following conditions exist under Section 9771(c) of the Sentencing Code:

- (1) the defendant has been convicted of another crime;
- (2) the conduct of the defendant indicates that it is likely that he will commit another crime if she is not imprisoned; or
- (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. § 9771. When it becomes apparent that the probationary order is not serving its desired rehabilitation effect, the court’s decision to impose a more appropriate sentence should not be inhibited. Commonwealth v. Ahmad, 961 A.2d 884 (Pa. Super. 2008) (citing Commonwealth v. Carver, 923 A.2d 495, 498 (Pa. Super. 2007)).

In this case, the Court had multiple justifications for imposing a sentence of total confinement. The Defendant failed at the opportunities given to avoid additional incarceration. The confinement for the Theft By Unlawful Taking charge ran entirely concurrent to a Federal sentence. After completing the Federal sentence, the Defendant violated his supervision with Northumberland County. After being released from Lycoming County Prison and placed back on supervision with Northumberland County the Defendant again violated for using controlled substances. The Defendant's repeated drug use showed the Court that his IP sentence did not have any rehabilitative effect. In addition, the Defendant's repeated violations of supervision made it apparent that the Defendant was likely to commit another crime if he was not imprisoned.

Finally, the Court did consider Defendant's rehabilitative treatment, his lifestyle changes, and his regard to authority. Despite a Prior Record Score of five (5) and repeated chances on supervision, the Defendant cited his seal coating business and his addiction to drugs for leniency in sentencing. The Court, however, believed that the Defendant was taking advantage of the court system. As stated on the record:

THE COURT: I see you do what you need to do to get what you need to get the benefit for yourself, to get the best opportunity for yourself, which I guess if I were in the system with your prior record score knowing the system the way you do why wouldn't you because you're playing the system against itself. The problem I have is when I saw that you got a 27 month sentence that ran entirely concurrent to a federal sentence, the fact that you relapsed, they sent you back to Northumberland County, which is to me is your one chance and you still blew that. Why should I mitigate what you just did in anyway? Why I feel – why I should feel sorry for you? Why should I feel compassion for you and oh, yeah, you started your own business yet I'm going to still do what I want to do. You're in recovery. You know you can't be around people who use. You know that's going to be an invitation to have a relapse. But you did it anyway. This is what I'm not – I'm just having a hard time buying your line of thinking. I have a hard time accepting what you're asking me to do. The debate I'm having is how long of a sentence I should impose because quite frankly when you come back before the Court for resentencing I'm only bound by the statutory limit and I'm about at the point where in light of everything that's happened with this case and your contact with the criminal

justice system, the fact that you were given multiple opportunities to do the right thing and you didn't do it, I'm going to give you a five to ten.

N.T., October 18, 2012, p 8-9. The record shows that this Court did not abuse its discretion and reasonably sentenced this Defendant. Therefore, this Court finds that the Defendant's issue lacks merit and respectfully suggests that the Defendant's sentence be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
PD (Bob Cronin, Esq.)