

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
	:	
<b>v.</b>	:	<b>No. CR-856-2011</b>
	:	
<b>EBONY MOORE,</b>	:	<b>CRIMINAL DIVISION</b>
<b>Defendant</b>	:	<b>APPEAL</b>

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

On July 25, 2011, Ebony Moore, (Defendant) pled guilty to one count of Retail Theft, a felony of the third degree. On the same day, the Defendant was sentenced to thirty-six (36) months of supervision with the Adult Probation Office of Lycoming County. A special condition of the supervision was that the Defendant was to attend and successfully complete the Drug Court Program.

On November 30, 2011, the Defendant was detained in the Lycoming Count Prison (Prison) for missing an appointment at West Branch Drug and Alcohol Abuse Commission (West Branch). On December 14, 2011, the defendant was sanctioned fifty (50) hours of community service. On January 4, 2012, the Defendant again missed her scheduled counseling and was detained in the Prison. On January 11, 2012, the Defendant was sanctioned fourteen (14) days in the Prison, a sixty (60) day phase extension with the Drug Court program, and to attend an additional ninety (90) meetings in ninety (90) days. On February 8, 2012, the Defendant missed another appointment with West Branch and was sanctioned with four (4) consecutive Saturdays of community service.

On April 11, 2012, following a Preliminary Intermediate Punishment Violation Hearing, the Honorable Dudley N. Anderson found probable cause to believe that the Defendant violated

conditions of the Intermediate Punishment Program. On May 29, 2012, Judge Anderson revoked the Defendant's sentence at a Final Intermediate Punishment and Probation Violation Hearing and she was sentenced to the Intermediate Punishment Program for a period of thirty-six (36) months with the first fourteen (14) months to be served at the Prison/Pre-Release center.

On November 13, 2013, following a Final IP Violation Hearing, this Court again revoked the Defendant's Retail Theft sentence and re-sentenced her to twenty-five (25) months to five (5) years in a State Correctional Institution. The Court did not take further action under docket number 1224-2010. The Defendant filed a Post-Sentence Motion on November 14, 2013, which was denied by this Court.

On November 27, 2013, the Defendant timely filed a Notice of Appeal, appealing the IP Violation Sentencing Order of September 5, 2013. The Court directed the Defendant to file a concise statement of the matters complained of on appeal, in accordance with Pa.R.A.P. 1925(b). The Defendant alleged two (2) issues in her 1925(b) statement: 1) whether the Court abused its discretion by imposing a manifestly unfair and excessive sentence; and 2) whether the Court abused its discretion by imposing a sentence against the fundamental norms of the sentencing process and failing to address several factors.

***The trial court abused its discretion by imposing a manifestly excessive sentence***

The Defendant claims that the sentence imposed against her was excessive. 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 her was excessive, she does not argue that the sentence was beyond the maximum. The record establishes that the sentence the Defendant received was not beyond the maximum. The Defendant pled guilty on July 25, 2011 to Retail Theft, a felony of the third degree. The statutory maximum for that offense is seven (7) years. The Defendant’s sentence of twenty-five (25) months to five (5) years, which she received at her final IP violation hearing, is within 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 did not impose a maximum sentence on the Defendant but at the time mistakenly believed that a sentence of twenty-five (25) months to five (5) years would have been the statutory maximum. Even though the statutory maximum was not imposed, the Court had multiple justifications for imposing a sentence of total confinement. The Court found from the Defendant's history of probation violations that supervision did not have any rehabilitative effect on the Defendant and that she did not respect the authority of the Court. The Defendant was originally placed on supervision for thirty-six (36) months and treatment court, which she violated and was then placed on IP for an additional thirty-six (36) months. While on IP, the Defendant failed to report to her probation officer and also failed to attend counseling. In addition, the Defendant had been committed to the county prison fourteen (14) times since 2007.

The Court also assessed multiple factors in sentencing the Defendant, including past supervision violations, disregard for authority, and past incarceration. The record is extensive and address numerous factors, which includes the following portion:

COURT: I believe that to sentence you to anything different depreciates the seriousness of the just systematic probation, intermediate punishment violations that you've had, that Judge Anderson gave you a huge opportunity in May of 2012 and I believe that based upon your track record for the most part you squandered that opportunity, that Mr. Stahl gave you credit for working with him and, as I said, gave you credit and backed you off to once a month; but then what did you do with that? And I'd say that's probably the most telling thing is since June until October when you were incarcerated is that you were going to report if you were going to report when you wanted to. You were complying with the conditions of your own program, which had nothing to do with

John, with Mr. Stahl, excuse me, and that's not acceptable behavior especially in light of the fact that Judge Anderson probably talked with you back on May 29<sup>th</sup> about the opportunity that he was giving you.

N.T., November 13, 2013, p 27. The record shows that this Court did not abuse its discretion and reasonably sentenced this Defendant.

Similarly, the Defendant alleges that this Court abused its discretion in failing to address several factors at sentencing. While sentencing guidelines are not required to be consulted for revocation proceedings, a court "should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." Commonwealth v. Cartrette, 2013 PA Super 325 (Pa. Super. December 24, 2013). Further, "the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." Id. Based on the record, the Court believes 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  
Jeana Longo, Esq.