

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **CR-1573-2009**
:
v. :
: **CRIMINAL DIVISION**
HEATHER SHOLLENBERGER, :
Defendant : **1925(a) Opinion**

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

I. Background

On October 29, 2009, the Defendant pled guilty to Theft by Unlawful Taking.¹ The amount involved in the theft was \$513.28, making the offense a misdemeanor of the first degree. On December 10, 2009, the Defendant was sentenced by this Court to twenty-four (24) months of Intermediate Punishment supervision. On August 17, 2010, the Court found that the Defendant violated the conditions of her Intermediate Punishment supervision. Her sentence was revoked, and she was resentenced to two (2) years of probation to be supervised by the Pennsylvania Board of Probation and Parole. Her new sentence was to run consecutively to another sentence with the Board.

On November 15, 2013, the Defendant was instructed to leave her recovery home because of behavioral issues. On November 22, 2013, the Defendant failed to report to her probation officer as she was instructed. The Defendant was also unwilling to give her location to her probation officer. A bench warrant was issued, and the Defendant was arrested on January 18, 2014.

On February 20, 2014, after a special probation violation hearing, this Court found beyond a reasonable doubt that the Defendant violated her special probation sentence. The Defendant was resentenced to incarceration in a state correctional institution for a minimum of

¹ Theft by Unlawful Taking is defined in 18 Pa. C.S. § 3921(a).

one (1) year and a maximum of two (2) years with an additional two (2) years of probationary supervision. This Court did not have an objection to the Defendant being placed in a therapeutic community within the state correctional system.

On March 4, 2014, the Defendant filed a motion with this Court to reconsider its sentence of February 20, 2014. In the motion, the Defendant argued that the sentence of February 20, 2014 was unduly harsh and manifestly excessive. The Defendant argued that a county sentence would be more appropriate because it would allow the Defendant to enter a treatment facility to help with her addictions. This Court denied the Defendant's motion.

On March 18, 2014, the Defendant appealed this Court's sentence of February 20, 2014. On appeal, the Defendant argues that this Court abused its discretion by imposing an unduly harsh and excessive sentence. Additionally, the Defendant argues that this Court abused its discretion by not making the Defendant eligible for the State Motivational Boot Camp Program. On April 22, 2014, this Court amended its sentence of February 20, 2014 to reflect that the Defendant is Boot Camp eligible.

II. This Court did not Impose an Unduly Harsh and Excessive Sentence

The Defendant argues that the sentence imposed was unduly harsh and excessive. 42 Pa. C.S. § 9781(b) provides:

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 or her 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, “upon 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. Fish, 752 A.2d 921, 923 (Pa. Super. 2000) (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 to the offense of Theft by Unlawful Taking, a misdemeanor of the first degree. The statutory maximum for that offense is five (5) years. The Defendant’s sentence of one (1) year to two (2) years, which she received at her special probation 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 she 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)).

The Court also assessed multiple factors in sentencing the Defendant, including past supervision violation, disregard for authority, and past incarceration. The record is extensive and addresses numerous factors, including the following:

COURT: I'm looking at the order that Judge Gray issued back in August of 2010. It was also for a failure to report it looks like a violation of condition one that's why I had to check. Seven was use. Ten I forgot what ten is, but that on access device fraud he sentenced her [Defendant] to state prison and then imposed this consecutive period of probation on the theft, it's an M-1, it's a max of five years. I can't sentence her to six months in jail. I think based upon her history and her failing to comply with conditions, specifically, absconding, that I'm going to sentence her to a year in state prison. It also looks as though she's not eligible for RRRI because of a previous conviction for recklessly endangering another person.

N.T., February 20, 2014, p. 4. The record shows that this Court did not abuse its discretion and reasonably sentenced this Defendant.

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 part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentenced 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.

III. Conclusion

Based upon 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

cc: Kirsten Gardner, Esq.
DA
APO