IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-617-2006**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
JAMES BORTZ,	:	
Appellant	:	**1925(a) Opinion**

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

This opinion is written in support of this court's judgment of sentence dated July 14, 2016. The relevant facts follow.

On May 8, 2006, Appellant James Bortz pled guilty to statutory sexual assault, a felony of the second degree, and corruption of minors, a misdemeanor of the first degree. On July 5, 2006, the Honorable William S. Kieser sentenced Bortz to 8 months to 10 years' incarceration in a state correctional facility for statutory sexual assault and a consecutive term of two years' probation for corruption of minors. The focus at the sentencing hearing was getting Bortz sexual offender treatment, which he could receive in a state correctional facility but would not receive in the county prison. Unfortunately, Bortz failed or refused to complete sexual offender treatment, and he "maxed out" his state sentence.

On July 14, 2016, Bortz came before the court for a probation violation hearing based on his failure to be processed into and complete a sexual offender treatment program. There was no dispute that Bortz did not complete the sexual offender treatment

program while he was incarcerated in state prison or that he was not currently enrolled in such programming.

Bortz' counsel argued that his probation should not be revoked based on his failure to complete the treatment, especially since he already served 10 years in state prison as a result of that failure. Counsel also noted that, as a sexually violent predator,[1] Bortz was required to complete monthly counseling. If he failed to complete his counseling while he was out on the street, not only would he be in violation of his probation, but he would also be subject to further criminal prosecution and face an additional 2 ½ to 5 years' incarceration.

Bortz' probation officer, Loretta Clark, noted that Bortz did not have a residence to be released to and he chose to max out his state prison sentence instead of attending any of the programs. Ms. Clark also noted that she did not think Bortz would comply with any kind of counseling out on the street since he had the option to be released from jail years ago if he complied but he still chose not to do so.

Bortz stated that he had a place at the American Rescue Workers and he asked to be given a second chance to try to do the individual counseling on his own. Ms. Clark, however, noted that the American Rescue Workers do not take sexually violent predators.

The court found Bortz in violation of his probation and re-sentenced him to serve 6 months to 2 years' incarceration in a state correctional institution. Bortz filed a motion for reconsideration of sentence, which the court summarily denied.

Bortz filed a timely appeal. The sole claim on appeal is that the court erred when it denied Bortz' motion for reconsideration of his probation violation sentence by

[1] Bortz was designated a sexually violent predator in a separate case, CP-41-CR-1906-2003.

failing to take into account his rehabilitative needs since he had already served a ten-year sentence and would be unable to complete the sexual offender rehabilitative program if he returned to a state facility.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in a judgment. Rather, the [appellant] must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa. Super. 2005)(quoting ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999)(en banc)(internal quotation marks and citations omitted)), appeal denied, 586 Pa. 723, 890 A.2d 1057 (2005).

Our Supreme Court has specifically explained that the "concept of unreasonableness…is inherently a circumstance-dependent concept that is flexible and understanding and lacking precise definition." ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 963 (2007). "Moreover, even though the unreasonableness inquiry lacks precise boundaries, …rejection of a sentencing court's imposition of sentence on unreasonableness grounds [will] occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review." 926 A.2d at 964.

The court did not impose a state prison sentence based on partiality, prejudice, bias or ill-will. Rather, the court imposed a state prison sentence because the county prison does not have a sexual offender treatment program and Judge Kieser's sentencing scheme clearly contemplated Appellant completing such a program before being supervised on the street so that he would have tools to deal with his sexual urges without committing additional

sexual offenses against minor females (see N.T., July 5, 2006, at 6-7, 10).

The court could have imposed a maximum sentence of up to five years. Instead, the court imposed the lowest maximum sentence it could while still putting Appellant in a location where he could, if he cooperated therewith, receive sexual offender treatment prior to him being around minor females in the general public.

The request for release onto supervision to obtain treatment outside a prison environment contained in Appellant's motion for reconsideration failed to adequately consider the protection of the public, especially minor females, and the likelihood that Appellant would re-offend without such treatment, as this case was not the only time Appellant committed a sexual offense and he has never completed sexual offender treatment. In fact, according to the affidavit of probable cause in this case, these charges came to light because Appellant continued to have contact via correspondence with the victim in this case while he was an inmate at the Pre-Release Center with respect to his other case.

The court did not find persuasive counsel's argument that the threat of new charges for failing to attend the mandatory monthly counseling for sexually violent predators would be a sufficient inducement for Appellant to complete sexual offender counseling while out on the street. Appellant could have avoided years of actual incarceration, yet he still refused to comply. Therefore, the court does not believe the possibility of future incarceration would have any deterrent effect on Appellant.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
Joshua Bower, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)