

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-56-2011
	:	CR-733-2011
vs.	:	
	:	CRIMINAL DIVISION
	:	
CODY HAMMAKER,	:	
Appellant	:	1925(a) Opinion

**OPINION IN SUPPORT OF ORDER OF JANUARY 10, 2017 IN
COMPLIANCE WITH RULE 1925(a) OF
THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE**

Cody Hammaker (hereinafter “Hammaker”) appeals from the January 10, 2017 aggregate judgment of sentence of 5 to 15 years’ imprisonment following the revocation of his State Intermediate Punishment (SIP) sentence.

Under Information No. 56-2011, on February 22, 2011, Hammaker pled guilty to Count 3, possessing instruments of a crime, a misdemeanor of the first degree; Count 4, simple assault, a misdemeanor of the second degree; Count 9, corruption of minors, a misdemeanor of the first degree; Count 10, propulsion of missiles, a misdemeanor of the third degree; a consolidated count of criminal mischief, a misdemeanor of the third degree encompassing Counts 11 through 17; and Count 18, possession of drug paraphernalia, an ungraded misdemeanor.

Over a period of days in late December of 2010, Hammaker drove around with another and shot a BB gun at property and at least one individual. He caused thousands of dollars in damage.

On May 16, 2011, Hammaker was sentenced as follows: 18 months’ probation

on Count 3, one year probation on Count 4, one year probation on Count 9, one year probation on Count 10 and six months' probation on Count 18. All of these probationary sentences ran consecutively to each other for an aggregate period of probation of five years. A fine was imposed on the consolidated criminal mischief count.

Under Information No. 733-2011, on June 13, 2011, Hammaker pled guilty and was sentenced on Count 2, criminal mischief, a felony of the third degree, to two years of county intermediate punishment (IP) with 30 days of work release, and Count 3, criminal mischief, also a felony of the third degree, to a consecutive term of two years' probation. This sentence ran consecutive to the sentence under Information No. 56-2011.

Between December 25, 2010 and December 27, 2010, Hammaker and two juveniles, using a BB gun, damaged numerous vehicles, homes and items belonging to 15 different victims, causing thousands of dollars of damage.

Hammaker's probation supervision went very poorly. Hammaker absconded from supervision on February 13, 2012. He was apprehended in May of 2012. He was re-sentenced under 56-2011 with respect to Count 3, possessing instruments of a crime to a 3 to 6 month max-out sentence. No further action was taken on the remaining Information or counts.

On November 21, 2012, Hammaker violated his probation again. He misrepresented his home plan information to the Adult Probation Office. While not revoking and re-sentencing Hammaker, the court would not release Hammaker until he obtained an approved home plan. Unfortunately, Hammaker was unable to obtain an approved home plan. As a result, he was not released until December 27, 2012 on the condition that he report daily to the Adult Probation Office.

On January 8, 2013, Hammaker violated probation by not reporting as directed. A bench warrant for absconding was issued on January 8, 2013. On January 31, 2013, Hammaker was re-sentenced under Information 56-2011 with respect to Count 4, to a 4 to 12 month period of county incarceration. The probationary and IP sentences on the remaining Informations and counts continued to run consecutive. Hammaker was paroled on May 20, 2013.

On October 10, 2013, however, Hammaker violated his parole by committing a new criminal offense. Under Information No. 56-2011, Hammaker was re-committed to serve his maximum sentence under Count 4 until January 31, 2014.

On May 27, 2014, a bench warrant was again issued for Hammaker for absconding from supervision. On December 11, 2014, following a hearing, Hammaker was found to have violated his IP and probationary sentences under both Informations by absconding and committing a new criminal offense, namely a misdemeanor retail theft. Given Hammaker's substantial substance abuse history, the court directed that he be transported to the state correctional institution at Camp Hill to determine if he was suitable for the SIP Program.

On June 18, 2015, Hammaker's intermediate punishment and probationary sentences were revoked under both Informations. Hammaker was sentenced to the SIP Program with respect to Counts 9, 10 and 18 of 56-2011, and Counts 2 and 3 of 733-2011.

On December 29, 2016, the court was informed that Hammaker was expelled from the SIP Program. On January 10, 2017, the court found that Hammaker was expelled from the SIP Program and was convicted of two new criminal offenses, escape and simple assault. As a result, and pursuant to 42 Pa. C.S.A. § 9774 (b), Hammaker's SIP was revoked.

Hammaker was re-sentenced under 56-2011 with respect to Count 9, corruption of minors, a misdemeanor 1 offense, to 2 ½ to 5 years, followed by consecutive sentences under 733-2011 of 1 ½ to 5 years on Count 2 and 1 to 5 years on Count 3, both criminal mischief offenses. The aggregate sentence was a minimum of 5 and a maximum of 15 years to be served in a State Correctional Institution.

Hammaker filed a motion to reconsider on January 26, 2017, arguing that the sentence was unduly harsh and excessive. Specifically, Hammaker argued that a 2 to 4 year sentence should be imposed or that his sentence should run concurrent to his sentence in Dauphin County with respect to the escape and simple assault charges. Hammaker argued that he has three children, he wished to be a father figure, he wanted to actively participate in the lives of his children, and he “realized” that his actions “have affected his children as well.” The court summarily denied the motion to reconsider.

Hammaker filed an appeal on February 7, 2017. By Order dated February 16, 2017, the court directed Hammaker to file a concise statement of errors complained of on appeal. As of the date of this Opinion, however, Hammaker has failed to comply with the Order, and no concise statement has been filed.

Pennsylvania Rule of Appellate Procedure 1925 (b) provides that the court may enter an order directing the appellant to file a concise statement of errors complained of on appeal (“Statement”). The Rule further provides that: “Issues not included in the Statement and/or raised in accordance with the provisions of this paragraph (b) (4) are waived.” PA. R. APP. P. 1925 (b) (4) (vii).

Despite being notified in the order that a failure to timely file such a Statement would result in waiver, Hammaker still has not filed a Statement. Therefore,

Hammaker has waived any and all issues he could have asserted in this appeal. PA. R. APP. P. 1925 (b) (4) (vii); see also *Commonwealth v. Lorde*, 719 A.2d 306, 309 (Pa. 1998) (issues not raised in Rule 1925 statement are waived).

There is, however, a procedure for appellate courts to rectify one's failure to file a Statement. Specifically, if an appellant in a criminal case is ordered to file such a Statement and fails to do so, the appellate court may remand the case for the filing of a Statement nunc pro tunc if the court is convinced that counsel has been per se ineffective. PA. R. APP. P.1925 (c) (3); *Commonwealth v. Scott*, 925 A.2d 1190, 1192 (Pa. Super. 2008).

To avoid a potential remand and for the purposes of judicial economy and expediting finality for all parties, the court will address the issue raised by Hammaker in his motion to reconsider. The court fully expects that this issue would be the only issue raised on appeal.

Upon revocation of an SIP sentence, the sentencing alternatives available to the court shall be the same as the alternatives available at the time of initial sentencing. 42 Pa. C.S.A. § 9774 (c). However, because one of the stated purposes of SIP is to afford treatment opportunities to those who might not otherwise be provided such, 61 Pa. C.S.A. §4102 (6), the court likens a violation of SIP to a violation of probation. See *Commonwealth v. Flowers*, 149 A.3d 867 (Pa. Super. 2016)(SIP sentence analogous to sentence of probation).

Hammaker contends that the aggregate sentence imposed was unduly harsh and excessive. In support of such, Hammaker argues that he now realizes that his children have been affected by his misconduct and that he now wishes to be a father figure and actively participate in their lives.

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character and the defendant's display of remorse, defiance or indifference. *Commonwealth v. Colon*, 102 A.3d 1033, 1043 (Pa. Super. 2014) (quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)). 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. *Commonwealth v. Derry*, 150 A.3d 987, 991 (Pa. Super. 2016).

In fashioning a sentence following a violation of probation (VOP), or in this case SIP, the court must consider not only the dictates of 42 Pa. C.S.A. §9771 (c) but should also consider the factors set forth in 42 Pa. C.S. § 9721 (b). *Derry*, 150 A.3d at 994. In other words, the sentence must be “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.” As well, the court should consider whether the sentence imposed is, among other things, essential to vindicate the authority of the court and must give due consideration to the time spent serving the order of probation. *Id.*

As well, in a VOP context, the court enjoys a greater degree of deference. *Id.* at 995 n.2 (citing *Commonwealth v. Pasture*, 107 A.3d 21, 27 (Pa. 2014)).

The sentencing court's institutional advantage is, perhaps, more pronounced in fashioning a sentence following the revocation of probation, which is qualitatively different than an initial sentencing proceeding....[I]t is a different matter when the defendant appears before the court for sentencing proceedings following a violation of the mercy bestowed upon him in the form of a probationary sentence.

Id. at 992 (citing *Pasture*, 107 A.3d at 27). Further,

since the defendant has previously appeared before the sentencing court, the stated reasons for a revocation sentence need not be as elaborate as that which is required at initial sentencing. The rationale for this is obvious. When sentencing is a consequence of the revocation and probation, the trial judge is already fully informed as to the facts and circumstances of both of the crime and nature of the defendant.

Id. at 995 n.2 (quoting *Pasture*, 107 A.3d at 28).

As the court specifically noted in its sentencing order of January 10, 2017:

The [c]ourt has considered the nature and circumstances of the offenses, and [Hammaker's] violations. [Hammaker,] since being placed on probation in 2011[,] has absconded twice, and has escaped once. He has committed new criminal offenses on four separate occasions. He has committed technical violations of his supervision on at least two (2), if not three (3) occasions. The [c]ourt has considered in detail [Hammaker's] history and characteristics. [Hammaker] is young, had a relatively stable childhood, but started getting into trouble at a young age, and has had a substantial substance abuse problem for many years; however, substantial efforts have been taken on behalf of the [c]ourt to address defendant's substance abuse history, but without success. The [c]ourt has observed [Hammaker], and has listened to [his] explanation of his conduct. The [c]ourt is left wanting. It does not appear that [Hammaker] has significant insight into his behaviors, nor does he have significant motivation to address such.

This sentence calls for confinement which is consistent with protecting the community, it calls for confinement which is consistent with the gravity of offenses as to the extent they relate to the impact on the community and the victims, and it is consistent with [Hammaker's] rehabilitative needs. It does not appear to the [c]ourt that expending time, efforts and resources on alternative programming outside of the normal programming in a State Correctional Institution would be beneficial. Due consideration has been given to the time [Hammaker] has spent on supervision, [his] conduct while on supervision, and the programming that has been offered.

The [c]ourt finds that total confinement is necessary because Hammaker was convicted of other offenses while on supervision, that [Hammaker] is likely to continue to flee and commit other criminal offenses, and that total confinement is necessary to vindicate the authority of the [c]ourt.

When Hammaker was accepted to SIP, he was an admitted addict and alcoholic who reported daily polysubstance abuse. His assessment concluded that he met the

established criteria for substance dependence.

He was to be confined in a State correctional facility for at least 7 months, with a minimum of 4 months in an alcohol or other drug therapeutic community. Then he would have a 2 month placement in a community based therapeutic community followed by a minimum of 6 months outpatient treatment.

In a nutshell, Hammaker's initial foolish criminal acts of destroying property and physically assaulting at least one individual were a precursor to Hammaker's continued criminal behaviors. County incarceration and a short period of state incarceration before attending the intensive treatment portion of the SIP Program were not enough to deter Hammaker from future criminal misconduct. Programming through county supervision and the state's "ultimate" treatment program was not enough to stop Hammaker from continuing his criminal behaviors. Hammaker has chosen not to be rehabilitated and has chosen a life of crime and drugs over a life with his children.

As this court noted in its sentencing order:

The loss of one's freedom is especially heartfelt in a society that values it practically ahead of everything else. This court does not make this decision lightly. [Hammaker's] conduct and refusing to comply with programs and conditions designed to actually help [him] necessitates this result. [Hammaker's] choices reflect a conscious desire to waive [his] freedoms.

The court's sentence was not manifestly unreasonable. The record clearly shows that the court took into account all of the relevant factors and arrived at a sentence that was consistent with the law.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Adult Probation Office
Kirsten Gardner, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
File 56-2011