

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1647-2012
vs. :
: CRIMINAL DIVISION
:
:
DERRICK JOHNSON, :
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 June 2, 2016. The relevant facts follow.

In July 2012, police were contacted by an individual who had been at the Brickyard bar/restaurant in Williamsport. The individual used his Discover card there and the card disappeared shortly thereafter. The individual checked with Discover and learned that someone subsequently had used his card on numerous occasions throughout the Williamsport area. Four additional individuals came forward and reported that their credit cards were taken. The police investigated the transactions made on the credit cards and, by viewing surveillance videos, identified the perpetrator as Appellant Derrick Johnson, who at the time was an employee of the Brickyard.

On September 11, 2012, the police charged Appellant with five counts of access device fraud, in violation of 18 Pa. C. S. §4106 (a)(1)(ii).

On January 7, 2014, Appellant pled guilty to a consolidated count of access device fraud, graded as a misdemeanor of the first degree, which encompassed counts 2, 3,

and 4.

On May 13, 2014, the court sentenced Appellant to pay the costs of prosecution, as well as restitution to the financial institutions who issued the credit cards, and to supervision on the Intermediate Punishment (IP) program for a period of five years, with the first twelve months to be served at the Lycoming County Pre-Release Center (PRC).

On August 6, 2015, Appellant appeared before the court for a preliminary IP violation hearing. The court found probable cause to believe that Appellant violated the conditions of his supervision by using controlled substances and by being discharged from an inpatient treatment facility. While the court considered state incarceration to be appropriate, the court gave Appellant another opportunity to avoid such a placement. The West Branch Drug and Alcohol Abuse Commission assessed Appellant and determined an appropriate treatment plan. Appellant was released from incarceration with the condition that he successfully complete the treatment plan.

On October 1, 2015, Appellant again came before the court for a preliminary IP violation hearing. The court found Appellant violated the conditions of his supervision by failing to keep current on his costs and fines obligations. The court lowered Appellant's monthly payment obligation and required him to provide verification of his employment and his attendance at treatment programs with Crossroads Counseling.

On March 31, 2016, Appellant appeared before the court for a third time for a preliminary IP violation hearing. The court found probable cause to believe that Appellant violated the conditions of his IP supervision by using his wife's prescription medication and by being discharged from the Re-Entry Program. Pending a final hearing, the court ordered Appellant to continue under IP supervision with the additional conditions that he attend and

successfully complete the Re-Entry Program and that he continue to participate in the court-appointed Re-Entry Program through the Middle District of Pennsylvania. The Court advised Appellant that if he failed to fully comply with the terms and conditions he would likely face revocation of his IP sentence and placement in a state facility.

On June 2, 2016, Appellant was before the court for a final hearing on the prior three sets of violations as well as two new violations for being discharged from Crossroads Counseling due to his failure to attend individual counseling sessions and for a positive test result for cocaine. Appellant denied using cocaine, but admitted all of the other violations.

The court found Appellant violated the conditions of his IP sentence, and it re-sentenced him to 2 ½ to 5 years' incarceration in a state correctional institution.

Through Post Conviction Relief Act (PCRA) proceedings, Appellant's rights to file a motion for reconsideration of sentence and a direct appeal were reinstated nunc pro tunc on March 25, 2017.

On April 21, 2017, Appellant filed a motion to modify sentence nunc pro tunc, in which he asserted that a "max out" state prison sentence for a single count of access device fraud was manifestly excessive and unreasonable and constituted an abuse of discretion where the basis for the revocation was a series of relatively minor violations of his IP sentence. On April 24, 2017, the court summarily denied Appellant's reconsideration motion.

Appellant filed a notice of appeal. The court did not direct Appellant to file a concise statement of errors complained of on appeal because the only issue preserved for appellate review was Appellant's claim that the sentence imposed was manifestly excessive

and unreasonable, as well as an abuse of discretion.

“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 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. Kitchen*, 2017 PA Super 147, 2017 Pa. Super. LEXIS 346, *11 (May 16, 2017), citing *Commonwealth v. Antidormi*, 84 A.3d 736, 760-61 (Pa. Super. 2014).

When imposing a sentence, a sentencing court must consider the protection of the public, gravity of the offense in relation to the impact on the victim and community, and the rehabilitative needs of the defendant. *Commonwealth v. Fullin*, 892 A.2d 843, 847 (Pa. Super. 2006). The court is also guided by § 9781 (d) of the Judicial Code, which requires appellate courts to review the record with regard to: “(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any presentence investigation; (3) the findings upon which the sentence was based; and (4) the guidelines promulgated by the commission.” 42 Pa. C.S.A. § 9781 (d).

When the court revokes a sentence of intermediate punishment, the sentencing alternatives available to the court are the same as were available at the time of initial sentencing. 42 Pa.C.S. §9773(b). The sentencing guidelines, however, do not apply at a violation hearing. 204 Pa. Code §303.1(b)(“The sentencing guidelines do not apply to sentences imposed as a result of ... revocation of probation, intermediate punishment or

parole.”); *Commonwealth v. Reaves*, 923 A.2d 1119, 1129 (Pa. 2007). Furthermore, a “trial court does not necessarily abuse its discretion in imposing a seemingly harsh post-revocation sentence where the defendant originally received a lenient sentence and then failed to adhere [to] the conditions imposed on him.” *Commonwealth v. Schutzues*, 54 A.3d 86, 99 (Pa. Super. 2012).

While the sentencing guidelines do not apply in this context, they illuminate the leniency of Appellant’s original sentence. According to Appellant’s guilty plea colloquy, the offense gravity score for access device fraud was a 4 and his prior record score was a repeat felony offender (RFEL). Therefore, the standard minimum guideline range for Appellant’s original sentence was 21 to 30 months’ incarceration.

Appellant was given a huge break when he was sentenced to supervision under the IP program. Transcript, June 2, 2016, at 10. The original sentence gave Appellant opportunities to remain employed to support himself and his family and to address his drug problems. Unfortunately, Appellant failed to avail himself of those opportunities.

The court gave Appellant multiple chances to avoid being removed from the IP program and being sentenced to incarceration. However, Appellant continued to do what he wanted rather than comply with the requirements of his supervision. Finally, enough was enough.

The court specifically stated:

Okay, here’s the problem when I look at everything. I mean I went through all of the violations, and Mr. Johnson, I’ll be honest with you, the time has come. You know it. I know it. Mr. Whiteman knows it. Everybody knows it. This is the third strike for lack of a better term. I’ve given you opportunity after opportunity. I met you in my office when you came in and asked questions. You talked about being involved in Re-Entry, you talked about being re[-]involved in the Re-Entry Coalition, you talk

about doing all of these wonderful things in the community. And all I hear is excuse, after excuse, after excuse.

Um, I disagree that you're not a threat to the community. I disagree that you're not a threat to – that you're not a risk of committing other crimes. You certainly are because you're not doing what you're supposed to be doing to lead you to live a law abiding life.

Here's what I have before me, all right? I have – I have the August 6th, okay, using controlled substances and being discharged from an inpatient treatment facility. There you go, you did that wrong. So, obviously, those are criminal behaviors and, obviously, you haven't done what you were supposed to be doing to address your substance abuse issues because you were discharged.

I have you not being current on your costs and fines. And what's particularly disturbing to me is that we had a very long cost and fines hearing not too long ago. It was about – it [was] on May 5th and you said that you couldn't pay the money, you got paid the following day. You asked for an extra day. You were – you were – I mean, you were as emotional and as determined as possible. That \$300.00 was paid before you even left the holding cell.

Um, I have serious doubts about your integrity. I have serious doubts about your credibility. Um, unfortunately, it appears to me at this point that you're a con artist. That you maneuver and you manipulate and you use your intelligence and your charm and your personality to essentially buffer you from your – what you want to do in terms of your own behaviors and what you want to do in terms of not doing what you are supposed to do. You know, you can fool me once, you can fool me twice, you can fool me three times but enough is enough.

Then after that we have you failing to comply – failing to report to Re-Entry Services program, being medically discharged from Re-Entry Services Program, and admitting to Agent Corman that you've been using [you're] wife's Percocets. Well, those are crimes. Using Percocet when you're not supposed to be using Percocet[,] [t]hat's a clear danger to the community because opiate use is[,] in and of itself[,] dangerous not only to yourself but to others. Taking your wife's Percocets meant that somebody else didn't get it. Um, I have you—and then most recently being kicked out of Crossroads after you were given the chance.

Transcript, June 2, 2016, at 11-13.

The court considered the protection of the public and Appellant's rehabilitative needs. Since Appellant was unwilling or unable to complete the programs that would rehabilitate him, Appellant left the court with no choice but to incarcerate him, not

only to protect the public and Appellant from his bad choices, but also to vindicate the authority of the court. Instead of complying with the conditions of his supervision, Appellant did whatever he wanted. Despite being warned that he risked going to state prison if he failed to fully comply, Appellant repeatedly violated the conditions of his IP program. Finally, enough was enough, and the court sentenced Appellant to incarceration in a state correctional institution. Although the sentencing guidelines do not apply to sentences imposed as a result of the revocation of intermediate punishment, the sentence that the court imposed was within the standard guideline range. Therefore, despite being a “maximum” sentence, such a sentence was appropriate under the facts and circumstances of this case.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Julian Allatt, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)