

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-30-2014
vs. : CP-41-CR-103-2014
: CP-41-CR-535-2014
:
:
CASEY STIDFOLE, :
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 November 16, 2016. The relevant facts follow.

Under Information 30-2014, the police charged the appellant with retail theft, a misdemeanor of the first degree, after he was caught trying to steal two televisions from Wal-Mart in Montoursville, Pennsylvania.

Under Information 103-2014, the police charged appellant with theft by unlawful taking, receiving stolen property, and criminal conspiracy for entering a residence and taking a flat screen television, an Xbox 360 game system, Xbox games, DVDs and \$60. He then sold the items for cash. All of these offenses were graded as misdemeanors of the first degree.

Under Information 535-2010, the police charged the appellant with burglary, a felony of the first degree; criminal trespass, a felony of the second degree; theft by unlawful taking, a misdemeanor of the first degree; receiving stolen property, a misdemeanor of the first degree; and theft by deception, a misdemeanor of the first degree. The police alleged

that the appellant broke into a residence and took DVDs, a PS3 game system and PS3 games. The appellant then sold the property as if it was his own to a video game store for cash.

On June 27, 2014, the appellant pled guilty to retail theft under information 30-2014; theft by unlawful taking under information 103-2014; burglary under information 535-2014; and burglary under information 2145-2013. As part of the plea agreement, the Commonwealth waived the appellant's ineligibility for the State Intermediate Punishment (SIP) program.

On January 27, 2015, the court sentenced the appellant to complete the SIP program with respect to a burglary conviction in an unrelated case (CR-2145-2013). For each of the other offenses, the court placed the appellant on probation supervision for a period of one year. These sentences were consecutive to each other and consecutive to the SIP sentence. One of the conditions of the appellant's probation supervision was that he successfully complete the SIP program

On August 3, 2016, the appellant's SIP and probation sentences were revoked because the appellant was expelled from the SIP program. The court resentenced the appellant to time served on the SIP revocation. Under information 30-2014, the court imposed a sentence of six months to two years less one day of incarceration at the Lycoming County Prison/Pre-Release Center for retail theft, a misdemeanor of the first degree. Under information 103-2014, the court again sentenced the appellant to one year of probation supervision for theft by unlawful taking, a misdemeanor of the first degree. Under information 535-2014, the court sentenced the appellant to four years' probation for burglary, a felony of the first degree. All of these sentences were to be served consecutively.

On or about October 27, 2016, the appellant was paroled and released from

the Pre-Release Center and directed to immediately report to the adult probation office (APO). As part of his conditions of probation and parole supervision, among other things, the appellant was to report as directed, refrain from consuming or using controlled substances, complete the Vivitrol Program, complete drug treatment, and complete the Re-entry Services Program.

On or about November 4, 2016, the appellant was detained on probation and parole violations.

On November 16, 2016, the appellant made a counseled admission to violating the conditions of his probation and parole by relapsing yet again on methamphetamines and cocaine, by not reporting for his treatment and APO visits, by attempting to get out of his Vivitrol shot and by not being honest with his adult probation officer. The court revoked the appellant's probation and parole. The court recommitted the appellant to serve the remaining balance of his sentence for retail theft under CR-30-2014. The court vacated the sentence for theft by unlawful taking under CR-103-2014 and imposed a sentence of guilt without further punishment. The court revoked the appellant's probation for burglary under CR-535-2014 and re-sentenced the appellant to 3 to 7 years' incarceration in a state correctional institution concurrent to his other sentences. The court also gave the appellant credit for time served from November 4, 2016 to November 15, 2016.

On December 9, 2016, PV counsel filed a motion for reconsideration of sentence nunc pro tunc, in which she alleged that: (1) the sentence was excessive; (2) the court failed to consider the appellant's loss of his best friend and his best friend's mother by homicide and its effect on him; and (3) the appellant immediately admitted his relapse to Crossroads Counseling and turned himself in to APO. The court summarily denied the

motion on December 12, 2016. No appeal was filed.

Through Post Conviction Relief Act (PCRA) proceedings, the court gave the appellant credit for additional time served from August 6, 2016 to October 18, 2016, and reinstated his direct appeal rights nunc pro tunc.

On appeal, the appellant asserts that the court erred in the following respects: (1) by imposing a sentence of total confinement upon revocation of supervision in violation of 42 Pa. C. S. §9771(c) without properly considering the general principles of sentencing, thus imposing a manifestly excessive sentence that amounted to an abuse of discretion; and (2) by imposing a sentence of total confinement upon revocation of supervision in violation of 42 Pa. C. S. §9771(d) due to the court's failure to consider the record of the appellant's original sentencing proceedings.

These issues were not raised before the court at the time of the revocation and re-sentencing hearing or in the motion to reconsider; they are being raised for the first time on appeal. Therefore, they are waived. PA. R. APP. P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); see also *Commonwealth v. Cartrette*, 83 A.3d 1030, 1041 (Pa. Super. 2013) (Challenges under §9771(c) are not among the narrow class of issues that implicate the legality of a sentence; therefore, such challenges must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings to be preserved for appellate review).

Even if these issues are not waived, they lack merit.

Section 9771(c) precludes the court from imposing a sentence of total confinement upon revocation of probation unless: “(1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that he will

commit another crime if he is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court.” 42 PA. C. S. §9771(c).

Although the appellant had not been convicted of another crime, a sentence of total confinement was appropriate under paragraphs (2) and (3). The appellant’s substance abuse issues were a significant contributing factor to his criminal activities. It appeared that the appellant was burglarizing residences and stealing property to obtain funds to support his drug addiction. On multiple occasions and through multiple programs, the court tried to get the appellant help with his substance abuse issues, but the appellant failed or refused to take advantage of those treatment opportunities.

The appellant was not eligible for the SIP program due to a juvenile adjudication for aggravated indecent assault, a crime requiring registration as a sexual offender, and may also have been ineligible due to his history of present or past violent behavior in the form of his convictions for burglary graded as a felony of the first degree, see *Commonwealth v. Chester*, 101 A.3d 56 (Pa. 2013)(convictions of first-degree burglary constitute history or present or past violent behavior rendering the appellant ineligible to receive an RRR-reduced minimum sentence). Nevertheless, in order to help the appellant get treatment for his addiction, the Lycoming County District Attorney waived the appellant’s ineligibility, and the court sentenced the appellant to the SIP program for one of his burglary convictions (CR-2145-2013) and imposed consecutive periods of probation for his other burglary and theft convictions. Unfortunately, the appellant was expelled from the SIP program for misconducts that included use of controlled substances. Instead of re-sentencing the appellant to serve a state sentence at that time, however, the court gave the appellant another opportunity to address his substance abuse issues. The court sentenced the

appellant to a county prison sentence with work release eligibility and imposed additional probation, so the appellant could be part of the Vivitrol Program and receive medically assisted treatment for his addiction. The appellant continued to use controlled substances, leaving the court with no choice but to incarcerate him to protect the public and keep him from using controlled substances.

A sentence of total confinement was also necessary to vindicate the authority of the court. As part of his conditions of supervision, the appellant was directed to successfully complete the SIP program. He disobeyed program rules throughout 2015, he entered a half-way house and used controlled substances in May of 2016, and he got expelled from the program. Transcript, November 16, 2016, at 2, 11.

The appellant came before the court on August 3, 2016 for his first revocation hearing and re-sentencing. The court gave the appellant a second chance to address his substance abuse issues through the Vivitrol Program and the Re-entry Services Program. The court even advised the appellant that “should he not address his substance abuse issues, any resentencing could result in a very lengthy state prison sentence with the primary purpose of warehousing the defendant to protect the public.” Order docketed August 5, 2016.

Within two weeks of his release from county incarceration, though, the appellant was missing appointments with his treatment providers and his probation officer and using controlled substances. Transcript, November 16, 2016, at 4, 9, 12. After briefly being confined in the county prison due to his sentence for retail theft under Information 30-2014, the appellant was initially released from incarceration on October 18, 2016. Transcript, at 2, 4. He did not appear for his partial appointment on October 20, his

rescheduled intake appointment on October 21, and a probation appointment. As a result, he was detained on October 24, 2017. He was released on October 27, and was to start the partial program on October 28. Transcript, at 4. On November 4, he attempted to reschedule his partial appointment and his Vivitrol shot because he was not feeling well. Transcript, at 4,

His probation officer told him that if he did not attend the appointment for his Vivitrol shot that he would be detained. Transcript, at 4, 9. The appellant appeared for his Vivitrol appointment, but could not receive the shot as he was positive for controlled substances. *Id.* He admitted to his probation officer that he used methamphetamines and cocaine. *Id.*

The court ordered the appellant to attend and complete certain programs to address his substance abuse issues. The appellant continually disregarded the court's orders and directives. He failed to complete the SIP program due to disobeying the rules of the program and using controlled substances. He failed to complete the partial program and the Vivitrol program by missing appointments and using controlled substances. A sentence of total confinement was necessary to vindicate the authority of the court.

The appellant next asserts that the court erred in imposing a sentence of total confinement upon revocation of supervision in violation of 42 Pa. C. S. A. §9771(d) due to the court's failure to consider the record of the appellant's original sentencing proceeding.

Section 9771(d) states, in relevant part: "There shall be no revocation or increase of conditions of sentence under this section except after a hearing at which the court shall consider the record of the sentencing proceeding together with evidence of the conduct of the defendant while on probation." 42 PA. C. S. §9771(d).

Although the court did not have transcripts of the appellant's original sentencing hearing or first revocation and re-sentencing hearing, the court considered both

the original sentence and the first revocation sentence as well as the appellant's conduct on probation before revoking his probationary sentences and re-sentencing him a second time. The whole point of the prior sentences was to get the appellant help for his substance abuse, but the appellant failed to take advantage of those opportunities.

The original probationary sentences in these cases were conditioned upon the appellant's successful completion of the SIP program. See Order dated January 27, 2015 ("Special conditions of supervision are that . . . the defendant successfully complete the [S]tate Intermediate Punishment Program."). During the hearing on November 16, 2016, the court considered the fact that the appellant was required to complete the SIP program and considered his conduct while he was a part of that program. Ms. Steinbacher noted that the appellant entered SCI Camp Hill for the SIP evaluation in August of 2014, and throughout 2015 he was transferred due to violations. She also indicate that, in May of 2016 he was in a half-way house and used K2 and meth, which resulted in him being returned back to SCI Coal Township. Transcript, at 10-11. The court also noted the appellant's history on the SIP program. The court stated:

Casey, we sent you to the best that we had available to you, and that was a State Intermediate Punishment Program. You know, in looking at – looking at how you did there, you went from one phase to the other phase, you were at – you went to Camp Hill for your evaluation, you were there for about 3 months, then you went to Quehanna Boot Camp, you were there for about 3 months – 2 months, and then you were sent back to SCI Houtzdale to – due to a misconduct, okay, then they transfer you to Chester to continue your SIP level one, then you were transferred to Conewago Snyder, which is an outpatient, okay, community facility, and then you were there for geez 6 ,7 months, then you were returned to Coal Township. So you were given every opportunity.

Transcript, at 18-19.

Despite the fact that the appellant failed to complete the SIP program, the

court gave him another chance at treatment for his substance abuse issues. The court gave him a county sentence with work release for retail theft under CR-30-2014 and new sentences of probation for theft and burglary under CR-2013-2014 and 535-2014, respectively. See Order dated August 3, 2016. Additionally, the court had the appellant assessed for the Vivitrol Program, and indicated that he could be released earlier, assuming he completed that program as well as any other conditions of supervision, including attending and completing the Re-entry Services Program. The court noted that such a lenient sentence was “unusual in light of the circumstances,” but the court gave the appellant a second chance because he suffered from some mental health issues, was taking medication, and appeared to be at least somewhat motivated to address his substance abuse. The court reminded the appellant that the District Attorney gave him a substantial opportunity when he waived his ineligibility for the SIP program, and that this was his second chance. The court cautioned the appellant that if he did not address his substance abuse issues, any resentencing could result in a very lengthy state prison sentence with the primary purpose of warehousing the defendant to protect the public.

The appellant, however, did not fare any better with his probationary sentences the second time or the treatment programs offered to him through county resources. Within two weeks of being released from the Lycoming County Prison/Pre-Release Center on October 18, 2017, the appellant committed five violations: (1) he did not appear his partial appointment on October 20; (2) he did not appear for his rescheduled intake appointment on October 21; (3) he did not appear for a probation appointment; (4) he used methamphetamines and cocaine; and (5) he did not appear for his partial appointment in early November and tried to reschedule his Vivitrol appointment because he was feeling ill

(likely as a result of using controlled substances after he had started receiving his monthly Vivitrol shots).

The court wanted the appellant to succeed in the various programs to which he was sentenced to complete so that he would be a healthy and productive member of society. Unfortunately, those programs had no chance of success when the appellant would not attend them and comply with their rules. The appellant left the court with no choice but to revoke his probation and impose a state sentence to protect the public.

The court is unsure what the appellant is contending it should have considered but did not. The sentencing guidelines do not apply to probation and parole violation hearings. 204 Pa. Code §303.1(b) (“The sentencing guidelines do not appeal to sentences imposed as a result of the following: ... revocation of probation, intermediate punishment or parole.”). Furthermore, an examination of the sentencing guidelines that would have been considered at the appellant’s original sentencing hearing only reinforces the fact that the appellant received a substantial break, not once but twice.

The appellant had a prior record score of a 2, due to a juvenile adjudication for a felony of the second degree. The offense gravity scores for retail theft, theft by unlawful taking, and burglary were 2, 3, and 7, respectively. Therefore, the sentencing guidelines considered at the appellant’s original sentencing were RS-3 for retail theft, RS-9 for theft by unlawful taking, and 12-18 for burglary of a home at which time no person was present. The statutory maximum sentences were 5 years for retail theft and theft by unlawful taking and 20 years for burglary.

On January 27, 2015, the court sentenced the appellant to one year of probation for each of these offenses to be served consecutively to each other. While the

sentences for retail theft and theft by unlawful taking were at the bottom of the standard guideline ranges, the sentence for burglary was not only below the standard guideline range (which suggested at least a twelve month minimum sentence of incarceration in a state correctional institution); it was outside of the mitigated range of 6-12 months. Furthermore, the District Attorney had waived the appellant's ineligibility for the SIP program so that the appellant could participate in the SIP program on another burglary of a home at which time no person was present (CR-2145-2013). Successful completion of the SIP program was an express condition of the appellant's probationary sentences.

After the appellant violated the conditions of his probation by being expelled from the SIP program in May 2016, the court revoked his probationary sentences. Instead of imposing a state prison sentence at that time, however, the court imposed a county prison sentence for retail theft, one year of probation for theft by unlawful taking, and four years' probation for burglary on August 3, 2016.

It was only after the appellant again violated the conditions of his supervision (this time within two weeks of his release from county incarceration), that the court sentenced the appellant to 3 -7 years' incarceration in a state correctional institution for burglary. The court imposed a sentence of guilt without further punishment for theft by unlawful taking. Although the court revoked the appellant's county parole for retail theft, the appellant, as a practical matter, is not serving any additional time on that sentence because that sentence and his state sentence are being served concurrently to each other.

The court believes that it is readily apparent from all of the facts and circumstances of these cases that, contrary to the appellant's assertions, the court did not impose a manifestly excessive sentence that amounted to an abuse of discretion when it

revoked the appellant's probationary sentences and imposed a sentence of 3 to 7 years' incarceration in a state correctional institution.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

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