IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-787-2015**
vs.	**:**	
KYLE AUNKST,	**:**	
Appellant	**:**	
	:	**Rule 1925(a) Opinion**

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

On December 28, 2016, following a hearing and based upon Appellant's counseled admissions, the court found that Appellant violated the conditions of his parole and probation. Appellant's probation was revoked, and Appellant was re-sentenced. As well, Appellant was recommitted on his parole sentence.

Appellant did not file a post-sentence motion or an appeal. Instead, Appellant wrote a letter to the court which the court received and reviewed on or about February 24, 2017. The court treated the letter as a pro se petition for relief under the Post-Conviction Relief Act and appointed counsel. Counsel then filed an amended petition for post-conviction relief which was disposed of pursuant to an Order dated July 31, 2017.

Specifically, and upon agreement of the parties, the court reinstated Appellant's post-sentence and appeal rights nunc pro tunc. Appellant, through counsel, filed a motion to modify the sentence nunc pro tunc which was summarily denied on August 29, 2017. Appellant filed a timely appeal. The court directed that Appellant file a concise statement of matters complained of on appeal.

Appellant filed that statement on September 21, 2017. In it, he contends that the court abused its discretion by sentencing him to a manifestly excessive period of

incarceration on a probation violation where the underlying crime was a single count of retail theft graded as a misdemeanor of the first degree and the basis for revocation was a series of relatively minor violations of the conditions of Appellant's probation.

This Opinion is being written in support of the court's December 28, 2016 Order. Candidly, and as a prelude to the more substantive aspects of this Opinion, the court is perplexed. The court's December 18, 2016 Order could not have been more detailed or comprehensive. The law on manifestly excessive sentences has been established again and again through repeated decisions. From where this court sits, however, it appears that virtually every sentence it imposes is being challenged as being either manifestly excessive or manifestly lenient. While the court understands zealous advocacy, the court sometimes wonders whether there is left any responsibility of appellate counsel of candor to the tribunal.

Perhaps, however, this court is wrong and to quote Claireece "Precious" Jones from the groundbreaking movie Precious, which was released in 2009, "I am gonna breakthrough or somebody gonna breakthrough to me."

Because Appellant only challenges the sentence under CR-787-2015, the court will only address such.

On June 1, 2015, Appellant pled guilty to a retail theft graded as a misdemeanor of the first degree. Appellant and an accomplice stole numerous DVD's and video games from a Target store on April 21, 2015. The value of the items stolen amounted to approximately $334.00.

On August 11, 2015, this court sentenced Appellant to three years of probation to run consecutive to Appellant's parole sentence under No. CR-438-2015.

Among other things, the court ordered that Appellant undergo a drug and alcohol assessment and comply with all recommended treatment, perform fifty hours of community service or complete the Changing Lives through Literature (CLTL) program and attend and complete any and all other programs and conditions to which he was directed by the Adult Probation office. The court specifically noted that Appellant had a substantial substance abuse history including opiate abuse, and it directed that the Adult Probation office consider such and supervise him accordingly.

Because of time served on the parole sentence, Appellant was released on August 11, 2015.

As the transcript of the December 28, 2016 probation violation hearing reflects, following his release from jail, the appellant did very poorly.

Only two weeks after he was released from jail, the probation officer made a field visit. Appellant admitted to using heroin. He was immediately assessed and sent to an inpatient treatment facility. (Probation Violation Hearing Transcript, December 28, 2016, p. 3).

Appellant was released from inpatient but shortly thereafter on September 29, 2015 after his probation officer made contact with him, despite Appellant trying to avoid contact, Appellant admitted to using heroin yet again. (Transcript, p. 3). He was directed for another assessment and sent to the Lycoming County Reentry Services program, a structured daily program, to work on the necessary skills to stop using and to become a productive member of society. He was also sent to Crossroads Outpatient Drug and Alcohol treatment.

By October 14, 2015, however, within a few weeks of beginning his

outpatient treatment, Appellant again admitted to using heroin on a daily basis. He was assessed and sent to another inpatient treatment facility. (Transcript, p. 3).

He was discharged successfully from the inpatient treatment facility on November 15, 2015 and directed to resume his outpatient treatment at Crossroads and continue with the Reentry Services program. He was also discharged on medically assisted treatment, which included taking Revia pills. According to Web MD, "this medication is used to prevent people who have been addicted to certain drugs (opiates) from taking them again. It is used as part of a complete treatment program for drug abuse."

Again, within approximately a month, on or about December 9, 2015, Appellant admitted to using heroin. This time, Appellant planned on obtaining the Vivitrol shot. Vivitrol works in the brain to block the effects of opiates. It also decreases the desire to take opiates. It is a once a month shot.

Appellant, however, continued using and was detained for heroin use on December 23, 2015. A hearing was held before the court on January 7, 2016. The court found that Appellant violated the conditions of his supervision by continuing to use heroin. On February 2, 2016, Appellant was released from the Lycoming County Prison after he received his first Vivitrol injection and he was placed on the court's Vivitrol program. (Transcript, p. 3).

On February 17, 2016, Appellant failed to attend a partial treatment meeting, received a warning for missing treatment, and missed the appointment for his Vivitrol shot. On February 18, 2016, he missed his group treatment and missed his check-in at reentry. (Transcript, p. 4).

On March 3, 2016, Appellant admitted to drinking alcohol over the weekend and was detained for 48 hours. (Transcript, p. 4).

On March 7, 2016, Appellant reported to the Adult Probation office that he was non-compliant with West Branch and he failed to report to get his Revia pills because his shot was on a backorder. He missed his partial programming as well. On March 8, 2016, he reported feeling overwhelmed. The Adult Probation office tried to work with him. The understanding was that if he violated, he would be detained. (Transcript, p. 4). On March 21, 2016, he tested positive for opiates (heroin) and was detained with a two-week sanction. (Transcript, p. 4). He was released from the Lycoming County prison on April 2, 2016.

On April 4, 2016, Appellant was admitted to White Deer Run Inpatient to help "get his shot faster." (Transcript, p. 4). As well, he was working on getting into a halfway house. He was eventually sent to Cove Forge Halfway House with the expectation that he would spend three months at this facility. He was to be receiving his injection. (Transcript, p. 4).

Appellant, however, continued to struggle. He would not attend meetings, volunteer, or obtain a sponsor and was at risk of losing his insurance as a result of not complying with his requirements. Appellant again looked into a halfway house. He was accepted to Madison House West in York and the case was sent to York County for supervision in early August of 2016. However, Appellant overdosed while at the facility and was removed. A warrant was issued for his arrest on September 20, 2016 for absconding from supervision.

On September 26, 2016, Appellant left a voicemail with his Adult Probation

officer indicating that he had checked himself into Eagleville Rehabilitation Center to detox and then his plan was to stay in a shelter. Appellant indicated he would turn himself in but never did so. (Transcript, p. 5). In October of 2016, Appellant contacted Deputy Scott Metzger of the Lycoming County Adult Probation Office and indicated that he got kicked out of treatment for "using yet again and didn't know what to do." (Transcript, p. 5).

Unfortunately for Appellant, he continued to use. He eventually went to yet another inpatient treatment facility in Duncansville, PA. He was apprehended on December 14, 2016 and admitted that he had been using heroin on a regular basis. (Transcript, p. 5).

In sum, Appellant was released from prison on his initial sentence on August 26, 2015. He was permanently detained on December 14, 2016. He was sentenced on December 28, 2016. In this 16-month period of time, Appellant was in five inpatient treatment facilities. Additionally, he was in three halfway houses. (Transcript, pp. 7, 8). He was on active supervision and when he was not in an inpatient facility or at a halfway house, he was provided outpatient counseling, reentry services and medically assisted treatment. Yet despite all of these efforts toward treatment and rehabilitation, Appellant could not maintain his sobriety and continued to use heroin. In fact, it appears that Appellant's addiction actually worsened. By August of 2016, while Appellant was in a halfway house, he overdosed. Appellant stopped reporting and absconded from supervision. Moreover, while Appellant was receiving inpatient treatment and/or a resident at a halfway house, he continued to receive his Vivitrol shots or pills to the extent he chose to do so.

Appellant had a history of treatment since 2014. He initially had outpatient treatment through Crossroads Counseling and then went to inpatient treatment followed by

being placed on Methadone. (Transcript, p. 8). Once being released on supervision in August of 2015, Appellant was also sanctioned on a handful of occasions. During the hearing, the court referenced that, in two and a half years, Appellant received "seven different punitive sanctions" and had "14 different treatment options." (Transcript, p. 9).

In addressing Appellant during the hearing, the court spoke passionately and honestly to Appellant. The court noted that Appellant was entrenched in his addiction and his behaviors. The court noted that Appellant had been at death's door more than once and nothing has helped. The court questioned whether Appellant was sufficiently motivated and why Appellant refused to take the hard steps to stay clean.

As the court specifically noted:

> The desire to use has not only infected you; it has become you. And your children and everyone are going to suffer. Your loved ones are going to suffer, and you're going to continue to suffer. Whatever has caused you to continue to use, you can't shake. And because of that, I have to stop thinking about you and start thinking about the rest of the community. I can't have you staying a member of this community or any community for that part except if you're locked up. Because that's the only place that I know the rest of us are gonna to be safe. (Transcript, p. 11).

The court noted to Appellant that it was clear to the court that the most important thing in Appellant's life was heroin and that he could not exist without it. (Transcript, p. 11).

Appellant argues that the sentence was manifestly excessive in light of his underlying crime and the "series of relatively minor violations of the conditions of defendant's probation." It's a sad day for society once someone concludes that continuing to use heroin over 16 months, despite numerous inpatient treatments and varied outpatient

options, to the extent that one overdoses and almost dies and then absconds completely from supervision, constitutes "a series of relatively minor violations." Appellant's literary license is nothing more than a fiction.

> 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. Robinson, 931 A.2d 15, 26 (Pa. Super. 2007))(quoting ***Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006); see also ***Commonwealth v. Rodda*****,** 723 A.2d 212, 214 (Pa. Super 1999)(en banc).

> In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing [judge'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)).

In a probation violation context, the sentencing court enjoys even a greater degree of deference.

> [W]here the revocation sentence was adequately considered and sufficiently explained on the record by the revocation judge, in light of the judge's experience with the [appellant] and awareness of the circumstances of the probation violation, under the appropriate deferential standard of review, the sentence, if within the statutory bounds, is peculiarly within the judge's discretion.

Commonwealth v. Pasture, 107 A.3d 21, 28 -29 (Pa. 2014).

As the Supreme Court noted in ***Pasture***, a sentencing court does not abuse its discretion by imposing a harsher post-revocation sentence where the appellant initially received a lenient sentence and failed to adhere to the conditions imposed. ***Id.*** at 28.

This court did not act with manifest unreasonableness, partiality, prejudice, bias, or ill will or abuse its discretion in any manner. Indeed, this court acted in the only way it could act to attempt to rehabilitate Appellant and protect the community. This court considered Appellant's failures on probation, his out-of-control substance abuse issues, his failure to control his behaviors despite the many interventions provided to him, the prior sanctions, the failed treatments and the purposes of sentencing. A simple review of the sentencing order reflects such.

Date: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Ken Osokow, Esquire (ADA)
Julian Allatt, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File
Superior Court (original and 1)