

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-2093-2013
vs. :
ERIC ECK, : CRIMINAL DIVISION
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 19, 2018, which was imposed as a result of a probation revocation. The relevant facts follow.

Appellant was charged with conspiracy to commit burglary of an occupied structure, a felony of the first degree, and conspiracy to commit criminal trespass, a felony of the second degree. On June 28, 2016, Appellant pled guilty to the charges; however, his sentencing was deferred due to his cooperation in the prosecution of his co-conspirator.

On September 13, 2017, the parties agreed to the withdrawal and dismissal of Count 1, burglary. On Count 2, conspiracy to commit trespass, Appellant was sentenced to six years' probation consecutive to a sentence a state incarceration in a separate case that would have Appellant under parole supervision into the year 2020.¹

On March 14, 2018, Appellant was before the court for a preliminary

¹See CP-41-CR-0000909-2011.

probation violation (Gagnon I) hearing at which the court found probable cause that Appellant violated the conditions of his probation by absconding from supervision and by committing two sets of new criminal charges related to receiving stolen property and possession with intent to deliver a controlled substance.

On July 19, 2018, the court held a final violation (Gagnon II) hearing. The court found that Appellant violated his probation by absconding from supervision and by committing new crimes. The court revoked Appellant's probation and resentenced Appellant to four to ten years' incarceration in a state correctional institution consecutive to any and all sentences he was presently serving. Appellant did not file a post-sentence motion.

On July 31, 2018, Appellant filed a notice of appeal. The sole issue asserted by Appellant on appeal is that the sentence of the court on the probation violation was manifestly excessive and unduly harsh as the court did not give meaningful consideration to the sentencing factors, everything positive Appellant had done, the time he already received/served or would receive/serve for this violation and the time he is serving on his new charges.

Unfortunately, Appellant did not properly preserve this issue. "[I]ssues challenging the discretionary aspects of sentencing must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to the discretionary aspects of sentencing is waived." *Commonwealth v. Cartrette*, 83 A.3d 1030, 2042 (Pa. Super. 2013)(quoting *Commonwealth v. Kittrell*, 19 A.3d 532, 538 (Pa. Super. 2011).

Even if this issue had been properly preserved, it lacks merit. The nature and the circumstances of the crime were that Appellant conspired with another individual to

break into a residence located at 426 Pearson Avenue in Loyalsock Township, Lycoming County, Pennsylvania. On November 13, 2013 at approximately 9:50 p.m., Appellant drove the co-conspirator to the residence. The co-conspirator broke the glass in the back door of the residence with a crow bar, unlocked the door, entered the residence, and turned on his flashlight. The residence was occupied by a 91-year old woman who was lying in a hospital bed, breathing with the assistance of oxygen. Appellant and his co-conspirator were apprehended by members of the Pennsylvania State Police, who were conducting surveillance due to numerous burglaries that had occurred in the area in the previous weeks.

Appellant's prior record score was a four and the offense gravity score for conspiracy to commit criminal trespass also was a four, which resulted in a standard minimum guideline range of 6-16 months and a mitigated guideline range of 3-6 months. Despite the fact that Appellant committed this crime while he was on supervision under the Intermediate Punishment Program for conspiracy to commit forgery in case CR-909-2011, which could be considered an aggravating factor, the plea agreement negotiated by the parties was accepted and Appellant was sentenced to six years' probation. The court noted that the sentence was below the standard range but it was negotiated between the parties and was appropriate based on Appellant's total time of incarceration previously, his cooperation in the prosecution of his co-conspirator, and the fact that Appellant admitted himself into the Teen Challenge program.

Unfortunately, Appellant did not take advantage of this lenient sentence. Appellant continued to use controlled substances. Appellant asked to go to the Teen Challenge program again, rather than be sentenced to incarceration in this case. Appellant, however, had been sent to numerous rehabilitation programs, but nothing worked; he kept

using controlled substances.

Appellant resumed using controlled substance shortly after he was paroled from state prison on April 18, 2017. He tested positive for heroin and cocaine in June 2017 and was sent to Colonial House in York, Pennsylvania. In July 2017, he tested positive for cocaine and was sent to outpatient rehabilitation. In August 2017, he failed to attend Safe Haven Outpatient and again tested positive for cocaine. Appellant was supposed to appear for sentencing in this case on August 21, 2017, but he failed to appear and a bench warrant was issued. On August 29, 2017, Appellant admitted himself to Teen Challenge.

On September 13, 2017, Appellant was sentenced in this case. On October 26, 2017, he was kicked out of a recovery house. In November 2017, he failed to attend a Drug and Alcohol appointment. He was placed on a GPS unit and continued in treatment. On December 15, 2017, a bench warrant was issued because Appellant absconded from supervision.

Appellant also continued to commit crimes. On October 24, 2017, he received stolen property in York County, and he was charged with that offense on November 6, 2017, see CP-67-CR-7826-2017. On January 3, 2018, he was arrested for possession with intent to deliver a controlled substance in York County, see CP-67-CR-0000532-2018.

Appellant's counsel noted that Appellant assisted in the prosecution of his co-conspirator and another individual, he received a lot of certificates for programs that he completed in state prison, he helped others in state prison, and he completed a four month therapeutic program at Gaudenzia in 2015. The court considered this information but found that such did not justify a lesser sentence in this case.

Appellant cooperated in the prosecution of other individuals to obtain the best

deal possible for himself. He was credited with his assistance when he received his original probationary sentence. Appellant, however, failed to uphold his end of the bargain when he failed or refused to abide by the conditions of his supervision. Furthermore, his probation was not revoked for mere technical violations, but rather for two new criminal convictions as well as absconding from supervision.

Appellant completed programs in state prison so that he could be paroled. Apparently, he did not learn anything from those programs or from his various drug rehabilitation programs because soon after he was released, he went back to using controlled substances. He also committed two new crimes within the first four months after he was sentenced to probation in this case. Despite certificates from prison programs and numerous rehabilitation programs, nothing worked.

Appellant was not facing a lengthy period of incarceration on his new charges as they resulted in one to two years' state incarceration and a period of consecutive probation. Although he was also facing a state parole revocation, he had not received his "green sheet" indicating the length of his parole "set back." Moreover, Appellant was not entitled to a volume discount for his crimes. This case was a separate incident which, given Appellant's abysmal supervision history during the time he was on probation, deserved a separate and significant period of incarceration.

The court considered everything that Appellant had done and his rehabilitative needs, but resources are limited. Appellant had numerous opportunities at rehabilitation, but nothing worked. When Appellant decided to continue to commit crimes, he took the risk that his actions would result in state incarceration. After all the breaks and resources that Appellant had squandered, the focus of the court was on the protection of the community.

Every previous time that Appellant was released to the community, he fell back into a life of drugs and crime. Therefore, to protect the public, the court imposed a sentence that would ensure that Appellant would not be released into the community for a significant period of time. See Sentencing Transcript, at 21-24.

As the Pennsylvania Supreme Court noted in *Commonwealth v. Pasture*:

[A] trial court does not necessarily abuse its discretion in imposing a seemingly harsher post-revocation sentence where the defendant received a lenient sentence and then failed to adhere to the conditions imposed on him. In point of fact, where 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 defendant 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.

630 Pa. 440, 107 A.3d 21, 28 (2014). Appellant received a lenient sentence but quickly failed to adhere to the conditions imposed on him. The court reviewed the circumstances of the probation violations and Appellant's supervision history on the record. It considered the information provided, and arguments made by, Appellant's counsel; it simply did not accord them much weight. It was not an abuse of discretion to do so.

[A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.... An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.... The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.

Commonwealth v. Allen, 24 A.3d 1058, 1064 (Pa. Super. 2011)(quoting *Commonwealth v.*

Walls, 592 Pa. 557, 926 A.2d 957, 961 (2007)(internal citations omitted)). The court based its decision on the particular circumstances of this case and not on any partiality, prejudice, bias, or ill-will against Appellant.

Finally, “[t]he 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 a defendant reappears before the court for sentencing proceedings following a violation of the mercy bestowed upon him in the form of a probationary sentence.” *Commonwealth v. Derry*, 150 A.3d 987, 992 (Pa. Super. 2016)(quoting *Pasture*, 107 A.3d at 27). AT VOP sentencing hearing additional factors and concerns are at issue. Those include the defendant’s time spent on probation and whether the sentence imposed is essential to vindicate the authority of the court, or the defendant’s conduct indicates that it is likely that he will commit another crime if he is not imprisoned, or if the defendant was convicted of another crime. 42 Pa. C.S. §9771(c); *Derry*, 150 A.3d at 994. The court considered all of these factors in imposing its sentence.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

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