IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1072-2012**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
GARY L. ROSE,	:	
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 order dated May 29, 2018 and docketed June 6, 2018, in which the court revoked the appellant's probation and re-sentenced him to six to twenty-four months' incarceration in a state correctional institution.

By way of background, the appellant stole checks from his mother. He wrote several checks out to himself and his paramour wrote several checks out to herself. The Commonwealth charged the appellant with numerous counts of forgery, theft by deception and receiving stolen property. On November 2, 2012, the appellant pled guilty to a consolidated count of theft by deception, graded as a misdemeanor of the first degree, and the court sentenced him to two years' probation under the supervision of the Pennsylvania Board of Probation and Parole (PBPP) consecutive to all of the sentences the appellant was serving.[1]

[1] Due to his other sentences, this sentence of probation was not set to commence until December 6, 2018. Nevertheless, the court had the power to revoke his probation for a violation that occurred after the appellant was sentenced but before his probation commenced. *Commonwealth v. Ware*, 737 A.2d 251, 253-254 (Pa. Super. 1999).

The appellant was charged with a new criminal offense of bad checks. To keep the appellant on the street while his new charge was pending, the appellant was placed on a GPS monitor on August 4, 2017, as part of his conditions of his supervision. The appellant, however, failed to properly charge his GPS unit as instructed. To ensure that the appellant was properly charging his monitor, on November 15, 2017, his probation officer, Agent Joshua Kreiger, directed the appellant to report daily to charge his monitor in the lobby of the PBPP district office. Agent Kreiger advised the appellant of this requirement in person and in writing on form PBPP 348, which the appellant signed. Board Exhibit 1. The appellant reported as directed on November 16, 2017, but did not report thereafter. On November 29, 2017, Agent Kreiger called the appellant and told him to report on November 30, 2017 at 9:00 a.m. to charge his GPS monitor. Not only did the appellant fail to report as directed, he cut off his GPS unit. On December 1, 2017, Agent Kreiger recovered the cut GPS unit in the parking lot of Van Campen Motors. Agent Kreiger attempted to contact the appellant at his residence, but he was not there and his paramour did not know where he was. On December 6, 2017, the court issued a bench warrant for the appellant's arrest for absconding from supervision. The appellant was arrested on the bench warrant on or about January 24, 2018.

The appellant's final (Gagnon II) probation violation hearing was held on May 29, 2018. Following that hearing, the court found that the appellant violated several conditions of his supervision. The court revoked the appellant's probation and re-sentenced him to serve six to twenty-four months' incarceration in a state correctional institution.

On June 7, 2018, the appellant, who remained represented by counsel, filed a

pro se motion to modify sentence and post-sentence motion.[2] In accordance with Rule 576, the court directed the clerk of courts to forward the motion to the district attorney and the appellant's counsel, and no action was taken on the appellant's pro se filing. Counsel did not file any motions challenging the appellant's sentence.

On June 22, 2018, the appellant filed a notice of appeal. The sole issue asserted in this appeal is that the trial court abused its discretion when imposing a probation violation resentencing of 6-24 months' incarceration in SCI Camp Hill. The appellant averred that the court should have imposed a county sentence of 6-12 months' as specified in his letter to the court dated June 4, 2018.

Initially, the court questions whether this issue has been properly preserved for appeal. "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). In order to preserve the challenge to the discretionary aspects of sentencing, the issue needed to be preserved either by objecting during the revocation hearing or by filing a post-sentence motion. *Commonwealth v. Kalichak*, 943 A.2d 285, 289 (Pa. Super. 2008). The appellant was represented by counsel throughout the probation revocation proceedings. No objection was made during the revocation hearing. In fact, it appeared that the appellant was satisfied with his sentence. N.T., May 29, 2018, at 43 ("That sounds really good. I'm not going to appeal that. That's really good. I appreciate that, Your Honor."). Counsel never filed a post-sentence motion to modify the appellant's sentence. Although the appellant filed a pro se motion, the court could not consider it. Since the appellant was represented by counsel, his pro se motion was a nullity, having no legal effect. *Commonwealth v. Nischan*, 928 A.2d 349, 355 (Pa. Super. 2007).

[2] This motion was dated June 4, 2018.

Even if the issue is properly preserved, it lacks merit. Clearly, supervision was not working in this case. An individual cannot be supervised when he fails to report for over two months. The appellant failed to properly charge his GPS monitor. As a result, he was directed to report daily to the District Office, so staff could ensure that he was properly charging his monitor. The appellant reported for one day, November 16, 2017, but he never reported thereafter. Instead, he cut off his monitor and disappeared. Agent Kreiger looked for him at his residence but he was not there and his paramour had no idea where he was. The appellant's claim that he returned home after four days was unavailing. He never reported to Agent Kreiger after November 16, 2017, and he did not have any contact with Agent Kreiger again until he was picked up on the bench warrant that was issued for absconding from supervision. His actions showed that he was not amenable to supervision.

The appellant contends that the court should have imposed a county sentence of six to twelve months' incarceration instead of a state sentence of six to 24 months. It made no sense to impose a county sentence in this case, though. The appellant was on state parole at the time and was not scheduled to begin his probation until December 2018. The appellant was facing the possibility of additional time in a state correctional institution for violating his state parole. See N.T., May 29, 2018, at 38. While he did not have any documentation to support his claims, the appellant indicated that he was diagnosed with paranoid schizophrenia in 1998. He indicated that he had been on medication at some point in the past and stopped taking it but probably needed it. *Id*. at 33-34. The county prison could not offer him any programming or any help with his mental health issues. *Id*. at 43. The court explained such to the appellant during the following exchange:

THE DEFENDANT: Your Honor, may I ask you something?

THE COURT: Yes?

THE DEFENDANT: The six months to two years, that was basically because I had two years special probation anyway.

THE COURT: No, I could have given you up to five years because it was a misdemeanor 1.

THE DEFENDANT: Yes, you could have. You actually—and you've always been a very, very good judge in regards to everything.

THE COURT: I think six months is fair. I think it makes no sense to keep you here in the county because all that does—you can't do anything in the county. You can't get the help you need. At least if I give you six months to two years it's clearly a state sentence and clearly they'll have to address it.

Id.

The court could have imposed a maximum sentence of five years' incarceration. The court's goal, however, was not to incarcerate the appellant for as long as possible. It was to incarcerate him for a shorter period of time in a state facility that could evaluate and address his mental health issues. There are state prisons with specialized units for inmates with mental health issues. These resources are not available at the county prison. The appellant would not get help for his mental issues in the county prison. He would have just sat in the general population, and been no better off at the time of his release than when began his sentence.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

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