

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0001598-2006
vs. :
NICHOLAS FISHER, :
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 August 27, 2019.

Appellant Nicholas Fisher (hereinafter "Fisher") was charged with two counts of Aggravated Assault, two counts of Simple Assault, and one count of Endangering the Welfare of Children (EWOC). Fisher entered a guilty plea to Count 1, Aggravated Assault, and Count 5, EWOC and was sentenced to five to ten years' incarceration followed by seven years' probation.

While Fisher was serving his parole sentence for Aggravated Assault, he violated his conditions of supervision.

The court held a probation violation hearing on August 27, 2019. The court found that Fisher violated his probation by absconding from supervision, failing to live at his approved address, and failing to report as directed. The court revoked Fisher's probation and resentenced him to one and one-half years to three years' incarceration in a state correctional institution to be served consecutive to his eight month parole set back.

On September 6, 2019, Fisher filed a motion to reconsider his sentence for the

following reasons: (1) he did not know he could be violated on probation that had not yet started; (2) resentencing him for a probation violation based on the same conduct as his parole violation violated double jeopardy; (3) he did not commit any new crimes and was not a menace to society; and (4) his sentence was unduly excessive and harsh considering he had already been violated by the state parole board (hereinafter “Board”). Fisher asked the court to reconsider his sentence and release him onto probation once he was done with his parole sentence. The court summarily denied this reconsideration motion.

Fisher filed a notice of appeal. The court directed Fisher to file a concise statement of errors complained of on appeal. To date, no such statement has been filed.

Based on Fisher’s motion for reconsideration, the court assumes that Fisher wishes to raise the following issues on appeal: (1) the court could not violate his probation as he had not yet begun to serve that sentence; (2) the court violated Fisher’s rights against double jeopardy when it violated his probation after the Board violated his parole based on the same conduct; and (3) the sentence imposed by the court was unduly harsh and excessive.

Fisher’s belief that his probation could not be violated as he had not yet begun to serve that sentence is simply mistaken. Instead, the Pennsylvania Superior Court has held that a term of probation “may and should be construed for revocation purposes as including the term beginning at the time probation is granted. Otherwise, having been granted probation a defendant could commit criminal acts with impunity—as far as revocation of probation is concerned—until he commenced actual service of the probationary period.” *Commonwealth v. Wendowski*, 278 Pa. Super. 453, 457, 420 A.2d 638, 630 (1980); *see also Commonwealth v. Ware*, 737 A.2d 251, 253-254 (Pa. Super. 1999).

The revocation of Fisher’s probation also did not constitute a double jeopardy

violation. See *Commonwealth v. Johnson*, 967 A.2d 1001, 1005 (Pa. Super. 2009); *Commonwealth v. Mysnyki*, 364 Pa. Super. 262, 527 A.2d 1055, 1058 (Pa. Super. 1987).

Fisher also asserts that his sentence was unduly harsh and excessive. The court cannot agree.

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. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007).

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.

The court did not revoke Fisher's probation and impose a state prison sentence based on partiality, prejudice, bias or ill-will. The court imposed such a sentence because Fisher's conduct clearly showed that he was not amenable to supervision.

Fisher's parole supervision was transferred to Florida so that he could live with his mother. A parole officer visited Fisher's approved address on June 29, 2016, and determined that he was no longer residing there. Fisher spoke to his parole officer on July 12, 2016, and the parole officer verbally instructed Fisher to report to the office immediately but Fisher failed to do so. Fisher was declared delinquent on July 12, 2016, and he was arrested in Pennsylvania on April 24, 2019. In other words, Fisher absconded from supervision for nearly three years. Fisher admitted such. Transcript, 08/27/2019, at 2-6.

Before Fisher absconded, his adjustment to supervision was poor. He was released on parole on September 6, 2011. He tested positive for controlled substances and he was placed in an inpatient drug and alcohol treatment facility. In 2014 he tested positive for controlled substances again. He absconded from supervision from December 18, 2014 until July 30, 2015. As a result of these violations, he was incarcerated at York County for three months and spent two and one half months at a halfway house in Wernersville. Transcript, 08/27/2019, at 7-9.

Fisher transferred his supervision to Florida in February 2016 and by July 2016, he had absconded again. He made his way to Tennessee where he stayed for approximately 18 months and then he moved to the Mahanoy City area of Pennsylvania. He neither turned himself in nor informed his parole officer of his whereabouts.

Fisher ignored the conditions and obligations of his supervision for nearly

three years. Clearly, his conduct while on parole supervision showed that probation was no longer a viable option. A sentence of incarceration was necessary to vindicate the authority of the court. 42 Pa. C.S.A. §9771(c)(3).

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Eric Birth, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)