

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 "Appellant") was charged with two counts of Aggravated Assault, two counts of Simple Assault, and one count of Endangering the Welfare of Children (EWOC), arising out of incidents in which a three-month old child sustained broken bones and brain injuries. Appellant entered an open plea to Count 1, Aggravated Assault, and Count 5, EWOC. He was sentenced to five to ten years' incarceration on Count 1, followed by seven years' probation on Count 5.

While Appellant 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 Appellant violated his probation by absconding from supervision, failing to live at his approved address, and failing to report as directed. The court revoked Appellant'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, Appellant 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”). Appellant asked the court to reconsider his sentence and release him onto probation once he was done with his parole sentence. On September 11, 2019, the court summarily denied this reconsideration motion.

On October 3, 2019, Appellant filed a notice of appeal, which the Pennsylvania Superior Court quashed as untimely.

On September 10, 2020, through PCRA proceedings, the court reinstated Appellant’s appeal rights nunc pro tunc.¹ On September 17, 2020, Appellant file a notice of appeal. The court directed Appellant to file a concise statement of errors on appeal. On September 30, 2020, Appellant filed his concise statement.

The sole issue asserted by Appellant is “that the trial court imposed a manifestly excessive and unduly harsh sentence for a probation violation because he had already been violated by the State Board and he had not committed any new crimes.” The court cannot agree that Appellant’s sentence was manifestly excessive or unduly harsh.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a

¹ The court dictated the order at the end of the PCRA proceeding held on September 10, 2020, but the order was not filed until September 18, 2020.

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.

Appellant's original sentence for EWOC was lenient. The offense gravity score was a six and his prior record score was a zero; therefore, the standard sentencing guideline range was three to twelve months, but Appellant received a mitigated range

sentence of probation.

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

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

Before Appellant 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.

Appellant 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.

Appellant 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
Jeana Longo, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)