

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-1139-2018**
 v. :
 :
 JOSHUA MOSTELLER :
 Appellant :

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

This opinion is written in support of the Court’s order revoking Appellant’s probation dated September 17, 2020 and filed September 18, 2020.

On October 12, 2018, Appellant pled guilty at Docket Number 1139-2018 to count one Theft of Property Lost, Mislaid or Delivered¹ a misdemeanor of the first degree. He received a split sentence of two to four months parole to be followed by a consecutive one (1) year period of probation. This sentence was calculated to expire June 5, 2020. Shortly thereafter, Appellant pled and was sentenced under Docket Number 43-2019 on March 22, 2019 to a charge of Driving under the Influence (high rate)² an ungraded misdemeanor, and reckless driving and unlawful activities, both traffic summaries. Appellant received a parole sentence of five (5) days to six (6) months, which was to run consecutive to any sentences that the Appellant was already serving. Adding this sentence to Appellant’s prior sentence, his aggregate sentence would expire December 5, 2020.

¹ 18 Pa. C.S. §3924

² 75 Pa. C.S.A. §3802(b)

On December 12, 2019, Appellant stipulated to a violation of parole and probation (PV) filed by the Lycoming County Adult Probation Office (APO). His then probation officer, Erick Fortin (Fortin) alleged that on November 23, 2019, Appellant was highly intoxicated, fighting with his live-in girlfriend and not having an approved address. As a result of this incident Appellant's girlfriend obtained a Protection from Abuse (PFA) against him, which excluded her home as an APO approved residence. As an additional consequence of this preliminary PV, Appellant would be required to attend and complete the Reentry Program. A final violation hearing was left up to either party to schedule if needed.

Throughout 2020, Appellant's probation officer attempted to support his compliance with conditions of supervision. As soon as January 2020, Appellant was noncompliant with Reentry by providing diluted samples of urine and generally displaying a "poor attitude". Violation Report, September 15, 2020. In February, Appellant was assigned a new probation officer, David Poretta (Poretta) due to the promotion of Fortin. Throughout the course of the year and prior to the expiration of his Theft sentence, Appellant failed to remain at his approved address, relapsed on alcohol and marijuana, possessed drug paraphernalia on more than one occasion and continued to exhibit poor behavior at Reentry. Poretta attempted to work with Appellant after his first violations under Poretta's supervision in an attempt to establish a "rapport with him." Notes of Testimony, 9/17/2020, at 11. On March 26th, Poretta was unable to locate Appellant because he was not staying at his approved address Id. Unfortunately, due to the complications that arose as a result of the COVID-19 pandemic, APO was limiting the number of bench warrants issued to minimize the spread of COVID into the county prison. Poretta ultimately found Appellant on April 21st in the City of Williamsport and directed him to return to his approved residence to meet with Poretta the next day.

However, when the time came, Appellant was not at his approved residence to meet with Poretta. Finally on May 1st, Appellant was located in the Borough of Hughesville and incarcerated for 11 days on an APO detainer for continued relapses and failing to comply with the directive to meet with his PO and stay at his approved address. Once released, Appellant was referred to West Branch for a drug and alcohol evaluation and to Diakon Counseling to get back into mental health counseling to help him manage the stress he had been experiencing. Appellant failed to comply with either referral as he failed to appear at either facility. He also continued to be noncompliant at Reentry. Poretta tried to work with the client to understand why he is having problems complying with conditions of supervision N.T. 9/17/20 at 13.

On June 9th, 2020 Poretta was notified by Appellant's brother that Appellant was arrested for Indirect Criminal Contempt for his violation of the PFA held by his girlfriend. Once he was released from county prison, Poretta indicated it appeared the Appellant was finally showing a positive attitude and staying in contact with his PO. That change of heart appeared to be brief. In July, Appellant's brother's significant other called Poretta to tell him that Appellant was using K2 or synthetic marijuana in front of her children N.T. 9/17/20, at 14). Appellant admitted to Poretta that he was using K2 and muscle relaxers, which he was getting on the street. Id. at 15. On July 17, Appellant pled guilty to the Indirect Criminal Contempt charge and was scheduled to report for the thirty (30) day sentence on August 14th. Appellant failed to report to the county prison as required and a warrant was then issued for his arrest. Once the Pennsylvania State Police were able to locate him and bring him to the barracks on August 31st, Poretta took Appellant into custody on the additional probation violations and the Contempt warrant Id. at 16.

At the Appellant's revocation hearing, Poretta described the Appellant's failure to address his addiction issues and continued risk to the public. N.T. 9/17/20, at 16. Poretta also shared that Appellant told him that he had recently purchased two (2) tickets to Mexico and was planning to take his infant child with him there so they could not be found. Poretta told the court that Appellant had previously been sentenced to state prisons on technical violations for similar behavior. Therefore, since Poretta felt that he had exhausted all of the local resources that could have helped Appellant, had he taken advantage of them, he recommended the revocation of Appellant's probation and a resentence to state prison.

Defense Counsel argues that the Court did not have jurisdiction to revoke the Appellant's probationary sentence as the revocation was not held within a reasonable time after the expiration of his probationary period and if the Court did have jurisdiction, its sentence was manifestly unreasonable as a result of the Appellant's sentence of probation having expired. In support of the initial position, Appellant cites *Commonwealth v. Wright*, 116 A.3d 133 (Pa. Super. 2015). In *Wright*, the Superior Court held that thirty-one (31) months after the expiration of her probationary period and four (4) years after her technical violations constituted a significant delay and an unreasonable length of time. *Id.* at 138. Pa.R.Crim.P. 708 also provides with a violation of probation, in applicable part:

- (B) Whenever a defendant has been sentenced to probation or intermediate punishment, or placed on parole, the judge shall not revoke such probation, intermediate punishment, or parole as allowed by law unless there has been:
- (1) **a hearing held as speedily as possible** at which the defendant is present and represented by counsel; and
 - (2) a finding of record that the defendant violated a condition of probation, intermediate punishment, or parole.

Commonwealth v. Wright, 116 A.3d at 137 citing Pa.R.Crim.P. 708 (emphasis added).

To determine whether the hearing was held within a reasonable amount of time, the Superior Court in *Wright* examined three factors: the length of the delay, the reasons for the delay and the prejudice resulting to the [Appellant] from the delay *Id.* at 137. Additionally, the Superior Court held that the Commonwealth did not provide the trial court with adequate reasons to justify the delay to move forward on the revocation after Wright's federal conviction and technical violations. *Id.* at 139. In this case, the hearing to revoke the Appellant's probation was held on September 17, 2020, slightly more than three (3) months after the expiration of his probationary sentence. Furthermore, Appellant was continuing to violate the conditions of his probation up to the very date of the expiration of his sentence. In addition, if the Court accounts for the few weeks that Appellant was in an absconder status, it would also then incorporate the Indirect Criminal Contempt charge committed on June 8, 2020 as a new criminal arrest having been committed while under supervision. Before moving forward with the Appellant's revocation, APO would then have the opportunity to wait until the disposition of this charge, which occurred on July 17th with the effective date of sentence to be served on August 14th. Appellant failed to appear to begin serving the sentence. Once Poretta was able to locate Appellant and incarcerate him, his final hearing was held less than three (3) weeks later.

This Court accepts the reasons given by APO here on the issue of the reason for the delay. Appellant's probation officer was trying to work with Appellant to see if his PO could help him become compliant and to revoke so quickly would have interfered with that work. The Court would also find that the Appellant's absconder status also interfered with APO's ability to bring him into court.

Finally, Appellant has not identified any specific prejudice other than what this Court would believe is the delayed accountability for his lack of compliance with the conditions of supervision after it had technically expired. In *Wright*, her sentence had completely expired for more than three years before her final hearing was held. *Id.* at 138. Here, Appellant’s revocation hearing did not take place after his total sentence had completely expired as Appellant was still under supervision with APO for his consecutive parole case until December 2020. Therefore, using the standard outlined in *Wright*, the Court finds that a period of less than 4 months after the expiration of the probation is not unreasonable³.

Appellant also argues that if the Court does have jurisdiction, any sentence imposed was manifestly excessive in light of his probationary period having expired. The Court disagrees.

The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment—a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Colon, 102 A.3d 1033, 1043 (Pa.Super.2014) (quoting *Commonwealth v. Simmons*, 56 A.3d 1280, 1283–84 (Pa.Super.2012)). To determine if a sentence is manifestly excessive, “the appellate court must give great weight to the sentencing court’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.*

³ The Court points out that in *Commonwealth v. Weiner*, 2020 WL 89988 (Pa. Super. 2020) in an unpublished opinion filed by the Superior Court on January 7, 2020, the assertion that Appellant’s revocation of his probation after the expiration of supervision is sufficient to establish prejudice “is meritless” (p.5).

Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003)). A court does not abuse its discretion by imposing a harsher post-revocation sentence when the defendant fails to comply with conditions of probation. *Commonwealth v. Pasture*, 107 A.3d 21, 28 (Pa. 2014).

Appellant had a prior record score at the time of initial sentencing of three (3), with a guideline range of RS-12 months. The Court did not impose a state sentence here due to bias, ill-will prejudice or partiality. The litany of violations testified to by APO illustrates the Appellant's repeated noncompliance with conditions of supervision. The Court determined not only that there were no other available options at the County level and a sentence of incarceration was appropriate and necessary to vindicate the authority of the court, but that based upon his statements, there was a significant likelihood of the Appellant either absconding or committing new offenses. 42 Pa. C.S.A. § 9771(c)(2), (c)(3).

Conclusion

As Appellant's contentions do not appear to have merit, it is respectfully suggested that the Court's revocation of Appellant's probation stand and his sentence be affirmed.

Nancy L. Butts, President Judge

cc: DA (JR)
PD (EB)
Joshua Mosteller

NLB/n