

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-936-2018
v.	:	
	:	
CALVIN CHARLES,	:	APPEAL
Petitioner	:	

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 on December 17, 2019, filed December 20, 2019. Appellant failed to file a timely direct appeal, however PCRA relief was granted by this Court on September 11, 2020 reinstating Appellant’s rights to file a motion to modify sentence and direct appeal. Since COVID restrictions in the state prison system interfered with the Appellant’s ability to participate in the motion to modify sentence, this Court extended Appellant’s thirty-day appellate deadline on January 8, 2021. Appellant has filed a timely appeal.

In Appellant’s timely Statement of Matters Complained of on Appeal, he raises the following challenges to the Court’s sentencing of Appellant: the Court abused its discretion in failing to run the sentences concurrently, in making him eligible for the State Motivational Boot Camp Program, and that the aggregate sentence was excessive based upon the Appellant’s history and characteristics as argued in his Motion to Reconsider.

Appellant had been convicted by the Court after a non-jury trial on September 19, 2019, of three (3) separate counts of Delivery of a Controlled Substance (cocaine) representing three (3) separate transactions. Each transaction carried with it a prior record score of five (5) and offense gravity score of five (5), and a standard range of 12-18 months, and the Court

sentenced him to 18 to 36 months in state prison on each count for an aggregate sentence of 54 to 108 months. The Court stated at the sentencing hearing that the charges before the Court were the third set of charges for which the Appellant had been convicted for delivery of a controlled substance or possession with the intent to deliver a controlled substance, and that a sentence at the bottom end of the standard range would not be appropriate. N.T. 12/17/19, at 11. While the Court had the opportunity to sentence the Appellant on additional charges, the sentence that was imposed considered all of the relevant information both in support of the Appellant and the Commonwealth.

“Issues challenging the discretionary aspects of a sentence 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 a discretionary aspect of a sentence is waived.”

Commonwealth v. Tirado, 870 A.2d 362, 365 (Pa. Super. 2005). Here, Appellant did raise the issue in a timely post-sentence motion. Therefore, Appellant has preserved his right to challenge this Court’s sentence. In reviewing the record, the appellate court shall have regard for:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa. C.S.A. § 9781. Defendant challenges the court’s imposition of his sentence as consecutive rather than concurrent. It is within the sound discretion of a sentencing court to decide whether to make sentences concurrent or consecutive under 42 Pa. C.S. § 9721(a). *Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa. Super. 2006). The Court believes that based upon the type of charges involved in this case, to sentence him concurrently would be to

diminish the seriousness of the offense. The Court noted in the record that this was his third set of charges for this type of offense and to sentence the Appellant to concurrent terms would be to diminish the nature and seriousness of the crimes and create a lack of deterrent effect that prior sentences would have had on the Appellant's subsequent behavior.

Appellant alleges that the court abused its discretion in not making him eligible for the Boot Camp program. 61 P.S. §§ 1121-1129, defines an "eligible" inmate for Boot Camp as follows:

A person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less or an inmate who is serving a term of confinement the minimum of which is not more than three years where that inmate is within two years of completing his minimum term, and who has not reached 35 years of age at the time he is approved for participation in the motivational boot camp program

61 P.S. § 1123. With a minimum sentence of 54 months and credit for time served of less than one year, the Appellant does not meet the eligibility requirements of the Boot Camp Program. Even if Appellant would have qualified despite the length of the sentence, the Court still would not have made him eligible. Appellant had received two (2) prior sentences to state prison, which apparently has not deterred his drug dealing behavior. The Court found that to make him eligible for Boot Camp would have given him the chance at a lesser sentence for repeated behaviors and therefore it was not appropriate.

Finally, Appellant alleges that the Court's sentence is excessive considering the information argued by new counsel at the Motion to Reconsider Sentence hearing. In determining whether 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. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

As the Court stated at the time of the original sentencing it had the benefit of a presentence investigation report which highlighted the factors argued by defense counsel at the reconsideration hearing. While the Court could have sentenced the Appellant to a greater sentence because there were additional charges that did not merge for sentencing, it chose not to as the Court felt that would be unduly harsh. N.T. 12/17/19, at 11. However, the Court did consider that the Appellant was out on bail for one delivery charge when another was committed, his history of felony drug offenses, his maximum risk score, and the facts of the case including the fact that the Appellant testified at trial. The Court believes that a sentence of any less would reward the Appellant for his conduct rather than deter it.

III. Conclusion

The Court gave due consideration to the character and prior record of the Appellant, the circumstances of the offenses, and the impact of the offenses. Therefore, the Court did not abuse its discretion in fashioning Appellant's sentence. The Court respectfully requests that the Order of December 17, 2019 be affirmed.

By the Court,

Nancy L. Butts, President Judge

cc: DA (RG)
PD (JH)

NLB/n