

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-563-2009
v.	:	
	:	
MARCUS DEGARMO,	:	APPEAL
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 judgment of sentence dated January 19, 2021. On August 18, 2009, Marcus Degarmo (Appellant) entered a guilty plea to one (1) count of Aggravated Assault, a felony of the first degree. Appellant admitted several episodes of violent treatment of his six-month old daughter while she was in his care. Such treatment included but is not limited to Appellant slamming the infant into her pack and play, multiple incidents where Appellant caused the child’s head to make significant contact with various hard surfaces, and shaking her until she stopped breathing and began vomiting. The treating physician indicated that, as a result of Appellant’s conduct, his daughter would likely suffer permanent damage. Appellant was sentenced by the Court to five (5) years minimum to ten (10) years maximum with a ten (10) year consecutive probation. Appellant’s sentence became final on September 18, 2009.

On August 28, 2020, Appellant was found guilty following a jury trial under docket number CR-661-2019. The convictions under CR-661-2019 include: two (2) counts of Criminal Solicitation—Rape of a Child, two (2) counts of Criminal Solicitation—Indecent Assault of a Child, three (3) counts of Unlawful Contact with a Minor, two (2) counts of Criminal Solicitation—Child Pornography, one (1) count of Corruption of Minors, four (4)

counts of Criminal Use of a Communication Facility, one (1) count of Endangering the Welfare of Children, and one (1) count of Criminal Attempt—Child Pornography. These charges were brought against Appellant after he sent repeated solicitous text and voice messages to his girlfriend's ten-year old daughter asking for nude photos of the child and indicating his desire to have sexual interactions with her. As a result, this Court found on January 19, 2021 that Appellant had violated the special conditions of his probation due to his convictions under CR-661-2019 and resentenced him.

On February 18, 2021, Appellant filed a timely Notice of Appeal. This Court directed Appellant, in accordance with Pa.R.A.P. No. 1925(b), to file a concise statement of matters complained of on appeal within twenty-one (21) days. The Court received Appellant's concise statement on March 15, 2021. In Appellant's timely concise statement, he asserts the following:

1. The Defendant argues that the revocation and resentencing on the captioned docket was done in error because the conviction for a new criminal charge under docket 661-2019, which was cited as the reason for the revocation, was based on insufficient evidence.
2. The Defendant also argues that in light of the above, the Court abused its discretion in resentencing him to a one (1) to three (3) year sentence of state incarceration.

Sentencing is a matter committed to the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. Commonwealth v. Fowler, 893 A.3d 758, 767 (Pa. Super. 2006); Commonwealth v. Galletta, 864 A.2d 532, 534 (Pa. Super. 2004). An abuse of discretion is more than a mere error of judgment. Commonwealth v. Bradley, 237 A.3d 1131, 1140 (Pa. Super. 2020). A sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. Id. The

unreasonable inquiry is based in part on the following factors set forth in § 9781(d) of the sentencing code:

- (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.

Id. In selecting from the sentencing alternatives such as probation or confinement, the court shall follow the general principle that the sentence imposed should call for total confinement that is consistent with section 9725 and the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa. C.S.A. § 9721(b). Although they are only advisory guideposts, the court must also consider the sentencing guidelines. Id.; Commonwealth v. Clemat, 218 A.3d 944, 960 (Pa. Super. 2019); Commonwealth v. Durazo, 210 A.3d 316, 320 (Pa. Super. 2019). Section 9725 directs the court to impose a sentence of total confinement if it is of the opinion that such is necessary because:

- (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;
- (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa. C.S.A. § 9725.

Appellant first argues the Court's revocation of probation and resentencing on the above captioned docket were based on insufficient evidence, namely the conviction in the 2019 docket. The Court disagrees with Appellant on this issue. It is well within the Court's proper jurisdiction to revoke probation based on a new conviction. *See* 42 Pa.C.S. § 9771(b).

In the 2019 case, a jury convicted Appellant on several counts, and he was sentenced accordingly. That conviction is considered valid until an appellate court vacates that judgment. As of the date of this opinion, that conviction has not been overturned. One of the conditions of Appellant's probation was to refrain from further convictions, which he failed to do. A main goal of putting a defendant on probation is to give them a chance to rehabilitate themselves. Instead of moving forward while on probation, Appellant chose to assault yet another child. Therefore, this Court had more than sufficient evidence to revoke Appellant's probation and Appellant's complaint is without merit.

Appellant also challenges his resentencing in the above captioned case arguing that the Court abused its discretion in resentencing Appellant to a one (1) to three (3) year sentence of state incarceration. "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 not raise the issue in a timely post-sentence motion, nor did he present his claim during the resentencing. Therefore, Appellant has not preserved his right to challenge this Court's sentence. However, even if Appellant is found to have not waived this challenge, we find that Appellant's claim lacks merit on this issue as well.

The court shall not impose a sentence of total confinement upon revocation unless it finds that:

- (1) the defendant has been convicted of another crime; or
- (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
- (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. § 9771(c). In Appellant's situation, he was convicted of several counts in the 2019 case. Those convicted charges involved the assault of a child while on supervision for the assault of his own daughter in the above captioned docket. This Court resentenced Appellant to one (1) to three (3) years at a state facility after considering a report from the Adult Probation Office that recommended a higher resentence, Appellant's behavior, and the protection of the victims. Appellant deserves to receive some consequence for being on supervision and committing and being convicted of a new offense. Furthermore, it is the duty of this Court to protect society's most vulnerable. Therefore, since Appellant falls within multiple sections of the prerequisites to impose a sentence of total confinement and has not raised any facts demonstrating an abuse of the Court's discretion during resentencing, it was within the Court's discretion to resentence for similar repeated misconduct and Appellant's argument fails on this issue.

Conclusion

The Appellant's convictions in his case from 2019 provided the Court with sufficient evidence to support a revocation of Appellant's probation. Furthermore, the conviction from 2019 remains valid and it is therefore within the Court's discretion to resentence Appellant under the above captioned docket for violating the conditions of his special probation following the conviction on new charges. The Court respectfully requests that the Order of January 19, 2021 be affirmed.

By the Court,

Nancy L. Butts, President Judge

cc: DA
PD (MW)
NLB/jmh