

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-1792-2012
:
vs. :
: CRIMINAL DIVISION
AARON J. MORRISON, :
Defendant : Motion to Vacate Sentence

OPINION AND ORDER

Before the Court is a Motion to Vacate Sentence filed by Defendant on November 10, 2021. For the reasons set forth below, Defendant’s Motion is granted.

I. Factual and Procedural Background

On November 8, 2012, Defendant was charged with five (5) counts relating to the kidnapping and assault of his ex-girlfriend. On February 26, 2014, a jury found Defendant guilty of Kidnapping, False Imprisonment, Terroristic Threats, and Simple Assault, and the Trial Court found him guilty of a summary harassment. Defendant was sentenced on May 21, 2014 to forty-two (42) months to eighty-four (84) months imprisonment “followed by a thirty-six (36) month supervision period under the supervision of the State Board of Probation and Parole subsequent to his release from confinement or other supervision.” According to the Lycoming County Adult Probation Office, the probation is effective from December 10, 2019 through December 10, 2022.

On September 27, 2020, the Lycoming County Adult Probation Office filed a Violation Report wherein it states that Defendant pled guilty to a misdemeanor three harassment charge on June 21, 2019 and was sentenced on August 20, 2019.¹ These charges arose out of an incident that occurred on March 28, 2019. Additionally, Defendant was

¹ Under docket number CR-541-2019.

sentenced on new charges arising from an automobile accident that occurred on January 21, 2018 in Union County. These offenses occurred while Defendant was on parole, and before his probation began.

On February 12, 2021, the Honorable Marc F. Lovecchio, retired, found that Defendant violated the conditions of his probation, revoked his probation, and resentenced him on Count 1 to six (6) months to two (2) years. On August 18, 2021, the Superior Court of Pennsylvania overruled over forty (40) years of precedent and held, in *Commonwealth v. Simmons*, that a trial court cannot anticipatorily revoke an order of probation for the commission of a new crime after sentencing, but prior to the beginning of the probation period. 262 A.3d 512. Defendant now argues that, because his probation had not yet commenced at the time of the above violations, the sentencing Order of February 12, 2021 should be vacated pursuant *Simmons*.

II. Discussion

In *Simmons*, Defendant pled guilty to firearm related charges and was sentenced on December 18, 2017 to a term of imprisonment followed by three (3) years of probation to be served consecutive to his imprisonment. *Id.* at 514. On February 19, 2018, under a separate case, Defendant was charged with additional firearm offenses. *Id.* The arrest in this subsequent case occurred while Defendant was still on parole in the prior case, and before his term of probation had begun. *Id.* at 514-15. On July 18, 2018, Defendant pled guilty to the charges in the subsequent case and, as a result, the trial court in the prior case revoked Defendant's parole, anticipatorily revoked his probation, and resentenced him. *Id.* at 515.

The Court, in strictly construing the statutes relating to orders of probation, probation

conditions, and modification or revocations of orders of probation,² held that when an “‘order of probation’ imposed ‘consecutively’ to a term of imprisonment, the ‘order of probation’ and the conditions of that order cannot take effect until the term of imprisonment ends.” *Id.* at 516-18 and 523. In so holding, the Court overruled *Commonwealth v. Wendowski*, 420 A.2d 628 (Pa.Super. 1980, and its progeny. *Id.* at 524 (“*Wendowski* was incorrect in holding that a trial court may anticipatorily revoke an order of probation . . .”).

The facts here are comparable to those in *Simmons*³ because Defendant was found to have violated his probation conditions prior to his probationary period beginning, and the Commonwealth does not dispute this. However, the question is whether *Simmons* should be applied retroactively. Defendant argues that it does apply retroactively and the Court agrees.

Initially, the Court notes that, “where a question concerns the lower courts’ facial interpretation of the statute as opposed to the factual predicates triggering application of the provision,” a legality of sentence issue is not waivable.” *Com. v. Finneccy*, 249 A.3d 903, 912 (Pa.Super. 2021). *See also Com. v. Robinson*, 931 A.2d 15, 19-20 (Pa.Super. 2007) (“A challenge to the legality of the sentence may be raised as a matter of right, is non-waivable, and may be entertained so long as the reviewing court has jurisdiction.”).

Generally, “new constitutional procedural rules . . . pertain to future cases and matters that are pending on direct review at the time of the rule's announcement.” *Com. v. Gill*, 261 A.3d 544, 547 (Pa.Super. 2021), *citing Com. v. Washington*, 142 A.3d 810, 820 (Pa. 2016). However, a new rule can apply retroactively in a collateral proceeding “only if it is

² 42 Pa.C.S.A. § 9721; 42 Pa.C.S.A. § 9754; 42 Pa.C.S.A. § 9771.

³ This Court notes that while the sentencing Court did not explicitly state that Defendant’s probationary term was to run consecutive to his incarceration, the Court uses phrases such as “follow by” and “subsequent to,” which indicate that the probation period was intended to be consecutive to his incarceration. Additionally, the

substantive in nature or if it is considered a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the proceeding.” *Gill*, 261 A.3d at 547, *citing Com. v. Ross*, 140 A.3d 55, 59 (Pa.Super. 2016).

A rule is substantive if it decriminalizes conduct or prohibits punishment against a class of persons and is procedural if it only regulates the “manner of determining the defendant’s culpability.” *Gill*, 261 A.3d at 547, *citing Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016) (emphasis not included). Procedural rules “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” *Com. v. Reid*, 235 A.3d 1124, 1162 (Pa. 2020), *citing Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). The Pennsylvania Supreme Court has explained further that where a “conviction or sentence may still be accurate and, by extension, a defendant’s continued confinement may still be lawful, even if a procedural error has infected a trial, ‘[t]he same possibility of a valid result does not exist where a substantive rule has eliminated a State’s power to proscribe the defendant’s conduct or impose a given punishment.’” *Reid*, 235 A.3d at 1162, *citing Montgomery*, 577 U.S. at 200. *See, i.e., Com. v. Spatz*, 896 A.2d 1191, 1243-44 (Pa. 2006) (holding that a new rule concerning the sufficiency of the evidence entitled a defendant to a *Simmons*⁴ instruction was procedural in nature because it “involves the procedural protections of a defendant during the sentencing phase of his trial.”); *Gill*, 261 A.2d at 546 (holding that new rule which allowed prior ARD case dispositions to be considered a prior offense was procedural in nature); *Com. v. Rivera-Figueroa*, 174 A.3d

Commonwealth has not contended that the incarceration and probationary terms were meant to run concurrently.

⁴Citing to *Simmons v. South Carolina*, 534 U.S. 246 (2002), which relates to the test for determining whether an issue of defendant’s future dangerousness was raised.

674, 678 (Pa.Super. 2017) (holding that new rule that SORNA was unconstitutional was substantive by nature and therefore applied retroactively).

First, this Court notes that this issue regarding an illegal sentence is non-waivable because it challenges the legality of the sentence rather than a discretionary aspect. Additionally, at the time Judge Lovecchio issued his February 12, 2021 sentence regarding Defendant's probation violations, any appeal taken by Defendant would have been meritless given the valid case law at that time. Since then, the case law has changed. The Court finds that the new rule set forth in *Simmons* is substantive because it prohibits defendants from being punished for what would otherwise be considered probation violations prior to their probation actually beginning, so long as the probation was ordered to run consecutive to their incarceration. Had the *Simmons* rule been in place at the time of Defendant's new convictions, as described above, he could not have been legally resentenced in the instant case for those violations. Simply put, Judge Lovecchio's sentence is no longer accurate or lawful.

III. Conclusion

For the reasons set forth above, the Court finds that the *Simmons* case is applicable to the case at bar and that its new rule is substantive and therefore applies retroactively.

ORDER

AND NOW, this 1st day of **February, 2022**, upon consideration of Defendant's Motion to Vacate Sentence and for the reasons set forth above, Defendant's Motion is

GRANTED. The February 12, 2021 sentencing Order is vacated and the May 21, 2014 sentencing Order is hereby reinstated.

By The Court,

Ryan M. Tira, Judge

cc: DA (M.Wade)
Robert Hoffa, Esquire
Pennsylvania Board of Probation and Parole
APO
Gary Weber, Esquire
Alexandra Sholley – Judge Tira’s Office