

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ALLAN WAYNE MATHERLY JR.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 824 MDA 2013

Appeal from the Judgment of Sentence of April 29, 2013  
In the Court of Common Pleas of Adams County  
Criminal Division at No.: CP-01-CR-0000776-2012

BEFORE: BENDER, J., WECHT, J., and FITZGERALD, J.\*

MEMORANDUM BY WECHT, J.:

**FILED APRIL 22, 2014**

Allan Matherly appeals from the judgment of sentence entered on April 29, 2013, which was imposed after Matherly was found to be in violation of his initial sentence of intermediate punishment. We affirm.

On October 22, 2012, Matherly pleaded guilty to one count of endangering the welfare of a child,<sup>1</sup> and one count of driving under the influence of alcohol—highest rate (“DUI”).<sup>2</sup> Pursuant to the plea agreement, Matherly was sentenced to serve three years of intermediate punishment on

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S. § 4304.

<sup>2</sup> 75 Pa.C.S. § 3802(c).

the endangering count, and a consecutive six months of intermediate punishment on the DUI count.

On February 11, 2013, the Adams County Department of Probation Services indicated to the trial court that Matherly had violated the terms of his intermediate punishment sentences, and requested that the sentences be revoked. A **Gagnon I**<sup>3</sup> hearing was scheduled for March 12, 2013. At the conclusion of the hearing, the hearing officer concluded that probable cause existed to believe that Matherly had violated the terms of his intermediate punishment, and that the matter should proceed to the trial court for a **Gagnon II** revocation hearing. The **Gagnon II** hearing was scheduled for April 29, 2013.

On March 15, 2013, Matherly filed a petition for *habeas corpus*, wherein Matherly alleged that the **Gagnon I** hearing was constitutionally defective because he was denied his right to confront the witnesses against him. The trial court scheduled a hearing on the *habeas* petition for April 15, 2013, two weeks before the scheduled **Gagnon II** hearing. On that date, the trial court decided to treat the scheduled *habeas* hearing as a **Gagnon II** hearing, a procedure to which Matherly allegedly consented. The Commonwealth called three witnesses who established Matherly's violations of the terms of his intermediate punishment. At the conclusion of the

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<sup>3</sup> **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

hearing, the trial court determined that Matherly had violated his intermediate punishment, and revoked said punishment. A new sentencing hearing was scheduled for April 29, 2013.

In its June 12, 2013 Pa.R.A.P. 1925(a) opinion, the trial court summarized the procedural events that followed Matherly's revocation hearing as follows:

Sentencing was held on April 29, 2013. At sentencing [Matherly] and Defense counsel were in agreement with the Commonwealth's recommendation for sentencing. The Court, in accordance with the parties' agreement for resentencing sentenced [Matherly] on Count I, Endangering the Welfare of Children to no less than 1 year [nor] more than 3 years in a State Correctional Institution designated by the State Department of Corrections. On Count III, [DUI, Matherly] was sentenced to serve no less than 1 month nor more than 6 months in a State Correctional Institution running consecutively to the sentence imposed on Count 1. On May 8, 2013[, Matherly, with the assistance of counsel,] filed a Notice of Appeal. [On] May 14, 2013 this Court entered an Order directing [Matherly] to file a Concise Statement of [Errors] Complained of within 21 days from the date of that Order pursuant to the requirements of Pa.R.A.P. 1925(b).

The deadline for filing the Concise Statement of [Errors] Complained of passed on June 4, 2013. As of the date of [the trial court's] Opinion no such Statement has been filed. Accordingly, in accordance with Pa.R.A.P. 1925(b)(1) any issue intended to be raised by [Matherly] is deemed waived.

Trial Court Opinion ("T.C.O."), 6/12/2013, at 1-2.

On June 20, 2013, after receiving a copy of the trial court's opinion, counsel for Matherly filed both a motion for leave to file a Rule 1925(b) statement and a Rule 1925(b) statement. On June 21, 2013, the trial court denied Matherly's motion for leave to file a Rule 1925(b) statement.

On January 29, 2014, we remanded this case for the filing of a timely concise statement pursuant to Pa.R.A.P. 1925(c)(3),<sup>4</sup> and for the preparation of a new Rule 1925(a) opinion in response to Matherly's concise statement. **See Commonwealth v. Matherly**, No. 824 MDA 2013, slip op. at 6-7 (Pa. Super. Jan. 29, 2013). Both Matherly and the trial court have complied with the directive on remand, and this case is now ripe for disposition on the merits.

Matherly raises the following question for our review: "Did the Court err in declaring [Matherly's] *habeas corpus* motion moot upon replacing a deficient **Gagnon I** hearing with a **Gagnon II** hearing?" Brief for Matherly at 4. However, for the reasons that follow, we conclude that Matherly has waived this issue.

As is clear from his statement of the question presented in this appeal, Matherly's primary contention is that the trial court erroneously supplanted a **Gagnon II** hearing in place of a hearing on his *habeas corpus* petition. That petition was predicated upon Matherly's claims that his **Gagnon I** hearing

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<sup>4</sup> Subsection 1925(c)(3) provides:

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge.

Pa.R.A.P. 1925(c)(3).

constitutionally was defective. Specifically, Matherly argued in his *habeas petition*, as he continues to argue presently before this Court, that he was denied his constitutional right to confront the witnesses against him at his **Gagnon I** hearing because the three material witnesses to his alleged probation violations were not present for the hearing, even though he specifically requested that they be there. Instead, the **Gagnon I** hearing officer permitted Matherly's probation officer to introduce into evidence a report from a corrections officer, who was not present to testify, that detailed the behaviors that formed the basis of Matherly's probation violations. Matherly objected to the procedure on the bases that the evidence was hearsay and that Matherly could not confront the witnesses against him. The hearing officer denied the objection, and concluded that the information contained within the report sufficed to establish probable cause that Matherly violated his probation.

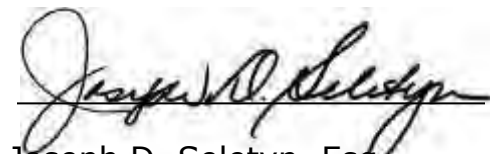
Matherly re-raised these claims in his *habeas corpus* petition. However, on the date scheduled for the hearing on the petition, the trial court decided to forego a hearing on the *habeas corpus* petition, and proceeded instead to a **Gagnon II** hearing. At that hearing, the Commonwealth presented three witnesses, which included two correctional officers and one prison inmate, each of whom described Matherly's behavior while incarcerated in the Adams County Correctional Complex. The witnesses explained that, while incarcerated, Matherly was observed kicking and punching a locker, using vulgarities with correctional officers, refusing to

obey orders from correctional officers, and committing various other violations of the facility's rules and regulations. Matherly was able to cross-examine each of the witnesses at length. At the conclusion of the hearing, the trial court concluded that the Commonwealth had adduced sufficient evidence to demonstrate that Matherly had violated his probation.

Notably absent from the transcript of the **Gagnon II** hearing is any indication that Matherly objected to the trial court's decision to move directly to a **Gagnon II** hearing. Consequently, Matherly's only stated claim to this Court, that the trial court erred in holding a **Gagnon II** hearing instead of a *habeas corpus* hearing regarding the procedure utilized at the **Gagnon I** hearing, is waived. **See Commonwealth v. Pellecchia**, 925 A.2d 848, 853 (Pa. Super. 2007); **Commonwealth v. DeLuca**, 418 A.2d 669, 672 (Pa. Super. 1980) (holding that failure to object to the fact that the appellant did not receive a **Gagnon I** before or during a **Gagnon II** hearing resulted in waiver that claim); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/22/2014