

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

LEROY TOWNSEND

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 614 WDA 2013

Appeal from the Judgment of Sentence March 13, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0000043-2009

BEFORE: PANELLA, J., MUNDY, J., and STABILE, J.

MEMORANDUM BY PANELLA, J.:

FILED: April 23, 2014

Appellant, Leroy Townsend, appeals from the judgment of sentence entered March 13, 2013, by the Honorable Joseph K. Williams III, in the Court of Common Pleas of Allegheny County, following the revocation of Townsend's probation. We affirm.

On August 26, 2009, Townsend entered a guilty plea at number CP-02-CR-0000043-2009 to retail theft, possession of drug paraphernalia, and conspiracy. Thereafter, the trial court sentenced Townsend on the retail theft charge to six to twelve months' incarceration with immediate parole, followed by three years of probation. No further penalty was imposed on the remaining charges. While on probation, on April 11, 2011, Townsend entered a guilty plea to retail theft and receiving stolen property, for which he received a sentence of five to ten months' incarceration to be followed by

seven years of probation. Thereafter, on September 19, 2012, Townsend entered yet another guilty plea to retail theft, and received a sentence of 36 months' probation.

On February 27, 2013, the trial court conducted a probation revocation hearing for the charges imposed at number CP-02-CR-0000043-2009. After reviewing a pre-sentence investigation report, the court revoked Townsend's probation for retail theft and resentedenced him to two to four years' incarceration. On March 1, 2013, Townsend filed a Motion to Reconsider Sentence, alleging that the lower court had not advised him of his appellate rights on-the-record, and that his sentence was excessive. A hearing was conducted on March 13, 2013, at which the sentencing court advised Townsend of his appellate rights. This timely appeal followed.¹

On appeal, Townsend raises the following issue for our review:

Did the sentencing court abuse its discretion in imposing a manifestly excessive and unreasonable sentence following probation revocation, where that sentence was based wholly on the underlying offenses, and did not account for Appellant's mental health, rehabilitative needs, and the unique circumstances surrounding his violation?

¹ The Commonwealth argues that because the revocation court did not issue a new sentencing order at the hearing of March 13, 2013, Townsend's appeal filed April 12, 2013, is patently untimely. We note, however, that the court explicitly advised Townsend that he had ten days *from the date of the hearing* in which to file a post sentence motion. **See** N.T., Hearing, 3/13/13 at 2. Townsend filed a subsequent Motion to Reconsider Sentence on March 22, 2013, and a notice of appeal on April 12, 2013. We therefore consider his appeal in this matter to be timely.

Appellant's Brief at 4. This issue raises a challenge to the discretionary aspects of Townsend's sentence.

"A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." **Commonwealth v. McAfee**, 849 A.2d 270, 274 (Pa. Super. 2004) (citation omitted). When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. **See Commonwealth v. Tirado**, 870 A.2d 362, 365 (Pa. Super. 2005). "Two requirements must be met before we will review this challenge on its merits." **McAfee**, 849 A.2d at 274. "First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." **Id.** "Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code." **Id.** That is, "the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process." **Tirado**, 870 A.2d at 365. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. **See id.** "Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits." **Id.**

In the present case, Townsend's appellate brief contains the requisite 2119(f) concise statement, and, as such, is in technical compliance with the requirements to challenge the discretionary aspects of a sentence. Townsend argues in his 2119(f) statement that the sentence imposed by the lower court was "manifestly unreasonable and excessive," and that the court failed to consider his rehabilitative needs and the facts surrounding his violation of probation. Appellant's Brief at 10. A claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question for our review. **See Commonwealth v. Kelly**, 33 A.3d 638, 640 (Pa. Super. 2011).

Our scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the sentence imposed following revocation. **Commonwealth v. Infante**, 585 Pa. 408, 419, 888 A.2d 783, 790 (2005). "Revocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." **Commonwealth v. Ahmad**, 961 A.2d 884, 888 (Pa. Super. 2008) (citation omitted). Upon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence. **See Commonwealth v. Coolbaugh**, 770 A.2d 788, 792 (Pa. Super. 2001). However, a re-sentence

may not exceed the statutory limits of the sentence, including allowable deductions for time served. **See id.**

Although Townsend argues that the sentence imposed by the lower court following revocation was excessive, he notably does not argue that the sentence imposed by the court was beyond the statutory maximum, nor does the record support such an assertion. It is well settled that the sentencing guidelines do not apply to sentences imposed as a result of probation or parole revocations. **See Commonwealth v. Ware**, 737 A.2d 251, 255 (Pa. Super. 1999).² Here, the lower court did not exceed the statutory maximum when it resentenced Townsend to two to four years' imprisonment for retail theft following the revocation of his probation. Therefore, we find no abuse of discretion in the lower court's sentence.

We further note that the record belies Townsend's assertion that the sentencing court failed to consider his rehabilitative needs and personal characteristics of the case. Where, as here, the trial court has the benefit of a pre-sentence investigation report, "we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." **Id.** at 171 (internal citations omitted). Noting Townsend's extensive prior criminal

² 204 PA.Code § 303.1(b) provides: "The sentencing guidelines do not apply to sentences imposed as a result of the following: . . . revocation of probation, intermediate punishment or parole."

record, the sentencing court reasoned that Townsend was not amendable to rehabilitation:

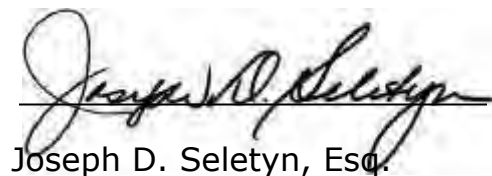
I mean, he can't stop stealing. I asked him can he stop stealing, and he won't. And he's proven that he won't. I mean, we have a 58-year-old man. I mean, he's a serial thief, and he won't quit.

N.T., Probation Violation Hearing, 2/27/13 at 30

Based on the foregoing, we find the sentence imposed by the lower court after revoking Townsend's probation was supported by the record and well within its discretion. Therefore, we find no merit to Townsend's challenge to the discretionary aspects of his sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/23/2014