

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DAVID KRAPF,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2734 EDA 2013

Appeal from the Judgment of Sentence June 28, 2013
in the Court of Common Pleas of Northampton County
Criminal Division at No.: CP-48-CR-0000929-2011

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED APRIL 15, 2014

Appellant, David Krapf, appeals, *nunc pro tunc*, from the judgment of sentence entered following the revocation of his probation. For the reasons discussed below, we affirm.

The underlying facts and procedural history in this matter are as follows. On February 1, 2012, Appellant entered a negotiated guilty plea to two counts of corruption of minors and one count of indecent assault of a person less than sixteen years of age.¹ (**See** N.T. Plea Hearing, 2/01/12, at 8). The charges arose out of Appellant's sexual relationship with his minor stepdaughter. In accordance with the terms of the plea, the trial court

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 6301(a)(1) and 3126(a)(8), respectively.

sentenced Appellant to a term of incarceration of not less than one year less a day nor more than two years less two days. The parties agreed that the trial court should also sentence Appellant to a term of probation, but left the length of that term to the trial court's discretion. The trial court imposed an aggregate term of eight years' probation following Appellant's term of incarceration.

On June 28, 2013, Appellant appeared before the trial court for a **Gagnon II** hearing.² The trial court found Appellant in violation of the conditions of his probation based upon the removal of his GPS monitoring bracelet, absconding to New Jersey, and his failure to report to authorities. (**See** N.T. **Gagnon II** Hearing, 6/28/13, at 2). The trial court revoked his probation and re-sentenced Appellant to an aggregate term of incarceration of not less than twenty-eight nor more than fifty-six months. (**See id.** at 9).

On July 16, 2013, the trial court received a *pro se* letter from Appellant asking counsel to file a motion for reconsideration of sentence. The trial court scheduled a hearing. On September 4, 2013, counsel filed a supplemental motion for reconsideration of sentence. The trial court held a hearing on the motion on September 6, 2013, and denied the motion on the

² **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

merits, despite the untimely filing.³ (**See** N.T. Motion Hearing, 9/06/13, at 8). The trial court granted leave for Appellant to appeal *nunc pro tunc*.

Appellant filed a notice of appeal on October 2, 2013. The trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant filed his statement on October 16, 2013; on October 18, 2013, the trial court issued an opinion. **See** Pa.R.A.P. 1925(a).

On appeal, Appellant raises the following question for our review:

- I. Did the trial [court] abuse [its] discretion by sentencing [Appellant] to total confinement following a probation violation hearing?

(Appellant's Brief, at 4).

Here, Appellant challenges the discretionary aspects of his sentence. (**See id.**). In a recent decision, **Commonwealth v. Cartrette**, 83 A.3d 1030 (Pa. Super. 2013) (*en banc*), this Court held that our scope of review in an appeal from a revocation of probation or parole does include

³ A defendant in a revocation proceeding has ten days from the date of imposition of sentence to file a post-sentence motion. **See** Pa.R.Crim.P. 708(E). Thus, Appellant's motion was untimely. The Commonwealth states (**see** the Commonwealth's Brief, at 3 n.3), however, that the trial court neglected to inform Appellant of his post-sentence rights on the record, including the period in which to file post-sentence motions. **See** Pa.R.Crim.P. 708(D)(3)(a). Our independent review of the record confirms this. We would ordinarily remand this matter to allow Appellant to file his post-sentence motion *nunc pro tunc*. **See Commonwealth v. Koziel**, 432 A.2d 1031 (Pa. Super. 1981). However, remand is unnecessary in the instant matter, because the trial court considered and addressed the merits of Appellant's motion. (**See** N.T. Motion Hearing, at 8).

discretionary aspects of sentence claims; thus Appellant's claim is properly before us. **See Cartrette, supra** at 1034. Our standard of review is abuse of discretion. **See id.** at 1041. However, for the reasons discussed below, we agree with the Commonwealth that Appellant's claim is waived. (**See** Commonwealth's Brief, at 5-6)

Appellant argues that his sentence was unreasonable based upon the non-violent nature of his probation violation. (**See** Appellant's Brief, at 9). However, in his Supplemental Motion for Reconsideration of Sentence and in his Statement of Matters Complained of on Appeal, Appellant argued that the sentence failed to consider his rehabilitative needs. (**See** Supplemental Motion for Reconsideration of Sentence, 9/04/13, at unnumbered page 2; Statement of Matters Complained of on Appeal, 10/16/13, at unnumbered page 1). As amended in 2007, Rule 1925 provides that issues that are not included in the Rule 1925(b) statement or raised in accordance with Rule 1925(b)(4) are waived. **See** Pa.R.A.P. 1925(b)(4)(vii); **see also Commonwealth v. Lord**, 719 A.2d 306, 308 (Pa. 1998), *superseded by rule on other grounds as stated in Commonwealth v. Burton*, 973 A.2d 428, 430 (Pa. Super. 2009). Further, an appellant cannot raise new legal theories for the first time on appeal. **See** Pa.R.A.P. 302(a); **Commonwealth v. Truong**, 36 A.3d 592, 598 (Pa. Super. 2012) (*en banc*), *appeal denied*, 57 A.3d 70 (Pa. 2012) (citations omitted). Thus, we hold

that Appellant has waived his claim that his sentence was unreasonable based upon the non-violent nature of his probation violation.⁴

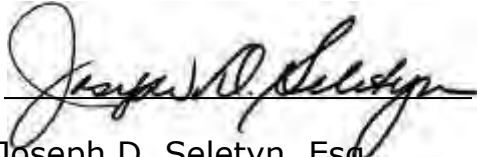
Appellant mentions the issue of rehabilitative needs in his Rule 2119(f) statement. (**See** Appellant's Brief, at 7). However, beyond a single cursory reference to rehabilitative needs in a discussion of 42 Pa.C.S.A. § 9721(b), Appellant does not address the issue of rehabilitative needs in his argument. (**See id.** at 8-9). Accordingly, Appellant has abandoned his argument on rehabilitative needs,⁵ and we deem it waived. **Cf. Commonwealth v. Jones**, 815 A.2d 598, 604 n.3 (Pa. 2002) (holding that argument raised in statement of questions involved but abandoned in body of brief is waived).

Judgment of sentence affirmed. Jurisdiction relinquished.

⁴ Moreover, as the Commonwealth notes, even if Appellant had properly preserved his claim, we would still find it waived. (**See** Commonwealth's Brief, at 6 n.4). Appellant's argument on this issue consists of three paragraphs of boilerplate language on sentencing. (**See** Appellant's Brief, at 8-9). His actual argument about the merits of his claim is made up of three conclusory sentences arguing that the sentence is unreasonable. (**See id.** at 9). This Court will not act as counsel and will not develop arguments on behalf of an appellant. **See In re R.D.**, 44 A.3d 657, 674 (Pa. Super. 2012), *appeal denied*, 56 A.3d 398 (Pa. 2012). When deficiencies in a brief hinder our ability to conduct meaningful appellate review, we can dismiss the appeal entirely or find certain issues to be waived. **See** Pa.R.A.P. 2101; **R.D., supra**. at 674.

⁵ In any event, such a claim does not present a substantial question. **See Commonwealth v. Griffin**, 65 A.3d 932, 936-37 (Pa. Super. 2013), *appeal denied*, 76 A.3d 538 (Pa. 2013) (citing cases). Therefore, even if Appellant had not waived the issue, we would not have addressed it.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014