

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LEROY J. JAMES,	:	
	:	
Appellant	:	No. 1367 MDA 2013

Appeal from the Judgment of Sentence Entered June 26, 2013,
in the Court of Common Pleas of Lancaster County,
Civil Division, at No(s): CI-10-00601.

BEFORE: BENDER, P.J.E, DONOHUE, J., and STRASSBURGER, J.*

MEMORANDUM BY: STRASSBURGER, J.

FILED APRIL 15, 2014

Leroy J. James (Appellant) appeals from the judgment of sentence entered June 26, 2013 following the revocation of his probation. We affirm.

On October 22, 2010, Appellant’s former paramour (Victim) filed a petition in the Lancaster County Court of Common Pleas seeking a protection from abuse (PFA) order against Appellant. On that date, following an *in camera* review of the petition, a temporary PFA order was entered. As part of the order, Appellant was prohibited from having any contact with Victim.

On October 25, 2010, Officer Matthew D. Leddy of the Columbia Borough Police Department filed a complaint against Appellant charging him with one count of indirect criminal contempt (ICC) for allegedly calling Victim multiple times in violation of the temporary PFA order. The following day, the Columbia Borough Police Department filed an additional ICC complaint

*Retired Senior Judge assigned to the Superior Court.

against Appellant for allegedly telephoning Victim six more times. A warrant was issued for Appellant's arrest on these charges.

On March 23, 2011, a final PFA hearing was held, after which a Final PFA Order was entered. The order was to remain in effect for a period of three years. On July 20, 2011, Appellant was apprehended on the outstanding ICC charges. On November 2, 2011, an ICC hearing was held after which Appellant was found guilty of nine ICC charges and sentenced to an aggregate term of six months' incarceration followed by 18 months' probation.

On May 12, 2013, while Appellant was still serving his probation sentence, he was arrested on charges of driving under the influence and possession of a controlled substance with the intent to deliver. On May 16, 2013, Appellant's probation officer filed a probation violation petition and an arrest warrant based upon those new charges.

A hearing on Appellant's alleged probation violation was held on June 26, 2013. At the beginning of the hearing, Appellant's counsel stipulated that the violation did occur, but argued that the original ICC sentence imposed on November 2, 2011 was illegal in light of a recent decision by this Court in **Ferko-Fox v. Fox**, 68 A.3d 917 (Pa. Super. 2013). Following argument by counsel, the violation court found Appellant had violated his probation and that **Ferko-Fox** was not applicable retroactively. Appellant

subsequently was sentenced to an aggregate term of six months' imprisonment, with credit for time served, followed by a 12 month period of probation.

Appellant filed timely post-sentence motions, which were denied on July 16, 2013. Appellant filed a timely notice of appeal on July 26, 2013. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

On appeal Appellant asks us to consider whether the trial court lacked jurisdiction to impose sentence because the 2011 temporary PFA order was "issued illegally in violation of 23 Pa.C.S. § 6107(b), as interpreted by **Ferko-Fox**." Appellant's Brief at 5.

"[T]his Court's 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**, 888 A.2d 783, 790 (Pa. 2005). Revocation of a probationary sentence is a matter within the discretion of the trial court, and that court's decision will not be disturbed absent an abuse of discretion or error of law. **Commonwealth v. Perreault**, 930 A.2d 553 (Pa.Super. 2007).

Section 6107(b) of the PFA act provides as follows:

(b) Temporary orders.—

- (1) If a plaintiff petitions for temporary order for protection from abuse and alleges immediate and

present danger of abuse to the plaintiff or minor children, the court shall conduct an *ex parte* proceeding.

(2) The court may enter such a temporary order as it deems necessary to protect the plaintiff or minor children when it finds they are in immediate and present danger of abuse. The order shall remain in effect until modified or terminated by the court after notice and hearing.

23 Pa.C.S. § 6107(b).

Prior to 2013, and during the time the instant temporary PFA order was issued, Lancaster County had adopted an informal procedure whereby the trial court would review the allegations contained in PFA petitions *in camera* "to determine if the allegations raised in the petition establish[ed] an immediate and present danger of abuse. If the trial court determine[d] that the four corners of the PFA petition [were] sufficient to support the required finding of an immediate and present danger, then it [would] issue a temporary PFA and schedule a hearing for a final PFA within ten days." **Ferko-Fox**, 68 A.3d at 923. In **Ferko-Fox**, a panel of this Court held, *inter alia*, that due process required the trial court to convene an *ex parte* hearing prior to issuing a temporary PFA order. **Id.** at 925. However, the Court further acknowledged that, where a final PFA order was entered following a full adversarial proceeding, the lack of an *ex parte* hearing is not grounds for reversal of the final PFA order. **Id.**

Appellant's central contention is that, because the underlying temporary PFA order was issued in violation of his due process rights, his new sentence is illegal. The appropriate time to raise that argument would have been on direct appeal from either the issuance of the final PFA order in March of 2011, or on direct appeal from the original judgment of sentence imposed on November 2, 2011.

Moreover, as in **Ferko-Fox**, because a final PFA order was entered following a full adversarial proceeding, the lack of an *ex parte* hearing prior to the issuance of the temporary order Appellant is accused of violating is not grounds for reversal of the underlying final PFA order. **Ferko-Fox**, 68 A.3d at 925.

Judgment of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.

Prothonotary

Date: 4/15/2014