

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RAHEEM MANLEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2443 EDA 2013

Appeal from the Judgment of Sentence entered August 5, 2013,
in the Court of Common Pleas of Montgomery County,
Criminal Division, at No(s): CP-46-CR-0009184-2010

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.:

FILED APRIL 22, 2014

Raheem Manley ("Appellant") appeals from the judgment of sentence imposed after he violated the conditions of his probation.

The trial court summarized the procedural history as follows:

On August 19, 2011, Appellant entered into a negotiated guilty plea to five counts of criminal attempt to commit burglary, for which he was sentenced to a term of time served to 23 months' imprisonment, followed by a two-year probationary term. Appellant was paroled on August 29, 2011.

[O]n August 20, 2012, a notice of probation/parole violation letter, signed by Appellant, was filed. Therein it alleged that on July 31, 2012, he was arrested by the Philadelphia Police Department on a cruelty to animals charge.

On May 17, 2013, Appellant proceeded to a Contested Gagnon Hearing at which time it was established that Appellant had been convicted in Philadelphia Municipal Court of the cruelty to animals charge on April 30, 2013.

F.N. 2 At the time of the Contested Gagnon Hearing, Appellant

had filed an appeal of that conviction for a trial de novo in the Philadelphia Court of Common Pleas.

At the conclusion of the hearing, [the trial court] determined that Appellant violated his parole.

On August 5, 2013, [the trial court], with the benefit of a pre-sentence investigation and report, [revoked Appellant's [parole and probation] and resentenced Appellant on his underlying criminal attempt conviction to a term of two to eight years' imprisonment.

Trial Court Opinion, 10/7/13, at 1-2 (first footnote and citations to notes of testimony omitted).

Appellant filed a post-sentence motion on August 14, 2013, which the trial court denied on August 20, 2014. This appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issue:

1. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED APPELLANT TO AN AGGREGATE TERM OF TWO (2) TO EIGHT (8) YEARS OF TOTAL CONFINEMENT FOLLOWING THE REVOCATION OF PROBATION ORDERS IMPOSED FOLLOWING APPELLANTS' FIVE (5) CRIMINAL ATTEMPT - BURGLARY AND AGGRAVATED ASSAULT CONVICTIONS?

Appellant's Brief at 5.

Appellant argues that the trial court abused its discretion when it imposed a sentence of two to eight years of imprisonment following the revocation of his probation. Appellant's Brief at 15-28. Specifically, Appellant claims that in fashioning his sentence, the trial court improperly relied on his Philadelphia Municipal Court conviction for cruelty to animals,

despite the fact that that conviction had been appealed to the Court of Common Pleas of Philadelphia County. *Id.* Appellant maintains that the filing of his appeal had the effect of vacating the Municipal Court conviction while he was awaiting trial *de novo*, and therefore the trial court abused its discretion by relying on the Municipal Court conviction to revoke his probation and resentence him to total confinement. *Id.*

Where an appellant challenges the discretionary aspects of a sentence, as in the instant case, there is no automatic right to appeal and the appeal should be considered a petition for allowance of appeal. ***Commonwealth v. Curran***, 932 A.2d 103, 105 (Pa. Super. 2007). Before we can address a discretionary challenge, an appellant must comply with the following requirements:

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Commonwealth v. Allen, 24 A.3d 1058, 1064 (Pa. Super. 2011).

Here, Appellant filed a timely notice of appeal. Additionally, Appellant filed a written post-sentence motion in which he asserted that the trial court abused its discretion by imposing a harsh and excessive sentence in light of the fact that this was Appellant's first violation, the violation was based on a

misdemeanor offense, and Appellant had been in jail on a detainer for over a year prior to sentencing. Post-Sentence Motion, 8/14/13. In his post-sentence motion, Appellant did not raise the specific claim he now presents to this Court, *i.e.*, that his Municipal Court conviction was effectively vacated pending appeal and trial *de novo*, and that the trial court therefore improperly relied on the Municipal Court conviction in its decision to sentence him to total confinement. However, at the sentencing hearing, Appellant verbally asserted, on the record, that it was impermissible for the trial court to rely on his Municipal Court conviction to revoke his probation and resentence him. N.T., 8/5/2, at 2-4. Thus, this issue has been preserved for appellate review.

Additionally, Appellant has included in his brief a Pa.R.A.P. 2119(f) statement. Appellant's Brief at 15-16. We further conclude that Appellant's argument that the trial court relied on an impermissible factor, *i.e.*, his Municipal Court conviction, presents a substantial question for our review. ***See Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004) (claim that the trial court relied upon incorrect factual assertions when imposing sentence asserts a 'substantial question'); ***Commonwealth v. Archer***, 722 A.2d 203, 210 (Pa. Super. 1998) (if a sentencing court considers improper factors in imposing sentence upon a defendant, the court thereby abuses its discretion...). We therefore proceed to address the merits of Appellant's sentencing claim.

In order to establish that the sentencing court abused its discretion, Appellant “must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” **Commonwealth v. Williams**, 69 A.3d 735, 741 (Pa. Super. 2013). In a situation where, as here, a sentence is imposed 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. 42 Pa.C.S.A. § 9771(b); **Commonwealth v. Kelly**, 33 A.3d 638, 645 (Pa. Super. 2011). “When imposing a sentence of total confinement after a probation revocation, the trial court is to consider the factors set forth in 42 Pa.C.S.A. § 9771.” **Commonwealth v. Crump**, 995 A.2d 1280, 1282-1283 (Pa. Super. 2010). 42 Pa.C.S.A. § 9771(c) provides that once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist:

- (1) the defendant has been convicted of another crime; or
- (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
- (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S.A. § 9771(c).

“[T]he sentencing court must follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” **Commonwealth v. Cartrette**, 83 A.3d 1030, 1040-1041 (Pa. Super. 2013) (internal quotations omitted); 42 Pa.C.S. § 9721(b). “In addition, in all cases where the court resentences an offender following revocation of probation ... the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed [and] [f]ailure to comply with these provisions shall be grounds for vacating the sentence or resentence and resentencing the defendant.” **Id.** “A trial court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court's consideration of the facts of the crime and character of the offender.” **Crump**, 995 A.2d at 1283.

Appellant asserts that the trial court abused its discretion by revoking his probation and resentencing him to total confinement based on his conviction of cruelty to animals in the Philadelphia Municipal Court, where Appellant filed an appeal from the Municipal Court conviction and was awaiting trial *de novo*. Appellant’s Brief at 17-28. Appellant argues that when an appeal is taken from a Philadelphia Municipal Court conviction, the

Municipal Court conviction is effectively vacated pending appeal and trial *de novo*, and as such, the trial court could not rely on the Municipal Court conviction to revoke his probation and resentence him in the present case.

In support of his assertion, Appellant relies on ***Johnson v. Com., Pennsylvania Bd. of Probation and Parole***, 511 A.2d 894 (Pa. Commw. 1986), in which the Commonwealth Court held that “Section 1123 of the Judicial Code, 42 Pa.C.S. § 1123, provides that appeals to the Philadelphia County Common Pleas Court from the Philadelphia Municipal Court are *de novo*” and that “the effect of [an] appeal [from the Municipal Court conviction] is to vacate the municipal court conviction.” ***Johnson***, 511 A.2d at 897. It is well-settled, however, that we are not bound by a decision of the Commonwealth Court, and we decline to rely on ***Johnson*** to conclude, here, that Appellant’s Municipal Court sentence was vacated when he filed an appeal from that conviction. ***Connor v. Crozer Keystone Health System***, 832 A.2d 1112, 1116, n.3. (Pa. Super. 2003); ***see also Commonwealth v. McDermott*** , 547 A.2d 1236, 1239-1240 (Pa. Super. 1988) (Under Pennsylvania law, the authority to parole convicted offenders is split between the common pleas courts and the Pennsylvania Board of Probation and Parole and “there are significant differences between common pleas court parole and administrative parole”; [r]evocation procedures in the common pleas court are governed by Pa.R.Crim.P. 1409 and local rules while

revocation of administrative parole is governed by the detailed regulations promulgated by the Parole Board and codified at 37 Pa.Code § 71 *et seq.*).

Moreover, in ***Commonwealth v. Davis***, 336 A.2d 616, 623 (Pa. Super. 1975), we explained that if a probationer has been arrested and tried and convicted of an offense within the jurisdiction of the Municipal Court before the probation revocation hearing “[e]ven though there is an automatic right to appeal and to obtain a trial *de novo* in the Court of Common Pleas, a ***Gagnon II*** hearing may be held without awaiting the outcome of that trial.” Thus, in accordance with ***Davis***, the trial court did not abuse its discretion by conducting a ***Gagnon II*** hearing and revoking Appellant’s probation and resentencing him while his trial *de novo* was pending.

Further, our Supreme Court has explained, “[i]n this jurisdiction it is well settled that a probation violation hearing may be conducted prior to a trial for the criminal charges based on the same activities. Nor is the revocation of probation and the imposition of a prison sentence restricted to a finding that a subsequent criminal act has been committed by the probationer during the term of the probation. A probation violation is established whenever it is shown that the conduct of the probationer indicates the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct.” ***Commonwealth v. Brown***, 503 Pa. 514, 523-524, 469 A.2d

1371, 1375 (1983); **see also Commonwealth v. Ortega**, 995 A.2d 879, 882, n.1. (Pa. Super. 2010) (“When the basis for revocation arises from evidence of intervening criminal conduct, a VOP hearing may be held prior to any trial arising from such criminal conduct.”); **Commonwealth v. Tomczak**, 381 A.2d 140, 177 (Pa. Super. 1977) (“Because of the difference between a trial and a probation revocation proceeding, it is not a violation of constitutional rights for the revocation of probation to take place after the arrest but before the trial [a]nd, if the probationer is later acquitted of those criminal charges, factual support of the earlier revocation of probation is not necessarily removed, and the revocation may still stand.”).

Here, the trial court determined that revocation of Appellant’s probation and a sentence of total confinement was warranted for the following reasons:

The [pre-sentence] investigation report, of course, sets out his criminal history, which is quite lengthy.

[For] cruelty to animals, according to the report, [Appellant] was found guilty and sentenced to 11 months, 13 days to no more than 23 months, with three year consecutive probation. The allegation there is that he had poured boiling hot water on a cat.

A state prison sentence is necessary to vindicate the authority of the [trial court] and the Probation Department, given his criminal history and his attitude.

His attitude is set forth in the report to some extent. For example, when questioned about his mental health history, he gives conflicting explanations about that. He was reluctant to discuss his employment history. Does

admit to smoking marijuana and taking Percocet and drinking alcohol, but would not go into any detail about his drug use.

Based on these considerations, the [trial court] believes that a sentence of total confinement is appropriate, given his character and attitude. A lesser sentence would depreciate this life of crime he's led thus far, and his antisocial tendencies.

N.T., 8/5/13, at 5-7.

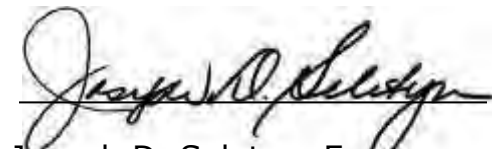
In its Pa.R.A.P. 1925(a) opinion, the trial court reiterated "the antisocial nature of [Appellant's] parole violation ... namely that he poured boiling water on a cat" and "also noted his attitude which was reflected in the pre-sentence investigation and report" to conclude that a sentence of total confinement was "necessary to vindicate the authority of the Court." Trial Court Opinion, 10/7/13, at 4-5. Although Appellant contends that it was impermissible for the trial court to revoke his probation while trial *de novo* was pending, we find no abuse of discretion in the trial court's determination that, based on Appellant having been arrested and convicted in the Municipal Court of animal cruelty, together with Appellant's criminal history and poor attitude, probation had proven to be an ineffective rehabilitative tool for defendant, and revocation and a sentence of total confinement was warranted. ***See Commonwealth v. A.R.***, 990 A.2d 1, 6 (Pa. Super. 2010) ("a VOP hearing is not a trial and, as such, does not deal with questions of 'guilt' or 'innocence' as those terms are understood commonly in the criminal law[;] the degree of proof necessary to achieve revocation of an offender's probation is far less than that required to sustain

a criminal conviction, and evidence not normally admissible at trial, or even necessarily criminal in nature, may be presented by the Commonwealth to meet this burden"); ***Commonwealth v. Del Conte***, 419 A.2d 780, 783 (Pa. Super. 1980) ("When it becomes apparent that the probationary order is not serving this desired end (of rehabilitation) the court's discretion to impose a more appropriate sanction should not be fettered.").

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

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: 4/22/2014