NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BILLY RAY BURTT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1873 WDA 2012

Appeal from the Judgment of Sentence November 2, 2012
In the Court of Common Pleas of Mercer County
Criminal Division at No(s): CP-43-CR-0001437-2008

BEFORE: BOWES, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED: APRIL 22, 2014**

Billy Ray Burtt appeals from the judgment of sentence of four to eight years imprisonment that was imposed after he was found to be in violation of the terms of his parole/probation ("VOP"). We affirm.

On April 13, 2009, Appellant pled guilty to aggravated indecent assault. Appellant admitted that, when he was eighteen years old, he placed his finger into the vagina of a six-year-old girl. The matter proceeded to sentencing on March 31, 2010. Appellant did not have a prior record and the offense gravity score was ten, which resulted in a standard range sentencing guideline of twenty-two to thirty-six months imprisonment. Appellant had a low IQ, suffered from mental health issues, had attempted suicide on several occasions, was in psychiatric counseling, and was a victim

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* Former Justice specially assigned to the Superior Court.

of sexual abuse himself. Based on these facts, the sentencing court granted Appellant's request for leniency, and it sentenced him slightly below the mitigated range to county imprisonment of one year less one day to two years minus one day followed by eight years probation. The sentencing court warned Appellant that if he violated his "parole or probation whenever you do get out, you're going in the state penitentiary, you'll serve the maximum up to ten years." N.T. Sentencing, 3/31/10, at 14.

Appellant was paroled in this matter on July 10, 2011, but remained incarcerated due to a sentence imposed in an unrelated matter. On July 11, 2012, he was remitted to the supervision of the Pennsylvania Board of Probation and Parole. One of the terms and conditions of Appellant's parole and probation was that he not have any contact with anyone who was under eighteen years old. Appellant was informed that contact included sending messages, email, instant messages, and text messages.

Appellant began to reside with another parolee in Farrell, Pennsylvania. One month later, on August 14, 2012, Appellant's roommate informed Appellant's probation officer that Appellant used the internet on the roommate's cell phone to contact a sixteen-year-old girl from Grove City, a nineteen-year-old woman from Sharon, and a seventeen-year-old female from the Ukraine. That same day, Appellant admitted commission of the described conduct to his probation officer.

Appellant was charged with VOP, and admitted at the September 13, 2012 VOP hearing that he contacted two females who were less than

eighteen years old and that the conduct constituted a VOP. On November 2, 2012, Appellant was sentenced to four to eight years imprisonment. Appellant filed the present appeal from the judgment of sentence. Appellant was ordered to file a Pa.R.A.P. 1925(b) statement, and he complied with that directive. In the document, Appellant raised these issues:

> 1. That the sentence of the Court is manifestly excessive in length, because it is not specifically tailored to the nature of the offense, the ends of justice and society and the rehabilitative needs of the defendant.
>
> 2. That the sentence exceeds the standard range of the Sentence Guidelines and is therefore improper.
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> 3. That the sentence is outside the Sentence Guidelines without sufficient reason and is therefore improper.

Statement of Errors Complained of on Appeal, 12/19/12, at 1.[1]

On appeal, Appellant raises a contention that is neither contained in nor suggested by any issue presented in his Pa.R.A.P. 1925(b) statement:

> Did the sentencing court violate the requirements of 42 Pa.C.S.A. §9771(c) when, after revoking his probation, sentenced [Appellant] to a period of total confinement where: a) he had not been convicted of or charged with a new crime, b) the record did not demonstrate the likelihood that he would commit a new crime if not incarcerated, and c) incarceration was not essential to vindicate the authority of the court?

Appellant's brief at 4.[2]

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[1] The sentencing guidelines do not apply when a court is imposing a sentence and result of VOP. 204 Pa.Code 303.1(b).

[2] Section 9771 of Title 42 pertains to modification or revocation of probation. It contains in subsection (c) a limitation on the ability of a court to order incarceration as a result of VOP, as follows:

(Footnote Continued Next Page)

As we noted in ***Commonwealth v. Garland***, 63 A.3d 339, 342 (Pa.Super. 2013), if an issue is not contained in a court-ordered Pa.R.A.P. 1925(b) statement, it is waived for purposes of appeal. Pa.R.A.P. 1925(b)(4)(vii) (issues not raised in statement are waived). In ***Garland***, we relied upon the case of ***Commonwealth v. Hill,*** 16 A.3d 484 (Pa. 2011), where our High Court articulated:

> Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte*[.]

Id. at 494.

(Footnote Continued) ———————

> **(c) Limitation on sentence of total confinement.--**The court shall not impose a sentence of total confinement upon revocation unless it finds that:
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> > (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.

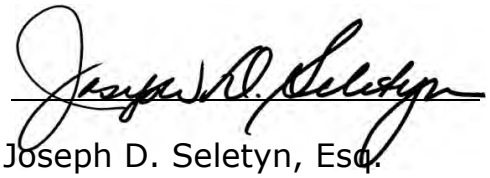
42 Pa.C.S. § 9771(c).

In the present case, the court addressed the sentencing claims raised in the filed statement, and it specifically noted that it outlined at sentencing why it imposed the sentence that it did. Trial Court Opinion, 1/16/13, at 7-10. However, the contention that imposition of sentence violated § 9771(c) was never presented to the trial court at any point during the trial court proceedings, nor is it contained in or suggested by the Pa.R.A.P. 1925(b) statement. Thus, we do not have the benefit of the trial court's justification for imposing total confinement under § 9771(c).

We do note that, if Appellant's present contention related to the legality of the sentence imposed, then it would not be subject to waiver. ***Commonwealth v. Robinson***, 931 A.2d 15 (Pa.Super. 2007) (*en banc*) (explaining that any challenge to the legality of sentence of the sentence imposed is incapable of being waived). However, we have expressly considered and rejected a position that the trial court's failure to explain its reasons for imposing total confinement under 9771(c) relates to the legality of sentence. ***Commonwealth v. Schutzues***, 54 A.3d 86, 98 (Pa.Super. 2012) ("Absent further instruction from our Supreme Court or an *en banc* panel of this Court, we decline to conclude that a trial court's apparent failure to consider § 9771(c) results in an illegal sentence.") (footnote omitted). Thus, Appellant's present contention is waived. ***Id***.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014