

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOHN KURTANICK

Appellant

No. 1459 MDA 2014

Appeal from the Judgment of Sentence August 6, 2014  
In the Court of Common Pleas of Dauphin County  
Criminal Division at No(s): CP-22-CR-0001602-2005

BEFORE: OTT, J., WECHT, J., and JENKINS, J.

MEMORANDUM BY OTT, J.:

**FILED AUGUST 03, 2015**

John Kurtanick appeals the judgment of sentence entered August 6, 2014, in the Dauphin County Court of Common Pleas, upon the revocation of his special probation.<sup>1</sup> On that day, the court sentenced him to a term of 15 to 30 months of state incarceration. Kurtanick originally pled guilty on April 3, 2006, to the crimes of involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, and corruption of minors,<sup>2</sup> and was sentenced to an aggregate term of three to six years' incarceration with a consecutive three-year period of probation. The sole issue on appeal is a

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<sup>1</sup> **See** 37 Pa. Code § 65 *et seq* (special conditions of parole or probation).

<sup>2</sup> 18 Pa.C.S. §§ 3123(a)(6), 3125(a)(7), 3126(a)(6), and 6301(a), respectively.

challenge to the discretionary aspects of sentencing. After a thorough review of the submissions by the parties, the certified record, and relevant law, we affirm the judgment of sentence.

Kurtanick's convictions stem from his sexual abuse of his minor granddaughter, which occurred over an extended period of time. The trial court set forth the procedural history as follows:

The conditions of [Kurtanick's] probation prohibited contact with the victim or the victim's family and any unsupervised contact with any minor females under the age of 18. The conditions further required that [Kurtanick] follow any rules or conditions imposed upon him including restrictions on contact with minors, curfew, electronic or GPS monitoring, geographic restrictions, and any special conditions concerning the use of computers or possession of pornography. The conditions of sentence further required that [Kurtanick] undergo evaluation for and successful completion of sex offenders counseling.

The Pennsylvania Board of Probation and Parole refused [Kurtanick]'s request for parole. He completed his six year sentence of incarceration and began the three year probationary period of his sentence on September 1, 2012.

On August 6, 2014, [Kurtanick] appeared before the court for a revocation hearing. Pennsylvania Board of Probation and Parole Officer Michael Gourley presented testimony in support of three violations of special probation conditions for sex offenders. First, Officer Gourley testified that in a search of [Kurtanick]'s home, he confiscated six photographs of the victim, including four of the victim nude in a pool. Possession of such photographs violated Special Condition 4, which prohibited the possession of sexually explicit materials. Second, pursuant to the conditions issued, [Kurtanick] was prohibited from having contact with minors. However, during an unannounced visit on June 10, 2014, [Kurtanick] admitted to Officer Gourley that his stepdaughter and her two minor children stayed at his home for an overnight visit on June 7, 2014. Third, Officer Gourley found McDonald's children's happy meals in [Kurtanick]'s vehicle,

which violated the condition which prohibited possession of toys or children's memorabilia.

Based upon these allegations of violations, the Commonwealth requested that the court revoke [Kurtanick]'s special probation and re-incarcerate him to a term of incarceration.

The court found that [Kurtanick] violated the conditions of parole and imposed a sentence of not less than 15 nor more than 30 months in a state correctional institute, and the requirement that [Kurtanick] comply with sexual offender treatment.

Trial Court Opinion, 2/4/2015, at 1-3 (record citations omitted).

On August 8, 2014, Kurtanick filed a post-sentence motion pursuant to Pa.R.Crim.P. 720, raising a discretionary aspects of sentencing claim. The court did not rule on the motion. Nevertheless, Kurtanick filed a timely notice of appeal on August 29, 2014. **See** Pa.R.Crim.P. 708(E) ("A motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition. The filing of a motion to modify sentence will not toll the 30-day appeal period.").<sup>3</sup>

In his sole issue, Kurtanick challenges the discretionary aspects of his sentence. Specifically, he complains the sentence was excessive and unreasonable in light of his rehabilitative needs and what is necessary to protect the public. Kurtanick's Brief at 14. Kurtanick indicates he has not

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<sup>3</sup> On September 5, 2014, the trial court ordered Kurtanick to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Kurtanick filed a concise statement on September 12, 2014. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on February 4, 2015.

had a prior violation in the eight years of supervision. Moreover, he alleges his violations were *de minimis* based on the following: (1) with respect to his first violation, even though the pictures were of his victim-granddaughter nude or in a bikini, Kurtanick states the photos are not patently offensive or of a perverted nature because they are “photos that a parent or grandparent take and keep memorializing the nostalgia of their children and grandchildren;”<sup>4</sup> (2) with regard to his second violation, concerning his step-daughter and her children showing up at his house with only two hours notice, Kurtanick emphasizes he was honest and admitted to his probation officer that he slept in another room of the house while they were there;<sup>5</sup> and (3) with respect to his third violation, involving the discovery of children’s toys in his car, he states the court did not find such possession “troubling” in its determination.<sup>6</sup> Furthermore, Kurtanick avers the court improperly considered the fact that he failed to comply with his sex offender treatment. He states this “information exacerbated [his] violations leading to an unreasonable and excessive sentence.” *Id.* at 18.

The standard of review for a claim challenging a discretionary aspect of sentencing is well-established:

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<sup>4</sup> Kurtanick’s Brief at 15.

<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.* at 17.

Sentencing is a matter vested in the sound discretion of the judge, and will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is not shown merely by an error in judgment. Rather, the 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. Sheller***, 961 A.2d 187, 190 (Pa. Super. 2008) (citation omitted), *appeal denied*, 980 A.2d 607 (Pa. 2009).

“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. Hoch***, 936 A.2d 515, 518 (Pa. Super. 2007) (citations and quotation marks omitted). To reach the merits of a discretionary issue, this Court must determine:

(1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant’s brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

***Commonwealth v. Dunphy***, 20 A.3d 1215, 1220 (Pa. Super. 2011) (footnotes omitted).

Here, Kurtanick filed a notice of appeal, preserved the issue in a post-sentence motion, and included the requisite statement pursuant to Pa.R.A.P. 2119(f) in his appellate brief. Therefore, we may proceed to determine whether Kurtanick has presented a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

***Commonwealth v. Edwards***, 71 A.3d 323, 330 (Pa. Super. 2013), *appeal denied*, 81 A.3d 75 (Pa. 2013).<sup>7</sup>

To the extent Kurtanick argues his sentence was manifestly excessive, such a claim does raise a substantial question. ***See Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011) (“A claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question.”).

“In general, the imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal.” ***Commonwealth v. Hoover***, 909 A.2d 321, 322 (Pa. Super. 2006). “[A] sentence should not be disturbed where it is evident that the sentencing

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<sup>7</sup> With respect to whether an issue presents a substantial question, we are guided by the following:

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***See Commonwealth v. Paul***, 2007 PA Super 134, 925 A.2d 825 (Pa. Super. 2007). “A substantial question exists only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” ***Commonwealth v. Griffin***, 2013 PA Super 70, 65 A.3d 932, 2013 WL 1313089, \*2 (Pa. Super. filed 4/2/13) (quotation and quotation marks omitted).

***Edwards***, 71 A.3d at 330 (citation omitted).

court was aware of sentencing considerations and weighed the considerations in a meaningful fashion.” **Commonwealth v. Fish**, 752 A.2d 921, 923 (Pa. Super. 2000), *appeal denied*, 771 A.2d 1279 (Pa. 2001). “[T]he 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) (citation omitted).

Upon the revocation of a defendant’s probation, a trial court may impose any sentencing option that was available under the Sentencing Code at the time of the original sentencing, regardless of any negotiated plea agreement. 42 Pa.C.S. § 9771(b); **Commonwealth v. Wallace**, 870 A.2d 838, 843 (Pa. 2005). Moreover, “[t]he trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence.” **Fish**, 752 A.2d at 923. Section 9771(c), however, limits the trial court’s authority to impose a sentence of total confinement upon revocation unless one of three circumstances are present:

- (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). Furthermore, it is well-established that “[t]echnical violations can support revocation and a sentence of incarceration when such violations are flagrant and indicate an inability to reform.” **Commonwealth v. Carver**, 923 A.2d 495, 498 (Pa. Super. 2007).

“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.” **Commonwealth v. Cartrette**, 83 A.3d 1030, 1040-1041 (Pa. Super. 2013) (internal quotations omitted); 42 Pa.C.S. § 9721(b). “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.” **Commonwealth v. Crump**, 995 A.2d 1280, 1282-1283 (Pa. Super. 2010), appeal denied, 13 A.3d 475 (Pa. 2010).

Turning to the present matter, the record reveals the following: With respect to the first violation, Officer Gourley indicated Kurtanick was not permitted to possess “sexually explicit material,” including photographs. N.T., 8/6/2016, at 3-4. Officer Gourley testified the images at issue were of the victim in the underlying case. **Id.** at 4. Four of the pictures were of the



victim nude in a pool and two of her in a swimsuit. **Id.** The photographs were located in an album on top of a stack of albums in the bedroom Kurtanick shared with his wife and, "were in the front page where you have the paper that you actually stick down and the paper goes over top of the photo album." **Id.** at 8. As for the second violation, Officer Gourley testified Kurtanick was not permitted to have any contact with his own familial children and grandchildren. **Id.** at 9-10. The probation officer indicated Kurtanick told him that several days earlier, his daughter and her children showed up at the house. The officer asked Kurtanick why he did not leave, and Kurtanick replied, "he didn't think it was a big deal." **Id.** at 10. Officer Gourley also testified, "I said, then why did you allow them to stay overnight when you know they're not allowed to be at the house. He said, well, they slept in a different bedroom so it would have been okay." **Id.** Lastly, with respect to the third violation, Kurtanick was prohibited from possessing toys or children's memorabilia. Officer Gourley stated there were two McDonald's children happy meal toys "still in the wrapper found in the glove box of [Kurtanick]'s vehicle." **Id.** at 11.

The trial court viewed the violations leading to Kurtanick's probation revocation much differently than he argues, emphasizing his actions were "troubling" and he has not "changed." **Id.** at 15, 16. Moreover, the court opined:

In proper exercise of our discretion, we considered the gravity of [Kurtanick]'s conduct which violated parole conditions.

We found that [Kurtanick]'s choices in violating conditions reflected a propensity to repeat his prior conduct. Of concern to this court was [Kurtanick]'s failure to appreciate the gravity of possessing nude photographs of the child victim of his crimes, his granddaughter. Further, although the conditions of his parole prohibited him from having any contact with minors, he allowed step-grandchildren ... to stay overnight at his house even though he received advance notice of their intention to visit. Finally, the presence of children's meal toys in his car further evidenced disregard for [Kurtanick]'s parole condition which prohibited possession of toys or children's memorabilia.

[Kurtanick]'s explanations as to why the violations occurred failed to satisfy us they were, in essence, harmless. To the contrary, we found significant [Kurtanick]'s minimization of concern for the violations.

Although we heard evidence as to [Kurtanick]'s lack of compliance with sexual offender's treatment, such evidence did not govern our analysis having found that [Kurtanick] violated the parole conditions for the reasons stated.

Trial Court Opinion, 2/4/2015, at 4-5.

We conclude the trial court properly considered all of the relevant facts concerning Kurtanick prior to sentencing, particularly his failure to appreciate the significance of his violations and his propensity to repeat his prior bad conduct.<sup>8</sup> Accordingly, considering all the attendant circumstances, we detect no abuse of discretion on the part of the trial court in imposing a sentence of 15 to 30 months' imprisonment for Kurtanick's numerous violations of the terms of his probation.

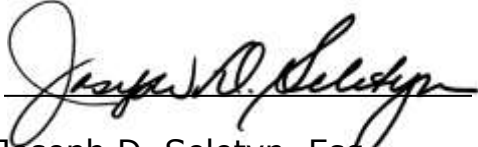
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<sup>8</sup> Moreover, contrary to Kurtanick's argument, it is evident from the court's opinion that it did not consider the fact that he failed to comply with his sex offender treatment when imposing the sentence.

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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: 8/3/2015