

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KARIM S. JONES,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2269 MDA 2013

Appeal from the Judgment of Sentence October 29, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0001101-2009

BEFORE: BENDER, P.J.E., BOWES, and PANELLA, JJ.

MEMORANDUM BY BOWES, J.:

FILED JULY 23, 2014

Karim S. Jones appeals from the October 29, 2013 judgment of sentence of two to five years imprisonment, which was imposed after Appellant stipulated to violating his probation by committing new felony offenses. Appellant has also petitioned for bail pending appeal. After thorough review, we deny Appellant's petition, and affirm.

Appellant pled guilty on October 26, 2009 to possession with intent to deliver ("PWID") and resisting arrest. The trial court sentenced him to eleven to twenty-three months imprisonment followed by two years of probation on the PWID charge, and a concurrent two-year probationary sentence for resisting arrest. On April 4, 2010, Appellant was paroled. He was subsequently charged with new felony offenses, and he stipulated to a violation of his probation on November 4, 2011. Upon completion of his

sentence on those new offenses, his probation on the PWID and resisting arrest charges was revoked and, on October 29, 2013, he was sentenced on the probation violation to two to five years imprisonment on the PWID and six to twelve months imprisonment on the resisting arrest charge, to run concurrent to the sentence on the PWID. Appellant was given fifty-eight days credit for time served while awaiting sentencing on the probation detainer.

On November 7, 2013, Appellant filed a timely motion for reconsideration of his sentence, which the trial court denied on November 13, 2013. Appellant appealed on December 13, 2013, and complied with the court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. He presents two issues for our review:

- I. Whether the trial court abused its discretion and imposed a manifestly unreasonable sentence by sentencing the Appellant in the aggravated range of the Sentencing Guidelines using improper factors and without giving appropriate weight and consideration to the Appellant's need for rehabilitation.
- II. Whether the trial court committed legal error in denying the Appellant's [sic] credit for the twelve (12) months and seventeen (17) days of imprisonment that he served prior to the commencement of his probation against the minimum and the maximum of the sentence imposed upon the Appellant on October 29, 2013 for the violation of his probation.

Appellant's brief at 4.

We note preliminarily that Appellant did not file the within appeal within thirty days of the October 29, 2013 sentencing. Although the

Commonwealth has not challenged the timeliness of this appeal, we may raise the question of jurisdiction *sua sponte*. It is apparent from the record, however, that the trial court did not advise Appellant of the times within which he could exercise his right to file a motion to modify sentence or to appeal, as required by Pa.R.Crim.P. 708(D)(3)(a). Thus, we view Appellant's failure to timely appeal as a breakdown in the court's operation, and we decline to quash the appeal. ***See Commonwealth v. Coolbaugh***, 770 A.2d 788 (Pa.Super. 2001) (refusing to quash untimely appeal where court incorrectly notified defendant that he had thirty days from the order deciding his post-sentence motion to appeal); ***see also Commonwealth v. Bogden***, 528 A.2d 168 (Pa.Super. 1987) (refusing to quash appeal where court failed to inform defendant that any appeal had to be taken within thirty days of the sentence).

Appellant's first issue implicates the discretionary aspects of his sentence. He filed a timely post-sentence motion, notice of appeal, Rule 1925(b) statement and Pa.R.A.P. 2119(f) statement containing the reasons why an appeal involving the discretionary aspects of sentence should be permitted. ***Commonwealth v Moury***, 992 A.2d 162 (Pa.Super. 2010). He alleges that his claims raise a substantial question because the trial court failed to consider his rehabilitative needs and a sentence in the aggravated range was excessive. Appellant also maintains the court failed to credit him with the time he served prior to the commencement of his probationary

period.¹ We find that Appellant's first position presents a substantial question. **See Commonwealth v. Macias**, 968 A.2d 773 (Pa.Super. 2009) (allegation that court failed to consider the defendant's rehabilitative needs presented substantial question).

In **Commonwealth v. Cartrette**, 83 A.3d 1030, 1034 (Pa.Super. 2013) (*en banc*), this Court held "unequivocally" that our "scope of review in an appeal from a revocation sentencing includes discretionary sentencing challenges." In reviewing a challenge to the discretionary aspects of a VOP sentence, we must determine whether the court abused its discretion or erred as a matter of law.

We noted in **Cartrette**, however, that since sentencing guidelines need not be consulted in revocation proceedings, certain portions of § 9721(b) are not pertinent. However, we do "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." 42 Pa.C.S. § 9721(b). In **Cartrette**, this Court also clarified that when resentencing following revocation of probation, the court "shall make as a part of the record, and disclose in open court at the

¹ For the reasons *infra*, Appellant's contention that he was entitled to credit for time served is a legality of sentence question.

time of sentencing, a statement of the reason or reasons for the sentence imposed." ***Id.***

Appellant's argument fails to make a distinction between discretionary sentencing claims generally, and those involving sentencing following violation of probation specifically. As the Commonwealth correctly points out, the sentencing guidelines do not apply to sentences imposed after revocation of probation. ***See Cartrette, supra***; 204 Pa.Code § 303.1(b). Thus, we do not speak in terms of an aggravated range sentence.

Appellant claims that the trial court failed to consider his rehabilitative needs and his "manifestation of social conscience and responsibility through contrition." Appellant's brief at 13. The record confirms, however, that the trial court had the benefit of a pre-sentence investigation report. The court is presumed to have considered and weighed the appropriate factors when it reviews such a report. ***Commonwealth v. Fowler***, 893 A.2d 758, 766 (Pa.Super. 2006). In addition, the court stated that it weighed Appellant's rehabilitative needs. Furthermore, Appellant expressed a desire on the record to redeem himself and do the right thing. Thus, the court considered Appellant's remorse in arriving at the VOP sentence. We find no record support for Appellant's contention that the sentencing court abused its discretion.

Appellant also complains that the trial court failed to state on the record the reasons for the sentence. Pa.R.Crim.P. 708(C)(2) requires a VOP

sentencing judge to “state on the record the reasons for the sentence imposed.” Our Supreme Court explained in ***Commonwealth v. Reaves***, 923 A.2d 1119, 1129 (Pa. 2007), that this requirement “provides a procedural mechanism for the aggrieved party both to attempt to rebut the court's explanation and inclination before the sentencing proceeding ends, and to identify and frame substantive claims for post-sentence motions or appeal.” If the aggrieved party contemporaneously objects to a failure to comply with the Rule, and the court still refuses to state its reasons, it is proper for the appellate court to remand for a new sentencing procedure. ***See also Commonwealth v. Schutzues***, 54 A.3d 86, 97 (Pa.Super. 2012).

In the instant case, the trial court recited at sentencing that it had considered the pre-sentence investigation, Appellant’s conduct while in prison, his rehabilitative needs, and the gravity of the offense. The court displayed familiarity with Appellant’s prison misconducts and the new offenses committed while on probation. As we held in ***Commonwealth v. Malovich***, 903 A.2d 1247, 1253 (Pa.Super. 2006), “the sentencing court need not undertake a lengthy discourse for imposing a sentence.” The trial court adequately stated its reasons for imposing the sentence, and Appellant’s contention is without merit.

Next, Appellant alleges that the trial court erred in denying him credit for the time he served before the commencement of his probation against the sentence imposed for the violation of probation. Appellant did not assert

this alleged error at sentencing or in his motion for reconsideration of sentence. Nor did he identify it in his Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. However, this is a non-waivable legality of sentence question, and we may address it *sua sponte*. ***Commonwealth v. Johnson***, 967 A.2d 1001, 1003 (Pa.Super. 2009) (a challenge to court's failure to award credit for time served involves a legality of sentence question).

Appellant contends first that he was entitled to credit for time served prior to probation on the underlying offense of PWID and resisting arrest, a period of twelve months and seventeen days. He relies upon 42 Pa.C.S. § 9760, ***Williams, supra***, and ***Commonwealth v. Cappiello***, 426 A.2d 146 (Pa.Super. 1981), in support of his contention. Appellant also maintains that, unless the trial court credits him for time served initially, "the infliction of multiple punishments for the same offenses" will violate the double jeopardy clause of the Fifth Amendment. ***See Commonwealth v. Arriaga***, 618 A.2d 1011, 1013 (Pa.Super. 1993).

The Commonwealth relies upon our decisions in ***Commonwealth v. Crump***, 995 A.2d 1280 (Pa.Super. 2010), ***Commonwealth v. Bowser***, 783 A.2d 348 (Pa.Super. 2001) and ***Commonwealth v. Infante***, 63 A.3d 358 (Pa.Super. 2013), as entitling a defendant to time served following revocation of probation only if the total sentences imposed exceed the statutory maximum. Since the two to five years imprisonment on the PWID

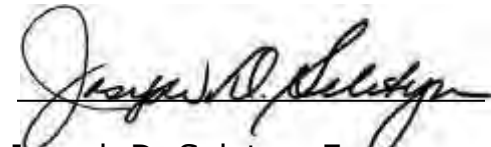
charge, together with the original sentence of eleven to twenty-three months, does not exceed the statutory maximum of ten years for that offense, Appellant is not entitled to credit for time served. Similarly, Appellant's revocation sentence on the resisting arrest charge was six to twelve months incarceration and he received no prison time on that charge when he was originally sentenced. Since the six to twelve months total sentence does not exceed the statutory maximum of two years in prison, the Commonwealth maintains that Appellant was not entitled to credit for time served.

We find first that 42 Pa.C.S. § 9760(1) entitled Appellant to credit for time served while in prison on the probation detainer, and the trial court properly credited him for that fifty-eight-day period. **See Johnson, supra** (appellant entitled to credit for time served while he was in prison prior to his VOP conviction and pursuant to the probation detainer pursuant to Section 9760(1)). However, **Williams, Cappiello, Arriaga** and 42 Pa.C.S. § 9760, do not support Appellant's contention that he is entitled to credit for time served under the original sentence. The sentencing court correctly noted that, upon revocation, the sentencing alternatives available to it were the same as the alternatives available at the time of initial sentencing. **See Commonwealth v. Coolbaugh, supra** (holding generally that, "the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence."). Furthermore, double

jeopardy is not implicated because "revocation is not a second punishment for the original conviction, but rather is an integral element of the original conditional sentence." *Id.*, quoting ***Commonwealth v. Mullins***, 918 A.2d 82, 85 (Pa. 2007). Moreover, a defendant is not automatically granted credit for time served while incarcerated on the original sentence unless the court imposes a new sentence that would result in the defendant serving time in prison in excess of the statutory maximum. ***Crump, supra; see also Commonwealth v. Yakell***, 876 A.2d 1040 (Pa.Super. 2005); ***Williams, supra*** (where appellant was re-sentenced to the maximum allowed by law, he was entitled to credit for time served or his sentence would be illegal). Since the total sentences imposed herein did not exceed the statutory maximum sentences, Appellant is not entitled to credit for time served. We find no error or abuse of discretion.

Petition for bail pending appeal denied. 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: 7/23/2014