

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

RASHAUN BANKS

Appellant

No. 2739 EDA 2015

Appeal from the Judgment of Sentence August 18, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001895-2009
CP-51-CR-0014267-2011

BEFORE: BOWES AND MOULTON, JJ., AND STEVENS, P.J.E.*

MEMORANDUM BY BOWES, J.:

FILED APRIL 20, 2017

Rashaun Banks appeals from the judgment of sentence of six-and-one-half to thirteen years incarceration, plus five years probation imposed after the court found him in violation of probation. We affirm.

The following facts are relevant to this appeal. On November 10, 2014, Appellant entered into an open guilty plea to burglary, conspiracy, and possessing an instrument of crime.¹ The court imposed a sentence of eighteen to thirty-six months imprisonment, with credit for time served, and

¹ The facts relevant to this offense are not included in the certified record related to this matter.

* Former Justice specially assigned to the Superior Court.

nine years probation. While serving his probationary sentence, Appellant was twice arrested on suspicion of burglary, giving rise to charges for burglary, criminal trespass, conspiracy, possessing an instrument of crime, theft by unlawful taking, receiving stolen property, and other related offenses.

On June 30, 2015, the court held a **Gagnon II** hearing² and heard testimony regarding the aforementioned charges. The court found Appellant had violated his probation, but withheld sentencing for the production of a presentencing report. The court received that report, and following a sentencing hearing on August 18, 2015, sentenced Appellant to six-and-one-half to thirteen years incarceration, plus five years probation for his violation of probation. Appellant objected to the sentence when it was imposed, but did not state the grounds for his objection.

Appellant filed a timely motion for reconsideration of sentence, which due to a breakdown in the court was not docketed at the appropriate case number.³ He then filed a timely notice of appeal, but failed to file a Rule 1925(b) statement of matters complained of on appeal as directed by the

² **Gagnon v. Scarpelli**, 411 U.S. 778 (1973) (defendant accused of violating probation is entitled to two hearings: 1) a pre-revocation hearing to determine probable cause of a violation; and 2) a revocation hearing to establish violation and determine whether revocation is warranted). The **Gagnon I** hearing was held on May 4, 2015.

³ Counsel for Appellant subsequently apprised the court of this error.

trial court. As a result, the court, in its Rule 1925(a) opinion, found that Appellant had waived his claims. The matter proceeded to this Court.

Before us, Appellant filed a motion for leave to file his Rule 1925(b) *nunc pro tunc*. By order dated February 4, 2016, we directed the trial court to resolve Appellant's motion. Thereafter, the trial court granted Appellant's motion to file a Rule 1925(b) statement *nunc pro tunc*, and on that same day, Appellant complied. The court then authored a supplemental Rule 1925(a) opinion, and this matter is now ready for our review.

Appellant raises two questions for our consideration:

- (A) Was Judge Wogan's violation of probation sentencing inappropriate, manifestly excessive and an abuse of discretion under the circumstances?
- (B) Did Judge Wogan err in failing to give individualized consideration to Appellant's personal history when sentencing the Appellant?

Appellant's brief at 6 (unnecessary capitalization omitted).

In an appeal from a sentence imposed after the court has revoked probation, we may review "the validity of the revocation proceedings, the legality of sentence imposed following revocation, and any challenge to the discretionary aspects of the sentence imposed." ***Commonwealth v. Wright***, 116 A.3d 133, 136 (Pa.Super. 2015).

Appellant's issues challenge the discretionary aspects of his sentence. Thus, we proceed under the following standard of review: "[s]entencing is a matter vested in the sound discretion of the sentencing judge, and a

sentence will not be disturbed on appeal absent a manifest abuse of discretion.” ***Commonwealth v. Zirkle***, 107 A.3d 127, 132 (Pa.Super. 2014) (citation omitted). Moreover, “the right to appellate review of the discretionary aspects of a sentence is not absolute, and must be considered as a petition for permission to appeal.” ***Id.*** In order to invoke this Court’s jurisdiction:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the issues were 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.

Id.

Here, Appellant filed a timely notice of appeal and a timely motion for reconsideration of his sentence. However, there is disparity between his allegations in his motion for reconsideration, subsequent *nunc pro tunc* Rule 1925(b) statement, and the matters he raises on appeal. Thus, the specter of waiver looms large.

In his motion for reconsideration, Appellant requested that the court review his sentence since “there [were] numerous other sentencing alternatives that could have been appropriately imposed in this case . . . a shorter county sentence would be a more appropriate sentence.” Motion, 8/31/15, at unnumbered 1. In his *nunc pro tunc* Rule 1925(b) statement, as reiterated in his Pa.R.A.P. 2119(f) concise statement in support of review,

Appellant contended that the court failed to consider factors that would militate in his favor, that the court ignored other mitigating aspects of his actions while on probation, and that it imposed a sentence without considering all the factors necessary to support the sentence, such as a pre-sentence report. Finally, on appeal, Appellant asserts that his sentence was manifestly excessive, and that the court failed to give him individualized consideration when levying his sentence.

Since Appellant's argument on appeal centers upon his averments that his sentence is manifestly excessive and that the Judge failed to provide him individualized consideration, we must determine whether those claims were preserved in his motion for reconsideration or at sentencing. Appellant objected to his sentence, but did not offer grounds for his objection, at sentencing. N.T. Sentencing, 8/18/15, at 21. Moreover, his motion for reconsideration raised a question as to the length of Appellant's sentence only in terms of other available sentencing alternatives. It did not, however, claim that the length of his sentence was manifestly excessive in comparison to those alternatives, or that the court failed to consider his circumstances individually when fashioning his sentence.

We find that Appellant has not properly preserved his challenge to the discretionary aspects of his sentence for review. Hence, these claims are waived. ***Commonwealth v. Cartrette***, 83 A.3d 1030, 1042-1043 (Pa.Super. 2013) (finding challenge to the discretionary aspects of a

sentence waived for failure to preserve issue in post-sentence motion or at sentencing).

In any case, Appellant would not be entitled to relief. In determining whether a substantial question exists as to the excessiveness of a sentence, we do not examine the merits of whether the sentence is excessive, but rather, “we look to whether the appellant has forwarded a plausible argument that the sentence, when it is within the guideline ranges, is clearly unreasonable.” ***Commonwealth v. Dodge***, 77 A.3d 1263, 1270 (Pa.Super. 2013). On the other hand, a claim that the court failed to achieve individualized justice and imposed an unduly harsh sentence raises a substantial question. ***Commonwealth v. Bowen***, 55 A.3d 1254, 1263 (Pa.Super. 2013).

Under 42 Pa.C.S. § 9771(c), the court cannot impose a sentence of total confinement upon probation revocation unless it finds:

- (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).

Instantly, the trial court molded a sentence for Appellant's violation of probation within the guideline range.⁴ In so doing, the court reviewed Appellant's presentence report,⁵ his extensive criminal history, and heard testimony from Appellant. The court offered the following:

At any rate it wouldn't be the first time that you [have] been accused of committing burglary or criminal trespass, I noticed. You have done that at different times in your life.

The presentence report that was completed notes that you [had] two arrests as a juvenile, you have 25 arrests as an adult. You have seven violations, nine convictions. Revoked seven times, you have these two open matters. Maybe you didn't complete the burglary, but that's overwhelming evidence that you were trying to burglarize the one property with the broken window.

...

I have to frame an appropriate sentence that takes into consideration your potential for being rehabilitated which isn't real good right now and I have to balance that with my duty to protect the public. And you're not ready to be rehabilitated. There's no doubt in my mind that for some strange reason you turned to burglary as an abdication and that's what we'll do unless you are separated from law-abiding people for a period of time.

Sentencing Hearing, 8/18/15, at 18-19.

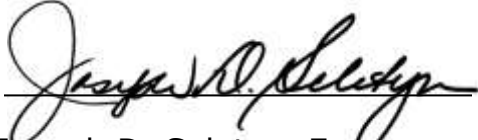
⁴ We recognize that the sentencing guidelines do not apply in this setting, **see** 204 Pa. Code § 303.1(b), but set this fact forth for context.

⁵ Where the sentencing judge has the benefit of a presentence investigation report, "it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." **Commonwealth v. Finnecy**, 135 A.3d 1028, 1038 (Pa.Super. 2016).

In light of the court's exposition, we find that Appellant has not advanced a plausible argument that his sentence is clearly unreasonable. The court indicated that Appellant was likely to return to burglary if not separated from the general public. As such, pursuant to 42 Pa.C.S. § 9771(c), the court had the authority to sentence him to incarceration. In addition, the court considered a wide range of factors and proffered sufficient justification for tailoring a sentence within the guideline range as it stands. Hence, even if his claims were preserved for review, Appellant's averments do not warrant relief.

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: 4/20/2017