

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

V.

ANTWAN BURGESS

Appellant

[illegible]

No. 1986 EDA 2022

Appeal from the Judgment of Sentence Entered May 13, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0403661-2002

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
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V.

ANTWAN BURGESS

Appellant

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No. 1987 EDA 2022

Appeal from the Judgment of Sentence Entered May 13, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0012933-2015

BEFORE: BOWES, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.:

FILED JANUARY 18, 2024

Appellant Antwan Burgess appeals from the judgments of sentence imposed following the revocation of his probation at trial court Docket Nos. 403661-2002 and 12933-2015. In these consolidated appeals, Appellant challenges the discretionary aspects of his revocation sentences. We affirm.

The trial court summarized the relevant facts and procedural history as follows:

On May 20, 2009, following a trial before the Honorable Shelley Robins New, Appellant, Antwan Burgess, was found guilty of robbery, aggravated assault, violations of the uniform firearms act ("VUFA"), and criminal conspiracy^[1] [at trial court Docket No. 403661-2002]. Appellant appealed to the Superior Court of Pennsylvania, which remanded the case for a new trial. Following a trial before the Honorable Glynnis Hill, Appellant was found guilty of the same charges, and sentenced to five to ten years of confinement for robbery, followed by five years of probation for aggravated assault, with no further penalty for the remaining charges.

On February 2, 2016, while on probation, Appellant entered into a negotiated guilty plea before this court [at trial court Docket No. 12933-2015] to one count of possession with intent to distribute [a controlled substance] ("PWID").^[2] On March 29, 2016, this court sentenced Appellant to eleven and one-half to twenty-three months of confinement, followed by four years of probation. This court also found Appellant to be in direct violation of probation [at 403661-2002] and imposed a violation of probation ("VOP") sentence of ten years of probation [at that docket].

On February 27, 2018, while on this court's probation, Appellant appeared in a video on social media, in which he could be seen holding what appeared to be an operable firearm. The video took place around the 600 block of Creighton Street in Philadelphia. Philadelphia police officers saw the video, and recognized Appellant, who they knew to be prohibited from carrying firearms. A search warrant was executed at 681 Creighton Street, and officers recovered multiple firearms, including one matching the gun Appellant brandished in the video. As a result of this incident, Appellant was arrested and charged with VUFA offenses. Appellant entered into a non-negotiated guilty plea before this Court to VUFA offenses [at trial court Docket No.] 6042-2018[] on December 12, 2018.

On May 13, 2019, following a joint sentencing and VOP hearing, this court found Appellant to be in direct violation of its probation

¹ 18 Pa.C.S. §§ 3701(a)(1)(i), 2702(a), 6106(a)(1), and 903(a)(1), respectively.

² 35 P.S. 780-113(a)(30).

[at 403661-2002 and 12933-2015]. It imposed a VOP sentence of five to ten years of confinement [at 403661-2002] and four to eight years of confinement [at 12933-2015] to run concurrently, for an aggregate VOP sentence of five to ten years of confinement. This court also imposed a sentence of eleven and one-half to twenty-three months of confinement followed by fifteen years of probation [at 6042-2018³], to run concurrently to the VOP sentences [at 403661-2002 and 12933-2015].

Appellant filed an untimely *pro se* motion for reconsideration of sentence [at 403661-2002 and 6042-2018] on October 10, 2019. Appellant filed a second *pro se* motion for reconsideration [at 403661-2002 and 6042-2018] on February 14, 2020, which this court treated as a petition pursuant to the Post Conviction Relief Act^[4] ("PCRA"). PCRA counsel was appointed, and on January 6, 2022, [PCRA counsel] filed an amended PCRA petition incorporating [trial court Docket No. 12933-2015] into Appellant's request for relief. This court granted relief and reinstated Appellant's post-sentence motion and appellate rights [*nunc pro tunc*] on June 27, 2022. . . .

Trial Ct. Op., 9/26/22, at 1-3 (footnote omitted and some formatting altered).

Appellant filed timely post-sentence motions for reconsideration of his sentences *nunc pro tunc* at each trial court docket on July 7, 2022. While his post-sentence motions were pending, Appellant filed timely appeals on July 26, 2022, at both 403661-2002 and 12933-2015.⁵ Both the trial court and Appellant complied with Pa.R.A.P. 1925.

³ Appellant's appeal from the judgment of sentence imposed at trial court docket number 6042-2018 was filed at Superior Court Docket No. 3058 EDA 2022. That appeal will be addressed in a separate memorandum (J-S36025-23).

⁴ **See** 42 Pa.C.S. §§ 9541-9546.

⁵ Filing post-sentence motions to reconsider a sentence imposed after the revocation of probation will not toll the thirty-day appeal period. **See** (*Footnote Continued Next Page*)

In the appeal from the revocation sentence imposed at trial court Docket No. 403661-2002 (Superior Court Docket No. 1986 EDA 2022), Appellant presents the following issue:

Whether the trial court erred when, after finding Appellant . . . in violation of probation and revoking probation, it resented [Appellant] to 5 years to 10 years' incarceration for (F1) robbery and 5 years to 10 years' incarceration for (F1) aggravated assault, as this resentence was manifestly excessive and unreasonable, due to the length of time of incarceration, and did not take into consideration 42 Pa.C.S. § 9771(c) ("limitation on sentence of total confinement") and 42 Pa.C.S. § 9721(b) ("general standards"), due to the rehabilitative needs of [Appellant] and the considerable amount of mitigation that was presented at resentencing?

Appellant's Brief at 1986 EDA 2022, at 4 (formatting altered).

Similarly, in the appeal from the revocation sentence imposed at trial court Docket No. 12933-2015 (Superior Court Docket No. 1987 EDA 2022), Appellant raises the following issue:

Whether the trial court erred when, after finding Appellant . . . in violation of probation and revoking probation, it resented [Appellant] to 4 years to 8 years' incarceration for [PWID], as this resentence was manifestly excessive and unreasonable, due to the length of time of incarceration, and did not take into consideration 42 Pa.C.S. § 9771(c) ("limitation on sentence of total confinement") and 42 Pa.C.S. § 9721(b) ("general standards"), due to the rehabilitative needs of [Appellant] and the

Pa.R.Crim.P. 708(E); Pa.R.A.P. 903(a); **see also *Commonwealth v. Swope***, 123 A.3d 333, 337 n.16 (Pa. Super. 2015) (concluding that the appeal was properly before this Court and addressing merits where the appellant filed a timely post-sentence motion challenging the discretionary aspects of his sentence, but the trial court did not rule prior to expiration of appeal period).

considerable amount of mitigation that was presented at resentencing?

Appellant's Brief at 1987 EDA 2022, at 4 (formatting altered). Because Appellant's claims of error at both dockets are nearly identical, we address them together.

Appellant's issues implicate the discretionary aspects of his sentence. **See Commonwealth v. Ferguson**, 893 A.2d 735, 736-37 (Pa. Super. 2006) (providing that claims the trial court erred in imposing a sentence of total confinement upon revocation of probation and imposed an excessive sentence challenged the discretionary aspects of the sentence). We note that "[t]he right to appellate review of the discretionary aspects of a sentence is not absolute[.]" **Commonwealth v. Zirkle**, 107 A.3d 127, 132 (Pa. Super. 2014) (citations omitted). Rather, where an appellant challenges the discretionary aspects of a sentence, the "appeal should be considered a petition for allowance of appeal." **Commonwealth v. W.H.M., Jr.**, 932 A.2d 155, 163 (Pa. Super. 2007) (citation omitted).

In **Commonwealth v. Moury**, 992 A.2d 162 (Pa. Super. 2010), this Court explained that an appellant challenging the discretionary aspects of a sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (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. [708(E)]; (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, 42 Pa.C.S. § 9781(b).

Id. at 170 (citation omitted and formatting altered).

Here, following the reinstatement of his post-sentence motion and appellate rights *nunc pro tunc*, Appellant filed a timely motion for reconsideration of his sentence, a timely appeal, and included a Rule 2119(f) statement in his appellate brief. Accordingly, Appellant is in technical compliance with the requirements to challenge the discretionary aspects of his sentence, therefore, we will proceed to determine whether Appellant has raised a substantial question. ***See id.***

The determination of whether there is a substantial question is decided on a case-by-case basis, and this Court will grant the appeal “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.” ***Id.*** (citation omitted). In the instant case, Appellant contends that the trial court imposed a manifestly excessive sentence and did not evaluate mitigating evidence and Appellant’s rehabilitative needs when considering the sentencing alternatives set forth in 42 Pa.C.S. § 9721(b) and failed to consider the limitation on sentences of total confinement under 42 Pa.C.S. § 9771. ***See*** Appellant’s Brief at 1986 EDA 2022, at 18; Appellant’s Brief at 1987 EDA 2022, at 18.

We conclude that Appellant has raised a substantial question for our review. ***See Commonwealth v. Derrickson***, 242 A.3d 667, 680 (Pa. Super. 2020) (holding that a claim that the trial court failed to consider sentencing

criteria required by 42 Pa.C.S. § 9721(b), including the defendant's rehabilitative needs, presents a substantial question), *appeal denied*, 253 A.3d 213 (Pa. 2021); **Ferguson**, 893 A.2d at 737 (concluding that a claim that the trial court erred in its application of Section 9771 and that the revocation sentence imposed was manifestly excessive raised a substantial question). Therefore, we will address the merits of Appellant's appeal.

Our standard of review is as follows:

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. An abuse of discretion is more than an error in judgment – a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Starr, 234 A.3d 755, 760-61 (Pa. Super. 2020) (citation omitted). Section 9721(b) provides, in relevant part, that “the sentence imposed should call for total 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).

The court shall not impose a sentence of total confinement upon revocation unless it finds that: (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) (formatting altered). Before the trial court may revoke probation, the court must find, “based on the preponderance of the evidence, that the probationer violated a specific condition of probation or committed a new crime[.]” **Commonwealth v. Parson**, 259 A.3d 1012, 1019 (Pa. Super. 2021) (citations omitted).⁶

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 failure to comply with these provisions shall be grounds for vacating the sentence or resentence and resentencing the defendant.

Commonwealth v. Colon, 102 A.3d 1033, 1044 (Pa. Super. 2014) (citation omitted and formatting altered); 42 Pa.C.S. § 9721(b); **see also** Pa.R.Crim.P. 708(D)(2) (indicating at the time of sentence following the revocation of probation, “[t]he judge shall state on the record the reasons for the sentence imposed.”). However, “[the] 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

⁶ We note that in **Commonwealth v. Foster**, 214 A.3d 1240 (Pa. 2019), our Supreme Court examined the statutory framework governing probation revocations and concluded that “a court may find a defendant in violation of probation only if the defendant has violated one of the specific conditions of probation included in the probation order or has committed a new crime.” **Id.** at 1250 (formatting altered); **see also** 42 Pa.C.S. § 9754(b). Here, Appellant was convicted of new crimes at trial court Docket No. 6042-2018 in direct violation of his probation sentences. **See** Trial Ct. Op., 9/26/22, at 4.

court's consideration of the facts of the crime and character of the offender."

Colon, 102 A.3d at 1044 (citation omitted).

Simply put, since the defendant has previously appeared before the sentencing court, the stated reasons for a revocation sentence need not be as elaborate as that which is required at initial sentencing. The rationale for this is obvious. When sentencing is a consequence of the revocation of probation, the trial judge is already fully informed as to the facts and circumstances of both the crime and the nature of the defendant, particularly where, as here, the trial judge had the benefit of a [presentence investigation (PSI) report] during the initial sentencing proceedings. **See [Commonwealth v.] Walls**, 926 A.2d [957,] 967 n.7 [(Pa. 2007)] ("Where [a PSI report] exist[s], we shall continue to presume that the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." [(citation omitted)]).

Commonwealth v. Pasture, 107 A.3d 21, 28 (Pa. 2014). "[O]ur review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing." **Parson**, 259 A.3d at 1019 (citations omitted and formatting altered); **see also** 42 Pa.C.S. § 9771(b).

Appellant argues that the trial court failed to consider mitigating factors including Appellant's difficult childhood, drug and alcohol use, and mental health issues. Appellant's Brief at 1986 EDA 2022, at 23-24.⁷ Appellant claims that his revocation sentence is manifestly excessive and constitutes too severe

⁷ Appellant presents the identical argument in his brief at 1987 EDA 2022. **See** Appellant's Brief at 1987 EDA 2022, at 23-24.

a punishment because the trial court did not sufficiently consider Appellant's rehabilitative needs or the factors set forth in 42 Pa.C.S. §§ 9721(b) and 9771(c). ***See id.*** at 24.

The Commonwealth responds that the trial court did not abuse its discretion, and Appellant is not entitled to relief. Commonwealth's Brief at 6. The Commonwealth argues that on this record, Appellant violated his probation by committing new crimes, that the revocation sentence was not manifestly excessive, and that the trial court did consider both 42 Pa.C.S. § 9721 and 42 Pa.C.S. § 9771 in fashioning Appellant's revocation sentence. ***See id.*** at 7-10.

The trial court addressed Appellant's argument as follows:

Here, Appellant satisfied all three of the conditions of [Section] 9771(c). His plea to VUFA charges placed him in direct violation of this court's probation. Appellant's multiple convictions and the fact that he was flaunting his illegal possession of a firearm on social media lead[s] this court to believe that he will continue to commit crimes if not incarcerated. This court is particularly concerned that Appellant committed a firearms offense while on its probation for robbery and aggravated assault. The nature of Appellant's conduct leads this court to believe that he will continue to commit crimes if not incarcerated. Moreover, as this court stated at the time of sentencing, the sentence was essential to vindicate the authority of the court.

The record also directly contradicts Appellant's claims that this court did not consider his rehabilitative needs or the mitigation presented. This court specifically stated that it considered the arguments of counsel and the presentence reports in fashioning its sentence. In addition, Appellant spoke at length prior to sentencing. This court considered all of this and determined that a state sentence was necessary because previous attempts at rehabilitation had failed. Specifically, this court stated that "[y]ou've been with me for a while. I know about you. I tried

county sentences. They have not worked. I've tried other forms of rehabilitation in the form of JFK and the Community Mental Health and those things seem to have not work[ed], so I am left to try to still make you a productive member of society, but I have to move to a higher level. A higher level means taking you into the state supervision."

Trial Ct. Op., 9/26/22, at 4-5 (some formatting altered).

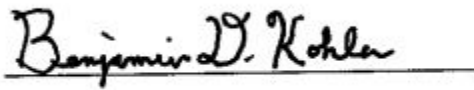
Following our review of the record, we discern no abuse of discretion by the trial court. **See Starr**, 234 A.3d at 760-61. The record reflects that the trial court knew Appellant because he had been before the court on multiple occasions, therefore it was aware of Appellant's history and Appellant's previous failures on probation. **See** N.T., 5/13/19, at 13. The trial court elaborated that it carefully considered Appellant's PSI report. **See id.** As noted, where the trial court has the benefit of a PSI report, we presume that the trial court was aware of the relevant information regarding Appellant's character and weighed those considerations along with mitigating factors. **See Pasture**, 107 A.3d at 28.

Additionally, the trial court opined that it fashioned Appellant's revocation sentence to address "the protection of the public, prevention, rehabilitation, and the vindication of the [c]ourt's authority." **See** N.T. 5/13/2019 at 13; **see also** 42 Pa.C.S. §§ 9721(b) and 9771(c). The trial court explained that it reviewed the PSI and the sentencing guidelines, considered arguments from Appellant's counsel and the Commonwealth, and then formulated a sentence in consideration of the factors set forth in 42 Pa.C.S. § 9721(b) and 42 Pa.C.S. § 9771(c). **See id.**

On this record, we find that Appellant's claims that his sentences imposed at docket numbers 1986 EDA 2022 and 1987 EDA 2022 are manifestly excessive are meritless, and no relief is due because the trial court did not abuse its discretion, its decisions are free from legal error, and are supported by the record. **See Starr**, 234 A.3d at 760-61; **Ferguson**, 893 A.2d at 737. Instantly, the trial court aptly considered Appellant's rehabilitative needs and mitigating factors, and it complied with the relevant resentencing statutes. **See Parson**, 259 A.3d at 1019; **Derrickson**, 242 A.3d at 680; **see also** 42 Pa.C.S. §§ 9721(b), 9771(c). For these reasons, Appellant is not entitled to relief, and we affirm the judgments of sentence on appeal at both 1986 EDA 2022 and 1987 EDA 2022.

Judgments of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024