

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

Vs. :

No. CR-551-2013

PATRICK KELLY,
Defendant :

Brian Gazo, Esquire
Brian Collins, Esquire

Counsel for Commonwealth
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - February 26 , 2018

This Opinion is in response to the Appeal filed by Patrick J. Kelly (hereinafter "Kelly") following this Court's decision to revoke his parole and resentence him to serve one hundred and seventy-four (174) days back time. For the reasons stated within this Opinion, this Court asks the Pennsylvania Superior Court to affirm that decision.

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2013, Kelly was arrested by the Lansford Borough Police Department and charged with a number of sex-related offenses involving his minor child, S.G. After years of pre-trial posturing between the Commonwealth, Kelly and various defense counsel, Kelly entered a guilty plea on July 5, 2016 for a single count of Indecent Assault, a violation of 18 Pa.C.S.A. § 3126(a)(1). Sentencing

occurred immediately after the acceptance of the guilty plea. This Court sentenced Kelly to a period of incarceration of not less than nine (9) months nor more than one (1) day less twenty-four (24) months. Kelly was given credit for five-hundred and fifty-five (555) days of incarceration. Additionally, this Court imposed various conditions upon Kelly's parole, including specifically that he undergo a sexual offender evaluation and follow any treatment recommendations. Kelly was paroled that same day. Kelly's maximum date for this sentence was December 27, 2016.

On December 28, 2016, the Carbon County Adult Probation Office, through its officer, Clifford Eckhart (hereinafter "Eckhart"), filed a Petition for Revocation of Parole. In that Petition, Eckhart alleged that Kelly failed to "engage in and complete sexual offender treatment." The initial Gagnon I hearing was waived by Kelly on or about January 18, 2017. Subsequently, a Gagnon II hearing was scheduled for March 27, 2017. That hearing was continued by Eckhart for the reason that Kelly was supposedly active in required treatment. The hearing was rescheduled for June 22, 2017, but continued again at the request of Kelly so that he could apply for a public defender.¹ The hearing was then

¹ The policy of the Carbon County Public Defender's Office is that any Defendant whom the office had previously represented or who had had a conflict counsel appointed to represent him must reapply for counsel if he had a pending revocation. After granting the continuance of the June 22, 2017 hearing, this Court instructed Kelly to re-apply for counsel, which he did. After the public defender approved Kelly for counsel, a request for conflict counsel was filed and this Court again appointed Brian Collins, Esquire to represent Kelly.

rescheduled for August 25, 2017, continued again until September 22, 2017, and then continued once more until October 19, 2017. Attorney Collins then requested and received a continuance of the October 19, 2017 hearing until November 17, 2017. That hearing was subsequently continued until December 19, 2017, when the Gagnon II hearing actually took place.

At the Gagnon II hearing, the Commonwealth presented testimony from two (2) different sexual offender therapists, whom Kelly had engaged to provide the court ordered evaluation and recommended treatment.

The first witness called was Lori Feneck (hereinafter "Feneck"), who testified that Kelly appeared at her agency for an evaluation on August 8, 2016, the results of which recommended treatment. Since the actual therapy was required to be prepaid, Kelly did not actually start therapy until January 2017,² when he finally paid the money for treatment.

Feneck testified that therapy began in January 2017, with group therapy being scheduled one (1) time per week for nineteen (19) sessions. In addition to attending those sessions, Kelly was also required to submit to a polygraph test as part of this treatment. Feneck further testified that Kelly did not complete

² It should be noted that the operable date to comply with the sexual offender evaluation and treatment was December 27, 2016, the last date of Kelly's parole. Consequently, he had already failed to satisfy the parole condition.

his treatment due to excessive absences (without legitimate excuses), and because he failed to submit to the required polygraph test. When asked, Feneck indicated that Kelly claimed his reasons for missing sessions were because of a lack of transportation, and because either he or his mother were sick. Feneck also stated that Kelly offered to make up these sessions, but failed to do so. As a result, on June 10, 2017, Feneck discharged Kelly unsuccessfully from treatment.

Next, the Commonwealth called Paula Brust (hereinafter "Brust", a therapist from Confidential Counselling Services, a sexual offender counselling agency that Kelly engaged after his discharge by Feneck. Brust testified that Kelly began treating with her on or about July 5, 2017. According to Brust, Kelly was to attend sexual offender group therapy sessions every other week. Brust further testified that from July 5, 2017 until October 16, 2017, Kelly made only three sessions. His justifications for not appearing were that his mother was sick, he did not have a car, and he forgot. Consequently, Brust also discharged Kelly unsuccessfully from treatment.

Kelly himself also testified at this hearing. He stated that he had missed sessions and explained to the Court that the reasons for these missed sessions were that "[he] had trouble with transportation" and that "[his] mother was ill." He also stated to

the Court that he felt he had "made the best possible effort."

After hearing all of this testimony, the Court found that Kelly violated his parole. Eckhart subsequently testified that his recommendation to the Court was to sentence Kelly to one hundred and seventy-four (174) days back time, effective immediately. Kelly requested that, in lieu of incarceration, he should be given yet another chance at getting treatment. Alternatively, if the Court were not inclined to do that, he requested for the sentence to begin after Christmas so he could spend Christmas with his ailing mother, as it may be her last. This Court then sentenced Kelly to the back time requested by Eckhart, but made it effective on December 26, 2017 at 9:00 A.M.³ Subsequent thereto, Kelly filed a timely "Motion to Reconsider Parole Violation Finding and Sentence." However, before this Court could act on it, Kelly, filed an appeal to Superior Court on January 16, 2018. As a result, on January 23, 2018, this Court issued an order denying that Motion for Reconsideration.

On January 17, 2018, this Court directed that Kelly file a concise statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), which he did on February 2, 2018. In that statement, Kelly raises three (3) issues as follows:

1. There was insufficient evidence to find that Defendant

³ Kelly failed to appear on this date and time as directed.

violated his parole prior to the expiration of his sentence;

2. The finding that Defendant violated parole was against the great weight of the evidence; and
3. The evidence was insufficient to support parole revocation where it did not establish Defendant's "willful or flagrant disrespect" for the terms of his parole prior to the expiration of his sentence.

In reviewing this concise statement, the three issues presented appear to all be related to the sufficiency and weight of the evidence presented by the Commonwealth at the Gagnon II proceeding. As a result, this Court will address them together as a challenge to the sufficiency and weight of the evidence.

LEGAL DISCUSSION

In this case, the Commonwealth has alleged that Kelly violated his parole by failing to follow the treatment recommendations of a sexual offender evaluation that was conducted on August 8, 2016. The testimony presented not only supports the finding that Kelly did not follow treatment recommendations before the expiration of his sentence, but also that he did not satisfy them after being given significant time to do so after his maximum date and after the Petition for Revocation was filed.

A parole violation is proven by a preponderance of the evidence. *Cmmw. v. Del Conte*, 419 A.2d 780, 781 (Pa. Super. Ct. 1980). "The quantum of proof necessary to establish grounds for parole revocation is significantly less than that required to sustain a criminal conviction." *Cmmw. v. Rossetti*, 388 A.2d 1090, 1092 (Pa. Super. Ct. 1978) (citation omitted) and "[A] basis for revoking parole is established by evidence of probative value substantiating the parolee's violation of the terms of his parole." *Id.* The evidence in the case *sub judice* is overwhelmingly, in favor of revocation.

To begin, Kelly did not even commence, let alone complete treatment by his maximum date, and only paid the money for treatment and began counselling after the revocation petition was filed. Notwithstanding the fact that it was only a short four (4) month period from Kelly being paroled until his maximum date,⁴ Kelly was given the opportunity not once, but twice to engage in and complete, his sexual offender treatment before the Gagnon II hearing on December 19, 2017.

Additionally, there was evidence presented by Kelly's therapists regarding his failure to attend sessions and his supposed reasons for missing them. Moreover, testimony was also presented that Kelly promised to make up these missed sessions but

⁴ The maximum sentence that could be imposed was two (2) years. In order to keep Kelly "in-county," the sentence imposed was one day less two years.

failed to do so, resulting in his unsuccessful discharges. Kelly himself confirmed most of this testimony. He unconvincingly stated that he "made the best possible effort."

Clearly, the weight and sufficiency of the evidence presented by the Commonwealth supports a finding by a preponderance of that evidence that Kelly violated his parole. Kelly proclaiming that he "made the best possible effort" was willful and disrespectful in light of the other testimony presented that showed he did not comply with the terms of his parole, especially when he engaged in a nominal amount of the recommended treatment resulting from his evaluation.

CONCLUSION

Based on the foregoing, this Court asks the Appellate Court to affirm our decision to revoke Kelly's parole and resentence him to a period of incarceration of one-hundred and seventy-four (174) days back time.

BY THE COURT:



Joseph J. Matika, J.

FILED
JUN 26 A 9:29
CLERK OF COURT
WILLIAM C. MCGINLEY