

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN ANGELO LAROCCO

Defendant/Appellant

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No. CR 743-2010

Jean A. Engler, Esquire

Matthew Mottola, Esquire

Counsel for Commonwealth
District Attorney
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - October 6, 2016

The Defendant, John Angelo Larocco, has appealed from the judgment of sentence imposed by this Court on July 7, 2016 after finding that the Defendant violated the terms and conditions of his five (5) year special probation, for which he was being supervised by the Pennsylvania Board of Probation and Parole. In his Concise Statement of Matters Complained of on Appeal, he raises one issue arguing that the trial court abused its discretion by imposing a "manifestly excessive sentence." This memorandum opinion is filed in accordance with Pennsylvania Rule of Appellate Procedure 1920(a).

FACTUAL AND PROCEDURAL BACKGROUND

On August 23, 2012, this Court sentenced Defendant to a total sentence in a state correctional institution for a period of no less than three (3) to no more than six (6) years, followed by

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five (5) years of special probation under the supervision of the Pennsylvania Board of Probation and Parole. After being paroled, Defendant was being supervised by State Parole Agent Kiley Sock. Based upon perceived and alleged violations of the conditions of supervision, Agent Sock filed a petition to revoke Defendant's special probation. On May 27, 2016, a Gagnon I hearing was held and this Court found probable cause that Defendant did in fact violate the conditions of his supervision. Additionally on that date, this Court continued the Gagnon II proceeding until July 7, 2016.

On July 7, 2016, this Court conducted a Gagnon II hearing and resentenced Defendant to a period of incarceration in a state correctional institution for a period of no less than two and a half (2 1/2) years nor more than five (5) years followed by two (2) years of probation. This sentence also contained a provision to provide Defendant with 146 days credit and further subjected Defendant to all previously imposed conditions. Defendant and his counsel agreed that a state sentence was proper¹. This Court stated at the hearing that the imposed sentence was thought to be appropriate considering Defendant's initial time in state prison had not been sufficiently effective insofar as his drug use was concerned². Additionally, this Court was troubled by the fact that

¹ 7/7/16 Tr. at 3.

² 7/7/16 Tr. at 4-5.

Defendant was not very far into his parole when he committed the violations³. It should also be noted that the sentence imposed by this Court was less severe than the sentence recommended by Agent Sock on behalf of the Commonwealth⁴.

On July 15, 2016, Defendant, through counsel, filed a petition to reconsider the sentence imposed on July 7, 2016. This Court, without expressly granting reconsideration, scheduled a hearing for September 19, 2016.

On August 4, 2016, Defendant, through counsel, filed the instant appeal. On August 5, 2016, this Court directed that Defendant file a Concise Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On August 8, 2016, Defendant, acting without counsel, filed a Motion to Modify Sentence⁵. This Court scheduled the Motion to Modify for August 30, 2016 and sua sponte moved forward to that same date the hearing for the Petition to Reconsider Sentence.

On August 25, 2016, Defendant filed a Concise Statement raising the following issue: "[Whether] [t]he trial court abused its discretion when it imposed a manifestly excessive sentence of total confinement of two-and-a-half to five years followed by two years of consecutive probation that was based only on an alleged

³ 7/7/16 Tr. at 5.

⁴ 7/7/16 Tr. at 3. Agent Sock recommended Defendant be sentenced to either five (5) to ten (10) years or three and a half (3 1/2) to seven (7) years.

⁵ It should be noted that in both the Petition to Reconsider Sentence and the Motion to Modify Sentence, the issue of an excessive sentence was raised.

technical violation for Appellant testing positive for opiates in violation of zero tolerance."

At the hearings on August 30, 2016, Defendant and counsel agreed that because of the appeal that was filed on August 4, 2016, this Court was divested of jurisdiction on both the Petition and Motion. Accordingly, this Court issued orders denying both for lack of jurisdiction.

DISCUSSION

The issue Defendant has raised on appeal is that this Court abused its discretion when it imposed a sentence of two and a half (2 1/2) to five (5) years imprisonment in a state correctional institution, followed by two (2) years of probation. Specifically, Defendant claims this sentence was "manifestly excessive" given that his violation was a "technical" one.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. *Commonwealth v. Sierra*, 752 A.2d 910, 912 (Pa. Super. Ct. 2000). Prior to reaching the merits of a discretionary sentencing issue, a four-part test must be satisfied: (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. 720; (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.A. § 9781(b). *Commonwealth v. Evans*, 901 A.2d 528, 533 (Pa. Super. Ct. 2006). The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. *Commonwealth v. Paul*, 925 A.2d 825, 828 (Pa. Super. Ct. 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." *Sierra*, 752 A.2d at 912-13.

Sentencing 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. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, 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. Twitty, 876 A.2d 433, 438 (Pa. Super. Ct. 2005) (quoting *Commonwealth v. Ritchey*, 779 A.2d 1183, 1185 (Pa. Super. Ct. 2001)).

Further, the Superior Court in *Commonwealth v. Mouzon*, 828 A.2d 1126 (Pa. Super. Ct. 2003), suggests that the Appellate Court should give great weight to the discretion of the sentencing court as the lower court has the best opportunity and is in the best position to evaluate the circumstances surrounding the defendant

as it relates to sentencing, and in particular his character, display of any remorse, defiance, or indifference. *Id.* at 1128 (citing *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. Ct. 1997)).

In the present case, Defendant appears to have satisfied the first three prongs of the *Evans* test. However, Defendant does not argue that his sentence is inconsistent with a specific provision of the Sentencing Code nor that it is contrary to the fundamental norms which underlie the sentencing process. Rather, Defendant merely alleges that his sentence was "manifestly excessive" because his violation was only a "technical" one. Because Defendant has failed to demonstrate that there is a substantial question that his sentence was not appropriate under the Sentencing Code, and thus does not satisfy the fourth prong of the test enumerated in *Evans*, his appeal should be dismissed. Nonetheless, assuming *arguendo* that there is a substantial question whether Defendant's sentence was appropriate, this Court will review the issue on the merits.

"Technical 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. Ct. 2007). It is an open question whether probation may be revoked for less than willful conduct, but in cases where revocation for technical violations was affirmed, the appellate

court had found clear evidence of willful conduct. *Commonwealth v. Edward*, 450 A.2d 15, 20 (Pa. Super. Ct. 1982); see *Commonwealth v. Cappellini*, 690 A.2d 1220 (Pa. Super. Ct. 1997) (sentence affirmed where court found that appellant's continued drug use and resistance to treatment and supervision was enough to determine he would likely commit another crime unless he were incarcerated); *Sierra*, 752 A.2d 910 (sentence affirmed where court found probation and parole had been ineffective in rehabilitating the appellant and that further incarceration to the degree suggested by the trial court was appropriate).

Based upon the testimony given at the Gagnon I and II hearings on May 27, 2016 and July 7, 2016, this Court concluded that Defendant's initial bout in state prison had not been sufficient insofar as his drug rehabilitation was concerned, as Defendant had failed several urine tests⁶. The testimony established Defendant had graduated from a pill addiction to a heroin addiction, his work history after his release from prison was sporadic⁷, and his drug and alcohol treatment attendance had become increasingly infrequent⁸. By Defendant's own admission, he agreed another state sentence was necessary and would benefit him in his recovery⁹. Considering all these factors, this Court sentenced Defendant to

⁶ 7/7/16 Tr. at 4-5; 5/27/16 Tr. at 39.

⁷ 5/27/16 Tr. at 24.

⁸ 5/27/16 Tr. at 28.

⁹ 5/27/16 Tr. at 35, 37-8.

a term of incarceration that it believed would be in Defendant's best interest and of a sufficient length to help Defendant overcome his drug addiction. The sentence imposed was within the standard guideline range¹⁰. Unquestionably, Defendant's "technical" violation of his parole was the result of willful conduct—he chose to use drugs. Much like the appellants in both *Cappellini* and *Sierra*, Defendant has demonstrated an inability to be rehabilitated and reform, thus rendering parole and probation ineffective at this stage. For these reasons, this Court believes the imposed sentence is fair, just, and appropriate.

Based upon the foregoing, this Court respectfully recommends that Defendant's issue raised on appeal be dismissed on the merits, as the sentence imposed was not an abuse of discretion and was appropriately tailored to Defendant. Accordingly, this Court respectfully recommends that its Order of Court dated July 7, 2016, imposing a period of incarceration in a state correctional institution of not less than two and a half years nor more than five years, followed by two years of consecutive probation, be affirmed.

BY THE COURT:



Joseph J. Matika, J.

¹⁰ It should be noted, however, that sentencing guidelines do not apply to Gagnon proceedings.