

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 129 CR 03
	:	
ALBERT EDWARD BROOKE,	:	
Defendant	:	
	:	
Jean A. Engler, Esquire		Counsel for Commonwealth
Assistant District Attorney		
Kent D. Watkins, Esquire		Counsel for Defendant
Nanovic, P.J. - September 15, 2011		

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant, Albert Edward Brooke, has appealed the sentence we imposed on April 25, 2011, following a *Gagnon II* revocation hearing. Defendant was sentenced to not less than one nor more than three years in a state correctional facility with the following special conditions: (1) that he successfully complete the Sexual Offenders Treatment Program offered by the State before being eligible for parole; (2) that he provide a blood sample for DNA testing; (3) that he comply with Megan's Law; and (4) that Defendant's existing sentences for corruption of minors and endangering the welfare of children run consecutive to this sentence as previously provided. In response to our 1925(b) order, Defendant identifies two issues he intends to raise on appeal: (1)

that revocation of his probation was not an available remedy and was an abuse of discretion, and (2) that the sentence imposed was unduly harsh and was an abuse of discretion.

On August 11, 2004, Defendant pled *nolo contendere* to one count of aggravated indecent assault, three counts of corruption of minors and three counts of endangering the welfare of a child, all related to the sexual abuse of his stepdaughter and stepson. Under the parties' plea agreement, Defendant was sentenced to an aggregate term of imprisonment in a state correctional facility of four to eight years, followed by four consecutive five-year periods of special probation: five years of special probation for Count 16 (corruption of minors) with an effective date of February 22, 2011; five years of special probation for Count 17 (corruption of minors) with an effective date of February 22, 2016; five years of special probation for Count 18 (endangering the welfare of children) with an effective date of February 22, 2021; and five years of special probation for Count 19 (endangering the welfare of children) with an effective date of February 22, 2026. The first of these five-year periods of probation was the subject of the revocation proceeding.

The petition to revoke Defendant's probation was filed by the Commonwealth on February 15, 2011. Following the waiver of his *Gagnon I* hearing, Defendant's *Gagnon II* hearing was held on March

31, 2011. Based upon the evidence received, the Court found a violation of Condition 5(c) (requiring that Defendant refrain from assaultive behavior) that occurred on June 26, 2009, and also that Defendant had refused an order and failed to stand count, a misconduct, that occurred on July 31, 2010. (Commonwealth Exhibit 1, Conditions Governing Special Probation/Parole, Condition 5(c)); see also 37 Pa.Code §65.4 (referring to "General Conditions Governing Special Probation and Parole")).

The other violations which the Commonwealth asserted in its revocation petition, thirty-four misconducts, including seven for assaultive behavior, were denied because they occurred prior to the date when Defendant was advised of the conditions of his special probation. Also denied was the alleged violation of Condition 8, that Defendant failed to comply with the requirements associated with lifetime registration under Megan's Law, in that Defendant had not yet been released from prison and had no approved residence to which to move. See Commonwealth v. Wilgus, 975 A.2d 1183 (Pa.Super. 2009) *appeal granted*, 989 A.2d 340 (Pa.2010) which held that a homeless person could not be held to have violated the mandate to register under Megan's Law because he had no residence at which to register. In making this latter finding the Court made clear that it was apparent that Defendant had failed to attend and successfully complete the Sexual Offenders Treatment Program, an

express condition imposed in the sentencing orders of November 18, 2005, however, Defendant had not been charged with this violation. (N.T. 4/25/11, pp.14-15). See Commonwealth v. DeLuca, 418 A.2d 669, 673 (Pa.Super. 1980) (requiring as a matter of due process that the defendant be provided prior written notice of the violations). Accordingly, the Court granted the Commonwealth's petition for revocation and imposed the sentence previously stated.

DISCUSSION

Probation as a Remedy

That revocation is available as a remedy when the terms and conditions of probation have been violated is clear. 42 Pa.C.S.A. §9771(b) (providing authority to revoke probation upon proof of violation of specified conditions); Pa.R.Crim.P. 708 (describing the procedure to be followed when a defendant has violated a condition of probation and probation is revoked). To be sure, the scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the judgment of sentence. Commonwealth v. Gheen, 688 A.2d 1206, 1207-08 (Pa.Super. 1997). Moreover, when the terms of special probation supervised by the Pennsylvania Board of Probation and Parole are at issue, as they are here, the Pennsylvania Code provides for Defendant's detention in a county prison and a recommendation by the Board

which may result in the revocation of probation and the imposition of a sentence. 37 Pa.Code §65.3.¹

Following hearing and receipt of briefs from counsel, we found Defendant violated the terms of probation in two respects, as charged: engaging in assaultive behavior on June 26, 2009, and refusing an order and failure to stand count on July 31, 2010. (N.T. 4/25/11, p.14). This finding was supported by the record. (N.T. 3/31/11, pp.35-36); Commonwealth Exhibit 3). The testimony also established that because of Defendant's failure to attend and refusal to participate in the Sexual Offenders Program offered by the State, he was removed from the program. (N.T. 3/31/11, p.39; Commonwealth Exhibit 2). Defendant was required by both the special conditions of his probation and the sentencing order to undergo a sexual offender evaluation and follow whatever course of treatment was recommended. (Commonwealth Exhibit 1, Conditions Governing Special Probation/Parole, Condition 8; Sentencing Order, Special Provision No. 2).

The violations of probation with which Defendant was charged were technical violations. Although they occurred prior to Defendant beginning his term of probation, while Defendant was

¹ Special probation following a state sentence is authorized by 61 Pa.C.S.A. § 6133(a). Although this section provides for probation supervised by the Pennsylvania Board of Probation and Parole, the trial court nevertheless retains the power, authority, and jurisdiction to assess whether the defendant violated his "special" probation, to revoke it and to re-sentence the defendant following a revocation. Commonwealth v. Mitchell, 955 A.2d 433, 440-41 (Pa.Super. 2008).

still incarcerated, the timing of this conduct does not preclude revocation of probation. Commonwealth v. Hoover, 909 A.2d 321 (Pa.Super. 2006) (upholding judgment of sentence following revocation of probation on technical grounds which occurred before the probationary period of defendant's sentence began). Moreover, revocation of probation is particularly appropriate when to do so "would not be in subservience to the ends of justice and the best interests of the public, or the defendant." *Id.* at 323 (quoting Commonwealth v. Wendowski, 420 A.2d 628, 630 (Pa.Super. 1980)). Here, the Court specifically found, based upon the Court's knowledge of the offenses Defendant had committed and his difficulty with sexual matters, that the need for Defendant to successfully complete the Sexual Offenders Program was critical. (N.T. 4/25/11, p.43). We would also note that Defendant was previously found by this Court to be a sexually violent predator under Megan's Law. (See Order dated October 20, 2005).

Propriety of Sentence

The offense with which Defendant was found to have violated probation, corruption of minors, is graded as a misdemeanor of the first degree. 18 Pa.C.S.A. §6301(a)(1). As such, the maximum penalties that can be imposed are a period of imprisonment not to exceed five years and a fine not to exceed \$10,000.00. 18 Pa.C.S.A. §§1101(4) and 1104(1). Moreover, the

sentencing guidelines are inapplicable for sentences imposed as a result of violating the terms and conditions of probation. 204 Pa.Code §303.1(b).

The sentence we imposed, one to three years, is within the statutory confines. It concerns a discretionary aspect of sentencing and violates no rule or fundamental principles of sentencing of which we are aware. Commonwealth v. Phillips, 946 A.2d 103, 112 (Pa.Super. 2008) (noting that when challenging the discretionary aspect of a sentence, the defendant must raise a substantial question with respect to the propriety of the sentence, one which "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."). The sentence was appropriate and just and, most importantly, seeks to have Defendant successfully complete the Sexual Offenders Program which this Court believes is critical to Defendant's rehabilitation and the safety of the public.

CONCLUSION

Our decision to revoke Defendant's probation and to re-sentence him to a period of imprisonment is based upon the evidence of record and is appropriate under the circumstances. Accordingly,

for the reasons stated, we respectively ask the Superior Court to affirm that decision and deny the appeal.

BY THE COURT:

P.J.