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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 819-CR-2009
	:	
KYLE KEHRLI,	:	
	:	
Defendant	:	

Sarah Modrick, Esquire — Counsel for the Commonwealth
Joseph V. Sebelin, Jr., Esquire — Counsel for Defendant

MEMORANDUM OPINION

Serfass, J. – January 18, 2013

Here before the Court is the appeal taken by Defendant Kyle Kehrli (hereinafter "Defendant") from our Order of Court dated August 17, 2012, pursuant to which, following a finding that Defendant had violated the conditions of his parole for a second time, we directed that Defendant be recommitted to the Carbon County Correctional Facility to serve the duration of the sentence of imprisonment (i.e. until January 29, 2015) which we ordered in the above-captioned matter on January 26, 2010. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and respectfully recommend that our Order dated August 17, 2012 be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 2009, the Commonwealth filed an information charging Defendant with six (6) violations of the Pennsylvania Vehicle Code, including multiple Driving Under the Influence offenses. Defendant had been cited for these offenses following a traffic stop on September 27, 2009 in Lansford, Carbon County, Pennsylvania. On that date, Defendant was subjected by police to a traffic stop after he failed to obey a posted stop sign while operating a motor vehicle and continued traveling westbound in the dedicated eastbound lane. Defendant pled guilty on January 26, 2010 to one count of Driving Under the Influence: Highest Rate of Alcohol (second offense),[1] a misdemeanor graded in the first degree, and one count of Driving While Operating Privilege is Suspended or Revoked-DUI Related,[2] graded as a summary offense. The remaining charges were dismissed pursuant to the plea agreement.

We sentenced Defendant on January 26, 2010 to serve a term of imprisonment in the Carbon County Correctional Facility of not less than ninety (90) days nor more than five (5) years. Pursuant to our Order of Sentence, Defendant was to be made eligible for parole subject to the standard Carbon County parole conditions and the following special conditions:

[1] 75 Pa. C.S.A. § 3802 (c)
[2] 75 Pa. C.S.A. § 1543 (b)(1)

1. That he not possess, control or consume any alcoholic beverages or unprescribed drugs;
2. That he complete an Alcohol Highway Safety School Program operated by the Carbon-Monroe-Pike Drug and Alcohol Commission (hereinafter "Carbon-Monroe-Pike");
3. That he obtain a Court Reporting Network evaluation from Carbon-Monroe-Pike and follow the recommendations thereof;
4. That he complete a drug and alcohol counseling and treatment program at Carbon-Monroe-Pike and pay all fees associated therewith;
5. That he engage in treatment with Carbon-Monroe-Pike within sixty (60) days of the date his supervision began;
6. That he report to the Carbon County Adult Probation and Parole Office within seventy-two (72) hours for an intake interview;
7. That he complete all requirements of Act 122-1990;[3] and
8. That he pay a fifty dollar ($50.00) per month supervision fee.

On July 14, 2011, the Carbon County Adult Probation and Parole Office filed with this Court a Petition for Revocation of Parole, on the grounds that Defendant had, in violation of the conditions of his parole, tested positive for illegal drugs on multiple occasions and had not, as of the date of the filing of the revocation petition, successfully completed the drug and alcohol treatment program as required pursuant to the special conditions of his parole.

On August 12, 2011, pursuant to Pa. R. Crim. P. 708, a Gagnon I hearing was conducted for the purposes of determining whether probable cause existed for the revocation by this Court of Defendant's parole. On August 16, 2011, the hearing officer filed a Gagnon I Hearing Report indicating that probable cause

[3] 75 Pa.C.S.A. § 1541

had been established in that Defendant had acknowledged violating Condition Six (6) of his parole by testing positive for illegal drugs.

On October 14, 2011, a Gagnon II hearing was conducted before this Court. We found that Defendant had violated the conditions of his parole and, in an order entered on that same date, directed that Defendant's parole be revoked, that he be sentenced to serve eighty-five (85) days of back time, with credit for eighty-five (85) days served, and that he be immediately paroled a second time, subject to the following additional conditions:

1. That Defendant obtain a drug and alcohol evaluation within ten (10) days of release and follow all recommendations thereof;
2. That any future violations of his supervision would result in his serving the balance of his sentence, to wit, until January 29, 2015, in the Carbon County Correctional Facility; and
3. That he pay the costs associated with the bench warrant issued for the purposes of the Gagnon proceedings; and
4. That he report for weekly urine screens.

Defendant subsequently committed further violations of his probation. On February 13, 2012, the Carbon County Adult Probation and Parole Office filed a second Petition for Revocation of Parole on the basis of Defendant's failing to report for a scheduled appointment at that office on February 6, 2012, absconding from his approved residence and failing to attend scheduled drug screens. That petition was subsequently

amended on August 14, 2012 to reflect an additional violation, to wit, that on April 17, 2012, Defendant had been charged with new criminal offenses by the Tinicum Township Police Department.

On May 8, 2012, based upon the information that the aforementioned criminal charges had been bound over for trial by a Magisterial District Judge, thereby independently establishing probable cause that a violation of Defendant's parole had occurred, we ordered the scheduled second Gagnon I hearing stricken from the list. A second Gagnon II hearing was conducted before the undersigned on August 17, 2012, at the conclusion of which we found that Defendant had violated his parole by failing to report to the Carbon County Adult Probation and Parole Office on February 6, 2012, by absconding from his approved address, by failing to submit to any scheduled drug screens after January 27, 2012 and by being arrested and charged with new criminal offenses and entering a no contest plea to those charges. By an Order of Court dated August 17, 2012, we thus revoked the October 14, 2011 sentence which made Defendant eligible for parole, recommitting Defendant to serve the balance of his prison term in accordance with the terms and conditions of that same order. Defendant has appealed the August 17, 2012 Order of Court.

DISCUSSION

Although Defendant's appeal was taken from the August 17, 2012 Order of Court which revoked Defendant's parole, each of Defendant's eight "Matters Complained on Appeal" is more properly understood as an attack on the legality of our Order of Sentence entered in this matter on January 26, 2010, in that the errors alleged pertain to the imposition of the sentence itself, and not to our decision to revoke Defendant's parole and recommit Defendant to serve that sentence. We submit that because Defendant has not taken an appeal from the January 26, 2010 Order of Sentence — the order which imposed the sentence which is the basis for the claims of error — these complaints are ineffectively raised and may not be addressed in the context of this appeal, which, we note again, is taken from the August 17, 2012 revocation order.

Defendant is barred from a direct appeal of the January 26, 2010 Order of Sentence by 42 Pa.C.S.A. § 5571 because more than thirty (30) days have elapsed since the date that order became final, and we suggest that it is improper for Defendant to attempt to initiate an appeal of that order by couching it as an appeal taken from the August 17, 2012 order. Further, because we would find that the "Defendant's Statement of Matters Complained on Appeal" pertain to the original sentence and should be disregarded for Defendant's failure to appeal the Order of

Sentence, no appealable issues have been effectively identified by Defendant's concise statement. As a result, we respectfully suggest that Defendant has necessarily waived all issues on appeal.

Notwithstanding our recommendation that Defendant's appeal be denied entirely on the grounds that it raises issues not attributable to the Order that is the subject of this appeal, we will address Defendant's contentions on their merits. In "Defendant's Statement of Matters Complained On Appeal", he raises eight (8) alleged errors made by this Court in directing that Defendant be recommitted to serve the balance of his sentence; however, we submit that several of these matters, to the extent that they are duplicative and do not raise sufficiently precise issues on appeal, are in violation of the Pennsylvania Rules of Appellate Procedure and should be disregarded on that basis. When a concise statement is filed pursuant to Pennsylvania Rule of Appellate Procedure 1925 "which is too vague to allow the court to identify the issues raised on appeal," that will be considered to be "the functional equivalent of no Concise Statement at all." Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa. Super. 2001). A claim that the evidence is insufficient or that a verdict is against the weight of the evidence, without specific allegations to substantiate that claim, is too vague to preserve such a claim for review.

Commonwealth v. Holmes, 461 A.2d 1268, 1270 (Pa. Super. 1983), Commonwealth v. Seibert, 799 A.2d 54 (Pa. Super. 2002).

We would thus find that Defendant effectively preserves only three (3) issues in his concise statement: first, the broad contention that the sentence was excessive or unjust; second, that "This Honorable Court committed an error of law and/or abuse of discretion by imposing a sentence beyond the standard range," (Defendant's Statement of Matters Complained on Appeal, Paragraph 2); and third, that "This Honorable Court committed an error of law and/or abuse of discretion by failing to order a Pre-Sentence Investigation before imposing total or maximum confinement" (Id. at Paragraph 6.). The majority of the matters raised by Defendant fall within the scope of the first of these issues, and will be addressed by an analysis of the general discretion afforded to the trial court for the purposes of sentencing. We will address the remaining matters in turn.

1. Excessiveness or Manifest Injustice

As a general rule, "the trial court is afforded broad discretion in sentencing criminal defendants 'because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.'" Commonwealth v. Mouzon, 571 Pa. 419, 423, 812 A.2d 617, 620 (2002) (quoting Commonwealth v. Ward, 524 Pa. 48, 568 A.2d 1242,

1243 (1990)). Appellate review of the discretionary aspects of a criminal sentence may be granted where the appellate court finds that "it appears that there is a substantial question that the sentence imposed is not appropriate under [the Pennsylvania Sentencing Code]." 42 Pa. Cons. Stat. Ann. § 9781.

Consequently, a trial court's imposition of sentence will not be disturbed in the absence of a manifest abuse of discretion. Commonwealth v. Smith, 543 Pa. 566, 571, 673 A.2d 893, 895 (1996). In order to rise to the level of error that will require an appellate court to overturn an order of sentence, then, that sentence "must either exceed the statutory limits or be so manifestly excessive as to constitute an abuse of discretion." Commonwealth v. Pickering, 368 Pa.Super. 100, 107, 533 A.2d 735, 738 (1987). A sentence will not be disturbed for such excess where it is "evident that the sentencing court was aware of sentencing considerations and weighed the considerations in a meaningful fashion." Commonwealth v. Cappellini, 456 Pa. Super. 498, 513, 690 A.2d 1220, 1228 (1997) (citing Commonwealth v. Devers, 519 Pa. 88, 546 A.2d 12 (1988)).

Defendant alleges that our Order of Sentence was an abuse of discretion. Our inquiry, therefore, is whether that sentence exceeded the statutory limits or whether it was manifestly excessive. If we took note of and properly weighed the relevant

sentencing considerations, then the sentence was not manifestly excessive.

As previously indicated, Defendant entered guilty pleas to one (1) count of Driving While Operating Privilege is Suspended or Revoked-DUI Related and one count of Driving Under the Influence. Defendant was sentenced immediately thereafter and as part of the same proceeding during which he entered those pleas. Defendant was represented by counsel at the guilty plea/sentencing proceeding. Defendant had committed a prior Driving Under the Influence offense within the past ten (10) years and his Offense Gravity Score was five (5), giving rise to a standard guideline range between ninety (90) days and nine (9) months. We imposed a sentence including a period of imprisonment ranging from the mandatory minimum of ninety (90) days, which is required by the Pennsylvania Vehicle Code for a second Driving Under The Influence-Highest Rate of Alcohol violation,[4] and a maximum of five (5) years, the statutory limit for a misdemeanor conviction. 18 Pa. Cons. Stat. Ann. § 1104.

At the time of sentencing, neither Defendant nor his counsel objected to the sentence on the grounds that it was excessive or an abuse of discretion; in fact, Defendant anticipated the terms of the sentence and apparently viewed them as appropriate and proportionate to the offense. Immediately

[4] 75 Pa. Cons. Stat. Ann. § 3804(c)(2)

prior to the imposition of sentence, this Court asked counsel for Defendant whether Defendant wished to be heard on the subject. Defendant's counsel responded, in pertinent part, as follows:

> MR. YAZINSKI: He is here to take responsibility for what he did. The only thing we would ask this Court, we realize there is 90-day minimum on both charges, that they run concurrent as with the plea agreement and Mr. Kehrli had asked me if he is sentenced today to the 90 days incarceration, if he could – if that could be put off 'til Friday so he could sit down with his two daughters and prepare them that he is not going to be around for some time.
>
> (N.T., 1/26/2010, p. 2).

Defendant himself then declined to address the Court personally. Clearly, Defendant was aware of the recommendation being made to this Court, and was prepared to comply with the conditions thereof in the event that we adopted that recommendation. We did so, imposing exactly the sentence that was contemplated pursuant to the aforementioned plea agreement. Defendant ratified the terms of the sentence to be imposed before this Court had done so, and did not subsequently appeal our Order of Sentence or petition this Court to reconsider its terms. The sentence was within the standard guidelines without deviation, and we respectfully recommend that Defendant's appeal in this regard should be dismissed on the grounds that there can be no question of manifest excess or abuse in the imposition of such a sentence, particularly where the defendant, represented

by competent counsel, makes no request that a different sentence be considered.

2. Sentence Beyond Standard Range

For the same reasons as those set forth hereinabove, we also submit that Defendant's contention that our sentence was beyond the standard range is without merit.

3. Failure to Order Pre-Sentence Investigation

In formulating an appropriate sentence, the trial judge "must consider the particular circumstances of the offense and the character of the defendant." Commonwealth v. Vernille, 275 Pa. Super. 263, 274, 418 A.2d 713, 719 (1980) (citing Commonwealth v. Martin, 466 Pa. 118, 351 A.2d 650 (1976)). The ordering of a pre-sentence investigation is within the discretion of the trial court. Pa. R. Crim. P. 702 (a)(1). A pre-sentence investigation report, when ordered by the trial court, must, as a result, include "information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence." Pa. R. Crim. P. 702 (a)(3).

Where the trial court elects not to order a pre-sentence investigation, it must "conduct sufficient presentence inquiry such that, at a minimum, the court is apprised of the particular circumstances of the offense, not limited to those of record, as well as the defendant's personal history and background."

Commonwealth v. Goggins, 748 A.2d 721, 728 (Pa. Super. Ct. 2000). These requirements arise from the imperative of individualized sentencing, in that "[e]ach person sentenced must receive a sentence fashioned to his or her individual needs." Commonwealth v. Flowers, 2008 Pa. Super. 109, 950 A.2d 330, 334 (2008) (quoting Commonwealth v. Carter, 336 Pa.Super. 275, 485 A.2d 802, 804 (1984)).

In this case, we conducted an inquiry into the nature of Defendant's offense in lieu of a pre-sentence investigation report. First, we elicited a recitation of the factual basis for Defendant's guilty plea, which the District Attorney provided, and Defendant and his counsel affirmed, as follows:

> MR. DOBIAS: Yes, Your Honor. Your Honor, Officer Fort of Lansford is the arresting officer. The incident occurred on September 27th of last year. Officer Fort was on routine patrol. He observed a vehicle that failed to come to a stop at a marked stop sign, Your Honor. He stopped the vehicle. The Defendant was the driver. He detected various objective signs of intoxication. The Defendant was cooperative, Your Honor. He acknowledged to the officer that he had a suspended license. He was administered field sobriety tests which he failed. He agreed to have blood taken, Your Honor, and blood was taken at the hospital, indicated a BAC of .18 as well as an amount just above the marginal amount for marijuana—I'm sorry, six units per milliliter with the minimum being five units, Your Honor.
> THE COURT: Are those facts essentially correct?
> MR. YAZINSKI: Yes, Your Honor.
> THE DEFENDANT: Yes.

As discussed in Section 1, *supra*, Defendant and his counsel were also invited to address the Court to apprise us of any

circumstances or personal history that might bear on the question of sentencing. Counsel for Defendant responded, in pertinent part, as follows:

> MR. YAZINSKI: Your Honor, Mr. Kehrli is 29 years old. He has two young daughters. Admittedly he has some problems with drinking and on that particular night that he got pulled over he did have I wouldn't say an altercation but disagreement with the mother of the children and that's what led him to drinking that night.

Defendant declined to address the Court personally. Based on this inquiry, at the time that we issued our Order of Sentence, we were able to consider, and did consider, both the factual circumstances of the offense to which Defendant had entered a plea of guilty, including the purported cause of the behavior underlying the offense as represented by counsel for Defendant, and relevant information about Defendant's personal history. The Court was aware that Defendant has a history of struggles with alcohol, that he had been convicted of a prior Driving Under the Influence offense and that his operating privileges had been suspended, and that Defendant had committed the offense as a result of an emotional disturbance in his personal life. We submit that this inquiry was sufficient to permit this Court to fashion an appropriate sentence for Defendant, and that a sentence ranging from the mandatory minimum to the statutory limit, with immediate eligibility for parole, was individually tailored to Defendant's needs.

We reiterate, as well, that Defendant did not and has not taken an appeal from the Order of Sentence which imposed those conditions; instead, Defendant has appealed our Order which revoked Defendant's eligibility for parole following Defendant's second series of parole violations. Assuming only for the purposes of this analysis that such an appeal is procedurally proper, it is significant that Defendant made no request for a presentencing investigation and made no attempt to inform the Court of any additional factors that should have been taken into consideration at the time of sentencing. Defendant was given the opportunity to ensure that this Court evaluated any of Defendant's particular needs or aspects of character in fashioning an appropriate sentence. Defendant declined to do so. We submit that this is because all such information was already before the Court, and because the sentence imposed upon Defendant was the only reasonable sanction which could have been imposed in light of the factual background and applicable statutory provisions. Therefore, we recommend that Defendant's appeal on the grounds of this Court's failure to order a pre-sentence investigation be denied.

CONCLUSION

Based upon the foregoing, we respectfully recommend that, first, Defendant's appeal be denied on the grounds that it raises no appealable issues arising from our Order of Court

dated August 17, 2012, and that all issues on appeal arising from the imposition of sentence on January 26, 2010 have been waived by Defendant's failure to appeal the Order of Sentence entered on that same date. We further recommend that Defendant's appeal be dismissed on the merits of the issues raised therein, in that the sentence imposed was not an abuse of discretion, did not exceed the standard sentencing guidelines and was appropriately tailored to Defendant. Accordingly, we respectfully recommend that our Order of Court dated August 17, 2012 revoking Defendant's parole and recommitting him to serve a term of imprisonment until January 29, 2015 be affirmed.

BY THE COURT:

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Steven R. Serfass, J.