NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. KYLE KEHRLI Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2688 EDA 2012

Appeal from the Judgment of Sentence August 17, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000819-2009

BEFORE: GANTMAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY GANTMAN, J.: **FILED JULY 29, 2013**

Appellant, Kyle Kehrli, appeals from the judgment of sentence entered in the Carbon County Court of Common Pleas, following revocation of his parole. We affirm.

The relevant facts and procedural history of this appeal are as follows.

> On December 24, 2009, the Commonwealth filed an information charging [Appellant] with six (6) violations of the Pennsylvania Vehicle Code, including multiple Driving Under the Influence offenses. [Appellant] had been cited for these offenses following a traffic stop on September 27, 2009 in Lansford…. On that date, [Appellant] 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. [Appellant] pled guilty on January 26, 2010 to one count of Driving Under the Influence: Highest Rate of Alcohol (second offense), a misdemeanor graded in the first degree, and one count of Driving While Operating Privilege is Suspended or Revoked—DUI Related, graded

---

*Retired Senior Judge assigned to the Superior Court.

> as a summary offense. The remaining charges were dismissed pursuant to the plea agreement.
>
> [The court] sentenced [Appellant] 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 [the court's] Order of Sentence, [Appellant] was to be made eligible for parole subject to the standard Carbon County parole conditions and [certain] special conditions[.]
>
> * * *
>
> On July 14, 2011, the Carbon County Adult Probation and Parole Office filed with [the court] a Petition for Revocation of Parole, on the grounds that [Appellant] 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***[1] hearing was conducted for the purposes of determining whether probable cause existed for the revocation…of [Appellant's] parole. On August 16, 2011, the hearing officer filed a ***Gagnon I*** Hearing Report indicating that probable cause had been established in that [Appellant] 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 [the court]. [The court] found that [Appellant] had violated the conditions of his parole and, in an order entered on that same date, directed that [Appellant's] parole be revoked, that he be sentenced to serve eighty-five (85) days of backtime, with credit for eighty-five (85) days served, and that he be immediately paroled a second time, subject to [certain] additional conditions[.]

---

[1] ***Gagnon v. Scarpelli***, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

* * *

> [Appellant] subsequently committed further violations of his [parole]. On February 13, 2012, the Carbon County Adult Probation and Parole Office filed a second Petition for Revocation of Parole on the basis of [Appellant'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, [Appellant] had been charged with new criminal offenses by the Tinicum Township Police Department. [Appellant subsequently pled *nolo contendere* to one count of possession of drug paraphernalia].

* * *

> A second ***Gagnon II*** hearing was conducted before the [court] on August 17, 2012, at the conclusion of which [the court] found that [Appellant] 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 [c]ourt dated August 17, 2012, [the court] revoked the October 14, 2011 sentence which made [Appellant] eligible for parole, recommitting [Appellant] to serve the balance of his prison term in accordance with the terms and conditions of that same order.

(Trial Court Opinion, filed January 18, 2013, at 2-5) (internal footnotes omitted).

On August 27, 2012, Appellant timely filed a motion for reconsideration of sentence, arguing the court imposed a harsh, excessive, and unjust sentence, the court failed to impose an individualized sentence,

and the court should have ordered a pre-sentence investigation ("PSI") report. Prior to the entry of an order disposing of the motion, Appellant timely filed a notice of appeal on Monday, September 17, 2012. On September 28, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on October 19, 2012.

Appellant raises four issues for our review:

> WHETHER…APPELLANT HAS PROPERLY PRESERVED HIS ISSUES FOR APPEAL?
>
> WHETHER APPELLANT…HAS SET FORTH A SUFFICIENTLY SPECIFIC [RULE] 1925(b) STATEMENT AND THUS PRESERVED HIS ISSUES FOR APPEAL?
>
> WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY IMPOSING A SENTENCE THAT IS HARSH, EXCESSIVE, AND MANIFESTLY UNJUST; DISPROPORTIONATE (TO THE UNDERLYING VIOLATION(S)) AND EXCESSIVE UNDER THE CIRCUMSTANCES; AND NOT CONSISTENT WITH PENNSYLVANIA LAW WHERE APPELLANT'S [PAROLE] VIOLATION WAS FOR A MISSED URINE TEST, WHERE THE ADULT [PAROLE] AGENT CALLED APPELLANT TO REQUEST THAT HE APPEAR IMMEDIATELY (THAT DAY), WHERE THE AGENT THREATENED MAXIMUM CONFINEMENT FOR…APPELLANT, WHERE APPELLANT ADVISED THAT HE WAS UNABLE TO APPEAR DUE TO TRANSPORTATION ISSUES, WHERE APPELLANT'S SUBSEQUENT CRIMINAL VIOLATION WAS FOR A NON-VIOLENT ACT (POSSESSION OF PARAPHERNALIA), WHERE APPELLANT HAS BATTLED DRUG ADDICTION THROUGHOUT THE CASE, AND WHERE APPELLANT'S ACTS DID NOT ENDANGER THE COMMUNITY?
>
> WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY IMPOSING A SENTENCE THAT WAS NOT TAILORED AND/OR

> INDIVIDUALIZED TO…APPELLANT AND ALSO BY FAILING TO ORDER A PRE-SENTENCE INVESTIGATION BEFORE IMPOSING TOTAL OR MAXIMUM CONFINEMENT?

(Appellant's Brief at 8).

In his first and second issues, Appellant asserts the court misinterpreted the claims raised in the Rule 1925(b) statement. Contrary to the court's analysis, Appellant insists he is not attempting to challenge the original sentence imposed in 2010. Instead, Appellant avers the claims in his Rule 1925(b) statement address the court's 2012 decision to revoke parole and re-sentence Appellant to a term of total confinement.[2] Moreover, Appellant maintains his Rule 1925(b) statement was not vague; rather, it raised specific claims regarding the revocation and re-sentencing. Appellant contends his Rule 1925(b) statement adequately preserved his claims for appellate review, and this Court must address the claims on their merits.

In his third and fourth issues, Appellant concedes that technical violations can support the revocation of parole. Nevertheless, Appellant emphasizes that the technical parole violations at issue, including missed drug tests, were non-violent in nature. Under these circumstances, Appellant argues that the court should not have imposed a sentence of total confinement. Appellant further argues that the court failed to fashion an individualized sentence, and the court should have ordered a PSI report prior

---

[2] Throughout his brief, Appellant mistakenly states that the court revoked "probation" rather than parole.

to re-sentencing Appellant. Appellant concludes the court imposed a manifestly excessive sentence following the revocation of parole. We cannot agree.

When reviewing the outcome of a revocation hearing, this Court is limited to determining the validity of the proceeding and the legality of the judgment of sentence imposed. ***Commonwealth v. Heilman***, 876 A.2d 1021 (Pa.Super. 2005). "Unlike a probation revocation, a parole revocation does not involve the imposition of a new sentence." ***Commonwealth v. Kalichak***, 943 A.2d 285, 290 (Pa.Super. 2008).

> Indeed, there is no authority for a parole-revocation court to impose a new penalty. Rather, the only option for a court that decides to revoke parole is to recommit the defendant to serve the already-imposed, original sentence. At some point thereafter, the defendant may again be paroled.
>
> Therefore, the purposes of a court's parole-revocation hearing—the revocation court's tasks—are to determine whether the parolee violated parole and, if so, whether parole remains a viable means of rehabilitating the defendant and deterring future antisocial conduct, or whether revocation, and thus recommitment, are in order. The Commonwealth must prove the violation by a preponderance of the evidence and, once it does so, the decision to revoke parole is a matter for the court's discretion. In the exercise of that discretion, a conviction for a new crime is a legally sufficient basis to revoke parole.
>
> **Following parole revocation and recommitment, the proper issue on appeal is whether the revocation court erred, as a matter of law, in deciding to revoke parole and, therefore, to recommit the defendant to confinement. Accordingly, an appeal of a parole**

> **revocation is not an appeal of the discretionary aspects of sentence.**
>
> As such, a defendant appealing recommitment cannot contend, for example, that the sentence is harsh and excessive. Such a claim might implicate discretionary sentencing but it is improper in a parole-revocation appeal. Similarly, it is inappropriate for a parole-revocation appellant to challenge the sentence by arguing that the court failed to consider mitigating factors or failed to place reasons for sentence on the record. Challenges of those types again implicate the discretionary aspects of the underlying sentence, not the legal propriety of revoking parole.

Id. at 290-91 (internal citations and footnote omitted) (emphasis added). Additionally, technical violations of the terms and conditions of parole are sufficient to trigger revocation. ***Commonwealth v. McDermott***, 547 A.2d 1236 (Pa.Super. 1988).

Instantly, Appellant raised the following issues in his Rule 1925(b) statement:

> 1. [The court] committed an error of law and/or abuse of discretion in sentencing [Appellant].
>
> 2. [The court] committed an error of law and/or abuse of discretion by imposing a sentence beyond the standard range.
>
> 3. [The court] committed an error of law and/or abuse of discretion by imposing a sentence that is harsh, excessive, and manifestly unjust.
>
> 4. [The court] committed an error of law and/or abuse of discretion by imposing a sentence that is harsh, excessive, and manifestly unjust where [Appellant's parole] violation was for a missed urine test, where the Adult [Parole] agent called [Appellant] to request that he appear immediately (that day), where the agent threatened to request a

> maximum sentence for [Appellant], where [Appellant] advised that he was unable to appear due to transportation issues, where [Appellant's] violation was not for a violent act or crime, where [Appellant] has battled drug addiction throughout the case, and where [Appellant's] acts did not endanger the community.
>
> 5. [The court] committed an error of law and/or abuse of discretion by imposing a sentence that was not tailored and/or individualized to [Appellant].
>
> 6. [The court] committed an error of law and/or abuse of discretion by failing to order a [PSI report] before imposing total or maximum confinement.
>
> 7. [The court] committed an error of law and/or abuse of discretion by imposing a sentence that is disproportionate to the underlying violation(s) and is excessive under the circumstances.
>
> 8. [The court] committed an error of law and/or abuse of discretion by imposing a sentence that is not consistent with Pennsylvania Law.

(***See*** Rule 1925(b) Statement, filed 10/19/12, at 1-2.)

Despite Appellant's attempt to challenge the backtime sentence imposed following parole revocation, the court recognized Appellant could not raise claims involving the discretionary aspects of sentencing:

> Although [Appellant's] appeal was taken from the August 17, 2012 Order of Court which revoked [Appellant's] parole, each of [Appellant's] eight "Matters Complained [of] on Appeal" is more properly understood as an attack on…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 [Appellant's] parole and recommit [Appellant] to serve that sentence. We submit that because [Appellant] 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

> [improperly] 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.

(***See*** Trial Court Opinion at 6).

Here, the proper issue on appeal following parole revocation and recommitment is whether the court erred, as a matter of law, in deciding to revoke parole. ***See Kalichak, supra***. Thus, Appellant cannot challenge the discretionary aspects of the sentence at this time.[3] ***Id.***

Further, Appellant's parole officer testified that Appellant violated the terms and conditions of parole by failing to report, absconding from his residence, and failing to submit to scheduled drug screens. (***See*** N.T. Revocation Hearing, 8/17/12, at 8-9.) Defense counsel also confirmed Appellant pled *nolo contendere* to a new charge, which constituted another violation. (***Id.*** at 4). On this record, the court conducted valid revocation proceedings and properly revoked Appellant's parole. ***See Kalichak, supra***; ***McDermott, supra***. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

---

[3] Appellant's claim that a sentence is manifestly excessive challenges the discretionary aspects of sentencing. ***Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002). Likewise, Appellant's complaints that the court failed to impose an individualized sentence and failed to order a PSI report challenge the discretionary aspects of sentencing. ***Commonwealth v. Coulverson***, 34 A.3d 135 (Pa.Super. 2011); ***Commonwealth v. Flowers***, 950 A.2d 330 (Pa.Super. 2008). In fact, all the claims in Appellant's Rule 1925(b) statement refer to the discretionary aspects of sentencing.

Judgment Entered.

Prothonotary

Date: 7/29/2013