

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-733-2011
	:
vs.	: CRIMINAL DIVISION
	:
	:
CODY HAMMAKER,	: Notice of Intent to Dismiss PCRA
Defendant	: Without Holding An Evidentiary Hearing
	: and Order Granting Counsel's Motion to
	: Withdraw

OPINION AND ORDER

By way of background, on June 13, 2011 Cody Hammaker (hereinafter Petitioner) pled guilty to Counts 2 and 3, two counts of criminal mischief graded as felonies of the third degree. The court sentenced Petitioner to two years of supervision under the Intermediate Punishment Program (IPP) with the first 30 days to be served at the county work release facility on Count 2 and a consecutive term of two years' probation on Count 3. These sentences were to be served consecutive to an aggregate period of five years' probation in case 56-2011.

After several violation hearings, the court revoked Petitioner's IPP and probation sentences and re-sentenced him to the State Intermediate Punishment (SIP) program on June 18, 2015.

On December 29, 2016, the court was informed that Petitioner had been expelled from the SIP program because he was charged with and convicted of two new criminal offenses, escape and simple assault. On January 10, 2017, the court revoked Petitioner's SIP sentence and re-sentenced him. The court imposed an aggregate sentence of 5 to 15 years' incarceration in a state correctional institution which consisted of 1 ½ to 5

years on Count 2, 1 to 5 years on Count 3, and 2 ½ to 5 years for corruption of minors in case 56-2011. Petitioner appealed. The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence on February 12, 2018.

Petitioner filed a Post Conviction Relief Act (PCRA) petition in which he claimed he was eligible for relief based on ineffective assistance of counsel and the imposition of a sentence greater than the lawful maximum and he asserted that: (1) his sentence was illegal; (2) he did not commit a probation violation because he was not yet serving those sentences; and (3) his re-sentencing violated double jeopardy and/or the court lacked jurisdiction to re-sentence him based on *Commonwealth v. Quinlan*, 433 Pa. Super. 111, 639 A.3d 1235 (Pa. Super. 1994).

Petitioner's sentence clearly did not exceed the lawful maximum. Both counts of criminal mischief were graded as felonies of the third degree. A person who has been convicted of a felony of the third degree may be sentenced to a term of imprisonment of not more than seven years. 18 Pa. C.S. §1103(3). The court imposed a maximum sentence of five years for each of Petitioner's criminal mischief convictions. Therefore, the court did not impose an illegal sentence.

Petitioner next claims that he could not be violated and re-sentenced because his probation had not yet begun. The court cannot agree.

To be eligible for relief, a petitioner must plead and prove by a preponderance of the evidence that his claim has not been waived. 42 Pa. C.S. §9543(a)(3). "[A]n issue is waived if petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa. C.S. §9544(b). The

court revoked Petitioner's probation and IPP sentences on June 18, 2015 and re-sentenced him to the SIP program. Petitioner, however, did not assert this claim during the revocation proceedings. He also could have filed an appeal from the imposition of the SIP sentence but he did not do so. He also did not assert this claim when he appealed the court's revocation of the SIP sentence and imposition of the aggregate sentence of 5 to 15 years' state incarceration. Therefore, this claim is waived.

Even if the claim was not waived and Petitioner raised it as a claim of ineffective assistance of counsel, Petitioner would not be entitled to relief. Counsel is presumed to be effective and the burden rests on the petitioner to prove that counsel was ineffective. *Commonwealth v. Crispell*, 193 A.3d 919, 928 (Pa. 2018). To show counsel was ineffective, a petitioner must plead and prove that: (1) the underlying claim has arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) counsel's deficient performance prejudiced the petitioner. *Id.*; *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). In this context, prejudice means that but for counsel's errors or omissions there is a reasonable probability that the outcome of the proceedings would have been different. *Pierce, id.*

Petitioner's claim lacks arguable merit. A sentence of probation or intermediate punishment can be revoked, even if the petitioner has not yet begun serving it. *Commonwealth v. Sierra*, 752 A.2d 910, 912 (Pa. Super. 2000); *Commonwealth v. Ware*, 737 A.2d 251, 253 (Pa. Super. 1999). As the Superior Court noted in *Ware*,

If, at any time before the defendant has completed the maximum period of probation, **or before he has begun service of his probation**, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in

subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation. A defendant on probation has no contract with the court. He is still a person convicted of crime, and the expressed intent of the Court to have him under probation beginning at a future time does not change his position from the possession of a privilege to the enjoyment of a right.

Further, this court has previously agreed that **a term of probation may and should be construed for revocation purposes as including the term beginning at the time probation is granted.** Otherwise, having been granted probation a defendant could commit criminal acts with impunity - as far as revocation of probation is concerned - until he commenced actual service of the probationary period.

757 A.2d at 253-254 (emphasis added)(quotations and citations omitted).

Petitioner next asserts that his re-sentencing violated double jeopardy principles. Again, this claim lacks merit. Sentences of intermediate punishment and probation are conditional sentences. To be entitled to finality in such a sentence, a defendant must comply with the conditions of supervision. Petitioner did not comply with the conditions of supervision. He committed two new criminal offenses—escape and simple assault—which resulted in the revocation of his SIP sentence and the imposition of a lengthy state sentence.

The revocation of probation, county intermediate punishment, and SIP do not violate the Double Jeopardy Clause. *Commonwealth v. Mullins*, 918 A.2d 82, 85 (Pa. 2007)(“Probation revocation is not a second punishment for the original conviction, but rather is an integral element of the original conditional sentence, and thus does not violate the Double Jeopardy Clause.”); *Commonwealth v. Kuykendall*, 2 A.3d 559, 564-565 (Pa. Super. 2010)(revocation of SIP and resentencing do not constitute a second punishment but provide a necessary incentive to complete the program; therefore, there is no double jeopardy violation).

Finally, Petitioner asserts the court lacked jurisdiction. After reviewing the *Quinlan* case, it appears that Petitioner's argument may be based on 42 Pa. C.S. §5505. Neither *Quinlan* nor section 5505 applies to the circumstances of this case. In *Quinlan*, the court stated on the record that it was imposing a sentence of five years' probation consecutive to a sentence of imprisonment, but the probationary sentence was not included in the sentencing order. Years later, the court attempted to amend the sentencing order to reflect the consecutive sentence of probation and then it revoked the probation and re-sentenced the defendant. The defendant appealed. He asserted that, since the sentence of probation was not included in the order and more than 30 days had elapsed, there was no valid sentence of probation that could be revoked. The Pennsylvania Superior Court agreed and noted that the sentence was only what was reflected in the original sentencing order; it did not include any additional statements or pronouncements made at the sentencing hearing but not included in the order. Moreover, since more than 30 days had elapsed since the sentence was imposed, the trial court lacked jurisdiction to amend the sentencing order.

Here, the court did not unilaterally modify or amend Petitioner's sentencing order. Rather, the court revoked the sentences of probation and IPP, and then ultimately SIP following various hearings due to Petitioner's violations of the conditions of his supervision.¹

An implied condition of any sentence of probation or intermediate punishment is that the defendant will not commit a further offense. See *Commonwealth v. Infante*, 888 A.2d 783, 790 (Pa. 2005) (“an implied condition of any sentence of probation is that the defendant will not commit any further offense.”); *Kuykendall*, *supra* (SIP revocation treated similarly as

¹ The history of Petitioner's violation hearings can be found in the Opinion entered on June 22, 2017.

probation revocation). Once Petitioner was expelled from the SIP program, the court was required to revoke his sentence. 42 Pa. C.S. §9774(b) (“The court shall revoke a sentence of State intermediate punishment if after a hearing it determines that the participant was expelled from or failed to complete the program.”); *Kuykendall*, 2 A.3d at 564 (“Once the sentencing court determined that Appellant had not successfully completed the SIP program, by law it was required to revoke the SIP sentence.”)

Accordingly, the following Order is entered.

ORDER

AND NOW, this ___ day of January 2019, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting a hearing, none will be scheduled and the parties are hereby notified of the court's intent to dismiss the Petition. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the court will enter an order dismissing the petition.

The court also grants PCRA counsel’s petition to withdraw. Petitioner may represent himself or hire private counsel, but the court will not appoint counsel to represent Petitioner further in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Donald Martino, Esquire
Cody Hammaker, LV9117 (legal mail)
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Work file