IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-2119-2015**
	:	**CP-41-CR-1403-2016**
vs.	**:**	**CP-41-CR-1893-2016**
	:	
	:	
CYNTHIA VILLANUEVA,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's judgment of sentence dated November 2, 2018.

By way of background, in case 2119-2015, Appellant was charged with retail theft and receiving stolen property, both misdemeanors of the second degree, for taking $120 worth of merchandise from J.C. Penney on October 27, 2015. On December 28, 2015, Appellant entered a guilty plea to retail theft and was sentenced to 18 months' probation.[1]

In case 1403-2106, on August 2, 2016, Appellant was charged with retail theft, a felony of the third degree; false identification to law enforcement, a misdemeanor of the third degree; and possession of a small amount of marijuana, an ungraded misdemeanor for taking $353.40 worth of merchandise from Wal-Mart, providing a false name to law enforcement officials, and possessing 1.2 grams of marijuana on July 28, 2016. On September 12, 2016, Appellant pled guilty to these charges.

[1] Appellant was already serving a sentence of 12 months' probation for retail theft in case 1920-2015.

In case 1893-2016, on October 11, 2016, Appellant was charged with retail theft, a felony of the third degree, for taking $39.85 worth of merchandise from Family Dollar on August 26, 2016.

On December 7, 2016, Appellant pled guilty to retail theft in case 1893-2016, and the court sentenced her to 18 months' probation. The court also sentenced Appellant to a consecutive term of 18 months' probation for retail theft in case 1403-2016. The aggregate sentence of 36 months' probation was to be served consecutive to any sentence Appellant was currently serving. As one of the conditions of Appellant's probation, the court directed Appellant to attend and complete the Drug Court Program. The court also found that Appellant violated the conditions of her probation in case 2119-2015 by committing these new offenses; however, rather than revoke Appellant's probation, the court ordered Appellant to complete the Drug Court Program.[2]

Unfortunately, Appellant did not successfully complete the Drug Court Program. Despite escalating sanctions, she continued to violate the conditions of the program. On March 21, 2018, she was removed from the program.

On June 21, 2018, the court found that Appellant violated the conditions of her probation (and her parole in case 1920-2015) by being removed from the Drug Court Program. The court sent Appellant for an evaluation to determine if she was appropriate for the State Intermediate Punishment (SIP) Program. New criminal charges were filed against Appellant after she was sent for the evaluation,[3] so she was either removed from the SIP

[2] As a result of the new offenses committed in 2016, the probationary sentence in 1920-2015 was revoked on December 7, 2016 and Appellant was sentenced to 100 days to 24 months' less one day of incarceration at the county prison. As Appellant had at least 100 days of credit toward this sentence, she was immediately paroled.

[3] See CP-41-CR-0001442-2018 and CP-41-CR-0001522-2018.

Program or removed from consideration for the SIP Program and returned to Lycoming County for sentencing.

On November 2, 2018, the court revoked Appellant's probation and re-sentenced her to 3 to 7 years' incarceration in a state correctional institution for retail theft, a felony of the third degree, under Information 1403-2016; a concurrent term of 3 to 7 years' incarceration for retail theft, a felony of the third degree, under Information 1893-2016; and a concurrent term of 1 to 2 years' incarceration for retail theft, a misdemeanor of the second degree, under Information 2119-2015.

On November 13, 2018, Appellant filed a post sentence motion, in which she asserted that her sentence was excessive and unreasonable, and a notice of appeal. The court summarily denied the post sentence motion on November 28, 2018.

The court did not order Appellant to file a concise statement of errors complained of on appeal as the court believed Appellant intended to assert on appeal the same issues that she raised in her post sentence motion.

Appellant asserted that the sentence imposed was unreasonable and excessive because: (1) the court imposed a greater sentence than probation was requesting; (2) the court did not consider additional drug treatment options rather than incarceration; (3) the court did not consider a county sentence rather that a lengthy state sentence; and (4) the court failed to give weight to the positive things Appellant had done while on probation.

Appellant first asserts that the sentence imposed was unreasonable and excessive because the court imposed a greater sentence than probation was requesting. The court concedes that it imposed a slightly longer sentence than probation was requesting. The recommendation from Appellant's probation officer was for the court to impose a sentence of

2 to 5 years' state incarceration under Information 1403-2016, a concurrent 2 to 5 years' incarceration under Information 1893-2016, and a consecutive 6 to 12 months' incarceration under Information 2119-2015. (N.T., 11/2/18, at 15). In other words, Appellant's probation officer was requesting an aggregate sentence of 2 ½ to 6 years' incarceration. The court imposed an aggregate sentence of 3 to 7 years' incarceration.

The mere fact that the court imposed a slightly greater sentence than requested by Appellant's probation officer does not render the sentence excessive and unreasonable. The court cannot delegate its sentencing responsibilities to the probation office as a whole or to any individual probation officer. *Commonwealth v. Schueg*, 582 A.2d 1339, 1241 (Pa. Super. 1990); *Commonwealth v. Bastone*, 467 A.2d 1339, 1342 (Pa. Super. 1983). The court must conduct its own evaluation of all the sentencing factors. Appellant's probation officer made a recommendation to the court. The court considered that recommendation, but it was not bound by it.

Appellant next asserts that the sentence was unreasonable and excessive because the court did not consider additional drug treatment options rather than incarceration. The old adage you can lead a horse to water but you cannot make it drink comes to mind in this case. The court tried on multiple occasions to get Appellant help with both her substance abuse issues and her mental health issues. Unfortunately, Appellant was her own worst enemy. Appellant was placed in Re-Entry Services and on Drug Court in December 2016. The court reviewed the extensive efforts made to assist Appellant from that time up to her current probation violation hearing and re-sentencing. The court stated:

> During her time on [D]rug [C]ourt she violated at least 11 times. Those violations included three relapses, two on alcohol and one on gabapentin. She was eventually sentenced for a 60-day evaluation in

which she was released back to the Drug Court Program but continued to violate.

Through March of 2018 when she was violated—or when she was removed[,] the violations included missing Cross Roads, failing to turn in meeting sheets, failing to turn in meeting sheets again, missing counseling, relapsing on alcohol, relapsing on alcohol again, meeting sheets violation, relapse on gabapentin, missing counseling, forged meeting sheets and missing groups.

Among the sanctions that were imposed included everything imaginable[:] writing an essay, restarting 90/90 meetings, restart 90/90 meetings again, five days suspended sentenced (sic), 30 days at the LCP [Lycoming County Prison] plus the five days—90 days—sanction of 90 days with reflection sheets, follow treatment, a 60-day evaluation, writing essays, being put in the penalty box of the Drug Court Program, completing the Sinking Thinking Program with a certified recovery specialist. Then there were a host of therapeutic and/or rehabilitative actions taken. Her mental health needs were considered and treated. She began partial with Cross Roads, she was permitted to switch to the CSG Partial Program after she experienced a mental health issue. She was set up for structured intensive out-patient counseling at Cross Roads. A certified recovery specialist was assigned to her. She had the 60-day evaluation at Muncy, which, by the way, indicated she didn't suffer from any formal thought disorder that would render her incapable of knowing what she needed to do to successfully complete the program. That indicated she should be returned to the Drug Court Program and that she should be required to follow it to the letter.

She was given psychiatric appointments. She was given medication, medically assisted treatment, so-to-speak, although it wasn't on Vivitrol or something along those lines. Continued counseling, NA/AA meetings, some educational support. Her positive urines were, as we spoke, even prior to being placed on [D]rug [C]ourt she had THC on a handful of occasions, Oxycodone, Benzos, opiates on one occasion. There seemed to be a pretty big problem with attitude. She was forced to attend her CSG partial and Cross Road programming.

Even though numerous professionals were working with her[,] she continued with defiant behavior, refusal to follow rules. She tried to use her diagnosis as a crutch. Sanctions were given in the hopes of altering her negative behaviors, all while she was receiving mental health treatment. The [c]ourt even revisited mental health court as a result of her struggling but she was continually deemed to be more suitable for [D]rug [C]ourt.

She wasn't being truthful. She was twisting situations around, not taking accountability for her actions. She had a tragedy, obviously, that everyone is aware of in April of 2107 while she was incarcerated. Her baby died from being shaken by her father. And I don't know whether

> that actually ever was proven but that was the allegation at the time.
>
> She broke up with him, moved in with another person. She apparently was kicked off the program because she missed the counseling group, allowed her new boyfriend to live with her without permission and he was on state parole, and she missed a psychiatric appointment that caused her to run out of her medication.
>
> She was granted bail. She was given a lot of chances when she was released so she could take care of her children. She was even placed on electronic monitoring. She wasn't making payments on her monitor. Her boyfriend did make a payment. After she was removed from [D]rug [C]ourt[,] treatment recommendations were discussed with her. A plan was put together. She was directed to participate in counseling, certified recovery specialist, meet with her psychiatric doctor for regular appointments, but she hadn't been following through with that. She felt she wasn't obligated to follow it. It was consistent with her past disregard for her recovery. She needed in-patient treatment on April 30th. She wasn't happy with the recommendations and didn't think she had to do it because she wasn't on [D]rug [C]ourt and because she wasn't caught providing a urine—a positive urine sample.
>
> She did go and see West Branch but didn't intend to comply with the in-patient so they stopped seeking a bed for her. She hasn't completed one second of community service even though she had 150 hours. She hasn't made one penny of a payment on her costs and fines in three and-a-half years. She made no effort toward obtaining her GED.
>
> Now, that was back in May of 2018, and more recently the reports indicated that she had indicated she was—at her weekly meetings she indicated she was attending counseling and groups and at the Friendship house with her son, three NA meeting, meetings with her certified recovery specialist and seeing her sponsor. She had indicated she was doing all of that. There was a recommendation as to the in-patient stay. She said that West Branch told her she didn't have to go, rather she could accomplish the same thing by attending all the other services. Apparently that wasn't true. West Branch reaffirmed that the recommendation was for an in-patient bed. [Appellant] became angry when confronted with such and still refused to follow the recommendations. (N.T. ,11/2/18, at 5-11).

On June 21, 2018, the court found that Appellant had violated the conditions of her parole and probation by being removed from the Drug Court Program. At that time, the adult probation office had recommended that she be sentenced to a period of state incarceration. The court wanted to give Appellant another chance so it sent her to SCI-

Muncy for participation in the SIP Program. Appellant could not complete the SIP Program, however, because she received new criminal charges as a result of her conduct while on supervision. Despite all these programs and services, Appellant continued to relapse and commit crimes. Quite simply, additional drug treatment was not an option, as there were no more options available. Nothing worked. Appellant's conduct and refusal to follow treatment recommendations left the court with no choice but to impose a sentence of state incarceration.

Appellant also contends the sentence was unreasonable and excessive because the court did not consider a county sentence rather than a lengthy state sentence. County incarceration also was not successful. Appellant received various short periods of county incarceration as Drug Court sanctions. Her probation was revoked under Information 1920-2015 in December of 2016, and she was sentenced to county incarceration for 100 days to 24 months less one day. She was given credit for time served and paroled. She continued to violate the conditions of her probation and parole supervision. The court could have violated Appellant's county parole but chose not to, so that she would have the opportunity to participate in the SIP Program. Again, despite escalating consequences, nothing worked.

Finally, Appellant contends that the court failed to give weight to the positive things Appellant had done while on probation. The court does not know what Appellant is referring to. Appellant's supervision history was abysmal. N.T., 11/2/18, at 23. If Appellant is referring to her attendance at weekly meetings and meetings with her recovery specialist between May of 2018 and her detention in late June of 2018, the court considered such, but Appellant was still doing what she wanted to do and not following the treatment recommendations of the professionals who were trying to help her. Apparently, Appellant

believes that her attendance at some outpatient counseling and meetings should outweigh her abysmal supervision history and her failure to follow the recommendation from West Branch for inpatient rehabilitation. The court cannot agree. Probationers and parolees must comply with the conditions of their supervision. They do not have the option of picking and choosing the conditions they want to follow. Furthermore, not only did Appellant fail to follow the recommendation for inpatient treatment, she tried to manipulate the situation by lying and saying that West Branch told her she didn't have to attend inpatient because she could accomplish the same thing by attending other outpatient services. When she was confronted with this lie, she became angry and **still** refused to follow the recommendation for inpatient treatment. N.T., 11/2/18, at 10-11.

> 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. 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. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007). The court did not impose Appellant's sentence based on partiality, prejudice, bias or ill-will. The court sentenced Appellant based on her supervision history, its concern for the protection of the public, the need to vindicate the authority of the court, and the fact that there were no programs or services left to address Appellant's rehabilitative needs. N.T., 11/2/18, at 21-26. In light of all the facts and circumstances of this case, the court does not believe it was a manifestly unreasonable decision to impose a sentence of three to seven years' incarceration

in a state correctional institution.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
Trisha Hoover Jasper, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)