NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
JOHN DAVID HEINZMAN,	:	
	:	
Appellant	:	No. 876 EDA 2013

Appeal from the Judgment of Sentence December 11, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division No(s).: CP-46-CR-0000603-2006

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
JOHN DAVID HEINZMAN,	:	
	:	
Appellant	:	No. 877 EDA 2013

Appeal from the Judgment of Sentence December 11, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division No(s).: CP-46-CR-0000607-2006

BEFORE: ALLEN, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 16, 2014**

* Former Justice specially assigned to the Superior Court.

Appellant, John David Heinzman, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas following the revocation of his probation.[1] Appellant contends the trial court imposed an illegal sentence by failing to credit him with time served on the underlying charges. We affirm.

The trial court summarized the procedural posture of this case as follows:

> [O]n August 17, 2006, Appellant entered into a negotiated guilty plea on two trial court files at docket numbers, 607-2006 and 603-2006. At file 607-2006, Appellant pled guilty to burglary and recklessly endangering another person [("REAP")], for which he received a probationary term of 4 years. He was also ordered to pay costs and restitution in the amount of $111,511.11. At file 603-2006, Appellant pled guilty to possession of an instrument of crime [("PIC")], and received a term of 5 years' probation, consecutive to the probation on 607-2006, plus costs. . . .
>
> On August 12, 2008, Appellant was notified of numerous probation violations, including the failure to obtain and maintain employment as directed by the probation office, the failure to make any payments in fines, costs and restitution as directed by the Court and the failure to abstain from the unlawful possession, use or sale of narcotics or other dangerous drugs. Appellant was before this Court and stipulated to his violations. Appellant was resentenced at file 607-2006 to a term of 2 to 23 months' imprisonment, with a concurrent 4-year probationary term, and at file number 603-2006, to a

[1] This case returns to us following remand for direct appeal counsel to file either an advocate's brief on behalf of Appellant or a petition to withdraw from representation and brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967).

concurrent 5-year probationary term. Appellant was again ordered to pay restitution.

Again on September 30, 2011, Appellant was notified of new probation violations, which included an arrest on September 24, 2011, in Whitpain Township for burglary, criminal trespass, theft by unlawful taking, receiving stolen property, criminal mischief and [PIC]. Appellant also violated his probation by failing to pay restitution.

On August 24, 2012, Appellant stipulated to the probation violations. Sentencing was deferred for the preparation of the presentence investigation and report, a PPI evaluation and report and a psychological evaluation and report.

On December 11, 2012, Appellant was sentenced with the benefit of a presentence investigation and report in addition to a report authored by Ralph Kaufman, M.D. At sentencing this Court acknowledged on-the-record that according to these reports Appellant then suffered from polysubstance abuse and generalized anxiety disorder. The reports recommended medication and treatment. This Court went on to summarize Appellant's lengthy criminal history as set forth in the presentence investigation and report. Additionally, this Court set forth his social, work and educational history. Further, this Court reviewed the Wisconsin Risk Assessment that assessed Appellant's needs score at 29, whereas a risk score of 23 suggests maximum supervision.

Prior to the imposition of the sentence, this Court noted that the conduct for which Appellant was before the Court for sentencing that day, i.e. violation of his probation due to his arrest on new burglary and related offenses, was the same kind of conduct that had generated most of Appellant's significant prison sentences over time. Appellant's violation with the new offenses, which were very serious offenses and of the same type, required a prison sentence.

Appellant was resentenced at file 607-2006, on the burglary conviction to a term of 5 to 10 years' imprisonment and at file 603-2006, on the [PIC] Appellant

> was sentenced to a term of 2 $^{1}/_{2}$ to 5 years' imprisonment, consecutive to the burglary.
>
> A timely direct appeal was not filed; rather, on March 12, 2013, by agreement, Appellant was permitted to file an appeal *nunc pro tunc* and Appellant was provided with 30 days from the date of the order to do so.[2] This timely *nunc pro tunc* appeal followed.

Trial Ct. Op., 4/25/13, at 1-4 (citations to the record omitted). Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issue for our review: "Did the trial court impose an illegal sentence upon Appellant by failing to credit Appellant's sentence with all of the time Appellant had spent confined on the underlying charges?" Appellant's Brief at 4. Appellant "contends that he was not given credit for time that he spent confined on a probation violation detainer prior to having his probation revoked on 25 September 2008 and while prior to his initial negotiated guilty plea and sentencing on these charges on 17 August 2006." ***Id.*** at 13. He avers that he did not receive credit towards the two and a half to five year sentence imposed on December 11, 2012 for PIC. ***Id.*** at 15-16. Appellant also claims that he did not receive credit towards the five to 10 year sentence for burglary. ***Id.*** at 16. He contends that he was confined from November 4, 2005 until April 13, 2006, the date when he posted bail on the burglary and PIC charges.

[2] On March 15,2013, appellate counsel entered his appearance.

Id. at 16. Appellant argues that he is entitled to a credit of 160 days on either his five to ten year sentence for burglary or towards his consecutive two and one-half to five year sentence for PIC. ***Id.***

> Our standard of review is well settled. Sentencing is a matter vested within the discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. An abuse of discretion requires the trial court to have acted with manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. It is also now accepted that in an appeal following the revocation of probation, it is within our scope of review to consider challenges to both the legality of the final sentence and the discretionary aspects of an appellant's sentence.

Commonwealth v. Crump, 995 A.2d 1280, 1282 (Pa. Super. 2010) (citations omitted). "An attack upon the court's failure to give credit for time served is an attack upon the legality of the sentence and cannot be waived." ***Commonwealth v. Davis***, 852 A.2d 392, 399 (Pa. Super. 2004).

> Issues relating to the legality of a sentence are questions of law.
>
> > [T]herefore, our task is to determine whether the trial court erred as a matter of law and, in doing so, our scope of review is plenary. Additionally, the trial court's application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law.

Commonwealth v. Lewis, 885 A.2d 51, 55 (Pa. Super. 2005) (citations omitted).

The legislature has codified pre-sentence confinement credit as follows:

> After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.
>
> (2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.
>
> (3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based.
>
> (4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge that has not been credited against another sentence.

42 Pa.C.S. § 9760.

> The decided cases have held generally that a defendant shall be given credit for any days spent in custody prior to

> the imposition of sentence, but only if such commitment is on the offense for which sentence is imposed. Credit is not given, however, for a commitment by reason of a separate and distinct offense.

Commonwealth v. Miller, 655 A.2d 1000, 1002 (Pa. Super. 1995) (quotation marks and citations omitted); ***see also Commonwealth v. Johnson***, 967 A.2d 1001 (Pa. Super. 2009) (stating right to credit for time served prior to trial or sentence is statutory).

In support of his contention that he is entitled to credit for time served, Appellant refers to the dockets for CP-46-CR-0000603-2006 and CP-46-CR-0000607-2006. Appellant's Brief at 13.[3]

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[3] We note that Appellant states that on August 26, 2006, at Docket Number CP-15-CR-0005796-2005, he pled guilty to possession of a controlled substance in Chester County. ***Id.*** at 14. At the sentencing hearing, the court referred to Appellant's criminal history. The Court stated:

> There is a criminal history starting with terroristic threats in Lancaster County, Pennsylvania. He was placed on a five-year probation and a one-year probation on harassment.
>
> Then we have the Towamencin burglary and recklessly endangering another person. He was initially placed on probation on the offenses. Later he violated probation and received a prison sentence on the [REAP] and a new probation on the burglary. That's one of the cases for which he'll be sentenced today.
>
> Another guilty plea from Towamencin, [PIC], placed on probation for five years there.
>
> Out of Downingtown, Chester County, he had a burglary, pled guilty, served 90 days, consecutive probation, in and out of Chester County.

Instantly, the docket indicates that bail was set on November 7, 2005 and posted on April 13, 2006. Appellant offers no corroboration of this claim with citation to the record. Pa.R.A.P. 2119 provides:

> If reference is made to the pleadings, evidence, charge, opinion or order, or any other matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appears (see Rule 2132) (references in briefs to the record).

Pa.R.A.P. 2119(c).

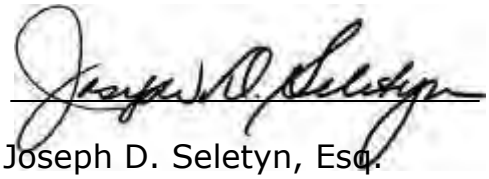
Appellant's reliance on the docket at CP-46-CR-0000607-2006 as evidence of his entitlement to credit for time served is unavailing. We find these docket entries insufficient to establish Appellant was incarcerated pursuant to the underlying charges in the instant case. ***See*** 42 Pa.C.S. § 9760; ***Miller***, 655 A.2d at 1002. We conclude the sentencing court did not err as a matter of law. ***See Lewis***, 885 A.2d at 55.

Judgment of sentence affirmed.

> In 2008, a burglary, eleven and a half to twenty-three with a one year consecutive probation.
>
> He has a burglary warrant pending from Wilmington, Delaware and he has a new file pending, which is a series of burglaries.

N.T. Sentencing Hr'g, 12/11/12, at 4-5 (unpaginated).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/16/2014