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**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION**

OFFICE OF JUDICIAL RECORDS
CRIMINAL DIVISION
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

COMMONWEALTH

:

CP-51-CR-00011614-2007

vs.

CP-51-CR-0011614-2007 Comm. v. Williams, Robert
Opinion



8089015951

ROBERT WILLIAMS

:

**SUPERIOR COURT
133 EDM 2017**

OPINION

BRINKLEY, J.

MARCH 29, 2018

Defendant Robert Williams appeared before this Court for a violation of probation hearing. This Court found him to be in technical violation of his probation for the fifth time and, as a result, revoked his probation and sentenced him to a term of 2 to 4 years state incarceration. Following Defendant's sentencing, he filed several motions for recusal which raised various untimely and unmeritorious claims of impropriety in an attempt to unfairly judge shop. Defendant appealed his judgment of sentence and raised the following issues on appeal: (1) whether this Court improperly failed to recuse herself from this matter and "erred in failing at any time to act upon any of defendant's motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018; (2) whether Defendant received proper notice of the alleged probation violations prior to the violation of probation hearing; (3) whether the evidence was sufficient to find Defendant in technical violation of his probation; (4) whether the sentence

imposed was manifestly excessive and whether this Court properly sentenced Defendant to a term of total confinement; and (5) whether the Court stated sufficient reasons on the record for the sentence imposed. This Court's judgment of sentence should be affirmed.

PROCEDURAL HISTORY AND FACTS

On or about January 23, 2007, Defendant was observed by undercover officers P.O. Sonia Jones and P.O. Reginald Graham selling crack cocaine to a confidential informant at the corner of 22nd and Jackson Streets in the city of Philadelphia, after which Defendant rode away on a dirt bike and entered a residence at 2204 South Hemberger Street. He had been observed earlier that day entering the residence with a key. After obtaining a search warrant for the residence, undercover officers returned to the residence the next day.

On January 24, 2007, after observing another drug sale to a confidential informant by a co-defendant, numerous backup officers were called to the scene. Upon arrival, Defendant, who was seen exiting the front of the location, produced a gun, hid behind a car, and pointed the gun at officers. After police repeatedly shouted, "Police, drop the gun," Defendant took off running, holding his waistband with police chasing him. He was caught crouching between two cars, handcuffed, and arrested. From between the cars, police recovered a loaded gun. (N.T. 8/19/2008, p. 44-51).

Upon execution of the search warrant, police recovered illegal drugs throughout the residence. In a second floor rear bedroom, in which numerous photographs of Defendant were found, police recovered 13 red packets and 13 clear jars with purple tops of marijuana, 128 grams of marijuana in a clear Ziploc baggy and \$6,808.00 in US currency. From the dining room table, police recovered 6 grams of marijuana and a black gun holster. From the basement, police recovered 11 grams of crack cocaine in one clear baggy and a black bag that contained 213

grams of marijuana, as well as a variety of drug paraphernalia, including plates, razor blades covered in a white powdery residue, new and unused clear plastic packets, clear jars with purple tops, and a box of Remington .40 caliber bullets. The gun, which was recovered from Defendant's hiding spot between two cars when he was chased by police officers, was a 9mm Luger semi-automatic, loaded with 8 live rounds, with an obliterated serial number. This firearm was test-fired and found to be operable. From Defendant's person, police recovered \$45 US currency and a clear packet containing 21 clear packets of marijuana. Id.

At trial on August 19, 2008, based upon evidence in the record and Defendant's own testimony to being in possession of a loaded weapon and carrying it concealed upon his person without a license, Defendant was found guilty of possession with intent to deliver a controlled substance (PWID); two violations of the Uniform Firearms Act (VUFA): Carrying a Firearm Without a License § 6106, and Carrying a Firearm in a Public Place in Philadelphia, § 6108; possession of an instrument of crime; possession of a loaded weapon; knowing and intentional possession of a controlled substance, and simple assault. Id. at 80, 118, 122-123. Sentencing was deferred until January 16, 2009, at which time he was sentenced to an aggregate sentence of 11 ½ to 23 months county incarceration plus 10 years reporting probation.¹ Defendant was ordered to receive drug treatment while in jail, and upon release, earn his GED, seek and maintain employment, and pay mandatory court costs and fees. (N.T. 1/16/2009, p. 93-95). After serving only six months of his sentence, Defendant was paroled to house arrest. Upon completion of six months on house arrest, Defendant continued on parole and probation. On January 13, 2011, Defendant tested positive for opiate use; however, Defendant was allowed to continue on probation/parole. (N.T. 2/11/2011, p. 5-7). On November 30, 2011, Defendant tested positive

¹ Even though Defendant was arrested while in possession of drugs and was seen tossing a gun, and was subject to then existing drug/gun state mandatory sentencing laws, he was sentenced to only a county sentence.

again for opiate use. He was found to be in technical violation on December 9, 2011. Once again, Defendant was permitted to continue on probation/parole. (N.T. 12/9/2011, p. 3-16).

Subsequently, Defendant was stopped in Philadelphia on October 31, 2012 while operating a Range Rover with illegally tinted windows. Upon exiting their vehicle, police smelled a strong odor of marijuana emanating from the vehicle. One passenger admitted to carrying a weapon and was later found to be an off duty police officer from Florida with a Florida license to carry a weapon. Police obtained a search warrant after K-9 police dogs were called to the scene and alerted to the exterior of the vehicle. Upon search, no contraband was located and a written warning was issued for the dark tinted windows. This stop later became the subject of a Federal lawsuit in which Defendant claimed mistreatment by the Philadelphia Police Department. This lawsuit resulted in a defense verdict. (See Police Report 10/31/2012).

On March 15, 2013, Defendant was found in technical violation for the second time for traveling outside Philadelphia County without permission. Defendant was allowed to continue on probation. (N.T. 3/15/2013). On July 11, 2014, Defendant was found in technical violation for the third time for failing to report to his probation officer, making unauthorized travel plans, and ignoring this Court's orders. Defendant was sentenced to an aggregate term of 3 to 6 months county incarceration plus 5 years reporting probation. (N.T. 7/11/2014, p. 159-195). Defendant was granted parole on December 1, 2014. On December 10, 2015, Defendant was found to be in technical violation for the fourth time for providing a sample of cold water instead of actual urine for drug screen, traveling without permission, failing to comply with his travel schedule and the rules relating to his travel vouchers, and failing to report as scheduled to his probation officer. Defendant's probation was revoked and he was sentenced to 6 to 12 months county incarceration

plus 6 years reporting probation, with immediate parole to house arrest. (See Court's Opinion 9/19/2016).

Subsequently, on March 15, 2017, Defendant was arrested in the St. Louis, Missouri Lambert International Airport and charged with assault. It was admitted by Defendant, defense counsel, and Probation Officer Subbio that Defendant was not involved in any altercation until he exited a vehicle in which he was riding from outside the terminal. He then ran inside the terminal and began to stomp on a person who was already on the ground. The charges were later reduced to summary offenses. (N.T. 11/6/2017, VOP Part I, p. 26-28, 60-62, 69, VOP Part II, p. 42). Defendant entered into a negotiated resolution under which he would perform community service.

Thereafter, Defendant was arrested again on or about August 16, 2017 and originally charged with felony reckless endangerment (of the first degree), arising from engaging in riding an all-terrain vehicle (ATV) in the middle of traffic while in New York City, creating a dangerous situation for the citizens of New York. Eventually, those charges were reduced to misdemeanor reckless endangerment (of the second degree). Defendant entered into a negotiated resolution under which he would perform community service. (N.T. 11/6/2017, VOP Part II p. 47-51).

Following Defendant's arrest in St. Louis in March 2017, Assistant District Attorney, Marian Braccia, requested that this Court schedule a violation of probation hearing. This Court declined to do so at that time and instead postponed scheduling a hearing until the matter in St. Louis was resolved. As outlined above, Defendant thereafter incurred a second arrest in New York City in August 2017, for which Defendant entered into a negotiated arrangement ultimately resolving the matter in April 2018.

On November 6, 2017, Defendant appeared before this Court for a violation of probation hearing. Recently assigned Assistant District Attorney, Jennifer Hoffman, appeared on behalf of the Commonwealth for the first time with respect to this matter. Defendant was represented by his newest and most recently retained counsel Brian McMonagle, Esquire. First, this Court reviewed Defendant's criminal history dating back to 2007 and his behavior while serving probation.

Next, Kathleen Subbio, Deputy Chief Montgomery County adult probation officer, testified. She stated that she began supervising Defendant on January 8, 2017, after he completed the house arrest portion of his sentence. She testified that she never received any information regarding Defendant's four (4) prior violations of probation. (N.T. 11/6/2017, VOP Part I, p. 15, 29-30). She testified that on January 9, 2017, she and Josh Mangle, Montgomery County probation supervisor, conducted a scheduled visit to Defendant at his home. Upon entering his living room she observed a packet of "Fast Flush" capsules on the sofa table. Supervisor Mangle proceeded to secure a urine sample. (N.T. 11/6/2017, VOP Part I, p. 47-48). It tested positive for oxycodone. Defendant reported to the probation office later that day and met with Subbio, Mangle, and Mike Gordon, the chief probation officer, at which time he admitted to ingesting Percocet. Subbio testified that Defendant originally agreed to enter inpatient drug treatment, but then decided to do in-home detoxification with a recovery coach in Atlanta. Subbio stated that Defendant told her the recovery coach was too expensive, so they agreed to have him return to Montgomery County and receive outpatient drug treatment, which he did. Subbio testified that Defendant did not test positive for any drugs after he entered treatment. She stated that, in her opinion, while there had been "certainly, a few hiccups, I guess, to say the least," Defendant was "meeting expectations." (N.T. 11/6/2017, VOP Part I, p. 14-18).

Probation supervisor Josh Mangle testified next. He stated that he supervised the house arrest portion of Defendant's sentence after the matter was transferred to Montgomery County in February 2016. Mangle supervised Defendant from February 28, 2016 until January 8, 2017. Mangle stated that he visited Defendant at his home approximately every 10 days and tested his urine for illegal substances. He testified that on March 4 and March 8, 2016, Defendant made unauthorized stops to and from community service. Mangle testified that he visited Defendant's home on January 9, 2017 and that he collected the urine sample that tested positive for oxycodone. He stated that at first Defendant denied any drug use, but then admitted that he was using Percocet and that he had been hiding an ongoing drug problem for years. *Id.* at 44-54.

Michael Brinkley, a representative of Defendant's management company ROC Nation, and no relationship to this Court, testified next. He stated he had been working with Defendant since early August 2017. The Court inquired why a performance originally scheduled at Syracuse University on September 24, 2017 was rescheduled for November 4, 2017 because both dates were well-after the August 17, 2017 order prohibiting travel or performances until further order of the Court. He stated he believed Defendant was free to schedule performances once the cases in St. Louis and New York were resolved and did not consider the meaning of the Court's order prohibiting travel and performances "until further order of the Court." Mr. Brinkley acknowledged that Defendant's management continued to promote performances through the date of this hearing. *Id.* at 93.

Next, the parties stipulated to the testimony of Clinton Saunders. Mr. Saunders was employed by MIH Enterprises as Defendant's booking agent. They stipulated that he would testify that "no scheduling of new shows was done after the Court's second order, which was in September." (N.T. 11/6/2017, VOP Part II, p. 4). The Court asked the parties to clarify which

order this referenced. The parties were unable to determine a date or produce a copy of that order. To clarify the stipulation, Clinton Saunders subsequently testified that he remembered making contracts in July with the schools where Defendant was scheduled to perform in September. However, the agreements were verbal so there were no email or written documents that could confirm the dates. He testified that it was his practice to call schools two weeks prior to a scheduled performance to let the school know “there’s a chance that [Defendant] might not be allowed to perform there” and offer to replace Defendant with another performer. He stated, “My communication was exactly what you said in the e-mail, that he cannot perform until after the cases in St. Louis and the New York case, which was October 12th.” *Id.* at 17. The Court reminded the witness that the order said “until further order of the Court.”

The Court then heard the argument of defense counsel. He argued that Defendant had been battling drug addiction and was spending large sums of money to combat his issue. He argued that with respect to the altercation at St. Louis International Airport, Defendant was merely jumping into a fight to protect a friend who was being “sucker punched.”

Defense counsel also argued that Defendant’s decision not to go to Greece and then not to inform this Court or the probation department was not out of “disrespect”, but rather was because he “could not pull it off.” He further argued that Defendant did not intend to perform while he was in Philadelphia instead of Greece, but a friend invited him to perform at a party and he obliged. Defense counsel noted that Defendant did not attend the approximately 15 performances that were scheduled in this time and argued that the goal for Defendant, after cutting his latest album, was to go to work and perform. The Court noted, “But if you can’t go, you can’t schedule it like you are going to go and tell members of the general public, in those

locations, that you are coming and then tell them, after they have bought their tickets, that they are not coming.” Id. at 89.

Defense counsel further argued that when Defendant was in New York riding the motorbike and doing wheelies, it was only because of his celebrity status that he was arrested and charged with a felony. Defense counsel argued that once the authorities in New York took a closer look at the facts, they agreed to put Defendant into a diversionary program. He argued that Defendant never intended to disrespect the Court, but that it was difficult to build a career as a performer while on probation. Id. at 64-65, 100.

Defendant was found in technical violation of this Court’s order for reasons including testing positive for drugs after this Court extended numerous opportunities for treatment, traveling and scheduling travel in violation of this Court’s order, staying in Philadelphia when he was supposed to go to Greece and not advising anyone of his proposed change in schedule, using Fast Flush to wash his urine, scheduling drug detoxification in Atlanta without first properly notifying the Court, and engaging in activity in St. Louis and New York which endangered the safety of citizens in those jurisdictions and which indicated that Defendant was no longer suitable for probation. The Court expressed a recognized pattern of Defendant going to public events and taking the stage to perform, which occurred at both the party at the Crystal Tea Room and at the Made In America concert, which events were not listed on his travel schedule. The Court described it “as a constant problem” that has been going on for years. Defense counsel argued there are a lot of people Defendant has to notify before performing and added, “I just think of the things that we deal with every day, [this is one] of the things that we shouldn’t be, I don’t know, losing sleep over.” Id. at 73. The Court stated that Defendant was required to notify the probation department and the District Attorney at least 72-hours ahead of a

performance because serious safety issues arose in the past from an unscheduled performance and police inability to handle crowd control. The Court then proceeded to sentencing.

At sentencing, Michael Rubin, the founder and CEO of Fanatics, Rue La La, and ShopRunner as well as a co-owner of the Philadelphia 76ers, testified on behalf of Defendant. He testified that he asked to be called to speak on behalf of Defendant. He stated that he met Defendant about four years prior at a basketball game and they became friends. He stated that he believed Defendant had a lot of potential and could make a big difference in the world. He described Defendant as kind to fans and “just so nice to everybody.” *Id.* at 22-26.

Defense counsel introduced letters from Shawn Carter (p/k/a Jay-Z) and Michael Rubin, on behalf of Defendant which both stated, in different ways, that the Court had as much to do with Defendant’s opportunity to build his future as anybody. Defense counsel argued that Defendant rescheduled cancelled performances in an attempt to comply with the Court’s orders and protect Defendant’s reputation and that this was done in the hope that Defendant would be able to meet the future obligations. *Id.* at 92, 100.

Defense counsel, who had been involved in the case for a week, recommended continuing probation in order to give Defendant a chance to continue to try to grow his career and improve as a person. He emphasized that Defendant must rely on people working for him in order to grow his career and then acknowledged, “[b]ut the ultimate result of what happened here is that they haven’t been as good as they should be.” *Id.* at 32.

The Commonwealth then acknowledged that Defendant was in technical violation and was not perfect. However she stated that, from what she was able to read that day and the testimony provided at the hearing, Defendant had grown since his initial arrest. She also stated that she believed the testimony that all representatives of Defendant misunderstood the Court’s

orders by overlooking the meaning of “until further order of the Court.” *Id.* at 27-28. Having been assigned to the case for a couple of days, she recommended that probation be continued.

Next, Defendant spoke on his own behalf. He admitted that he was a gun carrying drug dealer. (N.T. 11/6/2017, VOP Part II, p. 46). He admitted to committing crimes stating, “I came to this courtroom as a criminal. I was carrying guns, I was selling weed. I was being a criminal...I came here the minute [*sic*] [admitted] that I had a gun without even pleading [guilty].” *Id.* He further stated, “When I was in a life of crime, I used to -- when I was arrested by you, I could sit on something when I was in prison and knew that, like, I committed a crime. Even when two officers came in here and said that I pointed a firearm at them, your judgment was, you found me guilty of pointing a firearm at these two officers, which you should.” (N.T. 11/6/2017, VOP Part II, p. 58). He stated he is no longer involved in criminal activity, specifically averring that, “I turned away from a life of crime. And when I came in here, I was committing crimes, to sit in jail and keep my sanity knowing that I committed a crime and I had intentions to commit a crime.” (N.T. 11/6/2017, VOP Part II, p. 68). Defendant stated that he was addicted to Percocet for years. He stated the embarrassment made it difficult to try to get treatment while hiding it from the public and that detoxifying was the hardest battle of his life. He stated that he stopped rapping about Percocet and now uses his time to tell kids not to take the drug. He stated that in St. Louis, he jumped out of the car and ran back into the airport to try to protect a friend who was like a little brother to him. Defendant stated he tried to ignore the men who were insulting him for not taking a picture with them, but “my instincts kicked in” when he saw his friend getting hit. Growing up, he stated “I had to get aggressive.” “I got to protect myself... I got to get involved in activities that I don’t want to be in. I got to talk a certain

way, be a certain way around criminal activity I wouldn't be around if I wasn't in this position.”
Id. at 45-46.

Defendant also admitted to having a long history of illegally riding ATV bikes, “From state to state, when you let me go on tour, I always had bikes on the back of my tour bus. I rode state to state. The most thing we ever got is a ticket.” (N.T. 11/6/2017, VOP part II, p. 50). Defendant stated that he quit riding bikes after the arrest in New York. Defendant explained that he loved riding bikes because it was a safe place for black boys and men to put their differences aside and come together. He stated that he went into rough neighborhoods while riding bikes where other celebrities would not go. “My whole image is dream chasing. I’m based off of coming in contact with people. If I don’t come in contact with people, my music wouldn’t even resonate the way it resonates.” Id. at 49. He stated he popped a wheelie on a bike after a charity event and was arrested a few days later. He stated he took a deal to reduce the charge from an F1 felony by taking a driving class online.

Defendant asked the Court for leniency. Defendant stated he did not see most of the e-mails sent between the Court, his attorneys, and the District Attorney’s Office. He acknowledged, “I may have been wrong for even letting [the booking agent] attempt to try to rebook anything, but we’re just trying to survive.” Id. at 54. He stated he has worked hard to succeed in his career because a lot of people depend on him and the odds were against him from the beginning. He stated it is hard for him as a celebrity to get a regular job because he has to worry about protecting his life. He asked the Court not to take away his ladder to success because he was working hard. “I feel like you showed no [*sic*] favor towards me, I feel like you took a chance with me, and you put some type of dedication into seeing me win, as you probably did with [other defendants].” Id. at 62. Defendant said performing at Made In America was a

once-in-a-lifetime opportunity. When Jay-Z asked him to perform in Philadelphia, he jumped at the opportunity. He also described pressure to sing at a charitable event at the Crystal Tea Room hosted by Dion Waiters because the crowd cheered and his latest album had just come out, even though he had told the Court that he was travelling to Greece on a private airplane.

Defendant next described his charity work by describing the Court-mandated charity with veterans' groups as impactful. He stated that he also gave meals to the homeless. The Court reminded Defendant that she once toured his community service location at Broad Street Ministries and a supervisor told her that Defendant chose to sort clothing rather than serve food to the homeless, and that Defendant only served meals after he realized Judge Brinkley was there taking a tour. Defendant also described a different event where he walked around downtown Philadelphia passing out meals. "I put my life on the line, walking around in the streets knowing that a random person could approach me. I walked into some of these homeless people who got knives on them and they talking to us disrespectful, only taking... food." *Id.* at 72-73.

After listening to the testimony and considering the facts of record, the Court sentenced Defendant to 2 to 4 years incarceration. The Court stated that this sentence is absolutely necessary to vindicate the authority of the Court. "The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court." *Id.* at 74. The Court stated she appreciated the work both attorneys did for this hearing because both defense counsel and attorney for the Commonwealth came on to this case within the last week. She noted, however, that defense counsel's argument that Defendant was turning the corner was the exact same argument that prior defense counsel made at the last hearing in February 2016. *Id.* at 75-76.

On November 14, 2017, Defendant filed a Motion for Recusal. On November 15, 2017, Defendant filed a Motion to Modify Sentence. On November 16, 2017, Defendant filed a Motion for Bail pending post-trial motions stating that no hearing was required.² On November 27, 2017, Defendant filed an Emergency Petition for an Original Writ of Habeas Corpus with the Superior Court. On November 28, 2017, the Superior Court denied Defendant's Emergency Habeas Corpus Petition because his Motion for Bail was still pending and directed this Court to enter a disposition of Defendant's Motion for Bail.

Four days later, on December 1, 2017, this Court issued an Order and Opinion denying Defendant's Motion for Bail. On December 6, 2017, Defendant filed a Notice of Appeal with the Superior Court which included a request for the notes of testimony from the *in camera* portion of the February 6, 2016 sentencing hearing. On January 26, 2018, upon notes of testimony being transcribed and posted to the Court Reporting System, including the formerly sealed notes from the *in camera* portion of the hearing, this Court ordered that Defendant file a Concise Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b). Defendant, through counsel, did so on February 16, 2018.

ISSUES

- I. WHETHER THIS COURT IMPROPERLY FAILED TO RECUSE HERSELF FROM THIS MATTER AND "ERRED IN FAILING AT ANY TIME TO ACT UPON ANY OF DEFENDANT'S MOTIONS FOR RECUSAL, FILED NOVEMBER 14, 2017, DECEMBER 4, 2017, AND FEBRUARY 12, 2018.**
- II. WHETHER DEFENDANT RECEIVED PROPER NOTICE OF THE ALLEGED PROBATION VIOLATIONS PRIOR TO THE VIOLATION OF PROBATION HEARING.**

²On November 17, 2017, a bail hearing was listed in error for November 27, 2017, but was immediately cancelled as a result of the clerical error. Defendant never requested a hearing, to the contrary, he stated that a hearing was not necessary. See Defendant's Motion for Bail, 11/16/2017, p. 8; Defendant's Emergency Petition for an Original Writ of Habeas Corpus, 11/27/2017, p. 14.

- III. WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND DEFENDANT IN TECHNICAL VIOLATION OF HIS PROBATION.**
- IV. WHETHER THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE AND WHETHER THIS COURT PROPERLY SENTENCED DEFENDANT TO A TERM OF TOTAL CONFINEMENT.**
- V. WHETHER THE COURT STATED SUFFICIENT REASONS ON THE RECORD FOR THE SENTENCE IMPOSED.**

DISCUSSION

- I. THIS COURT COMMITTED NO ERROR WHEN IT DID NOT ACT UPON DEFENDANT'S MOTIONS FOR RECUSAL.**

Defendant claims that this Court should have recused herself from presiding over this matter and “erred in failing at any time to act upon any of the defendant’s motions for recusal, filed November 14, 2017, December 4, 2017, and February 12, 2018.” (Defendant’s Statement of Matters Complained of on Appeal, 2/16/2018). This Court committed no error and no relief is due. The motions for recusal were untimely and all issues contained therein were waived. Moreover, this Court lacked jurisdiction to consider said motions for recusal as Defendant filed a Notice of Appeal on December 6, 2017 and the Superior Court assumed jurisdiction on that date. Last, even if these motions could be deemed timely and this Court had proper jurisdiction to decide these motions, there was no basis for this Court’s recusal.

- a. After Defendant filed his Notice of Appeal, this Court lacked jurisdiction to rule on Defendant’s Motions for Recusal.**

First, this Court did not err by failing to act upon the defendant’s motions for recusal. Pursuant to Pa.R.Crim.P. Rule 720(B)(3)(a), the Court shall rule on a post-sentence motion within 120 days of the filing of the motion. If a decision is not made within 120 days, the motion will be considered denied by operation of law. However, pursuant to Pa. R. Crim. P. 708, this rule does not apply to a post-sentence motion following a violation of probation sentence. The

Court has jurisdiction to decide the motion only within 30 days from the date of sentence.

Commonwealth v. Swope, 123 A.3d 333, 337 n. 16 (Pa. Super. 2015). Defendant was sentenced on November 6, 2017. Defendant filed his first motion for recusal on November 14, 2017. The deadline for making a decision on this motion was therefore December 6, 2017. The second motion for recusal was filed December 4, 2017; this Court had until December 6, 2017 to rule, at which point the court's jurisdiction was extinguished. Likewise, under Pa.R.A.P. 1701, this Court's jurisdiction ended when the Defendant's appeal was filed and thus, this Court was no longer able to proceed further on those matters. See also Commonwealth v. Ledoux, 768 A.2d 1124 (Pa.Super.2001) (citing Commonwealth v. Miller, 715 A.2d 1203, 1205 (Pa.Super. 1998)) ("Jurisdiction is vested in the Superior Court upon the filing of a timely notice of appeal"). Thus, once Defendant filed his Notice of Appeal on December 6, 2017, this Court no longer had jurisdiction in this matter and was unable to rule on any of the motions for recusal in connection with Defendant's direct appeal of his violation sentence.³

b. Defendant's Motions for Recusal were untimely.

Even if this Court retained jurisdiction to rule on these motions, no relief is due as the motions for recusal were untimely filed since all facts which formed bases for Defendant's motions were known to Defendant prior to the violation of probation hearing. "The case law in this Commonwealth is clear and of long standing; it requires a party seeking recusal or disqualification to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred." Lomas v. Kravitz, 170 A.3d 380 (Pa. 2017) (quoting

³ To the extent that Defendant's Supplemental Motion for Recusal filed on February 12, 2018 might be considered timely and not barred by the assumption of jurisdiction of the Superior Court, it requests that this Court recuse from filing a 1925(a) Opinion as if the court had resigned from the bench, become disabled, retired, or otherwise become unavailable, and a different jurist should prepare this Court's Opinion in this case. This suggested posture lacks any basis in caselaw or reality. If, however, the Superior Court determines that a separate decision on Defendant's third "Supplemental" Motion for Recusal should be entered, the Court will enter an Order. However, Defendant's recusal issues are addressed in this Opinion.

Goodheart v. Casey, 565 A.2d 757, 763 (Pa. 1989) (citing Reilly by Reilly v. SEPTA, 489 A.2d 1291 (Pa. 1985)). The earliest possible moment is “when the party knows of the facts that form the basis for a motion to recuse.” Id. at 390. “Where the asserted impediment [to a jurist deciding a case] is known to the party, and that party fails to promptly direct the attention of the jurist to that fact, the objection is waived and the party may not subsequently offer the objection as a basis for invalidating the judgment.” Id. (quoting Goodheart, 565 A.2d at 764). If a party fails to raise an objection when the facts were already known, the “jurist, under such circumstances, may properly assume that the lack of objection by the litigants reflects the appropriateness of his or her participation.” Id. Allowing a motion for recusal to remain timely post-verdict would create a loophole wherein a defendant with an unfavorable result could seek to have the judge disqualified, thus creating an unfair judge shopping opportunity. Goodheart, 565 A.2d at 763.

In the case at bar, Defendant’s motions for recusal were untimely and therefore all issues were waived. The record reflects that Defendant filed his first motion for recusal on November 14, 2017. This was 8 days after this Court conducted a violation of probation hearing, found Defendant in technical violation, and sentenced him to 2 to 4 years state incarceration. In his motion, Defendant argued that this Court should recuse itself “from considering and ruling on [a timely motion under Pa.R.Crim.P. 708E for reconsideration and modification of his sentence] and from any further adjudicatory role in this case.” (Defendant’s Motion for Recusal of the Hon. Genece E. Brinkley, J., 11/14/2017). In support of his motion to recuse, Defendant claimed that this Court “personally revis[ed] and greatly expand[ed] the assigned Probation Officer’s summary report;” “personally visited the community service site where [Defendant] was assigned to serve the homeless;” “directed the parties and the Probation Office to include former Assistant District Attorney DeSantis, who handled prior violation hearings, as a recipient of

notices and communications concerning [Defendant];” “repeatedly offered inappropriate personal and professional advice to the defendant,” including suggesting that he “break his contract with his present professional management;” “invited the defendant and his then-girlfriend (Onika Maraj, p/k/a Nicki Minaj, also a prominent musical performer) into chambers” at the conclusion of the February 5, 2016 hearing; “relied on her (understandably imperfect) personal memory when determining whether Defendant was in compliance with the terms and conditions of his probation; and allegedly made improper remarks at several of Defendant’s violation of probation hearings by “repeatedly react[ing] and express[ing] herself in personal, injudicious terms” dating back to proceedings that took place in 2012. *Id.* First, there is no evidence in the record for many of these alleged bases for recusal. Second, if any evidence possibly exists, it was known to Defendant prior to his November 6, 2017 violation of probation hearing. Third, if Defendant believed that this conduct rendered this Court unable to impartially adjudicate his case, he should have filed a motion for recusal long before November 14, 2017. Indeed, none of these alleged actions were new, as Defendant cited to remarks this Court made on the record as far back as 2012. Rather, Defendant waited to file a motion for recusal until after his November 6, 2017 violation of probation hearing after he had an unfavorable result, and then filed his motions for recusal in an attempt to unfairly “judge shop.”

In his motion for recusal filed December 4, 2017, Defendant claimed an alleged FBI investigation as an “additional supporting factor supporting recusal.” He claimed that he is aware of when this Court learned of the investigation after the November 6, 2017 hearing and that this “raises further doubt as to her ability to preside impartially.” To the contrary, there is no evidence to support any of these claims. There is zero evidence that there was ever any FBI investigation. This Court was never directly informed of any past or ongoing investigation by the

FBI. This entirely self-serving and baseless allegation apparently was fabricated either by Defendant himself and/or others on his behalf and cannot be considered “new information” which could possibly form a timely basis for recusal as there is no evidence of any basis in fact or reality.

Furthermore, Defendant argued that he filed his motions for recusal at the earliest possible moment, claiming that none of his allegations of improper conduct would have been sufficient prior to the November 6, 2017 hearing because it was only at that hearing that this Court allegedly conducted an “adversarial” examination of Probation Officer Subbio. To the contrary, this Court’s examination of Subbio was not adversarial and the record reflects that Defendant never objected to any of this Court’s questioning of Subbio during the violation hearing. There is nothing from the record that indicates that this Court asking a witness questions during a hearing, which this Court is permitted to do, makes the hearing adversarial and thus would warrant this Court’s recusal.

Defendant further claims that this Court cited her visit to Defendant’s community service locale as a basis for his technical violation and that this, too, was “new” information that tipped the scales in favor of recusal. This claim is also without merit. First, Defendant already was aware of this Court’s tour of the community service site prior to the violation hearing since he saw her there himself. Second, the record clearly shows that this Court did not state that Defendant’s conduct at that particular community service location was a reason for finding him in technical violation. Indeed, Defendant was given full credit for the hours he spent in service at this organization. While this Court did discuss Defendant’s conduct at the homeless location in response to Defendant’s remarks regarding his community outreach efforts, it was not listed as a reason for revocation. Rather, this Court specifically stated that the reasons she found Defendant

in technical violation were contained, in part, in Probation Officer Subbio's summary letter, including "testing positive for drugs after this Court has extended numerous opportunities for treatment;" "traveling and scheduling travel in violation of this Court's order," including "staying in Philadelphia when he's supposed to be in Greece and not telling anybody;" "the use of the Fast Flush product to wash the urine," which was an ongoing issue since Defendant had previously given the Probation Department a sample of cold water instead of urine; picking up "two new cases...one in St. Louis, one in New York. Those are not direct violations, but the activity engaged in results in what I believe to be conduct which may mean he's not suitable for probation status anymore." (N.T. 11/6/2017, VOP Part II, p. 18-20). Based upon the foregoing, Defendant's motions for recusal were untimely.

c. Defendant's Motions for Recusal were without merit.

Last, even if the motions for recusal were timely and this Court had jurisdiction to act upon them, no relief is due as this Court has not engaged in any conduct that would require recusal. The standard of review for a denial of recusal is well settled. The Pennsylvania Supreme Court "presumes judges of this Commonwealth are 'honest, fair and competent,' and when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice." Commonwealth v. Kearney, 92 A.3d 51 (Pa.Super. 2014) (quoting Commonwealth v. White, 734 A.2d 374, 384 (Pa. 1999)). "The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion'." Id. (citing Commonwealth v. Darush, 459 A.2d 727, 731 (Pa. 1983)). "An abuse of discretion is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised

is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record.” Lomas, 170 A.3d at 389 (quoting Zappala v. Brandolini Prop. Mgmt., Inc., 909 A.2d 1272, 1284 (Pa. 2006)). The Pennsylvania Supreme Court has stated:

As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice that decision will not be overruled on appeal but for an abuse of discretion.

Commonwealth v. Abu-Jamal, 720 A.2d 79, 89 (Pa. 1998). It is presumed that the judge has the ability to determine whether he or she will be able to rule impartially and without prejudice, and his or her assessment is personal, unreviewable and final. Kearney, supra. (citing Commonwealth v. Druce, 848 A.2d 104, 108 (Pa. 2004)).

The Code of Judicial Conduct was adopted by the Pennsylvania Supreme Court for itself and members of the judiciary. According to the Pennsylvania Supreme Court in Reilly by Reilly v. SEPTA, 489 A.2d 1291, 1298 (Pa. 1985):

[T]he code of Judicial Conduct “does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by the judge in his self-assessment of whether he should volunteer to recuse from a matter pending before him. The rules do not give standing to others, including Superior Court, to seek compliance or enforcement of the Code because its provisions merely set a norm of conduct for all our judges and do not impose substantive legal duties on them.

In the case at bar, even if Defendant’s motions for recusal were timely and even if the Superior Court had not assumed jurisdiction by virtue of his direct appeal, there is no basis for

this Court to recuse itself from any further involvement in this matter. This Court has impartially and without prejudice presided over numerous proceedings in this matter since 2008, long before his current counsel became involved one week before the violation of probation hearing. None of the allegations by Defendant constitute evidence that this Court is unable to act impartially and without personal bias or prejudice with respect to this matter. In his motion for recusal filed November 14, 2017, Defendant alleged numerous grounds for recusal. *See supra*, p. 15-16. None of these allegations are sufficient grounds for recusal. This Court has presided over Defendant's proceedings in an impartial, unbiased manner. Moreover, a series of meritless claims of bias cannot be combined together to create a simple cumulative claim of bias. Commonwealth v. Kearney, 92 A.3d 51, 62 (Pa.Super. 2014). None of Defendant's meritless claims taken independently form a sufficient basis for recusal and neither are they sufficient when combined together.

Significantly, there was nothing improper about this Court providing additional information not specifically included in the probation officer's summary report, but which were contained in numerous e-mails from the same officer. The summary report prepared by Ms. Subbio was insufficient to provide Defendant with adequate notice of the potential violations that would be addressed at the violation hearing. Ms. Subbio's report failed to include many of the potential violations of which this Court became aware through email exchanges with Ms. Subbio and Mr. Mangle. This Court asked Ms. Subbio to include them in her report and she refused. Therefore, in order to provide Defendant with a complete and comprehensive list of the potential violations that had been brought to this Court's attention via email exchanges with his probation officers and which would be addressed at the hearing, this Court prepared a supplementary report

so that Defendant could adequately prepare to address those potential violations. There was nothing improper about this and no recusal is warranted.

Next, Defendant claims that it was improper for this Court to personally visit him at the location where he was performing community service for the homeless. This claim is without merit. This Court, as is true for many other judges in Philadelphia⁴, has toured other sites, custodial and noncustodial, to verify that they are appropriate places for her to send defendants. Indeed, this was a scheduled tour with the program managers who took her on a tour of the facility. Her visit did not make her a fact witness, as Defendant alleges. Moreover, he was not penalized in any way for his conduct at the location. He was given full credit for all hours he claimed he performed at the facility at issue. Furthermore, the Court never returned to this community service location and never visited or toured any other location Defendant listed on his schedule for community service. Indeed, it was a one time occurrence given the Court's calendar, and Defendant was to perform community service for at least 90 days, six days a week. Therefore, no relief is due.

Defendant claims it was improper for this Court to ask parties to include former Assistant District Attorney Noel DeSantis on email exchanges after she began working at the Attorney General's office. First, there is no evidence that the court "asked" the parties to include former ADA DeSantis on e-mails. However, Ms. DeSantis was very familiar with Defendant's case, as she had overseen it since his sentencing in 2009. She was familiar with his travel protocols and all aspects of his probation. There was nothing improper for Ms. DeSantis, someone with vast experience working with Defendant and the probation department, to remain informed in order to possibly assist the parties as a resource. Moreover, at no time prior to the motion for recusal did

⁴ In fact, there is another judge in Philadelphia who routinely performs community service *with* his defendants and is lauded for it. See "They performed community service with the judge who sentenced them," Philly Voice, 3/7/2018.

this Court receive any complaints regarding Ms. DeSantis' remaining informed. Indeed, she could have done this simply by reading newspapers and other public documents herself. Therefore, this is not a ground for recusal.

Next, Defendant claims this Court should recuse herself for allegedly asking Defendant and his girlfriend to have a private conversation,⁵ wherein this Court allegedly insisted Defendant sing a Boyz II Men song for her and give her a "shout out." This bald allegation has no basis in reality. There is zero evidence to support this claim. There is no record of such a conversation ever taking place and thus no evidence to support this claim. Therefore, this cannot serve as a ground for recusal.

Defendant also claims that this Court offered "inappropriate personal and professional advice," including urging him to change management companies. As discussed in further detail below, this claim is belied by the record. *See infra*, p. 27-28. This Court did not inappropriately try to persuade Defendant to change management companies. This Court has no personal interest in any of Defendant's professional and business matters and has never expressed an interest beyond making sure that Defendant reports as scheduled, abides by his travel protocols, and complied with the terms and conditions of his sentence, like all other probationers. **The court has repeatedly told Defendant that he cannot demand special treatment just because he has chosen to be an entertainer.** (N.T. 11/19/2012, p. 68-70); (N.T. 6/10/2009, p. 18-19).

Defendant further claims that this Court "repeatedly reacted and expressed herself in personal, injudicious terms," by referring to herself in the first person as opposed to the third person. He points to this Court using expressions such as "you thumbed your nose at me," and

⁵ Contrary to Defendant's assertions that this Court initiated and requested that Defendant and his then girlfriend, Onika Manaj, meet with her in chambers, this Court did not request the meeting, rather Manaj requested that the meeting occur several times throughout her testimony. (N.T. 12/5/2015, p. 78, 79, 80, 97, 92).

this his behavior was “a slap in my face.” None of this creates grounds for recusal. “Judicial remarks during the court of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” Kearney, 92 A.3d at 61. Expressions of annoyance, disappointment and in some cases, anger, are not valid to establish bias. Id. (quoting Liteky v. US, 510 U.S. 540, 555-56 (1994)). It is not expected for judges to withhold all expressions of personal feelings such as annoyance and disappointment. Id. In the case at bar, there was nothing improper or inappropriate about any of this Court’s comments or expressions. Nothing Defendant cites rises above the level of acceptable judicial behavior. Indeed, the Court referred to Defendant “thumbing your nose at this court” numerous times during the many violation hearings occasioned by Defendant’s behavior. (N.T. 8/18/2014, p. 80); (N.T. 8/29/2014, p. 16); (N.T. 12/10/2015, p. 8). Moreover, at Defendant’s November 6, 2017 VOP hearing, the Court used the terms “this Court” in referring to herself over 30 times. (N.T. 11/6/2017, VOP Part I, p. 5, 6, 7, 10, 11, 12, 13, 43, 55, 99); (N.T. 11/6/2017, VOP Part II, p. 4, 9, 18, 19, 74). Therefore, no relief is due.

Defendant also asserted that this Court had numerous instances of extra-judicial misconduct and that this Court’s decisions were “on a basis other than what has been heard in proceedings held in open court.” *See* Motion for Recusal, 11/14/2018, p. 6, 10. This Court did not base her decision for revocation on extra-judicial information, rather this Court was clear in stating that, “The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I’ve given you to try to address your issues, that each and every time you’ve done something that indicates that you have no respect for this Court.” (N.T. 11/6/2017, p. 73-74).

The Supreme Court has adopted the extra-judicial source doctrine, maintaining that, “the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). The Supreme Court of Pennsylvania “has also tentatively accepted the extra-judicial source doctrine, noting it is significant if the information at the root of the recusal motion was obtained in a prior proceeding of the case, and not from any pretrial bias or personal disdain.” Commonwealth v. Druce, 848 A.2d at 110 (citing Commonwealth v. Boyle, 447 A.2d 250, 252 n. 6 (Pa. 1982)). Simply put, in order to qualify as extra-judicial, information cannot have been obtained through either prior or present case proceedings. Id.

In the case at bar, all of the information considered in the making of this Court’s decision was provided to this Court through routine and standard proceedings which took place previously and/or presently in the course of this case. Therefore, Defendant’s allegations that this Court based her decision on information obtained independently from internet research and her **one time** tour of Defendant’s homeless community service location are false. This Court did question Defendant’s witnesses, Mr. Brinkley and Mr. Saunders, as to public appearances that were publicly known, as they were indicated on several of Defendant’s travel schedules and were put on the schedule after this Court mandated that Defendant cease all scheduling of future performances. Thus, this Court did not rely on public information in making its decision, but rather relied on the testimony by Mr. Brinkley and Mr. Saunders, representatives of his management company ROC Nation, given at Defendant’s hearing, which confirmed the scheduling and/or failure to cancel these appearances post order. This information was therefore not from an extra-judicial source, but from the mouths of the Defendant and his witnesses. (N.T.

11/6/17, VOP Part I, p. 80-82, 94); (N.T. 11/6/2017, VOP Part II, p. 13-15). Therefore, this Court did not use extra-judicial information to bias Defendant in anyway and no relief is due.

With regard to Defendant's Motion for Recusal filed December 6, 2017, Defendant claimed that this Court was under FBI investigation. This claim is entirely without merit. Defendant has not produced a scintilla of evidence that this Court was ever under any investigation. This Court has no knowledge of any alleged investigation other than that which was which was reported in local newspapers which are not evidence. Therefore, Defendant's motion for recusal on these grounds must fail as baseless and unfounded.

With regard to his motion for recusal filed February 12, 2018, Defendant claimed additional bases for this Court's recusal including the unsealing and public release of the February 5, 2016 *in camera* meeting, media reports that this Court had retained private counsel, A. Charles Peruto, Jr., Esquire, to refute Defendant's attack upon her personal integrity, and comments in the media made by Mr. Peruto⁶. Defendant also repeated his claim that this Court improperly urged him to switch professional management companies.

⁶ This Court retaining private counsel is not grounds for recusal. There is no evidence in Defendant's February 12, 2018 Supplemental Motion for Recusal, that support Defendant's allegations that a violations of the Judicial Code occurred. Rule 2.10(a) of the Code of Judicial Conduct states "(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." See 207 Pa. Code Canon 2. Furthermore, Rule 210(e) clarifies that "(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." *Id.*

The code is clear that instances involving allegations in the media of a judge's conduct, create an exception to the public statement rule allowing a representative of a judge to issue a comment in response to allegations so long as it does not address the merits of the case or impair the fairness of the matter. In the current instance, this Court personally did not make any statements to the media regarding the matter. To the extent that Mr. Peruto made comments about the case, the comments were not related to the merits of the case and addressed issues related solely to accusations in the media. These accusations were largely unrelated to the case at hand and instead were simply personal attacks. Assertions that Mr. Peruto made statements as to the merits of the case or that would impair the fairness of this Court are belied by the record. Moreover, Defendant attached newspaper articles as his only evidence for Peruto's alleged comments. Newspaper articles are not evidence in any case, and even if they were, the quoted statements in the articles do not indicate that Mr. Peruto directed his comments to anyone in particular.

Last, this Court made the decision to unseal the February 5, 2016 *in camera* notes on or around the time Defendant filed his Notice of Appeal on December 6, 2017. At that time, this Court had not even retained private counsel. Thus, the notes were not released on the advice of counsel.

First, as stated above, Defendant's claim which alleged that this Court urged him to change management companies is patently false and was disproven by the record. The notes of testimony from the February 5, 2016 *in camera* meeting directly belie this claim. These notes confirm that this Court did not force, coerce, or tell Defendant to leave his management at Roc Nation and return to a former manager by the name of Charles Alston, a/k/a/ "Charlie Mack." Indeed, these notes indicate that, not only did Defendant himself complain about his current management, but his attorney Frank DeSimone, Esquire, also complained about Defendant's management. (N.T. 2/5/2016, p. 30-31, 49-50, 53, 62-64, 67). Defendant stated, "Like with ROC Nation, so many people trying to help me with charity, they just juggle things. I tell them I am coming to get my son at four o'clock. It got outrageous... it damaged my life. When I am telling them I have to slow everything down, don't approve nothing until you have say so from me...I try just to organize my life." (N.T. 2/5/2016, p. 30-31). Mr. DeSimone stated, "I agree with Ms. Underwood and Ms. DeSantis. It was chaos. When I got into this, it was chaos. You have to see the E-mails. 15 people involved. Total chaos. This young man needs simple – keep it simple. Structure. That is what he needs...The rules are simple. I don't mean the rules. I mean the people trying to help him. They weren't helping him." (N.T. 2/5/2016, p. 50). These notes also indicate that the assigned probation officer complained of difficulty supervising Defendant under the current management as compared with the lack of problems she had with his former manager. *Id.* at 19, 23-24, 65-66. Likewise, the assigned district attorney agreed with the assigned probation officer regarding Defendant's performance on probation under his former manager as compared to his current management. *Id.* at 25, 3-34, 49, 56-57. However, this Court did not make any suggestions regarding Defendant's management. In fact, this Court tried more than once to redirect the conversation away from this topic and refocus the conversation onto Defendant's

allocation, which was the main reason the *in camera* session was held in the first place, and strictly at Defendant's request. *Id.* at 4, 34, 51, 66.

Furthermore, there was nothing improper about this Court unsealing and releasing these notes of testimony. Defendant repeatedly asked for private access to these notes, a request that this Court previously denied and was the subject of a prior appeal that was affirmed by the Superior Court. However, after Defendant appealed his most recent sentence on or about December 6, 2017 and the content of those sealed notes formed the basis of many of his claims, this Court decided at that time to unseal the notes as Defendant would need them to prepare his appellate brief and the Superior Court would require them to have a complete record in order to properly review all of Defendant's claims. Therefore, on January 26, 2018, upon completion of the notes being transcribed, this Court unsealed the notes, allowing them to be obtained by the parties, and issued a 1925(b) Order on that same date.

It should be noted that, in his February 12, 2018 Supplemental Motion for Recusal, Defendant stated that this Court had personally selected Probation Officer Treas Underwood for assignment to this case. *See* Defendant's Supplemental Motion for Recusal, 2/12/2018, p. 3. This statement is belied by the record which shows that at Defendant's November 19, 2012 VOP hearing, ADA DeSantis recommended Ms. Underwood stating, "So at this point, I want the case reassigned to Ms. Treas Underwood, because Your Honor asked for Ms. O'Loughlin and she couldn't do it because she's in House Arrest. So I checked around, and Ms. Underwood can do it, and I think it's only fair, because she's in the domestic violence unit, and she said she'll do it, and she writes three-page summaries." (N.T. 11/19/2012, p. 59-60).

II. DEFENDANT HAD PROPER NOTICE OF ALL POTENTIAL PROBATION VIOLATIONS PRIOR TO HIS PROBATION HEARING.

Defendant claims that he was not served with proper notice of the alleged probation violations prior to the hearing. This claim is entirely without merit. Defendant received a *Gagnon* / letter from his Montgomery County probation officer, Ms. Subbio, which outlined several of his potential violations. He also received a more detailed letter from this Court after Ms. Subbio refused to include certain information which had been provided to the Court in prior e-mails which included all of Defendant's potential violations. The primary purpose of the second letter from the Court was to ensure that Defendant received proper notice of all potential violations that would be addressed at the violation of probation hearing so that Defendant would be able to prepare properly. Thus, Defendant's claim that he had no notice "of what conduct of the defendant was said to constitute the alleged violations of the defendant's probationary term" and that he did not receive any notification "of what condition or conditions of probation were said to be violated by any specified instance of the defendant's alleged conduct" is completely false and belied by the record.

Due process requires that a probationer receive written notice of the claimed probation violations prior to commencement of the revocation hearing. Commonwealth v. Carter, 532 A.2d 779, 781 (Pa. 1987) (quoting Commonwealth v. Quinlan, 258 A.2d 494, 496 (Pa. 1980)). Specifically, a probationer must have "written notice of the claimed violations of [probation or] parole" and "disclosure to the [probationer or] parolee of evidence against him." Commonwealth v. Sims, 770 A.2d 346, 349 (Pa.Super. 2001) (citing Commonwealth v. Ferguson, 761 A.2d 613, 617 (Pa.Super. 2000)). The purpose of requiring written notice "is to ensure that the...probationer can sufficiently prepare his case, both against the allegations of violations, and against the argument that the violations, if proved, demonstrate that...probation is no longer an

effective rehabilitative tool and should be revoked...[T]he requirement bears directly on the ability to contest revocation.” Carter, 532 A.2d at 781 (quoting Commonwealth v. Perry, 385 A.2d 518, 520 (Pa.Super. 1978)).

In the case at bar, Defendant had sufficient advance notice of the potential violations to be addressed at the violation hearing on November 6, 2017. Defendant was supervised by Kathleen Subbio and Josh Mangle of the Montgomery County Probation Office.⁷ Rather than send a *Gagnon I* Probation Summary Report as is typical in Philadelphia County, on October 26, 2017, Ms. Subbio sent all parties a letter that included several alleged violations to be addressed at Defendant’s November 6, 2017. In this letter, Ms. Subbio outlined the following potential violations:

1. Two (2) instances of Defendant violating house arrest rules. Specifically, Defendant made additional unauthorized stops while traveling to and from his approved locations on March 4, 2016 and March 8, 2016.
2. On January 9, 2017, Ms. Subbio and her supervisor Mr. Mangle visited Defendant at his home and observed “Fast Flush” capsules on the coffee table.
3. On that same date, January 9, 2017, Defendant’s urine was collected and tested positive for Oxycodone.
4. On that same date, January 9, 2017, Defendant reported to the Montgomery County Adult Probation/Parole Department and initially denied any drug use. After further questioning, he admitted to an ongoing substance abuse problem that had been going on for years.

⁷ The transfer of his supervision from Philadelphia County to Montgomery County was done in 2016 at Defendant’s request.

5. On March 15, 2017, Defendant was charged by the St. Louis International Airport Police Department with Assault (Count 1 and Count 2). Defendant pled guilty to both charges on September 18, 2016, with the agreement that upon completion of 40 hours of community service, the plea would be withdrawn and the charges would be dismissed.
6. On August 16, 2017, Defendant was charged by the New York Police Department with Reckless Endangerment and Reckless Driving. Ms. Subbio indicated in her letter that this case was “due to be dismissed on April 10, 2018.”

(See attached Kathleen Subbio Letter, Montgomery County Adult Probation/Parole Department, 10/26/2017).

In addition to this letter from Ms. Subbio which outlined several potential probation violations, on October 31, 2017, this Court prepared and sent an even more detailed letter with any and all potential violations alleged so that Defendant would be adequately prepared. The additional details were based upon e-mails forwarded to this Court from Mr. Gordon, Mr. Mangle and Ms. Subbio that further described Defendant’s conduct while under supervision. This Court had asked Ms. Subbio to include these items in her letter for the sake of completeness and she refused to do so. These additional potential violations included Defendant engaging in community service with an organization benefitting children, which was not on the list of appropriate community service organizations for which Defendant could volunteer; failing to provide verification of participating in a medically assisted detoxification program in California; failing to travel to Athens, Greece as scheduled but instead remaining in Philadelphia and performing at the Crystal Tea Room without notifying the probation department or local police department as he was required to do; visiting a private residence in Atlanta, Georgia without

authorization or stating the address; and scheduling and promoting several professional engagements around the country despite this Court's August 17, 2017 Order stating that he could not travel outside of Philadelphia and Montgomery Counties except to attend court proceedings related to his pending charges in St. Louis and New York City, "until further order of the court." (See attached VOP Court Letter regarding Defendant's alleged violation allegations, 10/31/2017).

Ms. Subbio's and this Court's letters taken together provided Defendant with a detailed and comprehensive list of the alleged probation violations that would be addressed at the violation of probation hearing on November 6, 2017. In fact, a review of the notes of testimony from the violation hearing shows that each of these potential violations were addressed in turn and there were not any potential violations raised that Defendant did not have the opportunity for which to prepare.

As stated above, the purpose of advance notice is to ensure that the probationer has sufficient opportunity to prepare his case and gather evidence to rebut allegations of violations. Here, Defendant's due process rights were not violated because he received two detailed letters outlining potential violations that allowed him to prepare for his defense. Moreover, Defendant has presented no evidence to support his claim that he lacked sufficient notice and was unable to adequately prepare, and there is no evidence in the record to support it either. The record shows that Defendant did not raise an objection at any time during the violation of probation hearing claiming lack of sufficient notice. Thus, Defendant's claim is wholly without merit and no relief is due.

III. THE EVIDENCE PRESENTED AT THE VIOLATION OF PROBATION HEARING WAS SUFFICIENT FOR THIS COURT TO FIND DEFENDANT IN TECHNICAL VIOLATION OF HIS PROBATION.

The evidence presented at the violation hearing was sufficient to establish that Defendant was in technical violation of his probation. Sentencing following a revocation of probation is vested within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. Commonwealth v. Fish, 752 A.2d 921, 923 (Pa.Super. 2000) (quoting Commonwealth v. Smith, 669 A.2d 1008, 1011 (Pa.Super. 1996)). “An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.” Commonwealth v. Griffin, 804 A.2d 1, 7 (Pa.Super. 2002). Great weight must be given to the sentencing court’s decision since the sentencing court is “in the best position to view defendant’s character, displays of remorse, defiance or indifference, and overall effect and nature of the crime.” Fish, 752 A.2d at 923. The sentencing court “sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed.” Commonwealth v. Pasture, 107 A.3d 21, 28 (Pa. 2014). Therefore, when considering an appeal from a sentence imposed after the revocation of probation or parole, appellate review is limited to the determination of “the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives it had at the time of the initial sentencing.” Commonwealth v. MacGregor, 912 A.2d 315 (Pa.Super. 2006) (citing 42 Pa.C.S. §9771(b); Commonwealth v. Gheen, 688 A.2d 1206, 1207 (Pa.Super. 1997)).

In order to support a revocation of probation or parole, the Commonwealth must show by a preponderance of the evidence that a defendant violated his probation or parole.

Commonwealth v. Shimonvich, 858 A.2d 132, 134 (Pa.Super. 2004). To prove a fact by the preponderance of the evidence, the Commonwealth must prove that the existence of the contested fact is more probable than its nonexistence. Commonwealth v. Scott, 850 A.2d 762, 764 (Pa.Super. 2004). The preponderance of the evidence is “the lowest burden of proof in the administration of justice, and it is defined as the greater weight of the evidence, i.e., to tip the scales slightly in one’s favor.” Commonwealth v. Ortega, 995 A.2d 879, 886 n. 3 (Pa.Super. 2010).

A violation of probation hearing’s main purpose is “to determine whether [probation] remains a viable means of rehabilitation...” Shimonvich, 858 A.2d at 136 (quoting Commonwealth v. Mitchell, 632 A.2d 934, 936-937 (Pa.Super 1993)). The primary concern of probation is the rehabilitation and restoration of the individual to a useful life. Commonwealth v. Mullins, 918 A.2d 82, 85 (Pa. 2007). It is a suspended sentence of incarceration “served upon such lawful terms and conditions as imposed by the sentencing court.” Id. (citing Commonwealth v. Walton, 397 A.2d 1179, 1184-84 (Pa. 1979)). “The purpose of the revocation hearing is simply to establish to the satisfaction of the judge who granted probation that the individual’s conduct warrants his continuing as a probationer.” Id. (quoting Commonwealth v. Kates, 304 A.2d 701, 710 (Pa. 1973)). Thus, “a probation violation is established whenever it is shown that the conduct of the probationer has indicated that probation has proven to be an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct.” Commonwealth v. Infante, 888 A.2d 783, 791 (Pa. 2005) (quoting Commonwealth v. Brown, 469 A.2d 1371, 1376 (Pa. 1983)). Technical violations “can support

revocation and a sentence of incarceration when such violations are flagrant and indicate an inability to reform.” Commonwealth v. Carver, 923 A.2d 495, 498 (Pa.Super. 2007).

In the case at bar, the evidence presented at the violation hearing was sufficient to prove by a preponderance of the evidence that Defendant was in technical violation of his probation. This Court found Defendant committed several technical violations, not limited to, but including: illegal drug use and possession of “Fast Flush” to wash his urine; engaging in a fist fight at St. Louis International Airport, which resulted in arrest; driving a 4-wheeler on the streets of New York City, which resulted in arrest after he was seen coming into the airport and stomping on a person already on the ground being beaten; failing to go to Greece as scheduled and instead remaining in Philadelphia and performing at the Crystal Tea Room without notifying the probation department or police department for the public’s safety; scheduling and promoting professional events around the country in direct contravention of this Court’s order which stated Defendant could not leave the Philadelphia area until further notice except to attend to his criminal matters in St. Louis and New York City. (N.T. 11/6/2017, VOP Part II, p. 18-20).

At the violation hearing, Defendant admitted on the record that he had a drug addiction problem and had gone through drug treatment. (“I would like to start with, like, the Percocet addiction. I’ve been on and off the drug for a few years now.” N.T. 11/6/2017, VOP Part II, p. 34). He admitted that while he was at St. Louis International Airport, he ran out of a parked car and into the airport terminal to join in a fist fight. (“And it wasn’t just him, it was two airport workers that was actually fighting, and it was the two of us actually fighting. And, you know, it just got out of control.” N.T. 11/6/2017, VOP Part II, p. 41-43). He admitted that he broke the law by riding motorbikes around New York City on busy streets endangering the safety of its citizens. (“And that just was a mistake I made. I never felt that riding a bike would get me sent to

prison.” N.T. 11/6/2017, VOP Part II, p. 51). Both he and his attorney admitted that he did not go to Greece as he had been given permission to do, but instead went to a party at the Crystal Tea Room and performed because someone at the party pressured him to do so. (“I was approved to go to Greece about 2 o’clock in the afternoon, 2, 3 o’clock. The flight for Greece left at 6 o’clock. With international flights you have to leave about two hours before, so I couldn’t make it.” N.T. 11/6/2017, VOP Part II, p. 65; “). In fact, he was approved the day before his scheduled flight. He, his attorney Mr. McMonagle, and his representative Mr. Brinkley who scheduled and promoted his events, admitted that they continued to schedule and promote events nationwide even after this Court ordered him to stop until further notice. (N.T. 11/6/2017, Part I, p. 81, 83-84, 86-90; 11/6/2017, Part II, p. 16-17, 53-54).

These on-the-record admissions by Defendant, his attorney and those who work on his behalf, were sufficient to support this Court’s finding that probation had been an ineffective vehicle to accomplish rehabilitation and was insufficient to deter future antisocial conduct. There is no need to even weigh the preponderance of the evidence since Defendant admitted all of these violations on the record. Since Defendant’s ongoing and repeated violations indicated an inability to reform, this Court properly found Defendant in technical violation of his probation for the fifth time.

IV. THE SENTENCE IMPOSED WAS NOT MANIFESTLY EXCESSIVE AND DEFENDANT WAS PROPERLY SENTENCED TO A TERM OF TOTAL CONFINEMENT.

Defendant claims that this Court improperly sentenced him to a 2 to 4 year term of state incarceration, arguing that this sentence was manifestly excessive and that a term of total confinement was not appropriate under the circumstances of his case. This claim is without merit.

The standard of review for sentences imposed following a revocation of probation is well-settled:

The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment—a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Swope, 123 A.3d 333 (Pa.Super. 2015).

When considering an appeal from a sentence imposed after the revocation of probation or parole, appellate review is limited to the determination of “the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives it had at the time of the initial sentencing.” Commonwealth v. MacGregor, 912 A.2d 315, 317 (Pa.Super. 2006) (citing 42 Pa.C.S. § 9771(c)). The sentencing court is limited only by the maximum sentence it could have imposed at the time of the original sentencing. Id. Pursuant to 204 Pa. Code 303.1(b), sentencing guidelines do not apply to sentences imposed as a result of revocation of probation, intermediate punishment or parole. Once probation or parole has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist: the defendant has been convicted of another crime; the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or, such a sentence is essential to vindicate the authority of court. 42 Pa.C.S.A. § 9771(c); Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa.Super. 2001). There is no requirement that a sentencing court’s imposition of sentence be the “minimum possible confinement.” Walls, 926 A.2d at 965.

In the case at bar, this Court properly sentenced Defendant to a term of 2 to 4 years state incarceration after finding him in violation of his probation for the fifth time. This sentence was within the statutory limits and was reasonable after considering all relevant factors. As stated above, the length of incarceration was solely within this Court's discretion and was limited only by the maximum sentence that could have been imposed at the original sentencing. Under Pennsylvania law, the maximum sentence for possession with intent to deliver a controlled substance (PWID), an ungraded felony, is 10 years incarceration, a \$100,000 fine, or both. 35 Pa.C.S. 780-113 (f)(1.1). The maximum sentence for Carrying a Firearm without a License (VUFA § 6106), a felony of the third degree, is 7 years incarceration, a \$15,000 fine, or both. 18 Pa.C.S. 1103(3); 18 Pa.C.S. 1101(3). Thus, this Court could have sentenced Defendant up to a maximum aggregate sentence of 17 years, minus credit for time Defendant already served in prison. This Court sentenced Defendant to 2 to 4 years state incarceration. This sentence was well within the statutory limits and was a reasonable exercise of this Court's discretion in light of Defendant's admitted drug use and addiction; possession of "Fast Flush" drug masking agent; failure to adhere to the agreed upon travel protocols; and failure to show meaningful growth and progress towards his rehabilitation.

Indeed, this was the **fifth** time that this Court found Defendant in technical violation. As outlined in this Court's Opinion on September 19, 2016, Defendant's history while on probation showed a pattern of Defendant committing the same sorts of violations again and again:

In 2011, Defendant was in technical violation for testing positive for opiate use. This Court allowed his probation to continue. In 2013, Defendant was in technical violation for traveling outside Philadelphia County without permission and failing to report properly to his probation officer. Again, this Court showed leniency and allowed Defendant's probation to continue. In 2014, Defendant was in technical violation for failing to report properly to his probation officer, failing to provide his probation officer

with a working phone number, failing to abide by the rules of the Interstate Compact for Adult Offender Supervision for interstate travel, and traveling outside Philadelphia County without permission. At that time, this Court sentenced Defendant to 3 to 6 months county incarceration plus 5 years reporting probation; he was released on early parole in December 2014. [In December 2015], only a year later, Defendant appeared before this Court for yet another violation of probation hearing for committing the exact same technical violations. Once again, Defendant failed to report to his Probation Officer as ordered to do so, he failed to adhere to the agreed upon travel protocols, and failed to provide urinalysis for drug screens as ordered to do so by this Court. At his prior violation hearing, this Court had warned Defendant that she would impose a state sentence if he was found to be in violation again. However, this Court carefully considered the testimony presented at the violation of probation hearing and at sentencing by those who support Defendant and chose to be lenient and impose only a county sentence, explaining:

So, ordinarily, when I tell a person, and I do it routinely, that “if you come back, you are going to get a State sentence.” And that is what they get. Pure and simple. I don’t say how much it’s going to be ahead of time. We don’t do that. I just say, “You are going to get a State sentence.” If you do so much to bring yourself back here that means that you’re basically telling me that you want a State sentence. But this defendant did have a lot of community support, and I am taking that into consideration, as well.”

(N.T. 2/5/16, p. 86). After asking Defendant whether he understood his new sentence, this Court went on:

I don’t really know what that means to this defendant, because I have been trying to work with this Defendant since 2009. Try to help him move his career forward. I have tried to help him understand that this could have been over long ago. That he just do what he’s supposed to do all along, but okay. That is my sentence. I hope that the defendant takes it to heart and follows these instructions this [time].

(N.T. 2/5/16, p. 90).

Court’s Opinion, 9/19/2016, p. 20-21.

Instead of using this opportunity to turn his life around and comply with the terms and conditions of his sentence, Defendant once again chose to thumb his nose at this Court and continued to commit the same sort of violations. Specifically, Defendant tested positive for opiate use, failed to stay out of trouble by engaging in conduct such that he incurred two new arrests that resulted in negotiated resolutions; failed to abide by the protocols set in place to allow him to travel domestically and internationally for work; and failed to abide by this Court's orders to stop scheduling appearances while his cases were pending in St. Louis and New York City, until further order of this Court.

Furthermore, this Court properly considered the factors set forth in 42 Pa.C.S.A. § 9721: the protection of the public, the gravity of Defendant's offense in relation to the impact on the victim and the community, and his rehabilitative needs. Since his original conviction in 2008, this Court has given Defendant numerous chances to rehabilitate himself through house arrest, county probation and parole, and county incarceration. Unfortunately, Defendant once again failed to take his sentence seriously and his conduct while on probation indicated that he was not making meaningful progress towards rehabilitation. Revocation and a state sentence was an appropriate sentence under the circumstances in order to vindicate the authority of the Court. In order to make this determination, this Court considered Defendant's long history since his original conviction in 2008, listened to Montgomery County probation officers Subbio and Mangle and their report on Defendant's conduct while under their supervision, heard defense counsel's arguments, heard testimony from several of Defendant's friends and supporters, and listened to Defendant's allocution. After taking all of this into consideration, this Court found it appropriate to impose a 2 to 4 year state sentence. As stated above, there is no requirement that this Court impose the "minimum possible sentence." Rather, based upon Defendant's ongoing

failure to take the necessary steps to comply with the terms and conditions of probation, this Court found it appropriate to sentence Defendant to a term of state incarceration.

Defendant argues that a sentence of total confinement “violated 42 Pa.C.S. § 9771(c)(3) and the fundamental norms underlying the sentencing process.” This claim is without merit. This sentence was absolutely necessary to vindicate the authority of the Court under 42 Pa.C.S.A. § 9771(c). Through his course of conduct while serving probation, Defendant repeatedly demonstrated his disdain for this Court’s rules and the conditions placed upon him. Defendant failed to comply with previous judicial efforts to rehabilitate Defendant through house arrest, county probation, and parole, as well as prior revocations where this Court continued to give Defendant lenient sentences with the hope that he would make meaningful progress towards his rehabilitation without having to resort to state incarceration. Each time, Defendant thumbed his nose at this Court and refused to take his sentence seriously, ostensibly due to his status in the entertainment business. Instead of simply complying with the terms and conditions of his probation so he could finish out his sentence and continue to work, Defendant continued to disregard this Court’s directions and did whatever he wanted to do. Thus, this Court properly sentenced Defendant to a term of total confinement in order to vindicate the authority of the court.

Last, Defendant claims that “the totality of the circumstances of [Defendant’s] sentencing does not overcome the presumption of vindictiveness.” This claim is without merit. A claim of vindictiveness raises due process concerns. Specifically, the Pennsylvania courts have held that “a sentencing court may not punish a defendant for exercising his constitutional rights, or chill the exercise of those rights by resentencing a defendant vindictively.” Commonwealth v. Robinson, 931 A.2d 15, 22 (Pa.Super.2007) (citing Commonwealth v. Speight, 854 A.2d 450,

455 (Pa. 2004); *see also* North Carolina v. Pearce, 395 U.S. 711, 725 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (recognizing a due process violation where a court increases the severity of a punishment at resentencing).

Claims of judicial vindictiveness “ordinarily arise where a defendant has been resentenced to a more severe sentence after successfully having his first conviction overturned on appeal.” Robinson, 931 A.2d at 22 (citing Pearce, *supra*); *see also* Commonwealth v. Barnes, 167 A.3d 110, 123 (Pa.Super.2017) (noting that Pearce’s rationale extends to “when the original sentence is vacated and a second sentence is imposed without an additional trial.”); Commonwealth v. Tapp, 997 A.2d 1201, 1203 (Pa.Super. 2010)(stating that under Pearce, the U.S. Supreme Court recognized “the possibility that a trial court’s imposition of an enhanced sentence after retrial may be motivated by reasons personal to the judge, including vindictiveness toward the defendant for having secured relief from the original sentence on appeal.”)). These claims can also apply to situations “where the trial court increased a sentence after the defendant filed post-sentence motions, and where the court did not justify the increase in any way.” Robinson, 931 A.2d at 23 (citing Commonwealth v. Hernandez, 783 A.2d 784, 787-88 (Pa.Super. 2001); Commonwealth v. Serrano, 727 A.2d 1168, 1170 (Pa.Super. 1999)).

A presumption of vindictiveness may arise where “there is an apprehension on the part of a defendant to exercise his legal rights due to a fear of retaliation from the court.” Speight, 854 A.2d at 455 (citing United States v. Esposito, 968 F.2d 300, 303 (3d Cir.1992) (citing United States v. Goodwin, 457 U.S. 368, 380 (1982))). “Thus, if the court imposes a harsher sentence after a retrial, a presumption of vindictiveness applies. That presumption can be overcome by pointing to ‘objective information in the record justifying the increased sentence’.” Robinson, 931 A.2d at 22. More simply, “whenever a trial court imposes upon a defendant a more severe

sentence following resentencing, the reasons for such sentence must be made part of the record.” Barnes, 167 A.3d at 124 (citing Serrano, 727 A.2d at 1170).

After careful review of the case law where the Pennsylvania Superior and Supreme Courts have examined the presumption of vindictiveness, this Court could not find a single instance where this applies to sentencing after revocation of probation/parole. All of the case law cited above indicates that this presumption attaches where the trial court resentences after remand from the Superior Court or imposes a new sentence after the defendant filed post-sentence motions. In fact, the Pennsylvania Supreme Court expressly stated that a “trial court does not necessarily abuse its discretion in imposing a seemingly harsher post-revocation sentence where the defendant received a lenient sentence and then failed to adhere to the conditions imposed on him.” Commonwealth v. Pasture, 107 A.3d 21, 29 (Pa. 2014). It is well settled that “upon revocation, the sentencing alternatives available to the court shall be the same as the alternatives available at the time of initial sentencing.” 42 Pa.C.S.A. § 9773.

In the instant case, this Court properly revoked Defendant’s probation after finding him in technical violation for the fifth time for failing to adhere to the conditions imposed on his probation and, after weighing all of the sentencing alternatives originally available at the time of initial sentencing, properly imposed a sentence of 2 to 4 years state incarceration. This was a reasonable sentence within the statutory bounds based upon Defendant’s criminal history, conduct while on probation, and his disrespect for this Court and the conditions placed upon him for his probation. The presumption of vindictiveness is inapplicable as this Court was not resentencing Defendant following a remand from the Superior Court or a post-sentence motion. Therefore, Defendant’s claim must fail.

Moreover, to rebut the presumption of vindictiveness, the sentencing court must adequately state its reasons on the record for imposing a more severe sentence. This is already a requirement at violation of probation hearings. *See* Pa.R.Crim.P. 708(C)(2) (stating that at the time of sentencing following revocation, “[t]he judge shall state on the record the reasons for the sentence imposed.”). As discussed in detail below, this Court stated sufficient reasons on the record for the sentence imposed. Briefly, in support of revocation and a term of total confinement, this Court stated that Defendant had thumbed his nose at this Court repeatedly, tested positive for drugs, possessed “Fast Flush” drug masking agent, failed to adhere to the protocols put in place to allow him to travel for work, and scheduled and promoted events in violation of this Court’s order. All of these reasons, in conjunction with this Court’s experience with this Defendant since 2008, were sufficient for this Court to revoke Defendant’s probation and sentence him to a term of 2 to 4 years state incarceration.

V. THIS COURT PROPERLY STATED SUFFICIENT REASONS ON THE RECORD FOR THE SENTENCE IMPOSED.

The Court stated sufficient reasons on the record justifying the sentence imposed. At the time of sentencing, the judge is obligated to state on the record the reason for the sentence imposed, however the explanation need not be lengthy and “a discourse on the court’s sentencing philosophy is not required.” Pa. R. Crim. P. 708(C)(2); Commonwealth v. Malovich, 903 A.2d 1247 (Pa.Super.2006) (quoting Commonwealth v. McAfee, 849 A.2d 270, 275 (Pa.Super. 2004)). The purpose of this requirement is to provide “a procedural mechanism for the aggrieved party both to attempt to rebut the court’s explanation and inclination before the sentence proceeding ends, and to identify and frame substantive claims for post sentence motions or appeal.” Commonwealth v. Reaves, 923 A.2d 1119, 1129 (Pa. 2007). According to the Pennsylvania Supreme Court:

VOP proceedings are often short and to the point. A convicted defendant released into the community under such control of the sentencing judge, who violates the terms of his release and thereby betrays the judge's trust, is rarely in a strong position. Unless the defendant's lapses are explainable, or there has been some mistake of fact, the question of whether release will be terminated, and if so, the length of incarceration, rests peculiarly within the discretion of the VOP judge. In instances where parole is revoked, the reason for revocation and sentence are usually obvious, and there is not much that the judge would need to say.

Id. at 153, n. 12. More recently in Pasture, the Pennsylvania Supreme Court explained:

Simply put, since the defendant has previously appeared before the sentencing court, the stated reasons for a revocation sentence need not be as elaborate as that which is required at initial sentencing. The rationale for this is obvious. When sentencing is a consequence of the revocation of probation, the judge is already fully informed as to the facts and circumstances of both the crime and the nature of the defendant, particularly where, as here, the trial judge had the benefit of a PSI during the initial sentencing proceedings.

107 A.3d at 453. “[W]here the revocation sentence was adequately considered and sufficiently explained on the record by the revocation judge, in light of the judge’s experience with the defendant and awareness of the circumstances of the probation violation, under the appropriate deference standard of review, the sentence, if within the statutory bounds, is peculiarly within the judge’s discretion.” Id. at 454.

In the case at bar, this Court stated sufficient reasons for the sentence imposed. At the violation of probation hearing on November 6, 2017, this Court found Defendant in violation of his probation for the **fifth** time. Immediately prior to sentencing Defendant, this Court stated its reasons for the sentence:

But in any event, I appreciate everything that you said, but I have been trying to help you since 2009 [...] and every time I do more and more and more to give you break after break after break to help you, you, basically, thumb your nose at me and just do what you want the way you want. So, I have to—I’m going to give you a

sentence of incarceration. This sentence is absolutely necessary to vindicate the authority of the Court. The record will reflect over all of these sessions, all of these VOP hearings, all of the opportunities I've given you to try to address your issues, that each and every time you've done something that indicates that you have no respect for this Court.

(N.T. 11/6/2017, p. 74). Specifically, this Court pointed to Defendant's repeated disrespect of this Court, its orders, and the terms and conditions of his probation. The record shows that Defendant abused drugs, possessed "Fast Flush" capsules (a drug masking agent), incurred two new arrests that resulted in negotiated resolutions, failed to adhere to his approved travel schedule and performed without authorization in Philadelphia, and scheduled and promoted events in violation of this Court's order. All of these violations were enumerated in the *Gagnon I* letter written by Montgomery County Probation Officer Kathleen Subbio; the supplemental letter prepared by this Court to aid Defendant in his preparations for the violation hearing; and were discussed in great detail at the violation hearing itself. As stated above, the explanation for this Court's sentence need not be lengthy and where it is obvious that the probationer is not in compliance with the terms and conditions of his sentence, "there is not much that the judge would need to say." Reaves, 923 A.2d at n. 12. Therefore, Defendant's claim that this Court stated insufficient reasons for the sentence imposed is without merit and this Court's judgment of sentence should be affirmed.

CONCLUSION

After reviewing all applicable case law, statutes, and testimony, this Court committed no error. This Court did not commit any error with respect to Defendant's motions for recusal. Defendant received proper notice of all alleged probation violations in advance of his hearing. Additionally, the evidence at the hearing was sufficient for this Court to find Defendant in technical violation of his probation. The sentence imposed was not manifestly excessive and this Court stated sufficient reasons on the record to support a state sentence of 2 to 4 years. Accordingly, this Court's judgment of sentence should be affirmed.

BY THE COURT:


_____ J.

Court's Exhibit A



First Judicial District of Pennsylvania
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

GENECE E. BRINKLEY
Judge

THE JUSTICE JUANITA KIDD STOUT CENTER
FOR CRIMINAL JUSTICE
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October 31, 2017

Frank DeSimone, Esquire
1880 John F Kennedy Blvd
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Philadelphia, PA 19103

Marian Braccia, Esquire
Assistant District Attorney
Three South Penn Square
Philadelphia, PA 19102

RE: Commonwealth v. Robert Williams, CP-51-CR-0011614-2007

Dear Counsel:

As you know, I previously forwarded to you a probation summary prepared by Montgomery County Deputy Chief Probation Officer Kathleen Subbio. However, it appears that there are substantive facts which are missing from her summary which previously were included in various emails forwarded to me from Mr. Gordon, Mr. Mangle and/or Ms. Subbio. These facts should have been included in the probation summary as these facts and incidents are relevant and actually occurred during the course of Defendant's probation, and may assist both counsel in preparing for the VOP hearing scheduled for November 6, 2017.

First, Mr. Williams was sentenced on or about February 5, 2016 to six to 12 months county incarceration with immediate parole to house arrest, to be followed by six years reporting probation. Subsequently, on or about February 18, 2016, house arrest and probation supervision were transferred to Montgomery County at the request of Mr. Williams and they agreed to supervise as a courtesy to Philadelphia County. There were several conditions imposed at the time of sentence including ninety (90) days of community service at organizations serving the homeless, veterans, and by working to build homes with an organization such as Habitat for Humanity.

Unfortunately, at the outset, Mr. Williams was engaging in activity which violated house arrest rules as he was stopping at a convenience store every day before going to his community service work location. He was advised that this activity was not permitted and subsequently adjusted his behavior. In addition, unfortunately, Mr. Williams engaged in community service with an organization benefitting children, which was not on the list of appropriate community service organizations for which Mr. Williams could volunteer. Therefore, his house arrest and community service were extended to June 7, 2016, at which time he completed his 90 days of community service.

Mr. Williams was permitted by this Court to travel outside of Philadelphia and Montgomery Counties to allow him to further his career as an entertainer and recording artist. He was required to submit a requested travel schedule in advance to the Montgomery County Probation Department with copies to the Court, the assigned District Attorney and his counsel. For all Philadelphia engagements, the Assistant District Attorney was responsible to notify local police so that all engagements would have appropriate police and security coverage to protect the public.

Mr. Williams continued to travel and tested negative for controlled substances until approximately January 9, 2017. At that time, Mr. Mangle and Ms. Subbio conducted a routine and scheduled home visit at Defendant's residence in Montgomery County. Upon entering his living room, Ms. Subbio observed a packet of "Fast Flush" capsules on the sofa table. A urine sample was procured from Defendant which tested positive for the presence of Oxycodone. Defendant denied any drug usage and denied any knowledge of "Fast Flush" capsules which were located inside his home. Subsequently, Defendant claimed that he became ill in Atlanta, GA and Miami, FL and received those medications as part of his treatment. No verification of these claims was ever provided this Court. Defendant was ordered to report to the Probation Department later that day by 3:00 pm. At that time, Defendant admitted the illegal drug use citing recent stressors and depression as reasons for his relapse.

On or about January 10, 2017, this Court received an email that Ms. Desiree Perez, COO of Roc Nation indicated that she had coordinated with Cast Centers, West Hollywood, CA for assessment and treatment of Defendant. This treatment included seven days of medically assisted detox in California. However, even though requested, no verification of this detox treatment was provided to this Court. It is believed that Defendant may have had some sort of detox treatment in Atlanta, GA. However, this is not the travel plan or treatment plan which was approved by the Court. To date, no additional information has been provided concerning his medically assisted detox. However, Defendant did complete outpatient drug and alcohol treatment at RHD/Rise Above through the Montgomery County Probation Department on or about June 16, 2017.

While Defendant was still receiving drug treatment in Montgomery County, he continued to travel to promote his entertainment and recording business. He was arrested on or about March 15, 2017, in St. Louis, MO, and charged with two counts of assault. These charges arose from an altercation at the St. Louis International Airport in which Defendant, according to the police report, allegedly left his vehicle outside the airport, ran into the terminal and began fighting, at one point stomping on a subject on the ground, involving one or more airport employees. This case was resolved when Defendant negotiated an agreement under which the charges would be Nolle Prosequi upon proof of completion of 40 hours of community service.

On or about August 2, 2017, Defendant requested that he be allowed international personal travel to Athens, Greece, on a private airplane, from August 3 to August 6, 2017, which was granted by the Court. However, it came to the attention of the Court that, in fact, Defendant did not travel to Greece, but instead remained in Philadelphia and participated in a performance at the Crystal Tea Room in Downtown Philadelphia. No prior notice of this engagement was given to the Probation Department, the Court or the Philadelphia Police Department. In addition, it came to the Court's attention that Defendant was visiting a residence in Atlanta, GA when no recording or scheduled engagements were included on Defendant's requested travel schedule and no hotel arrangements appeared on the schedule. This travel was contrary to the court's order, in that Defendant was permitted to travel for specifically scheduled engagements to allow him to further his career as an entertainer and recording artist.

In addition, after Defendant completed his drug treatment, Defendant was again arrested, this time in New York City, about five months later, on or about August 16, 2017. He was charged with felony charges which were subsequently reduced to misdemeanor and/or summary Reckless Driving. Again, Defendant negotiated an agreement under which he would complete community service in exchange for dismissal of the charges which is scheduled for April 10, 2018.

On or about August 17, 2017, this Court ordered that Defendant could not travel outside of Philadelphia and Montgomery Counties, except to attend hearings in criminal court in St. Louis on September 8, 2017 and in New York City on October 11, 2017, until further order of the court. However, based upon information received, Defendant, in fact, scheduled and promoted numerous engagements outside Philadelphia up to and including November 4, 2017, some of which may have been posted on social media. Obviously, both counsel can consult various social media outlets to confirm any information available on this subject.

On or about August 22, 2017, the Montgomery County Probation Department indicated that they would be returning courtesy supervision to Philadelphia County due to overwhelmed resources and because this case posed unique challenges incongruent with their supervision and mission. Thereafter, this Court requested that they continue to supervise while the court took time to make other arrangements.

On or about October 24, 2017, this Court scheduled a Violation of Probation Hearing, in this matter for November 6, 2017.

On or about October 27, 2017, this Court received correspondence from a student group at Syracuse University requesting that Defendant be allowed to perform during their homecoming activities on November 4, 2017. The letter, which is attached, states that they had promoted the event as featuring "Meek Mill", that they had sold over 1400 tickets and expected to sell out. They also indicate that this is the second time they had scheduled this event to feature Defendant and they were concerned about their reputation if he did not perform. This is one example of an engagement which appears to have been scheduled in contravention of the court's travel order. A copy of relevant documents are attached.

As stated above, I have included specific facts which were not included in the Probation Summary from Ms. Subbio in order to allow both counsel to better prepare for the VOP hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Genece Brinkley/clw". The signature is fluid and cursive, with the initials "clw" at the end.

Judge Genece E. Brinkley

Attachment

GEB:clw

ADULT PROBATION, PAROLE AND
DUI SERVICES
OF
MONTGOMERY COUNTY

PARTNERING FOR A BETTER TOMORROW



408 Cherry Street
PO Box 311
Norristown, PA 19404
Office 610-992-7777 Fax: 610-992-7778

MICHAEL P. GORDON
CHIEF
TODD BERGMAN
DEPUTY CHIEF
KATHLEEN SUBBIO
DEPUTY CHIEF
STEPHANIE LANDES
DEPUTY CHIEF
ROBIN ELLIOTT
OFFICE MANAGER

October 26, 2017

Honorable Genece E. Brinkley
Philadelphia County Court of Common Pleas
Criminal Justice Center, Room 1404
Philadelphia, PA 19107

RE: Robert Williams, CP-51-CR-0011614-2007, PP#892643

The offender's case was originally received for courtesy supervision from Philadelphia County Adult Probation on February 19, 2016. On or about February 28, 2016, Mr. Williams was placed on Electronic Monitoring/House Arrest for a period of ninety (90) days. Initially, the offender presented with minor adjustment issues, specific to following the rules of house arrest supervision. On March 4, 2016, Mr. Williams had to be reminded that he could only travel directly to and from his approved location. No other stops were permitted. He acknowledged this reminder. On March 8, 2016, there was another secondary stop by Mr. Williams. A more direct conversation was had with Mr. Williams in which he was distinctly made aware that any future failure to comply actions would result in his removal and case being returned to Philadelphia. This Department addressed the issues with Mr. Williams, and no further infractions occurred. During the course of house arrest supervision, the offender tested negative for all substances and completed the required community service hours. Mr. Williams was subsequently released from house arrest on or about June 7, 2016.

The offender's case continued to be supervised without issue until January 9, 2017. On January 9, 2017, at approximately 10:45 a.m., Supervisor Josh Mangle and I conducted a routine and scheduled home visit with the offender at his address of record. Upon entering the living room, I observed a packet of "Fast Flush" capsules on the sofa table. Supervisor Mangle proceeded to the offender's bathroom and secured a urine sample which tested positive for the presence of Oxycodone. The offender denied any drug use and also denied any knowledge of the "Fast Flush" capsules that were located in the home. As a result of the home visit, the offender was directed to report to Montgomery County Adult Probation/Parole Department by 3:00 p.m. on that date to further address the issues.

The offender reported as directed and met with Chief Adult Probation Officer Michael Gordon, Supervisor Mangle and myself. The offender initially denied any illegal/unprescribed drug use.

Upon further questioning, the offender admitted to ingesting Percocet pills (1 to 2/day) for approximately 3 weeks prior to this visit. He cited depression and recent stressors as reason for his relapse. Further, the offender divulged that he has struggled with Percocet use on and off for years, and that this remains his "biggest battle." The offender indicated he has experienced withdraw symptoms in his attempt to cease use and also requested assistance to address his drug use. The offender was directed to coordinate for a drug and alcohol assessment and detoxification (if deemed appropriate by treating clinicians) no later than January 10, 2017 @ 1:00 p.m.

On January 10, 2017, Supervisor Mangle and I spoke with Desiree Perez, COO of Roc Nation. Ms. Perez coordinated with Cast Centers, West Hollywood, California, for assessment and treatment of the offender. I received an initial treatment plan from Dr. Mylett, Executive Director of Cast Centers. As per my conversation with Dr. Mylett, the offender was scheduled to receive approximately seven (7) days of medically assisted detox.

At that time, it was this Department's position to allow the offender to continue with inpatient/outpatient treatment as deemed appropriate by the treatment team at Cast Centers. With your Honor's approval, the offender was medically detoxed while staying at a residence in Atlanta, Georgia. Upon Mr. Williams' return to Pennsylvania, he underwent a drug and alcohol assessment at RHD/Rise Above. The assessment recommendation was for the offender to participate in individual outpatient counseling. Mr. Williams successfully completed outpatient drug and alcohol treatment on June 16, 2017.

It should be noted that the offender subsequently reported that he was ill while in Atlanta, Georgia and then Miami, Florida. In Atlanta, between 12/18/16 and 12/22/16, the offender was treated by Linda McIver, nurse practitioner. Records received from Linda McIver verify the offender was diagnosed with Viral syndrome, Cough and Abdominal Cramp. He was prescribed Benzonatate, Cheratussin AC and Bentyl.

On or about March 15, 2017, the offender was charged by the St. Louis International Airport Police Department with Assault (Count 1 and Count 2). This case was resolved on or about September 18, 2017, when the offender pled guilty to Counts 1 and 2. Upon completion of 40 hours of community service, the plea will be withdrawn and the charges will be dismissed.

On or about August 16, 2017, the offender was charged by the New York Police Department with Reckless Endangerment and Reckless Driving. Criminal Court of the City of New York, County of New York, NY, records indicate this case is due to be dismissed on April 10, 2018.

While the offender's supervision presented unique challenges to this Department, Mr. Williams' overall adjustment to our supervision has been within normal limits. He has responded well to corrective measures and actively participated in an effort towards behavioral change.

Respectfully,

Kathleen Subbio
Deputy Chief Adult Probation Officer