

Criminal Bench Roundtable

1. Courtroom Procedures for Criminal Courts
2. Jury Trials -
 - Where are we?
 - Where are we going?
3. Berks County Jail Procedures
4. Commonwealth v. Koger – See Attached
5. Other Issues

County Probation/Parole Violations

Commonwealth v. Christopher Albert Koger (Washington County), 251 WDA 2020, 2021 Pa Super 115 (decided June 4, 2021)

Questions Presented for Review:

1. Whether the [VOP] court erred in revoking [Appellant's] parole at count 1 where the Commonwealth failed to produce sufficient evidence establishing what the actual terms and conditions of [Appellant's] parole were and [Appellant] had not been charged with or convicted of a new offense?
2. Whether the [VOP] court abused its discretion in revoking [Appellant's] probation at count 2 where the Commonwealth failed to produce sufficient evidence establishing what the actual terms and conditions of [Appellant's] probation were and [Appellant] had not been charged with or convicted of a new offense?
3. Whether [Appellant's] parole and probation revocation sentences are illegal where the same were imposed without authority as a result of the [C]ommonwealth's failure to prove that [Appellant] violated any actual terms or conditions of his probation or parole?

Holding: "We hold that because the court did not advise Appellant of the conditions of his probation and parole at the time of the initial sentencing, the court could not have found he violated these conditions. Thus, we vacate the instant revocation of probation and parole (VOP) judgment of sentence."

In August 2018, Defendant pled guilty to possession of child pornography and criminal use of a communication facility. He was sentenced to eight to 23 months' incarceration on the child pornography charge and immediately paroled due to time already served. He was sentenced to three years' consecutive probation on the communication facility charge. The trial court stated the following at the time of sentence:



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As special conditions of this sentence, [Defendant] shall have no contact with any victims or persons displayed in the images. [Defendant] shall submit to a drug and alcohol evaluation and complete any recommended treatment; perform 100 hours of [c]ommunity [s]ervice and complete sexual offender counseling.

In December 2018, Defendant's probation and parole was revoked after he admitted to technical violations.

In September 2019, a second violation petition was filed. In said petition it was alleged that Defendant had violated the following terms of his supervision "...Condition 7, [relating to refraining] from any assaultive, threatening, or harassing behavior[,] Condition 1, [failing] to permit a [probation officer] to visit [him at his] residence [] and submit to warrantless searches of [his] residence, vehicle, property, and/or [his] person[,] and Condition 2, [relating to violations of] criminal laws or ordinances." (internal quotations omitted). A hearing was held in November 2019 and the probation officer testified that he had found pornographic images of a minor with whom Defendant had been communicating on the Defendant's cell phone. The officer set forth that Defendant had been provided with the probation/parole rules and had signed a copy of same. Once his phone was searched, Defendant became agitated and was placed into custody for safety. Defendant threatened an officer while at the jail. Defendant also had to be removed from his community service program. The court found Defendant in technical violation and revoked his probation and parole. In January 2020, Defendant was resentenced to serve the balance of his maximum sentence on the child pornography charge and one to three years' incarceration on the communication facility charge.

Defendant appealed. The Superior Court panel originally remanded the matter for a supplemental opinion from the lower court asking "...whether the court had imposed, or advised. Appellant of, the terms and specific conditions of his probation and parole at the time of the initial, August 21, 2018 sentencing." The lower court complied, setting forth that Defendant was not advised of his general conditions of probation and parole at sentencing but, pursuant to local county procedures, these conditions were explained to Defendant by adult probation after sentencing.

In considering whether to grant Defendant relief, the panel reviewed the Pennsylvania Supreme Court's decision in *Commonwealth v. Foster*, 214 A.3d 1240, 1250 (Pa. 2019). In *Foster*, the Court held that "...a court may find a defendant in violation of probation only if the defendant has violated one of the 'specific conditions' of probation [or parole] included in the probation order or has committed a new crime." In a footnote in *Foster*, the Court had noted that while probation/parole officers can impose specific conditions on a defendant they are supervising, those conditions "...must be in furtherance of the trial court's conditions of probation."

Taking into consideration *Foster*, and the lower court's supplemental response to the remand, the panel found that the lower court erred when it failed to advise Defendant of the specific conditions of probation and parole at the time of the original sentencing. Pursuant to *Foster*, the lower court had the obligation to impose any reasonable conditions it deemed necessary for supervision of Defendant. Since the court had not imposed specific conditions at the time of



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sentencing, Defendant could not be found in violation of the conditions set forth in the probation/parole departments allegation. "In short, a sentencing court may not delegate its statutorily proscribed duties to probation and parole offices and is required to communicate any conditions of probation or parole as a prerequisite to violating any such condition."

Since a violation could not be found, the revocation was reversed, and judgment of sentence vacated.

How do we address special conditions?

MEMO

TO: Parole Directors

FROM: Christian M. Stephens
Deputy Secretary of Parole Field Services



DATE: August 5, 2021

RE: General Conditions of Probation

The recent decision for the *Koger* case by the Pennsylvania Superior Court does not change how the Parole Field staff handle special probation cases.

The *Koger* case involved a person who received a county sentence, with county probation, who was supervised by the County Adult Probation Office. Therefore, we can distinguish our cases from the *Koger* case.

In addition, the Pennsylvania Supreme Court has said that “the Board and its agents may impose conditions of supervision that are germane to, elaborate on, or interpret any conditions of probation that are imposed by the trial court.”

And, the Pennsylvania Code, Title 37, Section 65.4 lists the general conditions that apply to special probationers and parolees. Per the Code, a special probationer or parolee must follow written instructions of the Board or supervising staff.