

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 97-10,922

VS :

JAMES GEORGE COWHER :

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

Defendant appeals this Court's Order dated February 23, 1999 and filed February 25, 1999. Pursuant to that Order, the Defendant was sentenced to undergo incarceration for an aggregate minimum of 15 months and a maximum of 39 months. This sentence was imposed after the Defendant was found guilty following a non-jury trial of driving under the influence and driving while his license is suspended or revoked, DUI related (75 Pa. C.S.A. Section 1543(b)). Defendant filed an appeal to the sentence on March 25, 1999. On March 26, 1999, the Defendant was ordered to file a concise statement of matters complained of on appeal. To date, the Defendant has not filed a concise statement of matters complained of on appeal.

The Pennsylvania Rule of Appellate Procedure 1925(b) provides that the Court may enter an Order directing the appellant to file a concise statement of matters complained of on appeal no later than 14 days from the entry of the Order. The Rule further provides that "a failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling, or other matter complained of." Waiver for failure to file a 1925(b) statement is not, however, automatic. The appellate court will review the case unless a failure to file the statement

prevents meaningful appellate review. Commonwealth v. Nelson, 453 Pa. Super. 637, 684 A.2d 579, (1996), *citing* Commonwealth v. Cortes, 442 Pa. Super. 258, 659 A.2d 573 (1995); Commonwealth v. Taylor, 448 Pa. Super. 238, 671 A.2d 235 (1996). In deciding whether to hold an objection waived, the appellate court examines the failure to comply with Rule 1925 in the context of the entire case. Commonwealth v. Johnson, 309 Pa. Super. Ct. 367, 371, 455 A.2d 654, 656 (1982). The court considers the seriousness of the failure, and balances the failure to comply against the purpose served by the Rule. The purpose of the Rule is to provide the appellate court with the lower court's reasoning in support of the order on appeal. To further that purpose, subsection (b) allows the lower court to request further delineation or explanation of issues raised by the appellant to enable it to respond to those issues. Commonwealth v. Mueller, 341 Pa. Super. 273, 491 A.2d 258, 261 (1985).

As the Court has no indication of the issues that the Defendant wishes to pursue in his appeal, we urge that a finding of waiver is appropriate in the instant case, See Barrick v. Fox, 73 Pa. Cmwlt. 6, 457 A.2d 208, (1983). In Barrick, both parties had appealed the court's order. The court directed that the parties submit a concise statement of matters complained of on appeal, but did not receive one from either party. The trial court had argued that they were then 'in a position where it must attempt to cover all possible issues, even though it is quite possible, in fact probable, that some of the issues are not being seriously advanced by counsel.' The Superior Court held that the issues had been waived under Rule 1925. The Court reasoned that:

(w)here the trial judge was admittedly uncertain as to which issues were being seriously advanced by counsel, he attempted to elicit a response 'with some degree of specificity' from counsel. Pursuant to Pa.R.A.P. 1925(b), he ordered both parties to file a statement of matters

complained of; however, in direct contravention of the Order, neither party responded. In light of the very difficult time which the trial court had in second-guessing, and addressing all of the possible matters complained of on appeal by both parties, it is easy to understand the difficulty which we have experienced in attempting to exercise our appellate review in this case.

Inasmuch as Pa.R.A.P. 1925(b) explicitly gives an appellate court the discretion to make a determination as to waiver, we see no reason to strip ourselves of this discretion. To relinquish our discretion in cases where a party has failed to comply with Pa.R.A.P. 1925(b) will effectively emasculate the rule, and totally undercut the purpose for which it was formulated.

While we do not believe that a failure to comply with Pa.R.A.P. 1925(b) will automatically result in a waiver, given our discretion in this matter, we feel that the failure to comply, here, interferes with our ability to exercise effective appellate review, and thus operates as a waiver in this case.

Barrick v. Fox, 73 Pa.Cmwlth. 6, 457 A.2d 208, 209-210 (1983); *citing* Adams v. Walsh, 295 Pa.Super. 311, 441 A.2d 1248 (1982); Matter of Harrison Square Inc., 470 Pa. 246, 368 A.2d 285 (1977).

The Court would find that the Defendant's failure to comply with the Court's Order to submit a concise statement of matters complained of on appeal interferes with the Superior Court's ability to exercise effective appellate review, and should operate as a

waiver in this case. Additionally, even if it were found that the Defendant's failure to file a statement does not act as a waiver in this case, the Court chooses not to bind the Superior Court to address an issue that the Defendant may or may not wish to raise, See Commonwealth v. Perez, 444 Pa. Super. 570, 664 A.2d 582 (1995).

Dated: _____

By The Court,

Nancy L. Butts, Judge

xc: David Marcello, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges