

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 97-12,116; 97-12,117  
: 97-12,024; 97-12,025  
:  
vs. : CRIMINAL DIVISION  
:  
:  
RICHARD BANEY, :  
Defendant : 1925(a) Opinion

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

This opinion is written in support of this Court's Order dated April 17, 2000. The relevant facts are as follows:

**Case No. 97-12,024**

Defendant was charged with theft, receiving stolen property, and driving under suspension - DUI related. A jury trial was held on August 13-14, 1998. The jury acquitted Defendant of the theft offense and the receiving charge was dismissed. The Court, however, found Defendant guilty of driving under suspension - DUI related and sentenced Defendant to pay a fine of \$1,000 and undergo incarceration for a period of 90 days. The Court indicated this sentence would be served concurrent to the sentence Defendant received in case numbers 97-10376, 97-10377, and 97-10378.<sup>1</sup> No appeal was filed to this decision.

**Case No. 97-12,025**

Defendant was charged with terroristic threats and three counts of harassment. A

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<sup>1</sup>In these cases, the Honorable William S. Kieser sentenced Defendant to an aggregate term of imprisonment of not less than 20 months nor more than 11 ½ years.

jury trial was held August 13-14, 1998 and the jury acquitted Defendant of all the charges.<sup>2</sup>

**Case No. 97-12,116 and 97-12,117**

On or about October 20, 1997 and November 12, 1997, respectively, Defendant was charged with driving under suspension-DUI related. A hearing on each of these offenses was held on or about December 4, 1997 before District Justice McDermott, who found Defendant guilty and sentenced him to pay the costs of prosecution, a \$1000 fine and undergo incarceration for 90 days for each offense. Defense counsel filed a notice of summary appeal to the Court of Common Pleas on December 16, 1997. A hearing was scheduled for March 4, 1998, but was continued. The matter was rescheduled for June 25, 1998. On that date, the summary appeals were withdrawn upon the motion of defense counsel. The Honorable Nancy L. Butts reimposed the original sentences for each offense and ordered them to be served consecutive to each other but concurrent to any sentence Defendant was currently serving.

On January 12, 2000, Defendant filed a pro se motion to proceed nunc pro tunc in filing post sentence motions and/or a direct appeal in each of the above-captioned cases. In his motion, Defendant asserted that counsel withdrew his summary appeals without his knowledge or consent in case numbers 97-12,116 and 97-12,117. With respect to case number 97-12,024, Defendant claimed counsel failed to file post sentence motions or a direct appeal as Defendant requested.

On March 17, 2000, the Court held a conference/hearing to determine whether Defendant was eligible for the relief requested. Essentially, the Court was trying to determine whether these cases involving summary convictions where Defendant was sentenced to

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<sup>2</sup>The Court does not know why Defendant included this case number in his petition and his appeal because he was not convicted of any charge filed under this case number.

incarceration were governed by the Post Conviction Relief Act (PCRA) or Commonwealth v. Stock, 545 Pa. 13, 679 A.2d 760 (1996). In its Order dated April 17, 2000, the Court denied Defendant's motion. Defendant has appealed this order.

Although Defendant raises numerous issues he would like to raise in a direct appeal of his summary convictions, the only issues which should be the subject of this appeal are whether the Court erred in failing to reinstate Defendant's direct appeal rights in case number 97-12,024 and whether the Court erred in failing to reinstate Defendant's summary appeals to the Court of Common Pleas in case numbers 97-12,116 and 97-12,117. This Court denied Defendant's requests for several reasons.

First, the Court believes this case is governed by the PCRA, not Stock. Unlike the defendant in Stock who was only sentenced to pay fines and costs, Mr. Baney was sentenced to 90 days incarceration on each offense and, thus, was eligible for relief under the PCRA. The PCRA supersedes all common-law remedies for obtaining collateral relief. Commonwealth v. Ahlborn, 548 Pa. 544, 549, 699 A.2d 718, 721 (1997). Therefore, Defendant cannot obtain relief through a motion to proceed nunc pro tunc. Commonwealth v. Lantzy, 736 A.2d 564, 569-570 (Pa. 1999).

Even if Defendant filed a petition under the PCRA, however, he would not be eligible for the relief requested. While an unjustified failure to file a requested appeal constitutes prejudice per se, Defendant must still satisfy the remaining requirements of the PCRA. Lantzy, 736 A.2d at 572. To be eligible for relief, the petitioner must plead and prove that he is currently serving a sentence of imprisonment, probation or parole for the crime. 42 Pa.C.S. §9543. Although Defendant still must pay fines and costs, he admittedly has served these sentences. Therefore, even if Defendant had filed a petition under the PCRA, he would still be ineligible for

relief. Ahlborn, supra.; Commonwealth v. Hayes, 408 Pa.Super. 68, 596 A.2d 195 (1991), appeal denied, 529 Pa. 646, 602 A.2d 856 (1992); Commonwealth v. Pierce, 397 Pa.Super. 126, 579 A.2d 963 (1990), appeal denied, 527 Pa. 609, 590 A.2d 296 (1991). In essence, Defendant's claims were rendered moot when he was no longer incarcerated for these offenses.

One may be tempted to treat Defendant's conviction as governed by Stock even though Defendant was sentenced to incarceration because it is a summary conviction and Defendant's sentence was not lengthy. However, if Defendant had been convicted of a misdemeanor and received a short sentence such as six months probation, his only avenue would be through the PCRA. He would not be eligible for relief and his conviction would result in a criminal record and the possibility of sentencing and recidivist enhancements in the future. See Ahlborn, 699 A.2d at 720. It would seem illogical that a defendant who has a summary conviction involving incarceration would be entitled to relief nunc pro tunc, but an individual convicted of a misdemeanor would not because the PCRA would be the exclusive remedy and he could not meet the eligibility requirements.

Generally, the PCRA also requires that any petition be filed within one year of the date the judgment becomes final. Defendant's summary appeals in numbers 97-12,116 and 97-12,117 were withdrawn by Order dated June 25, 1998 and docketed June 26, 1998. Therefore, these judgments became final on or about July 26, 1998. Defendant was sentenced in case number 97-12,024 on August 14, 1998 and this Order was docketed August 20, 1998. Therefore, this judgment became final on or about September 19, 1998. Defendant did not file his motion until January 12, 2000, approximately 18 months and 16 months after his judgments

became final.<sup>3</sup> The PCRA does contain an exception to this requirement if the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence. Although Defendant claims he did not know that his attorney withdrew his summary appeals in 97-12,116 and 97-12,177 or that he failed to file an appeal to the Superior Court in 97-12,024 until shortly before he filed his motion, the Court believes that this information could have been discovered within the limitation period through the exercise of due diligence. If Defendant had requested and received a copy of the docket in these cases, he would have immediately realized his summary appeals were withdrawn in numbers 97-12,116 and 97-12,117 and no appeal was filed in number 97-12,024.<sup>4</sup>

For these reasons, the Court denied Defendant's request to reinstate his appeal rights nunc pro tunc.

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, J.

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<sup>3</sup>The Court is also concerned about the practical consequences of permitting these convictions to be challenged at this late date. The charges against Defendant were filed in the Fall of 1997. It has been over three years since the offenses occurred. If these convictions were overturned, there may be witness availability and memory problems. Furthermore, it would be a waste of judicial resources to re-litigate these matters after Defendant has already served his sentence of incarceration.

<sup>4</sup>It is the Court's understanding that, since copies of the docket entries are free of charge, the Lycoming County Prothonotary provides them to any who makes a request.