

**IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH

v.

**KENNETH HILL,
Defendant**

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No: 98-11,244; 98-11,245

OPINION AND ORDER

Before the Court is Defendant's petition under the Post-Conviction Relief Act (PCRA) filed on November 8, 1999. The procedural history in this case is as follows:

On February 5, 1999, Defendant pled guilty to two counts of delivery of a controlled substance (cocaine) and one count of conspiracy under two separate informations. He was sentenced on April 13, 1999 to serve three consecutive terms of imprisonment of 16 to 32 months each. No direct appeal from this sentence was filed, however Defendant did file the instant PCRA petition alleging that his counsel was ineffective because he failed to file for a modification of sentence or to appeal the sentence when instructed to do so by Defendant. The trial court denied Defendant's PCRA petition without hearing and Defendant then appealed that decision to the Pennsylvania Superior Court. The Superior Court vacated the trial court's order and remanded Defendant's PCRA petition for a hearing. The hearing was held on January 30, 2003.

The issue which arose at the time of the PCRA petition hearing is essentially whether Defendant instructed trial counsel to file either a direct appeal of the sentence or a motion to modify the sentence. Defendant testified that he gave instruction to trial counsel to file for a modification of sentence as he was led away from the courtroom immediately following his sentencing. He also testified that trial counsel indicated no response or acknowledgment of any kind to his request, but merely looked at him as he was being led away. Trial counsel then testified that he did not hear Defendant request any motion or appeal immediately following the sentencing, but that Defendant did send him a letter approximately four months later, long after the appeal period had expired.

It is the finding of this Court, based upon the testimony offered at the hearing on January 30, 2003, that Defendant never communicated his desire to file for a modification of sentence or a notice of appeal to trial counsel. Trial counsel was not aware within the time periods allowed by law that Defendant wished for such a motion or notice. Consequently, trial counsel cannot be ineffective because of his failure to file a motion to modify sentence or his failure to file a notice of appeal.

ORDER

Accordingly, it is ORDERED and DIRECTED that Defendant's PCRA petition be DISMISSED.

By the Court,

_____ J.

xc: Kyle Rude, Esquire
District Attorney (KO)
Court Administrator
Honorable Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire