

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 99-10,874; 00-11,445

VS :

JAMES MITS DARFER :

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

Defendant appeals from the sentence imposed by this Court on January 23, 2001, under information 00-11, 445, after he pled no contest January 4, 2001 before the Honorable Kenneth D. Brown to the charge of unauthorized use of an automobile. Defendant was sentenced to a minimum of three (3) months and a maximum of twenty-four (24) months in a State Correctional Institution. In addition, the Defendant was required to pay restitution to James Donahue and Hutchison Insurance Company totaling \$2798.40. Defendant was also sentenced under information 00-11,530 to the charges of Criminal Trespass, felony of the third degree and Theft by Unlawful Taking, a misdemeanor of the first degree. The sentence imposed was a consecutive period of incarceration in a State Correctional Institution of nine (9) months and a maximum of three (3) years with a consecutive period of probation supervision of 3 years. On December 4, 2001, Defendant filed a *pro se* Petition for Post Conviction Collateral Relief to information 00-11,445. Defendant alleged, *inter alia*, that his attorney failed to file post sentence motions and a direct appeal to the Superior Court. After conference, appointed counsel filed an amended Petition on the Defendant's behalf. On August 6, 2002, this Court granted Defendant's petition and permitted him to file only a direct

appeal *nunc pro tunc*. Defense counsel filed a Notice of Appeal on September 4, 2002. On September 9, 2002, this Court requested a statement of matters complained of on appeal. Defense counsel submitted the statement on September 23, 2002.

Plea Agreement

On appeal, the Defendant first alleges that the sentence imposed by the Court violated the plea agreement. The Court does not agree. At the time of his plea, the agreement set forth on the face of the written colloquy that the sentence was "up to the court" with no reference made to the probation violation sentence under 99-10, 874. Although the Defendant alleges he was to receive a sentence of probation concurrent with his probation violation sentence, there is no record of that agreement either on the written colloquy prepared by the Defendant or during the plea and sentencing hearings. (N.T. 1/4/01, pp. 4-5 and N.T. 1/23/01, pp. 2-4). In fact, this Court expressly discussed the nature of any plea agreement with defense counsel in the presence of the Defendant. When defense counsel spoke of what the Defendant's understanding of the sentence would be, it was "the lower end of the standard range" *Id.* at 3. Defense counsel never stated that the plea agreement was for probation. The Court therefore rejects this argument.

Voluntariness of Plea

Defendant also alleges that his plea was not "knowingly, intelligently and voluntarily entered into" on January 4, 2001. Again, based upon a review of both the plea and sentence transcripts, there is no indication that the Defendant was not aware of the nature of the charges and that he was accepting responsibility for them. In fact,

the plea judge, Honorable Kenneth D. Brown, reviewed the 7 page written colloquy with the Defendant along with highlighting the most important rights given up by a defendant at the time of plea. N.T. 1/4/02 at p.4, 13 About midway through the plea, the Defendant indicated that he had been taking medication at the time the crimes would have been committed. He believed that as a result he did not have a clear recollection of committing the crimes and was willing to enter a no contest plea. Id. at p.12 Bolstering the Defendant's awareness of what he was doing, defense counsel indicated on his behalf that he was a "rather legally sophisticated defendant" and that he "[was] not doing this, you know, without familiarity of what his options could have been" Id. Therefore, the Court finds that the Defendant entered his plea in a knowing, intelligent and voluntary manner and the Court rejects Defendant's argument.

Restitution Challenge

Defendant alleges that plea counsel was ineffective for failing to dispute the amount of restitution imposed by the Court. Initially, the Court notes that at the time of sentencing, the Defendant spoke about the property taken and the damage to van which was the vehicle involved in the unauthorized use offense. N.T. 1/23/02 at p. 8. This Court explained that if the Defendant disputed the amount of restitution being claimed, the Defendant could file a hearing on the restitution and the Court would hear testimony to determine if the claim was proper. Id. The Court believes that defendants do not need to file Post Sentence Motion to have the Court review restitution.

The statute in Pennsylvania, which governs the order of restitution, is set forth in pertinent part.

§ 1106. Restitution for injuries to person or property

(c) MANDATORY RESTITUTION...

(2) At the time of sentencing the court shall specify the amount and method of restitution... In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

(3) The court may, at any time or upon the recommendation of the district attorney that is based on information received from the victim and the probation section of the county or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution, *alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.* (Emphasis added)

The Court, in reviewing the plain meaning of the statute, believes that a defendant may challenge the order of restitution at any time. Since the Defendant may still request the Court review the award of restitution, prior counsel was not ineffective for failing to dispute the amount of restitution.

Post Sentence Motions

Defendant also alleges that trial counsel was ineffective for failing to file Post Sentence Motions although requested to file them. The Court does not agree. Defendant in his petition does not allege what issues would have been raised in the Post Sentence Motion which would have been filed by original defense counsel. This

Court is satisfied the Defendant would not be prejudiced by failing to allow post-sentence motions to be filed *nunc pro tunc*.

Date: January 6, 2003

By The Court,

Nancy L. Butts, Judge

cc: DA
Eric Linhardt, Esquire
Honorable Nancy L. Butts
Judges
Gary Weber, Esquire