

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 02-11,322
:
vs. : CRIMINAL
:
MARK TANNER, :
Defendant : Post-Sentence Motion

ORDER

AND NOW, this ____ day of April 2004, the Court is constrained to find that the Defendant's post-sentence motions are untimely.

The Court sentenced the defendant on October 14, 2003. The sentencing order was docketed on October 16, 2003. John Piazza, III represented the defendant. After sentencing, the defendant applied for a public defender to represent him in post trial matters. On October 24, 2003, an assistant public defender filed a petition to extend the filing time for post-sentence motions. On October 27, 2003, the public defender formally entered his appearance on behalf of the defendant and simultaneously Mr. Piazza filed a withdrawal of appearance.¹ On November 6, 2003, the public defender filed a post-sentence motion.

On November 21, 2003, the Court held argument on the petition to extend the time for filing post-sentence motions. Since the public defender's office did not represent the defendant at trial **and there was no objection from the Commonwealth**, the Court granted the motion and gave defense counsel until February 6, 2004 (thirty days after the receipt of the trial transcripts) to file an amended post-sentence motion.² The public

1 Mr. Piazza filed a 'withdrawal of appearance' on October 24, 2003. However, there was neither a simultaneous entry of appearance by the public defender nor a motion to withdraw filed at that time.

2 This Order was docketed November 26, 2003.

defender filed an amended post-sentence motion on February 6, 2004. A hearing was scheduled for February 26, 2004, but was continued because the defense did not have their witnesses on that date. The motions were rescheduled for March 29, 2004. At the hearing on March 29, 2004, the first assistant district attorney, Kenneth Osokow, came into the courtroom during the testimony of the defendant's first witness. When the witness was finished testifying Mr. Osokow interrupted and argued that: (1) the post-sentence motions were untimely; (2) the Court did not have the authority to extend the filing date and (3) even if the first motion was filed nunc pro tunc, the 150-day time limit of Rule 720(B)(3)(b) would relate back to October 24, 2003 (the last day of the ten day period for filing post-sentence motions) and would not run from November 6, 2003, the date the first post-sentence motion was actually filed. Since all the witnesses were present and ready to testify, the court deferred ruling on the Commonwealth's timeliness argument until after the hearing when the Court could research the issue.

Initially, the Court must express its frustration with the Commonwealth. At the time the Court heard oral argument on the petition to extend time for filing post-sentence motions, the Commonwealth did not have any objection or argument against the motion. The Commonwealth did not raise any objection or argument until after the Court began taking testimony on March 29, 2004. The Court would like to find that the Commonwealth waived any objection to the timeliness of the motions by failing to object at the November 21, 2003 argument. As will become apparent later in this Order, however, such a finding would not save the defendant's post-sentence or appeal rights.

Rule 720(A) states: "a written post-sentence motion shall be filed no later than 10 days after imposition of sentence. Although the sentencing order was not docketed until

October 16, 2003, the Court imposed sentence on October 14, 2003. The first post-sentence motion was filed November 6, 2003. As this date is more than ten days from either October 14 or October 16, the motion was untimely.

On October 24, 2003, within the ten-day period, an assistant public defender filed a petition to extend the time for filing post-sentence motions. The Court believes it could consider this motion as a motion for file post-sentence motions nunc pro tunc. Nevertheless, even if the Court did so, the Court must expressly grant the motion within thirty days of the imposition of sentence. Commonwealth v. Dreves, 839 A.2d 1122, 1128 n.6 (Pa. Super. 2003). Since the Court imposed sentence on October 14, 2003 and did not grant the petition to extend time for filing post-sentence motions until its issued its order dated November 21, 2003 and docketed November 26, 2003, the motions must be considered untimely.³ Moreover, since the defendant failed to file a timely post-sentence motion and the Court did not expressly grant a motion to file a post-sentence motion nunc pro tunc within thirty days of the imposition of sentence, the defendant was required to file any appeal within thirty days of sentence. Pa.R.Cr.P. 720(A)(3); Pa.R.App.P. 903; Dreves, supra; Commonwealth v. Bilger, 803 A.2d 199 (Pa. Super. 2002), appeal denied, 572 Pa. 695, 813 A.2d 835 (Pa. 2002). Thus, any appeal filed by the defendant, even if filed within thirty days

³ Even if the Court had deemed the petition to extend a motion to file post-sentence motions nunc pro tunc and granted it within thirty days of imposition of sentence, the Court must treat the motion as though it were filed within the ten-day period following imposition of sentence. Commonwealth v. Dreves, 839 A.2d 1122, 1129 (Pa. Super. 2003). Therefore, in this case, the Court would have had to decide the motions by March 22, 2004 or March 24, 2004.

of this order, would be quashed by the Superior Court as untimely. Dreves, supra; Bilger, supra. At this point, it appears that the defendant's only recourse is to file a petition under the Post Conviction Relief Act (PCRA).⁴

By The Court,

Kenneth D. Brown, P.J.

cc: Mary Morris, Esquire (APD)
William Simmers, Esquire (ADA)
Kenneth Osokow, Esquire (ADA)
Mark D. Tanner, Lycoming County Prison
Work file
Gary Weber, Esquire (Lycoming Reporter)

⁴ To be considered timely, a PCRA petition must be filed within one year of the defendant's conviction becoming final. Since the sentencing order was docketed on October 16, 2003 and neither a timely post-sentence motion nor a timely appeal was filed, the defendant's conviction became final on or about November 15, 2003. Therefore, any PCRA petition must be filed on or before November 14, 2004. The Court encourages the defendant to file a PCRA petition. Once such a petition is filed, the Court would appoint new counsel for the defendant.