

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 99-10,731; 99-10,917  
: 99-10,940  
:  
vs. : CRIMINAL DIVISION  
:  
:  
ROBERT WELLS, :  
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 March 8, 2004.

The relevant facts follow.

The defendant filed a pro se Post Conviction Relief Act (PCRA) petition. On July 9, 2003, the Court entered an Order notifying the defendant and his counsel, John Felix, Esquire, of the Court's intent to dismiss the defendant's PCRA petition and giving the defense twenty days within which to respond. On August 1, 2003, Attorney Felix filed a request for an extension to respond to this notice. In an Order docketed August 5, 2003, the Court granted Mr. Felix's request and extended the filing deadline to September 8, 2003. Mr. Felix filed a response to the proposed dismissal on September 8. Mr. Felix resigned his position as a conflict counsel effective October 31, 2003.

In an Order dated November 14, 2003 and docketed November 18, 2003, the

Honorable Clinton W. Smith appointed William Kovalcik to represent the defendant.<sup>1</sup> The Court entered a final order denying the defendant's PCRA petition on November 17, 2003. The Order set forth the time limit for filing an appeal. Both the defendant and Mr. Kovalcik were sent a copy of the Order.

On or about December 3, 2003, an Order was entered appointing Jay Stillman to represent the defendant.<sup>2</sup> In an Order dated December 12, 2003 and docketed December 15, 2003, Judge Smith vacated the appointment of William Kovalcik and affirmed the appointment of Jay Stillman.

On December 22, 2003, Mr. Stillman filed a petition to appeal nunc pro tunc. In his petition he alleged he did not know of his appointment or receive the defendant's case files until December 15, 2003. He also claimed he did not realize the need to file an appeal until December 17, 2003, and his schedule precluded filing a notice of appeal on that date. The Court held an argument on the petition on March 1, 2004. At the argument, the Commonwealth argued the Court could not grant the petition because the sole avenue for the reinstatement of appeal rights is through the PCRA, not a nunc pro tunc petition. In an Order dated March 8, 2003, the Court denied the petition to appeal nunc pro tunc, since the case law in Pennsylvania clearly holds that the PCRA provides the exclusive remedy for post conviction claims seeking restoration of appellate rights.

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1 The Court requested the appointment of a new attorney as soon as possible so that it could enter a final order on the defendant's PCRA petition. At the time of Mr. Kovalcik's appointment, the Court believes the vacancy created by Mr. Felix's resignation had not yet been filled. Besides Mr. Kovalcik, the only other conflict attorney at that time was James Protasio, who could not take this case because he represented the defendant at trial.

2 Mr. Stillman was hired to fill the vacancy created by Mr. Felix's resignation.

On April 7, 2004, Mr. Stillman filed a notice of appeal on behalf of the defendant. The Court requested a concise statement of matters complained of on appeal. The defense filed such a statement on April 27, 2004.

In his statement of matters complained of on appeal, the defendant avers that the Court erred in denying the defendant's petition because no instructions were given to counsel nor was counsel advised of the appeal deadline. Regardless of the allegations, the Court cannot grant relief through a nunc pro tunc petition. Commonwealth v. Robinson, 575 Pa. 500, 837 A.2d 1157 (Pa. 2003); Commonwealth v. Hall, 565 Pa. 92, 771 A.2d 1232 (Pa. 2001); Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 570 (Pa. 1999); Commonwealth v. Bennett, 842 A.2d 953 (Pa.Super. 2004). Quite frankly, in light of this case law, the Court expected the defense to file a PCRA petition containing the allegations of the nunc pro tunc petition plus additional allegations to address the requirements of the PCRA such as the timeliness of the petition and the manifest injustice standard for second or subsequent PCRA petitions set forth in Commonwealth v. Lawson, 519 Pa. 504, 513, 549 A.2d 107, 112 (1988) and Commonwealth v. Loach, 618 A.2d 463 (Pa.Super. 1992), appeal denied 535 Pa. 655, 634 A.2d 219.<sup>3</sup>

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<sup>3</sup> Although not raised by the defendant or his counsel, the Court acknowledges that there is case law that would support treating a pro se petition to appeal nunc pro tunc as a PCRA petition and giving the defendant leave to amend to satisfy the requirements of the PCRA. See Commonwealth v. Eller, 569 Pa. 622, 634-35, 807 A.2d 838, 845 (Pa. 2002). Here, the Court is not dealing with a pro se petition, but one filed by counsel. It is unclear to the Court whether a counseled nunc pro tunc petition also should be treated as a PCRA petition or whether it merely gives rise to a new ineffective assistance of counsel claim (which would need to be filed within 60 days of the conclusion of this appeal). The Court is willing to treat the nunc pro tunc petition as a PCRA and permit an amendment, but defense counsel wants the Court to simply reinstate the defendant's appellate rights based on the nunc pro tunc petition, which the Court is not permitted to do.

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

By The Court,

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Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)  
Jay Stillman, Esquire  
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Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)