

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 03-10,050**
:
:
vs. : **CRIMINAL**
:
RICHARD WAYNE ILLES, SR., : **Supplemental Omnibus**
Defendant : **Pretrial Motion**

O R D E R

AND NOW, this 30th day of March 2004, this Order is entered after argument on the Motion of Defense Counsel George Lepley and Craig Miller, Esquire to Withdraw as Counsel for Defendant Richard Wayne Illes, Sr.

It is clear defense counsel at this point in time have reached a stage where they are no longer being compensated by their client to represent him. The Court cannot compel defense counsel to represent their client in this complex case in perpetuity. See Commonwealth v. Keys, 397 Pa.Super. 453, 580 A.2d 386 (1990).

While acknowledging the above, counsel and the Court have a responsibility to minimize any prejudice to the Defendant due to the withdrawal. See Rules of Professional Conduct Rule 1.16; See also Commonwealth V. Roman, 379 Pa.Super. 331, 549 A.2d 1320 (1988).

During a conference in chambers on March 29, 2004, defense counsel indicated to the Court they had planned to file a post-sentence motion pursuant to Pa.R.Cr.P. 720.

Consistent with defense counsels' obligation to their client not to leave their client in a prejudiced

position by withdrawal, defense counsel shall file the post-sentence motion on behalf of the Defendant. Upon the filing of this motion, the Court will grant defense counsels' Motion to Withdraw.

The Court will expect and request that defense counsel consult with new counsel so that new counsel can assume representation of the post-sentence motion.

Before closing, the Court will comment on a potentially complex question that may immediately confront new counsel. Understandably, in a complex case like this one, new counsel will have to consider amendment of the post-sentence motion to raise the issue of ineffective assistance of trial counsel.

The Court does not believe that the time parameters of Pa.R.Cr.P. 720 allow litigation of this issue at this time. Rule 720 requires the Court to decide the post-sentence motion within 120 days of filing. See Rule 720. Rule 720 provides for a possible thirty (30) day extension this time for good cause shown. See Rule 720(B)(3)(b). The post-sentence motion is deemed denied by operation of law if the Court does not decide the motion by the end of the 120 days or possibly 150 day period. Pa.R.Cr.P. 720(B)(3). As a practical reality given the length of this trial (over five (5) weeks), trial transcripts will not be available to new counsel for many months. New counsel will then have the demanding obligation of reviewing all the transcripts carefully to determine if the record reveals any arguable issue of ineffective assistance of

counsel. New counsel also will be obligated to investigate potential ineffective assistance of counsel issues that are beyond the transcript record of this case. Of course they will also be obligated to follow through with all other issues raised in original counsels' post-sentence motion. Finally, if all these things could be accomplished, the Court would need to schedule any possible hearing on issues raise and decide all issues within the maximum five (5) month period provided by Rule 720. It is not likely or reasonable to expect that any issue of ineffective assistance of counsel could be appropriately litigated in the post-section motion.

Logic would dictate that any issue of ineffective assistance of counsel be raised, if at all, in the collateral proceeding created by the Post Conviction Relief Act if the Defendant is unsuccessful on direct appeal. This is exactly what is envisioned by the Pennsylvania Supreme Court in the recent decision of Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002). The Pennsylvania Supreme Court stated: "Most jurisdictions considering this issue, however, express a clear preference that ineffectiveness claims be raised in collateral review proceedings." Id. at 62, 813 A.2d at 734.

In fact, the Pennsylvania Supreme Court in Grant noted that only after review of the alleged claims of trial error, can the full effect of trial counsel's conduct be placed in the context of the case. Id. at 66, 813 A.2d 737. The Court then announced the following holding: "We now hold that, as a general rule, a petitioner should wait to raise

claims of ineffective assistance of trial counsel until collateral review." Id. at 67, 813 A.2d at 738.

Accordingly, for the reasons explained in this Order, new defense counsel shall not file any claim of ineffective assistance of prior counsel in post-sentence proceeding. This ruling is without prejudice to the defendant raising any such issues in a post-conviction proceeding.

By The Court,

Kenneth D. Brown, Judge

cc: Michael Dinges, Esquire (DA)
Kenneth Osokow, Esquire (ADA)
Roan Confer, Esquire (ADA)
George Lepley, Esquire
Craig Miller, Esquire
William Miele, Esquire (PD)
Work file
Gary Weber, Esquire (Lycoming Reporter)