

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 02-10,585
	:	
vs.	:	CRIMINAL DIVISION
	:	
EARL R. KRAMER, III,	:	
Defendant	:	Motion to reconsider

**OPINION AND ORDER**

Before the Court is Defendant's Motion to Reconsider Suppression Decision, filed January 28, 2004. Argument on the motion was heard January 30, 2004.

By Order dated January 9, 2004, this Court granted, in part, Defendant's Suppression Motion contained in his Omnibus Pre-trial Motion, filed July 25, 2002. Specifically, this Court found Defendant to have invoked his right to counsel during custodial interrogation at a certain point after his arrest, and that such right was violated by further interrogation at the magistrate's office prior to arraignment. The Court directed that any statements made in response to such interrogation would be suppressed. The Commonwealth filed an appeal on January 27, 2004, certifying that the grant of the motion terminates or substantially handicaps the prosecution of the case. Defendant then filed the instant motion for reconsideration, seeking to have this Court reconsider that portion of the Order which granted his motion to suppress. Interestingly enough, Defendant wishes to have this Court rescind the only portion of its prior Order entered in his favor and instead enter a ruling in the Commonwealth's favor. Even more interesting, however, is that the Commonwealth appears strongly opposed to such.

Initially, the Commonwealth argues this Court is without jurisdiction to consider Defendant's request, citing 42 Pa.C.S. Section 5505, which provides, in pertinent part, that a court may modify or rescind any order within 30 days after its entry if no appeal from such order has been taken. Since an appeal has been taken, however, Section 5505 does not apply, rather, the situation is governed by Pennsylvania Rule of Appellate Procedure 1701. See Commonwealth v. Moir, 766

A.2d 1253 (Pa. Super. 2000); Jackson v. Hendrick, 746 A.2d 574 (Pa. 2000); Commonwealth v. Kissinger, 462 A.2d 768 (Pa. Super. 1983). That rule allows a trial court to grant reconsideration of an order which is the subject of an appeal if an application for reconsideration of the order is filed in the trial court within the time provided by law and an order expressly granting reconsideration of such prior order is filed in the trial court within the appeal period. Pa.R.App.P. 1701(b)(3). The rule goes on to provide that a timely order granting reconsideration shall render inoperative any such notice of appeal with respect to the prior order and that the notice of appeal is thereafter subject to being stricken by praecipe filed by any party. The instant situation clearly falls within the ambit of Rule 1701(b)(3). The Court will therefore consider the motion to reconsider on its merits.

Defendant offers three reasons for his request that this Court change its prior ruling and instead rule in the Commonwealth's favor: (1) he wishes to proceed to trial, currently scheduled to begin March 22, 2004, but the instant appeal will substantially delay such, and he remains incarcerated in the meantime; (2) he wishes to avoid any further effects of delay he has experienced with respect to witnesses, such as loss of memory or difficulty locating people; and (3) he does not consider the statement which was suppressed to be incriminating in any event.<sup>1</sup> The Court believes Defendant is within his rights to seek reconsideration under the circumstances presented herein, which in effect constitutes a waiver of his right to counsel during custodial interrogation. He is certainly entitled to waive that right to counsel at the time of questioning, and the Court fails to see why he would be unable to do so now, as long as such waiver is knowing and voluntary. A colloquy with Defendant at the time of argument convinces the Court that Defendant is indeed making a knowing and voluntary choice, and in fact, the Court can understand Defendant's decision as he has already been incarcerated on these charges for nearly two years.

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<sup>1</sup> According to the testimony of Agent David Ritter of the Williamsport Bureau of Police, when Agent Ritter remarked to Defendant that if anyone else was involved in the murders and Defendant "talked" Ritter would ask the district attorney if he'd be willing to not seek the death penalty, Defendant said if he got the death penalty he would not fight it, and that he would not want to spend the rest of his life with someone he would not spend time on the street with, that death would be like euthanasia.

The Commonwealth nevertheless contends the Court cannot reconsider its prior decision in Defendant's favor because to do so would be creating an issue of ineffective assistance of trial counsel. While the Court does not agree that reconsideration necessarily creates such an issue, the Court finds that consideration of trial counsel's effectiveness at this point is premature. To hold otherwise would require the Court to ignore many rules of procedure in order to avoid a later claim of ineffectiveness. For example, the defense counsel who failed to file an alibi notice but then sought to introduce testimony of alibi witnesses could counter the Commonwealth's argument against admission based on Pa.R.Crim.P. 573(C)(1)(a), which requires such a notice, simply by arguing he would later be found ineffective if the Court did not allow the testimony. Surely the Commonwealth would not abide such reasoning in that situation, and the Court will not accept it from the Commonwealth in this one.

Accordingly, the Court will grant Defendant's request for reconsideration and will modify its Order of January 9, 2004, to deny entirely all of Defendant's motions addressed therein. Since the Commonwealth has "promised" to appeal this decision, the Court wishes to note herein that although the Court would have a difficult time envisioning how this particular decision terminates or substantially hampers the prosecution, the Court recognizes that once the Commonwealth certifies such to the Superior Court, this Court has no say in that matter. The Court wishes to express its hope that the Superior Court will handle such an appeal on an expedited basis, however, in order to afford Defendant his long sought-after speedy trial.

**ORDER**

AND NOW, this 2<sup>nd</sup> day of February 2004, for the foregoing reasons, the Court hereby GRANTS Defendant's Motion to Reconsider Suppression Decision, filed January 28, 2004. This Court's Order dated January 9, 2004, is hereby

modified to deny all of Defendant's requests for relief addressed therein, including his Motion to Suppress, contained in his Omnibus Pre-trial Motion.

cc: DA  
PD  
Gary Weber, Esq.  
Hon. Dudley Anderson

BY THE COURT,

Dudley N. Anderson, Judge