

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 2093-2006; 403-2007
	:
CATHY CUMMINGS,	:
Defendant	: 1925(a) OPINION

Date: October 20, 2009

**OPINION IN SUPPORT OF THE ORDER OF JULY 21, 2009 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Cathy Cummings filed an appeal to our order of July 21, 2009, which granted her PCRA request that she be allowed to file an appeal *nunc pro tunc* from the sentence we imposed on February 9, 2009. We do not understand her current appeal of that order as it was to her benefit that we permitted her to file this appeal.

Ms. Cummings Statement of Issues on Appeal (Statement) reveals that, in fact, she takes issue with this Court's order of February 9, 2009 sentencing her pursuant to a parole violation hearing concerning the above-captioned cases. Ms. Cummings' Statement alleges that "[t]he Court erred in denying the requested resentencing of [her] where previous counsel was ineffective for arguing that the sentence imposed would lengthen the amount of time [she] would serve due to delays in getting state parole." We, furthermore, do not understand the Statement because Ms. Cummings' previous counsel, Kyle Rude, Esquire, offered no such argument. It can only be that Ms. Cummings' statement was meant to allege that her previous counsel was ineffective for not arguing that her sentence, a state sentence served in county prison, would be lengthened in that there may be delays in getting state parole while being held

in a county institution. To this complaint, which the Court itself has constructed from Ms. Cummings' Statement, we will respond in this opinion.

A review of the record reveals that Ms. Cummings was deserving of a state sentence. Ms. Cummings did not and does not now nor on her PCRA contest the factual allegations underlying the parole violation at her hearing. N.T., 2/9/2009, p. 2. It is uncontested that she violated probation conditions numerous times while on a county I.P. sentence, she was serving as a result of two DUI offenses, case #2093-2006 and 403-2007, each a misdemeanor 1 offense and each having a 30 month county I.P. sentence to be served consecutively. *Id.* at 5. Ms. Cummings repeated violations of her probation consented of her using and abusing alcohol and controlled substances. *Id.* at 3-4. It was also uncontested that upon a revocation of her I.P. sentences she faced a maximum sentence through March 12, 2012 for these violations. *Ibid.* It was the position of the Adult Probation Office, however, that it was only pursuing a revocation of the 2093-2006 sentence and was willing that sanctions under the 403-2007 case would not be pursued. *Id.* at 5, 6.

At the violation hearing, the county probation officer explained well his vehement request that Ms. Cummings be sentenced and committed to a State Correctional Institution: "As a county probation officer and with our staff of our office we have exhausted, and I emphasize exhausted, every avenue...; [there is] nothing left for her on a county level and we recommend a state sentence." *Id.* at 27-28. In a meaningful counter-argument Ms. Cummings' attorney explained well the reasons for Ms. Cummings' equally vehement opposition to the county probation office's position and requested that she remain on county supervision. *Id.* at 28-30.

At the close of arguments, the Court held an extensive off-record discussion with the parties involved, explaining that the Court did find that the county probation office had exhausted their resources to supervise Ms. Cummings. Evidence of this off-record discussion exists in the record: “Ms. Cummings, I think you need to understand as I indicated in our off-record discussion in the presence of yourself, your counsel, and the Adult Probation Office that they have exhausted their willingness, at least – although that’s not a controlling aspect – but also that they have substantially exhausted their resources and abilities to appropriately supervise you... Now, you’ve rejected my off-record suggestion that you look at the State I.P. Program. Maybe you’ll want to reconsider that and I can certainly reconsider my disposition for the next thirty days.” *Id.* at 34, 36.

During the off-record discussion, Ms. Cummings vigorously protested any possibility of serving her sentence in a state correctional institution due to her self-diagnosis of post traumatic stress disorder that she suffers from as a result of serving a previous state sentence, Ms. Cummings expressed both to the court and to her attorney, who was given time alone with Ms. Cummings during the course of discussions, her preference for being interned at Lycoming County Prison rather than in any state correctional institution. She stated this preference despite the fact that Mr. Metzger of the Adult Probation Office warned the Court, Ms. Cummings and her counsel that serving a state sentence in county prison would complicate her being paroled, the transition from detainment to probation not being as “smooth... [a]... transition.” *Id.* at 38.

Once this Court announced on the record our determination that Ms. Cummings would serve a state sentence, Ms. Cummings’ counsel argued effectively that she and the community

would benefit from her state sentence being served in county prison. Counsel cannot be said now to be ineffective for doing so, as it was at the request and direction of Ms. Cummings after not only counsel, but the Court, and the Adult Probation Office urged her to consider the ramifications of alternatives to such. *Id.* at 37.

This Court accepted Ms. Cummings position, as stated by her counsel, that she serve a state sentence in county prison and noted in addition to the reasons for being allowed to serve a state sentence in county prison that Ms. Cummings' max out date, explicitly noted in the sentence order as October 12, 2009 ensuring that she be given credit for time served as allowed by law, was relatively soon. *Id.* at 38-40. See also, our orders of February 9, 2009, March 11, 2009, and May 21, 2009 relating to sentencing.

Finally, we must disabuse Ms. Cummings of the thought that her parole is being complicated because of counsel's "ineffective" arguments resulting in her serving a state sentence in the county prison. To the contrary, we never intended her to be paroled by the state authorities but rather made it clear that she was to serve out the sentence until the maximum date of October 12, 2009. As that date is now passed and Ms. Cummings is again on the street under county I.P. probation this appeal is meritless.

For the foregoing reasons the appeal of Ms. Cummings to our order allowing her to file a direct appeal of her sentence should be dismissed.

BY THE COURT,

William S. Kieser, Senior Judge

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DA
Judges
Gary L. Weber, Esquire (Lycoming Reporter)