

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**BENJAMIN BROWN,
Defendant**

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**No. 212-2003
CRIMINAL**

OPINION AND ORDER

The Defendant filed a Petition for Writ of Habeas Corpus on June 18, 2012. A hearing on the Motion was held October 1, 2012.

Background

On November 17, 2003, Benjamin Brown (Defendant) was found guilty of Criminal Trespass, a felony of the third degree. Sentencing for the Defendant was originally scheduled on January 5, 2004. On February 7, 2005, the Honorable Kenneth D. Brown issued a Bench Warrant because the Defendant failed to appear for sentencing.¹ Judge Brown noted that notices sent to the Defendant's last known address had been returned and that his attorney also indicated the same. On April 26, 2005, the Bench Warrant was vacated and Judge Brown stated that:

The Defendant changed his address, which may explain why he did not get written notice of prior sentencing dates. However, Defendant was on supervised bail and apparently continued to report to supervised bail officer up to this time. In light of his reporting to the supervised bail officer, it does not appear that he was intentionally trying to flee.

On May 24, 2005, the Defendant was sentenced by Judge Brown to undergo incarceration in a State Correctional Institution for fourteen (14) months to five (5) years. The Court stated that "[p]ending appeal, bail is set at \$50,000.00 good bail being required."

¹ Judge Brown retired from active judicial service on December 31, 2009.

On June 24, 2005, the Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania. On January 25, 2006, the appeal was dismissed by the Superior Court for failure to comply with Pa.R.A.P. 3517.² On June 6, 2007, the Commonwealth filed a Petition for Contempt of Court because the Defendant failed to pay court costs/fines and restitution. On June 6, 2007, this Court filed a Rule to Show Cause which required the Defendant to attend a delinquent account hearing on July 9, 2007 or a Bench Warrant would be issued. The Commonwealth filed the same Petition for Contempt of Court on July 23, 2007 and again this Court ordered that the Defendant be present for a hearing on September 11, 2007. On October 16, 2007, this Court issued a Bench Warrant for the Defendant, which was vacated on February 4, 2008.

On May 27, 2008, the Commonwealth filed a Motion to Revoke Bail and requested that the Court order the Defendant to begin serving his sentence. On July 15, 2008, the Defendant did not appear at the hearing for the Motion to Revoke Bail because notice was not given to him. This Court, however, issued a Bench Warrant so that the Defendant, when picked up, could begin serving his sentence. On January 5, 2009, the Bench Warrant was vacated by this Court and the Defendant was ordered to surrender himself to the Lycoming County Prison on January 12, 2009. Subsequently, the Defendant filed a Motion to Reinstate Appeal Rights Nunc Pro Tunc/PCRA on January 6, 2009. On January 12, 2009, this Court continued the Defendant's existing bail until further Order of Court and required that he appear for a hearing on February 6, 2009. On February 6, 2009, the Defendant was ordered by Judge Brown to report to the Lycoming County Prison on March 31, 2009.

² Failure to file a docketing statement.

On March 31, 2009, Judge Brown restored the Defendant's appeal rights and set bail pending appeal at \$60,000 good bail. The Superior Court of Pennsylvania affirmed the Defendant's sentence on March 9, 2010. On September 16, 2010, the Supreme Court of Pennsylvania denied the Defendant's Petition for Allowance of Appeal. On March 22, 2011, the Defendant was ordered to report by this Court to the Lycoming County Prison on April 5, 2011, which the Defendant did in fact do.

On October 6, 2011, the Defendant filed this PCRA Petition alleging that his Due Process rights were violated by long delays occurring before his sentence was implemented. On May 4, 2012, this Court proposed dismissal of his PCRA Petition finding the issue raised should have been brought within the habeas corpus framework. On June 1, 2012, the PCRA Petition was dismissed. The Defendant then filed a Petition for Writ of Habeas Corpus on June 22, 2012.

Discussion

In the Petition for Writ of Habeas Corpus, the Defendant alleges that his Due Process rights were violated by the long delay that passed prior to the Court ordering the implementation of the Defendant's sentence. Pennsylvania courts have applied factors set forth in Barker v. Wingo in the context of post-sentence delay. 407 U.S. 514 (1972). The four part test used in Barker requires that courts examine: 1) whether the delay itself is sufficient to trigger further inquiry; 2) the reason for the delay; 3) the timeliness of the defendant's assertion of his or her right; and 4) any resulting prejudice to the defendant. Id.

In Blair, the Superior Court of Pennsylvania applied Barker in the context of a defendant who was sentenced and after a two (2) year delay was incarcerated. Commonwealth v. Blair, 699 A.2d 738 (Pa. Super. 1997). The Superior Court determined that two (2) years was

sufficient to trigger further inquiry. Id. at 745. With regard to the second factor, the Superior Court stated that “a deliberate attempt to delay should be weighed heavily against the government while ‘[a] more neutral reason for such as negligence should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” Id. at 745-46. The court determined in Blair that the delay was a result of negligence because the defendant’s bond papers were missing from the record. Id. at 746.

For the third factor, the defendant did not assert his due process right until after the trial court ordered him to appear for sentencing. The court stated that, [w]hile we question Blair’s assertion that he did not know that his sentence had been affirmed, we must assume that this is why he refrained from asserting any claim before that time.” The Fourth factor, which must be determined, is the amount of prejudice to the defendant as a result of the delay. “The traditional reasons for finding prejudice in the context of a speedy trial claim, *i.e.*, to prevent oppressive pre-trial incarceration, minimize the accused’s anxiety, and limit the possibility that the defense will be prejudiced by lost or missing witnesses are clearly absent from the instant case.” Id. (citations omitted). After considering all the factors the court determined that the defendant’s Due Process rights had not been violated.³

³ Prior to analyzing the Barker factors the court addressed the defendant’s prejudice:

We will not allow the court system’s inadvertent error to cancel any part of Blair’s punishment for the crimes for which he was justly convicted and sentenced. Society has an interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of an unintended delay or negligent error attributable to the government. The fact remains that, regardless of the delay, Blair has not served the time he was so ordered to serve. Blair’s “erroneous time at liberty” was spent, by his own admission, engaging in the normal activities of a member of free society. Considering Blair’s accomplishments in maintaining employment and pursuing educational goals, the argument could be made that he actually benefitted from his time at liberty. Indeed, it is difficult to accept Blair’s plea of “enormous prejudice” in light of these circumstances.

The Supreme Court of Pennsylvania used the same type of analysis in West. Commonwealth v. West, 938 A.2d 1034 (Pa. 2007). In that case, the defendant was at liberty for nine (9) years after his petition for allowance of appeal was denied by the Supreme Court. As the nine (9) year time length was sufficient to trigger further inquiry, the Supreme Court reviewed the reason for the delay. During the nine (9) years, government entities were contacted regarding the Defendant's status. Id. at 1048. The Supreme Court found that there was no evidence that any government entity "definitively received such notification and deliberately failed to take steps to rectify the error." Id. In addition, the defendant alleged prejudice because of missing transcripts and lapsed memories of potential witnesses. Id. 1049. The court found that any prejudice was speculative and "not based upon the loss of any real potential meritorious claim." Id. Based upon the Barker factors, the Supreme Court found that the defendant's Due Process rights were not violated.

In reviewing the facts of this case, the Court finds two potential periods of delay. The first period of delay began on January 25, 2006, after the Superior Court dismissed the Defendant's appeal for failure to comply with Pa.R.A.P. 3517. It was not until May 27, 2008, that the Commonwealth filed a motion to revoke the Defendant's bail and requested that the Court order the Defendant to begin serving his sentence. This delay calculates to be two (2) years and four (4) months.⁴ The second period of delay occurred after the Supreme Court denied the Defendant's Petition for Allowance of appeal on September 16, 2010, and on March 22, 2011, when the Defendant was ordered to report at the Lycoming County Prison on April 5,

Blair, 699 A.2d at 743.

⁴ The delay was two (2) years, four (4) months and two (days) or 853 days.

2011. The Court calculates this delay to be slightly over six (6) months.⁵ The Commonwealth concedes that the first delay triggers further inquiry, but argues that the second delay does not. While it is arguable that six (6) months is not sufficient to trigger further inquiry, the Court will still address the remaining factors but account for the short delay in favor of finding prejudice to the Defendant.

For the second factor, the Court must examine the reason for the delay. The parties stipulated that the first delay arose from the Commonwealth's failure to prepare an order directing the Defendant to report to jail once the Defendant's judgment became final at the conclusion of all appeals. As in Blair, the Commonwealth agrees it failed to timely check to see if the Defendant was released on bail and to prepare the order directing him to report. In late May or early June of 2008, the Commonwealth became aware of the problem and filed a petition to revoke bail. The record and stipulation reflects that the delay was not deliberate but the result of negligence by the Commonwealth. The Court finds the second delay was a deferral given to the Defendant so that he would not have to go to jail during the holidays. While such a delay is deliberate, it was created as a benefit to the Defendant and therefore should not be weighted heavily against the Commonwealth. In support of its argument alleging prejudicial delay, the Defendant argues that he appeared before the Court during the delays. Although Defendant had a delinquent act hearing for failure to pay court costs for a DUI that occurred in 1997 or 1998, and reported to the courthouse once a month for the past (10) to eleven (11) years paying courts costs, none of these contacts would have placed him in a hearing with the Commonwealth. Since the Commonwealth was not aware of the Defendant's delay in reporting to serve his sentence

⁵ The delay was six (6) months and six (6) days or 187 days.

and deliberately failed to take steps to rectify the error, the Commonwealth cannot be held accountable. See West, 938 A.2d at 1048.

Next, the Court must also look at the timely assertion of his rights. While Defendant was out on bail he testified he moved between 2005 and 2007, information which he never reported to the Courts and/or the Commonwealth. While out on bail pending appeal, the Defendant also stated that he never asked his attorney about the status of his appeal, assumed he would receive something in the mail, and could not remember when he moved. Although Defendant did assert his Due Process rights after his appeals were completed and the trial court ordered him to report to jail, there is no proof of when the Defendant became aware of his appeals. Therefore, the Court must infer that he has raised this right directly as a result of being ordered to report to the Lycoming County Prison to begin serving his sentence.

Finally, the Court must examine any prejudice suffered by the Defendant. The Commonwealth asserts that the Defendant adopted a child during the delay, which he would not have been able to do but for the delay. During the delays the Defendant testified that he moved into a larger house and became employed. It was clear to the Court that the Defendant did not appear concerned with his appeal or when he would have to be incarcerated since he was not in contact with his attorney. Although any delay in reporting to serve a sentence potentially is prejudicial, the Defendant was aware of the risk being out on bail pending his appeal. The Court finds that the delay caused by the Commonwealth's negligence delayed his reporting to jail, not his trial or sentencing. With no effect on the trial, no evidence or witness memories were adversely affected. Defendant was sentenced in a timely way and having an appeal available to litigate any issues also created no prejudice to the Defendant.

After weighting all of the Barker factors, this Court finds that the Defendant's Due Process rights were not violated. The Defendant, although highly inconvenienced by the extended delay, was not prejudiced. The Court believes that to award the Defendant dismissal of the charges for this type of delay is not in accordance with Barker.

ORDER

AND NOW, this _____ day of December, 2012, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc. DA (KO)
Amy Boring, Esquire