

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1898-2008;
 : SA-98-2008
 :
 vs. : CRIMINAL DIVISION
 :
 :
 STEVEN DRICK, :
 Appellant : 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 judgment of sentence entered September 28, 2010 and the various amendments thereto. The Court notes Appellant's direct appeal rights were reinstated by Order entered August 17, 2011. The relevant facts follow.

Appellant was charged with altered, forged or counterfeit documents and plates, driving under the influence of alcohol with highest rate of alcohol, driving under the influence of alcohol - incapable of safe driving, possession of a small amount of marijuana, possession of drug paraphernalia, driving while his operating privilege was suspended or revoked for a violation of the DUI laws (DUS-DUI related), driving without a license, and driving an unregistered vehicle in case CR-1898-2008. Appellant received another charge of DUS-DUI related in case SA-98-2008.

On May 18, 2009, Appellant entered an open guilty plea to all these charges. Sentencing was scheduled for August 7, 2009, but continued to October 8, 2009 at the request of the defense. Appellant failed to appear for his sentencing hearing, so the Court issued a bench warrant for his arrest.

On or about September 1, 2010, Appellant was apprehended on the bench warrant. A bench warrant hearing was scheduled for September 3, 2010, but Appellant requested a continuance so that his private attorney, who was in trial in another courtroom, could be available to represent him.

On September 8, 2010, the Court vacated the bench warrant, revoked bail and scheduled Appellant's sentencing for September 28, 2010. The Court also found Appellant in indirect criminal contempt. The Court noted that there was an Order requiring Appellant to appear for sentencing, Appellant was aware of that Order and the Appellant willfully failed to comply with that Order. The Court deferred imposing any sanction for indirect criminal contempt until the time of sentencing.

On September 28, 2010, the Court sentenced Appellant to an aggregate term of 2 ½ to 6 years incarceration in a state correctional institution. In light of this sentence, the Court imposed no further sanctions for indirect criminal contempt.

Appellant filed an appeal from this sentence, but the appeal was quashed because appellate counsel failed to file a docketing statement.

In December 2010, Appellant was charged with default in required appearance, which became case number CR-25-2011. Appellant entered a negotiated guilty plea for a minimum sentence at the bottom end of the standard range. The Court sentenced Appellant to incarceration in a state correctional institution for 1 month to 1 year, to be served consecutively to his 2 ½ to 6 year sentence. No appeal was filed with respect to this case.

On May 25, 2011, Appellant filed a Post Conviction Relief Act (PCRA) petition, which the Clerk of Courts docketed to case number 1898-2008 and SA-98-2008.

Appellant also included a claim in this petition that his default in required appearance conviction in case 25-2011 should be removed from his record, but this claim was not artfully drafted and was so scattered in and among the different portions of his PCRA petition that initially no one realized Appellant was attempting to assert a double jeopardy claim or even that case 25-2011 was involved.

Since this was Appellant's first PCRA petition, the Court appointed counsel for Appellant and gave counsel an opportunity to file an amended PCRA petition on Appellant's behalf. Counsel filed an amended PCRA petition. The issues raised in the amended PCRA petition related to the accuracy of Appellant's prior record score, a claim that his sentence was unduly harsh, the trial court's failure to award credit for time served, and the loss of Appellant's direct appeal rights due to his attorney's failure to file a docketing statement. All these claims related to CR-1898-2008 and SA-98-2008.

The Court held a conference with counsel on August 17, 2011, at which time the Commonwealth agreed that Appellant's appeal rights should be reinstated. Therefore, the Court simply issued an Order in the 2008 case numbers which reinstated Appellant's appeal rights nunc pro tunc and directed defense counsel to file a notice of appeal within 30 days.

On September 16, 2011, a notice of appeal was filed.¹

¹ As explained in a separate Order, this notice of appeal either was never transmitted to or was not received by the Superior Court. The Court also never received a copy of Appellant's concise statement. These problems were discovered when Appellant wrote a letter to the Court.

Appellant first asserts that the trial court erred in failing to grant Appellant credit for time served from September 1, 2010 to September 28, 2010. No one raised the credit issue at sentencing or in Appellant's motion for reconsideration of sentence. Although Appellant raised this issue in his PCRA petition, when a defendant successfully claims his direct appeal rights were lost due to ineffective assistance of counsel, the Court simply reinstates a defendant's appeal rights nunc pro tunc; it does not address the remaining issues raised in the PCRA petition. See Commonwealth v. Barnett, 25 A.3d 371 (Pa. Super. 2011). In this case, it was readily apparent from documents filed of record that Appellant was entitled to reinstatement of his direct appeal rights.

This issue can be raised in a direct appeal, because it relates to the legality of Appellant's sentence. Furthermore, Appellant might be entitled to most, if not all, of the credit he is claiming, but there is no record to support or refute Appellant's claim because this issue was not raised at sentencing or in the motion for reconsideration of sentence.² The Court would ask the Superior Court to remand this issue so the Court would have jurisdiction to create a record and enter an appropriate order.

Appellant's remaining issue on appeal is that Appellant was subjected to double jeopardy in violation of the United States Constitution when the Court sentenced him to one month to one year on February 7, 2011 in CR-25-2011 for default in required

² A letter from a former attorney is attached to Appellant's original PCRA petition, in which counsel informed Appellant he did not believe he was entitled to credit due to Appellant's contempt for failure to pay child support. Appellant also attached a letter from the Domestic Relations Office that indicated his domestic relations case has been closed since 2007. The Court has reason to believe Appellant was arrested on multiple bench warrants on September 1, 2010, but that the other warrants were for contempt based on Appellant's failure to pay fines and costs related to his previous criminal convictions, not a contempt for failure to pay child support. Further, the Court believes Appellant made a purge payment on those fines and costs, but it is not clear whether the purge payment was made before the contempt sentence commenced or sometime thereafter, which could result in the loss of some of the claimed credit.

appearance, after the Court had already found him guilty, on September 8, 2010, of indirect criminal contempt for failing to appear for sentencing on October 9, 2009, and determined that no further sanction would be given. Appellant notes that the facts for both the indirect criminal contempt and the default in required appearance were identical.

While Appellant presents an interesting issue, the Court does not believe it can be litigated in this direct appeal. This issue relates to CR-25-2011, not the 2008 cases. The notice of appeal was only filed to the 2008 cases. The Court also did not reinstate Appellant's direct appeal rights in case 25-2011. There was nothing in his PCRA petition or the record to show that an appeal had been requested or that Appellant's direct appeal rights were lost due to ineffective assistance of counsel in CR-25-2011.

Even if CR-25-2011 were part of this direct appeal, this issue could not be raised because it was not properly preserved. When appeal rights are reinstated, it puts a defendant in the same position as if counsel properly filed a direct appeal and the PCRA petition had never been filed; the PCRA claims are not addressed until the direct appeal is completed. See Commonwealth v. Barnett, 25 A.3d 371 (Pa. Super. 2011). Appellant did not raise his double jeopardy issue at any time prior to his guilty plea and sentencing. Issues not raised in the trial court cannot be raised for the first time on direct appeal. Pa.R.A.P. 302(a); Commonwealth v. Little, 903 A.2d 1269, 1272-73 (Pa. Super. 2006).

This is not to say that Appellant could not raise this issue in the PCRA context as a violation of his constitutional rights and/or a claim of ineffective assistance of counsel for failing to properly raise and preserve this issue. In fact, because the notice of appeal was not filed to CR-25-2011, the Court believes it has jurisdiction in CR-25-2011 to address this claim and, in a separate order, has scheduled a PCRA conference with counsel for both

parties to do just that.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

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