

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH | : No. CR-25-2011 |
| | : |
| vs. | : CRIMINAL DIVISION |
| | : |
| STEVEN DRICK, | : Notice of Intent to Dismiss PCRA petition |
| Defendant | : |
| | : |

OPINION AND ORDER

This matter came before the Court for a conference on Defendant's Post Conviction Relief Act (PCRA) petition, which asserts that his conviction and sentence for default in required appearance violated double jeopardy principles and must be vacated. The relevant facts follow.

Steven Drick was charged with altered, forged or counterfeit documents and plates, driving under the influence of alcohol, possession of a small amount of marijuana, possession of drug paraphernalia, and a summary traffic offense under docket number CR-1898-2008. He also was charged with driving under suspension, DUI related under docket number SA-98-2008. On May 19, 2009, Drick entered a guilty plea. Sentencing was scheduled for August 7, 2009, but was continued at Drick's request to October 8, 2009. Drick failed to appear for sentencing, and a bench warrant was issued for his arrest.

Drick was apprehended on September 1, 2010. A bench warrant hearing was scheduled for September 3, 2010; however Drick requested a continuance so that his private attorney would be available to represent him. The hearing was rescheduled for September 8, 2010.

On September 8, 2010, the court vacated that bench warrant, revoked Drick's

bail and scheduled his sentencing hearing for September 28, 2010. The court also found Drick in “indirect criminal contempt” for his failure to appear at the sentencing hearing that was scheduled for October 8, 2009, but deferred imposing any sanctions until the time of sentencing.

On September 28, 2010, the court sentenced Drick to an aggregate sentence of 2 ½ to 6 years of incarceration in a state correctional institution. In light of the length of this sentence, the court did not impose any further sanction for contempt.

Drick appealed his sentence, but the appeal was dismissed because counsel failed to file a docketing statement.

On December 1, 2010, Drick was charged under this docket number (CR-25-2011) with default in required appearance for failing to appear at his sentencing hearing on October 8, 2009. On February 7, 2011, Drick entered a guilty plea, and the court sentenced him to one month to one year of incarceration.

On May 25, 2011, Drick filed a Post Conviction Relief Act (PCRA) petition that raised several issues with respect to his 2008 cases, as well as a double jeopardy claim with respect to his conviction for default in required appearance, but the petition was inadvertently only filed in Drick’s 2008 cases.

Counsel was appointed and filed an amended PCRA petition, but the amended petition did not mention the double jeopardy claim and was filed to the 2008 docket number only.

After a conference with counsel, the court reinstated Drick’s direct appeal rights in the 2008 docket numbers. Although the notice of appeal was only filed to the 2008

docket numbers, defense counsel included the double jeopardy claim in this case in the statement of errors on appeal. In its appeal opinion, the Court indicated that it never addressed the double jeopardy issue on this case when it decided Drick's PCRA petition and, because the notice of appeal was not filed to this case number, the Court scheduled a PCRA conference to address this issue. In his appellate brief, defense counsel concurred with the Court's opinion that this issue should not be addressed through a direct appeal, but rather as an ineffective assistance of counsel claim under the PCRA.

Defense counsel initially filed a brief in support of Drick's position that his default in required appearance conviction violated double jeopardy principles, and the Commonwealth filed a brief in opposition to Drick's position. At the PCRA conference, however, defense counsel acknowledged that after reading the Commonwealth's brief and the cases cited therein he concluded that Drick's position lacked merit. Therefore, defense counsel requested and was granted leave to file a no merit letter pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (1988) and a motion to withdraw as counsel.

After review of counsel's filings and the record in this case, the Court concludes that Drick's double jeopardy claim lacks merit. Although the Court indicated in its September 8, 2010 order that it found Drick committed "indirect criminal contempt," in actuality he committed summary direct criminal contempt. See Commonwealth v. Ferrara, 487 Pa. 392, 409 A.2d 407, 410-11 (1979); Commonwealth v. Moody, 46 A.3d 765, 774 (Pa. Super. 2012)(an appellant who does not appear in court as ordered can be held in direct criminal contempt).

The United States Supreme Court has indicated that double jeopardy protections do not apply to summary direct criminal contempt. United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2856 (1993)(in a criminal prosecution for disruption of judicial business, the same elements test would not bar subsequent prosecution for a criminal offense because the contempt offense does not require the element of criminal conduct and the criminal offense does not require the element of disrupting judicial business). The Pennsylvania Superior Court came to a similar conclusion in Commonwealth v. Warrick, 415 Pa. Super. 385, 609 A.2d 576, 580 (1992), wherein the Court stated: “Until either the Pennsylvania Supreme Court or the United States Supreme Court clearly indicates that a conviction of direct criminal contempt triggers double jeopardy protections for additional criminal charges based on the same conduct, we cannot grant the type of relief sought by appellant.” Therefore, since Drick’s conduct was actually summary direct criminal contempt, his prosecution for default in required appearance based on the same conduct was not barred by double jeopardy principles.

Since the Court agrees with defense counsel that Drick’s PCRA lacks merit, the Court will grant defense counsel’s motion to withdraw as counsel.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ___ day of January 2013, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court concludes that no purpose would be served by conducting any further hearing. The parties

are hereby notified of this Court's intention to deny the Petition. Defendant Steven Drick may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order dismissing the petition.

The Court GRANTS defense counsel's motion to withdraw as counsel. Defendant Steven Drick is hereby notified that he may represent himself or he may hire private counsel to represent him, but the Court will not appoint any other counsel to represent him unless he establishes in his response to the proposed dismissal that his petition has merit.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald F. Martino, Esquire
Steven Drick, 6235 N. Rte 220, No. 14, Linden PA 17744
Gary Weber, Esquire (Lycoming Reporter)