

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-491-2013
: vs. : CRIMINAL DIVISION
: GREGORY R. AMOS, :
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 dated March 24, 2014 and docketed March 31, 2014. The relevant facts follow.

On March 8, 2013, Trooper Joel Miles charged Appellant with possession of a controlled substance, possession with intent to deliver a controlled substance, possession of drug paraphernalia, driving a vehicle with a suspended registration, driving without a license and driving while his license was suspended or revoked.

On August 21, 2013, Appellant entered a guilty plea to possession with intent to deliver more than 10 grams of cocaine and driving under suspension (DUS). The plea agreement provided that the Commonwealth would waive all mandatories and any school zone enhancement, and Appellant would waive his eligibility for Boot Camp and a Recidivism Risk Reduction Incentive (RRRI), forfeit \$195, and receive a sentence of 30-60 months for possession with intent to deliver a controlled substance, and a \$1000 fine and consecutive 30-day sentence for DUS.

On March 24, 2014,¹ the court sentenced Appellant to 2 ½ to 5 years'

¹ Appellant's sentencing was originally scheduled for December 5, 2013, but it was continued at Appellant's

incarceration in a state correctional institution for possession with intent to deliver cocaine and a \$1000 fine and a concurrent 15 to 30 days' incarceration for DUS. The court specifically noted that Appellant was ineligible for RRRI due to a simple assault conviction, but he also waived RRRI and boot camp eligibility as part of the plea agreement.

On or about June 26, 2014, Appellant submitted a petition for appellate review of sentence to the Pennsylvania Superior Court.² On July 17, 2014, the Superior Court entered an order granting the application "to the extent that it shall be treated as a Notice of Appeal, filed in the trial court on June 27, 2014." In his petition, Appellant asserts the trial court erred in failing to sentence him to a RRRI minimum sentence.

Initially, the court notes that Appellant's appeal is untimely. The court sentenced Appellant on March 24, 2014. According to the certificate of service attached to his petition, Appellant did not mail the petition until June 23, 2014, which is more than thirty (30) days after he was sentenced. The court understands that Appellant is alleging that his counsel was ineffective for failing to seek review of his sentence in accordance with his request. However, claims of ineffective assistance of counsel generally cannot be litigated on direct appeal. *Commonwealth v. Holmes*, 79 A.3d 562, 563-64 (Pa. 2013). Instead, an individual who believes his counsel was ineffective must file a Post Conviction Relief Act (PCRA) petition.³

Even if the appeal had been timely filed, Appellant would not be entitled to

request due to the death of his son.

²The court was not aware that Appellant had filed any petition seeking appellate review of his sentence until it received the docket sheet for the appeal from the Superior Court.

³ If the court had been aware of Appellant's petition, it would have treated it as a PCRA petition, and appointed new counsel to represent Appellant. Typically, in this type of situation, the Commonwealth will speak to trial counsel to determine if the individual was apprised of his appeal rights and timely requested an appeal. If so,

relief for two reasons: Appellant waived RRRI as part of his plea agreement; and he does not meet paragraph (3) of the definition of an eligible offender.

An “eligible offender” is a “defendant or inmate convicted of a criminal offense who will be committed to the custody of the department and who meets all of the following eligibility requirements:

(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or an attempt or conspiracy to commit a personal injury crime as defined under section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act, except for an offense under 18 Pa.C.S. § 2701 (relating to simple assault) when the offense is a misdemeanor of the third degree, or an equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.”

61 Pa.C.S. §4503.

In CP-41-CR-2287-1998, Appellant was convicted of simple assault.

Although neither the guilty plea nor sentencing order lists the grading of Appellant’s simple assault conviction, it is clear from the facts of the case and the sentence imposed for Appellant’s simple assault was graded as a misdemeanor of the second degree.

The only time simple assault is graded as a misdemeanor of the third degree is when it is committed in a fight or scuffle entered into by mutual consent. 18 Pa.C.S. 2701(b)(1). The maximum punishment for a misdemeanor of the third degree is imprisonment of one year. Appellant’s simple assault conviction did not involve a mutual fight, and his maximum sentence was incarceration in a state correctional institution for 6-18 months.⁴ Therefore, his simple assault conviction was a misdemeanor of the second degree,

the Commonwealth will stipulate to reinstating the individual’s appeal rights. If not, the court will schedule an evidentiary hearing to determine whether the individual’s direct appeal rights should be reinstated.

⁴ The affidavit of probable cause for Appellant’s simple assault conviction indicates that Appellant was involved

not a misdemeanor of the third degree, and it rendered him ineligible for a RRRRI minimum sentence.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Robert Cronin, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

in a domestic dispute with his girlfriend outside a local establishment. Appellant grabbed his girlfriend by the neck, and several individuals approached to intervene. When the victim told Appellant to stop, Appellant let go of his girlfriend and punched the victim in the face, knocking him unconscious.