

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1519-2013
Appellant :
vs. : CRIMINAL DIVISION
 :
 :
 :
EVAN M. FROMILLE, :
 : 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 order entered on November 26, 2013. The relevant facts follow.

Appellee was charged with possession with intent to deliver a controlled substance, possession of a controlled substance (marijuana), possession of a controlled substance (heroin), and possession of drug paraphernalia. On October 7, 2013, Appellee pled guilty to the two counts of possession of a controlled substance and, pursuant to the plea agreement, the court imposed an aggregate sentence of two years of probation. The remaining charges were dismissed.

At the end of the hearing, defense counsel noted that Appellee had been trying, without success, to get property returned to him that he had possessed at the time of his arrest. The property included a license, wallet, watch, belt, phone, and approximately \$1500. Counsel requested that the court address the return of those items in its order. The Commonwealth stated that the cash would not be returned because it intended to file a forfeiture petition, but it was not contesting the return of the other items.

As part of the October 7, 2013 guilty plea and sentencing order, the court directed the Commonwealth to return the license, wallet, phone, and belt to Appellee within 30 days. The court also directed the Commonwealth to return the cash unless it filed a motion for forfeiture within 30 days.

On November 20, 2013, Appellee filed a petition for return of property, in which he noted that the Commonwealth failed to return any personal property to him and failed to file a motion for forfeiture of the cash as directed in the October 7, 2013 order. Therefore, Appellee requested return of all of the property, including the cash. On November 26, 2013, the court summarily granted the motion and stated, "Property must be returned no later than 12-4-2013 directly to Defendant's counsel by law enforcement."

On December 4, 2013, the Commonwealth filed an appeal from the order entered on November 26, 2013. On December 6, 2013, the court directed the Commonwealth to file a concise statement of errors complained of on appeal within 21 days.¹ On December 30, 2013, the Commonwealth filed a statement asserting that the trial court erred by placing a 30-day time limit on the Commonwealth's ability to file a forfeiture petition when the statute of limitations would not expire until July 26, 2015. Later that day, the Commonwealth filed an amended statement which indicated that it erroneously omitted the following additional errors on appeal: the trial court erred in entering an order directing the property be returned without a motion for return of property being filed; and the trial

¹ The Lycoming County Prothonotary served the parties and noted service on the docket by making the following entry: "Notice under PRCP 576 Filed."

court erred in returning the property without a hearing being held on the motion, if in fact said motion was ever filed.

Initially, the court questions whether the Commonwealth has timely appealed or properly preserved any issue in its appeal. In the October 7, 2013 order, the court directed the Commonwealth to return the items of personal property and file a forfeiture petition with respect to the cash within 30 days. The Commonwealth did not object, file a motion for reconsideration, or file an appeal from this order.

The Commonwealth also did not raise any of the issues listed in its concise statements with the court. “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a).

Furthermore, the Commonwealth’s concise statement was due on December 27, 2013, but was not filed until December 30. It then filed a supplemental or amended statement without seeking leave of court to do so. See Pa.R.A.P. 1925(b)(2)(“Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed.”).

The court recognizes that the provisions of Rule 1925(c) have been extended to also apply to the Commonwealth. Commonwealth v. Grohowski, 980 A.2d 113 (Pa. Super. 2009). Unfortunately, the Appellate Court’s ability to excuse an untimely filing in criminal cases under Rule 1925(c) has led to many parties to disregard the specific procedures available to them in Rule 1925(b)(2). Doing so, however, may be perilous. In Commonwealth v. Gravely, 601 Pa. 68, 970 A.2d 1137, 1145 (2009), the Pennsylvania Supreme Court stated, “From this date forward, an appellant who seeks an extension of time

to file a Statement must do so by *filing a written* application with the trial court, setting out good cause for such extension, and requesting an order granting the extension. The failure to file such an application within the 21-day time limit set forth in Rule 1925(b)(2) will result in waiver of all issues not raised by that date.” Since amended or supplemental statements are also governed by Rule 1925(b)(2), a failure to file a written application seeking leave of court to file an amended or supplemental petition may also lead to a waiver of those issues.

Nevertheless, to avoid a potential remand under 1925(c), the court will address the issues contained in the Commonwealth’s original and amended statements.

The Commonwealth first asserts that the court erred by placing a 30-day limit on the Commonwealth’s ability to file a forfeiture petition, when the statute of limitations would not expire until July 26, 2015. The court acknowledges that an action upon a statute for civil penalty or forfeiture must be commenced within two years. 42 Pa.C.S.A. §5524(5).

However, the court also notes that the statute governing controlled substance forfeitures specifically states: “In the event seizure without process occurs, as provided herein, proceedings for the issuance thereof shall be instituted forthwith.” 42 Pa.C.S.A. §6801(c).

Paragraph (b) of section 6801, which governs process and seizure, states: “Property subject to forfeiture under this chapter may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property. Seizure without process may be made if: (1) the seizure is incident to an arrest. . . .” The seizure of Appellee’s property, including the cash, occurred incident to his arrest; therefore, it was seized without process.

The Commonwealth, though, did not institute proceedings “forthwith.” The

word “forthwith” means immediately or without delay. The criminal proceedings were ending and Appellee was inquiring about the return of his property. The Commonwealth indicated that it intended to file a petition to forfeit the money seized from Appellee. Under all the facts and circumstances of this case, it was not unreasonable to direct the Commonwealth to file its forfeiture petition within 30 days.

The Commonwealth next asserts that the trial court erred in entering an order directing that the property be returned without a motion for return of property being filed. The court does not completely understand this allegation. When the court entered its order on November 26, 2013, it was in response to the petition for return of property filed by Appellee. If the Commonwealth is referring to the court’s order of October 7, 2013, the Commonwealth did not file an appeal from that order. The court also notes that it routinely includes forfeiture or return of property provisions in its sentencing orders when the parties are in agreement. The Commonwealth agreed to return all of the property, except the cash. If the court cannot order return of property without a petition being filed, despite the parties’ agreement, then it also cannot order forfeiture without a petition being filed in such circumstances.

The Commonwealth’s final allegation of error is that the court erred in returning the property without a hearing being held on the motion, if in fact said motion was ever filed. The Commonwealth is well aware that Appellee filed a motion on November 20, 2013. The court did not hold a hearing on return of the personal property, because the Commonwealth agreed that it could be returned to Appellee. The court did not hold a hearing with respect to the cash, because the Commonwealth neither filed a forfeiture

petition within 30 days nor filed an appeal from the October 7, 2013 order. In hindsight, the court probably should have held a hearing for Appellee to provide evidence that he lawfully possessed the cash, which he was prepared to do, as evidenced by his statement at the end of the hearing on October 7, 2013 that he had bank statements.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
George Lepley, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work file