

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH : No. CR-1225-2011
vs. :
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RALPH THOMAS, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s Post Conviction Relief Act (PCRA) petition, which seeks reinstatement of his appeal rights nunc pro tunc. The relevant facts follow.

Defendant was charged with riot and disorderly conduct. A nonjury trial was held on August 14, 2012. The court acquitted Defendant of riot, but convicted him of disorderly conduct. Defendant requested immediate sentencing. The court sentenced Defendant to 6 months to one year of incarceration in a state correctional institution consecutive to the sentence Defendant was already serving.

On November 26, 2012, Defendant filed a motion for reconsideration of sentence nunc pro tunc, in which he requested reconsideration because he had not received any early release programs for nonviolent offenders, nor was he afforded RRRRI or the SIP program. Defendant also sought consolidation of his sentences for the purpose of an early parole minimum. On December 6, 2012, the court summarily denied Defendant’s reconsideration motion, noting that the petition was untimely, Defendant was not eligible for RRRRI or the SIP program, and a consecutive sentence was appropriate in this case.

Defendant filed a notice of appeal on January 7, 2013, but failed to serve it on

the court. On February 1, 2013, the court directed Defendant to file a concise statement of errors on appeal. However, the Superior Court quashed Defendant's appeal on February 15, 2013, before his concise statement was due.

On March 15, 2013, Defendant filed a "motion for enlargement of time" in which he claimed abandonment of counsel and a desire to appeal from the court's concise statement order and the Superior Court order filed February 15. The court believed Defendant was seeking an extension of his concise statement order deadline or his time to respond to the Superior Court's order dated January 29, 2013. In an order dated March 22, 2013, the court noted that any request for extension was now moot since the Superior Court already quashed Defendant's appeal. In light of the allegation that he was abandoned by counsel, however, the court informed Defendant that claims of ineffective assistance of counsel are raised through the filing of a PCRA petition. Defendant filed an appeal to this order.

In response to this appeal, the Superior Court directed the court to appoint counsel for Defendant, because any petition filed after a defendant's judgment of sentence becomes final is treated as a PCRA petition and an indigent first-time PCRA petitioner is entitled to representation by counsel. The court appointed Donald Martino to represent Defendant.

Counsel discontinued Defendant's pro se appeal and filed a PCRA petition to have his direct appeal rights reinstated nunc pro tunc on the basis that he requested trial counsel to file an appeal but she failed to honor his request.

The court held a hearing on the PCRA petition. Defendant testified that after

trial he spoke to his attorney outside the courtroom. According to Defendant, he asked trial counsel how he could be found guilty of disorderly conduct for a hostile situation and swearing. She asked him what he wanted to do. He indicated to counsel that he wanted her to appeal. On cross-examination, Defendant admitted that he was happy with the outcome of his trial, but that this sentiment related to the fact that the riot charge was thrown out.

Trial counsel also testified. She indicated that the court asked her to review Defendant's appeal rights with him and she did. Defendant said he was pleased with the outcome and he did not want to appeal. Trial counsel told Defendant that if he changed his mind, he needed to notify her within 30 days. She never received anything from Defendant stating that he wanted to appeal.

Defendant then took the stand to rebut trial counsel's testimony. He testified that he did not recall the judge telling trial counsel to discuss his appeal rights with him; his counsel did not advise him of his appeal rights; they did not discuss possible appeal issues; he wanted to appeal; and trial counsel should have just went ahead and submitted an appeal.

The court finds trial counsel's testimony credible. After Defendant was sentenced, the court asked trial counsel to explain Defendant's post sentencing rights to him. Transcript, August 14, 2012, p. 80. These rights included not only his right to file post sentence motions within 10 days after sentencing, but also his right to file an appeal. Counsel agreed to do so. Id. Her testimony is consistent with her response.

Defendant's testimony is inconsistent. When he first took the stand he said he spoke to his attorney after his trial, he asked her how he could have been found guilty, and he told her he wanted to appeal. When he took the stand to rebut his trial counsel's testimony,

however, he testified that counsel did not advise him of his appeal rights or discuss possible appeal issues. Defendant cannot have it both ways. Either they talked following trial about an appeal or they didn't. Furthermore, the motion Defendant filed two months after his trial did not in any way challenge his conviction; it only addressed sentencing issues. Therefore, the court does not believe Defendant's testimony that immediately after the trial he questioned how he could have been found guilty and then asked his counsel to file an appeal.

Defendant also seemed happy with the outcome of his nonjury trial. When given the opportunity to speak prior to sentencing, he stated: "You know, I just want to get this over with. I really want to get back upstate so I can – I applied to get my teacher's license to go along with my barber's license. And I just have enough time left to get that going. And I just want to get back to my family." Transcript, August 14, 2012, p. 77.

Defendant also admitted that he was happy with the outcome of the trial in his testimony at the PCRA hearing, but he claimed his happiness only related to the fact that he was acquitted of the riot charge. Defendant, however, appeared happy and he did not say anything at the time of his trial and sentencing to indicate otherwise.

It appears that Defendant only became dissatisfied after he returned to the state correctional institution, but by then the time period for filing an appeal had expired.

Accordingly, the court will deny Defendant's PCRA petition which seeks to reinstate his direct appeal rights nunc pro tunc.

ORDER

AND NOW, this _____ day of March 2014, the court denies Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Prothonotary shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald F. Martino, Esquire
Ralph Thomas (certified mail)
1510 Scott Street, Williamsport PA 17701
Work file
Suzanne Fedele, Prothonotary/Clerk of Courts