

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-598-2015
vs. :
 :
MESSIAH BURRELL, :
Defendant : Post-Sentence Motion

OPINION AND ORDER

On February 13, 2015, a criminal complaint was filed against Defendant charging him with delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia. Defendant was served with the charges and taken into custody. He was incarcerated in the Lycoming County prison on February 13, 2015 in lieu of \$50,000.00 bail.

Defendant's preliminary hearing was held on March 30, 2015. All of the charges were held for court.

Defendant's arraignment was scheduled for April 27, 2015. Defendant waived arraignment on April 15, 2015. The case was scheduled for a pretrial conference on May 5, 2015.

By letter to the court dated May 31, 2015, Defendant explained that he did not authorize his attorney to waive any hearings or among other things, request any continuances. He specifically noted that he wanted "to proceed to jury trial under [his] speedy trial rights." As well, he requested that the court not allow "the gross misconduct" to continue and to protect his "rights to a speedy trial."

Apparently, Defendant's letter was prompted by a continuance request made by the Commonwealth in May of 2015 to continue the trial that was scheduled for June 2015.

The Commonwealth indicated in its written request that the lab results were not yet obtained and accordingly requested said continuance. Defense counsel was “not opposed” to the continuance request and the court continued Defendant’s case to the August 4, 2015 pretrials. By letter to the court dated September 13, 2015, among other things, Defendant requested that the court “step in and make” defense counsel do a “more effective job.” Defendant argued that the Public Defender’s office was “continually allowed to just basically do whatever they want and handle things in such a way that it violates every right [he has].”

On October 6, 2015, defense counsel filed a petition for nominal bail pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. A hearing was held on November 4, 2015 and following the hearing the court granted Defendant’s motion for release on nominal bail. The court advised Defendant in open court and in a written Order that Defendant’s pretrial was scheduled for December 8, 2015 with the call of the list scheduled for January 5, 2016.

Defendant was released on nominal bail on November 5, 2015.

Subsequently, Defendant appeared for jury selection in January of 2016. Defendant’s jury trial was scheduled for January 28, 2016. Defendant failed to appear because he was in a hospital in Philadelphia. Accordingly, the jury was discharged and Defendant was directed to next appear for call of the list on February 16, 2016.

Defendant appeared for the call of the list and a jury was selected. Defendant was advised that his jury trial would proceed on March 7, 2016 in Courtroom No. 4 of the Lycoming County Courthouse.

Defendant failed to appear on March 7, 2016 for his jury trial and the court

entered an order issuing a bench warrant for the Defendant's arrest and directing the parties to proceed to the jury trial in absentia.

On March 7, 2016, the jury returned a verdict. Based on the verdict, the court found Defendant guilty on all counts. The court scheduled sentencing for June 8, 2016. A copy of the court's March 7, 2016 order was sent to Defendant at his address of record but was returned with a notation from the Post Office as "unable to forward."

Defendant failed to appear for his sentencing on June 8, 2016. The court sentenced the Defendant to 15 to 30 years on count 1 with credit for time served.

Defense counsel filed post-sentence motions on Defendant's behalf on June 17, 2016 in the nature of motion to vacate the verdict, a motion for a new trial, a motion to vacate the sentence for disproportionality in violation of Defendant's Eighth Amendment rights, and a motion for reconsideration of the sentence.

Defendant was subsequently arrested in Medford, Oregon and extradited to Lycoming County on August 5, 2016. On August 9, 2016, the court vacated the bench warrant.

The argument on Defendant's post-sentence motion was held before the court on August 17, 2016.

The Commonwealth first asserts that Defendant's post-sentence motions must be dismissed because Defendant was a fugitive during the time period required to file them. Defendant counters with two arguments. First, Defendant claims that he was not a fugitive. Secondly, Defendant claims that even if he was a fugitive, because he was apprehended within the time period that the court had to consider the post-sentence motions, they should

be heard.

The court will first address Defendant's claim that he was not a fugitive.

Defendant argues pursuant to Rule 602 of the Pennsylvania Rules of Criminal Procedure that the Commonwealth failed to prove that Defendant's absence at his trial and sentencing were without cause. Pursuant to Rule 602, a defendant's absence without cause at the time scheduled for the start of trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence. Pa. R. Crim. P. 602.

Defendant contends that the Commonwealth failed to prove that his absence during the jury trial and at sentencing were without cause. Defendant argues that the Commonwealth had the burden to prove that Defendant's absence was without cause and failed to satisfy this burden. Defendant argues that the Commonwealth needed to present evidence that Defendant was not hospitalized, incarcerated or otherwise unavailable for reasons beyond Defendant's control.

Defendant is correct that the Commonwealth bears the burden of proving that his absence was without cause but is entirely incorrect in his assertion that the Commonwealth can only meet that burden by presenting testimony that it engaged in an exhaustive search and discovered that Defendant was not unavailable because of causes outside of Defendant's control.

In fact, it is crystal clear from all of the cases that the Commonwealth meets that burden and a defendant's presence is deemed to be waived when the defendant is given notice of his trial date and fails to appear. *Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 (1998); *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992); *Commonwealth*

ex rel. Hancock v. Maroney, 177 Pa. Super. 133, 110 A.2d 923 (1955).

In this particular case, Defendant was present for his jury selection. During jury selection as well as immediately thereafter, the court advised Defendant and defense counsel that the jury trial would be held on March 7, 2016. Despite said notice, Defendant failed to appear. Moreover, and in violation of his bail conditions, Defendant left Pennsylvania and traveled at some point to Oregon where he was apprehended. Clearly, Defendant's flight to Oregon is further circumstantial evidence of Defendant's fugitive status and "absence without cause."

Having determined that Defendant was a fugitive from justice at the time of his trial, sentencing and the filing of his post-sentence motions, the next issue concerns whether this court may deny Defendant's post-sentence motions on that ground.

Defendant argues that because he was returned to Lycoming County while the post-sentence motions were pending, this court should consider the motions. In support of his argument, Defendant cites *Commonwealth v. Doty*, 997 A.2d 1184 (Pa. Super. 2010). Contrary to Defendant's assertions, however, the decision in *Doty* as well as one of the cases it relies upon, *Commonwealth v. Deemer*, 550 Pa. 290, 705 A.2d 827 (1997), support the Commonwealth's position.

In *Deemer* the defendant was present for his trial but failed to return to court when the jury announced its verdict. He also failed to appear for a post-verdict presentence investigation appointment. He was sentenced in absentia. His counsel filed post-sentence motions, which were dismissed due to his fugitive status. Once Deemer was apprehended, he filed a pro se motion to reinstate his post-verdict motions nunc pro tunc.

Both the trial court and the Superior Court following the then Supreme Court precedent denied defendant's motion to reinstate. The courts held that a defendant's voluntary escape acted as a per se forfeiture of his right of appeal where the defendant was a fugitive at any time after post-trial proceedings were commenced. Such a forfeiture was irrevocable and continued despite the defendant's capture or voluntary return to custody.

In *Deemer*, however, the court determined that the per se rule of forfeiture was no longer valid. While a returned fugitive should not benefit from his fugitive status, returned fugitives should not be punished additionally by forfeiture of their appellate rights when they return to the jurisdiction within the time period for filing post sentence motions or an appeal.

Specifically, the Court held that "a fugitive who has returned to the jurisdiction of the courts should be allowed to exercise his post-trial rights in the same manner he would have done had he not become a fugitive. If he returns in time for post-trial motions, he should be allowed to file them. If he returns after the time for post-trial motions has expired, his request to file post-trial motions or to reinstate post-trial motions should be denied." 705 A.2d at 829.

The decision in *Doty* did not hold otherwise. As in *Deemer*, the Court in *Doty* held that a fugitive who has returned to the jurisdiction of the court should be allowed to exercise his post-trial rights in the same manner he would have done had he not become a fugitive, *Doty* 997 A.3d at 1188 (quoting *Deemer*, 705 A.2d at 829). In order for a fugitive to be able to exercise his post sentencing or appellate rights, said fugitive would need to be returned to the jurisdiction within the time for filing said motions or appeals.

As the *Deemer* court noted, a defendant who deliberately chooses to bypass the orderly procedures afforded one convicted of a crime for challenging his convictions is bound by the consequences of his decision. *Deemer* at 1187 (citing *Commonwealth v. Passaro*, 504 Pa. 611, 476 A.2d 346, 348 (1984)). The *Deemer* court noted “it would be unseemly to permit a defendant who has rejected the appellate process in favor of escape to resume his appeal merely because his escape proved unsuccessful.” *Id.* (citing *Passaro*, 476 A.2d at 349).

Accordingly, because Defendant was a fugitive from justice during his trial, at the time of his sentencing, and, most importantly, at the time that his post-sentence motions were required to be filed, he has forfeited his right to file post-sentence motions and his post-sentence motions shall be dismissed on that ground.

ORDER

AND NOW, this ____ day of August 2016, following a hearing and argument on Defendant’s post-sentence motions, said post-sentence motions are **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esq., ADA
Joshua Bower, Esq., APD
Gary Weber, Esquire (Lycoming Reporter)
Work File