

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-427-2016
v.	:	
	:	
JOHN R. THOMAS, JR,	:	POST SENTENCE MOTION
Defendant	:	

OPINION AND ORDER

On April 12th, 2016, Defendant, through Counsel, filed a Post Sentence Motion *Nunc Pro Tunc*. Argument on the petition was heard on July 1, 2016. Defendant participated via videoconference from SCI Houtzdale.

Background

On March 28th, 2016, this Court accepted a guilty plea from Defendant on Count 2, possession of drug paraphernalia¹, an ungraded misdemeanor. Defendant was sentenced that same day to incarceration to a State Correctional Institution for a minimum of four (4) months and a maximum of twelve (12) months. Defendant was sentenced to a State Correctional Institution as he was already serving a state sentence on Docket Number: CP-41-CR-0000277-2016.² Though Defendant listed Attorney Jerry Lynch as his attorney in the guilty plea colloquy, a copy of his order of sentence for the Docket Number which is the subject of this Opinion and Order, CP-41-CR-0000427-2016, was distributed to the Public Defender rather than his private defense counsel. This could explain why Defense Counsel filed the current motion five (5) days after the ten (10) day period to file a post-sentence motion; however, Defense Counsel made no

¹ 35 Pa.C.S. § 113(a)(32).

² Defendant pled guilty in front of The Honorable Marc F. Lovecchio, of the Lycoming County Court of Common Pleas, to a charge of Criminal Trespass 18 Pa. C.S. § 3503(a)(1)(ii), a felony of the second degree, and was sentenced on February 29, 2016, to minimum of six months and a maximum of three years, six months.

such statement during argument. Rather, Defense Counsel stated that the reason his Defendant pled open to the paraphernalia charge was because at the time of the sentencing, i.e. March 28, 2016, (the guilty plea colloquy is signed and dated by Defendant on March 24, 2016) they had been told by the Commonwealth that it would be pursuing a burglary charge against Defendant in another criminal matter. Ultimately, the Commonwealth did not pursue those charges. The Court notes that a burglary charge against Defendant in Docket Number: CP-41-CR-0000277-2016, was dismissed on February 29, 2016, a month before he pled guilty to the paraphernalia charge. The offense date for the burglary and criminal trespass charges was January 9, 2016; whereas, the offense date for the case at bar was January 17, 2016. Defendant's counsel conceded at the July 1, 2016, hearing that the sentence of this Court was within the standard guideline range but that Defendant is disappointed that he will now be serving "22 months".

Discussion

Under Commonwealth v. Dreves, 2003 PA Super 503, 839 A.2d 1122, 1128 (Pa. Super. 2003) (en banc), a post-sentence motion *nunc pro tunc* may toll the appeal period, but only if two conditions are met. First, within 30 days of imposition of sentence, a defendant must request the trial court to consider a post-sentence motion *nunc pro tunc*. "The request for *nunc pro tunc* relief is separate and distinct from the merits of the underlying post-sentence motion." Id. at 1128-29. Second, the trial court must expressly permit the filing of a post-sentence motion *nunc pro tunc*, also within 30 days of imposition of sentence. Id. "If the trial court does not expressly grant *nunc pro tunc* relief, the time for filing an appeal is neither tolled nor extended." Id. Moreover, "the trial court's resolution of the merits of the late post-sentence motion is no substitute for an order expressly granting *nunc pro tunc* relief." Id. at 1129. Commonwealth v. Capaldi, 2015 PA Super 51 (Pa. Super. Ct. 2015).

Defendant's Counsel did not expressly motion the Court for permission to file a post-sentence motion *nunc pro tunc*, rather he filed an untimely post-sentence motion pleading the merits of his post-sentence motion and titling the motion *nunc pro tunc*. Nor did the Court expressly grant Defendant leave to motion the Trial Court for post sentence relief and rather scheduled a hearing on the underlying merits of the claim 90 days after the untimely filed post-sentence motion. The Court needed to expressly grant the leave to file a post-sentence motion *nunc pro tunc* sometime between April 8, 2016, and April 27, 2016 (i.e. the eleventh day after sentencing and the thirtieth day after sentencing; April 8th and any date thereafter before the expiration of the 30 day period where the Trial Court still has jurisdiction over its Order of Sentence).

As the Court did not receive the motion in a procedurally correct way, the Court is without jurisdiction to decide the merits; however, the Court is of the opinion that the post-sentence motion is without merit. The Defendant was sentenced within the standard guideline range. Additionally, the pending burglary charge for which Defendant's counsel states Defendant was considering when he was conserving the Court's resources by pleading open on March 28, 2016, had already been dismissed on February 29, 2016. The Court finds that the Defendant knowingly and voluntarily entered a plea of guilty and did not miss any benefit of the bargain when making his plea. The Sentence of the Court was reasonable in consideration of Defendant's past and current criminal activity and the Pennsylvania Commission on Sentencing's guideline range for an offense with a gravity score of one (1) and a Defendant with a prior record score of four (4).

AND NOW, this _____ day of July, 2016, based upon the foregoing Opinion,
the Post Sentence Motion *Nunc Pro Tunc* is hereby DENIED.

BY THE COURT,

Nancy L. Butts, President Judge

cc: District Attorney (KO)
Jerry Lynch, Esq.