

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No's. MD-56-2019; MD-57-2019
:
vs. :
:
:
: **Opinion and Order denying**
ALVIN BAUSINGER, : **Commonwealth's Oral Motion to Dismiss**
Defendant : **Petition for Return of Property**

OPINION AND ORDER

By way of background, criminal complaints were filed against the defendant in the above-captioned matters on January 10, 2019 charging him with, among other criminal acts, false reports, persons not to possess and facsimile weapon of mass destruction.

The defendant died on June 10, 2019 and the charges against the defendant were nol prossed by the Commonwealth on July 16, 2019.

On or about September 24, 2019, Jessica Feese, an attorney employed by the Lycoming County Public Defender's office filed a petition for return of property on behalf of "the deceased defendant, Alvin Bausinger." A hearing on the petition was held on October 7, 2019.

At the hearing, it was determined that the Montgomery Borough Police Department seized numerous items from the defendant as a part of the criminal investigation including a black powder pistol, a .22 Hornet SN342, a .303 British rifle SN6936, a New England .20 gauge shotgun SN027948, an Ardock Spanish .50 caliber flintlock rifle SN087379, and a Rossi .243 caliber rifle SN92022243 YMB.

It was also determined that while the petition for return of property was filed on behalf of "the deceased defendant", his ex-wife was actually seeking a return of the property on behalf of the defendant's minor children.

In opposition to the petition, the Commonwealth argued that it was untimely filed arguing that it needed to be filed within thirty (30) days after the case was nol prossed against the defendant.

In *Commonwealth v. Allen*, 630 Pa. 577, 107 A.3d 709 (2014), the court held that a criminal defendant's or arrestee's failure to file a motion for return of property during the pendency of the criminal proceedings against him or within thirty (30) days following dismissal of the charges, resulted in a waiver of the issue thereby precluding the court from exercising jurisdiction on a petition to return property. *Id.* at 718.

However, and contrary to what the Commonwealth argues in this case, the holding was limited to the factual circumstances where the property owner is the criminal defendant and had an opportunity to move for the return of property during the thirty (30) days following disposition of the charges, while the trial court had jurisdiction. *Id.* at 717 n.10. As the court explained, "if the claimant was the defendant, the waiver rule applies because he had a prior missed opportunity to move for the return of property." *Id.* at 718.

The Commonwealth has not provided to the court any authority to support its argument that under the circumstances of this case, the de facto petitioner, the guardian of defendant's minor heirs, waived her claim on behalf of the children to obtain the property. Indeed, while not precedential, the court finds the unreported decision in *In Re: Frederick*, 2018 WL 4167921 (Pa. Commw. 08/31/2018) to be persuasive.

Accordingly, the court will enter an Order addressing this issue by scheduling a conference and considering the petition to be orally amended to properly reflect the name and status of the petitioner.

ORDER

AND NOW, this ____ day of January, 2020, the court DENIES the Commonwealth's Motion to Dismiss the Petition for Return of Property. The court will consider the petition amended to reflect that it is being filed on behalf of the decedent's minor children by and through their legal guardian.

A conference on said Petition for Return of Property is scheduled for **January 22, 2019 at 2:30 P.M. in Courtroom No. 4** of the Lycoming County Courthouse.

By The Court,

Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire, (DA)
Jessica Feese, Esquire, (APD)
Gary Weber, Esquire, Lycoming Reporter
Work file
MD-57-2019