

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : Nos. CR-1473-2016; CR-1020-2019
:
VS :
:
COLIN J. BEST : MOTION FOR RETURN OF PROPERTY

OPINION AND ORDER

Before the Court are Defendant's Motions for Return of Property under 1020 of 2019 and 1473 of 2016. Under 1020 of 2019, Defendant pled guilty and was sentenced on January 23, 2020. His petition for return of property was mailed on or about December 11, 2020, and filed on December 23, 2020. Under 1473 of 2016, Defendant's case was dismissed by the Court in May of 2019. Defendant's petition for return of property was mailed on or about October 2, 2020, and subsequently filed.

Argument on this matter was held on February 5, 2021. Defendant proceeded pro se. Under 1020 of 2019, he is seeking the return of an Apple iPhone and an Apple iPad. Under 1473 of 2016, he is seeking the return of a black iPhone 6s Plus and a rose gold colored iPhone 6s plus.

Defendant concedes that his petitions are untimely pursuant to *Commonwealth v Allen*, 107 A.3d 709 (Pa. 2014), but argues that certain exceptions apply. In Allen, the Court held that Allen's failure to file a motion for return of property during the pendency of the criminal charges against him or

within 30 days following dismissal, during which the Court retained jurisdiction, resulted in waiver. Allen Id. at 717.

Under 1473 of 2016, Defendant argues that because the Commonwealth filed an answer and new matter on October 8, 2020, that it has waived its right to contest the untimeliness pursuant to *Commonwealth v Irland*, J-94-2017 (Pa. 9-21-18).

Under 1020 of 2019, Defendant argues that the return of the phones was a condition of the plea agreement and that accordingly, Allen does not apply.

Neither argument is meritorious. With respect to Defendant's untimely petition under 1473 of 2016, the Irland opinion does not support Defendant's argument. The case concerned whether a common law basis for forfeiture of derivative contraband exists in Pennsylvania. While the Defendant had filed a motion for return of property, under Rule 588 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth responded with a motion for forfeiture.

As to the Allen waiver argument, the Supreme Court explained in a footnote, that Allen did not apply because the Commonwealth responded to the return motion with a forfeiture petition. More specifically, because the Commonwealth filed a forfeiture petition in response to an untimely motion for return of property, it waived the defense of untimeliness or

waiver by claiming ownership of the subject property and asking the Court to adjudicate the merits of the case.

Such is not the case here for two reasons. First, the Commonwealth did not file a forfeiture petition in response to Defendant's motion. Second, the Commonwealth filed an answer and new matter specifically raising the untimeliness waiver issue.

Under 1020 of 2019, the Defendant pled guilty on January 23, 2020. The Court extensively reviewed the transcript of the guilty plea hearing. Defendant's copy of the transcript was mailed to him on February 9, 2021, by the official court reporter. During the hearing, Defendant was proceeding pro se, but with appointed standby counsel.

Prior to starting Defendant's colloquy, an extensive conversation took place on the record with the Court, the ADA, a supervised bail officer, an adult probation officer, Defendant's standby counsel, and Defendant regarding the plea agreement. The offer by the Commonwealth was two (2) to four (4) years on the underlying charges involving two counts of invasion of privacy with a concurrent two (2) to four (4) years on the violation of probation with the underlying offense being a felony three offense. The terms of the plea agreement also included a delayed reporting date.

Much of the conversation concerned the length of time the Defendant would be released on intensive supervised bail until his reporting date as well as the conditions of intensive supervised bail. Defendant had questions related to proving where his daughter resided, his credit, and being given at least 30 days to report.

The Court addressed Defendant's concerns and indicated based on considering the sentencing factors that it would accept the plea agreement and give Defendant 30 days to report. Defendant also requested to be classified to a state correctional institution close to this area because of his daughter's young age and his wife's medical condition. The Court agreed to recommend such.

An extensive discussion subsequently ensued regarding Defendant's credit for time served. Defendant agreed to accept the plea agreement noting among other things "let's do it" (Transcript Page 35), and "ought to do it now before I have a night to think about it" (Transcript Page 36), and "I'll sign it (guilty plea colloquy)" (Transcript Page 37).

The Court then proceeded through an exhaustive oral guilty plea colloquy of the Defendant. As for the plea agreement, the Court referenced the two (2) to four (4) years and the previously referenced credit (Transcript Page 39). The Defendant indicated that he understood the above provisions as

the plea agreement (Transcript Pages 39, 45). He acknowledged that other than the plea agreement he was not given any promises or inducement to plead guilty, other than no further charges would be filed against him based on information in the Commonwealth's and Adult Probation Office's possession including any "dump" of the Defendant's phone (Transcript Pages 43, 44).

Other than the Court referencing the phone dump as set forth above, there was no mention in the transcript of any return of phones to Defendant as part of any plea agreement or any inducement to plead guilty. Accordingly, there is no record evidence that the Defendant raised his request for return of property during the pendency of the criminal charges or 30 days thereafter.

AND NOW this 10th day of February, 2021, Defendant's Motions for Return of Property are DISMISSED. Defendant has waived his right to seek the return of his property and this Court lacks jurisdiction to hear said claims.

BY THE COURT,

MARC F. LOVECCHIO, JUDGE

CC: Joseph Ruby, Esquire (2)
Colin Best - QC-0994

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CR-1020-2019; Work File
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MFL/clj