

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

Appellee

v.

SPENCEL BROWN,

Appellant

No. 1674 EDA 2013

Appeal from the Judgment of Sentence April 30, 2013
In the Court of Common Pleas of Philadelphia County Criminal Division
at No(s): CP-51-CR-0003785-2011

BEFORE: SHOGAN, J., JENKINS, J., and PLATT, J.*

MEMORANDUM BY JENKINS, J.

FILED APRIL 22, 2014

For the following reasons, we remand this case to the trial court for an evidentiary hearing to determine whether appellant Spencel Brown filed his post-sentence motions on May 10, 2013 or on May 13, 2013. If he filed post-sentence motions on May 10, 2013, his appeal to this Court is timely, and we may proceed to decide the appeal on the merits. If he filed his post-sentence motions on May 13, 2013, his appeal to this Court is untimely, and we must quash the appeal.

Following a bench trial, the trial court found Brown guilty of aggravated assault, simple assault, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, possession

* Retired Senior Judge assigned to the Superior Court.

of an instrument of crime and reckless endangerment of another person. The court found Brown guilty of these charges based on evidence that Brown shot at a man multiple times after chasing him across a street in the Overbrook section of Philadelphia.

On Tuesday, April 30, 2013, the court sentenced Brown to 5½-11 years imprisonment plus two consecutive five year terms of probation. At the conclusion of the sentencing hearing, the court advised Brown: "You have ten days to ask this Court to reconsider the sentence or file any other post sentence motion. You have thirty days to file an appeal to the Superior Court of Pennsylvania." N.T., 4/30/13, pp. 31-32. The judgment of sentence was docketed on the same day.

Subsequently, Brown filed post-sentence motions. There are two timestamps on the motions. One timestamp, which is crossed out, is dated May 10, 2013. Another timestamp, which is not crossed out, is dated May 13, 2013. The docket states that May 13, 2013 is the date of filing. On May 13, 2013, the court denied Brown's motions. On June 7, 2013, Brown filed a notice of appeal to this Court.

We must examine whether Brown timely filed his notice of appeal, because an untimely appeal prevents us from exercising

jurisdiction over this appeal. ***Commonwealth v. Dreves***, 839 A.2d 1122, 1126 n. 4 (Pa.Super.2003) (*en banc*) (this Court may raise the question of jurisdiction *sua sponte*) (citation omitted).

Pa.R.Crim.P. 720 provides that “a written post-sentence motion **shall** be filed no later than 10 days after imposition of sentence.” Pa.R.Crim.P. 720(A)(1) (emphasis added). When the defendant files a timely post-sentence motion, the appeal period is tolled either until (1) the court decides the motion or (2) the clerk of courts enters an order denying the motion by operation of law¹. Pa.R.Crim.P. 720(A)(2)(a-b). The appeal period itself is thirty days. Pa.R.A.P. 903(a).

An untimely post-sentence motion does not toll the appeal period. ***Dreves, supra***. The thirty day appeal period begins to run upon imposition of the judgment of sentence in open court. Pa.R.A.P. 903(c)(3).

In this case, the trial court imposed sentence on April 30, 2013. If Brown filed his post-sentence motions on May 10, 2013, they are

¹ A post-sentence motion is deemed denied by operation of law when the court fails to decide the motion within 120 days after the date of filing. Pa.R.Crim.P. 720(B)(3)(a). Upon motion by the defendant within the 120 day period, the court may grant one 30 day extension for deciding the motion. If the court fails to decide the motion within the 30 day extension period, it is deemed denied by operation of law. Pa.R.Crim.P. 720(B)(3)(b).

timely, which means that (1) his appeal period did not begin running until May 13, 2013, when the trial court denied his motion, and (2) his appeal on June 7, 2013 is timely.

If Brown filed his post-sentence motions on May 13, 2013, thirteen days after sentencing, they are untimely and do not toll the appeal period. This means that Brown's appeal period began running on April 30, 2013 and expired on May 30, 2013, **Dreves, supra**, and that his appeal on June 6, 2013 was untimely. In this situation, we would have no choice but to quash his appeal. **Commonwealth v. Wrecks**, 934 A.2d 1287, 1289 (Pa. Super. 2007) (this Court lacked jurisdiction to hear defendant's appeal from denial of his post-sentence motion seeking reduction in sentence; defendant's post-sentence motion was untimely and did not toll defendant's direct appeal period, and defendant's time for filing a direct appeal expired 30 days after he was sentenced, thus defendant's appeal was late); **Dreves, supra**, 839 A.2d at 1129 (same).

The timeliness of Brown's appeal thus boils down to the question of whether he filed his post-sentence motion on May 10, 2013 or May 13, 2013.

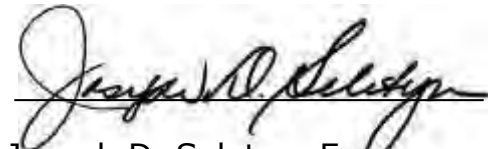
Accordingly, we direct the return of the record in this matter to the trial court upon the filing of this Memorandum. Within 45 days after receipt of the record by the trial court, the trial court shall

- (1) conduct an evidentiary hearing, *and*
- (2) file written findings of fact which resolve whether Brown filed his post-sentence motion on May 10, 2013 or May 13, 2013, *and*
- (3) return the record to the Superior Court Prothonotary.

Upon return of the record, this panel shall review the trial court's findings of fact and take appropriate action.

Case remanded for action consistent with this Memorandum. Superior Court jurisdiction retained. Panel jurisdiction retained.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014