

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JERMAINE HENDERSON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2432 EDA 2013

Appeal from the Judgment of Sentence June 18, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012686-2011,
CP-51-CR-0012688-2011

BEFORE: GANTMAN, P.J., SHOGAN, and LAZARUS, JJ.

DISSENTING MEMORANDUM BY SHOGAN, J.:

FILED JULY 24, 2015

Although procedural irregularities attend his case, I do not believe Appellant's appeal was untimely. Accordingly, I would consider the merits of this appeal.

"Jurisdiction is vested in the Superior Court upon the filing of a timely notice of appeal." ***Commonwealth v. Green***, 862 A.2d 613, 615 (Pa. Super. 2004) (*en banc*) (citation omitted). "A direct appeal in a criminal proceeding lies from the judgment of sentence." ***Commonwealth v. Preacher***, 827 A.2d 1235, 1236 n.1 (Pa. Super. 2003). "The time for filing an appeal can be extended beyond [thirty] days after the imposition of sentence only if the defendant files a timely post-sentence motion." ***Green***, 862 A.2d at 618. Pursuant to Pa.R.Crim.P. 720(A)(1), a post-sentence

motion must be filed no later than ten days after the imposition of sentence. An untimely post-sentence motion does not toll the thirty-day appeal period. **Green**, 862 A.2d at 618.

The trial court sentenced Appellant on June 18, 2013. Appellant did not raise any challenges at sentencing. N.T., 6/18/13, at 51–60. After sentence was imposed, Appellant was informed of his post-sentence rights and appellate rights. N.T., 6/18/13, at 59–60. Appellant had until June 28, 2013, to file a timely post-sentence motion and until July 18, 2013, to file an appeal. Pa.R.Crim.P. 720(A)(1); Pa.R.A.P. 903(a).

On July 8, 2013, twenty days after entry of the judgment of sentence, Appellant filed a petition for leave to file a post-sentence motion out of time. In his petition, Appellant asserted that counsel was filing a post-sentence motion concurrently with the petition. Petition, 7/8/13, at ¶ 4. However, the certified record does not contain a post-sentence motion, a fact noted by the Majority. Majority Memorandum at n.2. Nonetheless, on July 17, 2013, which was still within the thirty-day appeal period, the trial court stated that it considered a post-sentence motion and entered an order denying relief. **See** ORDER-Post Sentence Motion, 7/17/13. Appellant filed a timely appeal on July 18, 2013.

Although the trial court did not expressly issue an order permitting the filing of a post-sentence motion *nunc pro tunc*, it did state that it considered a motion and then denied relief within the original thirty-day appeal period.

In my opinion, the trial court's action of denying relief within the original thirty-day period distinguishes this case from ***Commonwealth v. Capaldi***, 112 A.3d 1242 (Pa. Super. 2015), wherein the hearing and subsequent denial of the post-sentence motion occurred after the thirty-day appeal period. Accordingly, I would consider the merits of this appeal.