NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DELORES ELLEN BRYANT Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 488 MDA 2013

Appeal from the Judgment of Sentence May 8, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000300-2010

BEFORE: PANELLA, J., MUNDY, J., and MUSMANNO, J.

MEMORANDUM BY MUNDY, J.: **FILED OCTOBER 28, 2013**

Appellant, Delores Ellen Bryant, appeals *nunc pro tunc* from the May 8, 2012 aggregate judgment of sentence of four to eight years' imprisonment, plus one year probation after she was found guilty of possession with intent to deliver (PWID), intentional possession of a controlled substance, and possession of drug paraphernalia.[1] After careful review, we are constrained to quash this appeal.

The trial court summarized the relevant background of this case as follows.

> On the afternoon of October 21, 2009, Tyson Havens, Pennsylvania State Trooper, observed a white Nissan Maxima in the area of the Pennvale

[1] 35 P.S. §§ 780-113(a)(30), 780-113(a)(16), and 780-113(a)(32), respectively.

Housing Development in Williamsport, Lycoming County, Pennsylvania. Prior to October 21, 2009, Trooper Havens had spoken with Christy Limbach, manager of the Pennvale Housing Development, regarding a suspicious white Nissan Maxima which she had observed frequenting the housing development. On the day in question, the driver of the Nissan parked and exited the vehicle. Trooper Havens proceeded to drive past the driver and greet him. A conversation ensued which at some point Trooper Havens became aware of the fact that the driver did not have a driver's license. At that point Trooper Havens initiated a traffic stop. The individual identified himself as Izone Jackson and indicated that he was going to visit his girlfriend [Appellant] at her place of residence, 1814 Hazel Drive. Mr. Jackson further indicated that his girlfriend was not home and that he did not have a key to her residence but a friend of his, Raymond Jones, was inside the residence. Trooper Havens gave Mr. Jackson a verbal warning and indicated that Mr. Jackson was free to leave.

Mr. Jackson then proceeded to walk away heading in the direction of [Appellant]'s residence. He then veered south away from the residence. Trooper Havens called out to Mr. Jackson "Hey, weren't you going to 1814? You passed it." Mr. Jackson indicated that he was not going to 1814 that he was going to pick his son up from daycare. Mr. Jackson then walked around the back of the building and out of sight.

Trooper Havens proceeded to 1814 Hazel Drive and knocked on the door. The door was opened approximately six inches and then slammed closed. Trooper Havens stayed at the door announcing himself and asking someone to come outside or indicate that they were alright for approximately ten minutes. After his attempts proved unsuccessful, Trooper Havens contacted Ms. Limbach. Ms. Limbach arrived and at that time requested Trooper Havens make entry to the residence due to the fact

that she was concerned that someone inside was injured or that there was a burglary in progress.

Trooper Havens and Trooper Rankey made entry into the residence. Upon entry, Trooper Havens encountered an individual by the name of Raymond Howard in the kitchen. Mr. Howard was placed under arrest after indicating erroneously that he was in Terra Smith's house. After the downstairs portion of the residence was cleared the officers proceeded upstairs. Trooper Havens entered the master bedroom and observed in plain view a pair of black Timberland boots. Inside one of the boots was a plastic bag. The bag contained nineteen (19) smaller ziplock bags which contained crack cocaine. A second bag, also in the boot, contained four smaller ziplock bags that contained crack cocaine. By the window in the master bedroom Trooper Havens observed a stack of approximately fifteen (15) shoe boxes the top shoebox was open and contained money. It was later determined that it contained one hundred thirty dollars ($130). The shoebox directly below the top shoebox had holes in the side of the box. Through the holes a stack of money was evident. It was later determined that it was the sum of seven hundred dollars ($700). The officers continued to clear the residence to make sure that there was no one else present. After the residence was secured Trooper Havens left and proceeded to apply for a search warrant.

After the search warrant was obtained the following evidence was recovered from [Appellant]'s residence:

Kitchen:

- In the kitchen drawer there was a plastic bag with marijuana dime bags and a grocery bag containing marijuana dime bags.
- In the kitchen cabinet there was a paper bag that contained a plastic bag containing marijuana and between 1,000 – 2,000 little

> plastic ziplock bags commonly used for distributing crack cocaine and marijuana.
> - In the trash box there were four clear yellow bags containing crack cocaine.
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> Living Room
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> - One hundred and thirty-one dollars ($131) in a pair of white Adidas sneakers.
> - A silver Page Plus cell phone
> - A blue Virgin Mobile cell phone
>
> Dining Room
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> - On the dining room table was a wallet that contained identification for Izone Jackson.
>
> Master Bedroom
>
> - Large Tupperware tote containing men's clothing and an Astra A-100 9mm handgun
> - Black wallet containing two forms of identification for [Appellant].
>
> Additionally, the master bedroom showed signs of use. It contained a dresser; ironing board; and a photo of [Appellant] and Mr. Jackson. [Appellant] and her minor child, who was approximately five or six years of age at the time, were the only individuals listed on the lease. During an interview with Trooper Havens [Appellant] stated that the items found in the residence belonged to her boyfriend, Earnest Jackson.

Trial Court Opinion, 5/10/13, at 2-4.

On March 22, 2010, the Commonwealth filed an information charging Appellant with one count of criminal conspiracy to commit PWID[2], two

[2] 18 Pa.C.S.A. § 903(a) (to commit 35 P.S. § 780-113(a)(30)).

counts of PWID, two counts of possession of a controlled substance, and one count of possession of drug paraphernalia. On April 21, 2010, Appellant filed a motion to suppress. The trial court conducted a suppression hearing on June 2, 2010. On June 30, 2010, the trial court denied Appellant's motion.

On December 8, 2010, Appellant filed a motion to dismiss on the ground that the Commonwealth had violated the provisions of Pennsylvania Rule of Criminal Procedure 600. The trial court conducted a hearing on December 21, 2010. On January 12, 2011, the trial court entered an order denying Appellant's Rule 600 motion. The case proceeded to a bench trial on April 26, 2011, at the conclusion of which Appellant was found guilty of the PWID counts, the intentional possession of a controlled substance counts, and the possession of drug paraphernalia count. The conspiracy charge was dismissed. On May 8, 2012, the trial court imposed an aggregate sentence of four to eight years' imprisonment, plus one year probation.[3]

On May 25, 2012, Appellant filed an untimely post-sentence motion, which the trial court denied on August 2, 2012. Appellant filed a notice of appeal on August 9, 2012. On September 27, 2012, this Court *sua sponte* quashed the appeal on the basis that because Appellant's post-sentence

[3] The trial court imposed consecutive two to four year sentences of imprisonment for each PWID charge, and one year probation for the drug paraphernalia charge. The trial court imposed no further penalty for the possession charges.

motion was untimely, it did not toll the appeal period, rendering her notice of appeal untimely. Superior Court Order, 9/27/12, at 1. Appellant did not file a petition for allowance of appeal with our Supreme Court and the record was subsequently returned to the trial court. The next docket entry is a March 14, 2013 order stating, "after stipulation, it is hereby [o]rdered and [d]irected that because of trial counsel's failure to timely file a [n]otice of [a]ppeal, and appellant counsel will raise sufficiency of the evidence on direct appeal, [A]ppellant's appeal rights are hereby reinstated." Trial Court Order, 3/14/13, at 1. The order gave Appellant 30 days to file a new notice of appeal. ***Id.*** The order was signed by the trial court and by the Commonwealth. ***See id.*** Appellant filed a second notice of appeal on March 15, 2013.[4]

On appeal, Appellant raises two issues for our review.

> 1. Did the [trial] court err by denying [] Appellant's motion to suppress where officers entered her residence and conducted a protective sweep?
>
> 2. Was the evidence presented at trial insufficient to prove that [Appellant] constructively possessed drugs in her residence when she was not present at the time of the police entry?

Appellant's Brief at 4.

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[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

Before we may address the merits of Appellant's issues, we must first determine whether this appeal is properly before us. We may raise issues concerning our appellate jurisdiction *sua sponte*. ***Commonwealth v. Patterson***, 940 A.2d 493, 497 (Pa. Super. 2007), *appeal denied*, 960 A.2d 838 (Pa. 2008). In order to invoke our appellate jurisdiction, Pennsylvania Rule of Appellate Procedure 903 requires that all "notice[s] of appeal … shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). "In a criminal case in which no post-sentence motion has been filed, the notice of appeal shall be filed within 30 days of the imposition of the judgment of sentence in open court." ***Id.*** at 903(c)(3). Since this filing period is jurisdictional in nature, it must be strictly construed and "may not be extended as a matter of indulgence or grace." ***Commonwealth v. Pena***, 31 A.3d 704, 706 (Pa. Super. 2011) (citation omitted). As noted above, Appellant filed the instant notice of appeal on March 15, 2013. This filing was based on the trial court's March 14, 2013 order *sua sponte* reinstating Appellant's direct appeal rights.

In general, trial courts are divested of jurisdiction after a notice of appeal is filed and may not enter further orders in a given case, save a few explicit exceptions. ***See*** Pa.R.A.P. 1701(a) (stating, "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter[]"); 42 Pa.C.S.A. § 5505 (stating, "[e]xcept as otherwise provided or prescribed by

law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed[]").

Our Supreme Court has consistently held that the Post Conviction Relief Act (PCRA)[5], "provides the exclusive remedy for post-conviction claims seeking restoration of appellate rights due to counsel's failure to perfect a direct appeal[.]" ***Commonwealth v. Ellis***, 807 A.2d 838, 839 (Pa. 2002), *quoting* ***Commonwealth v. Lantzy***, 736 A.2d 564, 569-570 (Pa. 1999). Our review of the certified record reveals that there was no PCRA petition, or any document that could be treated as a PCRA petition filed in this case prior to the trial court's March 14, 2013 order. ***See Commonwealth v. Taylor***, 65 A.3d 462, 466 (Pa. Super. 2013) (stating, "any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition[]"). This Court's order quashing Appellant's first appeal did not revive the trial court's jurisdiction over the case, absent the filing of a PCRA petition. ***See Ellis***, ***supra***; ***Lantzy***, ***supra***. Such a petition was required to invoke the jurisdiction of the Court of Common Pleas anew. ***See*** 42 Pa.C.S.A. § 9545(a) (stating, "[n]o court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under [the PCRA]").

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[5] 42 Pa.C.S.A. §§ 9541-9546.

Based on these considerations, we conclude that the trial court was not permitted to *sua sponte* enter an order reinstating Appellant's direct appeal rights, even if the Commonwealth agrees to such an order. ***See Commonwealth v. Turner***, --- A.3d ---, 2013 WL 4413293, *3 n.2 (Pa. Super. 2013) (concluding that a trial court's *sua sponte* order reinstating the appellant's direct appeal rights was "improper"). As a result, the trial court's March 14, 2013 order was a nullity and without legal effect. Therefore, Appellant's March 15, 2013 notice of appeal was patently untimely as it was filed 311 days after her sentence was imposed in open court, which triggered the filing period. ***See*** Pa.R.A.P. 903(c)(3).

Based on the foregoing, we conclude that the trial court's March 14, 2013 *sua sponte* reinstating Appellant's direct appeal rights was a nullity. Therefore, Appellant's notice of appeal was untimely filed. Accordingly, we are constrained to conclude that we are without jurisdiction and quash this appeal.

Appeal quashed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/28/2013