

RULE 462. TRIAL *DE NOVO*.

(A) When a defendant appeals after conviction by an issuing authority in any summary proceeding, upon the filing of the transcript and other papers by the issuing authority, the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury.

(B) The attorney for the Commonwealth may appear and assume charge of the prosecution. When the violation of an ordinance of a municipality is charged, an attorney representing that municipality, with the consent of the attorney for the Commonwealth, may appear and assume charge of the prosecution. When no attorney appears on behalf of the Commonwealth, the affiant may be permitted to ask questions of any witness who testifies.

(C) In appeals from summary proceedings arising under the Vehicle Code or local traffic ordinances, other than parking offenses, the law enforcement officer who observed the alleged offense must appear and testify. The failure of a law enforcement officer to appear and testify shall result in the dismissal of the charges unless:

(1) the defendant waives the presence of the law enforcement officer in open court on the record;

(2) the defendant waives the presence of the law enforcement officer by filing a written waiver signed by the defendant and defense counsel, or the defendant if proceeding *pro se*, with the clerk of courts; or

(3) the trial judge determines that good cause exists for the law enforcement officer's unavailability and grants a continuance.

(D) If the defendant fails to appear, the trial judge may dismiss the appeal and enter judgment in the court of common pleas on the judgment of the issuing authority.

(E) If the defendant withdraws the appeal, the trial judge shall enter judgment in the court of common pleas on the judgment of the issuing authority.

(F) The verdict and sentence, if any, shall be announced in open court immediately upon the conclusion of the trial.

(G) At the time of sentencing, the trial judge shall:

(1) if the defendant's sentence includes restitution, a fine, or costs, state the date on which payment is due. If the defendant is without the financial means to pay

the amount in a single remittance, the trial judge may provide for installment payments and shall state the date on which each installment is due;

(2) advise the defendant of the right to appeal to the Superior Court within 30 days **of the imposition of sentence**, and that, if an appeal is filed, the execution of sentence will be stayed and the trial judge may set bail;

(3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(4) issue a written order imposing sentence, signed by the trial judge. The order shall include the information specified in paragraphs (G)(1) through (G)(3), and a copy of the order shall be given to the defendant.

(H) After sentence is imposed by the trial judge, the case shall remain in the court of common pleas for the execution of sentence, including the collection of any fine and restitution, and for the collection of any costs.

COMMENT: This rule is derived from former Rule 86(G) and former Rule 1117(c).

The procedures for conducting the trial *de novo* in the court of common pleas set forth in paragraphs (B), (F), and (G) are comparable to the summary case trial procedures in Rule 454 (Trial in Summary Cases).

Pursuant to paragraph (B), the decision whether to appear and assume control of the prosecution of the trial *de novo* is solely within the discretion of the attorney for the Commonwealth. When no attorney appears at the trial *de novo* on behalf of the Commonwealth or a municipality, the trial judge may ask questions of any witness who testifies, and the affiant may request the trial judge to ask specific questions. In the appropriate circumstances, the trial judge may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the trial judge.

The provisions of paragraph (C) that permit the court to continue the case if there is good cause for the officer's unavailability were added in response to *Commonwealth v.*

*Hightower*, **438 Pa. Super. 400**, 652 A.2d 873 ([Pa. Super.] 1995).

Paragraph (D) makes it clear that the trial judge may dismiss a summary case appeal when the judge determines that the defendant is absent without cause from the trial *de novo*. If the appeal is dismissed, the trial judge should enter judgment and order execution of any sentence imposed by the issuing authority.

Pursuant to paragraph (G), if the defendant is convicted, the trial judge must impose sentence, and advise the defendant of the payment schedule, if any, and the defendant's appeal rights. See Rule 704(A)(3) **and Rule 720(D)**. No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. See *Alabama v. Shelton*, 535 U.S. 654 (2002), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Once sentence is imposed, paragraph (H) makes it clear that the case is to remain in the court of common pleas for execution of the sentence and collection of any costs, and the case may not be returned to the **[district justice]** **magisterial district judge**. The execution of sentence includes the collection of any fines and restitution.

NOTE: Former Rule 86 adopted July 12, 1985, effective January 1, 1986; revised September 23, 1985, effective January 1, 1986; the January 1, 1986 effective dates extended to July 1, 1986; amended February 2, 1989, effective March 1, 1989; amended March 22, 1993, effective January 1, 1994; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; amended February 27, 1995, effective July 1, 1995; amended October 1, 1997, effective October 1, 1998; amended May 14, 1999, effective July 1, 1999; rescinded March 1, 2000, effective April 1, 2001, and paragraph (G) replaced by Rule 462. New Rule 462 adopted March 1, 2000, effective April 1, 2001; amended February 28, 2003, effective July 1, 2003; *Comment* revised March 26, 2004, effective July 1, 2004 **[.]** **amended January 18, 2007, effective August 1, 2007.**

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**COMMITTEE EXPLANATORY REPORTS:**

**FORMER RULE 86:**

**Final Report explaining the March 22, 1993 amendments to former Rule 86 published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).**

**Final Report explaining the October 28, 1994 amendments to former Rule 86 published with the Court's Order at 24 Pa.B. 5843 (November 26, 1994).**

**Final Report explaining the February 27, 1995 amendments to former Rule 86 published with the Court's Order at 25 Pa.B. 935 (March 18, 1995).**

**Final Report explaining the October 1, 1997 amendments to former Rule 86 concerning stays published with the Court's Order at 27 Pa.B. 5408 (October 18, 1997).**

**Final Report explaining the May 14, 1999 amendments to former Rule 86, paragraph (G), concerning the police officer's presence published with the Court's Order at 29 Pa.B. 2776 (May 29, 1999).**

**NEW RULE 462:**

**Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 462 published at 30 Pa.B. 1478 (March 18, 2000).**

**Final Report explaining the February 28, 2003 amendments published with the Court's Order at 33 Pa.B. 1326 (March 15, 2003).**

**Final Report explaining the March 26, 2004 Comment revision published with the Court's Order at 34 Pa.B. 1931 (April 10, 2004)**

**Final Report explaining the January 18, 2007 amendment to paragraph (G)(2) published with the Court's Order at 37 Pa.B. ( , 2007)**

RULE 720. POST-SENTENCE PROCEDURES; APPEAL.

(A) TIMING.

(1) Except as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.

(2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed:

(a) within 30 days of the entry of the order deciding the motion;

(b) within 30 days of the entry of the order denying the motion by operation of law in cases in which the judge fails to decide the motion; or

(c) within 30 days of the entry of the order memorializing the withdrawal in cases in which the defendant withdraws the motion.

(3) If the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, except as provided in paragraph (A)(4).

(4) If the Commonwealth files a timely motion to modify sentence pursuant to Rule 721, the defendant's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion.

(B) OPTIONAL POST-SENTENCE MOTION.

(1) Generally.

(a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:

(i) a motion challenging the validity of a plea of guilty or *nolo contendere*, or the denial of a motion to withdraw a plea of guilty or *nolo contendere*;

(ii) a motion for judgment of acquittal;

(iii) a motion in arrest of judgment;

- (iv) a motion for a new trial; and/or
- (v) a motion to modify sentence.

(b) The defendant may file a supplemental post-sentence motion in the judge's discretion as long as the decision on the supplemental motion can be made in compliance with the time limits of paragraph (B)(3).

(c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.

## (2) Trial Court Action.

### (a) Briefing Schedule

Within 10 days after a post-sentence motion is filed, if the judge determines that briefs or memoranda of law are required for a resolution of the motion, the judge shall schedule a date certain for the submission of briefs or memoranda of law by the defendant and the Commonwealth.

### (b) Hearing; Argument

The judge shall also determine whether a hearing or argument on the motion is required, and if so, shall schedule a date or dates certain for one or both.

### (c) Transcript

If the grounds asserted in the post-sentence motion do not require a transcript, neither the briefs nor hearing nor argument on the post-sentence motion shall be delayed for transcript preparation.

## (3) Time Limits for Decision on Motion.

The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.

(a) Except as provided in paragraph (B)(3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law.

(b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

(c) When a post-sentence motion is denied by operation of law, the clerk of courts shall forthwith enter an order on behalf of the court, and, as provided in Rule 114, forthwith shall serve a copy of the order on the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented, that the post-sentence motion is deemed denied. This order is not subject to reconsideration.

(d) If the judge denies the post-sentence motion, the judge promptly shall issue an order and the order shall be filed and served as provided in Rule 114.

(e) If the defendant withdraws a post-sentence motion, the judge promptly shall issue an order memorializing the withdrawal, and the order shall be filed and served as provided in Rule 114.

#### (4) Contents of Order.

An order denying a post-sentence motion, whether issued by the judge pursuant to paragraph (B)(3)(d) or entered by the clerk of courts pursuant to paragraph (B)(3)(c), or an order issued following a defendant's withdrawal of the post-sentence motion, shall include notice to the defendant of the following:

(a) the right to appeal and the time limits within which the appeal must be filed;

(b) the right to assistance of counsel in the preparation of the appeal;

(c) the rights, if the defendant is indigent, to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Rule 122; and

(d) the qualified right to bail under Rule 521(B).

#### (C) AFTER-DISCOVERED EVIDENCE.

A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.

#### (D) SUMMARY CASE APPEALS.

There shall be no post-sentence motion in summary case appeals following a trial *de novo* in the court of common pleas. The imposition of sentence immediately following a determination of guilt at the conclusion of the trial *de novo* shall constitute a final order for purposes of appeal.

COMMENT: See Rules 606, 608, and 622.

For post-sentence procedures after a sentence of death has been imposed, see Rule 811.

The purpose of this rule is to promote the fair and prompt disposition of all issues relating to guilty pleas, trial, and sentence by consolidating all possible motions to be submitted for trial court review, and by setting reasonable but firm time limits within which the motion must be decided. Because the post-sentence motion is optional, the defendant may choose to raise any or all properly preserved issues in the trial court, in the appellate court, or both.

#### TIMING

Paragraph (A) contains the timing requirements for filing the optional post-sentence motion and taking an appeal. Under paragraph (A)(1), the post-sentence motion must be filed within 10 days of imposition of sentence.

When a defendant files a timely post-sentence motion, the 30-day period for the defendant's direct appeal on all matters in that case -- including all issues related to any informations and any charges consolidated against the defendant for trial -- is triggered by the trial judge's decision on the post-sentence motion, the denial of the motion by operation of law, or the withdrawal of the post-sentence motion. The appeal period runs from the entry of the order. As to the date of entry of orders, see Pa.R.A.P. 108. See also *Commonwealth v. Miller*, 715 A.2d 1203 (Pa. Super. [Ct.] 1998), concerning the time for appeal following the withdrawal of a post-sentence motion. No direct appeal may



be taken by a defendant while his or her post-sentence motion is pending. See paragraph (A)(2).

If no timely post-sentence motion is filed, the defendant's appeal period runs from the date sentence is imposed. See paragraph (A)(3). Under paragraph (A)(4), however, when the defendant has not filed a post-sentence motion but the Commonwealth files a timely motion to modify sentence under Rule 721, it is the entry of the order disposing of the Commonwealth's motion that commences the 30-day period during which the defendant's notice of appeal must be filed. See Rule 721(B)(2)(b).

All references to appeals in this rule relate to the defendant's right to appeal. The rule does not address or alter the Commonwealth's right to appeal. For Commonwealth challenges to sentences, see Rule 721.

#### OPTIONAL POST-SENTENCE MOTION

Paragraph (B) represents a departure from traditional Pennsylvania practice. It is intended to give the defendant the option of resubmitting for the trial judge's consideration issues that were raised before or during trial. Although the defendant may choose to raise only some issues in the post-sentence motion, the decision on the motion triggers the appeal period on all properly preserved issues. See paragraph (A)(2).

Under paragraph (B)(1)(c), any issue raised before or during trial is deemed preserved for appeal whether or not the defendant chooses to raise the issue in a post-sentence motion. It follows that the failure to brief or argue an issue in the post-sentence motion would not waive that issue on appeal as long as the issue was properly preserved, in the first instance, before or during trial. Nothing in this rule, however, is intended to address Pa.R.A.P. 1925(b) or the preservation of appellate issues once an appeal is filed. See *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998) (any issues not raised in a 1925(b) statement will be deemed waived).

Nothing in this rule precludes the judge from granting a motion for extraordinary relief before sentencing under the special provisions of Rule 704(B). *But see* Rule 704(B)(3).

Under paragraph (A)(1), if a defendant chooses to file a post-sentence motion, the motion must be filed within 10 days of imposition of sentence. The filing of the written post-sentence motion triggers the time limits for decision on the motion, including any supplement to it filed pursuant to paragraph (B)(1)(b). See paragraph (B)(3)(a).

For procedures governing post-sentence challenges to the sufficiency of the evidence, see Rule 606(A)(6) and (A)(7). For challenges to the weight of the evidence, see Rule 607(A).

In those cases in which a petitioner under the Post Conviction Relief Act has been granted leave to file a post-sentence motion or to appeal *nunc pro tunc*, the filing of the post-sentence motion or the notice of appeal must comply with the timing requirements contained in paragraph (A) of this rule. See the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*

#### BRIEFS; TRANSCRIPTS; ARGUMENT

Under paragraph (B)(2)(a), the judge should determine, on a case-by-case basis, whether briefs or memoranda of law are required for a fair resolution of the post-sentence motion. If they are not needed, or if a concise summary of the relevant law and facts is sufficient, the judge should so order. Any local rules requiring briefs or oral argument are inconsistent with this rule. See Rule 105(B)(1).

Under paragraph (B)(2)(c), the judge, in consultation with defense counsel and the attorney for the Commonwealth, should determine what, if any, portions of the notes of testimony must be transcribed so that the post-sentence motion can be resolved. The judge should then set clear deadlines for the court reporter to insure timely disposition of the motion. Nothing in this rule precludes the judge from ordering the transcript or portions of it immediately after the conclusion of the trial or the entry of a plea.

Paragraph (B)(1)(b) permits the trial judge to entertain a supplemental post-sentence motion at his or her discretion, as long as the decision on the supplemental issue(s) is made within the time limits of paragraph (B)(3).

For the recording and transcribing of court proceedings generally, see Rule 115. The requirements for the record and the writing of an opinion on appeal are set forth in the Pennsylvania Rules of Appellate Procedure.

There is no requirement that oral argument be heard on every post-sentence motion. When argument is to be heard, however, the judge should determine whether the post-sentence motion argument must be argued before the judge alone, or before a panel sitting *en banc*. It is recommended that, except in extraordinary circumstances, the post-sentence motion be heard by the judge alone. The judge may make any rulings that could be made by a court *en banc*. See *Commonwealth v. Norris*, 256 Pa. Super. 196, 389 A.2d 668 (1978). On the powers of courts *en banc*, see *Commonwealth v. Bonser*, 215 Pa. Super. 452, 258 A.2d 675 (1969). For cases in which there has been a change of venue, see Rule 584.

When oral argument is heard on the post-sentence motion, the defendant need not be present.

### DISPOSITION

Under paragraph (B)(3), once the defendant makes a timely written post-sentence motion, the judge retains jurisdiction for the duration of the disposition period. The judge may not vacate the order imposing sentence pending decision on the post-sentence motion. This is so whether or not the Commonwealth files a motion to modify sentence. See Rule 721.

Paragraph (B)(3)(b) permits one 30-day extension of the 120-day time limit, for good cause shown, upon motion of the defendant. In most cases, an extension would be requested and granted when new counsel has entered the case. Only the defendant or counsel may request such an

extension. The judge may not, *sua sponte*, extend the time for decision: a congested court calendar or other judicial delay does not constitute "good cause" under this rule.

The possibility of an extension is not intended to suggest that 120 days are required for decision in most cases. The time limits for disposition of the post-sentence motion are the outer limits. Easily resolvable issues, such as a modification of sentence or a guilty plea challenge, should ordinarily be decided in a much shorter period of time.

If the trial judge decides the motion within the time limits of this rule, the judge may grant reconsideration on the post-sentence motion pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701.1, but the judge may not vacate the sentence pending reconsideration. Rule 720(B)(3). The reconsideration period may not be used to extend the timing requirements set forth in paragraph (B)(3) for decision on the post-sentence motion: the time limits imposed by paragraphs (B)(3)(a) and (B)(3)(b) continue to run from the date the post-sentence motion was originally filed. The trial judge's reconsideration must therefore be resolved within the 120-day decision period of paragraph (B)(3)(a) or the 30-day extension period of paragraph (B)(3)(b), whichever applies. If a decision on the reconsideration is not reached within the appropriate period, the post-sentence motion, including any issues raised for reconsideration, will be denied pursuant to paragraph (B)(3)(c).

Under paragraph (B)(3)(a), on the date when the court disposes of the motion, or the date when the motion is denied by operation of law, the judgment becomes final for the purposes of appeal. See Judicial Code, 42 Pa.C.S. §§ 102, 722, 742, 5105(a) and *Commonwealth v. Bolden*, 472 Pa. 602, 373 A.2d 90 (1977).

An order entered by the clerk of courts under paragraph (B)(3)(c) constitutes a ministerial order and, as such, is not subject to reconsideration or modification pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701.

If the motion is denied by operation of law, paragraph (B)(3)(c) requires that the clerk of courts enter an order

denying the motion on behalf of the court and immediately notify the attorney for the Commonwealth, the defendant's attorney, or the defendant if unrepresented, that the motion has been denied. This notice is intended to protect the defendant's right to appeal. The clerk of courts also must comply with the filing, service, and docket entry requirements of Rule 114.

The disposition of a motion to modify a sentence imposed after a revocation hearing is governed by Rule 708 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition).

### CONTENTS OF ORDER

Paragraph (B)(4) protects the defendant's right to appeal by requiring that the judge's order denying the motion, the clerk of courts' order denying the motion by operation of law, or the order entered memorializing a defendant's withdrawal of a post-sentence motion, contain written notice of the defendant's appeal rights. This requirement ensures adequate notice to the defendant, which is important given the potential time lapse between the notice provided at sentencing and the resolution of the post-sentence motion. See Rule 704(C)(3). See also *Commonwealth v. Miller*, 715 A.2d 1203 (Pa. Super. [Ct.] 1998), concerning the contents of the order memorializing the withdrawal of a post-sentence motion.

When a defendant withdraws a post-sentence motion in open court and on the record, the judge should orally enter an order memorializing the withdrawal for the record, and give the defendant notice of the information required by paragraph (B)(4). See *Commonwealth v. Miller, supra*.

### MISCELLANEOUS

*Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), which overrules *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977), provides that a defendant should wait until collateral review to raise ineffective counsel claims.

Under paragraph (B)(1)(a), the grounds for the post-sentence motion should be stated with particularity. Motions alleging insufficient evidence, for example, must specify in what way the evidence was insufficient, and motions alleging that the verdict was against the weight of the evidence must specify why the verdict was against the weight of the evidence.

Because the post-sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial. See paragraph (B)(1)(c).

Under paragraph (B)(1)(a)(ii), a challenge to the sufficiency of the evidence would be made in a motion for judgment of acquittal. See Rule 606.

A post-sentence challenge to a guilty plea under this rule is distinct from a motion to withdraw a guilty plea prior to sentence. See Rule 591. Cf. Standards Relating to Pleas of Guilty § 2.1(a)(ii), ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (Approved Draft, 1968). Properly preserved issues related to guilty pleas need not be raised again in the post-sentence motion, but the defendant may choose to do so. A key consideration for the defendant is whether the record will be adequate for appellate review. If counsel is uncertain about the record, it is recommended that the guilty plea be challenged in the post-sentence motion.

Issues properly preserved at the sentencing proceeding need not, but may be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived. See *Commonwealth v. Jarvis*, 444 Pa. Super. 296, 663 A.2d 790 (1995). See also Rule 704(C)(4). As a general rule, the motion to modify sentence under paragraph (B)(1)(a)(v) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an

illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 520 Pa. 385, 554 A.2d 50 (1989) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 437 Pa. 288, 263 A.2d 339 (1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under paragraph (B)(1)(a)(v) or Rule 721, a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or reimposed.

Commonwealth challenges to sentences are governed by Rule 721. If the defendant files a post-sentence motion, the time limits for decision on the defendant's motion govern the time limits for disposition of the Commonwealth motion to modify sentence, regardless of which motion is filed first. See Rule 721(C)(1). If the defendant elects to file an appeal and the Commonwealth files a motion to modify sentence, decision on the Commonwealth's motion triggers the defendant's 30-day appeal period. See Rule 720(A)(4).

Given that the Commonwealth has 10 days to file a motion to modify sentence under Rule 721(B)(1), it is possible that the defendant might elect to file a notice of appeal under Rule 720(A)(3) *followed by* the Commonwealth's filing a timely motion to modify sentence. When this occurs, the defendant's notice of appeal is rendered premature, because the entry of the order disposing of the Commonwealth's motion to modify sentence then becomes the triggering device for the defendant's notice of appeal. In this situation, counsel for the defendant should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals that were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction that treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see

Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.

For bail proceedings pending the outcome of the post-sentence motion, see Rules 521 and 523.

Unlike ineffective counsel claims, which are the subject of *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), paragraph (C) requires that any claim of after-discovered evidence must be raised promptly after its discovery. Accordingly, after-discovered evidence discovered during the post-sentence stage must be raised promptly with the trial judge at the post-sentence stage; after-discovered evidence discovered during the direct appeal process must be raised promptly during the direct appeal process, and should include a request for a remand to the trial judge; and after-discovered evidence discovered after completion of the direct appeal process should be raised in the context of the PCRA. See 42 Pa.C.S. § 9545(b)(1)(ii) and (b)(2) (PCRA petition raising after-discovered evidence must be filed within 60 days of date claim could have been presented). *Commonwealth v. Kohan*, 825 A.2d 702 (Pa. Super. [Ct.] 2003), is superseded by the 2005 amendments to paragraphs (A) and (C) of the rule.

Although there are no post-sentence motions in summary appeals following the trial *de novo* pursuant to paragraph (D), nothing in this rule is intended to preclude the trial judge from acting on a defendant's petition for reconsideration. See the Judicial Code, 42 Pa.C.S. § 5505. See also *Commonwealth v. Dougherty*, 451 Pa. Super. 248, 679 A.2d 779, 784 (1996). **The time for appeal in summary cases following a trial *de novo* runs from the imposition of sentence.**

NOTE: Previous Rule 1410, adopted May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; rescinded March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994, and replaced by present Rule 1410. Present Rule 1410 adopted March 22, 1993 and amended December 17, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994;



amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996. *Comment* revised September 26, 1996, effective January 1, 1997; amended August 22, 1997, effective January 1, 1998; *Comment* revised October 15, 1997, effective January 1, 1998; amended July 9, 1999, effective January 1, 2000; renumbered Rule 720 and amended March 1, 2000, effective April 1, 2001; amended August 21, 2003, effective January 1, 2004; amended March 2, 2004, effective July 1, 2004; *Comment* revised June 4, 2004, effective November 1, 2004; amended June 8, 2005, effective August 1, 2005 [.] ; **Comment revised January 18, 2007, effective August 1, 2007.**

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**COMMITTEE EXPLANATORY REPORTS:**

**Final Report explaining the provisions of the new rule published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).**

**Report explaining the December 17, 1993 amendments published with the Court's Order at 24 Pa.B. 334 (January 15, 1994).**

**Final Report explaining the September 13, 1995 amendments concerning bail published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).**

**Final Report explaining the September 26, 1996 Comment revision on Rule 1409 procedures published at 26 Pa.B. 4900 (October 12, 1996).**

**Final Report explaining the August 22, 1997 amendments to paragraphs (A)(4) and (B)(3) published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).**

**Final Report explaining the Comment references to Rule 1124A (Challenges to the Weight of the Evidence) and to Commonwealth v. Dougherty published with the Court's Order at 27 Pa.B. 5594 (November 1, 1997).**

**Final Report explaining the July 9, 1999 amendments to paragraphs (A)(2) and (B)(4) concerning time for appeal and contents of the order entered following withdrawal of post-sentence motion, and revision of the Comment adding the citation to Commonwealth v. Lord, published with the Court's Order at 29 Pa.B. 3836 (July 24, 1999).**

**Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).**

**Final Report explaining the August 21, 2003 changes to Rule 720 concerning the timeliness of filings and the order published with the Court's Order at 33 Pa.B. 4438 (September 6, 2003).**

**Final Report explaining the March 2, 2004 amendments updating the cross-references correlative to the March 2, 2004 changes to the motions rules published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).**

**Final Report explaining the June 8, 2005 changes concerning ineffective counsel claims and concerning after-discovered evidence published with the Court's Order at 35 Pa.B. 3545 (June 25, 2005).**

**Final Report explaining the January 18, 2007 revision of the last paragraph of the Comment clarifying the time for appeal following a trial de novo published with the Court's Order at 37 Pa.B. ( \_\_\_\_\_, 2007).**

RULE 721. PROCEDURES FOR COMMONWEALTH CHALLENGES TO SENTENCE; SENTENCING APPEALS.

(A) Commonwealth Challenges to Sentence

(1) The Commonwealth may challenge a sentence by filing a motion to modify sentence, by filing an appeal on a preserved issue, or by filing a motion to modify sentence followed by an appeal.

(2) Sentencing issues raised by the Commonwealth at the sentencing proceeding shall be deemed preserved for appeal whether or not the Commonwealth elects to file a motion to modify sentence on those issues.

(B) Timing

(1) Motion for Modification of Sentence. A Commonwealth motion for modification of sentence shall be filed no later than 10 days after imposition of sentence.

(2) Appeal of Sentence.

(a) Appeal Directly from Order Imposing Sentence.

(i) If the defendant has filed a post-sentence motion, and the Commonwealth elects to challenge the sentence by filing an appeal directly from the order imposing sentence, notice of the Commonwealth's appeal shall be filed within 30 days of the entry of the order disposing of the defendant's post-sentence motion pursuant to Rule 720(B)(3).

(ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the **entry of the order imposing sentence**.

(b) Appeal Following Disposition of Commonwealth Motion to Modify Sentence.

(i) If the defendant has filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the orders disposing of the

Commonwealth's and the defendant's motions pursuant to paragraph (C)(1).

- (ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion pursuant to paragraph (C)(2).

(C) Trial Court Action; Disposition

If the attorney for the Commonwealth files a timely motion for modification of sentence pursuant to paragraph (A)(1), the judge shall dispose of the motion as provided in this paragraph.

(1) If the defendant has filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion and the defendant's post-sentence motion simultaneously. The Rule 720(B)(3) time limits for deciding the defendant's post-sentence motion, including the automatic denial provisions, shall apply to the disposition of the Commonwealth's motion. The starting date for disposition of both motions shall be the date on which the defendant filed the post-sentence motion.

(2) If the defendant has not filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion within 120 days of the filing of the motion. If the judge fails to decide the Commonwealth's motion within 120 days, the motion shall be deemed denied by operation of law.

(D) Entry of Order by Clerk of Courts

(1) When the Commonwealth's motion for modification of sentence is denied by operation of law, the clerk of courts shall forthwith:

(a) enter an order on behalf of the court denying the Commonwealth's motion for modification of sentence by operation of law; and

(b) furnish a copy of the order, by mail or personal delivery, to the attorney for the Commonwealth, the defendant, and defense counsel.

(2) An order entered by the clerk of courts pursuant to this section shall not be subject to reconsideration.

COMMENT: Rule 721 clarifies the procedures for Commonwealth challenges to sentences in light of the post-sentence procedures adopted in 1993. See **[Pa.R.Crim.P.] Rule 720**. This rule does not address any other type of Commonwealth challenge or Commonwealth appeals generally.

Historically, the Commonwealth has been required to raise a discretionary sentencing issue at the sentencing hearing or in a post-trial motion to modify sentence in order to preserve the issue for appellate review. See *Commonwealth v. Eyster*, **401 Pa. Super. 477**, 585 A.2d 1027 (**[Pa. Super.] 1991**) (*en banc*), appeal denied **529 Pa. 646**, 602 A.2d 857 (**[Pa.] 1992**). Challenges to the legality of a sentence, however, are not waived if the Commonwealth fails to timely file a motion for modification. See *Commonwealth v. Smith*, **529 Pa. 380**, 598 A.2d 268 (**[Pa.] 1991**).

Under Rule 721, the Commonwealth's motion for modification of sentence is optional, as long as any discretionary sentencing issue is properly preserved at the time sentence was imposed. Before forgoing trial court review and proceeding with a direct appeal, the attorney for the Commonwealth must therefore be sure that the record created at the sentencing proceeding is adequate for appellate review of the issue, or the issue may be waived. See *Commonwealth v. Jarvis*, **444 Pa. Super. 295**, 663 A.2d 790 (**[Pa. Super.] 1995**), at n. 1.

As a general rule, a motion for modification of sentence gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, **520 Pa. 385**, 554 A.2d 50 (**[Pa.] 1989**) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, **437 Pa. 288**, 263 A.2d 339 (**[Pa.] 1970**) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under this rule or Rule 720(B)(1)(a)(v), a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time the sentence was modified or reimposed.

### **Trial Court Action**

Paragraph (C) sets forth the procedures for trial court action on the Commonwealth's motion for modification. Key to the timing of the judge's decision on the Commonwealth's motion is whether the defendant files a post-sentence motion.

### **Rule 720 Motion Filed**

Under paragraph (C)(1), if the defendant has filed a post-sentence motion, the judge is not permitted to vacate sentence and must decide the defendant's post-sentence motion and the Commonwealth's motion simultaneously. The date on which the defendant's post-sentence motion is filed, see Rule 720(A)(1), triggers the time limit within which the judge must also dispose of the Commonwealth's motion, regardless of which motion is filed first. If the judge fails to decide the Commonwealth's motion within this time limit, the motion is deemed denied by operation of law. See Rule 720(B)(3).

### **Rule 720 Motion Not Filed**

When the defendant has not filed a post-sentence motion, the disposition of the Commonwealth's motion is governed by paragraph (C)(2). The judge may not vacate sentence, but has 120 days to decide the Commonwealth's motion or the motion is deemed denied by operation of law. If the judge decides the motion within the 120-day limit and then agrees to reconsider, the reconsideration must be resolved within the original 120-day time limit. The judge may not

vacate sentence in order to reconsider the motion or otherwise use the reconsideration period to extend the 120-day time limit. It follows that even if the defendant has filed a notice of appeal, the procedural exceptions provided in Pa.R.A.P. 1701(b)(3) do not apply to challenges to sentences.

See *also* the Rule 720 *Comment* under "Disposition."

### **Entry of Order by Clerk of Courts**

Under paragraph (D)(1), when a Commonwealth motion to modify sentence has been denied by operation of law, the clerk of courts must enter an order on behalf of the court and furnish copies to the attorney for the Commonwealth, the defendant, and defense counsel. The clerk of courts' order is ministerial and not subject to reconsideration. See paragraph (D)(2). The clerk of courts also must comply with the filing, service, and docket entry requirements of Rule 114.

### **Appeal of Sentence**

Paragraph (B)(2) contains the timing requirements for Commonwealth notices of appeal.

### **No Commonwealth Motion to Modify Sentence Filed**

Paragraph (B)(2)(a) covers the time for filing a notice of appeal when the Commonwealth has elected *not* to file a motion to modify sentence with the trial judge. The time for filing the Commonwealth's notice of appeal under this paragraph depends on whether the defendant has filed a post-sentence motion. When the defendant files a post-sentence motion, paragraph (B)(2)(a)(i) provides that the entry of the order disposing of the defendant's post-sentence motion triggers the 30-day period during which the Commonwealth's notice of appeal must be filed. If no post-sentence motion is filed, it is the **[entry of the order imposing] imposition of** sentence that triggers the

Commonwealth's 30-day appeal period. See Rule 721(B)(2)(a)(ii).

Given that a defendant has 10 days to file a post-sentence motion under Rule 720(A)(1), it is possible that the Commonwealth might file a notice of appeal under paragraph (B)(2)(a)(ii) *followed by* the defendant's filing a timely post-sentence motion. When this occurs, the Commonwealth's notice of appeal is rendered premature, because it is the entry of the order disposing of the defendant's post-sentence motion that becomes the triggering device for the Commonwealth's notice of appeal. In this situation, counsel for the Commonwealth should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction that treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.

### **Commonwealth Motion to Modify Sentence Filed**

Paragraph (B)(2)(b) covers the time for filing the notice of appeal when the Commonwealth has elected to file a motion to modify sentence with the trial judge. As in paragraph (B)(2)(a), the time for notice depends on whether the defendant files a post-sentence motion. If the defendant has filed a post-sentence motion, the disposition of the Commonwealth's and the defendant's motion is simultaneous. See Rule 721(C)(1). If the defendant does not file a post-sentence motion, the 30-day appeal period begins to run from the entry of the order disposing of the Commonwealth's motion pursuant to the time limit of paragraph (C)(2).

NOTE: Rule 1411 adopted August 22, 1997, effective January 1, 1998; renumbered Rule 721 and amended March 1, 2000, effective April 1, 2001; *Comment* revised March 2,



2004, effective July 1, 2004 [.] ; amended January 18, 2007, effective August 1, 2007.

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**COMMITTEE EXPLANATORY REPORTS:**

**Final Report explaining the new rule published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).**

**Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).**

**Final Report explaining the March 2, 2004 amendments updating the cross-references correlative to the March 2, 2004 changes to the motions rules published with the Court's Order at 34 Pa.B. ( , 2004).**

**Final Report explaining the January 18, 2007 amendments clarifying the time for appeal in paragraph (B)(2)(a)(ii) published with the Court's Order at 37 Pa.B. ( , 2007).**