

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

GABRIEL ALFONZO CARSON RIVERA,
Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 283 MDA 2013

Appeal from the Judgment of Sentence January 9, 2013
In the Court of Common Pleas of Franklin County
Criminal Division at Nos.: CP-28-CR-0002084-2011;
CP-28-CR-0002087-2011

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In the Court of Common Pleas of Franklin County
Criminal Division at No.: CP-28-CR-0002087-2011

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED NOVEMBER 22, 2013

* Retired Senior Judge assigned to the Superior Court.

Appellant, Gabriel Alfonso Carson Rivera, appeals from the judgment of sentence imposed following his conviction of two counts each of robbery and conspiracy to commit robbery and one count of conspiracy to commit theft.¹ After careful review, we quash.

In December of 2011, the Commonwealth filed informations charging Appellant with the above crimes for his participation in the attempted robbery of the Kenmar Hotel in Newburg and the armed robbery of a Super 8 motel in Chambersburg. The trial court consolidated the cases for purposes of trial and the case proceeded to a jury trial on November 19, 2012. On November 20, 2012, the jury convicted Appellant of all charges. On January 9, 2013, the court sentenced Appellant to an aggregate term of not less than seventy-two nor more than 144 months' incarceration.

Appellant's trial counsel moved for the appointment of new appellate counsel and Appellant filed a *pro se* supplemental motion accusing trial counsel of ineffective assistance.² On January 29, 2013, the trial court

¹ **See** 18 Pa.C.S.A. §§ 3701(a)(1)(ii), (iv), and 903(a), respectively.

² We note it is well-settled that "there is no constitutional right to hybrid representation" at trial and a party may not "confuse and overburden the court by his own *pro se* filings . . . at the same time his counsel is filing [motions] on his behalf." ***Commonwealth v. Ellis***, 626 A.2d 1137, 1139, 1141 (Pa. 1993). Accordingly, Appellant's *pro se* motion was a "legal nullity." ***Commonwealth v. Ali***, 10 A.3d 282, 293 (Pa. 2010) (citation omitted) (declaring *pro se* Rule 1925(b) statement a legal nullity where appellant was represented by appellate counsel).

rescinded its appointment of trial counsel and appointed new appellate counsel. On February 11, 2013, on Appellant's behalf, appellate counsel filed a notice of appeal dated February 7, 2013. The trial court ordered Appellant to file a Rule 1925(b) statement of errors, which he timely did on March 22, 2013.³ **See** Pa.R.A.P. 1925(b). On April 4, 2013, the court filed an opinion pursuant to Rule 1925(a).

On appeal, Appellant challenges the sufficiency and the weight of the evidence. (**See** Appellant's Brief, at 6). "Before addressing the merits of Appellant's claims, we must address the timeliness of this appeal as it implicates our jurisdiction. Jurisdiction is vested in the Superior Court upon the filing of a timely notice of appeal." **Commonwealth v. Nahavandian**, 954 A.2d 625, 629 (Pa. Super. 2008) (citations omitted). "Because the timeliness implicates our jurisdiction, we may consider the matter *sua sponte*." **Commonwealth v. Yarris**, 731 A.2d 581, 587 (Pa. 1999) (citations omitted). Pennsylvania Rule of Criminal Procedure 720(A)(3) provides: "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[.]" Pa.R.Crim.P. 720(A)(3); **see also Commonwealth v. Dreves**, 839 A.2d 1122, 1126 (Pa. Super. 2003) (same). The post-sentence motions expressly identified by this Rule are those that directly

³ Appellant filed a counseled motion for an extension of time to file the statement, which the court granted.

contest the trial and sentencing proceedings and include those challenging the entry of a guilty plea or requesting judgment of acquittal, arrest of judgment, a new trial, or sentence modification. **See** Pa.R.Crim.P. 720(B)(1); **see also, e.g., Commonwealth v. Lincoln**, 72 A.3d 606, 611 (Pa. Super. 2013) (noting that appellant failed to file motion to withdraw guilty plea pursuant to Rule 720(B)(1)(a)(i)); **Commonwealth v. Brown**, 956 A.2d 992, 994 n.2 (Pa. Super. 2008), *affirmed*, 981 A.2d 893 (Pa. 2009) (observing that timely post-sentence motion to modify sentence tolled appeal period).

In this case, the court imposed Appellant's sentence on January 9, 2013. No post-sentence motion was filed, other than the collateral request for trial counsel's withdrawal, which the court granted on January 29, 2013, appointing appellate counsel the same day.⁴ Therefore, the notice of appeal due date was February 8, 2013. **See** Pa.R.Crim.P. 720(A)(3); **Dreves, supra** at 1126. However, although he dated the notice of appeal February 7, 2013, Appellant did not file it until February 11, 2013. Therefore, this

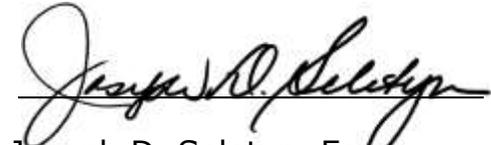
⁴ Even if this January 23, 2013 request were to be considered a post-sentence motion for purposes of tolling the appeal deadline, it would have been untimely and therefore would not have extended the appeal period. **See Commonwealth v. Khalil**, 806 A.2d 415, 418 (Pa. Super. 2002) ("A written post sentence motion shall be filed no later than ten days after imposition of sentence.") (citing Pa.R.Crim.P. 720(A)(1)); **see also** Pa.R.A.P. 720(A)(3); **Dreves, supra** at 1126.

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appeal is untimely and we lack jurisdiction to review its merits. **See**
Nahavandian, supra at 629.

Appeal quashed. Jurisdiction relinquished.

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: 11/22/2013