

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Commonwealth of Pennsylvania :  
 :  
 v. : No. 2306 C.D. 2010  
 : Submitted: August 12, 2011  
 Daniel LaBrake, :  
 Appellant :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED:** September 12, 2011

Appellant Daniel LaBrake (LaBrake) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), which denied LaBrake’s motion for return of property. We affirm.

On February 24, 2010, LaBrake filed a motion for return of property seeking an order from the trial court directing that the Philadelphia Police Department (Department) return property the Department took from him on May 20, 1998.<sup>1</sup> In a draft order LaBrake included with his motion, he indicates that he was filing his motion in accordance with Pennsylvania Rule of Criminal Procedure 588, which provides:

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<sup>1</sup> LaBrake identified property receipt 25839 and averred that the property included in that receipt is not contraband or derivative contraband.

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

(C) A motion to suppress evidence under Rule 581 may be joined with a motion under this rule.

The Philadelphia County District Attorney's Office (District Attorney) filed a motion to dismiss LaBrake's motion, admitting that on May 20, 1998, "the property at issue, \$148.00 & other miscellaneous items were recovered from Daniel LaBrake." Additionally, the District Attorney averred that (1) LaBrake had been charged with murder, (2) the criminal charge against LaBrake was resolved with a determination of guilty on February 1, 2001, (3) LaBrake's conviction was affirmed on appeal on December 8, 2006, and (4) LaBrake did not file his motion for return of property until nine years after the February 2001 disposition of the criminal charges and two years after the conclusion of the direct appeals of his conviction. Based upon this procedural history, the District Attorney, relying upon *Commonwealth v. Setzer*, 392 A.2d 772 (Pa. Super. 1978) (*Setzer*), asserted that, because LaBrake did not file his motion until thirty-one months after the completion of the underlying criminal matter, the trial court should dismiss LaBrake's motion.

On July 14, 2010, LaBrake filed a motion in opposition to the District Attorney's motion to dismiss.<sup>2</sup> In his motion in opposition, LaBrake argued that (1) *Setzer* did not apply, (2) Pa. R. Crim. P. 588 does not set forth any time period within which an individual must seek the return of property seized by the police, and (3) federal rules dictate that, once criminal proceedings are terminated, police should return any seized property that is not contraband.

On July 15, 2010, the trial court issued four orders relating to LaBrake's motion for return of property.<sup>3</sup> Thereafter, on August 11, 2010, LaBrake filed a document in the trial court captioned "praecipe for entry of judgment," in which he requested the trial court to issue a judgment with regard to his initial motion (for return of his property), indicating that the trial court's July 15, 2010 orders did not dispose of all of his claims and that, therefore, those orders could not constitute a final order for the purpose of appeal. On the same date, LaBrake also filed a notice of appeal with the trial court, referencing Pennsylvania Rule of Appellate Procedure 301(e).<sup>4</sup> LaBrake's notice of appeal also requested

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<sup>2</sup> Through this motion LaBrake also sought "to oppose any motion for forfeiture, oral or otherwise, of said property." (Motion in opposition at 1.)

<sup>3</sup> These orders, which, as indicated below, appear to have resulted from a settlement conference the trial court conducted, directed that specific property apparently still in the possession of the Department be returned to LaBrake. These orders pertained to the return of the following property: (1) photo albums (No. 2139346); (2) paperwork (No. 2121126); (3) paperwork and coins (No. 2121127); and (4) bags, handbags, phone, and contents of bags (No. 2121128). The trial court's opinion suggests that it issued these orders in accordance with a settlement agreement.

<sup>4</sup> Pa. R.A.P. 301(e) provides:

(e) Emergency appeals. Where the exigency of the case is such as to impel an immediate appeal and the party intending to appeal an adverse action is unable to secure the formal entry of an appealable

**(Footnote continued on next page...)**

the right to appeal the trial court's actions under Pa. R.A.P. 311 as an interlocutory appeal as of right.

The trial court issued an opinion in support of its orders in compliance with Pa. R.A.P. 1925(a). Upon review of the record in this case, this Court questioned whether the original record was complete, based upon a reference by the trial court in its 1925(a) opinion to settlement between the parties. Consequently, we remitted the record to the trial court with the direction to supplement the record and/or enter an order clarifying the status of LaBrake's motion, the Commonwealth's motion to dismiss, and the settlement. The trial court issued an amended opinion in which it indicated that the trial court was denying LaBrake's motion "through a reconstructed order, as the original order was lost and never docketed." In its amended opinion, the trial court summarized the appeal as LaBrake's appeal of the trial court's "decision denying [LaBrake's] motion for return of property." The trial court's amended opinion indicates that the trial court approved a settlement agreement between the parties, providing for the return of some of LaBrake's property, excluding the confiscated guns and \$148.00 that the police had removed from LaBrake's home.

The trial court indicated that, under Pa. R. Crim. P. 588 and *Setzer*, a person seeking the return of confiscated property must move for the return of the property either during the course of post-verdict motions or sentencing. Because

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**(continued...)**

order pursuant to the usual proceedings, the party may file in the lower court and serve a praecipe for entry of an adverse order, which action shall constitute entry of an appealable order for the purpose of these rules. The interlocutory or final nature of the action shall not be affected by this subdivision.

LaBrake did not seek return of his property at that time, the trial court denied his request, concluding that LaBrake's request, filed approximately four years after his conviction became final, was untimely and resulted in waiver that precluded consideration of his request.

In *Setzer*, the Pennsylvania Superior Court upheld an order of a trial court denying a motion for return of property where the owner, who had been convicted of certain crimes and sentenced to concurrent prison terms, failed to raise the issue of return of his property in post-trial motions. Citing the predecessor to Rule 588, former Pa. R. Crim. P. 324 (which contained the same pertinent language as present Rule 588), the Superior Court first observed that the Rule does not provide a specific time by which an owner must request return, but noted the rule of law that when a party fails to raise an issue that is "cognizable in a given proceeding" the party has waived the issue and courts may not thereafter engage in review of the issue. *Setzer*, 392 A.2d at 773. The property owner in *Setzer* never raised the issue at the time of his trial, a point at which, the Superior Court opined, the trial court could have addressed the issue. The Superior Court concluded that "[s]ince we would have been precluded from addressing this issue on appellant's initial appeal because it was not first raised in the lower court at the time of his trial, we certainly cannot consider it at this late date." *Id.*; *see also*, *Commonwealth v. One 1990 Dodge Ram Van*, 751 A.2d 1235 (Pa. Cmwlth. 2000) (holding that, in forfeiture proceeding property owner waived right to seek return of property when he did not raise issue at sentencing or in post-trial motions).

LaBrake argues that the trial court's reliance upon *Setzer* is misplaced because, despite the resolution of his appeals in state courts, a federal case remained active until the United States Supreme Court denied certiorari in

November, 2010. This argument fails to recognize that, notwithstanding the existence of the federal proceedings, LaBrake could nevertheless have sought return of the property at the time of sentencing or post-trial motions. LaBrake had the opportunity and right to seek return of his property at that time. He elected not to seek return. If he had sought return and the Commonwealth had concerns about releasing evidence that it might need for a potential re-trial, the ball would have been in the Commonwealth's court, but LaBrake never took such action and, similarly, based upon the holdings in *Setzer* and *One 1990 Dodge Ram Van*, we similarly conclude that LaBrake waived the issue.<sup>5</sup>

Accordingly, we affirm the trial court's order.

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P. KEVIN BROBSON, Judge

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<sup>5</sup> Based upon our conclusion that the trial court did not err in concluding that LaBrake has waived the issue of his entitlement to return of his property, we need not address the additional arguments he includes in his brief. We note, however, with regard to LaBrake's contention that the trial court acted inconsistently in entertaining LaBrake's motion in part, by returning some of LaBrake's property based on settlement negotiations, but denying his motion to return his remaining property, that the trial court, based upon the above-noted decisions, could have elected to deny LaBrake's motion in its entirety.

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	:	
Daniel LaBrake,	:	
	:	
Appellant	:	

***ORDER***

AND NOW, this 12th day of September, 2011, the order of the Court of Common Pleas of Philadelphia County is AFFIRMED.

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P. KEVIN BROBSON, Judge