

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CARL LESLIE SIMPSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1587 MDA 2012

Appeal from the Judgment of Sentence May 3, 2012
In the Court of Common Pleas of Bradford County
Criminal Division at No(s): CP-08-CR-0000752-2009

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED JUNE 03, 2013

Appellant, Carl Leslie Simpson, appeals from the May 3, 2012 judgment of sentence of 18 to 36 months' imprisonment, with credit for time-served, imposed following the revocation of his state intermediate punishment.¹ After careful review, we quash this appeal.²

* Retired Senior Judge assigned to the Superior Court.

¹ We note that on August 9, 2012, the trial court entered an order modifying Appellant's judgment of sentence to correct the number of days credit he was to receive for time-served. Although Appellant purports to appeal from said order, which, in effect, partially denied his May 23, 2012 post-sentence motion, a direct appeal in a criminal case is properly taken from a judgment of sentence. ***Commonwealth v. Yancoskie***, 915 A.2d 111, 112 n.1 (Pa. Super. 2006), *appeal denied*, 927 A.2d 625 (Pa. 2007). We have adjusted the caption accordingly.

The relevant facts and procedural history of this case may be summarized as follows. On July 8, 2010, Appellant was sentenced to 24 months' state intermediate punishment following his guilty plea to one count of delivery of a controlled substance.³ On March 15, 2012, the trial court revoked this sentence after Appellant was expelled from the program for assaulting and threatening another resident at the halfway house where he was residing. Thereafter, on May 3, 2012, Appellant was sentenced to 18 to 36 months' imprisonment, with 547 days' credit for time-served. In its May 3, 2012 sentencing order, the trial court indicated that it was retaining jurisdiction "for the purpose of recalculating credit for time-served[,]" and granted Appellant an additional 15 days to submit a memorandum detailing any additional periods of time for which he believes he is entitled to credit. **See** Trial Court Order, 5/3/12, at ¶ 2.

On May 23, 2012, Appellant filed a post-sentence motion requesting a total of 731 days' credit for the time he lived in a halfway house pursuant to his participation in the state intermediate punishment program. Following a hearing, the trial court granted Appellant's post-sentence motion in part, and denied it in part, granting Appellant an additional 64 days' credit for time-

(Footnote Continued) _____

² The Commonwealth has indicated that it will not be filing a brief in this matter.

³ 35 P.S. § 780-113(a)(30).

served. Appellant subsequently filed a notice of appeal on September 5, 2012.⁴ By order entered October 4, 2012, this Court directed Appellant to show cause why his appeal should not be quashed as untimely. Appellant filed a timely response alleging that the trial court extended the time for filing post-sentence motions. **See** Response to Order to Show Cause, 10/15/12, at ¶ 3. On October 31, 2012, this Court discharged the show-cause order and deferred the timeliness issue for appellate review.

On appeal, Appellant raises the following issue for our review.

- I. Whether [Appellant] is entitled to [an additional 119 days'] credit for time-served while participating in the state intermediate punishment program?

Appellant's Brief at 8.

Prior to reaching the merits of Appellant's argument, we must first determine whether this Court has proper jurisdiction to hear this appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 903, "the notice of appeal required by Rule 902 ... shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a).

Additionally, this Court can raise jurisdictional issues *sua sponte*. An appellant must file a notice of appeal within 30 days after the entry of the order from which the appeal is taken. **This Court "may not enlarge the time for filing a notice of appeal...." Pa.R.A.P. 105(b). Absent a breakdown in the operations of the court,**

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

[t]ime limitations on the taking of appeals are strictly construed and cannot be extended as a matter of grace.

Commonwealth v. Valentine, 928 A.2d 346, 349 (Pa. Super. 2007) (some citations and internal quotation marks omitted; emphasis added).

Pennsylvania Rule of Criminal Procedure 720 provides, in pertinent part, that “[e]xcept as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.” Pa.R.Crim.P. 720(A)(1). If a post-sentence motion is filed outside of this ten-day window then Pa.R.Crim.P. 720(A)(3) applies. Rule 720(A)(3) states, “[i]f 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). This 30-day window is in accord with Pa.R.A.P. 903(a). Moreover, a timely motion tolls the appeal period, however, an untimely motion does not. ***Commonwealth v. Dreves***, 839 A.2d 1122, 1127 (Pa. Super. 2003) (*en banc*); **see also *Commonwealth v. Patterson***, 940 A.2d 493, 498 n.3 (Pa. Super. 2007) (stating, “[a]fter the expiration of the ten-day period, a post-sentence motion cannot toll the appeal period unless the appellant files a motion seeking permission to file a post-sentence motion *nunc pro tunc* and the trial court expressly grants this request within thirty days of the imposition of sentence[]”).

Herein, the record indicates that Appellant failed to file his notice of appeal within 30 days of the underlying May 3, 2012 sentencing order. Furthermore, Appellant also failed to file a timely post-sentence motion within 10 days after the imposition of sentence, in violation of Pa.R.Crim.P. 720(A)(1). Thus, Appellant's May 23, 2012 post-sentence motion did not toll the appeal period, and as such, his notice of appeal filed on September 5, 2012 is patently untimely.

Appellant maintains that the basis for his untimely filing rests with the fact that the trial court extended the time for filing post-sentence motions. Specifically, Appellant argues as follows.

[T]he sentencing court noted in the sentencing order dated May 3, 2012, that it would retain jurisdiction to determine credit for time served, and gave the defense fifteen days to present a memorandum to the probation department regarding time served, who would then have ten days to respond. Therefore, the trial court retained jurisdiction over the sentence until May 28, 2012. The post sentence motion was filed on May 23, 2012, prior to the expiration of the sentencing court's retention of jurisdiction.

Response to Order to Show Cause, 10/15/12, at ¶ 3 (citation omitted).

We deem this argument unavailing. This Court has long recognized that because the 30-day appeal period is jurisdictional in nature, **it must be strictly construed.** *Commonwealth v. Moir*, 766 A.2d 1253, 1254 (Pa. Super. 2000) (finding the question of the timeliness of an appeal is jurisdictional). Moreover, an untimely appeal divests this Court of

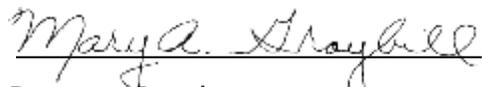
jurisdiction. ***In re J.M.P.***, 863 A.2d 17, 19 (Pa. Super. 2004), *appeal denied*, 878 A.2d 864 (Pa. 2005). “[W]here the defendant does not file a timely post-sentence motion,” as is the case here, “there is no basis to permit the filing of an appeal beyond 30 days after the imposition of sentence.” ***Commonwealth v. Green***, 862 A.2d 613, 618 (Pa. Super. 2004) (*en banc*), *appeal denied*, 882 A.2d 477 (Pa. 2005). Hence, this Court has no jurisdiction to excuse a failure to file a timely notice of appeal.

Accordingly, for all the foregoing reasons, we quash this appeal for lack of jurisdiction.⁵

Appeal quashed. Jurisdiction relinquished.

Judge Colville concurs in the result.

Judgment Entered.


Deputy Prothonotary

Date: 6/3/2013

⁵ In any event, we note that even if this appeal was properly before this Court, there is no merit to the substantive issue raised by Appellant. Herein, the trial court authored a six-page opinion wherein it concluded that “Appellant’s request for credit for time spent in the state intermediate punishment program is contrary to statutory law [specifically, 42 Pa.C.S.A. § 9760] and should be denied.” Trial Court Opinion, 12/28/12, at 6. Following our careful scrutiny of the certified record, we agree with the well-reasoned conclusions of the trial court. ***See id.*** at 2-5. Accordingly, we would adopt the trial court’s opinion as our own for purposes of further appellate review.