

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JEANETTE GARCIA,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1939 EDA 2012

Appeal from the Order entered June 13, 2012,
in the Court of Common Pleas of Pike County,
Criminal Division at No(s): CP-52-CR-0000294-2009.

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 18, 2013

Jeanette Garcia ("Appellant") appeals from the order denying her *nunc pro tunc* petition to withdraw her guilty plea, after she pled guilty to simple assault before a magisterial district judge.¹ We affirm.

Our Supreme Court summarized the facts and procedural history of this case as follows:

In May 2009, State Trooper Mark Pizzuti filed a criminal complaint against [Appellant] charging her with tampering with or fabricating physical evidence, 18 Pa.C.S. § 4910(a)(2), and simple assault, 18 Pa.C.S. § 2701(a)(1). In the supporting affidavit of probable cause, the trooper indicated that the victim and her father drove to [Appellant's] house because the victim

¹ 18 Pa.C.S. § 2701(a).

*Retired Senior Judge assigned to the Superior Court.

suspected her paramour of visiting [Appellant]. Although it is undisputed that the victim and [Appellant] were involved in an altercation resulting in minor injuries to both women, the affidavit presented differing accounts of the fight and the events surrounding the altercation, as told by the [Appellant], the victim, the victim's father, and the paramour. The affidavit claimed that [Appellant] also provided different versions of her story to two troopers including, as relevant to the evidence fabrication charge, accusing the victim of injuring [Appellant] with a butter knife in one version and a double-edged boot knife in a later account.

On the day of her scheduled preliminary hearing in August 2009, [Appellant] signed a one-page form entitled Pleas of Guilty Before Issuing Authority, stating "I, Jeanette Garcia ... plead guilty to: S 18 § 2701 §§ A1 Simple Assault before [the District Judge], this Fourth day of August, 2009, and represent that I do this knowingly, voluntarily, and intelligently." The District Judge also signed the form, certifying that, "I accepted the above defendant's plea of guilty after making full inquiry of the defendant. I have advised the defendant of the right to counsel. I certify that the plea was made voluntarily, knowingly, and intelligently." The record also includes a Magisterial District Judge Payment Order of the same date ordering [Appellant] to pay fees and costs of \$635.50, signed by the District Judge and the [Appellant]. By signing, [Appellant] indicated that she acknowledged "receipt of a copy of this order and further understand that if I do not make payments within the time specified, a warrant for my arrest will be issued" and that failure to comply with the payment schedule may result in a finding of criminal contempt among other sanctions.

On September 3, 2009, [Appellant] filed a counseled notice of appeal to the Superior Court from the "Order entered in this matter on August 4, 2009," which was the order of the District Judge. [Appellant] also filed a Notice of Appeal from Summary Criminal Conviction in the Court of Common Pleas of Pike County, pursuant to Pa.R.Crim.P. 460, which she later acknowledged was inappropriate given that simple assault is a third-degree misdemeanor not a summary criminal conviction. The Court of Common Pleas dismissed [Appellant's] appeal of the summary conviction on November 4, 2009, and [Appellant] did not appeal the dismissal.

Commonwealth v. Garcia, 43 A.3d 470, 471-472 (Pa. 2012) (footnote omitted).

On September 16, 2010, upon consideration of the September 3, 2009 notice of appeal, a panel of this Court filed an opinion and order remanding for the trial court to hold a hearing on Appellant's challenge to her guilty plea. ***Commonwealth v. Garcia***, 5 A.3d 397 (Pa. Super. 2010). The Commonwealth appealed.

On April 25, 2012, the Pennsylvania Supreme Court vacated the order of the Superior Court and quashed the appeal on the basis that the Superior Court did not have jurisdiction to consider the appeal because a final order had not been entered by the Court of Common Pleas. ***Garcia, supra*** (pursuant to 42 Pa.C.S.A § 742, the Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas and absent such a final order the Superior Court does not have appellate jurisdiction).

Thereafter, on May 11, 2012, Appellant filed a petition for allowance of withdrawal of guilty plea *nunc pro tunc* in the Pike County Court of Common Pleas, asserting that her plea was made unknowingly and involuntarily. The trial court conducted a hearing on Appellant's petition on June 7, 2012, and on June 13, 2012 denied Appellant's petition on the basis that she had waived her right to challenge her guilty plea by: (1) failing to file a petition to withdraw her guilty plea within 10 days after imposition of sentence, in

accordance with Pa.R.Crim.P. 550(D) and; (2) failing to file her post-sentence *nunc pro tunc* motion in a timely manner.

This appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

1. Did the trial court abuse its discretion in refusing to allow [Appellant] to withdraw *nunc pro tunc* her prior guilty plea to a third-degree misdemeanor entered before a Magisterial District Justice, given the specific procedural history of this case?
2. Did the trial court abuse its discretion in refusing to grant [Appellant] an evidentiary hearing on the merits of her underlying claim that her prior guilty plea was defective, given the specific procedural history of this case?

Appellant's Brief at 4.

Appellant entered a guilty plea to simple assault on August 4, 2009 before a magisterial district judge, and was sentenced that same day. Pursuant to Pa.R.Crim.P. 550, which governs pleas before magisterial district judges, Appellant had ten days to seek withdrawal of her guilty plea.²

² Pa.R.Crim.P. 550(D) provides:

A defendant who enters a plea of guilty under this rule may, within 10 days after sentence, change the plea to not guilty by so notifying the magisterial district judge in writing. In such event, the magisterial district judge shall vacate the plea and judgment of sentence, and the case shall proceed in accordance with Rule 547, as though the defendant had been held for court.

(Footnote Continued Next Page)

Appellant, however, did not seek to withdraw her guilty plea within the ten-day period, which expired on August 14, 2009.³ Instead, on September 3, 2009, thirty days after entry of her plea of guilty and sentence, Appellant filed two documents: (1) A “Notice of Appeal from Summary Criminal Conviction” in the Court of Common Pleas, from the judgment of sentence entered August 4, 2009⁴; and (2) a “Notice of Appeal” to the Superior Court of Pennsylvania from the August 4, 2009 order.

(Footnote Continued) _____

³ In its opinion vacating the decision of this Court, the Supreme Court made the following observation: “We acknowledge what can be perceived as an inconsistency in the rules of procedure as applied to defendants who plead guilty to a misdemeanor in the district court as compared to defendants who plead to the same charge in the Court of Common Pleas and as applied to defendants who plead in the district court to misdemeanors as compared to defendants who plead in the district court to summary offenses”. **Garcia**, 43 A.3d 470, 478, n.8. **See** Pa.R.Crim.P. 462 (when a defendant appeals after the entry of a guilty plea or a conviction by magisterial district judge in any summary proceeding, the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury); **Commonwealth v. Lindsey**, 760 A.2d 416 (Pa. Super. 2000) (the authority to appeal from a conviction before a district judge and to proceed with a *de novo* trial in the Court of Common Pleas applies only to summary proceedings and where the defendant pled guilty to a misdemeanor he did not have a right to a *de novo* review at the time he entered his plea); Pa.R.Crim.P. 720(A)(1) (allowing a defendant who pleads guilty in the trial court to file post-sentence motions within thirty days); Pa.R.Crim.P. 550 (limiting defendants who plead guilty to a third degree misdemeanor before a district judge to ten days to withdraw the guilty plea).

⁴ As noted above, simple assault is a misdemeanor not a summary criminal offense.

On October 20, 2009, the Commonwealth filed a motion to dismiss the summary appeal filed by Appellant in the Court of Common Pleas. In its motion, the Commonwealth explained that Appellant had improperly filed a "Notice of Appeal From Summary Criminal Conviction" pursuant to Pa.R.Crim.P. 460-462, pertaining to the procedure for appealing to the Court of Common Pleas in summary cases. The Commonwealth asserted in its motion that because Appellant was convicted of a misdemeanor and not a summary offense, the Court of Common Pleas did not have jurisdiction over the summary appeal filed by Appellant. On November 4, 2009, upon consideration of the Commonwealth's motion, the trial court dismissed Appellant's summary appeal. Appellant did not file a notice of appeal from the November 4, 2009 order.

In the interim, Appellant's notice of appeal was pending before this Court. On September 16, 2010, a panel of this Court reviewed the merits of the appeal and remanded for the trial court to conduct an evidentiary hearing. The Commonwealth appealed. On April 25, 2012, our Supreme Court vacated the Superior Court order and quashed the appeal. ***Garcia***, 43 A.3d at 478. In so doing, our Supreme Court held that this Court had no jurisdiction over the appeal, which was taken from the judgment of sentence imposed by the Magisterial District Judge, without a final order having been entered by the Court of Common Pleas. ***Id.*** Thus, the Superior Court's September 16, 2010 opinion and order was a legal nullity. ***See In re***

Estate of Brown, 30 A.3d 1200, 1205 (Pa. Super. 2011). (“A court must have personal jurisdiction over a party to enter a judgment against it [and an] [a]ction taken by a court without jurisdiction is a nullity.”).

On May 11, 2012, two years and nine months after entry of her guilty plea, Appellant filed a “Petition for Allowance of Withdrawal of Guilty Plea *Nunc Pro Tunc*,” which the trial court denied, and which is the basis for this appeal. Appellant asserts that the trial court should have granted her *nunc pro tunc* petition because the Rules of Criminal Procedure regarding withdrawing or appealing from a plea of guilty to a misdemeanor before a magistrate are unclear, and her misfiled appeals and the ensuing delay should therefore be excused. See footnote 3, *supra* at 5. The trial court disagreed, and denied Appellant’s petition to withdraw her plea *nunc pro tunc*, explaining:

[Appellant] did not attempt to change her plea at Magisterial District Court, either within the applicable ten-day period or otherwise. Further, [Appellant] only filed an appeal with [the Court of Common Pleas] instead of a Motion to Withdraw the Guilty Plea in 2010. Therefore, her right to withdraw the plea is deemed waived.

* * *

The [Court of Common Pleas] stated it denied Appellant’s Motion to Withdraw the Guilty Plea *nunc pro tunc* because she did not file the Motion when she filed her appeal in 2010. If Appellant filed the Motion in 2010, the [Court of Common Pleas] would have held an evidentiary hearing on the matter and decided the Motion on its merits. However, Appellant chose instead to file an appeal in 2010 and not a Motion to Withdraw her Plea. The appeal was improperly filed. See *Commonwealth of Pennsylvania v. Jeanette Garcia*, No. 52 MAP 2011, April 25,

201, page 14 (PA Supreme Court). At that time there was no final order of [the Court of Common Pleas] to appeal. A Motion to Withdraw the Guilty Plea *nunc pro tunc* would have been the more appropriate filing at that time.

Trial Court Opinion, 9/5/12, at 3-4.

We agree with the trial court. After entering her guilty plea on August 4, 2009, Appellant did not file a motion to withdraw her plea within ten days as required by Pa.R.Crim.P. 550(D). Appellant compounded her error when, rather than immediately filing a petition to withdraw her plea *nunc pro tunc*, Appellant instead filed an erroneous "Notice of Appeal from Summary Criminal Conviction" in the Court of Common Pleas and a second erroneous Notice of Appeal with this Court, which lacked jurisdiction. Only after disposition of the erroneously filed appeals did Appellant file a petition to withdraw her guilty plea *nunc pro tunc*. Appellant now asserts that her delay in seeking withdrawal of her plea should be excused and that the trial court should have permitted her to withdraw her plea *nunc pro tunc*.

We previously noted that there is a dearth of case law addressing *nunc pro tunc* petitions to withdraw a plea entered before a magisterial district judge.⁵ One decision, ***Commonwealth v. Jannetta***, 605 A.2d 386 (Pa. Super. 1992) *appeal dismissed*, 632 A.2d 307 (Pa. 1993), discusses this issue. In ***Janetta***, we held that the appellate court would presume that

⁵ ***See Garcia***, 5 A.3d 397, 401 (Pa. Super. 2010) (overruled).

appellant had knowledge of his right to seek withdrawal of the plea within ten days, such that the trial court did not err in denying the untimely motion to withdraw the plea *nunc pro tunc* after the appellant failed to challenge his plea within the applicable ten-day period.

Similarly, in the present case, pursuant to Pa.R.Crim.P. 550, Appellant had ten days to petition to withdraw her plea, and was apprised of this ten-day time limit at the time she entered her plea.⁶ Appellant did not seek to withdraw her plea within the ten-day period. Instead, Appellant opted to file an improper “summary appeal” with the Court of Common Pleas and an improper Notice of Appeal with this Court. Only after disposition of the erroneously filed appeals did Appellant file a petition to withdraw her guilty plea *nunc pro tunc*, two years and nine months later.

Appellant argues that her delay should be excused because of “disharmony among various Rules of Criminal Procedure.” Appellant’s Brief at 9. Our Supreme Court conceded that there is an “inconsistency in the rules of procedure as applied to defendants who plead guilty to a

⁶ The pre-printed guilty plea form which Appellant signed on August 4, 2009 before the magisterial district judge states:

A defendant who enters a plea of guilty under Pa.R.Crim.P. 550 may, within ten (10) days after sentence, change the plea to not guilty by so notifying the issuing authority in writing. ...

Plea of Guilty Before Issuing Authority, 8/4/09.

misdemeanor in the district court as compared to defendants who plead to the same charge in the Court of Common Pleas and as applied to defendants who plead in the district court to misdemeanors as compared to defendants who plead in the district court to summary offenses." **Garcia**, 43 A.3d at 478, n.8. Acknowledging this irregularity in the rules of procedure, our Supreme Court specifically recommended that the Criminal Procedure Rules Committee "consider this conundrum". **Id.**

Appellant argues that this "inconsistency in the rules of procedure" caused her various misfilings because she lacked clear guidance as to the appropriate method for challenging her guilty plea after the expiration of the ten day period set forth in Pa.R.Crim.P. 550(D). She asserts that only after the ensuing appellate litigation did she become aware that she had to seek review by petitioning the Court of Common Pleas to allow the withdrawal of the guilty plea *nunc pro tunc*. Appellant's Brief at 9-14. Accordingly, she contends that her delay in seeking to withdraw her petition *nunc pro tunc* should be excused.

While Appellant correctly raises the "inconsistency in the rules of criminal procedure," it is not the function of the Superior Court to alter or modify existing rules adopted by the Pennsylvania Supreme Court. As noted in the Supreme Court's decision in this case, that is a function for the Criminal Procedure Rules Committee. **Garcia**, 43 A.3d 478, n.8. **See also Commonwealth v. Lockridge**, 810 A.2d 1191, 1194-1195 (Pa. 2002) ("the

Constitution's grant to [the Pennsylvania Supreme] Court of rule-making authority is exclusive"); Pa. Const. art. V, § 10(c).

Moreover, Pa.R.Crim.P. 550 clearly states that Appellant had ten days to petition to withdraw her plea. Appellant does not dispute that she was properly apprised of the ten-day time limit. Appellant asserts, however, that she only became aware of the involuntary nature of her plea *after* the expiration of the ten-day period. Appellant's Brief at 5; Petition for Allowance of Withdrawal of Guilty Plea Nunc Pro Tunc, 5/11/12, at 1-3. Appellant contends that the aforementioned lack of uniformity in the Rules of Criminal Procedure, regarding how to challenge a guilty plea *after* the expiration of the ten day period, warrants a grant of her *nunc pro tunc* petition.

In ***Commonwealth v. Dreves***, 839 A.2d 1122, 1128 (Pa. Super. 2003), we addressed the requirements for a successful *nunc pro tunc* petition for relief.⁷ We explained that to obtain *nunc pro tunc* relief, a defendant must "demonstrate sufficient cause, i.e., reasons that excuse the late filing." ***Id.*** When the defendant has met this burden and has shown sufficient cause, the trial court must then exercise its discretion in deciding

⁷ We recognize that ***Dreves*** pertains to the failure to file a post-sentence motion after the expiration of the thirty day period set forth in Pa.R.Crim.P. 720(A)(2), which is not at issue here. However, to the extent that ***Dreves*** recites the standard of review of *nunc pro tunc* petitions for relief, we find it instructive.

whether to grant the *nunc pro tunc* petition. ***Id.*** In order to obtain such *nunc pro tunc* relief, the defendant must show an “extraordinary circumstance” which “excuses the tardiness.” ***Id.***

Here, we find no abuse of discretion in the trial court’s determination that Appellant failed to demonstrate an “extraordinary circumstance” for failing to file her *nunc pro tunc* petition to withdraw in a timely manner. After Appellant determined that her August 4, 2009 guilty plea was involuntary, rather than filing a *nunc pro tunc* petition to withdraw her plea, Appellant, on September 3, 2009, opted to file two appeals, one with the Court of Common Pleas, and one with the Superior Court. We agree with the trial court that Appellant’s misfilings do not constitute an “extraordinary circumstance” warranting the grant of a *nunc pro tunc* petition filed two years and nine months after the entry of the guilty plea. Given the trial court’s determination that Appellant’s delay in filing the *nunc pro tunc* petition was inexcusable, an evidentiary hearing to ascertain the merits of Appellant’s underlying claim was not warranted.

For the foregoing reasons, we affirm the trial court order denying Appellant’s petition to withdraw her guilty plea *nunc pro tunc*.

Order affirmed.