NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMES LOUGHNER,	:	No. 1840 WDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, December 3, 2013,
in the Court of Common Pleas of Butler County
Criminal Division at No. CP-10-CR-0001335-2000

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 23, 2014**

James Loughner appeals from the judgment of sentence imposed following a probation violation on his convictions of aggravated indecent assault, statutory sexual assault, indecent assault, and corruption of a minor.

On January 16, 2001, appellant pled guilty to the above-referenced crimes. On June 12, 2001, the Honorable George H. Hancher sentenced appellant to a five to ten-year term of imprisonment, followed by ten years of probation. Appellant completed his term of incarceration on August 4, 2010, and began his term of probation. On or about October 26, 2012, appellant was detained for violating probation after failing urine tests.[1] On

[1] Appellant was not charged with any additional offenses.

November 8, 2012, a combined request for a warrant to arrest/commit/detain and to schedule a preliminary ***Gagnon I***[2] hearing was filed alleging that appellant had violated two rules of probation; specifically, two rules prohibiting appellant from possessing and using cocaine. The requests were granted the same date.

On November 19, 2012, a ***Gagnon I*** probation violation hearing was held before the Honorable Timothy F. McCune. Appellant, proceedings ***pro se***, admitted there was probable cause to believe he violated the term of probation. A ***Gagnon II*** hearing was scheduled for December 3, 2012. (Docket #65.) At the ***Gagnon II*** hearing, appellant was represented by Terri Schultz, Esq. Testimony was presented from both the probation officer and appellant. Following the hearing, Judge McCune issued an order of court revoking appellant's probation and imposing a new sentence of 30 to 120 months' imprisonment. (Docket #67.) The court also recommended that appellant spend a portion of his sentence at SCI Chester in the

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[2] In ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973), the Supreme Court held that a two-step procedure was required before probation may be revoked:

> (A) parolee is entitled to two hearings, one a preliminary (***Gagnon I***) hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive (***Gagnon II***) hearing prior to the making of a final revocation decision.

Id. at 781-782.

therapeutic community. (***Id.***) The court directed defense counsel to provide appellant with written notice of his post-sentence rights, which appellant signed. (Notes of testimony, 12/3/12 at 11; Docket #66.)

Appellant filed a timely ***pro se*** motion to modify sentence which was filed on December 12, 2012. (Docket #69.) In response, a hearing was conducted on February 14, 2013, and appellant proceeded ***pro se***. Thereafter, the court entered an order denying appellant's motion to modify sentence. (Docket #71.) On February 28, 2013,[3] appellant filed a ***pro se*** notice of appeal.[4] (Docket #72.) On March 27, 2013, appellant's request to proceed ***in forma pauperis*** was granted. (Docket #74.) On October 15, 2013, the public defender's office filed a motion indicating that it had a conflict and could not represent appellant; the trial court appointed Joseph V. Charlton, Esq. (Docket #79.) Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal

[3] Appellant's notice of appeal was filed on March 22, 2013. However, we are mindful of the so-called "prisoner mailbox rule," pursuant to which an appeal is deemed filed on the date that a prisoner delivers the notice to prison authorities for mailing. ***Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997).

[4] On that same date, the clerk of courts docketed appellant's motion under Pa.R.A.P. 551 for continuation of ***in forma pauperis*** status for appeal. On April 3, 2013, this court returned the appeal to the Butler County Clerk of Courts with instructions to return the appeal to the Superior Court of Pennsylvania once appellant had provided proof of service of the notice of appeal. (Docket #75.) An amended notice of appeal, containing the required certificate of service, was filed on November 19, 2013.

within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Herein, appellant challenges the discretionary aspect of his sentence. As a prefatory matter, we address the Commonwealth's contention that we must quash this appeal as it was not timely filed. The question of timeliness of an appeal is jurisdictional. ***Commonwealth v. Moir***, 766 A.2d 1253, 1254 (Pa.Super. 2000)

Pennsylvania Rule of Criminal Procedure 708(E) states: "A motion to modify a sentence imposed after a revocation [of probation] shall be filed within 10 days of the date of the imposition. The filing of the motion to modify sentence will not toll the 30-day appeal period." Pa.R.Crim.P. 708(E). Because the period for filing an appeal begins to run from the day of sentencing, unless the trial court vacates the sentence or specifically grants reconsideration, an appeal must be filed within 30 days. ***Commonwealth v. Coleman***, 721 A.2d 798, 799 n.2 (Pa.Super. 1998). Here, appellant failed to file his notice of appeal within 30 days of the entry of his December 3, 2012 judgment of sentence. The fact that the sentencing court scheduled a hearing on appellant's petition for reconsideration did not excuse appellant from the requirement that he simultaneously file a notice of appeal within 30 days from the entry of his judgment of sentence to preserve his appellate rights. ***See*** Pa.R.A.P. 903(a); ***Moir***, ***supra*** (stating that a sentencing court's action in

setting a hearing date on a motion for reconsideration is insufficient to toll the appeal period). Appellant's notice of appeal had to be filed on or before January 3, 2013. Thus, appellant's appeal is facially untimely.

Appellant contends that even if untimely, his appeal should not be quashed because the untimeliness of his appeal was due to a "breakdown in the court's operation." (Appellant's reply brief at 1-2.) Appellant claims that the untimeliness is a "direct result of the trial court's misstatements of Rule 708(E) in its notice of [appellant's] rights following probation [revocation]." (***Id.*** at 2.)

We find that quashal would be unjust due to a different extenuating circumstance. In derogation of Rule 708(D)(3)(a), the trial court failed to discharge its mandatory Rule 704 obligation on the record. Pa.R.Crim.P. 708 provides that when the court revokes the defendant's probation and imposes a new sentence, "the judge ***shall*** advise the defendant on the record . . . of the right to file a motion to modify sentence and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal." Pa.R.Crim.P. 708(D)(3)(a) (emphasis added).

Rather, at the end of the ***Gagnon II*** hearing, the trial court directed counsel to have appellant "sign off on his post sentence rights." (Notes of testimony, 12/3/12 at 11; docket #66.) This court has excused untimely appeals when the trial court fails to advise the defendant of his

post-sentence or appellate rights or misadvises him. ***See***, ***e.g.***, ***Commonwealth v. Patterson***, 940 A.2d 493, 498-499 (Pa.Super. 2009), ***appeal denied***, 960 A.2d 838 (Pa. 2008) (collecting cases) (noting the trial court "shall determine on the record that the defendant has been advised" of the time for filing a post-sentence motion and appeal); ***Commonwealth v. Parlante***, 823 A.2d 927, 929 (Pa.Super. 2003) (declining to quash appeal where revocation court misstated appeal period). The revocation court has a duty to properly advise appellant of his time for filing post sentence motions and an appeal. Instantly, the record merely indicates appellant signed an acknowledgement of "rights at violation of probation intermediate punishment or parole sentences" form. The record is silent as to appellant's understanding of these rights. We find the form to be an inadequate advisement by the trial court and deem this procedure to be a breakdown in the operation of the court system; appellant cannot be faulted for the untimeliness of this appeal.

In his ***pro-se*** post-sentence motion, appellant avers that he is represented by "the public defender[']s office by Attorney Shultz." (Docket #69.) It is unclear from the docket whether this motion was forwarded to counsel. Pa.R.Crim.P. Rule 576(A)(4). There is no indication in the record that counsel ever sought to withdraw her appearance before the ***pro se*** motion was filed. ***See*** Pa.R.Crim.P. 120(B)(1) (counsel for defendant may not withdraw appearance except by leave of court); Pa.R.Crim.P. 122(B)(1)

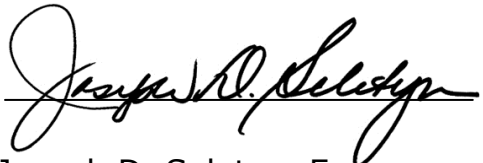
(when counsel is appointed, appointment is effective until final judgment, including any proceedings on direct appeal). In fact, after appellant's ***pro se*** notice of appeal was filed, the public defender's office filed a motion on October 15, 2013 averring that it had a conflict in representing appellant. (Docket #78.)

There is little question that the trial court should not have entertained appellant's ***pro se*** post-sentence motion as appellant appears to have been was represented by Attorney Schultz. ***Commonwealth v. Ellis***, 626 A.2d 1137, 1139 (Pa. 1993) ("[T]here is no constitutional right to hybrid representation either at trial or on appeal[.]"); **Commonwealth v. Jette**, 23 A.3d 1032 (Pa. 2011). Furthermore, the disapproval of hybrid representation is effective at all levels. ***See Commonwealth v. Pursell***, 724 A.2d 293, 301 (Pa. 1999) (criminal defendant has no right to hybrid representation during PCRA proceedings).

We are constrained to remand this matter to the trial court for a determination as to whether Attorney Schultz abandoned appellant after the December 3, 2012 ***Gagnon II*** proceeding. If the trial court determines that appellant had been abandoned, appellant's current counsel should be permitted to file a ***nunc pro tunc*** post-sentence motion raising and preserving any sentencing issues.

Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014