

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BENJAMIN RAYMOND BROWN,	:	
	:	
Appellant	:	No. 39 MDA 2013

Appeal from the Order entered December 10, 2012,
Court of Common Pleas, Lycoming County,
Criminal Division at No. CP-41-CR-0000212-2003

BEFORE: BENDER, DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED AUGUST 27, 2013

Appellant, Benjamin Raymond Brown (“Brown”), appeals from the order of court entered on December 10, 2012 dismissing his petition for writ of *habeas corpus*. Following our review, we affirm.

In November 2003, Brown was convicted of criminal trespass.¹ Due to delays caused by Brown’s failure to appear, he was not sentenced until May of 2005. At that time, Brown was sentenced to 14 months to five years of incarceration. The trial court permitted Brown’s release on bail pending the resolution of his appeal.

Brown’s court-appointed counsel filed a timely notice of appeal, but on January 25, 2006, this Court dismissed the appeal for failure to file a

¹ Brown was charged with trespass and other crimes in relation to the burglary of a residence in Williamsport. He was convicted only of trespass.

*Retired Senior Judge assigned to the Superior Court.

docketing statement. More than two years after this dismissal, on May 27, 2008, the Commonwealth filed a motion to revoke bail and commit Brown to begin serving his sentence. A hearing was set on this motion for July 15, 2008, but Brown did not appear, and a bench warrant was issued for his arrest. On a Friday in early January 2009, Sheriffs appeared at Brown's residence to take him in to custody. However, Brown explained to the sheriffs that he knew nothing about the bench warrant and provided them with documentation verifying that he was on bail. The sheriffs did not take Brown in to custody at that time, instead telling him to appear at the courthouse on the following Monday, January 5, 2009. Brown appeared at that time, and the trial court vacated the bench warrant and ordered Brown to appear in one week, on January 12, 2009, to begin serving his sentence.

The trial court aptly summarized the subsequent events as follows:

On January 12, 2009, [the trial court²] continued [Brown's] existing bail until further [o]rder of [c]ourt and required that he appear for a hearing on February 6, 2009. On February 6, 2009, [Brown] was ordered by [the trial court] to report to the Lycoming County Prison on March 31, 2009.

On March 31, 2009, [the trial court] restored [Brown's] appeal rights and set bail pending appeal at \$60,000 good bail. The Superior Court of Pennsylvania affirmed [Brown's] sentence on March 9, 2010. On September 16, 2010, the Supreme

² The Honorable Kenneth D. Brown presided over the matters in Brown's case until his retirement on December 31, 2009. Following his retirement, the Honorable Nancy L. Butts presided over all aspects of this matter.

Court of Pennsylvania denied [Brown's] [p]etition for [a]llowance of [a]ppeal. On March 21, 2011, [Brown] was ordered to report by this court to the Lycoming County Prison on April 5, 2011, which [Brown] did in fact do.

On October 6, 2011, [Brown] filed this [sic] PCRA petition alleging that his Due Process rights were violated by long delays occurring before his sentence was implemented. On May 4, 2012, this [c]ourt proposed dismissal of his PCRA petition finding the issue raised should have been brought within the *habeas corpus* framework. On June 1, 2012, the PCRA [p]etition was dismissed. [Brown] then filed a [p]etition for [w]rit of [*h*]abeas [*c*]orpus on June 22, 2012.

Trial Court Opinion, 12/10/12, at 2-3.

As mentioned above, in his *habeas corpus* petition, Brown alleged that his due process rights were violated "by the long delay that passed prior to the [c]ourt ordering the implementation of [his] sentence." Petition for Writ of *Habeas Corpus*, 6/22/12, at 2. Following a hearing, the trial court denied Brown relief.

This timely appeal followed, in which Brown presents one issue for our review: "Whether the trial court erred in denying [his] *habeas corpus* petition?" Appellant's Brief at 11. As we address this question, we are mindful that "a trial court's denial or grant of a writ of habeas corpus petition will be reversed on appeal only for a manifest abuse of discretion[,]" ***Commonwealth v. Miller***, 787 A.2d 1036, 1038 (Pa. Super. 2001). And that "[a]n abuse of discretion is not merely an error of judgment, but is

rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.” **Commonwealth v. Hanford**, 937 A.2d 1094, 1098 (Pa. Super. 2007).

Brown argues that his due process rights were violated by the delays between the imposition of his sentence and the time he was ordered to report to begin serving his sentence. Appellant’s Brief at 14. When considering a due process challenge involving a delay between the imposition of a sentence and the time the defendant is called to begin to serve that sentence, the four-part test first articulated by United States Supreme Court in **Barker v. Wingo**, 407 U.S. 514 (1972), applies. **Commonwealth v. West**, 595 Pa. 483, 501, 938 A.2d 1034, 1045 (2007). This test requires a court to examine “(1) whether the delay itself is sufficient to trigger further inquiry, (2) the reason for the delay, (3) the timeliness of the defendant's assertion of his or her right, and (4) any resulting prejudice to the defendant.” **Id.** at 502, 938 A.2d at 1046.

Initially, we note that there is disagreement between the trial court and Brown as to what constitutes the period of delay. Brown calculates two periods of delay to which the **Barker** test must be applied as follows: the period of nearly three years between the dismissal of his direct appeal on January 25, 2006 and the date he first was ordered to surrender himself, January 5, 2009; and the period of approximately one year between the

denial of his direct appeal (following the reinstatement of his direct appeal rights) on March 9, 2010, and the order to report to prison which was issued on March 23, 2011. Appellant's Brief at 14-15. The trial court also identified two periods of delay, but it calculated the first period of delay from the date Brown's first attempt at a direct appeal was dismissed (January 25, 2006) until the date the Commonwealth filed a motion to revoke Brown's bail (May 27, 2008), which is a period of approximately two years and four months. It found the second period of delay to run only from the Pennsylvania Supreme Court's denial of Brown's petition for allowance of appeal (September 16, 2010) and the trial court's order directing Brown to begin serving his sentence (issued on March 22, 2011), a period of approximately six months. Brown does not explicitly challenge the trial court's calculation of the length of the periods of delay in his appellate brief, instead merely noting his different perspective as to the relevant periods of time. Moreover, Brown did not challenge the trial court's calculation of these periods in his statement of matters complained of on appeal, and so any such argument is waived for purposes of appeal. **See** Pa.R.A.P. 1925(b)(4)(vii). Thus, for purposes of our review, we adopt the trial court's determination and calculate the periods of delay as two years and four months and six months, for a total delay period of two years and ten months. **See Commonwealth v. McLean**, 869 A.2d 537, 539 (Pa. Super. 2005) (combining periods of

delay for purposes of determining whether length of delay is sufficient to trigger further inquiry).

With regard to the first prong, we agree with the trial court that the period of the delay, two years and ten months, is sufficient to trigger further inquiry. **See Commonwealth v. Pounds**, 490 Pa. 621, 627, 417 A.2d 597, 600 (1980) (holding that a two-year delay is sufficient to trigger further inquiry).

The second prong requires consideration of the reasons for the delay. “[A] deliberate attempt to delay should be weighed heavily against the government while a more neutral reason such as negligence should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” **Commonwealth v. Blair**, 699 A.2d 738, 745-46 (Pa. Super. 1997) (citation omitted). In the present case, the record reveals that the parties stipulated to the fact that the delay between the dismissal of Brown’s first appeal and the filing of the Commonwealth’s motion to revoke bail was a result of negligence on the part of the Commonwealth; specifically, its failure to determine whether Brown was free on bail when it found out that his appeal had been dismissed. N.T., 10/1/12, at 36-37. The record therefore supports a finding

that the cause for this portion of the delay was the result of negligence on the Commonwealth's part.³

The trial court also found that the second delay period was "a deferral given to [Brown] so that he would not have to go to jail during the holidays." Trial Court Opinion, 12/10/12, at 6. This is supported by the evidence, as the parties stipulated that the Commonwealth "chose not to send [Brown] to jail over the holidays[.]" N.T., 10/1/12, at 39. However, the trial court then concluded that "[w]hile such a delay is deliberate, it was created as a benefit to [Brown] and therefore should not be weighted [*sic*] heavily against the Commonwealth." **Id.** We must disagree. As stated above, "a deliberate attempt to delay should be weighed heavily against the government[.]" **Blair**, 699 A.2d at 745. Despite altruistic intentions, the Commonwealth

³ Brown testified that during the period in question, he would go to the courthouse on a monthly basis to pay a fine relating to a DUI conviction (that he received prior to the conviction for trespass at issue in this case), and for adoption proceedings. N.T., 10/1/12, at 8. He contends that the Commonwealth's failure to act is particularly egregious in light of the fact that he was in the courthouse often during the period at issue, and should weigh in favor of finding that the delay therefore should be considered deliberate. Appellant's Brief at 16. However, the trial court found that Brown did not establish that these activities would have placed Brown in contact with representatives of the District Attorney's office, and therefore that they do not diminish the trial court's finding that the delay was caused by negligence. We find no error in this determination. **See Commonwealth v. West**, 595 Pa. 483, 506, 938 A.2d 1034, 1048 (2007) (rejecting finding that delay was intentional where there was alleged contact with the Commonwealth regarding fact that appellant had not begun serving sentence, but no evidence "demonstrating that any government entity definitively received such notification and deliberately failed to take steps to rectify the error").

deliberately delayed Brown's incarceration for this six-month period. Accordingly, we weigh this portion of the total delay heavily against the Commonwealth.

Considering the third prong, the trial court found that Brown did not assert his rights in the timeliest manner possible, and therefore weighed this factor against him. In support of this conclusion, the trial court points out that Brown never inquired as to the status of his appeal and that Brown failed to inform the courts, his counsel, or the Commonwealth of his new address when he moved, such that he could be notified of the result of his appeal. Trial Court Opinion, 12/10/12, at 7. The trial court noted that Brown asserted his due process rights only after he began serving his sentence. Again, these findings are supported by the record. In ***Commonwealth v. Fox***, 953 A.2d 808 (Pa. Super. 2008), the defendant challenged the delay of approximately one year between the remand of his case for resentencing and the resentencing hearing. This Court found it proper to weigh this factor against the defendant when he failed to take any affirmative step to check on the status of his case or to alert the court to the fact that he was waiting to be resentenced. ***Id.*** at 813. Similarly, in this case, Brown testified that from 2006 through 2008, he knew he was waiting for the result of his appeal, but he never contacted his counsel to check on its status. N.T., 10/1/12, at 13. Brown also testified that he moved while he was waiting for the results of his appeal, but he never informed his counsel

or the court of his new address. *Id.* at 19-20. When the Commonwealth discovered its oversight in 2008, Brown did not assert this violation of his rights at that time. Additionally, Brown admitted that he found out that his direct appeal *nunc pro tunc* was unsuccessful in late October 2010 and that his counsel told him he would likely have to start serving his sentence within weeks; however, when weeks and months passed, he did not make any inquiries as to when he would begin serving his sentence. *Id.* at 27-28. Thus, Brown's inaction during the second delay period also supports a finding that he was less than diligent in asserting his rights. Accordingly, we find no error in the trial court's conclusion that Brown did not assert these rights in the most timely manner, and therefore that this factor weighs against Brown's claim.

Finally, we find no error with the trial court's conclusion that Brown was not prejudiced by the delay. Brown articulates the prejudice he has suffered as follows:

Prejudice in the post[-]sentence situation involves a defendant's ability to serve his sentence and move on with his life. In this matter, [Brown] had a black cloud, i.e., 14 month sentence, hanging over him, it was a daily question as to when he was going to be called to serve his sentence. When he was finally told to prepare to serve his sentence, he quit his job, and he was still not ordered to serve for another 3-4 months. [Brown] is now on parole until 2016, where if [he] had been called to serve in a timely manner, he would be finished with his parole obligations.

Appellant's Brief at 20.

The trial court rejected these claims of prejudice, and we find no error in that conclusion. In **Blair**, this Court recognized that, as in the present case, the appellant “did nothing to hinder the order to commence service of sentence; he did not flee, did not conceal his identity, lived and worked in the [same] area.” **Blair**, 699 A.2d at 743. Nonetheless, we concluded:

While we sympathize with Blair's plight, we conclude, however, that these factors do not and cannot nullify any portion of Blair's sentence of imprisonment. We will not allow the court system's inadvertent error to cancel any part of Blair's punishment for the crimes for which he was justly convicted and sentenced. Society has an interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of an unintended delay or negligent error attributable to the government. The fact remains that, regardless of the delay, Blair has not served the time he was so ordered to serve. Blair's ‘erroneous time at liberty’ was spent, by his own admission, engaging in the normal activities of a member of free society. Considering Blair's accomplishments in maintaining employment and pursuing educational goals, the argument could be made that he actually benefitted from his time at liberty. Indeed, it is difficult to accept Blair's plea of ‘enormous prejudice’ in light of these circumstances.

Id.

Like Blair, Brown’s time at liberty was spent engaging in normal activities, such as working, moving his family to a larger home, and adopting a child. N.T., 10/1/12, at 9, 25. Furthermore, despite claiming that he had to live under a relentless “black cloud” because of this delay, the trial court rightfully noted that Brown “did not appear concerned with his appeal or

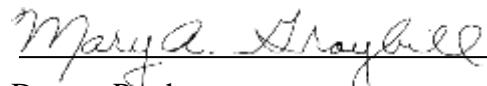
when he would have to be incarcerated since he was not in contact with his attorney. ... [Brown] was aware of the risk of being out on bail pending his appeal.” Trial Court Opinion, 12/10/12, at 7. Thus, we find no error in the trial court’s determination.

Considering all four factors, we are satisfied that the trial court did not abuse its discretion in denying Brown’s *habeas corpus* petition. Although a portion of the delay was deliberate and therefore weighs against the Commonwealth, on balance, this portion did not outweigh the other factors, which the trial court found to weigh against Brown.

Order affirmed.

Strassburger, J. files a Concurring Memorandum.

Judgment Entered.


Deputy Prothonotary

Date: 8/27/2013