Franklin County Legal Journal

Vol. 27, No. 18, pp. 18-22

Commonwealth v. Plantz

COMMONWEALTH OF PENNSYLVANIA
v. SCOTT A. PLANTZ, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 950 of 2003

Motion for modification of sentence; Pa.R.A.P. 1926

1. The purpose of Pa.R.A.P. 1926 is to provide an opportunity to correct obvious technical defects, inconsistencies and/or omissions in the record such as typographical and similar clerical errors so as to ensure that both the lower court and the appellate court have a complete and accurate record of the lower court proceedings.

2. The defendant cannot use Pa.R.A.P. 1926 to obtain a modification of sentence where that relief should have been sought via Pa.R.Crim.P. 720(A)(1).

Appearances:

Franklin County District Attorney's Office

Scott A. Plantz, *pro se*

OPINION SUR Pa.R.A.P. 1925(A)

Herman, P.J., July 27, 2009

The defendant was charged with 7 counts each of theft, conspiracy to commit theft, and receiving stolen property in No. 950 of 2003. He was charged with institutional vandalism and conspiracy to commit institutional vandalism in No. 951 of 2003, 5 counts of statutory sexual assault in No. 952 of 2003, burglary, conspiracy to commit burglary, theft, and corruption of a minor (2 counts) in No. 953 of 2003, and 3 counts each of burglary and conspiracy to commit burglary in No. 954 of 2003.

Pursuant to plea negotiations during which he was represented by James K. Reed, Esquire, the defendant appeared before the court and offered to plead guilty to 4 counts of receiving stolen property in No. 950 of 2003, appearing in the Informations and on the written plea agreement as counts 12, 13,14, and 15. He also offered to plead guilty to institutional vandalism in No. 951 of 2003 (one count), statutory sexual assault (one count) in No. 952 of 2003, conspiracy to commit burglary (one count) in No. 953 of 2003, and conspiracy to commit burglary (2 counts) in No. 954 of 2003. The defendant testified under oath that he understood his obligation to pay restitution on all these counts and that remaining charges would be dismissed in exchange. (N.T. Proceedings of Guilty Plea, November 12, 2003, p. 3.) The aggregate sentence amounted to 36-110 months, plus 96 months probation. The defendant did not file a post-sentence motion for modification of sentence, nor did he file an appeal.

On or about March 9, 2009, the defendant filed a pro se Motion for Correction or Modification of the Record, citing Pa.R.A.P. 1926. His allegations centered on count 5 of No. 950 which directed him to pay restitution as follows: $2,600 to Richard Sanderson, $470 to Laura Frey, $100 to Roger Carbaugh, and $412 to Peerless Insurance, totaling $3,582. First, the defendant alleged the court erred in directing him to pay this restitution because the Commonwealth agreed to dismiss the counts pertaining to those individuals in counts 1-3 for theft and counts 9-11 for receiving stolen property and those counts were in fact dismissed by the court on February 18, 2004. Second, the defendant alleged that as to count 15,

he pled guilty to receiving stolen property, specifically, a stereo and wallet worth $250 belonging to Belentan Cortez, and that Peerless Insurance appears nowhere in any of the Informations. Third, he alleged he "did not plead guilty to any offenses relating to damages within Counts 12 through 15." Finally, he alleged he is responsible for only one-half of the $250 because his co-defendant is responsible for the other half of that amount.

In its answer to the motion, the Commonwealth proposed that the defendant seeks a modification of the February 4, 2004 sentence, a form of substantive relief not encompassed by Rule 1926; he is not asking for the record to be corrected or modified due to a typographical or other technical error as Rule 1926 contemplates but is in fact seeking a modification of his sentence. This being the case, his motion falls under Pa.R.Crim.P. 720(A)(1) which governs post-sentence motions and requires these to be filed no later than 10 days after the imposition of sentence. The defendant therefore had until February 15, 2003 to file a motion to modify sentence, making this motional untimely by more than 5 years.

After considering the defendant's motion, the Commonwealth's answer, the record and the rules of criminal and appellate procedure, the court on May 13, 2009 entered an Order finding the motion was one for modification of sentence governed by Pa.R.Crim.P. 720(A)(1) and denying his request for relief because: (1) the motion was untimely under that rule; (2) the challenge made to the restitution ordered by the court as to count 15 was waived because the amount of restitution to be recovered on the dismissed cases appears on page 6 of the pre-sentence report of January 26, 2004 which the defendant reviewed prior to his sentence on February 4, 2004 and he never raised this issue at the sentencing; (3) the challenged restitution figures appear on the sentencing Order of February 4, 2004, count 15 and the defendant did not challenge them by way of a post-sentence motion, and (4) payment of restitution on the dismissed cases was a part of the plea agreement as evidenced in the written plea agreement in the second paragraph on page 2 where it states "[t]he defendant further agrees to make restitution on all charges to which pleas guilty and/or nolo contendere are entered and on nol-prossed cases as follows: Total Restitution (x) to be determined by probation." The defendant has filed a timely notice of appeal from the May 13, 2009 Order and a statement of matters complained of on appeal.

Appeal issues #1-#3 are related: (1) the court erred in holding appellant's motion for correction or modification of the record is a motion for modification of sentence under Pa.R.Crim.P. 720(A)(1) rather than Pa.R.A.P. 1926; (2) the court erred in holding appellant's motion was untimely filed, and (3) the court erred in holding appellant waived his claim that the sentencing Order at counts 15 erroneously misstates the names of the complainants and the net aggregate amount of restitution owed by the appellant. Clearly these allegations of error stem from the defendant's assertion that Pa.R.A.P. 1926 applies to his March 5, 2009 motion insofar as the motion alleges the sentencing Order as it pertains to count 15 imposes an illegal sentence and that a challenge to an illegal sentence cannot be waived.

We agree with the well-established principle that a challenge to the legality of a sentence cannot be waived. This does not mean, however, that the defendant can now invoke Pa.R.A.P. 1926 as the avenue for such a challenge. The rule states:

> If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court after notice to the parties and opportunity for objection, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

The comments to the rule state:

> This rule is intended to close a gap in the prior practice whereby the lower court could not correct an error discovered in writing an opinion under Rule 1925 (opinion in support of order). This rule does not enlarge the power of the lower court to rewrite the record, but, together with Rule 1922(c)(certification and filing), merely postpones the reading and transcription by the trial judge of an unobjected to transcript…from the transcription stage to the opinion writing stage.

It is well established that the purpose of Rule 1926 is to provide an opportunity to correct obvious technical defects, inconsistencies and/or omissions in the record such as typographical and similar clerical errors so as to ensure that both the lower court and the appellate court have a complete and accurate record of the lower court proceedings. West's Pennsylvania Practice Series: Pennsylvania Appellate Practice, Volume 20A, §§1926:1-7 (2008-1009 edition). The

defendant clearly misidentifies Rule 1926 as the proper method for raising a substantive challenge to the sentence which the court imposed pursuant to the plea agreement. Our review does not support his contention that any technical defects as contemplated by Rule 1926 (and related appellate rules) exist in the record to support his claim of an illegal sentence.

Appeal issues #4-#6 are likewise related: "(4) The court erred in holding that payment of restitution on [nol]-prossed cases was part of appellant's plea agreement, whereas the written plea agreement is a 'form' containing boilerplate informations, and where no case numbers were specified in the 2nd paragraph on page 2 as to any such further agreement by appellant to pay restitution on any such [nol]-prossed case numbers; (5) the court erred in its Order of May 13, 2009, affirming its contested sentencing Order of February 4, 2004, count 15, ordering appellant to pay restitution in [nol]-prossed offenses which were agreed to be dismissed by the Commonwealth and which were not agreed to be paid by appellant; (6) the court's sentencing Order of February 4, 2004, at count 15, ordering appellant to pay restitution on charges for which appellant was neither convicted nor agreed to pay as [nol]-prossed, and for which the Commonwealth agreed to dismiss, constitutes an illegal sentence of restitution and unjust enrichment."

The defendant in essence is here attempting to cast doubt on the soundness of his plea but there is no merit to his contentions. The written plea agreement clearly indicates on page 2 that he offered to plead guilty to four counts of receiving stolen property in No. 950 of 2003 (counts 12, 13, 14 and 15), as well as one count of institutional vandalism in No. 951 of 2003, one count of statutory sexual assault in No. 952 of 2003, one count of conspiracy to commit burglary in No. 953 of 2003, and two counts of conspiracy to commit burglary in No. 954 of 2003. In addition, "[t]he defendant further agrees to make restitution on all charges to which pleas of guilty and/or nolo contendere are entered and **on all nol-prossed charges as follows…(x) to be determined by probation**." (Emphasis supplied.) The Commonwealth agreed to drop all the remaining charges in exchange and this was later accomplished by court Order. The defendant indicated on page 3 of the written plea colloquy his ability to read, write and understand English, and on page 5 of that document he acknowledged having had enough time to discuss his case with his attorney and was satisfied with counsel's representation. The defendant also acknowledged his belief that his plea was voluntary and in his best interests.

During the oral plea colloquy with the Assistant District Attorney and the court, the defendant (who was then testifying under oath) was asked whether he understood he would be required to pay restitution on all the charges as determined by the probation department, to which he replied "yes." (N.T. Proceedings of Guilty Plea, November 12, 2003, p.3.) The court engaged in a comprehensive oral colloquy with the defendant which fully complied with Pa.R.Crim.P. 590. With regard to the "boilerplate" aspect of the written plea colloquy, the mere fact that a pre-printed form was used by the Commonwealth, the defendant (with the assistance of his counsel) and the court as part of the process of plea bargaining and the court's acceptance of the plea in no way undermines the validity of the written plea agreement, the plea in general, or the sentence itself.

In appeal issue #7, the defendant alleges "[t]he court erred in its sentencing Order of February 4, 2004, at count 15, in delegating the duty of determining restitution to a probation agency." In fact the process works as follows: the probation department makes a recommendation as to the appropriate amount of restitution but it is the District Attorney who then speaks directly to the victims and obtains information from them about their losses. The District Attorney then presents this information to the court at sentencing and the court orders the restitution. This procedure fully complies with the law.

We submit that this court committed no error in any aspect of these proceedings, and respectfully request that the February 4, 2004 sentencing Order and the Order of May 13, 2009 be affirmed.

ORDER OF COURT

July 27, 2009, pursuant to Pennsylvania Rule of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotory of the Superior Court the record in this matter, along with the attached Opinion sur Pa.R.A.P. 1925(a).