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Commonwealth v Kimberly

Commonwealth of Pennsylvania v. Jeremiah Kimberly, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 135-2012

HEADNOTES

Criminal Law; Appeal of Sentence

1. A defendant has 30 days from the date of sentencing to file his Notice of Appeal.

Criminal Law; Credit for Time Served

1. A defendant is entitled to credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

2. If a defendant is serving multiple sentences and one sentence is set aside, the defendant shall receive credit for time served in relation to the sentence set aside toward the remaining sentences.

3. A defendant is not entitled to credit for the same period of time served on two separate offenses. An alternate holding would result in the defendant receiving a volume discount on his sentences.

Appearances:

Michael J. Toms, Esq., Counsel for Defendant

Zachary I. Mills, Esq., Assistant District Attorney

OPINION

Before Van Horn, J.

STATEMENT OF THE CASE

Defendant pled guilty on February 29, 2012 to Count 1: Driving Under the Influence – High Rate, 3rd Offense in violation of 75 Pa.C.S.A. § 3802(b) and Count 3: Driving on a Suspended License with a Blood Alcohol Content higher than .02, in violation of 75 Pa.C.S.A. § 1543(b)(1.1)(i). Defendant was sentenced on May 30, 2012 by the Honorable Richard J. Walsh. At the Defendant's request, that sentence was vacated June 6, 2012. Defendant was then re-sentenced on August 15, 2012 by this Court. The Defendant's sentence for Count 3 was to run concurrently with the sentence the Defendant was, at that time, serving in Adams County. The sentence for Count 1 was to run consecutively to the sentence imposed for Count 3. On December 26, 2012, the Defendant filed a Petition for Writ of Habeas Corpus, averring that the Defendant's incarceration was unlawful because he had served the minimum portion of his sentence and was not released from incarceration and also averring that he was not given credit time for time he was incarcerated from May 30, 2012 through June 6, 2012. The Commonwealth filed its response to the Defendant's Petition on January 14, 2013. This Court held a hearing on the Defendant's Petition on February 14, 2013, at which time it was determined that the Defendant's Petition was moot because the Defendant was no longer incarcerated. Additionally, the Court determined that the Defendant's request for credit time was inappropriate under a Petition for Writ of Habeas Corpus, but also inappropriate based on the facts of the case.

Defendant filed a Notice of Appeal on February 20, 2013, and pursuant to an Order of Court, filed a Concise Statement of Matters Complained of on Appeal ("Statement") on March 19, 2013. In his Statement, Defendant raises one issue on appeal: "Whether the Sentencing Court committed error when it denied Appellants request for credit for time served from May 30, 2012 until June 6, 2012, when that sentence was vacated until a later sentencing date?" The Court now responds to Defendant's Statement through this Opinion pursuant to Pa.R.A.P. 1925(a).

DISCUSSION

A. Defendant's Appeal is Untimely

In his Statement, Defendant asks the Superior Court to review the Sentencing Court's denial of his request for credit for time served. As noted above, this Court re-sentenced the Defendant on August 15, 2012. Therefore, the Defendant had 30 days from August 15, 2012 to file his Notice of Appeal. See Pa.R.Crim.P. 720(A)(3). Defendant didn't file his Notice of Appeal until February 20, 2013, more than 6 months after the Court imposed his sentence, making it untimely. Defendant's Appeal was filed within 30 days of the Court's Order after the February 14, 2013 hearing on Defendant's Petition for Writ of Habeas Corpus. While credit for Defendant's time served was discussed at length at this hearing, the Defendant's Statement includes no reference to that Order or hearing. Further, as the Court stated in its Order that day, Defendant's request for credit time was inappropriate under a Petition for Writ of Habeas Corpus.

Because Defendant's appeal is untimely, this Court requests that the Superior Court dismiss the Defendant's appeal on procedural grounds.

B. Defendant is Not Entitled to Credit Time for the 6 Days requested

If the Superior Court does not determine that the Defendant's appeal should be dismissed as untimely, it should deny the appeal on its merits.

Defendant argued at the February 14, 2013 hearing that he is entitled to credit because "defendants should have credit for any time they spent incarcerated prior to being sentenced or trial." See Transcript of Proceedings of Habeas Corpus Hearing ("Habeas Tr.") at 7. In support of his position, Defendant cited 42 Pa.C.S.A. § 9760(1), which states that "Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal." The Commonwealth, in response, argues that because Defendant was serving a sentence in Adams County throughout the time period encompassing May 30, 2012 through June 6, 2012, that he is not entitled to credit for time served, as he received credit for that time toward his Adams County sentence. The Commonwealth cited subsection (3) of 42 Pa.C.S.A. § 9760 as the applicable statute in the instant case. That subsection states that "If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based."

This Court determined that because Defendant received credit for these 6 days toward his Adams County sentence, he was not entitled to credit for those same 6 days toward his sentence in the instant case. Defendants, without a doubt, are entitled to credit for time served, pursuant to 42 Pa.C.S.A. § 9760. However, a defendant is not entitled to credit for the same period of time served on two separate offenses. See *Commonwealth v. Hollawell*, 604 A.2d 723, 726 (Pa. Super. 1992) and *Commonwealth v. Frank*, 398 A.2d 663 (Pa. Super. 1979). In *Hollawell*, the Superior Court rejected the defendant's contention that he should receive credit for time served prior to sentencing on two separate cases, stating that such a holding would result in the defendant receiving a "windfall on sentencing for a completely unrelated crime." *Hollawell*, 604 A.2d at 726. Put simply, the Superior Court stated, "this court does not deal in 'volume discounts.'" *Id.*

Giving the Defendant credit for the 6 days requested would result in a "volume discount," just as it would have in the *Hollawell* case. Even though he was physically located in the Franklin County Jail during this 6 day window, Defendant was given credit for the entire time period between April 3, 2012 and December 17, 2012 toward his Adams County sentence. See *Commonwealth Exh. 1, Habeas Corpus Hearing*. Nothing in 42 Pa.C.S.A. §9760 nor in any Pennsylvania case law authorizes this Court to give Defendant credit for these 6 days on this matter, when credit for those days were already given on a separate, unrelated sentence. Therefore, the Court did not err in denying the Defendant's request for credit for time served between May 30, 2012 and June 6, 2012.

CONCLUSION

In light of the foregoing reasons, the Court did not err in denying the Defendant's request for credit for time served between May 30, 2012 and June 6, 2012. Further, Defendant's appeal was filed more than 30 days after this Court imposed a sentence on the Defendant in this case, making it untimely. This Court respectfully requests that the Superior Court dismiss the appeal of the Defendant.

ORDER OF COURT

AND NOW THIS 3rd DAY OF April, 2013 pursuant to Pa.R.A.P. 1931(c), IT IS HEREBY ORDERED THAT the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion sur Pa.R.A.P. 1925(a).

Pursuant to Pa.R.Crim.P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.