

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Plaintiff	:	
	:	
v.	:	No. 91-10,935
	:	
JERARD BRADLEY,	:	
Defendant	:	
	:	<i>Opinion issued May 5, 2001</i>

OPINION and ORDER

This opinion addresses the various attempts of the defendant, Jerard Bradley, to appeal a sentence this court imposed on him five years ago. For the reasons stated in this opinion, we will not permit him to appeal at this late date.

Factual Background

On 17 April 1996, this court imposed a sentence on the defendant for aggregated assault of a correction officer while incarcerated. No appeal was ever filed to the sentence. On 16 February 1999, the defendant filed a petition to appeal nunc pro tunc, alleging that he had requested his counsel to file a direct appeal, but his counsel failed to do so. On 9 September 1999, this court denied his petition, citing Commonwealth v. Lantzy, 712 A.2d 288 (Pa. Super. 1998) for the proposition that relief in such cases must be sought under the Post Conviction Relief Act. Although we acknowledged that the defendant's petition had been filed prior to the Lantzy decision,¹ we concluded that Lantzy should be retroactively applied.

The defendant then filed a PCRA petition on 5 September 2000, and this court

¹ Lantzy was decided on July 7, 1999.

issued an order announcing our intention to dismiss the petition without a hearing, due to the untimeliness of the petition. On 24 April 2001, Defendant's counsel submitted a letter objecting to the proposed dismissal.

Discussion

It is necessary to revisit our initial dismissal of the defendant's petition to appeal nunc pro tunc because of an appellate court case decided since that dismissal. On 23 March 2000, the Superior Court, sitting *en banc*, held that Lantzy should not be retroactively applied to petitions to reinstate direct appeal rights. Commonwealth v. Garcia, 749 A.2d 928 (Pa. Super. 2000).² See also Commonwealth v. Ross, 763 A.2d 853 (Pa. Super. 2001) (Garcia also applies to petitions to reinstate PCRA appellate rights.). Therefore, we feel bound to vacate our original order dismissing the defendant's petition to appeal nunc pro tunc and reconsider that petition, which we now proceed to do.

In his petition, the defendant states correctly that he was sentenced on the assault incident on the same date that he was sentenced to death for murder, and that an attorney, Marc Lovecchio, Esq., was appointed as his counsel. The defendant then states that although he told Mr. Lovecchio he wanted to appeal the assault sentence, Mr. Lovecchio never filed an appeal. The defendant claims this was because the court did not make it clear that Mr. Lovecchio was appointed to represent him for appeal purposes on the assault sentence. Although the defendant does not specifically state that Mr. Lovecchio

² It appears that a petition for *allocatur* is currently pending; however, it remains precedent at this time.

failed to file the appeal because he did not believe he was appointed to represent the defendant in that regard, it appears that is what the defendant is alleging.

Even assuming all of this is true, however, we must deny the defendant's petition to appeal nunc pro tunc because he was so dilatory in making this request. As a general rule, an appeal nunc pro tunc will be granted only when appellate rights have been lost due to certain extraordinary circumstances. Commonwealth v. Stock, 679 A.2d 760, 764 (Pa. 1996). Perhaps the misunderstanding the defendant alleges, if true, could be considered an extraordinary circumstance. However, the defendant offers no explanation for his own delay in asking to appeal nunc pro tunc. Surely the defendant must have realized, at some point in the intervening two and one-half years between the sentencing and the date he filed his nunc pro tunc petition, that no appeal had been filed. Even if the defendant was not aware of that fact until he filed the petition, he must be held responsible for his ignorance, and suffer the consequences. As the Superior Court has recently held, counsel's failure to file an appeal is discoverable during the one year PCRA window:

Thus, Appellant had a full year to learn if a direct appeal had been filed on his behalf. A phone call to his attorney or the clerk of courts would have readily revealed that no appeal had been filed. Due diligence requires that Appellate take such steps to protect his own interests.

Although the one year deadline does not apply to this case because of Garcia, the defendant nonetheless had a duty to exercise due diligence to protect his rights.

The defendant had more than one year to find out whether an appeal had been filed. If the defendant did not know his attorney failed to file the appeal he *should have known*, and therefore he is not entitled to nunc pro tunc relief. The right to a direct appeal is important, but not absolute. Like many rights, it can be lost through one's own

negligence or inaction.

ORDER

AND NOW, this _____ day of May, 2001, for the reasons stated in the foregoing opinion, this court's order of 9 September 1999 is vacated, and therefore the defendant's PCRA petition is moot. It is further ordered that the defendant's petition to appeal nunc pro tunc, filed on 16 February 1999, is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: District Attorney (Kenneth Osokow, Esq.)
Matthew Ziegler, Esq.