

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES FREDERICK OLIVER, II,  
Defendant

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:  
:  
:  
:  
:

No. 14 CR 2006

Michael S. Greek, Esquire,  
Assistant District Attorney

Counsel for Commonwealth

Charles Frederick Oliver, II

Pro se

Criminal Law - Sentencing - Recidivism Risk Reduction Incentive  
- Retroactivity - State Intermediate Punishment -  
Re-sentencing - Timeliness of Appeal

1. The Recidivism Risk Reduction Incentive is an alternative minimum sentence applicable to a defined class of state prisoners who by successfully completing specified Department of Corrections' programs designed to reduce their risk of re-offense become eligible for parole earlier.
2. To be eligible for the Recidivism Risk Reduction Incentive, a prisoner must have received a Recidivism Risk Reduction Incentive sentence and successfully completed the Recidivism Risk Reduction Incentive program.
3. The Recidivism Risk Reduction Incentive is not to be given retroactive effect. Consequently, a defendant serving a current sentence at the time of enactment of this statute is not entitled to be re-sentenced after the statute's effective date, November 24, 2008.
4. To be eligible for re-sentencing under the State's Intermediate Punishment Program, a written request for re-sentencing is to be initiated with the court by the Department of Corrections with re-sentencing to occur within 365 days of the date of the offender's admission into the Department of Corrections' custody. Under this Program, a defendant incarcerated in a State facility has no right to directly petition the court.

5. A request for reconsideration does not stay the time within which to appeal from the underlying order. Therefore, an appeal from the denial of a request for reconsideration which occurs more than thirty days after the order which is the subject of the request is untimely and should be quashed.

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MEMORANDUM OPINION

Nanovic, P.J. - March 16, 2009

PROCEDURAL BACKGROUND

On August 24, 2006, Charles Frederick Oliver, II ("Defendant"), then represented by counsel, entered a guilty plea to one count of Possession with Intent to Deliver a Controlled Substance (F).<sup>1</sup> That same day, Defendant was sentenced to a period of imprisonment of not less than two years nor more than four years in a State Correctional Institution, with credit for thirty-two days served.

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<sup>1</sup> 35 P.S. § 780-113(a) (30) (2005) .

On November 18, 2008, Defendant filed a *pro se* Motion for Recidivism Risk Reduction Incentive Application, which we denied by Order dated November 20, 2008, for two reasons. The first was that it was filed prematurely, as the statutes Defendant relied upon became effective on November 24, 2008. See Act 2008-81 § 11(3), 192 Gen.Assem., Reg.Sess. (Pa.). The second was that Defendant invoked the incorrect procedure, in that the Department of Corrections is to identify prisoners eligible for the Recidivism Risk Reduction Incentive and notify the Board of Probation and Parole, who then initiates proceedings with the court. See 44 Pa.C.S.A. § 5306 and 61 P.S. § 331.21(b.2)(1) and (2) (2008).<sup>2</sup> For the State Intermediate Punishment Program, re-sentencing of an offender who has been previously sentenced is to be initiated with the court by the Department of Corrections. See 42 Pa.C.S.A. § 9904(d.1) (2008). Based upon these procedural defects, we did not address the merits of Defendant's Motion at that time.

On December 11, 2008, Defendant filed a Petition to Reconsider the Motion for Recidivism Risk Reduction Incentive

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<sup>2</sup> The Pennsylvania Board of Probation and Parole has jurisdiction over parole for state sentences such as that imposed on Defendant. See 61 P.S. § 331.17 (2008). The Recidivism Risk Reduction Incentive is an alternative minimum sentence applicable to a defined class of state prisoners who by successfully completing specified Department of Corrections' programs designed to reduce their risk of re-offense become eligible for parole earlier. See 44 Pa.C.S.A. §§ 5303 (definition of "eligible offender") and 5312 (applicability) (2008). To be eligible for early parole, a prisoner must have received a Recidivism Risk Reduction Incentive sentence and successfully completed the Recidivism Risk Reduction Incentive program. See 42 Pa.C.S.A. § 9756(b.1) (2008); 44 Pa.C.S.A. § 5306(a) (2008).

Application, which we also denied by Order dated January 26, 2009. Defendant now appeals our denial of his Petition to Reconsider, thereby requiring the preparation of this Opinion, which we respectfully submit in accordance with Pa.R.A.P. 1925(a) (2007).<sup>3</sup>

#### DISCUSSION

In addition to directly petitioning the court, in violation of the procedures set forth as described above, Defendant is not eligible for either the Recidivism Risk Reduction Incentive or the State Intermediate Punishment Program regardless.<sup>4</sup> Eligibility for the Recidivism Risk Reduction Incentive is to be determined at the time of sentencing. See 44 Pa.C.S.A. § 5305 (2008). For State Intermediate Punishment, eligibility is to be determined by the court prior to the original sentencing, after an evaluation by the Department of Corrections, or prior to re-sentencing following a written request by the Department of Corrections. 42 Pa.C.S.A. § 9904(d) and (d.1) (2008). As noted, Defendant was sentenced on

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<sup>3</sup> Defendant filed his Appeal on February 26, 2009, from the January 26, 2009, Order denying his Petition for Reconsideration. Because a request for reconsideration does not stay the time within which to appeal from the underlying order, Defendant's Appeal from the November 20, 2008, Order is untimely and should be quashed. See Valley Forge Center Associates v. RIB-IT/K.P., Inc., 693 A.2d 242, 245 (Pa.Super. 1997) ("an untimely appeal divests this Court of jurisdiction"). This notwithstanding, for purposes of being inclusive, we also address the substance of Defendant's Appeal.

<sup>4</sup> It should be noted that application of the statutes is entirely discretionary, and the statutes do not expressly grant any rights to Defendant. See 44 Pa.C.S.A. §§ 5306(d), 5311 (2008) and 61 P.S. § 331.21(b.2) (6) (regarding Recidivism Risk Reduction Incentive); 42 Pa.C.S.A. § 9908 (2008) (regarding State Intermediate Punishment Program).

August 24, 2006, over two years prior to the statutes' effective date of November 24, 2008.

"No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa.C.S.A. § 1926 (1972). Our review of the Recidivism Risk Reduction statute reveals no such intent on the part of the Pennsylvania legislature. See 44 Pa.C.S.A. §§ 5301-5312 (2008) (regarding Recidivism Risk Reduction Incentive). Regarding the State Intermediate Punishment Program, eligible offenders may be re-sentenced, but Defendant is not an eligible offender because he was not re-sentenced within 365 days of the date of his admission to the Department of Corrections' custody. See 42 Pa.C.S.A. § 9904(d.1)(4) (2008). This would not have been possible seeing as Defendant was admitted into the Department of Correction's custody on August 29, 2006, over two years prior to the statute's effective date of November 24, 2008.

In Defendant's Concise Statement of Matters Complained of on Appeal, he requests relief "pursuant to *nunc pro tunc*" and Pa.R.Crim.P. 105 (2006). "*Nunc pro tunc*" means "now for then". Black's Law Dictionary (6th ed.). It signifies a thing done now which shall have the same effect as if done at the time when it ought to have been done. See id. As detailed above, it would not have been possible for us to sentence Defendant under either

the Recidivism Risk Reduction Incentive or State Intermediate Punishment Program "at the time when it ought to have been done" seeing as the two statutes were not in effect at such time, i.e., the time of sentencing for purposes of either statute, or within 365 days of sentencing for purposes of the State Intermediate Punishment Program statute. Therefore, Defendant is not entitled to any relief *nunc pro tunc*.<sup>5</sup>

Defendant also requests relief pursuant to Pa.R.Crim.P. 105(E) (2006),<sup>6</sup> which states "No case shall be dismissed nor request for relief granted or denied because of failure to comply with a local rule. In any case of noncompliance with a local rule, the court shall alert the party to the specific provision at issue and provide a reasonable time for the attorney to comply with the local rule." Defendant's request for relief was not denied because of failure to comply with any local rule. Defendant seeks relief pursuant to state statutes, neither of which qualifies him for relief. This is so regardless of any local rules whatsoever and Defendant is

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<sup>5</sup> Defendant's Concise Statement of Matters Complained of on Appeal, while concise, is not entirely coherent. "[T]he Pa.R.A.P.1925(b) statement must be sufficiently 'concise' and 'coherent' such that the trial court judge may be able to identify the issues to be raised on appeal . . . ." Jiricko v. Geico Ins. Co., 947 A.2d 206, 210 (Pa.Super. 2008), *appeal denied*, 958 A.2d 1048 (Pa. 2008). Although we have made a good faith effort to address Defendant's *nunc pro tunc* argument, its incoherence likely merits its waiver. See *id.* at 210 n.8.

<sup>6</sup> Defendant actually cites to "§§ R.C.P. Rule (105), Local Rules, (a)(b)(1)(6)(E)"; Pa.R.Crim.P. 105(E) (2006) is our best surmised of Defendant's intended citation. It should also be noted that a new version of Pa.R.Crim.P. 105 went into effect on February 1, 2009, with a similar provision contained in subsection (I).

therefore not entitled to any relief pursuant to Pa.R.Crim.P.  
105(E) (2006).

CONCLUSION

Because the law supports the decisions made on the  
issues presented in Defendant's Motion for Recidivism Risk  
Reduction Incentive Application and Petition for  
Reconsideration, we respectfully request that our Orders denying  
both be affirmed.

BY THE COURT:

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P.J.