

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. SA 008-2012
	:	
EARL KUNKEL, III,	:	
Defendant	:	
William E. McDonald, Esquire	Counsel for the Commonwealth	
Joseph V. Sebelin, Jr., Esquire	Counsel for the Defendant	

MEMORANDUM OPINION

Serfass, J. - May 18, 2012

Here before the Court is Defendant Earl Kunkel, III's (hereinafter "Defendant's") Appeal of his conviction for one (1) count of Harassment (S) following a Summary Appeal Trial held on March 19, 2012. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and recommend that Defendant's appeal be quashed for the reasons set forth in this Memorandum Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On January 12, 2012, before Magisterial District Judge Joseph D. Homanko, Sr., Defendant was found guilty of one (1) count of Harassment - Course of Conduct with No Legitimate Purpose (S)¹ and sentenced to pay a fine of one hundred dollars (\$100.00). On February 8, 2012, Defendant filed a "Notice of Summary Appeal" with this Court. On March 19, 2012, a de novo

¹ 18 Pa. C.S.A. § 2709(A)(3)

hearing was held before the undersigned on Defendant's summary appeal in accordance with Pennsylvania Rule of Criminal Procedure 462. Following the hearing, Defendant was found guilty of one (1) count of Harassment (S), and sentenced to pay the costs of prosecution and a one hundred dollar (\$100.00) fine. A written order imposing sentence and containing the information required by Pennsylvania Rule of Criminal Procedure 462(g) was issued on March 19, 2012.

Defendant timely filed a Notice of Appeal to the Superior Court in this case on April 16, 2012. On April 20, 2012, we entered an Order directing Defendant to file, within twenty-one (21) days of that Order's entry on the docket, a Concise Statement of the matters complained of in the appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). As of the date of this Memorandum Opinion, Defendant has failed to file a Concise Statement pursuant to this Order.

DISCUSSION

Pennsylvania Rule of Appellate Procedure 1925(b) provides, in relevant part, as follows:

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.—If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

(1) *Filing and service.*-Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa.R.A.P. 121(a) and shall be complete on mailing if appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified, in compliance with the requirements set forth in Pa.R.A.P. 1112(c). Service on parties shall be concurrent with filing and shall be by any means of service specified under Pa.R.A.P. 121(c).

(2) *Time for filing and service.*-The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.

(3) *Contents of order.*-The judge's order directing the filing and service of a Statement shall specify:

(i) the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement;

(ii) that the Statement shall be filed of record;

(iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1);

(iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

The docket entries in this case establish that the Order directing Defendant to file a Concise Statement was docketed on April 20, 2012. The docket entries in this case further

establish that the Order was mailed to counsel for Defendant by the Carbon County Clerk of Courts via first class mail on April 23, 2012. The twenty-first (21st) day following the docketing of our Order directing Defendant to file a Concise Statement was May 11, 2012. Defendant did not file a Concise Statement by that date, or on any date thereafter, in direct contravention of our Order of April 20, 2012.

Whenever a trial court orders an appellant to file a concise statement of matters complained of on appeal, the appellant must comply in a timely manner. Hess v. Fox Rothschild, LLP, 925 A.2d 798, 803 (Pa. Super. 2007); Commonwealth v. Castillo, 888 A.2d 775, 780 (Pa. 2005). The failure to file a 1925(b) Statement, after being directed to do so, is a waiver of all issues for the purposes of appellate review. Castillo, 888 A.2d at 780; Great Valley Sch. Dist. v. Zoning Hearing Bd. of East Whiteland Twp., 863 A.2d 74, 78 (Pa. Cmwlth. 2004). Also, the failure of a defendant to timely file a concise statement results in a waiver of appellate review. Castillo, 888 A.2d at 780; Commonwealth v. Lord, 719 A.2d 306, 309 (Pa. 1998). See also Commonwealth v. Hooks, 921 A.2d 1199, 1201-1202 (Pa. Super. 2007)(noting that the defendant's statement of matters complained of on appeal, filed one week beyond the time allowed by the trial court's order directing the

defendant to file a concise statement of matters complained of on appeal within fourteen days, was untimely).

In order to find a waiver under the aforementioned circumstances, the trial court must issue a Rule 1925(b) order directing an Appellant to file a response within twenty-one (21) days of the order, the Rule 1925(b) order must be filed with the Clerk of Courts, the Clerk of Courts must docket the Rule 1925(b) order and record in the docket the date it was made, the Clerk of Courts must give written notice of the entry of the order to each party's attorney of record, and the giving of said notice shall be recorded in the docket. Hooks, 921 A.2d at 1202; Forest Highlands Cmty. Ass'n v. Hammer, 879 A.2d 223, 227 (Pa. Super. 2005). "If any of the procedural steps set forth above are not complied with, Appellant's failure to act in accordance with Rule 1925(b) will not result in a waiver of the issues sought to be reviewed on appeal." Hooks, 921 A.2d at 1202.

In the present case, by this Court's Order of April 20, 2012, Defendant was directed to file a Concise Statement within twenty-one (21) days of the docketing of said Order, the Order was filed with the Clerk of Courts, the Order was docketed, and the date the Order was made was recorded in the docket. The docket entries also reflect that the Clerk of Courts provided notice of the Order to Defendant's counsel by first class mail on April 23, 2012. Since Defendant has failed to timely file a

Concise Statement with the Clerk of Courts, he has not complied with the terms of this Court's Order of April 20, 2012. As a result, we believe that Defendant has waived his right to appellate review. Accordingly, we respectfully recommend that Defendant's appeal be quashed.

CONCLUSION

Based upon the foregoing, we conclude that Defendant has waived his right to appellate review of this matter. As a result, we respectfully request that Defendant's appeal of his conviction be quashed.

BY THE COURT:

Steven R. Serfass, J.