

THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

[234 PA. CODE CHS. 1100 AND 1400]

Order Promulgating Pa.R.Crim.P. 1124A and Approving the Revisions of the Comments to Pa.R.Crim.P. 1124 and 1410; No. 229; Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the Supreme Court's promulgation of Pa.R.Crim.P. 1124A (Challenges to the Weight of the Evidence) and approval of the correlative revisions of the Comments to Rule 1124 (Challenges to Sufficiency of Evidence) and Rule 1410 (Post-Sentence Motion; Appeal), on October 15, 1997, effective January 1, 1998. These rule changes provide the procedures for raising challenges to the weight of the evidence to ensure that weight challenges are raised with the trial judge before appeal. The Final Report follows the Court's Order.

Order

Per Curiam:

And Now, this 15th day of October, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the Recommendation having been submitted without publication pursuant to Pa.R.J.A. 103(a)(3), and a Final Report to be published with this Order,

It is *Ordered* that:

- (1) Rule of Criminal Procedure 1124A is hereby promulgated; and
- (2) the revisions of the Comments to Rules of Criminal Procedure 1124 and 1410 are approved, all in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective January 1, 1998.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 1100. TRIAL

(Editor's Note: The following is a new rule. It is printed in regular type to enhance readability.)

Rule 1124A. Challenges to the Weight of the Evidence.

(1) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (a) orally, on the record, at any time before sentencing;
- (b) by written motion at any time before sentencing; or
- (c) in a post-sentence motion.

(2)(a) If the claim is raised before sentencing, the judge shall decide the motion before imposing sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.

(b) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 1410(A)(2) or (3), whichever applies.

Official Note: Adopted October 15, 1997, effective January 1, 1998.

Comment:

The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived. Appellate review of a weight of the evidence claim is limited to a review of the judge's exercise of discretion. See *Commonwealth v. Widmer*, 689 A.2d 211 (Pa. 1997), and *Commonwealth v. Brown*, 648 A.2d 1177, 1189-1192 (Pa. 1994).

When a claim is raised before sentencing, the defendant may, but need not, raise the issue again in a post-sentence motion. See Rule 1410(B)(1)(a)(iv).

Committee Explanatory Reports:

Final Report explaining the October 15, 1997 adoption of Rule 1124A published with the Court's Order at 27 Pa.B. 5599 (November 1, 1997).

Rule 1124. Challenges to Sufficiency of Evidence.

[(a)] (A) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in one or more of the following ways:

- (1) a motion for judgment of acquittal at the close of the Commonwealth's case-in-chief;
- (2) a motion for judgment of acquittal at the close of all the evidence;
- (3) a motion for judgment of acquittal filed within 10 days after the jury has been discharged without agreeing upon a verdict;
- (4) a motion for judgment of acquittal made orally immediately after verdict;
- (5) a motion for judgment of acquittal made orally before sentencing pursuant to Rule 1405.B;
- (6) a motion for judgment of acquittal made after sentence is imposed pursuant to Rule 1410 **[.B] (B)**; or
- (7) a challenge to the sufficiency of the evidence made on appeal.

[(b)] (B) A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made.

[(c)] (C) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.

Official Note: Previous Rule 1124 adopted January 24, 1968, effective August 1, 1968; amended September 18, 1973, effective January 1, 1974; amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; rescinded July 1, 1980, effective August 1, 1980, and not replaced. Present Rule 1124 adopted January 28, 1983, effective July 1, 1983; amended March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; **Comment revised October 15, 1997, effective January 1, 1998.**

Comment:

Previous Rule 1124, which suspended certain Acts of Assembly as being inconsistent with the Chapter 1100 Rules, was rescinded in 1980, as unnecessary in view of the Judiciary Act Repealer Act (JARA). Present Rule 1124 was adopted to codify the procedures applicable to challenges to the sufficiency of the evidence to convict in view of JARA, which repealed the statutes concerning such challenges. See JARA § 2(a), 42 P. S. § 20002(a) [194], [1275], [1322].

Paragraph [(a)] (A), amended in 1993, standardizes the terminology in Pennsylvania for challenges to the sufficiency of the evidence before verdict in view of *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). See also Fed.R.Crim.P. 29. These amendments do not preclude the use of demurrers for other than sufficiency of the evidence challenges, as otherwise provided by law. For similar reasons, the term "motion for judgment of acquittal" is used in subparagraph [(a)] (A)(6) instead of "motion for arrest of judgment" in order to align this aspect of Pennsylvania legal terminology with that of the majority of other states and with the Federal Rules. See Fed.R.Crim.P. 29. This amendment is not intended to change Pennsylvania law. It follows that the inadvertent use of the word "demurrer" where "motion for judgment of acquittal" is now appropriate, would not affect an otherwise valid sufficiency challenge.

A motion in arrest of judgment would still be the appropriate means for raising a challenge based on the court's jurisdiction, on double jeopardy, or on the statute of limitations. Subparagraph [(a)] (A)(4) permits an oral motion for judgment of acquittal to be made immediately after verdict, a procedure of long standing in Pennsylvania.

Other amendments in paragraph [(a)] (A), however, reflect changes in Pennsylvania practice. Under [present] Rule 1410, the time for a written post-verdict motion for judgment of acquittal has been moved to post-sentence. Rule 1405.B provides a narrow exception to these new procedures by authorizing an oral motion for extraordinary relief, which is made before sentencing.

A defendant may challenge the sufficiency of the evidence in any one or more of the ways listed in paragraph [(a)] (A) of this rule. If the defendant does not move for a judgment of acquittal before verdict pursuant to subparagraph [(a)] (A)(1) or [(a)] (A)(2), the defendant may still raise the issue for trial court review after the jury has been discharged without agreeing upon a verdict pursuant to subparagraph [(a)] (A)(3), or after verdict pursuant to subparagraphs [(a)] (A)(4), [(a)] (A)(5), or [(a)] (A)(6). The defendant may also raise the issue for the first time on appeal under subparagraph [(a)] (A)(7). If the defendant does move before verdict and the motion is denied, the defendant may renew the motion before the trial court pursuant to subparagraphs [(a)] (A)(3) through [(a)] (A)(6).

Appellate review of a weight of the evidence claim is limited to a review of the judge's exercise of discretion. See *Commonwealth v. Widmer*, 689 A.2d 211(Pa. 1997) and *Commonwealth v. Brown*, 648 A.2d 1177, 1189-1192 (Pa. 1994). Therefore, although a challenge to the sufficiency of the evidence may be raised for the first time on appeal, paragraph(A)(7), a challenge to the weight of the

evidence must be raised with the trial judge or it will be waived. See Rule 1124A.

For procedures governing a motion for judgment of acquittal after the jury has been discharged without agreeing upon a verdict, see Rule 1125.

Committee Explanatory Reports:

Final Report explaining the March 22, 1993 amendments published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Final Report explaining the October 15, 1997 Comment revision concerning weight of the evidence claims published with the Court's Order at 27 Pa.B. 5599 (November 1, 1997).

CHAPTER 1400. SENTENCING

Rule 1410. Post-Sentence Procedures; Appeal.

[A.] (A) *Timing.*

(1) Except as provided in Section D, a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.

(2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed within 30 days of the entry of the order deciding the motion, or, if the judge fails to decide the motion, within 30 days of the entry of the order denying the motion by operation of law.

(3) If the defendant does not file a post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, except as provided in subsection [A] (A)(4).

(4) If the Commonwealth files a motion to modify sentence pursuant to Rule 1411, the defendant's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion.

[B.] (B) *Optional Post-Sentence Motion.*(1) *Generally.*

(a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:

(i) a motion challenging the validity of a plea of guilty or nolo contendere, or the denial of a motion to withdraw a plea of guilty or nolo contendere;

(ii) a motion for judgment of acquittal;

(iii) a motion in arrest of judgment;

(iv) a motion for a new trial; and/or

(v) a motion to modify sentence.

(b) The defendant may file a supplemental post-sentence motion in the judge's discretion as long as the decision on the supplemental motion can be made in compliance with the time limits of subsection [B] (B)(3).

(c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.

(2) *Trial Court Action.*

(a) *Briefing Schedule.* Within 10 days after a post-sentence motion is filed, if the judge determines that briefs or memoranda of law are required for a resolution of the motion, the judge shall schedule a date certain for

the submission of briefs or memoranda of law by the defendant and the Commonwealth.

(b) *Hearing; Argument.* The judge shall also determine whether a hearing or argument on the motion is required, and if so, shall schedule a date or dates certain for one or both.

(c) *Transcript.* If the grounds asserted in the post-sentence motion do not require a transcript, neither the briefs nor hearing nor argument on the post-sentence motion shall be delayed for transcript preparation.

(3) *Time Limits for Decision on Motion.*

The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this subsection.

(a) Except as provided in subsection (3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in subsection (3)(b), the motion shall be deemed denied by operation of law.

(b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

(c) When a post-sentence motion is denied by operation of law, the clerk of courts shall forthwith enter an order on behalf of the court, and shall forthwith furnish a copy of the order by mail or personal delivery to the attorney for the Commonwealth, the defendant(s), and defense counsel that the post-sentence motion is deemed denied. This order is not subject to reconsideration.

(4) *Contents of Order.* An order denying a post-sentence motion, whether signed by the judge or entered by the clerk of courts, shall include notice to the defendant of the following:

(a) the right to appeal and the time limits within which the appeal must be filed;

(b) the right to assistance of counsel in the preparation of the appeal;

(c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 316; and

(d) the qualified right to bail under Rule 4009(B).

[C.] (C) After-Discovered Evidence.

A motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery. If an appeal is pending, the judge may grant the motion only upon remand of the case.

[D.] (D) Summary Case Appeals.

There shall be no post-sentence motion in summary case appeals following a trial de novo in the court of common pleas. The imposition of sentence immediately following a determination of guilt at the conclusion of the trial de novo shall constitute a final order for purposes of appeal.

Official Note: Previous Rule 1410, adopted May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; rescinded March 22, 1993, effective as to cases in which the determination of guilt

occurs on or after January 1, 1994, and replaced by present Rule 1410. Present Rule 1410 adopted March 22, 1993 and amended December 17, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996. Comment revised September 26, 1996, effective January 1, 1997; amended August 22, 1997, effective January 1, 1998; **Comment revised October 15, 1997, effective January 1, 1998.**

Comment:

This rule is derived from previous Rules 321, 1123, and 1410. See also Rules 1122, 1124, and 1125.

For post-sentence procedures after a sentence of death has been imposed, see Rule 360.

The purpose of this rule is to promote the fair and prompt disposition of all issues relating to guilty pleas, trial, and sentence by consolidating all possible motions to be submitted for trial court review, and by setting reasonable but firm time limits within which the motion must be decided. Because the post-sentence motion is optional, the defendant may choose to raise any or all properly preserved issues in the trial court, in the appellate court, or both.

Timing

Section **[A] (A)** contains the timing requirements for filing the optional post-sentence motion and taking an appeal. Under subsection **[A] (A)(1)**, the post-sentence motion must be filed within 10 days of imposition of sentence.

When a defendant files a timely post-sentence motion, the 30-day period for the defendant's direct appeal on all matters in that case — including all issues related to any informations and any charges consolidated against the defendant for trial — is triggered by the trial judge's decision on the post-sentence motion or the denial of the motion by operation of law. The appeal period runs from the entry of the order. As to the date of entry of orders, see Pa.R.A.P. 108. No direct appeal may be taken by a defendant while his or her post-sentence motion is pending. See subsection **[A] (A)(2)**.

If no timely post-sentence motion is filed, the defendant's appeal period runs from the date sentence is imposed. See subsection **[A] (A)(3)**. Under subsection **[A] (A)(4)**, however, when the defendant has not filed a post-sentence motion but the Commonwealth files a motion to modify sentence under Rule 1411, it is the entry of the order disposing of the Commonwealth's motion that commences the 30-day period during which the defendant's notice of appeal must be filed. See Rule 1411(B)(2)(b).

All references to appeals in this rule relate to the defendant's right to appeal. The rule does not address or alter the Commonwealth's right to appeal. For Commonwealth challenges to sentences, see Rule 1411.

Optional Post-Sentence Motion

Section **[B] (B)** represents a departure from traditional Pennsylvania practice. It is intended to give the defendant the option of resubmitting for the trial judge's consideration issues which were raised before or during trial. Although the defendant may choose to raise only some issues in the post-sentence motion, the decision on

the motion triggers the appeal period on all properly preserved issues. See subsection [A] (A)(2).

Under subsection [B] (B)(1)(c), any issue raised before or during trial is deemed preserved for appeal whether or not the defendant chooses to raise the issue in a post-sentence motion. It follows that the failure to brief or argue an issue in the post-sentence motion would not waive that issue on appeal as long as the issue was properly preserved, in the first instance, before or during trial.

Nothing in this rule precludes the judge from granting a motion for extraordinary relief before sentencing under the special provisions of Rule 1405.B. But see Rule 1405.B(3).

Under subsection [A] (A)(1), if a defendant chooses to file a post-sentence motion, the motion must be filed within 10 days of imposition of sentence. The filing of the written post-sentence motion triggers the time limits for decision on the motion, including any supplement to it filed pursuant to subsection [B] (B)(1)(b). See subsection [B] (B)(3)(a).

For procedures governing post-sentence challenges to the sufficiency of the evidence, see Rule 1124 [(a)] (A)(6) and [(a)] (A)(7). **For challenges to the weight of the evidence, see Rule 1124A.**

In those cases in which a petitioner under the Post Conviction Relief Act has been granted leave to file a post-sentence motion or to appeal nunc pro tunc, the filing of the post-sentence motion or the notice of appeal must comply with the timing requirements contained in Section A of this rule. See the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq.

Briefs; Transcripts; Arguments

Under subsection [B] (B)(2)(a), the judge should determine, on a case-by-case basis, whether briefs or memoranda of law are required for a fair resolution of the post-sentence motion. If they are not needed, or if a concise summary of the relevant law and facts is sufficient, the judge should so order. Any local rules requiring briefs or oral argument are inconsistent with this rule. See Rule 6(b)(1). Under subsection [B] (B)(2)(c), the judge, in consultation with defense counsel and the attorney for the Commonwealth, should determine what, if any, portions of the notes of testimony must be transcribed so that the post-sentence motion can be resolved. The judge should then set clear deadlines for the court reporter to insure timely disposition of the motion. Nothing in this rule precludes the judge from ordering the transcript or portions of it immediately after the conclusion of the trial or the entry of a plea.

Subsection [B] (B)(1)(b) permits the trial judge to entertain a supplemental post-sentence motion at his or her discretion, as long as the decision on the supplemental issue(s) is made within the time limits of subsection [B] (B)(3).

For the recording and transcribing of court proceedings generally, see Rule 9030. The requirements for the record and the writing of an opinion on appeal are set forth in the Pennsylvania Rules of Appellate Procedure.

There is no requirement that oral argument be heard on every post-sentence motion. When argument is to be heard, however, the judge should determine whether the post-sentence motion argument must be argued before the

judge alone, or before a panel sitting en banc. It is recommended that, except in extraordinary circumstances, the post-sentence motion be heard by the judge alone. The judge may make any rulings that could be made by a court en banc. *Commonwealth v. Norris*, 389 A.2d 668 (Pa. Super. 1978). On the powers of courts en banc, see *Commonwealth v. Bonser*, 258 A.2d 675 (Pa. Super. 1969). For cases in which there has been a change of venue, see Rule 312.

When oral argument is heard on the post-sentence motion, the defendant need not be present.

Disposition

Under subsection [B] (B)(3), once the defendant makes a timely written post-sentence motion, the judge retains jurisdiction for the duration of the disposition period. The judge may not vacate the order imposing sentence pending decision on the post-sentence motion. This is so whether or not the Commonwealth files a motion to modify sentence. See Rule 1411.

Subsection [B] (B)(3)(b) permits one 30-day extension of the 120-day time limit, for good cause shown, upon motion of the defendant. In most cases, an extension would be requested and granted when new counsel has entered the case. Only the defendant or counsel may request such an extension. The judge may not, sua sponte, extend the time for decision: a congested court calendar or other judicial delay does not constitute "good cause" under this rule.

The possibility of an extension is not intended to suggest that 120 days are required for decision in most cases. The time limits for disposition of the post-sentence motion are the outer limits. Easily resolvable issues, such as a modification of sentence or a guilty plea challenge, should ordinarily be decided in a much shorter period of time.

If the trial judge decides the motion within the time limits of this rule, the judge may reconsider that decision, but the judge may not vacate the sentence pending reconsideration. Rule 1410 [B] (B)(3). The reconsideration period may not be used to extend the timing requirements set forth in section [B] (B)(3) for decision on the post-sentence motion: the time limits imposed by subsections [B] (B)(3)(a) and [B] (B)(3)(b) continue to run from the date the post-sentence motion was originally filed. The trial judge's reconsideration must therefore be resolved within the 120-day decision period of subsection [B] (B)(3)(a) or the 30-day extension period of subsection [B] (B)(3)(b), whichever applies. If a decision on the reconsideration is not reached within the appropriate period, the post-sentence motion, including any issues raised for reconsideration, will be denied pursuant to subsection [B] (B)(3)(c).

Under subsection [B] (B)(3)(a), on the date when the court disposes of the motion, or the date when the motion is denied by operation of law, the judgment becomes final for the purposes of appeal. See Judicial Code, 42 Pa.C.S. §§ 102, 722, 742, 5105(a) and *Commonwealth v. Bolden*, 373 A.2d 90 (Pa. 1977).

An order entered by the clerk of courts under subsection [B] (B)(3)(c) constitutes a ministerial order and, as such, is not subject to reconsideration or modification pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701.

If the motion is denied by operation of law, subsection [B] (B)(3)(c) requires that the clerk of courts enter an

order denying the motion on behalf of the court and immediately notify the attorney for the Commonwealth, the defendant(s) and defense counsel that the motion has been denied. This notice is intended to protect the defendant's right to appeal. The clerk of courts must also comply with the notice and docketing requirements of Rule 9024.

The disposition of a motion to modify a sentence imposed after a revocation hearing is governed by Rule 1409 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition).

Contents of Order

Subsection [**B**] (**B**)(4) protects the defendant's right to appeal by requiring that the judge's order denying the motion, or the clerk of courts' order denying the motion by operation of law, contain written notice of the defendant's appeal rights. This requirement insures adequate notice to the defendant, which is important given the potential time lapse between the notice provided at sentencing and the resolution of the post-sentence motion. See Rule 1405.C(3).

Miscellaneous

When the defendant is represented by new counsel on the post-sentence motion, the defendant must raise any claim that prior counsel was ineffective, and the court must consider and decide the claim. Furthermore, unless the existing record is adequate for a determination of the claim, the judge must hold an evidentiary hearing. See *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977); *Commonwealth v. Dancer*, 331 A.2d 435 (Pa. 1975). For procedures governing the appearance and withdrawal of counsel, see Rule 302.

Under subsection [**B**] (**B**)(1)(a), the grounds for the post-sentence motion should be stated with particularity. Motions alleging insufficient evidence, for example, must specify in what way the evidence was insufficient, and motions alleging that the verdict was against the weight of the evidence must specify why the verdict was against the weight of the evidence.

Because the post-sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial. See subsection [**B**] (**B**)(1)(c).

Under subsection [**B**] (**B**)(1)(a)(ii), a challenge to the sufficiency of the evidence would be made in a motion for judgment of acquittal. See Rule 1124.

A post-sentence challenge to a guilty plea under this rule is distinct from a motion to withdraw a guilty plea prior to sentence. See Rule 320. Cf. Standards Relating to Pleas of Guilty § 2.1(a)(ii), A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (Approved Draft, 1968). Properly preserved issues related to guilty pleas need not be raised again in the post-sentence motion, but the defendant may choose to do so. A key consideration for the defendant is whether the record will be adequate for appellate review. If counsel is uncertain about the record, it is recommended that the guilty plea be challenged in the post-sentence motion.

Issues properly preserved at the sentencing proceeding need not, but may be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the

issues, or the issues may be waived. See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995). See also Rule 1405.C(4). As a general rule, the motion to modify sentence under subsection [**B**] (**B**)(1)(a)(v) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) (sentencing court can, sua sponte, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under subsection [**B**] (**B**)(1)(a)(v) or Rule 1411, a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or reimposed.

Commonwealth challenges to sentences are governed by Rule 1411. If the defendant files a post-sentence motion, the time limits for decision on the defendant's motion govern the time limits for disposition of the Commonwealth motion to modify sentence, regardless of which motion is filed first. See Rule 1411(C)(1). If the defendant elects to file an appeal and the Commonwealth files a motion to modify sentence, decision on the Commonwealth's motion triggers the defendant's 30-day appeal period. See Rule 1410 [**A**] (**A**)(4).

Given that the Commonwealth has 10 days to file a motion to modify sentence under Rule 1411(B)(1), it is possible that the defendant might elect to file a notice of appeal under [**paragraph**] Rule 1410 [**A**] (**A**)(3) followed by the Commonwealth's filing a timely motion to modify sentence. When this occurs, the defendant's notice of appeal is rendered premature, because the entry of the order disposing of the Commonwealth's motion to modify sentence then becomes the triggering device for the defendant's notice of appeal. In this situation, counsel for the defendant should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction which treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.

For bail proceedings pending the outcome of the post-sentence motion, see Rules 4002 and 4009.

Although there are no post-sentence motions in summary appeals following the trial de novo pursuant to Section [**D**] (**D**), nothing in this rule is intended to preclude the trial judge from acting on a defendant's petition for reconsideration. See the Judicial Code, 42 Pa.C.S. § 5505. *See also Commonwealth v. Dougherty*, 679 A.2d 779, 784 (Pa. Super. 1996).

Committee Explanatory Reports:

Final Report explaining the provisions of the new rule published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Report explaining the December 17, 1993 amendments published with the Court's Order at 24 Pa.B. 334 (January 15, 1994).

Final Report explaining the September 13, 1995 amendments concerning bail published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the September 26, 1996 Comment revision on Rule 1409 procedures published at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the August 22, 1997 amendments to subsections [A] (A)(4) and [B] (B)(3) published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

Final Report explaining the Comment references to Rule 1124A (Challenges to the Weight of the Evidence) and to Commonwealth v. Dougherty published with the Court's Order at 27 Pa.B. 5599 (November 1, 1997).

FINAL REPORT¹

Challenges to the Weight of the Evidence; New Pa.R.Crim.P. 1124A; Correlative Revisions to the Comments to Pa.Rs.Crim.P. 1124 and 1410

On October 15, 1997, upon the recommendation of the Criminal Rules Committee, the Supreme Court of Pennsylvania adopted Pa.R.Crim.P. 1124A (Challenges to the Weight of the Evidence) and approved revisions of the Comments to Rule 1124 (Challenges to Sufficiency of Evidence) and Rule 1410 (Post-Sentence Motion; Appeal), effective January 1, 1998. New Rule 1124A provides the procedures for raising challenges to the weight of the evidence, ensuring that weight challenges are raised with the trial judge before appeal. The correlative changes include revisions to the Rule 1124 Comment, which distinguish challenges to the sufficiency and the weight of the evidence, and to the Rule 1410 Comment, which cross-reference new Rule 1124A and address weight challenges in summary cases.

Background

Correspondence with the Committee and developing case law have made it clear that the optional post-sentence motion procedures of Rule 1410 and the absence of specific procedures for handling weight of the evidence claims have generated confusion about whether a weight of the evidence claim, which has not been raised with the trial judge, may be raised for the first time on appeal under Rule 1410. See, e.g., *Commonwealth v. Widmer*, 689 A.2d 211 (Pa. 1997), rev'g 667 A.2d 215, and *Commonwealth v. Hodge*, 658 A.2d 386 (Pa. Super. 1995).

When the issue was first raised with the Committee by a common pleas judge, in late 1995 following the Superior Court's decision in *Commonwealth v. Widmer*, 667 A.2d 215 (Pa. Super. 1995), the Committee agreed that the matter needed to be addressed. Initially, the Committee felt that a Comment provision would suffice, given the long-standing and clear requirement that weight of the evidence claims must be addressed to the discretion of the trial judge. See, e.g., *Commonwealth v. Brown*, 648 A.2d 1177, 1189-1192 (Pa. 1994). However, in the face of the case law documenting ongoing confusion, we concluded that the best solution was a separate, narrow rule which, by its requirements, would ensure that these weight claims are always first raised with the trial judge.

¹ The Committee's Final Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Report.

During the course of our discussion of weight claims in a Rule 1410 context, the Superior Court decided *Commonwealth v. Dougherty*, 679 A.2d 779 (Pa. Super. 1996). In *Dougherty*, the Superior Court noted that although Rule 1410(D) prohibits post-sentence motions in summary cases, a weight claim may be raised after sentencing as a motion for reconsideration pursuant to 42 Pa.C.S. § 5505. After reviewing *Dougherty*, the Committee agreed to add a citation to the case in the Rule 1410 Comment explanation of section (D).

Description of Rule Changes

1. New Rule 1124A (Challenges to the Weight of the Evidence)

The Committee considered placement of the new rule, and agreed that it should follow Rule 1124 (Challenges to Sufficiency of Evidence) to underscore the procedural differences between the two, a distinction that is further addressed in the Comments to both rules by emphasizing that sufficiency challenges may be raised for the first time on appeal, while weight challenges must be raised with the trial judge.

The new Rule 1124A procedures are straightforward, and require that the weight of the evidence claim be raised in the first instance with the trial judge, either at any time before sentencing, by oral or written motion, or after sentencing, in a Rule 1410 post-sentence motion. See Rule 1124A(1). For weight challenges raised before sentencing, the new rule makes it clear that the motion may not be used to delay sentencing and that the judge must decide the motion before imposing sentence. See Rule 1124A(2)(a).

The rule also makes it clear that no separate avenue of appeal is created under the new procedures. The time for appeal of the judge's disposition of the motion is governed by the timing provisions of Rule 1410(A)(2) or (3). Under Rule 1410 (A)(2), if the defendant files a post-sentence motion, disposition of that motion governs the time for appeal of the weight claim. If no post-sentence motion is filed, the time for appeal is governed by Rule 1410(A)(3), i.e., the notice of appeal must be filed within 30 days of imposition of sentence.

The Rule 1124A Comment states unequivocally that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived, and includes citations to *Commonwealth v. Widmer*, 689 A.2d 211 (Pa. 1997), and *Commonwealth v. Brown*, 648 A.2d 1177, 1189-1192 (Pa. 1994). Finally, to avoid any interpretation that weight claims raised before sentencing must be raised again in a post-sentence motion, the Comment also notes that when a weight claim has been raised before sentencing, it may, but need not, be raised again in a post-sentence motion.

2. Revision of the Comment to Rule 1124 (Challenges to Sufficiency of Evidence)

As noted above, the revision to the Rule 1124 Comment states, as simply as possible, the basic difference between sufficiency and weight challenges: although sufficiency challenges may be raised for the first time on appeal, weight challenges must be raised first with the trial judge or they will be waived. Citations to *Commonwealth v. Widmer*, 689 A.2d 211 (Pa. 1997) and *Commonwealth v. Brown*, 648 A.2d 1177 (Pa. 1994) also have been included here.

3. *Revision of the Comment to Rule 1410 (Post-Sentence Procedures; Appeals)*

The additions to the Rule 1410 Comment cover two areas. First, in that part of the "Optional Post-Sentence Motion" section of the Comment which discusses sufficiency challenges, the Committee has added a cross-reference to new Rule 1124A. Second, in that part of the "Miscellaneous" section of the Comment which notes the availability in summary cases of post-sentence reconsideration pursuant to 42 Pa.C.S. § 5505, we added a citation to *Commonwealth v. Dougherty*, 679 A.2d 779 (Pa. Super. 1996)(although there are no post-sentence motions in summary cases after a trial de novo, see Rule 1410(D), a defendant may raise a challenge to the weight of the evidence after sentencing in a summary case by petitioning for reconsideration pursuant to 42 Pa.C.S. § 5505).

[Pa.B. Doc. No. 97-1734. Filed for public inspection October 31, 1997, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Suspension; Corrected

Notice is hereby given that on September 23, 1997, pursuant to Rule 214(d)(l) of the Pa.R.D.E., John William Morris from the State of New Jersey has been placed on Temporary Suspension by the Supreme Court of Pennsylvania until further Order of the Court.

ELAINE M. BIXLER

Secretary

*The Disciplinary Board of the
Supreme Court of Pennsylvania*

[Pa.B. Doc. No. 97-1735. Filed for public inspection October 31, 1997, 9:00 a.m.]