

Judges Reject 1925(b) Argument

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By Asher Hawkins
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Much of the current exasperation over Pennsylvania Rule of Appellate Procedure 1925(b) has emanated from the civil side of the bar, but a Superior Court panel's recent rejection of a prolix appeal statement stemming from a dramatic Bucks County date rape trial could drag the state's criminal practitioners into the uproar as well.

In *Commonwealth v. Lungin*, the judges expressly rejected the argument that 1925(b) statements concerning appeals in criminal cases should be treated differently than those in appeals in civil actions.

If a civil appeal may be dismissed for a 104-issue-long 1925(b) statement - as was the case in the widely read 2004 Superior Court decision in *Kanter v. Epstein* - then a criminal defendant should be sanctioned for raising 150 appellate issues over the course of a 36-page document, the judges reasoned, agreeing with the logic of Bucks County Common Pleas Judge Mitchell S. Goldberg, who presided at trial in *Lungin*.

As a result of the decision, which was filed late last week, Lower Southampton native Roman Lungin's points on appeal are considered waived. His remaining appellate option, according to the panel's holding, is to allege ineffectiveness of appellate counsel.

Bucks County Deputy District Attorney Lyndsey Koches, who represented the prosecution on appeal, said that when she researched the issue of unwieldy 1925(b) statements, "it was the civil cases that popped up."

But Koches said it shouldn't make a difference whether a 1925(b) statement involves a civil or criminal action.

"I certainly can see having 10 issues that you have to address, but you can do that in a concise statement," she said, adding later, "[The defense in this case] really would have been better off narrowing it down to a few issues, rather than just throwing in everything but the kitchen sink."

But Lungin's appellate attorney, Gary Green of Sidkoff Pincus & Green in Philadelphia, said that the panel's decision in *Lungin* seems to stand for the proposition that the more potential errors that occur at trial, the harder it will be for a criminal defendant to call attention to them on appeal.

"You have a situation where, if the lawyer in his discretion thinks that there are 180 reasons why there was error, [he must] ditch some valid grounds for reversal, because if you put all the things in, it wouldn't be concise," Green said.

"And the ones you ditch, you waive. So how many am I supposed to ditch?"

Green said he's frustrated that a trial judge's desire not to be burdened with reviewing a lengthy 1925(b) statement seems to have been afforded more significance than a criminal defendant's right to pursue an appeal.

A judge, Green said, "is paid to be overwhelmed. He has clerks. How can a judge argue that he's put out because he has more work? It's like a cab driver arguing, 'How can you make me go all the way to the airport?'"

[Charles Becker](#) of Reed Smith, who chairs the Philadelphia Bar Association's appellate courts committee, is part of a group of attorneys from across the state - almost all them hailing from civil law backgrounds - who have been trying to convince the Pennsylvania Supreme Court to both extend the filing deadline for 1925(b) statements and create a more detailed explanation within the rule's language of how long/short the statements should be.

But Becker suggested that until the rule is officially changed, attorneys must keep track of what kinds of 1925(b) statements state appellate courts might reject as overly long.

The rule, he said, "is about judicial administration."

"Yes, [Lungin is] a criminal case, and yes, there was this argument that because it's a criminal case, the appellate courts have to construe the rule liberally," Becker said. "But it's important to follow the rules."

According to Goldberg's 68-page opinion in the matter, Lungin was convicted in October 2003 of rape and related charges stemming from the sexual assault of an unconscious 17-year-old girl in the early hours of Sept. 29, 2002. Lungin was 20 years old at the time.

Although the victim ultimately denied having been assaulted, Goldberg, in upholding Lungin's conviction, relied on the testimony of several eyewitnesses.

Goldberg also was not persuaded by arguments that talk of Lungin's family's being involved in the Russian Mafia - rumors that apparently reached the jury - had tainted the trial.

Having analyzed the nature of the assault and Lungin's previous arrests and charges for burglary, assault and drug possession, Goldberg found it was proper to have deemed Lungin a sexually violent predator. Lungin was sentenced to 9.5 to 22 years in prison.

The panel's key citation was to Kanter.

The underlying fee dispute in that complex civil matter sparked a 100-plus-point appeal that was dismissed by the Superior Court as too lengthy in December 2004.

"Counsel's action in [this] case is even more egregious than that in Kanter," states the order of the Lungin panel, which included Judges Richard B. Klein, Mary Jane Bowes and Jack A. Panella. "In Kanter, each defendant filed a 15-page document, listing a total of 59 issues and incorporating 55 others, for a total of 104 issues. In this case, 150 matters were listed in a 36-page document."

The judges went on to note that Rule 1925(b) applies to all appeals, whether they stem from civil or criminal cases.

Goldberg took nearly a year to file his Rule 1925 opinion in Lungin.

According to the Bucks County court's Web docket, Lungin's 1925(b) statement was filed on Oct. 7, 2004. (Defense attorney Green notes that the Superior Court's decision in Kanter was not handed down until later that winter.)

After seven months passed without an opinion from Goldberg, Lungin filed a petition with the Superior Court to compel the judge to write the opinion, according to the Superior Court's Web docket.

In a letter to the Superior Court's Prothonotary's Office, Goldberg explained that his delay was due to the "voluminous" number of issues raised in Lungin's appeal.

"Despite our heavy case load and other important matters, we have been diligently working on the Lungin opinion and are attempting to address Mr. Lungin's voluminous" 1925(b) statement, Goldberg wrote.

In a June 17, 2005, order, the Superior Court gave Goldberg 90 days to file his opinion. Exactly 90 days later, Goldberg filed his Lungin opinion, in which he acknowledged that he should have immediately ordered defense counsel to resubmit an appropriate 1925(b) statement right after he received Lungin's original.

But Lungin should not benefit from the fact that Goldberg analyzed all the issues defense counsel raised in the 1925(b), the Superior Court judges concluded.

"It makes no difference that the trial court addressed [Lungin's appellate] issues, because the [Kanter] trial court addressed [that case's appellate] issues in an 85-page opinion," the Lungin panel's order states. "Just as in Kanter, we conclude that Lungin has failed to preserve any of his issues for appellate review."

Green said his client will ask for an en banc reconsideration of the Lungin panel's holding.

"We elect people who voluntarily beg to become judges," Green said. "Judges are not like jurors. We pay judges' salaries, and there's a long line of lawyers who want to be judges. How in the world can you equate the rights of a man sitting in prison with 'overwhelming' a trial judge?"

(Copies of the three-page opinion in Commonwealth v. Lungin, PICS No. 06-1180, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)