

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Lamar Advertising Company v.

Forward Township Zoning Hearing Board, and Forward Township, James, J.Page 1
Land Subdivision—Scope of Review

Commonwealth of Pennsylvania v. Benjamin Boswell, Jr., McDaniel, A.J.Page 1
*Impeachment Testimony—Character Witness—Specificity of Notice of Intent to Dismiss—
Amending Post Conviction Relief Act Petition*

Commonwealth of Pennsylvania v. Thomas Ralph Moore, Manning, J.Page 4
Docket Entry—Notice of Service of Order of Court

Commonwealth of Pennsylvania v. Joan Tapia, Zottola, J.Page 9
Access Device Fraud—Sufficiency of Evidence—Weight of Evidence

Commonwealth of Pennsylvania v. Charla Osborne, Zottola, J.Page 10
Simple Assault—De Minimis Conduct—Involuntary Intoxication—Mens Rea

Commonwealth of Pennsylvania v. Robert Sanetta, Durkin, J.Page 12
*Withdrawal of Guilty Plea—Abuse of Discretion in Sentencing—Cruelty to Animals—
Conspiracy—Concurrent Sentences v. Consecutive Sentences*

Commonwealth of Pennsylvania v. Derrick Jamar Lawrence, Nauhaus, J.Page 13
Sufficiency of Evidence—Aggravated Assault—Self-Defense—Possession With Intent to Deliver

PLJ

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OPINIONS

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**Lamar Advertising Company v.
Forward Township Zoning Hearing Board,
and Forward Township**

Land Subdivision—Scope of Review

Lamar's proposal to erect two billboards on one parcel of undivided land pursuant to a lease agreement does not require subdivision and land development approval since there is no plan to subdivide or create new lots.

(Carol Sikov Gross)

Robert W. Kennedy, Jr. for Lamar Advertising.
Richard J. Joyce for Zoning Hearing Board.
Bernard M. Schneider for Forward Township.

No. SA 06-000724. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., August 24, 2007—This appeal arises from the decision of the Forward Township Zoning Hearing Board ("ZHB") dealing with a portion of undivided Property ("Property") located at Route 51 and Scenery Drive in Forward Township. The Property is a vacant lot owned by Robert Rhoderick, Jr. and zoned B-1. Lamar Advertising Company ("Lamar") is a leaseholder of the Property and has proposed to erect two billboards. The Township denied Lamar's request on the grounds that the billboards violated the 50 feet front and rear yard setbacks. Lamar appealed that decision challenging the Township Zoning Ordinance as de jure exclusionary not permitting a billboard anywhere in the Township. Lamar alternatively sought all setback and dimensional variances that may be applicable. The ZHB conducted a hearing on the Appeal on April 13, 2006 and dismissed Lamar's Appeal as not ripe because they failed to seek land development and subdivision approval. Lamar's original Applications contained a drawing that depicted the billboards on two separate lots. Lamar submitted a revised drawing that showed both billboards on different portions of the same lot. However, the ZHB still concluded that because Lamar failed to apply for or receive land development and subdivision approval, the matter was not ripe for determination. It is from that decision that Lamar appeals.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

The ZHB concluded that Lamar needed subdivision and land development approval because their proposal constituted a subdivision and land development. The Township's Subdivision and Land Development Ordinance ("SLDO") and Section 10107 of the Pennsylvania Municipalities Planning Code ("MPC") define "subdivision" as:

the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development.

The ZHB determined that because there were two leases

for two billboards, this constituted a division of the lot. Lamar was denied a building permit for the billboards due to Section 202 of the Township's Subdivision and Land Development Ordinance ("SLDO"). That Section provides:

No lot in a subdivision may be sold, no permit to erect, alter, repair or occupy any building on land in any subdivision may be issued and no building may be erected in any subdivision unless and until the provisions of this Ordinance (SLDO) have been complied with.

However, the two leases executed by Lamar and Mr. Rhoderick for two billboards do not constitute a subdivision or allocation of the Property into two lots. The ZHB relies on *Upper Southampton Township v. Upper Southampton Township Zoning Hearing Board*, 885 A.2d 85 (Pa.Cmwlth. 2005). In that case, the Commonwealth Court upheld a zoning officer's decision to deny permits to erect billboards because the owner had not applied for land development approval. The Court determined that the circumstances surrounding the lease of land to erect the billboards required land development approval. *Id.* at 90. However, the instant case is distinguishable from *Southampton*. Lamar proposed to erect two billboards on a vacant parcel of undivided land pursuant to lease agreements with Mr. Rhoderick. In *Southampton*, the appellants proposed to erect ten billboards pursuant to lease agreements on six subdivided and developed lots that were already being used for commercial purposes. The Court noted that a lease that "allocates land to a use separate from the existing use" is a land development plan. *Id.* at 92. Lamar's proposal does not contain plans to subdivide or to create new lot lines on the Property.

Based upon the foregoing, the decision of the ZHB is reversed. There is nothing of record to show that subdivision and land development approval is required.

**Commonwealth of Pennsylvania v.
Benjamin Boswell, Jr.**

Impeachment Testimony—Character Witness—Specificity of Notice of Intent to Dismiss—Amending Post Conviction Relief Act Petition

1. The Defendant was convicted of indecent assault, endangering the welfare of a child and corruption of minors. The Defendant's Post Conviction Relief Act Petition was denied without a hearing.

2. Where Defendant calls witness to testify as to his "good name" in the community, the Commonwealth may cross-examine the witness on the basis that the witness is not familiar with the Defendant's reputation for sexual preferences in the community where the witness was not questioned concerning the Defendant's specific acts.

3. The Court's Notice of Intent to Dismiss complies with Pa. R.Crim.P. 907 by denying the petition as patently frivolous and without support in the record. The rule does not require further detail as to the basis of the denial of the petition.

4. The Defendant is not entitled to file a Second Amended PCRA Petition where he does not indicate what

additional issues he would raise or what additional facts he would present.

(Jeffrey A. Ramaley)

Eric A. Fischer for the Commonwealth.
Thomas Farrell for Defendant.

No. CC 200112452. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, A.J., September 12, 2007—The Defendant has appealed from this Court's Order of April 17, 2007, which dismissed his Amended Post Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to present any meritorious issues for review and, therefore, his Amended Petition was properly dismissed.

The Defendant was charged with Involuntary Deviate Sexual Intercourse (IDSI),¹ Indecent Assault,² Endangering the Welfare of a Child³ and Corruption of Minors.⁴ At the close of the evidence, the Defendant's Motion for Judgment of Acquittal was granted as to two (2) counts of IDSI. The jury then returned a verdict of not guilty as to the remaining two (2) IDSI charges and one (1) Indecent Assault charge, and guilty verdicts as to the remaining charges.

On April 2, 2002, the Defendant appeared before this Court and was sentenced to consecutive terms of imprisonment of two and one half (2 1/2) to five (5) years at each count. A direct appeal was taken and, upon finding that the sentence imposed was outside the guidelines, the Superior Court remanded the case for re-sentencing. On April 8, 2004, the Defendant was re-sentenced to the same consecutive terms of imprisonment of two and one half (2 1/2) to five (5) years at each count. On August 25, 2006, the judgment of sentence was affirmed by the Superior Court. A Petition for Allowance of Appeal was not filed.

On September 27, 2006, the Defendant filed a pro se Post Conviction Relief Act Petition. Counsel was appointed to represent the Defendant and an Amended Petition was filed. After giving the appropriate notice, this Court dismissed the Amended Petition on April 17, 2007. This appeal followed.

On appeal, the Defendant first argues that this Court erred in allowing the Assistant District Attorney to cross-examine his mother, a character witness, regarding whether she had knowledge of his reputation for sexual preferences. He has layered the issue in terms of the ineffective assistance of counsel, and it is in that context that we review the claim.

In order to establish a claim for the ineffective assistance of counsel, a defendant must plead and prove that: "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." *Commonwealth v. Colavita*, 920 A.2d 836, 840-41 (Pa.Super. 2007). Counsel will never be found ineffective for failing to raise a meritorious claim. *Commonwealth v. Jones*, 912 A.2d 268, 278 (Pa. 2006). Therefore, in order for the Defendant to be afforded any relief, he must demonstrate that there is merit to the underlying claim and that the result of his direct appeal would have been different had appellate counsel raised it in that proceeding. He has not done so.

At issue is the following exchange during the cross-examination of the Defendant's mother:

Q. (Mr. Hoffman): And do you know your son's reputation in the community?

A. (Linda Boswell): Yes. He has always had a good name in the community...

...Q. (Ms. Starr): Mrs. Boswell, excuse me, Ms. Boswell, when you say that your son enjoys a good name in the community, isn't it fair to say that, in fact, you don't know what his reputation in the community for sexual preference is?

MR. HOFFMAN: I'm going to object to that question.

THE COURT: Overruled.

Q. I don't agree with that.

A. I asked you a question. If you could just answer that for me in the best way that you know how?

A. That's what I was trying to do.

Q. Okay. You don't agree with it, but my question was in the community, isn't it fair to say you don't know your son's reputation with respect to his sexual preferences?

A. In my community?

Q. Well, not in mine, Ms. Boswell.

A. Well, in my community I believe I do know.

Q. Tell me how is it that you know, that a mother would know of her son's sexual activities in the community.

A. Because I was with my children. Mothers don't know everything, but they hear. I know the type of life that we lived. That's what I go by.

Q. That's the type of life that you live and what you hear, but in the community, isn't it fair to say people do not come up to you and say, Linda Boswell, what a good thing that your son doesn't like little boys?

Ms. Boswell, you are the defendant's mother and you love him very much, and I don't think there's a person in this courtroom that would fault you for loving your son.

A. That doesn't mean I would lie for him.

Q. That's fine, but I'm not asking you whether you're lying for him. I'm asking you whether or not in the community, isn't it fair to say that as the mother of this man, people do not come up in the community and discuss your son's sex life with you?

A. I would say that they don't discuss anybody's sex life with me. No, they don't discuss my son's sex life with me.

Q. So quite frankly, we don't know what his reputation in the community is for sexual preferences and predilections, isn't that true?

A. For sexual preferences? I have never seen my son have a problem with girls.

Q. I'm not saying what you have seen your son, but in the community, isn't it fair to say that the community has not discussed with you or you are not aware of your son's reputation in the community

for what type of sex he likes, with whom he has sex?

Ms. Boswell, you're his mom. People generally—let me put it this way: People generally do not discuss your son's sex life with you; isn't that true?

A. They usually don't have to.

Q. Because it's not a subject of discussion. What one does in one's bedroom is generally not the subject of community reputation with the defendant's mother, isn't that true?

A. Or anyone else.

Q. I think we've answered it. Thank you.

(Trial Transcript, p. 167-171).

Contrary to the Defendant's assertion, his mother was not questioned regarding specific instances of his "sexual reputation in the community," but rather whether she was *familiar* with his reputation in the community with regard to sexual preference. The distinction is fine, but key. The Defendant's mother was *not* asked about specific acts; rather, the cross-examination was directed to her familiarity with his reputation for the specific trait at issue—sexual preference. Such testimony has been specifically held to be admissible by our Superior Court: "A distinction is drawn between cases where [cross-examination] is sought to prove particular acts of misconduct and **those where the purpose of the examination is to test the accuracy of the testimony by showing either that the witness is not familiar with the reputation concerning which he has testified or that his standard of what constitutes good repute is unsound.... Evidence of the former is inadmissible. Evidence of the latter may be shown, provided the actual purpose of the cross-examination is not to show commission by the defendant of a specific crime of which he or she is not now accused, but to test only the credibility of the character witness.**" *Commonwealth v. Adams*, 626 A.2d 1231, 1233 (Pa.Super. 1993), emphasis added.

When the Defendant's mother testified that he had a "good name" in the community, she opened the door to cross-examination regarding her basis for making such a statement. As the Defendant had been accused of having sexual relations with a young child, the Commonwealth was entitled to question his mother as to whether she was aware of her son's reputation in the community for his sexual preferences, and appropriately did so. The Commonwealth did NOT question his mother regarding specific instances of his having sex with young boys, but rather only questioned her to demonstrate that she was not familiar with his reputation in that regard, despite her character testimony on his behalf.

The Defendant's argument that a character witness may be cross-examined only with regard to the Defendant's reputation for truthfulness is a mis-interpretation of the rules regarding character evidence and impeachment. By testifying, any witness puts his or her credibility at issue, and the opposing party is entitled to cross-examine that witness regarding said credibility. However, a character witness may testify as to any relevant trait of the defendant, provided he or she is familiar with the defendant's reputation for that trait in the community; a character witness' testimony is NOT limited to the Defendant's reputation for truthfulness, as the Defendant now argues. Here, the Defendant's mother testified, **on direct examination**, that he had a "good name" in the community. Not only does such testimony exceed the scope of his reputation for "truthfulness"—as he now argues such character testimony is limited to—but it fairly opens the door to cross-examination regarding the witness' basis

for such knowledge. The questions were proper and well within the scope of cross-examination.

Moreover, the Defendant disregards the fact that he was acquitted of three (3) of the most serious charges—two (2) IDSI counts and one (1) Indecent Assault count. Had the cross-examination in question been as prejudicial as the Defendant now claims, the jury surely would not have been able to return acquittals to half of the charges—and the most serious ones at that. Because the jury was clearly *not* prejudiced by the cross-examination, the Defendant cannot show how the result of the direct appeal would have been different had appellate counsel raised the claim. Certainly even if it had been raised, the appellate court would not have granted relief given the appropriateness of the cross-examination and the total lack of prejudice resulting therefrom. Given the lack of merit of the underlying evidentiary issue, as well as the Defendant's inability to establish the prejudice prong of his ineffectiveness claim, the Defendant was not entitled to post conviction relief. This claim must fail.

The Defendant also argues that this Court erred in failing to "state in the notice the reasons for dismissal" and also failing to allow him to file a second Amended Petition. This claim is meritless.

First, a careful reading of this Court's Notice of Intent to Dismiss dated April 3, 2007, shows that this Court did, in fact, state its reasons for the proposed dismissal of the Defendant's Amended Petition, namely that it "is patently frivolous and without support on the record." Because it does state the reasons for the proposed dismissal, the Order is compliant with Rule 907 of the Pennsylvania Rules of Criminal Procedure. The fact that the Defendant does not agree with the dismissal does not mean the Order was insufficient or non-compliant.

The Defendant also argues that this Court erred when it denied his Motion seeking leave to file a second amended PCRA Petition. However, he does not indicate what additional issues he would have raised in a Second Amended Petition, or what additional facts he would present in support of the character testimony issue already raised, nor does he even aver that the result would have been different had a Second Amended Petition been permitted. Simply stating this Court erred in not permitting him to file a Second Amended Petition does not establish a reversible error. Counsel was appointed to represent the Defendant on September 27, 2006, whereupon he sought two (2) extensions of time to file an Amended Petition, which was ultimately done on March 1, 2007. Counsel had ample time to review the file and prepare a thorough Amended Petition raising all issues he deemed to have merit. He is not entitled to leave to file additional pleadings simply because this Court gave notice of its intention to deny the Amended Petition. As he has not made a colorable showing of how the result would have been different had a Second Amended Petition been permitted, this claim must fail.

Accordingly, for the above reasons of fact and law, this Court's Order of April 17, 2007, must be affirmed.

BY THE COURT:
/s/McDaniel, A.J.

September 12, 2007

¹ 18 Pa.C.S.A. §3123 (4 counts)

² 18 Pa.C.S.A. §3126(a)(7) (2 counts)

³ 18 Pa.C.S.A. §4304

⁴ 18 Pa.C.S.A. §6301

Commonwealth of Pennsylvania v. Thomas Ralph Moore

Docket Entry—Notice of Service of Order of Court

Failure of docket to show that defendant had been served with order of court to file Concise Statement of Matter Complained of on Appeal required granting defendant another opportunity to file. Defendant filed Concise Statement. All claims raised were found to be without merit.

(William F. Barker)

Dick Goldberg for the Commonwealth.
Thomas Ralph Moore, *pro se*

No. CC 198806077, 198806635. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Manning, J., July 17, 2007—This matter is on remand from the Superior Court to allow the defendant to file a Concise Statement of Matters Complained of on Appeal and for this Court to prepare an opinion addressing those claims. The Superior Court concluded that because the dockets maintained in the Allegheny County Clerk of Court's Office did not indicate that the defendant had been served with this Court's November 15, 2005 Order directing that he file a Concise Statement of Matters Complained of on Appeal, the defendant should be given another opportunity to do so. The Superior Court also directed this Court to address the claims identified in the Concise Statement. The defendant has filed his Concise Statement and the Court will address in this Opinion the claims he has identified.

The defendant was found guilty of second degree murder, burglary and five counts of recklessly endangering another person at the conclusion of his jury trial on April 10, 1990. On June 28, 1990 he was sentenced to: life imprisonment on the homicide charge; not less than ten (10) or more than twenty (20) on the burglary charge; not less than one (1) or more than two (2) years on the first reckless endangerment charge and no further penalty on the other reckless endangerment charge. The sentences were ordered to run concurrently. Post-Sentence Motions were filed and denied. The defendant filed an appeal to the Superior Court, which affirmed the judgment of sentence. A Petition for Allowance of Appeal to the Supreme Court was denied in 1992.

The defendant took no action to challenge his conviction until 1996 when a *Pro Se* Post-Conviction Relief Act Petition was filed. Counsel was appointed. Court appointed counsel withdrew due to a conflict of interest prior to filing an Amended Petition. The Order granted leave to withdraw and included language appointing new counsel, but the Order failed to include the name of new counsel.

This error was not brought to the Court's attention, however, until the Office of the District Attorney notified the Court that its records indicated that a *Pro Se* PCRA Petition remained outstanding. The defendant took no steps to advise the Court that he was without counsel for the nearly four years between the incomplete appointment Order and the notification from the Commonwealth. Upon learning of the error, the Court issued an Order directing the defendant to notify the Court if he intended to proceed with his Petition or if his lack of action for more than four years indicated, that he no longer wished to pursue post-conviction relief. Upon being notified by the defendant both that he wished to proceed and that he wanted counsel appointed, the Court issued an order appointing counsel.

Newly appointed counsel filed a Motion for Leave to Withdraw based on his determination, pursuant to *Commonwealth v. Finley* and *Commonwealth v. Turner*, that none of the claims that the defendant wished to pursue had any merit. The Commonwealth filed a reply indicating that while it agreed that the claims identified in the defendant's *Pro Se* Petition were without merit, counsel's attached *Finley* letter was deficient. Counsel thereafter filed an Amended Motion seeking to withdraw. The Court reviewed the record in the matter and agreed that the claims identified by the defendant in his *Pro Se* Petition were without merit and also concluded that there were no other meritorious claims that could be raised. The Court issued a Notice of Intention to Dismiss and permitted counsel to withdraw. After receiving and considering the Defendant's written opposition to the proposed dismissal, the Petition was dismissed. The defendant thereafter filed a timely appeal. In his 1925 B statement filed after remand, the defendant identified the following claims:

1. That he was denied due process of law because of the delay between the initial filing of his *Pro Se* PCRA Petition and its dismissal;
2. That he was denied his right to retain private counsel both in connection with the trial and in his appeal and PCRA proceedings;
3. That the prosecutor engaged in misconduct by suborning perjured testimony from one of the victim/witnesses, Theresa Allen;
4. That the Trial Court erred in refusing to give an alibi instruction to the jury and in giving the jury a charge on accomplice liability;
5. That counsel for the defendant knowingly refused to provide effective assistance of counsel to the defendant because of his collusion with the prosecutor and the police in the following particulars:
 - a. Failed to present John Duncan as an alibi witness;
 - b. Failing to object to irrelevant evidence from the defendant's former employer indicating that the defendant was fired from that employment;
 - c. Failing to object to testimony from representatives of the Port Authority of Allegheny County as to the distribution of baseball caps to its employees when that evidence was not relevant;
 - d. Failing to object to testimony from the Chief of Police of the Port Authority Police Department concerning the distribution of the baseball caps as that testimony was hearsay;
 - e. Failing to object to testimony from the defendant's wife on the basis of the spousal privilege;
 - f. Failing to demand exculpatory evidence; and
 - g. Failing to attach the unlawful and criminal acts of the prosecution.
6. That the prosecutor engaged in prosecutorial misconduct in the following particulars:
 - a. Presenting contrived and fabricated evidence concerning eyeglasses discovered at the scene of the shooting;

b. Presenting into evidence a yellow glove knowing that it was not relevant;

c. Failed to provide mandatory discovery in the form of statements from the victim's family that they did not believe that the defendant killed the victim and statements from other witnesses disputing that documents found in a briefcase in the house where the incident occurred belonged to the defendant;

d. Failed to disclose material evidence favorable to the defendant which was in the briefcase found at the scene of the shooting; and

e. In presenting testimony from a witness named Smithson regarding a briefcase.

7. The defendant was deprived of a fair trial by the Trial Court in the following particulars:

a. By permitting the prosecutor use knowing false testimony from a police detective regarding statement by defendant's daughter that defendant kept gun in closet;

b. By allowing prosecutor to present evidence from the PAT Police Chief regarding baseball caps without proper authentication; and

c. By failing to give an alibi instruction and giving improper instructions regarding accomplice liability and specific intent to kill.

Before turning to the multitude of claims raised by this defendant, a review of the evidence presented at trial is necessary. In its initial opinion, this Court summarized the facts as follows:

The facts adduced at trial may be briefly summarized in the following manner: On the afternoon of May 13, 1988 at approximately 2:30 p.m., Theresa Allen and her family were at home, a split level residence located at 975 Garden City Drive, Monroeville, Pennsylvania. Ms. Allen was spending a relatively quiet afternoon in company of her family which consisted of her brother, LaVaughn Johnson, her offspring Andre Allen, Marcus Allen, Nicole Anderson and Dion Anderson, Theresa was in her bedroom with her son Andre, age 6, watching television and talking on the telephone when a man came into the room and attacked her. This individual, Douglas Baskin, informed Ms. Allen that "this is a stickup" and that he wanted all of her money and jewelry. (Trial Transcript at 47). Young Andre alighted from his mother's room in order to enlist the aid of his uncle, LaVaughn Johnson, who was asleep elsewhere in the house. LaVaughn Johnson stated that he was aroused by Andre who told him that "someone was beating on Mother." (Trial Transcript at 138). LaVaughn tried to rouse himself from his resting place only to find that someone had taped his ankles together with duct tape while he was slumbering. (Trial Transcript at 137). LaVaughn, after freeing himself from his sticky fetters, ran up the stairs to his sister's bedroom. En route he encountered two men. LaVaughn tried to grab one of the men. As he did so, the other man shot LaVaughn in the shoulder blade. (Trial Transcript at 140-44).

Nicole Anderson, Theresa Allen's daughter, was in her own bedroom watching television when "a

man camp up...and held a gun up to me..." (Trial Transcript at 110). Nicole Anderson also testified that another man was lurking near a linen closet but that she could not see his face. (*Id.*). Also present in the room were Marcus Allen, Nicole's younger brother, and her infant son Dion Anderson. The intruder, whom Nicole identified as the defendant, ordered her to lie facedown and then relieved her of her jewelry. While in this position Nicole heard the sound of gunshots. At this point, Nicole got up from the floor, telephoned the police and fled from the house with her child in her arms.

Theresa Allen stated while she was in the bedroom with Baskin, she heard someone coming up the stairs and then heard gunshots (Trial Transcript at 49). Then, according to Theresa Allen, a well-dressed black man entered her bedroom, and then shot at Baskin 2 or 3 times. (Trial Transcript at 50). The assailant then fled the scene. Theresa Allen subsequently identified the assailant as being the defendant. (Trial Transcript at 51). One of the bullets fired by the defendant pierced Baskin's thorax and then "penetrated the liver and abdominal aorta." (Trial Transcript at 325). These wounds resulted in the death of Baskin.

The claim that he was denied due process because of the delay between his filing of the *Pro Se* Petition and this Court's final dismissal of it is not cognizable under the Post Conviction Relief Act ("PCRA"). A defendant seeking relief under the PCRA on grounds of constitutional error must establish that the error "...so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §9543(a)(2)(i). A delay in disposing of a collateral attack on a judgment could not have had any impact upon the truth determining process. *Commonwealth v. Granberry*, 644 A.2d. 204, 209 (Pa.Super. 1994).

Next, the defendant complains that the Court denied him the opportunity to retain private counsel to represent him at trial and in connection with the PCRA proceedings. This Court did nothing to prevent the defendant from proceeding with private counsel at any stage of these proceedings. If the defendant wanted to retain private counsel to represent him, he was free to do so at any time. He remains free to do so. As the record completely contradicts the claim that he was denied the right to hire counsel of his choosing, this claim was properly dismissed.

The Court will now turn to the trial claims. Defendant first complains that the prosecution knowingly presented false testimony from Theresa Allen. He claims that her testimony that she was awake, and speaking on the telephone when she was accosted in her bedroom was inconsistent with what she originally told the police. He claims that she told the first detectives who interviewed her that she was asleep in her bed when she was awakened by the assault. This insignificant inconsistency, contends the defendant, proves that all of her testimony was false and that the Commonwealth intentionally presented false testimony. He also claims that the police report that contains the supposedly inconstant statement was not provided in discovery.

This claim is frivolous because it is without a shred of support in the record of the trial of this matter or in the materials the defendant has submitted following his trial and in support of his request for post-conviction relief and because the witness denied that she told anyone that she was asleep when the defendant assaulted her. Even if there

is a police report that states that she did tell someone that she was asleep rather than awake, and on the phone, this contradiction is immaterial. It certainly does not establish, as the defendant contends, that her testimony was false. This claim is without merit because it is belied by the record. Moreover, even if the defendant could establish that she made the inconsistent prior statement, the defendant was not prejudiced because of the insignificance of the inconsistency.

With regard to the claim that he was not provided with discovery on this issue prior to trial, the record of the trial makes it clear that defense counsel was aware of this minor discrepancy. This witness was asked on cross-examination by defense counsel, "Do you remember telling any of the police officers that you were awakened by two men in your bedroom and one man shot the other one?" (N.T. p. 63). She responded that she did not tell any police officers that she was asleep. Later, defense counsel asked her if she told Detectives Lee Torbin or Herb Foote, the first detectives to interview her, that she was asleep when the assault began. Again, she said that she did not. (N.T. 71). Counsel was also able to present evidence impeaching this testimony through his examination of Harold Katofsky, Chief of the Monroeville Volunteer Fire Department, regarding a statement Ms. Allen made to him. According to Chief Katofsky, Ms. Allen told him that she was asleep in her bed when the two assailants woke her. (N.T. 358). Clearly, defense counsel was aware of this prior inconsistency; presented evidence of the existence of the prior inconsistent statement and did his best to use it to impeach her credibility. The suggestion, however, that this insignificant inconsistency somehow established that she testified falsely at trial, is absurd.¹

Next, the defendant claims that the Court erred in refusing to give the jury an alibi instruction and erred in charging the jury on accomplice liability. The defendant raises these same claims in paragraph 7 (c) of his 1925 B statement, along with a claim that the court erred in its instructions regarding specific intent. As these claims are all relate to the instructions provided to the jury, they will be addressed together.

The claim that the Court did not provide an alibi instruction is proven false by the record. The standard alibi instruction can be found at page 472 of the trial transcript. Defense counsel pointed out, at the conclusion of the instructions but before the jury was sent out to deliberate, that the Court failed to give this charge. The Court immediately advised the jury that it neglected to provide a portion of the instructions and then charged the jury on alibi, using the standard charge provided for in the Pennsylvania Standard Jury Instructions. Because the record establishes that this instruction was given, this claim was properly dismissed.

The claims regarding the accomplice liability instructions and the instruction as to specific intent to kill were dismissed both because they were previously litigated and because the underlying claims are without merit. These claims were raised by counsel in defendant's post-sentence motion as well as in his direct appeal. Each Court that addressed them found them to be without merit. Accordingly, as they were previously litigated, they cannot be raised in this proceeding. 42 Pa.C.S.A. §9544.

Regardless of their having been previously litigated, they are baseless claims. Because the defendant was found not guilty of first degree murder, he could not possibly have been prejudiced by any problem with the instruction on the specific intent to kill element of that offense.² The charge on accomplice liability was also taken from the Standard

Instructions and was entirely proper. It was given in response to a specific question from the jury regarding accomplice liability. It was also given; the Court would point out, with the agreement of defense counsel. As the instruction was properly given and warranted by the evidence presented, this claim was properly denied without hearing.³ The Court would note, parenthetically, that the charge on specific intent was the standard charge and was properly provided.

The next seven claims all allege that counsel was ineffective. Claims asserting ineffectiveness of counsel must satisfy three requirements. The defendant must "plead and prove": "(1) that his claim has arguable merit; (2) that counsel's actions or inaction was not the product of a reasonable strategic decision; and, (3) that he suffered prejudice because of counsel's action or inaction." *Commonwealth v. Pursell*, 724 A.2d 293, 304 (Pa. 1999). To establish that a defendant suffered "prejudice" in this context, it must be alleged and proven that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). This standard of prejudice is different from the harmless error analysis typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by the Pennsylvania Supreme Court in *Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978), states that "[w]henver there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." *Id.* at 164. (citations omitted). This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the *Pierce* prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's sixth amendment right to counsel. *Pierce, supra*.

Applying these standards, it is clear that the ineffectiveness claims are all without merit. The defendant first claims that counsel was ineffective for failing to call a John Duncan as an alibi witness. To establish ineffectiveness for failure to call an alibi witness, the defendant must establish that: (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or counsel should otherwise have known him; (4) the witness was prepared to cooperate and testify at trial; and (5) the absence of the testimony prejudiced the defendant so as to deny him a fair trial. *Commonwealth v. Todd*, 820 A.2d 707, 712 (Pa.Super. 2003).

This claim was dismissed because the defendant, although arguably establishing the first four elements, failed to establish that but for the absence of this witness, the outcome of the trial would have been different. This witness's testimony would have been merely cumulative of the testimony of the defendant's other alibi witness, Irvine Taylor, who placed the defendant near the corner of Lincoln and Frankstown Avenues in the East Liberty section of Pittsburgh around 3:00 p.m.; the approximate time that the offense occurred in Monroeville, approximately twenty (20) minutes away.

The defendant could not have been prejudiced by the absence of this cumulative testimony. This is particularly

true given the overwhelming circumstantial evidence presented in this matter that placed the defendant at the scene of this crime. The defendant was positively identified by two victims as the person who entered this residence, armed with a gun demanding jewelry and other valuables. A briefcase that several witnesses identified as belonging to the defendant, both from its general appearance as well as because it bore a distinctive sticker, was found at the scene. The briefcase contained documents related to a political campaign which bore the signature of persons who were willing to volunteer for that campaign. Two of the people who signed the documents, Christine Barbee and Sandra Roberts, identified their signatures and testified that the defendant obtained their signatures on those documents (N.T. pp. 220 & 226). The briefcase also contained a photo identification card for the defendant. (N.T. p. 206). Fingerprints lifted from three separate documents found in that briefcase matched the defendant's known prints. (N.T. p. 333).

In addition, at the approximate time of the incident, a witness who lived near the Allen residence saw a man walking in the direction of the Allen home carrying a briefcase bearing an AAA sticker. The man was dressed in a suit and wearing a baseball cap. He was walking with another man who also wore a baseball cap. (N.T. p. 165). Another witness from the neighborhood also saw a man walking towards and entering the Allen residence around 2:30 p.m. on May 13, 1990. He was wearing a suit and a blue baseball cap; carrying a briefcase and was accompanied by another man. He said that they entered the residence without knocking. (N.T. p. 175). A third neighbor saw a man wearing a brown suit run from the direction of the Allen residence and enter a car. He was wearing a baseball cap. (N.T. p. 170). She did not report seeing him carrying anything. Although these witnesses could not identify the defendant as the man they saw that afternoon, their description of his appearance and what he was wearing was consistent with the descriptions provided by the victim who later identified the defendant from a photographic array and in court. Moreover, their observations of him going to the Allen residence accompanied by another man carrying a briefcase and wearing a blue baseball cap and then running from that area, alone and without the cap or briefcase is compelling circumstantial evidence that he was present at the Allen residence and then left, leaving behind the PAT hat and the briefcase.

When this circumstantial evidence is combined with the eyewitness identification by Theresa Allen and Nicole Anderson, it becomes clear that the evidence of the defendant's guilt was overwhelming. The cumulative alibi evidence that the defendant contends should have been presented could not have overcome this evidence and, accordingly, the defendant was not prejudiced by counsel's alleged failure to call Duncan.

Next, the defendant complains that counsel failed to object to testimony from his former employer that the defendant had been fired from his employment. While the reasons for the defendant's termination were likely not relevant, the defendant could not possibly have been prejudiced by this brief reference to the manner of his termination. The witness provided no details of the reasons for the termination. An objection by counsel would likely have just called the jury's attention to this fact. Because the defendant suffered no prejudice, this claim was properly found to be without merit.

The next claim that counsel was ineffective for not objecting to the evidence concerning the Port Authority Transit (PAT) baseball cap. This claim is without merit

because this evidence was relevant and any objection to its introduction would have been overruled. The evidence collected at the scene included a blue baseball cap with a PAT logo. The testimony of the defendant's girlfriend, Jeanette Adams, established that she brought an identical cap to the home that she shared with the defendant a day or two before the incident and that she could not find this same cap several days after the incident when the police asked her to look through her home for it. The presence of this cap at the scene and its absence from the home that the defendant shared with his girlfriend several days later is circumstantial evidence that linked the defendant to the offenses charged. Moreover, two witnesses saw a man wearing a blue baseball cap in the vicinity of the crime scene at the time of the incident. The fact that the cap was one of a large number of caps distributed by PAT affected its weight, but did not render it inadmissible.⁴ It was clearly relevant that the defendant had access to a baseball cap identical to one found at the crime scene. Because any objection to the admission of the baseball cap would have been properly overruled, counsel was not ineffective for not making an objection.

The claim that counsel was ineffective for failing to object to the testimony from PAT Police Chief Ehland as to the number of caps distributed is equally frivolous. First of all, prior to Chief Ehland's testimony, it had already been established, through the testimony of Jeanette Adams, that she received a cap identical to the one found at the scene from her employer, PAT, days before the incident. That testimony was clearly admissible. Chief Ehland's testimony may have included hearsay in that he stated that he had asked the marketing division if such hats were distributed, but there was no point in counsel objecting to that testimony as that fact was already established through the girlfriend's testimony. More importantly, Chief Ehland's testimony was actually helpful to the defendant in that the jury learned that more than 38,000 of the caps had been distributed to PAT employees, not the several hundred testified to by the defendant's girlfriend. Had counsel objected to the Chief's testimony on the basis that it was hearsay, it is not likely that the jury would have learned of the large number of caps distributed. It was in the defendant's best interest that the jury know that the cap found at the scene was one of 38,000 distributed rather than one of only several hundred and counsel could not have been ineffective for taking action that actually benefited the defendant.

The defendant's next ineffective claim is that counsel failed to object to testimony from Jeanette Adams on the basis of spousal privilege. The record is clear, however, that the defendant and Ms. Adams were not married. Ms. Adams said that she lived with the defendant; she did not describe him as her husband. (N.T. 230). Her daughter, Natalie Adams, described the defendant as "her mother's boyfriend." (N.T. 244). Counsel was not ineffective for failing to object on the basis of the spousal privilege when the witness and the defendant were not, in fact, married. Even if the defendant were to contend that there was a common law marriage, the spousal privilege could not have been used to bar Jeanette Adams from testifying. 42 Pa.C.S.A. §5913, which bars spouses from testifying against one another, does not apply where the charge is murder. 42 Pa.C.S.A. 5913 (4). 42 Pa.C.S.A. §5914, which bars testimony concerning confidential communications between spouses regardless of the offense charged, does not apply to conduct observed by the spouse. *Commonwealth v. McBurrows*, 779 A.2d. 509 (Pa.Super. 2001). Jeanette Adams did not testify as to confidential communications between her and the defendant. She simply related her observations of the defendant's

conduct; his possession of a briefcase identical to the one found at the scene; his access to a PAT baseball cap identical to the one found at the scene and that, on occasion, he wore eyeglasses. (N.T. pp. 229-234). This witness was not asked a single question regarding any discussions she may have had with the defendant.

The defendant next makes a blanket allegation that counsel was ineffective for not obtaining discovery from the Commonwealth that would have contained exculpatory evidence from a number of persons. The defendant has not apprised the Court of the nature of the supposed exculpatory evidence in connection with any of the pleadings he filed in this matter. This Court already addressed the defendant's claim that the Commonwealth suborned perjury when it had Ms. Allen testify that she was awake and on the phone when the defendant attacked her rather than asleep. Not only was she confronted with this minor inconsistency, defense counsel presented evidence establishing that on at least one occasion she did state that she was asleep. Accordingly, it is clear that defense counsel was in possession of the reports that contained the evidence of Ms. Allen's prior inconsistent statement. With regard to the other witnesses, without knowing the substance of the statements that the defendant contends were exculpatory, it is impossible to address these claims.

The final ineffectiveness claim is a boilerplate allegation that his right to a fair trial was violated by the "unlawful and criminal acts of the prosecution." The record of the trial proceedings establish otherwise. The defendant's rights were protected by this Court and by his able counsel throughout the trial. He has not supported any of his claims of improper conduct by the prosecutor with anything other than his unsubstantiated claims that certain witnesses lied and that items of evidence were "contrived." The record reflects, to the contrary, that every piece of evidence admitted into the record was properly authenticated and probative of matters material to his guilt or innocence.

The defendant next raises five claims of prosecutorial misconduct. All are frivolous as a matter of law. First, he claims that the prosecutor presented evidence concerning bi-focal glasses found at the scene when she knew that the defendant never wore such glasses. Actually, the prosecution's evidence established that glasses were found at the scene; that the prescription for these glasses matched the prescription given to the defendant following an eye exam he underwent on March 18, 1988, six weeks before this incident; that one of the prescriptions was for reading glasses to be worn over his contacts and the glasses found at the scene were the same; and that the defendant called the eye doctor who performed the March exam on June 6, less than one month after the incident, and requested another copy of his prescription. (N.T. pp. 314-318). These glasses, and the testimony from the defendant's doctor, established a circumstantial connection between the glasses found at the Allen home and the defendant. It was but another item of circumstantial evidence linking the defendant to the incident at the Allen home. It was material, competent and admissible.

The claim regarding the glove found at the scene is similarly without merit. The glove found at the scene was similar to a glove found during the search of the defendant's apartment. When defense counsel objected, the Court overruled the objection, commenting: "I believe the issue is one of weight for the jury to determine, rather than admissibility." (N.T. p. 281). The evidence was clearly admissible.

The defendant again raises a claim that exculpatory evidence was not provided and refers once again to the testimony of Theresa Allen, among others. The Court need not

explain, for a third time, why the defendant's complaints regarding Ms. Allen are frivolous. As to the other persons who allegedly gave statements to the police that were favorable to the defendant, the Court would point out that simply because the statements were favorable to him, does not mean that testimony consistent with those statements would be admissible. The defendant claims that many members of Mr. Baskin's family, the accomplice who was shot and killed by the defendant during the robbery, told the police that they did not believe that the defendant killed Mr. Baskin. Their belief in the defendant's innocence would have been completely irrelevant. They would not have been permitted to testify as to that belief. As for Dr. Bell, the defendant has not shared with the Court what Dr. Bell said to the police that could possibly have been helpful to the defendant. The defendant suggests that Dr. Bell and others told the police that the documents found in the brief case were not the defendant's. He does not share how they would know that. Moreover, that does not explain how the defendant's fingerprints came to be on three of the documents found in that briefcase. Moreover, two witnesses already testified that they signed the documents found in the briefcase at the request of the defendant. They identified their signatures and were certain that they signed at the defendant's request. As the record of this trial completely contradicts the defendant's claim that there was exculpatory evidence contained in discovery that was not provided to him or his attorney, these claims were properly dismissed.

The defendant next complains that the prosecutor concealed evidence favorable to him that was found in the briefcase. He does not bother to share with the Court what evidence was concealed. Accordingly, this claim was properly denied.

The final prosecutorial misconduct claim is that the Commonwealth presented testimony from a witness named Smithson regarding the briefcase and that this witness failed to establish that the briefcase discovered at the scene or the incident was the same as the one she gave to the defendant. The transcript of the trial reveals that no one by that name testified. A witness by the name of Marianne Robinson was called, however, by the defendant. She testified that she gave a briefcase to the defendant sometime in 1987. She confirmed that he carried it with him through the spring of 1988. (N.T. 396-399). She said that the last time that she saw the defendant, he was not carrying it. She did not say when she last saw him. At no point was Ms. Robinson asked, by either attorney, to identify the briefcase found at the scene as the one that she gave the defendant. The defendant seems to be complaining that the Commonwealth presented the briefcase into evidence without any proof that it was the one that the defendant possessed. The record reveals otherwise.

The Commonwealth's evidence that the briefcase found at the scene belonged to the defendant was overwhelming. While it may have been one of many identical such briefcases sold in this area, it was the only one that contained defendant's photo ID and three documents that bore his fingerprints. It was also rendered unique by the triple AAA sticker affixed to the outside. Witnesses saw the defendant carrying a briefcase with such a sticker on it in the days and weeks prior to this incident. After the incident, the briefcase could not be found in his home. In fact, Rose Brown testified that prior to the day that Mr. Baskin was shot, every time that she saw the defendant at her place of employment, the Kingsley house, he was carrying a briefcase. She identified the one found at the Allen residence as the one she saw him carrying. (N.T. p. 269). She also said that the defendant came to

the Kingsley house on the day that Mr. Baskin was shot, but that he did not have the briefcase. He told her that he lost it. (N.T. p. 272). Given the substantial evidence establishing that the briefcase found at the scene belonged to the defendant, any claim that the Commonwealth somehow engaged in misconduct in connection with the presentation of evidence concerning the briefcase is wholly without merit.

In paragraph 7 the defendant identifies three further claims which, he contends, deprived him of a fair and impartial trial. All lack merit. The claim that the prosecutor used a "false statement" from an Allegheny County Detective regarding a statement made by Natalie Adams (falsely described by the defendant as "his daughter" in his 1925 B statement) is frivolous because there is nothing in the record or in the defendant's materials that establishes that the detective testified falsely. More importantly, the Court ordered the detective's testimony about which the defendant complains stricken. Detective Payne testified that Ms. Adams told her that she had seen a handgun in the defendant's possession. He was permitted to offer this testimony, even though Ms. Adams denied having said this, on the basis that the Commonwealth was surprised by Ms. Adams testimony and should therefore be permitted to impeach its own witness. When it became clear that Detective Payne could not provide a time frame for when Ms. Adams saw this weapon in the defendant's possessions the Court sustained the defendant's objection on relevancy grounds and instructed the jury to disregard. (N.T. pp. 255-262). Because the defendant's objection was sustained and the jury instructed to disregard the testimony about which the defendant complains, this claim is without merit. It should be noted, however, that the evidence was stricken not because it was false but because the Court deemed it not relevant when it became clear that the Detective did not know when Ms. Adams saw the weapon.

The last two claims in this paragraph complain about the admission of the PAT ball cap and the jury instructions. Both of these claims were addressed earlier in this opinion. As all of the defendant's claims lack merit, the Petition was properly dismissed.

The Clerk of Court is directed to serve a copy of this opinion on the defendant by regular mail and upon the Office of the District Attorney by interoffice mail.

BY THE COURT:
/s/Manning, J.

¹ Moreover, the defendant presented testimony in his case that corroborated her claim that Ms. Allen was awake and talking on the telephone when the intruders entered her room. Her seven year old son, Andre, was called as a witness by the defendant and testified that he was with his mother in her room when the men entered. When asked by defense counsel what his mother was doing, Andre responded, "She was sitting on the bed talking on the phone and watching TV." (N.T. 415).

² The Court would note that the instruction on this element of First Degree Murder was entirely proper and consistent with the Standard Instructions.

³ The Court's instructions on accomplice liability are found at pages 479 through 488 of the trial transcript.

⁴ The actual number of caps distributed was not clear. The defendant's girlfriend said that "a couple hundred" caps were distributed to employees. (N.T. p. 237). PAT Chief Ehland stated that the PAT marketing department advised him that the hats were distributed to all of PAT's 38,000 employees. (N.T. 262).

Commonwealth of Pennsylvania v. Joan Tapia

Access Device Fraud—Sufficiency of Evidence—Weight of Evidence

Defendant's admission, at time of arrest, that she had accompanied a third party several times as he was using a deceased person's Access card was not insufficient to establish beyond a reasonable doubt that Defendant was guilty of Access card fraud.

(Norma Caquatto)

Nicola Henry-Taylor for the Commonwealth.
Alan Patterson for Defendant.

No. CC 200518541. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Zottola, J., October 9, 2007—On April 12, 2007, following a non-jury trial, the Defendant, Joan Tapia, was convicted of Access Device Fraud and sentenced to a probationary term of one (1) year. On April 19, 2007 timely Post-Trial Motions were filed on the Defendant's behalf and were denied on April 25, 2007. A timely appeal was taken.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal from which the following is taken verbatim:

a. The trial court erred by denying Defendant's Motion for Judgment of Acquittal pursuant to Pa.R.Crim.P. 606(A)(6) in that the evidence presented by the Commonwealth of Pennsylvania was insufficient to sustain its burden of proving Defendant guilty beyond a reasonable doubt.

b. The trial court erred by denying Defendant's Motion Challenging the Weight of the Evidence pursuant to Pa.R.Crim.P. 607(A)(3) in that the evidence presented to convict the Defendant by the Commonwealth of Pennsylvania was so contrary to the evidence as to shock one's sense of justice.

SUFFICIENCY OF THE EVIDENCE

On April 12, 2007 a non-jury trial was held before the Honorable John A. Zottola. The parties stipulated the following facts. On November 12, 2005 officers of the City of Pittsburgh Police were notified that there was a possible drug overdose at 3805 Butler Street. The officers responded. They found the victim, later determined to be Heather Duffett; medics pronounced her dead. (N.T. pp 7 to 8)¹ Homicide detectives arrived at 3805 Butler Street and spoke to the owner of the house, the Defendant, Joan Tapia. (N.T. pp 8 to 9) Eleven days later officers approached the Defendant and informed her of imminent arrest under abuse of corpse charges in connection with the death of Heather Duffett. The officers asked the Defendant if she used the victim's car, debit card, and/or access card since her death. (N.T. pp 10 to 11). Discovery revealed use of all three items during the time between discovery of the body and the Defendant's arrest. (N.T. pp 11) At the time of her arrest, the Defendant told the officers that a friend of the victim, Jonathon Lunsford, used the victim's car and card; the Defendant admitted to accompanying him during his use. (N.T. pp 11) The Defendant accompanied Mr. Lunsford on every occasion he made purchases with the victim's Access Cards. (N.T. pp 16)

The Defendant challenges the sufficiency of the evidence to support the conviction of Access Device Theft. A challenge to the sufficiency of the evidence must be reviewed in

light of the following standard: "In determining if the evidence is sufficient to sustain a criminal conviction, [the test is] whether accepting as true all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the appellant was guilty of the crime of which he stands convicted." *Commonwealth v. Burton*, 301 A.2d 599, 600 (PA. 1973).

At the time of arrest, the Defendant admitted to being present when Mr. Lunsford used the victim's Access Cards. This occurred on several occasions. (N.T. pp 15). The Commonwealth stated this fact to the court from the Defendant's arrest record; the Defendant made no objections. (N.T. pp 15 to 16). Though the Defendant did not testify as to her involvement with the victim's stolen Access Cards, and their subsequent use, it is within the discretion of the finder of fact to believe all, part, or none of the evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003). The Commonwealth can sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Lyons*, 833 A.2d at 258. Taken in the light most favorable to the Commonwealth, the evidence was clearly sufficient to support the conviction.

Therefore, the Defendant's claim alleging insufficient evidence exists for her conviction of Access Device Theft must fail.

WEIGHT OF THE EVIDENCE

The Defendant challenges that her conviction is against the weight of the evidence, and alleges her conviction is so contrary to the evidence presented by the Commonwealth as to shock one's sense of justice. A claim arguing against the weight of evidence acknowledges that sufficient evidence exists to sustain the verdict, but maintains that certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all facts denies justice. *Lyons*, 833 A.2d at 258. Granting a new trial on this claim is within the sound discretion of the trial judge, and his decision will not be reversed on appeal absent an abuse of discretion. *Commonwealth v. Whitman*, 485 A.2d 459, 461 (Pa.Super. 1984). The verdict must be so contrary to the evidence presented as to make a new trial necessary, to give the defendant another chance to prevail. *Whitman*, 485 A.2d at 461. On appeal, the scope of review is narrow. *Commonwealth v. Lyons*, 833 A.2d 245, 258.

The only evidence on the record regarding Access Device Theft is the Defendant's statement at the time of her arrest. The Defendant admitted she was present every time the victim's stolen card was used. The Defendant chose not to testify as to this matter; the Defendant merely presented an argument regarding the lack of evidence of the Defendant's actual possession of the victim's stolen Access Card. It is within the discretion of the fact finder at trial to determine credibility and to believe any of the evidence he chooses. *Lyons*, 833 A.2d at 258. The trial court properly determined the Defendant's guilt; the Defendant's conviction was not against the weight of the evidence. Therefore, the Defendant's claim must fail.

Based on the foregoing, Defendant's matters complained of on appeal must fail.

BY THE COURT:
/s/Zottola, J.

Commonwealth of Pennsylvania v. Charla Osborne

Simple Assault—De Minimis Conduct—Involuntary Intoxication—Mens Rea

1. *De minimis* defense is unavailing absent a showing of either conduct insignificant to support criminal conviction or extenuations outside consideration of authority enacting criminal statute.

2. Defendant's breaking the skin of police officer by biting her thumb and thereby causing pain does not support the *de minimis* defense under the category of insignificant conduct.

3. Biting a corrections officer falls within the legislature's intent of preventing violent behavior in enacting statute prohibiting simple assault and therefore does not show extenuations.

4. Defendant's argument that she did not possess criminal intent fails because she offered no support to her testimony that she was involuntarily intoxicated by the effects of her schizophrenia medication by other evidence such as that of a medical professional.

(Norma Caquatto)

Heather Kelly for the Commonwealth.
Alan Patterson for Defendant.

No. CC 200503803. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Zottola, J., October 9, 2007—On January 25, 2007, following a continuation of a non-jury trial on January 11, 2007, the Defendant, Charla Osbourne, was convicted of Simple Assault and sentenced to a probationary period of nine (9) months. On February 5, 2007, timely Post-Trial Motions were filed on the Defendant's behalf and were denied on February 29, 2007. A timely appeal was taken.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal from which the following is taken verbatim:

- a. *De Minimis* Conduct Required Acquittal...;
- b. Extenuating Circumstances Rendered Conduct *De Minimis*...;
- c. Involuntary Intoxication Rendered Conduct Involuntary...;
- d. Involuntary Intoxication Precluded Formation of *Mens Rea*...;
- e. Erroneous Refusal to Recognize Involuntary Intoxication Defense...; and
- f. Unconstitutional Rejection of Involuntary Intoxication Defense....

DEMINIMIS ACQUITTAL

On January 11 and January 25, 2007, a non-jury trial was held before the Honorable John A. Zottola. The Defendant was found guilty of Simple Assault. (N.T. pp 3)¹ Corrections Officer Margaret Bonenberger testified that on August 8, 2004 she came into contact with Charla Osborne, the Defendant, at the intake area as the Defendant came through processing. (N.T. pp. 14 and 19) As she attempted to take the Defendant from the intake area to housing, the Defendant refused all direction by the Officer. (N.T. pp. 15)

¹ N.T. refers to notes of the Non-Jury trial dated April 12, 2007.

The Officer called for additional assistance; the Defendant struck the Officer on her head. (N.T. pp 16 to 17). The Defendant grabbed the Officer's hand, bit her thumb, and broke the skin. Blood appeared on the surface of the wound; Officer Bonenberger sustained an injury. (N.T. pp 17) The Officer again called for additional officers to de-escalate the situation; they arrived and sprayed the Defendant with pepper spray to stop the continuing struggle. (N.T. pp 17) Personnel at the jail cleaned Officer Bonenberger's wound, then sent her to South Side Hospital for x-rays and blood tests. (N.T. pp 18 to 19) The Officer had several blood tests since the incident to ensure her a clean bill of health. (N.T. pp 19)

The Defendant challenges her criminal conviction; she alleges her conduct was *de minimis* and warrants acquittal. The Commonwealth has the burden of proving the defendant's guilt during the trial phase. To prove guilt of Simple Assault, the Commonwealth must show the defendant attempted to cause, or intentionally, knowingly, or recklessly caused bodily injury to another. The injury requires impairment of a physical condition or substantial pain. *Commonwealth v. Emler*, 903 A.2d 1273, 1276-1277 (Pa.Super. 2006). This criminal attempt occurs when the Defendant intentionally does any act constituting a substantial step toward the commission of the crime, *Emler*, 903 A.2d at 1276-1277. The intent can be inferred from surrounding circumstances. *Commonwealth v. Polston*, 616 A.2d 669, 679 (Pa.Super. 1992). It is enough for the Defendant's conduct to be menacing or frightening, placing the victim in fear of imminent serious bodily injury. *Commonwealth v. Reynolds*, 835 A.2d 720, 726 (Pa.Super. 2003).

Officer Bonenberger's testified that the Defendant intentionally bit her, and caused a wound which required treatment. The Officer stated that this put her in a great deal of pain. (N.T. pp 21)² The trial Court found the Officer's testimony credible and that the Commonwealth met its burden of proof for Simple Assault. The defense of *de minimis* conduct warrants dismissal of a criminal conviction if the defendant's conduct is too insignificant to justify conviction. *Commonwealth v. Williams*, 579 A.2d 869, 871 (Pa. 1990). The tangible injury sustained by the Officer prevents the Defendant's conduct from being too insignificant to justify her conviction.

The defense of *de minimis* conduct warrants dismissal of a criminal conviction also if the defendant's conduct is the result of extenuations outside the considerations entertained by the authority in creating the criminal statute. *Williams*, 579 A.2d at 871. In seeking to prevent the threat of imminent bodily injury under 18 Pa.C.S. §2701 (a), the Pennsylvania Legislature clearly sought to ban violent conduct such as biting a jail corrections officer. Defendant's conduct falls within the meaning of and intentions behind the statute.

Therefore, the Defendant's claims for acquittal, alleging the Defendant's conduct is *de minimis* due to its insignificant nature and surrounding extenuating circumstances, must fail.

INVOLUNTARY INTOXICATION

The parties stipulated the Defendant's medical condition; the Defendant is schizophrenic. (N.T. pp 24)³ The Defendant testified that on August 8, 2004, she was under the influence of numerous medications for her mental disorder. (N.T. pp 28) She testified that she was unable to recall her entry into jail, or any incidents occurring within. (N.T. pp 33)

The Defendant challenges her conviction and alleges

her involuntary intoxication precludes it. Pennsylvania has yet to completely define the existence and scope of the involuntary intoxication defense. The varying circumstances surrounding the acceptance of the defense in other jurisdictions make it difficult to define; the key component is a lack of culpability, *Commonwealth v. Smith*, 831 A.2d 636, 641 (Pa.Super. 2003). Jurisdictions outside of Pennsylvania accepted the defense in a situation where a defendant experienced unexpected intoxication results from a medically prescribed drug, *Smith*, 831 A.2d at 641.

As late as 1991, no appellate court in Pennsylvania upheld the viability of involuntary intoxication as a criminal defense. *Commonwealth v. Griscom*, 600 A.2d 996, 998 (Pa.Super. 1991). One Pennsylvania trial court allowed its assertion where the defendant drove a newly painted car, inhaled the fumes, and caused a breathalyzer reading of .11, over the legal state limit. *Commonwealth v. Butterfield*, 17 Pa. D. & C.3d 62, 64 (Pa.Com. Pl. 1980). However, the facts of *Butterfield* distinguish it from the case at hand.

The intoxication in *Butterfield* resulted from the effect of vaporized chemicals the defendant unwittingly consumed while operating his vehicle. His nausea and loss of consciousness were nearly instantaneous; he was unable to anticipate his state of intoxication. *Butterfield*, 17 Pa. D. & C.3d at 66-67. A voluntary taking of medication, coupled with a mistaken belief that the Defendant could withstand its effects, does not render the intoxication involuntary. *Commonwealth v. Todaro*, 446 A.2d 1305 (Pa.Super. 1982). The Defendant in this case ingested medication knowingly and without coercion; she knew she disliked its physical effects from prior experience. The involuntary intoxication defense allowed by *Butterfield* is inapplicable to the case at hand.

Assuming the defense is even available and applicable to the present case in Pennsylvania, the Defendant's claims asserting involuntary intoxication must fail. The defense places the burden of proof on the defendant, to the standard of the preponderance of the evidence. *Id.* at 641. At a minimum, the defendant must prove extreme intoxication through the presentation of an expert witness. *Id.* The defendant's own self-serving statements through testimony are not enough to establish his burden of proof. *Id.*

Because the Defendant offered no testimony beyond her own, and had no medical documentation establishing the effect of extreme intoxication on the date in question, the Defendant's claim asserting the defense of involuntary intoxication rendering her conduct involuntary must fail.

The remainder of the Defendant's claims on appeal derive from the defense of involuntary intoxication. For the aforementioned reasons, the assertions that involuntary intoxication precluded the Defendant's formation of the necessary *mens rea*, that the trial court was in error when it refused to recognize the defense, and that the Defendant's Constitutional rights are violated in this refusal all must fail.

Based on the foregoing, Defendant's matters complained of on appeal must fail.

BY THE COURT:
/s/Zottola, J.

¹ N.T. refers to notes of Non-Jury Trial dated January 25, 2007.

² N.T. refers to notes of Non-Jury Trial dated January 11, 2007.

³ N.T. refers to notes of Non-Jury Trial dated January 11, 2007.

Commonwealth of Pennsylvania v. Robert Sanetta

Withdrawal of Guilty Plea—Abuse of Discretion in Sentencing—Cruelty to Animals—Conspiracy—Concurrent Sentences v. Consecutive Sentences

1. Imposition of 12 to 24 months of incarceration for conviction of cruelty to animals is within sentencing guidelines of 9 to 20 months of incarceration for this offense.

2. Imposition of 12 to 24 months of incarceration for conviction of conspiracy is within sentencing guidelines of 9 to 20 months of incarceration for this offense.

3. Trial judge has discretion of imposing concurrent or consecutive sentences for offenses. *Commonwealth v. Hoag*, 665 A.2d 1212.

4. Guilty plea is beyond attack if it is knowing, intelligent, and voluntary. *Commonwealth v. Rush*, 909 A.2d 805. Nothing in record supports a showing that Sanetta's plea was not knowing or not intelligent or involuntary.

(Norma Caquatto)

Michael W. Streily for the Commonwealth.

Michael Moser for the Defendant.

No. CC 200704548. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Durkin, J., October 12, 2007—The Defendant faced charges of Cruelty to Animals,¹ Criminal Conspiracy,² and Disorderly Conduct.³ On August 20, 2007, the Defendant pled guilty to all of the charges filed against him. He also waived his right to a pre-sentence report. That same day, the Defendant was sentenced to an aggregate term of 2 to 4 years imprisonment at a state correctional institution.⁴ (G.P.S.T. 12, 21-22)⁵

On August 29, 2007, the Defendant filed "Post-Sentence Motions In The Form Of A Motion To Modify Sentence And Motion To Withdraw Guilty Plea." By Order of Court dated August 31, 2007, said motions were denied.

A Notice of Appeal was filed on September 18, 2007. In a Concise Statement of Matters Complained of on Appeal filed October 4, 2007, the Defendant raised the issues that the Court erred in denying the Defendant's request to withdraw his guilty plea, and the Court abused its discretion in sentencing the Defendant to an aggregate term of imprisonment of 2 to 4 years at a state correctional institution.

This case involves a family pet dog named Smoky. The Defendant admitted that he and his co-conspirator, Jason Knowles, killed Smoky. The killing was accomplished by the Defendant holding Smoky down on the ground while Knowles beat Smoky about the head with an aluminum baseball bat. The two then threw Smoky in the river. The pet's body was later recovered down stream: bloody and frozen to the riverbank. (G.P.S.T. 6-8)

The Defendant here is clearly not happy with the result of his plea. Unfortunately for the Defendant, the law does not require that he be satisfied with the outcome of his decision to admit his guilt. *Commonwealth v. Pollard*, 832 A.2d 517, 524 (Pa.Super. 2003)

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. [A] plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he

knowingly and voluntarily decided to enter the plea.

Commonwealth v. Rush, 909 A.2d 805 (Pa.Super. 2006) quoting *Commonwealth v. Fluharty*, 632 A.2d 312 (Pa.Super. 1993) In examining the record in this matter, the Defendant's plea was knowing, voluntary, intelligent, and valid. (G.P.S.T. 2-12) No basis exists in either law or fact to justify permitting the Defendant to withdraw his plea of guilty.

As to the Defendant's sentencing issues raised, sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Griffin*, 804 A.2d 1, 7 (Pa.Super. 2002) To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the Defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa.Super. 2003)

Under the Pennsylvania Sentencing Guidelines, the Defendant was subject to a standard range sentence from 9 to 20 months for the Cruelty to Animals charge, and from 9 to 20 months for the Criminal Conspiracy charge. The Defendant received 12 to 24 months for the Cruelty to Animals conviction, and a consecutive 12 to 24 months imprisonment for the Criminal Conspiracy count, both well within the standard range.

"[A] trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed." *Commonwealth v. W.H.M., Jr.*, — A.2d —, 2007 WL 2381010 (Pa.Super. 2007) quoting *Commonwealth v. Rickabaugh*, 706 A.2d 826, 847 (Pa.Super. 1997) A challenge regarding whether a sentence should be imposed consecutively or concurrently "does not present a substantial question regarding the discretionary aspects of sentence." *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa.Super. 1995) The Defendant was sentenced in the standard range of the Sentencing Guidelines. The reasons for the imposition of such a sentence were given to the Defendant at the time of sentencing. (G.P.S.T. 21-23) This Court clearly did not abuse its discretion in sentencing the Defendant in the manner that it did.⁶ Therefore, this issue is also without merit.

For all of the above reasons, the Defendant's Judgment of Sentence must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: October 12, 2007.

¹ 18 Pa.C.S. §5511(a)(1)(i), as amended

² 18 Pa.C.S. §903(a)(1), as amended

³ 18 Pa.C.S. §5503(a)(1), as amended

⁴ The sentence imposed in this case was made effective March 4, 2007, which was the date of the Defendant's arrest.

⁵ "G.P.S.T." followed by numerals refers to the page numbers of the Guilty Plea and Sentencing Transcript dated August 20, 2007.

⁶ Contrary to the Defendant's arguments, the Court did not rely on any inadmissible and inaccurate hearsay evidence in formulating the sentence in this case. The Defendant regarding the admissibility of any evidence made no objections. Nor did the Court rely on alleged inaccurate assertions made by the Commonwealth about the applicability of the deadly weapons enhancement as put forth in the Defendant's Concise Statement of Matters Complained of on Appeal. The Court did not impose its sentence based on the Dead Weapons Enhancement. (G.P.S.T. 22)

Commonwealth of Pennsylvania v. Derrick Jamar Lawrence

*Sufficiency of Evidence—Aggravated Assault—Self-Defense
—Possession With Intent to Deliver*

1. Evidence of intent to deliver, rather than mere possession, may be inferred from following circumstances: shortly before arrest defendant was observed transferring a baggie to another person in a vehicle, and shortly after arrest defendant was found to have on his person 22 separately wrapped pieces of crack cocaine, \$80 in cash (despite being unemployed), pager, and no drug paraphernalia.

2. Self-defense argument used to defend against charge of aggravated assault is unavailing where victim was unarmed and was shot in the back one block from site defendant originally saw victim despite victim's attempt, shortly prior to shooting, to enter defendant's home.

(Norma Caquatto)

Michael W. Streily for the Commonwealth.

Aaron D. Sontz for the Defendant.

No. CC 200408383 and No. CC 200407587. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Nauhaus, J., October 15, 2007—Derrick Jamar Lawrence, the defendant in the above-captioned case, filed an appeal from his conviction and sentence. The defendant was convicted at CC200408383, of Aggravated Assault, Carrying a Firearm Without a License, and Resisting Arrest, after a non-jury trial before this Court on May 30, 2006. The defendant was also convicted at CC200407587 of Possession, Possession with Intent to Deliver, and Possession of Marijuana, after a non-jury trial before this Court on May 14, 2007. This Court imposed sentence in both cases on May 14, 2007. The defendant was sentenced at CC200408383 to incarceration for 7 1/2-15 years and at CC200407587 to a concurrent sentence of 10-20 years of incarceration.

On June 12, 2007, the defendant filed an appeal to the Superior Court of Pennsylvania. On June 26, 2007, this Court ordered the defendant to file a concise statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b), within 14 days from the date of the Order, or, if the transcripts had not been received, then 14 days after the transcripts were filed. The transcript from the non-jury trial that occurred before this Court on May 30, 2006, (hereinafter referred to as "T.T."), was filed on September 5, 2007. The transcript from the non-jury trial and sentencing that occurred before this Court on May 14, 2007 (hereinafter referred to as "T.S.T.") was filed on May 24, 2007. The defendant filed his timely Rule 1925(b) Statement on September 17, 2007, raising the following issues:

a) The evidence was insufficient to convict Mr. Lawrence of Aggravated Assault. The Commonwealth failed to prove beyond a reasonable doubt that Mr. Lawrence did not act in self-defense when he shot the victim in the back. Mr. Lawrence testified at trial that he shot the victim because he was attempting to gain entry into his home, thereby putting his baby's mother in danger. The testimony of the victim was inconclusive as a result of his heavy intoxication from alcohol and crack cocaine. The victim repeatedly testified that he could not even remember if he had attempted to break into Mr. Lawrence's house or not.

b) The evidence was insufficient to prove that Mr.

Lawrence possessed the drugs with the intent to deliver them. The Commonwealth failed to prove beyond a reasonable doubt that Mr. Lawrence was the purchaser, not the seller.

The defendant claims that there was insufficient evidence to convict him of Aggravated Assault. The evidence presented during the non-jury trial of May 30, 2006, established that the defendant fired multiple shots at an unarmed victim on May 15, 2004. The victim, William Hoy, was severely injured when one of the bullets hit him in the back, requiring 13 days of hospitalization and leaving a large permanent scar. (T.T. at 9, 12, 21, 22, 42). The victim was able to identify the defendant as the shooter during the trial, although he had been severely intoxicated from crack cocaine and alcohol when he was shot. (T.T. at 11). Another bystander testified that he saw the defendant running from the scene. The defendant was apprehended shortly after the shooting when officers stopped a jitney after the defendant got into it. (T.T. at 28). The defendant attempted to flee but he was apprehended after a brief struggle. (T.T. at 30). The firearm used in the shooting was visible from outside the jitney. Officers seized the firearm, which was protruding from the pocket of the defendant's jacket as it lay on the passenger seat of the jitney. (T.T. at 31).

The defendant did not deny shooting the victim, but claims it was self-defense. The defendant testified that the victim was pounding on his window during the early morning hours of May 15, 2004. The defendant stated that he did not know the victim. He testified that the victim was reaching through his window, and he told the victim to leave and told his pregnant girlfriend to call the police. The defendant testified that he went outside his house, saw the victim and four or five black men, asked why the victim was trying to break into the house, saw something silver, and shot the victim. (T.T. at 48). The victim was shot about one block from the defendant's house. The defendant said he returned to his house after shooting the victim, then got into a jitney with the intention of going to the police station to turn himself in. (T.T. at 49).

This Court did not find the petitioner's testimony to be credible. This Court did not believe that the defendant shot the victim in self-defense. (T.S.T. 47) The credibility of witnesses and the weight to be accorded to the evidence produced were within the province of this Court, which acted as factfinder in this matter. A person is justified to use force against another when the person believes that such force is immediately necessary to protect himself from unlawful force by the other person. 18 Pa.C.S. §505(a). *Commonwealth v. Elmer*, 2006 Pa.Super. 187, 903 A.2d 1273.

In the instant case, this Court does not find it credible that the defendant believed it was necessary to use a deadly weapon to protect himself against the victim. This Court determined that the defendant's testimony, which was that he perceived himself and his pregnant girlfriend to be endangered by the victim, was not credible. Additionally, this Court does not believe that the defendant thought the victim had a firearm. This Court notes that the victim was unarmed, and was shot a distance away from the defendant's residence.

Aggravated assault is committed when a person causes serious bodily injury to another intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa.C.S. §2702(a)(1). The shooting caused the victim to be hospitalized for 13 days and to have a large permanent scar. The evidence was sufficient to adjudicate the defendant guilty of aggravated assault. *Commonwealth v. Elmer*, 903 A.2d 1273 (2006);

Commonwealth v. Payne, 868 A.2d 1257 (Pa.Super. 2005) appeal denied 583 A.2d 681, 877 A.2d 461 (2005).

The defendant's other claim is that there was insufficient evidence to support his conviction for possession with intent to deliver drugs.¹ He claims the evidence only proved possession, not delivery. The evidence presented during the non-jury trial of May 14, 2007, established that the defendant was in possession of crack cocaine with the intention to sell it on February 13, 2004. The defendant was under surveillance at approximately 3:12 p.m., on February 13, 2004, when Officer Jeffries observed him inside a Grand Am vehicle. Officer Jeffries saw an unknown white male (hereinafter referred to as the "buyer") enter the passenger side of the Grand Am and saw the defendant pull out a baggie from his right coat sleeve and pull out a piece of crack cocaine. The defendant handed the piece of crack cocaine to the buyer, who gave the defendant currency in return, and then exited the vehicle. (T.S.T. at 14). The buyer put the crack cocaine in his mouth as he exited the vehicle. The entire drug transaction lasted only a matter of seconds. The buyer was never apprehended. (T.S.T. at 15). Officer Jeffries had an unobstructed view of the drug transaction and used his naked eye and binoculars to clearly observe the defendant. (T.S.T. at 13). He was able to view the transaction through the front windshield. (T.S.T. at 18). The defendant was ordered out of the vehicle and was patted down shortly after the drug transaction. Officers seized a plastic baggie from the defendant's right sleeve, which contained 22 individually wrapped pieces of crack cocaine and a pager and \$80.00 in cash. (T.S.T. at 23). The total weight of the crack cocaine was 2.16 grams. There were no needles or crack pipes found on the defendant. (T.S.T. at 24).

The defendant testified that the crack cocaine was intended for his personal use only. (T.S.T. at 33). This Court did not find the defendant's testimony credible. A conviction for possession of a controlled substance with the intent to deliver, requires proof that the defendant possessed a controlled substance and did so with the intent to deliver it. The intention to deliver may be inferred from an examination of the facts and circumstances surrounding the case. Factors to consider include the particular method of packaging, the form of the drug, and the behavior of the defendant. *Commonwealth v. Conaway*, 791 A.2d 359 (Pa.Super. 2002).

This Court did not believe that the crack cocaine was for the defendant's personal use. The crack cocaine was packaged in 22 separate corner bags. The defendant was unemployed and did not show how he could have afforded the crack cocaine or the money found on his person. (T.S.T. at 35). Furthermore, the defendant did not have any paraphernalia on him for using the crack cocaine when he was searched. The Commonwealth proved beyond a reasonable doubt that the crack cocaine found on the defendant's person was possessed with the intention to be delivered.

Judgment of sentence should be affirmed for the reasons contained herein.

BY THE COURT:
/s/Nauhaus, J.

¹ The Statement reads "...The Commonwealth failed to prove beyond a reasonable doubt that Mr. Lawrence was the purchaser, not the seller...." However, since this Court convicted the defendant as the seller, for possession with the intent to deliver, this Court realized the defendant meant to argue that the Commonwealth failed to prove beyond a reasonable doubt that Mr. Lawrence was the seller, not the purchaser.