

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

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Each jury verdict is then assigned for review of the pleadings and preparation of a brief summary of the case and identification of the parties, counsel, and witnesses.

No attempt is made to select, choose, emphasize, highlight, or categorize the results of lawsuits tried to verdict, either by plaintiff, defendant, result, or any other category. The purpose of this project is to report all results tried by jury to verdict.

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The Pittsburgh Legal Journal provides the ACBA members with precedent-setting, "Capsule Summaries" or a brief description of opinions from the Family Division of the Court of Common Pleas of Allegheny County.

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**Leona Koppel and John Koppel v.
Bonnie Case, M.D.; Michelle Mlakar, D.O.;
Scott Celin, M.D.; Metropolitan Ear,
Nose and Throat Associates**

**William I. McNeff, Administrator
of the Estate of Madalyn McNeff v.
Medi-Help, P.C., NENAD v.
B. Janicijevic, M.D., and
CVS Pharmacy, Inc.**

Medical Malpractice—Certificate of Merit—Sanctions

After voluntary dismissal of a medical malpractice case by the plaintiff against all defendants, a defendant requested the written statement on which plaintiff's attorney filed his certificates of merit. Upon production, defendant moved for sanctions. Held:

1. The Court is not precluded from granting relief under Rule 1042.7 because the discontinuance of the case constituted a final judgment that cannot be modified after thirty days, and the imposition of sanctions on an attorney is not a modification of the judgment.

2. In order to constitute an expert on which a plaintiff's attorney can rely in signing a certificate of merit, the expert must be licensed to practice medicine in a state or the District of Columbia, must be engaged or recently retired from active practice or teaching and must practice in the same or similar subspecialty as the defendant physician.

3. In order to support an attorney's certificate of merit, the expert's report must state that there exists a possibility that the defendant's care, skill or knowledge fell outside acceptable professional standards.

4. Preservation of the integrity of the rule that a certificate of merit be supported by a statement of an appropriate licensed professional requires that significant sanctions be imposed where there is flagrant disregard of the rule's requirements.

* * * *

After a jury verdict in favor of the defendant-physician in a medical malpractice case, a judgment was entered against the plaintiff. On the date the judgment was entered, the defendant requested the written statement forming the basis for the certificate of merit. Held:

1. Entry of a praecipe for judgment does not preclude a request for the written statement.

2. The fact that the plaintiff included an expert report in his pretrial statement and presented expert testimony sufficient to proceed to a jury does not relieve the plaintiff from providing the written statement.

(Mark C. Coulson)

Deborah D. Olszewski for Plaintiffs in *Koppel v. Case et al.*
James R. Schadel for Defendants in *Koppel v. Case et al.*
Robert A. Goldman for Plaintiffs in *McNeff v. Medi-Help et al.*
Regis M. McClelland for Defendants in *McNeff v. Medi-Help et al.*

Nos. GD 04-026654 and GD 03-024486. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION
AND ORDER OF COURT**

Wettick, J., November 20, 2007—Both lawsuits raise the issue of whether a court, more than thirty days after the entry of a final judgment in a defendant's favor on a plaintiff's medical malpractice claim, may grant sanctions against an attorney pursuant to Pa. R.C.P. No. 1042.7 for improperly certifying that an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill, or knowledge experienced or exhibited in the treatment, practice, or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.

Rule 1042.7(a) provides that if a defendant against whom the plaintiff has filed a certificate of merit is dismissed from the case through voluntary dismissal, verdict, or order of court, the plaintiff, within thirty days of the written request of that defendant, shall provide him or her with the written statement obtained from the licensed professional upon which the certificate of merit as to that defendant was based. However, if a plaintiff's claims against other licensed professionals are still pending, the written statement shall be produced within thirty days of resolution of all claims against the other licensed professionals.

I. Koppel Litigation

Plaintiffs' complaint included medical malpractice actions against Dr. Celin and his professional corporation ("Metropolitan") based on Dr. Celin's alleged failure to detect plaintiff-wife's thyroid cancer. The complaint was filed on January 26, 2005, and certificates of merit signed by Peter J. Pietrandrea, counsel for plaintiffs, were filed on March 28, 2005.

On April 13, 2006, Dr. Celin and Metropolitan filed a motion for summary judgment based on a court order barring expert testimony because of plaintiffs' failure to furnish any expert reports. Unbeknownst to defendants, on April 12, 2006, Attorney Pietrandrea (counsel for plaintiffs) had filed a praecipe to discontinue as to all defendants.

On June 15, 2006, counsel for Celin/Metropolitan requested Attorney Pietrandrea to provide the written statement that supported the certificates of merit which he filed as to Dr. Celin and Metropolitan. On July 5, 2006, he provided a Case Study Report prepared by Dr. Qin Eisler. Upon review of the Report, Celin/Metropolitan filed a motion for sanctions. At oral argument on the motion, counsel for Attorney Pietrandrea raised the defense that this court may not grant relief pursuant to Rule 1042.7 because of the discontinuance. Counsel argued that the discontinuance on April 12, 2006 was a final judgment and a common pleas court may modify a final judgment only within thirty days after the entry of the final judgment.

In this litigation, Dr. Celin could not have sought sanctions pursuant to Rule 1042.7 until he was provided with the written statement upon which Attorney Pietrandrea based the certificates of merit which he filed. Under Rule 1042.7(a), Dr. Celin was not entitled to the statement until thirty days of a written request by Dr. Celin to provide this statement. Dr. Celin could not make this written request until he was dismissed through a voluntary dismissal. A voluntary dismissal is a final judgment. Thus, if I were to accept the argument of counsel for Attorney Pietrandrea, sanctions could never be imposed pursuant to Rule 1042.7 in the situation in which a plaintiff voluntarily dismisses all claims.

Furthermore, there are numerous other situations, including the following, in which a plaintiff could avoid the

imposition of sanctions pursuant to Rule 1042.7 if sanctions must be awarded within thirty days of the entry of the judgment:

Example 1—Pursuant to a motion for summary judgment filed by the only defendants in the case, a judgment is entered on August 11th dismissing the entire case as to each physician defendant. This judgment is a final judgment as of August 11th and the defendant could not have made the thirty-day request to the plaintiff's attorney prior to the entry of the judgment on August 11th. Example 2—A verdict is entered in favor of the defendants. The plaintiff files a motion for post-trial relief. Since a claim is not resolved while a motion for post-trial relief is pending, the request to provide the statement cannot be made until the entry of a court order denying the motion for post-trial relief.¹ As soon as the court denies the motion, the plaintiff may file a praecipe for entry of judgment for the defendant.

The case law upon which Attorney Pietrandrea relies does not support his contention that sanctions cannot be awarded against him pursuant to Rule 1042.7. I agree with the statement that the voluntary dismissal entered on April 12, 2006 is a final judgment and that I can modify this judgment only within thirty days of its entry. However, the imposition of sanctions pursuant to Rule 1042.7 is not a modification of the April 12, 2006 judgment. Instead, the imposition of sanctions constitutes a resolution of a collateral matter that is not covered by the judgment.

Celin/Metropolitan's request for sanctions pursuant to rule 1042.7 is governed by the recent opinion of the Pennsylvania Supreme Court in *Miller Electric Company v. DeWeese*, 907 A.2d 1051 (Pa. 2006). Miller Electric had obtained a judgment against DeWeese. DeWeese was president of Birmingham Bistro, Inc. Miller Electric instituted garnishment proceedings against Birmingham, asserting that it was entitled to attach property held by Birmingham and to garnish compensation and benefits paid by Birmingham to DeWeese. On February 14, 2002, the trial court entered a verdict in favor of Birmingham, finding that its assets were exempt from garnishment. The following day, Birmingham filed a motion for counsel fees, citing 42 Pa.C.S. §2503(3) which entitles a garnishee who is found to have in his or her possession or control no indebtedness due to or property of the defendant to collect reasonable counsel fees as part of the taxable costs of the matter.

On February 26, 2002, Miller filed a motion for post-trial relief. The trial court did not enter an order disposing of the motion within the 120-day period of Pa. R.C.P. No. 227.4 which states that a final judgment may be entered where a court does not within 120 days enter an order disposing of the motion. On June 27, 2002, the Prothonotary entered a final judgment pursuant to a praecipe to enter judgment filed by Birmingham. Neither party filed an appeal from the entry of this judgment.

On July 10, 2002, the trial court entered an order denying Birmingham's February 15th motion for attorney fees. On August 8, 2002, Birmingham filed a notice of appeal from the July 10th order. Miller Electric moved to quash the appeal as untimely, arguing that the notice of appeal was filed more than thirty days after the final judgment entered on June 27, 2002. The Pennsylvania Superior Court granted Miller's motion and quashed the appeal. The Pennsylvania Supreme Court reversed.

The Supreme Court reviewed the Superior Court's reasoning. The Superior Court relied on 42 Pa.C.S. §5505 which provides that except as otherwise provided or prescribed by law, a court may modify or rescind any order within thirty days after its entry.² The Superior Court concluded that requests for counsel fees under 42 Pa.C.S.

§2503 are part of the principal claim and must be determined as part of that claim. Consequently, a trial court may act on a motion for fees only within thirty days from the final judgment. The Superior Court based its ruling on its prior rulings in *First National Bank of Northeast v. Gooslin*, 582 A.2d 1054 (Pa.Super. 1990), and *Freidenbloom v. Weyant*, 814 A.2d 1253 (Pa.Super. 2003), where the Superior Court ruled that a cause of action for attorney fees cannot exist independent of the principal claim and therefore the judgment disposing of the principal claim is the final judgment for purposes of appeal.

The Supreme Court rejected the reasoning of the Superior Court that Birmingham's motion for counsel fees and other sanctions could not be considered because of the finality of the June 27, 2002 judgment.

The Court's analysis began with the language of 42 Pa.C.S. §2505(3) which permits the award of counsel fees if a garnishee "is found to have in his possession or control no indebtedness due to or other property of the debtor." Under this provision, counsel fees may be awarded only if the garnishee is the prevailing party. A garnishee cannot be the prevailing party until a final determination has been made that the garnishee has "no indebtedness due to or other property of the debtor." This means that Birmingham's status as the prevailing party was not perfected until the time for appeal from the June 27, 2002 order expired. This, in turn, means that the June 27, 2002 date cannot be the date of a judgment disposing of the garnishee's request for counsel fees because it is the first day on which the garnishee can raise a claim for counsel fees. Thus, the final order for purposes of awarding counsel fees based on §2503(3) is the date of a court order disposing of the motion for counsel fees. The Court said: "We agree that the judgment entered in June 27, 2002 was the final judgment in the underlying garnishment action, but we cannot say it was the final order with regard to the motion for fees." *Miller Electric, supra*, 907 A.2d at 1056.

The present case presents the same situation. Celin/Metropolitan could not file a motion for sanctions until they had reviewed the written statement upon which the certificate of merit was based. Plaintiffs were not obligated to furnish the written statement until thirty days of the written request or thirty days of resolution of all claims against all professionals, whichever is later. Thus, it was not possible for Dr. Celin to even file a motion for sanctions based on Rule 1042.7 within thirty days of the entry of the final judgment (i.e., the voluntary discontinuance of the case).

Furthermore, the present case, in comparison to *DeWeese*, presents a more compelling justification for allowing post-judgment proceedings to extend beyond the thirty-day period after the voluntary discontinuance. In the present case, Celin/Metropolitan is not seeking to alter or amend the judgment. To the contrary, Celin/Metropolitan is seeking sanctions against a person who is not a party to the lawsuit, namely counsel for the plaintiffs. Also, the claim for relief is not based on the merits—or lack thereof—of the claims and defenses raised in the underlying action. The right to relief is based on an unrelated issue: Did plaintiff's counsel obtain a written statement from an appropriate licensed professional that (i) there exists a reasonable probability that the care, skill, knowledge, or experience exhibited in the treatment, practice, or work that is the subject of the complaint fell outside acceptable professional standards and (ii) such conduct was a cause of bringing about the harm?

For these reasons, I will consider the merits of Celin/Metropolitan's motion to impose sanctions.

In their complaint, the Koppels allege that on October 17, 2000, Dr. Celin, upon referral of the other two defendant-physicians, examined plaintiff-wife with respect to thyroid nodules. Three years later, she was diagnosed with papillary thyroid cancer. Plaintiffs' claim against Dr. Celin is that he failed to diagnose the existence of thyroid cancer when plaintiff-wife exhibited all signs, symptoms, and conditions of this disease.

The certificates of merit which Attorney Pietrandrea filed as to Dr. Celin and Metropolitan Ear, Nose and Throat were based on a March 23, 2005 Report of Qin Eisler, M.D., PhD. She lists her specialty as "Medical Research and Analysis." Prior to filing the certificate of merit, Attorney Pietrandrea received Dr. Eisler's CV. The complete CV contains the following information:

QIN EISLER, MD, PhD
 Medical Research & Analysis
 603 Kelly Boulevard
 Slippery Rock, PA 16057
 Telephone 724-794-5351

EDUCATION AND PRACTICES:

1979-1984	Medical Degree and Internship, Bengbu Medical School, China.
1984-1987	Master Degree in Medical Biology, the Chinese Academy of Preventive Medicine, Beijing.
1988-1990	PhD in Medical Biology, the Chinese Academy of Preventive Medicine, Beijing.
1991	Post-doctoral program, the University of Montpellier and the University of Perpignan, France.
1992-1994	Associate Professor/Researcher, the Chinese Academy of Preventive Medicine, Beijing.
1995-	Residing in US, studying cases on trial or under investigation through the various programs of <i>Court TV</i> .
2002-	Medical-legal consulting.

Pa. R.C.P. No. 1042.3 requires a plaintiff's attorney to sign and file a certificate of merit stating that "an appropriate licensed professional" has filed a written statement. The Note to Rule 1042.3(a)(1) requires the person filing the statement "be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial. For example, in a medical professional liability action against a physician, the expert... should meet the qualifications set forth in §512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.512." Under this Act, the expert must possess an unrestricted physician's license to practice in at least one state or the District of Columbia and be engaged in (or retired within the past five years) from active clinical practice or teaching. In addition, the expert must practice in the same subspecialty (or in a subspecialty which has a substantially similar standard of care) as the defendant-physician.

Dr. Eisler's resume states that she obtained a medical degree in China in 1984 and that she has been residing in the United States since 1995. For the seven-year period from 1995 to 2002, the only activity listed in the CV is "studying cases on trial or under investigation through the various programs of *Court TV*." From 2002, the only activity listed is medical-legal consulting. There is no information in the

resume which suggests that she has engaged in the practice of medicine since 1995. Furthermore, there is no information which suggests that she has a license to practice medicine in the United States.³

Assuming that Dr. Eisler has some field of expertise, it is not listed in the CV and any attorney reviewing the CV would have had absolutely no reason to believe that Dr. Eisler practiced in the same or a related field as the defendant-physician.

It would be impossible for any attorney who reviewed the CV and the Rules of Civil Procedure governing certificates of merit (Pa. R.C.P. Nos. 1042.1-1042.8) to conclude in good faith that a certificate of merit may be based on any report issued by Dr. Eisler.

Furthermore, even if Dr. Eisler was qualified to issue a report, the Case Study Report that she issued does not meet either requirement of Rule 1042.3. It does not state that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited by Dr. Celin in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional standards. In addition, it does not state that such conduct was a cause in bringing about the harm.

Dr. Eisler described the treatment furnished by Dr. Celin at page 3 of the report:

1. Upon referral of Dr. Case, Dr. Scott Celin saw the patient, apparently as a consultant on 10/09/2000. Dr. Celin belongs to Metropolitan Ear, Nose and Throat Associates. It does not appear that Dr. Celin is a specialist in endocrinology or oncology, although Dr. Celin may be clinically involved with thyroid gland which is located in the neck area.
2. Dr. Celin believed that the patient "appears to have a stable thyroid exam by ultrasound presently has no physical exam abnormalities or symptoms to suggest malignancy." Dr. Celin felt that the right thyroid nodule was essentially unchanged and needs no further workup presently, and it was unnecessary to perform a needle biopsy despite of the suggestion made by the radiologist who performed the ultrasound (probably on 09/20-21/2000, Passavant Hospital, see Table I).

The only opinions that she rendered are set forth at pages 9, 11 and 12 of the Report:

4. Thyroid Papillary Carcinoma

Dr. Case did refer the patient to Dr. Celin, an Ear, Nose and Throat doctor who may be not identified as an endocrinologist or an oncologist and had a partially incorrect opinion in this case.

RE: Dr. Scott Celin

An Ear, Nose and Throat doctor. If Dr. Celin was identified as a specialist but irrelevant to this case, his opinion would be considered as a second opinion, in which he recommended to monitor the suspicious thyroid nodule by ultrasound only. The patient went to see him once(?) His professional liability in this case could be argued.

CONCLUSIONS

Dr. Scott Celin's professional liability in the case could be argued.

No attorney could in good faith conclude that this Report constitutes a statement that there exists a reasonable probability that the care, skill, or knowledge exercised by Dr. Celin fell outside professional standards. Furthermore, Dr.

Eisler's Report never discusses whether the professional liability that "could be argued" was a cause in bringing about plaintiff's harm.⁴

The filing of a certificate of merit without a statement of an appropriate licensed professional completely undermines the purpose of the rule that a professional not be required to defend a case that has not been favorably reviewed by an appropriate licensed professional. It would have been possible for the Supreme Court to draft a rule requiring the statement to be attached to the certificate of merit. Such a requirement was not imposed because the Supreme Court assumed that lawyers can be trusted to pursue only cases for which they have obtained a statement required under Rule 1042.3. Preservation of the integrity of the rule requires that significant sanctions be imposed where there is a flagrant disregard of the requirements of this rule.

I now consider the specific sanctions that should be imposed based on my finding of a flagrant violation of Rule 1042.3. Under Rule 1042.7(b), a court may impose "appropriate sanctions, including sanctions provided for in Rule 1023.4." The sanctions that may be imposed under Pa. R.C.P. No. 1023.4 include reasonable attorneys' fees, other expenses, and ordering payment of a penalty into the court.⁵

Because Dr. Celin and his medical group should never have been forced to defend this case, I am awarding the counsel fees and costs which the insurance carrier for Dr. Celin/Metropolitan incurred of \$6,967.94.

I am also awarding attorneys' fees and costs not to exceed \$2,000 that Dr. Celin has incurred in pursuing this motion for sanctions.

The evidence supports a finding that Dr. Celin made increased insurance premiums in the amount of \$8,277 because of this litigation. I am requiring the payment of these premiums because the premium would not have been increased if the certificate of merit had not been filed.⁶

Finally, I am requiring Attorney Pietrandrea to make a donation of \$2,000 to Operation Smile (<http://www.operation-smile.org>).

II. *McNeff v. Medi-Help, et al.*—GD03-24486

A jury entered a verdict in favor of Dr. Janicijevic and his medical corporation (hereinafter referred to as "Dr. Janicijevic") on November 27, 2006. Plaintiff did not file a motion for post-trial relief. Pursuant to a praecipe filed by Dr. Janicijevic, the Prothonotary entered a judgment against the plaintiff and in favor of Dr. Janicijevic on December 5, 2006. On the same date, counsel for Dr. Janicijevic formally requested plaintiff to provide the written statement from a licensed physician that allegedly formed the basis for counsel's certificate of merit. Plaintiff refused to provide a copy of the statement. On May 11, 2007, defendant filed a motion to compel.⁷ On July 21, 2007, I denied the motion. My court order denying the motion included a statement that defendant had obtained a final judgment through the filing of a praecipe for entry of a judgment on December 5, 2006.

I entered my court order denying the discovery request because there was no reason for Dr. Janicijevic to file a praecipe for the entry of a judgment based on the verdict on December 5, 2006. If he intended to pursue sanctions, he should have delayed taking steps for the entry of a final judgment until after resolution of any requests for sanctions sought pursuant to Rule 1042.7.

Prior to the entry of my July 21, 2007 court order, the parties did not cite and I did not consider *Miller Electric Co. v. DeWeese, supra*. In *Miller Electric*, the garnishee filed a praecipe to enter a judgment on the verdict while its request for counsel fees was pending. In that case, there

was no reason for the garnishee to praecipe for judgment until its ancillary motion was decided. Consequently, I find that *Miller Electric* is controlling and that I erred in denying relief on the ground that Dr. Janicijevic entered judgment even though he intended to seek sanctions under Rule 1042.7.

I also denied Dr. Janicijevic's motion to compel the production of the written statement on which the certificate of merit was based because plaintiff had included an expert report in his pretrial statement and had at trial presented expert testimony that was sufficient for plaintiff's case to proceed to a jury. I saw no need for the court to become involved in a situation in which an appropriate licensed professional had offered testimony that the defendant-physician's care, skill, or knowledge exercised in the treatment of the patient fell outside acceptable professional standards and was a cause in bringing about the patient's harm.

However, upon further review, I conclude that my ruling is inconsistent with the provisions of Rule 1042.7(a). This rule explicitly provides that the plaintiff shall provide a written statement upon which the certificate of merit is based upon the written request of a defendant who is dismissed from the case through "verdict."

I cannot ignore the language of the rule on the ground this is an unintentional result. A literal reading of Rule 1042.7(a) is consistent with the purpose of the requirement that a plaintiff obtain a written statement of an appropriate licensed professional before the plaintiff may proceed with a professional liability action. See *Womer v. Hilliker*, 908 A.2d 269, 275-76 (Pa. 2006), where the Court said that nothing should transpire in a medical malpractice action until the plaintiff has obtained a certificate of merit supporting the allegations in the plaintiff's complaint.

ORDER OF COURT

On this 20th day of November, 2007, upon consideration of the motion for sanctions of Scott Celin, M.D., and Metropolitan Ear, Nose and Throat Associates, it is hereby ORDERED that within ninety (90) days:

- (1) Attorney Peter J. Pietrandrea shall pay counsel fees and costs incurred in the defense of the underlying lawsuit in the amount of \$6,967.94;
- (2) Attorney Pietrandrea shall pay counsel fees and costs that Dr. Celin incurred in pursuing his motion for sanctions in an amount not to exceed \$2,000.00;
- (3) Attorney Pietrandrea shall pay Dr. Celin \$8,277.00 for increased insurance premium payments; and
- (4) Attorney Pietrandrea shall donate the sum of \$2,000.00 to Operation Smile and shall file an affidavit of compliance.

BY THE COURT:

/s/Wettick, A.J.

ORDER OF COURT

On this 20th day of November, 2007, upon consideration of Defendants' Statement of Errors Complained Of on Appeal, it is recommended that the Pennsylvania Superior Court reverse my ruling and remand the matter to this court in order that this court may compel plaintiff to furnish the written statement upon which plaintiff's certificate of merit is based.

BY THE COURT:

/s/Wettick, A.J.

¹ Possibly, the request could not be made until the expiration of the thirty-day appeal period.

² The case law construes this provision to mean that a common pleas court may modify or rescind a final judgment only

within thirty days of its entry. *Orie v. Stone*, 601 A.2d 1268 (Pa.Super. 1992).

³ The evidence in these proceedings has established that Dr. Eisler never had a license to practice in the United States.

⁴ In his deposition, Attorney Pietrandrea testified that after talking to Dr. Eisler he believed that she was a licensed practicing physician but that she had no specialty. He also testified that he now knows that she did not have a license to practice medicine in the United States (T. 39-40).

⁵ The difference between imposing sanctions under Rule 1023.4 and Rule 1042.7 is that the sanctions under Rule 1023.4 are limited to those specifically described in the rule while Rule 1042.7(b) provides that a court may impose whatever sanctions it deems to be appropriate, including those provided in Rule 1023.4.

⁶ I find to be credible the testimony of Charles Parker, Director of Underwriting Compliance for PMSLIC Insurance Company, that the 2006 premium increased an additional \$8,277 because of the *Koppel* lawsuit (5/17/2007 Deposition T. 14, 49-50). While the premium would not have increased if Dr. Celin had not also been involved in a prior incident, the direct cause of the \$8,277 increase was the *Koppel* litigation.

⁷ It appears that plaintiff's attorney refused to furnish the statement to defendant's attorney only because he believed that he was not required to do so. At oral argument, he was prepared to have me read the statement.

Township of Collier v. Collier Township Zoning Hearing Board v. Ray and Janet Maioli

Zoning Variance

The requisite elements of a zoning variance are not met where there is no evidence showing economic hardship to the property owner or anything unique or unusual about the property not shared by other property owners. An extreme backyard slope does not justify a variance to build a shed in front of the house, where the owners have lived in the house for a long time without the proposed shed, and the property characteristics are not unique to the homeowner.

(Mark C. Coulson)

Charles M. Means for Appellant.

John R. Orie, Jr. for Appellee.

Ray & Janet Maioli, Pro Se.

No. S.A. 07-140. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., October 22, 2007—The Intervenor Ray and Janet Maioli (hereinafter "Maiolis") began constructing a wooden shed on their properties' front yard without obtaining a permit. The Collier Township Zoning Officer issued a Notice of Zoning Violation directing the Maiolis to stop the construction. The Maiolis filed an appeal of the Notice of Zoning Violation and application with the Collier Township Zoning Hearing Board (hereinafter "Board") requesting a variance to allow a shed to be constructed in their front yard.

The Maiolis' property is located at 24 5th Street,

Carnegie, Pa 15106 in the R-3 Zoning District of Collier Township. Collier Township Ordinance No. 592, Article XVIII, Section 1803.3(h) provides that "no detached garage or storage structure accessory to a dwelling shall be located in the minimum required front yard." The Maiolis argue that they cannot construct the shed in the rear of their property due to the extreme downward slope in their backyard.

On December 20, 2006, a hearing was held before the Board, wherein Maiolis presented testimony. After hearing, the Board issued a written decision granting the variance, reasoning that the Maiolis presented credible testimony and that the documents provided in connection with this matter establish that the Maiolis have met their burden of proof with respect to the variance requirements set forth in 53 P.S. 10912 and the Township of Collier Zoning Ordinances. The Township of Collier (hereinafter "Appellant"), filed a timely appeal of the grant of the variance.

Where 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.Cmwlt. 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, 640 (Pa. 1983).

To establish entitlement to a variance, the Appellant must prove the following:

- 1) the zoning ordinance imposes unnecessary hardship resulting from the unique physical characteristics of the property, as distinguished from the impact of the zoning regulation on the entire district;
- 2) the alleged hardship is not self inflicted;
- 3) the requested variance will not destroy the character of the neighborhood nor be detrimental to public welfare.

Valley View Civic Association, 462 A.2d at 640.

To justify the grant of a dimensional variance, the courts may consider multiple factors:

- 1) the economic detriment to the Appellants if the variance was denied;
- 2) the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and
- 3) the characteristics of the surrounding neighborhood.

Hertzberg v. Zoning Board of City of Pittsburgh, 721 A.2d 43, 50 (Pa. 1989).

The Board found that due to the extreme downward slope in their backyard, the Maiolis cannot construct the shed in the rear of their property. There is no place else to construct the shed other than the front yard. There are other existing structures in the neighborhood, which are similar to the proposed shed. The proposed variance will not alter the essential character of the neighborhood.

A review of the record shows that the Maiolis have lived in the house on this property for twenty-one years without the proposed shed in their front yard. There is no evidence of economic detriment to the Maiolis if the vari-

ance is not granted. There is no evidence indicating anything unique or unusual about the Maiolis' property to support a finding of an unnecessary hardship not shared by other property owners that would justify a variance in this case.

Because the requisite elements of a variance have not been established in this case, the decision of the Zoning Hearing Board must be reversed.

ORDER OF COURT

AND NOW, this 22nd day of October, 2007, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Collier Township Zoning Hearing Board is reversed.

BY THE COURT:
/s/James, J.

In the Interest of B.L., A Minor

Petition to Intervene in a Dependency Case—Former Foster Parents Lack Standing—Undue Delay in Filing Petition—Petition Dismissed

1. The former foster parents of B.L. (R.E. and J.E.) filed a Petition to Intervene which was denied by the Hearing Officer on October 25, 2007 following a full hearing. Following a *de novo* hearing, the judge dismissed the Petition.

2. The former foster parents were found to lack status as parties since

- a. they were not the biological parents of B.L.;
- b. they were not the legal custodian of B.L.; and
- c. they were not persons whose care and control of B.L. is in question.

3. Former foster parents were found to lack standing to intervene in the dependency proceedings under the Juvenile Act, 42 Pa.C.S.A., sec. 6301 *et seq.* as they did not have legal custody of B.L. as required in Section 6336.1 of the Act.

4. The order appointing the foster parents as the medical and educational guardians of B.L. did not give them legal custody as their guardianship was limited to medical and educational decisions. Assuming *arguendo* that the medical and educational guardianship could be construed as legal custody, it ended on June 11, 2007 when they were released as guardians and new ones appointed.

5. Since B.L. had been out of the care of his former foster parents for more than eight months and with his current pre-adoptive parents for nearly six months when the Petition to Intervene was presented, they did not have standing as persons whose care and control of the child was in question.

6. The Petition to Intervene was untimely as B.L. was removed from their physical custody on January 26, 2007 and placed in respite care due to Mr. E's illness. On April 12, 2007 CYF presented a Motion for Permission to place B.L. in another pre-adoptive foster home which was granted by the Hearing Officer. Although having received notice of the hearing, neither foster parent appeared to contest it. On April 17, 2007 B.L. was placed in his current pre-adoption home. The Petition to Intervene was not presented until October 5, 2007—six months later.

(Mary K. McDonald)

James J. Robertson, Jr. for the Former Foster Parents, R.E. and J.E.
Rebecca Heaton Hall, Guardian *ad litem* for B.L., KidsVoice.
Beatrice Longo, Allegheny County Law Department, for OCYFS.

Docket No. 2019-01. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division, Juvenile Section.

OPINION

Clark, J., February 19, 2008—This is an appeal from the dismissal of a petition to intervene in a dependency case, filed by R.E. and J.E., the former foster parents of the child, B.L. On October 5, 2007, appellants presented a petition to intervene in the dependency proceedings of B.L. (D.O.B. 10/11/2001). Because a permanency review hearing was scheduled before Hearing Officer James Alter on October 25, 2007, I ordered that the petition to intervene be heard by Mr. Alter at the time of the permanency review hearing. On October 25, 2007, Hearing Officer Alter dismissed the petition because appellants lacked standing to intervene in the dependency proceeding and due to the undue delay on the part of appellants in filing their petition to intervene.

On October 29, 2007, appellants presented a motion for *de novo* review of Mr. Alter's October 25, 2007 order. The *de novo* hearing was originally scheduled to occur on November 9, 2007, but was continued until November 21, 2007. On November 21, 2007, I held a *de novo* hearing on appellants' petition to intervene. After the hearing, I dismissed appellants' petition to intervene because I found that appellants lacked the standing to intervene and that the petition to intervene was untimely filed. On December 19, 2007, appellants filed a notice of appeal of my order entered on November 21, 2007.

MATTERS COMPLAINED OF ON APPEAL

Appellants raise one matter on appeal. Appellants allege that I erred as a matter of law when I denied standing to prospective adoptive parents who had custody of the child for almost three years, who remain his psychological parents, and who desire to adopt the child as soon as possible.

DISCUSSION

Appellants contend that I erred as a matter of law when I dismissed their petition to intervene in a dependency proceeding on the basis that they lacked standing. I disagree.

The *de novo* hearing on the petition to intervene filed by appellants, former foster parents of B.L., was held on November 21, 2007. At this hearing, Assistant County Solicitor Beatrice Longo represented Children Youth and Family Services (CYF); James Robertson, Esquire represented appellants; and Rebecca Hall, Esquire represented B.L. In reaching my decision in this case, I considered the history of this case, the legal arguments of counsel, and the statutory and case law of this Commonwealth. Consequently, I found that appellants lacked standing to intervene in the dependency proceedings and I found that their petition to intervene, filed on October 5, 2007 (nearly six months after B.L. had been placed in the pre-adoptive foster home of Jeannette and Donald W.), was untimely and further supports my decision to dismiss their petition to intervene.

Dependency proceedings are governed by the Juvenile Act, 42 Pa.C.S.A., §6301, *et seq.* In general, our Superior Court of Pennsylvania has determined that party status is conferred upon three classes of persons: (1) the parents of the juvenile whose dependency status is at issue; (2) the legal custodians of the juvenile whose dependency status is at issue; or (3) the persons whose care and control of the

juvenile is in question. *In the Interest of L.C.*, II, 900 A.2d 378, 382 (Pa.Super. 2006).

Section 6336.1 of the Juvenile Act provides that:

The court shall direct the county agency or juvenile probation department to provide the child's foster parent, pre-adoptive parent or relative providing care for the child with timely notice of the hearing. The court shall provide the child's foster parent, pre-adoptive parent or relative providing care for the child the opportunity to be heard at any hearing under this chapter. Unless a foster parent, pre-adoptive parent or relative providing care for a child has been awarded legal custody pursuant to section 6357 (relating to rights and duties of legal custodian), nothing in this section shall give the foster parent, pre-adoptive parent or relative providing care for the child legal standing in the matter being heard by the court. (Emphasis added.)

To achieve statutory standing under the dependency statute, a foster parent, pre-adoption parent or relative providing care must have legal custody of the child. *In re L.C.*, II, *supra*, at 382.

In the case of *In re B.S.*, 923 A.2d 517, (Pa.Super. 2007), the Superior Court determined that paternal grandmother did not have standing to participate in the child's dependency proceedings even though grandmother had been providing care for the child pursuant to a kinship placement for approximately seven months. In that case, our Superior Court reasoned that legal custody of the child had remained at all times with the county child protection agency and that the grandmother was not within the zone of interests protected by the Juvenile Act.

The case history regarding B.L. is as follows. B.L. was born on October 11, 2001 and removed from his parents' care and placed into foster care upon his discharge from the hospital. On November 14, 2001, B.L. was adjudicated dependent. His permanency goal was changed to adoption on April 28, 2004. On May 26, 2005, I terminated the parental rights of both parents.¹

On or about March 10, 2004, B.L. was placed in the pre-adoptive home of appellants, R.E. and J.E., who cared for the child until January 26, 2007 when Mr. E. became ill and was hospitalized. As a result, appellants requested that B.L. be placed into respite care. During the time that B.L. was in respite care and out of appellants' care, appellants made little, if any, attempts to communicate with or visit B.L. During this period, CYF also requested that appellants provide the respite caregiver with information on B.L.'s special needs and diet. Appellants failed to provide this information. After B.L. spent several months in respite care, CYF filed a motion for permission to place B.L. in another pre-adoptive foster home and served a notice of presentation of the motion on appellants. On April 12, 2007 Hearing Officer Alter heard arguments on the motion and granted CYF's motion to place B.L. in another pre-adoptive home. Appellants did not appear at the hearing to contest the motion despite having received notice of the presentation. On April 17, 2007, B.L. was placed in his current pre-adoptive foster home with Donald and Jeanette W. B.L. had been out of the care of appellants and in respite care from January 30, 2007 until April 17, 2007.

On November 21, 2007, after a hearing and argument on appellants' motion to intervene, I found that appellants were not members of any of the three classes of individuals who may be considered a party who would have standing in a dependency proceeding. Clearly, appellants are not the biological parents of B.L. I also found that appellants also did

not fall into the class of members having standing as the legal custodian of the juvenile whose dependency status is at issue class. Section 6336.1 of the Juvenile Act specifically prohibits foster parents, pre-adoptive parents or relatives providing care for the child from asserting standing unless they have been awarded legal standing. To achieve statutory standing under the dependency statute, a foster parent, pre-adoptive parent or relative providing care must have legal custody of the child. *In re L.C.*, II, *supra*, at 382. B.L. was adjudicated dependant on November 14, 2001 and legal custody was at that time granted to CYF. During the time that B.L. was in appellants' care, the court entered an order appointing them as the medical and educational guardians of the child, so that they could make medical and educational decisions for the child. I submit that although by order of court, appellants were permitted to make educational and medical decisions for the child; they did not have legal custody over the child because their "guardianship" was limited to educational and medical decisions. For example, they could not take the child out of state or the country without the permission of the court. I contend that at all times in question, CYF maintained legal custody over B.L. Assuming *arguendo*, that the medical and educational guardianship could be construed as legal custody, this status ended on June 11, 2007 when, by order of court, appellants were released as the educational and medical guardians of the child and new guardians were appointed.

Finally, in considering whether appellants had standing as persons whose care and control of the juvenile is in question, I looked to the period of time when B.L. was in the care and control of appellants. B.L. was placed into the care of appellants on March 10, 2004 and remained there for more than thirty-four months. On January 16, 2007, Mr. E. became seriously ill, with ongoing congestive heart failure and was hospitalized. Consequently, Mrs. E. requested that B.L. be placed into respite care. B.L. was placed into a respite foster home on January 26, 2007, where he remained until April 17, 2007 when he was placed into his current foster home. On October 5, 2007, when appellants presented their petition to intervene, B.L. had been living with his current pre-adoptive foster parents for nearly six months and had been out of the immediate care and control of appellants for more than eight months. I found that this eight-month period disqualified them from seeking standing as persons whose care and control of the juvenile is in question.

I also found that appellants' petition to intervene, filed on October 5, 2007 was untimely and represented such an undue delay as to further support my decision to deny their petition to intervene. The Comments to Rule 1133 (B) of the Pennsylvania Supreme Court Rules of Juvenile Court Procedure state that, "A motion to intervene may be denied by the court if the motion was unduly delayed, or the intervention will unduly delay or prejudice the adjudication of dependency or rights of the parties." In this case, although appellants were given notice of the April 12, 2007 presentation of the motion to place the child in another foster home, they did not appear. They remained silent on this issue until October 5, 2007, six months after the child was in his new foster home and six months after the child began bonding with his new family. In any dependency case, the need for permanency is of primary importance. In this case, I found that given the history of this case, permanency is of paramount importance for B.L.² I must strongly protest appellants' attempts to assert standing because of their love for B.L. or their desire to adopt him as soon as possible. The issue here is a legal one, and all decisions must be based upon the facts of the case and the application of the law to the facts and not the emotions of the case. Simply put, love

and desire do not constitute standing. I find that the delay in petitioning for standing in this case has unduly prejudiced the right of this child to a permanent home.³ I cannot put this child's life on hold to wait for appellants to ask for his return at a more convenient time.

CONCLUSION

Based on the foregoing, appellants do not have standing to intervene in the dependency proceedings in this case. The order dismissing their petition should be left undisturbed.

BY THE COURT:
/s/Clark, J.

¹ Natural mother filed an appeal of my May 26, 2005 order terminating her parental rights to B.L. The termination was upheld by the Superior Court on April 28, 2006, at 1004 WDA 2005.

² B.L. has been in care, without permanence, for his entire life.

³ By order of the Superior Court, entered on January 28, 2008, this case cannot proceed to adoption until this appeal is concluded.

Commonwealth of Pennsylvania v. Theodore Grier

Motion for Judgment of Acquittal—Motion for New Trial—Expert Testimony

1. The Commonwealth can sustain its burden of proof by means of circumstantial evidence.

2. To be granted a new trial because the verdict goes against the weight of the evidence, the verdict must be so contrary to the weight of the evidence as to make new trial necessary to give the defendant another chance to prevail.

3. It is within the trial court's discretion to qualify a police officer as an expert witness.

4. Admission of improper expert testimony is harmless error, because a judge, as a trier of fact, is presumed to disregard inadmissible statements.

(Mark C. Coulson)

Robert J. Heister, Jr. for Plaintiff.

Leo C. Harper, Jr. for Defendants.

CC No. 200407431. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION:

Zottola, J., January 8, 2008—On May 11, 2007, following a non-jury trial, the Defendant, Theodore Grier, was convicted of Aggravated Assault, Resisting Arrest, and Simple Possession. The Defendant was sentenced on July 30, 2007 under Pennsylvania's mandatory sentencing requirements to a period of incarceration of not less than 120 months and not more than 240 months. The Allegheny County District Attorney's Office had filed a Notice of the Commonwealth's Intention to Proceed Pursuant to 42 Pa.C.S. §9714 (2007) on June 18, 2007. Motions for a New Trial were filed on the Defendant's behalf and denied on July 30, 2007. Post-Trial Motions were filed on the Defendant's behalf on September 5, 2007, and were denied on September 10, 2007. A Notice of

Appeal to the Superior court was filed on October 2, 2007 and denied. A timely appeal was then taken.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal on December 4, 2007, from which the following is taken verbatim:

a. The trial court erred when it denied Defendant's Motion for Judgment of Acquittal pursuant to Pa.R.Crim.P. 606(A)(6) relative to Counts One, Two and Three wherein Defendant was convicted of Aggravated Assault, §2702(a)(3), which involved City of Pittsburgh Police Officers Mushinsky, Scarpine and Jeffries. Specifically, Defendant avers that the Commonwealth failed to present sufficient evidence that Defendant caused or attempted to cause bodily injury to any of the aforementioned officers;

b. The trial court erred when it denied Defendant's Motion for a New Trial pursuant to Pa.R.Crim.P. 607(A)(3) relative to Counts One, Two and Three wherein Defendant was convicted of Aggravated Assault, §2702(a)(3), which involved City of Pittsburgh Police Officers Mushinsky, Scarpine and Jeffries. Specifically, Defendant avers that inasmuch as the Commonwealth failed to present sufficient evidence that Defendant caused or attempted to cause bodily injury to any of the aforementioned officers the court's verdict therefore shock one's sense of justice.

c. The trial court erred when it permitted Officer Scarpine to testify as an expert relative to police defensive tactics; and

d. The trial court abused its discretion when it sentenced Defendant to a period of ten (10) to twenty (20) years incarceration at Court 1.

MOTION FOR JUDGMENT OF ACQUITTAL

On May 11, 2007, a continuation of a non-jury trial was held before the Honorable John A. Zottola. The Defendant was found guilty of Aggravated Assault. The Defendant challenges the sufficiency of the evidence to support his conviction; he alleges the trial court erred when it denied the Defendant's Motion for Judgment of Acquittal.

The Commonwealth presented testimonial evidence from the officers involved in the physical fight with the Defendant on January 22, 2004. Officer Mushinsky testified that, upon entering J.R.'s Bar in response to another call, he saw the Defendant place a bundle of cash and heroin in his sweat-shirt. (N.T. pp 39)¹ When Officer Mushinsky moved to grab the heroin off the Defendant, the Defendant attempted to exit the bar. The Defendant violently pushed Officer Mushinsky into the bar while trying to flee. (N.T. pp 40) The Defendant struck Officer Mushinsky's head and back with closed fist blows, and attempted to pull the Officer's gun from his holster. (N.T. pp 41, 43) The Officer prevented this by locking his arms over the Defendant's. (N.T. pp 43) The Defendant hyper-extended and broke the Officer's thumb. Officer Mushinsky had to seek medical treatment, was off of work for approximately six months, sustained arthritis in his hand, and also experienced back injuries to his lower disks. (N.T. pp 44, 45) The Defendant continuously fought to get to the bar's door; he tossed officers off of his body at every opportunity. (N.T. 17, 28) Officer Scarpine testified when he attempted to block the Defendant from exiting the bar, the Defendant put his shoulder into the Officer and drove him into the wall. The Defendant tugged at his gun, but was unsuccessful. (N.T. pp 23, 24)² The Defendant knocked

Officer Scarpine's OC spray out of his hand. (N.T. pp 39) The Defendant pulled Officer Scarpine by his sweater and threw him into a table. The Officer experienced back and shoulder pain. (N.T. pp 40, 41) In response to an emergency radio call, Officer Gasiorowski entered J.R.'s and observed Officer Scarpine, Officer Mushinsky, and Officer Jeffries involved in a fight; the Defendant was attacking them. The Defendant was trying to steal Officer Mushinsky's weapon. (N.T. pp 49) Officer Scarpine testified that the caution level had risen to one of deadly force, because the Defendant grabbed for the officers' weapons. (N.T. pp 37) Officer Gasiorowski drew her weapon, ordered the Defendant to let go of the officers, and threatened to shoot the Defendant. The Defendant started towards her then stopped. (N.T. pp 50) Numerous verbal warnings had to be given. (N.T. pp 56) The Defendant succumbed to law enforcement and was cuffed. (N.T. pp 51) Officer Scarpine testified that, once in custody, the Defendant told the officers they were lucky he never got one of their weapons, or they would have been lying in a pool of their own blood. (N.T. pp 42) Officer Artzenberger testified he was present and heard this as well. (N.T. pp 18)³ Officer Jeffries testified that during the struggle, the Defendant told the officers he was 'not going back [to jail].' (N.T. pp 14)⁴

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 there from, 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).

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. Officer Mushinsky testified the Defendant shoved him into the bar and pounded him with closed-fisted blows. Officers Mushinsky and Scarpine testified the Defendant tried to steal both of their weapons numerous times. Officer Scarpine testified the Defendant used his shoulder to drive him into the wall and threw him into a table. The Defendant tossed any interfering officer off of his body. It took Officer Gasiorowski's numerous verbal warnings, and drawn gun, to make the Defendant stop fighting. Officer Scarpine testified the Defendant made a statement while in custody that, had he prevailed in the fight, all of the officers would have been dead. Officer Mushinsky sustained serious injuries to his hand. 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 his conviction of Aggravated Assault, and that the trial court's denial of his Motion for Judgment of Acquittal was in error, must fail.

MOTION FOR A NEW TRIAL

The Defendant challenges the sufficiency of the evidence to support his conviction; he alleges the trial court erred when it denied the Defendant's Motion for a New Trial. The Defendant alleges this insufficiency "shocks one's sense of justice." This standard is reserved for a challenge to the weight of the evidence. As such, the Defendant alleges a muddled claim.

For all of the reasons stated above, the evidence is sufficient to sustain the Defendant's conviction.

If this is a claim that a new trial is justified because the verdict goes against the weight of the evidence, it also fails for the following reasons.

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.

Officers Mushinsky testified the Defendant threw him into the bar. The Defendant struggled to get his gun. Officer Scarpine testified the Defendant drove him into a wall and threw him into a table. The Defendant also struggled to get his weapon. Officers Mushinsky and Scarpine testified the Defendant was completely focused on getting out of the bar, despite any actions by police. The Defendant was placed in custody only after Officer Gasiorowski repeatedly threatened to shoot him with her drawn weapon. After he was in custody, the Defendant made a statement that, had he been successful in obtaining a weapon, he would have shot the officers. 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 Defendant's conviction was not against the weight of the evidence. The trial court properly determined the Defendant's guilt and did not err in denying the Defendant's Motion for a New Trial.

Therefore, any and all of the Defendant's claims must fail.

EXPERT TESTIMONY

The Defendant alleges that the trial court erred when it permitted Officer Scarpine to testify as an expert relative to police defense tactics.

A challenge to the admission of expert testimony at trial is reviewed under a stand of whether the trial judge abused his discretion. *Commonwealth v. Dengler*, 890 A.2d 372, 379 (Pa. 2005). In determining whether this abuse occurred, the court examines whether his judgment was founded upon reason. Discretion is abused when the judgment is manifestly unreasonable, where the law is not applied, or where a review of the entire trial record shows the ruling to be based on partiality, prejudice, bias, or ill will. *Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000). Unless the facts within the record show a palpable abuse of the trial judge's discretion in passing upon either motion, his reasoning should prevail. *Commonwealth v. Brown*, 648 A.2d 1177, 1190 (Pa. 1994).

The Commonwealth presented the testimony of Officer Scarpine at trial to explain police defense tactics. He testified he had been a police officer for thirty-six years. (N.T. pp 19)⁵ He was trained to use defensive tactics. (N.T. pp 24) Officer Scarpine attended approximately fifty classes on defensive tactics through the Pittsburgh Police Academy. (N.T. pp 30, 31) It was within the trial judge's discretion to qualify Officer Scarpine as an expert because of his training and years of experience.

Even if all that the Defendant's allegations were true, his claim would still fail. As the fact finder, the judge is presumed to disregard any inadmissible evidence or statements. *Commonwealth v. Brown*, 476 A.2d 969, 971 (Pa.Super. 1984). Thus, admission of improper expert testimony would at most result in harmless error.

For all the aforementioned reasons, the Defendant's claim must fail.

SENTENCING

The Defendant alleges that the trial court abused its discretion when it sentenced the Defendant to a period of not less than 120 and not more than 240 months of incarceration at Count One.

The judgment of the sentencing judge will not be disturbed absent an abuse of discretion. *Commonwealth v. Lee*, 876 A.2d 408, 413 (Pa.Super. 2005). An abuse of discretion occurs when the judgment is manifestly unreasonable, where the appropriate law is not applied, or where the record shows the sentence is a result of partiality, prejudice, bias, or ill will. *Lee*, 876 A.2d at 413.

The Commonwealth filed a notice of its intention to proceed under 42 Pa.C.S. §9714 (2007). It informed the court that the Defendant was a repeat offender, and that, due to his previous conviction under CC. No. 199308140, Count One required a ten-year mandatory minimum sentence. (N.T. pp 3, 6)⁶ The court properly determined the Defendant's sentence.

Thus, the Defendant's claim must fail.

Based on the foregoing, the Defendant's issues raised as matters complained of on appeal are deemed to be without merit.

BY THE COURT:

/s/Zottola, J.

¹ N.T. refers to notes of a Non-Jury Trial dated July 24, 2006.

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

³ N.T. refers to notes of a Non-Jury Trial dated July 24, 2006.

⁴ N.T. refers to notes of a Non-Jury Trial dated May 11, 2007.

⁵ N.T. refers to notes of a Non-Jury Trial dated May 11, 2007.

⁶ N.T. refers to notes of a Sentencing Hearing dated July 30, 2007.

Commonwealth of Pennsylvania v. Jonathan Liebro

Suppression Hearing—Traffic Stop—Miranda Warnings

1. A motor vehicle stop by the police is normally an "investigative detention," where an officer may verify the driver's license, registration and proof of financial responsibility, and may direct a driver or passenger to step out of the vehicle, regardless of whether the police have reasonable suspicion of criminal activity.

2. An investigative detention may be considered a "customized interrogation" requiring *Miranda* warnings if the person is deprived of his or her freedom in any significant way or reasonably believes that his or her freedom of action or movement is restricted.

3. Where there were no other grounds for suspicion, the police are not entitled to ask a question regarding the possession of drugs designed to elicit incriminating information, without *Miranda* warnings.

(Mark C. Coulson)

Kevin F. McCarthy for the Commonwealth.

David S. Shrager for Defendant.

CC No. 200612315. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Todd, J., January 15, 2008—This appeal by the Commonwealth arises from a suppression hearing held on August 20, 2007 and the resulting findings of fact and order of September 5, 2007 granting the Motion to Suppress Evidence filed on behalf of the Defendant, Jonathan Liebro. The order directed that a statement made by Defendant while the subject of a custodial interrogation was inadmissible. In addition, marijuana seized from Defendant's vehicle incident to Defendant's arrest was also deemed inadmissible.

The Commonwealth filed a timely Notice of Appeal on September 26, 2007 and on September 27, 2007 the Commonwealth was ordered to file a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days of the receipt of all court transcripts. An order was also entered on September 27, 2007 directing that all transcripts be filed within thirty (30) days.

The Commonwealth filed its Concise Statement of Matters Complained of on Appeal on October 15, 2007 which provided:

"1. Whether the trial court erred in finding that appellee was subject to custodial interrogation and was therefore entitled to *Miranda* warnings prior to any questioning by the police, where said questioning occurred during a traffic stop for summary violations of the Vehicle Code?

2. Whether the trial court erred in concluding that the search that occurred was after appellee was questioned by the police was unlawful?"

BACKGROUND

At the suppression hearing of August 20, 2007, the Commonwealth called Detective Eric Harpster who was employed with the City of Pittsburgh Narcotics and Vice division. Detective Harpster testified that on March 13, 2006, at approximately 4:19 p.m. he was patrolling with Officer Carpezio on the North Side when he observed a Ford Expedition with heavily tinted windows make a right hand turn on to the road in front of them. (T., pp. 3-5) At this point the vehicle was a half block in front of the detectives' vehicle. The detectives began to follow the Expedition, which then made another right hand turn without the proper use of turn signals. (T., p. 5) The detectives activated their lights and sirens at which time the vehicle continued to drive slowly for a short distance before stopping. (T., p. 5) Detective Harpster testified that the failure to use the turn signal and the heavily tinted windows on the vehicle both constituted a violation of the motor vehicle code that justified the traffic stop. (T., p. 5)

Detective Harpster testified that as they were following the vehicle and as it was driving slowly, he saw the driver lean towards the glove box, but he could not see anything else because of the window tint. (T., p. 6). Apparently this movement was interpreted initially as the driver looking for his insurance and registration. Detective Harpster testified that leaning toward the glove box was "no big deal" and that "people do that all the time to get their registration and insurance." (T., p. 16). After the vehicle stopped, Detective Harpster exited his vehicle and approached the vehicle on the passenger side and Officer Carpezio approached the vehicle on the driver's side. Officer Holland, in a second vehicle arrived on the scene. As they approached the vehicle, Defendant was told several times to put the windows down. Defendant ultimately complied and put the driver's window all the way down and the passenger's window about three-quarters of the way down. (T.,

pp. 6, 7) When the windows were lowered it was noted that Defendant was the only individual in the vehicle and Detective Harpster testified that he smelled an extremely strong smell of marijuana coming from the vehicle. (T., p. 7) A large black jacket was also noted sitting on the passenger seat. At this time Detective Harpster did not observe any unusual movements of Defendant. Detective Harpster testified that Officer Carpezio then asked Defendant for his license and registration. Detective Harpster did not recall if Defendant had his license, but he did recall that Defendant did not have the registration and insurance card. On direct examination, Detective Harpster testified that when Defendant indicated that he did not have his insurance, he became concerned as he had previously seen Defendant leaning toward the glove box while the vehicle was moving and, therefore, while Defendant was still in the vehicle, Officer Carpezio, "... asked him if he had any weapons, drugs, anything on him. He said yes, a small amount of marijuana in his pocket." (T., p. 8) Detective Harpster testified that the question was asked for the officers' safety. (T., p. 8). On cross-examination, however, Detective Harpster acknowledged that his report of the arrest made on March 16, 2006 indicated that Defendant was first asked to exit the vehicle, and after he was out of the vehicle, he was asked if he had anything on him, to which Defendant replied that he had a "small baggie of marijuana." (T., p. 20). Detective Harpster then instructed Officer Holland to check under the jacket that was on the passenger seat at which time a gallon bag of marijuana was found. (T., p. 9) Detective Harpster further indicated on cross that there were no roaches found, there were no pipes and there was no indication that anyone had been smoking marijuana in the vehicle. (T., pp. 20, 21) Further, once Defendant's vehicle was stopped there were no evidence of any suspicious movements by Defendant nor were there any suspicious bulges in his clothing that looked like a possible weapon. In addition there were nothing suspicious on the floor or anywhere else in the vehicle. (T., p. 21) Detective Harpster further testified that he did not see Defendant reach for the jacket or ever see his hands extending out to grab anything, but only saw Defendant lean to the right while they were following him.

At the close of the testimony, Defendant's counsel argued that Defendant was subject to a custodial interrogation without being given his *Miranda* warnings and further that there was no basis for an alleged *Terry* frisk as Detective did not articulate specific facts from which he could reasonably infer that the individual was armed and dangerous. The Commonwealth argued that the violations of the vehicle code concerning the turn signal violation and the tinted window violations created a valid traffic stop. Further, that whether or not the Defendant was in the vehicle or was out of the vehicle, the questions asked to the Defendant did not constitute a custodial interrogation but an investigatory detention and, therefore, *Miranda* warnings were not required. Further, the Commonwealth argues that Defendant's admission that he had a small amount of marijuana created probable cause for a valid arrest and the marijuana in the vehicle was found incident to his arrest.

Upon review of the evidence it was found that there was sufficient evidence to warrant the vehicle stop based on a violation of 75 Pa.C.S.A. §4524 related to the tinting of windows, and 75 Pa.C.S.A. §3334(b) related to right hand turns without a signal. However, Detective Harpster's testimony that he observed the movement of Defendant within the vehicle prior to the stop was not credible as it was in direct conflict with his testimony concerning the tint of the win-

dows. Further, Detective Harpster testified regarding a strong odor of marijuana yet the search of the Defendant, as well as the vehicle, failed to yield any evidence of active marijuana use, consumption or paraphernalia that would result in the strong odor of marijuana emanating from the vehicle. Unlit marijuana sealed in a plastic bag under the jacket would not likely result in the strong odor of marijuana. In addition, there was no testimony that Defendant's eyes were glassy or he exhibited any other indications that he was under the influence of marijuana which would suggest that the odor of marijuana was coming from Defendant.

During the encounter, which began as a traffic stop by a marked vehicle, Defendant's vehicle was approached on both sides by Detectives, with a back-up arriving on the scene. Defendant was ordered to lower his windows, which he did, although after several requests. Defendant apparently had his license, but not his registration card and proof of insurance. Other than having a coat on the seat of the car, there was no evidence of any suspicious movements or observations made by the officers and Defendant was then asked to step outside of the car. After being asked to exit the vehicle, again the officers did not observe or articulate any specific facts which would reasonably lead the officers to believe that Defendant may be armed or dangerous. At that time, Defendant was questioned not only about the possible presence of weapons, but as Detective Harpster testified, "we asked him if he had any weapons, drugs, anything on him." Thus the questioning did not go to simply the issue of the safety of the officers, but specifically asked Defendant if he had drugs, which was questioning specifically designed to illicit incriminating information from Defendant. Considering all of the circumstances, the questioning of Defendant was found to be a custodial interrogation which occurred without the appropriate *Miranda* warnings and, therefore, the statement elicited, as well as all of the evidence flowing therefrom, was suppressed.

DISCUSSION

In order to analyze the present case, the nature of the interaction between Defendant and the officers must be determined. It is recognized in Pennsylvania that there are three levels of interaction between the police and citizens which have been described as follows:

"The first [level of interaction] is the 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an 'investigative detention' must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or 'custodial detention' must be supported by probable cause." *Commonwealth v. Clinton*, 905 A.2d 1026, 1030 (Pa.Super. 2006) citing *Commonwealth v. Stevenson*, 894 A.2d 759, 770 (Pa.Super. 2006)

A stop of a motor vehicle by the police is an "investigative detention" which carries with it the constitutional protections of the Fourth Amendment. A police officer has the authority to stop a motor vehicle for investigation of violations of the motor vehicle code and during a traffic stop an officer may verify the driver's license and the vehicle registration and proof of financial responsibility as well as other information as the officer may reasonably believe necessary

to enforce the motor vehicle code. 75 Pa.C.S.A. §6308(b). In addition, an officer may direct a driver or passenger to step out of the vehicle which is subject to a traffic stop regardless of whether the police have reasonable suspicion that criminal activity is afoot. *Commonwealth v. Campbell*, 862 A.2d 659, 663-664 (Pa.Super. 2004), appeal denied, 882 A.2d 1004 (Pa. 2005).

An investigative detention may be considered a custodial interrogation, however, when, under the totality of the circumstances, the conditions of the encounter or the detention become so coercive as to constitute the functional equivalent of arrest. *Commonwealth v. Ellis*, 549 A.2d 1323, 1332 (1988). The test to determine whether a person is being subjected to a custodial interrogation requiring *Miranda* warnings is whether the person is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. *Commonwealth v. Chacko*, 500 Pa. 571, 459 A.2d 311, 314 (1983). The basis for determining if a person is subject to a custodial determination has been described as follows:

“The standard for determining whether police have initiated a custodial interrogation or an arrest is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the troopers or the person being seized.” *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078, 1085-86 (1993).

The factors that the court may use to determine whether there has been a custodial interrogation include: the basis for the detention; its length; its location; whether the suspect was transported against his will, how far and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. *Commonwealth v. Peters*, 434 Pa.Super. 268, 642 A.2d 1126, 1130 (1994) (en banc). Whether a person is in subject to a custodial interrogation for purposes of determining if *Miranda* warnings are required must be evaluated on case-by-case basis with due regard for the facts involved. *Commonwealth v. Mannion*, 725 A.2d 196, 201 (Pa.Super. 1999) (en banc)

The facts in the present case are similar to, but distinguishable from, the facts in the case of *Commonwealth v. Clinton*, 905 A.2d 1026 (Pa.Super. 2006). In *Clinton*, narcotics officers were patrolling in an unmarked vehicle when they observed the defendant’s vehicle fail to stop at an intersection. The officers activated their lights and followed the defendant into a parking lot. The detectives approached the defendant’s vehicle, one on each side, and asked for a driver’s license. Defendant was then asked for registration and insurance at which time the defendant was observed “reaching around trying to go to the glove box.” *Clinton*, at 1028. At that point, the detective asked defendant whether “he had any weapons...or anything [the police] should be aware of.” *Clinton*, at 1028. Defendant responded that he had, “a little bit of weed.” When defendant stated that he had, “a little bit of weed” he was asked to step out of the vehicle and was asked about the location of the marijuana. At that point, the defendant pulled a small knotted baggie containing marijuana from his pocket and he was placed under arrest. Defendant was searched and a digital scale, \$332.00 in cash and a cell phone were found. Defendant was then asked if he had anything else in the vehicle. Defendant responded no and informed the officers they could check for themselves at which time a search of

the trunk of the vehicle revealed a one pound bag of marijuana. *Clinton*, at 1029

After the close of the testimony, the suppression court concluded that while the initial traffic stop was valid that:

“...[t]he detectives acted towards Appellee in a manner that was inherently coercive with the aim of eliciting evidence without having advised Appellee of his right against self-incrimination.” *Clinton*, at 1029.

Further the Superior Court stated:

“The court determined that the circumstances creating a ‘coercive’ atmosphere at the scene consisted of the police parking their vehicle behind Appellee’s vehicle in the parking lot, and the three detectives positioning themselves at the driver’s window and passenger-side window. The court concluded that Appellee was ‘surrounded’ making Detective Love’s question to Appellee regarding whether he ‘had any weapons or anything he should be concerned about’ and ‘improper’ one. The court determined that, under the circumstances, ‘Detective Love’s questioning was inherently coercive and heavy-handed.’” *Clinton, supra*, at 1029.

The Superior Court reviewed the well recognized concerns for officer safety during a traffic stop as enunciated in *Terry v. Ohio*, 392 U.S. 1, 23-24, 88 S.Ct. 1868, 20 L.Ed 2nd 889, (1968) as adopted in Pennsylvania by *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969) and stated that:

“Officers must be concerned with their safety at all times, and particularly at a time when the occupant of a vehicle is reaching into an unexposed area of the vehicle which may contain a weapon.” *Clinton, supra*, at 1031.

The Court determined that under all of the circumstances, the general question to the defendant if he had weapons or anything the officers should be concerned about before defendant “prior to Appellee rooting through the vehicle’s glove box” was not improper. The Court found that the question was not the type of question that normally elicits incriminating information as a citizen may carry a weapon lawfully or may carry other objects which are not illegal but may still cause concern for the safety of the officer. The Court stated:

“Thus we determine that it was error for the suppression court to conclude that a police officer’s question, posed during a traffic stop prior to permitting a driver to search the vehicle’s closed glove compartments presumably, but not necessarily, for the papers, was “coercive” simply because its subject was the existence of weapons or anything else of which the police had a legitimate reason to be aware.” *Clinton*, at 1031.

As noted by the dissent in *Clinton*, the concepts related to arrest and custodial interrogation “compel a fine line of distinction.” *Clinton*, at 1035. In the present case, there are important distinctions from the facts as found by the Court in *Clinton*. In that case, the defendant was asked a specific question about the existence of a weapon or other potentially dangerous objects as he was about to reach into a glove box, during an encounter which took place late at night which required the officers to use their flashlights to see into the vehicle. The question was deemed by the court not to be coercive or seeking inherently incriminating information as

the defendant may have legally possessed a weapon or other legal object that could have posed a danger to the officers. The question was therefore not coercive and not designed to elicit incriminating information.

In the present case, Defendant's vehicle was also stopped by the detective's using lights and sirens and a second vehicle arrived in back-up. The detectives approached the vehicle on both sides of the vehicle and after requests by the detectives, Defendant lowered the windows on both sides of his vehicle and the officers, during daylight hours, were able to observe into Defendant's vehicle. There was no evidence that the detectives' views of Defendant were obstructed. There was no evidence that during this time Defendant made any unusual movements or attempted to reach into any area of the vehicle, whether exposed or unexposed. Defendant was not observed to have anything potentially dangerous in his hands and there was no evidence that he reached between his legs or under the seat of his vehicle. There was no evidence that the detectives observed any bulges in his clothing or anything else in the vehicle which the detectives credibly articulated as posing a potential risk to their safety. Unlike the defendant in *Clinton*, Defendant herein was not asked to and did not reach into a glove box or other area of the vehicle. Although, Detective Harpster testified that Defendant was seen to lean to his right while the vehicle was being followed, this movement was also described as not being unusual for a motorist to look for his or her documents. While Detective Harpster testified that when Defendant said he did not have the papers that this raised his suspicion, it is no less probable that Defendant was looking for the documents and simply found that he did not have them. The detectives also did not see any evidence of drugs or paraphernalia in plain view. The detectives did not describe that Defendant appeared nervous or agitated in any way, exhibited excessive furtive movements or that there were any indications of Defendant having recently used or being under the influence of drugs or alcohol.

Defendant was then asked to exit the vehicle, which was entirely proper. However, upon exiting the vehicle, there was no indication that there was anything about the appearance of Defendant that created the impression that he may have a weapon on him. A pat down was not conducted that revealed a possible suspicious object. Finally, and most importantly, the question put to Defendant was not limited to whether or not he had a weapon on him for purposes of the officers' safety. Defendant was asked "...if he had any weapons, *drugs, anything on him.*" (T., p. 8). This question, placed to a motorist stopped for a routine traffic violation, with the motorist out of the vehicle and in the presence of three detectives, is in fact specifically designed to elicit incriminating information. This question also goes beyond the type of question that was found proper in *Commonwealth v. Kondash*, 808 A.2d 943 (Pa.Super. 2002) where, prior to a *Terry* search, an officer asked a suspected intravenous drug user if he had any needles in his or her possession so that the officer, concerned for his safety, could avoid being stuck. In the present case, there was no evidence that Defendant was being subjected to a *Terry* search or that there was any evidence that Defendant was using drugs. The question put to Defendant was coercive and specifically addressed the possession of drugs and Defendant responded to that question truthfully which resulted in his arrest and the search of the vehicle and the discovery of the marijuana. Considering all of the circumstances attendant to the detention and questioning of Defendant as described above, the finding that Defendant reasonably believed that his freedom of action and movement was restricted; that he was subjected to a custodial

interrogation; and, that it was required that he be advised of his *Miranda* rights before he was questioned about the possession of drugs was appropriate. Therefore, based on the finding that he was not properly advised of his *Miranda* rights, the suppression of his statement and the marijuana that was found as a result of the search of his vehicle subsequent to his statement was also appropriate.

BY THE COURT:
/s/Todd, J.

Commonwealth of Pennsylvania v. Steven Addlespurger

*Driving Under the Influence—Investigatory Detention—
Ineffective Assistance of Counsel—Post-Conviction Relief Act*

Defendant was asleep in a car parked at a gas station with the motor running. Upon being awakened by the police he failed a field sobriety test and was found guilty of Driving under the Influence of Alcohol or Controlled Substance. Held:

1. In order to support a charge of driving under the influence of alcohol under 77 Pa. C.S.A. §3802(a)(1), the Commonwealth must prove (1) that defendant was operating a motor vehicle or was in actual physical control of the movement of a motor vehicle, (2) after imbibing enough alcohol such that the individual is incapable of safely driving.

2. Considering the totality of the evidence, including circumstantial evidence, the Court found that the defendant was in actual physical control of the vehicle where defendant was sitting in the driver's seat with his foot on the brake and hand on the gear shift with the motor running, outside a store that does not sell alcohol, with no one else inside the vehicle.

3. Substantial impairment is found based on defendant's behavior, the opinion of the police officer, and the breath test result.

(Mark C. Coulson)

Deana M. Shirley for the Commonwealth.

Robert E. Stewart for Defendant.

CC No. 200415102. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division

OPINION

Mariani, J., January 23, 2008—This is a direct appeal wherein the defendant appeals the Judgment of Sentence of April 24, 2007 which became final when this Court denied defendant's post-sentencing motions on May 23, 2007. After a non-jury trial conducted on April 24, 2007, this Court found the defendant guilty of one count of Driving Under the Influence of Alcohol or Controlled Substance, in violation of 75 Pa.C.S.A. §3802(a)(1), and sentenced the defendant to a term of non-reporting probation of 30 days and a \$300 fine. This Court found the defendant not guilty of violating 75 Pa.C.S.A. §3802(b). The defendant timely filed a Notice of Appeal. The defendant filed a Rule 1925(b) Concise Statement of Errors to Be Raised on Appeal alleging the following claims of error:

(a) The officer did not have reasonable suspicion to conduct an investigatory detention of Mr. Addlespurger. The officer's testimony failed to establish reasonable suspicion

that Mr. Addlespurger was engaged in criminal activity in violation of *Terry v. Ohio*, 392 U.S. 1 (1968). The investigatory detention—*i.e.*, shaking a man awake and requesting identification—violated Mr. Addlespurger's Constitutional rights provided by the Fourth Amendment of the U.S. Constitution and Article I section 8 of the Pennsylvania Constitution. Any evidence obtained as a result of the violation, including the results of the breath tests should have been suppressed. This issue was raised and preserved in the Omnibus Pretrial Motion filed on March 28, 2005.

(b) The officer did not have probable cause to arrest Mr. Addlespurger and request that he submit to a breath test. Consequently, the results of the breath test should not have been admitted into evidence and should not have been considered by the court. NT 63. There was no evidence that Mr. Addlespurger consumed a sufficient amount of alcohol to impair normal mental and physical faculties required for safe driving. The only evidence cited by the officer that even suggests any physical or mental impairment was that Mr. Addlespurger appeared to be confused after the officer shook him awake, and the smell of alcohol emanating from his person. NT 26. This issue was raised in the Omnibus Pretrial Motion.

(c) If the issues raised in (a) and (b) above were waived as a result of defense counsel's failure to present the Omnibus Pretrial Motion to the court or the failure to request a ruling on the motion, defense counsel was ineffective for failing to preserve the issues and for failing to request that trial court rule on the motion. Counsel's ineffectiveness is apparent on the record, and no evidentiary hearing is needed, because there can be no reasonable, strategic basis for failing to present an application to suppress that has already been filed, and for failing to request a ruling on that motion, even if just a *pro-forma* ruling without argument. Furthermore, this claim must be raised on direct appeal or it will be forever lost. Mr. Addlespurger will not have the redress of the Post Conviction Relief Act because his sentence will expire before the outcome of the appeal. 42 Pa.C.S. §9543(a)(1)(i); *See Generally* Kirk J. Henderson, *The Right To Argue that Counsel was Constitutionally Ineffective*, 45 Duq L. Rev. 1 (2006) (arguing for a short sentence exception to *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002)); *cf. Commonwealth v. O'Berg*, 880 A.2d 597 (Pa. 2005) (rejecting short sentence exception). Thus, if Mr. Addlespurger is denied the right to raise the claim of ineffectiveness of counsel on direct appeal he will be denied effective representation of counsel and due process of law as required by the Fifth, Sixth and 14th Amendments of the United States Constitution and Article I section 9 of the Pennsylvania Constitutions.

(d) The Post Conviction Relief Act, 42 Pa.C.S. §9541 *et. seq.* is unconstitutional to the extent that it deprives Mr. Addlespurger of asserting his federal and state constitutional right to effective assistance of counsel. Since Mr. Addlespurger's sentence has already expired, he will not be able to assert his claim of ineffective assistance through the PCRA.

(e) Section 3802(a)(1) of the vehicle code is void for vagueness under the Fifth Amendment of the US Constitution and Article I section 9 of the Pennsylvania Constitution in that it does not define a criminal offense with sufficient definiteness in order that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Section 3802(a) of the Vehicle code prohibits driving, operating or being in actual physical control of a vehicle after imbibing a sufficient amount of alcohol such that the individual is incapable of safely driving, etc.

(f) The evidence was insufficient to sustain conviction because the Commonwealth failed to prove beyond a reasonable doubt that Mr. Addlespurger was incapable of safe driving. The officer did not observe Mr. Addlespurger driving the vehicle. While a police officer's testimony is generally sufficient, in this case the officer could not recall any relevant facts that led to his ultimate conclusion that Mr. Addlespurger was incapable of safe driving. The officer could not remember which field sobriety tests he administered and he could not remember the manner in which Mr. Addlespurger allegedly failed the field sobriety tests. Furthermore, the fact that Mr. Addlespurger appeared confused when he was awoken by a police officer, and the fact that he smelled like alcohol does not prove that Mr. Addlespurger was incapable of safe driving. The officer testified that Mr. Addlespurger's hand was on the gearshift, but he could not recall whether the gearshift was located on the floor or the steering column. The officer should not be permitted to immunize himself from effective cross-examination as a result of his failure to recall any specific details of the incident in question.

(g) The verdict was against the weight of the evidence. The evidence presented at trial was that Mr. Addlespurger was asleep in his car while the car was parked at a BP station. All the evidence concerning Mr. Addlespurger's intoxication or ability to drive is thoroughly marred by the officer's inability to remember anything specific about the time in question. The officer did not even create report from which he could refresh his recollection. The officer's testimony should not have been afforded any weight because it consisted only of the officer's ultimate conclusion, but none of the facts upon which the conclusions were based.

Relevant to this appeal, the credible facts of record adduced in this case are as follows:

On May 4, 2004 at approximately 7:49 p.m., in response to a dispatch, Officer Noel Pelewski of the Robinson Township Police Department responded to a local BP convenience store/gas station and he encountered the defendant, passed out behind the wheel of his automobile and the automobile was still running. The window of the automobile was down and Officer Pelewski observed the defendant's right hand was on the gear shifter and the defendant's left foot was on the brake of the automobile. After approaching the vehicle, Officer Pelewski attempted to speak to the defendant, however, the defendant did not respond. Officer Pelewski shook the defendant to arouse him. As he was asking the defendant for identification, the defendant appeared confused and Officer Pelewski detected a strong odor of alcohol emanating from the defendant's person and breath. Upon being questioned, the defendant indicated he had consumed two alcoholic drinks that night and he was also on prescription sleep aids. Although Officer Pelewski did not personally conduct field sobriety tests on the defendant, Officer Pelewski did observe the administration of those tests by another officer. Officer Pelewski did not specifically recall which tests were administered but, without objection, he testified that Officer Moritz did administer such tests and, in the opinion of both Officer Pelewski and Officer Moritz, the defendant failed the field sobriety tests. Officer Pelewski then opined that the defendant was incapable of safe driving. The defendant then consented to breath testing. The results of that testing was a reading of .109. This Court then found the defendant guilty and imposed sentence as set forth above.

The defendant's first two complaints center on the initial interaction that Officer Pelewski had with the defendant and the subsequent arrest of the defendant. The defendant disputes whether Officer Pelewski had reasonable suspicion to conduct an investigatory stop of the defendant and he chal-

lenges whether Officer Pelewski had probable cause to arrest the defendant in this case. Neither of these issues were presented to this Court during any pretrial hearing nor was aware that either of these issues had been preserved by the defendant. It appears from the record that Omnibus Pretrial Motions Pursuant to 578 Pa. R.Cr.P. raising these issues were filed by William E. Stockey, Esquire, on March 28, 2005, a time when this case was assigned to The Honorable Robert C. Gallo. On January 23, 2006, attorney Robert E. Stewart replaced attorney Stockey as counsel for the defendant. On August 28, 2006 this case was transferred to this Court. On March 29, 2006, Attorney Stewart filed a Motion in Limine/Motion to Quash raising issues different from those raised in Attorney Stockey's omnibus filing. This case proceeded to a non-jury trial on April 24, 2007. This Court addressed Attorney Stewart's motion but it was not aware of Attorney Stockey's motion. Attorney Stewart did not seek to advance the suppression issues before this Court prior to the non-jury trial. The first time this Court became aware of the suppression issues relating to the defendant's investigatory detention and arrest were when current defense counsel filed his 1925(b) statement.

With respect to the suppression issues challenging the initial investigatory detention and arrest of the defendant, due to the circumstances set forth above, no factual record has been developed upon which to make a ruling on the suppression issues. It may, perhaps, be in the interest of justice to remand this case on the limited issue relating to the constitutionality of the investigatory detention and the arrest of the defendant. See *Commonwealth v. Long*, 753 A.2d 272, 282 (Pa.Super. 2000). In that case, a full suppression record was not created and, in the interests of justice and fundamental fairness, the Superior Court vacated the judgment of sentence and remanded the case to the trial court to conduct a suppression hearing restricted to the issue of whether the officer's stop of Appellant's vehicle was lawful. The Superior Court noted that, at the conclusion of the remanded suppression hearing, the trial court should then make specific-findings of fact and conclusions of law which it shall set forth in an opinion. If the suppression motions were denied by the Court, the original sentence would be reinstated. If such motions were granted, the defendant would be discharged. *Id.*

The defendant next argues that if he has waived challenges to his investigatory detention and arrest that such waiver is the result of ineffectiveness of counsel. As set forth above, this Court is not convinced that the defendant has waived these issues and that the defendant may be able to litigate these issues in this Court after remand. If necessary, defendant's claim of ineffectiveness could also be addressed at that time. The standard for evaluating claims of legal ineffectiveness on direct appeal is well known. In *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (Pa. 2002), the Pennsylvania Supreme Court stated that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." Underlying this rule is the Supreme Court's observation that "time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness." Thus, "the record may not be sufficiently developed on direct appeal to permit adequate review of ineffectiveness claims[.]" Because appellate courts do not normally consider issues that were not raised and developed in the court below, the *Grant* court reasoned that "deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel."

In *Grant*, however, the Supreme Court acknowledged that under limited circumstances, the Court could create excep-

tions and review certain claims of ineffectiveness on direct appeal. *Grant*, 813 A.2d at 738 n.14. In *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 853 (Pa. 2003), the Pennsylvania Supreme Court held that the rule announced in *Grant* did not apply where the trial court conducted an evidentiary hearing and addressed the ineffectiveness claims in its opinion. The Supreme Court later clarified this exception, stating that, for ineffectiveness issues to be addressed on direct appeal, there must be a record developed that is "devoted solely to the ineffectiveness claims." *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431, 441 n.16 (Pa. 2005).

In this case, defendant did not raise his claim of ineffectiveness of trial counsel in a post-sentence motion and this Court held no evidentiary hearing on the claim. Accordingly, no record has been developed addressing this claim. In a claim such as the one made by defendant, it is necessary to delve into trial counsel's reasons for not advancing the suppression issues in the trial court. Because defendant and trial counsel elected to proceed to trial without a jury, it is conceivable that they elected to forgo the pretrial motions hearing to avoid presentation of evidence which was relevant to pretrial issues but not admissible at trial.

Accordingly, the appellate court should not address defendant's claim of ineffectiveness of trial counsel on the merits. See *Commonwealth v. Davis*, 894 A.2d 151, 153 (Pa.Super. 2006). Therefore, this allegation of error should be dismissed without prejudice to raise it on collateral review or otherwise.

The defendant next claims that the Post-Conviction Relief Act is unconstitutional because it deprives the defendant of asserting his federal and state constitutional right to effective assistance of counsel because his sentence has already expired. He claims that he should be able to raise this issue on direct appeal because his sentence has expired and he will not be able to levy a challenge to his trial counsel's effectiveness during post-conviction proceedings. The defendant did not, however, raise this issue before this Court and it is being raised for the first time on appeal and is, therefore, presumably waived and not preserved for appellate review. See Pa.R.A.P. 302(a) (stating that "issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); *Commonwealth v. Lawson*, 789 A.2d 252, 253 (Pa.Super. 2001) (explaining that "even issues of constitutional dimension may not be raised for first time on appeal."); *Commonwealth v. Cain*, 906 A.2d 1242, 1244; (Pa.Super. 2006). The defendant could have, but did not raise the issue in post-sentencing motions. Additionally, should the claims that form the basis of the alleged ineffectiveness be remanded to this Court, the defendant will have an opportunity to litigate the very issues he complains his counsel failed to litigate.¹

The defendant next challenges the constitutionality of 75 Pa.C.S.A. 3802(a)(1). With respect to the unconstitutionality of this statute, the defendant alleges that the statute is void for vagueness. This Court notes that the challenges he raises in this case are identical to those raised by the defendant in *Commonwealth v. Duda*, 923 A.2d 1138 (Pa. 2007). On May 31, 2007, the Supreme Court decided *Duda* and it rejected all of the defendant's constitutional challenges in that case. *Commonwealth v. Duda*, 923 A.2d 1138 (Pa. 2007). By the defendant's own admission on the record on April 24, 2007, his constitutional issues are identical to those of the defendant in *Duda*. Because the Supreme Court specifically rejected, in *Duda*, the constitutional claims raised by the defendant in this case, this Court's ruling denying the Omnibus Pretrial Motion challenging the constitutionality of 75 Pa.C.S.A. §3802(b) should be affirmed. See also

Commonwealth v. Finchio, 926 A.2d 968 (Pa. 2007).

The defendant next challenges the sufficiency of the evidence to convict him. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt were to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.* A trial court's credibility determinations must be given great deference. The trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon*, 820 A.2d 1287, 1290 (Pa.Super. 2003).

Defendant was charged with and convicted of driving under the influence of alcohol under 75 Pa.C.S.A. §3802(a)(1) which provides:

§3802. Driving under influence of alcohol or controlled substance

(a) General impairment.—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. §3802(a)(1). Thus, the Commonwealth must prove: (1) that defendant was operating a motor vehicle or was in actual physical control of the movement of a motor vehicle, (2) after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving. *Commonwealth v. Kerry*, 906 A.2d 1237, 1241 (Pa.Super. 2006).

With respect to what constitutes "actual physical control," courts have held that whether a person is in actual physical control of a motor vehicle is determined based on the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was other evidence indicating that the defendant had driven the vehicle at some point prior to the arrival of police on the scene. The Commonwealth can establish that a defendant had "actual physical control" of a vehicle through wholly circumstantial evidence. *Commonwealth v. Byers*, 437 Pa.Super. 502, 506, 650 A.2d 468, 469 (1994). See also, *Commonwealth v. Woodruff*, 447 Pa.Super. 222, 668 A.2d 1158 (1995) (actual physical control found where defendant's car was on berm of the road fifty yards west of the store where he had purchased beer, the engine was running, the high beams were on and the car was protruding into traffic lanes); *Commonwealth v. Trial*, 438 Pa.Super. 209, 652 A.2d 338 (1994) (actual physical control found where defendant's car was diagonally across a roadway, defendant was in the car with his seatbelt on, the parking lights were on and the keys were in the ignition in the "on" position, although the engine was not running); *Commonwealth v. Wilson*, 442 Pa.Super. 521, 660 A.2d 105 (1995) (actual physical control found where defendant's car was down an embankment by the roadside, no keys were found, but the hood of the car was still warm on a winter night); *Commonwealth v. Leib*, 403 Pa.Super. 223, 588 A.2d 922, *alloc. denied*, 528 Pa. 642, 600

A.2d 194 (1991) (actual physical control found where defendant was asleep in the car in the middle of the road with the engine off); *Commonwealth v. Bobotas*, 403 Pa.Super. 136, 588 A.2d 518 (1991) (actual physical control found where defendant was parked in an alley on his way home with his engine running); *Commonwealth v. Crum*, 362 Pa.Super. 110, 523 A.2d 799 (1987) (actual physical control found where defendant was sleeping in his car on the side of the road with the engine and headlights on); *Commonwealth v. Kloch*, 230 Pa.Super. 563, 327 A.2d 375 (1974) (actual physical control found where defendant was asleep behind the wheel of a car parked along the side of the highway, protruding into a traffic lane with the engine and headlights on); *Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Farner*, 90 Pa. Commw. 201, 494 A.2d 513 (1985) (actual physical control found where defendant was behind the wheel in a traffic lane with the motor running and the brake lights activated).

Moreover, in *Commonwealth v. Williams*, 871 A.2d 254; 2005 Pa.Super. the Superior Court specifically determined that the following evidence, in considering the totality of the circumstances, was sufficient to constitute actual physical control of a motor vehicle:

(1) Williams was parked outside of an establishment that does not serve alcoholic beverages and there was no evidence Williams consumed alcohol nearby; (2) the car was parked diagonally across two handicapped spaces; (3) Williams was sitting in the driver's seat with his hands on the wheel; (4) the engine of the vehicle was running, the car headlights and stereo were on; (5) the vehicle was registered to Williams' employer and only Williams was authorized to drive it; (6) Williams showed signs of visible intoxication and failed field sobriety tests; and (7) the court found Williams' testimony incredible.

Id. at 260-261.

In finding beyond a reasonable doubt that the defendant was in actual physical control of the operation of his vehicle, this Court relied on the fact that the defendant was sitting in the driver's seat of his vehicle with his foot on the brake of the vehicle, his hand was on the gear shift, the motor was running, he was parked outside a BP convenience store/gas station that does not sell alcohol and there were no other persons inside the vehicle. This evidence was sufficient to demonstrate that the defendant was in actual physical control of his vehicle.

The evidence was also sufficient to demonstrate that the defendant was incapable of safe driving. In *Kerry*, the Superior Court looked back to the predecessor statute to §3802(a)(1), 75 Pa.C.S.A. 3731, and explained

[t]o establish that one is incapable of safe driving ...the Commonwealth must prove that alcohol has substantially impaired the normal mental and physical faculties required to operate the vehicle safely; "substantial impairment" means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions.

Id. citing *Commonwealth v. Gruff*, 2003 Pa.Super. 126, 822 A.2d 773, 781, (Pa.Super. 2003), *appeal denied*, 581 Pa. 672, 863 A.2d 1143 (2004). "The meaning of substantial impairment is not limited to some extreme condition of disability." *Id.* citing *Commonwealth v. Griscavage*, 512 Pa. 540, 545 517 A.2d 1256, 1258 (1986). As set forth in *Kerry*, "Section 3802(a)(1), like its predecessor, "is a general provision and provides no specific restraint upon the Commonwealth in the

manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving.” *Id.* citing *Commonwealth v. Loeper*, 541 Pa. 393, 402-403, 663 A.2d 669, 673-674 (1995). Furthermore, “a police officer may utilize both his experience and personal observations to render an opinion as to whether a person is intoxicated.” *Commonwealth v. Kelley*, 438 Pa.Super. 289, 652 A.2d 378, 382 (Pa.Super. 1994) (citing *Commonwealth v. Bowser*, 425 Pa.Super. 24, 624 A.2d 125 (Pa.Super. 1993)).

Various courts have determined that certain evidence was sufficient to prove that a defendant was incapable of safe driving. See *Gruff*, *supra* (finding conviction for DUI under former statute was supported by evidence of defendant’s bloodshot eyes, smell of alcohol, inappropriate responses, refusal to take a blood test, and driving at a high rate of speed); see also, *Commonwealth v. O’Byron*, 2003 Pa.Super. 139, 820 A.2d 1287 (Pa.Super. 2003) (holding that evidence supported defendant’s conviction under §3731(a)(1) where officer testified that defendant ran her car into parked car and left scene, and where defendant was confused and staggering, had alcohol on breath, and could not maintain balance); *Commonwealth v. Leighty*, 693 A.2d 1324 (Pa.Super. 1997) (holding evidence of glassy and bloodshot eyes, admittance of alcohol consumption, failure of two field sobriety tests and minor accident before arrest was sufficient to support conviction for driving under the influence of alcohol under former §3731(a)(1)); *Commonwealth v. Feathers*, 442 Pa.Super. 490, 660 A.2d 90 (Pa.Super. 1995), *affirmed*, 546 Pa. 139, 683 A.2d 289 (1996) (finding evidence was sufficient to sustain conviction under §3731(a)(1), where defendant had glassy eyes and slurred speech, staggered as she walked, smelled of alcohol and failed field sobriety tests, notwithstanding absence of evidence of erratic or unsafe driving); *Commonwealth v. Rishel*, 441 Pa.Super. 584, 658 A.2d 352 (Pa.Super. 1995) (holding evidence sufficient to sustain conviction under §3731(a)(1), where defendant smelled of alcohol, appeared confused, was involved in an automobile accident, failed two field sobriety tests and admitted to consuming two 16-ounce beers) *vacated on other grounds*, 546 Pa. 48, 682 A.2d 1267 (1996).

In this case, this Court relied on the fact that the defendant was sleeping behind the steering wheel of his vehicle with his foot on the brake, his hand on the shifter and the engine running. Upon being approached by the officer, the defendant appeared disoriented and was difficult to arouse, he admitted to drinking two alcoholic beverages, he emitted a strong odor of alcohol, and he was parked outside a BP convenience store/gas station that does not sell alcohol. The opinion of the officer and the defendant’s breath testing result was a .109 after he consented to such testing. This evidence was sufficient to demonstrate that the defendant was incapable of safe driving.

The defendant finally claims that this Court’s verdict was so contrary to the weight of the evidence that the verdict shocks one’s sense of justice. This claim of error was not properly preserved and the defendant has, therefore, waived this claim. As set forth in *Criswell v. King*, 834 A.2d 505; 512. (Pa. 2003) referring to claims challenging the weight of the evidence, “it is a claim which, by definition, ripens only after the verdict, and it is properly preserved so long as it is raised in timely post-verdict motions.” The record is devoid of a post-verdict motion raising this issue. Therefore, the Court believes that this issue has been waived by the defendant.

However, assuming that the issue has not been waived, the claim of error is wholly without merit. As further set forth in *Criswell*,

Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury’s verdict is so contrary to the evidence that it shocks one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury’s verdict was contrary to the weight of the evidence claim is the trial judge—decidedly not the jury.

834 A.2d at 512. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994)). Although *Criswell* spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder, in this case, this Court. *Commonwealth v. Jaroweki*, 923 A.2d 425, 433 (Pa.Super. 2007). This Court was free to believe all, some or none of the evidence. *Id.* A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one’s sense of justice. *Id.* See also *Commonwealth v. Habay*, 2007 Pa.Super. 303; 2007 Pa.Super. LEXIS 3125 (October 10, 2007).

The Court here concluded that, after considering and weighing all the evidence, the testimony at trial was credible. As set forth above, this evidence supported the verdict. This evidence was supported in the record and the verdict was not against the weight of the evidence.

For the foregoing reasons, the Judgment of Sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

¹ The Supreme Court has refused to create “short sentence” exception to the general rule announced in *Grant*. *Commonwealth v. O’Berg*, 880 A.2d 597 (Pa. 2005).

Commonwealth of Pennsylvania v. Cathy Marie Brentzel

Motion to Suppress—Pa. R. Crim. P. 581 (1)—Reasonable Suspicion

1. The Court properly granted a Motion to Suppress where the Court found that the Defendant and the Defendant’s witnesses credibly testified that the Defendant was properly complying with the motor vehicle code rules of the road, including having properly functioning tail lights and operating the vehicle in a prudent manner.

2. When such evidence is presented to the Court, the Court finds that there was not reasonable suspicion for the Defendant to be stopped.

(Jeffrey A. Ramaley)

Turahn LaMont Jenkins for the Commonwealth.
Thomas R. Ceraso for Defendant.

No.: CC 200601789. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Machen, J., February 2, 2008—Defendant was charged at CC: 200601789 with one count of Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S. §3802(c) and §3803(b)(4), as amended and one count of Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S. §3802(a)(1), as amended. In addition, three (3) Summary Traffic Offenses were also charged.

Defendant filed a Motion to Suppress and a hearing was held on March 26, 2007 on defendant's Motion. On October 10, 2007, this court granted the defendant's Motion to Suppress. It is this Order that the Commonwealth has timely appealed.

In its Concise Statement of Matters Complained of on Appeal, the Commonwealth raises two issues. First, the Commonwealth claims that the court erred by failing to comply with Pa.R.Crim.P. 581(I). While the record does not reflect this court's reasons, they will be addressed in this Opinion.

As stated in *Commonwealth v. Hamlin*, 503 Pa. 210, 469 A.2d 137 (Pa. 1983) "where the Commonwealth is appealing the adverse decision of a suppression court, a reviewing court must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted."

The defendant credibly testified that she was obeying the speed limit (T. 26); that the headlights were on (T. 24); that she did not go off the road (T. 26); that the state trooper told her the reason that she was stopped was that her back lights were out (T. 27); and that she was not told that she was exceeding the speed limit (T. 27). Mr. Squires, the defendant's witness and owner of the vehicle, credibly testified that the vehicle in question was approximately 8 months old (T. 30); that he had not experienced any prior problems relative to a mechanical infirmity of the vehicle (T. 31); that he had observed the defendant prior to giving her permission to drive his vehicle and she appeared "completely normal" (T. 32); that the Trooper told Mr. Squires that Miss Brentzel had been pulled over because "the taillights were out" (T. 33); and that the trooper told him the vehicle was inoperable because the taillights weren't working (T. 34, 36). He further testified that later that evening he went to see the vehicle and the taillights were functioning (T. 37); that he had the car inspected by the car dealer and that the dealer submitted a written report that the taillights were functioning properly (T. 38). A document from the car dealer was introduced and admitted into evidence. Defense witness Miller testified that he had inspected the vehicle in question as a part of his employment with Suburban Buick Suburu and that the taillights worked. (T. 50-51).

The Commonwealth's second matter raises the claim that the court erred in granting the Motion to Suppress because reasonable suspicion existed.

Based upon the above recited credible testimony by the defense witnesses, this court did not believe that there was reasonable suspicion for the defendant to be stopped and as such, did not err in granting defendant's Motion to Suppress.

BY THE COURT
/s/ Machen, J.