

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Edward and Kristin Limbacher v. Second Chance Body Armor, Inc., a corporation, et al., Della Vecchia, J.Page 217
Waiver of Insurance Coverage—Failure to Cooperate with Insurer

Lobos Management v. Alaina Stallworth, Friedman, J.Page 218
Landlord-Tenant Action—Unpaid Rent, Late Fees and Expenses

Tracy Nolan v. Daniel J. McGreevy and Daniel M. McGreevy, Friedman, J.Page 219
Agreement for Sale of Real Estate—Return of Hand Money

Northwest Savings Bank, a Pennsylvania Corporation, Successor by Merger to Bell Federal Savings and Loan Association of Bellevue v. Nicholas A. Sychak & Mary Jo Sychak, Friedman, J.Page 220
Mortgage Foreclosure—Motion for Judgment on the Pleadings—Award of Judgment of Possession.

Commonwealth of Pennsylvania v. Quinton Love, Manning, J.Page 221
Admissibility of Confession—Motion to Suppress—Photo Array—Admission of Photographs—Display of Replica Firearms at Trial—Dying Declaration—Competency of Child Witness—Jury Instructions—Sufficiency of the Evidence—Weight of the Evidence

Commonwealth of Pennsylvania v. Shaun Carl Nolder, Cashman, J.Page 227
Post-Conviction Relief Act Petition—Ineffective Assistance of Counsel—Validity of a Guilty Plea—Legality of Sentence—Right to Appellate Review

PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

OPINIONS

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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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**Edward and Kristin Limbacher v.
Second Chance Body Armor, Inc.,
a corporation, et al.**

Waiver of Insurance Coverage—Failure to Cooperate with Insurer

1. An insurance carrier does not waive, nor is it estopped from contesting coverage by virtue of its entry into a settlement agreement.

2. An insured does not violate its duty of cooperation with its insurer by failing to call live witnesses at trial or by agreeing to lift an automatic bankruptcy stay so as to allow the case to proceed to trial.

(Robert A. Crisanti)

James K. Thomas, III for Markl Supply Company and Mutual Benefit Insurance Company.
Gale White for Royal Indemnity Company.

No. GD 03-025417. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

STATEMENT IN LIEU OF OPINION

Pursuant to Pa.R.A.P. 1925(a), this Court responds to the Notice of Appeal Previously filed regarding the above-captioned case. This Court has previously filed Findings of Fact and Conclusions of Law that address the issues now raised. This Court believes that said Findings, etc., (attached) are sufficient to satisfy Pa. R.C.P. 1925(a), as well as aid the Superior Court in making its determination.

BY THE COURT:
/s/Della Vecchia, J.

Date: March 17, 2008

Della Vecchia, J., March 17, 2008—AND NOW, to wit, this 28th day of August, 2007, the Court having reviewed the original and supplemental proposed Findings of Facts, Conclusions of Law and Briefs submitted by the above parties, the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. On June 23, 2003, Police Officer Edward Limbacher (“Limbacher”) was seriously injured when he was shot and the bullet-resistant vest that he was wearing at the time failed to stop said bullet.

2. The vest Limbacher was wearing was designed and manufactured by Second Chance Body Armor, Inc. (“SCBA”).

3. Markl Supply Company, Inc. (“Markl”) was the retail seller of the Limbacher vest. However, the vest was never in Markl’s possession and it did not alter the vest in any fashion, nor was it aware that the vest was dangerous for the use for which it was supplied. (Judge Wettick’s Memorandum and Order of November 14, 2005 and L. Markl Deposition p. 36-40)

4. The Limbachers instituted suit against SCBA as designer and manufacturer; Markl as the seller of the allegedly defective vest; and Toyobo as the supplier of certain fiber in the vest.

5. Scottsdale Insurance Company (“Scottsdale”) issued a primary commercial general liability policy to SCBA.

6. Royal Insurance Company of America issued a commercial excess liability policy (“Royal policy”) to SCBA.

7. Markl was insured by the Mutual Benefit Insurance Company (“Mutual Benefit”).

8. The body armor worn by Limbacher on the night he

was shot was an Ultima IIA vest manufactured by SCBA in November 2002, using a zylon fiber woven into zylon fabric manufactured by Toyobo.

9. Royal Insurance maintains that SCBA had knowledge long before the subject incident that the subject vest was defective and would not perform as represented by SCBA to various customers and suppliers.

10. Royal maintains that the Limbachers intended to present evidence at trial regarding SCBA’s prior knowledge of the allegedly defective condition.

11. Royal maintains that SCBA “expected and/or intended” that its vest would fail and thereby “expected and/or intended” that Officer Limbacher would be injured as a result of the failure of the vest to deflect bullets.

12. Scottsdale agreed to defend SCBA and assigned the defense of SCBA to the law firm of Rawle & Henderson immediately prior to trial.

13. Royal maintains that Scottsdale denied coverage to Markl on the basis that Markl does not qualify as an “additional insured vendor” under the Scottsdale policy and because SCBA violated the “expected and intended” exclusion clause as well as the “cooperation” clause of the Royal policy.

14. On or about October 17, 2004, SCBA filed for bankruptcy, seeking protection from its creditors.

15. On October 25, 2004, only a few days after SCBA filed for bankruptcy, the Limbachers filed a Motion for Relief from the automatic bankruptcy stay; and subsequent thereto, SCBA entered into a stipulation to lift the automatic stay to permit the Limbachers to proceed to the extent their claims were covered by insurance.

16. Simultaneous with the above, SCBA also agreed to forego and not assert any claim for indemnity or contribution from Toyobo.

17. In addition to the allegations set forth in Paragraph 13 above, Royal maintains that it was neither asked to nor did it consent to SCBA’s voluntary agreement to lift the automatic stay nor was it aware of said agreement.

18. Shortly before the scheduled trial of the Limbacher action, SCBA’s defense counsel, which was provided by the Scottsdale Insurance Company, learned and advised Royal that SCBA would have no live fact witnesses at trial and that the lack of such witnesses would “cripple” the defense of the case.

19. Scottsdale’s/SCBA’s counsel conclude that “without any fact witnesses, the prospects for SCBA’s, defense are very bleak.”

20. Scottsdale’s/SCBA’s defense counsel further advised Royal that SCBA would have no live fact witnesses, Royal should settle the case and threatened that Royal could be held in bad faith for failing to settle the case.

21. Royal maintains that it immediately advised SCBA of its failure to cooperate (because it would have no live fact witnesses at trial) and emphasized that the defense of SCBA may be substantially prejudiced if SCBA did not present any fact witnesses at trial, and Royal reserved all rights to deny coverage based upon the SCBA’s violation of the conditions of the Royal policy including, but not limited to, the duty to cooperate.

22. Markl maintains that Scottsdale issued SCBA a Primary Insurance Policy for the period 4/17/03 – 4/17/04. The Binder issued by SCBA’s insurance agent provides for “Blanket Additional Insured Vendors.”

23. Markl was a vendor of SCBA and the above referenced Binder provided coverage to Markl under the Scottsdale policy.

24. Royal had issued a Commercial Excess Liability Policy to SCBA for the period of 4/17/03 – 4/17/04.

25. Markl being a qualified additional insured under the Scottsdale policy, it likewise qualifies as an insured under the Royal policy.

26. Royal has offered no evidence or theory that Markl has somehow violated the Scottsdale or Royal policies or negated the coverage available to Markl thereunder.

27. This Court finds the “proposed contra findings of fact” submitted by Markl in Paragraphs 7 through 66 particularly compelling and adopts said Findings as submitted by Markl.

28. With the consent and full participation of counsel for all parties, including Royal’s current counsel, the Limbacher Court entered a confidential Order (January 10, 2006) memorializing the settlement between Limbacher and the defendants. This agreement preserved for future litigation whether or not \$1,000,000 of the settlement should be paid by Mutual Benefit or Royal on behalf of Markl.

II. CONCLUSIONS OF LAW

1. This matter is governed by Pennsylvania law.

2. Royal has not waived, nor is estopped, from contesting coverage for the disputed amounts by virtue of the fact that Royal entered into the subject settlement agreement.

3. SCBA did not violate the terms of the Royal Insurance policy; specifically it did not violate the terms of the “expected or intended” exclusion in the SCBA policy.

4. SCBA did not abrogate its coverage under the Royal policy; specifically, it did not violate either a) the cooperation clause in allegedly failing to call live fact witnesses; or b) the “cooperation clause and no assumption of liability clause” by agreeing to lift the automatic bankruptcy stay to permit Markl to proceed against SCBA.

5. Rawle & Henderson’s conduct of the defense in the underlying matter was completely appropriate.

6. This Court concludes as a matter of law that Markl is entitled to coverage under the Royal policy.

BY THE COURT:
/s/Della Vecchia, J.

Lobos Management v. Alaina Stallworth

Landlord-Tenant Action—Unpaid Rent, Late Fees and Expenses

1. An agent of a party with apparent authority, even if lacking actual authority, can bind a principal.

2. An oral modification of a lease by an agent with apparent authority to do so, with adequate consideration for that modification, is binding upon the principal.

3. Possession of the premises will not be granted to a landlord before the end of the lease term where the landlord, not the tenant, was in breach of the parties’ lease agreement.

(Robert A. Crisanti)

Jason Greenwald for the Plaintiff.
Alaina Stallworth, pro se.

No. LT 07-000589. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

DECISION

Friedman, J., March 27, 2008—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

The captioned matter is based on a residential lease between the parties. The dispute is whether Defendant owes

Plaintiff rent of \$4,165 plus \$300 late fees plus counsel fees, as Plaintiff claims, or merely \$840, as Defendant concedes. Plaintiff also seeks possession.

A key element is the statement of a person named Adele, who Plaintiff admits was its employee during the period in question but who no longer works there. Plaintiff also admits that Adele was not in the secretarial pool, but rather had duties related to the posting of rents and handling phone calls from tenants. Plaintiff admits that the secretarial pool would refer tenant calls to the manager’s office, and (by implication) to managerial staff such as Lori Kaplan, who handled delinquent accounts, and Adele, who handled posting of rents. Again by implication, Adele seems to have been one of the manager’s staff who would refer late payments to Ms. Kaplan for further action. Her hearsay statement, which was admitted as a statement against interest by Plaintiff, was to the effect that Plaintiff would give the Defendant certain credits against rent due based on damage Defendant suffered as a result of Plaintiff’s failure to correct known defects in a hot water heater and a furnace.

The Court file indicates that Defendant’s Pre-Trial Statement mentions that “Adell” was said to have agreed to “some leniency” for September to November. Plaintiff was therefore on notice that it might need Adele if only for rebuttal. Plaintiff provided no reason why it was unable to subpoena Adele or otherwise have her available, nor did Plaintiff ask for a continuance so Adele’s evidence could be taken if it were contrary to Defendant’s testimony.

The Court finds Defendant a credible witness. The Court notes also that it is undisputed that her payments of three months’ rent into escrow have been for this year, January, February and March, 2008. She disputes only Plaintiff’s failure to give her the credits promised by Adele, which total \$3,325.00, according to the credible evidence.

The issue then becomes whether Adele in fact made such a promise and, if so, did she have the apparent authority to do so even if she did not have *actual* authority. The Court concludes that Adele did make such a promise and that she had apparent authority to do so.

The Court also concludes that Plaintiff’s attempt in the lease to excuse its own negligence regarding the defective hot water tank and furnace are not enforceable. Plaintiff admittedly had adequate notice of both problems *before* Defendant suffered harm (in the form of personal property damage from the unrepaired water tank and lack of necessary warmth from the non-functioning furnace). Despite adequate notice, Plaintiff failed to make the requisite repairs in a timely fashion.

Had Adele not handled Defendant’s justifiable complaints, Defendant most probably would have persisted with her complaints to the Health Department. According to Plaintiff’s manager, the Health Department would then have cited Plaintiff and might even have abated Defendant’s rent. The Court concludes that there was an oral modification of the lease (giving Defendant a credit against rent due from September through November in the amount of \$3,325) by a person with apparent authority to do so, and that there was adequate consideration provided by Defendant for that modification.

The Court therefore concludes that there was no material breach of the lease by Defendant, despite the possible miscommunications among Plaintiff’s various agents and employees. The Court further concludes that Plaintiff breached the lease by failing to repair or replace the hot water heater and the furnace in a timely manner and by beginning eviction proceedings on October 30, 2007, the day before Adele and Defendant had agreed Defendant’s payments on account, if any were then due, might be due.

However, the Court concludes that the breach related to eviction, whether or not material, has been waived by Defendant who has continued to pay rent into escrow so that she may remain on the premises until the expiration of the lease on March 31, 2008.

The Court awards Plaintiff the undisputed sum of \$840 rent still unpaid for the period of September 2007 through December 2007. However, the Court imposes costs on Plaintiff, not Defendant, and further denies Plaintiff's request for attorney fees. The Court also denies Plaintiff immediate possession as the Court regards the lease to be in effect through the end of this month, at which point it terminates by its own terms.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT
/s/ Friedman, J.

Date: March 27, 2008

**Tracy Nolan v.
Daniel J. McGreevy and
Daniel M. McGreevy**

Agreement for Sale of Real Estate—Return of Hand Money

1. The absence of one of the defendants, in defiance of a Notice to Appear, leads to the implication that that party would have provided unfavorable testimony to the defendants.

2. A prospective purchaser of real estate is entitled to the return of hand money when the contract is terminated by the seller without cause.

(Robert A. Crisanti)

Timothy D. Berkebile for the Plaintiffs.
Richard W. Kelly, Jr. for the Defendants.

No. AR 06-009233. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

DECISION

Friedman, J., March 27, 2008—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

The captioned matter involves a dispute over hand money given by Plaintiff to Defendants pursuant to two identical agreements of sale for two parcels of land, one having roughly 20 acres and owned by Defendant Daniel J. McGreevy (hereinafter referred to as "Father") and the other having roughly 6 acres and owned by Defendant Daniel M. McGreevy (hereinafter referred to as "Son").

The Court finds in favor of Plaintiff and against each Defendant and awards Plaintiff the hand money Plaintiff paid to each. The Court does not award Plaintiff the other amounts claimed. The credible facts and the Court's legal conclusions are set forth below in narrative form.

FINDINGS OF FACT

Father handled all the negotiations for both Defendants and William "Ed" Matteson handled them for Plaintiff, who resides in Florida. Plaintiff was interested in the subject real estate because he had lived in the area as a child and still has family ties there. The Agreements of Sale for the parcels (Agreements) were signed in late December 2005 and closing was scheduled for February 1, 2006.

The credible evidence showed that, although the real

estate had slopes, hills and varying terrain, Defendants had represented that their prior investigation indicated it was buildable and their prior "Engineering Plans & Data" were therefore made part of the sale and were said to show how the land could be built upon. The credible evidence showed that the documents Defendants gave to Plaintiff at the time the Agreements were signed were material to the provision regarding the time for closing. The credible evidence also showed that the documents in fact did not contain sufficient information for a determination to be made as to either buildability or economic feasibility. The agreements of sale were not clear on the nature of the contingency, so parol evidence was heard. The contingency language is found at Paragraph 27B of the Agreements, "Contingence [*sic*] upon Buyer reviewing Engineering Plans, Utilities Available, and Environmental Data."

The credible evidence indicates that all parties expected Plaintiff to use the documents provided by Defendants to do his "due diligence" regarding the purchase and that all parties agreed that he could cancel the Agreements if the documents provided Defendant and the available utilities or environmental data were not satisfactory to Plaintiff. The credible evidence showed that the documents were not as represented and were not sufficient to enable Plaintiff, in the short amount of time before the February closing date, to do his due diligence regarding the items in the contingency. As a result, Plaintiff asked for and was given additional time to close, although the evidence suggests that no new closing date was actually set by either Plaintiff or Defendants.

On March 13, 2006, Defendants' lawyer sent Plaintiff a letter indicating that, if the closing did not occur "on or before March 26, 2006, the Agreements of Sale are null and void." (Plaintiff Exhibit C.) Plaintiff, understandably, regarded this as a termination of the Agreements since he was still trying to gather the information he reasonably believed should have been in the documents Defendants supplied at closing. Plaintiff's agent, Mr. Matteson, therefore prepared and mailed to Plaintiff for signature the customary forms regarding the agreement being terminated and arranging for the disposition of the hand money (in this case, to be returned to Plaintiff). Plaintiff signed the form, but Father, after first stating he would return Plaintiff's hand money, then changed his mind and refused to sign the form. Father stated that he would not return the hand money unless another prospective buyer he had begun dealing with actually closed the sale. That other buyer did not close and Defendants continued to retain the hand money. (The Court concludes that the Agreements at issue here terminated as of March 26, 2006.)

In early May 2006, after Defendants were unable to sell the property to the other prospective buyer they had been dealing with, they contacted either Plaintiff or his agent again, to see if Plaintiff was still interested in the property. Plaintiff had concluded that the price Defendants had asked for was too high given what he had learned about the property before the Agreements were terminated. He was still interested in the property, however, because of the family memories and connections it evoked for him. He therefore made a proposal to buy the real estate for a lower price with a later payment only if the property, after development, generated a certain amount of money within three years. Father interpreted that as Plaintiff's seeking a purchase money mortgage, which was not the case. Father therefore sent Plaintiff a proposal on May 2, 2006 for a purchase money mortgage. (Plaintiff's Exhibit F) Mr. Matteson, on behalf of Plaintiff, sent a written proposal dated May 4, 2006, giving clearer details of Plaintiff's offer and indicated at the end, "We can close this contract shortly if accepted." (Plaintiff

Exhibit G.) There is no evidence that Defendants ever accepted this offer.

The next writing from the Defendants is a letter from Father dated May 11, 2006 reiterating Defendants' refusal to return the hand money related to the terminated earlier Agreements. (Plaintiff Exhibit H.) On May 23, 2006, another lawyer of Defendants' sent Mr. Matheson a letter contending that Plaintiff was "in default under both agreements" of December 27, 2005. (Plaintiff Exhibit L)

From the above facts, it appears that the parties decided to try to close a sale after the March 26 termination, but the evidence indicates they never reached a new agreement. Defendants' new lawyer's letter of May 11, 2006 suggests that he was not even aware of the earlier letter from a different lawyer terminating the Agreements at issue. Neither lawyer was called to testify.

In late August, around August 22, 2006, Plaintiff received an opinion from his architect regarding some surrounding land he was also thinking of buying from other parties not involved in the instant action. The slope on the other property made it unbuildable. Shortly after receiving that information, Plaintiff called off the renewed negotiations for the purchase of Defendants' instant real estate. Plaintiff's lawyer then wrote to Defendants' new lawyer demanding the return of the hand money that Defendants had been holding since they terminated the first deal. Defendants refused to do so and the instant action ensued.

CONCLUSIONS OF LAW

As previously indicated, the Court concludes that the written Agreements were terminated by the Defendants as of March 26, 2006. Defendants even tried to sell the real estate to another purchaser shortly thereafter. The legal question is who breached the Agreements? Did Plaintiff breach by failing to close on or before March 26, 2006, or did Defendants breach by giving Plaintiff copies of documents that were not as had been represented and by then refusing to postpone the closing for sufficient time for Plaintiff to do his due diligence (since the documents were not as represented and were useless for the due diligence contemplated by the parties)?

The Court concludes that Defendants breached. Son never testified in this proceeding and refused to honor the Notice to Appear that had been served upon him. There was testimony that, at the prior hearing in this matter, before this Court's Arbitration Section, Son had testified that there was a large stack of papers related to Defendants' own investigations. All that Father caused to be given to Plaintiff was a small number of documents. Son's absence at trial, in defiance of a Notice to Appear, leads to the implication that Defendants withheld from Plaintiff unfavorable information that would have been in those documents. The withholding of the complete documents also prolonged the time in which Plaintiff could reasonably be expected to close, if the property in the end satisfied the contingency. Defendants terminated prematurely, without good cause, and were not entitled to retain the Plaintiff's hand money. The events subsequent to March 26, 2006 were related to the parties' later attempts to reach new agreements after Defendants' new prospective purchaser did not pan out. Those events do not excuse Defendants' breach of the Agreements at issue, nor do they entitle Defendants to retain the Plaintiff's hand money.

Plaintiff also seeks an award of his architectural fees related to the due diligence. The Court concludes they are not awardable under the contract.

It is the decision of this Court that Plaintiff is entitled to the return of his \$20,000 hand money from the Defendants, \$15,000 from Father, Daniel J. McGreevy and \$5,000 from

Son, Daniel M. McGreevy.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT
/s/ Friedman, J.

Dated: March 27, 2008

**Northwest Savings Bank,
a Pennsylvania Corporation,
Successor by Merger to Bell Federal
Savings and Loan Association
of Bellevue v.
Nicholas A. Sychak & Mary Jo Sychak**

Mortgage Foreclosure—Motion for Judgment on the Pleadings—Award of Judgment of Possession.

1. When the record contains adequate proof that Defendants received notice of a mortgage foreclosure action and subsequent sale of the property, Defendants bear the burden of challenging the Sheriff's Sale prior to delivery of the deed.

2. Where the record does not reflect the pendency of a bankruptcy proceeding involving Defendants at the time of the sale of the property, a subsequent bankruptcy filing cannot serve as a basis for challenging a previously completed Sheriff's Sale.

(Robert A. Crisanti)

Cory O. Daschbach for the Plaintiff.
Nicholas A. Sychak, *pro se*.
Mary Jo Sychak, *pro se*.

No. GD 07-0017252. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., April 2, 2008—Defendants have appealed from this Court's Order dated December 17, 2007, in which we granted Plaintiff's Motion for Judgment on the Pleadings and granted judgment for possession of the subject property in favor of the Plaintiff.

Plaintiff filed its Complaint in Ejectment in this matter on August 10, 2007. On September 12, 2007, the Defendants filed a pleading which did not specifically answer the allegations in the Complaint, but which makes various assertions, including that the Defendants were not notified that the property was going to be sold at Sheriff's Sale or that the property was bought by the Plaintiff, that Defendants' bankruptcy counsel failed to communicate with them, and that Defendants had contacted Plaintiff's counsel about renting the property.

Defendants do not dispute that at the underlying mortgage foreclosure action, which maybe found at docket number GD 03-13607, a Sheriff's Sale of the property was held on May 11, 2007 and the Sheriff's Deed was delivered on June 5, 2007. No Petition to Set Aside the Sheriff's Sale was filed in that action.

Pennsylvania Rule of Civil Procedure 3132 sets forth the procedure for setting aside a sheriff's sale:

Upon petition of any party in interest *before delivery of the personal property or of the sheriff's deed*

to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

(Emphasis added.) It is undisputed that in this case, no petition to set aside was filed by Defendants before the delivery of the sheriff's deed.

In *Workingmen's Savings and Loan Assn. of Dellwood Corp. v. Kestner*, 438 Pa.Super. 186, 189, 652 A.2d 327, 328 (1994), the Pennsylvania Superior Court stated that "[a]fter delivery of a sheriff's deed to a purchaser, the only attacks possible on the sheriff's sale are those based on fraud which vitiates the transaction or a lack of authority to make the sale."

However, in *Meritor Mortgage Corp. v. Henderson*, 421 Pa.Super. 339, 344-45, 617 A.2d 1323, 1326 (1992), the Superior Court also stated that "[i]f adequate notice of the [underlying] foreclosure action was not given, the court lacked jurisdiction to enter judgment.... The appellant has alleged and has filed affidavits to support his defense that the mortgage foreclosure judgment was void for lack of jurisdiction. If this is correct, then the judgment entered in the mortgage foreclosure action can be attacked collaterally in the mortgagee's action in ejectment.... When the trial court held that such a defense could not be raised in the ejectment action, it committed legal error."

The Superior Court cited *Meritor* with approval in *Federal National Mortgage Assn. v. Citiano*, 834 A.2d 645 (Pa.Super. 2003). However, the Court also distinguished the circumstances in *Meritor*, in which the property owner received no notice whatsoever of the foreclosure or ejectment proceedings, from those in *Citano* in which the records showed that the property was posted with notice of the Sheriff's Sale and that the property owner was also notified by certified and regular mail. The Superior Court therefore concluded that the property owner in *Citano* should have been aware of the pending action.

In the instant case, Defendants argue that

they were never notified of the Sheriff's Sale held on May 11, 2007. This is a similar tactic that the plaintiff's attorney used on or about October 24, 2007 when a returned receipt dated on or about October 25, 2007 was not entered on the docket till on or about November 6, 2007. On November 9, 2005 the defendants filed a Notice of Appeal on that event. The case number at that time was GD 03-013607.

(12, Defendants' "Appeal to Motion Granted December 17, 2007 consolidated with Appeal to Notice of Judgment [*sic*] entered on January 4, 2008 consolidated with Motion for Extension of Notice and Proper Execution of Sheriff's Sale" (hereinafter referred to as "Defendants' Appeal to Motion").) Defendants also argue that

[w]e were told by our Bankruptcy Attorney that the plaintiff would have to refile for the Sheriff Sale. This would have been after the Discharge of Debtor on August 28, 2007.

("Defendants' Appeal to Motion," ¶13.)

A review of the docket entries for the underlying mortgage foreclosure case, at GD 03-13607, shows that from and including Plaintiff's Petition for Court Permission to Reassess Damages (which was granted by the Honorable Alan D. Hertzberg, also of this Court, on November 29, 2006), a total of four documents were served at the Defendants' residence of 4 Eastvue Drive, Pittsburgh PA

15239. This is the address that Mrs. Sychak continues to use for purposes of this appeal. Defendants must have had some awareness that a sale of the property may have been pending. This awareness would be enough to meet the standard of *Citano*, discussed above, such that Defendants would still bear the burden of challenging the Sheriff's Sale prior to delivery of the deed.

We now turn to the first issue raised by Defendants in their "Appeal to Motion," that

[a]t the time of the Sheriff's Sale, the Bankruptcy filing was still in process.

("Defendants' Appeal to Motion," ¶1.) Defendants attach as Exhibit A to their "Appeal to Motion" a document filed in the United States Bankruptcy Court for the Western District of Pennsylvania. It is entitled "Discharge of Debtor," and is dated August 28, 2007. This would have been after the date of the Sheriff's Sale, which was May 11, 2007. However, in the underlying case, Plaintiff averred in its "Petition for Court Permission to Reassess Damages in Mortgage Foreclosure" that Mr. Sychak had filed a bankruptcy petition "in the Northern District of West Virginia, the jurisdiction in which said Defendant was incarcerated," and that that Bankruptcy petition was dismissed by Order dated March 28, 2006. (Plaintiff's "Petition for Court Permission to Reassess Damages in Mortgage Foreclosure" ¶¶8 and 10, emphasis added.) The interplay and timing of these two Bankruptcy filings is unclear and has not been elucidated by any of the parties in either of the cases. It should be noted that in the underlying case of GD 03-13607, Defendants' appeal to the Superior Court, at docket number 182 WDA 2006, was "dismissed without prejudice to file a petition for reinstatement of the appeal in the event that such is necessary following the conclusion of bankruptcy proceedings" on February 10, 2006. According to the appellate court docket, no petition for reinstatement was filed. Any error in that case was never reviewed by the appellate court, and we cannot now attempt to review it here.

Under the circumstances of this case and the underlying mortgage foreclosure case, we properly granted Plaintiff's Motion for Judgment on the Pleadings and awarded possession of the subject property to Plaintiff:

BY THE COURT:
/s/Friedman, J.

Dated: April 2, 2008

Commonwealth of Pennsylvania v. Quinton Love

Admissibility of Confession—Motion to Suppress—Photo Array—Admission of Photographs—Display of Replica Firearms at Trial—Dying Declaration—Competency of Child Witness—Jury Instructions—Sufficiency of the Evidence—Weight of the Evidence

1. While evidence suggests that Defendant may have been consuming alcohol at the time he gave a statement to the police, surrounding circumstances established that the waiver of the right to speak with police and subsequent statement by Defendant were voluntary.

2. A statement is not involuntarily induced by a promise when there is no evidence of such inducement.

3. A motion to suppress evidence shall not be consid-

ered when Defendant lacks an ownership interest in the property being searched and thus lacks standing to challenge the search.

4. A motion to suppress eyewitness identification shall not be granted where the court has had opportunity to review the photo-array and finds it not to be unduly suggestive.

5. The admission of the photo-array to the jury is not improper when it does not suggest any prior criminal activity.

6. Photographs depicting a homicide victim will not be excluded where their probative value outweighs any possible prejudicial impact to the Defendant.

7. The Commonwealth may display replica firearms at trial so long as they are similar to those used in the commission of the crimes charged and are probative of a trial issue.

8. A dying declaration is admissible when the evidence is sufficient to establish the requisite sense of imminent death.

9. A child is competent to testify if the witness has the capacity to communicate, including an ability to understand questions and to frame and express intelligent answers; the mental capacity to observe and remember the occurrence; and a consciousness of the duty to speak the truth.

10. An instruction on accomplice liability is proper where the evidence was sufficient to allow the jury to conclude that the Defendant intended to kill a victim and that he aided and/or abetted a co-defendant in carrying out that task.

11. An instruction for first degree murder predicated upon criminal conspiracy is appropriate where there is sufficient evidence to support the inference that there was a conspiratorial agreement and there is sufficient evidence of the offense.

12. An involuntary manslaughter instruction is only required where that offense has been made an issue at trial and where the evidence reasonably would support such a verdict.

13. There is sufficient evidence to sustain a first degree murder conviction when circumstantial and eyewitness testimony establish the requisite intent necessary to support such a verdict.

14. A challenge to the weight of the evidence is without merit where the verdict does not shock the Court's sense of justice and is wholly consistent with the evidence presented at trial.

(Robert A. Crisanti)

Michael Steily for the Commonwealth.
Christopher Patarini for Defendant.

No. CC200508599. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., March 7, 2008—Quinton Love, defendant, was charged by criminal information with two counts of criminal homicide (18 Pa.C.S.A. §2501(a)), one count of conspiracy to commit homicide (18 Pa.C.S.A. §903(a)(1)), two counts of robbery (18 Pa.C.S.A. §3701(a)(1)(i) and (ii)), one

count of carrying a firearm without a license (18 Pa.C.S.A. §6101) and one count of recklessly endangering another person (18 Pa.C.S.A. §2705). Following the denial of the defendant's Motion to Suppress Evidence, he proceeded to a jury trial. At the conclusion of that trial, the jury found the defendant guilty at all counts. At the criminal homicide counts, the jury set the degree of murder at Murder of the First Degree. The defendant was sentenced on October 2, 2006 to life imprisonment at both homicide counts. At the criminal conspiracy count at count 3, the defendant was sentenced to not less than fifteen (15) nor more than thirty (30) years. At each of the robbery counts at counts 4 and 5, the defendant was sentenced to not less than seven (7) nor more than fifteen (15) years. He received no further penalty at counts 6 and 7. The life sentences were ordered to run concurrently with one another. The criminal conspiracy sentence was ordered to run consecutive to the life sentences. Each of the robbery sentences was to run consecutive to one another but concurrent with the sentences of criminal conspiracy. In the aggregate, the defendant received a sentence of life imprisonment plus an additional fifteen (15) to thirty (30) years. The defendant filed Post Sentence Motions, which were denied.

The defendant filed a Notice of Appeal. Due to a delay in the filing of the transcripts of this lengthy homicide trial, the defendant sought and was granted an extension of time in which to file a Concise Statement of Matters Complained of on Appeal. By Order dated September 6, 2007, the Court directed that the defendant file his Concise Statement no later than October 15, 2007. On October 9, 2007, the defendant filed a Concise Statement of Errors Complained of on Appeal. In that statement, the defendant identified eighteen distinct claims of error. After a brief recitation of the facts as established by the evidence presented in this case, this Court will address those claims in the order in which they were raised.

The evidence established that on May 20, 2005, the defendant and his co-defendant, Jeffrey Steadman, went to the first floor apartment at 820 Spring Garden Avenue in the Troy Hill section of the City of Pittsburgh, intending to rob the occupants, brothers Malcolm and Randolph Taylor. This defendant was positively identified by Erica Johnson, who lived in the upstairs apartment. She stated that she was in her apartment when the buzzer rang. She went to the front window to see who was at the door and saw two individuals, who she later identified from a photo array and in court as the defendant and Jeffrey Steadman, standing at the door. They told her they needed to get into the Taylor brother's apartment. She told them that they would have to buzz that apartment. Shortly after that encounter, she heard scuffling and an argument in the downstairs hallway. Within seconds of her opening the door and yelling down that she was going to call the police, she heard several gunshots. She moved down the steps and saw the defendants running out the front door of the apartment. She continued down the stairs and locked the front door. She then summoned the police. One of the victims, Randolph Taylor, was still alive when the police arrived. When the officers asked him what happened, he was able to respond, "Q shot me," before he lost consciousness.

Randolph Taylor's six year old daughter, Brandy, was in the apartment when the defendants burst in. She watched as the defendants shot her father and her uncle. She testified that each of the men who came into her father's apartment had guns. She said that one of the men had braids while the other one did not. She was also able to pick the defendant's photograph out of a photo array.

A video surveillance camera located around the corner from the residence captured the image of two men parking a green pick-up shortly before the incident. They were seen

exiting the truck and walking in the general direction of the Taylor apartment. The same men were seen minutes later, returning to the truck and quickly leaving the area. The video was not clear enough to identify either man.

Kevin O'Brien testified that he was the owner of a green pickup truck and that he loaned it to the defendant on or about May 18, 2005. O'Brien's truck was located in the area of St. Clair Village later on May 20th by Patrolman Judd Emery. Officer Emery had been asked by Homicide Detective Stephen Hitchings to try to locate a green Dodge Dakota truck in his patrol area. When Officer Emery approached the truck, he noticed through the window that there was a smudge of blood on the passenger side door handle. The vehicle was then towed to the auto squad garage.

On Sunday evening, May 22, O'Brien learned from Detective Weismantle that his truck may have been involved in a homicide. Weismantle asked O'Brien if he would consent to his vehicle being searched and processed by the crime lab for evidence. O'Brien gave his consent and Detective Michael Jozwiak, assisted by other members of the mobile crime unit, searched the truck and removed evidence for analysis at the Crime Lab. Evidence obtained from the truck included a blood sample from the door handle; an empty Hawaiian Punch bottle; a drink bottle as well as several fingerprints from the vehicle and its contents. DNA testing was conducted on the blood sample from the door handle. It was determined to be a match for a blood sample obtained from the victim Randolph Taylor. Saliva from the drink bottle was also tested for DNA. The DNA from the saliva matched the DNA of a blood sample obtained from the defendant. A right thumb print impression taken from the drink bottle was a match for the right thumb print of the defendant. Other fingerprints obtained matched the co-defendant.

The defendant also gave a statement following his arrest. After being read his rights and signing and dating a pre-interrogation warning form, he agreed to speak with Homicide Detective James McGee. Initially, he told detective McGee that he was approached by the co-defendant who was driving the green pickup truck. He claimed that the co-defendant said he needed some quick money and knew where to get it. He said that they then drove to the North Side, parked and walked to the Taylor residence. He essentially admitted to participating in the robbery but claimed that he did not have a weapon and did not shoot either of the victims. The defendant then gave a statement that was recorded and played for the jury. Once again, he indicated that he was not aware that the co-defendant had a weapon, although he did admit agreeing to participate in the robbery.

The first two claims the defendant raises in his Concise Statement concern the admissibility of his confession. He claims that his confession was not voluntary because he was intoxicated at the time he executed his Miranda waiver and/or that it was involuntary because the detectives who questioned him promised that he would not face homicide charges if he would confess to the offense of robbery.

The Commonwealth bears the burden in a suppression hearing of proving by preponderance of the evidence that a defendant has voluntarily waived his constitutional right to remain silent. *Commonwealth v. Firth*, 388 A.2d 683 (Pa. 1978). In making a determination as to whether the defendant's waiver was knowing, voluntary and intelligent, the totality of the circumstances surrounding the confession must be considered. *Commonwealth v. Anderl*, 477 A.2d 1356 (Pa.Super. 1984).

The totality of the circumstances as established by the evidence presented by the Commonwealth at the suppression hearing established by a preponderance of the evidence that the defendant was not intoxicated at the time that he

gave his voluntary statement. Standing alone, the fact that a defendant had been drinking before his arrest and his inculpatory statement does not render the confession inadmissible, but only goes to the weight to be accorded the confession. *Commonwealth v. Edwards*, 555 A.2d 818 (Pa. 1989) This Court is satisfied that the circumstances surrounding the defendant's statement establish his decision to waive his rights and speak with the officers was not rendered involuntary by the fact that he may have consumed alcoholic beverages prior to his arrest. The officers testified as to their observations of the defendant's physical condition and demeanor during the time that he was in their custody. They saw none of the common indicators of alcohol intoxication; indicators that they are familiar with from their training and experience. They testified that they did not believe that he was under the influence of alcohol.

It must be remembered that the test to determine the voluntariness of a confession is, "whether there was sufficient mental capacity for the defendant to know what he was saying and voluntarily intended to say it." *Commonwealth v. Culberson*, 358 A.2d 416, 417 (Pa. 1976). The evidence suggesting that the defendant may have consumed alcoholic beverages was outweighed by the officer's observations of the defendant, his physical characteristics and demeanor. It is also important to note that the testimony concerning the defendant's level of intoxication presented through the defense expert was entirely dependent upon the veracity of the facts presented to the expert. The defendant's blood was not drawn and his blood alcohol content not tested. The expert's opinion that the defendant was intoxicated was based solely on information provided to the expert by the defendant. The weight of that opinion is obviously dependent upon the credibility of that information. That credibility determination was made against the defendant's evidence and in favor of the testimony from the officers who saw no indication that the defendant had consumed any alcoholic beverage, let alone was so intoxicated as to render his statement involuntary.

Similarly, this Court found that the evidence presented at the suppression hearing established that the defendant was not given improper inducement to make his statement. The claim that the defendant was promised that he would not be charged with homicide if he confessed to the robbery is belied by the record from the suppression hearing. As there was no improper inducement and the defendant was not intoxicative, the suppression motion was properly denied.

Next, the defendant contends that the Court erred in failing to grant the defendant's Motion to Suppress directed at evidence recovered from Kevin O'Brien's green pickup truck. Mr. O'Brien testified that he had lent or rented the truck to the defendant. The truck was identified as being involved in the incident and was later located parked in the strip district. The officer who located the truck noticed a blood smudge in the interior of the truck. The truck was thereafter transported to the impound lot and, after Mr. O'Brien consented to it being processed for evidence, the truck was evaluated by the mobile crime lab and evidence was seized from that truck.

In order for a defendant to challenge the seizure of evidence, it must first be determined if that defendant has standing to do so. In *Commonwealth v. Millner*, 888 A.2d 680 (Pa. 2005), the Supreme Court held that "...a defendant cannot prevail upon a suppression motion unless he demonstrates that the challenged police conduct violated his own, personal privacy interests." *Id.*, at 692. At the time that the vehicle was seized there was nothing suggesting that the defendant had a reasonable expectation of privacy in that vehicle. It was not registered to him and he was not in or

around the vehicle when it was located. The actual owner of the vehicle was located after it was taken to the impound lot but before it was searched and processed for evidence. Because the search was consented to, the Suppression Motion was properly denied.¹

The defendant also challenges this Court's denial of his Motion seeking to suppress the out of court identification by Erica Johnson, contending that the photo array was unduly suggestive. The photo array was displayed to the Court. This Court observed it and determined that it was not unduly suggestive. It is also important to note that this witness had some familiarity with the defendant, having seen him visit the victim's apartment on at least one occasion in the past. Her identification was not simply based upon her observation of the defendant from the window but also from her prior observation of him when he visited the victims' apartment. Considering the totality of the circumstances, this Court concluded properly that Ms. Johnson's identification of the defendant was not tainted and that the photo array was not unduly suggestive. Accordingly, this Motion was properly denied.

The defendant makes a somewhat related claim in that he complains that the Court erred in permitting the Commonwealth to display to the jury the photographic array from which Ms. Johnson selected the defendant as the individual she saw outside her apartment shortly before the victims were shot. The record reflects that at the time that this photo array was offered as a Commonwealth Exhibit, defense counsel did not object either to its admission or to its display to the jury. Accordingly, this claim was waived. To the extent that it may have been preserved through the pre-trial Motion in *Limine*, it is abundantly clear that the Court did not err in admitting this exhibit and allowing the jury to observe it. The photographs did not contain any data that would suggest that any persons depicted therein had been engaged in criminal activity. To the extent that they may have, the failure of counsel to request a cautionary instruction also results in a waiver of any challenge to the presentation to the jury of information that might have been suggestive of prior criminal involvement by the defendant. The photo array from which the defendant's photograph was selected was probative of the credibility of this witness' identification of the defendant and was therefore properly admitted. The probative value of the exhibit outweighed any prejudice that may have accrued to the defendant by possibility that the jurors might believe that the existence of the photograph indicated that the defendant was previously involved in criminal activity.

Next, the defendant complains that the Court erred in admitting photograph exhibits depicting the victims. The photographs were admitted as Commonwealth's exhibits 32, 65, 66, 67, 71, 72, 73, 74 and 75. Exhibit 32 was a photograph of Malcolm Taylor, who died at the scene. It depicted the body lying on the floor with evidence of medical intervention and blood around the area. It was a color photograph. The Commonwealth indicated that the photograph of Malcolm Taylor was necessary because it showed blood splatters above a fan also depicted in the picture. The Commonwealth also sought to introduce Commonwealth Exhibit 35 which was another color photograph of Mr. Taylor. The Court sustained the objection to exhibit 35 but admitted exhibit 32. Exhibits 65 and 66 were black and white photographs showing the unclothed body of Malcolm Taylor taken at the medical examiner's office. Exhibit 67 was a color photograph of the same. Photographs 71 through 75 were also autopsy photographs of the various wounds suffered by Randolph Taylor. When the defendant objected, the Commonwealth explained that these photographs were necessary because Dr. Shakir

was testifying in place of Dr. Ladham, who actually had performed the autopsy. The photographs were necessary for the doctor to explain the wounds that the victims received.

The test for the admissibility of photographic evidence in a murder case was recently set forth by the Superior Court in *Commonwealth v. Hetzell*, 822 A.2d 747 (Pa.Super. 2003) That Court wrote:

The viewing of photographic evidence in a murder case is, by its nature, a gruesome task. But photographs of a corpse are not inadmissible *per se*. *Commonwealth v. Henry*, 550 Pa. 346, 706 A.2d 313, 333 (1997). Rather, the Court must conduct a two part test in determining admissibility. *Id.* First the Court must decide if the photos are inflammatory. If not, they are admissible. If they are inflammatory, the Court must balance the evidentiary need for the photos against the likelihood that they will inflame the minds and passions of the jurors. Where the evidentiary value exceeds the inflammatory danger, admission is proper. *Id.*

822 A.2d at 765. The Commonwealth explained the need for all of the photographs that were admitted over defense objection. Exhibit 32 was necessary to demonstrate to the jury the blood splatter patterns. The Court only admitted one of the two photographs that the Commonwealth sought. The Court is satisfied that the probative nature of that photograph outweighed any possible prejudice to the defendant by its admission.

With respect to the autopsy photographs, again, the Commonwealth explained that those photographs were necessary to depict the wounds suffered by the victims in this case. The fact that there was more than one photograph arises from the fact that this defendant participated in the killing of two individuals, shooting them numerous times. The Commonwealth is certainly permitted to show photographic evidence of each specific wound, particularly under the circumstances of this case where the forensic pathologist who actually performed the autopsy was not present to testify and another forensic pathologist had to testify, Doctor Shakir relied on the report from Dr. Ladham and on the photographic evidence to explain his testimony. All of that testimony was certainly probative and the photographs were a necessary adjunct to that testimony. The probative nature of each of the admitted photographs outweighed any possible prejudice.

That possible prejudice was also diluted by the instruction given to the jury when the photographs were offered. The Court gave a proper cautionary instruction to the jury regarding the reasons for the admission of the photographs and cautioned the jury that they were not to allow the photographs to stir up their emotions to the prejudice of the defendant. The jury was told:

Ladies and Gentleman, as you know, Dr. Shakir is going to testify as to the cause and manner of death of the two deceased individuals here. He is going to do so with the use of photographs.

The photographs are admitted for the purpose of showing you the wounds that the victims received. As I told you at the outset, you are selected on the jury for—on a homicide case, you are going to see a dead body. These photographs are not particularly pleasing to look at, but they are necessary for you to understand the nature of the wounds that are inflicted here.

You should not let these photographs stir up your

emotions as to the prejudice of the defendant. Your verdicts must be based on a rational and fair consideration of all of the evidence and not on passion or prejudice against the defendant, the Commonwealth or anyone else connected with this case.

Keeping in mind that they may not be pleasant to look at. They are photographs that are necessary in the process of understanding what went on here. (N.T., Vol. II, p. 371)

The defendant next complains that the Court erred in permitting the Commonwealth to display to the jury replicas of the two weapons that the evidence established were used in this case. The weapons that were used in the robbery and killing of the victims were never recovered. From the analysis of the shell casings and bullet fragments, the Commonwealth's firearms expert was able to determine the type of weapons that were used in this shooting: a rifle similar to an AK-47 and a .38 or .357 caliber handgun. The Commonwealth produced replicas of these weapons at trial and used them for demonstrative purposes at trial and during closing argument.

It was clearly proper for the Court to allow the Commonwealth to do so. There was sufficient evidence establishing that weapons similar to these were used in the commission of the offenses charged. It was important to use these replicas because the Commonwealth witness Brandy Taylor described the weapons as being one that could be held with one hand (the handgun) and one that could be held with two hands (the rifle). Also, the defendant claimed in his statement that he did not have a weapon; that only his co-defendant was armed; that his co-defendant did all of the shooting; and that he did not know that his co-defendant had a weapon until they entered the residence. Showing the jury both weapons helped to contradict these claim in that the jury saw how difficult, if not impossible, it would have been for a single person to have operated both weapons or for a person to have concealed the rifle such that the defendant did not know his co-defendant had it. Finally, the weapons were also used by the Commonwealth firearms expert during his testimony. The expert used the weapons to illustrate to the jury the difference between a semi-automatic weapon and a revolver and, in particular, what happens to shell casings when those weapons are fired. Although the evidence from the pathologist established that the victims suffered five or six total wounds, there were only two shell casings, those from an automatic weapon, found at the scene. The expert explained, using the replicas, that shell casings from an automatic weapon are ejected from the weapon after it is fired while casings from a revolver remain in the weapon. This was, important to the Commonwealth's case because the defendant, in his statement, said that his co-defendant was the only one with a weapon. The use of the replicas by the expert was necessary to rebut that claim.

It is also important to note that when the firearms were displayed to the jury, the Court instructed the jury that the weapons they were being shown were not used in the commission of the crimes charged and were being shown to them solely for demonstrative purposes. (N.T. Vol. II, p. 421). The Court cautioned them against considering the weapons for any purpose other than as demonstrative aids to the expert's testimony.

The admission of demonstrative evidence is within the discretion of the trial court. *Commonwealth v. Lee*, 638 A.2d 1006 (Pa.Super. 1994). Absent an abuse of that discretion, there is no error in admitting such evidence. Where the use of a replica weapon is necessary to illustrate expert testimony, it is admissible. *Commonwealth v. Ragan*, 645 A.2d 811

(Pa.Super. 1994). Accordingly, the Court did not err in permitting the use of the replica weapons in this case.

In his eighth claim, the defendant contends that the Court erred in determining that Randolph Taylor's statement to the police that "Q" shot him was a dying declaration because the evidence did not establish that Taylor believed that his death was imminent. The knowledge that death may be imminent need not be expressed by the witness; it can be inferred from the circumstances, including the severity of the wounds. *Commonwealth v. Cooley*, 348 A.2d 103 (Pa. 1975). The police officer to whom the statement was made, Kim Stanley, described the defendant's condition when she arrived at the scene: "He was lying on his right side. There was blood all over his clothing and in puddles around him. He seemed to be having a difficult time breathing. He was wheezing to catch his breath." (N.T. Vol. I, p. 87). She went on to say that it appeared to her that he "...knew he was in bad shape....He said to ask them [the medics] to hurry." (N.T. Vol. I, p. 87). This evidence was sufficient to establish the requisite sense of imminent death necessary for the statement to be admitted.

The defendant's ninth and tenth claims concern the testimony of Brandy Taylor. He contends that the Court erred in determining that she was competent to testify because "...by her own admission...she had an impaired memory and, as a result, did not have the capacity to remember anything about the events that she was called to testify." (Concise Statement, at ¶6 (i)). He also argues that the Court erred in refusing to give the jury Suggested Standard Criminal Jury Instruction 4.06, which cautions the jury "to examine closely and carefully and receive with caution the testimony of..." a witness under certain circumstances, including that the witness is a child of tender years.

Brandy Taylor was, without question, competent to testify. A young witness must have "...a capacity to communicate, including an ability to understand questions and to frame and express intelligent answers; mental capacity to observe and remember the occurrence; and a consciousness of the duty to speak the truth." *Commonwealth v. Haber*, 505 A.2d 273, 278 (Pa.Super. 1986). The defendant only challenges the second prong of this test, the ability of the witness to observe and remember the occurrence. His challenge, however, is wholly contradicted by the record. This child did not admit that she had any trouble remembering what occurred in her father's apartment. Counsel asked her if she remembered "everything" that happened a year ago and, as any person would have done, she said "no." No one is capable of remembering "everything" that happened a year previously and her recognition of that was actually indicative of her competence. She did, however, remember how old she was in May of the previous year, that she attended Johnston School at that time and that she "didn't do nothing" on Memorial day of the prior year. Her testimony concerning the events of May 18 is further evidence of her competence in that her testimony was consistent with the overwhelming evidence presented by the Commonwealth. Her description of events was corroborated by testimony from other witnesses and from the physical evidence introduced. She was competent and nothing about her testimony justified a specific caution about her testimony. Quite frankly, this young lady testified with the poise and courage unusual for a person of her age and remarkable given the traumatic nature of the events she was describing.

In his 11th, 12th and 13th complaints of error, the defendant contends that the Court's instructions to the jury were improper. He first complains that the evidence was insufficient to warrant the jury be instructed on an accomplice liability theory with regard to the charge of first degree

Murder. This charge was properly given because the evidence presented was sufficient to allow the jury to conclude that this defendant intended to kill the victims and that he aided and/or abetted his co-defendant in carrying out this intent. It was not possible from the evidence to determine which of the defendants shot which of the victims. It was possible to determine, however, from the evidence that both defendants possessed weapons and fired them at the victims. Clearly, the act of this defendant in shooting at the victims was sufficient to conclude that he was attempting to aid or abet his co-defendant in carrying out the intended killings of these individuals. This Court properly instructed the jury on the principle of accomplice liability and the facts presented by the Commonwealth certainly supported that instruction being given.

Similarly, the defendant contends that there was insufficient evidence to support a charge on liability for first degree murder under a criminal conspiracy theory. First, it is irrelevant that the verdicts did not contain the charge of criminal conspiracy to commit first degree murder. The defendant was not charged with conspiracy to commit first degree murder. That does not mean, however, that he could not have been guilty of the crime of first degree murder under a criminal conspiracy theory. The jury could very well have concluded that the defendant and co-defendant agreed that they would kill the victims based upon the evidence presented at this trial. It is important to remember that an agreement necessary for criminal conspiracy need not be an express agreement. An agreement may be unspoken. As long as there is circumstantial evidence sufficient to support, beyond a reasonable doubt, the inference that there was a conspiratorial agreement, the evidence is sufficient for the offense and warrants an instruction on criminal conspiracy.

Finally, the defendant contends that the Court erred in denying the defendant's request that the jury be instructed on the charge of involuntary manslaughter. The Pennsylvania Supreme Court held in *Commonwealth v. Browdie*, that "...a trial court shall only instruct on an offense where the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict." 671 A.1d 668, 674 (Pa. 1996). The crime of involuntary manslaughter is defined as follows:

A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless of grossly negligent manner, he causes the death of another person.

18 Pa.C.S.A. §2504 (a). In *Commonwealth v. Soltis*, 687 A.2d 1139 (Pa.Super. 1996) the Court addressed a claim that the trial court erred in refusing to charge on involuntary manslaughter. In affirming the trial Court, the Superior Court wrote:

Under Pennsylvania law, a homicide defendant is entitled to a charge on involuntary or voluntary manslaughter only if the evidence adduced at trial would reasonably support a verdict on such a charge. *Commonwealth v. Browdie*, 543 Pa. 337, 671 A.2d 668 (1996) (applying this rule to heat-of-passion voluntary manslaughter); *Commonwealth v. Carter*, 502 Pa. 433, 466 A.2d 1328 (1983) (applying this rule to unreasonable belief voluntary manslaughter); *Commonwealth v. White*, 490 Pa. 179, 415 A.2d 399 (1980) (applying this rule to involuntary manslaughter). In other words, a trial court can give a manslaughter instruction only

when there is evidence tending to show that the defendant is not guilty of the crime of murder but is guilty of the lesser crime of manslaughter. See *White, supra*, at 183-84, 415 A.2d at 401. In determining whether the evidence would support a manslaughter charge, we must view the evidence in the light most favorable to the defendant. *Commonwealth v. McCloskey*, 441 Pa.Super. 116, 121-22 n. 1, 656 A.2d 1369, 1372 n. 1. *appeal disallowed*, 542 Pa. 662, 668 A.2d 1126 (1995).

687 A.2d at 1141. The evidence presented in this matter, even when viewed in a light favorable to the defendant, did not tend to show that the defendant was not guilty of murder but guilty of involuntary manslaughter. The evidence tended to show that the defendant and his co-defendant killed the victims through the intentional acts of shooting them. There was no evidence tending to show that the killings were the result of reckless or grossly negligent conduct by the defendant. In the absence of evidence supporting the conclusion that the killings were not intentional, it would not have been proper for the jury to have been instructed on the offenses of voluntary or involuntary manslaughter.

The defendant also next challenges the verdict of guilty as to first degree murder, contending that the evidence was insufficient to prove beyond a reasonable doubt that this defendant actually fired the shots that killed either men and was also insufficient to prove that the defendant possessed the specific intent to kill. The evidence was sufficient. The forensic evidence established that the victims were shot multiple times. There were, however, only two shell casings found in the apartment. This, alone, was sufficient to establish that more than one weapon was used in the assault and that one of those weapons was not an automatic weapon because of the absence of other shell casings. The Commonwealth also, however, presented the testimony of Brandy Taylor who testified that she saw both defendants with weapons, shooting them at her father and her uncle. Accordingly, the evidence was more than sufficient to establish that both defendants fired weapons at the victims in this matter. With regard to evidence of specific intent, it is axiomatic that where the evidence shows that an individual used a deadly weapon on a vital portion of the body, that is sufficient to infer that the actor did so with the specific intent to kill. Again, the evidence was sufficient to show that both defendants fired weapons toward vital portions of the victim's body. Accordingly, the evidence was sufficient to establish that this defendant possessed the specific intent to kill with regard to both of these victims.

Defendant also challenges the sufficiency of the evidence as to a finding that this defendant possessed the specific intent to kill both victims necessary for, finding that he was guilty under either an accomplice or criminal conspiracy liability. Again, the evidence established the use of a deadly weapon on vital portions of the victim's body. That alone was sufficient to establish the specific intent to kill. With regard to evidence tending to show a conspiracy, it is again necessary to point out that the agreement necessary for conspiracy need not be an express agreement. It can be an agreement tacitly acknowledged by the parties moments before they engage in their criminal enterprise. The evidence showing that this defendant entered this apartment, armed with a deadly weapon, and thereafter discharged that deadly weapon against one or both of these defendants was sufficient to establish that an agreement existed between the parties with regard to the charge of first degree murder. With regard to accomplice liability, the evidence was sufficient to support the inference that this defendant did discharge his

weapon in aid or abetment of his co-defendant's actions in aiding and abetting the murder of the victims. The evidence was sufficient for the jury to conclude that this defendant began to fire with the specific intent to kill and with the intent of aiding his co-defendant in fulfilling the object of killing these victims.

The defendant's challenge of the weight of the evidence is similarly without merit. This Court has considered all the evidence presented in this matter and the verdicts returned do not shock its sense of justice. The verdicts were wholly consistent with the evidence presented in this matter. This Court's denial of the defendant's Motion for New Trial on the basis that the verdict was against the weight of the evidence was properly denied.

Finally, the defendant complains that the Court abused its discretion in imposing the life sentences consecutive to one another. Because these sentences were imposed concurrently and not consecutively, this claim is without merit.

For the reasons set forth in the foregoing Opinion, the defendant's judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, J.

¹ The defendant does not, in his concise statement, complain that the initial seizure of the truck by Officer Judd Emery was unlawful. He only challenges the later seizure of evidence from the truck when it was at the automobile impound lot. To the extent that he does attempt to challenge the initial seizure of the vehicle, he is also without standing to do so.

Commonwealth of Pennsylvania v. Shaun Carl Nolder

Post-Conviction Relief Act Petition—Ineffective Assistance of Counsel—Validity of a Guilty Plea—Legality of Sentence—Right to Appellate Review

1. Trial counsel did not render ineffective assistance for failing to challenge the validity of a guilty plea when the totality of the circumstances surrounding the plea was knowing, voluntary, and intelligent.

2. When all of the offenses arise from a single act and there was no break in the commission of these crimes, the sentences imposed must merge.

3. A claim that the trial court abused its discretion by not allowing Defendant to raise all possible issues in the Statement of Matters Complained of on Appeal is without merit when the Defendant's attorney concedes that these issues are also without merit.

(Robert A. Crisanti)

Michael Streily for the Commonwealth.
Scott B. Rudolf for Defendant.

No. CC200203344. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., March 7, 2008—The appellant, Shawn Nolder, (hereinafter referred to as "Nolder"), originally was charged with one count of involuntary deviate sexual intercourse, one count of indecent assault and one count of the corruption of the morals of a minor as a result of his sexual assault of his five year old, female victim. On August 18,

2003, Nolder entered into a limited plea agreement whereby the charge of involuntary deviate sexual intercourse was reduced to the charge of sexual assault. A presentence report was ordered and a request was made of the Sexual Offenders' Assessment Board to make a determination as to whether or not Nolder was a violent sexual predator under the Terms of Megan's Law.¹ Nolder was scheduled to be sentenced on November 14, 2003, however, that sentencing hearing was delayed since the Sexual Offenders' Assessment Board had not completed its assessment of Nolder.

A sentencing hearing was held on January 15, 2004, at which time the report of the Sexual Offenders' Assessment Board was accepted and it was determined that Nolder did not meet the criteria to be classified as a violent sexual predator; however, he was still required to register with the Pennsylvania State Police for a period of ten years following his release from incarceration. Nolder was sentenced to a period of incarceration of not less than one and one-half nor more than three years with respect to his conviction on the charge of indecent assault, one to two years for his conviction on the charge of corruption of the morals of a minor, and five to ten years on his conviction for sexual assault, all of these sentences of incarceration to run consecutively. Nolder did not file any post-sentencing motions nor did he file a direct appeal to the Superior Court following the imposition of his sentences.

On December 1, 2004, Nolder filed a pro se petition for post-conviction relief and the Public Defender's Office of Allegheny County was appointed to represent him in connection with that petition. An amended petition for post-conviction relief was filed by Nolder's appointed counsel and after numerous continuances because of the unavailability of Nolder and his trial counsel, a hearing was held on his petition. Following that hearing, Nolder's request for relief was denied. Nolder filed a timely appeal and in response to that appeal was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(h), to file a concise statement of matters complained of on appeal. In his statement, Nolder has raised five claims of the ineffectiveness of his trial counsel, one claim of the ineffectiveness of his appellate counsel and asserted three claims of error by this Court in imposing illegal sentences on Nolder and in preventing him from perfecting his appeal.

Section 9543(a) of the Post-Conviction Relief Act provides the basis for relief if Nolder pleads and proves by the preponderance of the evidence that his conviction resulted from any one or more of the following circumstances:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government offi-

cials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

In his statement of matters complained of on appeal, Nolder has suggested that his plea was not intelligently, knowingly and voluntarily made because there was a defective plea colloquy. In particular, Nolder has suggested that during the plea colloquy, he was never advised of the nature of the charges to which he was pleading guilty and, accordingly, his counsel was ineffective for failing to object to the deficient plea colloquy, failing to move to withdraw his guilty plea, and in failing to preserve that issue for direct appeal.

In order to establish the claim of the ineffectiveness of counsel, Nolder is required to meet the standards set forth in *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 323 (1999):

The petitioner must still show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. This requires the petitioner to show: (1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Nolder's first three claims of the ineffectiveness of his counsel are predicated upon the fact that the guilty plea colloquy was defective because the nature of the charges to which he was pleading guilty were not explained to him. Pennsylvania Rule of Criminal Procedure 590(a) sets forth the basis for accepting a plea of guilty and provides as follows:

(A) Generally (1) Pleas shall be taken in open court. (2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf. (3) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly

tendered. Such inquiry shall appear on the record.

In the comment following that rule, the minimum requirements for accepting a plea of guilty or *nolo contendere* were set forth:

Comment: The purpose of paragraph (A)(2) is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea or plea of *nolo contendere* is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, 316 A.2d 77 (Pa. 1974); *Commonwealth v. Campbell*, 304 A.2d 121 (Pa. 1973); *Commonwealth v. Jackson*, 299 A.2d 209 (Pa. 1973).

It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty or a plea of *nolo contendere*. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?

(2) Is there a factual basis for the plea?

(3) Does the defendant understand that he or she has the right to trial by jury?

(4) Does the defendant, understand that he or she is presumed innocent until found guilty?

(5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the Judge accepts such agreement? Inquiry into the above six areas is mandatory during a guilty plea colloquy under *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977), and *Commonwealth v. Dilbeck*, 353 A.2d 824 (Pa. 1976).

Using these guidelines it is clear that the guilty plea colloquy was neither defective nor in violation of this Rule of Criminal Procedure.

The examination of Nolder's plea must be done in the totality of the circumstances and not in the abstract since it is necessary to determine whether or not Nolder knew the consequences of his plea. *Commonwealth v. Yager*, 454 Pa.Super. 428, 685 A.2d 1000 (1996). This Court conducted an oral colloquy with Nolder and advised him that he was pleading guilty to one count of statutory sexual assault, a felony in the second degree; one count of indecent assault, and one count of corruption of the morals of a minor, both of which are misdemeanors in the first degree. When asked whether or not he understood that he was pleading guilty to these charges, Nolder responded in the affirmative. (Guilty Plea Transcript, p. 2). Nolder was then advised of the maximum penalty that could be imposed upon him for each of the offenses and when Nolder was asked if he understood those penalties, he again responded in the affirmative. (Guilty Plea Transcript, p. 3). Nolder acknowledged that he understood his right, to a jury trial and a non-jury trial. (Guilty Plea Transcript, pp. 3-4). Nolder was specifically asked as to whether or not he was satisfied with his representation by

his trial counsel to which he again responded in the affirmative. (Guilty Plea Transcript, p. 3). Nolder was specifically asked whether or not his trial counsel had explained the nature of the charges to which he was pleading guilty and Nolder responded, "Yes, sir." (Guilty Plea Transcript, p. 3). Additionally, Nolder was asked whether or not his trial counsel had explained each and every element of the offenses to which he was pleading guilty and, again, Nolder responded "Yes, sir." (Guilty Plea Transcript, p. 3). In addition, Nolder was asked whether or not his trial counsel had explained the facts that the Commonwealth would have attempted to prove had his case gone to trial and again, Nolder responded, "Yes, sir." (Guilty Plea Transcript, p. 3). When asked why he was pleading guilty, Nolder responded, "Because I did it." (Guilty Plea Transcript, p. 4).

Nolder, in addition to responding to the oral colloquy with respect to his rights and the nature of the charges to which he was pleading guilty, also executed a ten-page written colloquy. In that written colloquy, Nolder acknowledged that he understood the elements and facts of the crimes and how those facts proved the crimes to which he was pleading guilty. (Questions 6, 7 and 8). Nolder also acknowledged that he understood his right to a jury trial and a non-jury trial and his rights pertinent thereto. (Questions 9 through 16). Nolder also indicated that he understood that the Commonwealth's burden of proof was to establish the elements of the offenses beyond a reasonable doubt, (Questions 17 through 19), and that he was not required to testify nor present any witnesses on his behalf, (Questions 20 through 21), and that by pleading guilty he was giving up these rights. (Question 22). In Question 24, Nolder acknowledged that he admitted that he committed the crime by pleading guilty. Nolder acknowledged that by pleading guilty he was giving up any rights to present potential defenses, (Question 26). Nolder also acknowledged that the entry of his plea of guilty was done of his own free will and no one forced, threatened, or coerced him into doing so, (Questions 51 through 53). Nolder, in Questions 51 through 53, acknowledged that he was satisfied with his counsel and his counsel had reviewed the form with him. In Question 63, Nolder acknowledged that he was pleading guilty because he committed the offenses with which he was charged. Nolder also acknowledged that he understood all of the rights that were explained to him in this form, (Question 64). At the time of the oral colloquy, Nolder once again acknowledged that he had no difficulty in understanding any of the questions that were asked of him in the ten-page explanation of rights form. (Guilty Plea Transcript, p. 2).

It is clear from a review of the explanation of rights form executed by Nolder and the Guilty Plea Transcript that Nolder fully understood the nature of the charges filed against him and that he was freely and voluntarily admitting his guilt. Since Nolder entered a knowing, voluntary and intelligent plea of guilty to these charges, his counsel could not, have been ineffective for failing to object to the colloquy, in failing to file a motion to withdraw the guilty plea on the basis of a defective colloquy, nor in failing to preserve that is an issue on appeal.

Nolder's next three claims of error deal with the question of his sentences and whether or not this Court erred in failing to merge his offenses for the purpose of sentencing. In *Commonwealth v. Gatling*, 570 Pa. 34, 807 A.2d 890 (2002), the Pennsylvania Supreme Court did an extensive analysis of the history of the doctrine of merger and announced a new rule in making a determination as to whether or not a merger analysis is necessary at the time of sentencing. In that case, *Gatling* was convicted of indecent assault and corruption of the morals of a minor with respect to an incident that

occurred in September of 1996 and also was convicted of statutory sexual assault and corruption of the morals of a minor with respect to an incident that occurred approximately a month later with the same victim. That Court, in defining the standard by which a merger analysis must take place, stated as follows:

To the extent that our merger jurisprudence is confusing, we now definitively state, for bench and bar, the standard for determining when convictions should merge for the purposes of sentencing. The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts.^{FN9} If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.

FN9. One crime is a lesser-included offense of another crime if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime, and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime. Thus, in a situation where the crimes, as statutorily defined, each have an element not included in the other but the same narrow fact satisfies both of the different elements, the lesser crime merges into the greater-inclusive offense for sentencing. 807 A.2d at 899.

That Court further went on to find the circumstances that would militate against a merger analysis.

Thus, the rule that we now announce is that an overarching chain of events does not constitute a single criminal act when there is a break in that chain. A break requires both that: (1) the acts constituting commission of the first crime were completed before the defendant began committing the second crime; and (2) proof of the second crime did not in any way rely on the facts necessary to prove the first crime. In addition, the break must be either: (1) a significant temporal lapse; or (2) where applicable, indicated by a change in the criminal intent of the defendant at some point during the sequence. Where a defendant is convicted of two or more crimes and there is no break, the court must then proceed to the merger analysis as above described. If the acts that make-up the first crime are complete before the defendant begins the second crime, if proof of the second crime does not rely on any of the facts supplying proof of the first crime, and if there is either a significant temporal break or a change in the defendant's intent, the defendant will have committed multiple criminal acts. 807 A.2d at 900.

Using these guidelines in reviewing Nolder's factual situation, it is clear that all of these crimes arose out of a single

act and there was no break in the commission of these crimes, accordingly, the merger analysis is required. Viewing the case in light of the Court's instruction as to how the merger analysis should be undertaken, it is clear that the crimes of indecent assault, corruption of the morals of a minor are lesser included offenses of the crime of statutory sexual assault and, as such, these crimes should have merged for the purposes of sentencing. Accordingly, the sentences imposed upon Nolder for his guilty pleas to corruption of the morals of a minor and indecent assault should be vacated. In light of this Court's disposition on the issue of merger, The other claims with regard to Nolder's sentence are moot.

Nolder's remaining claims of error deal with the perfecting of his current appeal. Nolder's current counsel has suggested that he was ineffective for failing to include an order for the transcript of the April 12, 2000 post-conviction hearing with his notice of appeal, thereby forcing him to file a concise statement of matters complained of on appeal without the transcript from the post-conviction relief hearing. The second claim is that this Court abused its discretion when it refused to grant Nolder leave to file an amended concise statement of matters complained of on appeal after it received the notes of testimony from the April 12, 2007 hearing. The final claim of error is that this Court abused its discretion when it required him to file the statement of matters complained of on appeal since he was unable to address all potential claims of error.

A review of the record in this case shows that none of these claims have any merit. Initially it should be noted that Nolder's request for an extension of time to file a concise statement of matters complained of on appeal was granted on July 17, 2007, one day after the request was made. Nolder was given until September 10, 2007, to file that concise statement of matters complained of on appeal. With respect to the assertions that Nolder was prejudiced because his counsel was unable to file a concise statement of matters complained of on appeal, which fully delineated all of the issues that he wished to raise, that is contradicted by Nolder's counsel's notice of the receipt of the post-conviction hearing transcript. In that notice, Nolder's counsel made the following statement, "Counsel further advises the Court that his review of the April 12, 2007, notes of testimony reveals no additional claims of error. Accordingly, the concise statement of matters complained of on appeal previously filed, need not be amended." Counsel, by his own words has acknowledged that these claims of error are patently frivolous.

BY THE COURT:
/s/Cashman, J.

Dated: March 7, 2008

¹ 42 Pa.C.S.A. §9791, *et seq.*