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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

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

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The Pittsburgh Legal Journal provides the ACBA members with a quarterly report of jury verdicts from the Civil Division of the Court of Common Pleas of Allegheny County. The verdicts which appear in the Pittsburgh Legal Journal, a supplement of the Lawyers Journal, under the heading "Allegheny Jury Verdict Reporter" are provided by court staff from the assignment room.

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

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

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

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**Richard Scampone, Executor of the
Estate of Madeline Scampone v.
Highland Park Care Center, LLC
d/b/a Highland Park Care Center,
Grave Healthcare Company,
Grave Associates, L.P.,
Trebro, Incorporated**

*Nursing Home Malpractice—Punitive Damages—
Applicability of Corporate Negligence to Nursing Home Facility*

1. While evidence of substandard care at the nursing home was sufficient to support the jury's finding of negligent conduct, it was not sufficient to support an award of punitive damages where the allegations of substandard care failed to causally connect, through competent expert testimony, to treatment or a specific injury sustained by Plaintiff, nor did it demonstrate that the conduct in question was intentional, willful or reckless sufficient to demonstrate Defendant's conscious disregard of the safety of Plaintiff.

2. Evidence of Pennsylvania Department of Health Survey's "deficiencies" not improperly excluded from evidence as none of the excluded "deficiencies" were causally related to substandard treatment or injuries suffered by the Plaintiff.

3. Although the "Corporate Negligence Theory" of liability was never previously applied to a nursing home by Pennsylvania appellate court, there is no appellate decision that bars its applicability to a nursing home.

4. Plaintiff's fundamental theory of liability was based upon staffing decisions at the nursing home that directly and detrimentally affected the care and treatment of Plaintiff and ultimately caused her decline and demise. These types of allegations are not distinct from allegations that might be asserted against a hospital or HMO utilizing the corporate negligence theory as articulated and applied in *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991) & *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super. 1998).

5. Nursing Home's argument, that Plaintiff's corporate negligence claim should not have been presented to the jury as Plaintiff failed to present expert testimony that the understaffing constituted a deviation from the acceptable standard of care and that the deviation was a substantial factor in causing harm to the Plaintiff, will not prevail. Although, as a general matter, medical malpractice claims must be supported by competent expert testimony, in the instant case the nature of the alleged deviation from the accepted standard of care, i.e., insufficient staffing levels, was not one that was susceptible to expert opinion testimony. In the judgment of the court, the jury was without need of expert testimony to explain how understaffing affected the ability to render adequate medical care and treatment.

(Shannon F. Barkley)

Peter Giglione for Plaintiff.

John A. Bass and *Michael K. Feeney* for Defendant.

No. GD 05-024806. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION OF THE COURT

Colville, J., February 8, 2008—This case is a nursing home malpractice case involving the care and treatment provided to the Plaintiff's decedent, Madeline Scampone, dur-

ing her residency at Highland Park Care Center at various times between February 5, 1998 and January 30, 2004. While a resident at Highland Park Care Center, Ms. Scampone became gravely ill, was hospitalized, and shortly thereafter died at 94 years of age from complications following an acute myocardial infarction and stroke. The Plaintiff brought wrongful death and survival claims against the Defendants asserting theories of vicarious liability, ostensible agency, and corporate negligence, including a claim for punitive damages in relation to each cause of action. Trial began May 14, 2007. On May 25, 2007, at the close of the Plaintiff's case, the Defendants Grane Healthcare, Grane Associates, and Trebro, Incorporated moved for compulsory non-suit on all of Plaintiff's claims. These Motions for Non-Suit were granted by the undersigned. Highland Park Care Center moved for Compulsory Non-Suit on Plaintiff's punitive damages claim, which was granted by the undersigned. Additionally, Highland Park Care Center moved for Compulsory Non-Suit on Plaintiff's Corporate Negligence Claim, which was denied by the undersigned. On June 1, 2007, the jury returned a verdict in favor of the Plaintiff in the amount of \$193,500.00. The Plaintiff (and subsequently Defendant) filed timely Motions for Post-Trial Relief. On October 18, 2007, the undersigned denied all Post-Trial Motions. Judgment was entered and docketed on November 8, 2007. Plaintiff and Defendant filed timely Notices of Appeal on December 3, 2007, and December 17, 2007 respectively.

Plaintiff's Appeal

The Plaintiff's Statement of Matters Complained of on Appeal asserts that this court erred in granting the Defendants' Motion for Compulsory Non-Suit as to the punitive damage claims against Highland Park Care Center, LLC (hereinafter "Highland Park"), following the close of the Plaintiff's case. Additionally, Plaintiff complains that this court erred in excluding evidence that Plaintiff purports would have supported Plaintiff's claim for punitive damages.

Plaintiff and Defendants do not materially dispute the standards applicable to determining the viability of a punitive damages claim:

Under Pennsylvania law, punitive damages may be awarded if the evidence is sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. *Hutchison v. Luddy*, 870 A.2d 766, 772, 582 Pa. 114 (2005). Where an actor knows, or has reason to know, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act (or fails to act) in conscience disregard of, or indifference to, that risk, punitive damages may be assessed. *Continental Grain Co. v. SHV Coal, Inc.*, 526 Pa. 489, 587 A.2d 702, 704-05 (1991) (discussing Restatement (Second) of Torts §908(2), Comment A, as adopted by *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984). "Punitive damages may be properly imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). Additionally, under Pennsylvania law, a health care provider, including nursing homes, may be held liable for punitive damages if their conduct is willful, wanton, or exhibits a reckless indifference to the rights of others. 40 Pa.C.S.A. §1303.505(a).

In *Philip Morris USA v. Williams*, 127 S.Ct. 1057,

166 L.Ed.2d 940 (2007), the United States Supreme Court, in discussing the types of evidence that may support a punitive damages award, specifically noted:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the general public, or the converse.

Philip Morris, 127 S.Ct. at 1063-4.

The Supreme in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003), in assessing the appropriateness of a punitive damage award, noted that the trial court should look to whether the conduct at issue “replicates prior transgressions,” and the “existence and frequency of similar past conduct.” *Id.* 123 S.Ct. at 1523 (citations omitted).

Brief in Support of Plaintiff’s Motions for Post-Trial Relief, pp. 14-15.

This issue is governed by the abuse of discretion standard. “The determination of whether the defendant’s actions constituted outrageous conduct is within the sound discretion of the trier of fact and will not be disturbed on appeal absent an abuse of that discretion.” *Lesoon v. Metro Life Ins. Co.*, 898 A.2d 620, 634 (Pa.Super. Ct. 2006) (citing *Pestco, Inc. v. Associated Prods., Inc.*, 880 A.2d 700 (Pa.Super. 2005)).

An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. An abuse of discretion will not be found where an appellate court simply concludes that it would have reached a different result than the trial court. If the record adequately supports the trial court’s reasons and factual basis, an appellate court may not conclude the court abused its discretion.

Brodowski v. Ryave, 885 A.2d 1045, 1055 (Pa.Super. 2005) (quoting *Blicha v. Jacks*, 864 A.2d 1214, 1217 (Pa.Super. 2004)).

Pennsylvania case law is clear that punitive damages are an “extreme remedy” available in only the most exceptional matters. *Phillips v. Cricket Lighters*, 883 A.2d 439, 445-446 (Pa. 2005). Punitive damages may be appropriately awarded only when the plaintiff has established that the defendant has acted in an outrageous fashion due to either “the defendant’s evil motive or his reckless indifference to the right of others.” *Id.* At 445 (quoting *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985), *rev’d on other grounds sub nom., Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989)); *see also Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005) (finding that punitive damages may be appropriately awarded only when the plaintiff has established that the defendant has acted in a fashion “so outrageous as to demonstrate willful, wan-

ton or reckless conduct”).

A defendant acts recklessly when “his conduct creates an unreasonable risk of physical harm to another [and] such risk is substantially greater than that which is necessary to make his conduct negligent.” *Hutchison*, 870 A.2d at 771 (citation omitted); *see also* Restatement (Second) of Torts §500. Thus, a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed. *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991). Rather, the plaintiff must adduce evidence which goes beyond a showing of negligence, evidence sufficient to establish that the defendant’s acts amounted to “intentional, willful, wanton or reckless conduct...” *Id.* At 704.

Punitive damages claims against health care providers in Pennsylvania are also governed by Section 505 of the Medical Care Availability and Reduction of Error Act (“MCARE Act”), which provides in part:

§1303.505. Punitive damages

(a) AWARD.—Punitive damages may be awarded for conduct that is the result of the health care provider’s willful or wanton conduct or reckless indifference to the right of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider’s act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.

(b) GROSS NEGLIGENCE.—A showing of gross negligence is insufficient to support an award of punitive damages.

40 P.S. §1303.505; *see also Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (adopting Section 908(2) of the Restatement (Second) of Torts).

Brief in Opposition to Plaintiff’s Motions for Post-Trial Relief, pp. 2-4.

In support of their claim for punitive damages, the Plaintiffs direct the court’s attention to a plethora of alleged instances of substandard treatment of Ms. Scampone, which Plaintiff contends could support a jury’s award of punitive damages in this case. In fact, the Plaintiffs point to an extensive list of specific factual allegations which they contend support their punitive damage claim, including:

- the deteriorated physical condition of Ms. Scampone and the condition of her room on the date she was removed from the Defendant’s facility;
- the inability of staff to timely perform their duties necessary to meet the needs of the residents including: passing snacks, filling water pitchers, answering call lights, checking vital signs, and dealing with bowel and bladder issues;
- the intentional misrepresentations within, and falsification of, medical records of residents;
- the understaffing that generally prevented available staff to satisfactorily perform their work duties;
- the failure to insure proper distribution of medication, and/or intentional discard of prescribed

medication to residents generally, and in one instance to Ms. Scampone in particular;

- the failure to maintain complete medical records of residents;
- the increase in staffing on occasions when the Department of Health surveyors reviewed facility conditions;
- the failure to adequately respond to staff's complaints regarding understaffing;
- the failure of budgeting/administrative personnel to properly consider the clinical needs of the residents.

Many of the above-described substandard practices were testified to by multiple witnesses and alleged to have occurred on multiple occasions. In some, but not all, instances, the above-described substandard practices were alleged to have related directly to Ms. Scampone's care and treatment at the facility.

While the Defendants argue that the vast majority, if not all, of this testimony was offered by disgruntled former employees, is taken out of context, and/or fails to recognize that each complaint or substandard practice constitutes a single instance regarding a multi-residence facility over a large span of time during which Ms. Scampone otherwise enjoyed excellent care,¹ this court entertained the Defendant's Motion for Non-Suit as to the punitive damage claims, considering all of the evidence, in a light most favorable to the Plaintiff. In the end, however, this court was persuaded that this evidence was not sufficient to support a punitive damage claim as a matter of law for the following reasons.

Each allegation of a substandard conduct by the Defendant fails to either causally connect, through competent expert testimony, the substandard conduct by the Defendant to the treatment of, or a specific injury sustained by, Ms. Scampone, or demonstrate that the conduct in question was intentional, willful or reckless behavior, sufficient to demonstrate the Defendant's conscious disregard to the safety of Ms. Scampone. Most often, the conduct can be reasonably inferred to have been no more than a simple mistake or inadvertence. Additionally, much of the evidence of the Defendants' alleged substandard conduct (particularly in the instance of surveys compiled by the Department of Health) was offered "not for the truth of the matter asserted," but rather only for "proof of notice" of a *potential* problem to the Defendants.

Accordingly, when viewed in its entirety, this court is unable to discern any particular instance (let alone a pattern of instances or a group of instances) which could be reasonably interpreted to constitute intentional, willful or reckless behavior demonstrating conscious disregard to the safety of the Plaintiff which was, actually, causally connected, through expert testimony, to the treatment of an injury suffered, by Ms. Scampone, and which was supported by admissible evidence offered for the truth of the matter asserted. For this reason, the Plaintiff's evidence of the substandard conduct of the Defendants, while competent to support the jury's finding of negligent conduct, was not sufficient to support an award of punitive damages.

Next, Plaintiff complains that this court errantly precluded the admission of evidence that would have supported the Plaintiff's punitive damage claim. In particular, Plaintiff asserts that evidence in the form of Pennsylvania Department of Health Surveys (sometimes referred to as "deficiencies") was improperly excluded from evidence. Plaintiff asserts that these surveys, dating back to August 22, 2002, were admissible for purposes of showing that the

Defendants were aware of dangerous conditions that existed at Highland Park Care Center, and of the risk of physical harm that these dangerous conditions presented to the residents in numerous respects including:

- failing to follow and develop comprehensive resident care plans;
- failing to follow physician orders, including failures to obtain laboratory services as ordered by a physician;
- failing to investigate and address resident grievances regarding staff not responding to resident call lights;
- failing to notify the Pennsylvania Department of Health of "serious incidents involving residents";
- failing to provide therapeutic exercises to prevent decreases in ranges of motion and contractures;
- failing to notify residents' family members of significant changes in residents' conditions;
- failing to enact and enforce policies and procedures relating to following physician orders and preventing abuse and neglect;
- failing to monitor assess, and notify physicians of significant changes in residents' conditions;
- failing to obtain physician-ordered blood tests;
- failing to meet residents' nutritional needs;
- failing to notify residents' physicians of abnormal lab test results; and
- failing to review and update resident care policies.

Notwithstanding the extensive list of cited "deficiencies" set forth in the Department of Health surveys, this court concluded that none of the excluded "deficiencies" were demonstrated to be (or, for that matter, were proffered to be) causally related, through competent expert testimony, to any substandard treatment of, or any injuries suffered by, Ms. Scampone. The Plaintiff's own proffer, as to this evidence, belies its competency to support a punitive damage claim. Plaintiff proffers the surveys only to demonstrate "notice" to the Defendants of potential problems. If admitted for that limited purpose, they are not competent to demonstrate actual substandard conduct, or that such substandard conduct affected Ms. Scampone. Accordingly, this court concluded that they were not relevant or material to the issues presented in this case. All of the Department of Health surveys that were alleged to be causally related, through competent expert testimony, to any substandard treatment of, or any injuries suffered by, Ms. Scampone were admitted.

Defendants' Appeal

Defendants' appeal this court's determination that the theory of corporate negligence, first recognized by the Pennsylvania Supreme Court in *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991), and later recognized as applicable to an HMO in *Shannon v. McNulty*, 718 A.2d 828 (Pa.Super. 1998) was applicable to the Defendant, Highland Park Care Center, a nursing home, in this case.

Highland Park Care Center correctly asserts that the corporate negligence theory of liability has never been recognized as applicable to a nursing home by any Pennsylvania appellate court; however, this court is aware of no appellate court decision holding that the *Thompson/Shannon* corporate negligence theory was not applicable to nursing homes. This court undertook to determine whether the criteria

established, and the principles applied, in *Thompson* and *Shannon* were similarly applicable to a nursing home such as Highland Park Care Center in the instant matter. I discern no reasoning within the *Thompson* or *Shannon* decisions to treat a nursing home, such as Highland Park Care Center, any differently than a hospital or an HMO with respect to corporate negligence liability.

Highland Park Care Center emphasizes the Supreme Court's focus in *Thompson* on the "role of a comprehensive health center with responsibility for arranging and coordinating the total health care of its patients." As discussed above, in *Shannon*, the Superior Court determined that the central role played by HMO's in the total health care of its subscribers was sufficient to warrant the imposition of corporate negligence liability. In so doing, the Superior Court stated that "when a benefits provider, albeit an insurer or a managed care organization, interjects itself into the rendering of medical decisions affecting a subscriber's care, it must do so in a medically reasonable manner," *Shannon*, 718 A.2d at 836.

The Plaintiff's fundamental theory of liability in this case was that the staffing decisions made by Highland Park Care Center directly and detrimentally affected the care and treatment of Ms. Scampone and ultimately caused her decline and demise. While these allegations were certainly contested by Highland Park Care Center, they are in no material respect distinct from allegations that might be asserted against a hospital or HMO utilizing the corporate negligence theory articulated and applied in *Thompson* and *Shannon*.²

Additionally, Highland Park Care Center asserts that the Plaintiff's corporate negligence claim premised, as it was, upon the factual allegations of institutional understaffing, should not have been presented to the jury because the Plaintiffs failed to present expert testimony to support the jury's finding that such understaffing constituted a deviation from the acceptable standard of care, and that the deviation was a substantial factor in causing harm to the Plaintiff. Highland Park Care Center is, of course, correct in its assertion that, as a general matter, medical malpractice claims must be supported by competent expert testimony. In this case, however, the nature of the alleged deviation from the accepted standard of care was not one that was susceptible to expert opinion testimony. The Plaintiff offered evidence that, simply because of the allegedly insufficient staff levels, staff members did not have enough time in their workday to perform all of the tasks necessary to provide adequate medical care and treatment to Ms. Scampone. In the judgment of this court, expert testimony was not necessary to explain to the jury that enough personnel must be staffed to permit those personnel to perform their required obligations. If the jury accepted the testimony of several witnesses who alleged that such inadequate staffing occurred, the jury was without the need of expert testimony to explain how the understaffing affected their ability to render adequate medical care and treatment to Ms. Scampone. That, they could easily deduce on their own. With respect to expert testimony regarding causation, this court found that the Plaintiff did offer competent expert testimony correlating all of the alleged inadequate medical treatment and care of Ms. Scampone, including that flowing from the alleged understaffing, to her ultimate decline and demise.

BY THE COURT
/s/Colville, J.

¹ Not surprisingly the Defendants describe a far brighter picture of the care rendered to Ms. Scampone over her multiple-years stay at their facility. They note that, in light of her medical conditions and her advanced age, Ms. Scampone

enjoyed a relatively vigorous, vital, healthy, and positive lifestyle for many years at their facility prior to her precipitous decline immediately preceding her death. They note that Ms. Scampone's family members were regular visitors with broad access to the facility and its other residents, whose concerns or objections to Ms. Scampone's care over the many years preceding her decline were so rare as to constitute the exception rather than the rule regarding their perceptions of Ms. Scampone's care and treatment at the Defendant's facility.

² This court recognizes that the Defendants proffer several arguments suggesting that, for sound public policy reasons, a claim based upon allegations of "understaffing" should not be recognized by this court. While the merit of these arguments are not lost on this court, this court feels constrained to abide by the principles articulated in the existing appellate case law, specifically *Thompson* and *Shannon*. If a deviation from those principles is warranted based upon public policy considerations, such public policy considerations should be first recognized by the Pennsylvania appellate courts, and not be presumed to exist by a trial court absent specific appellate direction.

Rebecca Richter Villa and Nicholas Villa, her husband v. Argonaut Great Central Insurance Company

*Motor Vehicle Financial Responsibility Law ("MVFRL")—
Waiver of Uninsured/Underinsured Motorist Coverage
("UM/UIM")*

1. The MVFRL requires that if the insurer fails to produce a valid rejection form for UM/UIM coverage that the policy shall be equal to the bodily injury liability limits. The Municipality of Bethel Park issued a Request for Proposal ("RFP") for various insurances including motor vehicle insurance. The terms of the RFP specified the lower amount of \$35,000 UM/UIM coverage and the policy specified the same. Bethel Park's request for lower UM/UIM coverage in their RFP satisfied the requirements of 75 Pa.C.S. §1731 and 1734. Thus, the amount of the UM/UIM coverage is the lower amount specifically requested by the municipality in their RFP.

2. The requirement of the express rejection requirements of 75 Pa.C.S. §1731 appear to be for the protection of ordinary consumers, not governmental entities or businesses as the language mandated by that provision references "my household."

(Shannon F. Barkley)

Robert C. Eddins for Plaintiffs.

Bruce H. Gelman and Stephen J. Poljak for Defendants.

No. GD 04-027129. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER INTRODUCTION

Friedman, J., February 7, 2008—The parties have filed cross-motions for summary judgment in the captioned action for declaratory judgment. Decision on the cross-motions was stayed pending a decision, now entered, by the Pennsylvania Supreme Court in *Blood v. Old Guard Insurance Company*, 594 Pa. 151, 934 A.2d 1218 (2007). That stay was lifted in part on December 18, 2007, and the parties were directed to sub-

mit briefs on the issue of the policy limits of UM/UIM coverage. The stay continued as to the issue of stacking, which was also pending in the Pennsylvania Supreme Court in *Everhart v. The PMA Insurance Group*, 2007 WL 4553355 (Pa. 2007). *Everhart* also has now been decided and Plaintiffs concede that their position on stacking is not that of the Supreme Court and have withdrawn that aspect of their motion in their Supplemental Brief in Support of Motion for Summary Judgment filed January 11, 2008.

After a review of the *Blood* decision and the undisputed facts of this case, it is clear that the declaration Plaintiffs request must be denied and that requested by Defendant must be granted. An Order to that effect is attached hereto and filed herewith.

DISCUSSION

The undisputed facts that are pertinent and material to the cross-motions are as set forth in Defendant's cross-motion, portions of which are found in Plaintiffs' motion as well.

The issue presented here is whether or not the Insured's request for proposal (RFP) satisfies the requirements of the Motor Vehicle Financial Responsibility Law (MVFRL) at 75 Pa. C.S. §§1731 and 1734. Those sections are fully quoted below:

§1731

(a) Mandatory offering.—No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734 (relating to request for lower limits of coverage). Purchase of uninsured motorist and underinsured motorist coverages is optional.

(b) Uninsured motorist coverage.—Uninsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of uninsured motor vehicles. The named insured shall be informed that he may reject uninsured motorist coverage by signing the following written rejection form:

REJECTION OF UNINSURED MOTORIST PROTECTION By signing this waiver I am rejecting uninsured motorist coverage under this policy, for myself and all relatives residing in my household. **Uninsured coverage protects me and relatives living in my household** for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages. I knowingly and voluntarily reject this coverage.

(Signature of First Named Individual)

Date

[Subsections (b.1), (b.2), and (b.3) deal with rental or leased vehicles and are therefore omitted.]

(c) Underinsured motorist coverage.—Underinsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles. The named insured shall be informed that he may reject underinsured motorist coverage by

signing the following written rejection form:

REJECTION OF UNDERINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. **Underinsured coverage protects me and relatives living in my household** for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.

(Signature of First Named Individual)

Date

(c.1) Form of waiver.—Insurers shall print the rejection forms required by subsections (b) and (c) on separate sheets in prominent type and location. The forms must be signed by the first named insured and dated to be valid. The signatures on the forms may be witnessed by an insurance agent or broker. Any rejection form that does not specifically comply with this section is void. **If the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits. On policies in which either uninsured or underinsured coverage has been rejected, the policy renewals must contain notice in prominent type that the policy does not provide protection against damages caused by uninsured or underinsured motorists.** Any person who executes a waiver under subsection (b) or (c) shall be precluded from claiming liability of any person based upon inadequate information.

(d) Limitation on recovery.—

(1) A person who recovers damages under uninsured motorist coverage or coverages cannot recover damages under underinsured motorist coverage or coverages for the same accident.

(2) A person precluded from maintaining an action for noneconomic damages under section 1705 (relating to election of tort options) may not recover from uninsured motorist coverage or underinsured motorist coverage for noneconomic damages.

§1734. Request for lower limits of coverage

A named insured may request in writing the issuance of coverages under section 1731 (relating to availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily injury.

(Emphasis added.)

The question before the Court boils down to whether the RFP or the Application controls. *Only* the Application is silent on the UM/UIM issue. The RFP specifies \$35,000 UM/UIM coverage and the Policy itself specifies \$35,000 UM/UIM coverage.

Plaintiffs' case hinges on paragraph 5 of the General Specifications in the RFP that the Defendant "desires that proposed coverages meet or exceed the named specifications." That Specification also states "Material differences from current coverages must be specified in the proposal." See Plaintiffs' [Second] Supplemental Brief filed on January 29,

2008, Exhibit 1. It should be noted that the RFP request is for various types of insurance and not just motor vehicle-related coverage. The “current coverages” are stated in the Application (Ibid. Exhibit 2), which does not have a blank for UM/UIM.

Although the facts in *Blood* are not on all fours with those here,¹ the *Blood* decision adopts the Third Circuit’s characterization of Sections 1731 and 1734:

[Section] 1731 is a simple statement whose plain meaning is apparent from its language. It mandates that an insurance company cannot issue a policy in the Commonwealth of Pennsylvania unless it provides UM/UIM coverage equal to the bodily injury liability coverage, except as provided in §1734.

[W]e also agree that [Section] 1734’s language is plain and the Pennsylvania General Assembly’s intention is clear. By its terms, a named insured may lower her statutorily provided UIM coverage limits by requesting in writing to her insurer to do so. The insurance company’s obligation to *issue* a policy with [UM/UIM] coverage in an amount equal to the policy’s bodily injury liability coverage is not relieved unless it has received such a written request.

Blood, 934 A.2d at 1226, quoting *Nationwide Insurance Co. v. Resseque*, 980 F.2d 226, 230 (3d Cir. 1992). The Supreme Court reinstated the trial court’s decision in which the trial court held that “the purpose of requiring a written waiver of all UM/UIM coverage is tied to providing *notice* of available coverage to the insured” (emphasis added) and rejected the notion that the purpose of “the requirement of a written reduction in UM/UIM coverage limits is ‘to avoid confusion and litigation by providing a presumption that in the absence of an explicit written election, the...coverage limit is equivalent to the liability coverage limit.’” *Blood*, 934 A.2d at 1223, quoting *Blood v. Old Guard Ins. Co.*, 894 A.2d 795 (Pa.Super. 2006).

Here, there is no doubt that Defendant’s Insured was on notice of the lower level of UM/UIM benefits—it expressly requested them. The thrust of the *Blood* decision is that *initial* notice to the insured is sufficient even where a presumably unsophisticated consumer is the insured. This would be a matter for the Legislature to change if it wishes so as to have reminders of the UM/UIM coverage status at each policy change, not just at renewals as now provided in §1731(c.1).

It must also be noted that the express rejection requirements of §1731 appear to be for the protection of ordinary consumers, not governmental entities or businesses. For example, the mandated language emphasized in bold earlier refers to “my household.” Here, where the Insured is a sophisticated governmental entity having the advice of lawyers and insurance consultants as well as its own Finance Director, question for a jury to decide. Under the current law, the conscious request for lower UM/UIM coverage by the Municipality of Bethel Park is the equivalent of the statutory notice requirement to consumers.² Plaintiffs’ Motion must be denied and Defendant’s Cross-Motion must be granted. It is therefore declared that the subject policy limits UM/UIM coverage to the \$35,000 requested in the RFP and provided by the policy. See Order filed herewith.

BY THE COURT
/s/Friedman, J.

Date: February 7, 2008

ORDER OF COURT

AND NOW, to-wit, this 8th day of February 2008, for the reasons set forth in the accompanying Memorandum in Support of Order, Plaintiffs’ Motion for Summary Judgment is

hereby DENIED and Defendant’s Cross-Motion for Summary Judgment is hereby GRANTED and it is declared that:

The Defendant has complied with the requirements of §1734 of the Motor Vehicle Financial Responsibility Act;

If the Plaintiffs are entitled to underinsured motorist benefits under the subject policy, Defendant has no legal or contractual obligation to indemnify Plaintiffs for any damages beyond the limits of liability set forth in the applicable underinsured motorist coverage section of the policy, i.e., \$35,000.00; and

The Plaintiffs have no legal standing to seek reformation of the policy issued by the Defendant to the Municipality of Bethel Park, and pursuant to the law of Pennsylvania, the remedy of reformation of the Defendant’s policy is not available to the Plaintiff.

BY THE COURT
/s/Friedman, J.

¹ The question posed there was “how an *insured’s decision* to *reduce* the limits of his or her liability coverage affects a *previous* election of [UM/UIM] coverage at a level less than the liability limits established prior to the reduction.” *Blood*, 934 A.2d at 1219.

² It is truly tragic that neither the Municipality nor the union representing its police officers saw fit to protect persons in Officer Rebecca Villa’s position by requesting or demanding higher UM/UIM limits.

Grady Jordan, a minor, Brian Jordan and Pamela Jordan v.

The Western Pennsylvania Hospital, d/b/a West Penn Hospital, West Penn Allegheny Health System, Inc., Birth Place (Midwifery Services of West Penn Hospital) Aurora Miranda, M.D., Carol Manspeaker, C.N.M.

Claim for Reimbursement by DPW—Settlement of Minor’s Claim

1. DPW is not entitled to reimbursement for medical assistance payments from the proceeds of a medical malpractice settlement distributed to minor.

2. Decision in *Bowmaster v. Clair*, 933 A.2d 86 (Pa.Super. 2007), holding that DPW was not entitled to recover money awarded to a minor for care during her minority is controlling, because an award to minor is factually indistinguishable from a settlement distributing funds to minor.

(Carol L. Rosen)

Jason W. Manne for Commonwealth of PA, Department of Public Welfare.

Shanin Specter and Andrew Youman for Plaintiffs, Grady Jordan, Brian Jordan and Pamela Jordan.

Diane B. Quinlan and Stephan A. Ryan for The Western Pennsylvania Hospital d/b/a West Penn Hospital, Birth Place (Midwifery Services of West Penn Hospital) c/o Western Pennsylvania Hospital d/b/a West Penn Hospital and Carol Manspeaker, C.N.M..

David R. Johnson for West Penn Allegheny Health System, Inc.

Christopher C. Rulis for Aurora Miranda, M.D.
Richard J. Federowicz and Terry J. Yandrich for Jeffrey Varga, M.D.

No. GD 05-025160. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., March 20, 2008—Plaintiff Grady Jordan, a minor, was severely injured during his birth allegedly due to the negligence of Defendant hospitals, doctors, and a certified nurse midwife. Plaintiff filed a complaint in this court on September 27, 2005 to recover for those injuries and trial was scheduled in this case for May 11, 2007. On May 23, 2007, the Honorable Terrence W. O'Brien continued the case for settlement, as the parties had essentially reached an agreement after over a week in trial for \$23 million.

Pursuant to Pa. R.C.P. 2039, Plaintiff presented a petition for leave of court to settle a claim involving a minor to both the Honorable Frank J. Lucchino, Administrative Judge of the Orphan's Court Division, and the undersigned, Calendar Control Judge of the Civil Division. On July 18, 2007, Judges Lucchino and Strassburger approved the distribution of the minor's claim petition, but set \$168,731.61 aside in escrow because of objections filed by the Pennsylvania Department of Public Welfare (DPW).

On November 26, 2007, Judge Lucchino ordered the parties to file briefs on the issue of the Department of Public Welfare's claim for reimbursement of medical assistance payments and scheduled argument before both judges for December 7, 2007. After argument, on January 31, 2008, this court overruled the objections of the DPW and directed the escrow be distributed. On February 20, 2008, DPW filed a timely appeal from that order.

In *Bowmaster v. Clair*, 933 A.2d 86 (Pa.Super. 2007), the court held that DPW was not entitled to recover money awarded to a minor alone for care during her minority. The instant case is factually indistinguishable from *Bowmaster*, and this court overruled the DPW's objections.

BY THE COURT
/s/Strassburger, A.J.

Date: March 20, 2008

William S. Unger and Gail Unger Fryncko v. Dollar Savings Bank FSB

Certificate of Deposit—Automatic Rollover—Termination Date—Redemption

1. Where Certificate of Deposit rolled over automatically every four years and the terms did not require that it be cashed, and where the bank did not dispute the authenticity of the CD, Plaintiff was not obligated to redeem the CD prior to the expiration of twenty years.

2. Precedent barring a judgment creditor from executing on a judgment after twenty years, particularly where the judgment creditor acted in bad faith in not previously executing on the judgment, was inapposite because the CD is not a judgment and the evidence does not support allegation that Plaintiff was at fault for not redeeming the CD prior to the expiration of twenty years.

(Carol L. Rosen)

Kenneth J. Fryncko for Plaintiffs.

J. Michael McCague for Defendant.

No. GD 06-2437. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

STATEMENT IN LIEU OF OPINION

Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), my MEMORANDUM and NON-JURY VERDICT of June 13, 2007 and my MEMORANDUM ORDER of February 12, 2008, copies of which are attached hereto, and for the reasons set forth therein, shall serve as my Opinion with respect to the Appeal filed by the Appellant, DOLLAR SAVINGS BANK, FSB, to the Superior Court of Pennsylvania.

BY THE COURT:
/s/O'Reilly, J.

Date: March 18, 2008

MEMORANDUM

O'Reilly, J., June 13, 2007—This novel case involves a bank's refusal to pay a depositor for an admitted valid and authentic Certificate of Deposit. Plaintiffs, William S. Unger and Gail Unger Fryncko ("Unger") filed this action when Defendant, Dollar Bank ("Dollar") refused to pay on the valid and authentic Certificate of Deposit presented to it in July, 2006.

The facts show that in 1973, when Gail Unger was a child, her father, William Unger, on October 17, 1973, bought for her, as a birthday present, a Certificate of Deposit for \$3,400. He was named as the Custodian for Gail under the Pennsylvania Uniform Gifts to Minors Act. It was a 48 month instrument of 7 percent and it rolled over automatically at the same interest rate after 4 years, and so on thereafter. No termination date or expiration date appears on the certificate, which was received as Plaintiffs' Exhibit "1." The relevant text of the CD is as follows:

This is to certify that there has been deposited in the Squirrel Hill Office of this Bank on this Date:
OCTOBER 17, 1973

DATE OF ISSUE

EXACTLY \$3400 AND 00CTS DOLLARS
(\$3,400.00)

PAYABLE TO WILLIAM S. UNGER CUSTODIAN FOR GAIL K. UNGER UNDER THE PENNA. UNIFORM GIFTS TO MINORS ACT 48 MONTHS AFTER DATE OF ISSUE UPON PRESENTATION AND SURRENDER OF THIS CERTIFICATE AT THE ISSUING OFFICE WITH INTEREST AT THE RATE OF 7 PER CENT PER ANNUM, COMPOUNDED CONTINUOUSLY. IF THIS CERTIFICATE IS NOT REDEEMED WITHIN 10 DAYS OF MATURITY DATE OR WITHIN 10 DAYS OF ANY EXTENSION THEREOF, IT WILL BE EXTENDED AT THE RATE AND TERM EFFECTIVE ON THE DATE OF SUCH EXTENSIONS. INTEREST NOT WITHDRAWN WILL BE ADDED TO PRINCIPAL. THIS CERTIFICATE ASSIGNABLE ONLY ON THE BOOKS OF THE ISSUING OFFICE.

William Unger, at the expiration of 4 years, (i.e. October 17, 1977), noted on the envelope in which he kept the Certificate that it would roll over for another 4 years at the same rate and took no action to redeem it. He continued to permit this investment to "roll over" until 2006, when he gave it to his daughter Gail, now an adult, and, indeed, working in the banking industry for a large local bank. Gail's effort to redeem the certificate, now worth \$41,000, (a stipulated amount) was rebuffed by Dollar. This suit ensued.

The parties had stipulated that this CD was authentic and valid, but Dollar asserts it has no legal obligation to pay because more than 20 years had elapsed since the initial investment of \$3,400. It does not claim the CD was lost or destroyed, or in anyway altered or forged. It simply says after 20 years, we don't have to pay.

In its defense, Dollar called two bank employees. One Richard R. Wallace, with a 36 year history of employment with Dollar, who was the Manager of Dollar's Monroeville Branch from 1971 to 1976. The other was Donna Matthews, who has been employed by Dollar for the last 9 years, and is its Operations Manager.

Both testified to the computerization of Dollar dating back to 1964, and the practice and procedures that should have been followed when the CD herein involved was purchased.

Matthews, Dollar's Computer Manager, testified to a document produced by computer from microfiche records kept by Dollar (Dollar's Exhibit "A"). It showed only one custodial account for the Plaintiffs for a few years (1976 to 1984), but it is under a different account number, and then disappears from the system.

I do not find this testimony informative or enlightening, since it does nothing to explain why a different account number appears on the CD, *nor* does it show numerous accounts or CDs by William Unger as counsel had suggested in his opening, and in his cross-examination of William Unger. Indeed, on Dollar's Exhibit "A," only *one* custodial account by William Unger appears, and no other account. It appears William Unger *Junior* had two CDs, but William had *none*. Further, the account number for the Custodian Account on Dollar's Exhibit "A" was 502304188 while the account number on William's is 50208248. I also found it revealing that when I asked Computer Manager Matthews if she had researched the account numbers on Plaintiffs' Exhibit 1, she said "No, I was not asked to!!" This sounds like Dollar did not want to know what had happened to the earlier account number.

Dollar's microfiche Exhibit "A" covers 1976 through 1984. The Unger's CD reached its first maturity date on October 1977 and continued to roll over. Yet, it appears nowhere on Dollar's Exhibit "A." The only reasonable conclusion is that inattention, employee error, or poor record keeping failed to account for the *only* CD that Unger held. In this regard, I credit William Unger that this CD was the only one he had. If *both* had appeared on Dollar's Exhibit "A," I might have ruled otherwise, but Dollar's own records show only *one* (1) CD, and they cannot explain why a different number appears.

Mr. Wallace testified that an imbalance would have shown up at the end of the banking day if receipt of the \$3400 for the CD was not balanced by an issued CD for the same amount. Assuming this to have been true as of October 17, 1973, it does not answer any discrepancy between the CD issued, and the CD account number that ultimately showed up on the microfiche. Thus, there would be no imbalance if the CD was issued at a different number or the account number was erroneously recorded.

Dollar also argues at page 7 of its brief that William was aware of numerous business practices of Dollar; that he was aware of Dollar's practice of forwarding notices of interest accrued; and "that he owned at least *two other* CDs with Dollar." My review of the evidence offered by the Bank, to-wit, the microfiche list, shows only one CD for "William Unger, Custodian for..." and shows no knowledge by him of what were Dollar's practice.

Counsel's argument is clearly a distortion of its own evidence. Further, it could offer no evidence as to why its records ended in 1984, nor why this admittedly authentic

and unaltered CD appears nowhere in its records.

The conclusion I draw is erroneous record keeping by Dollar. Its inability to find any reference to *this* CD at any-time, despite computerization since 1964, makes the evidence it did submit less than persuasive.

As to the legal defense that 20 years is a "statute of repose" for a situation like this, Dollar relies on what it contends is "established law" as set out in *Rosenbaum v. Newhof*, 152 A.2d 763 (Pa. 1959).

This is a 1959 Supreme Court case involving three recorded confessed judgments from 1927, which were never really attempted to be executed upon. The opinion by Justice Benjamin R. Jones is a tour de force of legal Latin involving what the holder of the notes did *after* they had been recorded. The holder of the judgment issued a Writ of *feri facias*, but the Sheriff returned it as "nulla bona" (no goods—i.e. no goods found to execute against). Later, in 1942, and 1947, writs of *scire facias* were issued to revive the judgments, but the holder thereof instructed the Sheriff to return the writs marked "nihil habet" (he has nothing). The same procedure occurred in 1952. Then in 1956, after the makers had died, the Estate apparently learned for the first time of the notes, and petitioned to have them opened. The Trial Court denied the Petition, and granted judgment in favor of the holder of the notes. The appeal followed.

The Court begins its opinion with the sweeping phrase: "After the lapse of twenty years, all debts, including judgments, not within the orbit of the Statute of Limitations, are presumed to have been paid. *Until* the passage of twenty years it is the burden of the debtor to prove payment; after the passage of twenty years it is the burden of the creditor to establish non-payment, and for the satisfaction of such burden the evidence must be clear and convincing and must consist of proof other than the specialty itself." 152 A.2d 763 at 766. [Emphasis in original]

The facts of that case show, however, that because the holder of the judgments specifically directed the Sheriff to not serve the writs, the holder of the judgment intentionally kept their debtor in the dark about the notes. The Court apparently concluded that this intentional act was *only* for the purpose of preventing the presumption referred to above from coming into play. Incensed by their duplicitous behavior, the Court reversed the judgment, and applied the presumption.

My initial question is, 20 years from when any period of limitation must start with some act, or due date or some point fixed in time from which the period can be measured. None exists here and I question the applicability of *Rosenbaum*. By its own terms, the CD continue to roll over every 4 years paying the interest rate *then* applicable. This 20 year rule would play havoc with 30 year bonds—quite common in municipal and corporate finance.

In its opinion, the Court also cited *Reed v. Reed*, 46 Pa. 239 (no A.2d citation available) for the proposition that the presumption of payment "does not arise where there is affirmative proof beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the *delay* of the creditor."

I focus on the Court's use of the word *delay*. This suggests some kind of due date, or point in time at which the instrument itself requires it be paid, or cashed in or other action by the holder is required.

The Court also cited *James v. Jarett*, 17 Pa. 370, and used the word "supineness" in characterizing the twenty years of inaction by the judgment creditor.

These words all suggest some fault by the holder of a judgment in not prosecuting his claim earlier.

Here, Unger had no judgment. He had an investment—a

good one, and he simply let it continue. He so testified, and was clear, and lucid about purchasing the CD, the reason therefor, and his ultimate delivery of it to Gail. While Dollar has attempted to attack his memory, particularly as to those "other" CDs he held, their evidence did not bear out this attack. Finally, Dollar's own records for the time when the CD was still in its first 4 year term show sloppy record keeping.

Further, this was a good investment that William made for his daughter and he was under no requirement to do anything, but hold it, as one does any investment, until, in the judgment of the investor, it needs to be liquidated. Unless by its terms it must be cashed. In finance this would be termed a "call," but none exists here.

Thus, I am totally unpersuaded by the evidence offered by Dollar. Moreover, I find that the CD here, authentic, unaltered, and with no expiration date, and the direct and clear testimony of William is clear and convincing evidence that Dollar owes the Plaintiffs the present value of \$41,000.

Accordingly, an appropriate verdict slip is attached finding for Unger, and against Dollar in the amount of \$41,000.

BY THE COURT:

/s/O'Reilly, J.

Date: March 13, 2007

NON-JURY VERDICT

AND NOW, to-wit, this 13th day of June, 2007, consistent with my Memorandum of this date, I find in favor of the Plaintiffs, WILLIAM S. UNGER and GAIL UNGER FRYNCKO, and against the Defendant, DOLLAR SAVINGS BANK, FSB, in the amount of \$41,000.00.

BY THE COURT:

/s/O'Reilly, J.

Commonwealth of Pennsylvania v. Labron Ray Ross

Criminal Law—Post Conviction Relief Act ("PCRA")—Ineffective Assistance of Counsel—Admission of Prior Bad Acts—Prosecutorial Misconduct

1. Defendant's claim for ineffective assistance due to counsel's failure to raise a post-sentence motion alleging that the sentence was excessive, due to the imposition of consecutive sentences, will fail since the sentence was within statutory limits and thus did not present a substantial question for appeal.

2. A claim for ineffective assistance for counsel's failure to call alibi witnesses, at trial, will fail when the alibi witnesses' testimony would not be beneficial to the defendant's case. Neither alibi witness attested to knowing the Defendant's whereabouts at the time of the shooting. Moreover, the affidavits of the alibi witnesses contradicted each other. One of the alibi witness's affidavits also contradicted the testimony of a detective who went to the home during the time frame in question and found that no one was home.

3. Defendant's argument that the Commonwealth prejudiced him by improperly introducing evidence of prior bad acts through the introduction of information that he was arrested on an outstanding warrant in an incident that occurred before the shooting along with the testimony of a detective who indicated that he was familiar with Defendant

will fail, as the Rules of Evidence allow the introduction of "evidence of other crimes, wrongs or acts...for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa. R. Evid. 404(b)(2).

4. Defendant's argument that the Commonwealth improperly presented testimony regarding gunshot residue tests when no such test was performed on the defendant was found to be meritless. In recent years, the Court has noted increased awareness by jurors of various forensic matters, "the CSI effect." Jurors have come to demand forensic testing and draw their own conclusions if none is present. The Court found that testimony regarding the gunshot residue test in general and the specific reasons why a test was not done in this case was appropriate to explain to the jury why a test was not done. A gunshot residue test would not have been effective if given the next day, as testing within four hours of a shooting is the rule for obtaining a positive reaction to the test.

5. Where the prosecuting attorney argued in his closing that the Defendant did not turn himself in until 32 hours after the shooting because a gunshot residue test would have been effective in the hours immediately after the shooting, no prosecutorial misconduct was found as "prosecutorial misconduct does not occur unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility towards the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. Due to the nature of a criminal trial, both sides must be allowed reasonable latitude in presenting their case to the jury.... Prosecutorial misconduct will not be found where comments were done so for oratorical flair." *Comm. v. Miller*, 897 A.2d 1281, 1291 (Pa.Super. 2006).

6. During a closing argument, a prosecutor is entitled to make and argue all inferences that can reasonably be derived from the evidence presented. *Comm. v. Robinson*, 877 A.2d 433, 441 (Pa.2005).

(Shannon F. Barkley)

Rebecca Good McBride for the Commonwealth.
David O'Hanesian for Defendant.

No. CC20025968. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, A.J., January 22, 2008—The Defendant has appealed from this Court's Order of September 17, 2007, dismissing his Amended Post Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to present any meritorious issues and, therefore, this Court's Order must be affirmed.

The Defendant was charged with Burglary,¹ Criminal Attempt,² Aggravated Assault³ and Recklessly Endangering Another Person.⁴ The Defendant was initially tried before this Court from July 8 to 10, 2003, but that trial ended in a hung jury. The Defendant was re-tried from May 13-20, 2004, but prior to that retrial, the Commonwealth nolle-prossed the REAP charges. At the conclusion of the retrial, the Defendant was found guilty of all charges. He appeared before this Court on July 21, 2004 and was sentenced to two (2) consecutive terms of imprisonment of ten (10) to twenty (20) years at the attempt charges. No Post-Sentence Motions were filed.

A direct appeal was taken and the Superior Court

affirmed the judgment of sentence on July 15, 2005. The Defendant's timely *pro se* PCRA Petition was filed on August 15, 2006. Counsel was appointed to represent the Defendant and an Amended Petition followed. After giving the appropriate notice, this Court dismissed the Defendant's Amended PCRA Petition without a hearing on September 17, 2007. This appeal followed.

Briefly, at trial the evidence presented established that one of the victims, Manikia Mickle, maintained a cell phone rental service for individuals in her neighborhood. Ms. Mickle would obtain many cell phone lines through her account and then rent them to various people who were unable to purchase their own cell phones. The individuals would then simply pay her the amount of their monthly charges. She performed this service for the Defendant, among others.

In the spring of 2002, the Defendant became delinquent on his cell phone account with Ms. Mickle and she terminated his service on April 4, 2002. The Defendant called her numerous times to complain about the termination and request that she turn the phone back on. She refused. She testified that the Defendant was irate and yelling at her. Eventually, she stopped answering his calls, which continued into the night.

In the early morning hours of April 5, 2002, Ms. Mickle was awakened by the sound of someone coming up her stairs. She sat up in bed and saw the Defendant standing in the doorway of her bedroom. The Defendant then fired numerous shots at her. Ms. Mickle was hit several times, as was her boyfriend, Anthony Fleming. Her young child, who was also sleeping in the bed, was not hit. Ms. Mickle was able to call 911 and identified the Defendant as the shooter to the responding police and paramedics.

On appeal, the Defendant raises a number of ineffectiveness claims, discussed below. In order to establish a claim for the ineffective assistance of counsel, the Defendant must establish that "(1) the underlying claim is of arguable merit; (2) the particular course of conduct chosen by trial counsel did not have some reasonable basis designed to effectuate the claimant's interests; and (3) counsel's alleged ineffectiveness prejudiced the claimant.... Counsel can never be deemed ineffective for failing to raise a meritless claim." *Commonwealth v. Roberts*, 681 A.2d 1274, 1276 (Pa. 1996).

1. Failure to File Post-Sentence Motions

On his previous direct appeal, the Defendant raised a claim that the sentence was excessive due to the imposition of consecutive sentences, however the Superior Court deemed that claim to be waived because it was not raised in Post-Sentence Motions. He now alleges that counsel was ineffective for failing to file Post Sentence Motions on this issue.

Appellate courts "may only reach the merits of an appeal challenging the discretionary aspects of sentence 'where it appears that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code.'" *Commonwealth v. Zurburg*, 2007 WL 4226966, p.3 (Pa.Super. 2007). Generally, when a sentence is within the statutory limits, it does not present a substantial question for appeal. *Commonwealth v. Brown*, 741 A.2d 726, 735 (Pa.Super. 1999). Moreover, "in imposing sentence, a trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed. For this reason, [the Superior Court] has previously held that such a challenge 'does not present a substantial question regarding the discretionary aspects of sentence.'" *Commonwealth v. Wellor*, 731 A.2d 152, 155 (Pa.Super. 1999), internal citations omitted.

The imposition of consecutive sentences was not only well within this Court's discretion, but in and of itself, does not present a substantial question for review. Thus, even had counsel raised the claim on appeal, the Superior Court could not, as a matter of law, have reached the merits of the claim, nor would any relief have been granted. Though the Defendant is correct that his counsel did not raise the claim on appeal, it is also true that counsel is never ineffective for failing to raise a meritless claim. See *Roberts, supra*. Thus, counsel was not ineffective for failing to raise the issue of the consecutive nature of the sentences on appeal. This claim must fail.

2. Alibi Witnesses

The Defendant also argues that trial counsel was ineffective for failing to call his mother and sister as alibi witnesses at trial. Again, this claim must fail.

Generally, to establish that counsel was ineffective for failing to call a witness, Appellant must demonstrate that (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial." *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007). More specifically, "the failure to call a possible alibi witness is not per se ineffective assistance of counsel.... It is only where it is shown that a defendant has informed his attorney of the existence of an alibi witness and trial counsel, without investigation and without adequate explanation, fails to call the witness at trial that counsel will be deemed ineffective.... Thus, to prevail, a defendant must establish that defense counsel knew of the existence of the alibi witness and that the alibi testimony would have been beneficial to his or her case." *Commonwealth v. Williams*, 418 A.2d 499, 503 (Pa.Super. 1980).

In support of his claim, the Defendant has submitted the affidavits of his mother, Tracy Ross, and his sister, Christina Ross, which read as follows:

Affidavit of Tracy Ross:

On the night April 5, 2002 I Tracy was playing card at 1530 Brighton Road I came home at 11:45 to get money and left to returning at 6:00 am April 6 2002. I call LaBron in his room and he was therie he leff at about 9:00 am and had my cell phone when he got the call about Missy. I told Mr. David O'Hanesian about Lee Lee Johnson saying in my home that LaBron didn't it he say that hear say. Lee Lee said she know who did it.'

Affidavit of Christina Ross:

To Whom it May Concern I Christina Ross let LaBron Ross in the house about 11:30 quarter to 12. He didn't go back out the house on the day the shooting happen.

A careful review of the affidavits shows that they are insufficient to establish the defendant's claim of ineffective assistance. First and most importantly, neither woman attests to having seen the Defendant at approximately 4:30 a.m., the time of the shooting, which would have been necessary to constitute a valid alibi. Moreover, although Tracy Ross states that the Defendant was at her home from 6:00 a.m. until 9:00 a.m., this is contrary to the testimony of Detective Hitchings, who went to the home at approximately 7:00 a.m. and found that no one was home. Further, Christina Ross states that the Defendant never left the house

on the day of the shooting, April 5, 2002, which is contradicted by Tracy Ross's affidavit, which states that the Defendant left the house at 9:00 a.m.

The Defendant has also failed to establish that counsel was aware of the proposed alibi testimony of Tracy Ross and Christina Ross. Although Tracy Ross indicates she told trial counsel of her ability to provide an alibi, counsel "could not recollect being informed" about her proposed testimony. (Concise Statement, p. 16). Even if trial counsel had been so informed, her testimony—namely that she was not even with the Defendant at the time she would have been supposedly providing an alibi for him—would not have been persuasive to the jury. In her affidavit, Christina Ross does not allege that she ever told trial counsel of her ability to provide an alibi but, as with Tracy Ross, above, even if she had, her affidavit does not establish that she would have been able to offer persuasive alibi testimony.

Ultimately, given Ms. Mickle's clear and certain identification of the Defendant and the actual failure of either woman to provide an alibi for the Defendant at the time of the shooting, it cannot be said that counsel was ineffective for failing to present their testimony at trial. This claim must also fail.

3. Prior Bad Acts

Next, the Defendant argues that the Commonwealth inappropriately introduced evidence of the Defendant's prior bad acts at trial. Specifically, he argues that references to the Defendant's arrest on an outstanding warrant in an incident that occurred before this shooting, and Detective Hitchings' statement that he was familiar with the Defendant constituted the admission of prior bad acts and caused him prejudice. This claim must also fail.

Pursuant to Rule 404(b)(2) of the Pennsylvania Rules of Evidence, "evidence of other crimes, wrongs or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.Evid. 404(b)(2). "Not all improper references to prior bad acts will mandate a new trial, however. 'Mere passing references to criminal activity will not require reversal unless the record indicates that prejudice resulted from the reference'... 'Harmless error is present when the properly admitted evidence of guilt is so overwhelming that the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict.'" *Commonwealth v. Stafford*, 749 A.2d 489, 496-7 (Pa.Super. 2000).

At trial, Ms. Mickle testified regarding an incident which occurred several months prior to the shooting. She and the Defendant were returning a rental car at the airport when they were stopped by a police officer. At the time the officer believed that the Defendant was wanted on an outstanding warrant and he was taken into custody while Ms. Mickle was released. It was later determined that the Defendant was *not* actually wanted and he was released. He now alleges that this testimony was an improper reference to prior bad acts or prior criminal activity. This claim is meritless.

This Court initially disputes that the testimony in question constituted a "prior bad act" or reference to prior criminal activity. If anything, the testimony that the Defendant was *not* actually wanted on a warrant would have demonstrated a *lack* of prior criminal activity to the jury. However, even if the mistaken arrest would be considered a prior bad act, the testimony was properly admitted pursuant to Rule 404(b) of the Pennsylvania Rules of Evidence, above, because the Defendant had made statements to various members of the community that he thought Ms. Mickle had

"set him up" for the arrest. Given the Defendant's statements, testimony regarding this incident could have implicated a possible revenge shooting and was therefore clearly relevant regarding motive. Therefore, to the extent that the testimony could somehow have been said to have concerned a prior bad act, it was certainly relevant to establishing a possible motive for the shooting and was thus admissible.

The Defendant also argues that Detective Hitchings' testimony that he knew where the Defendant lived constituted evidence of a prior bad act. Again, this claim is meritless.

At trial, the following occurred:

Q. (Mr. Zur): Actually, did you know where Labron Ross lived before he was arrested?

A. (Detective Hitchings): Yes.

Q. And let's just say if you needed to find him you knew where to go?

A. Yes.

(Trial Transcript, p. 115-6).

As is evident from the testimony, Detective Hitchings did not elaborate on how he knew the Defendant, and thus his knowledge of where the Defendant resided could have come from anywhere or anything. Nothing about Detective Hitchings' testimony gave any indication that the Defendant had a prior criminal history, and thus it was not improper.

Even, assuming *arguendo*, it could have been said that Detective Hitchings' testimony was a reference to the Defendant's prior criminal behavior, any error was totally harmless and did not result in a guilty verdict. The victim saw the Defendant fire the gun and clearly and unequivocally identified him at trial, despite defense counsel's best attempts to shake her testimony. There is no possible or plausible scenario under which the jury ignored Ms. Mickle's eyewitness identification and convicted the Defendant solely on the fact that Detective Hitchings knew where he lived, and therefore counsel was not ineffective for failing to raise it. This claim must fail.

4. Gunshot Residue Test

Finally, the Defendant argues that the Commonwealth inappropriately presented, and this Court erred in allowing, testimony regarding gunshot residue tests when such a test was never performed on the Defendant. This claim is also meritless.

At trial, the Commonwealth presented testimony from ballistics expert Dr. Robert Levine regarding the general nature of gunshot residue and the basics of the gunshot residue test. He also testified that the sooner the test was done after the shots were fired, the more effective the test would be, because the residue particles tend to come off the hands with normal activity. Then, during the testimony of Detective Hitchings, the following occurred:

Q. (Mr. Zur): What time did you say you went to check his mother's house?

A. (Det. Hitchings): It would have been at the latest seven o'clock in the morning.

Q. This is several hours after the shooting occurred, correct?

A. Approximately two and a half hours after the shooting occurred. Once we learned his address we went to that residence in an attempt to arrest him.

Q. If you had apprehended him two and a half hours, after the shooting occurred would that have

been sufficient time frame that you would have actually asked for a gunshot residue kit?

A. Yes, as Dr. Levine noted four hours is like the rule that the best chances of getting a positive reaction to the test.

(T.T. p. 157-8).

Contrary to the Defendant's assertion, there was no error in this question. In recent years, the Court has noted an increased awareness by jurors of various forensic matters, what has been described as the "CSI effect." Jurors have come to demand forensic testing and despite all instructions to the contrary, draw their own conclusions if none is presented. The Commonwealth now regularly mentions such forensic evidence, or the reason(s) why none is being offered in their opening and closing statements, and testimony is often offered on the subject. Here, the testimony regarding the Gunshot Residue Test in general and the specific reasons why a test was not done in this case was appropriate to simply explain to the jury why, even if the Defendant was in custody the day after the shooting, a test would not have been effective and therefore was not done. There was no error in the admission of the testimony.

However, the Defendant also takes issue with Mr. Zur's statements regarding the gunshot residue test during his closing argument and the implications he drew from that for the jury. He stated:

MR. ZUR: Now, you also heard testimony that—from Detective Tom Foley Labron Ross turned himself in. Well, I would suggest to you that actually is just as consistent with someone who is guilty as someone who is not guilty. If you are in his position and you know the police are looking for you, well you have two options; one is to run and the other is to turn yourself in. Clearly if you run and hide it gives the impression that you are guilty. So he had no other choice. The other thing is they knew where to find him. So, he was really left little choice but just simply to at least appear to be cooperative, to at least show the detectives well, I didn't do this because look here, I'm talking to you and I'm cooperating. It is meaningless.

What would count for something if Labron Ross answered the door at his mother's house where he said he was asleep until nine in the morning. Detective Hitchings went to that house, knocked on the door several times and no one answered. And the reason is—and I think it should be quite obvious is that because at that point a gunshot residue kit would have had some effect. Would have only been several hours since the shooting occurred. However, he didn't turn himself in until 32 hours later when any evidence or any sort of gunshot residue test is worthless because of the poor adhesive quality of gunshot residue.

(T.T. p. 209-10).

"Prosecutorial misconduct does not occur unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weight the evidence objectively and render a true verdict. Due to the nature of a criminal trial, both sides must be allowed reasonable latitude in presenting their case to the jury.... Prosecutorial misconduct will not be found where comments made were done so for oratorical flair."

Commonwealth v. Miller, 897 A.2d 1281, 1291 (Pa.Super. 2006). The question to be answered in evaluating a claim of prosecutorial misconduct is whether the defendant "was deprived of a fair trial, not a perfect one." *Commonwealth v. Einhorn*, 911 A.2d 960, 970 (Pa.Super. 2006).

The Defendant now alleges that Mr. Zur "manufactured an inference" that the Defendant deliberately waited 32 hours to turn himself in because he knew that a gunshot residue test would be ineffective after that amount of time.

During his closing argument, Mr. Zur was entitled to make and argue all inferences that could reasonably be derived from the evidence presented. *Commonwealth v. Robinson*, 877 A.2d 433, 441 (Pa. 2005). Though the statement was perhaps a bit far-fetched and was certainly not the Commonwealth's best argument, the statement was reasonably derived from the evidence presented at trial. The statement did not, in any way, prejudice the jury or the defendant and in no way prevented him from getting a fair trial.

As noted exhaustively above, Ms. Mickle identified the Defendant as the shooter and given her positive and certain identification, Mr. Zur's comments certainly were not the reason that the Defendant was convicted. Counsel was certainly not ineffective for failing to raise this claim and therefore, under the circumstances, this claim must also fail.

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

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

Date: January 22, 2008

¹ 18 Pa.C.S.A. §3502

² 18 Pa.C.S.A. §901 (2 counts)

³ 18 Pa.C.S.A. §2702(a)(4)—amended to §2702(a)(1) (2 counts)

⁴ 18 Pa.C.S.A. §2705 (2 counts)

Commonwealth of Pennsylvania v. Julius James Clark a/k/a Julius James Brown

*Criminal Law—Post Conviction Relief Act ("PCRA")—
Ineffective Assistance of Counsel*

1. In order to establish ineffective assistance of counsel for failure to call a witness, a defendant must plead and prove that the witness existed, that the witness was available at the time of trial, that trial counsel knew or should have known of the witness's existence, that the witness was willing to testify, and that the absence of testimony prejudiced the defendant. *Comm. v. Crawley*, 541 Pa. 408, 663 A.2d 678 (1995).

2. Where defendant has failed to establish that the witness was available at the time of trial and that he was willing to testify at trial, the defendant's claim of ineffective assistance of counsel is without merit as it does not satisfy each of the prongs of the test set forth in *Crawley*.

3. Defendant's claim for ineffective assistance of counsel when trial counsel failed to file a Post-Sentencing Motion challenging the weight of the evidence regarding Defendant's convictions for robberies graded as first-degree felonies and appellate counsel failed to raise the issue on direct appeal will fail as the Defendant's claim regarding the weight of evidence was found to be preposterous. Both vic-

tims testified that they were in fear and that they were physically assaulted. Trial and appellate counsel cannot be found to have rendered ineffective assistance in failing to pursue a meritless claim.

4. Defendant's claim for ineffective assistance of counsel when his attorney failed to object to the prosecutor's reference to threats that he allegedly made to the victim's sons and the court's charge to the jury in that regard will fail when the claim had been previously litigated and the Superior Court found the claim of prosecutorial misconduct to be without merit.

(Shannon F. Barkley)

James R. Gilmore for the Commonwealth.
Scott Coffey for the Defendant.

No. CC 200401043. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

O'Toole, J., February 1, 2008—The Defendant, Julius James Brown, was found guilty by a jury of two counts of Robbery, 18 Pa.C.S.A. §3701, on January 7, 2005. On March 7, 2005, the Defendant was sentenced to serve two consecutive periods of incarceration of not less than five (5) years nor more than ten (10) years.

A direct appeal was filed to the Pennsylvania Superior Court, who affirmed the judgment of sentence in a Memorandum Opinion issued on March 13, 2006. A subsequent Petition for Allowance of Appeal to the Supreme Court was denied on August 29, 2006.

On February 7, 2007, the Defendant filed a Petition under the Post-Conviction Relief Act. Counsel was appointed and a Hybrid Amended Petition and No Merit Letter was filed. The Commonwealth filed an Answer. On November 29, 2007, after a Notice of Intention to Dismiss had been filed, an Order of Court was issued dismissing the Defendant's Petition without a hearing.

On appeal, the Defendant alleges that prior counsel rendered ineffective assistance in failing to present the testimony of an alibi witness at trial, in failing to file a Post-Sentencing Motion challenging the weight of the evidence, and in failing to object to the prosecutor's references to the threats to the victim's son and the Court's charge to the jury in that regard. Our Supreme Court, in *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999), set forth the standard to be used in assessing a claim of ineffective assistance of counsel in the context of a PCRA Petition as follows:

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 reasonable 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 proceeding would have been different.

If Petitioner fails to meet one of the three prongs of the test, he has not overcome the presumption of effectiveness of counsel and an evidentiary hearing is not required. *Id.*

The Defendant's first claim of ineffective assistance is that counsel failed to present the testimony of an alibi witness at trial. In order to establish a claim of ineffective assistance of counsel for failure to call a witness, the Defendant must plead and prove that the witness existed, that the wit-

ness was available at the time of trial, that trial counsel knew or should have known of the witness's existence, that the witness was willing to testify, and that the absence of the testimony prejudiced the defendant. *Commonwealth v. Crawley*, 541 Pa. 408, 663 A.2d 676 (1995). While the Defendant has shown that the witness, Eric Carpenter, existed and counsel had some knowledge of his existence, he has failed to establish that the witness was available at the time of trial and that he was willing to testify at that time. According to the statements of defense counsel at trial, she made several attempts to locate Mr. Carpenter, but was unable to do so. Also, in the Affidavit attached to the Defendant's Amended Petition, Mr. Carpenter states that trial counsel probably had difficulty locating him because he changed his address and his telephone number; however, Mr. Carpenter never states that he was willing to testify at the Defendant's trial. Accordingly, the Defendant has failed to satisfy each of the prongs of the test set forth in *Crawley*; and therefore, this claim is without merit.

The Defendant's second claim of ineffective assistance is that trial counsel failed to file a Post-Sentencing Motion challenging the weight of the evidence regarding the Defendant's convictions for Robberies graded as first degree felonies and appellate counsel failed to raise this issue on direct appeal. The Court notes that the Defendant unsuccessfully challenged the sufficiency of the evidence on his direct appeal by claiming that there was insufficient evidence to prove that he was the perpetrator and that the victims were in fear of serious bodily injury. He now alleges that counsel should have claimed that the verdict was against the weight of the evidence in that his actions in pushing one victim to the ground while grabbing her purse and pushing the other victim twice did not threaten either victim, nor did it put either victim in fear of serious bodily injury. An allegation that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends that not withstanding all of the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all of the facts is to deny justice. *Commonwealth v. Lyons*, 833 A.2d 245 (Pa.Super. 2003). As this argument by the Defendant is preposterous, it could not possibly have resulted in the Defendant being granted a new trial on the grounds that the verdict was against the weight of the evidence. Both victims expressed that they were in fear and the Defendant physically assaulted both women. As such, trial and appellate counsel cannot be found to have rendered ineffective assistance in failing to pursue a meritless claim.

The Defendant's third claim of ineffective assistance is that counsel failed to object to the prosecutor's references to the threats to the victim's sons and the Court's charge to the jury in that regard. Initially, the Court notes that the allegation of prosecutorial misconduct due to the prosecutor's reference to perceived threats to the victim's sons was addressed by the Superior Court in the Defendant's direct appeal. The Superior Court found the claim to be without merit; and therefore, that portion of this claim has been previously litigated. With regard to the Court's charge to the jury, the Court clearly instructed the jury that there were two victims—Kathleen Scott and Josephine Vozza. When the Court re-charged the jury after their question about whether they should consider the perceived threat to the victim's sons, the Court reread the entire Robbery charge and again noted the specific names of the victims, so that the jury would understand that they must only consider the threat of fear to the two named victims and not to third persons. Accordingly, as the first portion of this allegation has been

previously litigated and trial counsel had no grounds to object to the charge of the Court or the re-charge by the Court, there is no grounds for a claim of ineffectiveness with regard to this issue.

For the foregoing reasons, the Court finds that the Defendant's PCRA Petition was properly dismissed without a hearing.

BY THE COURT:
/s/O'Toole, J.

Commonwealth of Pennsylvania v. Daron Cox

*Criminal Law—Post Conviction Relief Act ("PCRA")—
Ineffective Assistance of Counsel*

1. Trial counsel cannot be found to have provided ineffective assistance of counsel for failing to call a witness who was neither available to testify at trial nor prepared to cooperate and appear as a defense witness. Furthermore, the claim of ineffective assistance for failure to present a witness who was not available or willing to testify will be barred when the merits of the claim were previously reviewed by the Superior Court.

2. The after-discovered evidence rule as set forth in *Comm. v. Holmes*, 905 A.2d 507 (Pa.Super. 1998) provides that the sixty (60) day time limit provided for in §9545(b)(2) begins with the date that the defendant knew of the after-discovered evidence, not the date that he obtained that evidence in some admissible form. Thus, the sixty (60) day time limit on admissibility of after-discovered evidence began to run from the time that the Defendant knew of the existence of the new witness, not on the date that the new witness, confirmed the facts in an affidavit.

3. The state legislature carved out specific exceptions for late filing of PCRA petitions, ineffective assistance of counsel is not one of those exceptions. Allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness of the, PCRA. *Comm. v. Wharton*, 886 A.2d 1120 (2005).

4. A criminal Defendant is required to make a *prima facie* showing that the proceedings resulting in his conviction were so unfair that a miscarriage of justice may have occurred. *Comm. v. Lawson*, 549 A.2d 107 (Pa. 1988). A miscarriage of justice for a Defendant's inability to provide witness testimony will not be found when the court determines that the testimony, had it been offered at trial would not have affected the outcome, as one of the witnesses provided contradictory affidavits and information that contradicted another witness's testimony and the other witness acknowledged that he was under the influence of alcohol and marijuana.

(Shannon F. Barkley)

Kevin F. McCarthy for the Commonwealth.
Michael J. Healey for Defendant.

Nos. CC 199702029 & 199701126. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

MEMORANDUM OPINION AND ORDER OF COURT

Manning, J., February 12, 2008—Before the Court is the

Amended Second and Subsequent Post Conviction Relief Act Petition filed by the defendant, Daron Cox. On July 24, 1997 a jury found the defendant guilty of one count of First Degree Murder in the death of Brian Roberts. He was also found guilty of violating the Uniform Firearms Act. He was sentenced to life imprisonment on the homicide charge and to 3 1/2 to 7 years on the firearms violation. He filed an appeal and argued in the Superior Court that he was entitled to a new trial on the following bases:

1. That trial counsel was ineffective in failing to interview two eyewitnesses prior to trial;
2. That trial counsel was ineffective in failing to present Taneka Jackson as a witness;
3. That trial counsel was ineffective in failing to object to the testimony of Raishaie Smith;
4. That the Court erred in denying the defendant's motion to suppress his confession; and
5. That the Court erred in admitting a statement from the victim that was hearsay.

The Superior Court affirmed the judgment of sentence on January 19, 1999. A Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied on June 22, 1999.

The defendant filed his first PCRA Petition on June 13, 2000. Counsel was appointed but later withdrew. New counsel entered his appearance a short time thereafter and filed an Amended Petition in which he claimed that trial counsel was ineffective for failing to call Orande Shelton and Jamil Gray as witnesses at trial. The Court issued a Notice of Intention to Dismiss on March 8, 2002 on the basis that the Petition failed to allege facts in support of the ineffective assistance of counsel claim. The defendant then filed an Amended Petition and supplied affidavits from these witnesses that eliminated the defects that caused the Court to issue the Notice of Intention to Dismiss. The Court scheduled a hearing for June 7, 2004. At that hearing, the Court heard testimony from Jamil Gray, trial counsel and appellate counsel. Orande Shelton was not available to testify because of his alleged involvement the previous evening in a police pursuit that resulted in an accident and the death of a passenger in the vehicle being driven by Mr. Shelton. Mr. Shelton had apparently fled the scene was wanted in connection with the incident. He did not appear for the hearing.

After the hearing, the Court denied the petition and the defendant appealed. The Court explained in its Opinion that the petition was denied because the testimony presented at the PCRA hearing on behalf of the defendant was not credible. The Court further concluded that the testimony of Gray would not have affected the outcome of the trial. With regard to Orande Shelton, the Court stated that it did not continue the PCRA hearing or allow the defendant to supplement the record from that hearing with testimony from Orande Shelton because Shelton has supplied two affidavits in this matter that were contradictory. In his initial affidavit, executed in 2000 and submitted with the *pro se* Petition filed by the defendant in 2000, he claimed that the shooter he observed could not have been this defendant because the shooter was taller and thinner than the defendant. In the affidavit executed in 2001, he claimed that the shooter could not have been the defendant because he was "shorter and heavier" than the defendant.

The Superior Court affirmed the denial of the defendant's first PCRA Petition on September 24, 2005. The Court specifically upheld this Court's determination that Jamil Gray was not credible and that the conflicting affidavits of Orande

Shelton Justified the Court's decision to not continue the PCRA hearing or to reopen the record of the PCRA hearing for his testimony. The defendant did not file a Petition for Allowance of Appeal to the Supreme Court.

On November 3, 2006 the defendant filed a Second and Subsequent PCRA Petition. Represented by the same attorney who pursued the first PCRA petition, the defendant claimed in this petition that he was entitled to a new trial on the basis of after discovered evidence and ineffective assistance of counsel. The after discovered evidence claim is based on an affidavit from a DeWayne Jackson who claimed that he was present when the victim was shot and that the shooter could not have been the defendant because the shooter was Roland Cephas, who was shorter and stockier than the defendant. Jackson also claimed that the Commonwealth's eyewitness to the shooting, Raishaie Smith could not have seen the defendant shoot Roberts as Smith was not present when the shooting occurred. Finally, Jackson claimed that Smith called him later and asked him who the shooter was because Smith wanted to use that information to obtain his release from juvenile detention. In this Petition, the defendant again raised the claim that counsel was ineffective for failing to call Orande Shelton.

On April 24, 2007 this Court issued a Notice of Intention to Dismiss, advising the defendant the Court intended to dismiss his petition because the after discovered evidence claim was untimely in that the PCRA Petition was filed on November 3, 2006 and the defendant claimed that he learned of the information from Jackson in August 2006 when he discussed the matter with him in the prison yard. The claim involving Orande Shelton was going to be dismissed because it was previously litigated. The Court concluded that the defendant had not made out a *prima facie* showing that the proceedings resulting in his conviction were so unfair that a miscarriage of justice had occurred.

On May 25, 2007 present counsel entered his appearance for the defendant. A Response to the Notice of Intention to Dismiss was filed as was a Motion for Leave to Amend Second and Subsequent PCRA Petition. In these filings, the defendant argued that the claim based on Jackson was timely because it was filed within 60 days of the execution by Jackson of the affidavit submitted with the Petition. New counsel also argued that the late filing should be excused because previous counsel was ineffective for failing to timely file the Petition. On July 3, 2007 the Court granted the Motion for Leave to Amend. The parties were provided with deadlines for filing and a hearing was scheduled for September 10, 2007. The Amended Petition was filed as was the Commonwealth's Answer. Both parties filed briefs. Based upon a review of pleadings and of the entire record in this matter, the Court is convinced that its decision in April of this year to dismiss this Petition without a hearing was correct.

First, with regard to the claim based on the affidavit of Orande Shelton, this claim was previously litigated. Both this Court and the Superior Court determined that the facts set forth in Shelton's affidavit were not sufficient to warrant a hearing because of the inconsistency between the two affidavits he supplied. The Superior Court also observed that trial counsel explained, during the June 4, 2004 PCRA hearing, why he chose not to present evidence from Shelton. That Court concluded: "...the record establishes that Mr. Shelton, an eyewitness who undoubtedly knew of Appellant's arrest, was neither available to testify at trial nor prepared to cooperate and appear as a defense witness; thus, Mr. Sokolsky [trial counsel] cannot be deemed ineffective for failing to call him as a witness." (Superior Court of Pennsylvania, Memorandum Opinion, September 14, 2005).¹ As the defen-

dant had review of the merits of this issue in the Superior Court, the highest appellate court in which he could have had review as a matter of right, the claim is previously litigated. 42 Pa.C.S.A. §9544 (b).

Turning to the after discovered evidence claim, this claim will be dismissed for two reasons. First, the Superior Court in *Commonwealth v. Holmes*, 905 A.2d 507 (Pa.Super. 1998) held that the sixty (60) day time limit provided for in §9545(b)(2) begins from the date that the defendant knew of the after-discovered evidence; not the date that he obtained that evidence in some admissible form. The Superior Court wrote:

Initially, we observe that Holmes failed to satisfy his burden of proving that he raised the after-discovered evidence claim within sixty days of the date that new facts were first discovered pursuant to 42 Pa.C.S.A. §9545(b)(2). Holmes did not disclose the date Mr. Fauntleroy first informed him that he knew that Holmes did not kill Jerome Harris. The Holmes' petition was admittedly filed within sixty (60) days of the date of the Fauntleroy affidavit. There is absolutely no indication that Mr. Fauntleroy drafted the affidavit on the same day that he first approached Appellant and revealed to him the new information. Thus, Holmes failed to demonstrate the predicate requirement that the instant claim was raised within sixty days of the date it first could be presented, and, therefore he did not sustain his burden of pleading and proving that the after-discovered evidence exception permits him to circumvent the statutory time bar.

Holmes, supra, 905 A.2d at 510-511.

In this case, the record actually does establish when DeWayne Jackson informed the defendant of the new facts later set forth in the affidavit. DeWayne Jackson wrote in his affidavit, "I told DaRon that I knew Raishaie lied when I saw him in August 2006." The last date in August 2006 that the defendant could have learned of this information was August 31, 2006. Accordingly, the last date that the petition could have been timely filed was October 30, 2006. The filing on November 3, 2006 was, therefore, not timely. The defendant's argument that the 60 day time limit began to run when the witness confirmed the facts related to the defendant in an affidavit was rejected by the Superior Court in *Holmes*. This Court is bound to follow the holding of the Superior Court.

The defendant's suggestion that the holding in *Holmes* is somehow contrary to the Supreme Court's holding in *Commonwealth v. Beasley*, 741 A.2d 1258 (1999) is incorrect. In *Beasley* the Supreme Court did not address the issue of whether the sixty-day time limit began to run from the date an affidavit is executed or the date that the information contained in the affidavit is received by the defendant. The Supreme Court simply noted the date of the affidavit (May 23, 1990) when it held that the Petition filed on January 16, 1997 was not untimely. The Supreme Court did not hold, as the defendant contends in his brief, that the date "to be looked" at is the date of the affidavit. That is a complete misrepresentation of the Supreme Court's holdings in *Beasley*. This Court is bound to apply *Holmes* and find the Petition untimely.²

The claim that the late filing can be excused because former counsel was ineffective in failing to timely file must also be rejected. The legislature carved out specific exceptions for late filing that could be applied. Ineffective assistance of counsel is not among these exceptions. The Supreme Court, in *Commonwealth v. Wharton*, 886 A.2d 1120 (2005), held: "It

is well settled that allegations of ineffective assistance of counsel will not overcome the jurisdictional timeliness requirements of the PCRA." *Id.*, at 1126.

Even had this claim been raised timely it would have been dismissed without a hearing. Because this is the defendant's second petition, he was required to make a *prima facie* showing that the proceedings resulting in his conviction were so unfair that a miscarriage of justice may have occurred. *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988). The defendant did not meet this standard with the testimony from Jackson, when that testimony is considered along with all of the other evidence offered in this matter. Most important among the matters in this record that compels this conclusion are the other affidavits the defendant has offered since his conviction to try to change the outcome of his trial, as well as the testimony offered at the first PCRA hearing from Jamil Gray. The two affidavits from Orande Shelton contradict one another and one of them contradicts Jackson's testimony. While Jackson averred in his affidavit that the shooter was Roland Cephas, who he described as being a "short stocky dude," and testified at trial that Cephas was about 5'5" or 5'6", Mr. Gray testified that the shooter was as being "six, six three or something." (N.T. 22). Gray also testified that he could not identify the shooter because the shooter concealed his face with a hooded sweatshirt. Jackson, however, claimed that he was able to identify the shooter because he could see his face. Jackson also alleged in his affidavit that he had spent the evening partying with several people; that they had been "...drinking 40's and smoking marijuana" from the evening of December 6 until approximately 2:30 or 3:30 a.m. on December 7. Based upon all of the above, this Court finds the testimony of Dwayne Jackson to not be credible and further concludes that his testimony, had it been offered at trial, would not have affected the outcome.

Given the inconsistencies between the other evidence offered by the defendant in previous attempts to obtain collateral relief, the fact that the new witness was, by his own admission, under the influence of alcohol and marijuana and in light of the overwhelming evidence of the defendant's guilt presented at trial, the Court concludes that the testimony of DeWayne Jackson is insufficient to meet the requirement that the defendant show that his conviction was the result of proceedings so unfair that a miscarriage of justice occurred.

For the reasons set forth in this Memorandum Opinion, an Order will be filed contemporaneously with this Memorandum denying the defendant's Petition.

BY THE COURT:

/s/Manning, J.

Date: February 12, 2008

ORDER OF COURT

AND NOW, this 12th day of February, 2008, it is ORDERED that the defendant's PCRA Petition is DENIED. The defendant is advised that he may file an appeal from this Order within thirty days of the date of the Order.

The Office of Court Records, Criminal Division, is directed to serve a copy of this Memorandum Opinion and Order upon counsel for the defendant, Michael J. Healey, Esquire, at Healey and Hornack, P.C., The Pennsylvanian, Suite C-2, 1100 Liberty Avenue, Pittsburgh, Pennsylvania 15222, by regular mail; upon the defendant at DK-3774, SCI Huntingdon, 1100 Pike Street, Huntingdon, PA 16654 by certified mail-return receipt requested; and upon Ronald M. Wabby, Jr., Esquire, Assistant District Attorney, Office of the District Attorney of Allegheny County, by interoffice mail.

BY THE COURT:

/s/Manning, J.

Date: February 12, 2008

¹ The defendant attempts to avoid the bar on claims previously litigated by submitting evidence in the form of records from the Allegheny County Jail showing that Shelton was an inmate there through June 18, 1997 and arguing that these records undermines the credibility of Attorney Sokolsky's testimony during the first PCRA proceeding. A defendant cannot avoid the previously litigation bar by offering different theories in support of a previously litigated claim. *Commonwealth v. Marinelli*, 810 A.2d 1257 (Pa. 2002). Offering what amounts to impeachment evidence is nothing more than an attempt to relitigate a previously denied claim by using a different theory in support of that claim.

² Although required to apply the ruling in *Holmes*, this Court is troubled by the Superior Court's holding because it is inconsistent with the plain language of the statute. 42 Pa.C.S.A. §9545 (b)(2) provides "Any petition invoking the exception provided in paragraph (1) shall be filed within 60 days of the date *the claim could have been presented*." (Emphasis added). The plain language of this statute does not require that the claim be presented within 60 days of the defendant *learning* of the facts necessary to support the claim; but, rather, within 60 days of the date that the claim could be presented. A claim cannot be presented properly under the PCRA unless the petition setting forth the claim contains facts supporting the claim and where in the record those facts appear or, of the facts are not in the record, the identification of "...affidavits, documents or other evidence showing such facts." Pa. R. Crim P. 902 (A)(12). Accordingly, a claim cannot be presented in a petition under the PCRA unless the facts supporting that claim are already in the record or the petition identifies the documents or evidence that will set forth the facts supportive of the claims set forth in the petition. Although the Court reluctantly concluded that the holding in *Holmes* requires a dismissal pursuant to section 9545 (b)(2), the Court had no reluctance in concluding that the after discovered evidence claim warranted dismissal without a hearing for the other reasons set forth in this Memorandum Opinion.

Commonwealth of Pennsylvania v.

Ronald Aiello

Supplement to Post Conviction Relief Act Claim—Harmless Error—Witness Certifications Regarding Defendant's Character

1. Erroneous statement in factual section of trial court opinion that defendant violated a PFA Order did not impact verdict where court described its reasons for the verdict and those reasons did not make any reference to the PFA or the fact that victim had filed a PFA petition.

2. Witness certifications filed in support of PCRA Supplemental Petition do not support ineffective assistance of counsel claim. Defendant's claim that he was depressed and that he ingested a drink and a Vicodin prior to confessing to stabbing his wife did not render defendant's counsel ineffective for failing to pursue a mental infirmity defense or for moving to suppress the confession. Certifications of character witnesses as to defendant's reputation for non-violence

and peacefulness would not have helped defendant who confessed to stabbing his wife repeatedly and who acknowledged that he lied to police because he was scared.

(Kenneth M. Argentieri)

Mark Tranquilli for the Commonwealth.
Louis Emmi for Defendant.

CC No. 20007117. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., February 19, 2008—This matter has been remanded from the Superior Court to address an additional claim raised in a Supplement to the defendant's Amended Post Conviction Collateral Relief Act (PCRA) Petition that was filed with the Clerk of Courts between this Court's filing of the Notice of Intention to Dismiss and the filing of the final Order of Court dismissing the defendant's Petition. Although the Supplement was filed with the Clerk of Courts, it was not provided to this Court before the Final Order dismissing the Petition was filed.

The Superior Court also pointed out that the Supplement contained witness certifications that may impact upon the Court's disposition of the claims raised in the Amended Petition. When this Court denied the defendant's Petition, it was unaware the Supplement had been filed. A review of this Court's file reveals that it does not contain a copy of this Supplement, although it is unclear if that is because it was not served on the Court or it was misplaced. Upon remand, the Court obtained a copy of the Supplement and will address in this Opinion the issues and facts raised therein.

In the Supplement, the defendant raised one additional claim that counsel was ineffective for failing to object to the Court's consideration of evidence pertaining a Protection from Abuse (PFA) Act proceeding involving the defendant and the victim. The Supplement also contained witness certifications and the Superior Court has requested that this Court address what effect, if any, those certifications would have had on this Court's disposition of the defendant's Petition had they been available to the Court.

The Court is satisfied, after a review of the additional claim identified in the Supplement and the witness certifications attached to that Supplement, that nothing in the supplement warrants any reconsideration of the Court's determination that the defendant is not entitled to relief pursuant to the Post Conviction Collateral Relief Act.

Turning first to the issue concerning evidence of the PFA, this is a red herring.¹ As the record establishes, and as counsel certainly knows, the statement in the Opinion that the defendant violated a PFA Order when he entered the residence and stabbed the victim was *not accurate*. The record of the trial reveals, that it was made clear that the victim filed, but later withdrew a PFA Petition approximately six months before her death. There was absolutely no evidence presented that established or even suggested that there was a PFA order in place on the day that the defendant killed his wife.

Because no such evidence was introduced, it is impossible for the Court to have relied on the "surmised" violation of a PFA Order in reaching its verdict, regardless of this Court's error in its recitation of the facts in an Opinion written two years later. The Court also notes that it delineated or the record its reasons for the verdict rendered prior to announcing that verdict. There was absolutely no reference to any PFA at that time because the Court gave no consideration to the fact that the victim filed such a Petition.

Finally, when the Court addressed the sufficiency of the

evidence claim in its Opinion, there was no reference to the PFA proceedings. The error that the Court made in its recitation of the factual history of this matter in an Opinion written two years after the trial is completely and utterly irrelevant to the verdict rendered; a verdict reached based on a consideration of the evidence admitted at trial and nothing else.

As to the witness certifications, nothing contained in them would have changed this Court's finding that the defendant was not entitled to relief pursuant to the PCRA. This Court set forth at length in the Notice of Intention to Dismiss why it believed that the claims raised in the Amended PCRA Petition were without merit. None of the assertions made in the certifications alter this Court's analysis of the claims raised in the Petition.

The first certification was from the defendant. It contains no new information included in his Amended Petition, either in the body of that Petition or in the exhibits attached thereto. In his certification, he claims that he told his attorney that he was depressed and had sought treatment or counseling for his depression. He had claimed in his Amended PCRA that counsel was ineffective for failing to pursue a mental infirmity defense or to present expert testimony in support of a claim that he acted in the heat of passion when he killed his wife and attached to that Petition records establishing that he attended two counseling sessions with a therapist with Catholic Charities. These records established that the defendant suffered from depression. This Court concluded, however, that these records did not establish that counsel was ineffective in failing to pursue a mental infirmity defense or a defense that he acted in the heat of passion following adequate provocation. These records were certainly of greater weight than the defendant's self serving claim in his certification that he was depressed. If the records from his treatment sessions were not enough to establish counsel's ineffectiveness, then testimony from the defendant that he was depressed or from lay witnesses as to their belief in his depression would clearly not have been enough to establish his claim. This Court properly rejected this claim and nothing in the Supplement would have altered that conclusion.

The defendant also stated in his certification that he ingested a "rum and coke" and a vicodin approximately one hour before he confessed to killing his wife. This fact was also part of the defendant's Amended Petition and formed the basis for his claim that trial counsel was ineffective for failing to move to suppress his confession on the basis that he was so intoxicated. This Court concluded that even if the defendant had ingested one alcoholic drink and a vicodin, he would not have been rendered so intoxicated that he was not capable of giving a voluntary statement. The Court wrote in its opinion, "The fact that the defendant had one half of an alcoholic drink and a single vicodin is certainly no evidence that the defendant was so intoxicated that he could not understand the Miranda warnings that were given to him or could not give a knowing, voluntary or intelligent statement to the police." As the defendant's certification provided no facts beyond those set forth in the Amended Petition, this claim was properly dismissed.

The defendant also attached witness certifications from two purported character witnesses, Joseph Iezzi and Harry McDonald, in support of his claim that counsel was ineffective for failing to present evidence as to his reputation for non-violence, peacefulness and truthfulness. While it is true that the Amended Petition did not identify the character witnesses or set forth the nature of their testimony, the Court concluded that even had such information been provided, the claim would still have been found to lack merit

given that the defendant admitted that he stabbed his wife repeatedly after she made a comment critical of his masculinity. Given that the defendant did not deny committing the horribly violent act of repeatedly plunging a knife into the body of another human being, it is difficult to see how testimony from two of his acquaintances that he was known in the community to be non-violent could possibly have affected the outcome of this trial.

With regard to testimony that he had a reputation for being truthful, the defendant claimed at trial that he initially lied to the police when he said that he acted in self defense. He said that he did that because he was scared. He then gave a statement more consistent with his trial testimony and which blamed his conduct on his “uncontrollable rage” that resulted from his wife’s insulting comments about his masculinity. Since the defendant admitted that he lied to the police, testimony from character witnesses that he had a good reputation for truthfulness would have been of little utility. Because this Court was the fact-finder, it can state with certainty that the introduction of the testimony described in the certifications would not have changed the outcome of this trial.

There are other problems with the proffered character evidence. Harry McDonald’s certification revealed that he did not meet the defendant until after he killed his wife. According to the certification, McDonald met the defendant on April 18, 2000. The attack on the victim took place three days earlier, on April 15, 2000. Testimony that the defendant had a reputation for non-violence, peacefulness and truthfulness during a time period that followed a brutally violent assault and during which the defendant was incarcerated, would hardly have been helpful. Joseph Iezzi, according to the certification, would have testified as the defendant’s reputation as it existed prior to and at the time of this incident. He also would have testified, however, that the defendant “...was always a perfect gentleman, and I believe that his late wife tormented and verbally abused and belittled an otherwise stable, happy and good individual.” As the fact-finder in this matter, this Court can state without equivocation that testimony from this witness that, in essence, the victim brought this on herself, would not have been helpful to the defendant.

Finally, the Supplement contained a certification of the expected testimony of trial counsel, Louis Emmi, Esquire. If called as a witness at the PCRA hearing, Mr. Emmi would have testified that the defendant did not provide him with the names of character witnesses other than the defendant’s mother and brother. Moreover, he would have testified that he believed that the presentation of character witnesses would have opened the door to the admission of evidence pertaining to the defendant’s prior violent conduct, which included an incident where the defendant allegedly plunged a knife into a mattress, cutting it. Regardless of whether the defendant did provide his attorney with the names of character witnesses, this certification establishes that counsel had a good strategic reason for not wanting to present character witnesses. Character evidence would have been of limited value given that the defendant did not deny that he fatally stabbed his wife.

For these reasons, the Court properly denied the Defendant’s PCRA Petition.

BY THE COURT:
/s/Manning, J.

Commonwealth of Pennsylvania v. Keith Dewayne Grace

*Motion to Correct Illegal Sentence—Credit for Time Served
—Merger of Counts*

1. Where defendant was sentenced following probation revocation, he was entitled to credit for time served during the period he had been imprisoned due to probation violations.

2. Where the trial court originally did not sentence the defendant at count two because it merged with count one, the trial court’s subsequent imposition of probation at count two following probation revocation was illegal.

3. The trial court has authority to enter an order providing credit for time served even though the matter is on appeal, because a trial court never loses jurisdiction to correct illegal sentences.

(Carol L. Rosen)

Michael W. Streily for the Commonwealth.
Aaron D. Sontz for Defendant.

CC No. 200203996. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

MEMORANDUM AND ORDER OF COURT

Manning, J., March 13, 2008—The defendant filed a Motion to Correct Illegal Sentence on December 21, 2007. There is currently pending before the Superior Court an appeal from this Court’s denial of post-sentence motions. In his appeal, the defendant claims that the sentence imposed following the revocation of the defendant’s probation was illegal because he was not granted credit for time served and because the Court imposed a sentence of probation at Count when no sentence was imposed at that Count at the original sentence because that count merged with Count 1. These are the same claims raised in the Motion.

When the defendant filed his Post-Sentence Motion and his Concise Statement of Matters Complained of on Appeal, he did not have transcripts of the relevant proceedings and did not supply the Court with anything that would have established his claim. The Motion to Correct Illegal Sentence, however, references passages from the sentencing transcripts, which were only filed in mid December, and also includes records from the Allegheny County Jail establishing the dates during which the defendant was incarcerated there on this case. A review of those and other records in this matter reveal the following: The defendant entered a plea of *Nolo Contendere* to two counts charging violations of 18 Pa.C.S.A. §4915 which deals with the failure of sexual offenders to fulfill the registration requirements of Megan’s Law. At the first count, he was sentenced to one year less one day to two years less one day, to be followed by two years probation. No penalty was imposed at Count 2 as the Court determined that that offense merged with the offense at Count 1. The defendant was given credit for time served from March 8, 2002. He was paroled on March 10, 2003.

The defendant was arrested on July 18, 2003 for probation and parole violations. Following a hearing on August 6, 2003, his parole and probation was revoked. He was then sentenced to serve the balance of his sentence (one year and six days) to be followed by five years probation. He was transferred to the ACTA program. The defendant completed his sentence, and left the ACTA program on July 24, 2004, although he failed to complete that program. The defendant was immediately placed on electronic home monitoring as a condition of his probation and directed to find a suitable res-

¹ Salt cured herring has a strong reddish color and was once used to train hunting dogs. A dog so trained could be drawn off the trail of the animal it was pursuing by “dragging a red herring across the trail.”

idence. Because of his inability to abide by the conditions of the EHM; his failure to find suitable residence and two positive urine samples, he was returned to the Allegheny County Jail on September 16, 2004 for violating the conditions of his probation.

A hearing was held on February 9, 2005. The defendant's probation was continued and he was directed to comply with his service plan. The Court lifted the detainer, but directed that he only be released to the CROMISA program. The defendant was eventually released to that program on March 9, 2005.

The defendant completed the CROMISA program in November 2005, but was allowed to stay in residence there because his two home plans were rejected as not suitable. The officials at CROMISA advised him that they would have to transfer him to the Renewal Center by December 27, 2005 unless he secured a suitable residence. He did not, and left the CROMISA program on December 27, 2005 without the permission of his probation officer. He was arrested the next day, December 28, 2005 and remanded to the county jail. He remained in the jail pending his submission of an appropriate home plan. He finally submitted a suitable home plan and was released on September 9, 2006.

The defendant was rearrested on February 2, 2007 for violating the conditions of his probation by using controlled substances. At the hearing held on May 24, 2007, the defendant's probation was revoked. The court then sentenced him to not less than thirty or more than sixty months at Count 1 and two years consecutive probation at Count 2.

The defendant claims that his sentences were illegal because he was not given credit for time served and because he was sentenced to probation at Count 2, which the Court previously determined merged with Count 1 for sentencing purposes. The defendant further contends that this Court has the authority to address both of these claims even though the matter has been appealed because a sentencing court always has jurisdiction to correct an illegal sentence. Based upon a review of the record in this matter, the Court agrees with the defendant. He was not given credit for the time that he served in the Allegheny County Jail between September 16, 2004 and March 9, 2005 and between December 28, 2005 and September 29, 2006. The records from the jail attached to the defendant's Motion clearly establish that he was incarcerated during these periods of time. The report from the probation office corroborates that those periods of incarceration were attributable to this case. Accordingly, the defendant is entitled to credit for 449 days towards the sentence of incarceration imposed in this matter. This court has the authority to enter an order providing that credit even though this matter is on appeal. A trial court never loses the jurisdiction to correct illegal sentences. *Commonwealth v. Holmes*, 923 A.2d 57 (Pa. 2007),

The defendant is also correct with regard to the sentence of probation imposed at Count 2. Because the Court did not impose a sentence on that count by reason of merger, the probationary sentence imposed on May 24, 2007 is an illegal sentence and must be vacated. *Commonwealth v. Sharpe*, 665 A.2d 1194 (Pa.Super. 1995).

For the reasons set forth above, the following Order will be entered:

ORDER OF COURT

AND NOW, this 13th day of March, 2008, the defendant's Motion to Correct Illegal Sentence is GRANTED and it is ORDERED as follows:

1. The defendant shall be given credit for time served for the time periods between September 16, 2004 and March 9, 2005 and between December 28,

2005 and September 29, 2006, a total of 449 days;

2. The sentence of two years probation imposed at Count Two of the Information is VACATED, and

3. The Office of Court Records, Criminal Division, shall serve copies of this Order upon counsel for the defendant and the Office of the District Attorney by interoffice mail and upon the State Correctional Institution at Rockview, Box A, Bellefonte, PA 16823-0820, by certified mail.

BY THE COURT
/s/Manning, J.

Commonwealth of Pennsylvania v. Peter Perry Pajich

Interference With Custody of Children—Excessive Sentence

1. Defendant approached two nine-year-old boys who were looking in the window of a store in a shopping center while their parents were in another store. Defendant asked boys to come with him in his car to help him find his dog. Boys ran to parents and police found defendant in nearby liquor store. Evidence sufficient to support guilt of crime of interference with custody of children.

2. Sentence of 30 to 60 months with 10 years of probation is not excessive in light of the defendant's extensive criminal history, impact of his conduct on victims, and consistency with sentencing guidelines.

(Kenneth M. Argentieri)

Michael Streily for the Commonwealth.
Suzanne Swan for Defendant.

CC No. 200605410. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., March 18, 2008—The defendant, Peter Perry Pajich, (hereinafter referred to as "Pajich"), has appealed from his conviction on two counts of interference with the custody of children, two counts of luring a child into a motor vehicle and two counts of harassment, following a non-jury trial before this Court on September 18, 2006. The defendant was sentenced on December 12, 2006, to a term of imprisonment of thirty to sixty months on the one count of interference with the custody of children. Pajich received a consecutive ten-year period of probation on the second count of interference with the custody of children. No further penalty was imposed on the remaining counts.

Pajich has caused to be filed a concise statement of matters complained of on appeal. This document raises three assertions of error that Pajich intends to pursue on appeal. These assertions are as follows: (1) the evidence was insufficient as a matter of law to sustain his convictions for interference with the custody of children, as Pajich contends that the Commonwealth failed to prove beyond a reasonable doubt that he took or enticed the minors. Pajich further contends that the Commonwealth's proof failed to establish that he knew or acted in a reckless disregard of the likelihood of causing serious alarm for the safety of these children; (2) Pajich contends that the evidence was insufficient as a matter of law to sustain his two convictions for luring a child into a motor vehicle, based upon his belief that the Commonwealth failed to prove beyond a reasonable doubt

that he possessed the necessary mens rea to commit these crimes, where he was intoxicated and panhandling. Pajich further contends that the Commonwealth failed to prove that he took a substantial step toward the commission of those crimes; and, (3) Pajich contends that he received an excessive sentence of imprisonment, and that the sentence imposed constituted an abuse of discretion.

The evidence presented at trial, in the light most favorable to the Commonwealth, established that Zachary Bluming, (hereinafter referred to as "Zachary"), age nine, and nine year old Logan Shebeck, (hereinafter referred to as "Logan"), were at a shopping center with Zachary's mom in Monroeville, Pennsylvania on March 25, 2006. Zachary and Logan were looking into the window of Bike Tech, a store at that shopping center, while Zachary's mother and aunt were inside another store at the shopping center. Pajich approached these two boys while they were standing by the bike store, tapped Zachary on the shoulder, and told Zachary and Logan that his dog had run away. Pajich asked Zachary and Logan to come with him in his car to go back to his house and look in the woods for Pajich's dog. The boys ran at this point, and Pajich chased them. The boys entered the store where Zachary's mother and aunt were shopping, and informed them of Pajich's actions. Pajich ran and hid behind a car at this time.

The police were subsequently called to the shopping center area. While the police were investigating this matter, Logan spotted Pajich. Zachary and Logan ran down to a police officer and advised him that they had seen Pajich, and the police subsequently arrested Pajich in a liquor store in that same shopping center. The parties also entered into a stipulation that Pajich was not known to either of these children or to the children's parents and that he was not somebody who was privileged to have custody or otherwise have care and/or possession of these children.

When reviewing a challenge to the sufficiency of the evidence, [the Appellate Court] must "accept all evidence and all reasonable inferences there from, upon which the fact-finder could have based the verdict, in order to determine whether the Commonwealth's evidence was legally sufficient to support the verdict." *Commonwealth v. McClintock*, 433 Pa.Super. 83, 639 A.2d 1222, 1223 (1994), quoting *Commonwealth v. Cody*, 401 Pa.Super. 85, 584 A.2d 992, 993 (1991). An individual violates Section 2904, interference with the custody of children, if he knowingly or recklessly takes or entices any child under the age of eighteen from the custody of that child's parents or guardian or other lawful custodian when he has no privilege to do so. Further, when the defendant acts with knowledge that his conduct would cause serious alarm for the safety of the child or acts in reckless disregard of the likelihood of causing such alarm, the grading of the offense increases to a felony of the second degree. It is Pajich's contention here that he did not take or entice the minor from the parents and that the Commonwealth likewise failed to prove that he had knowledge or acted in reckless disregard of the likelihood that his conduct would cause serious alarm for the safety of the children. Pajich's argument relies upon his version of facts, namely that he was simply a panhandler looking for money to satisfy his desire for alcoholic beverages. That is not the testimony, however, when taken in the light most favorable to the Commonwealth. Rather, that testimony established that Pajich approached two young children and sought to entice them to leave the whereabouts of the shopping center, with the parent and guardian of the children a short distance away in another store. This conduct, taken in the light most favorable to the Commonwealth, establishes that Pajich sought to entice the children into his car to return to the area

of his home, purportedly to look for his dog. When the young boys ran from Pajich, he chased them until the boys entered the store where the one young man's mother and aunt were shopping. Pajich ran and hid at this time. This evidence, taken in the light most favorable to the Commonwealth, readily establishes Pajich's guilt of the crime of interference with the custody of children. See, *Commonwealth v. McClintock*, *supra*.

Pajich next contends that the evidence was insufficient as a matter of law to sustain his convictions for luring a child into a motor vehicle. Pajich contends that the Commonwealth failed to prove that he had the mens rea to commit the crime, where he was intoxicated and panhandling, and had no motor vehicle. Pajich also claims that the Commonwealth failed to prove that he took a substantial step toward committing these crimes. Once again, Pajich's reliance upon his testimony that he was intoxicated and panhandling is of no moment, as the evidence, again taken in the light most favorable to the Commonwealth, established that Pajich sought to lure these boys into his vehicle and remove them from the area of the shopping center. Even assuming we credit Pajich's testimony that he was intoxicated, Section 308 of the Crimes Code precludes the defense of voluntary intoxication to this type of crime. In any event, this Court rejected Pajich's testimony that he was intoxicated. Rather, this Court chose to credit the testimony of the two young boys concerning the actions of Pajich and his statements on this occasion, including the testimony that he ran and hid by a vehicle following his failed attempts to lure the children from the shopping center site. The evidence, including Pajich's statements to the young boys, as well as his conduct in chasing them following their flight from him, and the fact that each were nine years old on the date in question, readily establishes the elements set forth in Section 2910 of the Crimes Code, namely, Pajich attempted to lure these children into a motor vehicle or structure without the consent of the parents or guardians of these children. This evidence amply establishes the mens rea requirements of 18 Pa.C.S. §302(c) as they apply to this offense. See, *Commonwealth v. Gallagher*, 592 Pa. 262, 924 A.2d 636 (2007). It is further clear that Pajich's conduct satisfies the element of attempting to lure a child into a motor vehicle. While the Supreme Court in *Commonwealth v. Tate*, 572 Pa. 411, 816 A.2d 1097 (2003), reversed a conviction under the former version of Section 2910 of the Crimes Code on an attempt theory, that statute has been modified to make an attempt to lure a child a crime, under the formulation of that statute as it existed at the time of Pajich's actions. The various Superior Court cases that had held that an attempt to lure was sufficient prior to the decision in *Tate*, *supra*, all recognized conduct similar to that exhibited by Pajich in this particular instance. It is abundantly clear that Pajich's conduct herein, when taken in the light most favorable to the Commonwealth as verdict winner, clearly falls within the parameters of luring a child into a motor vehicle statute. Accordingly, Pajich's assertions of error with respect to these convictions must fail.

Finally, Pajich seeks to challenge the sentence that he received. Pajich claims that the Court abused its discretion in imposing an excessive sentence of thirty to sixty months' imprisonment, to be followed by a ten-year period of probation. The record reveals, however, that Pajich had an extensive criminal history. Pajich's conduct also had a significant impact on his young victims, one of whom is afraid to enter a public restroom by himself, the other of whom is terrified to be in the area of a bike store in a public shopping center, the area where the crime happened. Evidence at the sentencing hearing also established that contrary to Pajich's

assertions that he had been intoxicated at the time of this incident, witnesses observed no evidence of alcoholic beverages, nor intoxication upon him at the time of his arrest. The sentence that Pajich received was consistent with the Sentencing Guidelines of the Commonwealth of Pennsylvania, it was imposed after consideration of the pre-sentence report, witnesses presented by the defense, testimony provided by the Commonwealth, arguments by counsel for both parties, as well as the statements of Pajich and a review of the Sentencing Guidelines. The sentence is clearly appropriate, given the conduct of Pajich in this matter and the above factors. Accordingly, Pajich's final assertion of error must fail.

BY THE COURT:
/s/Cashman, J.

Commonwealth of Pennsylvania v. Justin Lee Moultrie

Decertification of Juvenile—Identification—Sufficiency of Evidence—Weight of Evidence

1. Although defendant completed Vision Quest boot camp and the Allegheny Academy following his juvenile delinquency adjudication, the fact that shortly after his release from those programs he was engaging in the same conduct that led to his juvenile adjudication shows he was not amenable to rehabilitative programs available in the juvenile system and supports the denial of his petition for decertification.

2. The evidence—consisting of (1) Victim's testimony that she saw defendant, whom she knew from the neighborhood, holding a gun and pointing it at her house and that she dove behind her bed and immediately heard at least six gunshots; (2) Corroboration evidence that the defendant knew the victim had met with police; and (3) Impeachment of the defendant's mother/alibi witness—overwhelmingly supported finding that the defendant fired shots into the victim's residence.

(Carol L. Rosen)

Christopher Avetta for the Commonwealth.
John Knorr for Defendant.

CC No. 200504078. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., March 19, 2008—The defendant, Justin Lee Moultrie, was charged by criminal information with one count of aggravated assault (18 Pa.C.S.A. § 2702 (A) (1)); one count of discharge of a firearm into an occupied structure (18 Pa.C.S.A. §2707.1 (A)); and one count of recklessly endangering another person (18 Pa.C.S.A. §2705). The charges involve an incident that occurred on March 8, 2005 when the defendant fired a number of shots into the residence of Cheri Barren, a neighbor who the defendant and his fellow gang members apparently believed was the source of several complaints to the police about their conduct. The victim positively identified the defendant as the individual she saw pointing a gun at her home immediately before the shots struck her home. The defendant, who was sixteen (16) years and ten (10) months old at the time of his arrest, moved to have his case decertified and transferred to juvenile court. A hearing on that Motion was held before the Honorable John A. Zottola on December 8, 2005. After that hearing, Judge

Zottola denied the decertification and the matter was eventually assigned to this Court.

The defendant proceeded non-jury and, at the conclusion of the case, was adjudged guilty at all counts. On May 1, 2007, the Court sentenced him to not less than seventy two (72) nor more than one hundred and eighty (180) months incarceration on the charge of aggravated assault. No further penalty was imposed on the remaining counts by reason of the sentence imposed on Count 1. The defendant filed a timely Motion for Judgment of Acquittal. This was denied by Order dated July 20, 2007. The defendant thereafter filed an appeal and, in a Concise Statement of Matters Complained of an Appeal filed pursuant to this Court's Order, identified the following claims he intends to raise in that appeal:

1. The evidence was not sufficient support the verdict;
2. The verdict was against the weight of the, evidence;
3. The Court abused its discretion in imposing sentence; and
4. The Court erred in denying the defendant's Petition to transfer jurisdiction to juvenile; court.

The Court would first note that because the decertification matter was decided by the Honorable John A. Zottola, this Court cannot set forth in this Opinion Judge Zottola's reasons for denying that Motion. The Court has, however, reviewed the record from the decertification hearing and that record amply supports Judge Zottola's denial of the defendant's Motion. The evidence presented at that hearing revealed that the defendant had been adjudicated delinquent for a Violation of the Uniform Firearms Act (Possession of Firearms of a Minor), Receiving Stolen Property and Possession of Instruments of Crime on May 27, 2004, less than a year prior to this incident. He was remanded to a Vision Quest boot camp facility where he remained until being released to the custody of his aunt on September 5, 2004 and directed to attend the Allegheny Academy. He completed the Academy program in November 2004 and was placed on probation and was to remain in his aunt's custody. Although the defendant presented evidence tending to show that he successfully completed both the Vision Quest and Allegheny Academy programs, it also revealed that shortly after his release, when he was supposed to be residing with his aunt in Hazelwood, he was staying in South Oakland, associating with known or suspected gang members and engaging in the type of conduct that led to his juvenile adjudication. The fact that he was engaging in the same conduct that landed him in the juvenile system shortly after being released clearly established that he was not amenable to the rehabilitative programs available in the juvenile system. Although this Court cannot speak for Judge Zottola, the record of the decertification hearing supported his decision to allow the defendant's case to remain in the Criminal Division.

The defendant's next two claims challenge the weight and sufficiency of the evidence. The tests for both of these claims are well known. "A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993)." *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa.Super. 2000). A challenge to the weight of the evidence concedes that the evidence is sufficient, but contends that the verdict is so contrary to the evidence that it shocks the conscience of the Court and that a new trial must be awarded so that jus-

tice may prevail.

The evidence in this case consisted of the eyewitness testimony of the victim and corroborating testimony from the police officers who investigated the crime. The victim testified that she was asleep in her bed shortly after midnight on March 8, 2005 when a loud sound woke her. She spent several seconds calming down before moving to the window at the front of her house, lifting the blind and looking out. She said that she saw the defendant and several other young men standing in front of her house. The defendant had a gun in his hand and was pointing it at her house. She dove behind her bed and immediately heard at least six gunshots. She also heard the bullets hitting her house and debris inside the house falling. She had the presence of mind to grab a cordless phone before crawling into a bathtub for cover. She called 911 and the police soon arrived.

This evidence was clearly sufficient to establish each element of the crimes charged beyond a reasonable doubt. Obviously, shots were fired into her home, clearly demonstrating that the person who fired those shots did so with the intent to cause serious bodily injury or death to the victim or any person who happened to be in that home. The only issue disputed at trial was the identity of the shooter. Resolving that dispute turned on the credibility of the victim and those witnesses presented by the defendant who claimed he was with them when the shooting occurred. This Court was the fact finder and found the victim's testimony to be credible and compelling. She was not identifying a stranger. She testified that she knew the defendant from the neighborhood. He lived around the corner from her and she had been raised with him and knew his mother and grandmother. Her testimony was corroborated by tapes of phone calls between the defendant and other suspected gang members obtained by a joint robbery task force working in the area. These conversations demonstrated that the defendant was aware that the police had visited the victim's home and that he and his associates blamed her for cooperating with the police. The victim related that the police had been to her home the day before the attack and that their marked police vehicles were parked in front of her house while they met with her on a matter actually unrelated to the defendant. The defendant's comments on the taped calls reveal that he observed the police vehicles in front of her house and suspected that she was providing the police with information.

The defendant did not testify, but offered testimony from his mother, Jamelle Moultrie, and his 16 year old brother, James Moultrie. They claimed that the defendant was in their home with them watching television when the incident occurred. As this Court's verdict reveals, the testimony of the defendant's mother and brother was not credible. Mrs. Moultrie claimed that within seconds of hearing the shots, she received a telephone call from a neighbor, Sue Israel, who called to see if anyone was hurt. The Commonwealth presented in rebuttal another neighbor, Barbara Richmond, who testified that she also spoke with Sue Israel on the night of the shooting and that Ms. Israel told her that she was next going to call the Moultrie's to determine their condition. According to Ms. Richmond, however, this call took place 15 minutes after she heard the shots.

In light of the victim's positive identification of the defendant and the impeachment of the alleged alibi by the testimony of Ms. Richmond, this Court concluded that neither Ms. Moultrie nor James Moultrie were worthy of belief. Frankly, the evidence was not only sufficient; it was overwhelming. The verdict rendered was wholly consistent with the evidence presented. The challenges to the weight and sufficiency of the evidence were properly rejected.

Finally, the defendant challenges the sentence imposed,

contending that it was an abuse of discretion. The defendant was subject to a mandatory minimum sentence of five (5) years incarceration because he committed the offense of Aggravated Assault with the a firearm. The standard range minimum sentence was 48 to 60 months. The aggravated range sentence was 60 to 72 months. The sentence the Court imposed, not less than 72 or more than 180 months, was within the guidelines, at the top of the aggravated range. It was an appropriate sentence and was imposed after a consideration of all of the factors that are to guide the Court in imposing sentence. The Sentencing Code directs the Court when imposing a sentence of confinement, to impose a sentence that is consistent with "...the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community and the rehabilitative needs of the defendant." 42 Pa.C.S.A. §9721 (b).

The facts of this case and the evidence presented at sentencing amply demonstrated that this defendant was a menace to the victim and the other members of the south Oakland community. The protection of that community required that he be removed from there for as long as possible. He also posed, and most likely continues to pose, a real and direct threat to the life of this victim. He tried to kill her when he suspected that she might be talking to the police about his associates and him. Now that she demonstrated the courage to appear in Court and testify, the danger to her can only be greater. As for his rehabilitative needs, they must defer to the needs of the victim and the community for safety. The sentence imposed was not an abuse of discretion; it was wholly consistent with the general principles that are to guide a Court when fashioning a sentence.

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

BY THE COURT:
/s/Manning, J.

Date: March 19, 2008

Commonwealth of Pennsylvania v. Raymond S. White

Illegal Sentence—Excessive Sentence—Ineffectiveness

1. Even after the thirty-day period to modify sentence has expired, the trial court has inherent power to correct an illegal sentence resulting from a clerical error.

2. A claim that a sentence is excessive even though it is within the statutory maximum presents a substantial question that can be reviewed on a case-by-case basis.

3. Bald allegation that sentence is excessive is insufficient to raise substantial question.

4. Aggregate sentence of incarceration of not less than thirteen and one-half nor more than twenty-seven years was not excessive and not an abuse of discretion but rather complied with the Sentencing Code in considering the needs of the victim and the rehabilitative needs of the defendant where: 1) the defendant beat victim's head on concrete until victim was limp and continued to beat her until police forced him to stop at gunpoint; 2) victim was in coma for fifty-five days, and where victim had to learn to walk and talk again, and no longer had use of left hand and could raise right arm only slightly; and 3) the defendant exhibited a lack of

remorse and tried to shift blame to the victim.

5. Counsel was not ineffective in failing to object to withdrawal of plea agreement where the record is totally devoid of any agreement having been either offered or withdrawn.

(Carol L. Rosen)

Michael W. Streily for the Commonwealth.
Donna J. McClelland for Defendant.

CC Nos. 200108387; 200110708. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., March 26, 2008—The instant appeal results from the reinstatement of Raymond S. White's (hereinafter referred to as "White"), appellate rights as a result of the granting of the second Petition for Post-Conviction Relief. The procedural history of White's case was fully described in this Court's prior Opinion and the Opinion of the Superior Court reinstating White's appellate rights. In his current appeal, White has asserted six claims of error. Initially he suggests that his sentence of three and one-half to seven years at criminal complaint number 200108387, where he was charged with the crimes of unlawful restraint and simple assault, is illegal. White next suggests that the aggregate sentence for his two cases of thirteen and one-half to twenty-seven years is excessive and an abuse of discretion. White next maintains that White's trial counsel was ineffective in: a) failing to raise the claim of the illegality of his three and one-half to seven year sentence; b) failing to raise a claim that his aggregate sentence of thirteen and one-half to twenty-seven years was excessive and an abuse of discretion; c) was ineffective in failing to insure that White received the plea agreement previously tendered by the Commonwealth; and, d) that his trial counsel was ineffective for failing to advise White that the Commonwealth had rescinded the plea agreement previously offered.

White's first claim of error is that a sentence of a period of incarceration of not less than three and one-half nor more than seven years for the crime of unlawful restraint is an illegal sentence since it exceeded the maximum penalty for that crime. White was charged at two separate complaints as a result of his conduct toward his victim, Toni Wilson, (hereinafter referred to as "Wilson"). At the first complaint, White was charged with the crimes of unlawful restraint and simple assault. Unlawful restraint is graded as a misdemeanor in the first degree, therefore having a maximum penalty of a period of incarceration of not less than two and one-half nor more than five years. Simple assault is graded as a misdemeanor in the second degree, having a maximum penalty of a period of incarceration of not less than one or more than two years. At the time of sentencing, this Court had available to it the presentence report that was prepared and also had the benefit of the victim's impact statement and photographs that were taken of the victim which demonstrated the injuries that White had inflicted upon his victim. In reviewing all of the information in this case, this Court came to the conclusion that the appropriate sentence to be imposed upon White for his pleas of guilty to the charges of unlawful restraint and simple assault were to be statutory maximums at each count which resulted in an aggregate sentence of a period of incarceration of not less than three and one-half nor more than seven years. However, in preparing the sentencing Order, a clerical error was made since the sentencing Order designates both charges on the sentencing Order; but, it aggregated the sentences to count one, thereby making it appear that White was sentenced only at that count which would then mean that his sentence is illegal since it

exceeds the statutory maximum sentence permitted.

In *Commonwealth v. Pastorkovic*, 390 Pa.Super. 1, 567 A.2d 1089 (1989), the Superior Court recognized that a Trial Court had the inherent power to rectify an error in sentencing so as to correct an illegal sentence even when the thirty-day time period for modification had expired. The recognition of this inherent power to correct an illegal sentence was set forth by the Supreme Court in *Commonwealth v. Jones*, 520 Pa. 385, 554 A.2d 50, 52 (1989): "an illegal sentence is a legal nullity, and sentencing courts must have the authority to correct such a sentence even if that means increasing the sentence." To rectify the clerical error in this regard would be to separate the aggregate sentence set forth on the original sentencing Order then to show a sentence of two and one-half to five years for the conviction of unlawful restraint and a consecutive sentence of one to two years for the conviction of simple assault. The ability to rectify an illegal sentence has been recognized even after an appeal has been filed. *Commonwealth v. Moran*, 823 A.2d 923 (Pa.Super. 2003).

White's next claim of error is that the aggregate sentence imposed upon him of a period of incarceration of not less than thirteen and one-half nor more than twenty-seven years is excessive and an abuse of discretion. As previously noted, White was sentenced to two and one-half to five years for his conviction on the crime of unlawful restraint, one to two years consecutive to that sentence for his conviction of the crime of simple assault and ten to twenty years on his conviction for the crime of aggravated assault. All of these crimes involved the same victim, Wilson. The Pennsylvania Supreme Court in *Commonwealth v. Mouzon*, 571 Pa. 419, 812 A.2d 617 (2002), recognized that a claim of an excessive sentence within the statutory maximum does present a substantial question that can be reviewed. The claim of the excessiveness of the sentence, when the sentence was within the statutory maximum, must be reviewed on a case-by-case basis. *Commonwealth v. Titus*, 816 A.2d 251 (Pa.Super. 2003). However, bald allegations of excessiveness unaccompanied by a plausible argument that the sentence imposed violated a provision of the Sentencing Code are insufficient to raise a substantial question. *Commonwealth v. Mouzon*, supra.

In *Commonwealth v. Walls*, 592 Pa. 557, 926 A.2d 957, 961-962 (2007), the Pennsylvania Supreme Court examined the standard of review to be employed when the discretionary aspect of sentencing has been challenged.

The standard of review typically refers to the level of deference to be accorded a lower tribunal's decision. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. Appellate Prac. & Process 47 (2000). Our Court has stated that the proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893, 895 (1996) ("Imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion."). As stated in *Smith*, an abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Id.*^{FN2} In more expansive terms, our Court recently offered: "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a

result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.” *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038, 1046 (2003).

FN2. As supported by both our case law mandating review of the record, *Smith*, 673 A.2d at 895, and the Sentencing Code requiring an appellate court to review the “record” in making the reasonableness determination described below, 42 Pa.C.S. §9781(d), our scope of review on appeal is plenary, in other words, we may review the entire record.

The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is “in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.” *Commonwealth v. Ward*, 524 Pa. 48, 568 A.2d 1242, 1243 (1990); see also *Commonwealth v. Jones*, 418 Pa.Super. 93, 613 A.2d 587, 591 (1992)(en banc) (offering that the sentencing court is in a superior position to “view the defendant’s character, displays of remorse, defiance or indifference and the overall effect and nature of the crime.”). Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed. Even with the advent of the sentencing guidelines,^{FN3} the power of sentencing is a function to be performed by the sentencing court. *Ward*, 568 A.2d at 1243. Thus, rather than cabin the exercise of a sentencing court’s discretion, the guidelines merely inform the sentencing decision. See also *United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004).

FN3. The sentencing guidelines were promulgated by the Pennsylvania Commission on Sentencing to be considered by and to aid courts in imposing sentences. See generally *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987). The guidelines were designed to bring greater rationality and consistency to sentences and to eliminate unwarranted disparity in sentencing. *Commonwealth v. Mouzon*, 571 Pa. 419, 812 A.2d 617, 620 n. 2 (2002) (plurality).

The Court, in *Walls*, went on further to review the question of what an unreasonable sentence would be and how a determination would be made during an appellate review.

The Sentencing Code also sets forth express standards regarding appellate review of a defendant’s sentence. As is apparent from the statutory provision setting forth the parameters of appellate review, the central focus of substantive appellate review with respect to a sentence outside of the guidelines is whether the sentence is “unreasonable”:

(c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

(3) *the sentencing court sentenced outside the*

sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court. 42 Pa.C.S. §9781(c)(emphasis supplied).

In making this “unreasonableness” inquiry, the General Assembly has set forth four factors that an appellate court is to consider:

(d) Review of record.—In reviewing the record the appellate court shall have regard for:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission. 42 Pa.C.S. §9781(d).

Thus, under the Sentencing Code an appellate court is to exercise its judgment in reviewing a sentence outside the sentencing guidelines to assess whether the sentencing court imposed a sentence that is “unreasonable.” 42 Pa.C.S. §9781(c), (d).

Yet, what makes a sentence “unreasonable” is not defined in the statute. Generally speaking, “unreasonable” commonly connotes a decision that is “irrational” or “not guided by sound judgment.” The Random House Dictionary of the English Language, 2084 (2nd ed.1987); see 1 Pa.C.S. §1903 (words to be construed according to their common and approved usage). While a general understanding of unreasonableness is helpful, in this context, it is apparent that the General Assembly has intended the concept of unreasonableness to be a fluid one, as exemplified by the four factors set forth in *Section 9781(d)* to be considered in making this determination. Indeed, based upon the very factors set out in *Section 9781(d)*, it is clear that the General Assembly intended the concept of unreasonableness to be inherently a circumstance-dependent concept that is flexible in understanding and lacking precise definition. Cf. *United States v. Crosby*, 397 F.3d 103, 115 (2nd Cir.2005)(explaining concept or reasonableness in context of sentencing matters).

Commonwealth v. Walls, *supra.*, 926 A.2d at 963.

This Court, in fashioning White’s sentence, had the opportunity to listen to the stipulated summaries of the two events giving rise to White’s assault on Wilson; had the opportunity to review a presentence report that was prepared in aid of sentence; also had the ability to observe the defendant and listen to his purported explanations of what had transpired; and, had the benefit of the guidelines at the time of his sentencing. In White’s first case, his victim, Wilson, was dropping her daughter off at school on June 4, 2001, when White approached her car and got into the passenger seat and placed a knife against her ribs and demanded that he be taken to Wilson’s residence. Once they reached the residence, White demanded Wilson’s car keys and got out of the car in an attempt to walk around to the driver’s side of the vehicle when Wilson locked the doors to her car. White

was able to open the driver's doors with the keys that he had and a struggle ensued in which Wilson was yelling for help and she was able to get the keys back from White and then she drove off.

In White's second case, which occurred approximately five weeks later on July 14, 2001, Wilson received a telephone call from her nine-year old daughter who was then in the custody of her father, White. White got on the phone and told Wilson that he wanted to bring their daughter back to Wilson's home, however, Wilson believed that it was too late to do that. A short time later, Wilson's nine-year old daughter appeared on the steps of Wilson's residence and Wilson wanted to know how she got there. Wilson went up onto the porch and confronted White who told her that he had brought their daughter back and then demanded that he be given a hug. Wilson refused and an altercation between them began.

In an effort to get away from White, Wilson bit White's nose. White then grabbed Wilson by the neck and threw her down onto the ground, got on top of her and began to choke her and was banging her head against the concrete porch floor. Wilson's sister-in-law, Edith Wilson, saw White beating Wilson and ran out in an attempt to come to the aid of her sister-in-law. White continued to pound Wilson's head on the concrete until she went limp. Her sister-in-law was able to get the nine-year old girl away from White and Wilson, all the while she was screaming, "Don't hurt Mommy." Once inside, Edith Wilson called 911 and then went back outside in an effort to try to help her sister-in-law. Again, White was pounding her head into the concrete porch and now both he and Wilson were covered with blood. The police arrived and White stopped only when the police ordered him at gunpoint to get off of the victim. Paramedics were called and found that Wilson was unresponsive, she had a very slight pulse, and she had no sensation in any of her extremities. Wilson was transported to Allegheny General Hospital where she remained in a coma for fifty-five days. Following her release from Allegheny General Hospital, she was transported to a rehabilitation facility where she spent another month. While at that rehabilitation facility, Wilson learned how to walk and how to talk again.

Among the numerous injuries sustained by Wilson is the impairment of her left hand and arm so that she cannot use her left hand and she can only raise her arm slightly. Wilson lost teeth as a result of this occurrence and she had scars on her hands and neck which are permanent as a result of not only injuries inflicted by White, but also the medical procedures necessary to treat those injuries. Wilson also has impairment of her vision as a result of orbital fractures that she sustained in this beating. Underscoring the serious and life-threatening injuries that Wilson sustained were the voluminous medical records that were generated in her treatment not only at Allegheny General Hospital but, also, the Rehabilitative Institute of Pittsburgh where she underwent physical therapy.

This Court also had the benefit of observing White and listening to him in an attempt to minimize what happened in either event. In attempting to minimize his actions, White also attempted to shift the blame for what happened to Wilson and not himself. This Court considered the nature of the attack, the fact that it was committed in the presence of their nine-year old daughter, the continuation of the attack after Wilson's sister-in-law attempted to come to her aid, and the fact that White only stopped after being forced to do so at gunpoint. In addition, this Court also considered his lack of remorse and the fact that he attempted to place the blame for this incident on the victim and not himself. The presentence report was also of an aid in coming to the ultimate con-

clusion that total confinement was required and that the period of incarceration that would be appropriate was the statutory maximum. The imposition of this sentence was neither irrational or not guided by sound judgment. It is clear that the sentences imposed upon White were neither excessive nor an abuse of discretion but, rather, complied with the Sentencing Code since it considered the needs of the victim and the rehabilitative needs of White.

White's third claim of error is that his counsel was ineffective in failing to note the illegality of White's original sentence, in failing to raise the issue of the excessiveness and unreasonableness of his aggregate sentence, in failing to insure that White received the plea agreement previously tendered by the Commonwealth and, finally, in failing to advise White that the Commonwealth had withdrawn its plea agreement. In order to be entitled to relief under the Post-Conviction Relief Act, a petition must meet the eligibility requirements set forth in 42 Pa.C.S.A. §9543(a), which provides as follows:

§9543. Eligibility for relief

(a) General rule.—To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(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 officials 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 reviewing the record in the instant case, it is clear that White’s petition was timely filed and that his claims of the ineffectiveness of counsel if plead and proven would establish the basis for entitlement to relief. To demonstrate his counsel’s ineffectiveness, White was required to plead and to prove the three-prong test set forth in *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (1999).

By holding that the PCRA standard does not impose a more onerous burden on a defendant than that required by *Pierce*, we do not rewrite the PCRA nor alter the test for proving ineffective assistance of counsel in a PCRA petition. 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. What we hold today is that, where the petitioner has demonstrated that counsel’s ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different, then no *reliable* adjudication of guilt or innocence could have taken place. Reliability of the adjudication of guilt or innocence and the probability that counsel’s ineffectiveness caused a different outcome of the proceedings are concepts so closely intertwined and commonly-rooted in *Strickland* that we refuse to separate them.

It is axiomatic that counsel is presumed to be effective and the burden of proving counsel’s ineffectiveness rests with the petitioner. *Commonwealth v. Rollins*, 558 Pa. 532, 738 A.2d 435 (1999). As previously demonstrated, White’s first two claims of ineffectiveness of his counsel with respect to his sentences are without merit and, accordingly, trial counsel could not be ineffective for failing to pursue a claim without merit. With respect to his claims of ineffectiveness as they relate to the proposed plea agreement, the record is totally devoid of any agreement either offered or withdrawn.

The Assistant District Attorney assigned to White’s case, David Spurgeon, (hereinafter referred to as “Spurgeon”), testified at the post-conviction relief hearing with respect to his conversations with White’s lawyers. Initially, White was represented by Robert Goehring (hereinafter referred to as “Goehring”), of the Public Defender’s Office and he stated unequivocally that he had made no offer to Goehring due to the severity of the injuries in this case and that he would only

accept a general plea. Goehring apparently conveyed this information to White and was attempting to have him execute a guilty plea colloquy when White broke down and refused to go forward. White requested new counsel and Timothy Finnerty, (hereinafter referred to as “Finnerty”), was appointed to be his new counsel. After Finnerty was appointed, Spurgeon testified that he filed a petition to amend the aggravated assault indictment to include a charge of criminal attempt to commit criminal homicide but that petition was never presented. On the date that this case was scheduled for trial, Spurgeon testified that he once again talked with Finnerty and was advised that White would be willing to enter into a general plea and Spurgeon advised him that as a result of that decision, he would not go forward with his motion to amend the indictment to include the charge of criminal attempt to commit criminal homicide. There was no plea agreement ever offered to Finnerty.

White acted as his own counsel in the post-conviction relief hearing and testified that he was offered a three to six year plea agreement if he would enter a general plea. When he cross-examined Spurgeon on this issue, Spurgeon told him that there was never an offer of three to six years and that offer would have been ludicrous since that type of sentence would have been below the mitigated range for this case. Finnerty testified and also stated that he had never received a plea offer and that White told him a number of times that he would be agreeable to a sentence of three to six years; however, that was not an offer ever made by the Commonwealth. The Sentencing Transcript demonstrates the lack of a plea agreement and White’s knowledge that no such plea agreement had ever been made when White informed this Court “Whatever you decide with me I would accept it with all fairness because I know it was wrong, Your Honor.” Sentencing Transcript, page 19, lines 19-21.

The review of the record generated in this case clearly indicates that no plea agreement was ever entered and, accordingly, no plea agreement was ever withdrawn. White’s contention that there was such a plea agreement for three to six years is nothing more than White’s demand that that be the sentence. That request was ludicrous since such a sentence would be a substantial departure below the mitigated range and would be a further acknowledgement of White’s lack of remorse for the devastation that he visited upon his victim. Since there was no plea agreement in this case, White’s counsel could not have been ineffective for failing to see that he was entitled to that agreement or in failing to advise White that the plea agreement had been withdrawn.

BY THE COURT
/s/Cashman, J.

Date: March 26, 2008