

# PITTSBURGH LEGAL JOURNAL

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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](http://www.acba.org).

## ALLEGHENY JURY VERDICT REPORTER

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

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

## CAPSULE SUMMARIES

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## BINDERS

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**Eric J. and Melanie Werner v.  
Zoning Hearing Board  
of the Borough of Sewickley  
and Borough of Sewickley**

*Violation of Zoning Ordinance—Vested Right*

1. In order to establish a vested right as a result of using land contrary to a zoning ordinance, the applicant must establish due diligence and good faith, among other things.

2. Building without waiting for the outcome of a consent order appeal does not demonstrate due diligence and good faith.

(Amy R. Schrempf)

*Joel P. Aaronson* for Appellant Eric J. and Melanie Werner.  
*Colin W. Murray* for Appellee Zoning Hearing Board of the Borough of Sewickley.

*Richard B. Tucker, III* for Intervenor Borough of Sewickley.

No. SA 04-000960. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., December 17, 2007—This appeal arises from the August 3, 2004 decision of the Zoning Hearing Board of the Borough of Sewickley (“Board”) granting two variances with certain conditions to Eric J. and Melanie Werner (“the Werners”). This case dates back to 2004. The Werners purchased the Property, located at 44 Beaver Street, an R-1 zoning district, in November of 2002. They planned to remove and replace the existing house, rebuild the existing garage and install a governor’s drive. In July of 2003, the Board granted them variances to rebuild the garage and for lot coverage, but denied them a variance for the governor’s drive. That decision was upheld by this Court and is currently on appeal in the Commonwealth Court at Docket No. 804 C.D. 2004.

On April 29, 2004, the Code Enforcement Officer (“CEO”) notified the Werners that their plans for a new garage satisfied the zoning requirements but that their proposed walled mechanical equipment enclosure, as well as a second rear yard enclosure (rear enclosure), violated the rear and side yard setback requirements and the lot coverage requirements. The CEO’s letter made no mention of the side terrace which was already under construction. Specifically, the mechanical enclosure violated the 30-foot rear setback requirement by 29 feet and the limitation on lot coverage by 4 percent. The Werners appealed to the Board. A hearing was held on July 6, 2004 and a decision was made on August 3, 2004. The Board sustained the CEO’s determinations but granted the Werners a variance from the rear yard setback with respect to both the walled mechanical equipment enclosure and the rear enclosure but denied a side yard setback variance with respect to the location of the rear enclosure. The Board also granted a variance with respect to lot coverage allowing an increase in the maximum lot coverage to 36.67%. It is from that decision that the Werners appeal.

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

support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

The Board correctly determined that the proposed walled mechanical enclosure and the proposed side terrace violated the yard and lot coverage requirements of the Ordinance. The side terrace currently violates the setback requirement by five or six feet. The walled mechanical equipment enclosure violates the rear setback requirement by 29 feet. The lot coverage exceeds the 36.67% permitted by the Board.

The Werners are not entitled to keep the side terrace on a vested right theory. The Pennsylvania Supreme Court has set the criteria for determining whether a property owner acquired a vested right as a result of using land contrary to the Ordinance in *Petrosky v. Zoning Hearing Board of Upper Chichester Delaware County*, 402 A.2d 1385 (Pa. 1979). The applicant must establish:

- (1) due diligence in attempting to comply with the law;
- (2) good faith throughout the entire proceeding;
- (3) expenditure of substantial unrecoverable funds;
- (4) expiration of the period during which an appeal could have been taken from issuance of a Permit; and
- (5) insufficiency of evidence that individual property owners or public health, safety and welfare would be adversely affected by use of the Permit.

*Randolph Vine Associates v. Zoning Hearing Board Adjustment of Philadelphia*, 573 A.2d 255, 259 citing *Petrosky*. In the instant case, the Werners cannot establish that they exhibited due diligence and good faith in attempting to comply with the law. They built the side terrace four feet from the right side line without waiting to see the outcome of the Consent Order Appeal. Further, the Werners’ side terrace was partially completed at the time of the Board’s decision on August 3, 2004. To be compliant with the Ordinance, only six feet of the side terrace must be removed.

Based upon the foregoing, the decision of the Zoning Hearing Board of the Borough of Sewickley is affirmed and the Appeal is dismissed.

**ORDER OF COURT**

AND NOW, this 15th day of December, 2007, based upon the foregoing, the decision of the Zoning Hearing Board of the Borough of Sewickley is affirmed and the Appeal is dismissed.

BY THE COURT:  
/s/James, J.

**Mark and Mary Pat Pinsoneault,  
Fred and Michelle Mason Liechti,  
Thomas and Jennifer Collins,  
Matthew and Kristin Bryan,  
Victoria Evans-Crawford, Bill Ehrlich  
and Deborah Crawford v.  
Findlay Township and Edward Kosis**

*Zoning—Conditional Use*

1. If applicant for conditional use satisfies the criteria in

the Ordinance, burden shifts to objectors to establish with a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community greater than would be expected under normal circumstances.

2. This particular convenience store and gasoline station was not more detrimental to the health, safety and welfare of the community than any other convenience store and gasoline station.

(Amy R. Schrempf)

Bonnie Brimmeier for Appellants.

Alan T. Shuckrow for Appellee Findlay Township.

Michael J. Witherel for Intervenor Edward Kosis.

No. SA 07-000319. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., January 14, 2008—This appeal arises from the decision of the Findlay Township Board of Supervisors (hereinafter “Board”) dealing with Property located on state Route 30 in the Village of Clinton in Findlay Township. The Property is located in a Village Zoning District (hereinafter “VLD”). Edward Kosis, (hereinafter “Intervenor”) the owner of the Property, proposed to construct a convenience store, gasoline station, and car wash on his Property. The proposed car wash was later withdrawn from the request. The Intervenor filed a petition for a conditional use permit with Findley Township on August 14, 2006. The Findlay Township Planning Commission held a public hearing on October 24, 2006, and gave a non-favorable recommendation to the Board. The Board held a hearing on January 10, 2007, and on February 22, 2007, rendered a decision approving the conditional use subject to twelve (12) conditions.

Before this court is the Objectors’ appeal from the Board’s decision granting the Intervenor a conditional use permitting the construction of the convenience store and gasoline station.

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

The Objectors cite a number of errors in their appeal and argue that the project fails to meet the requirements for approval of a conditional use. In this case, the Intervenor has the burden of proving that the proposed use is a type permitted by conditional use and that the proposed use complies with the requirements of the Ordinance. *Appeal of Baird*, 537 A.2d 976 (Pa.Cmwth. 1988). Then the burden shifts to those protesting the use to prove that it will have an adverse effect on the general public. *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa.Cmwth. 1994). When dealing with the granting or denial of a conditional use, the protestors must show with “a high degree of probability” that the proposed use will “pose a substantial threat.” *Bray v. Zoning Board of Adjustment*. 410 A.2d 909, 914 (Pa.Cmwth. 1980).

The Board found that the Ordinance permits both convenience stores and gasoline service stations in the VLD District. Furthermore, in Section 117.604.16.1 of the

Ordinance, it is specifically contemplated that convenience stores will sometimes include gasoline service stations. Section 117.604.16.1 provides that if gasoline is sold as part of the convenience store operation, the specific conditions relating to gasoline service stations listed in the Ordinance shall also apply.

The Board found that although Section 117.604.25 of the Ordinance provides that “No gasoline service station shall be within five hundred (500) feet of a Church, school or Residential Zoning District or Residential Use,” the Ordinance provides for discretion to be given to the Supervisors in conditional use cases. Specifically, Section 117.602.1.7 provides:

The Supervisors shall consider whether proposed modifications in any of the requirements of this ordinance for each zoning district...will make for a more efficient, attractive and harmonious conditional use. If such modifications, in the judgment of the supervisors constitute a more beneficial use of the site than provided for under the requirements of the zoning district in which the site of the conditional use is located, the supervisors in its sole discretion may grant the modifications for less strict requirements.”

The Board found that Section 103.604.10, the subdivision and land development ordinance, specifically contemplates a modification of the buffer requirements where the buffer takes up more than 10% of the width or depth of the applicant’s property and that the buffer yard requirement was properly modified under Section 117.602.1.7 of the Ordinance.

The Intervenor has satisfied the criteria contained in the Ordinance for a conditional use and therefore, it is presumed that the proposed use is consistent with the general welfare. The burden then shifts to the Objectors to rebut the presumption. As objectors, they must establish with “a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community” greater than would be expected under normal circumstances. *Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644, 650 (Pa.Cmwth. 1999), citing *Tuckfelt v. Zoning Board of Adjustment of Pittsburgh*, 471 A.2d 1311, 1314 (Pa. Cmwth. 1984).

Finally, the Board found that there are no circumstances involved that would make this particular convenience store and gasoline station more detrimental to the health, safety and welfare of the community than would any other convenience store and gasoline station. Granting the modifications will make for a more beneficial use of the site than provided for under strict construction of the conditions, provided certain conditions are met and that the applicant subsequently meets all requirements at the time of land development approval.

The Board heard the witnesses and reviewed the exhibits. It is the duty of the Board in the exercise of its discretionary power to determine whether a party has met its burden. *A.A. Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299, 1304 (Pa.Cmwth. 1994). The record supports the findings and the decision of the Board will be affirmed.

#### ORDER OF COURT

AND NOW, to-wit, this 25th day of January, 2008, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Findley Township Board of Supervisors is affirmed.

BY THE COURT:  
/s/James, J.

**In re: I.L.P. and I.L.P.**  
**Joint Petition on Assisted Conception**  
**Birth Registration**

*Gestational Carriers—Assisted Conception—Vital Statistics  
 —Birth Certificates*

1. Prior decree of the Court in 2006 determined that genetic father was sole parent of unborn twins and directed that birth certificate reflect his parentage.

2. Petitioners sought amendment to that decree to, *inter alia*, terminate parental rights of Gestational Carrier's husband.

3. Court denied Petition stating that original decree contained sufficient information to make it clear that neither Gestational Carrier nor Gestational Carrier's husband had any genetic or parental connection to the children; therefore, they had no parental rights to terminate.

4. Petitioners requested said relief in order to establish dual U.S.-Taiwanese citizenship. Petitioners alleged that Taiwan would not grant such citizenship absent a voluntary request by Gestational Carrier to terminate her parental rights and those of her husband.

5. The court followed the policies and procedures of the Pennsylvania Department of Health regarding birth certificates. For resolution of Petitioners' Taiwanese issue, Petitioners must deal directly with the Taiwanese.

*(Lynn E. MacBeth)*

*Melissa Brisman* for Petitioners.

*Hilary Andrew Kinal* for Gina and Brian Scanlon.

No. 4655 of 2006. In the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division.

**OPINION**

**Procedural History**

Lucchino, A.J., May 28, 2008—On July 28, 2006, after consideration of Petitioners' Joint Petition ("2006 Petition"), this Court Issued a Decree ("Decree") determining that Chun-Hsien Lu ("Lu") was the father and sole parent<sup>1</sup> of the unborn twin Children ("Children") in this matter. The Decree directed that any certified copies of Children's birth records reflect Lu's parentage.

It is important to understand that there is no statute or regulation regarding gestational carriers. This Court's only direction in gestational carrier matters is an October 2, 2003 Pennsylvania Department of Health Letter ("Letter") that sets forth the policy and procedures of that department for the registration of an assisted conception birth. The Letter acknowledges what this Court is well aware of: that "the Vital Statistics law and associated regulations do not specifically address assisted conception." In other words, the law has not yet caught up with the science that makes conception by *in vitro* fertilization ("IVR") using a gestational carrier possible. The Letter provides a mechanism to ensure a child born of a gestational carrier has a genetic parent's name on a birth record.

On April 2, 2008, Petitioners presented a Joint Petition for Amended Decree ("2008 Petition"). They averred that Lu, a Taiwanese citizen, wanted Children to be joint U.S.-Taiwanese citizens. Petitioners state that because Children are the product of a Taiwanese citizen and a woman married to someone else, Taiwanese authorities would not grant citizenship unless Gestational Carrier voluntarily requests that

the Court terminate her parental rights, and that her husband, Brian Scanlon ("Gestational Carrier's Husband"), disavow he is the biological father and also requests termination of his parental rights. This Court denied the 2008 Petition, stating that sufficient information regarding this matter was contained in the original 2006 Petition and Decree which followed. Petitioners appealed.

This Opinion follows.

**Discussion**

Based upon the verified and notarized information provided in the 2008 Petition, this Court determined that Lu was Childrens' genetic parent and that his name should appear as such on certified birth records. As the sperm donor, Lu was and is the only party in this matter who has a genetic connection to Children, hence this Court's determination of his parentage. The physician ("Physician") who performed the IVR provided in a sworn affidavit that it was Lu's sperm that had fertilized the eggs from an anonymous egg donor. That affidavit also stated that Gestational Carrier was placed on hormone therapy making it impossible for Gestational Carrier to ovulate. That made the anonymous donor eggs the only eggs that Lu could have fertilized and therefore established that Gestational Carrier could not have contributed any genetic material to the embryos.

In addition to Physician's affidavit, the 2006 Petition also stated that the embryos were "not the result of [Gestational Carrier's] eggs, or from [Gestational Carrier's Husband's] sperm." 2006 Petition, Para 7. Gestational Carrier and Gestational Carrier's Husband then verified that the facts contained therein were true and correct.

Also contained in the 2006 Petition was Gestational Carrier's agreement to deliver possession and custody of Children upon their birth and to "release any rights she or her husband, Brian Scanlon, may have in said children." 2006 Petition, Ex.C. She acknowledged that Lu was the true and biological father. She further consented that her name not appear on Childrens' birth records. Based upon the 2006 Petition, it was clear that neither Gestational Carrier nor Gestational Carrier's Husband had any genetic or parental connection to Children. Gestational Carrier was contracted only to carry embryos fertilized by Lu's sperm and deliver Children upon birth.

Simply put, Gestational Carrier and Gestational Carrier's Husband had no parental rights for this Court to terminate.

Petitioners' "Concise Statement of Matters Appealed," misstates the purpose of this Court's 2006 Decree. This Court did not and could not "correct" Childrens' birth registration since the Children were born five weeks *after* the Decree was signed.

When this Court denied the 2008 Petition and refused to grant the Amended Decree, it suggested that the straightest road to resolution of Petitioners' Taiwanese issue was to deal directly with the Taiwanese. That is still true.

Petitioners are mistaken in their statement that "in Pennsylvania an order is necessary to confirm that the gestational carrier is not the birth parent, so that a court still has to make a determination that carrier and her husband have no rights to the child." A reading of this Court's 2006 Decree will show that it contains no determination regarding those issues.

Termination of parental rights is a precondition of adoption. Gestational carrier registrations have no termination hearing since by the nature of the gestational carrier process she and her husband have no parental rights to terminate.

This Court applied the policies and procedures of the Pennsylvania Department of Health set forth in its Letter and issued its Decree.

Filed May 28, 2008.

<sup>1</sup> The eggs were from anonymous donor, Gina Scanlon (“Gestational Carrier”) had agreed to carry embryos in her womb, provide them with nutrition during pregnancy, and deliver Children upon birth.

## Commonwealth of Pennsylvania v. Samuel Brown

*Sentencing—Challenge to Jury Array*

1. Under *Commonwealth v. Walls* standard affording trial judge broad discretion in sentencing, trial court did not abuse discretion in imposing consecutive rather than concurrent sentences for convictions where sentences for each offense were within sentencing guidelines and presentence report indicated that defendant had multiple prior convictions (including juvenile conviction for aggravated assault) and was currently serving parole.

2. Claim of insufficiency of evidence to convict on charges of criminal attempt to commit criminal homicide and aggravated assault on police officer will fail where Commonwealth established that each of criminal actors evidenced a clear intention to kill.

3. Challenge to jury array will fail where Defendant presented no evidence supporting contention that jury selection process was designed to systematically exclude African-Americans.

(Norma Caquatto)

Michael Streily for the Commonwealth.  
J. Richard Narvin for Defendant.

CC No. 200217193. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Cashman, J., February 29, 2008—The appellant, Samuel Brown, (hereinafter referred to as “Brown”), has filed the instant appeal as a result of the imposition of an aggregate sentence of a period of incarceration of not less than eighteen nor more than thirty-six years as a result of his convictions of the crimes of criminal attempt to commit criminal homicide, aggravated assault, aggravated assault on a police officer, criminal conspiracy, criminal trespass and one count of violation of the Uniform Firearms Act which was possession of a firearm without a license. Brown was directed to file a concise statement of matters complained of on appeal and in complying with that directive, has identified three issues. Initially, Brown claims that by imposing consecutive sentences with respect to his convictions for these crimes that those sentences are an abuse of discretion. In his second claim of error, Brown contends that the evidence was insufficient to support his convictions for the crimes of criminal attempt to commit criminal homicide and aggravated assault. Brown’s final claim is that this Court erred in refusing to allow him another jury panel since the array was not representative of the African-American community.

At approximately 1:45 a.m. on October 24, 2002, Sammi Dobransky was working alone as a cashier at the 7-11 convenience store located on Camp Hollow Road in West Mifflin, Pennsylvania, when she looked out the window and saw a dark-colored, two-door automobile parked in an odd manner in that the rear of the car was pointed toward the store and the front of the car pointed toward Camp Hollow

Road. Although she was able to see the car, she was unable to determine whether or not the engine was on or if there were any occupants in that car. She returned to work only to hear the bells on the store door go off when an individual entered the store. When she asked the individual if there was something he wanted, the first time she got no response. She repeated her question a second time and still got no response. It was only after she approached the cash register that the individual who was wearing a black or gray coat with a hood and a ski mask, told her not to push any buttons and to give him all of the money in the cash register. After she complied with those requests, this individual placed a gun to her head and demanded that she give him some cigarettes, and in particular Newport cigarettes, and she placed approximately eight packs in a brown paper bag and gave him those cigarettes. He then told her to get on the ground and not to call the police and then exited the store. After she was assured that he was no longer in the store, she got up and looked out the window and saw that the parking lot was now empty. She immediately called the police and advised them that she had been robbed. Ultimately, she gave a description to the police of a male of unknown weight, anywhere from five feet six to six feet tall. She was able to say that he was an African-American because he had no gloves on and she was able to see the color of the skin on his hands. At the time of trial she was unable to identify either Brown or his co-defendant, Derrick Hampton, (hereinafter referred to as “Hampton”), as the individual who came in and robbed her store that evening.

Officer Michael Booth, (hereinafter referred to as “Booth”), of the West Mifflin Police Department was on routine patrol when he received radio report of the robbery at the 7-11 convenience store. Since he was miles away from the robbery site, he decided to go to another twenty-four hour convenience store and observe that store in case a second robbery was planned. During the course of his surveillance, he received a radio report that his partner had stopped a black, two-door automobile on the Duquesne-McKeesport Bridge and he then left his surveillance post to go provide backup to his partner. While he rode to that traffic stop, he was informed that the vehicle did not contain a black male but, rather, four white females.

Booth, since he was approaching the Mifflin Estates Apartment complex, decided to cruise through that apartment complex and check to see if there were any vehicles that might match the description that had been given to him about the vehicle used by the robbery suspect. When Booth pulled into the parking lot for buildings one hundred and two hundred of the Mifflin Estate Apartments, he spotted, what he perceived to be a dark-colored, two-door automobile. Booth stopped his vehicle and did a full inspection of the dark vehicle, determining that it was a dark blue and that it had extensive front-end damage and that there was nobody in the vehicle. He knew that this was not the vehicle. Booth was about to continue his investigation when he noticed a dark, two-door automobile back up in the direction of his police car and that car subsequently struck his right wheel well with its right fender. Booth got out of his car and told the driver of the other vehicle to stop with which command the driver complied.

Once both vehicles were stopped, Booth went over the passenger side of the vehicle and asked the driver if he had a license, and the driver said no. At this time, Booth noted that the driver and his passenger were both African-Americans. When Booth persisted in requesting identification, he noticed that the driver’s hands went down into his lap area and then he saw the driver pull a gun, reach across the passenger, and start to fire. Booth heard the gun click

and misfire as he attempted to get behind his vehicle for protection. He additionally heard two other shots being fired. Booth then unholstered his weapon and returned the fire that was being directed at him from this automobile. During the course of the gunfight that ensued, the driver of the dark, two-door automobile attempted to get away and climb a concrete barrier and drive between apartment buildings 100 and 200. While this vehicle was attempting to flee, the occupants were still firing at Booth and, in fact, hit him in the leg. Booth then radioed his dispatch center and advised him that he had been hit and that he was being fired upon.

Booth then noticed that the vehicle crashed into a sign and the driver and passenger exited the vehicle and then ran toward apartment buildings 300 and 400 in the West Mifflin Estates. Booth waited until backup arrived and advised them of his belief that these individuals had run towards the other apartment buildings. Booth was then ordered to seek medical attention and he drove himself to the paramedic station located at a Jehovah Witness Hall and from there was transported to UPMC Jefferson Hospital. After his initial assessment in the emergency room and following the taking of x-rays, he was advised that he did not have a life-threatening injury and no effort was made to remove the bullet in his leg. After being given some first aid treatment, he was discharged and he subsequently returned to the West Mifflin Estates.

Officer Ronald Skillpa, (hereinafter referred to as "Skillpa"), of the West Mifflin Police Department, who is a canine officer, arrived on the scene and helped secure the area where the gunshots were fired. Skillpa made a visual inspection of the damage to the 1998 black, two-door automobile and noticed a thirty-eight-caliber revolver on the front seat, driver's side floor. Skillpa took this revolver into evidence. Officers Constantine and Davies, (hereinafter referred to as "Constantine" and "Davies"), continued their search for the two individuals who fled from the scene and Constantine observed two individuals running from the woods towards the back of the 300 building. Constantine gave chase and as he rounded the corner of the building, both men had disappeared. Constantine noticed, however, that a screen on a window to one of the ground floor apartments had been removed. The police ultimately made the determination that that screen belonged to apartment 308 and they went into the building in an attempt to talk to the residents of that apartment.

Caroline Hoachlanger, (hereinafter referred to as "Hoachlanger"), and her then fiancée, now husband, Ronald Stein, (hereinafter referred to as "Stein"), were the tenants of apartment 308. They were asleep when they heard a crashing sound in the room that adjoined their bedroom. Before they could get up to investigate, they heard voices and then heard somebody using their telephone. They both pretended to be asleep when the door opened to their bedroom and an individual entered. Several minutes went by when Brown, who had stripped down to his tee shirt and underwear and got in bed with them and said, "let's pretend that this is normal." A couple of minutes later, Hampton walked into the room holding a gun pointed at the floor and then the four of them walked into the living room. Brown and Stein then went back into the bedroom and Brown asked Stein for a pair of his pants so that he could put them on and Stein provided him with a pair of pants. At that point there was a knock on the door to which Hoachlanger responded. As she approached the door, Hampton got into the closet in the living room and closed the door.

The police were at the door and asking Hoachlanger how many people were in her apartment and if they had guns to which she responded that there were two people in the apartment and that they did have guns. After coaxing her out of

the apartment, Brown walked out into the hallway wearing only a pair of pajama bottoms and asked what was going on. The police subsequently arrested Brown. They also arrested Hampton, who was in the closet. When the police inspected that closet, they found a nine-millimeter Glock with several extra magazines for that Glock, and there was a black coat with a hood and a ski mask. As they continued to search the residence, they found a nine-millimeter Ruger that had been placed underneath the mattress of Hoachlanger's bed. Both Hoachlanger and her fiancée, Stein, denied that they were the owners of these semi-automatic weapons.

While Hampton and Brown were being arrested, the search of the shooting scene continued. As a result of that search, the police found fourteen shell casings, which were taken in as evidence, and they found a forty-five-caliber weapon approximately twelve feet from where the car crashed that was being driven by Hampton. All of these pieces of evidence together with the evidence seized from Hoachlanger's apartment were submitted to the crime lab.

Brown's initial claim of error is that the sentences that were imposed upon him were an abuse of discretion since this Court ran those sentences consecutively. Although Brown was convicted of the crimes of criminal attempt to commit homicide, aggravated assault, aggravated assault of a police officer, criminal conspiracy, criminal trespass and the violation of the Uniform Firearms Act, he was only sentenced on counts one, three and eight. At the count of criminal attempt to commit criminal homicide, Brown was sentenced to a period of incarceration of not less than one hundred fourteen nor more than two hundred twenty months; at the count of aggravated assault of a police officer he was sentenced to a period of incarceration of not less than eighty-four nor more than one hundred sixty-eight months; and, finally, at the count of carrying a firearm without a license, he was sentenced to a period of incarceration of not less than eighteen nor more than thirty-six months, with all of these sentences to run consecutively.

In *Commonwealth v. Walls*, 592 Pa. 557, 926 A.2d 957, 961-962 (2007), the Pennsylvania Supreme Court set forth the standard for appellate review when considering a challenge to the discretionary aspect of sentencing.

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.*<sup>FN2</sup> 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,<sup>FN3</sup> 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).

As can be seen from the above, the abuse of discretion standard includes review of whether the judgment exercised was unreasonable. As more fully described below, the Sentencing Code sets forth a requirement of appellate review for whether a sentence outside of the guidelines is “unreasonable.” 42 Pa.C.S. §9781(c). Thus, the statutory unreasonableness inquiry is a component of the jurisprudential standard of review for an abuse of discretion. We now turn to a review of that statutory standard.

The sentencing guidelines in Brown’s case followed in each of the sentences since each of those respective sentences fell within the standard range of those guidelines. The guidelines for Brown with respect to the charge of criminal attempt to commit criminal homicide were one hundred two months in the mitigated range; one hundred fourteen to one hundred twenty in the standard range; and, one hundred twenty in the aggravated range. With respect to the charge of aggravated assault on a police officer, the guidelines were sixty-six months in the mitigated range; seventy-eight to

ninety months in the standard range and one hundred two months in the aggravated range. Finally, the guidelines for the charge of possession of a firearm without a license were nine months in the mitigated range; twelve to eighteen months in the standard range; and, twenty-one months in the aggravated range. Individually each of these sentences was a standard range sentence. In light of these sentences, no further penalty was imposed with respect to the remaining charges for which he had been convicted. This Court had the benefit of a presentence report in fashioning Brown’s sentences and was it used in making a determination as to whether or not those sentences should be served concurrently or consecutively. Since none of Brown’s sentences deviated from the guidelines but were rather standard range sentence, his only claim is that to run his sentences consecutively demonstrated an abuse of discretion. As previously noted by the Pennsylvania Supreme Court, an abuse of discretion is not an error in judgment because an Appellate Court might have reached a different sentencing result, but requires:

“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).

This Court, at the time of sentencing of Brown, was mindful of the fact that he and his co-conspirator, Hampton, had robbed the 7-11 grocery store moments before they came into contact with Booth of the West Mifflin Police Department. Booth requested identification and the driver reached across the passenger and started to fire at Booth. Fortunately for Booth the first attempt at shooting resulted in a misfire and Booth was able to attempt to protect himself by getting behind his police car. Both the driver and the passenger continued to fire at Booth in their effort to escape and during the subsequent inspection of the shooting scene, the police were able to recover fourteen shell casings, together with a thirty-eight-caliber revolver in the vehicle and a forty-five-caliber weapon approximately twelve feet from where the vehicle which was being driven by Hampton crashed. It should also be noted that at the time of their arrest both Brown and Hampton were wearing bulletproof vests. When Brown and Hampton were finally apprehended in the Steins’ apartment, the police recovered a nine-millimeter Glock, several extra magazines for that Glock in the closet where Hampton was hiding and a nine-millimeter Ruger that was placed underneath the mattress in the Steins’ bedroom, where Brown was hiding. Both the Steins denied ownership of these guns. It became readily apparent that these two individuals possessed all four weapons.

In reviewing his presentence report, Brown had previously been convicted as a juvenile of aggravated assault, recklessly endangering another individual, disorderly conduct and criminal conspiracy. As an adult, he had been convicted of simple assault, a violation of the Uniform Firearms Act, criminal conspiracy and resisting arrest. In addition to those charges, Brown had plead guilty to simple assault in 1999; disorderly conduct in 1998; and, in 1999, three counts of the violation of the Controlled Substance, Drug, Device & Cosmetic Act, one count of resisting arrest and one count of fleeing or eluding the police. That presentence report also revealed that at the time of the commission of the instant offenses, Brown was on parole and residing at a halfway house.

This Court, in fashioning the sentences, made a determi-

nation that Brown was a dangerous individual who attempted to murder a police officer and that he was a danger to society. All of his actions demonstrated a necessity for a lengthy period of incarceration. The fact that Brown and Hampton possessed four weapons and body armor indicated that they were aware of the danger that they presented to society. In choosing consecutive sentences, as opposed to concurrent sentences, this Court recognized the danger that Brown presented to society and the need to protect society from him and his actions.

Brown's second claim of error is that the evidence was insufficient to establish that he committed the crimes of criminal attempt to commit criminal homicide or aggravated assault on a police officer. In reviewing a claim that the evidence was insufficient to support the verdict, one must view the evidence and all reasonable inferences drawn there from when viewed in the light most favorable to the verdict-winner, to determine whether the evidence was sufficient to enable a fact-finder to find each and every element of the crime has been proven beyond a reasonable doubt. *Commonwealth v. Sullivan*, 864 A.2d 1246 (Pa.Super. 2004). The difference between a claim of the insufficiency of the evidence and that a verdict is against the weight of the evidence is set forth in *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), wherein the Supreme Court described the distinction between the two claims and the effect of granting a motion predicated on either of those claims.

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to how the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

In the instant case, Brown has claimed that the evidence was insufficient to find him guilty of the charge of criminal attempt to commit criminal homicide and aggravated assault on a police officer. In viewing the evidence and all of the logical and reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, it is clear that the Commonwealth established each and every element of these particular offenses. Brown and Hampton were each armed with two weapons and body armor when Booth stopped them. Hampton attempted to shoot Booth; however, his gun misfired allowing Booth to get behind his police car. Brown and Hampton then continued to fire at Booth as they attempted to flee in their vehicle. During the escape attempt,

Booth was hit in the leg by one of the shots fired by either Brown or Hampton. Although the injury was not life-threatening, it did demonstrate an attempt to cause bodily injury to Booth. Brown was convicted of both counts of aggravated assault, the second count being aggravated assault on a police officer. That statute provides as follows:

**(a) Offense defined.**—A person is guilty of aggravated assault if he:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty; 18 Pa.C.S.A. §2702.

In the instant case it is clear that the Commonwealth demonstrated that both Brown and Hampton were acting in concert in an attempt to cause bodily injury to Booth from the time they initially fired their guns until they escaped from the scene. It is clear their intention was to kill Booth. Viewing all of the facts of this case in the light most favorable to the Commonwealth, it is clear that the Commonwealth met its burden of proving the elements of these offenses.

Brown's final contention is that this Court erred when it did not allow him a different jury array since the panel did not have a significant number of African-Americans on it to ensure Brown by a trial by his peers. In *Commonwealth v. Lopez*, 559 Pa. 131, 739 A.2d 485, 495 (1999), the Pennsylvania Supreme Court set forth the requirements necessary for an appellant to challenge the makeup of the jury array:

In order for Appellant to make out a prima facie case that Lehigh County's jury pool selection system violates the Sixth Amendment's fair cross-section requirement for jury pool selection, he must show that 1) the group allegedly excluded is a distinctive group in the community; 2) representation of this group in the pool from which juries are selected is unfair and unreasonable in relation to the number of such persons in the community; and 3) the under-representation is due to the systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). In *Duren*, the United States Supreme Court stated that, in order to establish the second prong of the prima facie case, one "must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark of the Sixth Amendment fair cross-section requirement." *Id.*

Here, Appellant completely fails to make out the second prong of the prima facie case set forth in *Duren* as he offers absolutely no statistical proof that the elderly, the poor, or the handicapped are unfairly represented in Lehigh County's jury pool in relation to the number of such persons in the community. Appellant does not attempt to establish what percentage of the population of Lehigh County the elderly, the poor, and the handicapped constitute, nor does he offer any objective indica-

tion that any of these groups are under-represented in relation to their total numbers in the community. Accordingly, Appellant has not made out a prima facie case of a Sixth Amendment violation under *Duren*. Because Appellant has failed to show that his underlying claim of a Sixth Amendment fair cross-section violation has arguable merit, his trial counsel cannot be deemed to have rendered him ineffective assistance by failing to object to Lehigh County's method for selecting its jury pool. See *Commonwealth v. Pierce*, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994) (counsel cannot be considered ineffective for failing to pursue a meritless claim) (citing *Commonwealth v. Durst*, 522 Pa. 2, 559 A.2d 504 (1989); *Commonwealth v. Pursell*, 508 Pa. 212, 495 A.2d 183 (1985)).

The fallacy of Brown's current contention is that he presented no evidence as to anything other than a bland assertion that the jury array that was put together for his case was racially inadequate. When asked whether or not he was going to present evidence that would demonstrate that the jury selection process was designed to systematically exclude African-Americans from the panel, Brown's counsel indicated that he did not but rather, suggested that there were just insufficient numbers of African-Americans on the panel. Since Brown failed to provide any evidence that the jury selection process was systematically designed to exclude African-Americans, his request for a new jury panel was denied. It is clear that Brown never even attempted to satisfy his burden set forth in *Commonwealth v. Lopez*, *supra*. Accordingly, the third contention of error is without merit.

Cashman, J.

Dated: February 29, 2008

## Commonwealth of Pennsylvania v. Jamar Lashawn Travillion

### *Sufficiency of Evidence—Identification—Fingerprints*

1. Crime scene evidence including multiple fingerprints on a manila folder, which match Defendant's fingerprints, is not insufficient to support a verdict as such evidence taken together with reasonable inferences therefrom and other credible trial evidence, in light most favorable to Commonwealth, supported jury's finding all elements of crime of robbery beyond a reasonable doubt.

2. Evidence of multiple fingerprints on manila folder, matching Defendant's fingerprints, is not insufficient to find Defendant guilty of robbery when taken together with other trial evidence which clearly establishes that a robbery was committed, even though victim could not identify Defendant.

(Norma Caquatto)

Michael Streily for the Commonwealth.  
Thomas N. Farrell for Defendant.

CC No. 200306704. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Cashman, J., March 20, 2008—On December 21, 2006, the appellant, Jamar Travillion, (hereinafter referred to as "Travillion"), was convicted of the crime of robbery follow-

ing a two-day jury trial. On December 22, 2006, the Commonwealth filed its motion of intent to proceed under 42 Pa.C.S.A. §9714(a)(1),<sup>1</sup> requiring the imposition of a mandatory sentence of ten to twenty years for Travillion's conviction of his second crime of violence.<sup>2</sup> On January 3, 2007, Travillion was sentenced in accordance with the mandatory sentencing provision to a period of incarceration of not less than ten nor more than twenty years, which was to run consecutive to any sentence he was now serving. Travillion currently is serving a sentence of life without the possibility of parole as a result of his conviction for second-degree murder on February 21, 2006.

Travillion filed post-sentencing motions, which subsequently were denied by operation of law on August 29, 2007. Travillion filed a timely appeal from the denial of his post-sentencing motions and in his concise statement of matters complained of on appeal has raised two issues. Travillion initially claims that the evidence was insufficient to support his conviction and, in the alternative, suggests that the verdict was against the weight of the evidence.

The testimony at trial revealed that on February 24, 2003, Debra Lynn Diodati, (hereinafter referred to as "Diodati"), was reporting to work at the Rainbow Apparel Store located on Wharton Street in the Southside Section of the City of Pittsburgh. Diodati was the store manager and, in accordance with company policy, no one could enter the store prior to its operating hours without another employee. The store hours during the weekdays were from 10:00 a.m. to 9:00 p.m. and 10:00 a.m. to 5:00 p.m. on the weekends. Diodati got to the store at approximately 9:30 a.m. and was awaiting another employee to arrive so that she could open the door to the store, in accordance with company policy. Diodati usually got to work between 8:00 a.m. and 9:00 a.m.; however, she did not arrive until 9:30 a.m. because of a snow-storm and the resultant bad road conditions. Realizing that her fellow employees might be late, she decided to open the front door and go into the store alone.

As Diodati approached the front door she noticed an individual in a winter jacket who was holding a manila folder in his left hand approach her. Initially Diodati thought nothing of this and proceeded to unlock the first of two locks, which would allow her to enter into the store. As she opened the second lock, this individual pushed her through the door and demanded that she turn off the alarm. Diodati complied with this request and then her intruder grabbed her by the arm and forced her over to an area known as the cash wrap where the cash registers and first of two safes were located. Her intruder, later identified as Travillion, demanded the money from the safe and she knelt onto the floor, opened the safe and extracted two envelopes, which contained several hundred dollars each, and gave them to Travillion. Travillion also knelt down, placing the manila folder on the ground and pulled out a semi-automatic weapon, which Diodati believed to be a Beretta. Travillion, after checking to make sure there was no more money left in the safe, grabbed Diodati by her arm, and told her that they were going to her office to get the rest of the money.

Travillion pushed Diodati toward her office and, in the process of going to that office, he ripped a hinged door from the wall. Once in her office Travillion, who was still brandishing his weapon, instructed Diodati to open the other safe, which she did. She turned over to him two bank deposit bags containing over six thousand dollars. Travillion took the money, put it in a green bag strapped over his shoulder and then told Diodati that he wanted to leave by going through the back door. Diodati unlocked the back door and then Travillion ran from the building across a parking lot to a four-door Ford Taurus automobile, which had the motor

running. Travillion got into the front passenger side of the vehicle and the driver then pulled away. When Diodati was sure that Travillion had left, she locked the back door, ran to the front of the store, locked the front door and then called the police. While she was talking to the police, Diodati looked on the floor and noticed that the manila folder and the papers inside that folder were still lying on the floor.

Diodati waited for the police to arrive and then told them about the events that had occurred moments earlier. She also pointed the manila folder and the papers that were inside of that folder. In describing her intruder, she estimated that he was five foot nine inches to five foot ten tall and, although he had a big, bulky jacket on, she believed that he was athletically built and weighed approximately one hundred sixty pounds. She also thought that he was in his early to mid-twenties and that he was an African-American. She also noted that he was very well spoken. In describing his clothing, she stated that he had dark pants and a big off-white winter coat with fur around the hood and looked like he had a turtle neck pulled up over his nose and a woman's stocking over the top of that, with the hood of his jacket pulled down so that she did not get a good look at his face. It was stipulated at the time of trial that Travillion was six foot one and his weight was approximately one hundred seventy pounds.

The police, in processing the scene, took possession of the manila folder and papers and fingerprinted both the folder and the papers inside to see if there were any latent prints of value. The police were able to identify two left thumbprints, a left ring finger print and a left middle finger print on the manila folder and one left thumbprint on a paper inside the folder. After submitting these fingerprints for comparison, it was determined that the fingerprints belonged to Travillion.

In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standards by which claims that the verdict was against the weight of the evidence and that the evidence was insufficient to support verdicts were to be viewed. In addition, that Court also explained the differences in results with respect to these two claims.

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

In reviewing a claim that the evidence was insufficient to support a verdict, a determination must be made as to

whether or not the evidence admitted at trial and all of the reasonable inferences derived there from, when viewed in the light most favorable to the Commonwealth as the verdict-winner, supported the jury's finding of all of the elements that the offense had been proven beyond a reasonable doubt. *Commonwealth v. Murphy*, 557 Pa. 275, 844 A.2d 1228 (2004).

Travillion was charged with the crime of robbery which required that the Commonwealth prove beyond a reasonable doubt that he: 1) threatened the victim with or intentionally put the victim in fear of immediate serious bodily injury; 2) that he did so while taking movable property of another by force, however slight; and, 3) he intended to deprive that individual of his or her property. 18 Pa.C.S.A. §3701. It is unquestioned that the Commonwealth proved that a robbery did occur at the Rainbow Apparel Store since the victim, Diodati, testified unequivocally that the perpetrator of this crime forced his way into her store, demanded that she open the safes and give him the money and did so while he was pointing a gun at her, which caused her to believe that if she did not comply with those requests that she would be killed. The only issue which would go to the sufficiency of the evidence claim is the identity of the perpetrator. Although Diodati was able to give a reasonable description of the individual who committed this crime, she was not able to identify Travillion as the perpetrator since his face was covered and she did not see it. What did identify Travillion as the perpetrator was the fact that his fingerprints were on the manila folder and its contents, which the perpetrator brought into and left in the store. Diodati indicated that the manila folder was not in the store until the perpetrator came in and that once he left with the money, she did not disturb anything in the store so as to allow the police to do their investigation. The police were able to process the scene and then fingerprint the manila folder and paper and come up with five fingerprints that belonged to Travillion. Using the standard required for a claim of the sufficiency of the evidence, it is clear that the Commonwealth met its burden and the evidence was more than sufficient to sustain Travillion's conviction of this charge.

With respect to his claim that the verdict was against the weight of the evidence, the standard for review is well established. The weight of the evidence is for the fact-finder who is free to believe any, all or none of the evidence in determining the credibility of the witnesses and what weight it would place on each witness' testimony. An Appellate Court cannot substitute its judgment for that of the fact-finder, thus it may only reverse the Lower Court's verdict if it is so contrary to the evidence so as to shock one's sense of justice. *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403 (2003). In reviewing the evidence in light of this standard, it is clear that the only verdict that would have shocked one's sense of justice would have been had the jury returned a verdict of not guilty. The Commonwealth established all of the elements of the crime beyond a reasonable doubt and Travillion's fingerprints on the manila folder and the paper inside that folder, identified him as the individual who committed this robbery. As with Travillion's other claim that the evidence was insufficient to support the verdict, this claim that the verdict was against the weight of the evidence is also without merit.

Cashman, J.

Dated: March 20, 2008

<sup>1</sup> (a) Mandatory sentence.—

This Section of the Sentencing Code requiring the imposition of a mandatory sentence for a second conviction of violence provides as follows:

(1) Any person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a minimum sentence of at least ten years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Upon a second conviction for a crime of violence, the court shall give the person oral and written notice of the penalties under this section for a third conviction for a crime of violence. Failure to provide such notice shall not render the offender ineligible to be sentenced under paragraph (2).

<sup>2</sup> On December 18, 2001, Travillion plead nolo contendere to the charges of burglary and robbery.

## Commonwealth of Pennsylvania v. Vicki Mastalski

### *DUI—Off-Duty Police Traffic Stop*

1. Post-sentence motions denied where twelve-year police department veteran working off duty at club was in full uniform with police radio and service revolver when he personally witnessed erratic operation of appellant's vehicle after hearing police radio report to be on lookout for suspected drunk driver operating a silver Mitsubishi along Penn Avenue.

2. Off-duty police officer had jurisdiction to effectuate traffic stop where record supported that he had reasonable suspicion that driver was violating the Motor Vehicle Code where he observed erratic driving behavior on at least three separate occasions before he stopped vehicle on March 28, 2004.

3. Information over police radio for police dispatcher was not the basis for the stop since he witnessed driving behavior. Even assuming it was error to permit police broadcast, it played no part in ultimate disposition.

(I. M. Lundberg)

Michael Streily for the Commonwealth.

Michael P. O'Day, Sr. for Defendant/Appellant.

No. CC 200413555. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Cashman, J., April 2, 2008—On July 26, 2005, the appellant, Vicki Lynn Mastalski, (hereinafter referred to as "Mastalski"), was found guilty of two counts of driving under the influence of alcohol. At her request sentencing was scheduled for October 25, 2005, at which point in time she was sentenced to eighteen months probation, three months of which would be served through the Intermediate Punishment Program, fined the mandatory sum of fifteen hundred dollars, required to attend and to complete safe driving school and also to have an alcohol evaluation performed by the probation department. Mastalski filed post-sentencing motions in October of 2005 and a hearing was held on those motions on January 12, 2006. Those motions were subsequently denied on April 4, 2006.

On April 17, 2006, Mastalski served this Court and the District Attorney's Office with a notice of appeal; however, the original notice was never docketed with the Clerk of Courts Office. When Mastalski's counsel determined that

the notice of appeal had not been filed, he filed a petition for post-conviction relief since the thirty-day appeal period had expired. That petition was granted and Mastalski's appellate rights were reinstated. Mastalski was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal, with which directive she complied. In that statement she has asserted three claims of error. Initially, Mastalski claims that this Court erred when it failed to grant her suppression motion based upon the fact that the police officer who stopped her did not have probable cause to effectuate that stop. Mastalski next maintains that this Court erred in failing to grant her suppression motion on the basis that the police officer that stopped her was off duty and, accordingly, did not have jurisdiction to effectuate a traffic stop. Finally, Mastalski maintains that this Court erred in permitting unreliable non-police officer hearsay testimony to be entered into evidence with regard to a suspected intoxicated driver. In order to understand these claims of error, it is necessary that a brief review of the facts of Mastalski's case be made.

On March 28, 2004, at approximately 3:30 a.m., Sergeant Steven Matakovich, (hereinafter referred to as "Matakovich"), a twelve-year veteran of the Pittsburgh Police Department, was in an off duty capacity working a job at a club called Naughty Dogs at the corner of Eighteenth and Penn Avenue in the City of Pittsburgh. Matakovich was in full uniform and had all of his equipment, including his police radio and service revolver. Matakovich's job at Naughty Dogs was to stay outside to make sure there were no fights and to see that the sidewalk area was clear. Most of the customers had left Naughty Dogs and Matakovich was about to finish his shift on this job when he heard over his police radio a report to be on the lookout for a suspected drunk driver operating a silver Mitsubishi along Penn Avenue. The report also identified the driver as being a female. Dispatch also gave the license plate number of that car.

Shortly thereafter, Matakovich saw a vehicle heading toward him that he recognized as being a Mitsubishi Ellipse because of its distinctive headlights. He observed that vehicle swerve back and forth along Penn Avenue several times almost hitting several parked vehicles that were to the right of the Ellipse. Matakovich observed this vehicle travel for approximately one and one-half blocks during which time it weaved across the roadway coming within inches of striking parked vehicles. There were no lines painted on Penn Avenue to designate particular lanes of traffic; however, Matakovich believed that it was swerving in and out of what would have been its designated area of travel.

In light of these observations, Matakovich stepped out into the street, raised his hand and stopped the motor vehicle Mastalski was driving. When he approached the driver's door, the driver appeared to be lethargic and had what Matakovich described as a thousand mile stare. Officer Matakovich went around the vehicle and checked the license plate and it corresponded with the information that was given to him in the police dispatch. He also noted that the vehicle Mastalski was driving was a silver Ellipse, also confirming the information that he received in the police dispatch. As a result of this stop, Matakovich radioed for another unit to come to the scene and Officer Nemlo of the Pittsburgh Police Department responded to that request. Nemlo noted that Mastalski had glassy, bloodshot eyes and a strong odor of alcohol emanating from her and that her speech was slurred. He administered three field sobriety tests, all of which she failed. She was placed under arrest and taken to the police station where she was asked to submit to a breath test which she agreed to do, however, that test

was not administered when it was determined that she suffered from asthma. She was then transported to Mercy Hospital where blood was drawn which indicated that she had a blood alcohol content of point two three seven percent.

Mastalski's initial claim of error is that this Court should have granted her suppression motion based upon Matakovich's failure to obtain the requisite probable cause to effectuate the traffic stop. In support of this contention, Mastalski relies on the Supreme Court decisions in the *Commonwealth v. Gleason*, 567 Pa. 111, 785 A.2d 983 (2001) and *Commonwealth v. Vokes*, 569 Pa. 234, 803 A.2d 1175 (2002). In *Commonwealth v. Gleason*, *supra*, 785 A.2d at 122, the Supreme Court declared:

If the alleged basis of a vehicular stop is to permit a determination whether there has been compliance with the Motor Vehicle Code of this Commonwealth, it is incumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.

*Whitmyer*, 668 A.2d at 1116, citing *Swanger*, 307 A.2d at 879 (emphasis added).

The problem with this contention is that the probable cause standard which Mastalski suggests is applicable to her case has been superseded by the Motor Vehicle Code. In *Commonwealth v. Smith*, 917 A.2d 848 (Pa.Super. 2007), the Court recognized the change in the standard when it stated:

Specifically, Smith argues that Officer Scicchitano was required to have probable cause to effectuate a valid stop, and that neither the officer's own observations nor the 911 call provided such probable cause. Appellant's brief at 7-10. To support these claims, Smith cites to, *inter alia*, *Commonwealth v. Gleason*, 567 Pa. 111, 785 A.2d 983 (Pa. 2001) and *Commonwealth v. Battaglia*, 802 A.2d 652 (Pa.Super. 2002). Smith is incorrect that Officer Scicchitano was required to have probable cause to effectuate a valid stop, however, since the probable cause standard enunciated by Gleason has been superseded by 75 Pa.C.S.A. §6308(b), which was amended on September 30, 2003, effective February 1, 2004. *Martin v. Commonwealth*, 588 Pa. 429, 905 A.2d 438, 450 (2006) (Eakin, J. Concurring) ("Effective February 1, 2004, the General Assembly 'lowered the quantum of cause an officer must possess from "articulable and reasonable grounds" [which is equivalent to probable cause] to "reasonable suspicion" to conduct a vehicle stop."').<sup>FN2</sup>

FN2. Section 6308(b) now states: Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title. 75 Pa.C.S.A. §6308(b) (emphasis added). In its previous form, the statute required the officer to

have "articulable and reasonable grounds to suspect a violation." 75 Pa.C.S.A. §6308(b) (1998), amended by 75 Pa.C.S. §6308(b) (2004). As a panel of this Court explained in *Commonwealth v. Ulman*, 902 A.2d 514 (Pa.Super. 2006): [T]he Legislature amended 75 Pa.C.S.A. §6308(b) to clarify that whenever an officer "has reasonable suspicion that a violation of [the Motor Vehicle Code] is occurring or has occurred, he may stop a vehicle[.]" 75 Pa.C.S.A. §6308(b) (emphasis added). [*Commonwealth v. Sands*, 887 A.2d 261, 267 (Pa.Super. 2005)]. The legislative history of this amendment clearly indicates that it was the Legislature's intent to authorize police officers to stop a vehicle based upon a "reasonable suspicion" that the driver has violated the Vehicle Code, rather than the heightened standard of probable cause. *Ulman*, 902 A.2d at 518.

75 Pa.C.S.A. §6308(b) clearly controls the stop that was made in this particular case since the effective date of that statute was February 1, 2004, and Mastalski's vehicle was stopped on March 28, 2004.

In reviewing the record in the instant case, it is clear that Matakovich had reasonable suspicion that Mastalski was violating the Motor Vehicle Code. Although Matakovich received a radio dispatch indicating that there was a suspected intoxicated driver operating a silver Mitsubishi Eclipse along Penn Avenue in his general direction, he did not make a stop on Mastalski's vehicle on the basis of that information alone. Rather, Matakovich observed a vehicle heading toward him that was weaving back and forth across Penn Avenue. As noted previously, Penn Avenue at this point does not have designated lanes of traffic. What he did note was that the vehicle traveled back and forth overcompensating for the times that it came within inches of striking parked motor vehicles on its right. Matakovich observed this erratic behavior occur on at least three separate occasions before he stopped that vehicle. The only thing that Matakovich knew at the time that he stopped the motor vehicle was that the vehicle he was stopping was a Mitsubishi Eclipse since it had very distinctive headlights. It is only when he was able to stop the vehicle that he was able to note the color of the vehicle as being silver and also checked the license plate to see that it corresponded with the information that he had been given in his dispatch report. The reasonable suspicion articulated by Matakovich was not the radio dispatch report but, rather, his observations of the silver Mitsubishi that was being driven toward him in an erratic manner.

Mastalski next contends that Matakovich had no jurisdiction to effectuate this stop since he was not on duty. In *Commonwealth v. Eshelman*, 477 Pa. 93, 383 A.2d 838 (1978), the Pennsylvania Supreme Court considered the validity of action taken by an off-duty police officer in searching an abandoned car where he discovered a large quantity of marijuana. In analyzing the question as to whether or not the seizure of that controlled substance should be suppressed, the Supreme Court noted that this off-duty police officer was not acting in the capacity of an ordinary citizen but, rather, was acting as a police officer when he removed the contraband from that vehicle. Similarly, in *Commonwealth v. Hurst*, 367 Pa. 214, 532 A.2d 865, 869 (1987) the Pennsylvania Superior Court rejected the appellant's contention that his arrest was illegal since the off-duty Pennsylvania state trooper was acting consistent with his duties as a police officer.

Although the facts in *Eshelman* dealt with suppression issues, we find its holding to be applicable to the case at bar. Presently, Appellant was directed to stop his rig along an interstate highway, which was within the trooper's jurisdiction while on-duty. The record reflects that Trooper Mory was in uniform, with the exceptions of his tie, hat, and service revolver. Likewise, it is undisputed that the trooper conducted himself in an official manner while interviewing Appellant. Later, after speaking to his superior about this occurrence, the officer chose to file a citation with the district magistrate's office himself, rather than transfer the case to another officer based on information received.

We find from these facts that Trooper Mory was acting as a police officer, not as a private citizen, when he stopped Appellant's tractor trailer. Despite Appellant's position to the contrary, the fact that the officer was off-duty does not mean that the trooper's power to conduct official police business automatically ceased. The circumstances attendant to Appellant's delay clearly illustrate that the safeguards which attach to a driver being pulled over by an on-duty police officer were present at all times. Therefore, we disagree with Appellant's contention that the issued citation was null.

In *Commonwealth v. Schwenk*, 777 A.2d 1149, 1154 (Pa.Super. 2001), the Superior Court also acknowledged that the mere fact that a police officer was off duty did not make the arrest that he had made illegal.

In this case, evidence was presented at trial that Groman was a Pennsylvania state trooper, that he identified himself to Schwenk as a state trooper, that Groman told Schwenk that he was "under arrest," that Groman displayed his state police handcuffs to Schwenk and told him that he did not want to use them. Throughout the struggle with Schwenk, Groman attempted to get Schwenk to "calm down" until the municipal police arrived. Unable to get Schwenk to cease his struggle with Groman, Groman attempted to do "everything [he] could" to restrain Schwenk. *See* N.T., 10/26/99, at 40-46. Eventually, Groman was able to restrain Schwenk, and Groman directed a bystander to place his handcuffs on Schwenk. *Id.* at 55.

We conclude that the evidence was more than sufficient to establish that Groman was acting in the performance of his duties as a state police officer, despite the fact that Groman was not in uniform, and was off-duty. The evidence therefore was sufficient to sustain the convictions in this respect.

Mastalski was not arrested until after Nemlo performed field sobriety tests and made the determination that she was under the influence of alcohol to such an extent that she was incapable of the safe operation of her motor vehicle.

Mastalski's final contention is that this Court erred in permitting non-police officer hearsay as evidence regarding the report of a suspected intoxicated driver. The hearsay testimony to which Mastalski makes reference was the police broadcast that Matakovich heard on his police radio. There was no identification as to the origin of this information other than the fact that Matakovich received it on his police radio from a police dispatcher. This information only alerted Matakovich to what he was about to see on Penn Avenue. The

hearsay statements did not form the basis for Matakovich's stop since he witnessed the erratic operation of Mastalski's vehicle as it was swerving from side to side and coming within inches of parked cars on Penn Avenue. Even assuming that it was error to permit the police broadcast to come in, it played no part in the ultimate disposition of these charges since Matakovich had ample opportunity to witness Mastalski's operation of her vehicle.

Cashman, J.

Dated: April 2, 2008

## Commonwealth of Pennsylvania v. Marlynn Devaughn Bryant

*Seizure of Property—Forfeiture*

After Defendant failed to appear at pre-trial conference, warrant issued and Commonwealth's forfeiture motion was granted. Defendant failed to appeal from forfeiture order within time prescribed in Rules of Appellate Procedure and Defendant cannot appeal from such forfeiture order and seizure of property despite appealable issues in underlying cause of action after convictions for the crimes of possession, possession with intent to deliver, and traffic violations.

(Norma M. Caquatto)

Michael Streily for the Commonwealth.

Carrie Allman for Defendant.

No. 200402445. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Cashman, J., April 3, 2008—On January 31, 2004, the appellant, Marlynn Devaughn Bryant, (hereinafter referred to as "Bryant"), was arrested and charged with the crimes of possession with intent to deliver a controlled substance, possession of a controlled substance and two summary offenses of driving while her license had been suspended for an alcohol-related offense and failing to stop at a stop sign. On June 4, 2004, Bryant's case was assigned to the Honorable Kathleen A. Durkin and a pre-trial conference was scheduled for June 25, 2004. Bryant did not appear at the time of scheduled pre-trial conference and a warrant was issued for her arrest. On August 19, 2004, this member of the Court was sitting as Motions' Judge for the Criminal Division of the Court of Common Pleas of Allegheny County and a forfeiture motion was submitted to it pursuant to 42 P.C.S.A. §6802(e).<sup>1</sup> This Court signed that Order and the property set forth in that Order was forfeited to the benefit of the Commonwealth. No appeal was ever taken from that Order.

On December 15, 2004, Bryant was convicted of the charges filed against her and she filed a direct Appeal to the Superior Court which resulted in her conviction of the charge of possession with intent to deliver a controlled substance being reversed and vacated and the case was remanded to Judge Durkin for the purpose of resentencing. The Commonwealth sought a review of this case by the Pennsylvania Supreme Court; however, that request was denied on January 11, 2007. Resentencing was scheduled for March 19, 2007, and prior to that sentencing date, Bryant filed a petition for return of property that was to be heard at the time of her resentencing. Bryant was sentenced to a period of incarceration of not less eighteen nor more than thirty-six months, the statutory maximum for her conviction of the charge of possession of a controlled substance since she had

prior convictions for similar charges. Judge Durkin did not rule on Bryant's petition for return of property and she continued it to another hearing date of May 21, 2007.

At the May 21, 2007 hearing on Bryant's petition for return of property, then Assistant District Attorney Joseph Horowitz informed Judge Durkin that the property had been forfeited on August 19, 2004, and that the Commonwealth needed additional time to provide Judge Durkin with the necessary paperwork. Judge Durkin subsequently denied without prejudice Bryant's petition for return of property on September 18, 2007, indicating that Bryant should seek to have this Court reconsider its Order of August 19, 2004.

On September 27, 2007, a petition for return of property was filed with this Court and a hearing was scheduled for December 4, 2007. Following a hearing on that petition for return of property, this Court denied that request. It is from this denial that a timely appeal was filed. In Bryant's concise statement of matters complained of on appeal she has raised two issues, the first being that this Court did not have jurisdiction to entertain the petition that she filed since that matter should have been addressed by Judge Durkin and, second, that as a result of the Superior Court's reversal of Bryant's conviction for possession with intent to deliver, that there was no basis for the forfeiture of Bryant's property.

In reviewing the unusual history of this case, it is clear that the money that was forfeited in August of 2004 was not done pursuant to the Controlled Substance, Drug, Device and Cosmetic Act but, rather, the forfeiture occurred as a result of Bryant's failure to appear at the time of trial. The forfeiture of Bryant's property was a final Order, which required that any appeal be filed within thirty days of the date of the entry of that Order. Pennsylvania Rule of Appellate Procedure 903.<sup>2</sup>

No appeal was ever taken from this Order and, accordingly, these funds that were forfeited became the property of the Commonwealth. Despite Bryant's contention to the contrary, the property that was forfeited was not done pursuant to the Controlled Substance, Drug, Device & Cosmetic Act since at the time it was forfeited Bryant was still awaiting trial and he had not been convicted of any charge. The fact that her conviction for the charge of possession with intent to deliver a controlled substance was reversed by the Superior Court is irrelevant to the question as to whether or not she is entitled to the monies that were previously forfeited. Having failed to file a timely appeal from the original Order forfeiting that money, this Court was without jurisdiction to entertain by way of a collateral proceeding, the return of her property. Since Bryant had failed to take a timely appeal from the forfeiture Order entered in August of 2004, she had no claim to that money and, accordingly, her motion for return of property was properly denied.

Cashman, J.

Dated: April 3, 2008

<sup>1</sup> (e) Notice automatically waived.—The notice provisions of this section are automatically waived when the owner, without good cause, fails to appear in court in response to a subpoena on the underlying criminal charges. Forty-five days after such a failure to appear, if good cause has not been demonstrated, the property shall summarily forfeit to the Commonwealth.

<sup>2</sup> Rule 903. Time for Appeal

(a) General rule. Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken. (b) Cross appeals.

Except as otherwise prescribed in Subdivision (c) of this rule, if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. (c) Special provisions. Notwithstanding any other provision of this rule:

(1) An appeal from any of the following orders shall be taken within ten days after the entry of the order from which the appeal is taken:

(i) An order changing venue or venue in a criminal proceeding. See Rule 311 (a)(3) (change of criminal venue or venire).

(ii) An order in any matter arising under the Pennsylvania Election Code.

(iii) An order in any matter arising under the Local Government Unit Debt Act or any similar statute relating to the authorization of public debt.

(2) Where an election has been filed under Rule 311(b) (order sustaining venue or personal or in rem jurisdiction), the notice of appeal shall be filed within 30 days after the filing of the election.

(3) In a criminal case in which no post-sentence motion has been filed, the notice of appeal shall be filed within 30 days of the imposition of the judgment of sentence in open court.

## Commonwealth of Pennsylvania v. Kevin Lee Napper

### Revocation of Probation

1. Defendant alleged that hearing to revoke probation was not held in timely manner. Court found that hearing held within six weeks of determination of acts in technical violation of probation is timely.

2. Defendant may not argue that acts committed while on parole may not be raised as issues in hearing to revoke probation.

(William F. Barker)

Michael W. Streily for the Commonwealth.  
Scott Coffey for Defendant.

No. CC 1999-02495. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

O'Toole, J., May 7, 2008—Pursuant to a plea agreement, on March 8, 2000, the Defendant, Kevin Lee Napper, pled guilty to Robbery, 18 Pa.C.S.A. §3701, Violation of the Uniform Firearms Act: Firearms not to be Carried without a License, 18 Pa.C.S.A. §6106, and Criminal Conspiracy, 18 Pa.C.S.A. §903. On the same day, the Defendant was sentenced to serve a period of incarceration of not less than three years nor more than six years, plus a consecutive period of probation for three years. No appeal was filed.

On December 1, 2006, the Defendant appeared before the Court for a probation violation hearing. At the request of defense counsel, the hearing was continued to December 14, 2006. On that date, the Court found that the Defendant had committed the technical probation violations of possessing a firearm and possessing illegal narcotics. As a result, the Court revoked the Defendant's probation and imposed a sen-

tence of incarceration of not less than seventeen (17) months nor more than thirty-four (34) months, with credit for time served of approximately seventeen (17) months in the Allegheny County Jail.

A direct appeal was filed by the Office of the Public Defender of Allegheny County on behalf of the Defendant. This Court filed an Opinion on May 1, 2007. The appeal was dismissed *sua sponte* by the Superior Court on October 3, 2007 due the failure of defense counsel to file a Brief.

On November 14, 2007, the Defendant filed a *pro se* Petition under the Post Conviction Relief Act. Counsel was appointed and filed a Petition requesting reinstatement of the defendant's appellate rights due to the ineffective assistance of counsel in failing to file an appellate brief. As the Commonwealth posed no objection, this Court issued an Order of Court dated March 6, 2008 granting the Defendant's PCRA Petition and reinstating his appellate rights.

On appeal, the Defendant alleges that his right to due process was violated in that his probation revocation hearing was not held "as speedily as possible" and he was not on probation at the time of the alleged technical parole violations.

First, the Defendant alleges that his revocation hearing was not held "as speedily as possible." On the contrary, the criminal charges filed against the Defendant were resolved on October 13, 2006 when he was found not guilty. A violation hearing was scheduled for December 1, 2006—approximately six weeks later, which is clearly "as speedily as possible." While the probation/parole officer may schedule a hearing prior to the resolution of pending criminal charges, there is no obligation on the part of the officer to do so. The officer is entitled, under the law, to wait until the Defendant has been tried to pursue a violation hearing. As such, this allegation is without merit.

Second, the Defendant claims that the Court improperly revoked his probation and imposed a sentence of incarceration because he was not on probation at the time of the technical violations. The Court recognizes that the technical violations committed by the Defendant occurred on July 22, 2005 while he was on parole. His parole expired on September 9, 2005 and his three-year consecutive probation become effective on that date. However, the case law is very clear that the fact that the Defendant had not commenced serving his probation when the incidents occurred does not prevent the court from revoking its prior order placing the Defendant on probation. See, *Commonwealth v. Dickens*, 475 A.2d 142 (Pa.Super. 1984). In *Commonwealth v. Miller*, 516 A.2d 1263 (Pa.Super. 1986), the Court states that this rule was explained in *Commonwealth v. Wendowski*, 420 A.2d 628, 630-631 (Pa.Super. 1980) when the Superior Court stated:

If, at any time before the defendant has completed the maximum period of probation, or **before he has begun service of his probation**, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation. A defendant on probation has no contract with the court. He is still a person convicted of crime, and the expressed intent of the Court to have him under probation beginning at a future time does not change his position from the possession of a privilege to the enjoyment of a right. (citations omitted) (emphasis in original)

To suggest, as appellant does, that a defendant is free to commit unlimited additional crimes with-

out in any way impairing or endangering a previously imposed sentence of probation merely because the probationary period has not commenced is to suggest an absurdity in the statute [i.e., 42 Pa.C.S.A. §9771(d)] which this Court is not prepared to create. Indeed, such an interpretation would be contrary to the policy and the purposes to be served by probation. If a probationer's criminal conduct, even if committed prior to commencement of the probationary period, discloses that probation will not be in the best interests of the public or the defendant, a court may revoke or change the order of probation. The commission of a new crime violates an implied condition of probation and suggests that the defendant is a poor probation risk.

As in the cited cases, it is obvious that the Defendant, who was apprehended in possession of a large amount of heroin, a small amount of marijuana, and a firearm with an obliterated serial number, is a very poor probation risk. Moreover, it is in the best interests of the public that the Defendant, who is unwilling to abide by the laws of the Commonwealth, not be permitted to roam the streets of this county. Accordingly, the Court finds that the Defendant's probation was properly revoked.

For the foregoing reasons, the Court finds that the Defendant is not entitled to a new probation violation hearing.

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

## Commonwealth of Pennsylvania v. William H. Thomas, IV

### *Ineffectiveness of Counsel—Direct Appeal*

1. New trial granted after hearing based on evidence produced on the day of trial with no action by trial counsel to meet or rebut evidence or delay trial to investigate.

2. Ineffectiveness issues were addressed on direct appeal where the Court conducted an evidentiary hearing to determine that trial counsel did nothing to exclude or limit last minute disclosure of identification evidence. His client's incarceration at the time of the inflammatory evidence may have weakened credibility of victim's testimony and may have altered the jury's verdict as well as changed his strategic decision not to have the accused testify on his own behalf.

(I. M. Lundberg)

Randy Ricciuti for the Commonwealth.  
Bruce A. Carsia for Defendant/Appellant.

No. CC 200416286. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Mariani, J., June 10, 2008—This is an appeal wherein the Commonwealth of Pennsylvania appeals from the Order of Court dated May 9, 2007 which granted the defendant's Motion for New Trial. On December 20, 2006, a jury convicted the defendant of Robbery of a Motor Vehicle and Simple Assault. The jury acquitted the defendant of Criminal Conspiracy. In a separate non-jury trial, the Court

found the defendant not guilty of Person Not to Possess Firearm. Prior to sentencing, the defendant filed a Motion for New Trial and/or for an Evidentiary Hearing, which this Court treated as an oral motion for extraordinary relief pursuant to Pa.R.Crim.P 704(B). After hearing, this Court granted the defendant a new trial. The Commonwealth of Pennsylvania filed a timely Notice of Appeal and Concise Statement of Matters Complained Of On Appeal alleging the following errors:

1. The Honorable Trial Court erred in accumulating claims of ineffectiveness as well as in not specifically stating which claim was the basis for relief;
2. The Honorable Trial Court erred in acting as an advocate for defendant and injecting the issue of whether the language attributed to defendant was so prejudicial that counsel should have moved to limit it. Defendant only raised 2 issues, yet the court felt compelled to create additional reasons for counsel's alleged ineffectiveness;
3. The Honorable Trial Court erred in ruling that trial counsel was ineffective for not presenting evidence that defendant was incarcerated in jail from January 25, 2003 through January 20, 2004;
4. Insofar as the Trial Court may have granted relief on the claim that counsel was ineffective for advising his client not to testify, it erred as counsel had a reasonable basis based on the defendant's prior criminal record;
5. Insofar as the Trial Court may have granted relief based upon a finding that the information was disclosed to defense counsel too late, it erred in raising a discovery issue *sua sponte*. Further, counsel was not ineffective for not asking for a continuance to investigate jail records; and
6. The verdict was not against the weight of the evidence and defendant offered no substantive argument to support that claim.

This Court's ruling was not based on a discovery violation. It was also not based on a "weight of the evidence" argument. Therefore, these claims of error are not pertinent for purposes of appeal. This Court will address the remaining issues.

The credible facts germane to this appeal are as follows:

During the trial of this case, Athena Pegram testified that on September 28, 2004 at approximately 3:30 a.m. she and her fiancé were returning to their residence after spending an evening at her fiancé's sister's residence. Prior to pulling into their driveway, she testified that she observed three individuals lurking in the shadows of the neighborhood behind a tree. Because it was dark, she was unable to identify the three individuals at that time. Ms. Pegram testified that after she and her fiancé pulled in their driveway and alighted from their vehicle, she observed the defendant, William Thomas, approach them with a gun in his hand with a black bandanna covering most of his face and only disclosing approximately two inches of his face around his eyes.

Ms. Pegram testified that her fiancé asked the defendant what he was doing. She testified that the defendant said, "give me your keys." She testified that she tossed the keys to her fiancé who gave them to defendant. The defendant opened the car door and the alarm in the car sounded. She testified that defendant pulled out of the driveway in her car

and sped off. She immediately called the police. The police responded to the residence and Ms. Pegram was interviewed. Ms. Pegram did not identify the defendant or any of the other individuals at that time.

About a month after the incident, Ms. Pegram was shown a photo array by a police officer. She identified the defendant and his co-defendant at trial, Zane Lundy, as two of the three individuals she observed that evening. She identified the defendant as the person who approached her fiancé and her with the gun and who drove off in her car.

Ms. Pegram's identification of the defendant was triggered by the fact that she remembered seeing the defendant in a "corner store" when she was five to six months pregnant, about 12-18 months before the incident. At that time, she encountered the defendant at the corner store and as she was walking into the store, she recalled the defendant commenting that "pregnant pussy is the best." She also testified that she thought she went to high school with the defendant. She also identified Zane Lundy from the photo array as someone she knew from around the neighborhood.

The defendant's fiancé also testified in this case and essentially confirmed the testimony of Ms. Pegram. He also testified that the defendant was wearing a bandanna at the time of the incident. He testified that he was able to identify the defendant based on his recollection of the appearance of the defendant's eyes. He also identified Zane Lundy as being one of the individuals present at the time of the incident. The jury returned a verdict of not guilty as to Zane Lundy but returned a verdict of guilty as to the defendant.

Prior to sentencing, the defendant filed a Motion for New Trial and/or for an Evidentiary Hearing raising the ineffectiveness of trial counsel for his failure "to present evidence which would have directly contradicted and effectively impeached the testimony of the key Commonwealth witness." This Court treated defendant's motion as an oral motion for extraordinary relief pursuant to Pa.R.Crim.P 704(B). The defendant claimed, and additional evidence disclosed, that the defendant was incarcerated in the Allegheny County Jail between January 25, 2003 and January 20, 2004 and this evidence would have contradicted Athena Pegram's testimony that she encountered the defendant in the corner store approximately 12-18 months prior to the incident of September 28, 2004. This Court convened an evidentiary hearing on May 2, 2007 during which trial counsel for the defendant testified. He testified that, just prior to selecting the jury, the Assistant District Attorney assigned to this case orally advised him that Ms. Pegram claimed to have seen the defendant in the corner store and that the defendant allegedly made the graphic statement attributed to him as testified to by Ms. Pegram. No reference to this incident appeared anywhere in any pre-trial discovery materials.

Trial counsel then discussed this potential evidence with the defendant. The defendant advised trial counsel that the incident could not have occurred because, according to the defendant, he was incarcerated at the time Ms. Pegram claimed the incident occurred. Trial counsel candidly acknowledged that, prior to trial, he took no steps to investigate whether his client was in jail during this period. His candid testimony disclosed that he did not do any investigation until after the trial had been concluded. Indeed, trial counsel's testimony disclosed that he had very little recollection as to whether he undertook any action whatsoever relative to any potential evidence that his client was incarcerated at the time Ms. Pegram claims to have been confronted by him at the corner store.

This Court has ruled that trial counsel was ineffective in this case. In *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (Pa. 2002), the Pennsylvania Supreme Court stated that “as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review.” Underlying this rule is the Supreme Court’s observation that “time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness.” Thus, “the record may not be sufficiently developed on direct appeal to permit adequate review of ineffectiveness claims[.]” Because appellate courts do not normally consider issues that were not raised and developed in the court below, the *Grant* court reasoned that “deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel.”

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

In this case, this Court did conduct an evidentiary hearing sufficient to develop the issues relative to any allegations of ineffective assistance of counsel. Therefore, the substantive claims can be assessed. It is well-established that counsel is presumed to have provided effective representation unless the following is demonstrated: (1) the underlying legal claim is of arguable merit; (2) counsel’s action or inaction lacked any objectively reasonable basis designed to effectuate his client’s interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel’s error. See *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975-76 (Pa. 1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Immediately prior to trial, trial counsel was advised by the prosecuting attorney that his client, who was, by the victims’ testimony, wearing a mask at the time of the crime, was being identified as the gun-wielding robber, at least in part, because of an incident which occurred 12 to 18 months prior to the robbery at a corner store during which the defendant supposedly made a vile, disgusting statement to the victim, which statement, in the opinion of this Court, would be very offensive to anyone. Defendant advised trial counsel that he could not have been the person that the victim said she encountered at the corner store well over a year before the incident involved in this case because the defendant was incarcerated at the time the victim had the encounter at the corner store.

Trial counsel did nothing to investigate whether defendant was in jail at the time of the corner store incident. Trial counsel did nothing to attempt to delay the trial to allow him to investigate whether defendant was in jail at the relevant time. Trial counsel did nothing to object to the last minute disclosure of this identification evidence. Trial counsel did nothing to move to exclude or even limit the testimony of the victim regarding the corner store incident. This Court believes that the victim’s identification of the defendant was

based substantially on her belief that she had a prior encounter with the defendant. If the trier of fact had evidence that the defendant was incarcerated during the time period that the victim believed she encountered the defendant, it very well may have weakened her credibility and altered the jury’s verdict in this case. Trial counsel’s failure to take any action to exclude or limit the statement, in conjunction with his failure to investigate whether defendant was even at the corner store on the day in question, did nothing to further defendant’s interest.

Additionally, the strategic decision as to whether the defendant would have testified on his own behalf was compromised by trial counsel’s failure to investigate whether his client was in jail at the time of the incident in question. Trial counsel did not want the defendant’s prior record known to the jury and, therefore, the decision that the defendant would not testify was made. Had trial counsel undertaken a cursory investigation and decided that evidence of the defendant’s prior incarceration should have been introduced, the strategy considerations as to whether the defendant would have testified would have differed greatly as his prior criminal record would have been disclosed during the presentation of evidence of his incarceration. Again, trial counsel’s actions had no reasonable basis in relation to defendant’s interests. The Court believes that trial counsel’s conduct prejudiced defendant’s right to a fair trial.

The Commonwealth also claims that this Court erroneously served as an advocate for the defendant. Although not within the context of an evidentiary hearing on a claim of ineffectiveness, in *Commonwealth v. Ables*, 590 A.2d 334, 341; (Pa.Super. 1991), the Superior Court stated:

A new trial is required only when the trial court’s questioning is prejudicial, that is when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial. *Commonwealth v. Purcell*, 403 Pa.Super. 342, 356, 589 A.2d 217, 224 (1988). It is always the right and sometimes the duty of the trial judge to interrogate witnesses. However, questioning from the bench should not show bias or feeling or be unduly protracted. *Id.*, 403 Pa.Superior Ct. at 355, 589 A.2d at 223.

*Commonwealth v. Goosby*, 450 Pa. 609, 611, 301 A.2d 673, 674 (1973). *Commonwealth v. Watts*, 358 Pa. 92, 96, 56 A.2d 81, 83 (1948), see also, *Commonwealth v. Miller*, 442 Pa. 95, 97, 275 A.2d 328, 329 (1971); *Commonwealth v. Brown*, 438 Pa. 52, 62-63, 265 A.2d 101, 107 (1970); *Commonwealth v. Patskin*, 372 Pa. 402, 418-19, 93 A.2d 704, 713 (1953).

This Court has reviewed the trial court record and cannot find any grounds for relief on this issue. This Court was neither acting as an advocate for the defendant nor was this Court attempting to accumulate claims of ineffectiveness. The Court was simply attempting to ensure that the record was as thorough as possible with respect to any potential claims of ineffectiveness concerning all issues relating to the Commonwealth’s having produced critical, inflammatory evidence on the day of trial and defendant’s trial counsel’s having taken no action to meet or rebut that evidence. Accordingly, the Commonwealth’s claims of error are without merit.

For the foregoing reasons, the Order of Court granting Defendant’s Motion for a New Trial should be affirmed.

BY THE COURT:  
/s/Mariani, J.

## Commonwealth of Pennsylvania v. David Sylvester Jones

*Appeal—Motion to Suppress—Concurrent Trials—  
Insufficient Evidence*

1. Defendant was convicted by jury of first degree murder and possession of a firearm without a license. Court found Defendant guilty of the charge of a person not to possess a firearm in a separate non-jury trial. Both trials occurred concurrently by agreement of counsel without objection.

2. Photographic array presented in North Carolina to witness by Pittsburgh detectives in 2003 for 2001 shooting was not unduly suggestive in identification of defendant based on prior arrays sent by mail to local police where witness immediately picked out defendant who had been less than ten feet from witness. Her identification was supported by physical DNA evidence, testimony of another witness, and the fact that she had not identified the Defendant in any of the prior 200 photos.

(*I. M. Lundberg*)

*Michael Streily* for the Commonwealth.  
*Thomas N. Farrell* for Defendant.

No. CC 200408273; 200410371. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Cashman, J., April 7, 2008—The appellant, Donald Jones, (hereinafter referred to as “Jones”), has filed the instant appeal as a result of his convictions following a jury trial of the crimes of first degree murder and possession of a firearm without a license. In a separate non-jury trial, he was found guilty of a person not to possess a firearm. Jones was sentenced to the mandatory period of incarceration of life without the possibility of parole with respect to his conviction for first degree murder and he was sentenced to a consecutive period of incarceration of five to ten years on his conviction of the crime of a person not to possess a firearm and no further penalty was imposed for his conviction of possession of a firearm without a license.

In his concise statement of matters complained of on appeal, Jones has raised four claims of error. Initially, Jones maintains that this Court erred in failing to grant his request to suppress the photo array shown to an eyewitness of the homicide as being unduly suggestive. Jones next suggests that this Court erred in finding him guilty of the charge of a person not to possess a firearm when it was alleged that Jones never waived his right to a jury trial or that he agreed to have that charge tried in a non-jury trial, which was to run concurrent with his jury trial. Finally, Jones has suggested that there was insufficient evidence to support the verdict of a person not to possess a firearm.

Donna Biss, (hereinafter referred to as “Biss”), and Anthony Wilkinson, (hereinafter referred to as “Wilkinson”), were South Carolina residents who were involved in not only a romantic but also a criminal relationship. Biss and Wilkinson traveled throughout the country ripping off poker machines. Wilkinson and Biss would go to a bar and while Biss sat at the bar drinking, Wilkinson would go to an available poker machine and put up numbers on the poker machine and then have the bartender pay him out for his winnings. Wilkinson employed two different techniques in getting the scores on the poker machines, the first was to have a dollar bill attached to a string and then insert that dollar bill into the machine and pull it out before the machine

could collect it. The second scheme was to take a wire that was concealed in his shirt sleeve, put it down the coin slot and touch the counter button inside the machine, thereby increasing the score on the machine. When he had accumulated a sufficient number of points, he would then ask the bartender to pay him for his winning scores.

In February of 2001, Wilkinson and Biss came to Pittsburgh and performed these scams in numerous bars throughout Allegheny County. Wilkinson and Biss generated anywhere between five hundred and one thousand dollars each night they went out to rip off poker machines. The monies that they were able to obtain were used to purchase crack cocaine. On February 16, 2001, at approximately 11:00 p.m., Biss and Wilkinson were at the home of Joyce Cager, (hereinafter referred to as “Cager”), to purchase drugs and to collect their clothing since they intended to return to South Carolina that evening. Cager was a known user and seller of crack cocaine and her house was known to be a crack house. Biss was in the kitchen preparing some food for their trip when she heard a loud commotion in the living room near the front door. She next heard Wilkinson yell to her to get his knife and when she looked into the living room, she saw Wilkinson on his knees with a large, heavy-set, African-American male standing over him with a semi-automatic revolver. Biss went back into the kitchen as Wilkinson directed and then heard a single shot that was subsequently followed by two other shots. Wilkinson was shot in the back of the head at close range and died instantaneously from that single gunshot. Cager, who was upstairs when she heard the first shot, attempted to come down the steps into her living room when she thought she was fired upon by the intruder. After these three shots were fired, this intruder ran from Cager’s house.

The police were called and when they arrived on the scene, Biss was interviewed and gave a description to the homicide detectives of a large, African-American, heavy-set male in his early forties. She then went to the police headquarters and as a result of the information that she gave to the homicide detectives, a computer sketch was generated of the individual who she believed killed Wilkinson. As a result of the generation of this composite Biss was shown numerous photographs; however, she was unable to make an identification of any individual from viewing those photographs. Biss then returned to South Carolina and the police continued with their investigation without any discernible progress. Over the next several years, Biss would review additional photo arrays that were prepared by the Pittsburgh homicide detectives and sent to Charleston, South Carolina Police Department, however she was unable to make any identification as a result of those arrays. It was estimated that over the next several years she viewed at least two hundred photographs and was unable to identify the individual who killed Wilkinson.

In September of 2001, William Grayson, (hereinafter referred to as “Grayson”), was indicted by the U.S. Attorney’s Office for the Western District of Pennsylvania, on numerous drug charges. On February 7, 2003, Grayson entered a plea of guilty to those charges and was sentenced to fifteen years in prison. Grayson advised his Federal Public Defender that he had information with respect to an unsolved Pittsburgh homicide. Grayson’s lawyer contacted the District Attorney’s Office of Allegheny County and told that office that his client would be willing to speak to homicide detectives with respect to his knowledge. Grayson initially met with two homicide detectives in early December of 2003 and told them that Jones had killed Wilkinson and gave them the information that he had about this killing.

In the early part of 2004, Grayson met with two City of

Pittsburgh homicide detectives and an Assistant District Attorney gave them a taped statement with respect to his knowledge of that shooting and in April of 2004, he was given a non-prosecution agreement by the District Attorney's Office in exchange for his testimony. While no promises were made to Grayson, he did expect that by providing this information to the District Attorney's Office that he could hope to seek a downward departure from his federal sentence of fifteen years.

Grayson told the police that he and his uncle, Jones, had become very close over the years despite their age difference and they would socialize on almost a daily basis. Generally they went to bars and had something to drink but they also went into these bars so that Grayson could sell his drugs. On the evening of February 16, 2001, Jones asked Grayson to drive him to Cager's house since Jones' vehicle was inoperable. Jones wanted to meet up with Cager's daughter, Linda, since he was attracted to her. Grayson drove Jones to Cager's house and Jones, who was always armed with a gun, left the vehicle and went to the house. Grayson stayed in the car and was arranging for further drug sales by the numerous phone calls that he was making when he heard a gunshot. Grayson ended the phone call that he was on, pulled out his gun, and then ran to the porch of Cager's house. After hearing several other shots, he opened the door and saw Jones standing in the living room over Wilkinson's dead body. They both had their weapons pointed at each other and then Jones told Grayson that they had to get out of that residence. They ran to the car and Grayson then drove Jones to his home. While they were in the car, Jones told Grayson that he had shot Wilkinson "because he was an asshole" and that "he had left his DNA" at the scene of the crime. What Jones meant by this is that during the original scuffle with Wilkinson, his glasses and a knit touse cap came off of him and were laying on the floor of the living room of Cager's home. Jones also told Grayson that he had to get rid of the gun and ammunition that he used to kill Wilkinson. Grayson noticed that in addition to Jones missing his hat and glasses, that he had a split lip and that he was very nervous.

The reason that Grayson was offered the non-prosecution agreement for his testimony was that Grayson had knowledge of facts surrounding this homicide, which information was not known to the public. In particular, Grayson knew that the perpetrator's hat and glasses had been left at the scene. Having identified Jones as the shooter, two Pittsburgh Homicide Detectives put together another photo array that contained Jones' photograph. Detectives Moffat and Nutter drove down to Charlotte, North Carolina on December 26, 2003, and showed Biss another photo array. The photo array was six photographs on one sheet of paper. Biss immediately identified Jones, pointed him out and then initialed and dated the photo array by Jones' picture.

Armed with a positive and unequivocal identification of Jones as the shooter by Biss and the taped statement of Grayson also identifying Jones as the shooter, Jones was arrested and charged with the crimes of criminal homicide and two counts of violation of Uniform Firearms Act. Once Jones was lodged in the Allegheny County Jail, the police obtained a search warrant and obtained a sample of Jones' blood which was submitted to the Allegheny County Crime Lab for DNA testing. The Crime Lab was able to extract numerous hair follicles from the knit cap and as a result of those samples, was able to do a DNA comparison with Jones' blood. The results of that DNA testing were that the likelihood that someone other than Jones was wearing that hat on February 16, 2001, was one in seventy-one quadrillion. The glasses that were found at the scene of the homicide were

also submitted to the crime lab and after receiving Jones' prescription for his glasses, a comparison was made and it was determined that the prescription was the same and it was extremely unlikely that someone other than Jones had this exact prescription.<sup>1</sup>

Jones proceeded with a jury trial in May of 2006; however, that trial resulted in a hung jury and Jones' case was relisted for trial in March of 2007. On March 19, 2007, the jury found Jones guilty of first-degree murder and possession of a firearm without a license. In the non-jury proceeding that was held concurrent with his jury trial, this Court found him guilty of a person not to possess a firearm. These convictions ultimately led to his sentences of life without the possibility of parole to be followed by a period of incarceration of five to ten years.

Jones' first issue on appeal is that this Court erred when it failed to suppress the photo identification made by Biss as being unduly suggestive. In *Commonwealth v. Mistler*, 590 Pa. 390, 912 A.2d 1265 (2006), the Pennsylvania Supreme Court explained the standard for reviewing the propriety of the suppression order.

When reviewing the propriety of a suppression order, an appellate court is required to determine whether the record supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. *Commonwealth v. Davis*, 491 Pa. 363, 421 A.2d 179 (1980). Because the students prevailed in the suppression court, we may consider only the evidence of the defense and so much of the evidence for the Commonwealth as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 842 (2003) (citations omitted).

When the object sought to be suppressed is a photographic array, additional factors must be considered. In *Commonwealth v. Kyle*, 367 Pa.Super. 484, 533 A.2d 120, 131 (1987) the Court listed several of these factors:

Appellant contends the lower court improperly refused to suppress the victim's identification testimony. Specifically, he argues that the two photographic arrays and the pre-trial lineup were unduly suggestive.

Upon review of a challenge to pre-trial identification procedures, we must determine whether those procedures were so suggestive and thus, unreliable, that a mistaken identification was the necessary result. *Commonwealth v. Thomas*, 363 Pa.Super. 348, 352, 526 A.2d 380, 381 (1987). In determining the reliability of the identification, the following factors are considered:

...the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

*Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct.

2243, 2253, 53 L.Ed.2d 140 (1977), *quoted in*, *Commonwealth v. Sample*, 321 Pa.Super. 457, 461, 468 A.2d 799, 801 (1983). In applying the test “we are to consider only the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.” *Commonwealth v. Cavalieri*, 336 Pa.Super. 252, 254-255, 485 A.2d 790, 791 (1984).

A photographic array will be suppressed if it is determined that that array was unduly suggestive in its identification of a defendant as the ultimate perpetrator. In *Commonwealth v. Patterson*, 940 A.2d 493 (Pa.Super. 2007) the Court explained the basis for granting a suppression motion of a photographic array:

Foremost, we observe that the “exclusion of identification testimony is proper when improper police conduct results in an impermissible suggestive confrontation.” *Commonwealth v. O’Bryant*, 320 Pa.Super. 231, 467 A.2d 14, 16 (1983) (quotations omitted). The courts will not suppress an identification based upon a challenge to the reliability of the identification alone; rather, the record must demonstrate suggestiveness. *See Id.*

Herein, Appellant does allege that Mr. Turner selected him from a suggestive photo array. Specifically, he argues that, unlike most of the other photographs in the array, Appellant’s photo exposed his neck and shoulders. Additionally, Appellant contends that, unlike the other photos, Appellant’s photograph was taken from a distance and, as a result, made his head appear smaller than the others.

“A photographic identification is unduly suggestive when the procedure creates a substantial likelihood of misidentification.” *Commonwealth v. Fisher*, 564 Pa. 505, 522, 769 A.2d 1116, 1126 (2001). “Photographs used in line-ups are not unduly suggestive if the suspect’s picture does not stand out more than the others, and the people depicted all exhibit similar facial characteristics.” *Id.*

In the instant case, Jones does not suggest that the photo array that was shown to Biss in Charlotte, North Carolina in 2003 was unduly suggestive with respect to the actual photographs. Jones maintains that it is not the photographs themselves that were unduly suggestive but the manner in which those photographs were displayed to Biss. Jones maintains that by having Detectives Moffat and Nutter drive to Charlotte, North Carolina to personally display the photographic array to Biss was suggestive in that it conveyed the impression that the individual who killed Wilkinson was contained in that photographic array. Jones maintains that this array was suggestive since all of the other photographic arrays that were shown to Biss once she left the Pittsburgh area were done by having those photos sent to a local police department where Biss could view those photos. Here the Detectives personally went to Biss and handed her the photo array, thereby demonstrating and suggesting that Wilkinson’s killer was in that photo array.

Biss testified at the time of the suppression hearing that neither Detective Moffat nor Detective Nutter told or intimated to her that the killer was in this photo array or that she should identify anyone in the array. She stated that she was given the photo array, looked at it, and immediately identified Jones as the individual who shot Wilkinson. The only thing that she was directed to do by the Detectives was

to initial and to date the photograph so as to document her identification of Jones.

Biss was less than ten feet from Jones when she saw him standing over Wilkinson with a gun and was able to tell the investigating homicide detectives that the shooter was a large, heavy-set, African-American in his forties, wearing a blue and white sweat suit. She noticed that he had glasses and she also noticed that he had a touse cap on his head that made his hair appear bushy. Biss had an opportunity to see him at the scene and also to see him leave Cager’s house. Her identification of Jones was supported by the fact that she never identified anyone else despite looking at more than two hundred photographs and that the physical evidence that was left at the scene of the crime showed that it was a one in seventy-one quadrillion chance that someone other than Jones was the perpetrator of this homicide.

Jones’ alternative theory of the unduly suggestive nature of this photo array is that this photo array did not match the composite drawing that was prepared shortly after the shooting. The problem with this contention is that it confuses the question of credibility with the claim of undue suggestiveness. This Court had the benefit of viewing the composite drawing and the photo array and listening to Biss’ unequivocal testimony identifying Jones as the shooter. Based upon the standards for review it is clear that there was no basis upon which to suppress the photo array shown to Biss.

Jones next maintains that this Court erred in finding him guilty of the charge of a person not to possess a firearm when no such trial occurred on that charge and that Jones never waived his right to a jury trial nor did he agree that a non-jury trial should be held concurrently with his jury trial. Prior to the commencement of Jones’ first trial, his counsel Frank E. Reilly, filed numerous pre-trial motions, one of which was to sever the charge of a person not to possess a firearm from the charges of criminal homicide and possession of a firearm without a license. Immediately before testimony was taken on the motion to suppress the photo array, Assistant District Attorney Lisa Pellegrini advised this Court that an agreement had been reached as to Jones’ motion to sever and that agreement was, “As well as the motion to sever, we have come to an agreement that the charge of 6105, former convict not to possess a firearm, will be severed and heard non-jury before your Honor at the same time.” (Trial Transcript I, page 5, lines 8-13). When the jury in Jones’ first trial was unable to reach a unanimous verdict, a mistrial was declared and Jones’ case was rescheduled for trial in March of 2007. Prior to the commencement of that second trial, this Court reaffirmed the prior agreement of the parties to sever the charge of former convict not to possess firearm from the other charges and to try that charge in a non-jury trial concurrent with the jury trial with respect to the other charges. The same counsel in the first and second trial represented Jones and no objection was made to that procedure.

In *Commonwealth v. Mulholland*, 549 Pa. 634, 702 A.2d 1027 (1997), the Supreme Court declared that proceedings revert to a pre-trial status when a case ends in a mistrial and that re prosecution of the defendant is not barred. Similarly, in *Commonwealth v. Henderson*, 513 Pa. 296, 520 A.2d 1372 (1987), the Supreme Court also held that rulings made in the prior proceeding were binding upon a Court in a subsequent retrial unless the defendant had new evidence to present to the Court on those issues. By accepting the agreement of the parties in the first case, a ruling was made that the charge of a former convict not to possess firearm would be tried as a non-jury trial at the same time the jury considered the charge of criminal homicide and possession of a firearm without a license. No objection was made to this request nor should one have been made.

In the case of the *Commonwealth v. Kareem Jones*, 858 A.2d 1198, 1206-1207 (Pa.Super. 2004), the Superior Court was confronted with an identical situation as to the question of whether or not the crime of a person not to possess a firearm should be severed from the other charges so that a jury did not hear all of the elements of that offense.

It is axiomatic that a VUFA charge under 18 Pa.C.S.A. §6105, former convict not to possess a firearm, requires evidence that the defendant was previously convicted of a crime. In this case, appellant was charged with three VUFA violations including violation of §6105. The other charges against appellant did not require evidence of a prior conviction. Believing that he would be prejudiced on the remaining charges once the jury heard evidence of his prior conviction, appellant filed a motion to sever the charges. The trial court denied the motion...

On appeal we stated that there is no question that appellant was prejudiced in this case. The crime of "Former convict not to own a firearm," requires the Commonwealth to show a previous conviction for a violent crime. Thus, where these charges are brought with others, clearly the jury is exposed to the fact that this particular defendant had previously committed a violent crime.

Normally, in criminal trials, evidence of prior crimes committed by a particular defendant is not admissible and any reference to it constitutes reversible error. *Commonwealth v. Martin*, 479 Pa. 63, 387 A.2d 835 (1978). The purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes, he was more likely to commit that crime for which he is being tried. *Commonwealth v. Trowery*, 211 Pa.Super. 171, 173, 235 A.2d 171, 172 (1967).

The prejudice here is a bit different. Clearly the introduction of the fact of appellant's former conviction of a violent crime was required as an element of proof of the crime of "Former convict not to own a firearm."

Appellant claims that because of the nature of the proof required in that crime, it could not be consolidated with other charges, since then the prejudice of the introduction of his former conviction would spread to all the charges. We agree. We feel to reach any other result would be inconsistent with general principles of evidence admissible in a criminal trial.

Jones' trial counsel realized the prejudice that would befall Jones if information as to his prior conviction of the crime of third degree murder had been presented to a jury, hence the filing of his motion to sever. Had Jones' trial counsel failed to file a motion to sever, the contention that Jones would currently be advancing would be the ineffectiveness of his trial counsel in failing to file that severance motion. It is clear from a review of the record in both trials that Jones was the individual who requested severance of the violation of Uniform Firearms Act charges and agreed to have that one charge tried in a non-jury trial which was to run concurrent with his jury trial. Jones was represented by the same counsel at both trials and never objected to the procedure that he requested.

Jones' final contention of error was that there was insufficient evidence presented to this Court to convict him of the charge of a person not to possess a firearm. The standard for reviewing a claim challenging the sufficiency of the evidence is set forth in *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000).

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and *Article I, Section 10* of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

The Commonwealth is required to prove that Jones was a former convict and that he possessed a firearm. The evidence in the instant case obviously demonstrated that he possessed a firearm since he killed Wilkinson. What Jones is suggesting is that there was no evidence of the fact that he had ever been convicted of a crime that would disqualify him from possessing a firearm. While the record is silent in this regard, what happened in Jones' case was that after the final instructions were given to the jury on the charges of criminal homicide and possession of a firearm without a license, the jury retired and Ms. Pellegrini presented to this Court a certified copy of Jones' conviction for third degree murder, a copy of which is attached to this Opinion.\* This Court, after receiving the verdicts with respect to the charges of criminal homicide and possession of a firearm without a license, entered its non-jury verdict on the charge of former convict not to possess a firearm. That verdict was based upon the testimony received during the course of trial and the certified copy of his conviction of third degree murder. Jones and his counsel are well aware of the submission of his prior record since it was done in the same manner that it had been done in the first trial.<sup>2</sup>

Cashman, J.

Dated: 4/7/08

<sup>1</sup> The reason that prescription was identical to Jones' prescription is that these were the glasses that were provided to him at SCI Graterford where he was serving a sentence of ten to twenty years for his conviction of third degree murder. This information was never provided to the jury but was provided to this Court during some off-the-record discussions.

<sup>2</sup> For the purpose of this record, this Court is supplementing the record with a copy of Jones' prior conviction.

\* A photo copy of the certified copy of Jones' conviction for third degree murder, is available by contacting the Allegheny County Bar Association at 412-402-6684 or [santill@acba.org](mailto:santill@acba.org). (Ed.)

## JURY VERDICTS

### Kelly Andreen v. Michael L. Sturdivant and Kelly K. Sturdivant

Court: Common Pleas  
 Case Number: GD 05-010932  
 Jury Verdict: For Plaintiff in the amount of \$250,000.00  
 Date of Verdict: 1/31/08  
 Judge: Della Vecchia  
 Pltf's Atty: R. Sean O'Connell  
 Def's Atty: Scott T. Redman  
 Type of Case: Negligence  
 Experts: Plaintiff(s): David Oliver-Smith, M.D.;  
 Cameron McGavin, M.D.  
 Defendant(s): Jon A. Levy, M.D.;  
 Lawson Bernstein, M.D.

**Remarks:** Defendants owned an apartment building and Plaintiff leased an apartment from Defendants. In the middle of the night, a fire started in the apartment directly below Plaintiff's unit. No fire alarms or smoke detectors activated in the building. Heavy smoke forced Plaintiff to escape the building by jumping from her third floor apartment. She sustained serious injuries including multiple fractures and post-traumatic stress disorder. Defendants contended that all apartments contained smoke detectors with alarms and that all hallways were so equipped and that at all relevant times the building complied with fire safety ordinances. The jury found for Plaintiff and awarded \$250,000.00 in compensatory damages.

### Mary Lou Dahmen, Lindsay Dahmen and Dana Beresford v. Forbes Regional Hospital

Court: Common Pleas  
 Case Number: GD 06-004837  
 Jury Verdict: For Defendant  
 Date of Verdict: 3/11/08  
 Judge: Wecht  
 Pltf's Atty: Harry M. Paras  
 Def's Atty: Terry C. Cavanaugh, Steven J. Forry,  
 C. Justin Conrad  
 Type of Case: Medical Malpractice-Cardiac/Circulatory  
 Experts: Plaintiff(s): Francine Hovanec, MS, RN;  
 Stuart S. Burstein, M.D.; William Stuart,  
 M.D. (Westford, MA); Rebecca J. Camlin,  
 B.A., C.A.C.  
 Defendant(s): Francis Robicsek, M.D.,  
 Ph.D. (Charlotte, N.C.); Ronald V.  
 Pellegrini, M.D.

**Remarks:** Plaintiffs filed this lawsuit arising from the circumstances surrounding the death of Burt Dahmen, 47 years of age, their husband and father. Mr. Dahmen presented to Defendant's emergency department with complaints including day-long chest pain. Defendant's triage nurse assessed the pain to be epigastric in nature and directed him to the waiting area with his family. After waiting nearly one and a half hours without further assessment or treatment of any kind, Mr. Dahmen fell to the floor and turned blue. Plaintiffs alleged chaos ensued in the waiting room and in the area outside the treatment room, where Mr. Dahmen was pronounced dead more than two and a half hours after arriving at the facility. Plaintiffs' alleged damages included post-traumatic stress disorder and depression. Defendants contended that Mr. Dahmen's death, from a dissecting aneurysm, was the result of a rapidly occurring chain of events and that Defendant's agents did not act negligently. The jury found that neither Defendant Hospital nor its agents were negligent.

### Thelma Caplan v. Neil A. Busis, M.D. and Pittsburgh Neurology Group

Court: Common Pleas  
 Case Number: GD 06-000593  
 Jury Verdict: For Defendants  
 Date of Verdict: 4/3/08  
 Judge: Scanlon  
 Pltf's Atty: James B. Cole  
 Def's Atty: Bernard Rizza  
 Type of Case: Medical Malpractice  
 Experts: Plaintiff(s): Gary L. Simon, M.D.  
 (Potomac, MD); M. Marc Soriano, M.D.  
 (Rockford, IL)  
 Defendant(s): John B. Talbott, M.D.;  
 Daniel F. Hanley, M.C. (Baltimore, MD);  
 Karen L. Roos, M.D. (Indianapolis, IN)

**Remarks:** Plaintiff was admitted to Shadyside Hospital with symptoms of neck and shoulder pain. After nine days, Plaintiff was unable to move her extremities and Defendant doctor, a neurologist was consulted. No MRI of the cervical spine was done at the hospital despite complaints of neck pain. Plaintiff alleged Defendants' failure to timely diagnose a spinal epidural abscess caused the abscess to spread and resulted in neurological complications of upper extremity weakness and loss of use of the lower extremities. Damages included close to \$250,000.00 in past medical expenses. Defendants contended Plaintiff, 77 years of age, had a long history of neuropathy of the upper and lower extremities and significant degenerative joint disease. Defendants also contended Plaintiff had recovered much of her upper extremity function. The jury found the Defendant doctor did not deviate from the applicable standard of care.

### George Bauer v. Penn Animal Hospital, P.C., t/d/b/a Penn Animal Hospital

Court: Common Pleas  
 Case Number: GD 05-005951  
 Jury Verdict: For Defendant  
 Date of Verdict: 1/31/08  
 Judge: Colville  
 Pltf's Atty: Wayne M. Chiurazzi  
 Def's Atty: Judith A. Moses  
 Type of Case: Slip and Fall  
 Experts: Plaintiff(s): Mitchell E. Antin, D.O.  
 Defendant(s): D. Kelly Agnew, M.D.

**Remarks:** Plaintiff, a below-the-knee amputee who uses crutches to ambulate, fell on Defendant's premises when one of his crutch tips caught in a hole in a grassy area. The fall allegedly caused extensive injury to the stump of his leg. Plaintiff's damages included more than \$50,000.00 in medical bills and a DPW lien. Defendant contended that Plaintiff had a long and complex medical history and that any injury he may have suffered had resolved. Defendant disputed where Plaintiff fell and contended it had no notice of the hole in the parking lot where Defendant believed Plaintiff actually fell. The jury found Defendant was not negligent.

### Linda Dillard v. Arcadia Court Office Condominium Association

Court: Common Pleas  
 Case Number: GD 05-032135  
 Jury Verdict: For Defendant

Date of Verdict: 3/25/08  
 Judge: Folino  
 Pltf's Atty: John Newborg  
 Def's Atty: Gary M. Scoulos  
 Type of Case: Slip and Fall  
 Experts: Plaintiff(s): Jeffrey A. Baum, M.D.  
 Defendant(s): Jon Tucker, M.D.

**Remarks:** Plaintiff slipped and fell on ice on a sidewalk on Defendant's premises. Plaintiff alleged that Defendant knew the sidewalk was prone to collecting water run off but did nothing to make the sidewalk safe or warn of the danger. Plaintiff alleged the fall caused various injuries including a back injury requiring surgery, caused lost wages of over \$80,000.00 and medical bills of over \$75,000.00. Defendant contended that by Plaintiff's own admission the sidewalk was merely wet, not icy. Defendant's medical expert opined the injuries sustained in the fall were minor ones which resolved, and that the back surgery resulted from a trip and fall at Plaintiff's home, after the fall on Defendant's property. The jury found the Defendant was not negligent.

#### Christine Connor v. Mark A. Salerno

Court: Common Pleas  
 Case Number: GD 00-017679  
 Jury Verdict: For Defendant  
 Date of Verdict: 2/1/08  
 Judge: Horgos  
 Pltf's Atty: Charles E. Evans; Gregory R. Unatin  
 Def's Atty: Robert A. Loch  
 Type of Case: Motor Vehicle-Rear-End Collision  
 Experts: Plaintiff(s): David A. Stone, M.D.

**Remarks:** Plaintiff was operating her vehicle on the Churchill Ramp entrance to the Parkway East. Defendant was operating his vehicle directly behind the Plaintiff. Plaintiff alleged Defendant negligently struck her vehicle from behind, causing her to sustain injuries to her neck and back and/or causing an aggravation of pre-existing neck and back conditions. Plaintiff's damages included lost wages totaling \$40,901.00. The jury found Defendant was not negligent.

#### Erie Insurance Exchange v. Campos & Stratis, Certified Public Accountants, and Gerald J. Vancko, C.P.A., an individual

Court: Common Pleas  
 Case Number: GD 00-019090  
 Jury Verdict: For Defendants  
 Date of Verdict: 2/8/08  
 Judge: Della Vecchia  
 Pltf's Atty: Rodger L. Puz; Amy J. Brinkos  
 Def's Atty: Andrew F. Adomitis; Jason G. Wehrle  
 Type of Case: Contract  
 Experts: Plaintiff(s): Carl A. Wiker, Jr., C.P.A.;  
 Richard C. Kelly, Esq. (insurance claims  
 evaluation); Michael Hillwig (information  
 systems)  
 Defendant(s): James S. Fellin, C.P.A.,  
 C.F.E.; Charles D. Henderson (Newtown  
 Square, PA); Chris Campos (Teaneck, NJ)

**Remarks:** Plaintiff retained Defendants to evaluate a business interruption claim. The Erie insured making the claim alleged it sustained damages of \$319,710.00 and lost information critical to its business. During his investigation, Defendant Vancko advised Plaintiff to make advance payments to its insured totaling \$245,000.00 and ultimately to pay the entire

claim which Plaintiff did, based on Defendant's report. Plaintiff then investigated a potential subrogation claim and discovered that the data that its insured claimed was destroyed still existed on a back up server and at its two other offices. Plaintiff then examined Vancko's files and alleged that Vancko's investigation was deficient and that at the time he was assigned the claim, Vancko's C.P.A. license had expired. Plaintiffs claimed damages of \$505,020.00, plus interest. Defendants contended that Erie initiated suit only after failing to recoup what it paid you from other sources, and that at all times, Defendants acted within the standard of care. The jury found Defendants were negligent and that Plaintiff was contributorily negligent. No damages were awarded.

#### Eric Kelvington v. Gardner Denver, Inc. and Gardner Denver Water Jetting Systems, Inc.

Court: Common Pleas  
 Case Number: GD 05-007636  
 Jury Verdict: For Defendants  
 Date of Verdict: 1/18/08  
 Judge: Horgos  
 Pltf's Atty: James L. Weisman; Samuel F. Reynolds;  
 Richard A. Marhefka  
 Def's Atty: Kevin C. Harkins; Jennifer S. Park;  
 William McCandless  
 Type of Case: Product Liability  
 Experts: Plaintiff(s): None  
 Defendant(s): David Summers, Ph.D.;  
 S. E. Mahmoud, Ph.D., P.E.;  
 William Kitzes; William Fisher (engineer)

**Remarks:** Plaintiff was severely injured while working on a cleaning crew at an oil refinery. The injuries occurred when the fitting on a high pressure hose assembly fractured, allowing the hose assembly to whip about and strike Plaintiff in the face. The product was sold and distributed by Defendant. Defendant contended the failure of the product was caused by erosion induced by constriction of the hose end which occurred after manufacture. The jury found the product was not in a defective condition when it left the possession of the seller.

#### Andrew J. Horlick v. Bradley Vasy

Court: Common Pleas  
 Case Number: GD 06-021774  
 Jury Verdict: For Defendant  
 Date of Verdict: 1/10/08  
 Judge: O'Brien  
 Pltf's Atty: Morton B. DeBross  
 Def's Atty: Stephen J. Summers, Jason A. Hines  
 Type of Case: Motor Vehicle  
 Experts: Plaintiff(s): Selim El-Attrache, M.D.  
 Defendant(s): Michael Weiss, M.D.

**Remarks:** Plaintiff was rear-ended by Defendant while stopped at an intersection. The impact caused Plaintiff to be thrown forward, striking his head against the driver's side window twice. Plaintiff alleged the crash caused injuries including to the neck with right-sided paresthesia and tendonitis of the right shoulder and wrists bilaterally. Plaintiff further alleged that the injuries caused persistent symptoms of pain and discomfort. Defendant's medical expert claimed Plaintiff suffered from pre-existing arthritis and that any injuries sustained in the collision would have resolved within two to three months. The jury found in favor of Defendant.