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PLJ

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OPINIONS

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**Allegheny Valley School District v.
Allegheny Valley
Education Association**

Statutory Arbitration Appeal—Scope of Review

An award of an arbitrator arising from statutory arbitration conducted pursuant to a collective bargaining agreement shall be affirmed on appeal if the arbitrator's interpretation of the facts can in any way be derived from the parties' agreement, viewed in light of its language, its context, and any other indicia of the parties' intentions.

(Robert A. Crisanti)

Martin W. Sheerer for Plaintiff.

Mary Jo Miller for Defendant.

No. GD-06-028218. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., September 21, 2007—This matter comes before the Commonwealth Court on the appeal of the Allegheny Valley School District (hereinafter "District") from this Court's Order of May 31, 2007, wherein this Court discharged the rule previously issued to Allegheny Valley Education Association (hereinafter "Association") to "Show Cause Why (the) Arbitration Award Should Not Be Vacated and Corrected to Affirm Denial of a Grievance" and this Court further ruled that the award of the arbitrator be affirmed.

I. BACKGROUND

The District and the Association are parties to a collective bargaining agreement effective from July 1, 2004 through June 30, 2009. The Association represents professional employees of the District, including teachers, for purposes of collective bargaining. As mandated by the Pennsylvania Public Employee Relations Act, the agreement contains a grievance procedure, culminating in arbitration before a neutral arbitrator selected by the parties. (Section 903 of the Public Employee Relations Act (Act of July 23, 1970, P.L. 563 as amended, 43 P.S. §1101.903)).

The particular grievance in the instant matter concerned the District's denial of the use of sick leave for a family member's medical appointment.

II. PROCEDURAL HISTORY

The Association, the exclusive collective bargaining unit representative for certain professional employees of the District filed a grievance contending that the District is obligated to permit its professional employees to use "sick days" for the purpose of other persons' medical appointments, claiming violation of the 2004-2009 Collective Bargaining Agreement (hereinafter "CBA") dated June 2, 2004. The District denied the grievance.

The parties selected an arbitrator to hear and decide the grievance. The arbitrator found that from 1974 to 1993, bargaining unit members enjoyed contractual right to use unlimited leave time, including sick leave, for family members' medical appointments. In 1993, the parties agreed to limitations for those leaves and that language continued, unchanged until the adoption of the 2004-2009 agreement. (See Award at 2).

The relevant language in the 1999-2002 agreement (extended through the 2003-2004 school year) provided: "sick leave shall be granted as provided in the School Code" (Section 1, entitled Sick Leave). The agreement continued to explain Emergency Leave Days:

[b]eginning with the 1994-1995 school year, emergency leave days will be granted each school year at the discretion of the Superintendent. Emergency leave may be used in one half (1/2) day increments. Emergency leave for family doctor's appointments with any health care professional scheduled more than twenty-four (24) hours in advance and not involving any surgical procedure or hospital admission shall be limited to twenty-one (21) periods per year. (Section 5, entitled Emergency Leave Days).

During negotiations for the current agreement, the parties renegotiated the leave provisions of the agreement based on the District's concerns with administering the emergency leave provision. Those negotiations resulted in new leave provisions, including Article VII, section 8:

[s]ick leave, personal leave, or earned compensatory time can be used for medical appointments. These must be taken in one-half day increments. The use of compensatory time for this Section will not restrict the normal use of compensatory time as described in Article VII, Section 5D.

The arbitrator found that the parties intended to preserve the right to utilize sick leave for family medical appointments in negotiating the new language. (Award at 6). The issue as defined by the arbitrator was "whether Article VII, Section 8 of the Agreement entitles bargaining unit employees to utilize sick leave to attend medical appointments with family members." (Award at 4).

The arbitrator found that the language in dispute was not clear and unambiguous and that the parties intended that bargaining unit members would continue to have a contractual right to use sick leave for family members' medical appointments.

The arbitrator made the Award an award as follows, "[t]he grievance is sustained and the District is ordered to permit employees to use sick leave to attend family members' medical appointments." (See Award, dated October 24, 2006). The District filed a timely petition to vacate the Award on November 27, 2006.

On May 17, 2007, an argument was held on District's Petition for Rule to Show Cause Why Arbitration Award Should Not be Vacated and Corrected to Affirm Denial of a Grievance.

Following argument on said petition, this Court discharged the Rule and affirmed the ruling of the arbitrator.

III. ISSUES RAISED ON APPEAL

Defendant asserts the following claims of error:

1. Should the Arbitration Award be vacated due to its failure to draw its essence from the Collective Bargaining Agreement?
2. Should the Arbitration Award be vacated since it represents an excessive exercise of authority by the arbitrator?
3. Should the Arbitration Award be vacated as contrary to law and based on errors of law or abuses of discretion as follows:
 - a. in failing to acknowledge the clear and unambiguous language of the subject clause;
 - b. in considering parole evidence to interpret the subject contract clause which is clear and unambiguous;

c. in failing to properly apply the basis tenet of contract law which prohibits going beyond the four corners of a written contract to alter the meaning of clear and unambiguous language of the contract;

d. in failing to acknowledge that the "sick days" granted to employees are as provided by law in the Pennsylvania Public School Code and are so provided to allow for those occasions when a professional employee is unable to perform duties of employment due to medical reasons relating to their own condition of health;

e. in giving inappropriate significance to evidence unrelated to the language of the collective bargaining agreement;

f. in incorrectly concluding that the subject contract language was misinterpreted or misapplied by the School District; and

g. by making an award that is contrary to the provisions of the collective bargaining agreement and alters it.

IV. DISCUSSION

The clause in question appears in Article VII, Section 8 of the CBA, entitled "Medical Appointments," and reads as follows: "Sick Leave, personal leave, or earned compensatory time can be used for medical appointments." The association asserts that employees should be allowed to use "sick days" for medical appointments of family members. The District contends that the contract language is clear and unambiguous and that sick days are restricted to use for the employee's own health purposes.

The legislature has mandated the submission of disputes arising under a collective bargaining agreement to a neutral arbitrator and the courts have consistently held that all issues surrounding these disputes, both procedural and substantive, must be submitted to an arbitrator. (Public Employee Relations Act, Section 903 (Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §1103.903). The parties may bargain the preliminary steps of the grievance procedure, but are required to provide for binding arbitration as the final step of the process. (*Id.*).

It has long been accepted that an arbitrator's award is subject to a narrow scope of review. The standard of review applicable to the case at hand is one of deference to the arbitrator's award.¹ It is also well settled by the Commonwealth Court that the scope of review when determining the soundness of a grievance arbitration award is the essence test.²

The essence test mandates a two prong analysis:

First, the court must determine whether the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can be rationally derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from the collective bargaining agreement.³

As to the first prong, it can hardly be argued that the issue raised is not contemplated by the parties in the collective bargaining agreement. The agreement specifically pro-

vides for a variety of reasons necessitating a leave of absence, crucial to the instant matter, Article VII, Section 1 entitled Sick Leave.⁴ Any dispute regarding the interpretation of the contract terms is by both the statutory and contractual definitions, within the terms of the collective bargaining agreement and subject to the grievance and arbitration procedure.

This Court was then left to consider whether the arbitrator's interpretation was rationally derived from the parties' collective bargaining agreement. The arbitrator credited the testimony of Association witnesses for the change in language concerning the right to use sick time for family members' medical appointments. The arbitrator found that the district drafted the language and that their own superintendent confirmed the position taken by the Association in response to a specific question posed at a staff meeting early in the 2004-2005 school year. The arbitrator found that in a number of instances the District had interpreted the language of Article VII Section 8 as permitting employees to use sick leave to attend medical appointments for family members. (Award at 6).

Further, the current superintendent testified that the former superintendent informed him that sick leave could be used for family members' medical appointments. (Award at 7). Based on the language of the collective bargaining agreement coupled with the testimony proffered, the arbitrator concluded, "the parties intended that Article VII, Section 8 permits employees to use sick days for purposes of attending medical appointments for family members." (Award at 7).

Pennsylvania courts have held that a reviewing court must defer to an arbitrator's interpretation of the parties' collective bargaining agreement if "the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties intention..."⁵ This standard of review does not require that the reviewing Court agree with or approve the arbitrator's award. Pursuant to this standard, this Court is powerless to vacate the arbitrator's award even if the Court would have ruled differently had it heard the case in the first instant. In light of the above recitation of the applicable law, this Court affirmed the award of the arbitrator.

V. CONCLUSION

For the above set forth reasons, this Court respectfully requests the Commonwealth Court of Pennsylvania affirm this Court's Order of May 31, 2007.

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

Date: September 21, 2007

¹ *State System of Higher Education Cheyney University v. State College University Professional Association (PSEA-NEA)*, 743 A.2d 405 (Pa. 1999).

² *State System of Higher Education v. Association of Pa. State College University Faculties*, 834 A.2d 1235, 1240 (Pa.Cmwlth. 2003).

³ *State System of Higher Education (Cheyney University)*, 743 A.2d at 413.

⁴ See also, Emergency Leave Days (Section 5), Personal Days (Section 8) and Family and Medical Leave (Section 9).

⁵ *Community College of Beaver County v. Community College of Beaver County, Society of Faculty*, 375 A.2d 1267, 1275 (1977).

Jeffrey Clement
d/b/a Parke Place Properties v.
Amsouth Bank as Trustee of the
Estate of Elias J. Hakim and Janet R. Hakim

Preliminary Objections—Breach of Contract—Negligence Action

1. Preliminary objections dismissing a breach of contract action will be granted when the contract supporting the claim was not signed by all parties.

2. Preliminary objections dismissing a negligence action will be granted when the court finds that there is no legally binding relationship between the parties.

(Robert A. Crisanti)

Bradley S. Dornish for Plaintiff.
Mark Grace for Defendant.

No. GD 06-017099. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., September 24, 2007—This matter comes before the Superior Court on the appeal of Jeffrey Clement d/b/a Parke Place Properties (hereinafter “Plaintiff”) from this Court’s Order of June 1, 2007, wherein this Court sustained the Preliminary Objections of Amsouth Bank as Trustee of the Estates of Elias J. Hakim, Jr. and Janet R. Hakim (hereinafter “Amsouth”) and dismissed Plaintiff’s Complaint with prejudice.

I. PROCEDURAL HISTORY

Plaintiff filed a Complaint in Equity against Amsouth, an Alabama Corporation, with offices in the State of Florida. At all times relevant to this matter, Amsouth was the Florida court-appointed guardian of the estate of Elias J. Hakim, Jr., an incapacitated person.

Amsouth in its capacity as said guardian was selling two (2) parcels of vacant land located in Allegheny County, Pennsylvania. Howard Hanna had listed both parcels for sale on August 23, 2005.

On or about March 9, 2006, a written offer in the amount of \$150,000, along with \$5,000 hand money was submitted by Plaintiff, through his broker, Avalar Realty, to Amsouth for both parcels of land. (Exhibit A of Amended Complaint).¹ Although Exhibit A of the Amended Complaint fails to evidence a signature by a representative of Amsouth, Plaintiff alleges that “based on the express representation of Amsouth and its agents, said offer was signed and accepted as a contract of sale.” (Amended Complaint, Para. 7). Plaintiff, however, admits that he does not possess a copy of the fully executed contract.

On or about April 28, 2006, Amsouth filed a Petition with the Circuit Court of Pinellas County to seek Court approval to enter into the contract of sale of the properties. Before such approval was granted, Amsouth received a written offer from Charles R. Schweinsberg, III, in which he agreed to purchase the properties for \$450,000.

On or about May 14, 2006, Jodi Rita Hakim, a beneficiary of the Florida Court’s “ward,” i.e. Mr. Hakim, filed her opposition to Amsouth’s April 28, 2006 Petition.

A hearing on Amsouth’s petition to enter into the contract with Plaintiff was scheduled for May 17, 2006. At said hearing, Amsouth informed the Florida Court of the Schweinsberg offer. Amsouth suggested that the hearing be continued so that both offers could be presented to the Court. The Court granted the request for continuance.

On or about June 28, 2006, Amsouth filed a Petition with the Circuit Court of Pinellas County, Florida, wherein Amsouth sought approval to enter into the contract of sale with Schweinsberg for the sale of the properties, i.e., “the Second Petition.”

On or about July 10, 2006, the Florida Court held a hearing on the Second Petition. Following argument, the Court entered an Order finding the sale of the Properties to Schweinsberg in the best interest of the “ward”/Mr. Hakim, thus approving and authorizing Amsouth to execute the contract for sale of the properties to Schweinsberg. The Court also held that the offer from Plaintiff was not in the best interest of the “ward”/Mr. Hakim, and ordered that such proposed sale be disapproved.

Amsouth then executed the contract for sale of the properties to Schweinsberg pursuant to the Florida Court Order. On or about July 20, 2006, before the sale was fully effectuated, Plaintiff filed a Praecipe for Writ of Summons in Equity, which included a Praecipe for *Lis Pendens*, against Amsouth in the Court of Common Pleas of Allegheny County, Pennsylvania at the above general docket number. The Writ was followed by a Complaint in Equity filed on August 30, 2006.

An Amended Complaint in Equity was electronically filed in the Allegheny County Prothonotary’s Office on March 8, 2007. The three- (3) count complaint alleged Breach of Contract against both Hakim (Count I) and Amsouth (Count II), as well as an alternative claim of Negligence asserted against Amsouth (Count III).

Plaintiff asserts a claim of Breach of Contract asserting it lost profits as a result of Amsouth’s improperly securing an alternative buyer for the real property while the properties were under contract with Plaintiff and the Complaint also seeks specific performance of said real estate sales contract, and in the alternative, monetary damages.

On September 15, 2007, the defendants filed a Petition to Strike the aforementioned *Lis Pendens*. On or about October 23, 2006, the parties appeared before the Motions Court of Allegheny County (the Honorable Paul F. Luty presiding). Following argument on said Petition, the *Lis Pendens* was stricken. (See Luty Order, October 23, 2006).

Defendants had filed Preliminary Objections based upon Failure to State a Cause of Action for which Relief may be Granted as to all three (3) Counts of Plaintiff’s Complaint. (May 3, 2007). Following argument on June 1, 2007, this Court entered an Order sustaining Defendant’s Preliminary Objections thereby dismissing Plaintiff’s Complaint with prejudice.

II. ISSUES RAISED ON APPEAL

Plaintiff asserts the following claims of error:

1. Did the lower court err in Granting the Defendant’s Preliminary Objections on Count I where the existence of an enforceable agreement between Plaintiff and Hakim remained a disputed question of fact?
2. Did the lower court err in Granting the Defendant’s Preliminary Objections on Count II ruling that (1) no contractual relationship existed between the Defendant, Amsouth and Hakim with respect to Amsouth’s handling of the guardianship property, and (2) that Plaintiff was not an intended third-party beneficiary of the alleged contractual relationship between Amsouth and Hakim?
3. Did the lower court err in failing to find that Amsouth, as the guardian of Hakim, owed a duty to Plaintiff to process the purchase of real estate

under its control, in conformity with the duties set forth under common law, as well as the applicable state statutes governing the handling of the guardianship of property?

III. DISCUSSION

Pursuant to Pa. R.C.P. 1028(a)(4), Preliminary Objections may be filed by any party to any pleading based on the legal insufficiency of the pleadings in the nature of a demurrer. It remains Plaintiff's contention that he submitted a written offer to Amsouth for the sale of the properties. This offer, titled Contract for the Purchase and Sale of Real Property (Exhibit A), is absent a signature by a representative of Amsouth.

The Statute of Frauds "provides in effect that no agreement for sale of real estate will be enforced unless it is in writing and signed by party to be charged." (33 P.S. §1, *citing Fannin v. Cratty*, 480 A.2d 1056, 1060 (Pa.Super. 1984)). The statute's purpose is to prevent fraud by "forbidding assertion of right in interest in real estate by one who can show no written basis for the claim."²

This Court accepts that Plaintiff made a written offer to Amsouth for the purchase of the properties. However, nowhere is it evidenced that Amsouth accepted the terms of the offer. Plaintiff presents only the naked assertion that said offer was accepted by Amsouth.

This Court cannot accept Plaintiff's facts pleaded as true when there are inconsistencies with a written instrument; "the latter will prevail and in this context a demurrer does not admit the truth of averments in a complaint conflicting with the exhibits."³ The file presents only an offer signed by Plaintiff and absent as to any signature by Amsouth or Mr. Hakim.

Further, in accordance with Florida guardianship laws, which govern the relationship between Amsouth and its "ward" Mr. Hakim, Amsouth must receive court approval from the Circuit Court of Pinellas County before it is authorized to accept an offer and execute an agreement memorializing the sale of same. (FLA. STAT. Ch. 744.441 and 744.447, Exhibit B to Preliminary Objections).

In short, we have an offer made by Plaintiff that was never accepted by Amsouth by signature as required by the Statute of Frauds. Even if we assume that said offer was signed, the agreement would still be null and void as per Florida guardianship law because the condition precedent, i.e. obtaining Florida Court's approval, was not met. Accordingly, there is no binding contract between Plaintiff and Amsouth or Plaintiff and Mr. Hakim, hence Counts I and II for Breach of Contract must fail as a matter of law.

Count III similarly fails to state a claim upon which relief can be granted. In order for a Plaintiff to recover in a cause of action in negligence, the Plaintiff must establish facts demonstrating that the Defendant owed some duty to the Plaintiff; that the Defendant breached said duty; that the Plaintiff suffered actual harm and a causal connection existing between the breach of duty and the harm.⁴

Even at this early stage in the proceedings, where Plaintiff need only allege a duty owed by Amsouth, Plaintiff has failed to plead any such duty Amsouth as the custodian for its "ward" owes to a third party e.g. the Plaintiff. Amsouth's duty, that of a fiduciary, runs solely to its "ward." "Negligence cannot be found where the law does not impose a duty."⁵

Further, "the existence of a duty is a question for the court to decide."⁶ In making this determination, this Court considered the five-factor test enunciated by the courts of this Commonwealth and considered,

(1) the relationship between the parties;

(2) the utility of the actor's conduct;

(3) the nature of the risk imposed and foreseeability of the harm incurred;

(4) the consequences of imposing a duty upon the actor; and

(5) the overall public interest in the proposed solution.⁷

After due consideration, this Court found that parties had failed to establish any legally binding relationship, contractual or otherwise. Amsouth's conduct was found by both this Court and the Florida Court to be in the best interests of the "ward." The remaining factors considered similarly fail to bolster Plaintiff's imposition of a duty on Amsouth to Plaintiff.

In summary, this Court found there was no legally binding contract between the parties. Nor does the Court discern any duty imposed upon Amsouth for the benefit of Plaintiff. This was a business transaction in which Amsouth and Plaintiff had differing interests, i.e. that of seller vs. buyer; accordingly, Amsouth's duties lay with its "ward" (the Seller), not Plaintiff (the Buyer).

IV. CONCLUSION

Given the facts of this matter as pleaded and for the aforesaid reasons, Plaintiff has not and cannot state a claim upon which relief can be granted. This Court respectfully requests the Superior Court of Pennsylvania to affirm this Court's Order of June 1, 2007.

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

Date: September 24, 2007.

¹ Howard Hanna was listing the parcels for \$108,500 for the Greentree parcel and \$101,500 for the Swallow Hill parcel.

² *Gerlock v. Gabel*, 112 A.2d 78, 82 (1955).

³ *Framlau Corp. v. Delaware Co.*, 299 A.2d 335, 338 (Pa.Super. 1972).

⁴ *See Freed v. Geisinger Med. Ctr.*, 910 A.2d 68, 72-73 (Pa.Super. 2006).

⁵ *Spienkel v. Consol. Rail Corp.*, 666 A.2d 1099, 1002 (1995).

⁶ *R.W. v. Manzek*, 888 A.2d 740, 746 (2005), *citing Emerich v. Phila. Center for Human Dev., Inc.*, 720 A.2d 1032, 1034 (1998).

⁷ *Wisniski v. Brown & Brown Ins. Co. of PA*, 906 A.2d 571, 576 (Pa.Super. 2006), *see also*, *R.W.*, 888 A.2d at 747.

Commonwealth of Pennsylvania v. Yusef Rhone

First Degree Murder—Intent to Kill—Abandonment of Conspiracy—Overbroad Search Warrant

1. Defendant's confession (in one conversation with police) that he discharged a firearm into vital part of victim's body establishes requisite and specific intent necessary for conviction of first degree murder.

2. Even if Defendant's claim (in second conversation with police) that he was co-conspirator only, not shooter, abandonment does not occur without showing either affirmative act communicating withdrawal to confederates or informing

authorities of conspiracy in time to halt its progress.

3. Abandonment not shown where independent witness testified that Defendant pursued victim to place of killing and Defendant himself admitted that he aided shooter in attempted disposal of weapon.

4. Argument that court failed to give correct abandonment jury instruction fails for two independent reasons: a) Court gave clear and concise statement of law of abandonment to jury and b) Long line of appellate cases shows that failure to instruct jury properly is not error unless counsel objects and no objection was made despite opportunity to do so.

5. Search warrant is not overbroad where it seeks to retrieve "any and all handguns, ammunition, and firearm accessories...and all articles of clothing with suspected blood stains, and indicia of ownership" for crime of murder using a handgun.

6. Search warrant is not unsupported by probable cause under totality of circumstances standard where supporting affidavit describes both the killing and an incident occurring between Defendant and third party approximately one week prior to killing wherein Defendant waived a handgun at third party in the presence of two individuals also present at killing.

(Norma Caquatto)

Bruce Beemer for the Commonwealth.

Frank Reilly for Defendant.

No. CC 200515163. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Zottola, J., September 20, 2007—The Defendant Yusef Rhone and co-defendant Joseph Rhone were convicted of murder of the first degree and criminal conspiracy. On July 24, 2006, they both were sentenced to life in prison for the Criminal Homicide and Criminal Conspiracy. The sentences were to run concurrent to each other. The Defendant filed a timely appeal.

FACTS

The underlying facts may be summarized as follows: Darrel Collins, the Defendant, and co-defendant were on Cornell Street, in the City of McKeesport, near a cemetery when they were approached by the victim, Thomas Holmes. The victim was known to both the Defendant and the co-defendant as a police informant who had informed the McKeesport Police Department previous day that their sister, Makinna Gustave, was selling illegal narcotics, which subsequently lead to her arrest that same day.

As the victim approached the three men, Yusef Rhone asked him for a cigarette. Their conversation became agitated, and the Defendant shot the victim. Collins immediately fled the scene but, prior to his exodus, he observed the Defendant and co-defendant pursuing the victim in the opposite direction.

During the first shooting, two other individuals were also in close proximity. Leonard Topley, who lived on an adjacent street; and McKeesport Police Detective Joseph Olsinski, who was in the area to meet with the victim to receive information. (T.T. p. 78)¹

Mr. Topley heard the first round of gunshots and walked to the front of his home on Madison Avenue where he was met by the victim who stated, "they shot me." (T.T. p. 88) Mr. Topley immediately entered his home and denied the victim entry. (T.T. p. 90) Once inside, Mr. Topley heard a second

round of gunshots, which appeared to be growing closer in proximity. (T.T. p. 95). Almost instantly, after the second series of shots occurred, Mr. Topley heard Detective Olsinski outside identifying himself as a police officer. (T.T. p. 101). Detective Olsinski immediately checked the victim's vital signs and determined that he was deceased.

Two years later, in 2005, The Defendant was charged with the murder of Thomas Holmes. The Defendant, Yusef Rhone, was read his rights, provided with a written form describing each, and signed the same. (T.T. p. 442) Two conversations occurred subsequent to this, first, the Defendant stated that he witnessed the shooting by the co-defendant, Joseph Rhone, but did not in any way participate in the shooting. In the second taped interview, the Defendant stated that he had in fact fired a .38 at the victim. (T.T. pp. 451-74).

Pursuant to Pa.R.A.P. 1925(b), the Defendant filed the following allegations of error:

1. The verdict on the charge of Murder in the First Degree was against the weight of the evidence in that the defendant's statements, which were not controverted by the Commonwealth's evidence, established that there was no intent to kill the victim;
2. The verdict on the charge of Criminal Conspiracy was against the weight of the evidence in that the Defendant's statements, which were not controverted by the Commonwealth's evidence, established that he terminated his participation prior to the to the co-defendant's firing of the fatal shots;
3. The verdict on the charge of Murder in the First Degree was not supported by sufficient evidence in that the defendant's statements, which were not controverted by the Commonwealth's evidence, established that there was no intent to kill the victim;
4. The verdict on the charge of Criminal Conspiracy was not supported by sufficient evidence in that the defendant's statements, which were not controverted by the Commonwealth's evidence, established that he terminated his participation in the criminal activity prior to the co-defendant's firing the fatal shots.
5. The charge to the jury was in error on that it did not clearly instruct the jury regarding the defense of abandonment of a conspiracy;
6. The search warrant which authorized the search of the Defendant's residence is overbroad;
7. The search warrant which authorized the search of the defendant's residence was not supported by probable cause;
8. Trial counsel was ineffective for failing to file and argue a motion to suppress physical evidence which was discovered as a result of legally a legally defective search warrant;
9. Defense lacked the mental capacity to tender a valid waiver of his *Miranda* rights
10. Trial counsel was ineffective for failing to file and argue a motion to suppress defendant's statements due to, his lack of mental capacity to tender a valid waiver of his *Miranda* warnings; and
11. Trial counsel was ineffective for failure to present character witnesses on behalf of the defendant.

The Defendant's first and third claims of error are sufficiency and weight of evidence claims that state that the Commonwealth did not establish intent sufficient for conviction of Murder in the first degree. These claims correctly assert that in order for the commission of murder in the first degree to occur, specific intent to commit the act is required. 18 Pa. C.S.A. §2502. Intentional killings occur by any kind of willful, deliberate, and premeditated murders. In fact, "the principle that first degree murder is distinguished from all other degrees of murder by the existence of a specific premeditated intent to kill harbored by the accused." *Commonwealth v. Wayne*, 553 Pa. 614, 630 (Pa. 1998). However, use of a deadly instrument on a vital part of the body is sufficient to establish the specific intent to kill required for conviction of murder in the first-degree. *Commonwealth v. Sepulveda*, 579 Pa. 217 (Pa. 2004); *Commonwealth v. Collins*, 702 A.2d 540, 549 Pa. 593 (Pa. 1997). The Defendant, in his confession to police, admitted that he had a .38 caliber revolver, which he fired at the victim. Several .38 bullets were retrieved from the victim's body, and the autopsy revealed that at least one of these shots would have been fatal. (T.T. p. 381). The Defendant, by his own admissions and actions, clearly stated that he had the requisite intent to commit murder in the first degree by discharging a firearm into a vital part of the victim's body. Furthermore, the verdict of first-degree murder is not so contrary to the evidence to shock ones sense of justice and justify a claim that it is against the weight of the evidence. See *Commonwealth v. Gibson*, 553 Pa. 648, 664 (Pa. 1998).

The Defendant's second and fourth claims of error are both sufficiency and weight of evidence claims stating that the evidence showed that he had abandoned the conspiracy prior to co-defendant Joseph Rhone firing the fatal shots. The Pennsylvania crimes code defines criminal conspiracy as an agreement between parties where one or more will engage in conduct which would constitute a crime or where one or more of the parties will aid in the commission of such a crime where both parties have the requisite intent for the overriding crime. 18 Pa.C.S. §903 (2006). As stated *supra* the intent to commit the overriding offense, Murder in the first degree, may be inferred by the Defendant's use of a deadly weapon on a vital part of the body. Thus, the intent for the overriding offense is present. The duration of criminal conspiracies do vary and may be abandoned.

Abandonment of a conspiracy occurs "only if and when he advises those with him he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein." 18 Pa.C.S.A. 903(g)(3). Abandonment essentially requires either some affirmative act bringing home the fact of his withdrawal to the knowledge of his confederates or inform the authorities of the existence of the conspiracy in time to halt its progress. *Commonwealth v. Lloyd*, 2005 Pa.Super. 236, P9 (Pa.Super. Ct. 2005). Though Yusef did claim that he exited the cemetery prior to the shots being fired on Mr. Topley's porch, Mr. Collins testified that the Defendant pursued the victim to the scene of his final execution. During the Defendant's tape-recorded statement, he stated that after the murder he gave the .38 to the co-defendant for disposal. Thereafter, he received the weapon used by the co-defendant so that he could "get rid of it." It is clear from these admissions that he had not abandoned their criminal conspiracy either during commission of the murder, or thereafter by aiding in the disposal of the weapons, (T.T. pp. 474-476).

The fifth claim of error asserted by the Defendant is that the trial court erred in its instruction as to abandonment of conspiracy. The trial court did, in fact, instruct the jury as to

abandonment of conspiracy. The court stated that once a conspiracy is created, a conspirator will not be liable for the acts of another if, before the commission of the crime, he:

...either stops his or her own efforts to promote or facilitate the commission of the crime, and either whole deprives his or her own previous efforts in the effectiveness of the commission of the crime or gives timely warning to law enforcement authorities or otherwise makes proper efforts to prevent the commission of the crime. (T.T. pp. 643-644).

This clear and concise statement clearly reflects the defense of abandonment of conspiracy as well as renunciation. 18 Pa.C.S.A. 903. Furthermore, failure to instruct the jury in this manner would not constitute error. As stated in Pa. R. Crim. P. 1119(b):

No portions of the charge nor omissions there from may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

There is nothing in the trial record to show that at any point objection was raised, though the defense was given an opportunity to do so. (T.T. p. 656) This rule has been upheld both the Superior and Supreme Courts of Pennsylvania. This rule has been upheld as recently in, *Commonwealth v. Rivera*, 565 Pa. 289 (Pa. 2001).

The Defendant also asserts error in relation to the search warrants executed to search his residence. Two claims are expounded, first, that the warrant was overbroad and secondly that the warrant was not supported by probable cause. Citizens are protected from overbroad warrants both by the fourth amendment of the United States Constitution its prohibition on generalized searches and seizures and Article I Section 8 of the Pennsylvania Constitution. Search warrants are overbroad when they authorize seizure of items not justified by probable cause. *Commonwealth v. Santner*, 308 Pa.Super. 67 (Pa.Super. Ct. 1982).

Overbroad search warrants occur where the investigating officers are given free reign to search for items unrelated to the crime. The search warrant in the instant case identifies the items to be retrieved from the residence as "any and all handguns, ammunition, and firearm accessories. Any and all articles of clothing with suspected blood stains, and indicia of ownership." The warrant was issued related to two incidents, both involving handguns and one involving a murder. Thus, seeking handguns, ammunition, blood stained clothing and indicia of ownership all directly relate to the charges. The Defendant were not subjected to an unconstitutionally overbroad search because the warrant seeks only to introduce evidence of the criminal activities which was supported by the affidavit of probable cause. *Commonwealth v. Coleman*, 574 Pa. 261, 270 (Pa. 2003).

The validity of the warrant is also challenged on the grounds that it was not sufficiently supported by probable cause. The standard for determining whether a warrant is supported by probable cause is the totality of the circumstances analysis. The issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* Not only must probable cause be asserted in order for a valid warrant as well as a description of where such knowledge has been derived. *Commonwealth v. Morris*, 402 A.2d 702, 265 Pa.Super. 203, (Pa.Super. 1981)

In order to determine whether the search warrant was supported by probable cause both the language of the search warrant and the affidavit of probable cause must be considered. The affidavit alleges that, approximately one week earlier, Devon King witnessed three individuals, the two defendants and Collins, walking near King's residence. During this incident the Defendant waived a chrome handgun menacingly at King while shouting threatening statements. Furthermore, Collins stated that he had been to the residence of both defendants and had witnessed a small, silver handgun at the home in the possession of the Defendant. The affidavit also states that the Defendant's sister was arrested on drug charges on information provided by Holmes. The affidavit of probable cause relies on evidence found at the scene of the murder of Mr. Holmes, information learned by the police officers involved in the case or through a confidential informant. The affidavit pertains both to the incident involving King during which the Defendant allegedly waived a chrome handgun at him as well as the murder of Holmes. The affidavit of probable cause relied both on the investigations of the officers, the physical evidence gathered in and around the scene of the Holmes murder, as well as eyewitness statements that the Defendant had threatened him with a weapon hours earlier. As such, the issuing authority clearly had sufficient probable cause to believe it was probable that evidence relating to either incident would be found at the defendants' home.

In relation to the Defendant's statement to police, error is asserted on the grounds that he lacked the mental capacity to waive his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). All that is necessary for an individual to waive their *Miranda* rights is that they be reasonably conveyed to him. *Commonwealth v. Miller*, 664 A.2d 1310, (1995). In *Commonwealth v. Fogan* the Supreme Court of Pennsylvania determined that a seventeen-year-old juvenile with a lower than average I.Q., who was illegally arrested and detained, and only informed of his *Miranda* rights after seven hours without rest did knowingly and intelligently waive his right to remain silent and his right to an attorney. 449 Pa. 552, 559 (Pa. 1972).

In the instant matter there has been no testimony or evidence that the Defendant lacked mental capacity to waive his *Miranda* rights. As to the voluntariness of his statements, the record shows that the Defendant was read his rights, given a written copy of the same, initialed and signed the form to show that he understood them, and finally assented to making a statement. (T.T. pp. 451-474). Furthermore, the interviewing officer testified that he attempted to determine whether the Defendant appeared to be under the influence of drugs or alcohol and was clear-headed to which the officer responded, "...he did not" (T.T. p. 448). Therefore, no evidence exists on the record to support the Defendant's claim that he lacked mental capacity to waive his *Miranda* rights.

In three of the Defendant's claims, the allegations concern the issue of ineffective assistance of counsel. The court has held, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." *Commonwealth v. Grant*, 572 Pa. 48 (Pa. 2002). Thus, claims of ineffective assistance of counsel is more appropriately via the Post Conviction Relief Act. 42 Pa.C.S. §9541.

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

BY THE COURT:
/s/Zottola, J.

¹ T.T.: Denotes Trial Transcript dated March 2-5, 2006.

Commonwealth of Pennsylvania v. Joseph Rhone

Abandonment of Conspiracy—Confession—Jury Instruction—Probable Cause—Search Warrant

1. The Defendant, who had prior experience with *Miranda* warnings, in this case received a written copy of his *Miranda* rights and was read his rights before he signed and initialed a waiver, following which he made a voluntary confession.

2. The authority that issued the search warrant had sufficient probable cause to issue the search warrant of the Defendant's home, after considering the language of the search warrant and the affidavit of probable cause.

3. The warrant was not overbroad since it sought only evidence of criminal activities which were supported by the affidavit of probable cause.

4. The evidence proffered by the Commonwealth was sufficient for the jury to find the Defendant guilty.

5. The trial court gave a clear and concise jury instruction on the defense of abandonment of conspiracy as well as on renunciation.

6. There was no evidence that the Defendant abandoned the conspiracy.

(Carol Sikov Gross)

Bruce Beemer for the Commonwealth.
William Brennan for Defendant.

No. CC200301484. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., September 20, 2007—The Defendant Joseph Rhone and co-defendant Yusef Rhone were convicted of murder of the first degree and criminal conspiracy. On July 24, 2006, they both were sentenced to life in prison for Criminal Homicide and Criminal Conspiracy. The sentences were to run concurrent to each other. The Defendant filed a timely appeal.

The underlying facts may be surmised as follows: Darrel Collins, the Defendant, and co-defendant were on Cornell Street, in the City of McKeesport, near a cemetery when they were approached by the victim, Thomas Holmes. The victim was known to both the Defendant and the co-defendant as a police informant who had informed the McKeesport Police Department previous day that their sister, Makimna Gustave, was selling illegal narcotics, which subsequently lead to her arrest that same day.

As the victim approached the three men, the co-defendant, Yusef Rhone asked him for a cigarette. Their conversation became agitated, and the co-defendant shot the victim. Collins immediately fled the scene but, prior to his exodus, he observed the Defendant and co-defendant pursuing the victim in the opposite direction.

During the first shooting, two other individuals were also in close proximity. Leonard Topley, who lived on an adjacent street; and McKeesport Police Detective Joseph Olsinski, who was in the area to meet with the victim to receive information. (T.T. p. 78)¹

Mr. Topley heard the first round of gunshots and walked to the front of his home on Madison Avenue where he was met by the victim who stated, "they shot me." (T.T. p. 88) Mr. Topley immediately entered his home and denied the victim

entry. (T.T. p. 90) Once inside, Mr. Topley heard a second round of gunshots, which appeared to be growing closer in proximity. (T.T. p. 95). Almost instantly, after the second series of shots occurred, Mr. Topley heard Detective Olsinski outside identifying himself as a police officer. (T.T. p. 101). Detective Olsinski immediately checked the victim's vital signs and determined that he was deceased.

The Defendant, Joseph Rhone, was the first to be arrested for the shooting. When interviewed, the Defendant admitted to shooting the victim at the cemetery, pursuing him, and shooting him again on Madison Avenue. This story was first given orally, and then was subsequently tape-recorded, as well as, portions of it were handwritten by the Defendant. (T.T. p. 231)

Pursuant to Pa.R.A.P. 1925(b), the Defendant filed the following allegations of error:

- a. The trial court erred by denying Defendant's motion to suppress statements made by the Defendant when the statements were not knowingly, intelligently and voluntarily made;
- b. The trial court erred in failing to suppress the affidavit of probable cause in that said affidavit was not supported by probable cause;
- c. The trial court erred in denying Defendant's motion for judgment of acquittal pursuant to Pa.R.Crim.P. 606 in that the evidence presented by the commonwealth was insufficient to sustain its burden of proving defendant guilty beyond a reasonable doubt of the charged offenses for which he was convicted;
- d. The trial court erred in denying Defendant's motion Challenging the Weight of the Evidence pursuant to Pa.R.Crim.P. 607 where Defendant's conviction was so contrary to the evidence presented so as to shock one's sense of justice;
- e. The Trial court erred in failing to properly instruct the jury regarding the defense of abandonment of conspiracy; and
- f. The search warrant, which authorized the search of the Defendant's residence, was over-broad.

The first claim of error asserts that the trial court erred when they failed to suppress Defendant's statements to the police, because the statements were not made knowingly, intelligently or voluntarily. Defendant was interviewed twice and each time he was advised of his *Miranda* rights. During the second interview the Defendant had these rights read to him, received a form on which these rights were written, initialed each individually and signed and dated the waiver. Furthermore, it did not appear to the officers that the Defendant was "under the influence of alcohol, under the influence of narcotics... or laboring under some mental deficiency." (S.T. p. 12).² The officer also stated that at no point was the Defendant coerced or offered anything for his confession. (S.T. p. 15) It was only after the Defendant was informed of his rights, both verbally and in writing, that he confessed to the murder.

The standard of review applied by courts to evaluate the voluntariness of statements made to the police is governed by *Commonwealth v. Miller*. All that is necessary for an individual to waive their *Miranda* rights is that they be reasonably conveyed to him. 541 Pa. 531, 556 (Pa. 1995). It is clear both from the motion to suppress as well as the trial record that the Defendant received a written copy of his rights, was read his rights, and signed and initialed the waiver.

Furthermore, the Defendant's prior experience with *Miranda* warnings suggests that the current waiver was knowing and voluntary. *Id.* Thus, the Defendant's previous waiver of his *Miranda* rights would suggest that he voluntarily waived his *Miranda* rights.

The Defendant also claims that the search warrant was overbroad and the affidavit of probable cause was unsupported. The appropriate standard for determining whether there is sufficient probable cause for a search warrant is the totality of the circumstances test established in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983), and adopted in *Commonwealth v. Gray*, 509 Pa. 476, 481-88, 503 A.2d 921, 924-27 (1985). This standard has been upheld as recently as *Commonwealth v. Sanchez*, 589 Pa. 43, 53-54 (Pa. 2006). A search warrant must specifically describe the property or things to be seized, the search warrant cannot be used as a general investigatory tool. *Commonwealth v. Coleman*, 574 Pa. 261, 270 (Pa. 2003). Similarly, a request in the search warrant may not be overbroad because an overbroad warrant authorizes a general search and seizure, clearly prohibited by both the Pennsylvania and United States Constitutions. The task of the issuing authority of a warrant is to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*

In order to determine whether the search warrant was supported by probable cause both the language of the search warrant and the affidavit of probable cause must be considered. The affidavit alleges that, approximately one week earlier, Devon King witnessed three individuals, the two defendants and Collins, walking near King's residence. During this incident the Defendant waived a chrome handgun menacingly at King while shouting threatening statements. Furthermore, Collins stated that he had been to the residence of both defendants and had witnessed a small, silver handgun at the home in the possession of the Defendant. The affidavit also states that the Defendant's sister was arrested on drug charges on information provided by Holmes. The affidavit of probable cause relies on evidence found at the scene of the murder of Mr. Holmes, information learned by the police officers involved in the case or through a confidential informant. (Aff. Probable Cause, 1-2, January 14, 2003). The affidavit pertains both to the incident involving King during which the Defendant allegedly waived a chrome handgun at him as well as the murder of Holmes. The affidavit of probable cause relied both on the investigations of the officers, the physical evidence gathered in and around the scene of the Holmes murder, as well as eyewitness statements that the Defendant had threatened him with a weapon hours earlier. As such, the issuing authority clearly had sufficient probable cause to believe it was probable that evidence relating to either incident would be found at the defendants home.

Similarly, the search warrant was not overbroad. Overbroad search warrants occur where the investigating officers are given free reign to search for items unrelated to the crime. The search warrant identifies the items to be retrieved from the residence as "any and all handguns, ammunition, and firearm accessories. Any and all articles of clothing with suspected blood stains, and indicia of ownership." The warrant was issued related to two incidents, both involving handguns and one involving a murder. Thus, seeking handguns, ammunition, blood stained clothing and indi-

cia of ownership all directly relate to the charges. The defendants were not subjected to an unconstitutionally overbroad because the warrant seeks only to introduce evidence of the criminal activities which was supported by the affidavit of probable cause. *Commonwealth v. Rivera*, 2003 Pa.Super. 29, (Pa.Super. Ct. 2003).

The Defendant also raises claims challenging the sufficiency of evidence and the weight of the evidence. When considering whether the evidence proffered at a criminal trial was sufficient to support the guilty verdict, courts view the evidence and all reasonable inferences in the light most favorable to the Commonwealth to determine whether every element of the crime has been established beyond a reasonable doubt. *Commonwealth v. Wright*, 2003 Pa.Super. 344, P20 (Pa.Super. Ct. 2003). The evidence proffered at trial established through their witness that the co-defendant shot the victim first at the cemetery, that both he and the Defendant pursued the victim where the Defendant fired the final shots at the head of the victim. The evidence proffered by the Commonwealth was clearly sufficient for the jury to find the Defendant guilty.

Regarding the issue of the weight of the evidence, it is clear that the verdict was not so contrary to the evidence as shock one's sense of justice pursuant to *Commonwealth v. Gibson*, 553 Pa. 648, 664 (Pa. 1998).

The next claim of error asserted by the Defendant is that the trial court erred in its instruction as to abandonment of conspiracy. The trial court did, in fact, instruct the jury as to abandonment of conspiracy. The court stated that once a conspiracy is created, a conspirator will not be liable for the acts of another if, before the commission of the crime, he:

...either stops his or her own efforts to promote or facilitate the commission of the crime, and either whole deprives his or her own previous efforts in the effectiveness of the commission of the crime or gives timely warning to law enforcement authorities or otherwise makes proper efforts to prevent the commission of the crime. (T.T. pp. 643-644).

This clear and concise statement reflects the defense of abandonment of conspiracy as well as renunciation. 18 Pa.C.S.A. 903. Furthermore, failure to instruct the jury in this manner would not constitute error. As stated in Pa. R. Crim. P. 1119(b):

No portions of the charge nor omissions there from may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

There is nothing in the trial record to show that at any point objection was raised, though the defense was given an opportunity to do so. (T.T. p. 656) This rule has been upheld as recently in *Commonwealth v. Coleman*, 574 Pa. 261, 270 (Pa. 2003).

Abandonment of a conspiracy occurs "only if and when he advises those with him he conspired of his abandonment or he informs the law enforcement authorizes of the existence of the conspiracy and of his participation therein. 18 Pa.C.S. §903(g)(3). Abandonment essentially requires either some affirmative act bringing home the fact of his withdrawal to the knowledge of his confederates or inform the authorities of the existence of the conspiracy in time to halt its progress. *Commonwealth v. Lloyd*, 2005 Pa.Super. 236, P9 (Pa.Super. Ct. 2005). There is no

evidence in the record that the Defendant at any point abandoned the conspiracy. He followed the co-defendant in pursuit of the victim and admitted to firing the final fatal shots. Furthermore, he sought to hide the murder weapon by giving it to his co-conspirator, thus continuing the conspiracy even after the murder had occurred. Therefore, there is no evidence that the conspiracy had been abandoned.

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

BY THE COURT:

/s/Zottola, J.

¹ T.T.: Denotes Trial Transcript dated March 2-5, 2006.

² S.T.: Denotes Suppression Transcript dated April, 22, 2005.

Commonwealth of Pennsylvania v. Jeremiah Rico Davidson

Sentencing—Clerical Error—Plea Agreement

1. Due to clerical error, record reflects that sentence of incarceration and probation were imposed at the same count.

2. Review of transcript of proceedings at Defendant's sentencing proceeding (pursuant to plea agreement) verifies that Court's intention was to sentence Defendant to two to four years at each information, to run concurrently, followed by probation for seven years at each information, also to run concurrently. This sentence was clearly legal.

3. In resentencing Defendant to correct this clerical error, Defendant received the same sentence, which is wholly consistent with his plea bargain.

(Margaret P. Joy)

Michael Streily for the Commonwealth.

Charles R. Pass, III for Defendant.

Nos. CC 200017780, 200100718, 200100719, 200102139, 200106695. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Cashman, J., November 14, 2007—The appellant, Jeremiah Rico Davidson, (hereinafter referred to as "Davidson"), has appealed from the judgment of sentence imposed upon him on March 15, 2007. Davidson has filed a concise statement of matters complained of on appeal. This statement contains a laundry list of assertions of error. These assertions will be addressed following a brief recitation of the facts in this matter.

Davidson entered a plea of guilty pursuant to a plea agreement on September 4, 2002. The agreement, which was recited in the presence of Davidson, called for him to receive a two to four year sentence of incarceration at each criminal information pending against him. Davidson was also to receive a concurrent period of probation to be set by the Court. Davidson, in fact, received a two to four year sentence of incarceration, to run concurrently at all five criminal informations pending against him. Davidson was also advised that he was to receive a seven-year period of probation on each of those informations, to run concurrently. Restitution orders were also entered at each criminal infor-

mation. Davidson filed a pro se motion for modification of his sentence on September 20, 2002. This motion was denied on September 27, 2002. A counseled petition to reconsider sentence was filed on October 4, 2002, and denied on October 8, 2002.

Davidson next filed a pro se petition for credit for imprisonment while in custody prior to sentence on January 23, 2003. Davidson was otherwise silent concerning the sentence imposed upon him until February of 2006, in when a counseled motion to transfer probation was filed. This motion to transfer probation was granted on February 14, 2006. Davidson then filed a pro se motion for post-conviction relief on August 1, 2006, nearly four years after he was sentenced pursuant to the plea agreement that he had negotiated. Attorney Charles R. Pass, III, (hereinafter referred to as "Pass"), was appointed to represent petitioner, and filed an amended petition for post-conviction relief on October 2, 2006. The Commonwealth filed an answer to the petition for post-conviction relief in which it conceded that the sentence imposed upon Davidson appeared to be illegal and would mandate a resentencing. The Commonwealth further noted that the Court could achieve substantially the same sentence by simply placing the probationary sentence at any of the various counts at the various informations to which Davidson had plead guilty. It appears that by clerical happenstance, the sentence of probation was imposed at the same count as the sentence of incarceration, thereby causing a sentence as to the first count at each information that exceeded the lawful statutory maximum.

A resentencing proceeding took place on March 15, 2007. At that time, Davidson received the very sentence that he had received pursuant to the plea agreement. He thus again received sentences of two to four years of incarceration at each information. He likewise received concurrent periods of probation of seven years at each count. Davidson thus received the exact sentence that he had originally received, with the only difference being that the period of probation was placed at a count other than count one. Davidson, of course, filed a post-sentence motion asking that the sentence be reconsidered. This motion was denied by Order dated April 24, 2007, resulting in the instant appeal.

Davidson claims that the sentence imposed upon him on March 15, 2007, exceeds the statutory/lawful maximum that may be imposed for those offenses or violate his rights to due process or place him twice in jeopardy. Davidson also claims that the probation detainers constitute proceedings in a tribunal without jurisdiction to issue those detainers. Davidson likewise claims that the Court erred and/or abused its discretion in denying him release, claiming that the sentences of probation imposed are beyond the statutory maximums that he could face. Davidson likewise claims that the sentence that he received at CC 200017780 is illegal as they purportedly merge or are in violation of the double jeopardy clause of the Pennsylvania and United States Constitutions. Davidson next claims that the sentences at 200100718 are illegal as they involve separate sentences on inchoate crimes. Davidson likewise claims that the sentence imposed at 200100719 is illegal as involving separate sentences on inchoate crimes. Davidson next claims that his sentence was illegal and in violation of the double jeopardy clauses where the Court failed to award all credit to which he was entitled. Finally, Davidson claims that his rights to due process of law and against being placed twice in jeopardy have been violated by a sentence that is purportedly vindictive as imposing a longer sentence based upon his successful pursuit of post-conviction relief.

Davidson misses the point that he received the precise sentence that this Court always intended to impose upon him. The fact that a clerical error caused the records to reflect that the sentence of incarceration and probation were imposed at the same count is obviously at odds with the transcript of the sentencing proceeding of September 4, 2002. The transcript reflects the Court's intention to sentence Davidson to a period of incarceration of not less than two nor more than four years at each information to run concurrently, to be followed by a period of probation of seven years, again to run concurrently. (Notes of testimony of September 4, 2002, at pages 6-7). The sentence originally intended was clearly a legal sentence, based on the various charges that Davidson faced. As noted at the resentencing on March 15, 2007, the available time was there, it was simply put at the wrong count. As was noted at that time, Davidson's argument was essentially form over substance. (Notes of testimony of March 15, 2007, at page 3). There is nothing vindictive nor is there anything illegal, in the resentencing that occurred in this matter. Davidson essentially received the benefit of the bargain that he had originally struck with the Commonwealth—a sentence of incarceration of two to four years to be followed by a period of probation to be set by the Court. The Court always intended to impose a period of seven years probation in light of the substantial amount of restitution that was ordered. The resentencing simply sought to correct the clerical error that had placed that period of probation at the same count as the sentence of incarceration when the records were initially prepared. As noted, the sentencing transcript does not support the notion of an illegal sentence. Rather, the record supports an attempt to impose a valid sentence that was more than fair to Davidson, given the volume of crimes that he had committed. Davidson received concurrent time on five separate criminal schemes that he had committed. The length of probation was left up to the Court, and the sentence of probation imposed following the period of incarceration is clearly not illegal.

For the within reasons, Davidson's judgment of sentence should be upheld by the Court.

BY THE COURT:
/s/Cashman, J.

Dated: November 14, 2007