

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.

ALLEGHENY JURY VERDICT REPORTER

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

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

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

CAPSULE SUMMARIES

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

BINDERS

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**FIA Card Services, N.A. v.
Jeffrey M. Kirasic**

Consumer Credit Transactions—Pleading Requirements

1. Amended Complaint seeking credit card charges is proper when all statements supporting the amounts claimed in the Complaint are attached thereto.

2. Even though credit agreement itself (containing information about late fees, over limit charges, etc.) is not attached to Complaint, where those items are not sought in the suit, failure to attach them is not basis to dismiss Complaint.

(Margaret P. Joy)

Sarah E. Ehasz for Plaintiff.

Thomas J. Dausch for Defendant.

No. AR 06-009360. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION

Wettick, J., November 7, 2007—The preliminary objections of defendant questioning the sufficiency of plaintiff's second amended complaint to recover credit card balances are the subject of this Opinion and Order of Court.

Card Services' original complaint alleges that defendant was issued an open-end credit account that was created through a written contract accepted by defendant when he signed and utilized the credit card account.¹ Card Services attached to the complaint a five-page writing which it identified as a true and correct copy of the credit card agreement governing this account. The complaint alleges that defendant received monthly statements which accurately stated all purchases and payments made during the month, interest charges imposed on the unpaid balance, and the amount due. As of November 9, 2006, the remaining balance is \$22,061.86.

Defendant filed preliminary objections based on my ruling in *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2005). In that case, the credit card companies filed complaints very similar to the original complaint filed in this case. I ruled that the complaints failed to comply with the requirements of Pa. R.C.P. No. 1019, that the plaintiff set forth the material facts upon which the cause of action is based, and that the writings be attached when a claim is based on a writing. I stated that whenever a claim involves one period of time in which the initial terms and conditions of the credit card agreement apply and later periods of time in which amended terms and conditions apply, the complaint must attach both the original and amended terms and conditions with the dates for which they were applicable.

I also stated that the complaint cannot seek recovery of a specific amount of money that is allegedly due without including any documentation or allegations supporting recovery of this amount. Under Rule 1019, a complaint must include the amounts of the charges that are part of the claim, the dates of the charges, credits for payments, dates and amounts of interest charges, and dates and amounts of other charges. The complaint must contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations within the complaint.

I sustained defendants' preliminary objections to the original complaint filed in the present case, because it did not satisfy the pleading requirements described in *Worldwide Asset Purchasing*.

In the present case, Card Services filed an amended com-

plaint which attached the monthly statements upon which it based its claim for \$22,061.86 but did not attach any writings showing the terms and conditions of the amended credit card agreements applicable to defendant during the relevant times. Consequently, I sustained defendant's preliminary objections to the amended complaint with leave to amend.

Plaintiff filed a second amended complaint which stated at paragraph 11 that plaintiff is unable to attach a copy of the applicable writings governing interest rates and fees. Defendant filed essentially the same preliminary objections to the second amended complaint that he had filed to the original and first amended complaint; he sought dismissal of the complaint because plaintiff was incapable of providing the writings upon which plaintiff bases its claims.

However, plaintiff's second complaint was not a carbon copy of its prior complaints. Instead, plaintiff sought payment only for the amount of the cash advances and purchases identified in the invoices attached to the complaint, less payments defendant made to plaintiff as set forth in the invoice.

Plaintiff has attached to its second amended complaint the November 2004 statement showing a balance of \$0.00 for the beginning of the billing cycle. Plaintiff has also attached to this complaint the statements from November 2004 through August 2006. Plaintiff alleges that the total amount of the cash advances or purchases shown on these statements, less the total amount of payments shown on these statements, is \$16,251.99. In this lawsuit, this is the only money plaintiff seeks to recover.

In *Worldwide Asset Purchasing*, I stated that under the pleading requirements of Pa. R.C.P. No. 1019, the complaint must contain sufficient documents and allegations to permit a defendant to calculate the total amount of damages that are sought by reading the documents attached to the complaint and the allegations within the complaint. Plaintiff's second amended complaint satisfies this requirement.

While plaintiff cannot produce the writings that govern defendant's obligations during the period in question, it is not disputed that the credit card that is the subject of this litigation was issued to defendant in 1990. A fact-finder may assume that any writing governing defendant's obligations to plaintiff from 1990 to August 2006 would include the obligation to pay the cash advances and the purchases shown on the invoices. Writings that plaintiff cannot produce would be relevant only to establish the finance charges, late fees, over limit fees, and the like that plaintiff may have been permitted to impose. However, the claim raised in the second amended complaint does not include any of these items. Consequently, the writings that plaintiff attached to the second amended complaint support the claim that plaintiff is raising.

In summary, in consumer credit transactions, the Pennsylvania Rules of Civil Procedure require a credit cardholder seeking to recover money allegedly due to attach to the complaint the writings which support the claim which the credit cardholder is making. Invoices showing cash advances or purchases support a claim for payment of these items.

ORDER OF COURT

On this 7th day of November, 2007, it is hereby ORDERED that defendant's preliminary objections to plaintiff's second amended complaint are overruled.

BY THE COURT:
/s/Wettick, A.J.

¹ Plaintiff is FIA Card Services, N.A., formerly known as MBNA America Bank, N.A.

**Cavalla, Inc. v.
Tri-State Plastics, Inc.**

Motion to Mold Verdict—Prejudgment Interest on Counterclaim Award

1. Jury awarded Plaintiff \$9,000 on contract claims involving bottling equipment and awarded the Defendant \$301,621 on counterclaim for primarily lost profits.

2. The award of interest on the lost profits was a matter of the Court's discretion and not a matter of right.

3. Following guidelines in *Frank B. Bozzo, Inc. v. Electric Weld Division*, 498 A.2d 978 (Pa.Super. 1991) and treatise cited therein, Court awarded prejudgment interest on the entire counterclaim award where the essence of the contract was for the modification of bottling equipment by Plaintiff so Defendant could timely supply seasonal product to customer and the Court found Plaintiff's Motion for Post-Trial Relief to have no merit.

4. Calculations for prejudgment interest on the entire net verdict was from the date Plaintiff left the job to the date of the verdict minus the days related to the continuance requested by Defendant.

(I. M. Lundberg)

Meghan E. Jones-Rolla for Cavalla, Inc.
Austin P. Henry for Tri-State Plastics, Inc.

No. AR 04-000714. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., December 14, 2007—Both parties have filed Post-Verdict Motions after a jury verdict in the captioned action, which is based on a contract between the parties involving certain bottling equipment. This Memorandum will deal primarily with one aspect of those Motions, Defendant's Motion to Mold Verdict to include prejudgment interest on the award rendered on its counterclaim. The Court finds Plaintiff's Motion for Post-Trial Relief to have no merit for reasons previously discussed on the record during the trial.¹

Defendant was the real victor in the action, receiving a jury award of \$301,621.00 (consisting mostly of lost profits) on its counterclaims, versus the award to Plaintiff of \$9,000.00 on its claim for payment under the contract for certain items. There was ample evidence to support the jury's verdict. The issue now is whether Defendant is entitled to prejudgment interest on the entire counterclaim award or on only a small portion of it. Ancillary to this is the question of whether prejudgment interest here is a matter of right (as Defendant contends) or of the Court's discretion (Plaintiff's position).

Plaintiff contends that the analysis to be made under Pennsylvania law involves whether or not the damages suffered by Defendants were ascertainable, so that Plaintiff could have tendered that amount in satisfaction of the counterclaim. Plaintiff cites *Spang & Co. v. USX Corporation*, 599 A.2d 978 (Pa.Super. 1991) and *Frank B. Bozzo, Inc. v. Electric Weld Division*, 498 A.2d 895 (Pa.Super. 1985), for the proposition that the award of prejudgment interest on lost profits is within the Court's discretion. Plaintiff concedes that Defendant is entitled to interest of 6% on its out-of-pocket losses, said to be \$11,968 of the total award; however, Plaintiff also contends that the period for which Defendant claims interest includes 192 "excludable days," being the period that the trial was continued at Defendant's request

(November 14, 2006 to May 24, 2007).

The Court agrees with Plaintiff that the award of interest on the lost profits of \$289,653.00 is a matter of the Court's discretion and not a matter of right. However, the Court concludes that it would be an abuse of discretion not to award Defendant interest on the entire award. *Bozzo, supra*, sets forth the proper analysis: there are two aspects to an award of "interest" in a situation such as we have here, the first being "interest *as such*" (emphasis in original) on a liquidated amount and the second being "compensation for delay" on unliquidated amounts, which the *Bozzo* Court describes as being "in the nature of interest" and "measured by the legal rate of interest." 498 A.2d at 899.

The *Bozzo* Court then goes on to quote favorably and at length from a treatise on remedies by Professor Dobbs² in which the professor states that the analysis based on liquidated or ascertainable claims must be abandoned, leaving the "fairly rational collection of guidelines" found in the various cases he reviewed:

(1) Would an award of interest duplicate any other elements already awarded? (2) Was there actually any loss by the plaintiff, and if not (3) was there any unjust gain by the defendant reasonably measurable in terms of interest? (4) Was there a contract between the parties on which the claim is based, and if so, does the nature of the contract indicate an intent to either charge or forego interest in the situation before the court? The answers to these questions would furnish a reasonable guide to the award of interest. Since courts have moved steadily toward more liberal grants of interest, and have increasingly departed from standards based upon liquidation of claims[,] it seems reasonably likely that some such set of guidelines of approximately, if not exactly, this order will affect decisions—subject of course to local statutes.

498 A.2d at 901.

We will follow those guidelines in the instant case.³

In the instant case, the essence of the contract was that the modification of certain bottling equipment and the installation of appropriate parts be completed in a timely fashion by Plaintiff so that Defendant could begin supplying product to its customer in accordance with the customer's seasonal needs. Plaintiff claimed this work was done as of May 10, 2003 (a date that would have been timely), and performed no substantial work on the project after that date. (See videotape 5/31/07 around 11:17 a.m.) However, Plaintiff supplied and installed incorrect parts (*not* defective parts) and never completed the modification. By the time Defendant had managed to perform the modifications itself, correcting Plaintiff's failed performance of its contract obligations, the customer for whose seasonal business the modifications had been required had had to find a different supplier to meet its needs in a timely fashion.

Defendant's production needs were based on its customer's supply requirements and were known to Plaintiff in substantial detail. Plaintiff knew that Defendant had to be able to supply the product to its customer by a certain deadline. Plaintiff knew that if it did not perform its contract properly and in a timely fashion, Defendant would lose the customer totally, and, of course, would receive none of the profits Defendant had expected to gain from the customer.

Given these factors and the *Bozzo* adoption of Professor Dobbs' guidelines, the Court must award Defendant prejudgment interest on the entire verdict amount less the \$9,000 award to Plaintiff, i.e. on a net verdict for Defendant of

\$292,621. The date from which interest should be calculated is the date when Plaintiff abandoned the job, claiming it was completed, May 10, 2003, to the date of verdict, June 6, 2007, less the 192 days related to the continuance, an exclusion conceded by Defendant at argument on the post-verdict motions.⁴

The amount of prejudgment interest due is \$62,328.27 (calculated at the rate of .000164383562 per day).

The Plaintiff's Motion for Post-Trial Relief is denied and Defendant's Motion to Mold Verdict is granted. Judgment must be entered in favor of Defendant in the amount of \$354,949.27

BY THE COURT:
/s/Friedman, J.

Dated: December 14, 2007

ORDER OF COURT

AND NOW, to-wit, this 14th day of December 2007, Plaintiff's Motion for Post-Trial Relief is DENIED, Defendant's Motion to Mold Verdict is GRANTED, and judgment is hereby entered in favor of Defendant Tri-State Plastics, Inc. on its Counterclaim in the amount of \$354,949.27.

BY THE COURT:
/s/Friedman, J.

¹ The issues raised were the applicability of a warranty, the meaning of "principal" in the warranty and whether the parts at issue were defective rather than simply incorrect.

² D. Dobbs, Remedies 173-174 (1974).

³ In *Bozzo*, the parties had "agreed that the trial court should determine whether appellee was entitled to damages for delay." Here, it appears that both sides believed that the decision was for the Court, although their reasons differ. (Defendant believes it is a matter of right, therefore a matter of law, and Plaintiff contends that it is rather a matter of the Court's discretion.) In any event, neither party objected to the issue of interest on the lost profits being decided by the Court rather than the jury, so the Court will not dwell on this point further.

⁴ This time frame is consistent with the oral motion to amend that Defendant made near the end of argument on its motion regarding interest.

Commonwealth of Pennsylvania v. Todd Jonathan Hollis

Harassment—Private Criminal Complaint—Prosecutorial Discretion

1. Appellant presented a motion to institute a private criminal complaint alleging misdemeanor harassment for messages posted on an internet website. The District Attorney opposed the motion which was denied.

2. The District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions and to decide whether and when to prosecute and whether and when to discontinue a case.

3. For public policy reasons the District Attorney can refuse to prosecute a private criminal complaint when there are civil remedies available to redress grievances.

4. For legal reasons the District Attorney can refuse to prosecute a private criminal complaint when it lacks prosecutorial merit and when the burden of proof beyond a reasonable doubt cannot be met.

(William R. Friedman)

Eric Woltshock for the Commonwealth.
Todd Jonathan Hollis, *Pro Se*.

No. CP-02-MD-10782-2007, CC200710782. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Sasinoski, J., December 31, 2007—Appellant Todd Jonathan Hollis attempted to institute a criminal complaint against Meritt Latimore-Dallas, alleging misdemeanor harassment,¹ because according to Mr. Hollis, Ms. Latimore-Dallas posted a message on an internet website found at DONTDATEHIMGIRL.COM, stating that she believed Mr. Hollis had or has herpes.² The District Attorney's Office, however, refused to accept Mr. Hollis' harassment complaint. Consequently, Mr. Hollis filed a Motion to Allow a Private Complaint before the trial court. *See* Pa.R.Crim.P. 506 (establishing the procedure for handling private civil complaints). A hearing on that motion was set for June 12, 2007.

At the hearing, Mr. Hollis called Cheryl Stanko who testified that she knew both Mr. Hollis and Ms. Latimore-Dallas. While Ms. Stanko denied having anything to do with the posting on the DONTDATEHIMGIRL.COM website, she testified that she was aware that Ms. Latimore-Dallas was responsible for it. N.T. at 5-7.

Assistant District Attorney Eric Woltshock appeared for the Commonwealth to oppose the motion. He offered a hybrid of policy and legal reasons for disapproval of the private criminal complaint. First, he stated on the record that the Commonwealth rejected Mr. Hollis' request for a private complaint based on public policy concerns. N.T. at 7. ADA Woltshock explained that Mr. Hollis had availed himself of a civil remedy for libel. Second, ADA Woltshock explained that a complaint under these circumstances lacked prosecutorial merit, particularly where a case for harassment could not be made out. In this regard, ADA Woltshock pointed out that Mr. Hollis' attempt to sue the website in federal district court as unsuccessful because of First Amendment issues. N.T. at 8-9.

This Court agreed with the District Attorney's assessment and Mr. Hollis filed a timely appeal, contending that this Court erred by not compelling the Commonwealth to approve his criminal complaint. Essentially, Mr. Hollis challenges this Court's finding that the Commonwealth's interest would not be served by accepting his private criminal complaint and our finding that the type of harassment complained of by Mr. Hollis does not fall within the definition of Section 2709(a)(4).

It has long been settled that "the District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case." *Commonwealth v. Brown*, 708 A.2d 81, 84 (Pa. 1998); *see also Hearn v. Myers*, 699 A.2d 1265 (Pa.Super. 1997).

Presently, as noted above, the Commonwealth offered a hybrid of policy and legal reasons for disapproval of the private criminal complaint. First, the Commonwealth cited the policy reason that Mr. Hollis had the adequate civil remedy of suing for libel. This Court recognizes that the district attorney has the discretion to decline prosecution when ade-

quate civil remedies are available to redress grievances. See generally, *Commonwealth v. McGinley*, 673 A.2d 343 (Pa.Super. 1996). Consequently, it appears that the Commonwealth was well within its discretion to decline to prosecute under these circumstances.

Second, this Court is not convinced that Mr. Hollis would be successful in prosecuting a criminal complaint alleging harassment against Ms. Latimore-Dallas. While a statement about whether a person has a social disease may arguably give rise to an action for defamation in civil court, it is highly questionable that accusing someone of having herpes qualifies as a "lewd and lascivious" communication, as contemplated by the harassment statute. See 18 Pa.C.S. 2709 (a)(4) (criminalizing the use of lewd, lascivious, threatening or obscene words or language with the intent to harass, annoy or alarm another person). Moreover, the harassment statute defines the term "communicates" as "convey[ing] a message without intent of legitimate communication or address by...written or electronic means, including... Internet...or similar transmission." 18 Pa.C.S. §2709(f). There is no doubt that Mr. Hollis was annoyed or even angry by the description of him on the website in question as being a carrier of a social disease. The context of the remark, that was published on a website purporting to be a place to share information for social networking, however, raises the question of whether this posting was based in fact and had a legitimate purpose or whether it was false and malicious. Unsure that it could meet its burden of proof beyond a reasonable doubt, it is not surprising that the Commonwealth chose not to expend its limited resources prosecuting this case.

Consequently, this Court declined to interfere with the prosecutor's decision, which is grounded in both legitimate public policy and legal concerns, to disapprove of Mr. Hollis' harassment complaint. For these reasons the decision should be upheld.

BY THE COURT:
/s/Sasinowski, J.

¹ 18 Pa.C.S. §2709, entitled harassment, states in pertinent part:

(a) Offense defined.—A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

* * *

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;

* * *

(f) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Communicates." Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

² This website advertises that it is "a social networking site where women can share information with each other." See <http://www.DONTDATEHIMGIRL.COM> (last visited on 12-26-07). The site purports to be "a top-ranked Internet portal for women with information on everything from how to find a great guy, create a sound financial plan and to finding innovative ways to boost your self-esteem." *Id.*

Commonwealth of Pennsylvania v. Edward Charles Hyatt

Post Sentence Motions—Suppression—Weight of Evidence—Sentencing

1. Probable cause existed to search Defendant's residence where warrant clearly stated that previously reliable confidential informant was inside residence within last 48 hours and observed large quantities of cocaine with details of the Defendant's distribution of illegal controlled substances provided to the police.

2. Examination of the facts at trial with the testimony of the Commonwealth's expert demonstrated that the Commonwealth met its burden of proof as to all charges.

3. Evidence of how cocaine was packaged on the street was relevant to show intent to traffic in illegal narcotics, and even if inadmissible, the Defendant's guilt was so overwhelming that the prejudicial effect, if any, was insignificant.

4. Review of the law, sentencing guidelines, and the sentencing transcript showed no abuse of discretion on the part of the Court.

(I. M. Lundberg)

Michael Streily for the Commonwealth of Pennsylvania.
Suzanne Swan, Office of the Public Defender for Defendant/Appellant.

No. CC 200606608. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division

OPINION

Durkin, J., December 19, 2007—The Defendant was charged with two (2) counts each of Possession with the Intent to Deliver,¹ and Possession of a Controlled Substance (2nd or Subsequent Offense).² He was further charged at the same Information with one (1) count each of Possession of Drug Paraphernalia,³ and Possession or Distribution of a Small Amount.⁴

On April 9, 2007, a jury found the Defendant guilty on all charges. On June 29, 2007, the Defendant, who was represented by attorney Louis Coles, was sentenced at Count 1 to serve a term of 2 years to 4 years for Possession With Intent To Deliver Heroin and at Count 3, to serve a term of 5 years to 10 years for Possession With Intent To Deliver Cocaine. These sentences were imposed to run concurrently and were in accord with the mandatory sentence sought by the Commonwealth.

Attorney Coles filed post-sentence motions, and then withdrew from representing the Defendant. Said motions were denied by operation of law pursuant to Pa.R.Crim. 720 on November 13, 2007. The Allegheny County Public Defender's Office, having been appointed to represent the Defendant, filed a timely Notice of Appeal on November 27, 2007.

On December 10, 2007 a Concise Statement of Matters Complained of on Appeal was filed in which it was asserted that: the Court abused its discretion in denying the Defendant's motion to suppress; the verdict was against the weight of the evidence; the evidence was insufficient to support a verdict; the Court abused its discretion in allowing the admission of certain evidence concerning drug paraphernalia; and the Court abused its discretion in sentencing the Defendant in the manner that it did. The Defendant filed an amended Concise Statement on December 17, 2007, adding the argument that this Court abused its discretion when it

sentenced the Defendant separately on two (2) counts of possession with the intent to deliver.

The evidence in this case shows that at about 9:00 a.m. on January 20, 2006, police executed a search warrant at a residence located at 3390 Webster Avenue in the City of Pittsburgh. Upon the officers' arrival at the house, they knocked on the door and announced their presence. When they received no response, the police used a battering ram to gain entry. (T.T. 68-70)⁵

Once inside, the police observed the Defendant standing at the top of the steps that led to the structure's second floor. (T.T. 69-71, 90, 92) When asked by the police where the narcotics were, the Defendant took the police to a dresser in his upstairs bedroom. A search of the dresser revealed three (3) rolled up baggies of marijuana, thirteen (13) small baggie corners of cocaine and heroin, and a digital scale with residue. (T.T. 71-73) A search of the Defendant's pillowcase recovered one grocery bag containing a bag of cocaine and a bag of heroin. (T.T. 110-111) In all, 22.803 grams of cocaine, 3.868 grams of heroin, and 4.318 grams of marijuana were recovered from the Webster Avenue address. (T.T. 159-163)

Also found in the house were intact baggies, baggies with missing corners, balloons, and balloons with missing tips. The police described these items as either being used to package narcotics for distribution, or as being the bi-products of the material used to package and distribute the drugs. (T.T. 75, 77, 84, 99, 100, 115)

While still at the house, the police gave the Defendant his *Miranda* warnings. The Defendant then admitted to the ownership of the drugs found, and to selling the drugs in order to make money. The Defendant never told the police that he was a drug user. The Defendant did say, though, that he was glad that he had gotten caught. (T.T. 191-194)

Finally, the Commonwealth produced an expert. The expert testified that in light of all the evidence gathered from the Defendant's home, the heroin and cocaine in this matter were possessed with the intent to deliver. (T.T. 219)

As to the challenge raised by the Defendant that this Court erred in denying suppression of the evidence seized, the scope of review of a suppression court's ruling is confined primarily to questions of law. A suppression court's decision must stand unless its legal conclusions are in error. *Commonwealth v. Gommer*, 665 A.2d 1269, 1270 (Pa.Super. 1995) In this Commonwealth, the "totality of the circumstances" test set forth by the United States Supreme Court in *Illinois v. Gates*, 103 S.Ct. 2317 (1983) was adopted in *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985) to determine whether probable cause for issuance of a warrant exists. Under such a standard, an assessment must be made of whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Commonwealth v. Melilli*, 555 A.2d 1254, 1262 (Pa. 1989) A finding of probable cause must be based on facts set forth within the four corners of the affidavit of probable cause. *Commonwealth v. Smith*, 784 A.2d 182, 185 (Pa.Super. 2001) (internal citations omitted)

After careful examination of the information contained within the four corners of the warrant issued in this case, it is clear that probable cause existed to search the Defendant's residence. The warrant clearly states that a previously reliable confidential informant (CI), within 48 hours prior to the issuance of the warrant, was inside the Defendant's Webster Avenue residence. The CI told the police that while he/she was inside the home, the CI observed large quantities of cocaine in the possession of the Defendant. The CI gave the police details regarding the CI's knowledge of the Defendant's distribution of illegal con-

trolled substances.

As to the Defendant's sufficiency of the evidence and weight of the evidence claims:

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.... When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Dale, 836 A.2d 150, 153 (Pa.Super. 2003) quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (citations omitted). The trier of fact may infer that a party intended to deliver drugs "from an examination of the facts and circumstances surrounding the case." *Commonwealth v. Kirkland*, 831 A.2d 607, 611 (Pa.Super. 2003) An examination of all the facts introduced at trial, coupled with the testimony of the Commonwealth's expert, reveals that the Commonwealth clearly met its burden of proof as to all the charges, and therefore, both of these issues raised are without merit.

The Defendant raises the claim that this Court allowed inadmissible evidence to be introduced concerning how cocaine is packaged on the street, the street value of cocaine and heroin when it is packaged in a certain manner, and the admission of a photograph of drugs packaged in balloons. It is well settled, however, that the decision to admit or exclude evidence is vested in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *Commonwealth v. Stallworth*, 781 A.2d 110, 117 (Pa. 2001) Discretion is abused when the course pursued by the trial court represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied, or where the record shows that the action is a result of partiality, prejudice, bias, or ill will. *Commonwealth v. Dargan*, 897 A.2d 496 (Pa.Super. 2006) An error is harmless where it could not have contributed to the verdict. *Commonwealth v. Story*, 383 A.2d 155, 164-66 (Pa. 1978) (factors to be considered in weighing harmlessness include: (1) whether it was prejudicial, and if so, whether it was *de minimus*; (2) whether erroneously admitted evidence was merely cumulative of other untainted evidence; and/or (3) whether evidence of guilt was so overwhelming, as established by properly admitted evidence, that the prejudicial effect of error was insignificant).

In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a reasonable doubt that a defendant possessed a controlled substance and did so with the intent to deliver it. *Commonwealth v. Harper*, 611 A.2d 1211 (Pa.Super. 1992) The intent to deliver may be inferred from an examination of the facts and circumstances surrounding the case including the particular method of packaging drugs. *Commonwealth v. Sherrell*, 607 A.2d 767 (Pa.Super. 1992) The evidence objected to by the Defendant was relevant to show the Defendant's intent to traffic in illegal narcotics. Further, even if this evidence was inadmissible, the Defendant's guilt was so overwhelming that the prejudicial effect, if any, was insignificant.

As to the Defendant's sentencing issues, sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Griffin*, 804 A.2d 1, 7 (Pa.Super. 2002) To constitute an abuse of discre-

tion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the Defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa.Super. 2003) A review of the law, sentencing guidelines, and the sentencing transcript clearly shows no abuse of discretion on the part of this court. *Commonwealth v. Swavely*, 554 A.2d 946 (Pa.Super. 1989) *appeal denied* 571 A.2d 382 (Pa. 1989); *See also* 18 Pa.C.S.A. §7508.

For all of the above stated reasons, the Judgment of Sentence in this matter must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: December 19, 2007

¹ 35 P.S. §780-113(a)(30)

² 35 P.S. §113(a)(16) & (b)

³ 35 P.S. §113(a)(32)

⁴ 35 P.S. §113(a)(31)

⁵ Numerals in parentheses preceded by the letters "T.T." refer to pages of the Jury Trial transcript dated April 3-9, 2007.

Commonwealth of Pennsylvania v. Amy Beth Milner

Investigatory Stop—Search—Suppression

1. Police officer stopped Defendant based solely on a telephone call from an anonymous person stating that Defendant was attempting to rent a vehicle while intoxicated.

2. When a police officer has a reasonable and articulable suspicion of a Motor Vehicle Code violation he or she may stop a vehicle for the purpose of checking specifically enumerated documents.

3. An investigatory stop of an automobile is justified only when it is based on objective facts creating a reasonable suspicion the vehicle's occupants are presently involved in criminal activity.

4. Police officers need not personally observe the illegal or suspicious conduct but may rely upon the information of third parties, including "tips" from citizens.

5. The lack of specific and articulable facts coupled with the unreliability of the initial tip by an unknown caller, does not support a reasonable suspicion that Defendant was engaged in criminal conduct, thus the stop of her vehicle was invalid.

(William R. Friedman)

Robert J. Heister for the Commonwealth.
David B. Cercone for Defendant.

No. CC 200601852. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Sasinoski, J., December 31, 2007—On November 2, 2005, Allegheny County Police Officer Karin Orchowski stopped a car in the parking garage of the Greater Pittsburgh International Airport. N.T. at 5-7, 18. The officer based the stop on a radio dispatch report that an unknown individual called to say that an intoxicated female was attempting to rent a vehicle. *Id.* at 6, 18-19. Officer Orchowski testified that the only other information she had at the time of the stop was the car's description and license number, which was provided to her by Officer Raybos. *Id.* at 7 and 21. After conducting the traffic stop, Officer Orchowski identified the driver as Amy Beth Milner (Appellee). *Id.* at 8. She later admitted at a suppression hearing that she never observed any vehicle violations or poor driving. *Id.* at 20-21.

The Commonwealth next called County Police Officer James Costanzo, Officer Orchowski's partner. He also admitted that he witnessed no traffic violations or poor driving. He said that the only reason for the stop was the radio dispatch report of a call from an unknown source that an intoxicated woman attempted to rent a car. *Id.* at 27-33.

Finally, the Commonwealth called William Boyle, the Avis employee who gave Appellee keys to the rental car. He testified that he never communicated his personal observations with either Officers Orchowski or Costanzo. N.T. at 37 and 39. Further, he denied being the anonymous caller. When asked why he would give Appellee keys to a rental car if he thought that she was too intoxicated to drive, Boyle responded that he was not qualified to say if she had been too impaired to safely operate a vehicle. N.T. at 39.

Section 6308(b) of the Motor Vehicle Code provides that when an officer has reasonable and articulable suspicion of a Motor Vehicle Code violation, he or she may stop the vehicle for the purpose of checking specifically enumerated documents, including registration and driver's license, or to secure other information he or she believes is reasonably necessary to enforce the Motor Vehicle Code. 75 Pa.C.S. §6308(b); *see also Commonwealth v. Lohr*, 715 A.2d 459 (Pa.Super. 1998). In *Lohr*, the Superior Court explained that an investigatory stop of an automobile is justified only when it is based upon objective facts creating a reasonable suspicion the vehicle's occupants are presently involved in criminal activity. *Lohr* at 461. To meet this standard, the officer must point to specific articulable facts which, together with the rational inferences therefrom, reasonably warrant the intrusion. *Id.*

In *Lohr*, a police dispatcher received a call from a citizen who reported that he had seen the defendant erratically driving a particular car into the parking lot of a local store, that the driver appeared intoxicated, and that the driver smelled of an alcoholic beverage. While upholding the validity of the stop in *Lohr*, the Superior Court explained that to have reasonable suspicion, police officers need not personally observe the illegal or suspicious conduct, but may rely upon the information of third parties, including "tips" from citizens. *Id.* The Superior Court in *Lohr* further explained that reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. *Id.* It said that both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," that must be taken into account when evaluating whether there is reasonable suspicion. *Id.* The Superior Court in *Lohr* added that when the underlying source of the officer's information is an anonymous call, the tip should be treated with particular suspicion.

Unlike the caller in *Lohr*, who identified himself to police, remained on the phone with police during the incident, and was available to testify, in the present case, the

Commonwealth never identified or produced the anonymous caller at the suppression hearing. Neither Officer Orchowski nor her partner Officer Costanzo, could point to any specific and articulable facts creating a reasonable suspicion to justify the stop. They only knew that an unknown caller told dispatch that an Avis employee gave rental car keys to a woman who may be drunk. There was no evidence that the caller ever met Appellee. The only known Avis employee who came in contact with Appellee was Mr. Boyle, who never spoke with the police about his observations prior to the stop. Accordingly, the officers were not provided with any reason to believe that the unknown caller was reliable or had reliable information that Appellee was drunk. The officers did not seek these missing details by verifying the information with the caller or Mr. Boyle when they arrived at the garage or investigate further before stopping Appellee's vehicle.

Moreover, the officers did not observe Appellee violate any traffic laws. The officers even testified they solely relied on the police dispatcher's information. This information constitutes vague, second-hand conclusions drawn by an anonymous caller to then told an Avis employee, who not only provided Appellee with keys to an Avis rental car, but who also testified that he was not, in fact, qualified to say if she was inebriated. N.T. at 39.

Viewing the stop objectively under the totality of the circumstance, the absence of any detailed information or personal observations regarding unlawful conduct precludes any rational inference that Appellee was driving under the influence. To the contrary, the officers only knew of a single fact—that Avis Car Rental willingly allowed Appellee to rent and take possession of its vehicle. The lack of specific and articulable facts, coupled with the unreliability of the initial tip by the unknown caller, does not support a reasonable suspicion that Appellee was engaged in criminal conduct. Therefore, the stop of her vehicle was invalid. For these reasons, the trial court's order granting suppression should be sustained.

BY THE COURT:
/s/Sasinowski, J.

Commonwealth of Pennsylvania v. Barbara Lynn Webb

Theft by Deception—Sufficiency of Evidence—Admission of E-Mail

1. Defendant obtained money intentionally by deception from two victims.

2. The admission of an e-mail between Defendant and one victim was not germane where the Court did not rely on the contents of the e-mail or the testimony related to the e-mail. The Commonwealth met its burden and established the Defendant's guilt beyond a reasonable doubt without the e-mail.

(I. M. Lundberg)

Michael Streily for the Commonwealth of Pennsylvania.
Francis Robert Murman for Defendant.

No. CC 200514744. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Durkin, J., December 24, 2007—The Defendant was charged with Theft by Deception¹ at CC#200514744 and she

was also charged with Theft by Deception.² at CC#200514790. These cases were consolidated for trial, and on March 15, 2006, the Defendant waived her right to a jury trial, and proceeded to a bench trial. (T.T. 3-10)³ She was found guilty as charged. (T.T. 108)

On May 10, 2006, the Defendant was sentenced at CC200514744 to time served, and an eighteen (18) month period of probation. At CC200514790, a concurrent eighteen (18) month period of supervision was imposed. (S.T. 15)⁴

On June 8, 2006, the Defendant filed a timely Notice of Appeal. This Court ordered a Pa.R.A.P. 1925(b) statement due on or before July 19, 2006. Defense counsel made a request for an extension of time. This Court granted an extension to October 18, 2006, by Order dated July 18, 2006. No Concise Statement was timely filed in the Allegheny County Court of Common Pleas on the due date. On October 26, 2006, this Court issued an opinion finding all issues waived for appellate review pursuant to *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998) and *Commonwealth v. Overby*, 744 A.2d 797 (Pa.Super. 2000). A Concise Statement was eventually filed on November 6, 2006.

By Order dated September 14, 2007, the Superior Court remanded this matter for the filing of an opinion addressing the issues raised in the Defendant's Concise Statement. The requested opinion and supplemental record was to be transmitted to the Superior Court within 45 days of September 14, 2007. This Court, however, was not notified of the remand until December 21, 2007, at which time the Clerk of Court's Office of Allegheny County presented this Court with the order dated September 14, 2007.

In the Defendant's Concise Statement, the following issues are raised: (1) the evidence was insufficient; (2) the Court erred in allowing testimony regarding an e-mail without the proper evidentiary foundation; (3) the Court erred in allowing testimony that the e-mail was from the Defendant; (4) the Court erroneously considered the contents of the e-mail transmission; (5) the Court erred in allowing testimony regarding the e-mail because the e-mailed was "decoded"; (6) the Court erred in allowing testimony from a witness concerning the contents of the e-mail; (7) without the contents of the e-mail, the Commonwealth failed to establish the Defendant's guilt; (8) the Court failed to properly consider the testimony of Pastor William Spahr; (9) the Court failed to properly evaluate the Defendant's motion for judgment of acquittal; (10) the Court failed to properly consider the execution of a written contract where the Defendant acknowledged her indebtedness; (11) the Court erroneously considered the subsequent actions of the Defendant as illustrative of the Defendant's intent to deprive.

Under 18 Pa.C.S. §3922, Theft by Deception is:

(a) Offense defined.—A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

(2) prevents another from acquiring information which would affect his judgment of a transaction; or

(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing

another to whom he stands in a fiduciary or confidential relationship.

(b) Exception.—The term “deceive” does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

As to the Defendant’s sufficiency of the evidence claim:

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.... When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Dale, 836 A.2d 150, 153 (Pa.Super. 2003) quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (citations omitted) A verdict may be based on circumstantial evidence, and such evidence may establish criminal intent. *Commonwealth v. Shirey*, 494 A.2d 420, 422 (Pa.Super. 1985); *Commonwealth v. Russell*, 313 Pa.Super. 534, 543, 460 A.2d 316, 321 (Pa.Super. 1983)

It is this Court’s opinion that the evidence produced at trial was sufficient to support the Defendant’s convictions. In the case with victim Barbara Mussano (at CC#200514744), she and the Defendant knew each other through their church. In late October of 2003, the Defendant asked Ms. Mussano for an emergency \$10,000.00 loan to buy a home for “a Christian girl in the church that had two children and needed a home.” The money was to be repaid within thirty (30) days. Ms. Mussano gave the money to the Defendant on October 30, 2003, in the form of a personal check. Because of a bank hold placed on the transaction, the Defendant asked Ms. Mussano to replace the personal check with a cashier’s check. This was on a Friday. According to the testimony, the Defendant needed the money right away because she wanted to buy the house the following Monday. Ms. Mussano complied with the request regarding the cashier’s check. (T.T. 13-21)

The evidence showed that the Defendant did not purchase a house that following Monday, and did not return the money to Ms. Mussano. To the contrary, when Ms. Mussano requested the return of her funds on November 4, 2003, the Defendant said no. The Defendant later agreed to pay the all the money back by December 30, 2003. That likewise did not happen. At the time of trial, the money was yet to be returned, though the Defendant had made some “interest only” payments to the victim. (T.T. 13-21)

The Defendant’s second victim was Valerie Ritter (at CC#200514790). In March of 2004, the Defendant helped Ms. Ritter obtain a Certificate of Deposit (CD) for a \$4,000.00 tax refund Ms. Ritter had received. Two (2) weeks later, the Defendant had Ms. Ritter withdraw the money.⁵ The Defendant took the \$4,000.00, in cash, and promised to use the funds as a down payment on a house. The down payment was to be placed on a home before Ms. Ritter ever saw the residence. The Defendant told Ms. Ritter that if the house was not to Ms. Ritter’s liking, the \$4,000.00 would be returned. Ms. Ritter went to look at a residence at 2959 Ruthwood Avenue, but did not like the house and asked for the return of the \$4,000.00. The Defendant first said that the money would be returned within 30 days, but then said it

would be returned within 90 days. The Defendant used as an excuse for the delay in the repayment of the money, that the \$4,000.00 had been sent to the wrong address, and that a check had to be cancelled, and reissued. At the time of trial, the money was yet to be returned. (T.T. 35-42)

Lisa Fera, a friend of Ms. Ritter, contacted the Defendant about the \$4,000.00. The Defendant told Ms. Fera that she had used the money as a payment on a house for Ms. Ritter, and that, that house had been listed for Sheriff’s Sale. According to the Defendant, once Ms. Ritter had changed her mind about purchasing the residence, the money was lost. A check of the Allegheny County Sheriff’s records showed that no \$4,000.00 was ever deposited to purchase the property at 2959 Ruthwood Avenue. When confronted with this information by Ms. Fera, the Defendant told Ms. Fera that 2959 Ruthwood Avenue was really not the address of the house in question. (T.T. 59-61)

The Defendant raises numerous issues regarding an e-mail between Ms. Ritter and the Defendant. In convicting the Defendant, this Court did not rely on the contents of the e-mail or the testimony related to the e-mail. The evidence was thus not a factor in determining the Defendant’s guilt. See *Commonwealth v. Brown*, 476 A.2d 969 (Pa.Super. 1984); *Commonwealth v. Glover*, 266 Pa.Super. 531, 405 A.2d 945, 947 (Pa.Super. 1979) Thus, whether or not the e-mail was properly admitted is not germane. Even without the e-mail, the Commonwealth met its burden and established the Defendant’s guilt beyond a reasonable doubt as to Ms. Ritter.

Two other issues raised are that the Court failed to properly consider the testimony of Pastor William Spahr, and that it failed to properly considered the execution of a written contract where the Defendant acknowledged her indebtedness. These contentions are meritless. The Court gave said testimony its due weight. The evidence, however, did not change this Court’s opinion that the money from Ms. Mussano was intentionally obtained by deception.

The final two (2) issues are that the Court failed to properly evaluate the Defendant’s motion for judgment of acquittal, and the Court erroneously considered the subsequent actions of the Defendant as illustrative of the Defendant’s intent to deprive. Neither issue has merit. *Commonwealth v. Feathers*, 660 A.2d 90 (Pa.Super. 1995); *Commonwealth v. Brown*, *supra*.

For the above reason, the Judgments of Sentence must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: December 24, 2007

¹ 18 Pa.C.S. §3922

² 18 Pa.C.S. §3922

³ Numerals in parentheses preceded by the letters “T.T.” refer to pages of the trial transcript dated March 15-16, 2006.

⁴ Numerals in parentheses preceded by the letters “S.T.” refer to pages of the sentencing transcript dated May 10, 2006.

⁵ The Defendant paid the penalty for the early withdrawal.

CAPSULE SUMMARIES

John Schroeder v. Kimberly K. Schroeder

Equitable Distribution—Investment Experience—Interest as Delay Damages

1. By consent order the parties resolved all of their outstanding economic claims. In pertinent part the order provided Wife with the “Amex IRA \$65,200.00” and Husband’s counsel was to prepare the QDRO. The sum awarded Wife was 55% of the value of the IRA.

2. Husband’s counsel promptly forwarded a “Change of Ownership/Annuitant Form” to effectuate the transfer, to which Wife responded by presenting a Motion to Enforce. Additional motions and cross-motions were filed and after hearing the Hearing Officer held Husband in contempt for failure to abide by the terms of the consent order and awarded Wife \$1,335.00 in interest due to the delay. Both parties filed exceptions.

3. The Court granted Husband’s exception and dismissed the Hearing Officer’s contempt finding but upheld the Hearing Officer’s award of interest to Wife as damages. The Court dismissed Wife’s cross-exception requesting an award of investment experience on the IRA from the date of the consent order to date of transfer.

4. The Court held that because none of the filings requested a finding of contempt, the Hearing Officer’s *sua sponte* determination was not before the Court and procedurally improper. Further, because the Hearing Officer found that there was “mutual fault” in conjunction with the delay in processing the QDRO the record would not support a finding of contempt. (Wife’s counsel admitted that he had altered the form forwarded by Husband’s counsel without consultation to more accurately reflect the amount his client had been awarded.)

5. Recognizing that the parties’ consent order awarded Wife a fixed dollar sum from the IRA, the Court found that there was no evidence that the specific award was to include investment experience to date of distribution. Without statutory or case law authority to support her position, Wife is not entitled to any share of the increase in value on her share of the asset. The Court held that an award of proportional investment experience would have been inconsistent with the plain language of the parties’ consent order.

6. The Court did affirm the Hearing Officer’s award to Wife of interest as damages on account of the processing delay.

(Hilary A. Spatz)

David Young for Plaintiff.
Craig Alexander for Defendant.

No. FD 04-003457 (002). In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Kaplan, J., October 24, 2007.

Jeffrey D. Martin v. Terri Benedict

Custody

1. Mother and Father were never married and never resided together, but dated briefly prior to Mother becoming pregnant. Paternity was established and supervised visits were agreed to by the parties. At the first custody conciliation, overnight partial custody was commenced for Father and then at a subsequent conciliation, Father was granted partial custody for long alternate weekends and two evenings per week. Following trial, equal shared custody was ordered.

2. The psychological expert did not recommend equal shared custody because of communication difficulties, but the trial court did not accept the expert’s recommendation because the Court saw Mother as being the cause of the communication difficulties. She had initially ignored prior requests of Father for counseling and was the party to insist on communication only via e-mail. The Court determined that it would not reward Mother and punish the child and Father because of this lack of cooperation on the part of Mother. If there had not at least been this minimal degree of cooperation, the trial court indicated that it would have granted primary custody to Father.

3. The court determined that shared custody did not require the parties to be amicable, but simply required them to have a modicum of cooperation. The parties had initially reached two agreements concerning the initial custody arrangement, were making progress in co-parenting counseling, and were communicating via e-mail.

4. The court-appointed psychologist testified that children thrive better when they spend close to equal amounts of time and have meaningful relationships with each parent. The trial judge increased the time gradually so as to avoid adjustment difficulties and recognized that the child was adjusting well, even per Mother’s testimony.

5. The Court resisted having the parents serve as each other’s first option for caretaking when the parent in custody was unavailable as this would require too many exchanges for the child.

(Christine Gale)

Mary Margaret Boyd for Plaintiff/Father.
William Bishop for Defendant/Mother.
No. FD 05-7658-001. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Hertzberg, J., November 5, 2007.

In re: In the Interest of B.F., a minor

Conspiracy—Agreement or Common Design—Overt Act— Sufficiency of Direct or Circumstantial Evidence—Burglary —Multiple Conviction Provision

1. On June 4, 2007, the court found that B.F., a minor, had committed the delinquent acts of Conspiracy, 18 Pa.C.S. §903(1), Burglary, 18 Pa.C.S. §3502(a) and Simple Assault, 18 Pa.C.S. §2701(1).

2. On July 30, 2007, the court issued an order placing B.F. on probation, conditioned upon his continued enrollment in school, his gainful employment, and the completion of all hours of community service. He was removed from electronic monitoring and his commitment to Vision Quest Boot & Hat Camp was suspended.

3. B.F. appealed, alleging that the evidence was insufficient to demonstrate that B.F. “planned, aided, or participated in any way in a conspiracy,” and that the Commonwealth failed to prove that B.F. committed an “overt act in furtherance of the conspiracy.”

4. Criminal conspiracy requires proof, either by direct or circumstantial evidence, of agreement or common design to commit a criminal act. *Commonwealth v. Dancy*, 650 A.2d 448 (Pa.Super. 1994).

5. Sufficiency of the evidence is determined by “whether, viewing all evidence admitted at trial, together with all reasonable inferences therefrom, in a light most favorable to the Commonwealth as verdict winner, the trier of fact could have found that the defendant’s guilt was established beyond a reasonable doubt.” *Commonwealth v. Collins*, 702 A.2d 540, 543 (Pa. 1997).

6. At trial, the victim, Andrew Cummings, testified that on January 12, 2007, at approximately 10:30 p.m., B.F. knocked on the door of his apartment in Moon Township.

7. When Mr. Cummings opened the door, he was greeted by B.F., whom he had known for some time from working with him at a local KFC, and had felt comfortable enough with to have given him rides home on several occasions.

8. B.F. asked Mr. Cummings if he wanted to “hang out.” Immediately after declining, Mr. Cummings was struck with a gun twice (“pistol-whipped”) by an unknown actor.

9. B.F. left the scene, but two unidentified actors, who had their faces covered, entered the apartment, assaulted Mr. Cummings by kicking him in the throat and shoving the gun into his face, accused him of killing one of the actor’s brother, and robbed him of his wallet containing his I.D. which he had produced to dispute his identity regarding the killing, \$40 in cash, and a \$60 check, as well as a phone, a knife, and keys.

10. Mr. Cummings received medical treatment at a hospital, and had a quarter inch scar on his chin and had difficulty swallowing for a month.

11. On cross-examination, Mr. Cummings restated that B.F. did not have the gun, that to the best of his knowledge B.F. did not enter his apartment, and that he had no knowledge as to what B.F. did following Mr. Cummings being struck by the gun.

12. Officer G. Dale Grant of the Moon Township Police Department, who was part of the investigative unit, testified that B.F. was identified by Mr. Cummings shortly after the incident, and when Officer Grant and his partner interviewed B.F. at KFC, he gave several conflicting stories as to his whereabouts on the evening of January 12, 2007: He had taken the bus home from work, he had gotten a ride from a friend and hung out at his house, he had gone to the North Park Clubhouse, and he had gone to his girlfriend’s house, who happened to live across the street from Mr. Cummings. B.F. accused Mr. Cummings of not liking him.

13. The court found Mr. Cummings to be a credible witness; consequently, his testimony that B.F. knocked on the door and engaged Mr. Cummings in a short conversation immediately preceding the assault, constituted sufficient evidence that B.F. provided entry for the other actors, a “necessary and key element,” the overt act in furtherance of the conspiracy.

14. The court found that the coincidental knocking on the door mere seconds before the appearance of the unknown actors, as well as B.F.’s inconsistent statements regarding his whereabouts on the evening of the attack, constituted circumstantial evidence of an agreement between B.F. and the other actors.

15. In the opinion, however, the court acknowledged that perhaps an argument could have been made that B.F. “did not know the ultimate purpose for such an encounter”; however, because B.F. argued that mere presence at the scene of a crime is insufficient to prove agreement or common design, and because the court found that B.F. had committed an overt act by knocking on Mr. Cummings’ door, circumstantial evidence appeared to be sufficient to establish an agreement between B.F. and the other two actors.

16. Notwithstanding the above, if the findings of Conspiracy and Conspiracy to Commit Burglary stand, the charge of Simple Assault (a misdemeanor) should be dismissed under the Burglary Multiple Conviction Provision, 18 Pa.C.S. §3502(d), which provides that a person cannot be convicted of burglary and the underlying crime within the burglary, unless said crime is a felony of the first or second degree.

(Kathryn L. Miehle)

Michael Streily for the Commonwealth.

Jeffrey Michael Murray for B.F.

No. 65 of 2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division, Juvenile Section. Mulligan, J., October 31, 2007.