

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Douglas Drwal v. Borough of West View, O'Reilly, J.Page 63
Civil Summary Appeal—Credibility—Standard of Review

Commonwealth of Pennsylvania v. Dorian Lamont Gray, O'Toole, J.Page 65
Inflammatory Photographs—Hearsay Exception—Insufficient Evidence

Commonwealth of Pennsylvania v. Alonzo Griffin, Mariani, J.Page 67
Direct Appeal—Suppression Motion Granted—Forced Abandonment

Commonwealth of Pennsylvania v. Mitchell Harris, Mariani, J.Page 69
Appeal—Sufficiency of Evidence—Verdict Contrary to Evidence

Commonwealth of Pennsylvania v. John S. Burton, Mariani, J.Page 71
Appeal—Reasonable Suspicion—Sufficiency of Evidence—Sentence

PLJ

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OPINIONS

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Douglas Drwal v. Borough of West View

Civil Summary Appeal—Credibility—Standard of Review

1. By agreement of the parties, the Appeal was decided on briefs.

2. When provided by the fact-finder with a full and complete record that includes a clear analysis and sets forth findings with regard to credibility, the reviewing Court must accept such credibility determinations. The reviewing Court does not have general authority to make its own findings of fact or conclusions of law.

(Meg L. Burkardt)

Ronald P. Koerner for Petitioner.

Vicki L. Beatty for Respondent.

No. SA 06-1293. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., November 20, 2007—This matter is a civil summary appeal from a decision rendered by the West View Civil Service Commission (“Commission”) on November 16, 2006. That decision affirmed the termination of Police Officer Douglas Drwal (“Drwal”) January 19, 2006 by the Borough of West View (“West View”). (See West View Exhibit 1, letter dated January 20, 2006 to Drwal.). Drwal’s termination was made after the required *Loudermill* hearing¹ was held by Borough Council on January 3, 2006. The charges against Drwal were: 1. neglect of duty and conduct unbecoming an officer for failure to follow West View police policy in processing DUI cases involving 4 separate persons; and 2. spending excess break time resulting in a missed call and filing a falsified report.

As noted, West View terminated Drwal on January 20, 2006 and Drwal timely appealed his termination to the Commission. The hearing on the appeal was held on August 17, 2006 and August 24, 2006. Testimony was taken from the Chief of Police of West View, Charles M. Holtgraver, Barbara O’Lare, the record-keeping clerk of West View, Randall Freedman, West View police lieutenant, Matthew Holland, West View police officer and Drwal.

After taking testimony, the Commission prepared its Findings of Fact, Conclusions of Law and Adjudication, which West View adopted on November 16, 2006 that affirmed its termination of Drwal as a police officer. (R. 471a).²

Drwal filed this timely appeal. After a Status Conference held before me, the parties agreed to have me decide this matter based on their briefs. On September 28, 2007, the parties filed the Transcript of the Commission’s Hearing Audiotapes/CD’s with Stipulation that the references in the audiotapes/CDs to “7147” pertain to Drwal and that “7154” pertains to Police Officer Matthew Holland; and that these Transcripts shall become part of the Record before me on this appeal. These Transcripts are of audio of 911 recordings and voice messages left for Drwal. In addition to these Transcripts, I have reviewed the Transcript of the hearings, and the Record with all exhibits, including the Commission’s Findings of Fact, Conclusions of Law and Adjudication, together with the parties’ briefs. I am now in a position to render my decision.

I. Facts:

On November 16, 2006, the Commission affirmed Drwal’s termination as a police officer with West View. Prior to that decision, he was employed for ten (10) years in the Borough’s police department in various positions as a police officer. He was a DARE officer in the school program; he worked on drug related enforcement teams with the District Attorney’s Office and the Attorney General’s Office drug enforcement; he performed duties as a bike patrol officer; and he was a

detective from September 2003 through May 2005. (N.T. pp. 178-179).³ During the course of his career, he received various commendations, which he testified about at the hearing. (N.T. pp. 181-187 & Police Exhibit “B”). He is also married and has a daughter and a son. (N.T. p. 178). His son, who is four (4) years old, is prone to seizures. (N.T. p. 188).

Drwal became the center of investigation in several matters, being the handling of four (4) driving under the influence (DUI) cases and failure to respond to a call to assist a fellow officer. (N.T. p. 20). On December 29, 2005, he was placed on administrative leave while the investigation was being conducted.

The first DUI involved an individual, Mark Kasperowicz, who is also a school board director for North Hills. The actual blood alcohol content (BAC) was .159, which was well over the state legal limit of .08. 75 Pa.C.S.A. §3802. The Chief’s investigation revealed that the Kasperowicz file contained a Crime Lab Report that indicated a BAC of .09, but that was for an individual known as Rebecca Coyle. It also contained a Crime Lab Report for Kasperowicz with a BAC of .159. In either event, the Chief testified that a criminal complaint should have been filed, not a citation as the file indicated. (N.T. pp. 39-58). He further stated that he found the Kasperowicz file in the area where “closed” files are kept. (N.T. p. 60). As to Rebecca Coyle, she was charged with DUI and a criminal complaint was filed. (N.T. p. 58). The Records keeper/clerk, Barbara O’Lare further confirmed the Chief’s testimony about the Kasperowicz file. In particular, she stated that she found the Crime Lab report for that file on the top of the filing cabinet; and when she went to look for that file, she did not find it in the “open” ones, but instead, it was in the “closed” cabinet. (N.T. pp. 135-138).

Drwal asserted in his testimony that he withheld filing charges against Kasperowicz because Kasperowicz asked him to, and also, because Drwal was of the opinion that the BAC would come back low. (N.T. p. 191). The testimony before the Commission further revealed that Mr. Kasperowicz’s attorney had also requested that Drwal withhold charges. (N.T. p. 192). But most noteworthy is that testimony also disclosed that this attorney had also represented Drwal himself in prior matters with the Borough. (N.T. p. 70-73).

The second DUI case was the Joseph Boylan matter. Drwal was the arresting officer. The BAC was .21, but again, no criminal complaint was filed. (N.T. p. 63). Drwal’s proffered explanation was that while he was on a drug task force, he was called to assist another officer. He effectuated the DUI arrest, and started the necessary paperwork. However, he testified that he knew he would not be able to handle the preliminary hearing because he was going to be out for the next 10 days for undercover narcotics. He said it was his understanding that the other officer, Officer Holland, was going to follow up on this matter. (N.T. pp. 203-209). However, Officer Holland testified that he only did the accident report in this matter, and that there was never any understanding that he was going to handle the DUI case for Drwal. (N.T. pp. 154-156).

The third matter involved a minor. Again, no DUI charges were filed. (N.T. p. 64). Drwal contended that the BAC results were lower than .02, and that he had done nothing wrong. (N.T. pp. 201-203).

The fourth and final DUI case involved another male individual, Robert W. Santoriello. The BAC was .183, but no charges were filed. (N.T. pp. 69-70). Drwal said that the reasons no charges were filed was because the matter of “probable cause was a little bit weak.” (N.T. pp. 213-214). He stated that he noticed Mr. Santoriello’s vehicle in the parking lot of a Dollar Store, and that it looked suspicious. So, he decided to follow it, not finding it to be driving “horribly bad,” but

eventually stopped it. He stated that “from my training and experience, it was my opinion that he was intoxicated. He failed some field sobriety tests, and was subsequently transported to the hospital for a blood draw.” (N.T. pp. 211-212). He further testified as follows:

“First of all, the defendant in this case informed me that his attorney was a very well known attorney. I can’t think of his name right now. And I didn’t feel very comfortable with my probable cause for the stop.

And with DUI arrest(s), there’s three phases. There’s the vehicle in motion, there’s the contact with the driver, and there’s the field sobriety tests. These are typically the three things that a defense attorney will attack.

My probable cause for stopping the vehicle, in any opinion, was weak. So I wanted to wait for the blood results to come back before I filed the charges on the guy.”

(N.T. p. 213).

When he returned from vacation, he stated that he could not locate this particular file. (N.T. p. 214). Apparently, this was because the Chief was conducting the investigation into Drwal’s DUI filings.

The other part of the investigation involved Drwal’s failure to respond to a call while he was on duty on December 24, 2005. Testimony was given that he did not advise dispatch of his whereabouts. The Chief testified that the reports given by Drwal were inaccurate, because West View has GPS to monitor the locations of its police vehicles; and that the GPS report revealed that Drwal was at home when he listed other locations on his report. (N.T. pp. 91-92). The Chief stated that Drwal’s explanation was that he lost his original report, so he copied off the other officer’s. (N.T. p. 92). Drwal acknowledged he was dealing with a family issue, i.e. his son’s medical condition and seizure that occurred that night at his home, and that he therefore, was not “thinking clearly.” (N.T. p. 275).

On November 16, 2006, the Commission met and adopted its Findings of Fact, Conclusions of Law and Adjudication, which upheld the termination of Drwal’s employment by West View. (See, R. 460a and 471a).

II. Analysis and Conclusions:

The fifteen (15) page, 97 paragraph Findings of Fact, Conclusions of Law and Adjudication by the Commission gives a highly detailed basis upon which it upheld the termination of Drwal. It traces the testimony and gives a clear analysis of why it did what it did. In addition, and most importantly, it set forth its findings as to “credibility.” In particular, Paragraphs 16 through 19 unequivocally state that the Chief, Ms. O’Lare, Lieutenant Freedman and Officer Holland all “testified credibly. (Their) demeanor indicated that (they were) straightforward, frank and non-deceptive in (their) responses to questions.” (R. 473a). In addition, Paragraph 20 states “Police Chief Holtgraver, Barbara O’Lare, Lieutenant Freedman and Officer Holland testified consistently and honestly. Their testimony was clear and given without hesitation.” (R. 473a).

With respect to Drwal, the Commission found that his “testimony was not credible”; that “(H)is demeanor on the witness stand did not inspire any confidence that he was being straightforward, frank or willing to deal directly with the matter at hand”; and that “his testimony was both self-serving and contradictory.” (Para. 72; R. 479a). The Commission further stated that he “called no corroboration

witnesses at the hearing including his spouse whom he testified was present at his residence on December 24, 2005” and that he “raised no procedural issues before” the Commission. (Paras. 73 & 74; R. 480a).

Since I am the reviewing court, and there is a full and complete record made before the Commission, I can only review the evidence filed, and relied on by the Commission, as the fact-finder. *In Re: Thompson*, 896 A.2d 659 (Pa.Cmwlth. 2005). *Thompson* states that “(No)where in Section 754⁴ is the reviewing court given general authority to make its own findings of fact and conclusions of law when the local agency has developed a full and complete record.” *Id.* at 668. Furthermore, I must accept the credibility determinations made by the Commission before whom the testimony was given and who evaluates the credibility of the witnesses, and ultimately serves as the fact-finder. *Hinkle v. City of Philadelphia*, 881 A.2d 22 (Pa.Cmwlth. 2005). All that is required is substantial evidence to support the findings.

I credit the testimony offered by West View about how criminal matters are handled internally, and that in particular, there is no discretion in the police officer about whether or not to file charges in DUI matters. Moreover, I find that it is not their policy to hold charges pending BAC results, although Drwal used this reasoning to justify what he did in all four (4) DUI’s listed above. (N.T. pp. 26-33).

While I am sympathetic to paternal concerns for one’s child with the medical condition that Drwal’s son has, it certainly was a lapse in judgment by Drwal in the December 24th incident. He placed a fellow officer in peril by not responding to the radio dispatches. The Transcript of the Audiotapes/CDs reveals this. Fortunately for the fellow officer, nothing threatening occurred. Moreover, the derelictions with respect to the DUI charges are more than enough to support the termination.

Applying the appropriate standard of review (2 Pa.C.S.A. §704), I find that the Commission’s adjudication is supported by substantial evidence. That is, that Drwal failed to follow department procedures in not filing charges in four (4) separate DUI cases, and that he neglected his duty in failing to respond to assist another officer, or as stated by the Commission “guilty of conduct unbecoming an officer and neglect or violation of official duty.” (See, Commission’s Findings of Fact, Conclusions of Law and Adjudication).

Accordingly, based upon the above, I AFFIRM the finding of the Commission.

BY THE COURT:
/s/O’Reilly, J.

Dated: November 20, 2007

¹ The due process hearing that a public employee is afforded prior to termination where the employee is given oral or written notice of the charges against him/her; an explanation of the evidence against him/her; and the opportunity to present the employee’s version of the matter. It is derived from the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

² All references to “R” is to the Record filed in this case by the Commission.

³ All references to “N.T.” are to the notes of testimony before the Civil Service Commission of the West View Borough on August 17, 2006 and August 24, 2006.

⁴ Section 754(a) of the Local Agency Law. 2 Pa.C.S.A. §754(a).

Commonwealth of Pennsylvania v. Dorian Lamont Gray

*Inflammatory Photographs—Hearsay Exception—
Insufficient Evidence*

1. The Court must conduct a two-step analysis to determine admissibility of crime scene photographs. First, the Court must determine if the photographs are inflammatory. If not, they are admissible. If they are inflammatory, the Court must balance the evidentiary need against the likelihood that the photographs will inflame the minds and passions of the jurors. Where the evidentiary value exceeds the inflammatory danger, admission is proper.

2. Hearsay is not admissible unless it qualifies under one of the enumerated exceptions. Pa. R.E. 802, 803.

3. The test for sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the fact-finder to find every element of the crime charged beyond a reasonable doubt.

(*Meg L. Burkardt*)

Michael W. Streily for the Commonwealth.
Daniel DeLisio for Defendant.

CC No. 200605501. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

O'Toole, J., November 7, 2007—The Defendant, Dorian Lamont Gray, was charged with Criminal Homicide, 18 Pa.C.S.A. §2502. On November 14, 2006, the Defendant proceeded to a jury trial. After the presentation of evidence by both the Commonwealth and the defense, the Court instructed the jury and they retired to deliberate. As the jury was unable to reach a verdict, the jury was declared hung and a mistrial was granted. The Defendant appeared for a second trial on April 11, 2007. At the conclusion of the trial on April 17, 2007, the jury returned a verdict of guilty of Murder in the First Degree. The Defendant was sentenced on the same day to life imprisonment.

The facts of this case can be summarized as follows:

Louis Jones testified that at approximately 6:30 p.m. on the evening of March 8, 2006, he was in the Fineview section of the City of Pittsburgh visiting his girlfriend. He observed the Defendant exit a burgundy vehicle. He knew the Defendant by his nickname, "Hot Boy." He said to the Defendant, "You're just the person that I want to see." The Defendant indicated that many people wanted to see him. As the Defendant pulled out a handgun, he told Mr. Louis to "clear the street." Mr. Louis stated, "Don't do anything stupid." The Defendant went across the street and entered an apartment building. Mr. Louis observed the Defendant knocking on the apartment door of the victim, Jermaine Drewry. The Defendant started to walk away and then he turned back to the door. When he did so, Mr. Louis heard a gunshot. The Defendant ran out of the building, with the gun still in his hand. Mr. Louis again told the Defendant not to "do anything stupid." The Defendant responded by saying, "he was a bitch ass nigger." The Defendant ran down the "city" stairs toward Sandusky Street. (N.T. 4/11/07, pp. 99-113)

Mr. Louis's testimony was corroborated by the testimony of Joanne Brown, who was sitting in her son's vehicle in front of the apartment building. She observed the Defendant, who had a gun in his hand and was wearing a "hoodie," walk in front of the vehicle. The Defendant entered the apartment building. She heard a gunshot and then the Defendant

walked back in front of the vehicle, with the gun still in his hand. (N.T. 4/11/07, pp. 309-315)

Both eyewitnesses gave tape recorded statements to the police and picked the Defendant's photo from a computer-generated photographic array. (N.T. 4/11/07, pp. 239, 253, 347, 349)

According to the pathologist who conducted the autopsy on Mr. Drewry, he died of a gunshot wound to the abdomen. (N.T., 4/11/07, p. 402)

On appeal, the Defendant alleges the following: the Court erred in permitting the Commonwealth to display inflammatory photographs of the victim to the jury; the Court erred in permitting the Commonwealth to display photographs of the inside of the victim's apartment to the jury; the Court erred in permitting a police detective to testify that Louis Jones told him that he was afraid that he would be killed if he was seen talking to the police on the night of the shooting; the Court erred in permitting Commonwealth witness, Stephanie Peeples, to testify regarding certain threats made to her if she testified against the Defendant; the Court erred in permitting the Commonwealth to read into the record the prior testimony of Stephanie Peeples; the Court erred in refusing to allow the defense to introduce the testimony of the court reporter from the first trial, who would have testified that Ms. Peeples had an odor of alcohol on her breath during her testimony; the Court erred in denying the defense motion to compel the Commonwealth to disclose exculpatory evidence, when that Motion had originally been denied by another member of the Court; the Court erred in instructing the jury with regard to the Defendant's possession of a firearm and refusing to instruct the jury on "false in one, false in all"; and there was insufficient evidence to sustain his conviction.

The Defendant's first allegation is that the Court erred in permitting the Commonwealth to display inflammatory photographs of the victim to the jury. The viewing of photographic evidence in a murder case is, by its nature, a gruesome task; however, photographs of a corpse are not inadmissible *per se*. *Commonwealth v. Henry*, 706 A.2d 313 (Pa. 1997). The Court must conduct a two-step analysis to determine admissibility: First, the Court must decide if the photos are inflammatory. If not, they are admissible. If they are inflammatory, the Court must balance the evidentiary need for the photos against the likelihood that they will inflame the minds and passions of the jurors. Where the evidentiary value exceeds the inflammatory danger, admission is proper. *Id.*; *Commonwealth v. Hetzel*, 822 A.2d 747 (Pa.Super. 2003). Specifically, the defense objects to a black and white photograph of the victim as he lay dead in his apartment and a color photograph of the victim at the coroner's office. The Court reviewed the photographs and found them not to be inflammatory. They were not gory in that the victim was not lying in a pool of blood and the color photo merely demonstrated to the jury the manner in which the body was received by the coroner. As such, the admission of these photos was not prejudicial to the Defendant.

The Defendant's second allegation is that the Court erred in permitting the Commonwealth to display photographs of the inside of the victim's apartment to the jury. Again, these photos were not inflammatory; rather, they were introduced for the purpose of depicting the scene of the crime. The fact that the photos showed "baby toys and other family items" was of no moment. These items were part of the scene and there was no intent by the Commonwealth to inflame the jury with these photos. Accordingly, the admission of these scene-depicting photos was not improper.

The Defendant's third allegation is that the Court erred in permitting a police detective to testify that Louis Jones told him that he was afraid that he would be killed if he was seen talking to the police on the night of the shooting. Specifically,

Mr. Jones, who was speaking to Detective Schanck shortly after the homicide, gave the detective some details about the shooting and the perpetrator. Detective Schanck requested that Mr. Jones come with him to police headquarters for a further interview. Mr. Jones refused to do so due to a fear that he would be killed if he left the scene of the crime in the company of the police. Defense counsel objected to this testimony on the grounds that it was hearsay. (N.T. 4/11/07, pp. 91-92) Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa. R.E. 801(c). Hearsay is not admissible, unless it qualifies under one of the enumerated exceptions. Pa. R.E. 802 and 803. In this case, the testimony was admissible on two grounds. First, the declarant, Mr. Jones, was the Commonwealth’s next witness. The purpose of having Detective Schanck testify as to Mr. Jones’s statement about his fear was for the purpose of corroborating Mr. Jones’s upcoming testimony. Second, the “state of mind” exception is applicable. Mr. Jones was clearly setting forth that he was afraid for his safety if he accompanied the police in their vehicle. Accordingly, there was no error in admitting this testimony.

The Defendant’s fourth allegation is that the Court erred in permitting Commonwealth witness, Stephanie Peeples, to testify regarding certain threats made to her if she testified against the Defendant. During her direct examination in this trial, Ms. Peeples, who had testified at length during the Defendant’s first trial as to certain conversations that she overheard between the Defendant and the victim and that she actually had with the Defendant, testified that she did not remember the conversations. It was obvious to the Court that she was very reluctant to be present in court and that she did not want to testify. As such, the prosecutor was permitted to inquire as to why Ms. Peeples’ memory was suddenly flawed. She stated that she was scared “because people have a lot of stuff to say about me sitting up here on the stand.” She indicated that the “people” were the Defendant’s friends and family. She further said that “the word on the street” was that she was a “rat” and if she testified against the Defendant, “something is going to happen to me.” (N.T. 4/11/07, pp. 195-197) This testimony was admitted over the objection of defense counsel. A review of the testimony convinces the court that it was properly admitted as an exception to hearsay for the same reason that Mr. Jones’s testimony was admitted. The statements expressed Ms. Peeples’ state of mind—she was fearful for her safety due to threats that were made about what would happen to her if she testified against the Defendant. As above, this evidence was properly admitted.

The Defendant’s fifth allegation is that the Court erred in permitting the Commonwealth to read into the record the prior testimony of Stephanie Peeples. Pursuant to Pa. R.E. 803.1, inconsistent statements of a witness are not excluded by the hearsay rule if the declarant testifies at the trial and is subject to cross-examination, as long as the inconsistent statement was given under oath subject to the penalty of perjury at a trial. In this case, Ms. Peeples testimony in this trial was significantly altered due to her stated fear of reprisal by the Defendant’s family if she testified. While she clearly remembered certain relevant conversations in the Defendant’s first trial, she was unable to remember these same conversations in this trial. Thus, at the request of the Commonwealth, the Court permitted her previous testimony to be read to the jury. This was a proper ruling under Rule 803.1; and thus, this allegation is without merit.

The Defendant’s sixth allegation is that the Court erred in refusing to allow the defense to introduce the testimony of the court reporter from the first trial, who would have testified that Ms. Peeples had an odor of alcohol on her breath

during her testimony. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. *Commonwealth v. Urrutia*, 653 A.2d 706 (Pa.Super. 1995). As the witness stand is directly next to the bench in this Court’s courtroom, the Court would have been able to detect the odor of alcohol on the witness’s breath when she testified. If the Court had detected even the scent of alcohol about the witness’s person, the Court would have notified the defense and the Commonwealth *sua sponte* and would have made the appropriate inquiry out of the presence of the jury. The fact that such did not occur indicates to the Court that the witness did not smell of alcohol during her testimony at the first trial. Thus, the testimony of a court reporter, who is further away from the witness than is the Court, would not be relevant in this proceeding.

The Defendant’s seventh allegation is that the Court erred in denying the defense motion to compel the Commonwealth to disclose exculpatory evidence, when that Motion had originally been denied by another member of the Court. As the ruling regarding the discovery of certain testimony before the grand jury was made by the Honorable John Zottola, who is another member of this Court, the undersigned is bound by that ruling.

The Defendant’s eighth allegation is that the Court erred in instructing the jury with regard to the Defendant’s possession of a firearm and refusing to instruct the jury on “false in one, false in all.” Appellate review of a trial court’s charge must involve consideration of the charge as a whole to determine whether it was fair and complete. This review does not focus upon whether specific “magic words” are used; rather it is the effect of the charge as a whole that is controlling. *Commonwealth v. La*, 640 A.2d 1336 (Pa.Super. 1994). Also, the trial court has broad discretion to phrase instructions so long as it adequately, accurately, and clearly explains the principle of law for the jury. *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001). Initially, the Defendant claims that the following wording was improper: “if the Defendant was armed with a firearm that was used or attempted to be used and he did not have a license, you may consider that as circumstantial evidence with an intent to commit a criminal homicide.” As the parties stipulated that the Defendant did not have a license to carry a firearm, it was necessary for the Court to explain to the jury the significance of said fact in the context of this prosecution. The jury was entitled to use that fact as circumstantial evidence with regard to the Defendant’s intent in committing this crime. Therefore, the instruction was proper. Secondly, the defense objects to the Court’s refusal to instruct the jury on the concept of “false in one, false in all.” This instruction, which this Court routinely refuses to give to a jury, is only appropriate in a situation wherein a witness willfully and corruptly swears falsely to any material fact. The defense claim that Commonwealth witnesses, Stephanie Peeples and Louis Jones, gave testimony that was “internally contradictory and conflicting and in many respects contradicted their testimony in the previous trial and statements given to the police” is simply incorrect. Ms. Peeples’ testimony was admittedly different than her testimony in the first trial; however, that was due solely to her fear that she would be harmed by the Defendant’s family, which is the reason for the Court permitting her prior testimony to be presented to the jury. With regard to Mr. Jones, his testimony was essentially consistent with his previous testimony and the taped statement to the police. After reviewing the entire jury charge, the Court finds that it completely and clearly explained the applicable law to the jury.

The Defendant’s final allegation is that the evidence was

insufficient to sustain his conviction. The test for sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the fact-finder to find every element of the crime charged beyond a reasonable doubt. *Commonwealth v. Sullivan*, 864 A.2d 1246 (Pa.Super. 2004). As is true in many homicide cases, this case is based primarily on the credibility of the testimony of two eyewitnesses. Both Mr. Jones and Ms. Brown, who identified the Defendant in photo arrays and at trial without hesitation, testified that they observed the Defendant with a gun in his hand. They saw him enter an apartment building and they heard a gunshot. Shortly thereafter, the body of the victim was found in the bedroom of the apartment. While neither witness actually saw the Defendant shoot the victim, the circumstantial evidence that he did so was overwhelming. As such, the Court finds that the evidence was more than sufficient to sustain the Defendant's conviction.

For the foregoing reasons, the Court finds that the Defendant is not entitled to an arrest of judgment or a new trial.

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

Commonwealth of Pennsylvania v. Alonzo Griffin

Direct Appeal—Suppression Motion Granted—Forced Abandonment

1. Defendant voluntarily interjected himself into an ongoing police questioning of the driver of a pick-up truck parked in a high crime area during daylight hours when Defendant entered the passenger side of the truck. Opinion outlined circumstances of various types of police encounters with citizens as (1) inquiry with no official compulsion to stop or respond; (2) investigative detention; and (3) custodial detention.

2. Court found Defendant was subjected to an investigative detention without the Commonwealth proving sufficient facts to demonstrate reasonable suspicion of criminal activity.

3. Court suppressed evidence of cocaine that fell to the ground when Defendant left the truck and began running where the record disclosed neither probable cause to arrest nor reasonable suspicion to stop the individual and conduct an investigative detention.

(I. M. Lundberg)

Christopher T. Avetta, Sr. for the Commonwealth.
James A. Wymard for Defendant.

No. CC 200507272. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., December 3, 2007—This is a direct appeal wherein the Commonwealth of Pennsylvania appeals from the Order of Court dated June 7, 2007 which granted the defendant's motion to suppress cocaine allegedly discarded by the defendant during a police chase. The Commonwealth has certified that the Court's order substantially handicapped and/or effectively terminated prosecution of this case. The Commonwealth of Pennsylvania filed a Statement of Errors Complained Of On Appeal alleging that the following error:

Whether the trial court could properly find forced abandonment in a situation in which the defendant had voluntarily interjected himself into an ongoing police situation?

The facts of this case demonstrate that on March 24, 2005, Officer Eastman of the McKeesport Police Department was on routine foot patrol when he noticed a brown GMC pick-up truck parked on Butler Street near Jenny Lind Street in McKeesport, Pennsylvania during daylight hours. The truck was parked against the flow of traffic. According to Officer Eastman, this is an area known as a high crime area. A person, not the defendant in this case, occupied the driver's seat of the pick-up truck. Because Officer Eastman was concerned that the driver of the pick-up truck may have had mechanical or medical problems, Officer Eastman approached the truck and spoke to the driver. Officer Eastman learned that the driver lived several blocks from the location where he was parked. Officer Eastman believed that the driver having parked at the Butler Street location was "very suspicious circumstances." However, Officer Eastman also indicated that he did not observe anyone doing anything illegal at that time.

Shortly thereafter, the defendant walked up to the pick-up truck and entered the passenger side of the pick-up truck. The driver of the pick-up truck identified the defendant as his nephew. The defendant described himself as a friend of the driver. Upon questioning from Officer Eastman, the defendant identified himself but the defendant did not have identification cards on his person at that time. Officer Eastman testified that the fact that the driver identified the defendant as his nephew and the defendant described himself as a friend of the driver was "suspicious." Officer Eastman specifically testified that, at this point, because of the inconsistency in the descriptions the defendant and driver gave about the defendant's relationship with the driver, neither the driver nor the defendant were free to leave the pick-up truck. Officer Eastman conceded that he had no reason to believe that defendant had committed any illegal act.

Despite no observations of wrongdoing, Officer Eastman called for back-up. Officer Eastman believes "everybody is armed, period." Fearing for his safety, Officer Eastman repeatedly ordered the defendant to "keep his hands where [he] could see them." Officer Eastman did observe the defendant move his hands toward his right coat pocket. The defendant and the driver both testified that the defendant's cell phone was ringing. According to the driver and the defendant, the defendant unsuccessfully requested permission to answer the phone. Officer Eastman did not recall whether the defendant's phone rang or whether the defendant requested permission to answer the phone. Officer Eastman did, however, testify that it was possible that the defendant reached for his pocket to answer the phone.

Officer Eastman moved to the rear of the pick-up truck. When Officer Eastman got to the rear bumper of the pick-up truck, the defendant exited the vehicle. Because he was still "worried for his safety," Officer Eastman instructed the defendant to remain inside the vehicle. The defendant turned toward Officer Eastman who again ordered the defendant to "get back in the vehicle." The defendant continued to move away from the pick-up truck. Officer Eastman then noticed a baggie containing an off-white substance hanging out of the defendant's right pocket. The defendant started to run and while running, two baggies containing cocaine fell to the ground.

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, thereby ensuring the "right of each individual to be let alone." *Commonwealth v. Blair*, 394 Pa.Super. 207, 575 A.2d 593, 596 (Pa.Super. 1990). To secure this right, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. See *Commonwealth v. Beasley*, 2000 Pa.Super. 315, 761 A.2d 621,

624 (Pa.Super. 2000). The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an 'investigative detention,' must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043, 1047 (1995). Finally, an arrest, or 'custodial detention,' must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriguez*, 532 Pa. 62, 614 A.2d 1378 (1992).

As set forth above, a mere encounter between police and a citizen need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond. See *Beasley*, 761 A.2d at 624. No constitutional provision prohibits police officers from approaching citizens in public to make inquiries of them. If, however, the police action becomes too intrusive, a mere encounter may be regarded as an investigatory detention or seizure. See *Id.* To determine whether a mere encounter rises to the level of an investigatory detention, we must discern whether, as a matter of law, police have conducted a seizure of the person involved. See *Commonwealth v. Mendenhall*, 552 Pa. 484, 715 A.2d 1117, 1119 (Pa. 1998).

An investigative detention occurs when a police officer temporarily detains an individual by means of physical force or a show of authority for investigative purposes. See *Ellis*, *supra*; see also *Commonwealth v. Lopez*, 415 Pa.Super. 252, 258, 609 A.2d 177, 180, *appeal denied* 533 Pa. 598, 617 A.2d 1273 (1992). See also *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994). Such a detention constitutes a seizure of a person and thus activates the protections of the Fourth Amendment and the requirements of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In order to determine whether a particular encounter constitutes a seizure or detention, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." *Lewis*, 535 Pa. at 509, 636 A.2d at 623 (quoting *Florida v. Bostick*, 501 U.S. 429, 439, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991)). Moreover, it is necessary to examine the nature of the encounter. Circumstances to consider include, but are not limited to, the following: the number of officers present during the interaction; whether the officer informs the citizen they are suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. See *Beasley*, 761 A.2d at 624.

If a court determines that an investigative detention has occurred, fruits seized pursuant to the investigative detention shall be suppressed unless a police officer can point to specific facts which create a reasonable suspicion that the person is involved in criminal activity. *Commonwealth v. Hayward*, 756 A.2d 23, 27 (Pa.Super. 2000); *Terry v. Ohio*, 392 U.S. 1, 25-27, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). In determining whether reasonable suspicion exists, a court must examine several factors, including the informant's reliability, veracity, and basis of knowledge, as well as whether the information supplied to the police contained "specific and articulable facts" that would lead the police to believe that criminal activity may be afoot. *Hayward*, 756 A.2d at 27.

Finally, an arrest or "custodial detention" must be sup-

ported by probable cause. See *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriguez*, 532 Pa. 62, 614 A.2d 1378 (Pa. 1992); *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043, 1047-1048 (Pa. 1995). The distinction between an investigative detention and a custodial one is that a custodial detention "involve[s] such coercive conditions as to constitute the functional equivalent of an arrest." *Ellis*, 662 A.2d at 1047. In determining whether custodial detention exists, "[t]he standard...is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the troopers or the person being seized..." and "must be determined with reference to the totality of the circumstances." *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078, 1085-86 (Pa. 1993). As our Supreme Court has noted in *Commonwealth v. Boczowski*, 577 Pa. 421, 846 A.2d 75, 90 (Pa. 2004):

A person is in custody for Miranda purposes only when he "is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation." *Commonwealth v. Johnson*, 556 Pa. 216, 727 A.2d 1089, 1100 (Pa. 1999). The U.S. Supreme Court has elaborated that, in determining whether an individual was in custody, the "ultimate inquiry is...whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

To justify a custodial detention, probable cause must exist. Probable cause is present when there is reasonably trustworthy information which warrants a reasonable person in the belief that the suspect has committed or is committing a crime. *Commonwealth v. Rodriguez*, 526 Pa. 268, 585 A.2d 988, 990 (1991). Probable cause has also been characterized as those facts and circumstances existing at the time of arrest which would justify a reasonably prudent person in the belief that a crime has been committed and that the defendant was the probable perpetrator. *Commonwealth v. Bailey*, 460 Pa. 498, 333 A.2d 882 (1975).

The defendant was subjected to an investigative detention and the Commonwealth did not prove sufficient facts demonstrating reasonable suspicion that criminal activity was afoot. While it is true that the subsequent police chase and the abandonment of the contraband in question are facts of record, the Court has no difficulty in finding that the flight and abandonment resulted from the illegal investigative detention of the defendant, which began well before the defendant made the decision to flee.

This Court believes that the interaction between Officer Eastman and the defendant began as a mere encounter. However, within seconds of the mere encounter, Officer Eastman transformed the interaction into much more. The record reflects that Officer Eastman requested that the defendant identify himself while sitting in the passenger seat of a pick-up truck during daylight hours, albeit in a high crime area. Officer Eastman's own testimony discloses that the defendant was not free to leave the scene at this time. There were no facts presented by the Commonwealth demonstrating reasonable suspicion at the time Officer Eastman testified that the defendant was not free to leave the scene. Officer Eastman ordered the defendant to keep his hands where they could be seen. When the defendant attempted to leave the pick-up truck, Officer Eastman ordered the defendant to return to the pick-up truck. At a minimum, the inter-

action became an investigative detention, which must have been supported by reasonable suspicion.¹ Noticeably absent from the suppression hearing testimony is any observation or evidence remotely providing a reasonable suspicion that the defendant was engaged in any criminal activity. Officer Eastman's suspicions concerning the descriptions of the relationship between the driver and the defendant do not amount to reasonable suspicion that criminal activity was afoot. Officer Eastman positively stated that he did not observe any criminal activity at the time. Any evidence derived from the investigative detention was, therefore, properly suppressed.

Additionally, contraband discarded by a person fleeing a police officer are the fruits of an illegal 'seizure' where the police officer possessed neither 'probable cause' to arrest the individual nor reasonable suspicion to stop the individual and conduct an investigative detention. *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769 (1996); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). The record in this case discloses that Officer Eastman turned his interaction with the defendant into an investigative detention very early into the interaction without any legal basis for doing so. The suppression hearing record is devoid of specific facts which create a reasonable suspicion that the defendant was involved in criminal activity at the time he was not free to leave. Officer Eastman had neither probable cause nor reasonable suspicion to justify the seizure of the defendant and, therefore, the action of the police in chasing the defendant and subsequently arresting him was a violation of his Fourth Amendment rights.

For the foregoing reasons, the Order of Court granting suppression should be affirmed.

BY THE COURT:
/s/Mariani, J.

¹ This Court does not believe that the interaction ever arose to the level of an arrest. However, assuming that such a conclusion could be made, the record certainly does not contain facts that rise to the level of probable cause.

Commonwealth of Pennsylvania v. Mitchell Harris

Appeal—Sufficiency of Evidence—Verdict Contrary to Evidence

1. The Court found that the Defendant intentionally placed the victim in fear of imminent serious bodily injury through the use of menacing or frightening activity and following a non-jury trial Defendant was found guilty of two counts of simple assault.

2. It is for the trier of fact to determine credibility and any doubts concerning defendant's guilt are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence.

3. Defendant waived his claim that the Court's verdict was so contrary to the weight of the evidence that it shocks one's sense of justice by not properly preserving the claim, but even if he had preserved it, only the trial judge can determine the weight of the evidence.

(William R. Friedman)

Krista M. Hartnett for the Commonwealth.
Lisa Vogel Phillips for Defendant.

No. CC 200604510. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., December 4, 2007—This is a direct appeal wherein the defendant, Mitchell Harris, appeals from the Judgment of sentence of November 20, 2006. After a non-jury trial, this Court found the defendant guilty of two counts of simple assault, in violation of 18 Pa.C.S.A. §2701(a)(1) and §2701(a)(3), both second degree misdemeanors. At Count 3 of the Information, the defendant was sentenced to a period of incarceration of 11 1/2 to 23 months with permission for alternative housing at the Next Step Program. At Count 2, this Court sentenced the defendant to a period of time served of approximately 487 days. The defendant filed a timely notice of appeal. The defendant filed an Amended Concise Statement of Matters Complained Of On Appeal alleging that the evidence adduced at trial was insufficient as a matter of law to convict the defendant of both counts of simple assault. The defendant also claims that the verdict is so contrary to the evidence that the verdict shocks one's sense of justice. The errors raised by the defendant are without merit and the judgment of sentence should be affirmed.

The credible evidence presented at trial disclosed that the following events transpired:

On July 20, 2005, the defendant and the victim, Nicole McCune, who was at the time of trial 32 years old, resided in separate apartments within the same house. The defendant resided with his mother in the downstairs apartment and the victim resided in the upstairs apartment with her mother and her 5 year old son. The defendant and the victim had known each other for approximately 30 years. On the evening of July 20, 2005, at approximately 10:30 p.m., the defendant asked the victim to give him a ride to a local bar. The victim agreed. While en route to the bar, the defendant made a derogatory comment to the victim, which the victim did not take seriously but rather interpreted more as a joke. The victim tapped the defendant on his leg and told the defendant "not to say that." At this point, the defendant became agitated and grabbed the victim's right wrist. The defendant then told the victim to hit him on his right leg. The victim resisted and the defendant then grabbed the victim's hand and began hitting himself on his own leg with the victim's fist. The defendant then opened the passenger door of the victim's vehicle and stated "If you don't stop this fucking car, you will lose your door and I will make sure of it." The victim repeatedly asked the defendant to close the door. At this point, the defendant began moving the transmission gear shift as the victim drove the vehicle, to the point that the gears became stripped. When the victim was finally able to stop the car, the defendant exited the vehicle and slammed the door shut. The defendant called the victim a "fucking bitch" and a "nigger." The victim believed that the door was broken as a result of the defendant's conduct.

The defendant began walking away from the victim's vehicle. The victim parked her car and exited the vehicle. She approached the defendant, who by this time entered another vehicle being operated by another person. The victim yelled at the defendant and advised him of the damage to her vehicle. The defendant attempted to strike the victim at this time but the victim returned to her vehicle and returned home to her apartment. As the victim was removing items from her car and as she was about to enter her apartment, a vehicle pulled up and the defendant exited that vehicle. The defendant entered his first-floor apartment. The victim entered the building a few minutes later. As the victim entered the building, the defendant approached her in the doorway and began yelling at her and accusing her of hitting him in the leg. The victim responded by telling the defendant that his statements were "a goddamn lie." As soon as the victim made that statement, the defendant grabbed the victim by the throat and "body slammed" her to the floor. The defendant grabbed the victim with both hands and

threatened to kill her. The defendant was choking the victim and the victim was unable to breathe. The victim was forcibly thrown to the floor. The defendant continued to choke the victim and the victim was unable to move as a result of the defendant's weight being on top of her. At this time of the incident, the victim weighed approximately 90 pounds. The defendant weighed approximately 190 pounds. The victim's mother then came down from the upstairs apartment. The defendant released the victim for a brief period of time. However, the defendant then grabbed the victim's neck and "slammed" her up against the front door of the building. The defendant grabbed the victim's wrists and began punching the victim with her own fists. In an effort to defend herself, the victim grabbed the defendant's groin area. The victim freed herself and, upon her mother's directive, went upstairs to her apartment.

The victim temporarily lost consciousness during the incident. However, after the incident had subsided, she called the police and sought medical attention. As a result of this incident, the victim suffered a fractured tibia and an anterior lateral meniscus tear as well as other physical injuries. The defendant was subsequently arrested.

The defendant claims that the evidence was insufficient to convict him of both counts of simple assault. When considering a challenge to the sufficiency of the evidence, the appellate court must determine whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in a light most favorable to the Commonwealth, establish all of the elements of the offense of conviction beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.*

With respect to the conviction at Count 2, Title 18 Pa.C.S.A. §2701(a)(1), states that a person is guilty of simple assault if he "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa.C.S. §2701(a)(1); See *Commonwealth v. Jackson*, 907 A.2d 540, 545 (Pa.Super. 2006). Bodily injury is statutorily defined as an "impairment of physical condition or substantial pain." 18 Pa.C.S.A. 2301.

This Court found the testimony of the victim and her mother to be credible in this case. Their testimony clearly demonstrates that the defendant not only attempted to cause bodily injury to the victim. The evidence demonstrated that the defendant attempted to strike the victim while the defendant was located inside a vehicle prior to the incident that occurred in the entrance way to the defendant's and victim's apartments. The evidence was abundantly sufficient to prove these elements once the defendant attacked the victim inside the apartment entrance way. The defendant grabbed the victim, threw her to the floor while holding her neck and once the victim was on the floor, the defendant choked the victim. Once the victim freed herself, the defendant again grabbed the victim by her throat and "slammed" her into the front door of the residence. Moreover, the victim sustained a fractured tibia, a meniscal tear and other injuries. The elements of simple assault, 18 Pa.C.S. §2701(a)(1), were sufficiently proven in this case.

With respect to the conviction at Count 3, Title 18 Pa.C.S.A. §2701(a)(3) provides that a person commits simple assault when he "attempts by physical menace to put another in fear of imminent serious bodily injury." The elements which must be proven are intentionally placing another in fear of imminent serious bodily injury through the use of menacing or frightening activity. *Commonwealth v. Little*, 614 A.2d 1146, 1151-1155. Intent can be proven by circumstantial evidence and may be inferred from the defendant's conduct under the attendant circumstances. *Id.* at 1154.

The evidence in this case, as recited above, demonstrates beyond a reasonable doubt that the defendant intentionally placed the victim in fear of imminent serious bodily injury through the use of menacing or frightening activity. The defendant violently choked the victim and otherwise attacked the victim. During this period, the defendant threatened to kill the victim. The defendant was much larger than the victim. The defendant was male and the victim was female. This Court believes that the evidence demonstrated beyond a reasonable doubt that the defendant engaged in frightening and menacing activity designed to place the victim in fear of imminent serious bodily injury. Accordingly, the defendant was found guilty of both counts simple assault and the judgment of sentence should be affirmed.

The defendant finally claims that this Court's verdict was so contrary to the weight of the evidence that the verdict shocks one's sense of justice. This claim of error was not properly preserved and the defendant has, therefore, waived this claim. As set forth in *Criswell v. King*, 834 A.2d 505; 512. (Pa. 2003) referring to claims challenging the weight of the evidence, "it is a claim which, by definition, ripens only after the verdict, and it is properly preserved so long as it is raised in timely post-verdict motions." The record is devoid of a post-verdict motion raising this issue. Therefore, the Court believes that this issue has been waived by the defendant.

However, assuming that the issue has not been waived, the claim of error is wholly without merit. As further set forth in *Criswell*,

Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury's verdict was contrary to the weight of the evidence claim is the trial judge—decidedly not the jury.

834 A.2d at 512. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994). Although *Criswell* spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder, in this case, this Court. *Commonwealth v. Jarowecki*, 923 A.2d 425, 433 (Pa.Super. 2007). This Court was free to believe all, some or none of the evidence. *Id.* A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one's sense of justice. *Id.* See also *Commonwealth v. Habay*, 2007 Pa.Super. 303; 2007 Pa.Super. LEXIS 3125 (October 10, 2007).

The court here concluded that, after considering and weighing all the evidence, the testimony of the victim and the Commonwealth's evidence was credible, despite the arguments made by the defendant to the contrary. As set forth above, this evidence supported the verdict. This evidence was supported in the record and the verdict was not against the weight of the evidence.

The judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Commonwealth of Pennsylvania v. John S. Burton

Appeal—Reasonable Suspicion—Sufficiency of Evidence—Sentence

1. Police officer conducted a traffic stop of Defendant with whom the police officer was familiar. Defendant provided false identification, but when police officer attempted to arrest him, Defendant assaulted police officer and resisted arrest.

2. Following a non-jury trial and sentencing, Defendant filed a timely direct appeal alleging that reasonable suspicion did not support the traffic stop and there was insufficient evidence to convict.

3. A police officer must be able to articulate specific facts that establish reasonable suspicion to believe that the vehicle or its driver violated the Pennsylvania Vehicle Code and must do so by considering the totality of the circumstances.

4. The test for sufficiency of evidence is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt.

(William R. Friedman)

Christopher Mark Stone for the Commonwealth.
Stephen J. Taylor for Defendant.

No. CC 200616671. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., December 4, 2007—This is a direct appeal wherein the defendant, John S. Burton, appeals from the judgment of sentence of April 12, 2007. Prior to trial, this Court denied the defendant's motion to suppress based upon his allegation that his vehicle was illegally stopped. After a non-jury trial, the defendant was convicted of Aggravated Assault (Count I), in violation of 18 Pa.C.S.A. §2702(a)(3) and (c), Resisting Arrest (Count II), in violation of 18 Pa.C.S.A. §5104, False Identification to Law Enforcement, in violation of 18 Pa.C.S.A. §4914(a)(Count III) and Driving Without a License, in violation of 18 Pa.C.S.A. §1501(a)(Count V). The defendant was acquitted of violating 35 Pa.C.S.A. §780-113(a)(16)(Count IV). Thereafter, this Court sentenced the defendant to a period of incarceration of not less than 9 not more than 23 months' imprisonment at Count I. At Count II, the defendant received a concurrent term of probation of two years. At Count III, the defendant received a concurrent term of probation of one year. Count V, the defendant received no further penalty. A timely Notice of Appeal was filed. The defendant filed a Concise Statement of Errors Complained Of On Appeal alleging that the requisite level of reasonable suspicion did not support the stop of his vehicle. He has also alleged that evidence adduced at trial was insufficient as a matter of law to convict the defendant of aggravated assault and resisting arrest. The record in this case supports the verdict of this Court and the judgment of sentence should be affirmed.

The evidence presented established that on September 9, 2006, Pittsburgh Police Officer Daniel Nowak was on routine patrol in the Arlington Heights section of Pittsburgh, Pennsylvania. At approximately 6:43 p.m. on that day, Officer Nowak observed the defendant driving a blue Audi sedan automobile at the intersection of Arlington Avenue and Sterling Street. The defendant was familiar to Officer Nowak because Officer Nowak had conducted a traffic stop of the defendant's vehicle on July 11, 2006 during which time the defendant identified himself as John Carlos Miller. During

that stop, the defendant advised Officer Nowak that he was from Detroit, Michigan. The defendant advised Officer Nowak that he did not possess a valid Pennsylvania or Michigan driver's license. The defendant was issued a citation in the name of John Carlos Miller on that date. Subsequent to the interaction of July 11, 2006, Officer Nowak learned that the defendant was a homicide suspect in Detroit.

Based upon the facts that Officer Nowak believed that the defendant did not possess a valid driver's license in July, 2006 and the fact that the defendant was a wanted "at-large" homicide suspect, Officer Nowak conducted a stop of the vehicle operated by the defendant on September 9, 2006. Officer Nowak approached the blue Audi and requested that the defendant provide his driver's license. The defendant responded that he didn't possess one. Officer Nowak then requested any form of identification. The defendant responded that he didn't have any. Upon being questioned by Officer Nowak as to ownership of the vehicle, the defendant responded that his friend owned the vehicle. Officer Nowak requested the name of the friend. The defendant then responded that his aunt owned the vehicle. Officer Nowak requested that the defendant step out of the vehicle toward the rear of the vehicle. The defendant complied and consented to a search of the vehicle for weapons.

At this point, Officer Nowak asked the defendant for his name and date of birth. The defendant provided the name of Michael Thomas with a date of birth of March 14, 1987. Based upon his July, 2006 interaction with the defendant, Officer Nowak believed the defendant was lying about his identity at this time. The defendant recalled the July, 2006 incident and asked Officer Nowak if he had a warrant based upon the citation that was issued in July, 2006. The defendant then acknowledged lying about his identity.

Officer Nowak then advised the defendant he was under arrest and requested the defendant to turn around. Officer Nowak pulled out his handcuffs. The defendant slowly turned around and Officer Nowak was able to place one handcuff around his left wrist. As that handcuff locked, the defendant pulled away from Officer Nowak, turned toward him and struck Officer Nowak in the face, hitting his nose. The defendant struck Officer Nowak "hard" with a closed fist. Officer Nowak's nose immediately began bleeding and he experienced pain. Officer Nowak continued to attempt to take the defendant into custody but the defendant began to struggle and fight with Officer Nowak and refused to comply with Officer Nowak's demands to "stop fighting" and "stop resisting arrest." Officer Nowak repeatedly attempted to reach for his taser and his police radio but every time he tried to do so, the defendant gained an advantage in the struggle. Officer Nowak was "scared."

At some point, a civilian, Brendan Speers, drove by. Officer Nowak requested Mr. Speers' assistance and Mr. Speers immediately stopped at the scene, left his vehicle and helped Officer Nowak control the defendant. When Mr. Speers approached the scene, Officer Nowak was on his back, holding onto the defendant "for dear life." With Mr. Speers help, Officer Nowak was able to place the defendant in handcuffs and the defendant was arrested. At a later date, the defendant was identified as John Samuel Burton having a date of birth of December 29, 1983. Although not germane to this appeal, after the defendant was arrested, a quantity of cocaine was found in the vehicle operated by the defendant.

Officer Nowak was treated at UPMC South Side Hospital. During the incident, Officer Nowak received cuts and abrasions to his hands and face. His lips were swelled. His knees were swelled up for a couple of weeks. His nose continued to bleed on and off for about a week.

The defendant questions whether this Court properly denied

his suppression motion challenging the legality of the stop of his motor vehicle. Before stopping a vehicle, an officer must be able to articulate specific facts that establish reasonable suspicion to believe that the vehicle or its driver was in violation of the Pennsylvania Vehicle Code. *Commonwealth v. Hall*, 2007 Pa.Super. 220; 2007 Pa.Super. LEXIS 2169; *Commonwealth v. Hendricks*, 927 A.2d 289 (Pa.Super. 2007); *Commonwealth v. Little*, 2006 Pa.Super. 186, 903 A.2d 1269, 1272 (Pa.Super. 2006); *Commonwealth v. Sands*, 2005 Pa.Super. 372, 887 A.2d 261, 271-72 (Pa.Super. 2005). Although a police officer need not establish that the Vehicle Code was actually violated prior to stopping a vehicle, the officer must provide a reasonable basis for his or her belief that the Vehicle Code was being violated. *Commonwealth v. Vincent*, 806 A.2d 31, 33 (Pa.Super. 2002); *Commonwealth v. Palmer*, 751 A.2d 223, 226 (Pa.Super. 2000); *Commonwealth v. Bowersox*, 450 Pa.Super. 176, 675 A.2d 718, 721 (Pa.Super. 1996). This standard is less demanding than probable cause. *Commonwealth v. Cook*, 558 Pa. 50, 57, 735 A.2d 673, 676 (1999). In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. *In the Interest of D.M.*, 566 Pa. 445, 781 A.2d 1161, 1163 (2001). A police officer's reasonable inferences which are drawn from the facts in light of his experience are entitled to due weight. *Cook*, 735 A.2d at 676.

The evidence adduced at the suppression hearing demonstrated that Officer Nowak possessed reasonable suspicion that the defendant was violating the Pennsylvania Motor Vehicle Code. Officer Nowak credibly testified that he believed that at the time of the vehicle stop, the defendant did not possess a valid driver's license. This knowledge arose from his personal observation in July of 2006 that the defendant did not possess a valid driver's license. Officer Nowak personally observed the defendant driving in July, 2006 and about two months later in September, 2006. Officer Nowak cited the defendant for driving without a valid license in July, 2006. Additionally, Officer Nowak testified that the traffic stop was also based on information that he received that the defendant was a wanted "at-large" homicide suspect. These facts demonstrate that Officer Nowak had a reasonable suspicion that the defendant was violating the vehicle code at the time of the vehicle stop and he had reasonable suspicion that the defendant was wanted for a homicide in Michigan. The stop of the vehicle was constitutional.

The defendant next challenges whether the evidence was sufficient to convict him for aggravated assault and resisting arrest. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt were to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.* A trial court's credibility determinations must be given great deference. See *Commonwealth v. O'Bryon*, 820 A.2d 1287, 1290 (Pa.Super. 2003).

The defendant complains that the evidence was insufficient to convict him of 18 Pa.C.S.A. §2702(a)(3). As it applies to this case, that provision states

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

(3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer...in the performance of duty;

With respect to the charged aggravated assault, the verdict can only stand if the following four elements existed beyond a reasonable doubt: that appellant (1) attempted to cause or intentionally or knowingly caused (2) bodily injury (3) to a police officer (4) in the performance of duty. 18 Pa.C.S.A. 2703(a)(3). *Commonwealth v. Petaccio*, 764 A.2d 582, 585 (Pa.Super. 2000). Knowledge that the victim is a police officer is not an element of the crime of aggravated assault. Bodily injury is statutorily defined as an "impairment of physical condition or substantial pain." 18 Pa.C.S.A. 2301.

The evidence in this case was sufficient to convict the defendant of aggravated assault. There can be no dispute that, at the time of the incident at issue, the evidence was more than sufficient to prove beyond a reasonable doubt that Officer Nowak was a police officer performing his duties as a police officer.

Moreover, the facts adduced at trial were sufficient to prove that the defendant attempted to cause or intentionally or knowingly caused an impairment of Officer Nowak's physical condition. The testimony at trial established that the defendant punched Officer Nowak in the face while Officer Nowak was attempting to place the defendant under arrest. The resultant injury necessitated that Officer Nowak present himself to the hospital for treatment. His nose bled for over a week as a result of the injury. He sustained lacerations to his face and other parts of his body. His knees were injured as well. These injuries constitute impairment of Officer Nowak's physical condition and, moreover, the actions of the defendant were consistent with an attempt to cause an impairment of Officer Nowak's physical condition and substantial pain to Officer Nowak.

This Court finds that the facts of this case are consistent with those set forth in *Commonwealth v. Petaccio*, 764 A.2d 582 (holding that punch to the face of an officer, accompanied by a kick to her stomach, is the very type of conduct prohibited by §2702(a)(3)) and *Commonwealth v. Biagini*, 540 Pa. 22, 655 A.2d 492 (1995) (bodily injury proved where defendant punched police officer in the face). Accordingly, the evidence was sufficient to convict the defendant of aggravated assault.

The defendant also challenges his conviction for resisting arrest. The offense of resisting arrest is established when a "person...with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty...creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance." 18 Pa.C.S. §5104; *Commonwealth v. Stevenson*, 894 A.2d 759, 775 (Pa.Super. 2006).

There was sufficient evidence by which the Commonwealth of Pennsylvania proved beyond a reasonable doubt that these elements existed. As set forth above, Officer Nowak was clearly discharging his duties as a police officer during the incident in question in this case. Officer Nowak was clearly attempting to arrest the defendant. The defendant engaged in significant physical aggression in resisting that arrest by punching Officer Nowak in the face and by otherwise fighting with Officer Nowak. These facts demonstrate that the defendant's conduct created a substantial risk of bodily injury. Additionally, both Officer Nowak's testimony and Brendan Speer's testimony as to the fact that substantial force was necessary to overcome the defendant's resistance and to take the defendant into custody was credible. Without the help of a good Samaritan, Officer Nowak may have been unable to overcome the defendant's aggression and resistance. The evidence was sufficient to convict the defendant of resisting arrest.

Accordingly, the judgment in this case should be affirmed.

BY THE COURT:
/s/Mariani, J.