

PITTSBURGH LEGAL JOURNAL

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OPINIONS

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Morewood Point Community Association v. The Port Authority of Allegheny County, et al.

Sovereign Immunity—Real Estate Exception—Lateral Support—Jury Instructions

1. Proof of a dangerous condition of Commonwealth agency real estate in the form of fill placed on a hillside and the agency having notice of that condition is insufficient to establish liability against the agency. Causation must also be established.

2. A landowner incurs liability when an adjacent property owner suffers loss as a result of the loss of lateral support only when the Defendant/landowner actively withdraws such support.

3. There is no error in refusing to provide the jury with a super-abundance of instructions on the same issue. When additional proposed instructions set forth incomplete statements of law, omitting mention of causation, and therefore tend to undermine the correct, more complete instruction, they will be denied.

(*Jeffrey A. Ramaley*)

Fred C. Jug, Jr. for Morewood Point Community Association. *Colin Meneely* and *Michael J. Cetra* for Port Authority of Allegheny County.

No. GD 05-033362. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

McCarthy, J., May 29, 2009—In February 1983, following an approximate nine (9) year period of design and construction, the Port Authority of Allegheny County (hereinafter, “Port Authority”) opened the Martin Luther King, Jr. East Busway. Adjacent to a portion of that busway is a hillside that slopes upward approximately 70 feet. The Port Authority owns that slope. A chain link fence borders the base of the slope and another chain link fence is at the top of the slope. Since the opening of the busway, Port Authority had not done any work on the hillside area, with the exception of some minor tree trimming.

Subsequent to the construction of the busway, a residential condominium development was constructed on the flat hilltop above the Port Authority slope. Following construction of the condominiums, Morewood Point Community Association (“Morewood”), a non-profit corporation, was formed among unit owners to maintain certain common areas within the boundaries of the development.

Aerial photographs and engineering drawings demonstrate that additional fill was placed at the upper area of the Port Authority-owned hillside sometime after the busway opened but before completion of the construction of the condominiums and the formation of the plaintiff association. In the spring of 2005, backyards to the rear of several condominium units near the slope showed signs of earth movement. Upon receipt of notice of that condition, Port Authority dispatched personnel to view the site. An in-house civil engineer determined that the earth movement resulted from a sinkhole. Although requests had been made by Morewood in advance of suit for a copy of the Port Authority engineering report, that report was not shared until produced during discovery in the course of litigation.

Morewood commenced its action against the Port Authority by praecipe. Thereafter, Morewood filed a complaint that set forth a single count of landowner negligence against Port Authority and additionally sought injunctive

relief in the nature of an order compelling production of the Port Authority engineering report and granting a construction easement that would afford Morewood such access as was necessary to address and stem the earth movement. Thereafter, Morewood amended its complaint alleging further damage occurring subsequent to the initial complaint but arising from the same alleged negligence of Port Authority. Following a Port Authority response that included a counterclaim alleging that Morewood or its predecessors in interest had substantially increased the area and composition of the slope by depositing additional fill on the Port Authority hillside before construction of the condominiums, Morewood filed a second amended complaint. That pleading named the development company, the builder and “unknown engineers” as additional defendants, and alleged that such defendants had been negligent in, among other things, the design and planning of the development and in the execution of grading, excavation and fill activities, including failure to address placement, compaction and saturation of slope soils. Morewood obtained default judgments as to all additional defendants with the consent of such defendants.

The matter ultimately proceeded to trial solely against the Port Authority and solely on the allegation of negligence. A jury trial concluded with a verdict against Morewood and in favor of the Port Authority. Morewood timely petitioned for post-trial relief. By Order of Court dated March 10, 2009, this Court denied the motion submitted by Morewood Association “Requesting Judgment Non Obstante Veredicto and New Trial.” From that Order, Morewood has taken an appeal.

In response to a direction to file a statement of matters complained of on appeal, Morewood has asserted that judgment n.o.v. should have been granted.¹ Specifically, Morewood contends that because undisputed facts of record show that a dangerous condition existed on the property of the Port Authority, and that the Port Authority had notice of that condition in advance of the harm suffered by Morewood, plaintiff was entitled to judgment as a matter of law. Morewood submits that proof of a known unsafe condition on the government realty not only satisfies the requirements of a waiver of sovereign immunity under so-called “real estate exception” set forth at 42 Pa.C.S.A. §8522(b)(4), but also fully establishes the liability of a Commonwealth agency.

42 Pa.C.S.A. § 8522 provides, in pertinent part:

§ 8522. Exceptions to sovereign immunity

(a) **Liability imposed.**—The General Assembly, pursuant to section 11 of Article I of the Constitution of Pennsylvania, does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in section 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.

(b) **Acts which may impose liability.**—The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(4) Commonwealth real estate, highways and sidewalks.—A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5).

(5) Potholes and other dangerous conditions.—A dangerous condition of highways under the jurisdiction of a Commonwealth agency created by potholes or sinkholes or other similar conditions created by natural elements, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition. Property damages shall not be recoverable under this paragraph.

In waiving sovereign immunity, 42 Pa.C.S. §8522 does not generate new, additional theories of negligence, but merely relinquishes, in part, an immunity defense, and, to that limited extent, exposes Commonwealth agencies to prosecution of negligence claims from which they would otherwise be shielded. To the extent that immunity has been waived, liability may be imposed on a Commonwealth agency for damages flowing from a negligent act where those damages would be recoverable under the common law or a statute against a person not having the defense of sovereign immunity available. 42 Pa.C.S.A. § 8522(a); See, *Jones v. South Eastern Pennsylvania Transportation Authority* 565 Pa. 211, 772 A.2d 435 (Pa. 2001).

Morewood's contention that proof of a dangerous condition of Commonwealth agency real estate and that Port Authority had notice of that condition is sufficient to establish the liability aspect of its claim against Port Authority is an incorrect, incomplete statement of its burden. In asserting that its burden is met merely by identifying a dangerous condition and establishing the fact of Port Authority notice of that condition, Morewood relies on *Commonwealth of Pennsylvania, Department of Transportation v. Patton*, 686 A.2d 1302 (1997). *Patton* involved a driver on a state road who was killed when a large limb fell from a tree within a Commonwealth right-of-way onto her car. The tree had been topped more than twenty years earlier, causing the tree to decay from the top down, weakening the socket of the limb and causing it to fall. The *Patton* Court addressed only the matter of notice, and, from that, Morewood infers that the Court deemed the active negligence of another – that is, matter of who may have “topped” the tree – to be immaterial to the question of the Commonwealth's liability in any matter pursued under the statutory waiver of immunity. Morewood asserts that the matter of who may have placed fill on the slope owned by Port Authority was immaterial to question of the liability of Port Authority for the harm resulting to Morewood from the dangerous condition of loose fill.

Morewood's reliance on *Patton* is misplaced. The *Patton* Court limited its inquiry to the matter of notice simply because the sole issue presented on appeal was the refusal of the court below to give a requested instruction pertaining to

notice of a dangerous condition. *Patton* does not suggest that the mere coalescence of a dangerous condition and notice to a Commonwealth agency of that condition is in itself sufficient in every case to establish agency liability under 42 Pa.C.S.A. § 8522(b). On the contrary, *Patton* indicated that the plaintiff in that matter could prevail “provided that damages would have been recoverable at common law.” The *Patton* Court considered the elements of that common law cause of action, one of which is notice. *Patton*, at 546 Pa 566, citing *Good v. City of Philadelphia*, 335 Pa. 13, 6 A.2d 101 (1939). At common law, liability may attach to a municipality for injuries suffered as a result of defects in the highway provided that entity has notice, actual or constructive, of the dangerous condition. *Murdaugh v. Oxford Borough*, 214 Pa 384, 63 A. 696 (1906). *Patton* did not establish that, in every matter involving an injury resulting from a dangerous condition on real estate owned by a Commonwealth agency, prior notice to the agency of that dangerous condition is sufficient to establish liability.

To prevail on a motion for judgment n.o.v., Morewood must not only demonstrate that it has put forward proof such that no two reasonable minds could disagree on the fact posited but also that such proof is sufficient to support a cognizable theory of liability. *Haddad v. Gopal*, 2001 Pa.Super. 317, 787 A.2d 975, (2001) app. den. 572 Pa 705, 813 A.2d 842 (2002). Morewood has failed to show that the facts it regards as undisputed would be sufficient to establish liability.

Morewood identified no common law action nor any other authority that permits recovery for damages to adjacent private property based solely upon a dangerous condition on the neighboring estate and that neighbor's actual or constructive prior notice of that condition. Indeed, in the specific instance of a claim derived from a loss of lateral support, as is Morewood's claim in this instance, a landowner incurs liability only by actively withdrawing such support. At common law, no liability attaches for subsidence of a neighbor's land so long as a landowner does nothing to change the contour of his own property. See, *Beal v. Reading Company*, 370 Pa 45, 87 A.2d 214 (1952). In the absence of any activity by Port Authority that contributed to the loss of support for the condominium units, damages were not recoverable by Morewood from Port Authority at common law. Consequently, damages were not recoverable by Morewood from Port Authority under §8522(b)(4).

Furthermore, as the Port Authority correctly observed in its response to the post-trial motion, Morewood's analysis too blithely disregards the element of causation:

...there is no question that a landslide occurred on Port Authority property. During trial, Plaintiff treated this as a strict liability case and did nothing to establish exactly what caused the landslide. Again, Plaintiff's expert, Mr. Murray, testifying on behalf of the Plaintiff readily admitted that landslides are common phenomena. Nowhere in his testimony did he state that any work done on Port Authority's Busway or hillside contributed to the earth movement. Rather, when asked by Plaintiff's counsel regarding his opinion as to the origin of the landslide Mr. Murray responded “[i]t's my opinion, as – I'm sorry – as the other attorney said, that the origin of this landslide is probably the water – ground water effect – and it has to be either at the boundary or on the Port Authority (side)” TT, P49, L 3. No one ever established where this water was coming from that saturated the hillside, or whether it was an artificial

condition or a naturally occurring event.

Defendants Brief in Response to Plaintiff's Motion for Post-Trial Relief, at p. 5 (emphasis in original)

Morewood complains, however, that it was not permitted to call as a witness Christopher Hess, an assistant general manager of legal and corporate services for Port Authority. Morewood insists that such testimony could have established the fact of notice to Port Authority of the instability of its slope.

The substance of Hess' testimony was a matter of stipulation. The trial was bracketed by a stipulation read to the jury at the outset that, if called to testify Mr. Hess would confirm the fact of notice on the approximate date indicated by Morewood and by an instruction at the conclusion that: "It has been established by the evidence and has not been disputed that the Port Authority first had notice of earth movement on this land in June of 2005." (N.T., 18-19; 321-322). The fact of notice to Port Authority at the approximate time alleged by Morewood was not in dispute; it was a matter of a judicial admission. Morewood was not entitled to call Hess as a witness on a matter established beyond contradiction. See, *Fuller v. Pennsylvania Railroad Company*, 371 Pa 330, 339 (1952).

Similarly, although Morewood concedes that an accurate instruction on the issue of negligence of the owner of land with a defective condition was given to the jury (Plaintiff's Brief in Support of Post Trial Motion, p.5), it nonetheless complains that the jury should have received additional proposed similar instructions, specifically Nos. 22, 23 and 25.² Each of those proposed instructions replicated aspects of the more complete instruction that Morewood concedes was accurate. There is no error in refusing to provide the jury with a superabundance of instruction on the same item. That is particularly so where, as here, the additional proposed instructions set forth incomplete statements of the law, omitting any mention of causation, and would therefore tend to undermine the correct, more complete instruction.

The jury also received lengthy instruction emphasizing that if the Port Authority was negligent and such negligence was a factual cause in producing the damages alleged by Morewood, then the jury must find the Port Authority liable to Morewood, notwithstanding that prior conditions or other causes may have contributed to such damage. The jury was sufficiently instructed that, while the Port Authority could not be liable to Morewood based solely upon the acts of the developer or builder and had no duty to engineer lateral support for neighboring properties, the Port Authority would be responsible to Morewood for damages resulting from the Port Authority's own negligence. The jury, after receiving those instructions and considering all that had been presented, was free to determine, as it did, that the Port Authority had not committed any negligent act that caused damage to Morewood. There is nothing of record or in the law that compels setting aside that verdict and granting judgment to Morewood.

BY THE COURT:
/s/McCarthy, J.

Dated: May 29, 2009

¹ Morewood's motion for post-trial relief sought judgment n.o.v. or a new trial. The concise statement of matters complained of on appeal addresses only the matter of failure to grant judgment n.o.v., and would seem, therefore, to waive the issue of the denial of a new trial on appeal. Pa.R.A.P.

1925(b)(3)(iv).

² Although Morewood confines its 1925(b) statement to an assertion that judgment n.o.v. was improperly denied, its arguments as to additional testimony and jury charges relate more to a motion for new trial than judgment n.o.v.

Port Authority of Allegheny County v. Amalgamated Transit Union Local 85

Arbitration—Grievance—Intent—Racial Intimidation

1. The court denied the Port Authority's petition to vacate a grievance arbitration award.

2. Arbitrator had found in favor of employee who was terminated for tying a noose-knot on a spool of rope. The arbitrator found as a fact that the employee was simply tying rope to pass the time and was not attempting to intimidate anyone.

3. Where the issue of discipline and termination were appropriately before the arbitrator, a court may vacate the arbitrator's award only if "the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement."

4. Port Authority contended that the arbitrator irrational-ly read an intent requirement into its rule. The court found that the rule in question, providing for immediate discharge for engaging in acts of violence, fighting, intimidating or threatening behavior, implies intent since one cannot "accidentally" engage in fighting.

5. Port Authority also contended that a public policy exception existed to allow a court to refuse to enforce the arbitrator's decision if public policy is violated. However, the Port Authority failed to allege any public policy violation, let alone one that would be, as required by case law, explicit, well-defined and dominant. The court found that no public policy existed against innocently (as the arbitrator found as a matter of fact) tying a noose-knot.

(Lynn E. MacBeth)

No. GD 09-007904. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

Michael A. Palombo and Christopher P. Gabriel for Port Authority of Allegheny County.

Joseph S. Pass for Amalgamated Transit Union Local 85.

MEMORANDUM

Folino, J., July 23, 2009—What follows is a short discussion explaining why I must deny the Port Authority's "Petition to Vacate Grievance Arbitration Award."

While at work, Port Authority employee Kirk Blasko tied a noose-knot on a spool of rope. As a result of this action, the Port Authority initiated disciplinary procedures against Mr. Blasko; and, after a *Loudermill* hearing, Mr. Blasko was discharged for violating "Major Rule" number ten and "General Rule" number nine. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). These two rules, respectively, read:

Major Rule Violations:

THE FOLLOWING RULE VIOLATIONS ARE CONSIDERED SUFFICIENT CAUSE FOR IMMEDIATE DISCHARGE.

...

10. Engaging in acts of violence, fighting, intimidating or threatening behavior on duty or on Port Authority Property.

...

General Rule Violations:

A single incident in violation of a General Rule is cause for disciplinary action. Port Authority retains the discretion to determine when and what type of disciplinary action is appropriate in each particular instance. Disciplinary measures include verbal warning (written documentation), written warning, final written warning, held off, suspension, or discharge. The nature of the discipline will vary depending on the circumstances involved including the employee's prior disciplinary history. In some cases, the immediate termination of an employee may be appropriate...

...

9. Discourtesy/disrespectful behavior.

"Port Authority of Allegheny County Performance Code," attached as "Exhibit 'G'" to the "Petition to Vacate Grievance Arbitration Award" (hereinafter "Performance Code"), at pgs. 3 & 2.

The Union grieved Mr. Blasko's discharge and the parties proceeded to "final and binding arbitration." *Office of the Attorney Gen. v. Council 13, Am. Fed'n of State, County Mun. Employees, AFL-CIO*, 844 A.2d 1217, 1222 (Pa. 2004) (hereinafter "*Office of the Attorney General*") (holding: the Public Employee Relations Act "mandates that the final step in the resolution of grievances or disputes arising from the [Collective Bargaining A]greement must be final and binding arbitration").

During the arbitration hearing, the arbitrator heard all of the evidence presented, judged the credibility of the witnesses and finally found, *as a fact*, that Mr. Blasko "was merely tying a knot otherwise known as a noose." "Arbitration Award" Opinion, dated March 26, 2009, at 13. In other words, the arbitrator believed Mr. Blasko's testimony and therefore held, *as a fact*, that Mr. Blasko's tying of the noose "was not done to intimidate or threaten any employee"; rather, Mr. Blasko tied the knot simply to "kill[] time and was just using knot-tying skills he learned while in the Navy." *Id.* at 3. Hence, the arbitrator concluded:

the Port Authority has failed to establish sufficient cause for [Mr. Blasko's] termination. The record does not establish that [Mr. Blasko's] fashioning of a noose was disrespectful, discourteous, intimidating or threatening to any of the employees who were present that evening. [Mr. Blasko's] actions must be viewed in the context in which they took place. There is no evidence that the noose was fashioned as an act of racial intimidation. The Port Authority has not carried its burden to meet the test of sufficient cause for the termination of [Mr. Blasko].

Id. at 13-14.

After receiving the arbitrator's ruling that Mr. Blasko was to be "returned to employment with full back pay and benefits," the Port Authority filed the current "Petition to Vacate Grievance Arbitration Award" in the Court of Common Pleas.

The Port Authority's petition makes a two-fronted attack on the arbitration award. First, the Port Authority argues

that the award "does not draw its essence from the collective bargaining agreement"; second, the Port Authority generically contends that Mr. Blasko's reinstatement violates "the public policy of the Commonwealth of Pennsylvania and of the United States." "Petition to Vacate Grievance Arbitration Award," filed on behalf of the Port Authority of Allegheny County, (hereinafter "Petition to Vacate"), at 8. When considered in light of this Court's standard of review, both of the Port Authority's arguments fail.

As our Supreme Court has explained, Pennsylvania's statutory and case law evince a "strong public policy of encouraging peaceful settlement of industrial disputes by means of arbitration." *Office of the Attorney General*, 844 A.2d at 1222. And, because "arbitration is the favored means of resolution in labor disputes," our Supreme Court has mandated that Courts "play *an extremely limited role* in resolving such disputes." *Id.* at 1223 (emphasis added). This "extremely limited role" is now solidly embodied in the "essence test." *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n, PSEA/NEA*, 939 A.2d 855 (Pa. 2007). Specifically, the "essence test" requires that a court engage in a two-pronged analysis:

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

State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA), 743 A.2d 405, 413 (Pa. 1999) (hereinafter "*Cheyney University*").

Applying the essence test to the case at bar, both parties agree that the first prong has been met: the issue of Mr. Blasko's discipline and termination were "appropriately before the arbitrator." So, the issue becomes: whether the "arbitrator's interpretation can rationally be derived from the collective bargaining agreement."

As stated above, our Supreme Court has made it clear that courts are to "play an extremely limited role in resolving [labor] disputes." *Office of the Attorney General*, 844 A.2d at 1222. The reasons for this "extremely limited role" are at least three-fold. First, our legislature has imposed a "mandate that arbitration awards be final and binding." *Westmoreland Intermediate Unit #7*, 939 A.2d at 862; 43 P.S. § 1101.903. Second, both our Supreme Court and our legislature have recognized a "strong public policy of encouraging peaceful settlement of industrial disputes by means of arbitration." *Office of the Attorney General*, 844 A.2d at 1222. And, finally, parties to a collective bargaining agreement specifically bargain for the relatively expeditious and inexpensive method of arbitration of disputes. Certainly, in the case at bar, both the Port Authority and Local 85 are parties to a collective bargaining agreement; moreover, within that contract, the parties agreed that any covered dispute must be submitted to an arbitrator. "Collective Bargaining Agreement," at § 106. Thus, both the Port Authority and Local 85 have agreed that it is the arbitrator's - and not the court's - job to: 1) determine the underlying facts in dispute; 2) determine the meaning of specific language contained within the collective bargaining agreement and 3) apply the

facts to the law.

The second prong of the essence test intentionally and significantly restricts a court's ability to interfere with an arbitrator's award. In particular, under the second prong of the test, a court may vacate an arbitrator's award only if "the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." *Cheyney University*, 743 A.2d at 413. Here, the arbitrator's award undoubtedly passes this circumscribed standard of review.

In the case at bar, the arbitrator found as a fact that Mr. Blasko "was merely tying a knot otherwise known as a noose" and that Mr. Blasko tied the knot simply to "kill[] time and was just using knot-tying skills he learned while in the Navy." The arbitrator further found that there was no credible evidence that Mr. Blasko, whose job it was to clean the Port Authority facilities during the night, was "aware of the historical implication of the noose for the Black community." After making these factual findings, the arbitrator then had to determine whether Mr. Blasko's conduct violated either "Major Rule" number ten or "General Rule" number nine; as recited above, these two rules allowed for punishment if the employee engages in "violence, fighting, intimidating or threatening behavior" or if the employee acted in a "discourteous" or "disrespectful" manner.

The arbitrator concluded that Mr. Blasko had not violated Major Rule number ten: Mr. Blasko neither intended to nor did, in fact, "intimidate or threaten any employee." "Arbitration Award" Opinion, at 13. Moreover, the arbitrator held that, as Mr. Blasko was unaware of the noose's symbolic nature, Mr. Blasko could not have engaged in "discourteous" or "disrespectful" behavior; thus, Mr. Blasko had not violated General Rule number nine. *Id.* at 11-12 & 13. And, because Mr. Blasko violated neither of the two cited rules, the Port Authority could not, under the collective bargaining agreement, terminate Mr. Blasko's employment.

Perhaps some different arbitrator might have reached different conclusions, or made different credibility findings, but that is not the issue before me. There really is no question that this award was "rationally...derived from the collective bargaining agreement." *Cheyney University*, 743 A.2d at 413. The award, therefore, passes the second prong of the essence test.

Yet, the Port Authority takes issue with this arbitrator's conclusions and contends that the arbitrator misinterpreted Major Rule number ten. According to the Port Authority, when all of the Major Rules are read in harmony, it becomes apparent that Major Rule number ten has no intent requirement. Thus, according to the Port Authority, the arbitrator's award must be vacated, as the arbitrator "irrationally" read an intent requirement into the rule. "Brief in Support of Petition to Vacate Grievance Arbitration Award," filed on behalf of the Port Authority of Allegheny County (hereinafter "Brief in Support"), at 7. In other words, the Port Authority seems to suggest that irrespective of the employee's intent - whether he intended to tie the knot for some functional purpose, or whether he tied it absent mindedly with no thought or purpose, or whether he tied it to send a message of racial hatred directed at an African American fellow employee - the conduct must be treated by the arbitrator as having the same effect in each instance: that intent is irrelevant, but that in each example noted above the employee has engaged in intimidating and threatening behavior as a matter of law. Simply stated, the Port Authority's argument is mistaken.

Initially, the Port Authority's argument must fail because Major Rule number ten can be reasonably read as having an intent requirement. According to Major Rule number ten, an

employee may be "immediately discharged" for "[e]ngaging in acts of violence, fighting, intimidating or threatening behavior." "Performance Code," at 3. One cannot "accidentally" engage in a fight. And, by including "intimidating or threatening behavior" in the same clause as "violence" or "fighting" acts, one could logically believe that an intent requirement does exist as to the restriction on "intimidating or threatening behavior." Additionally, the extreme punishment of "immediate discharge" lends credence to the arbitrator's construction: one would think that, before an individual is immediately discharged for engaging in "intimidating or threatening behavior," that individual must, at least, have some type of culpable mind.

Secondly, the Port Authority is taking a myopic view of the arbitrator's decision. It is true that, on a number of occasions, the arbitrator references Mr. Blasko's "intent." However, this is not a case where Mr. Blasko hung a noose as some kind of racial "joke" and then argued, in defense, that he did not "intend" to threaten anyone. *See, e.g., Burns v. Winroc Corp. (Midwest)*, 565 F.Supp.2d 1056 (D.Minn. 2008). Rather, in this case, the arbitrator found as a fact that Mr. Blasko tied the noose innocently: he was "merely tying a knot," a knot he had been taught to tie in the Navy, and that "he had **no understanding** that his fashioning" of this particular knot "was or could be offensive to anyone." The arbitrator found that "[t]here is no evidence that the noose was fashioned as an act of racial intimidation." In this case, given that factual premise, the arbitrator could very properly conclude that Mr. Blasko did not engage in "intimidating or threatening behavior."

Moreover, and crucially, the issue before this Court is not whether the arbitrator "misread" a contractual provision. Both of the parties *bargained for* an arbitrator to interpret their collective bargaining agreement. *Cheyney University*, 743 A.2d at 413. Rather, the only question I may ask is whether the arbitrator's interpretation "indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." *Id.* As described above, the arbitrator's interpretation easily satisfies that standard.

Next, the Port Authority argues that Mr. Blasko's reinstatement would violate "the public policy of the Commonwealth of Pennsylvania and of the United States." "Petition to Vacate," at 8. This argument stems from a recent Pennsylvania Supreme Court opinion, where a majority of our high Court indicated that a "public policy exception" exists to the "essence test." *See Westmoreland Intermediate Unit #7*, 939 A.2d at 865 & 868.³ Further, as a majority of the *Westmoreland* Court agreed, the Commonwealth's "public policy exception" should either be "based upon" or "narrower than" the "federal public policy exception." *See Westmoreland Intermediate Unit #7*, 939 A.2d at 865 (lead opinion declares that the Commonwealth's "public policy exception" would be "based upon the federal public policy exception") & 868 (Saylor, J., concurring) (opining that the Commonwealth's "public policy exception" should be "in alignment with federal jurisprudence" but "with the understanding that the exception is exceptionally narrow, consistent with [the Pennsylvania Supreme Court's] prior explanations.").

As explained by the United States Supreme Court, the "public policy exception" to the essence test is:

rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. [Such a] doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which

it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42 (1987) (internal citations omitted).

For an arbitrator's decision to fall within the "public policy exception," the relied-upon public policy "must be 'explicit,' 'well defined,' and 'dominant.'" *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000). Further, the public policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'" *Id.* (emphasis added) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983)). In other words, before an arbitrator's decision can be found to run afoul of the "public policy exception," the decision must be "contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to *positive law* and not from general considerations of supposed public interests." *E. Associated Coal Corp.*, 531 U.S. at 63 (emphasis added). Additionally, as the Pennsylvania Supreme Court has held, "the burden to establish [a public policy violation] rests with the party asserting the public policy exception." *Westmoreland Intermediate Unit #7*, 939 A.2d at 864.

Here, the Port Authority's petition fails to specify a single "public policy" that would be violated by Mr. Blasko's reinstatement. See *infra*, at footnote 1. Therefore, the Port Authority has most likely waived their "public policy" argument. *Westmoreland Intermediate Unit #7*, 939 A.2d at 864.

Yet, even if the public policy argument has not been waived, the Port Authority's petition must still fail. Here, the arbitrator found, as a fact, that Mr. Blasko *innocently* tied the noose-knot. Therefore, by bringing a public policy argument before this Court, the Port Authority is apparently asking this Court to find a public policy that, *per se*, forbids the noose-knot. No such law exists anywhere within this country. Even state laws that specifically target the depiction of a noose do not target the "innocent" creation of a noose. See, e.g., Louisiana Criminal Statute § 14:40.5 (requires that the actor create the depiction "with the intent to intimidate" another person); New York Penal Law § 240.31 (requires that the noose be created "with intent to harass, annoy, threaten or alarm another person, because of...such person's race, color, national origin, [etc.].").

Now, obviously, this Court is not unaware of the Port Authority's concerns. Our American past has imbued the noose-knot with a peculiarly foul symbolic meaning. Indeed, the noose can symbolize pure evil. The noose can symbolize oppression, segregation, violence, and racial hatred. Yet, without a doubt, the noose-knot can, in fact, be viewed as "just a knot." Instructions for tying this knot are found within basically every single comprehensive knot-tying guide and the noose has been demonstrated to have many extraordinarily valuable functions. According to *The Ashley Book of Knots*, the noose can be used for parcel tying and pack lashing. Clifford W. Ashley, *The Ashley Book of Knots* 203 (The Int'l Guild of Knot Tyers ed., Doubleday 1993) (1944). The guide *Chapman Essential Marine Knots* identifies the noose as an "essential marine knot." Dominique le Brun, *Chapman Essential Marine Knots* 92 (Hearst Books 2004) (2001). To be sure, according to *The Ashley Book of Knots*: "Captain John Smith mentions the Noose in 1627 but the name is probably older. The knot itself is undoubtedly prehistoric since it would be one of the first knots required by mankind for snaring animals and birds needed for food." Ashley, *supra*, at 203.

Therefore, although saturated with evil symbolism, the

noose-knot has unlimited benign purposes as well. That is why context is so important in cases such as these. And, in these cases, it is exclusively the arbitrator's role – and not the court's – to determine the facts that give meaning to that context.

In the case at bar, the arbitrator looked at the context surrounding Mr. Blasko's action and determined that Mr. Blasko tied the noose with a completely innocent mind. With this factual finding having been established, this Court can arrive at but one conclusion: no public policy of this Commonwealth is violated by Mr. Blasko's reinstatement.

This Court has analyzed both of the Port Authority's arguments; neither argument entitles the Port Authority to relief. I must therefore deny the Port Authority's "Petition to Vacate Grievance Arbitration Award." For the foregoing reasons I am this date issuing the following Order of Court.

ORDER OF COURT

AND NOW, this 23rd day of July, 2009, upon consideration of the "Petition to Vacate Grievance Arbitration Award," filed on behalf of Plaintiff, Port Authority of Allegheny County, it is hereby ORDERED, ADJUDGED and DECREED as follows:

Said Motion is DENIED.

BY THE COURT:

/s/Folino, J.

¹ At two points in the petition, the Port Authority declares that the arbitration award violates the "public policy of the Commonwealth of Pennsylvania and of the United States." Yet, the Port Authority's petition does not cite to a single specific law or legal precedent that would be violated by Mr. Blasko's reinstatement.

The Port Authority writes:

The arbitrator exceeded his authority by: ...ordering in violation of the public policy of the Commonwealth and of the United States the reinstatement with full back pay and benefits (*i.e.* with no punishment at all) a public employee who admittedly entered a supervisor's office and tied a noose, and who disobeyed an order to untie that noose, instead leaving it to be found by the supervisor upon entering his office the next morning...

...

The arbitration decision should be vacated and the discharge affirmed [because]...the Award violates the public policy of the Commonwealth of Pennsylvania and of the United States for the reasons set forth above and because it renders [the] Port Authority unable to control the orderly functioning of its operations by eliminating its ability to discipline employees who commit this type of misconduct.

"Petition to Vacate," at 8-9.

As is evident from the above, nowhere does the Port Authority tell what public policy the reinstatement violates. Indeed, the second quotation does not even speak to the "public policy exception" at all; rather, within the second quotation, the Port Authority seems to argue that the reinstatement will compromise the Port Authority's "core functions." See, e.g., *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n, PSEA/NEA*, 939 A.2d 855, 861 (Pa. 2007). Yet, the "core functions test" has no bearing upon the public policy of this Commonwealth.

² See also “Agreement between Local 85 Amalgamated Transit Unit Pittsburgh, PA and Port Authority of Allegheny County Covering Wages and Working Conditions Commencing July 1, 2005” (hereinafter “Collective Bargaining Agreement”), at § 105 (declaring: “The Authority has the right to discipline employees covered by this Agreement for sufficient cause...”).

³ The lead opinion in *Westmoreland Intermediate Unit #7* was authored by then-Chief Justice Cappy and was joined by Justices Baer and Baldwin. And, within this lead opinion, the Justices declared: “we now recognize a public policy exception to the essence test that is based upon the federal public policy exception.” 939 A.2d at 866. Justice Saylor wrote a concurring opinion and, although Justice Saylor did not join the lead opinion, the Justice apparently agreed with a majority of the thoughts contained within that lead opinion. Moreover, as to the “public policy exception,” Justice Saylor wrote: “I have no objection to the separate adoption of a public policy exception to the essence test, in alignment with federal jurisprudence, with the understanding that the exception is exceptionally narrow, consistent with this Court’s prior explanations.” *Id.* at 868 (Saylor, J., concurring).

**Sanford L. Pollock d/b/a
Sanford L. Pollock Real Estate v.
Pittsburgh Opera and
Pennsylvania Commercial Real Estate, Inc.
and GVA Oxford f/k/a
Oxford Development Company and/or
Oxford Realty Services, Inc.**

Real Estate Commission—Real Estate Licensing and Registration Act (RELRA) 63 P.S. §455.606a(b)—Quantum Meruit Relief

1. Summary judgment was entered in favor of all defendants where Plaintiff real estate broker was not entitled to a commission for a property sold to the Opera by a different broker where Plaintiff did not have a written agreement as described in the Act (RELRA). The writing alleged by Plaintiff was a letter sent after termination of his relationship with the Opera stating his legal position.

2. Plaintiff cannot recover on a theory of *quantum meruit* because the law does not recognize such an exception to the requirements of the Act. The Act’s purpose in requiring a writing is not merely technical, but is designed to protect the consumer.

(Lynn E. MacBeth)

No. GD 07-022024. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

Adrian N. Roe for Plaintiff.

Kevin K. Douglass and *Peter H. Schnore* for Pennsylvania Commercial Real Estate, Inc.

Gerald J. Schirato, Jr. for Pittsburgh Opera and GVA Oxford.

MEMORANDUM

Folino, J., July 22, 2009—This Memorandum sets forth the rationale behind my Orders dated February 20, 2009 granting Defendants’ Motions for Summary Judgment.

I.

The following facts are either not in dispute or are set forth in a light most favorable to Plaintiff, Sanford L. Pollock d/b/a Sanford L. Pollock Real Estate (“Pollock”). In August 2006, the Pittsburgh Opera (“Opera”) began searching for properties in the Pittsburgh area in connection with its plans to relocate its corporate headquarters. (K. Tarasi Dep. at p.9). The Opera contacted numerous Pittsburgh real estate brokers it considered to be friends of the Opera, including Mr. Pollock, and at least five others, to help it with the search (K. Tarasi Dep. at p.11). The Opera did not enter into a written agreement with any real estate broker until June 1, 2007, when the Opera signed an exclusive broker’s agreement with Defendant Oxford Development Company (“Oxford”).

On June 25, 2007, after learning that the Opera had entered into an exclusive broker’s agreement with Oxford, Pollock wrote to Opera President Mark Weinstein and expressed his disappointment. The entire text of Pollock’s June 25, 2007 letter is as follows:

Dear Mark:

I was surprised to learn from Ken Tarasi that Oxford Realty has been hired to send out RFPs for office space for the Opera. I had discussed this with Ken and he had said that the properties which I have shown or submitted to the Opera would be excluded from the Oxford RFP. Please know that I will be the Broker in the event that the Opera wishes to arrange a lease or purchase of any of these properties. The situation created as a result of this is very awkward, and I do not understand why this was done when I have expended such effort in seeking and showing space to the Opera.

Sincerely,
Sanford L. Pollock

A few weeks later, in a letter dated July 19, 2007, the Opera wrote back to state its position regarding Mr. Pollock’s claim to real estate commissions:

Dear Sandy:

In follow-up to our recent conversation, I am confirming with you the position of Pittsburgh Opera regarding your claim to a real estate commission in the event the Opera does pursue one or more of the real estate options under consideration. Specifically, that position is as follows:

Should the Opera purchase or lease space in any building to which we were physically accompanied by you, we will ensure that the seller/lessor recognizes you as the procuring broker in the transaction, in which case the seller/lessor will pay commissions in accordance with any agreement you and that party may come to. The buildings to which this will apply are the Boggs Building, 933 Penn Avenue, 925 Penn Avenue.

Under no circumstances and in no event will the Opera recognize you as the procuring broker in any case where you have not physically introduced the property to us and we will so direct any seller/lessor accordingly.

Should the Opera pursue one of the properties noted above, we will apprise you of the end result.

Sincerely,
Ken Tarasi,
Finance Director

As is apparent from this exchange of correspondence between the Opera and Pollock, there was at least one major disagreement between them regarding the terms of any alleged oral arrangement they had entered into. Pollock claimed the agreement was that he was to be the broker as to “the properties that I have shown or submitted to the Opera...,” and therefore was to receive a commission any such properties. The Opera, on the other hand, stated that Pollock was to be recognized as the procuring broker only “in any building which we were physically accompanied by you,” and that “[u]nder no circumstances and in no event will the Opera recognize you as the procuring broker in any case where you have not physically introduced the property to us....”

Thereafter, Oxford represented the Opera as its exclusive broker in the Opera’s selection and purchase of the Opera’s new headquarters, a property located at 2401-2425 Liberty Avenue in Pittsburgh’s Strip District.

Pollock then filed the within lawsuit claiming that he, and not Oxford, was entitled to the commission for the sale of this Strip District property. Pollock claims that on May 9, 2007 he had sent brochures about this property to the Opera (Sanford L. Pollock Dep. Vol. I, pp.107-108), and that therefore, under his oral agreement with the Opera he is the broker for this property and is entitled to the brokerage commission. Pollock argues that it is irrelevant that he never physically showed the property to the Opera or that he never physically accompanied the Opera to the property.

In his Amended Complaint, Pollock has sued the Opera under theories of Breach of Contract (Count I) and Promissory Estoppel (Count II); he has sued Pennsylvania Commercial, the listing broker for the Strip District property, under theories of Breach of Contract (Count III) and Promissory Estoppel (Count IV); and has sued Oxford, the broker with whom the Opera signed an exclusive broker’s agreement, for Tortious Interference with Contractual Relations (Count V); Pollock has also sued all three Defendants for Unjust Enrichment (Count VI).

At the close of discovery, all Defendants moved for summary judgment, and by Orders dated February 20, 2009, I granted their motions. Pollock has now appealed to the Superior Court of Pennsylvania.

II.

As Plaintiff Pollock is claiming a broker’s commission arising out of a real estate transaction, this action is governed by the Real Estate Licensing and Registration Act (RELRA), specifically 63 P.S. § 455.606a(b). This provision of RELRA provides that, in order for a real estate broker to receive a commission, the broker is required to have either (1) entered into a written agreement with his client or, at least (2) provided his client with a written memorandum stating the terms of the agreement.

The full text of the applicable RELRA provision is as follows:

(1) A licensee may not perform a service for a consumer of real estate services for a fee, commission, or other valuable consideration paid by or on behalf of the consumer unless the nature of the service and the fee to be charged are set forth in a *written agreement between the broker and the consumer that is signed by the consumer*. This paragraph shall not prohibit a licensee from performing services before such an agreement is signed, but *the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of such a signed agreement*.

(2) Notwithstanding paragraph (1), an open listing agreement or a nonexclusive agreement for a licensee to act as a buyer/tenant agent may be oral if the seller or buyer is provided with a *written memorandum stating the terms of the agreement*.

63 P.S. §§ 455.606a(b)(1), (2) (emphasis added).

In this case, it is undisputed that Plaintiff and Defendant Opera did not have a written agreement, signed by the Opera. In fact, Plaintiff has acknowledged that it is not his practice to enter into such written agreements:

Q: As a general matter of practice, is it normal for you to work without a written agreement with a client?

A: I don’t do it. I don’t sign contracts with buyers or tenants.... I don’t sign contracts with them.

A. I just have never signed contracts with buyers or tenants.

(S. Pollock Dep. Vol. I. at pp.60-61).

Thus, the question becomes whether Plaintiff provided the Opera with a “written memorandum stating the terms of the agreement.” Plaintiff claims that he and the Opera entered into their oral agreement in “approximately August 2006.” (Am. Compl. pp.5-9). He also claims that letters he wrote to the Opera on and after June 25, 2007, after he learned that the Opera had entered into an exclusive broker’s agreement with Defendant Oxford, satisfy the RELRA requirements. In particular, Plaintiff argues that the above-quoted “letter of June 25, 2007 both by itself and when considered in light of other correspondence between the Opera and Pollock, is plainly an adequate writing under RELRA.” (Plaintiff’s Brief in Opposition to Motion for Summary Judgment of Defendant Pittsburgh Opera at pp.7-8).

It is clear to me that the June 25, 2007 letter is not a written memorandum stating the terms of the oral agreement between the broker and the consumer. For one thing, the June 25, 2007 letter does not set forth any of the terms of the August 2006 oral agreement. Rather, it is simply a letter sent approximately ten months after the alleged oral agreement was entered into that expresses Plaintiff’s disappointment in the fact that the Opera entered into an exclusive written agreement with some other broker. The letter simply sets forth Plaintiff’s legal position in connection with that hiring. The letter does not even mention the alleged August 2006 oral agreement. Even when read in a light most favorable to Plaintiff, the only conversation with the Opera that the June 25, 2007 letter mentions is one that Plaintiff claims took place *after* Plaintiff learned that the Opera had hired Oxford to be the exclusive broker. Thus, the June 25, 2007 letter does not even reference or purport to confirm the alleged August 2006 oral agreement whereby Plaintiff was allegedly hired to be a non-exclusive broker.

A written memorandum should at least set forth the nature of the service to be provided by the broker and the fee he will charge. But, again, the June 25, 2007 letter contains no such information.

The utterly insufficient **content** of the June 25, 2007 letter is itself an independent reason (and is the primary reason) why that letter does not satisfy the RELRA requirements. In addition, however, the timing (*i.e.* when the letter was sent) also supports the conclusion that the June 25, 2007 letter is not a written memorandum stating the terms of the August 2006 agreement. As noted above, the June 25, 2007 letter was sent by Plaintiff ten months **after** the alleged agreement was entered into; it was sent **after** Plaintiff

learned that Oxford had become the **exclusive** broker, which necessarily meant, of course, that any non-exclusive broker agreement between the Opera and Pollock was by then terminated. Thus, the June 25, 2007 letter was not sent until after the agreement it purports to memorialize was already terminated. Because this allegedly confirming letter was sent so late, it could provide no benefit whatsoever to the consumer (the Opera). Obviously, for example, the June 25, 2007 letter could not clarify for the parties the terms of an oral agreement that they were both to perform under, where the letter was sent after the agreement in question had already been terminated, and after the time for performance had passed.

Plaintiff argues that it is error for the Court to consider the timing of its confirming memorandum. Plaintiff argues that the RELRA statute does not set forth a deadline pursuant to which the broker must provide the consumer with the written memorandum confirming the oral agreement. Thus, in Plaintiff's view a confirming memorandum sent ten months after the oral agreement was entered into is perfectly adequate, even if that meant the confirming memorandum provided no benefit to the consumer, and was sent **after** the brokerage arrangement had already been terminated, and **after** a controversy had already materialized and litigation by Plaintiff appeared to be imminent.

The analysis of Plaintiff's argument on this point should begin with a consideration of the purpose of this particular statutory provision. It seems to me that the legislature intended to provide some small benefit to the consumer here by requiring the broker to put in writing the terms of the oral agreement. In this way, both parties (the broker and the consumer) would be clear as to their obligations as they moved forward in their contractual relationship. This would imply, of course, that the broker send the confirming writing to the consumer somewhere near the time of the formation of the oral agreement. So for example, in our case, if Plaintiff had sent a confirming writing to the Opera back in August 2006, he could have spelled out his understanding of the terms of the oral agreement, something like the following:

This will confirm our oral agreement entered into yesterday whereby I will be your non-exclusive broker to help you find a building for your new headquarters. You are not required to pay me any commission, as I will negotiate for my commission directly with the seller of the property. Your only obligation is to recognize me as the broker for any building that you ultimately purchase where I was the first broker to have accompanied you on a tour of that building or where I was the first broker to have mailed you brochures about that building. Our agreement may be terminated by either of us at any time...etc.

If Plaintiff had sent such a confirming writing near the outset of their agreement, before either party had substantially performed under it, the Opera could have written back, clarifying the terms of the agreement it was willing to perform under. Something like:

The Opera is willing to recognize you as a broker for any building we ultimately purchase where you have accompanied us on a tour of the building, but not where you simply mailed brochures to us about the building.

Obviously, if a broker sends a confirming writing to the consumer somewhere near the outset of the oral contract formation, multiple benefits are thereby achieved, includ-

ing: (1) both parties are clear on their obligations as they move forward and perform under this newly formed oral agreement; (2) controversy, misunderstanding and lawsuits are avoided.

Thus, if one of the purposes of the RELRA statute was to provide some of these benefits to the broker and the consumer, then it makes sense to interpret the statute to imply that the broker be required to send the confirming writing somewhere near the time that the oral agreement was entered into, or at least before the parties have substantially performed under the oral agreement.

Under Plaintiff Pollock's interpretation, the purpose of this provision of RELRA would seem to be merely to impose a purely technical requirement on the broker (to send the writing to the consumer anytime before commencing a lawsuit or perhaps even after the lawsuit is commenced). Under Plaintiff's interpretation, this provision of RELRA is not intended to provide any benefit to the consumer. Under Plaintiff's interpretation, this RELRA provision is not intended to provide a means for the broker and consumer to clarify the terms of the oral agreement as the broker and consumer move forward to perform under it. Under Plaintiff's view the confirming memorandum may be sent to the consumer months or even years after the oral agreement was entered into.

It seems to me, however, that the legislature did not intend this to be a purely technical provision that provides no benefit to the consumer, and therefore I believe it is appropriate for the Court to consider the timing (*i.e.*, when the alleged confirming writing was sent) in making its determination of whether that writing satisfies the requirements of 63 P.S. §§ 455.606a(b)(2).

For all of these reasons, as Plaintiff does not have a writing in compliance with RELRA, he cannot recover a broker's fee.

III.

Having determined that Plaintiff has not satisfied the requirements of RELRA and therefore cannot recover a broker's commission on a breach of oral contract theory, the question then becomes whether Plaintiff can avoid the RELRA requirements by styling his lawsuit as an alternative theory such as a promissory estoppel, unjust enrichment or tortious interference with contractual relations.

The Pennsylvania Superior Court has stated that RELRA provides "no exception...that would permit a Pennsylvania Court to order *quantum meruit* relief" to avoid the provisions of RELRA. *Meyer v. Gwynedd Dev. Group*, 756 A.2d 67, 73 (Pa.Super. 2000); *see also Willis Bancroft, Inc. v. Millcreek Township*, 6 A.2d 916, 919 (Pa. 1939) (holding that where an implied contract would defeat the purpose of a statute "[t]he courts will not assist any claimant to avoid the mandate of...[a] statute by permitting a recovery upon...*quantum meruit* for service rendered...").

The same logic applies as to Plaintiff's claims of estoppel and unjust enrichment, particularly where RELRA does not provide for such relief. Allowing a broker such as Plaintiff to proceed under estoppel or unjust enrichment theories in circumstances such as those presented here would wholly defeat and render meaningless the provisions of RELRA that permit a broker to receive a commission only after he sets forth the terms of any oral agreement between the broker and the consumer in a written memorandum.

Similarly, as to Plaintiff's claim that Oxford tortiously interfered with Plaintiff's contract with the Opera, obviously no such claim can go forward where, as a matter of law, Plaintiff and the Opera did not have a legally viable contract under RELRA. Oxford could not induce the Opera to break a contract that did not exist.

IV.

For the foregoing reasons, this Court's Orders dated February 20, 2009, granting summary judgment as to all Defendants should be affirmed.

BY THE COURT:

/s/Folino, J.

Dated: July 22, 2009

¹ It is not clear what "other correspondence" Pollock contends satisfied his obligation that the consumer be "provided with a written memorandum stating the terms of the agreement." Pollock's Brief in Opposition seems to suggest that the Opera's letter of July 19, 2007 is the "other correspondence" that helps satisfy Pollock's obligations under RELRA. (See Plaintiff Sanford L. Pollock's Brief in Opposition to Motion for Summary Judgment of Defendant Pittsburgh Opera at pp. 10-11). But, as noted above, the Opera's letter of July 19, 2007 expresses a completely different understanding by the Opera on the key issue in dispute. Thus, if, as Pollock seems to suggest, we look to the Opera's letter of July 19, 2007 as the "memorandum stating the terms of the agreement," then Pollock clearly would not be entitled to a commission since even he agrees that he never physically introduced the property in question to the Opera.

John Antonucci and Judith A. Antonucci v. Shawmut Woodworking, et al.

Statutory Employee—Borrowed Servant—Conflicting Superior Court and Commonwealth Court Opinions

1. An issue of fact exists as to whether a company is a statutory employer of an individual where it is in dispute whether the company was merely a project manager which did no work itself on the project and whether the company had any obligation to pay workers' compensation benefits to the Plaintiff because the Plaintiff's hiring employer did not make such payments to the Plaintiff.

2. A conflict exists between the Superior and Commonwealth Courts on the issue of statutory employer and borrowed servant.

3. When there is a conflict between two intermediate appellate courts, and no decision from the Supreme Court, the Court must look to the underlying purpose of the workers' compensation act that imposed obligations on statutory employers if the hiring employer failed in its duties to compensate workers for injuries occurred on the job and the Court will follow that line of cases most consistent with the essential purpose of the act.

(Jeffrey A. Ramaley)

John P. Goodrich for Plaintiffs.

John Cromer for Shamut Design and Construction.

William R. Haushalter for Dynamic Ceramic Tile Inc.

Daniel T. Moskal for Sauer, Inc.

Gary M. Scoulos for Miller Electric Construction Inc.

Bryan J. Smith for Jeff Miller d/b/a Miller Tile Company.

No. GD 05-006590. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., May 15, 2009—Defendant Shawmut Woodworking & Supply, Inc., d/b/a Shawmut Design and

Construction's ("Shawmut") Motion for Summary Judgment must be denied. There are disputes of facts that are material to whether or not Shawmut is a statutory employer of John Antonucci. Among the facts in dispute are the following:

1. Whether Shawmut was merely a project manager which did no work itself on the project and merely organized and inspected the work of the various sub-contractors, one of whom was Plaintiff's actual employer, Pittsburgh Interiors.

2. Whether Shawmut had any obligation under Section 302(b) of the Workman's Compensation Act to pay workers' compensation to Plaintiff because Plaintiff's actual employer a/k/a his "hiring employer" did not make such payments to Plaintiff.

It is a question of fact for the jury whether Shawmut's regular business was more than that of a project manager. Did Shawmut have its own drywall installers, its own carpenters, or were Shawmut's capabilities limited to project management?

The undersigned has previously ruled that there is a conflict between the holdings of the two intermediate appellate courts on the issue of statutory employer and borrowed servant. In *Wallis v. AEG Westinghouse Transportation Systems, Inc., et al.*, GD 93-9312, we held that since we could not obey both intermediate appellate courts, we had to look to the Supreme Court decisions and the underlying purpose of the portion of the Workmen's Compensation Act that imposed obligations on statutory employers if the hiring employer failed in its duties to compensate workers for injuries incurred on the job.

In *Wallis* we pointed out that the question is often framed either as involving a putative "borrowed servant" or a putative "statutory employer." We went on to say:

The law should therefore yield the same result regardless of which question is posed and answered. However, it seems that this has not occurred at the intermediate appellate levels, with Commonwealth Court decisions going one way and Superior Court decisions going another. Unfortunately, Courts of Common Pleas must defer equally to both appellate courts, an impossibility in cases where an alleged tortfeasor...seeks the same protection under the Act that an injured employee...must concede to his actual employer.

On at least one other occasion, this Court has been compelled to choose between the two lines of cases. In order to make the choice in the earlier case, this Court looked to the purpose of the Act, as articulated by the Pennsylvania Supreme Court:

In construing the Act, we are mindful that, being remedial in nature and intended to benefit the Pennsylvania worker, the Act must be liberally construed to effectuate its humanitarian objectives.

Krawchuk vs. Philadelphia Electric Co., 497 Pa. 115, ____, 439 A.2d 627, 630 (1981).

It is evident that the Supreme Court recognizes that the Act was chiefly intended to benefit workers, not to shield employers, "statutory" or otherwise, although benefits do accrue to employers who comply with the Act.

The Supreme Court seems not yet to have addressed cases which highlight the dichotomy

between the Superior Court and Commonwealth Court decisions. The prior case which compelled this Court to choose between the two lines of appellate cases was settled before a ruling could be issued and an opinion written on the putative statutory employer's contention, in post-verdict motions, that it was entitled to the bar of the Act. Nevertheless, the Court must be consistent in its own rulings, whether published or not. Having once found the Commonwealth Court line of cases more consistent with the essential purposes of the Act, and being unaware of any Supreme Court case which has resolved the discrepancy between the appellate decisions, this Court must continue to follow those cases even recognizing that any appeal herefrom will go to the Superior Court, as was true in the prior case. Under Commonwealth Court cases, [this general contractor] is *not* a statutory employer.

Similarly, here we cannot say that there is no dispute as to the facts material to the question of whether or not Shawmut is entitled to the protection of the Act as a statutory employer. The parties have not found any Supreme Court case resolving the differences between the Commonwealth Court and Superior Court. We must continue to follow our earlier rulings.

The Motion must be denied. See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: May 15, 2009

ORDER OF COURT

AND NOW, to-wit, this 15th day of May 2009, Defendant Shawmut Woodworking & Supply, Inc., d/b/a Shawmut Design and Construction's Motion for Summary Judgment is hereby DENIED for the reasons set forth in the accompanying Memorandum in Support of Order.

BY THE COURT:
/s/Friedman, J.

Housing Authority of the City of Pittsburgh v. Tonya Hearn

Eviction—Zero Tolerance Policy

Housing Authority did not sustain its burden of proof to show that the conduct of a resident's child required that the entire family be evicted in order to promote the safety and well-being of other tenants.

(Lynn E. MacBeth)

A. Kenneth Mann for Plaintiff.
Tonya Hearn, *pro se*.

No. LT 09-200. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

DECISION

Friedman, J., July 13, 2009—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

Plaintiff Housing Authority seeks to evict Mrs. Hearn and her family for the sole reason that one of her sons, a juvenile, was picked up in a police sweep off the Plaintiff's property. The son had never been in any trouble before, was a good stu-

dent, and presents no threat to anyone. Those are undoubtedly the reasons his case was kept in Juvenile Court.¹

It was undisputed that Mrs. Hearn is an excellent tenant. In fact, she even works for the Plaintiff. It was also undisputed that she has already raised her older children in an admirable fashion. The undisputed evidence shows that her son, despite his current involvement with Juvenile Court, is in all probability going to turn out fine. As we said, he is a good student with no disciplinary problems. In other words, this is a fine family.

So, if Mrs. Hearn is so great and her family is so fine, why does Plaintiff want her out of its housing? The answer is a simple one: Zero Tolerance a/k/a One Strike and You're Out. Plaintiff says that under the Lease, the fact that the son was picked up by the police is all that is needed to trigger eviction.

Plaintiff argues that the HUD regulations that govern the terms of its leases permit them to treat any infraction that involves the police the same. A juvenile offender is no different from a serial killer as far as Plaintiff's eviction policy is concerned. Plaintiff agrees that the regulation at issue here does not *mandate* eviction. It concedes that the applicable regulation (and, as a consequence, the Lease) gives it the *discretion* to consider the entire situation to determine whether or not eviction is the only way to protect the other tenants from the family of a wrongdoer.

We do not find it *credible* that the Zero Tolerance/One Strike policy is an *effective* way to promote safety in public housing. Plaintiff offered no evidence to show that across-the-board eviction protects other tenants at all. The evidence of record shows nothing more than a vague assumption tantamount to mere superstition. "One Strike" may be an easy policy to administer, but it can end up defeating the broader purpose for which HUD and housing authorities exist – to provide decent housing for those who would otherwise have to choose between squalor or living in the street, between food or shelter.

We can take judicial notice of the fact that teenagers have chronic poor judgment. There is not a soul among us who has not been foolish at best when we were in our teens. Is it then credible that a Zero Tolerance for such behavior serves a realistic purpose? We find that there has been no evidence to support the Plaintiff's position.

Plaintiff argued that it has the discretion *not* to exercise any discretion. Were that the case, the HUD regulation permitting consideration of the family circumstances for all but methamphetamine manufacturers and sexual offenders would be meaningless. It is well-settled that Courts must presume that virtually every word of a statute or regulation has meaning. Plaintiff's position would require us to ignore this precept.

We conclude that the Plaintiff has not sustained its burden of proof to show that the conduct of Defendant's child requires that she, the child, and her entire family be evicted in order to promote the safety and well-being of the other tenants.

We therefore find in favor of Defendant.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT:
/s/Friedman

Dated: July 13, 2009

¹ Although this is not crucial to our Decision, it is believed that it is still the rule that those in the jurisdiction of Juvenile Court are *ipso facto* not charged with *criminal* activity.

Commonwealth of Pennsylvania v. David Pierre King

Suppression of Statements—Double Jeopardy

1. A jury found Defendant guilty of third degree murder and acquitted him of second degree murder, robbery and criminal conspiracy.

2. In the course of a drug sale, Defendant and another person were involved with shooting and killing the victim.

3. Prior to trial, facts adduced at a suppression hearing established that Defendant was given his Miranda warnings; had an opportunity for food and beverage; did not ask for counsel during the interrogation; and, despite the length of the interrogation, there was no undue coercion. Acting as a fact finder, the court found credible evidence that the Defendant's statements were not the product of coercion and that the Defendant made the statements after receiving his constitutional rights. Thus, the court concluded, the Defendant's statements should not be suppressed.

4. The Defendant alleged that the court abused its discretion by failing to bar his trial on grounds of double jeopardy. In a pre-trial hearing, it was established that previously the Defendant had a non-jury trial. In that trial, after evidence was concluded, the Defendant obtained new counsel who claimed that the judge presiding over the trial had reached the conclusion the Defendant was guilty, so wanted a mistrial. Out of an abundance of caution the judge recused himself and declared a mistrial.

5. The Defendant's case was not barred by double jeopardy because a defendant's successful motion for a mistrial does not bar double jeopardy, even if the defendant's motion was necessitated by prosecutorial or judicial error.

(Margaret M. Cassidy)

Michael Streilly for the Commonwealth.
Jeffrey Murray for Defendant.

No. 200509438. In the Court of Common Pleas for Allegheny County, Pennsylvania, Criminal Division.

OPINION

Reilly, S.J., April 20, 2009—The defendant, David King, was found guilty in a jury trial of Third Degree Murder. He was found not guilty of second-degree murder, robbery, and criminal conspiracy. The defendant was sentenced to 15 to 30 years imprisonment. The defendant has appealed the conviction. In March of 2008, a concise statement of matters complained of on appeal, in accordance with Pa.R.A.P. Rule 1925(b), was filed. The defendant asserts that the trial court erred in: not suppressing evidence of statements made to detectives in Atlanta; abused its discretion in denying a pre-trial motion to bar a retrial on double jeopardy grounds; denying the post verdict motions for judgment of acquittal; and denying the defendant's motion to set aside the jury verdict. The defendant also asserts that the evidence was insufficient to convict the defendant of third-degree murder.

A suppression hearing was conducted on March 19, 2007. At the suppression hearing, Detectives David Quinn and Nicole Redlinger of the Atlanta Police Department homicide unit testified regarding their interrogation of the defendant while he was in custody in Atlanta Georgia. They stated that the defendant was presented with a standard waiver of counsel form and that the interview was videotaped. They testified that the defendant was told that if he

cooperated, they would come to Pittsburgh and tell the judge how he did so. Throughout the tapes of the interrogation, the defendant never asked for an attorney. Also, the defendant had an opportunity to have beverages and food during the interrogation.

Also testifying during this portion of the suppression hearing were Lonnie Stevens and the defendant. Stevens was with the defendant when he was arrested in Atlanta in June 2005. He remembered telling the defendant that he and the defendant's father had a lawyer who was going to take care everything. The defendant testified that he had driven all-night to Atlanta, and that he had told the officers that he was supposed to have a lawyer. This allegedly occurred prior to the Miranda warnings and the videotape. The court found that the videotapes showed that the defendant was given his constitutional rights under Miranda, and found no ill effects at the end of the interview, given its length or any undue coercion.

In a hearing on a motion to suppress, the court acts as the fact finder where there is conflicting evidence. *Commonwealth v. Eden*, 456 Pa. 1, 317 A.2d 255 (1974). The fact finder determines the credibility of witnesses presented and the weight of their testimony. *Commonwealth v. Scavello*, 703 A.2d 35 (Pa.Super. 1997), appeal granted, affirmed, 557 Pa. 429, 734 A.2d 386. In this case the court acting as the fact finder, found the credible evidence and reasonable inferences to be drawn therefrom, that the statements given to the detectives in Atlanta were not the product of coercion and were given after the defendant was advised to his constitutional rights. As the court stated, if the officers did not testify before the jury what had been promised, the motion to preclude their interview would be granted. Accordingly, the statements obtained in the Atlanta interrogation were not suppressed, subject to this condition.

The defendant next asserted that the trial court abused its discretion in denying his pretrial motion to bar retrial on double jeopardy grounds. A hearing was conducted regarding the first trial which concluded in the granting of a mistrial. Judge Lester Nauhaus testified that he presided over a non-jury trial of this case. At the conclusion of the evidence, Judge Nauhaus requested that the parties file proposed findings and conclusions of law. Subsequently, new counsel for the defendant filed a motion which was granted to reopen the case to allow the defendant to testify. Prior to the defendant testifying, it was the defense attorney's belief that the judge had already concluded his client was guilty, based upon the attorney's interpretation of comments made by the judge. The defendant's attorney subsequently successfully moved for the judge to recuse himself. Thereafter, the defendant's request for mistrial was granted. Judge Nauhaus testified that he had not made up his mind prior to the conclusion of the evidence but, recused himself out of an abundance of caution for the defendant's rights.

The court ruled that because the former prosecution was not improperly terminated, this subsequent prosecution was not barred in accordance with 18 Pa.C.S.A. §109(4). Where... a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Jorn*, 400 U.S. 470, 485 [91 S.Ct. 547, 557, 27 L.Ed.2d 543] (1971).

At trial, the Commonwealth presented evidence through various witnesses of the events prior to and subsequent to the incident, investigative witnesses and various expert witnesses. The incident in question occurred on June 6,

2005 around lunchtime. The defendant had arranged for Ronald Warrick to purchase six pounds of marijuana from Othmane Lahmamsi and Mohcine El Joufri. The defendant and Warrick directed Lahmamsi and El Joufri to an alley located the city of Pittsburgh, the Larimer area of East Liberty. Prior to the arrival of Lahmamsi and El Joufri, Warrick displayed to the defendant a firearm and indicated that a robbery of the drugs was going to occur and that the defendant would share the proceeds with him. When Lahmamsi and El Joufri arrived, Warrick got in the back-seat of their vehicle on the driver-side and the defendant did likewise on the passenger-side. Warrick immediately pulled out his handgun and pointed it at Lahmamsi and El Joufri, and demanded that they turn over the marijuana. The defendant at this point exited the automobile and stood close by. With Warrick partially out of the car and appeared distracted, Lahmamsi put the automobile in gear and accelerated, in an attempt to escape. Warrick at that point discharged the weapon pointed at the head of Lahmamsi, killing him. The automobile ultimately crashed into a telephone pole. These events were testified to by El Joufri, the surviving victim.

After the shooting, Warrick and the defendant reunited at their vehicle which they had parked approximately a block away. The defendant drove Warrick home, and thereafter fled to Atlanta Georgia. The defendant's placement at the time of the shooting was testified to by the surviving witness and not disputed by the defendant during his testimony. The defendant asserted in his defense that it was the duress of an imminent threat by Warrick for his actions.

The determination for the jury based upon the facts was whether the Commonwealth had proved the elements of second-degree murder or third-degree murder, robbery, or criminal conspiracy. The Commonwealth introduced evidence that prior to the incident in question, the defendant knew that victims were going to be robbed by Warrick who was believed by the defendant to have killed prior.

In this case through stipulations and the multitude of witnesses' testimony had given various assorted pieces of the events prior to the murder and subsequent. All of those factors were placed before the jury for its consideration regarding the testimony and the weight to place thereon.

In a jury trial, the function of the fact finder is to weigh conflicting evidence. *Commonwealth v. Tumminello*, 292 Pa.Super., 437 A.2d 435 (1981). Additionally, the fact finder viewing the witnesses makes credibility determinations with regard to their testimony. The fact finder is free to believe all, some, or none of the evidence presented. *Commonwealth v. Miller*, 555 Pa. 354, 724 A.2d 895, certiorari denied, *Miller v. Pennsylvania*, 120 S.Ct. 242, 528 U.S. 903, 145 L.E.d. 2d 204 (1999). The number of witnesses offered by one side or the other does not in itself determine the weight of the evidence. The fact finder determines the credibility of witnesses presented and the weight of their testimony. *Commonwealth v. Dunn*, 424 Pa.Super. 521, 623 A.2d 347 (1993). Because the Commonwealth does not have to establish guilt to a mathematical certainty, they may rely wholly on circumstantial evidence. *Commonwealth v. Cichy*, 227 Pa.Super. 480, 323 A.2d 817 (1974). In this case the jury acting as the fact finder, found the testimony of the Commonwealth's version of the witnesses testimony in combination with the physical evidence, sufficient to prove the elements of third degree murder beyond a reasonable doubt. As such, the defendant was found guilty.

The defendant also complains without any specificity, that the court erred in denying his motion for judgment of acquittal. The evidence in the case was sufficient, as matter of law to sustain the defendant's conviction. When we apply

the law to the facts, it is clear that the evidence adduced at trial was sufficient to establish malice and sustain a conviction of third-degree murder. Consequently, the motion for judgment of acquittal was denied. *Commonwealth v. Feathers*, 442 Pa.Super. 490, 660 A.2d 90, 94 (1995) (en banc), affirmed, 546 Pa. 139, 683 A.2d 289 (1996).

Lastly, the defendant assigns error to the trial court in denying the defendant's motion to set aside the verdict due to juror misconduct. As this member of the court has previously indicated the reasons for the denial of this motion in its opinion of October 17, 2008, the same will not be addressed in the within opinion of the Court.

BY THE COURT:
/s/Reilly, S.J.

Date: April 20, 2009

Commonwealth of Pennsylvania v. Anthony Mendoza

Hung Jury

1. Defendant was tried on three separate incidents of selling drugs. His first trial ended in a hung jury. At the second trial Defendant was found guilty of the first incident but the jury was unable to reach a decision on incidents two and three. At the third trial, Defendant was found guilty of incidents two and three. Defendant complained that the court should have dismissed the charges after the second hung jury with regard to incidents two and three.

2. There is no case law that bars the retrial of a defendant after two hung juries. A jury may be discharged without prejudice to the Commonwealth to try the accused again on the same charges.

(Rhoda Shear Neft)

Michael Streily for the Commonwealth.
Mathew Debbis for Defendant.

No. CC 200412926, 200412927, 200412929. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Reilly, S.J., May 22, 2009—The defendant, Anthony Mendoza, was found guilty in two jury trials of three occurrences of Possession with Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, and Delivery of a Controlled Substance. The defendant was sentenced to 10 to 20 years imprisonment. The defendant filed his concise statement of matters complained of on appeal, in which he alleges that the trial court erred by not dismissing the remaining charges after a second hung jury and the court's charge to the jury regarding reasonable doubt at the May 13-14 2008 jury trial; that the defendant was prejudiced by the nondisclosure of the Confidential Informant file; and that the guilty verdicts were not supported by sufficient evidence.

The defendant was initially tried in July of 2007. The jury at that time was unable to render a verdict. Subsequently, on October 29, 2007, a second trial was commenced. At the conclusion of the trial the jury returned a guilty verdict for (1) Possession with Intent to deliver; (2) Delivery of a Controlled Substance; and (3) Possession of a Controlled Substance in connection with the May 19, 2004 drug transaction. The jury was unable to reach a verdict for the drug

transactions that allegedly occurred April 19, 2004, and May 6, 2004. On May 13, 2008, a third jury trial was commenced. The jury in that case rendered guilty verdicts for Possession with Intent to deliver; Delivery of a Controlled Substance; and Possession of a Controlled Substance for both April 19, 2004 and May 6, 2004 transactions.

At the trials, Daniel Moriarty with the Pennsylvania State Police, along with West View Police officer Douglas Drwal, testified that on April 19, 2004 at approximately 7:54 p.m., while utilizing a confidential informant, a drug transaction with the defendant was observed in the parking lot of a West View drugstore. Prior to the transaction, the confidential informant was searched for any drugs or money to ensure reliability. The confidential informant by telephone (with police listening and recording) set up the drug-buy from the defendant to occur. The confidential informant met the defendant, obtained 1/4 ounce of cocaine and tendered it to the officer. The officer upon receiving the cocaine gave the confidential informant money that was then delivered to the defendant for the purchase. The officers observed the defendant and confidential informant during the transaction. Subsequent to the transaction the confidential informant was again searched to insure reliability.

Again, on May 6, 2004, a drug-buy was set up by the confidential informant to occur at the same location. On that occasion, the defendant walked up to the car in which trooper Moriarty was driving the confidential informant. The defendant got into the back seat of the vehicle and handed over drugs for that transaction. He was paid \$545 (\$5 less than the negotiated price for 14 g of powder cocaine) as five dollars was overpaid during the first transaction.

Subsequent to these two transactions the defendant became comfortable enough with the undercover officer to set up a third transaction without utilizing the confidential informant. This transaction was set up and occurred on May 19, 2004, in the same location as the prior two. On that occasion the defendant was arrested.

The Commonwealth also presented evidence by way of testimony from various representatives from the Allegheny County Medical Examiners Office Crime Lab. The evidence technician and drug chemist testified regarding the physical evidence cocaine which was purchased and its handling throughout the case.

The defendant has complained that the trial court erred in not dismissing the remaining charges after a second hung jury with regard to the first two drug transactions. In instances of a deadlocked jury, the jury may be discharged without prejudice to the Commonwealth to try the accused again on the same charges. In *Commonwealth v. Sullivan*, 484 Pa. 130, 398 A.2d 978 (1979), the Supreme Court addressed a situation where an accused was convicted after two juries were previously unable to return a verdict. Although addressing the propriety of the trial court's dismissal of the second jury, thus analyzing whether there was "manifest necessity" for declaration of mistrial, the Supreme Court gave no indication that the double jeopardy clause bars retrial after two hung juries. The United States Supreme Court has consistently upheld the validity of retrial of an offense following a hung jury. *United States v. Perez*, 9 Wheat. 579, 22 U.S. 579, 6 L.Ed. 165, 1824.

The defendant also complains that the court erred in its charge to the jury regarding reasonable doubt at the May 13-14 2008 jury trial. The court's charge in the instant case, as a whole, adequately instructed the jury on the meaning of "reasonable doubt." Appellate courts do not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy...rather they evaluate whether the

charge sufficiently and accurately appraises a lay jury of the law it must consider in rendering its decision. *Commonwealth v. Thompson*, 543 Pa. 634, 674 A.2d 217, 218-19 (1996). The charge of the court must be looked at as a whole. *Commonwealth v. Spatz*, 563 Pa. 269, 759 A.2d 1280, 1290 (2000). The court may use its own form of expression to explain difficult legal concepts to the jury, as long as its instruction accurately conveys the law. *Commonwealth v. Johnson*, 572 Pa. 283, 815 A.2d 563, 580 (2002). The instructions of the court, taken as a whole, and in context, accurately set forth the applicable reasonable doubt standard. *Commonwealth v. Bracey*, 541 Pa. 322, 662 A.2d 1062, 1068 (1995).

The defendant also asserts that he was prejudiced by the nondisclosure of the Confidential Informant file. The identity of the informant must be exculpatory information *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). However, to be admissible, exculpatory evidence must also be material. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40, 57 (1987), quoting *United States v. Bagley*, *supra* 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494. However, it cannot be concluded that the requested evidence in this case related to information about a confidential informant would have produced any such evidence sufficient to satisfy the "reasonable probability" standard set forth in *Bagley*, *supra*. There appears no reasonable probability that this information, if disclosed to the defense, would make a difference in the outcome of the case. The information of the informant could not produce sufficient doubt about the identification of defendant as the perpetrator of the drug transactions as to render a guilty verdict uncertain.

Next the defendant challenges the sufficiency of evidence at the convictions rendered at the October 2007 and May 2008 jury trials. The testimony and other evidence presented at the trials were placed before the respective juries for their determination of the facts. Based upon the facts, the juries' function was to conclude whether the prosecution had proved the defendant's guilt beyond a reasonable doubt. In a jury trial, the function of the fact finder is to weigh conflicting evidence. *Commonwealth v. Tumminello*, 292 Pa.Super., 437 A.2d 435 (1981). Additionally, the fact finder viewing the witnesses makes credibility determinations with regard to their testimony. The fact finder is free to believe all, some, or none of the evidence presented. *Commonwealth v. Miller*, 555 Pa. 354, 724 A.2d 895, *certiorari denied*, *Miller v. Pennsylvania*, 120 S.Ct. 242, 528 U.S. 903, 145 L.E.d. 2d 204 (1999). The number of witnesses offered by one side or the other does not in itself determine the weight of the evidence. The fact finder determines the credibility of witnesses presented and the weight of their testimony. *Commonwealth v. Dunn*, 424 Pa.Super. 521, 623 A.2d 347 (1993). Because the Commonwealth does not have to establish guilt to a mathematical certainty, they may rely wholly on circumstantial evidence. *Commonwealth v. Cichy*, 227 Pa.Super. 480, 323 A.2d 817 (1974). In these cases the juries acting as the fact finder, found the testimony and other evidence presented by the Commonwealth, sufficient to prove the elements of the crimes beyond a reasonable doubt. As such, the defendant was found guilty.

BY THE COURT:
/s/Reilly, S.J.

Dated: May 22, 2009

Commonwealth of Pennsylvania v. Charles Jackson

Motion to Suppress—Warrantless Search—Scope of Review

Drugs and paraphernalia discovered incident to a lawful inventory search to secure the contents of a vehicle before having it towed to the police station are admissible as evidence.

(*Meg L. Burkardt*)

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

CC No. 200604322. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., May 22, 2009—A criminal information was filed against Charles Jackson (“Jackson”) on December 26, 2005, charging him with two (2) counts of Possession with Intent to Deliver, 35 P.S. §780-113(a)(30); two (2) counts of Possession of a Controlled Substance, 35 P.S. §780-113(a)(16); one (1) count of Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32); two (2) counts of Retail Theft, 18 Pa.C.S.A. §3929(A)(1); one (1) count of Receiving Stolen Property, 18 Pa.C.S.A. §3925; two (2) counts of Theft by Deception, 18 Pa.C.S.A. §3922; and one (1) count of Bad Checks, 18 Pa.C.S.A. §4105.

Jackson’s case was joined for trial with his co-defendants, Douglas Ray (“Ray”) at CC200604317, and Jennifer Marie Ballard (“Ballard”) at CC200604318. All three cases proceeded to a jury trial beginning September 10, 2007, in front of the Honorable Cheryl Allen.¹ At the conclusion of the Commonwealth’s case, Judge Allen dismissed one (1) count each of theft by deception, receiving stolen property, retail theft, and bad checks. The jury convicted Jackson of all remaining drug charges, as well as criminal attempt (retail theft) and criminal attempt (theft by deception), on September 13, 2007.

Jackson was sentenced on December 6, 2007. Judge Allen imposed a period of incarceration of five (5) to ten (10) years as to count one, (possession with intent to deliver), with no further penalty on the remaining counts. Thereafter, trial counsel was granted leave to withdraw and Scott Coffey, Esq., was appointed to represent Jackson on appeal. Jackson filed post-sentence motions, which this Court denied on May 5, 2008. A timely Notice of Appeal was filed on May 29, 2008. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant’s Concise Statement lists the following issues for appellate review:

1. [Judge Borkowski] erred in denying post-sentencing motions since [Judge Allen] erred in denying the motion to suppress the drugs found in the van since the search was illegal and not associated with an inventory of the vehicle.
2. [Judge Borkowski] erred in denying post-sentencing motions without a hearing since trial counsel was ineffective for failing to cross-examine Tina Jordan regarding her preliminary hearing testimony, which was vastly different from her trial testimony.
3. [Judge Borkowski] erred in denying post-sentencing motions without a hearing since trial counsel was ineffective for failing to timely object to the prosecutor’s misleading closing argument, the

prosecutor committed misconduct and [Judge Allen] erred in overruling the objection and request for a curative instruction.

4. [Judge Borkowski] erred in denying post-sentencing motions since the evidence was insufficient to convict Jackson of the theft, retail theft and drug counts, and even if sufficient, those convictions were against the weight of the evidence.

5. [Judge Borkowski] erred in denying post-sentencing motions since Jackson’s speedy trial rights were violated and therefore the instant convictions must be vacated.

6. [Judge Borkowski] erred in denying post-sentencing motions without a hearing since Jackson raised newly discovered evidence pursuant to Pa.R.Crim.P. 720(c), specifically that co-defendant Ray admitted that the drugs found in the van were his and not Jackson’s.

FINDINGS OF FACT

On December 26, 2005, Jackson, Ballard and Ray went into the Walmart in Scott Township. Walmart security guard Ronald Hargenrader noticed the three in the electronics department acting suspiciously, e.g. putting high-priced items into a shopping cart without looking at the prices. One of the men then placed a blanket on top of the shopping cart to cover the items. See Jury Trial Transcript, September 10-13, 2007, pp. 51-53. (hereafter “T.T.”) Hargenrader notified his supervisor, Tina Jordan, that the three suspicious individuals were heading to the check-out counter in electronics. (T.T. 52-53, 67-68) Jordan viewed the live security video, spotted the trio, and then notified the check-out clerk at the register where the three were waiting in line. (T.T. 68) Jordan notified the store manager about the situation and proceeded to the check-out counter. (T.T. 69)

Ballard attempted to pay for the items using a stolen check, driver’s license and social security card belonging to Marlene Gillock. (T.T. 71, 81-83, 158-159) The driver’s license photograph had been altered so that Gillock’s face was burned off. (T.T. 159) When the assistant store manager realized that Ballard, Ray and Jackson were attempting to purchase the merchandise by check, using altered identification, he would not let the sale proceed. The three then immediately left the store, leaving behind the check, driver’s license and social security card. (T.T. 53, 73-73)

Hargenrader and Jordan followed the three out of the store and into the parking lot. (T.T. 54, 74) As Jordan pursued the three actors, she telephoned the Scott Township Police Department from her cell phone, requesting that a patrol officer call her back regarding the incident. (T.T. 71) Scott Township Police Officer Alan Ballo immediately telephoned Jordan on her cell phone and was informed that Jordan and Hargenrader were following the actors through the Walmart parking lot. (T.T. 72-75, 150-151) Officer Ballo drove in a marked cruiser toward the Walmart, while talking on the phone with Jordan. (T.T. 151) En route, Jordan informed Officer Ballo that the actors got into a van with an Ohio license plate. (T.T. 75) Officer Ballo spotted a van with an Ohio license plate and stopped the van on I-79 near the Carnegie exit. (T.T. 152, 213) Ballard was in the driver’s seat of the van, Ray was in the passenger seat, and Jackson was crouched in the back of the van. (T.T. 152)

Ballard, Jackson and Ray were removed from the vehicle and taken into custody. (T.T. 213) Officer Eric Davis of the Collier Township Police Department was one of the officers who responded to a request for back-up and proceeded to the scene of the stopped van on I-79. (T.T. 213) Officer Davis and

the other responding officers began to conduct an inventory search of the van because, consistent with Scott Township Police Department policy, it had to be impounded and transported to the Scott Township Police Department. (T.T. 213) Officer Davis entered the van from the rear and found Ray's jacket sitting between the two front seats. (T.T. 260, 263) The jacket pocket contained four small bags of marijuana. (T.T. 214, 239) Officer Ronald Zygmontowicz of the Collier Township Police Department, who also responded to the request for back-up, was inside the van attempting to inventory the items located in the rear of the van. (T.T. 220, 222) Officer Zygmontowicz found a black bag between the front and back seats which contained small baggies of marijuana and crack cocaine, and a CD case which opened into a digital scale. (T.T. 222-223, 242) He then noticed a small baggie of crack cocaine inside the door handle on the front passenger side. (T.T. 224) When Officer Davis and Officer Zygmontowicz discovered the drugs, they stopped the inventory search and handed over the contraband to Officer Shawn Arlet of the Scott Township Police Department, who then had the van towed to the Scott Township Police Department for closer inspection. (T.T. 214, 226, 238-239)

On December 27, 2005, Officer Paul Abel of the Scott Township Police Department executed a search warrant on the van. The search revealed mink coats, Snow King boots, two pairs of brown work gloves, a gold necklace, and two Walmart receipts. (T.T. 317) Officer Abel did not find any drug paraphernalia, such as a crack pipe, during the search. (T.T. 315)

The total weight of the marijuana was 164.88 grams, packaged into smaller bags with each containing approximately 1.25 grams. The street value of the marijuana was \$10 per bag with an approximate total value of \$1319. (T.T. 288) The total weight of the crack cocaine was 29.03 grams, divided among 13 baggies. Each bag contained approximately 20 pieces of crack cocaine, valued at \$20 per piece. Consequently, the approximate value of the crack cocaine was \$4460. (T.T. 289) Detective Martin Zimmer, based upon his 27 years of experience with the Allegheny County Police Department, testified as an expert in the area of narcotics trafficking and concluded that the drugs had been possessed for purposes of sale. His opinion was based upon the amount and value of the drugs, the packaging, and the digital scale. (T.T. 283, 292)

Ballard and Ray admitted to going into Walmart with Jackson and filling two shopping carts with items, including a computer. (T.T. 342, 354-356, 475, 477-478) Ballard also admitted to using Ms. Gillock's check, driver's license and social security card to attempt to purchase the items. (T.T. 345)

DISCUSSION

I.

Jackson's claims that this Court erred in denying his post-sentence motions because Judge Allen erred in denying the motion to suppress the drugs found in the van.

The Superior Court reviews the denial of a motion to suppress to establish whether the record supports the trial court's findings and is otherwise free of legal error. The review is limited to the prosecution's evidence and that part of the evidence from the defense, which remains uncontradicted. The reviewing court is bound by factual findings which are substantiated by the record. *Commonwealth v. Henley*, 909 A.2d 352, 357-358 (Pa. 2006).

Jackson maintains that the warrantless search of the van was illegal. However, Judge Allen's determination is supported by the record in this case and applicable law of this Commonwealth.

Jackson, Ballard and Ray were stopped in Jackson's van

on I-79 after the three actors had attempted to steal merchandise from Walmart. Scott Township police officers were assisted by Collier Township police officers on I-79 where the van was stopped on the side of the road. See Suppression Hearing Transcript, June 12-13, 2007, pp. 23-24 (hereafter "H.T.") Since the three occupants of the van were taken into custody, the van could not be left on the side of I-79 and was to be towed back to the police station. (H.T. 110) Based upon the Scott Township Police Department's inventory search policy, the officers were required to inventory the items inside the van in order to secure the vehicle and to insure that they account for the items inside the vehicle. (H.T. 101, 103, 110)

Consequently, the responding officers began to inventory the items inside the van while at the scene. (H.T. 24, 54, 170) When the officers discovered the drugs, they stopped their inventory search and had the van towed to the Scott Township Police Department in order to obtain a search warrant to conduct a search of the van. (H.T. 24, 37, 55-56, 178) Additionally, the officers believed it would be safer to tow the vehicle before completing the inventory search, due to heavy traffic at that hour as well as the fact that it was getting dark outside. (H.T. 56)

Based upon these facts, the suppression court correctly concluded that the officers were conducting an appropriate inventory search of Jackson's van in order to secure the van and its contents before having it towed to the station. *Commonwealth v. Chambers*, 920 A.2d 892, 895 (Pa.Super. 2007) (inventory search was proper when police needed to tow defendant's vehicle for safety purposes, rather than to leave the vehicle precariously parked on the side of the road) Consequently, the drugs and paraphernalia discovered incident to this lawful inventory search were legally seized, and Judge Allen's denial of Jackson's motion to suppress was not error.

II.

Jackson argues that this Court erred in denying post-sentence motions, because trial counsel was ineffective for failing to cross-examine Tina Jordan regarding the difference in her trial testimony to that given at the preliminary hearing. This issue is without merit.

In *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), the Pennsylvania Supreme Court announced that issues involving trial counsel's ineffectiveness should be raised on collateral review. Furthermore, the Supreme Court abrogated the procedural rule which previously required new counsel to allege all claims implicating prior counsel's ineffectiveness at the first opportunity. *Commonwealth v. May*, 887 A.2d 750, 757-758 (Pa. 2005). Consequently, this issue is more appropriately reserved until such time as Jackson pursues a collateral attack on his conviction.

III.

Jackson's third issue alleges that this Court erred in denying post-sentence motions, alleging that trial counsel was ineffective for failing to object to the prosecutor's closing argument, which Jackson characterizes as misleading.

This issue involves the allegation of ineffective assistance of prior counsel. As such, it is more appropriately reserved when and if collateral review occurs. *Commonwealth v. May*, 887 A.2d at 757-758; *Commonwealth v. Grant*, 813 A.2d at 738.

IV.

Jackson's fourth claim contends that there was insufficient evidence to support his conviction for the theft and drug charges, and even if the evidence was sufficient, the conviction was nonetheless against the weight of the evidence.

The standard of review for a challenge to the sufficiency

of the evidence is to consider the evidence in the light most favorable to the Commonwealth, as verdict winner, including all reasonable inferences drawn from the evidence. The reviewing court may not substitute its judgment for that of the fact finder; but rather to discern whether sufficient evidence supports the verdict, mindful of the fact that the fact finder was free to believe all, part, or none of the evidence presented. *Commonwealth v. Hartle*, 894 A.2d 800, 803-804 (Pa.Super. 2006).

A post-sentence motion for a new trial alleging that the verdict was against the weight of the evidence will only be granted when the verdict is so contrary to the evidence as to shock one's sense of justice. The trial court's denial of a motion for new trial must stand, absent an abuse of discretion. *Commonwealth v. Spatz*, 716 A.2d 580, 583 (Pa. 1998). Again, the jury as trier of fact, may consider the credibility of witnesses, and is free to believe all, part, or none of the evidence. *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1069 (Pa.Super. 2003).

The facts established that Jackson, Ballard and Ray entered the Walmart and filled two shopping carts with goods that were offered for sale in the store. The three then proceeded to the cashier where Ballard presented a stolen check and identification to pay for the items in the two carts. When the cashier would not accept the stolen check for payment, the three fled the store. (T.T. 52-53, 67-69) This evidence established that Jackson committed retail theft from Walmart. *Commonwealth v. Dent*, 837 A.2d 571, 576-577 (Pa.Super. 2003) (sufficient evidence to support retail theft conviction where defendant could not produce receipt for merchandise and proceeded to flee the store after learning that the store manager intended to call the police) Moreover, Ballard and Ray admitted that the three actors had attempted to buy items from the Walmart using the stolen check and supporting identification. (T.T. 342, 354-356, 475, 477-478) The evidence was more than sufficient to support the conviction retail theft and theft by deception.

Thereafter, when the police stopped Jackson, Ballard and Ray in Jackson's van after they fled Walmart, the officers found marijuana, cocaine, and a digital scale inside the van. Some of the drugs were found in the passenger side door handle of the van; some of the of the drugs were found in the pocket of a denim jacket, which was laying between the front seats; and some of the drugs, as well as a digital scale, were found in a black bag located in between the front and back seats of the van. (T.T. 213-214, 222-224, 242) Detective Martin Zimmer, based upon his 27 years of experience with the Allegheny County Police Department, concluded that the drugs had been possessed for purposes of sale, based upon the value and amount of the drugs, the packaging, and the digital scale. (T.T. 283, 292) Based upon Jackson's proximity to the drugs inside the van, coupled with the packaging of the drugs, there was sufficient evidence to support the convictions for possession, possession with intent to deliver, and possession of paraphernalia. *Commonwealth v. Hutchinson*, 947 A.2d 800, 806-807 (Pa.Super. 2008). (evidence of co-defendant's proximity to drugs stashed in rafters of a pavilion was sufficient to support conviction for possession and possession with intent to deliver the drugs)

The jury had sufficient evidence to support their guilty verdict. Based upon that ample credible evidence, the verdict does not shock one's sense of justice and thus this Court did not commit an abuse of discretion by denying the post-sentence motion for a new trial. Consequently, Jackson's issue that the verdict was not supported by sufficient evidence and was against the weight of the evidence is without merit.

V.

Jackson's fifth issue is that this Court erred in denying post-sentence motions, because his speedy trial rights were violated.

When reviewing a trial court's denial of a motion regarding Pa.R.Crim.P. 600 (Rule 600), the Superior Court looks to the evidence presented at the evidentiary hearing and the findings of facts of the trial court. *Commonwealth v. Ramos*, 936 A.2d 1097, 1100 (Pa. 2007). In the absence of misconduct by the Commonwealth, Rule 600 is construed to protect society's need to punish and deter criminal activity. *Id.* 936 A.2d at 1100.

Rule 600 states, in pertinent part, as follows:

(A)(3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.

(B) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.

(C) In determining the period for commencement of trial, there shall be excluded therefrom:

(1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

(2) any period of time for which the defendant expressly waives Rule 600;

(3) such period of delay at any stage of the proceedings as results from:

(a) the unavailability of the defendant or the defendant's attorney;

(b) any continuance granted at the request of the defendant or the defendant's attorney.

Pa. R. Crim. P. 600.

The court must determine the amount of time excludable for any periods during which Jackson was unavailable, requested any continuances, or consented to a delay, as well as excusable time when a delay occurs beyond the Commonwealth's control. *Commonwealth v. Hill*, 736 A.2d 578, 591 (Pa. 1999) The Pennsylvania Superior Court has explained that,

[t]he law recognizes the distinction between "excludable time" and "excusable delay" in the context of Rule 600 has been blurred. "Excludable time" is defined in Rule 600(C) as the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence; any period of time for which the defendant expressly waives Rule 600; and/or such period of delay at any stage of the proceedings as results from: (a) the unavailability of the defendant or the defendant's attorney; (b) any continuance granted at the request of the defendant or the defendant's attorney. "Excusable delay" is not expressly defined in Rule 600, but the legal construct takes into

account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence.

Commonwealth v. Hunt, 858 A.2d 1234, 1241 (Pa.Super. 2004). Moreover, "judicial delay is a justifiable basis for an extension of time if the Commonwealth is ready to proceed." *Commonwealth v. Wroten*, 451 A.2d 678, 681 (Pa.Super. 1982). Even where a violation of Rule 600 has occurred, a motion to dismiss the charges will not be granted if the Commonwealth can establish that it exercised due diligence in bringing the case to trial. *Commonwealth v. Hunt*, 858 A.2d at 1241-1242.

The facts in this case establish that the Commonwealth exercised due diligence in bringing Jackson to trial. The Commonwealth had until December 26, 2006, to bring Jackson to trial. Since trial did not commence until September 10, 2007, the court had to determine if the 259-day delay was attributable to the defense or was otherwise excludable time.

At the evidentiary hearing, it was established that Jackson, Ballard and Ray were scheduled to have their preliminary hearing on the same date. The initial 10-day delay in setting the hearing date was attributed to the Commonwealth. (H.T. 10) On February 4, 2006, Ray's attorney postponed the case until March 9, 2006. (H.T. 10) Thereafter, the case was listed for trial on October 10, 2006. Thus, the initial 10 days, added to the 215 days between the preliminary hearing and the first listed trial date, were attributed to the Commonwealth, for a total of 225 days. (H.T. 10-11)

Ray's counsel then postponed the case again, with the case being rescheduled for February 1, 2007. (H.T. 7) This postponement was objected to by Jackson, and added 114 more days against the Commonwealth for a total of 339 days. (H.T. 11) Ballard's counsel thereafter postponed the trial again until the ultimate trial date; however, Jackson did not oppose this postponement. (H.T. 7-8) Consequently, 339 days were attributable to the Commonwealth.

Ultimately, Judge Allen denied Jackson's Rule 600 Motion. (H.T. 14) Although there are no findings of fact of record, Judge Allen obviously determined that of the 339-day delay in bringing Jackson to trial, (counting only the days attributable either to the Court or to the Commonwealth), did not violate Jackson's speedy trial rights. Thus, Judge Allen did not err in denying Jackson's Rule 600 Motion. *Commonwealth v. Solano*, 906 A.2d 1180, 1188-1189 (Pa. 2006)(defendant brought to trial within 365 days when factoring excludable time attributable to defendant including postponing the preliminary hearing to obtain counsel); *Commonwealth v. Hill*, 736 A.2d at 591-592. (motion to dismiss properly denied where failure to bring defendant to trial due to pending pre-trial motions was beyond Commonwealth's control, and record established that Commonwealth acted with due diligence in bringing the case to trial.) *Commonwealth v. Staten*, 950 A.2d 1006, 1010 (Pa.Super. 2008)(delay in bringing case to trial was excusable where Commonwealth requested a continuance to secure a necessary witness and scheduled the case for the next available date with defendant's consent); *Commonwealth v. Frye*, 909 A.2d 853, 858 (Pa.Super. 2006) (crime victim's extended hospital stay constituted excusable delay in bringing defendant to trial within 365 days). The trial court did not abuse its discretion in denying the motion to dismiss and this court did not err in denying Jackson's post-sentence motion.

VI.

Jackson's sixth issue is that this Court erred in denying

post-sentence motions without a hearing, maintaining that Jackson had newly discovered evidence that co-defendant Ray admitted that the drugs were his. Specifically, on the day of Ray's sentencing, Ray informed the trial court that the drugs were his and not Jackson's. Thus, Jackson claims that Ray's statements constitute after-discovered evidence.

This Court concludes that Ray's post-verdict acceptance of responsibility for the drugs, after he had already been found guilty by a jury of his peers, was suspect at best. Ray's "confession" was rendered at a point when he had nothing left to lose, except perhaps to assist his co-defendant (Jackson). Accordingly, this Court did not find Ray's statement credible. See *Commonwealth v. Washington*, 927 A.2d 586, 596-597 (Pa. 2007) (co-defendant's post-verdict statement that he fired the fatal shot not accepted as after-discovered evidence for defendant, where co-defendant had nothing to lose by making the statement and defendant should have known that co-defendant fired fatal shot) Consequently, this Court did not err in denying Jackson's post-sentence motions without a hearing.

CONCLUSION

Based on the foregoing, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Dated: May 22, 2009

¹ This Court was assigned this case at the post-sentence phase given Judge Allen's election to the Superior Court of Pennsylvania.

Commonwealth of Pennsylvania v. Jason Barber

Recusal—Ineffective Assistance of Counsel—Negotiated Plea

1. The trial judge should not recuse himself on the basis that the judge referred to the Defendant as a "terrorist" at sentencing, when a review of the statement, in context, reveals that the statement to the Defendant was nothing more than an observation as to the tragic consequence of Defendant's decision to be a drunken driver and its impact on the innocent victims.

2. All claims of ineffective assistance of counsel are to be raised in collateral post-conviction relief proceedings and not on direct appeal.

3. A Defendant is precluded from challenging a sentence or seeking to modify it when he entered into a negotiated plea agreement which calls for a specific sentence.

4. A Defendant may seek to withdraw his plea after sentencing only if he is able to demonstrate a showing of prejudice that results in manifest injustice.

(Jeffrey A. Ramaley)

Michael Streily for the Commonwealth.
Matthew Debbis for Defendant.

No. CC 200505045. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., May 27, 2009—On December 20, 2005, the appellant, Jason A. Barber, (hereinafter referred to as “Barber”), plead guilty to two counts of homicide by vehicle while driving under the influence, two counts of homicide by vehicle, two counts of involuntary manslaughter, three counts of aggravated assault by vehicle while driving under the influence, sixteen counts of accident involving death or personal injury while not properly licensed, eight counts of recklessly endangering another person, two counts of driving under the influence of alcohol, one count of driving under the influence of alcohol or a controlled substance, one count of providing false identification to law enforcement authorities, one count of driving while his operator’s privileges had been suspended or revoked; one count of failing to obey traffic control signals, and one count of failing to drive a vehicle at a safe speed. (page one and two of commonwealth’s answer to pcra). At each homicide by vehicle while driving under the influence, Barber was sentenced to a period of incarceration of not less than five nor more than ten years, which sentences were to be run consecutively for an aggregate sentence of ten to twenty years.

Barber did not file any post-sentencing motions nor did he file a direct appeal to the Superior Court. However, Barber did file a petition for post-conviction relief on December 18, 2006. Barber’s PCRA counsel then filed two amended petitions for post-conviction relief and a hearing was held on Barber’s petition on May 1, 2008. Following that hearing, Barber’s petition for post-conviction relief was denied.

Barber filed a timely appeal from the denial of his request for post-conviction relief and was directed to file a concise statement of matters complained of on appeal. Barber’s appellate counsel had requested several extensions to file this statement, which requests were granted. Barber’s appellate counsel filed his last concise statement of matters complained of on appeal on May 1, 2009. In his concise statement of matters complained of on appeal, Barber has claimed that this Court erred in failing to recuse itself from hearing Barber’s petition for post-conviction relief since at the time of Barber’s sentencing, this Court referred to him as “terrorist.” Barber next maintains that his trial counsel was ineffective for failing to preserve his post-sentencing and appellate rights in that Barber did not understand fully the nature of the plea agreement which he entered since he believed that he was to receive a sentence of not less than six nor more than ten years, and not a sentence of ten to twenty years. Finally, Barber maintains that his trial counsel was ineffective for fully advising him of the length of the sentence that he was to receive for his pleas of guilty.

In order to understand the current claims of error, a brief review of the facts of Barber’s case must be made. On December 4, 2004, at approximately 3:15 a.m., Barber was driving his red Ford F-150 truck at a high rate of speed along Baum Boulevard in the City of Pittsburgh. Stephen White was a passenger in that vehicle as the two of them had left the Traveler’s Club located in the Hill District Section of the City of Pittsburgh, sometime earlier. As he approached the intersection of Baum Boulevard and Liberty Avenue, Barber ran a red light and then struck three vehicles. The first vehicle that he hit was a Pontiac Grand Am being driven by Ian Price and in Ian Price’s vehicle was his passenger, David Gapsky. Both of these individuals sustained minor injuries and were treated and released at Presbyterian University Hospital. After striking the Pontiac Grand Am, Barber’s vehicle then turned approximately ninety degrees and struck a black Mitsubishi Damonte sedan that had four peo-

ple in that vehicle. The driver of the Mitsubishi automobile, Hwa Shu, died at the scene of the accident. The front seat passenger, Margaret Yi, was transported to Presbyterian University Hospital in critical condition as was one of the backseat passengers, Marlene Krout. The fourth passenger in the vehicle, Daniel Casture, was also taken to Presbyterian University Hospital and died shortly after his arrival there.

Barber’s vehicle, after hitting Ms. Shu’s car, then struck a parked vehicle that was occupied by Sharmel Harris, who was taken to Presbyterian University Hospital where she was treated for minor injuries. After striking the third vehicle, Barber and his passenger Sheldon White, fled the scene; however, they were apprehended by the police several blocks from this collision. White was also taken to Presbyterian University Hospital and was listed in critical condition as a result of the injuries he sustained when he went through the windshield.

When Barber was apprehended by the police, it was noted that he had a strong odor of alcohol on his breath, glazed and bloodshot eyes, mumbled speech and his speech was difficult to understand. Barber identified himself to the police as Jeff Lincoln. Barber was also taken to Presbyterian University Hospital for treatment of his injuries and as a result of that treatment it was determined that his blood alcohol level was point one five percent at the time he was driving. A follow-up investigation was done as a result of this accident and indicated that there no mechanical problems in any of the vehicles involved in this accident and that the cause of the accident was the fact that Barber was operating his vehicle while he was under the influence of alcohol to such an extent that he was incapable of the safe operation of a motor vehicle. It was further determined that at the time that he was driving his truck, that his license had been suspended.

Barber’s first issue is that this Court erred when it did not grant his request to recuse itself from hearing Barber’s petition for post-conviction relief. Barber maintains that when this Court made reference to the fact that Barber was a terrorist, that it demonstrated a revulsion of Barber in light of the crimes that he had committed. Canon 3(C)(1)(a) of the Code of Judicial Conduct requires recusal when the impartiality of the Court might be reasonably questioned. That Canon provides in part:

C. Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

In *Commonwealth v. King*, 576 Pa. 318, 839 A.2d 237, 239-240 (2003), the Pennsylvania Supreme Court set forth the factors that one should consider when deciding a request for recusal.

In general, a motion for recusal is properly directed to and decided by the jurist whose participation the moving party is challenging. *Commonwealth v. Travaglia*, 541 Pa. 108, 661 A.2d 352, 370. In filing a motion for recusal, the moving party must allege facts tending to show bias, interest or other disqualifying factors. *Reilly v. Southeastern Pa. Transp. Auth.*, 507 Pa. 204, 489 A.2d 1291, 1300

(1985). In turn, once the judge decides whether to preside over the case, that decision is “final and the cause must proceed.” *Id.* at 1300.

Although it is well-established that this Court may review the denial of a motion for recusal to determine whether the lower court abused its discretion in refusing to recuse itself, see *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 89 (1998), this Court has not yet considered the standard for reviewing the *grant* of a motion for recusal, such as the one at issue here.^{FN5} In reviewing the *denial* of a recusal motion to determine whether the judge abused his discretion, we “recognize that our judges are honorable, fair and competent.” *Reilly*, 489 A.2d at 1300. Based on this premise, where a judge has refused to recuse himself, on appeal, we place the burden on the party requesting recusal to establish that the judge abused his discretion. See *Commonwealth v. White*, 557 Pa. 408, 734 A.2d 374, 384 (“It is Appellant’s burden to establish that [the judge] abused his discretion by denying her recusal motion.”). Of course, it is self-evident that the characteristics of our judges do not change according to whether they recuse themselves from a particular case or not, and as such, where a judge has, in fact, recused himself, we must proceed on a similar premise, recognizing that our “honorable, fair and competent” judges do not grant recusal motions lightly. Therefore, where a judge has decided to recuse himself, we must place the burden on the party opposing recusal to establish that the judge did in fact abuse his discretion in doing so.^{FN6}

FN5. In fact, neither party has cited to a single case from this Commonwealth or, for that matter, any other jurisdiction, in which a court has reviewed a judge’s decision to recuse himself. Similarly, our review of the case law of this Commonwealth and other jurisdictions yields no such decisions.

FN6. Indeed, both the Commonwealth and Appellee appear to agree that the standard applicable here is one of abuse of discretion. Moreover, given the extraordinary nature of the remedy for a judge’s improper recusal, *i.e.*, ordering the judge to preside over a case from which he saw fit to recuse himself, it is more than appropriate to place the burden on the party opposing recusal to demonstrate that there has been an abuse of discretion.

Here, the Commonwealth cites to *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 753 (2000), in support of its argument that President Judge Eby abused his discretion by granting Appellee’s motion for recusal.^{FN7} In *Widmer*, 560 Pa. 308, 744 A.2d 745, 753 (2000), we explained the abuse-of-discretion standard in depth:

FN7. The Commonwealth also argues that Appellee’s claims regarding her allegedly inexperienced trial counsel and the County’s limits on expenditures in capital cases are not cognizable under the PCRA. Given that the PCRA court has not yet ruled on any of the claims in Appellee’s amended PCRA petition, it would be premature for us to consider the

Commonwealth’s claims here, and therefore, we decline to do so. See *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 733 (2002) (“[T]he absence of a trial court opinion can pose a ‘substantial impediment to meaningful and effective appellate review.’”) (citing *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306, 309 (1998)).

“The term ‘discretion’ imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued 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.” *Id.* at 753 (emphasis added) (quoting *Coker v. S.M. Flickinger Co.*, 533 Pa. 441, 625 A.2d 1181, 1185 (1993)).

The basis for Barber’s claim that this Court should recuse itself is the statement that it made to him at the time of sentencing which, in part, referred to him as a terrorist. In looking at this statement in isolation, one might perceive that there would have been a basis to question this Court’s impartiality; however, the statement cannot be viewed in a vacuum but, rather, should be viewed in light of the entire statement that was made to Barber at the time that he was sentenced.

THE COURT: Mr. Barber, this month will conclude my 14th year in the Criminal Division. I have a file cabinet of about 16,000 cases. Over that period of time listening to the cases going from prostitution to retail theft to homicides, I’ve come to one conclusion; you’re a terrorist.

I say that because in all of the cases where there’s a homicide that I had, there’s an intended victim. People go out there and they intend to kill somebody in particular.

I’ve got 3,000 pages of transcript sitting behind me on one case (indicating). There people were executed, a guy in a wheelchair, the father and his eight-year-old daughter.

The guy in the wheelchair, the two guys that came into that restaurant intended to kill him. The other two people, they were victims because they were in the wrong spot at the wrong time.

But when you have a case like this, you don’t even know the victims. They’re just out and you happen to come upon them and you lay the devastation upon them and the impact upon their families.

I say you’re a terrorist because you terrorize me. It could have been my sons. It could have been my wife. It could have been the people that I work with. You wouldn’t even know them. You wouldn’t have known anything about them.

That’s what’s so terrible. They are innocent victims. They didn’t ask to be a part of your life. They didn’t ask to be involved in this accident. They didn’t do anything to you.

Guilty Plea Transcript, pp. 17-19, lines 23-11.

When this term is read in the context of the entire statement, it is clear that this Court was doing nothing more than to express to Barber the terrible tragedy that resulted when he decided that he had the right to operate a motor vehicle while he was intoxicated, thereby disregarding the rights of everyone else on the road. Barber had never met any of his victims, yet his decision to get behind the wheel of an automobile while he was impaired, effectively signed their death warrants. It is a terrifying thought that someone may die not knowing the individual who killed them or the reason why they were killed. In this case, Barber's unknown and unintended victims died as a result of his belief that he was entitled to drive an automobile while he was intoxicated. Compounding his intoxication was the manner in which he drove that vehicle at a high rate of speed and through a solid red light, thereby smashing into not one, but three separate motor vehicles. This Court, in making reference to the fact that it believed that Barber was a terrorist, was attempting to underscore the tragedy that had taken place as a result of Barber's drunken decision to drive a car. At no time did this Court ever perceive that it had in any way been prejudiced against Barber or that its impartiality could be questioned as having a personal bias or animus toward Barber. The statement to Barber was nothing more than an observation as to the tragic consequences of his decision to be a drunken driver.

Barber next suggests that his trial counsel was ineffective for failing to protect his post-sentencing and appellate rights and in failing to fully inform him of the nature of the plea agreement which was being offered to him and subsequently accepted by him. These claims of the ineffectiveness of counsel were properly raised in light of the Supreme Court's directive in the case of the *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), mandating that all claims of ineffectiveness are to be raised in the collateral post-conviction relief proceeding and not a direct appeal.

The Sixth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution, guarantee a criminal defendant the right to effective representation. The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), recognized that the ineffectiveness of counsel requires the granting of a new trial. The Pennsylvania Supreme Court in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987), adopted the standard for performance set forth in *Strickland v. Washington*, *supra*, and required that a defendant claiming ineffectiveness of his counsel had to prove a three-prong test, that being that the claim now being asserted had some arguable merit, that his counsel had no reasonable basis for his action or omission with respect to that claim and, finally, that the defendant was prejudiced by his counsel's conduct. In reviewing a claim of ineffectiveness it is well-settled that the law presumes that counsel was effective and that the petitioner asserting the claim of ineffectiveness bears the burden of proving it. *Commonwealth v. Khalil*, 806 A.2d 415 (Pa.Super. 2002). The burden of proof imposed upon a petitioner asserting the claim of ineffectiveness has been set forth in *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999) as follows:

To show ineffective assistance of counsel which so undermined truth-determining process that no reliable adjudication of guilt or innocence could have taken place, post-conviction petitioner must show: (1) that claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is reasonable prob-

ability that outcome of proceeding would have been different.

Barber's initial claim of the ineffectiveness of his counsel is that his trial counsel did not file any post-sentencing motions or a direct appeal to the Superior Court. At the time of the hearing on his petition for post-conviction relief, both Barber and his trial attorney, Michael Foglia, (hereinafter referred to as "Foglia"), testified. Barber maintained that following the imposition of sentence, he requested that Foglia file a motion to modify his sentence of an appeal in the hopes of getting a reduction in his sentence. Barber further testified that Foglia indicated to him that since it was a negotiated plea, there was no basis for an appeal and that he would not waste his time or Barber's money in attempting to file a frivolous appeal. Foglia confirmed those statements and further indicated that although Barber knew he was facing two mandatory sentences of three to six years, for each vehicular homicide DUI-related, which the sentences of incarceration had to be run consecutively,¹ Barber still wanted to attempt to cap his exposure at the mandatory minimum sentences of six to twelve years. Foglia further stated that although he made numerous attempts to have the Commonwealth reduce its plea offer, that the Assistant District Attorney, Jennifer DiGiovanni, refused to go below the ten to twenty year proposal. Foglia further testified that he fully informed Barber that the plea agreement was a sentence of ten to twenty years and not Barber's request for six to twelve years.

In explaining to Barber that any motion seeking a modification of sentence or an appeal requesting a reduction of sentence would be frivolous, Foglia was accurately explaining the law to Barber. In *Commonwealth v. Dalberto*, 436 Pa.Super. 391, 648 A.2d 16, 19-20 (1994), the Court discussed the difference of appellate review when there is an open plea and a negotiated plea.

In *Commonwealth v. Coles*, 365 Pa.Super. 562, 530 A.2d 453 (1987), this court examined the consequences of entering into a strictly negotiated plea agreement. The appellee in *Coles* entered guilty pleas to theft charges and, as part of the plea negotiations, the Commonwealth recommended a sentence of imprisonment of not less than two and one-half years, less one day, to not more than five years, less one day, each sentence to run concurrently. The trial judge imposed the recommended sentence. Appellee filed a motion to reconsider the sentence and, following a hearing on the matter, the trial court entered an order reducing appellee's sentence. The trial court denied the Commonwealth's motion to vacate the order and the Commonwealth appealed. The issue presented to this court was whether the trial court was prevented from modifying the sentence, since the sentence was a result of plea bargaining negotiations.

Finding that the Commonwealth and the appellee had bargained for a *specific sentence*, we decided that the appellee had "attempted to strip the Commonwealth of the 'benefit of the bargain' when he petitioned the judge to unilaterally set aside the bargain." *Id.* at 568, 530 A.2d at 456.

This was an inappropriate proceeding as by negotiating the sentence accepted by the court, the sentence could not be altered in the absence of mistake, misrepresentation or illegality. To hold otherwise would make a sham of the negotiated plea process and would give the defendant a second bite at his

sentence, which we have frequently deplored in the context of withdrawal of a guilty plea.

Id. Importantly, in discussing the appellee's motion to modify sentence, the court stated, where a plea agreement is an *open one* as opposed to one for a negotiated sentence, unquestionably, after sentencing the defendant can properly request reconsideration as the court alone decided the sentence *and no bargain for a stated term, agreed upon by the parties, is involved*. *Id.* at 570, 530 A.2d at 457 (emphasis added).

Finding the order modifying the sentence to have been in error, the court concluded that [i]f either party to a negotiated plea agreement believed the other side could, at any time following entry of sentence, approach the judge and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement. *Id.* at 571, 530 A.2d at 458.

Shortly after *Coles* was decided, this court in *Commonwealth v. Becker*, 383 Pa.Super. 553, 557 A.2d 390 (1989) suggested a similar approach to negotiated guilty pleas in the context of challenges to the discretionary aspects of sentencing. There, appellant entered a guilty plea to a drunk driving charge, and the trial court sentenced him to the shortest sentence permissible under the mandatory sentencing provisions of the Vehicle Code. Appellant filed a motion to withdraw his guilty plea and also sought modification of his sentence. On appeal, this court found no basis for the withdrawal of the guilty plea. While indicating that a defendant does not waive the right to appeal the legality of sentence upon entry of a guilty plea, this court expressed the following in a footnote:

Though it has often been stated casually that a person who pleads guilty may only challenge the legality of sentence, this is not strictly true. *A defendant, who enters a guilty plea which does not involve a plea bargain designating the sentence to be imposed, cannot be said to have granted the sentencing court carte blanche to impose a discriminatory, vindictive or excessive sentence so long as the legal limits are not exceeded.* Obviously, the entry of a guilty plea does not preclude a petition for allowance of appeal of discretionary aspects of sentence subsequently imposed. *See* [,] *e.g.* [,] *Commonwealth v. Sanchez*, 372 Pa.Super. 369, 539 A.2d 840 (1988) (appeal of discretionary aspects of sentence following entry of a guilty plea); *Commonwealth v. Krum*, 367 Pa.Super. 511, 533 A.2d 134 (1987) (same). *Becker*, 383 Pa.Super. at 557 n. 1, 557 A.2d at 392 n. 1 (1989) (emphasis added).

More recently, in *Commonwealth v. Reichle*, 404 Pa.Super. 1, 589 A.2d 1140 (1991), it was determined that the appellant had waived the right to appeal the discretionary aspects of her sentence where the plea agreement contained a negotiated sentence. Appellant was charged with two counts of driving under the influence of alcohol (DUI), and entered a plea to one DUI count in exchange for the Commonwealth's agreement to *not pros* the remaining charge and recommend the mandatory minimum sentence of 48 hours incarceration. The sentencing court accepted the plea agreement and sentenced

appellant to 48 hours imprisonment and 50 hours of community service. A motion to modify sentence was filed and denied. On appeal, appellant challenged the discretionary aspects of her sentence.

In deciding whether to allow appellant's appeal, the court initially pointed out that the Commonwealth and Reichle had bargained for a particular sentence, and that appellant received precisely what she was promised under the terms of the agreement. *Id.* at 3-4, 589 A.2d at 1141. Considering the specific terms of the negotiated sentence, this court pronounced, "Where the plea agreement contains a *negotiated sentence* which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that sentence." *Id.* (emphasis added). The court went on to cite *Coles*, *supra*, for the proposition that permitting a discretionary appeal following the entry of a negotiated plea would make a sham of the negotiated plea process. Ultimately, the court dismissed the appeal.

Coles and *Reichle* clearly indicate that where there are specific penalties outlined in the plea agreement, an appeal from a discretionary sentence will not stand. Consistent with this reasoning, the *Becker* decision implies that where there have been no sentencing restrictions in a plea agreement, the entry of a guilty plea will not preclude a challenge to the discretionary aspects of sentencing. Otherwise stated, the plea agreements in *Coles* and *Reichle* represented "negotiated pleas," while *Becker* referred to an "open plea."

In an open plea agreement, there is an agreement as to the charges to be brought, but no agreement at all to restrict the prosecution's right to seek the maximum sentences applicable to those charges. At the other end of the negotiated plea agreement continuum, a plea agreement may specify not only the charges to be brought, but also the specific penalties to be imposed. *Commonwealth v. Porreca*, 389 Pa.Super. 553, 560, 567 A.2d 1044, 1047 (1989), *rev'd on other grounds* in 528 Pa. 46, 595 A.2d 23 (1991).^{FN4}

FN4. The Pennsylvania Supreme Court in *Porreca* determined that, since there was no inquiry into whether the defendant's plea was induced by an unfulfilled promise or threat, reversal was necessary so that the case could be remanded for a new guilty plea colloquy. Thus, the grounds for reversal did not affect the above quoted language describing the plea bargain continuum.

When a defendant enters a plea of guilty he forecloses all challenges on an appeal except the voluntariness of his plea, the jurisdiction of the Court and the legality of his sentence. *Commonwealth v. Alexander*, 811 A.2d 1064 (Pa.Super. 2002). Nevertheless an appellant may raise a challenge to the discretionary aspect of sentence if there is no agreement as to that sentence. *Commonwealth v. Becker*, 383 Pa.Super. 553, 557 A.2d 30 (1989). However, if there is a negotiated plea agreement which calls for a specific sentence, appellant is precluded from challenging that sentence or seeking to modify it. *Commonwealth v. Stewart*, 867 A.2d 589 (Pa.Super. 2005). In Barber's case he received a negotiated plea agreement which envisioned a specific sentence of ten to twenty

years for his plea of guilty to all of the charges filed against him. Since he received a negotiated sentence, he was not entitled to seek discretionary review of that sentence. *Commonwealth v. O'Malley*, 957 A.2d 1265 (Pa.Super. 2008). Since he was not entitled to seek review or modification of his sentence, his counsel could not have been ineffective for failing to file a motion seeking to modify his sentence or an appeal from the imposition of sentence.

Barber's final claim of error is that his counsel was ineffective in failing to communicate to him the terms of the plea agreement for a period of incarceration of not less than ten nor more than twenty years when he believed that the plea agreement was for a period of incarceration of not less than six nor more than twelve years. In reviewing the record in the instant case, it is clear that the plea agreement that was offered by the Commonwealth and accepted by Barber, was a period of incarceration of not less than ten nor more than twenty years. It is also abundantly clear that Barber knew that he was facing two mandatory sentences of three to six years for each homicide, which would have caused an aggregate sentence of six to twelve years and he wanted his counsel to negotiate a sentence of no more than those mandatory terms. It is also abundantly clear from the testimony of his counsel and the district attorney that the Commonwealth did not change its position or ever suggest that it would reduce its proposed offer and that fact was communicated not only to Barber, but also to his mother. The Commonwealth's reasoning for maintaining a ten to twenty year sentence was not only the two deaths that resulted from this accident, but the serious and catastrophic injuries suffered by two other passengers in the Shu car, in addition to the critical injuries sustained by Barber's passenger.²

At the time of Barber's plea, the district attorney placed on the record the sentencing agreement that was reached.

MS. DIGIOVANNI: I have no further testimony.

We do have a sentencing agreement, if the Court would accept it, for 10 to 20 years incarceration.

Guilty Plea Transcript, page 17, lines 13-17.

This Court imposed that sentence and advised Barber of his post-sentencing rights and asked him if he had any questions as to his sentence to which he responded, "No." Both Foglia and DiGiovanni agreed at the time of the hearing on Barber's petition for post-conviction relief that the only sentencing agreement that was reached by the parties was for a sentence of ten to twenty years.

Barber maintains that his counsel did not fully inform him of the request for ten to twenty years yet even his testimony at the hearing on his petition for post-conviction relief underscores that that was the negotiated plea to which he agreed. When asked whether or not he ever alleged in any of his petitions for post-conviction relief that the true plea agreement that was reached for six to twelve years, he indicated that he did not. It is clear from a review of the record that Barber understood what his sentence was to be and had he agreed to a negotiated sentence of a period of incarceration of not less than ten nor more than twenty years.

The record in this case does not support Barber's contention nor would it support a motion to withdraw his guilty plea since he could never meet the requirement of manifest injustice. A defendant may seek to withdraw his plea after sentencing only if he is able to demonstrate a showing of prejudice that results in manifest injustice. *Commonwealth v. Persinger*, 532 Pa. 317, 615 A.2d 1305 (1992). Manifest injustice may be established if the plea was not tendered knowingly, intelligently and voluntarily. *Commonwealth v.*

Hodges, 789 A.2d 764 (Pa.Super. 2002). Similarly, Barber would not be able to withdraw his plea to a negotiated sentence because he has been unable to demonstrate that he was misinformed as to what the real sentence was. *Commonwealth v. Barbosa*, 819 A.2d 81 (Pa.Super. 2003). As with Barber's other claims of error, this claim of the ineffectiveness of his counsel is without merit.

BY THE COURT:
/s/Cashman, J.

Dated: May 27, 2009

¹ §3735. Homicide by vehicle while driving under influence

(a) Offense defined.—Any person who unintentionally causes the death of another person as the result of a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 is guilty of a felony of the second degree when the violation is the cause of death and the sentencing court shall order the person to serve a minimum term of imprisonment of not less than three years. A consecutive three-year term of imprisonment shall be imposed for each victim whose death is the result of the violation of section 3802.

(b) Applicability of sentencing guidelines.—The sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory penalty of this section.

² A sentence of six to twelve years would only take into consideration the two deaths that resulted from this accident and it is obvious that the district attorney wanted to make sure that Barber was punished for the injuries he inflicted upon the survivors of this crash.

Commonwealth of Pennsylvania v. Carl Collins

Post-Conviction Relief Act—After-Discovered Evidence—Credibility of Eyewitness

1. As a result of his Post-Conviction Relief Act Petition, Defendant offered the testimony of a witness purportedly at the murder scene. The witness testified that defendant was not the shooter.

2. The court did not find the witness's testimony credible. The court based its assessment of credibility on the facts that the witness could have come forward 11 years earlier, but did not; that the witness was friends with defendant and they could have discussed the testimony; and that the testimony was amazingly consistent with the statement given to police by defendant. In addition, the demeanor of the witness was not credible.

(Lynn E. MacBeth)

Bill Jones for the Commonwealth.
John Fenner for Defendants.

Nos. CC9312112 and 9313464. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., June 10, 2009—The Defendant has appealed from this Court's Order of September 29, 2008 following remand which dismissed his June, 2003 and April 2006 Post-Conviction Relief Act Petitions. A review of the

record reveals that the Defendant has failed to raise any meritorious issues and, therefore, the Order must be affirmed.

The Defendant was charged with Criminal Homicide,¹ Possession of a Firearm Without a License,² Robbery,³ Criminal Conspiracy⁴ and Aggravated Assault.⁵ Following a jury trial held in February, 1994 before the Honorable Walter Little, then of this Court, the Defendant was found guilty of First-Degree Murder and all other counts. On May 17, 1994, he was sentenced to a term of life imprisonment at the First-Degree Murder count, plus an additional aggregate term of 15-43 years consecutive to the life sentence. Timely Post-Sentence Motions were filed and denied on June 8, 1994. The judgment of sentence was affirmed by the Superior Court on May 15, 1996 and his subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on October 31, 1996.

No action was taken until July 16, 1998, when the Defendant sought leave to reinstate his post-conviction rights *nunc pro tunc*. The Motion was granted and the Defendant filed a *pro se* PCRA Petition on August 12, 1998. Counsel was appointed to represent the Defendant, but a *Turner* letter was filed and she was granted permission to withdraw. After giving the appropriate notice, and reviewing the Defendant's response to that notice, Judge Little dismissed the Defendant's PCRA Petition on January 17, 2001. The Superior Court affirmed the dismissal on December 10, 2001 and the Defendant's Petition for Allowance of Appeal was denied on June 28, 2002.

On June 25, 2003, the Defendant filed a second *pro se* PCRA Petition. For reasons unclear to this Court,⁶ counsel – Scott Coffey, Esquire – was appointed to represent the Defendant. However, after filing a *Turner* letter, counsel was permitted to withdraw. On June 30, 2005, Judge Little gave Notice of his Intent to Dismiss the Petition and the Defendant responded to the proposed dismissal. However, Judge Little never entered an Order dismissing the Petition.

Then, on September 16, 2005, the Defendant filed a third *pro se* PCRA Petition alleging a claim of after-discovered evidence in the form of a witness named Merrior Coleman. By this time the case had been transferred to Judge Cheryl Allen, also formerly of this Court. Again, for reasons unknown to this Court, Judge Allen appointed counsel – Scott Coffey, Esquire – to represent the Defendant. However, because he had formerly represented the Defendant at a prior stage of these proceedings, Attorney Coffey was permitted to withdraw and the Defendant elected to proceed *pro se*. On April 20, 2006, the Defendant filed an Amended Petition again alleging a second after-discovered witness – this time, Ronald Williams.

After giving the appropriate notice, Judge Allen denied post-conviction relief on September 19, 2006. On appeal, the Superior Court found that Judge Allen's Order pertained only to the September 16, 2005 Petition regarding Merrior Coleman, and did not resolve the April 20, 2006 Petition regarding Ronald Williams and so it remanded the case to this Court for an evidentiary hearing.

The prescribed evidentiary hearing was held before this Court on September 24 and 25, 2008. Following the hearing, this Court denied the Defendant's April 20, 2006 Amended Petition regarding the after-discovered evidence of Ronald Williams. This appeal followed.

The Defendant first argues that this Court erred in denying collateral relief when he “demonstrated with newly discovered evidence that he was innocent.” However, a review of the record reveals that the testimony of Mr. Williams was not credible and did not establish the Defendant's innocence. Therefore, this claim must fail.

It is well-established that the “standard of review in PCRA appeals is limited to determining whether the findings of the PCRA Court are supported by the record and free from legal error.” *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009). “As a matter of law, resolving issues of credibility falls clearly within the province of the [PCRA] Court.” *Commonwealth v. Wallace*, 500 A.2d 816, 819 (Pa.Super. 1985). See also *Commonwealth v. Khalifah* 852 A.2d 1238, 1240 (Pa.Super. 2004). “Where a PCRA Court's credibility determinations are supported by the record, they are binding on the reviewing court.” *Commonwealth v. White*, 734 A.2d 374, 387 (Pa. 1999).

At the evidentiary hearing, the Defendant presented the testimony of the purported after-discovered witness, Ronald Williams. The testimony given to this court by both the Defendant and Mr. Williams was that the two were acquaintances from the Hill District in the 1990's, but had not seen each other since the night of the killing in question. One day they happened upon each other in the block yard at SCI-Fayette and began talking. The Defendant said he was in prison for a “situation that happened up in Elmore” (Evidentiary Hearing Transcript, p. 12). Purportedly, Mr. Williams knew exactly which “situation” to which the Defendant was referring and recalled immediately that the Defendant was not the shooter. Then, for reasons of conscience, he offered to write an Affidavit to this effect for the Defendant.

It was this Court's opinion, after having observed both the Defendant and Mr. Williams, that this testimony was not credible. As this Court explained at the conclusion of the hearing:

THE COURT: I do, however, find that the evidence in this case that I have heard is somewhat absurd and bizarre to think that Mr. Williams could, good citizen that he was, apparently, an eyewitness to a murder, and he just never mentioned it to the police. But then, 11 years later, saw someone who he knew didn't do it. And on that basis they struck up a friendship.

They may not have been living in the same cell. However, this Court knows how these work. And if they wanted to spend time together and discuss this, they had the opportunity to do so.

For the sake of argument, I would point out that Mr. Williams' testimony is amazingly consistent with the statement given by Mr. Collins to Detective Logan. And if you say that the taller man that Mr. Williams was discussing was, in fact, Ian, then Mr. Williams' testimony is consistent with what Mr. Collins told Detective Logan, leaving out the part about getting the gun from the stash and so on.

(E.H.T. p. 91-2). Having heard the testimony and observed the demeanor of the witnesses, it was this Court's conclusion that Mr. Williams' statement was too coincidental, too consistent and too rehearsed to be the least bit credible. This Court was well within its discretion in according it no weight and in subsequently denying post-conviction relief. This claim must fail.

Next, the Defendant argues that this Court erred in refusing to allow the testimony of Merrior Coleman and also in allowing the use of the Defendant's statement to police. Both claims of error are meritless.

“The admissibility of evidence [at a PCRA hearing] is vested in the sound discretion of the hearing court and an appellate court may reverse only when there is an abuse of that discretion.” *Commonwealth v. Henry*, 706 A.2d 313, 319

(Pa. 1997).

At the evidentiary hearing, the Defendant attempted to present the testimony of Merrior Coleman, the first “after-discovered witness” who was the subject of the September 16, 2005 PCRA Petition. However, a careful review of the record reveals that Judge Allen dismissed the September 16, 2005/Merrior Coleman Petition as untimely and the Superior Court conceded the correctness of that ruling. (See Superior Court Opinion of February 13, 2008 at FN7). Because the Defendant failed to satisfy the timeliness requirements of the Post-Conviction Relief Act with regard to the testimony of Merrior Coleman, this Court’s refusal to permit the testimony was proper and well within its discretion. This claim must fail.

The Defendant also argues that this Court erred in permitting the use of his post-arrest statement to police, which he now alleges was taken in violation of his right to counsel. However, the record reveals that the Sixth Amendment claim is a meritless distraction – since the statement was taken in the presence of his mother and following a signed waiver of his right to counsel. (E.H.T. p. 16). During his direct examination at the evidentiary hearing, the Defendant testified that he was sitting on a bench somewhere away from the scene and smoking marijuana when the shooting occurred. (E.H.T., p. 6). On cross-examination, the Commonwealth properly used the statement – in which he placed himself at the scene of the shooting and identified the shooter as Ian Grant – to impeach his testimony (and, peripherally, that of Mr. Williams, who also said the Defendant was sitting on a bench away from the scene of the shooting). This Court did not err in permitting the Commonwealth’s use of the statement and, therefore, this claim must fail.

Accordingly, for the above reasons of fact and law, this Court’s Order of September 29, 2008 must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

Date: May 29, 2009

¹ 18 Pa.C.S.A. §2501 – CC 9312112

² 18 Pa.C.S.A. §6106(a) – CC 9313464

³ 18 Pa.C.S.A. §3701(a)(1) – (2 counts) - CC 9313464

⁴ 18 Pa.C.S.A. §903(a)(1) – CC 9313464

⁵ 18 Pa.C.S.A. §2702(a) – CC 9313464

⁶ The Defendant not being entitled to appointed counsel for second and subsequent PCRA Petitions, see Pa.R.Crim.Pro. 904(d)

Commonwealth of Pennsylvania v. Michael McMillan

Self-Defense—Corpus Delicti Rule

1. The Commonwealth is not required to present evidence to disprove the Defendant’s claim of self-defense, especially when the only evidence supporting the claim is Defendant’s self-serving statement.

2. The “closely related crimes exception” to the *corpus delicti* rule permits the introduction of a defendant’s statement relative to an offense when the *corpus delicti* of another

er closely related offense is established.

(Rhoda Shear Neft)

Simquita Renetta Bridges for the Commonwealth.
Mathew Debbis for Defendant.

No. CC: 0006930-2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., June 5, 2009—This is a direct appeal wherein the defendant, Michael McMillan, appeals from the judgment of sentence of July 16, 2008. In this case, the defendant was charged with criminal homicide, criminal attempted homicide, aggravated assault, possession of a firearm by a minor and robbery. After a jury trial, the defendant was convicted of all charges except the criminal attempted homicide. The jury returned a verdict of second-degree murder relative to the charge of criminal homicide. At the second-degree murder conviction, the defendant was sentenced to a mandatory term of prison of life without parole. This Court imposed a sentence of not less than 10 years nor more than 20 years imprisonment at the robbery conviction. This Court also imposed a sentence of not less than 10 years nor more than 20 years at the aggravated assault conviction, concurrent to the robbery conviction. Relative to the conviction for possession of a firearm by a minor, this Court imposed a sentence of not less than two and one-half years nor more than five years imprisonment.

Mr. McMillan filed a timely Notice of Appeal. He also filed a timely Concise Statement Of Matters Complained Of On Appeal raising a number of issues. The issues are addressed below.

At trial, the following facts were adduced: Rachel Larue testified that she was present in her residence on April 17, 2007. At that time, she became aware that the defendant was also in her residence on an upstairs floor playing video games with her son, Will Smoot, and another person she knew as “Reese.”¹ Upon learning that the defendant was in the house, Ms. Larue went upstairs and advised the defendant he had to leave.² Ms. Larue escorted the defendant partly out of her house and she then went into her bedroom. Shortly after she entered her bedroom, she heard four or five gunshots and the sound of scuffling. She was also able to smell what she termed “gun smoke.” As she quickly moved toward the upstairs room she observed the defendant running down her stairway, jumping between landings, carrying what appeared to be a gray 9 millimeter handgun. Ms. Larue observed Will lying on the floor suffering from an apparent gunshot wound. She ran from the house and began to chase the defendant. She was not able to catch him.

Jessica Stewart Logan, the girlfriend of Ms. Larue’s son, testified. She testified that she was in the residence at the time of the shooting. She testified that just prior to the shooting, she heard what sounded like a bunch of chairs being moved around upstairs. She then heard what she believed to be five or six gun shots coming from the direction of Will’s room. She then observed the defendant run down the stairs with a gun in his hand. She, along with Ms. Larue, ran to the attic room and tended to Will, who was bleeding from his nose and mouth. She observed Reese in the corner of the room, also apparently suffering from a gunshot wound. Ms. Logan then called 911. Will was pronounced dead at the scene, a victim of homicide. He had been shot in the back of his head. Reese was shot in the back.

Another witness, Krystal Hall, testified that just after the shooting, she observed the defendant running down McClure Street “like he was scared.” She observed him enter a residence on McClure Street. She then entered her residence.

She remained in her residence with her friend, Belinda. A short time later, the defendant came to her residence and asked if he could stay there for a short time. He was wearing different clothes than he was wearing when she observed him running. According to Ms. Hall, the defendant appeared very nervous. She asked him why he was nervous and he responded that he had tried to “come up off of some niggas.” Ms. Hall testified that the phrase was street slang for trying to rob somebody. The defendant then told Ms. Hall that he shot Will in the head and shot Reese in the arm. When Ms. Hall went outside to observe police helicopters hovering over the residence, the defendant locked her out of her house.

Officer Jeffrey Snyder of the Homestead Police Department testified that he was the first officer to respond to the scene of the shooting. He testified that he observed the room where the shooting occurred. A substantial amount of money, approximately \$1,400, was scattered all over the room. Shell casings were about the floor. The furniture in the room was scattered.

Allegheny County detectives also responded to the scene. After being advised that the defendant had entered a residence on McClure Street just after the shooting, the detectives searched that residence. There they found boots with blood stains, blue jeans, cell phones and a hair brush. Forensic DNA testing was performed on some of this evidence and Will Smoot's DNA was found on the boots and pants belonging to the defendant.

The defendant testified in his own defense. He testified that on the date in question, he was at Will's house playing computer games with Will and Reese. He testified that he had purchased crack cocaine from Will in the past. The defendant testified that on April 17, 2007, after being at Will's residence for approximately three hours, he began to have a conversation with Reese about Alexandra, Reese's girlfriend. According to the defendant, in the past, there had been an incident in which Reese and the defendant exchanged words over the defendant's attempted contact with Alexandra while she and Reese were dating. Some time after the telephone conversation, the defendant testified he met Reese on the streets. According to the defendant, at the time of the meeting neither the defendant nor Reese apparently recalled the prior conversation about Alexandra. They became social acquaintances. On the date of the shooting, the defendant testified that he and Reese met on the street. Reese advised the defendant that he was going to Will's house to buy some “weed.” The two then went to Will's house together.

The defendant then testified that he went to Will's residence where he smoked marijuana with Reese. The defendant and Reese then went up to Will's room in the attic where they hung out and played computer games. At some point, Ms. Larue came home and, after determining that the defendant was in the residence, she asked him to leave. He testified that he started to walk down the stairs to leave but that he realized he forgot his cell phone. He then went back upstairs. While upstairs, Will addressed the defendant about concerns that the defendant had disrespected Will's mother. According to the defendant, Reese then began to ask the defendant about Alexandra. The defendant testified that he told Reese that he got Alexandra pregnant. The defendant testified that as he began to walk away he heard a chair move and then he was punched in the back of the head by Reese. When he fell, a gun he had in his sweatshirt fell out of the sweatshirt and slid across the floor. The defendant testified Reese moved toward the gun. The defendant then recalled that Reese was the person he had the discussion with earlier about Alexandra. According to the defendant, Reese grabbed the gun. Will told Reese to “chill.” Reese then

cocked the gun and pointed it at the defendant. The defendant testified that he attempted to grab Reese's arm to move the gun from being pointed at him. According to the defendant, the gun accidentally discharged and delivered the fatal shot to Will. The defendant claimed that gun powder filled his eyes and his eyes were burning but he was able to grab his gun. Reese then took off running toward the entertainment center. The defendant believed Reese was trying to retrieve a gun. The defendant then fired his gun at Reese, hitting him in his left lower back. Reese shot his gun but missed the defendant. The defendant shot again, this time grazing Reese across the chest and arm. The defendant was able to grab Reese's gun. He checked on Will and fled the scene with both guns. He admitted that he fled the scene, hid the guns, and went to a residence to change his clothes. He also admitted that he made telephone calls to a person in an effort to help him flee.

Mr. McMillan first challenges the sufficiency of the evidence relative to his convictions for second-degree murder. The defendant does not claim that the Commonwealth failed to present sufficient evidence to satisfy each element of this offense. Rather, the defendant alleges that the Commonwealth's evidence was insufficient because it failed to pre-sent evidence sufficient to disprove the defendant's claim of self-defense.

It is axiomatic that the use of force against a person is justified when a person believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person. When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt. See *Commonwealth v. Samuel*, 527 Pa. 298, 303, 590 A.2d 1245, 1247 (1991); *Commonwealth v. Upsper*, 497 Pa. 621, 624, 444 A.2d 90, 91 (1982). While there is no burden on a defendant to prove the claim, before the defense is properly at issue at trial, there must be some evidence, from whatever source, to justify a finding of self-defense. *Commonwealth v. Black*, 474 Pa. 47, 53, 376 A.2d 627, 630 (1977). If there is any evidence that will support the claim, then the issue is properly before the fact-finder. *Commonwealth v. Mayfield*, 401 Pa.Super. 560, 564, 585 A.2d 1069, 1071 (1991).

In this case, the only evidence suggesting that the defendant acted in self-defense was the self-serving statement of the defendant himself. “Although the Commonwealth is required to disprove a claim of self-defense arising from any source beyond a reasonable doubt, a jury is not required to believe the testimony of the defendant who raises the claim.” *Commonwealth v. Bullock*, 948 A.2d 818, 825 (Pa.Super. 2008); *Commonwealth v. Carbone*, 524 Pa. 551, 562, 574 A.2d 584, 589 (1990). The jury was free to reject the defendant's testimony as incredible, which it apparently did in this case. Accordingly, Defendant's assertion the evidence was insufficient to sustain his convictions is without merit. Moreover, undercutting the defendant's version that he was attempting to defend himself at the time of the shooting are the facts that the defendant fled and attempted to conceal himself after the shooting. Flight and concealment may be considered by a jury as evidence of guilt. *Commonwealth v. Harvey*, 514 Pa. 531, 538-39, 526 A.2d 330, 334 (1987) (noting that flight and concealment constitute evidence of consciousness of guilt). The jury was free to reject the defendant's testimony and consider all of the evidence adduced in this trial that the defendant shot Will, that he did so in the course of trying to rob Will and that he fled the scene in an effort to conceal himself as proof beyond a reasonable doubt that the defendant did not act in self-defense. This claim of error fails.

The defendant next claims that admission of his state-

ments that he tried to rob Will and Reese was in violation of the *corpus delicti* rule. In *Commonwealth v. Taylor*, 574 Pa. 390, 395; 831 A.2d 587, 590-91 (Pa. 2003), the Supreme Court explained

It is beyond cavil that, in this Commonwealth, "a confession is not evidence in the absence of proof of the *corpus delicti*.... When the Commonwealth has given sufficient evidence of the *corpus delicti* to entitle the case to go to the jury, it is competent to show a confession made by the prisoner connecting him with the crime." *Gray v. Commonwealth*, 101 Pa. 380, 386, 30 Pitts. Leg. J. 185 (Pa. 1882). See *Commonwealth v. Smallwood*, 497 Pa. 476, 442 A.2d 222, 225 (Pa. 1982) (extending rule to admissions and statements of the accused; not limited to formal confessions). "*Corpus delicti*" means, literally, "the body of a crime." *Black's Law Dictionary*, 344 (6th ed. 1990). The "*corpus delicti* consists of the occurrence of a loss or injury resulting from some person's criminal conduct." *Commonwealth v. McMullen*, 545 Pa. 361, 681 A.2d 717, 721 (Pa. 1996). The *corpus delicti* rule requires the Commonwealth to present evidence that: (1) a loss has occurred; and (2) the loss occurred as a result of a criminal agency. *Commonwealth v. May*, 451 Pa. 31, 301 A.2d 368, 369 (Pa. 1973). Only then can "the Commonwealth...rely upon statements and declarations of the accused" to prove that the accused was, in fact, the criminal agent responsible for the loss. *Id.* "The grounds on which the rule rests are the hasty and unguarded character [that] is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed." *Commonwealth v. Turza*, 340 Pa. 128, 16 A.2d 401, 404 (Pa. 1940).

In *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (Pa. 1974), we explained that the *corpus delicti* rule should not be viewed as a condition precedent to the admissibility of the statements or confessions of the accused. *Id.* at 274, n.41. Rather, the rule seeks to ensure that the Commonwealth has established the occurrence of a crime before introducing the statements or confessions of the accused to demonstrate that the accused committed the crime. The rule was adopted "to avoid the injustice of a conviction where no crime exists.... The fact that a crime has been committed by someone must be shown before a confession will be received." *Commonwealth v. Leslie*, 424 Pa. 331, 227 A.2d 900, 904 (Pa. 1967) (internal citations omitted) (a minor defendant confessed to having committed arson, but the Fire Marshal could not support his suspicion that the fire was of an incendiary origin; accordingly, this Court overturned the conviction).

Over the years, however, the Supreme Court has adopted the "closely related crimes exception" to the *corpus delicti* rule. This rule permits the introduction of a defendant's statement relative to an offense when the *corpus delicti* of another closely related offense is established. *Commonwealth v. Bardo*, 551 Pa. 140, 709 A.2d 871 (Pa. 1998), cert. denied, 525 U.S. 936, 142 L.Ed.2d 289, 119 S.Ct. 350 (1998). That exception provides that "[u]nder those circumstances where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the *corpus delicti* rule, the statement of the accused will be admissible as to

all the crimes charged." *Id.* Accord *Commonwealth v. Jacobs*, 556 Pa. 138, 727 A.2d 545 (Pa. 1999), habeas corpus conditionally granted on other grounds, 129 F.Supp.2d 390 (M.D. Pa. 2001) (quoting and applying the test as articulated in *Bardo*).

In this case, the defendant's statements concerning the robbery were admissible under the "closely related crimes exception" to the *corpus delicti* rule. The Commonwealth proved the *corpus delicti* of the closely related offenses of criminal attempted homicide (possibly criminal homicide) and aggravated assault prior to the admission of the defendant's statement. Prior to the admission of the statement, the jury had been apprised of the circumstances of the shooting, namely that shots were fired, the defendant fled holding a gun and Will and Reese were shot and seriously injured. The relationship between the criminal attempted homicide and aggravated assault and the robbery is markedly close. The introduction of the statement did not violate the purpose underlying the *corpus delicti* rule, the statement was, therefore, admissible as to the robbery charge.

The defendant next asserts that the evidence was insufficient to convict him of robbery. 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 are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that, as a matter of law, no probability of fact may be drawn from the evidence. *Id.* Credibility determinations must be given great deference. The trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon*, 820 A.2d 1287, 1290 (Pa.Super. 2003).

The robbery statute provides, in relevant part:

- (1) A person is guilty of robbery if, in the course of committing a theft, he:
 - (i) inflicts serious bodily injury upon another;
 - (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
 - (iii) commits or threatens immediately to commit any felony of the first or second degree;
 - (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
 - (v) physically takes or removes property from the person of another by force however slight.
- (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa.C.S.A. § 3701.

A review of the record reflects that the evidence in this case was sufficient to convict Mr. McMillan of robbery. Trial testimony included the testimony of Ms. Hall who testified that just after the shooting the defendant told her that he had just "come up off of some niggas." According to the trial testimony, this phrase meant that the defendant attempted to rob Will and Reese. Moreover, both of the victims of the robbery were shot. Will was fatally shot. Money and furniture

were scattered all over the room where the shooting took place. This evidence was clearly sufficient to convict the defendant of robbery.

The defendant next challenges this Court's granting the Commonwealth's motion to amend the Information to include the robbery charge. Pennsylvania Rule of Criminal Procedure 564 states:

The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as necessary in the interests of justice.

The purpose of Rule 564 "is to ensure that a defendant is fully apprised of the charges and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." *Commonwealth v. Sinclair*, 897 A.2d 1218, 1221 (Pa.Super. 2006); *Commonwealth v. Duda*, 2003 Pa.Super. 315, 831 A.2d 728, 732 (Pa.Super. 2003); *Commonwealth v. Bricker*, 882 A.2d 1008, 1019 (Pa.Super. 2005) (quoting *Commonwealth v. Davalos*, 2001 Pa.Super. 197, 779 A.2d 1190, 1194 (Pa.Super. 2001)). The test to be applied is:

Whether the crimes specified in the original indictment or information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.

Davalos, 779 A.2d at 1194.

Just prior to trial, the Commonwealth sought to amend the Information to include the charge of robbery. This Court granted the Commonwealth's motion and permitted the amendment because the additional charge of robbery involved the same basic elements of the crimes already charged (aggravated assault and criminal homicide, second-degree murder) and the defendant could not demonstrate prejudice as a result of the amendment. The defendant had been provided with discovery approximately two months before trial containing information that the defendant tried to rob the victims in this case and that the Commonwealth was pursuing a conviction for second-degree murder as a result of a killing committed during the commission of a robbery. The only reason the Commonwealth sought the amendment was because the Assistant District Attorney realized on the date of trial that robbery had not been charged in this case. She believed that it had been charged. As the Assistant District Attorney pointed out during argument on the motion, "[e]verything in the discovery has always indicated that it was an idea of a robbery taking place and then a shooting occurred. And there is nothing new that we are adding in terms of facts that the defense is not already aware of." The amendment did not involve any new facts that were not already part of the Commonwealth's case. Importantly, defense counsel candidly admitted that it would have been "ludicrous" to argue that it would have been impossible to defend the charge of robbery on the date of trial.

Accordingly, there was no error in granting the Commonwealth's motion to amend.

The defendant finally challenges this Court's refusal to provide a voluntary manslaughter instruction to the jury. An "unreasonable belief" manslaughter charge shall be given only when requested by the defendant, where the offense has been made an issue in the case, and the trial evidence reasonably would support such a verdict. *Commonwealth v. Patton*, 936 A.2d 1170, 1177 (Pa.Super. 2007) see also *Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344, 353 (Pa. 1999) (citing *Commonwealth v. Browdie*, 543 Pa. 337, 671 A.2d 668, 674 (Pa. 1996); *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251 (Pa. 1994)) *Commonwealth v. White*, 490 Pa. 179, 415 A.2d 399 (1980) (involuntary manslaughter); *Commonwealth v. Williams*, 490 Pa. 187, 415 A.2d 403 (1980) (involuntary manslaughter). A defendant is not entitled to a jury instruction that has no basis in the evidence presented at trial. See *Commonwealth v. Carter*, 502 Pa. 433, 466 A.2d 1328 (Pa. 1983) (defendant not entitled to unreasonable belief voluntary manslaughter instruction where no evidence supported such charge).

In order to obtain a verdict of voluntary manslaughter, the Commonwealth has the burden of proving beyond a reasonable doubt that a homicide was not a justifiable act of self-defense. *Commonwealth v. White*, 492 Pa. 489, 491, 424 A.2d 1296 (1981); *Commonwealth v. Walley*, 466 Pa. 363, 353 A.2d 396 (1976). A killing which occurs because a defendant mistakenly believes that he or she is justified in taking such action constitutes voluntary manslaughter. See 18 Pa.C.S.A. § 2503(b); *Commonwealth v. Cain*, 484 Pa. 240, 398 A.2d 1359 (1979); *Commonwealth v. Nau*, 473 Pa. 1, 373 A.2d 449 (1977). The crime of voluntary manslaughter is codified at 18 Pa.C.S. §2503, which provides in relevant part:

(a) General rule.—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

(b) Unreasonable belief killing justifiable.—A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable.

In this case, the defendant could not, even by his own testimony, meet this standard. The defendant testified at trial that he grabbed Reese's arm to prevent him from pointing the gun at the defendant. He testified that he gun accidentally discharged and shot Will. Voluntary manslaughter requires a killing to be intentional or knowing. Moreover, critical to this case is that Will, not Reese, was shot by the defendant. The defendant could not claim that he shot Will to prevent Will from using similar force on him. Will posed no threat whatsoever to the defendant. Similar evidence has warranted a denial of an "unreasonable belief" voluntary manslaughter charge. See *Patton*, 936 A.2d 1170 (denial of voluntary manslaughter charge was appropriate upon defendant's claim of accidental shooting); *Carter*, 466 A.2d 1328 (instruction not warranted where defendant testified that he accidentally shot the victim as they were wrestling for con-

trol of the defendant's gun following a verbal altercation.) Because the defendant's own testimony indicated that the shooting was accidental and because the defendant shot and killed someone who was no threat to him, the jury should not have been charged on voluntary manslaughter.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:

/s/Mariani, J.

¹ "Reese" has been identified as James Maurice Jones.

² Ms. Larue testified that due to a prior incident when the defendant showed Ms. Larue a gun while in her residence, she decided that the defendant was no longer permitted to be in her residence.

Commonwealth of Pennsylvania v. Maurice Miles a/k/a Robert Turner

Sufficiency of Evidence

1. Defendant, a jitney driver, was stopped in a routine traffic stop in which the police found a gun under the driver's seat of the car.

2. Evidence adduced at trial showed that the gun was operable, Defendant did not have a license to carry a gun, the weapon was found close to Defendant, and Defendant had the power to exercise control over the gun.

3. Despite Defendant's testimony that illegal items are often left in his jitney by passengers, there was sufficient evidence to convict Defendant of violating the Uniform Firearms Act.

(Rhoda Shear Neft)

Christopher Mark Stone for the Commonwealth.

Michelle Louise Collins for Defendant.

No. CC: 200617372. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., June 5, 2009—This is a direct appeal wherein the defendant, Maurice Miles a/k/a Robert Turner, appeals from the judgment of sentence of December 10, 2008. He was convicted after a jury trial of a violation of the Uniform Firearms Act, specifically possessing a firearm without a license and one count of violating the vehicle code for failing to use the proper turning signals. This Court sentenced the defendant to a term of 12 months' probation. On February 17, 2009, the defendant filed a timely Notice of Appeal. On May 7, 2009, the defendant filed a timely Concise Statement of Errors Complained of on Appeal raising the following issues:

Whether the evidence was sufficient beyond a reasonable doubt to convict Mr. Miles on the charge of Firearms Not to be Carried Without a License when the evidence failed to prove that Mr. Miles had actual or constructive possession of the gun?

Whether the verdict was against the weight of the evidence when the incident took place in a high-crime area in which guns were prevalent, Mr. Miles was a jitney driver who had multiple jitney fares on the night in question, a jitney fare/passenger was in

the car at the time of the incident, Mr. Miles did not check his car for mislaid/forgotten belongings after each jitney fare on the night in question, Mr. Miles has previously found mislaid/forgotten belongings, including weapons in his car during his 15 years as a jitney driver, and although Mr. Miles had never owned or possessed a gun, he could lawfully do so?

During the trial of this case, the following credible facts were adduced: Officer Michael Saldutte of the City of Pittsburgh Bureau of Police participated in a traffic stop on Frankstown Avenue in the City of Pittsburgh at approximately 2:30 a.m. on October 5, 2006. Officer Saldutte, along with Officer Killmeyer approached the driver's side of the vehicle and observed two male occupants in the vehicle. Neither of the occupants was in the rear seat of the vehicle. Both the driver and passenger held their hands up through their respective windows of the vehicle. The defendant, Robert Turner, was identified as the driver of the vehicle. Officer Saldutte testified that he was standing near the rear driver's side door and he observed a handgun sticking out from under the driver's seat. Officer Ewing testified that he responded to the scene and he also observed the gun under the defendant's seat. After he observed the gun, he yelled "gun" and both the defendant and the passenger were removed from the vehicle and placed in handcuffs. The handgun was then seized. It was subsequently sent to the crime laboratory for testing and the handgun was determined to be in operating condition. Additional evidence was adduced that the defendant was not licensed to carry a firearm in the Commonwealth of Pennsylvania.

The defendant testified that he was acting as a jitney on the date in question.¹ The defendant testified that just before he was pulled over by the police, an unknown person asked him for a ride. The defendant claimed that his customer never knocked on his door but that he just got into the defendant's vehicle. According to the defendant, the police began following him as soon as the customer got into the vehicle. The defendant didn't know the customer and had never seen him before. The defendant claimed that the customer got into the front passenger seat and at some point the passenger lifted his arm. As soon as the passenger did this, the police activated their sirens and effectuated the traffic stop. The defendant testified that he was blind in one eye, had glaucoma in the other eye and was trying to watch the road so he was unable to observe whether the customer had anything in his hand. The defendant also testified that other jitneys had used his vehicle in the past. He also testified that he did not own a gun. He testified that he did not know there was a gun in the back seat of his vehicle. He testified that he checks his car every morning to make sure there's nothing in it. He did not have an opportunity to check the vehicle on the date in question. He testified that he had found illegal items in the car before that were placed there by other people. After deliberations, the jury found the defendant guilty of possessing the firearm without a license.

The defendant challenges the sufficiency of the evidence relative to his conviction for possessing a firearm without a license. 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

are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that, as a matter of law, no probability of fact may be drawn from the evidence. *Id.* Credibility determinations must be given great deference. The trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon*, 2003 Pa.Super. 139, 820 A.2d 1287, 1290 (Pa.Super. 2003).

The defendant challenges his conviction for violating the Uniform Firearms Act. His challenge to the sufficiency of the evidence only relates to whether the Commonwealth presented sufficient evidence that the defendant had actual or constructive possession of the gun. The crime of carrying a firearm without a license is set forth in 18 Pa. C.S. §6106(a), which states:

Any person who carries a firearm in any vehicle or any person who carries a firearm on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this Chapter commits a felony of the third degree.

To prove possession of a firearm, the Commonwealth must establish that an individual either had actual physical possession of the weapon or had the power of control over the weapon with the intention to exercise that control. *In Re R.N. Jr.*, 951 A.2d 363, 370 (Pa.Super. 2008) citing *Commonwealth v. Carter*, 304 Pa.Super. 142, 450 A.2d 142, 144 (Pa.Super. 1982). Moreover, possession may be proven by circumstantial evidence. *Id.*

As set forth above, the jury heard evidence that the gun was found under the driver's seat of the defendant's vehicle while the defendant was driving the vehicle. Although the gun was not found on defendant's person, the gun was found directly under the defendant in the defendant's vehicle. At a minimum, the evidence adduced at trial was sufficient to circumstantially demonstrate that the defendant had the power to control the weapon and that he had the intention to exercise that control. There were no persons in the back seat of the vehicle at the time the gun was found. This Court believes that evidence is sufficient to convict the defendant of a violation of the Uniform Firearms Act.

The defendant next claims that this Court's verdict was contrary to the weight of the evidence. As forth in *Criswell v. King*, 834 A.2d 505; 512. (Pa. 2003)

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 trier of fact 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*, 934 A.2d 732, 736-737 (Pa.Super. 2007).

The defendant alleges a number of facts demonstrating that the weight of the evidence mandates that the verdict should be overturned. The evidence alleged by the defendant, i.e., the fact that the incident occurred in a high-crime area in which guns were prevalent, that the defendant was a jitney driver who had multiple jitney fares on the night in question, that a jitney fare/passenger was in the car at the time of the incident, that the defendant did not check his car for mislaid/forgotten belongings after each jitney fare on the night in question, that the defendant has previously found mislaid/forgotten belongings, including weapons, in his car during his 15 years as a jitney driver, and that the defendant had never owned or possessed a gun and, if he did, he could lawfully do so was evidence that the trier of fact was free to reject in arriving at its verdict. The jury was in a position to evaluate the defendant's credibility during his testimony. Based on the verdict, the jury apparently rejected the defendant's testimony and it was well within its province to do so. As set forth above, there was sufficient credible evidence to convict the defendant of the crime charged and the verdict was not shocking to this Court's sense of justice. Accordingly, this claim fails.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

¹ As explained by the defendant, a jitney is similar to a taxi service.