

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

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In the Interest of: A.R.

Juvenile Delinquency—Narcotics Possession—Firearm Possession—Weight of Evidence

1. A.R., a minor, appealed his charges of Possession of Crack/Cocaine, Heroin, and Firearm for which he was adjudicated delinquent. Possession with Intent to Deliver and Possession of a Firearm Without a License were dismissed. The disposition was deferred with permission to place him at Vision Quest Buffalo Soldiers Academy juvenile treatment facility because he was in need of treatment, rehabilitation and supervision, and, thus, delinquent.

2. City Detectives testified that they were conducting surveillance in a drug impact capacity from a confidential location, while other Detectives patrolled in a vehicle. They observed two males standing on the street in front of an abandoned lot. A.R. walked to the side of the lot, removed a plastic bag from behind a pile of rocks, reached into the bag and pulled out a bundle of smaller bags believed to contain heroin. A.R. spoke briefly with the older male and then put the bundle back into the larger bag. The older man then walked away. A.R. held onto the bag. An older black female approached, and A.R. reached into the bag and pulled out an unidentified object. A.R. and the female walked out of the Detective's view; then the female walked away. A.R. walked back to place the bag under rocks to cover it up. A.R. and the other male walked away together. The Detective then radioed to the officers in the vehicle with a detailed description of the two men, went down to the lot, lifted the rocks, and recovered a bag containing 14 white bags of what appeared to be heroin and one knotted plastic baggie corner containing what he thought to be crack cocaine.

3. The Crime Lab found that 14 bags held .89 grams of heroin and the other bag contained .06 grams of crack cocaine. Detectives in an unmarked car approached two young men fitting the suspects' description. A.R. was observed dropping a revolver into the weed line along the sidewalk. Another Detective retrieved the gun. A.R. was then handcuffed because he appeared to be a juvenile. Detectives testified that the gun was warm. A search of A.R. recovered no drug paraphernalia and six dollars in U.S. currency. Headlights and operable streetlights illuminated the area in which the young men were seen.

4. M.M., a juvenile who was with A.R. testified that he and A.R. were walking to the store when they were stopped by police. He did not see A.R. throw anything to the ground but heard one of the officers say that A.R. threw a gun. M.M. said that he had not seen A.R. with a gun or any packages and that the vacant lot is dark and hard to see.

5. A.R. asserted error by the court in failing to require full disclosure of the police surveillance location since it was claimed to be confidential. A.R. claimed he was not able to test the credibility of witnesses or adequately cross-examine Detectives without the exact location. Under *Commonwealth v. Rodriguez*, 674 A.2d 225, 229 (Pa. 1996), if the Commonwealth claims a surveillance location is confidential, the defendant bears the initial burden of showing that disclosure is necessary to conduct a defense, and the Commonwealth must provide reasons why confidentiality is imperative. A balancing test determines if confidentiality outweighs defendant's need for information to adequately defend himself. A.R. did not show a need to know the location thus not meeting his burden to demonstrate that disclosure of the location was necessary to conduct a defense. Any need of the defense for the information

was not as great as the interest in protecting the confidentiality of an active surveillance location.

6. A.R. also asserted that the evidence was insufficient to sustain the drug possession verdicts, arguing that Detectives' testimony was vague and that the hidden bag's location was out of sight during A.R.'s alleged retrieval, so the evidence was too weak and inconclusive to sustain adjudication. However, no reason existed that the Detective was mistaken in his observations and the court found him wholly credible. Detectives had training and knowledge about bags and drugs, observed suspicious activity, and retrieved items suspected and later found to be heroin and crack cocaine. The location of the bag was out of sight only briefly as the Detective went to retrieve it. No reason existed to believe that the location of the bag was compromised.

(Jeffrey Pollock)

Michael W. Streily for the Commonwealth.

Carrie L. Allman for A.R.

JID #48478-D/Case #T151315/Docket #2062-07. In the Court of Common Pleas, Allegheny County, Pennsylvania, Family Division, Juvenile Section.

OPINION

Mulligan, J., June 24, 2008—A.R., a minor, appeals his adjudication of delinquency on the charges of Possession of Crack/Cocaine, 35 Pa.C.S. §780-113(a)(16), Possession of Heroin, 35 Pa.C.S. §780-113(a)(16), and Possession of a Firearm by a Minor, 18 Pa.C.S. §6110.1.

On October 29, 2007, A.R. was adjudicated delinquent on the charges of Possession of Crack/Cocaine, 35 Pa.C.S. §780-113(a)(16), Possession of Heroin, 35 Pa.C.S. §780-113(a)(16), and Possession of a Firearm by a Minor, 18 Pa.C.S. §6110.1. Also, on October 29, 2007, I ordered the disposition was to be deferred with permission to place A.R. at a later date at Vision Quest. On December 17, 2007, a delinquency commitment order was entered committing A.R. to the Vision Quest Buffalo Soldiers Academy, a juvenile treatment facility.

At the adjudication hearing on October 15, 2007, Detective Judd Emery of the City of Pittsburgh Police Department, testified that on the evening of October 4, 2007, he and Detective Fallert were conducting surveillance in a drug impact capacity from a confidential location, while Detective Scott Love, Detective Charles Higgins, and Detective Adametz, patrolled the area in a separate vehicle. Officer Emery stated that the officers observed two males standing on the street in front of an abandoned lot on the 1700 block of Brighton Place. He further testified that one of the men, later identified as A.R., was observed walking to the side of the lot and removing a plastic bag from behind a pile of rocks. The Detective testified that he observed A.R. reach into the bag and pull out a bundle of smaller bags that he believed to contain heroin. A.R. spoke briefly with the older man and then put the bundle back into the larger bag. The older man then walked away. The detective was not able to tell how many individual bags he observed, but said that A.R. held onto the bag.

Detective Emery then testified that about a minute later an older black female approached A.R., and A.R. then reached into the bag and pulled out an object that the detective could not identify. A.R. and the female then walked between the buildings and out of the view of the Detective, and when they reappeared the female walked away. The Detective then observed A.R. walking back in to the area where the rock was and placing the bag back under the rocks and covering it up. A.R. and the other man he was originally observed with walked away together toward the 1500 block of Brighton Place. Detective Emery then radioed to the officers

in the vehicle with a detailed description of the two men.

Detective Emery then stated that he went down to the lot and lifted the rocks, recovering a bag, which contained 14 white bags of what he thought to be heroin, and one knotted plastic baggie corner containing what he thought to be crack cocaine. The bags were then sent to the Allegheny County Crime Lab and the report indicated that the substance recovered in the 14 bags was .89 grams of heroin, and the other bag was confirmed to contain .06 grams of crack cocaine.

At the October 22, 2007 delinquency hearing, Detective Charles Higgins, of the City of Pittsburgh Police Department, testified on the evening of October 4, 2007 he was patrolling Brighton Heights with Detectives Love and Adametz when Detective Emery radioed in a description of two young men who were suspected of drug activity and asked that they be stopped. Driving in an unmarked car, the detectives approached two young men fitting the description. One of the actors, later identified as A.R., was observed dropping what the Detective thought to be a revolver into the weed line along the sidewalk. The Detective testified that he told Detective Love what he had seen and pointed him in the direction of the gun. He then observed Detective Love walk over and pick up the same gun that he had observed being dropped to the ground. Detective Higgins testified that A.R. was handcuffed at that point because he appeared to be a juvenile.

At the October 22, 2007, delinquency hearing, Detective Scott Love, of the City of Pittsburgh Police Department, testified to the events on the evening of October 4, 2007. He testified that, while undercover with Detectives Higgins and Adametz, he received a call from Detective Emery providing the physical description of two men who were suspected of drug activity and asked that they be stopped. Detective Love then testified that they approached two men fitting the description walking along the roadway approximately one block from the location of Detective Emery's observation. The Detective heard Detective Higgins yell that one of the young men, later identified as A.R., threw a gun and saw Detective Higgins point to the location where Detective Love later picked up the gun.

The Detective testified that the gun was warm and that if it had been on the ground for an extended period of time it would have been cold, as there was dew and frost on the ground. I then pointed out to him that it had not been cold enough for frost, and that dew would be found in the morning. Detective Love testified that during a search of A.R. no drug paraphernalia was recovered and only \$6 in U.S. currency was found in his pants pocket. The Detective also said that headlights illuminated the area in which the young men were seen, although there were operable streetlights as well.

At the October 22, 2007, delinquency hearing, M.M., a juvenile, who was with A.R. at the time of the October 4, 2007 incident, was subpoenaed to testify. He said that he and A.R. were walking to the store when they were stopped by the police. M.M. testified that before heading to the store they walked the other direction to the vacant lot and stopped to talk to each other, during which time no other individual approached them, nor did they venture into the lot during that time. He then testified that they walked away back towards the store and when he heard the sound of an engine the two young men walked into the street. He testified that police then exited the car telling them to stop and searching the two young men. M.M. testified that before they were stopped, he did not see A.R. throw anything to the ground but overheard one of the officers say that he threw a gun. M.M. testified that he had not seen A.R. with a gun at any point during that evening, nor had he seen A.R. with any packages. He also said that while the area where the police stopped him is fairly well lit, the vacant lot is darker and harder to see.

At the conclusion of the hearing, I found that A.R. committed the act of Possession of Crack/Cocaine (35 Pa.C.S. §780-113(a)(16)), Possession of Heroin (35 Pa.C.S. §780-113(a)(16)), and Possession of a Firearm by a Minor (18 Pa.C.S. §6110.1).¹ I found him in need of treatment, rehabilitation, and supervision, and thus delinquent.

In his statement of matters complained of on appeal, A.R. first avers that the court erred in failing to require the full disclosure of the surveillance location utilized by the police. At the October 22, 2007 hearing, testimony was heard from Detective Emery regarding his observation of A.R. on the night of October 4, 2007. Upon questioning regarding the location of the officer during surveillance the Commonwealth objected, claiming that the location was confidential. The Commonwealth was given an opportunity to brief the issue and a continuance was granted. At the October 29, 2007 hearing, the Detective was ordered by the court to "identify the location or to describe the location with more specificity." (T. 10/29/2007, 4-5 to 4-7). The Detective then clarified that he was approximately 35 feet away and a little higher than street level. He also drew a sketch of the view he had including an area that he was unable to see. A.R. claims he is not able to test the credibility of the witness and therefore cannot adequately cross-examine the Detective without the exact location of surveillance.

The Supreme Court of Pennsylvania has held that "whenever the Commonwealth asserts that a surveillance location is confidential, the defendant bears the initial burden of demonstrating that disclosure is necessary to conduct his defense." *Commonwealth v. Rodriquez*, 674 A.2d 225, 229 (Pa. 1996). The Commonwealth is then required to provide reasons for why confidentiality is imperative. *Id.* The court must then use a balancing test to determine whether or not maintaining the confidentiality of the location outweighs the defendant's need for information to adequately defend against the charges. *Id.*

Other cases decided by the Superior Court of Pennsylvania have applied the balancing test set forth in *Rodriquez*. In *Commonwealth v. Santiago*, 631 A.2d 1323 (Pa.Super. 1993), the Court found that an officer's testimony was sufficient to provide effective cross-examination. In *Santiago*, the officer provided the court with information regarding his approximate distance away and height. He also testified that he had adequate lighting, in addition to use of binoculars, to view the area in question. *Id.* at 1326-1327. In the more recent decision of *Commonwealth v. Nobles*, 941 A.2d 50 (Pa.Super. 2008), the Court used *Rodriquez* for guidance. Using the decision in *Rodriquez* as framework, the court determined that a location was permitted to remain confidential because the location was still being used for drug related surveillance. It was necessary to uphold nondisclosure of the location to maintain effective surveillance. *Id.* at 53. In addition, *Nobles* also provides that a defendant cannot rely only on the claim that he/she cannot effectively cross-examine the witness without the location, but must provide a specific claim of necessity. *Id.* (citing *Commonwealth v. Rodriquez*, 674 A.2d 225, 229 (Pa. 1996)).

A.R. claims that he could not effectively test the credibility of Detective Emery without knowing the exact location; however there was no specific claim as to what he needed to know or why it was necessary to provide him with the location. A.R. did not, as required by *Rodriquez*, meet the initial burden of demonstrating that disclosure of the location was necessary to conduct his defense. Also, Officer Emery did divulge more details about the location once I ordered that the location be described with more specificity, including providing a map of the area and detailing how far he was above street level. A.R. did not state at trial, nor does he

assert in his 1925 (b) statement, why the “full disclosure” of the location is necessary to conduct his defense. I also note that A.R., similar to the Defendant in *Commonwealth v. Nobles*, relies on the notion that he cannot cross-examine the officers without knowing his precise location, but does not provide any specific claim of necessity. For these reasons, A.R. fails to sustain the initial burden of demonstrating that knowledge of the precise location of surveillance is necessary for an effective defense.

Even if the initial step were found to have been met, the Commonwealth noted in its brief submitted to me that the location is required to remain confidential as it is still being used for surveillance. I found that, in this instance, any need of the defense for the information was not as great as the interest in protecting the confidentiality of an active surveillance location. Similar to the court in *Nobles*, I found that maintaining the precise details of the location imperative in order to maintain effective surveillance. For this reason, the request for full disclosure of the surveillance location was properly denied.

A.R. also avers in his 1925(b) statement that the verdict rendered by the court is contrary to the weight of the evidence presented. A.R. claims that the evidence presented by the Commonwealth is of such low quality and vague that this court’s adjudication of delinquency shocks the conscience. A.R. specifically relies on the incorrect testimony of Detective Love regarding the condition of the gun when found, Detective Emery’s observations, and the defense witness M.M.’s indication that he was with A.R. all day and A.R. was never in possession of a gun or drugs. The defense asserts that the evidence presented was more consistent with the innocence of A.R. than the finding of his delinquency.

In *Commonwealth v. Smith*, 861 A.2d 892 (Pa.Super. 2004), the Superior Court of Pennsylvania found that a new trial should be awarded only if, “the 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.” *Id.* at 895. In this case Detective Emery described in detail what he observed, and that based on his observations he ultimately found the drugs in question. He does admit that the location of the bag was out of his sight when he went to retrieve it. However, this was only while he walked down to the location, and he later found the drugs exactly where he testified A.R. had left them. Detective Love testified that the gun was recently dropped because it did not have frost or dew on it as it would have if it had been lying there for a period of time. While I addressed the issue regarding the unlikelihood of moisture on the gun due to the time and date it was found during the hearing, I find that the officer’s testimony was otherwise credible. As for the defense witness, M.M. was unsure of what time he had met A.R. as well as why they were in the abandoned lot as observed by Detective Emery. M.M. further testified that neither he nor A.R. spoke with anyone else while standing in front of the lot, and that he did not see A.R. with a gun or drugs of any kind. He did not have a detailed and reliable story about the events of the evening, and thus I did not find his version of the events credible. For these reasons the claim that the verdict shocks the conscience is without merit.²

A.R.’s final issue in his 1925(b) statement is that the evidence was insufficient to sustain the drug possession verdicts. The test for determining the sufficiency of the evidence is “whether, viewing all evidence admitted at trial, together with all reasonable inferences therefrom, in a light most favorable to the Commonwealth as verdict winner, the trier of fact could have found that the defendant’s guilt was established beyond a reasonable doubt.” *Commonwealth v. Collins*, 702 A.2d 540, 543 (Pa. 1997). Here A.R. argues that

Detective Emery’s testimony was vague as to what he observed, and that the location where the bag was allegedly hidden was out of Detective Emery’s sight while he went to retrieve it, leading to evidence that is too weak and inconclusive to sustain the adjudications.

I had no reason to believe that Detective Emery was mistaken in his observations and I found his testimony wholly credible. Regardless of the Detective’s training or knowledge that would cause him to believe that the bag contained drugs, he observed suspicious activity and followed up by retrieving the items he clearly observed.³ These items were then submitted to the Crime Lab and were found to be heroin and crack cocaine. The location where the bag was found was out of the Detective’s line of sight briefly as he went to retrieve it. However, there is no reason to believe that the location or the bag was compromised while they were out of the Detective’s sight. It is not necessary for the other detective on surveillance duty to provide corroboration, as the area was not a crowded location and the detective was able to retrieve the bag in the same condition as A.R. was reported to have abandoned it. For these reasons the claim of insufficient evidence is also without merit.

For these reasons the Final Order of December 17, 2007 should be affirmed.

K.R. Mulligan, J.

¹ I did not find that the Commonwealth had met their burden on the charges of possession with intent to deliver, 35 Pa.C.S. §113(a)(30) and possession of a firearm without a license (18 Pa.C.S. §6106.(a)(1)), and these charges were dismissed.

² In regards to any ineffectiveness claim raised by A.R. in his 1925 (b) statement, I note that counsel did raise these credibility issues at trial, and as I have stated in the above opinion, the testimony of the officers was found to be credible.

³ Also, any training or knowledge Officer Emery might have with respect to drug transactions is irrelevant in this instance. Officer Emery did not stop A.R. with the drugs in question, nor did he seize any drugs from any location of which A.R. might properly assert a privacy interest. Here, Officer Emery observed A.R. placing something possibly drugs, under a pile of rocks. Officer Emery, who had the location out of his sight for mere moments, recognized the items in the pile of rocks as those he had observed, and once they were identified as what the officers believed to be drugs, a stop was initiated on A.R. A.R.’s arguments of whether Officer Emery possessed the knowledge and training to identify the drugs from a distance, or whether he would recognize that drugs are usually bundled in that manner, are irrelevant once that package is out of A.R.’s possession or from any place in which he might assert a privacy right.

Sonya Ring v. Bruce Goldblatt

Child Support

1. The parties were the divorced parents of one child who had reached the age of eighteen years and graduated from high school. The father’s request to terminate child support was denied because the mother successfully argued that the grown child was disabled and, therefore, not emancipated. The hearing officer accepted the mother’s testimony that was not corroborated by the daughter herself or by medical testimony. While the lack of medical testimony can render a position weaker, it is not fatal.

2. In order to show that the child was not emancipated, testimony must establish that the child did not have the physical or mental ability to engage in profitable employment available at a supporting wage. The burden of proof lies with the parent asserting a lack of emancipation. Expert testimony is not required and the fact that a child is living on his or her own, working full time and even attending college, will not result in an automatic conclusion that the child is emancipated. Even where a child is able to find employment, but unable to keep the employment, a lack of emancipation can be found.

3. The Court also determined that it was reasonable for the child to seek out-of-network therapy if progress was being realized and prior attempts with in-network therapists failed.

(Christine Gale)

Sonya Ring, *Pro Se*.

Melaine Rothey for Defendant/Father.

No. FD 97-9711-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

OPINION OF THE COURT

Wecht, J., December 10, 2008—This appeal arises from this Court's October 31, 2008 Order. That Order dismissed Defendant Bruce Goldblatt ["Father"]'s Exceptions to the Recommendations of Hearing Officer Sue Weber, Esquire. The hearing officer's recommendations continued Father's support obligation for his emancipated daughter.

Background and Procedural History

Plaintiff Sonya Ring ["Mother"] and Father married on June 10, 1979. On April 4, 1990, their daughter, Erica, was born. On July 30, 1997, Mother filed a divorce complaint. The parties divorced on September 10, 1999.

While there has been on-going litigation over support matters, the parties' most recent dispute, and the subject of this appeal, is Father's petition for termination of support filed on February 28, 2008. Erica graduated from high school on June 12, 2008, and at graduation was eighteen years old. On June 16, 2008, the parties attended a hearing on Father's petition. At the hearing, Mother argued that, due to a disability, Erica was not yet emancipated. Father contended that Erica was emancipated. The hearing officer concluded that Erica did have a disability that warranted the continuation of child support at that time. (*See* 6/16/08 Rec. at 1-2.)

On July 2, 2008, Father filed Exceptions to the hearing officer's Recommendations. On September 26, 2008, this Court heard oral arguments on the Exceptions. On October 31, 2008, this Court issued an Order dismissing Father's Exceptions.

On November 12, 2008, Father filed a Notice of Appeal of the October 31 Order. On November 14, 2008, this Court issued an Order directing Father to file a Concise Statement of Errors Complained of on Appeal per Pa.R.A.P. 1925 (b). On November 18, 2008, Father timely filed his Concise Statement.

Issues Raised on Appeal

In his 1925(b) Statement, Father alleges the following errors:

1. The Trial Court erred in failing to find that the Hearing Officer erred in finding that Plaintiff-Mother presented competent evidence to establish that the parties' adult daughter is not emancipated and requiring Defendant-Father to continue to provide child support and health insurance.
2. The Trial Court erred in failing to find that the Hearing Officer erred in failing to address the issues raised regarding Plaintiff-Mother's request

for payment of unreimbursed medical expenses.

Discussion

The standard of review for a child support order is abuse of discretion. *Style v. Shaub*, 955 A.2d 403, 406-07 (Pa.Super. 2008) (citing *Kotzbauer v. Kotzbauer*, 937, A.2d 487, 489 (Pa.Super. 2007)). The appellate court determines whether there is sufficient evidence to sustain the trial judge. *Id.* Similarly, in reviewing the hearing officer's recommendations on Exceptions, this Court must conduct an independent review, and must determine whether the record from the hearing adequately supports the hearing officer's findings and recommendations. *Neil v. Neil*, 731 A.2d 156, 159 n.4 (Pa.Super. 1999).

Father contended that Mother did not present sufficient evidence for the hearing officer to find that Erica was unable to engage in profitable employment and be self-supporting. Father argued that neither Erica nor any physician testified. Mother argued that she provided credible testimony that the hearing officer believed, and from which the hearing officer properly found that Erica was not emancipated. Mother also brought letters from Erica's doctors, as she testified she was instructed to do by court personnel, but the letters were excluded due to a hearsay objection by Father.

Generally, a parent is not required to support a child once the child reaches the age of majority. *Style*, 955 A.2d at 408. There is an exception to this presumption, however, when the child is unable physically or mentally to support himself or herself. *Id.* "To rebut the presumption that a parent has no obligation to support an adult child, 'the test is whether the child is physically and mentally able to engage in profitable employment and whether employment is available to that child at a supporting wage.'" *Id.* at 409 (quoting *Hanson v. Hanson*, 625 A.2d 1212, 1214 (Pa.Super. 1993)).

Because the test relates to a particular individual's ability to work at a supporting wage, the decisional law is highly fact-specific. Accordingly, a review of fact patterns and holdings in Superior Court cases is instructive and necessary.

In the *Style* case,¹ the son, Dustin, had a history of psychiatric and medical disabilities, including ADHD, Oppositional Defiant Disorder, depression, and autism. *Id.* at 406. He had taken medication for the conditions. *Id.* He also had an erratic job history. *Id.* He had attended vocational training. *Id.* A vocational evaluator testified that Dustin would be able to work in some environments, such as kitchen or custodial work. *Id.* The Superior Court affirmed the trial court's dismissal of the support action, finding that Dustin did not meet his burden to show that he could not support himself. *Id.* at 411. Given the testimony by the vocational evaluator, the Superior Court agreed with the trial court that Dustin could work and self-support with a job in an environment appropriate and conducive to his particular needs. *Id.* at 410. There also was no testimony about Dustin's reasonable needs, probable salary, whether such jobs were available, or whether Dustin could support himself with the probable salary. *Id.* at 410-11. Without this evidence, the trial court could not determine whether Dustin could be self-supporting. *Id.* at 411. Since Dustin had the burden of proof, the lack of evidence compelled the finding that the support order should not have been reinstated. *Id.*

In the *Kotzbauer* case, support was continued for a 19-year-old, Kaitlin. *Kotzbauer v. Kotzbauer*, 937 A.2d 487, 488 (Pa.Super. 2007). Kaitlin had surgery for seizures that resulted in memory and focus problems, as well as severe headaches and a continuing risk of seizures. *Id.* Kaitlin lived with her mother, who supervised Kaitlin's medication and monitored her behavior. *Id.* Kaitlin attended community college as a full-time student, but struggled with the course

work, and worked part-time. *Id.* Further, Kaitlin was unable to go away to school because she was incapable of living on her own. *Id.* At the trial, Kaitlin, the mother and Kaitlin's work supervisor testified about her medical condition and her ability to work and care for herself. *Id.* at 490. There also was testimony that Kaitlin had performed in stage productions, had gone on hunting trips and could drive. *Id.* The trial court held that expert testimony was not required to satisfy the mother's burden of proof. *Id.* at 491. The Superior Court agreed that the un rebutted testimony concerning Kaitlin's medical condition and its impact upon her were sufficient to support the trial court's decision to continue support. *Id.* at 493.

The *Nolte* case involved a college student, A.J., who was blind. *Heitzman-Nolte v. Nolte*, 837 A.2d 1182, 1183 (Pa.Super. 2004). A.J. was a good student, but depended on others for help with daily living activities due to his blindness. *Id.* The trial court continued the order for support payments because, while A.J. had developed skills to cope with his college environment, he still required additional training to handle basic activities, such as navigating around campus, using public transportation, using the cafeteria, and doing laundry. *Id.* at 1184. The Superior Court held that college attendance does not automatically mean that an adult child is emancipated. *Id.* at 1185. Because A.J. did not yet have the skills needed for independence, the Superior Court affirmed the trial court's decision. *Id.*

In the *Cann* case, the Superior Court affirmed the trial court's decision that support should be continued for a 19-year-old, Lila. *Cann v. Cann*, 418 A.2d 403 (Pa.Super. 1980). Lila had completed school, but suffered from a learning disability. *Id.* at 404. Lila lived apart from her parents in a rented apartment, and worked 40 hours per week. *Id.* at 405-06. Given the testimony regarding Lila's income from her jobs and her expenses, the record supported the finding that she was incapable of self-support. *Id.* There was no evidence that Lila could engage in employment that would sustain her. *Id.*

These appellate cases convinced this Court that the instant claim for support does not fail *per se* due to lack of expert testimony or due to the facts that Erica is in college, is a good student, or is living away from home. Instead, this Court was required to examine the record in order to determine whether that record supported the hearing officer's decision that Erica was incapable of self-support.

Father testified that he was not aware of any emotional issues for Erica beyond that of a normal teenager. (T. at 9-10.) Yet Father knew Erica was in treatment, because he testified that he tried to get information from various therapists. (T. at 7-8.) Mother testified that Erica had struggled with social and emotional issues for years. (T. at 10.) Mother tried to introduce letters from a physician and from therapists and individualized education programs (IEPs), but Father objected on hearsay grounds, and the objection was sustained. (T. at 10-13.) Mother had been told by Court administrative personnel to provide written documentation of the disability. (T. at 12.) The hearing officer specifically found Mother's testimony as to Erica's problems credible and Father's testimony inconsistent. (6/16/08 Rec. at 2.)

Mother testified that Erica had IEPs going back to first grade. (T. at 13.) Erica takes three different medications for her condition. (T. at 15.) Mother testified to Erica's on-going behavioral problems, which have resulted in truancy, smoking and relationship difficulties. (T. at 15.) Erica has been hospitalized twice for her condition, and has qualified for medical assistance. (T. at 15-16.) Erica sees a therapist every two to three weeks, and has difficulty finding a therapist she can work with. (T. at 22-23.) Erica was required to be in an emotional support program in high school, but at times Erica

refused to meet with the counselor and rarely saw either the counselor or school social worker during her senior year. (T. at 26-27, 35.) Erica had difficulty making and keeping friends, and engaged in unhealthy relationships that could be violent. (T. at 24.) Erica was kicked off her softball team for attitude problems. *Id.*

Erica had held part-time jobs, but had quit or been fired due to her emotional issues. (T. at 33.) Mother testified that Erica is able to find jobs, but has not been able to keep one for long. *Id.* Erica's previous job experience was in food service. *Id.*

There was ample testimony of record that Erica has difficulties. Much of Mother's testimony was un rebutted. Father did not dispute that Erica sees a therapist, has IEPs, takes medications, is on medical assistance, and was hospitalized. Also compelling was the testimony that Erica has not been able to hold a job, which testimony was not rebutted.

There can be no gainsaying the fact that, without Erica's testimony or the testimony of a physician, or some other corroborating testimony, this obligee's case is weaker than those in the above-cited decisional law. While acknowledging that this case is undoubtedly a close one, this Court dismissed Father's Exceptions because it found sufficient support in the record for the hearing officer's decision that the burden for continuation of support was met.

As to Father's second issue on appeal, this Court also found sufficient support in the record to support the hearing officer's decision concerning the unreimbursed medical expenses. Mother testified to \$1500, for which she had provided documentation to Father. (T. at 18.) Father agreed that documentation had been provided for all, but questioned a \$530 expense for eyeglasses as unreasonable. (T. at 19.) Mother testified that the \$530 was simply the cost of the glasses with Erica's prescription. (T. at 21.) Father also questioned the amount in view of the fact that Erica received medical assistance. Mother testified that medical assistance did not cover two of the medications (T. at 19) Father also questioned the use of an out-of-network therapist. (T. at 20.) Mother testified that she used the out-of-network therapist because this was a therapist with whom Erica worked well, and because Mother had encountered difficulty in finding a therapist with whom Erica would work. (T. at 22-23.)

It was reasonable that Erica sought treatment with an out-of-network therapist. Mother's testimony showed that this therapist was not chosen at random, nor to increase costs for Father, but was rather found after failed attempts with various other providers. If this was the therapist with whom Erica was making progress, then it was reasonable for Erica to stay with that therapist. As for the glasses, there is no evidence from Father that the expense was unreasonable other than an apparent distaste for the price itself. Mother testified that Erica had not obtained new glasses in two or three years. While the unreimbursed medical expenses may have been higher than Father would have liked, there is nothing in the record to suggest that those expenses were unreasonable or unnecessary.

BY THE COURT:
/s/Wecht, J.

¹ *Style v. Shaub*, 955 A.2d 403 (Pa.Super. 2008). In *Style*, the support order was terminated because Dustin reached 18 and graduated. *Id.* at 405-06. Mother never responded to the notice of the administrative termination. *Id.* Later, Mother filed a new support action. *Id.* at 406. The Superior Court did not hold that Mother could not file a new support action. *Id.* at 408.

Commonwealth of Pennsylvania v. Ryan Michael Luterman

Scope of Cross Examination—Victim’s Misidentification of Alleged Co-Conspirator

1. Where victim properly identified Defendant at each stage of the proceedings, but arguably misidentified an alleged co-conspirator, the Court properly barred cross examination of the victim by the Defendant on that subject as an impermissible impeachment on a collateral matter.

2. A Defendant may be found guilty of conspiracy without the jury actually determining with whom the Defendant conspired.

(*Jeffrey A. Ramaley*)

Daniel John Konieczka, Jr. for the Commonwealth.
Thomas N. Farrell for Defendant.

No. CC 200416605. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., December 22, 2008—The defendant, Ryan Luterman, was charged by criminal information with one count of robbery (18 Pa.C.S.A. §3701(A)(1)(i)) and one count of criminal conspiracy (18 Pa.C.S.A. §903). The defendant was tried by a jury on December 12, 2007. At the conclusion of the trial, the jury returned verdicts of guilty as to both counts. The jury also answered in the affirmative a jury interrogatory asking if the defendant visibly possessed a firearm during the commission of the robbery. The Court ordered a pre-sentence report and scheduled sentencing for March 10, 2008. Defendant’s bail was revoked and he was remanded to the Allegheny County Jail.

The defendant appeared on March 10, 2008 and was sentenced to not less than five (5) nor more than ten (10) years on the robbery count and to no further penalty on the criminal conspiracy count. The sentence imposed on the robbery count was a mandatory sentence pursuant to 42 Pa.C.S.A. 9712, which mandates a minimum sentence of five years when a firearm is visibly possessed during certain enumerated felonies, including robbery.

The defendant, through trial counsel, filed a Post Sentence Motion on March 11, 2008, which was denied on July 31, 2008. Trial counsel withdrew, new counsel was appointed and a timely Notice of Appeal was filed on August 28, 2008. Pursuant to this Court’s Order, the defendant filed a Concise Statement of Errors Complained of on Appeal on October 15, 2008, raising the following two claims: 1) Whether the trial court abused its discretion in refusing to permit testimony and/or evidence that would have demonstrated the victim misidentified an alleged co-conspirator; and 2) Whether the Trial Court erred in instructing the jury that any one could have been the conspirator in order to find the defendant guilty of conspiracy.

The evidence presented by the Commonwealth established that in 2004 the victim, Nicole Mautino was engaged in a side business of selling sports memorabilia, including sports jerseys, to people on eBay and to other persons as a way of making extra cash. She had on several occasions sold jerseys to Joseph Iannaccio, the co-defendant in this matter.¹ Her practice with Mr. Iannaccio was that when she would obtain jerseys that he might be interested in, she would call him and they would meet at different locations around the city where he would pay her for the jerseys. At approximately 4:30 p.m. on February 23, 2004 the victim called Iannaccio and told him that she had some jerseys that he might be interested in pur-

chasing. He told her that he would call back in about twenty minutes to make arrangements to meet her to buy the jerseys. He did not, however, return her call until approximately 1:00 a.m. in the morning. He asked her to meet him at a Giant Eagle located in the Greenfield section of Pittsburgh. She agreed and was waiting outside the Giant Eagle when she received another phone call from Iannaccio and he asked her to meet him at a residential address a couple blocks away. When she parked in front of the address Mr. Iannaccio provided, he approached her car. They went to the back of the car where she opened the trunk and showed him the shirts.

She stated that Mr. Iannaccio inspected the jerseys and asked her questions about size and price. She noticed that during this time he seemed nervous or anxious. He continually looked in the direction of a dark alley. Eventually, two individuals walked from that alley and approached Ms. Mautino and Mr. Iannaccio. One of the individuals, who was later identified by the victim as the defendant, Ryan Luterman, approached Iannaccio and said, “Hey man, I really need—I need that, I need that, I’m getting sick.” She testified that Iannaccio told Luterman that he did not know what Luterman was talking about and he should “get the fuck out of there.” She saw Luterman turn as if he was leaving and then turn back towards her and Iannaccio, holding a handgun which he quickly pointed at her head. The defendant told the other individual with him to go into the vehicle and get the “stuff.” He did and removed the jerseys that Iannaccio had as well as approximately 13 others that were in the victim’s car. Luterman and his accomplice then fled the area.

After they left, Iannaccio began to make calls on his cell phone. The victim quickly entered her car and drove from the scene, ignoring Iannaccio’s calls to her to “wait.” When the victim first arrived at the location to meet Iannaccio, she had been talking on her cell phone with her boyfriend, a police officer for the Borough of Braddock Hills. The connection with him remained open during the incident and he could hear the anxiety in her voice during the incident. When she drove off she resumed talking to him and told him what had happened. He told her to drive to a nearby BP Service Station where he would meet her. He also told her that he would call the Pittsburgh police and have them meet her there as well. When she arrived and met with the responding Pittsburgh Police officers, she told them what had happened.

She was able to provide the officers with Mr. Iannaccio’s name and also with physical descriptions of the individuals who pointed the gun at her and his accomplice. Over the next few days, she spoke with friends who knew both her and Iannaccio. Based on her descriptions, they provided her with the name of the defendant, which she in turn relayed to the police. She met with the investigating detectives and they showed her a photo array that contained six photographs of men who matched the description she gave. The defendant’s photograph was in the array and she immediately pointed to it and told the officers that he was the man who pointed the gun at her and robbed her.

The Commonwealth also presented testimony from a Jessica Birckley. She testified that Iannaccio, the defendant and an individual named Steve Saling were in her home in the Squirrel Hill/Greenfield section of Pittsburgh on the evening of February 23, 2004. She described them as friends. She said that they left together shortly after midnight.

The defendant’s first claim is that the Court erred in not permitting defense counsel to cross examine Ms. Mautino concerning her identification of another individual, Ryan O’Leary, as being the third person involved in this incident. The record established that Ms. Mautino told the police that a Ryan O’Leary may have been the second individual with

the defendant. The police showed her a photo array containing Mr. O'Leary's picture and she identified him as the person with the defendant. She also identified him at his preliminary hearing. Sometime after his case was held for Court, however, the Commonwealth *nolle prossed* the charges against him, apparently based on the Commonwealth's investigation of alibi evidence disclosed by Mr. O'Leary.

Defense counsel wanted to cross examine the victim on her identification of Mr. O'Leary as being the defendant's accomplice. He said that he wanted to ask her if she was as positive of that identification as she was of Mr. Luteran. He also wanted to present evidence showing that the Commonwealth had chosen to *nolle pross* the charges against Mr. Luteran. The Court sustained the Commonwealth's objections to any questions of this witness concerning her alleged misidentification of Mr. O'Leary. The Court concluded that inquiry into that matter would not be relevant. When defense counsel repeatedly attempted to introduce into evidence the fact of the alleged misidentification, he was admonished and told not to even mention the name of Mr. O'Leary.

The Court concluded that whether the victim misidentified Mr. O'Leary was not relevant. It did not make any fact material to the defendant's case more or less likely. Relevant evidence is any evidence that tends to make a material fact more or less probable. Whether the victim was mistaken as to her identification of someone other than the defendant would not make her identification of the defendant any more or less likely.

Defense counsel's reliance on *United States, ex rel. Boelter v. Cuyler*, 486 F.Supp. 1141 (D.C.Pa., 1980) is misplaced. In that case the Court permitted cross examination of witnesses who, although they positively identified the defendant in a photo array, had, during previous arrays, suggested that other persons looked like the individual who had participated in the robbery of their place of employment. These prior misidentifications were relevant because these witnesses claimed to only have seen one of the several robbers who had participated in the robbery and had selected persons other than the defendant as looking like the person who robbed them. They did not positively identify these other persons; but did state that they resembled the robber. They did, however, when viewing a line-up that included the defendant, positively identify him. They maintained that identification through the pre-trial proceedings and at two trials.

The obvious distinction between the "misidentification" in the *Cuyler* matter and the alleged "misidentification" here is that in *Cuyler* the defendant who was on trial was the subject of the earlier misidentifications. The fact that a witness who identifies the defendant at trial thought, at a previous occasion, that someone other than the defendant might have been the person who committed the crime was relevant to the strength and reliability of their identification of the defendant. In this matter, there was no misidentification of the defendant on trial. The victim never identified anyone other than this defendant as being the person who pointed the gun at her head and stole her belongings. Even if it were undisputed that her identification of the other participant was in error, that fact would not make her identification of the defendant any less likely to have been accurate.

To have allowed the defendant to try to impeach the victim by trying to prove that she was mistaken when she identified Mr. O'Leary as the other participant in the robbery would have permitted impeachment on a collateral matter. Her possible error with regard to Mr. O'Leary was collateral to the issue of whether she was accurate in her identification of the defendant. As such, the Court properly precluded defense counsel from cross examination on that matter.

Next, the defendant complains that the Court erred when it instructed the jury that the defendant could be guilty of conspiracy without the jury actually determining with whom he conspired. This issue is also related to Mr. O'Leary. The criminal information identified Mr. O'Leary as a co-conspirator. After the criminal information was filed, the charges against Mr. O'Leary were *nolle prossed*. When the charges in this matter were read to the venire prior to jury selection, the Commonwealth made sure that Mr. O'Leary's name was not mentioned. After the jury was selected, the Commonwealth, in the presence of the defendant and his counsel, asked the Court to amend the information to remove the reference to Mr. O'Leary. The defendant did not object and the information was modified to remove the reference to Mr. O'Leary. After the close of the evidence, defense counsel advised the Court that he wanted to argue to the jury that the Commonwealth failed to prove what was alleged in the information that his client conspired with Mr. O'Leary. The Court precluded him from making such an argument, finding that the Commonwealth's request to strike Mr. O'Leary's name from the criminal information, made prior to trial, in the presence of the defendant and his counsel and without objection, resulted in an amendment of the information.

The Court advised defense counsel, and so instructed the jury, that it was not necessary that they determine with whom the defendant conspired. Defense counsel renewed his objection when, during their deliberations, the jury asked the Court to reinstruct on conspiracy and also asked the following question: "Do we consider conspiracy charges against Luteran and Mr. Iannaccio only?" (N.T. 205) The Court advised counsel that he intended to give the standard conspiracy instruction again and, in response to the specific question, to tell them, "He agreed with another person that the two of them engaged in conduct. That person does not need to be identified..." (N.T. 205). Defense counsel objected. The Court then reinstructed the jury with the standard instruction on criminal conspiracy and, in response to their specific question regarding the identity of the co-conspirator, told them:

The answer to that question is you may find that the defendant agreed with either the other defendant or any other person that you find to be a co-conspirator; that you believe the evidence establishes beyond a reasonable doubt that he agreed with to commit the crime of robbery in order to find him guilty of conspiracy, otherwise you must find him not guilty.

(N.T. 208).

This instruction was a correct statement of the law. Where the identity of the alleged co-conspirator is not known, a defendant may still be found guilty of conspiracy. Here, there were two possible co-conspirators: Joseph Iannaccio and the unidentified person with the defendant. The jury was properly instructed that the defendant could be found guilty if it found that he conspired with his co-defendant or any other person. From the jury verdict, it is impossible to know whether they found him guilty of conspiring with his co-defendant, with the unidentified person or with both. The evidence, however, was sufficient to support the verdict of guilty on any of these bases. Even where a jury acquits the only person identified as the co-conspirator, they may still find the co-defendant guilty as long as they are satisfied beyond a reasonable doubt that the defendant conspired with some other person. *Commonwealth v. Campbell*, 651 A.2d 1096 (Pa. 1994). The identity of the person with whom the defendant conspired is not an element of the crime of conspiracy.

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

BY THE COURT:
/s/Manning, J.

Dated: December 22, 2008

¹ Mr. Iannaccio's case was joined with the defendant's for trial but he elected to waive his right to a jury trial and proceed before this Court in a non-jury trial. He was adjudged not guilty.

**Commonwealth of Pennsylvania v.
Jesse William Thornton**

**Commonwealth of Pennsylvania v.
Hayden Nathaniel Marshall**

Sufficiency and Weight of the Evidence—Prior Inconsistent Statement

1. In reviewing a sufficiency of the evidence claim, the Court reviews the evidence in a light most favorable to the Commonwealth, with all reasonable inferences therefrom.

2. Although one defendant presented an alibi witness that he was at a football game and an after-hours club, neither defendant testified, and the other defendant presented no evidence. The Court found the evidence sufficient to meet each element of the crimes charged. Although neither of the defendants was directly identified by the victims or others at the scene of the incident, the Court found that the jury could have found that the defendants were the perpetrators based upon the significant circumstantial evidence.

3. Defendant Marshall claimed that the Court erred in permitting the detective's testimony regarding his discussions with a Commonwealth witness, as this was inadmissible hearsay and impermissibly bolstered the Commonwealth's impeachment evidence. The Court found that because the Commonwealth witness gave an interview and a recorded statement, the Commonwealth was permitted to introduce the latter for impeachment and substantive value. The Commonwealth was also permitted to introduce testimony by the detective of the unrecorded interview for impeachment value, since the witness's court testimony differed from her statements provided to police.

(Angel L. Revelant)

Bruce Beamer for the Commonwealth.
Scott Coffey for Jesse Thornton.
Carrie L. Allman for Hayden Marshall.

No. CC200601065 and Nos. CC200505039 and CC200500522. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., December 22, 2008—The defendants, Hayden Nathaniel Marshall and Jesse William Thornton, have both appealed from the judgments of sentence imposed after they were found guilty by a jury of Murder of the First Degree and related offenses. They each received sentences of life imprisonment on the homicide charge and concurrent aggregate sentences of seven and one half to fifteen years on the remain-

ing charges. Both defendants contend in their Concise Statement of Matters Complained of on Appeal that the verdicts as to all charges were not supported by sufficient evidence. Thornton also challenges the weight of the evidence. Marshall claims that this Court erred in failing to appoint counsel to represent him immediately following the imposition of sentence. He contends that this delay deprived him of the opportunity to file a post-sentence motion that challenged the weight of the evidence and that, as a result, that claim is waived on appeal. He also claims that the Court erred when it permitted Detective Dale Canofari to testify about a prior inconsistent statement given by Commonwealth witness Tomorra Williams, contending that the statement was inadmissible hearsay. These claims will be addressed after a brief review of the evidence presented at trial.

The evidence, taken in a light favorable to the Commonwealth, established that in the early morning hours of December 5, 2004, the victims, Maury Budd and Anthony Reeves, were walking on Hamilton Avenue in the Homewood section of Pittsburgh. They had arrived there minutes earlier, planning to go to an after-hours club known as the Traveler's Club. When they saw the long line outside the door of the club, they decided to leave and walked the block or so back to where Reeves' vehicle was parked. As they approached Reeves' vehicle, Budd saw another vehicle, a white or tan colored Bronco that had been parked on a side street move to a position directly across the street from where Reeves' vehicle was parked. (N.T. p. 98). Budd and Reeves entered their vehicle and were sitting in the front seat when Budd heard gunshots. He immediately felt a bullet strike his right leg. (N.T. 103). He looked and saw that Reeves had also been hit and grabbed him in an attempt to pull him into the backseat. As he did this, he was struck several more times in the back. The shooting stopped and he heard screeching tires. (N.T. p. 104).

He saw Reeves exit the vehicle and begin to pace on the sidewalk. Budd could not get out of the car as he could not move. When the police arrived and opened the driver side door, Budd fell out, into the officer's arms. As the officer held him he asked Budd if he saw who did this and what they were driving.

Budd recalled telling the officer that they were driving, "... like the OJ Simpson Bronco, but the other Bronco, the little Bronco." (N.T. 107). He then passed out. Budd recovered from his wounds but Reeves later died.

A survey at the crime scene revealed that there were twenty-four (24) spent cartridge casings on the street in the area where Budd testified that the light colored Bronco had been parked. The cartridges revealed that the shots had been fired from a high powered assault rifle, most likely an AK47.

At the same time that Budd and Reeves were being fired upon, Pittsburgh Police Officers Victor DiSanti and Thomas Lockard were conducting a traffic stop approximately two blocks away. When they heard the sound of gun fire, they terminated the traffic stop and proceeded in the direction of the gunfire. They stopped briefly at the scene of the shooting and spoke with one of the officers there before continuing on down Hamilton Avenue and right onto Enterprise, looking for the light colored Bronco described by the victim, Budd. At the intersection of Enterprise and Frankstown, a block or so from where the shooting had occurred, they observed a light colored Bronco travel through the intersection at a high rate of speed and without stopping for the red light. They began pursuing the vehicle, following it through several Pittsburgh neighborhoods and eventually into the borough of Wilksburg. Other police vehicles joined in the pursuit. Eventually, the fleeing vehicle came to a stop in Wilksburg and the two occupants fled in different directions. The clos-

est unit to the vehicle when it stopped was a K-9 Unit operated by Officer Dan Hartung.¹

As soon as the vehicle stopped, Officer Hartung saw two African American males exit and run in different directions. He decided to chase the driver, who was closer to him. As he ran, the driver removed the camouflage jacket he had been wearing and discarded it. Under the jacket, Officer Hartung noticed that the driver was wearing a blue long sleeve shirt with lettering across the top and with two numbers, one of which he believed to be a "3," on the back. Officer Hartung lost sight of the driver and a subsequent search of the area by numerous officers was not successful.

A search of the vehicle and the area around it resulted in the seizure of a banana shaped ammunition clip from the car. It was empty. Police also seized the camouflage jacket that had been discarded by the driver. Police found three cell phones and a small amount of marijuana in the pockets. The vehicle was also processed by the mobile crime unit and several latent fingerprints were discovered on the exterior of the vehicle and on one of the phones seized from the camouflage jacket. One of the prints from the exterior of the vehicle, above the driver's side door handle, matched the known prints of the defendant Marshall as did prints obtained from one of the cell phones. There were no matches with defendant Thornton.

It was also determined that the Bronco belonged to William Thornton, the father of defendant, Jesse Thornton. Dean Hough, the owner of an auto body shop in Hazelwood, testified that a couple days before the December 4 shooting, defendant Thornton picked the vehicle up from his shop.

The Commonwealth also presented two witnesses who were with the defendants both before and after the shooting. Tomorra Williams testified that the defendants were at her home in Hawkins Village in Rankin the evening before the shooting. They arrived there in a tan Ford Bronco. When they left, they took with them a rifle that had been left there by defendant Thornton earlier that day. Williams described the rifle as a long gun with an ammunition clip shaped like a "half moon." (N.T. 409). She next saw the defendant Hayden at her place at about 4:45 a.m. when he pounded on her door and she let him in. He was alone. (N.T. 413). Thornton arrived about five hours later. They no longer had either the gun they had removed the night before or the Bronco they had been driving. (N.T. 415).

During her testimony, Williams retreated from statements she had given to police shortly after the incident. She claimed at trial that her testimony was different because when she spoke with the police she was threatened with jail and told the police what she thought they wanted to hear. (N.T. 419) She claimed that rather than staying at home that night, as she told the police, she actually went to the Hill District, to an after-hours club known as the Cotton Club. She also denied that Marshall appeared nervous when he came back to her home later that morning or that he discussed having shot anyone. (N.T. 420). She said that she did not know how Marshall got back to her house and only told the detectives about him arriving with Robin Craver because that is what Robin told her. (N.T. 421). During cross-examination, she claimed that she was at the Cotton Club in the Hill District from approximately 1:45 a.m. until between 3:20 and 3:40 a.m. She said that Marshall was there from shortly after she arrived and was still there when she left. (N.T. 432). She said that he arrived at her house after 4:00 a.m., shortly after she arrived home from the night club.

The Commonwealth presented Detective Dale Canofari, who testified as to his interview of Ms. Williams and his later taking of a taped statement from her. According to the detective, during the unrecorded statement, Williams told him that

defendant Marshall brought the assault rifle to her house during the day on December 4. It was wrapped in garbage bags and included a banana shaped ammunition clip. She had him put it in an upstairs bedroom. Marshall returned to her house late that evening, accompanied by Thornton. They arrived in a tan Ford Bronco she believed belonged to Thornton's father. Marshall asked her to retrieve the rifle and she did, giving it to Marshall. Although she had planned to go out, she did not. At about 3:00 a.m. she went downstairs to check on a noise she heard and found the defendants climbing in through a window. Both were excited and sweating. One of the defendants said that they had just committed a murder or shooting, but she could not specify which one. She told Detective Canofari that her friend Robin picked the defendants up in a jitney and brought them to her house. Marshall did not have shoes on. Upon completing the oral interview, Detective Canofari asked Williams if she would give a taped statement, and she agreed to do. The taped statement was admitted into evidence and played for the jury.

The Commonwealth also presented testimony from Devon Duell, who was present in the Williams home on the evening of December 4 and the morning of December 5. Duell, who was serving a sentence in Federal Prison following his conviction of various charges at the time of his testimony, told the jury that he saw the defendants with an assault rifle the evening of December 4. He described as, "...a big gun, clip curved top, got a stock you pull. Gun you'll see on video games." (N.T. 555). Marshall took the weapon with him when he and Thornton left later that evening. Duell said that he stayed at Williams' apartment that night and was awakened near dawn when Williams' sister woke him up and told him to, "Go down and holler at Junior [Hayden Marshall]." (N.T. 564). When he went downstairs he saw both defendants. Marshall appeared nervous and fidgety while Thornton appeared calm. Marshall told Duell that he had been on a high speed chase after being involved in a shooting at the Travelers' Club. (N.T. 565). Later the same day, Duell went with the defendants to a restaurant. He said that the defendants were arguing about the shooting and that he heard Thornton tell Marshall he was scared "...because this was his first time ever catching a body." (N.T. 571).

Another Commonwealth witness, Robin Craver, testified that she was at the Traveler's Club at approximately 2:00 a.m. with a friend named Kayla. She said that Kayla got a phone call and immediately told her that they had to leave the club. They got in a jitney. Kayla handed her cell phone to the jitney driver who apparently took directions from whoever was on the other end of the phone. They then proceeded to a location that Ms. Craver could not remember and they picked up the defendant, Hayden Marshall. Craver was dropped off at her home in Homewood and does not know where the defendant went after that.

Defendant Marshall presented an alibi witness, Anthony Lee, who claimed that the defendant was with him the entire evening of December 4 and until about 4 or 5 in the morning on the 5th at a football game and then at several clubs, including an after-hours club, the Cotton Club, from around 2:20 a.m. until around 4:30 a.m. Defendant Thornton did not present any evidence. Neither defendant testified.

Defendant Marshall's first claim is that the Court erred in not appointing counsel to represent him immediately after sentence was imposed. He contends that this deprived him of the right to file timely post-sentence motions raising certain issues. His inability to file those motions, he claims, will prevent him from raising on appeal issues that could have been raised in his post-sentence motions. The only issue he claims he could have raised, but is now precluded from raising, is a challenge to the weight of the evidence. Because this was not

raised in a post-sentence motion, the defendant contends that it cannot be addressed on appeal and that the only appropriate remedy is for the Appellate Court to remand the matter to this Court to allow the defendant to file a post-sentence motion challenging the weight of the evidence.

Whether the Court erred in failing to appoint counsel after sentence was imposed is immaterial and the remedy he proposes, a remand, is unnecessary. Unlike a claim that counsel was ineffective or an after discovered evidence claim, both of which may require that the trial court conduct an evidentiary hearing to properly address the issues raised, a challenge to the weight of the evidence does not require that the Court do anything more than review the record, as it exists, and determine if the verdict is contrary to that evidence. While this Court may not have the power to grant the defendant relief on this claim, if relief were warranted, it can certainly explain, in this Opinion, whether the Court believes that the verdict was or was not against the weight of the evidence. This Court is sure that the Superior Court, in the exercise of judicial economy, will permit the defendant to raise a challenge to the weight of the evidence on appeal under the circumstances of this case. Accordingly, the Court will address the defendant Marshall's challenge to the weight of the evidence as if it had been timely raised in a post-sentence motion.

First, however, both defendants challenge the sufficiency of the evidence. The standard for evaluating a claim to the sufficiency of the evidence is well known. The evidence must be viewed in a light favorable to the Commonwealth as verdict winner. The Commonwealth is entitled to all reasonable inferences that arise from the evidence. Credibility is a determination that is to be made by the fact finder. *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). To be considered sufficient, the evidence must establish each and every element of the crimes charged beyond a reasonable doubt. When a verdict is based largely on circumstantial evidence, the same standard is applicable and the verdict will be upheld "as long as the evidence implicates the accused in the crime beyond a reasonable doubt." *Commonwealth v. Ockenhouse*, 756 A.2d 1130, 1135 (Pa. 2000); *Commonwealth v. Cox*, 686 A.2d 1279, 1285 (Pa. 1996); *Commonwealth v. Murphy*, 657 A.2d 927, 930 (Pa. 1995).

The defendants do not claim that any particular element of any of the offenses for which they were convicted was absent. They claim, rather, that the evidence was not sufficient to establish that they were persons in the Ford Bronco that fired upon the victims and then became the focus of the police chase. While it is true that neither the surviving victim nor anyone else at the scene were able to identify either defendant as having been there, the circumstantial evidence presented by the Commonwealth overwhelmingly established that they were the assailants.

Two witnesses, Tomorra Williams and Devon Duell, testified that the defendants were together several hours before the shootings in a tan Ford Bronco and that they left in that vehicle in possession of an assault weapon. It was from the area where a tan Ford Bronco was parked that the shots that killed Anthony Reeves and wounded Maurice Budd were fired. This was established both by the testimony of Budd and from the fact that numerous shell casings were found where that vehicle was parked. Moments after the shooting, the same vehicle was seen fleeing the area of the shooting at a high rate of speed. Unable to avoid the police, the assailants ditched the car and fled on foot, in different directions. The fingerprints of the defendant Marshall were found on the vehicle and, more importantly, on a cell phone found in a jacket discarded by the driver as he fled. The vehicle recovered belonged to Jesse Thornton's father. Inside the

vehicle was an ammunition clip identical to the one that was described by Williams and Duell as being on the assault weapon that these defendants possessed only hours earlier.

In addition, the evidence established that within a short period of time after the police chase ended with the assailants fleeing on foot, defendant Marshall was being picked up by a jitney driver a short distance from where the chase ended. He arrived at the Williams' residence around dawn and was joined by the defendant Thornton a short time later. They no longer had the Ford Bronco they were driving hours earlier and were no longer in possession of the assault weapon. Finally, they made statements in the presence of the witness Deull that amounted to admissions of their involvement in the shooting of the victims and subsequent police chase. Taken as a whole, when viewed in a light favorable to the Commonwealth as the verdict winner, this evidence was certainly sufficient to establish that these defendants were the individuals who fired at the victims with the assault rifle and then led the police on the high speed chase.

The weight of the evidence claims are similarly without merit. When reviewing a claim that the verdict was against the weight of the evidence, it must be remembered that, "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the jury's verdict if it is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Begley*, 780 A.2d 605, 619 (2001)). The jury's verdict in this case was entirely consistent with the evidence. The Commonwealth was able to establish, through their witnesses, the defendant's whereabouts from shortly before the shooting when they were seen leaving Rankin in possession of an assault rifle and driving a tan Ford Bronco, until shortly after the shooting, when they returned to Rankin without the rifle and without the tan Ford Bronco. Both were clearly linked to the Bronco; Hayden through his fingerprints on the vehicle and on the cell phone and Thornton because his father owned it. Frankly, any verdict other than guilty would have been contrary to the evidence.

Defendant Marshall raised one additional claim; that the Court erred in permitting Detective Canofari to testify concerning his discussion with Tomorra Williams. The defendant contends this was inadmissible hearsay. In addition, he complains that by allowing the detective to testify regarding Ms. Williams prior statement, the Court permitted the Commonwealth to unfairly bolster the impeachment value of the prior inconsistent statements by, in essence, allowing the jury to hear it twice. This claim must fail because it is based on the erroneous contention that Ms. Williams only gave a single prior statement. The record, however, established that Ms. Williams gave two statements. The first consisted of her answering a series of questions by Detective Canofari. After that interview was completed, Williams gave permission to have another interview tape recorded. (N.T. 458, 465). The Commonwealth sought to introduce the taped statement both for its impeachment value and as substantive evidence. They also offered the testimony of Detective Canofari as to the unrecorded statement for impeachment purposes. Trial counsel did not object to the admissibility of the taped statement, conceding that it was admissible for both impeachment and substantive purposes. (N.T. 452). Counsel did object, however, to Detective Canofari relating the content of his oral interview of Ms. Williams. The Court overruled the objection but instructed the jury that while the taped statement could be considered by them both as impeachment evidence and as substantive evidence, they could only consider the unrecorded oral interview with Detective Canofari for

impeachment purposes. (N.T. 453-454).

The objection was properly overruled. A prior inconsistent statement by a witness may be used to impeach the credibility of that witness as to relevant matters. Pa. R. E. 613 (a) & (b). Extrinsic evidence of that statement is admissible as long as the witness is confronted with the prior statements and given the opportunity to deny having made the statement or to explain the statements. With regard to the recorded statement, the extrinsic evidence of the statement was the tape recording. It was properly admitted, without objection. The extrinsic evidence of the unrecorded interview was the testimony of Detective Canofari in which he related the contents of his interview of the defendant. It was also properly admitted as impeachment evidence only.

The Court, in its closing instructions to the jury, explained how it could consider prior statements. The Court told the jury:

You also heard evidence that some of the witnesses made statements on previous occasions which you might believe were different, you may choose to determine were different from the testimony presented on the witness stand. There are two ways that evidence is to be considered.

First, were the previous statements handwritten, signed or tape recorded? You may regard that evidence as proof of the truth of anything the witness said in the earlier statement.

You may also consider that to help you judge the credibility and weight of the testimony of the witness given at trial.

If, however, the statement was not handwritten, signed or tape recorded, then you may consider the prior statement for one purpose and one purpose only; that is to help judge the weight and credibility of the testimony given by the witness at trial.

You may not regard the evidence of the earlier statement as proof of the truth of anything said at that time.

(N.T. 881-882). Accordingly, the jury was properly instructed as to the difference between the two types of prior statements and what use they could make of them.

For the reasons set forth in this Opinion, the judgment of sentence imposed on each defendant should be affirmed.

BY THE COURT:
/s/Manning, J.

Date: December 22, 2008

¹ The vehicle operated by Officer DiSanti became disabled and gave up pursuit.

Commonwealth of Pennsylvania v. Theresa Logsdon

Restitution—Consideration of Restitution in Sentencing

1. In sentencing, a Court may properly consider whether the Defendant has done anything to try to make amends to the victim.

2. Where the Defendant has assets, and more than enough time to at least begin to make restitution on the matter, the

Court may properly consider, in sentencing, her failure to have made restitution as an indication of her lack of remorse.

(Jeffrey A. Ramaley)

Geoffrey William Melada for the Commonwealth.
Suzanne M. Swan for Defendant.

No. CC 200701245. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., December 29, 2008—The defendant, Theresa Logsdon, was charged by criminal information with one count of theft by failure to make required disposition of funds.¹ The defendant appeared with counsel on January 17, 2008 and entered a plea of *nolo contendere* to the single charge. The Commonwealth summarized the factual basis for the plea as follows:

Your Honor, had this matter proceeded to trial, the evidence would have been substantially as follows: that in July, 2004, the defendant became the executor of her late mother's estate. That is the estate of Mary Foley. Pursuant to those duties of executor, she sold her late mother's house for approximately \$34,000.00. That money was not distributed to any of the heirs. Instead, the defendant kept that money. When questioned, the defendant did admit to using it for her own purposes, loans and gifts to friends as well as some of it lost through gambling. With that, Commonwealth would rest.

(N.T. 7)

The Commonwealth went on to explain that because the defendant was one of four heirs, she would have actually inherited part of the proceeds and that therefore the actual loss was not the full amount of the sale of the house but, rather, three-fourths of that, or \$25,346.55. Each of the heirs were to receive \$8,448.85. Subtracting that amount as her share from the total amount resulted in a loss of \$25,346.55. After the defendant entered her plea, the Court inquired of defense counsel about the defendant's ability to make restitution. The Court explained to counsel that a significant amount of restitution was a fact that the Court would consider at the time of sentence. The defendant disclosed at sentencing that she currently owned a residence worth approximately \$21,000.00 and that it was owned free and clear and therefore available for restitution.

The defendant returned for sentencing on April 9, 2008. The defendant did not make restitution at that time and the Court proceeded to impose a sentence of not less than one (1) nor more than five (5) years. A Petition for Reconsideration of Sentence was filed on April 14, 2008. This was denied by an Order dated May 7, 2008 and the defendant filed this timely appeal. In the Concise Statement of Errors Complained of an Appeal, the defendant raises a single claim: that the Court erred in imposing an excessive and unreasonable sentence for the reasons set forth in the Petition for Reconsideration of Sentence.

Sentencing is a matter vested in the sound discretion of the sentencing court and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercise was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will. *Commonwealth v. Hess*, 745 A.2d 29 (Pa.Super. 2000). The defendant was convicted of theft by failure to make required disposition of funds. The amount the defendant was convicted of taking unlawfully was \$25,436.55.

This resulted in an offense gravity score for purposes of the sentencing guidelines of 6. With a prior record score of zero (0), the sentencing guidelines called for a minimum sentence of between three (3) and twelve (12) months in the standard range. Accordingly, the defendant's sentence was within the standard range of the sentencing guidelines.

The defendant's claim that the Court abused its discretion is based solely on the suggestion that the Court did not consider in imposing sentence the circumstances surrounding the defendant's poor health. The Court did, however, consider all of those facts in imposing sentence. The Court had to weigh those against the fact that the defendant had done nothing to try to make amends to the victims of her crime. The offense was committed in 2004. The defendant was charged in July of 2007 and entered her plea in January of 2008. By the time she was sentenced, nearly four years had passed since the offense. The defendant had more than enough time to at least begin to make restitution in this matter. Her failure to do so is an indication of her lack of remorse and was among the factors that weighed against imposing a sentence in the lower portion of the standard range. This Court considered all the factors set forth in the sentencing code and determined that a sentence at the top of the standard range was appropriate based upon those factors.

For these reasons, judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, J.

¹ 18 Pa.C.S.A. §3927(A) The offense was a felony in the third degree as it is alleged that the property taken had a value in excess of \$2,000.00.

Commonwealth of Pennsylvania v. Thomas Julian

Post Conviction Relief Act Petition—Time for Filing Petition

1. The one-year time limit for filing a Petition under the Post Conviction Relief Act begins to run from the date the judgment of sentence became final in a direct appeal.

2. The filing of an earlier PCRA Petition does not toll the one-year filing period from the date of judgment of sentence.

3. The record failed to support Defendant's allegation of an exception to the one-year filing period based on facts that were not known to him. Each and every claim that the Defendant identified in his brief was based upon facts that were clearly known to him at the time of trial.

(Jeffrey A. Ramaley)

Angharad Grimes Stock for the Commonwealth.
Thomas Julian, *pro se*.

No. CC 199909159 & 199990916. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, J., December 29, 2008—The defendant, Thomas Julian, has filed an appeal from this Court's Order dismissing the Post Conviction Relief Act ("Act") Petition which he filed on or about July 28, 2008. This Court issued a Notice of Intention to Dismiss on August 22, 2008. The reasons for the dismissal were several. First, the defendant's Petition was

untimely. Second, the Court had reviewed the claims raised in the defendant's Petition and determined that they were either waived by the defendant's failure to raise them or were previously litigated. Finally, the Court determined that there were no genuine issues concerning any material fact raised in the Petition and that the defendant was not entitled to Post Conviction Relief.

The defendant filed a Motion for Extension of Time in Which to Respond to the Notice of Intention to Dismiss. He thereafter filed a Response on September 11, 2008. This Court considered the averments set forth in the Response and then issued a final Order dismissing the PCRA on September 25, 2008.

A review of the dockets reveals that the defendant's Petition was clearly filed beyond the one-year time limit set forth in the Act. Moreover, the defendant did not set forth any facts in his Petition that would warrant an exception to this untimely filing as is permitted by the Act at 42 Pa. C.S. §9545(b)(1). The defendant was originally found guilty by a jury on July 28, 2000. He was sentenced on December 4, 2000. He filed a timely appeal to the Superior Court on or about January 3, 2001. The Superior Court affirmed on March 10, 2003. A Petition for Allowance of Appeal from the Supreme Court was denied on July 29, 2003.

The defendant filed his first Post Conviction Relief Act Petition on or about March 31, 2004. Counsel was appointed. Original counsel withdrew and new counsel was appointed on October 8, 2004. An Amended Post Conviction Relief Act Petition was filed on or about November 14, 2005. This Court issued a Notice of Intention to Dismiss on January 10, 2006. Defendant, through counsel, filed a response to the proposed dismissal and a brief in support of the Amended Post Conviction Relief Act Petition. On June 26, 2006, this Court issued an Order dismissing the first Post Conviction Relief Act Petition for the reasons set forth in the Notice of Intention to Dismiss dated January 10, 2006. The defendant filed an appeal of that dismissal to the Superior Court. On March 5, 2007, the Superior Court affirmed this Court's denial of the defendant's first Post Conviction Relief Act Petition. On July 12, 2007, the Pennsylvania Supreme Court denied defendant's Petition for Allowance of Appeal. The instant Post Conviction Relief Act proceeding began on July 28, 2008 when the defendant filed his second Pro-Se Petition.

As this docket demonstrates, the instant PCRA Petition, the defendant's second, was filed well beyond the one-year time limit for filing. It must be remembered that the time limit for filing commences as of the date the judgment of sentence became final. The judgment of sentence became final in this case ninety (90) days after the defendant's original Petition for Allowance of Appeal to the Supreme Court on his direct appeal was denied. That Petition was denied on July 29, 2003, which meant that the judgment of sentence became final ninety (90) days thereafter, or October 28, 2003. The defendant's instant Petition is three and one half years beyond the time limit for filing a Post Conviction Relief Act Petition. The fact that the defendant in the interim filed a first PCRA which was later denied and that that denial was upheld by the Supreme Court is of no moment. The time limit does not run from the denial of an initial Post Conviction Relief Act Petition but, rather, from the judgment of sentence.

More importantly, the defendant has not set forth in his Petition any claim that this untimely filing should be excused for the reasons provided for in the PCRA at §9545(b)(1). The defendant alleges in the brief in support of this Pro-Se Petition, in paragraph 10, that his Petition was timely because it was filed within one year plus ninety days of the date that the Supreme Court denied the allowance of appeal in 2007. As is pointed out above, the one-year filing

period runs from the date judgment of sentence became final in a direct appeal and not when the Superior Court entered final judgment on a subsequent PCRA.

The defendant also attempts to invoke the exception at §9545(b)(1)(ii) by stating, at paragraph 11 of his brief, that the claims are predicated on facts that were not known to him. Nowhere in his brief or in his Petition, however, does the defendant describe what facts he learned in June of 2008 that led to the filing of this Petition.

It appears from reading his voluminous brief that he is simply claiming that it was only in June of 2008 that he was able to identify the legal claims that he attempts to raise in his Petition. Each and every claim that the defendant identifies in his brief is based upon facts that were clearly known to him at the time of his trial. His first issue contends that he was denied due process because of an improper consolidation of his charges. The fact of this consolidation was certainly known to him at the time of his trial.

Next the defendant contends that there were problems with his jury selection. Once again, all the facts surrounding his jury selection that form the basis for his jury selection related claims were known to him at the time of his trial. Most paragraphs consist mainly of legal argument and do not identify any facts that were not known to him at the time and subsequently came to be known by him.

This defendant has had a thorough review of the circumstances surrounding his conviction. He had competent counsel represent him at trial, in his direct appeal following conviction and in connection with his first Post Conviction Relief Act Petition. He has been provided with all the review to which he is entitled under the law. For these reasons, this Court properly denied the defendant's Post Conviction Relief Act Petition because it was untimely.

BY THE COURT:
/s/Manning, J.

Dated: December 29, 2008

Commonwealth of Pennsylvania v. Dennis Foy

Post Conviction DNA Testing

Defendant asserted that his rights to post-conviction DNA testing were violated by improper storage and destruction of physical evidence. As the evidence was destroyed, the Court could not have granted defendant's request. The inquiry became whether or not the evidence was destroyed in bad faith. The Court found this claim to be without merit as officers testified that the facility had been flooded, the department had no reason to believe the evidence was in danger of a flood of that magnitude, and that only one evidence bag was identifiable but was likely contaminated and compromised by the flood debris.

(*Angel L. Revelant*)

Anthony Krastek for the Commonwealth.
Scott Rudolf for Defendant.

Nos. CC 198710528, CC 198710548, and 198710549. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL BACKGROUND

Machen, J., December 30, 2008—Defendant was convict-

ed of numerous crimes after a jury trial before the Honorable John O'Brien. Defendant was sentenced on January 3, 1998, to consecutive sentences, which are enumerated in the record. Defendant filed a timely appeal and on May 29, 1990, the Superior Court affirmed the judgment of sentence. The Supreme Court affirmed the judgment of sentence.

On October 26, 1994, defendant filed a pro-se PCRA Petition. The Office of the Public Defender was appointed to represent defendant and over the next several years various motions for extensions of time to file amended PCRA were filed and granted. By this time, Judge O'Brien was no longer on the bench and the matter was assigned to this Court. After the PCRA law changed in late 2002 with regard to Motions for DNA testing, defendant filed a Motion pursuant to 42 Pa.C.S.A. §9543.1 on May 8, 2003. Amended PCRA Petitions were filed, Commonwealth's Answers were filed and several Evidentiary Hearings were held (Nov. 6, 2003; Nov. 18, 2003; Aug. 16, 2004; Oct. 14, 2004 and January 24, 2006). After the defendant filed his Proposed Findings of Fact and Conclusions of Law; the Commonwealth filed its Response thereto, and an extensive review by the PCRA Court, the Petition was denied by Order of Court dated Dec. 26, 2007. This timely appeal followed. In the Concise Statement of Errors Complained of on Appeal, defendant raises 27 issues that can be categorized and addressed as eight (8) main issues: Improper Storage and Destruction of Physical Evidence; Improper Consolidation of Criminal Charges; Improper Exclusion from Jury Selection; Improper Omission of Good Character Evidence; Defective Jury Instruction; Sentencing Issues; Due Process Violation; and Unconstitutionality of Concise Statement Requirements. Most of these claims have an underlying claim as to Ineffective Assistance of Counsel.

STANDARD FOR REVIEW

In reviewing the propriety of an order granting or denying PCRA relief, the Appellate Court "is limited to determining whether the evidence of record supports the determination of the PCRA court, and whether the ruling is free of legal error." *Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." *Commonwealth v. McClellan*, 887 A.2d 291 (Pa.Super. 2005).

The standard for review of an ineffective assistance of counsel claim is well settled in Pennsylvania. To establish a claim of ineffective assistance of counsel, a petitioner must establish, by a preponderance of the evidence that the circumstances of the particular case "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §9543(a)(2)(ii). This requires the petitioner to show: (1) that the 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 or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimble*, 724 A.2d 326 (Pa. 1999).

IMPROPER STORAGE AND DESTRUCTION OF PHYSICAL EVIDENCE CLAIMS

The first three issues raised by defendant in his Concise Statement of Errors Complained of on Appeal all stem from the same claim that the defendant's right to post-conviction DNA testing were violated by the improper storage and resulting destruction of the physical evidence. These three claims will be addressed together.

With regard to Defendant's claim, 42 Pa.C.S.A. §9543.1(a) states, in pertinent part, that:

(1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

(2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion.

42 Pa.C.S.A. §9543.1(a)(1), (2).

Defendant's claims that he was entitled to relief stem from his assertion that the Commonwealth (through the Allegheny County Police Department) was responsible for improperly storing and/or destroying the physical evidence and that the circumstances surrounding the flooding and the subsequent destruction of the evidence in question—exercised bad faith. A similar issue was addressed by the Superior Court in *Commonwealth v. Watson*, 927 A.2d 274 (Super. 2007) reargument denied, appeal denied 945 A.2d 171. In that matter, defendant had requested DNA testing on evidence that was destroyed prior to the filing of the Motion Requesting DNA testing. The Superior Court concluded, "in that there existed no DNA evidence to test, Appellant's request for such testing was logically impossible. See 42 Pa.C.S.A. §8543.1(a)(2). Consequently, the court could not have granted Appellant's petition." *Id.*

The question must then turn to the question of bad faith. Similarly, in *Commonwealth v. Moss*, 689 A.2d 259 (Pa.Super. 1997), the Superior Court stated "is undisputed that the evidence which Appellant contends should be subjected to DNA testing is no longer-in existence, having been destroyed by the Bethlehem Police Department. Accordingly, the relevant inquiry becomes whether such evidence was destroyed in bad faith."

At the evidentiary hearing on November 18, 2003, Officer Ryan credibly testified that evidence had been stored in said facility from 1981 to the January 1996 date of the flood and there had been no prior water infiltration at that site. (Hearing Transcript of 11/18/03, hereinafter "T-11/18/03," p. 7-8, 18). Further investigation revealed that there had not previously been a flood of the magnitude of January 1996 since 1972. The time before that was 1936. The County Police had no reason to believe that the evidence was in danger of flooding. DNA Expert Houck credibly testified that the Allegheny County Police stored evidence, in evidence bags inside brown paper bags in sealed boxes. She testified that this was a "very standard and commonplace and acceptable method of storing" evidence. (Hearing Transcript of 10/14/04, hereinafter "T-10/14/04," p. 24-25). Based upon the credible testimony presented, this court found that the Allegheny County Police evidence storage was not improper.

Testimony at the November 18, 2003 hearing established that during the inventory of flood damaged evidence, only the evidence bag from County Police case # 870650, victim Leskanic, was identifiable. (T-11/18/03, p. 17). Evidence from the remaining cases was not identifiable and thus could not have been preserved. (T-11/18/03, p.17-18, 50). Further, because of the mixing of outside biological material and possible cross-contamination, the Leskanic evidence may have been compromised. The evidence contaminated in the January 1996 flood was destroyed pursuant to a Court Order because of contamination by sewage waters, mud, cross-contamination, and the possibility of spontaneous combustion of

agricultural materials (quantities of marijuana). (T-11/18/03, p. 10-11, 14, 27-28, 30, 37-40, 50-51, 53). Officer Ryan was required to be inoculated against tetanus and hepatitis and wear HAZMAT clothing during the inventory of the contaminated evidence. (T-11/18/03, p. 14).

The only evidence pertaining to petitioner's convictions identified at the Wood Street facility was evidence from the Leskanic case. The evidence in that case was contained in a paper evidence bag which was dripping wet and had been floating in sewage-contaminated floodwaters mixed with blood and other biological evidence from other cases. (T-11/18/03, p. 10-11, 14, 27-28, 30, 37-40). Such conditions could have resulted in bacterial degradation and/or cross-contamination. (T-10/14/04, p. 21).

Upon review of the testimony, the defendant did not demonstrate prosecution's bad faith in ordering or permitting its destruction; absent such a showing, failure to preserve evidence which might be of use to a criminal defendant after testing does not constitute a denial of due process.

Defendant's claims numbered 1 through 3 have no merit.

IMPROPER CONSOLIDATION

Issues 4 and 5 raised by defendant in his Concise Statement of Errors Complained of on Appeal both stem from the claim that the defendant's rights were violated when charges arising from five alleged criminal episodes were tried in a single trial. These two claims will be addressed together.

As set forth in the trial court's direct appeal opinion, adopted by the Superior Court on appeal, circumstances of the five criminal episodes were sufficiently similar, and the offenses were sufficiently linked temporally and spatially to make them admissible in separate prosecutions and to support consolidation for trial." *Commonwealth v. Foy*, trial court opinion dated 4/19/1989, at 6; *Commonwealth v. Foy*, No. 203 Pgh, 1989, memo. op. filed 5/29/1990 at 4 (Pa.Super. 1990).

As cited by the Commonwealth in its Response to Petitioner's Proposed Findings of Fact and Conclusions of Law (hereinafter "Response"), a PCRA petitioner may not re-litigate a claim previously raised in any prior proceeding by "positing it under a new and/or different theory as a basis for relief." *Commonwealth v. Fuller*, 509 A.2d 364 (Pa.Super. 1986). (A change in legal theory constitutes previous litigation in a post-conviction proceeding.) See also *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999); *Commonwealth v. McCall*, 786 A.2d 191 (Pa. 2001). A petitioner cannot obtain relief under the Post-Conviction Relief Act for claims that were previously litigated by now couching them in a claim of ineffective assistance of counsel. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 (Pa. 1998). See *Commonwealth v. Carpenter*, 725 A.2d 154, 160 (Pa. 1999); *Commonwealth v. Michael*, 755 A.2d 1274 (Pa. 2000). Petitioner's claim has been previously litigated and may not provide the basis for relief. *Id.*

The remaining aspects of Issues 4 and 5 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 4 and 5 are without merit.

IMPROPER JURY SELECTION PROCESS

Issues 6 and 7 raised by defendant in his Concise Statement of Errors Complained of on Appeal both stem from the claim that the defendant's rights were violated when critical portions of the jury selection phase of defendant's trial were conducted outside of the presence of the general public and trial counsel was ineffective for failing to object to this aspect of the jury selection process. These two

claims will be addressed together.

A review of the trial records and transcripts reveal that prior to the trial Judge O'Brien discussed the need to conduct individual juror *voir dire* in chambers and that members of the public were free to come into his chambers to observe the *voir dire*. (Trial Transcript, Vol. 1, 19-20). As a result, the general public was not excluded from the *voir dire*.

Additionally, at the October 14, 2004, PCRA evidentiary hearing on Defendant's PCRA Petition, trial counsel testified that he had filed a pre-trial motion requesting individual *voir dire* and it was trial strategy to conduct individual *voir dire* of the individual jurors in the judge's chambers to protect the venire from possible contamination from hearing questioning of other members of the venire. (T-10/14/04, p. 35-36, 44-45). As such, this was a part of trial counsel's strategy and as a result, this claim fails to meet the three-prong test for ineffective assistance of counsel.

The remaining aspects of Issue 5 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 4 and 5 are without merit.

IMPROPER EXCLUSION OF GOOD CHARACTER TESTIMONY

Issues 7 and 8 raised by defendant in his Concise Statement of Errors Complained of on Appeal both stem from the claim that the defendant's due process and informed jury rights were violated when his trial was permitted to conclude without his jury having had heard testimony of the defendant's good character and that trial counsel was ineffective for failing to present testimony of defendant's good character. These two claims will be addressed together.

The decision whether to call character witnesses or not is a question for the defendant and his counsel and while failure to do so may rise to the level of ineffective assistance of counsel, it does not violate defendant's due process or jury rights. As such, this discussion will focus on the ineffective assistance of counsel claim in failing to present testimony of defendant's good character.

For trial counsel to be deemed ineffective for failing to call witnesses, a petitioner must establish that the proposed witnesses' testimony would have been beneficial. *Commonwealth v. Auker*, 681 A.2d 1305 (Pa. 1996). Character evidence is limited to evidence of a general reputation in the community for the trait at issue at the time of the offense. *Commonwealth v. Loop*, 589 A.2d 343 (Pa.Super. 1990). Personal opinion is not admissible as reputation and character evidence, because mere opinion testimony is not probative. A review of the transcript from the PCRA evidentiary hearing of August 16, 2004, reveals the following information about the defendant's potential character witnesses. Petitioner's proposed character witness Lou Ann Morris testified she had never heard anyone say anything about petitioner, good or bad. (Hearing Transcript of 8/16/04, hereinafter "T-8/16/04," p. 17). Petitioner's proposed character witness Helen Knox also testified that her opinion was that petitioner was non-violent but that petitioner's reputation "never came up" in conversation with others. (T-8/16/04, p. 25). Petitioner's sister Lora Foy-Garner testified at the August evidentiary hearing as a potential character witness. Ms. Foy-Garner testified she never heard anyone discuss petitioner's reputation. (T-8/16/04, p. 29). Petitioner's sister Diane Foy also testified that she never heard other people refer to petitioner as violent. (T-8/16/04, p. 33, 34). Petitioner's sister Yvonne Foy testified that she never heard

any negative comments about her brother. (T-8/16/04, p. 45).

The testimony presented from petitioner's proposed character witnesses did not amount to proper character testimony. The witnesses did not testify that petitioner was known to have a reputation for non-violence in the community. The witnesses could only testify that they could not recall hearing anyone say anything negative about petitioner. This absence of knowledge does not constitute a general reputation in the community and such testimony would not have been beneficial. As such, trial counsel's failure to present testimony of the defendant's good character did not rise to a level of ineffective assistance of counsel.

The remaining aspects of Issues 8 and 9 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 8 and 9 are without merit.

DEFECTIVE JURY INSTRUCTIONS

Issues 10, 12, 14, 16 raised by defendant in his Concise Statement of Errors Complained of on Appeal claim that the defendant's rights were violated by the trial court when the Judge gave a defective jury instruction (Rape, IDSI, Burglary Objective and Target Crime of Burglary, respectively). Issues 11, 13, 15, and 17 each claim that trial counsel was ineffective for failing to object to the defective instructions. These issues will be addressed together.

As the Pennsylvania Supreme Court held in *Commonwealth v. Jones*, 668 A.2d 491 (Pa. 1995), when reviewing a challenge to a part of a jury instruction, the Court must review the jury charge as a whole to determine if it is fair and complete. *Commonwealth v. Saunders*, 602 A.2d 816 (Pa. 1992). A trial court has broad discretion in phrasing its charge and can choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error. See *Commonwealth v. Prosdocimo*, 578 A.2d 1273 (Pa. 1990). A review of the trial transcript reveals that Judge O'Brien did indeed instruct the jury on these various crimes (Trial Transcript Vol. IV, p. 900-932) and that each instruction given comported with the Standard Jury Instructions that were appropriate and recognized at the time of trial and such were proper.

Next, defendant argues that trial counsel was ineffective for failing to object to the instructions given. Our appellate courts have held that counsel will not be held to be ineffective if the instruction given was proper. *Commonwealth v. Purcell*, 724 A.2d 293 (Pa. 1999); *Commonwealth v. Tyler*, 451 A.2d 218 (Pa.Super. 1982).

The remaining aspects of Issues 10 through 17 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 10, 11, 12, 13, 14, 15, 16 and 17 are without merit.

INSTRUCTION OMISSIONS

Issues 18 and 20 raised by defendant in his Concise Statement of Errors Complained of on Appeal claim that the defendant's rights were violated when the trial judge failed to instruct the jury regarding missing evidence and integrated defense, respectively. Issues 19 and 21 claim that trial counsel was ineffective for failing to object to the trial judge's failure to instruct the jury on these points. These issues will be addressed together.

The Commonwealth, in its Response to Petitioner's Proposed Findings of Fact and Conclusions of law, addresses this issue succinctly and this Court incorporates and adopts the following as a part of this Opinion.

Petitioner provides no support for this novel claim and, instead, ignores the fact that his confession was contemporaneously recorded by word processor and that he signed the typewritten statement as accurate. (T.T.-IV 353-69). Trial counsel was not ineffective for failing to request a baseless instruction. Petitioner also claims the trial court erred in not instructing the jury that if it believed petitioner's alibi defense to the one incident, it could consider that his confessions to the remaining crimes were false. Again, petitioner fails to provide any support for this proposed instruction. Accordingly, prior counsel was not ineffective for failing to request it and petitioner is not entitled to relief on this claim."

Paragraph 71 of Response

As to the specific claims in Issues 19 and 21, and based upon an extension of the principal that counsel cannot be ineffective for failing to object to a proper charge, this court believes that counsel cannot be ineffective for failing to request a unsupported and improper instruction.

The remaining aspects of Issues 18, 19, 20, and 21 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 18, 19, 20 and 21 are without merit.

SENTENCING ERRORS

Issues 22 and 24 raised by defendant in his Concise Statement of Errors Complained of on Appeal claim that the defendant's rights were violated when the trial judge imposed the most severe minimum and maximum sentences permitted by law on each count without specifying proper reasons for that action and that the trial judge imposed consecutive sentences without specifying proper reasons for that action, respectively. These two issues will be addressed together.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Common-wealth v. Cunningham*, 805 A.2d 566 (Pa.Super. 2002).

In fashioning a sentence, among the factors that the court shall consider is the protection of the public and the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. §9721(b). In 1988 and 1989, when this case was tried and the defendant was sentenced, 42 Pa.C.S.A. §9721 read essentially the same as it does today with a few additions. It read, in pertinent part:

42 Pa.C.S.A. §9721

Sentencing generally.

(a) General rule.—In determining the sentence to be imposed the court shall, except where a mandatory minimum sentence is otherwise provided by law, consider and

select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.
- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.

(b) General standards.—In selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to section 2154 (relating to adoption of guidelines for sentencing) and made effective pursuant to section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.

42 Pa.C.S.A. §9721 (*Archived version current through the 1988 Regular Session of the 172nd General Assembly, as contained in the 1989 pocket part.*)

Similarly, the version of 42 Pa.C.S.A. §9757 in effect at the time stated:

42 Pa.C.S.A. §9757 Consecutive sentences of total confinement for multiple offenses:

Whenever the court determines that a sentence should be served consecutively to one being then imposed by the court, or to one previously imposed, the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed. Such minimum sentence shall not exceed one-half of the maximum sentence imposed.

42 Pa.C.S.A. §9757 (*Archived version current through the 1988 Regular Session of the 172nd General Assembly, as contained in the 1989 pocket part.*)

The trial court provided an explanation in excess of three pages for the sentence it was about to impose including that the victims were elderly women between the ages of 64-84 who lived alone and the impact that petitioner's brutal assaults had upon them. (Sentencing Transcript, hereinafter "ST," p. 22-25). As such, this sentence complied with the applicable laws and rules in effect at the time and should not be disturbed.

The remaining aspects of Issues 22 and 24 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 22 and 24 are without merit.

Issues 23 and 25 raised by defendant in his Concise Statement of Errors Complained of on Appeal claims that the defendant's rights were violated when trial counsel failed to object to the sentencing issues raised in Issues 22 and 24, respectively. These two issues will be addressed together.

Defendant's claim that trial counsel was ineffective for failing to "object to the trial court's decision to impose the most severe minimum and maximum sentences" and for failure "to object to the trial court's decision to impose consecutive sentences of imprisonment" is without basis and without merit. A review of the Sentencing Transcript reveals that trial counsel did object to the sentence at sentencing on the grounds that the sentences imposed exceeded the sentencing guidelines and the trial court failed to state sufficient reasons or its sentence. (ST, p. 30-31). However, the trial court responded that the sentencing guidelines were inapplicable because they had been declared unconstitutional the year before. The court then expounded further on the reasons for the sentence imposed. (ST, p. 31-33). The remaining aspects of Issues 23 and 25 are restatements of the claims already disposed of in the discussion for Issues 1, 2 and 3 above and will not be addressed here. The PCRA court incorporates its discussion of the alleged improper storage and destruction of physical evidence in Issues 1, 2, and 3.

Defendant's claims raised in Issues 23 and 25 are without merit.

CUMULATIVE DUE PROCESS

Issue 26 raised by defendant in his Concise Statement of Errors Complained of on Appeal claims that the defendant was entitled to post-conviction collateral relief owing to the cumulative violation of his Pa. and U.S. constitutional rights.

"[N]o number of *failed* claims may collectively attain merit if they could not do so individually." *Commonwealth v. Williams*, 615 A.2d 716 (Pa. 1992). As such, defendant's claim raised in Issue 26 is without merit.

UNCONSTITUTIONALITY OF CONCISE STATEMENT REQUIREMENTS

Issues 27 and 28 raised by defendant in his Concise Statement of Errors Complained of on Appeal claim that the rule under which he was ordered (and thus, the Order of Court itself) is unconstitutional and should the Concise Statement of Errors Complained of on Appeal be defective in anyway, that his counsel was ineffective.

The Order of Court requiring the defendant to file a Concise Statement is based on the authority found in Pa. Rule of Appellate Procedure 1925 (b). While this court finds it unlikely that a Concise Statement that is comprised of 25 errors (not including these final 2 claims) could be defective, this court does not believe that any additional explanation is required.

Dated: December 30, 2008

Commonwealth of Pennsylvania v. Cordell Broadus

*Denial of PCRA Petition Without Evidentiary Hearing—
Cross-Examination in Response to Self-Defense Claim*

1. Where Defendant asserted self-defense to shooting and testified that he was remorseful following the shooting, the Commonwealth may test that testimony on cross-examination.

2. It was proper for the Commonwealth to cross-examine the Defendant as to actions inconsistent with remorse when

Defendant testified on direct examination that he was remorseful for the shooting.

(Jeffrey A. Ramaley)

Francis Dacey Wymard for the Commonwealth.
Sandra Ann Kozlowski for Defendant.

No. CC 200111023. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., January 2, 2009—The Defendant has appealed from this Court's Order of July 1, 2008, which dismissed his Amended Post Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to raise any meritorious issues and, therefore, this Court's Order should be affirmed.

The Defendant was charged with Criminal Homicide¹ in relation to the shooting death of Rob Dixon on June 25, 2001 in the Lincoln-Lemington section of the City of Pittsburgh. Following a jury trial, he was convicted of first-degree murder and on May 1, 2002, he was sentenced to a term of life imprisonment. Following a reinstatement of his appellate rights *nunc pro tunc*,² the judgment of sentence was affirmed by the Superior Court on January 20, 2004. Following a second reinstatement of his appellate rights *nunc pro tunc*,³ the Defendant's Petition for Allowance of Appeal was denied on April 13, 2005.

On July 6, 2006, the Defendant filed a pro se Post Conviction Relief Act Petition with this Court.⁴ Counsel was appointed to represent the Defendant and an Amended Petition was filed on March 31, 2008. Upon thorough review of the record, and after giving the appropriate notice, this Court dismissed the Defendant's Amended PCRA Petition without an evidentiary hearing on July 1, 2008. This timely appeal followed.

On appeal, the Defendant raises a single claim of error, which he has appropriately layered for ineffectiveness. He alleges that this Court erred in allowing cross-examination regarding the Defendant's remorse and failure to apologize to Mr. Dixon's parents and that appellate counsel was ineffective for failing to raise this issue on direct appeal. A careful review of the record reveals that the claim is meritless.

Initially, we note that in order "[t]o obtain relief on a claim of ineffective assistance of counsel, [a defendant] must show that: there is merit to the underlying claim; that counsel had no reasonable basis for their course of conduct; and that there is a reasonable probability that but for the act or omission in question, the outcome of the proceeding would have been different.... The burden of proving ineffectiveness rests with [the defendant].... To sustain a claim of ineffectiveness, [the defendant] must prove that the strategy employed by trial counsel 'was so unreasonable that no competent lawyer would have chosen that course of conduct'.... Trial counsel will not be deemed ineffective for failing to pursue a meritless claim." *Commonwealth v. Rega*, 933 A.2d 1007, 1018-1019 (Pa. 2007), internal citations omitted.

At trial, the Defendant admitted to shooting Mr. Dixon but claimed that he did so in self-defense. During his direct examination, he testified that he felt remorse immediately after the shooting:

Q. (Mr. Hudak): Now, how did you feel during this time period that you thought about going to the police? What was going through your mind?

A. (Defendant): Everything. My son, my family, my soul, my soul, everything. I didn't know what to do. The only thing that made me feel any kind of com-

fort was to be around my son...

...Q. Okay. And is it fair to say that you've cried about this incident?

A. Yes, many times.

Q. And did you cry because you're sad for yourself or sad for the people?

A. I'm sad mostly for his family and mostly for my soul. Like, where do I go after this life?

(Trial Transcript, p. 422-23).

On cross-examination, ADA Ed Borkowski, Esquire, asked a series of questions directed to the Defendant's claim of remorse:

Q. (Mr. Borkowski): How long did you stay at the scene?

A. (Defendant): Not long.

Q. Give us an estimation. Two minutes? A minute? Five minutes?

A. Probably about three minutes.

Q. And during that period of time there was more than one police officer, isn't that correct?

A. Yes.

Q. There were plenty of police officers there, correct?

A. Yes.

Q. Rob Dixon was laying in the street –

A. Yes.

Q. – at that point, is that right? And the remorse that you conveyed to the jury today, feeling sorry for his family, of course, when Valerie Dixon came and saw her only son laying in the street, you didn't go up to her and apologize then, did you?

MR. HUDAK: Objection, Your Honor.

A. I didn't know it was his mother.

THE COURT: Overruled.

MR. HUDAK: It presupposes a fact not in evidence, Your Honor, namely that my client even saw Mrs. Dixon.

THE COURT: You may lay a proper foundation.

Q. Do you know Mrs. Dixon?

A. No.

Q. Do you remember seeing an obviously distraught and wailing woman at the scene?

MR. HUDAK: Objection, Your Honor. Objection to that characterization.

THE COURT: Overruled.

Q. Do you remember such a person?

A. I remember seeing a few.

Q. Did you see someone crying and wailing?

MR. HUDAK: Objection, Your Honor.

A. There were a few.

THE COURT: Overruled.

Q. Did you see this lady right here (indicating)?

MR. HUDAK: Objection.

A. Not to my recollection, no.

THE COURT: Overruled.

Q. Did you see a tall black male try to get through the crowd to see his son, to see Rob Dixon, and being held back?

A. Yes.

Q. And that person, did you know that to be Rob's dad?

A. Yes.

Q. And at that time did you go up to Mr. Dixon and express your remorse then as you did today?

A. No.

Q. You knew Mr. Dixon, did you not?

A. No, I didn't know him.

Q. You knew him to see him?

A. I knew who he was.

Q. And so the day after this, the week after this, did you try to find his mom and express your remorse–

MR. HUDAK: Objection, Your Honor.

Q. – in those days and weeks?

MR. HUDAK: Your Honor, it's almost comical that he would ask questions that any person would do these kinds of things.

THE COURT: Overruled.

Q. Did you do that?

A. No.

Q. So the first time you actually expressed your remorse to anybody from these families is today in court in front of this jury, is that correct?

A. Yes.

(Trial Transcript, p. 432-35).

Rule 611 of the Pennsylvania Rules of Evidence provides that the scope of cross-examination "should be limited to the subject matter of the direct examination and matters affecting credibility; however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Pa.R.Evid. 611(b). Our Supreme Court has further clarified that standard, holding that "cross-examination in criminal cases may extend beyond the subjects of direct testimony and 'includes the right to examine a witness on any facts tending to refute inferences or deductions arising from matters testified to on direct-examination'.... However, the scope of cross-examination is within the sound discretion of the trial judge and, absent an abuse of that discretion, an appellate court will not disturb the trial judge's rulings." *Commonwealth v. Pagan*, 950 A.2d 270, 285 (Pa. 2008). See also *Commonwealth v. Begley*, 780 A.2d 605, 627 (Pa. 2001).

As is clear from the entire portion of the record reproduced above, Mr. Borkowski's cross-examination was merely an attempt to test the Defendant's direct-examination testimony that he was immediately remorseful for shooting Mr. Dixon. Given the Defendant's testimony, the timing of his first apology to Mr. Dixon's family is both a relevant and appropriate topic for cross-examination.

Further examination of the portion of the record at issue reveals that this Court properly ruled on Mr. Hudak's

numerous objections. After initially allowing Mr. Borkowski to lay a foundation regarding as to whether the Defendant knew who Valerie Dixon was, this Court properly overruled Mr. Hudak's attempts to thwart the laying of that foundation. When Mr. Borkowski finally "struck out" and was unable to lay a foundation regarding Mr. Dixon's mother, he appropriately moved on to the Defendant's familiarity with Mr. Dixon's father. This Court's rulings were appropriate and well within its discretion.

The Defendant's argument also fails to take into account the requirement of prejudice. Not only did the Defendant admit shooting Mr. Dixon four (4) times, but several other individuals witnessed the shooting and testified that the Defendant initiated the confrontation. (See Trial Transcript, pp. 167 and 172-175). Under the circumstances, there is simply no basis for the Defendant's contention that had this Court ruled differently on Mr. Hudak's objections or even shut down Mr. Borkowski's line of questioning completely, he would have been acquitted. Because the Defendant has failed to demonstrate that the result would have been different, he has failed to establish the prejudice necessary to sustain a claim for the ineffective assistance of counsel.

Inasmuch as this Court's rulings on Mr. Borkowski's cross-examination would not have given rise to an acquittal or appellate relief, appellate counsel was not ineffective for failing to raise the issue and, likewise, this Court did not err in denying collateral relief. The Defendant's claim is meritless.

Accordingly, for the above reasons of fact and law, this Court's Order of July 1, 2008 must be affirmed.

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

Dated: January 2, 2009

¹ 18 Pa.C.S.A. §2501(a)

² Reinstatement granted due to trial counsel, Joe Hudak, Esquire's, failure to inquire as to the Defendant's wishes regarding an appeal;

³ Reinstatement granted because the Superior Court failed to notify the Defendant or his counsel of their January 20, 2004 decision.

⁴ Neither this Court nor the Clerk of Courts have any record of receiving said pro se PCRA Petition. However, the Defendant has produced notices of mailing and cash slip deduction forms sufficient to satisfy this Court of its mailing, regardless of the United States Postal Service's (mis)handling of it.

Commonwealth of Pennsylvania v. Whitney Sumpter

Search and Seizure Incident to Motor Vehicle Stop

1. When a motor vehicle was lawfully stopped and a gun was in plain view, its seizure was lawful and a Motion to Suppress was properly denied.

2. A front seat passenger in a car is considered to be in constructive possession of a gun found under a front passenger seat even though she was not the owner or renter of the vehicle.

3. Evidence presented established that the gun was in

Defendant's immediate area of control, and she was aware of its presence.

(Jeffrey A. Ramaley)

Francis Dacey Wymard for the Commonwealth.
Art Ettinger for Defendant.

No. CC 200717389. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., January 2, 2009—The Defendant has appealed from the judgment of sentence entered on September 16, 2008. A review of the record reveals that the Defendant has failed to raise any meritorious issues and, therefore, the judgment of sentence must be affirmed.

The Defendant was charged with Altering or Obliterating a Mark of Identification,¹ Firearms Not to be Carried Without a License² and Possession of a Controlled Substance,³ which was later amended to Possession of a Small Amount.⁴ The Defendant's Motion to Suppress was denied following a hearing on September 16, 2008. She proceeded immediately to a stipulated non-jury trial, was found guilty of all charges and was sentenced to a term of probation of two (2) years. This appeal followed.

The record in this case reflects that on September 7, 2007, Police Officer Craig Lear, while on patrol in the East Hills section of the City of Pittsburgh, ran the license plate of a vehicle and determined that it was uninsured and that its registration had lapsed. He initiated a traffic stop, and the Defendant was found to be in the front passenger seat. Upon determining that neither the driver nor the Defendant had a valid drivers' license, he asked them both to exit the vehicle. At that point, without any outside light source and without touching or moving the seat or any part of the car, he observed the handle of a gun protruding from under the front passenger seat. The Defendant was arrested, and a search incident to the arrest revealed a package of marijuana in her purse.

Initially, the Defendant argues that this Court erred in denying her Motion to Suppress. A careful review of the record reveals that this issue is meritless.

"The standard and scope of review for a challenge to the denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. When reviewing rulings of a suppression court, [the appellate court] must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports findings of the suppression court, [the appellate court is] bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error." *Commonwealth v. Graham*, 949 A.2d 939, 941-42 (Pa.Super. 2008).

Section 6308 of the Vehicle Code authorizes a police officer to stop a vehicle upon the officer's reasonable suspicion of a violation of any provision of the Vehicle Code. 75 Pa.C.S.A. §6308(a). Having determined that the vehicle in question was uninsured and out of registration, Officer Lear was authorized to stop the vehicle and he properly did so. Notwithstanding any statements made by the Defendant as to the existence or location of the gun, it was visibly protruding from underneath the passenger seat and, therefore, was subject to seizure under the "plain view doctrine." "The plain view doctrine permits the warrantless seizure of an object in plain view when (1) an officer views the object from a lawful vantage point; (2) it is immediately apparent to him that the object is incriminating; and (3) the officer has a lawful right of access to the object." *Commonwealth v. Collins*,

950 A.2d 1041, 1045, FN4 (Pa.Super. 2008). Because the vehicle was lawfully stopped and the gun was in plain view, its seizure was lawful and the Defendant's Motion to Suppress was properly denied. This claim must fail.

Next, the Defendant raises two (2) claims as to the sufficiency of the evidence to support the convictions of Altered or Obliterated Mark of Identification and Firearms Not to be Carried Without a License. Both claims of error challenge the requirement of possession, but careful review of the relevant law renders both claims meritless.

When "evaluating a challenge to the sufficiency of the evidence, [the appellate court] must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt." *Commonwealth v. Lee*, 956 A.2d 1024, 1027 (Pa.Super. 2008).

With regard to the first claim regarding Altered or Obliterated Mark of Identification, Section 6117 of the Crimes Code states in relevant part:

(a) *Offense defined.* – No person shall change, alter, remove or obliterate the manufacturer's number to the frame or receiver of any firearm...

(b) *Presumption – Possession of any firearm upon which any such mark shall have been changed, altered, removed or obliterated shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same.*

18 Pa.C.S.A. §6117.

As to the firearms possession charge, section 6016 of the Crimes Code states:

(a) *Offense defined* – ...Any person who carries a firearm in any vehicle or any person who carries a firearm concealed 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.

18 Pa.C.S.A. §6106(a). There does not seem to be any dispute that the serial number of the gun in question was scratched off or that the Defendant was not licensed to carry a gun. Thus, the question becomes whether the Defendant "possessed" the gun which was located underneath her car seat. The answer is a resounding "yes."

Pennsylvania law is clear that "possession can be found by proving actual possession [or] constructive possession.... Constructive possession is found where the individual does not have actual possession of the illegal item but has conscious dominion over it.... In order to prove 'conscious dominion,' the commonwealth must present evidence to show that the defendant had both the power to control the firearm and the intent to exercise such control.... These elements can be inferred from the totality of the circumstances." *Commonwealth v. Heidler*, 741 A.2d 213, 216 (Pa.Super. 1999). Our case law is replete with findings of constructive possession over items located on the floor of vehicles [*Commonwealth v. Santiesteban*, 552 A.2d 1072 (Pa.Super. 1988)], in the backseat of vehicles [*Commonwealth v. Thompson*, 779 A.2d 1195 (Pa.Super. 2001)] and even in different rooms of a defendant's residence [*Commonwealth v. Petteway*, 847 A.2d 713 (Pa.Super. 2005)].

With specific reference to this case, our Superior Court has also held that a passenger in a car is considered to be in constructive possession of drugs found under his seat, even though he was not the owner or renter of the vehicle.

Commonwealth v. Cruz-Ortega, 539 A.2d 849, 851 (Pa.Super. 1988). Further, our Superior Court has held that knowledge of the presence of a controlled substance is a sufficient demonstration of intent to control for purposes of constructive possession. *Commonwealth v. Miley*, 460 A.2d 778, 784 (Pa.Super. 1983). Although both *Cruz-Ortega* and *Miley* concerned the presence and constructive possession of drugs, there is no difference in the analysis with regard to the gun in the instant case.

The evidence in the present case demonstrates that the gun was both in the Defendant's immediate area of control and that she was aware of its presence. Thus, this Court was well within its discretion in inferring that the Defendant had conscious dominion over the gun, and thus, constructive possession of it. As such, the statutory element of possession for both charges in question is satisfied and the Defendant's sufficiency claims must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on September 16, 2008 must be affirmed.

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

Dated: January 2, 2009

¹ 18 Pa.C.S.A. §6117(a)

² 18 Pa.C.S.A. §6106(a)

³ 35 P.S. §780-113(a)(16)

⁴ 35 P.S. §780-113(a)(31)

CAPSULE SUMMARY

Sharon Ruth Pietrone v. Gregory Paul Pietrone

Equitable Distribution—Discovery Sanctions

1. The parties were married in 1998; a divorce action was filed in 2006; and a trial regarding equitable distribution was held in 2008. Prior to trial, the parties engaged in discovery, with the husband being ordered to answer certain discovery requests propounded by the wife; however, the husband failed to comply and was precluded from offering evidence, including testimony, on issues to which he failed to respond.

2. The wife presented credible opinion testimony as to the value of furniture and life insurance benefits, about which the husband was precluded from presenting testimony.

3. The husband, who had remained in the marital residence, was responsible for the mortgage as he received the enjoyment of the premises and shared in the benefit of the increased equity.

4. Counsel fees were awarded to the wife as the husband had behaved in a dilatory, obdurate and vexatious manner. He had been uncooperative with discovery and tried to introduce evidence of fault divorce which was excluded by the granting of a motion *in limine*. The husband had filed multiple, frivolous appeals and motions. The court found that if a case is ripe for the granting of a no-fault divorce, it would not entertain a request for a fault divorce.

(Christine Gale)

Robert L. Garber for Plaintiff/Wife.

Gregory Pietrone, Pro Se.

No. FD 05-4230-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, J., November 21, 2008.

JURY VERDICTS

Teena M. Allie v. Sandra Smith

Court: Common Pleas
 Case Number: GD 07-007757
 Jury Verdict: For Defendant
 Date of Verdict: 9/4/08
 Judge: Della Vecchia
 Pltf's Atty: James B. Cole
 Def's Atty: Charles A. Buechel, Jr.
 Type of Case: Motor Vehicle—Rear End Collision
 Experts: Plaintiff(s): Ghassan Bajjani, M.D.; Richard B. Kasdan, M.D.; Amitesh Prasad, M.D.; Neil Klitsch, M.D.; Marion Hughes, M.D.
 Defendant(s): Frank Vertosick, M.D.

Remarks: Plaintiff alleged she suffered injuries to her cervical spine and an aggravation of her pre-existing lumbar spine condition when Defendant rear-ended her at a merge point. Plaintiff underwent a course of physical therapy and multiple diagnostic exams due to a disc herniation in the cervical spine and underwent a lumbar spine laminectomy after the within collision. Defendant contended the minor-impact collision could not have caused the injuries alleged by Plaintiff and maintained that the Plaintiff's complaints were the result of pre-existing conditions. The jury found in favor of Defendant.

Elizabeth Sexton and Thomas J. Sexton, her husband v. J.C. Schultz Interiors, Inc., t/d/b/a J.C. Schultz Co. and Oxford Development Corp., t/d/b/a Oxford Realty Management

Court: Common Pleas
 Case Number: GD 03-020652
 Jury Verdict: For Defendants
 Date of Verdict: 5/13/08
 Judge: O'Brien
 Pltf's Atty: Fred G. Rabner
 Def's Atty: Mark J. Gesk; Jonathon M. Gesk;
 Eugene A. Giotto
 Type of Case: Negligence
 Experts: Plaintiff(s): Glenn A. Buterbaugh, M.D.; Robert Love Baker, II, D.O.; David J. Bizzak, Ph.D., P.E.; Thomas D. Kramer, M.D.
 Defendant(s): Jeffrey N. Kann, M.D.; Kai J. Baumann, Ph.D., P.E.

Remarks: Plaintiff Elizabeth Sexton sustained injuries to her neck, shoulder, low back and knee while in the course of employment, when a metal shelving unit and its contents fell on her. Plaintiff alleged that the installer of the shelving unit, Defendant J.C. Schultz, failed to install the unit properly in that it was not secured to the wall or floor. Plaintiff alleged that Defendant Oxford Development pursuant to a Property Management Agreement owed a duty of care to Plaintiff, that Defendant knew or should have known of the instability of the shelving, and that Defendant failed to inspect or warn of the danger. Defendant Schultz contended the shelving units were installed properly and according to unit specifications and the specific directive of Plaintiff's employer was not to bolt the shelving units down. Defendant Oxford contended that they were not contracted or otherwise responsible for the installation of the shelving units, and that they owed no duty of care to Plaintiff. The jury found Defendants were not negligent.

Justine M. Bajek v. Steven J. Eliou

Court: Common Pleas
 Case Number: GD 06-029310
 Jury Verdict: For Defendant
 Date of Verdict: 6/3/08
 Judge: O'Brien
 Pltf's Atty: John R. Orie, Jr.
 Def's Atty: Erin M. Braun
 Type of Case: Motor Vehicle—Pedestrian
 Experts: Plaintiff(s): Larry M. Jones, M.D.
 Defendant(s): Richard B. Kasdan;
 Jon B. Tucker, M.D.

Remarks: Plaintiff alleged she suffered numerous injuries when she was struck by Defendant's car while crossing the street. Her injuries included a cerebral concussion, rib fractures, pneumothorax, fractures of the fibula, clavicle and right tibial plateau, and a laceration resulting in permanent scarring to the back of her knee. Defendant contended Plaintiff was standing in the middle of the road, not at an intersection or cross-walk, when he encountered her and he was unable to stop his vehicle. Defendant alleged Plaintiff had a number of pre-existing conditions which could explain any continuing symptoms and that Plaintiff's cheerleading activities after the accident either exacerbated her pre-existing knee condition or caused a new injury to her knee. The jury found Defendant was negligent and that his negligence was a factual cause of harm to Plaintiff but assessed Plaintiff's comparative negligence to be 80%.

Constance Jones and Terry Lee Jones v. Robert Levin, Administrator d.b.n.c.t.a. of the Estate of Howard Phillip Levin, also known as Howard Levin

Court: Common Pleas
 Case Number: GD 04-022982
 Jury Verdict: For Defendant
 Date of Verdict: 9/7/08
 Judge: Friedman
 Pltf's Atty: Christine Zaremski-Young; Richard M. Rosenthal
 Def's Atty: Michael E. Lang
 Type of Case: Slip and Fall
 Experts: Plaintiff(s): Russell Gilchrist, D.O.; Mark Rodosky, M.D.; Robert Liss, M.D.
 Defendant(s): None

Remarks: Plaintiff-wife, a sales clerk employed by Sam Levin, Inc., slipped and fell on ice in the parking lot of the Monroeville Levin Furniture Store. The parking lot was owned by Defendant Howard Levin. Plaintiffs alleged that Defendant negligently maintained the parking lot, causing Plaintiff-wife to fall and sustain numerous injuries including partial thickness rotator cuff tear requiring arthroscopic debridement; acromioclavicular arthrosis requiring arthroscopic subacromial decompression; and meniscal tear in the right knee. Plaintiff-wife's damages included medical bills totaling \$74,810.13 and wage loss of \$44,689.25. Plaintiff-husband alleged he suffered a loss of consortium. Defendant contended the property was leased by Sam Levin, Inc. and that under the terms of the lease Sam Levin, Inc. had maintenance responsibility for the parking lot. The jury found Defendant was not negligent.

**Cynthia McGuinness and
Matthew McGuinness, her husband v.
The Mercy Hospital of Pittsburgh;
Pittsburgh Neurosurgery Associates, Ltd.;
Eric M. Altschuler, M.D.; Arthur H. Palmer, M.D.**

Court: Common Pleas
Case Number: GD 04-026955
Jury Verdict: For Defendants
Date of Verdict: 9/12/08
Judge: Luty
Pltf's Atty: Victor H. Pribanic; Charles A. Frankovic
Def's Atty: Anita B. Folino (East Lansing, MI); Terry
J. Yandrich; Richard J. Federowicz;
Bernard R. Rizza; Alan S. Baum
Type of Case: Medical Malpractice
Experts: Plaintiff(s): Albert J. Camma, M.D.
(Zanesville, OH)(neurosurgery); Richard
Paul Bonfiglio, M.D.; David Zak, M.Ed.,
CLCP (Rehab. Consultant); Paul J. Macchi,
M.D. (Sarasota, FL)(neuroradiology);
Bertrand Y. Tuan, M.D. (San Francisco,
CA); Jeroen Walstra, M.A., C.E.A. (earn-
ings analyst); Charles Cohen, Ph.D. (psy-
chologist/vocational expert); David M.
Matta, C.A.P.S. (Aging in Place Specialist)
Defendant(s): Richard Alan Close, M.D.
(Limekiln, PA)(Neurosurgery); Douglas S.
King, CPA; Patricia Costantini, RN, CLCP;
Leonard F. Hirsh, M.D. (Upland, PA)
(neurosurgery); Donald M. Whiting, M.D.;
William C. Welch, M.D.; Charles A.
Jungreis, M.D. (Philadelphia,
PA)(Radiology)

Remarks: Plaintiff-wife underwent thoracic spine surgery by Defendant doctors. She emerged from the surgery paralyzed from the waist down. Despite extensive rehabilitation, she has not been able to regain substantial use of her lower extremities. Plaintiffs alleged Defendant surgeons deviated from the standard of care by using a transpedicular approach, which requires extensive spinal cord manipulation, rather than removing the pedicles of the vertebrae. Plaintiffs' damages included lost earning of over \$700,000.00 and future medicals and other costs between \$2.7 million and \$6.6 million dollars. Defendant doctor I contended Defendants acted within the standard of care and the paralysis was not due to a lapse in neurosurgical care or technique. Defendant doctor II maintained that the transpedicular approach was appropriate, that paraplegia was a known risk of the procedure and that Plaintiff-wife had several risk factors that could have contributed to the outcome. Defendant hospital contended there was no ostensible agency and no negligence by the doctors. The jury found Defendants were not negligent.

**Donna L. Aiken and Thomas W. Aiken, III v.
Eric Robert Hasis**

Court: Common Pleas
Case Number: GD 05-027019
Jury Verdict: For Plaintiff Donna L. Aiken in the amount
of \$5,000.00
Date of Verdict: 9/10/08
Judge: O'Reilly
Pltf's Atty: Stephen M. Elek; A. Blane Volovich
Def's Atty: Robert J. Fisher, Jr.
Type of Case: Motor Vehicle—Rear End Collision;
Loss of Consortium
Experts: Plaintiff(s): James D. Kang, M.D.
Defendant(s): David S. Zorub, M.D.

Remarks: Plaintiff alleged Defendant rear-ended her while she was stopped at a red light. The impact allegedly caused neck and back pain, and persistent numbness, tingling and weakness in the right arm. Defendant alleged Plaintiff's vehicle drifted backward and barely tapped the front bumper of Defendant's vehicle. Defendant's medical expert claimed Plaintiff suffered only a musculoligamentous strain in the accident and that her on-going symptoms were degenerative in nature. The jury found Defendant was negligent and awarded Plaintiff-wife \$5,000.00 and Plaintiff-husband zero on his loss of consortium claim.