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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Eliot Burney

Motion to Suppress—Inventory Search after Traffic Stop

1. Requirements for a valid inventory search were met through the testimony of the officer and written procedures of the Police Department. After a valid basis to stop the Defendant's vehicle, Defendant could not be issued a citation and allowed to leave the scene when he was found to only have a learner's permit. The vehicle was stopped on the lot of a private business and owners were not present to determine if there was consent to leave the vehicle thereby initiating a towing situation and an inventory search prior to the tow.

2. The Defendant asked and received his jacket from the car with no indication that it was searched improperly. Opening the glove box to determine if it had any valuables was a reasonable part of the inventory search when Defendant indicated there were valuables in the car. When the marijuana was in plain view when the glove box was opened, the Defendant fled.

(I. M. Lundberg)

Michael Streily for Plaintiff.

Mark D. Lancaster for Defendant.

No. CC200707459. 794 WDA 2009. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Todd, J., February 2, 2010—This is an Appeal by Defendant, Eliot Burney, who was found guilty on April 3, 2009 after a Non-Jury Trial of Persons Not to Possess or Own a Firearm in violation of 18 Pa. C.S.A. §6105(c)(8); Carrying a Firearm Without a License in violation of 18 Pa. C.S.A. §6106(a)(1); and Possession of a Controlled Substance in violation of 35 Pa. C.S.A. §780-113(a)(16). Defendant was found not guilty of Receiving Stolen Property in violation of 18 Pa. C.S.A. §3925(a). Defendant was sentenced to 48 to 96 months on incarceration and 1 year of probation. Prior to trial Defendant filed a Motion to Suppress Evidence obtained as a result of an inventory search of his vehicle that was impounded after being stopped for a motor vehicle violation. A hearing on the Motion to Suppress was held on January 22, 2009. An Order was entered denying the Motion to Suppress on January 26, 2009.

After his conviction Defendant filed a timely Notice of Appeal on May 1, 2009 and an Order was entered on May 26, 2009 directing Defendant to file his Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. §1925(b) within twenty-one (21) days of receipt of all court transcripts. The Defendant filed a Concise Statement of Matters Complained on Appeal on July 17, 2009 and set forth the following:

“1. The Trial Court erred in its failure to grant defendant's Omnibus Pretrial Motion, specifically, the Motion to Suppress, as the police conducted an illegal search and seizure of Defendant's legally parked vehicle as it occurred in the absence of: (1) consent; (2) a warrant; (3) exigent circumstances; (4) any reason to believe the car could not be temporarily parked on the private property; and (5) borough policy.”

BACKGROUND

This matter arises out of the arrest of Defendant after a traffic stop during which his vehicle was towed and subjected to an inventory search. During the inventory search an unlicensed firearm and marijuana were found in Defendant's vehicle. Defendant filed a Motion to Suppress in which he alleged that the search of his vehicle was illegal as there was no basis for an inventory search since it was parked on private property after he was stopped and, therefore, did not need to be towed. Further, as the vehicle did not need to be towed, any inventory search was therefore illegal. Defendant also alleged that he did not give consent to the search and that there were no exigent circumstances to justify a warrantless search of the vehicle.

At the hearing on the Motion to Suppress, the Commonwealth presented the testimony of Officer Shaun Wiesenbach of the McKees Rocks Police Department who testified that he stopped Defendant on January 7, 2008 at approximately 12:40 a.m. At that time, Officer Wiesenbach was on patrol when he stopped the vehicle Defendant was operating due to excessively dark tinted windows on the vehicle in violation of 75 Pa. C.S.A. §4524(a). (T., p. 4) When Defendant was stopped he pulled his vehicle into the parking lot of an automated self-service car wash. The car wash was described as a 24-hour coin operated car wash with car wash stalls and an area for vacuum cleaners for the cars. (T., p. 5) When Officer Wiesenbach approached the vehicle he recognized Defendant from prior encounters with him and obtained his license and information for the vehicle. Defendant did not have a driver's license, only a valid learner's permit. (T., p. 6) After Officer Wiesenbach confirmed that Defendant did not have a driver's license and, therefore, could not drive the vehicle from the car wash, Officer Wiesenbach decided to cite Defendant for driving without a license and called for a tow truck to tow Defendant's vehicle. (T., p. 7) Defendant was then asked to step from the vehicle at which time he was patted down for weapons and was informed that his vehicle was going to be towed. Pursuant to a written policy established by the McKees Rocks Police Department for conducting inventory searches, Officer Wiesenbach then asked Defendant if there was anything of value in the vehicle that he should know about so that he could list it in the inventory. Defendant stated that there was. (T., p. 7) While Officer Wiesenbach was conducting the inventory of the vehicle, Defendant requested his jacket from the backseat of the vehicle, which was given to him. (T., p. 8) Officer Wiesenbach continued the inventory and opened the glove compartment and saw, in plain view, a medium sized plastic bag containing what appeared to be marijuana. (T., p. 9) As he did so, Defendant stated, “Oh, shit” and started running. Officer Wiesenbach attempted to catch Defendant but eventually lost sight of him. (T., p. 9) Attempts were made to apprehend Defendant that evening, but he could not be found. During the continued inventory search of the vehicle, a revolver was located underneath the bag of marijuana in the glove box. A subsequent records check concerning the firearm indicated that it was stolen. Defendant was later arrested and charged as set forth above.

The Commonwealth introduced into evidence the written standard procedure of the McKees Rocks Borough Police Department for vehicle inventory searches. This procedure provides in pertinent part as follows:

“Any and all vehicles which are seized following a chase, recovered after having been stolen, located abandoned, towed from an illegal parking area or legally seized by this Department for any reason will be completely inventoried. A reliable witness, generally another officer, should be present. The purpose of the inventory is to preclude liability of the Department of to the Borough of McKees Rocks where the owner of (sic) individual legally empowered to recover the vehicle alleges that there was something of value taken from the vehicle. This would include, tape decks, stereos, money, collectibles, spare tire or any of valuables. If deemed appropriate, photographs should be taken prior to and during the inventory.” (Emphasis added)

Based on the testimony of Officer Wiesenbach and his compliance with the written policy for inventory searches, it was concluded that a valid inventory search had occurred and Defendant's Motion to Suppress was denied.

DISCUSSION

In *Commonwealth v. West*, 937 A.2d 516 (Pa.Super. 2007), the Superior Court discussed at length the law related to the warrantless search and seizure of an automobile. The Court noted that as a general rule searches and seizures without a warrant are unreasonable for constitutional purposes. In discussing the requirements for a valid inventory search, the Court stated:

"One exception to the warrant requirement is the inventory search. *Commonwealth v. Hennigan*, 753 A.2d 245, 254 (Pa.Super. 2000) A warrantless inventory search is permitted where: (1) police have legally impounded the vehicle; and (2) they conduct the search in accordance with a reasonable, standard policy of routinely securing and inventorying the contents of the impounded vehicle. *Id.* at 255. The purpose of this type of search is not to find evidence of crime. *Id.* at 254. Rather, it is intended: (1) to protect the owner's property while in official custody; (2) to protect the police against claims of lost or stolen property; (3) to protect the police from danger; and/or (4) to help the police in determining whether the vehicle was stolen and abandoned. *Id.* at 255.

In *Hennigan*, this Court explained that a court considering the validity of an inventory search must first decide if police have lawful custody thereof and, if they do, the court must then consider, *inter alia*, the facts and circumstances relating to the scope of the search, the procedure actually utilized during the search and whether any items were in plain view. *Id.* at 256, 257. Moreover, the Commonwealth has the burden to prove the legitimacy of the search. *Id.* at 255." *Commonwealth v. West*, 937 A.2d at 526.

In *Commonwealth v. Chambers*, 920 A.2d 892 (Pa.Super. 2007) the Court, citing *Commonwealth v. Henley*, 909 A.2d 352, 359 (Pa.Super. 2006)(en banc) stated:

"The authority of the police to impound vehicles derives from the police's reasonable community care-taking functions. Such functions include removing disabled or damaged vehicles from the highway, impounding automobiles which violate parking ordinances...and protecting the community's safety." *Commonwealth v. Chambers*, 920 A.2d at 895.

In *Commonwealth v. Henley*, 909 A.2d 352 (Pa.Super. 2006)(en banc) the Court, in finding that a valid inventory search had occurred, indicated that police may impound and tow an unregistered, uninsured vehicle, pursuant to their community care-taking function. The Court stated:

"Judges are not in a position to second-guess a police officer's decision to tow a vehicle which, in the officer's opinion might create a traffic hazard. To do so would seriously handicap legitimate traffic-control activities." *Commonwealth v. Henley*, 909 A.2d at 364.

In *Commonwealth v. Germann*, 621 A.2d 589 (Pa.Super. 1992) the Superior Court noted that, "It is well established that a valid inventory search is not designed to uncover evidence of a crime." *Id.*, citing *South Dakota v. Opperman*, 96 S. Ct. 3092 (1976), the Superior Court stated:

"In *Opperman*, the Supreme Court established that an inventory search is only excepted from the warrant requirement or probable cause where it is motivated by a desire to safeguard the contents of the vehicle and not by a design to uncover incriminating evidence." *Id.*

In the present case it is clear that the Commonwealth established through the testimony of Officer Wiesenbach and the evidence of the written procedures of the McKees Rocks Police Department that Officer Wiesenbach conducted a valid vehicle inventory search of Defendant's vehicle. Initially there is no question that Officer Wiesenbach had a valid basis to stop Defendant's vehicle. 75 Pa. C.S.A. §4524(e) states that:

"No person shall drive any motor vehicle with any sunscreen device or other material that does not permit a person to see or view the inside of the vehicle through a windshield, side wing or side window of the vehicle."

Consequently, the stop of Defendant's vehicle was valid. In addition, it is clear that pursuant to 75 Pa. C.S.A. §§1501(a) and 1505(b) that Defendant was not permitted to be driving the vehicle when he was stopped and he was not permitted to drive the vehicle from the scene. 75 Pa. C.S.A. §1505(b) provides:

"A learner's permit entitles the person for whom it was issued to drive vehicles and a combination of vehicles of the class or classes specified, but only while the holder of the learner's permit is accompanied by and under the immediate supervision of a person who is at least 21 years of age, is licensed to drive vehicles of the class then being driven and is actually occupying the seat beside the holder of the learner's permit."

Therefore, this was not a case where a violation had occurred and the driver could be issued a citation and then allowed to leave the scene as in many other motor vehicle code violation cases. Also, the vehicle could not remain where it was parked as it was clearly on private property and to leave it parked on private property would also be a violation of the vehicle code. 75 Pa. C.S.A. §3353(b) provides that:

"No person shall park or leave unattended a vehicle on private property without the consent of the owner or other person in control or possession of the property except in the case of emergency or disablement of the vehicle, in which case the operator shall arrange for the removal of the vehicle as soon as possible."

Defendant does not dispute and, in fact, argues that the area where his vehicle was stopped was private property and, therefore, there was no need to tow it. The vehicle was, however, stopped in the lot of a private business that required vehicles to move about the lot in order to access the carwash stalls and vacuum area. The evidence also established that this was not a private business where the owners of the business were present on a daily, or even regular basis, which would allow either Defendant or Officer Wiesenbach to determine if the owners consented to the vehicle being left there. There was also no basis to find that the owners of the property consented to the vehicle being left on the lot. There was no evidence that there was a safe or appropriate place or area to which the vehicle could be moved without being towed. In addition, there is no basis to believe that it would be appropriate for

Officer Wiesenbach to move the vehicle, thus exposing himself or the Borough to the potential liability of moving the vehicle nor was it appropriate to permit Defendant access to the vehicle, if only to move it a short distance. To allow Defendant to drive the vehicle, with the possibility of his attempting to flee the scene and a resulting vehicle chase, would be potentially dangerous. There was no evidence that anyone else on behalf of Defendant was readily available to move the car from the carwash. Finally, it would certainly be reasonable for Officer Wiesenbach to believe that leaving a vehicle unattended in a carwash area late at night, even if only for a few hours, could cause it to be vandalized, broken into or stolen. Therefore, there was sufficient evidence to establish that towing the vehicle was a valid exercise of the police community care-taking function under the circumstances presented to Officer Wiesenbach.

Once a determination is made that it was appropriate to tow the vehicle, the second inquiry is whether or not the inventory search was conducted pursuant to a standard police policy or procedure. “An inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation.” *Commonwealth v. Henley*, 909 A.2d 352, 359 (Pa.Super. 2006) The standard procedure offered by the Commonwealth specifically provided that vehicles being towed from an illegal parking area were to be completely inventoried. In addition, there is no evidence that Officer Wiesenbach extended the search beyond that necessary to determine if there were valuables in the vehicle. Defendant told Officer Wiesenbach that, in fact, the vehicle did contain some valuables. Defendant asked for and received his jacket from the car with no indication that it was searched improperly. Opening the glove box to determine if it had any valuables was a reasonable part of the inventory search. The bag of marijuana was in plain view. Its seizure does not indicate that this was a search for incriminating evidence instead of a valid inventory search. Accordingly the Commonwealth met its burden of establishing that Officer Wiesenbach conducted a valid inventory search and Defendant’s Motion to Suppress was appropriately denied.

BY THE COURT:
/s/Todd, J.

Commonwealth of Pennsylvania v. Eric Clark

Search Warrant—Conspiracy Conviction—Sentencing Guidelines

1. Based on the totality of the circumstances, the probable cause affidavit provided information sufficient to conclude that a fair probability existed that contraband or evidence of a crime would be found in the apartment.
2. Exceptions to the “Knock and Announce” rule were found with the open apartment door by peril to the officers and observance of a monitor to announce arrival to the apartment.
3. Combination of direct and circumstantial evidence supported a conspiracy conviction that was not negated when the Commonwealth *nolle prossed* the charge of criminal conspiracy against a named and only co-conspirator after the close of the evidence against this appellant but prior to jury deliberations and a verdict.
4. The sentence imposed by Court was not an abuse of discretion under the underlying circumstances of the case and the Court’s opportunity to review pre-sentence report, sentence guidelines, and observe the defendant.

(I. M. Lundberg)

Brandon P. Ging for Appellant.

Michael W. Streily for Appellee.

No. CC200604004. 1020 WDA 2009. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., April 26, 2010—On December 13, 2005 Appellant was charged with one (1) count each of: Possession with Intent to Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30); Criminal Conspiracy (Intent to Deliver), 18 Pa.C.S. § 903(a); Possession of a Controlled Substance, Second or Subsequent Offense, 35 P.S. § 780-113(a)(16); Possession of a Small Amount of Marijuana, 35 P.S. § 780-113(a)(31); and Possession of Drug Paraphernalia, 35 P.S. § 780-113(a)(32). On February 11-12, 2008 a hearing on Appellant’s suppression motion was held before the Honorable Kevin G. Sasinoski. Judge Sasinoski denied that motion on May 15, 2008.¹ The case was then transferred to this Court for trial.

Appellant proceeded to a jury trial on October 17-20, . On October 20, 2008 Appellant was convicted of one (1) count of Criminal Conspiracy, 18 Pa.C.S. § 903(a) (Intent to Deliver), and acquitted of all other charges. On December 1, 2008 Appellant filed a post-trial motion requesting relief in the form of an arrest of judgment and a judgment of acquittal. On January 26, 2009, this Court denied Appellant’s post-trial motion and imposed a sentence of five (5) to ten (10) years incarceration.

On February 13, 2009 Appellant requested leave to file post-sentence motions, *nunc pro tunc*, seeking modification of his sentence. This Court granted him leave to file the motion on February 24, 2009. Appellant’s post-sentence motion was subsequently denied on May 28, 2009. Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania on June 5, 2009. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

- I. Judge Sasinoski committed an abuse of discretion and/or an error of law in denying the *Omnibus* Pretrial Motion and Amended *Omnibus* Pretrial Motion. The police executed a search warrant that was unsupported by probable cause. The police violated the “knock and announce” rule.
- II. The evidence was insufficient to convict on the charge of Criminal Conspiracy. The Commonwealth failed to prove beyond a reasonable doubt that Mr. Clark: (1) entered an agreement to commit or aid an unlawful act with another person (2) with a shared criminal intent and (3) that an overt act was done in furtherance of the conspiracy.
- III. Judge Borkowski committed an abuse of discretion and/or an error of law in not granting the Motion for Relief in

Accordance with Pa.R.Crim.P. 7[04](B). The evidence was insufficient beyond a reasonable doubt and/or against the weight of the evidence when the Commonwealth *nolle prossed* the charge of Criminal Conspiracy against the named and only co-conspirator, which occurred after the close of evidence in Mr. Clark's case but prior to the jury deliberations and verdict. An arrest of judgment or judgment of acquittal was warranted in the interests of justice.

IV. Judge Borkowski committed an abuse of discretion in sentencing Mr. Clark. The sentence was manifestly excessive, unreasonable, and unjust. The sentence imposed was contrary to the Sentencing Code and the fundamental norms underlying the sentencing process. Judge Borkowski failed to place adequate reasons on the record for his sentencing decision. Judge Borkowski did not consider and apply all of the relevant and necessary factors to ensure that the sentence was consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of Mr. Clark. Instead, Judge Borkowski based the sentence entirely on his indignation as to the facts of the case.

FINDINGS OF FACT

On November 30, 2005, after receiving information from a tip line that drugs were being sold in the courtyard of 2527-2441 Chauncey Drive, City of Pittsburgh Housing Authority Police began an investigation and surveillance of that location. *See* Trial Transcript dated October 17-20, 2008 (hereafter, "T.T.") at pages 50-51; 85. Surveillance of that location from November 30 through December 12, 2005 revealed ongoing drug related activity from 2529 Chauncey Drive, Apartment 211. (T.T. 60; 63.) That surveillance included observations that a light-skinned black female who Detective Michael Hampton identified as a "toutter,"² regularly stood or sat on a bench in the courtyard of 2529 Chauncey Drive. (T.T. 52-53; 61-62.) This woman engaged individuals in the courtyard, had brief conversations with them, and took folded U.S. currency from them. (T.T. 53; 62; 96.) She then walked up to Apartment 211 and knocked on the window, after which, the security door to the apartment building opened, and she went inside Apartment 211. (T.T. 52-53; 61-62.) After being inside the apartment for twenty (20) to ninety (90) seconds, the toutter exited and handed something to the individuals she had engaged in the courtyard. (T.T. 52-54; 61-63.) The toutter engaged in this conduct with known drug users, and did so a minimum of sixteen (16) times on November 30, 2005 alone. (T.T. 61; 63.) On various other occasions during this period of surveillance two other persons (toutters) engaged in the same activity in the courtyard and Apartment 211. (T.T. 55, 63, 95.)

At least three (3) times during the course of this ongoing drug activity Appellant came out of Apartment 211 and stood in the courtyard of 2529 Chauncey Drive. On those occasions Appellant stood in the courtyard and surveyed the area for possible police presence. (T.T. 64; 81-82; 94.)

Following the surveillance of Apartment 211 from November 30 through December 12, 2005, Detective Hampton filed a probable cause affidavit and obtained a search warrant for the apartment. (T.T. 65; 85; 105.) The search warrant was executed on December 13, 2005. (T.T. 88; 115; 130.) When the police approached the apartment building to execute the warrant they saw a surveillance camera in the bathroom window and a second surveillance camera in the living room window of Apartment 211. (T.T. 66.)

When Detective Hampton entered the apartment the first person he encountered was Michael Winston, who was sitting on the couch in the living room facing two monitors. (T.T. 67; 97-98.) These monitors were attached to the cameras placed in the living room and bathroom windows of Apartment 211, and were placed so that the area outside the apartment, including the courtyard and its approach, could be observed. (T.T. 66-67; 71-72.) Additionally, there was an operating police scanner sitting on top of one of the monitors. (T.T. 72.) There was a coffee table in front of the couch where Mr. Winston was sitting, on which there were an open box of sandwich bags, a box of powder-free latex gloves, and a small baggy of marijuana. (T.T. 68-70; 98.) Two sets of keys were also on the living room table. (T.T. 79.) There was no bed, bedroom furniture, or mattress in the bedroom, nor was there any clothing in the closets, food in the kitchen cabinets, or mail in the apartment. (T.T. 72-74; 104.)

Appellant was coming out of the bathroom when Detective Hampton entered the apartment. (T.T. 68; 97; 111.) In the bathroom, there was a footprint on the edge of the bathtub and a pair of pliers sitting on the corner of the sink. (T.T. 73; 131; 140.) In the ceiling above the bathtub where the footprint was located there was an unlocked pulldown access panel with a knob. (T.T. 73-74; 140.) A plastic bag containing crack cocaine and an unlocked black lockbox were retrieved from the space behind the panel. (T.T. 75-76; 101; 140-41.) Two baggies containing crack cocaine and a digital scale with crack cocaine residue on it were found inside the lockbox. (T.T. 76-77; 101; 140-41.)

Crime Lab analysis of the drugs recovered was as follows: one (1) knotted plastic bag holding one knotted plastic bag containing off-white solid, weighing 122.3 grams, positive for cocaine base, a Schedule II controlled substance; one (1) knotted plastic bag holding off-white solid, weighing 51.07 grams net weight, positive for cocaine base; one (1) knotted plastic bag containing off-white solid, weighing 42.07 grams net weight, positive for cocaine base; and one (1) knotted plastic baggy corner holding green-brown vegetable matter, weighing 0.97 grams net weight, positive for marijuana, a Schedule I controlled substance. (T.T. 114-15.)

Cash in the amount of \$640.00 was recovered from Appellant's person during a search of Defendant by Detective Guy Collins. (T.T. 78-79; 131-32; 142.) The cash was in the following denominations: one (1) one-hundred dollar bill; six (6) twenty dollar bills; five (5) ten dollar bills; sixty-seven (67) five dollar bills; and thirty-five (35) one dollar bills. (T.T. 78-79.)

After Appellant was placed under arrest, but prior to being taken out of the apartment, he asked Detective Hampton if he could have the keys to his truck so that he could give them to his girlfriend. (T.T. 79.) Detective Hampton picked up the two sets of keys that were on the living room table and observed that one of the keys appeared to be the type of key issued by the Housing Authority. (T.T. 79-80.) He handed the key ring to Detective Adams, whereupon Detective Adams went to the door of Apartment 211, removed the key from the key ring, and placed the key in the door lock. (T.T. 80.) The key operated the deadbolt lock on the front door of Apartment 211. (T.T. 80-81; 115-16.) The rest of the keys on the key ring were placed in Appellant's pocket, consistent with his request of Detective Hampton. (T.T. 80-81; 120.)

City of Pittsburgh Police Officer Edward Fallert testified as an expert witness for the Commonwealth. (T.T. 146.) Officer Fallert was a 15-year veteran of the Pittsburgh Police Department, seven years of which he was assigned to Narcotics and Vice Section, Impact Squad, and approximately one year of which he worked in the Weed and Seed Division videotaping drug arrests. (T.T. 146.) Officer Fallert opined as follows: (1) someone in possession of 215.44 grams of crack cocaine would not leave it where others not involved with them had access to it because it would be taken and stolen or used; (2) latex gloves like the ones recovered from Apartment 211 are used in drug delivery activity to keep fingerprints off of the larger baggies and scales, and to keep an individual from becoming contaminated with the crack; (3) plastic baggies are used to package narcotics; (4) digital scales are used to weigh crack when it is being sold in grams; (5) the street value of the crack cocaine recovered from Apartment 211 is between \$21,000 and \$40,000; and, (6) the 215.44 grams of crack cocaine recovered from the apartment is consistent with the "intent to

deliver” rather than possession for personal use. (T.T. 153-159.)

DISCUSSION

I.

Appellant initially argues that Judge Sasinoski committed an abuse of discretion and/or an error of law in denying the *Omnibus* Pretrial Motion and Amended *Omnibus* Pretrial Motion. Specifically, he argues that: the police executed a search warrant that was unsupported by probable cause; and, the police, when serving the search warrant, violated the “knock and announce” rule.

Recently, the Supreme Court of Pennsylvania reiterated the standard of review that an appeals court applies when reviewing the denial of a suppression motion as follows:

Our standard of review in addressing a challenge to the denial of suppression motion is limited to determining whether the suppression court’s factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth 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 suppression court’s factual findings are supported by the record, we are bound by these findings and may reverse only if the court’s legal conclusions are erroneous.

Commonwealth v. Curtis Jones, 2010 WL 522825, —A.2d— (Pa. Feb. 16, 2010).

A. Probable Cause for the Search Warrant

Appellant argues that the suppression court erred in denying his motion to suppress certain evidence in the instant case on the ground that the search warrant executed by the police was unsupported by probable cause. This issue is without merit.

Rule 203(B) of the Pennsylvania Rules of Criminal Procedure provides in relevant part: “No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology.” Pa.R.Crim.P. 203(B). *See also*, *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991) (the test of probable cause is the “linch-pin” to determine the appropriateness of issuing a search warrant).

Recently, the Pennsylvania Supreme Court restated this test as follows: “Probable cause exists where the facts and circumstances within the affiant’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted.” *Curtis Jones*, 2010 WL 522825, quoting *Commonwealth v. Thomas*, 292 A.2d 352, 357 (Pa. 1972). In determining whether a search warrant is supported by probable cause the reviewing court looks to the “totality of the circumstances” as set forth in the affidavit of probable cause. *Curtis Jones*, 2010 WL 522825 (citing *Illinois v. Gates*, 462 U.S. 213 (1983) and *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1986)). The “totality of the circumstances” test requires that the authority issuing a search warrant

[s]imply [] make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.... It is the duty of a court reviewing an issuing authority’s probable cause determination to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In so doing, the reviewing court must accord deference to the issuing authority’s probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner.

[...]

[Further,] a reviewing court [is] not to conduct a *de novo* review of the issuing authority’s probable cause determination, but [is] simply to determine whether there is substantial evidence in the record supporting the decision to issue the warrant.

Curtis Jones, 2010 WL 522825, quoting *Commonwealth v. Torres*, 764 A.2d 532, 537-38, 540 (Pa. 2001).

When determining whether probable cause exists to issue a search warrant, the issuing authority is constrained by the facts described within the four corners of the supporting affidavit. *Commonwealth v. Dukeman*, 917 A.2d 338, 341 (Pa.Super. 2007), appeal denied, 594 Pa. 685 (Oct. 11, 2007) (table).

In the instant case, based on the totality of the circumstances, the probable cause affidavit (hereafter, “affidavit”) set forth information sufficient to conclude that a fair probability existed that contraband or evidence of a crime would be found in Apartment 211. The affidavit established that on November 30, 2005 the affiant, Officer Hampton, while investigating numerous complaints of narcotics activity in the courtyard of 2527-2441 Chauncey Drive, observed a continuous pattern of conduct that was consistent with drug trafficking, e.g. sixteen transactions on that day alone. This location was placed under surveillance from December 1 to December 12, 2005. The affidavit indicated that Detectives Madison, Collins, and Adams observed similar drug trafficking activity at that location during the period of surveillance including: (1) either a light-skinned black female or a short black male met with known addicts, took money from them, knocked on the window of Apartment 211, and then entered that apartment; (2) the black female or the black male exited the apartment 20-60 seconds later and placed an object in the hand of the waiting addict; (3) on several occasions Defendant Eric Clark came outside, looked around, then re-entered Apartment 211. (Defendant’s *Omnibus* Pretrial Motion, Attachment A, Probable Cause Affidavit.)³

The affidavit further established that Detective Hampton received information that on December 2, 2005 Detective Curry was informed by a proven confidential informant (C.I.) that E-Dub (Eric Clark) and Terrell Childs, operating in shifts, were selling weed, hard (crack cocaine) and heroin from Apartment 211. This C.I. had given information in the past that led to the arrests of five (5) individuals. The C.I. also informed Detective Curry that Apartment 211 had a camera system that was used to monitor the courtyard of the building.

Consequently, review of the affidavit and applicable Pennsylvania law indicate that the search warrant was properly issued and the trial court did not err in denying Appellant’s motion in this regard. *See Commonwealth v. Cramutola*, 676 A.2d 1214, 1217 (Pa.Super. 1996) (under the totality of the circumstances test a concerned citizen’s tip of drug activity, corroborated by police surveillance and statements by informant established probable cause to search premises); *Commonwealth v. Corleto*, 477 A.2d 863, 866 (Pa.Super. 1984) (informant’s report of criminal activity, combined with police surveillance revealing a pattern of pedestrian drug trafficking, sufficient to establish probable cause). *See also*, *Dukeman*, 917 A.2d at 342 (under the totality of the circumstances standard, probable cause existed for issuance of a search warrant where the reliability of the information provided by a

C.I. was corroborated by independent police surveillance confirming activity consistent with drug trafficking).

B. Knock and Announce Rule

Appellant argues that the suppression court erred in denying his motion to suppress certain evidence in the instant case on the ground that the police, when serving the search warrant, violated the “knock and announce” rule. This issue is without merit.

Rule 207 of the Pennsylvania Rules of Criminal Procedure, which codifies the “knock and announce” rule, provides in relevant part:

(A) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of the officer’s identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require the officer’s immediate forcible entry.

(B) Such officer shall await a response for a reasonable period of time after this announcement of identity, authority, and purpose, unless exigent circumstances require the officer’s immediate forcible entry.

Pa.R.Crim.P. 207.

The Supreme Court of Pennsylvania has recognized the following four exceptions to the requirements of the knock and announce rule:

1. the occupants remain silent after repeated knocking and announcing;
2. the police are virtually certain that the occupants of the premises already know their purpose;
3. the police have reason to believe that an announcement prior to entry would imperil their safety; and
4. the police have reason to believe that evidence is about to be destroyed.

Commonwealth v. Carlton, 701 A.2d 143, 147 (Pa. 1997) (quotations and citations omitted).

As the rule and case law explicitly acknowledge, compliance with the knock and announce rule is not required if exigent circumstances exist. Whether exigent circumstances exist is determined based on the totality of the circumstances. *Commonwealth v. Walker*, 874 A.2d 667, 674 (Pa.Super. 2005) (adopting the reasoning of the Supreme Court of the United States in *United States v. Banks*, 540 U.S. 31, 37 (2003) (stressing the importance of a totality of the circumstances analysis in determining reasonableness of the length of time police must wait after knocking and announcing their intent to execute a search warrant)).

In the instant case, the record establishes that exigent circumstances existed such that the police were not required to strictly comply with the knock and announce rule. Specifically, when the police approached the apartment building to execute the warrant they saw a surveillance camera in the living room window of Apartment 211. (Suppression Hearing Transcript, Feb. 11-12, 2008, at pages 43, 48) (hereafter, “H.T.”)⁴ Furthermore, Detective Douglas Butler, the officer who first approached the door of Apartment 211, testified that he was concerned that someone inside the apartment knew he was at the door. (H.T. 64.) Under this circumstance it was reasonable for the police executing the search warrant to believe that their approach to Apartment 211 was being observed, and thus, the second exception to the knock and announce rule was satisfied. *Carlton*, 701 A.2d at 147. *See also: Commonwealth v. Kane*, 940 A.2d 483, 489 (Pa.Super. 2007) (police must only possess “a reasonable suspicion” that knock and announce would be futile); *Commonwealth v. Davis*, 480 A.2d 1035, 1042 (Pa.Super. 1984) (the police need not knock and announce where they are reasonably certain the occupants of the premises are aware of their presence and purpose).

Furthermore, the police had reason to believe that announcement prior to entry would imperil their safety. Specifically, Detective Butler testified that the apartment door was closed when he approached it, but as he knocked on the door it opened itself because it was not locked. (H.T. 55 & 59.) When Detective Butler noticed the door was open he treated it as an “opened door threat” and went straight in. (H.T. 63.) He was concerned that someone knew he was at the door and that officer safety was compromised. (H.T. 64, 66.) Contributing to Detective Butler’s safety concerns was his observation that a surveillance camera was positioned in the living room window of Apartment 211 to monitor the outside approach to the apartment. These circumstances satisfy the third exception to the knock and announce rule. *Kane*, 940 A.2d at 489 (police must only possess “a reasonable suspicion” that knock and announce would present risk of physical violence); *Dean*, 693 A.2d at 1363 (officers who had specific and articulable reason to believe that they were in peril justified in departing from the knock and announce rule).

Consequently, Appellant’s arguments as to lack of probable cause in the search warrant and alleged violation of the “knock and announce rule” are without merit.

II.

Appellant next argues that the evidence presented in the instant case was insufficient to support a conviction for Criminal Conspiracy (Intent to Deliver). This issue is meritless.

The standard of review for a challenge to the sufficiency of the evidence is to consider the evidence in the light most favorable to the Commonwealth, as verdict winner, including all reasonable inferences drawn from the evidence. *Commonwealth v. Santiago*, 980 A.2d 659, 662 (Pa.Super. 2009). A verdict of guilty is supported if the evidence establishes, beyond a reasonable doubt, that the accused committed every element of the charged crime. *Santiago*, 980 A.2d at 662. Keeping in mind that the finder of fact was free to believe all, part, or none of the evidence, where the verdict is supported by the record, the reviewing court may not substitute its judgment for that of the finder of fact. *Id.*

Here, Appellant was convicted of Criminal Conspiracy (Intent to Deliver), 18 Pa.C.S. § 903(a).⁵ The Superior Court of Pennsylvania has determined that in order for a conviction for criminal conspiracy to be sustained, “the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy.” *Commonwealth v. McCall*, 911 A.2d 992, 996 (Pa.Super. 2006).

The Supreme Court of Pennsylvania has recognized that “[d]irect evidence of [a] defendant’s criminal intent or the conspiratorial agreement...is rarely available.” *Commonwealth v. Murphy*, 844 A.2d 1228, 1238 (Pa. 2004). Rather, these elements are almost always proven by circumstantial evidence, “such as ‘the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.’” *Murphy*, 844 A.2d at 292, quoting *Commonwealth v. Spatz*, 716 A.2d 580, 592 (Pa. 1998). Where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators, sufficiently prove an agreement with another person or persons to commit or aid in the commission of an unlawful act, a criminal conspiracy may be inferred. *McCall*, 911 A.2d at 996.

The findings of fact set forth herein above detail the participation of Appellant in relation to the ongoing drug dealing activities from Apartment 211. That recitation is incorporated by reference for purposes of this discussion. Briefly stated, it is clear that Appellant and Michael Winston were engaged in a conspiracy to distribute drugs, to wit: (1) police observed drug trafficking conduct taking place at Apartment 211 from November 30 through December 12, 2005; (2) during the course of the drug trafficking Appellant came out of the apartment into the courtyard on at least three occasions and surveyed the area for possible police presence, and then returned to the apartment; (3) Appellant and Winston were present in Apartment 211 at the time the search warrant was executed; (4) when the search warrant was executed, co-conspirator Winston was sitting on the living room couch watching two monitors that showed the area outside the apartment, including the courtyard and its approach; (5) while Winston watched the monitors, Appellant was in the bathroom attempting to secrete the cocaine; (6) someone in possession of 215.44 grams of crack cocaine would not leave it where others not involved in the enterprise had access to it because it would be taken and stolen or used; (7) there were two sets of keys in the apartment, one set belonged to Appellant and held the key to the apartment door's deadbolt lock; (8) three (3) baggies containing a large amount of cocaine and a digital scale were found in an unlocked pulldown access panel in the bathroom ceiling in an unlocked lockbox; (9) cash totaling \$640.00, in small denominations consistent with the sale of drugs, was recovered from Appellant's person; and, (10) the apartment appeared to have no purpose other than for drug trafficking. *Commonwealth v. Perez*, 402 A.2d 703, 708 (Pa.Super. 2007) (where the defendant was convicted of Criminal Conspiracy (Intent to Deliver), association between the alleged conspirators, knowledge of the commission of a crime, presence at the scene of the crime, and participation in the object of the conspiracy, viewed in conjunction with each other and in the context in which they occurred, are relevant circumstances that may prove criminal conspiracy). *See also, McCall*, 911 A.2d at 996-97 (evidence was sufficient to support conviction for possession with intent to deliver and criminal conspiracy to deliver where the conduct of the parties and the circumstances surrounding their conduct created a "web of evidence" linking the accused to the alleged conspiracy beyond a reasonable doubt).

The combination of direct and circumstantial evidence clearly supports the conspiracy conviction, and Appellant's claim in this regard is without merit.

III.

Appellant also argues that the Court committed an abuse of discretion and/or an error of law in not granting his post-trial motion for an arrest of judgment and/or judgment of acquittal pursuant to Rule 704(B) of the Pennsylvania Rules of Criminal Procedure. Specifically, he argues that because the Commonwealth *nolle prossed* the charge of Criminal Conspiracy against the named and only co-conspirator after the close of evidence in Appellant's case, but prior to the jury deliberations and verdict, the evidence was insufficient beyond a reasonable doubt to convict on the charge of criminal conspiracy and such a conviction was against the weight of the evidence.

A. Sufficiency of the Evidence

The standard of review for a sufficiency of the evidence claim as outlined in the discussion for Issue II is incorporated by reference herein. *Commonwealth v. Santiago*, *supra* at 18. Also incorporated by reference herein are the ten (10) enumerated circumstances set forth by the Court in Issue II that establish the existence of a criminal conspiracy. *Supra* at 20.

Here Appellant argues that because the charge of criminal conspiracy against co-conspirator Winston was *nolle prossed*, the evidence presented to the jury was insufficient to convict him of criminal conspiracy. This argument is without merit because all that is required to sustain a conviction for criminal conspiracy is to prove each of the elements of the crime of criminal conspiracy, one of which is that the defendant conspired with one or more persons to plan or commit a crime. *Commonwealth v. Fremd*, 860 A.2d 515, 521 (Pa.Super. 2004). Whether an alleged co-conspirator is prosecuted is irrelevant to the prosecution of a defendant. *Fremd*, 860 A.2d at 521 (the path of prosecution, or non-prosecution of a defendant's alleged co-conspirator is irrelevant to the prosecution of the defendant). *See also, Commonwealth v. Hatch*, 611 A.2d 291, 292 (Pa.Super. 1992) (co-conspirator not entitled to relief where a charge against one co-conspirator is *nolle prossed* prior to another co-conspirator's trial).

B. Weight of the Evidence

Review of a trial court's denial of a request for a new trial based upon a claim that the verdict is against the weight of the evidence is limited to a determination of whether the trial court palpably abused its discretion in denying the motion. *Commonwealth v. Champney*, 832 A.2d 403, 408 (Pa. 2003). A verdict is against the weight of the evidence when it is so contrary to the evidence presented that it shocks one's sense of justice. *Commonwealth v. Vandivner*, 962 A.2d 1170, 1177 (Pa. 2009). A trial judge will not grant a new trial merely because there is conflicting testimony or because he would have reached a different conclusion. *Id.* Rather, assessing the credibility of witnesses is the province of the jury, and the jury is free to believe all, part, or none of the testimony presented at trial. *Id.*

Here, Appellant contends that the jury's finding of guilty to the charge of Criminal Conspiracy (Intent to Deliver) was against the weight of the evidence because the Commonwealth *nolle prossed* the charge of Criminal Conspiracy against the named and only co-conspirator after the close of evidence. For the same reasons discussed *supra* at Part III A, this issue is also without merit. *See Commonwealth v. Fremd*, 860 A.2d at 521, and *Commonwealth v. Hatch*, 611 A.2d at 292.

IV.

Finally, Appellant argues that Judge Borkowski committed an abuse of discretion in sentencing Mr. Clark. Specifically, he argues that the sentence imposed was manifestly excessive, unreasonable, and unjust. He further argues that the sentence imposed was contrary to the Sentencing Code and the fundamental norms underlying the sentencing process, on the grounds that Judge Borkowski failed to place adequate reasons on the record for his sentencing decision, and did not consider and apply all of the relevant and necessary factors to ensure that the sentence was consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of Mr. Clark. This issue is also without merit.

A claim that a sentence is unduly harsh or excessive questions the discretionary aspect of a sentence. *Commonwealth v. Khalil*, 806 A.2d 415, 422 (Pa.Super. 2002). When reviewing a claim that the sentence imposed was an abuse of discretion, the appellate court must affirm the sentence imposed unless the guidelines were improperly applied, the guideline sentence was clearly unreasonable, or the sentence imposed outside the guidelines was unreasonable. 42 Pa.C.S.A. § 9781(c); *Commonwealth v. Dodge*, 859 A.2d 771, 778 (Pa.Super. 2004). In considering whether a particular sentence is clearly unreasonable or unreasonable, the reviewing court must consider the underlying circumstances of the case, the defendant's background and characteristics, and the trial court's opportunity to review the presentence report, the sentencing guidelines, and to observe the defendant. *Id.*

Appellant was convicted of Criminal Conspiracy (Intent to Deliver), 18 Pa.C.S.A. § 903(a), which carried a maximum penalty of

ten (10) years incarceration.⁶ This Court imposed a sentence of 5-10 years incarceration.

The record in this matter clearly demonstrates that before imposing sentence, this Court reviewed and considered: (1) the sentencing guidelines,⁷ *Commonwealth v. Walls*, 926 A.2d 957, 964-965 (Pa. 2007); (2) the statutory factors that attach to every sentencing scheme, 42 Pa.C.S.A. § 9721(b); and (3) the presentence report which detailed Appellant's personal and criminal history. Sentencing Transcript, January 26, 2009, at 11-12 (hereafter "S.T."). *Commonwealth v. Hyland*, 875 A.2d 1175, 1184 (Pa.Super. 2005) (sentencing court required to consider the particular circumstances of the offense and the character of the defendant), This Court also considered the rehabilitative needs of Appellant, the impact of the crime on the community, and future protection of the community in terms of drug activity and the potential violence sometimes associated with it. (S.T. 11-12.) Finally, this Court noted the ongoing nature of the drug activity, Appellant's participation as a co-conspirator in the ongoing drug activity, and the amount of drugs that were sold during the enterprise. (S.T. 12.) *Commonwealth v. Fish*, 752 A.2d 921, 923 (Pa.Super. 2000) (a sentence should not be disturbed where it is evident that the sentencing court was aware of sentencing considerations and weighed the considerations in a meaningful fashion).

Consequently the sentence imposed by this Court was appropriate under the circumstances of this case and Appellant's claim in this regard is without merit.

CONCLUSION

For the aforementioned reasons, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:

/s/Borkowski, J.

Date: April 26, 2010

¹ While the record indicates that the Suppression Court denied Appellant's suppression motion, there are no factual findings of record in this matter. Consequently this Court has reviewed the record of the suppression hearing and entered findings of fact and conclusions of law consistent with the Suppression Court's ruling.

² A touter is someone who works for or works with persons that sell narcotics. (T.T. 53.) The touter is a dealer, but also is the middleman in a drug transaction. (T.T. 150.) She finds a buyer for drugs then goes to the dealer, obtains the drugs and delivers them to the buyer in exchange for money. (T.T. 150.) The touter then takes the money to the dealer. (T.T. 150.)

³ At the suppression hearing neither the Commonwealth nor Appellant marked and requested admission of the Affidavit of Probable Cause now at issue. Consequently the only resource of record for that document to this Court is the Defendant's Omnibus Pretrial Motion and the original warrant which is part of the Clerk of Courts file. Both will be part of the reproduced record which will be available to the Superior Court.

⁴ The police had prior knowledge provided by a proven confidential informant that Apartment 211 had a camera system that was used to monitor the courtyard of the building. (Defendant's Omnibus Pretrial Motion, Attachment A, Probable Cause Affidavit.)

⁵ Section 903(a) provides:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. §903(a).

⁶ Section 905(a) provides, "[A]ttempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy." 18 Pa.C.S.A. § 905(a). In the instant case the object of Appellant's conspiracy was the intent to deliver 216.07 grams of crack cocaine, which is a felony. 35 P.S. § 780-113(a)(30);(f)(1.1).

⁷ The guideline ranges were as follows: mitigated (36 months); standard (48-60 months); aggravated (60 months).

**Elizabeth MacDonald, individually and as
Executor of the Estate of James T. MacDonald v.
Jefferson Regional Medical Center and Courtney Bittner**

Summary Judgment—Hearsay

1. Summary judgment granted to defendants in claim alleging negligence for allowing patient to fall in hospital bathroom because plaintiff could not prove that Plaintiff's decedent fell in the hospital bathroom.

2. Statements relied upon by Plaintiff to establish the decedent's fall were admissible hearsay pursuant to Pennsylvania Rule of Evidence 801 *et seq.*

3. The Court did not consider other theories of recovery because Plaintiff did not have expert testimony to support those theories. (I. M. Lundberg)

Charles P. McCullough for Plaintiff.

Jennifer M. Kirschler for Defendants.

No. GD 08-014690. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, J., May 14, 2010—Plaintiff Elizabeth MacDonald, executrix for the Estate of James MacDonald, initiated this suit against Defendants Jefferson Regional Medical Center (“Jefferson”) and Courtney Bittner (“Bittner”) by writ of summons on July 21, 2008. The complaint was filed on October 24, 2008, alleging Defendants were negligent for allowing Mr. MacDonald to fall in the hospital bathroom on July 4, 2007 resulting in a head injury culminating in his death on August 26, 2007.

On August 19, 2009, Defendants filed a motion for summary judgment and argument was scheduled before the Honorable Judith Olson on October 13, 2009. On December 1, 2009, Judge Olson ordered “Defendants’ Motion for Summary Judgment is denied without prejudice. Defendants may renew said Motion at any time up to and including trial once all discovery is completed.” Trial was scheduled for March 11, 2010. On February 18, 2010, I granted Defendants’ motion to schedule summary judgment argument on this case in front of me on March 5, 2010. On March 5, 2010, I issued an order granting Defendants’ motion for summary judgment because Plaintiff could not prove that Plaintiff’s decedent actually fell.

On March 16, 2010, Plaintiff filed a Notice of Appeal from that order. On the same day, I ordered Plaintiff to file a concise statement of matters complained of on appeal pursuant to Pa. Rule of Appellate Procedure 1925(b). On April 6, 2010, Plaintiff filed her concise statement with the following issues:

1. The Court has abused its discretion and committed error of law by entering summary judgment against Plaintiff.
2. The Court abused its discretion and committed error of law by entering summary judgment against Plaintiff by determining, in advance of trial, that all evidence Plaintiff had to proffer regarding the fall suffered by her late husband at the hands of defendants was inadmissible hearsay. It was an abuse of discretion and error of law to make such a ruling in advance of trial when all the evidence had yet to be proffered.
3. The Court abused its discretion and committed error of law not applying the proper standard for entry of a summary judgment against plaintiff, i.e. that there were serious factual issues in dispute and that in such instances summary judgment is inappropriate (citations omitted).
4. The Court abused its discretion and committed error of law by misapplying the decision in *Botkin v. Metropolitan Life Insurance Company*, 907 A.2d 641 (Pa.Super. 2006).
5. The Court abused its discretion and committed error of law by denying Plaintiff the opportunity to establish material facts at trial through circumstantial evidence, which included deposition testimony from one of Defendant Jefferson Regional Medical Center’s employees, Patrick Jones, that clearly contradicted the deposition testimony of Defendant Bittner. Hence the Court denied Plaintiff the opportunity to demonstrate at trial that Defendant Bittner was lying, in violation of the *Nanty-Glo* Rule.
6. The Court abused its discretion and committed error of law by entering summary judgment on the basis of only one issue, i.e., a fall suffered by Plaintiff’s late husband, and in so doing, ignored other theories of recovery that had been set forth in the Complaint and in subsequent pleadings and that were raised at oral argument.
7. The Court abused its discretion and committed error of law by entering summary judgment despite the evidence of record that demonstrated Defendants’ negligence.
8. Plaintiff also reserves the right, to raise such other matters on appeal as may arise from a further review of the record, or as may arise due to subsequent pleadings or further orders, opinions or memoranda from the Court.

In *ADP, Inc. v. Morrow Motors Inc.*, 969 A.2d 1244, 1246 (Pa.Super. 2009), the Superior Court explained its standard of review on appeal from the grant of a motion for summary judgment:

Our standard of review on an appeal from the grant of a motion for summary judgment is well-settled. A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary. In evaluating the trial court’s decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Plaintiff’s issue numbers 1, 2, 3, 5, and 7 all basically state that I should not have granted summary judgment in favor of Defendants. In my order granting summary judgment, I specifically stated that I did so because Plaintiff could not prove that Mr. MacDonald fell in the hospital bathroom. The summary judgment standard states that “failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.” *Id.*

The following evidence is all Plaintiff could offer to prove that Mr. MacDonald fell. Plaintiff’s expert, Dr. Cyril Wecht, in his narrative report, states that “Based upon the personal statements of both Mrs. MacDonald and Dr. Brooks, the patient suffered a fall, striking his head. The posterior fossa/cerebellar hemorrhage can be attributed to that injury.”

Both statements relied upon by Dr. Wecht are inadmissible hearsay pursuant to Pennsylvania Rule of Evidence 801 *et. seq.* Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). “Hearsay is not admissible except as provided by these rules, or other rules prescribed by the Pennsylvania Supreme Court, or by statute.” *Id.* at 802.

The first statement relied upon by Plaintiff is from Mrs. MacDonald. She testified at her deposition extensively on this issue (Deposition of Elizabeth MacDonald on July 30, 2009, pages 57-59):

Q. Your husband died in August and at that time the CT scan showed a subdural hematoma. What is the basis for your

allegation that that subdural hematoma occurred on July 4th?

A. He was in the bathroom alone and went into respiratory arrest. From what he told me, he had to pull himself up from the floor. I don't think he remembered very much between the time he was on the floor until the time he pulled the cord.

Q. But you have no reason to know that he hit his head other than what you're saying, that he had the subdural hematoma in August. That's your only basis for believing that he hit his head.

Q. You did not see him hit his head in the bathroom; correct?

A. No.

Q. None of the nurses told you that he hit his head in the bathroom?

A. No.

Q. He did not tell you that he hit his head in the bathroom?

A. No.

Q. There was no other healthcare provider that cared for your husband from July 4th until August 25th that told you that he hit his head in the bathroom?

A. No.

By Mr. McCullough (Plaintiff's Attorney): Did he tell you he fell in the bathroom?

A. Yes.

Q. Did he fall face down or on the side? Did he tell you how he fell?

A. No.

Q. When did your husband tell you that he woke up on the floor and pulled himself to the toilet? Is that what he told you?

A. Yes.

Q. When did your husband tell you that?

A. As soon as they took him off the ventilator after his valve replacement.

Q. So he was still in the hospital?

A. Yes. And this was on July the 5th.

For Mrs. MacDonald to testify about what Mr. MacDonald told her about his alleged fall would be hearsay, and therefore inadmissible.

The second statement relied upon by Plaintiff is from Dr. James Brooks, Mr. MacDonald's former physician. Dr. Brooks' letter states that Mr. MacDonald had not been a patient since Dr. Brooks retired in 2001. Dr. Brooks' statement relays that Mr. MacDonald told Dr. Brooks in early August 2007 that he, Mr. MacDonald, "walked into the shower, closing the door, and the next thing he remembered was waking up on the floor with his body blocking the door, then crawling and reaching up to pull the emergency cord." This statement falls squarely into the definition of hearsay. Plaintiff attempts to couch it as a statement for the purposes of medical diagnosis or treatment pursuant to Pa.R.E. 803(4). However, Dr. Brooks had been retired from practice for six years when Mr. MacDonald made these statements in early August 2007 – a month after the incident in question. Furthermore, these statements were made in a car on the way back from a doctor's appointment on which Dr. Brooks accompanied Mr. MacDonald as a friend. Based on these two factors alone, the statement from Dr. Brooks is hearsay and does not fall into the 803(4) exception.

Plaintiff, in issue number 5, also argues that circumstantial evidence presented at trial would show that Mr. MacDonald fell. The other testimony at trial would have been from Defendant Courtney Bittner, the nurse who allegedly made Mr. MacDonald shower by himself and Patrick Jones, the nurse who found Mr. MacDonald.

Because Plaintiff did not include the depositions of either Bittner or Jones in his response to the Motion for Summary Judgment, this court could find that their testimony would not have helped Plaintiff.

Plaintiff's issue number 4 states that I misapplied the decision in *Botkin v. Metropolitan Life Insurance Company*, 907 A.2d 641 (Pa.Super. 2006). In *Botkin*, the Superior Court affirmed a trial court's grant of summary judgment in favor of defendants in part because "a motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence." *Id.* at 649. In fact, the holding in *Botkin* is directly on point, and Plaintiff does not explain how I misapplied this holding in *Botkin*.

Plaintiff's issue number 6 states that I should have considered other "theories of recovery." I did not consider other theories of recovery because Plaintiff did not have expert testimony to support these theories.

For the foregoing reasons, the Superior Court should affirm this court's order.

Strassburger, J.

May 14, 2010

Stuart Irwin v. Matthews International Corporation

Non-competition Covenants—Injunctive Relief—Terminated Employment

1. The Court evaluated each of the preliminary injunction prerequisites and concluded as a matter of law that Plaintiff met all elements necessary to establish entitlement to preliminary injunctive relief.

2. The termination of the employee Plaintiff was found to be one of the determining factors considered by the Court in assessing the unreasonableness of enforcing the restrictive covenants under the facts and circumstance.

3. The relative harm to the employer was insignificant and a denial would have imposed a significant hardship on the terminated employee because of the combined geographic scope of the non-competition covenants preventing him from working in specialized death care industry throughout the entire world and thereby eliminating the terminated employee from making a living in his established line of work and from accepting offered employment in that field.

(I. M. Lundberg)

Ronald D. Barber and Julie A. Aquino for Plaintiff.

Brian T. Himmel and Justin H. Werner for Defendant.

No. GD 09-022732. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

A. SUMMARY

Ward, J., May 12 2001—On December 7, 2009, Plaintiff Stuart Mr. Irwin (“Irwin”) filed a Complaint for Declaratory Judgment and Injunctive Relief against Defendant Matthews International Corporation (“Matthews”), his former employer, to determine his rights under two employment contracts in which he covenanted, inter alia, that upon termination of his employment, he would not compete or solicit customers of Matthews International throughout the entire world for a period of two years. Prior to accepting an offer of employment with his new employer, Biondan SpA, Mr. Irwin moved for and obtained an injunction from this Court that preliminarily enjoined enforcement of certain non-competition covenants until the merits of his declaratory judgment action could be decided. Under the facts presented at the preliminary injunction hearing, Mr. Irwin was entitled to obtain a preliminary judicial determination that such restrictive covenants were unenforceable. Mr. Irwin need not have waited to bring these issues before the Court by breaching the agreement and then defending himself (and possibly his new employer) against the former employer’s action for the breach.

B. INTRODUCTION

On February 25, 2010, this Court held the hearing on Plaintiff’s Motion for Preliminary Injunction (the “Hearing”). The Hearing was transcribed to create the notes of transcript of the courtroom proceedings (hereinafter “N.T.”). Plaintiff testified on behalf of himself. (N.T. at pp. 3-69). Defendant elicited testimony from Robert Newcombe, former supervisor of Mr. Irwin as Vice President Sales and Marketing of Bronze Division for Matthews International. (N.T. at pp. 69-93). At the Hearing, Defendant also elicited testimony from Marcy Lynn Campbell, Regional Human Resources Manager for Matthews. (N.T. at pp. 93-100). Deposition transcripts of Mr. Newcombe and James Doyle, Group President of Memorialization for Matthews International were submitted. (Hearing Exhibits 10 and 11).

On Friday, February 26, 2010, based upon consideration of the testimony, the exhibits and the evidence presented at the Hearing, this Court entered its order granting Plaintiff’s Motion for Preliminary Injunction (the “Preliminary Injunction Order”), which is the subject of this appeal. The Preliminary Injunction Order states, in relevant part:

AND NOW, this 25th day of February 2010, IT IS HEREBY ORDERED that until further order of court Defendant Matthews International Corporation is preliminarily enjoined from enforcing the 1994 Agreement executed between Defendant Matthews International Corporation and Plaintiff Stuart Irwin.

IT IS FURTHER HEREBY ORDERED that until further order of court Defendant Matthews International Corporation is preliminarily enjoined from enforcing the Covenant Not to Compete After Termination of Employment and the Customer Non-Solicitation provisions contained in Sections 2(b) and 2(c) of the 2008 Agreement executed between Defendant Matthews International Corporation and Plaintiff Stuart Irwin.

On Monday, March 1, 2010, Mr. Irwin posted the \$2,000 bond required pursuant to the Preliminary Injunction Order to effectuate the injunction.

On March 10, 2010, Matthews filed its timely Notice of Appeal. On March 30, 2010, as directed by this Court, Matthews filed its Statement of Matters Complained of on Appeal. On April 8, 2010, this Court denied Defendant’s Application for Suspension of Injunction Pending Appeal. This Opinion sets forth reasonable grounds for why the matters complained of on appeal have no merit.

C. FACTUAL BACKGROUND

Mr. Irwin is an individual residing in Thornburg, Pennsylvania. (N.T. at p. 4). He is married with two children. (N.T. at pp. 4-5). His wife works for the United States Department of Justice. (*Id.*). Mr. Irwin received a Bachelor of Science degree in Geology from the University of Pittsburgh in 1985. (N.T. at p. 5). He received a Master of Business Administration degree from the University of Pittsburgh in 1987. (*Id.*). He was employed by Matthews International for the last fifteen years at a salary of under \$100,000. (N.T. at pp. 8-9, 20-21).

Matthews International has its corporate headquarters in Pittsburgh, Pennsylvania. (Hearing Exhibit 4). Matthews is a designer, manufacturer and marketer principally of cast bronze memorials and other memorialization products used primarily in the cemetery and funeral home industries in the United States of America, Canada, Europe and Australia. (*Id.*). Matthews also manufactures and markets cast bronze and aluminum architectural products used to identify or commemorate people, places and events. (*Id.*).

Mr. Irwin was employed as a Product Manager of Matthews International for about fourteen years, from 1994 until 2008. (N.T. at p. 8). On October 3, 1994, two days after Mr. Irwin began his initial employment with Matthews International, Mr. Irwin signed an employment agreement, which contained, inter alia, non-competition restrictive covenants (the “1994 Agreement”). (Hearing Exhibit 1; N.T. at p.7). In his role as Product Manager, Mr. Irwin did marketing research, competitive research, and managed product lines for Matthews International, but was not the primary customer contact person within Matthews International. (N.T. at p. 6). As Product Manager, Mr. Irwin was primarily involved with granite, mausoleum, memorialization, and specialty ethnic products. (N.T. at p. 9).

On October 1, 2008, Mr. Irwin was promoted to the position of Eastern District Sales Manager of Matthews International’s Bronze Division for Northeastern United States and Eastern Canada. (N.T. at pp. 10-11, 20). In his role as Eastern District Sales Manager, Mr. Irwin’s responsibilities included increasing Matthews’ market share, protecting existing market share, evaluating the talent of his regional managers, and contacting customers. (N.T. at pp. 11-12). On November 27, 2008, in conjunction with his promotion, Mr. Irwin signed a second employment agreement, titled “*Confidentiality, Non-Solicitation, Non-Competition, and Intellectual Property Agreement*,” which contained, inter alia, non-competition restrictive covenants (the “2008 Agreement”). (Hearing Exhibit 4; N.T. at pp. 17, 43-44). Mr. Irwin’s January 23, 2009 Earnings Statement shows that he received a ten (10%) per-

cent salary increase plus a one time bonus, paid retroactively to October 1, 2008, for the promotion and as consideration for signing the 2008 Agreement. (Hearing Exhibit D; N.T. at pp. 95-98).

A telling summary of Mr. Irwin's Talent Assessment Ratings related to his job performance at Matthews International took place in January - February of 2009. (Hearing Exhibit 10 at p. 21, Newcombe Deposition Exhibit 3 at p. MAT-IRW 0112-0116). Mr. Irwin received the Talent Forecast assessment rating of "Limited." (*Id.* at p. MAT-IRW 0116). A Talent Forecast of "Limited" was the lowest assessment of nine possible ratings (*Id.* at p. MAT-IRW 0114). Mr. Irwin's Talent Assessment Ratings also included the following unfavorable comments in the "Key Developmental Needs" section specific to his job performance as a district sales manager:

- Cocky and know it all; Does not listen well; Will not allow himself to be questioned
- Not fact based; Emotion based; Not completes due diligence
- *Screws up everything he touches*; Requires that work needs to be redone by others
- Changes style but then flips back to old habits
- *Not respected by customers*
- Tries to over step the policies; Avoids SOX requirements
- Misrepresents himself to others

(*Id.* at p. MAT-IRW 0116) (emphasis added).

On October 23, 2009, after Mr. Irwin had been working for Matthews International as a district sales manager for about a year, Mr. Newcombe and Ms. Campbell informed him that he was being terminated and permanently laid off of work. (Hearing Exhibit 10 at pp. 14-15; N.T. at pp. 25-26, 79-80). The reason Mr. Irwin was given for his termination was that, as a result of a corporate restructuring of Matthews' sales organization, the number of district sales managers would be reduced from four to three, and therefore, his sales position was being eliminated. (*Id.*). Mr. Irwin was not terminated for cause. (N.T. at p. 79). Rather, his termination reflected an economic determination on the part of Matthews International that the other district sales managers were either performing at a higher level, or had a greater upside potential. (N.T. at 80). Mr. Irwin was told that there were no other positions available for him at Matthews International. (N.T. at pp. 26, 80).

Enforcement of Section 2(b) of the 2008 Agreement would prohibit Mr. Irwin from working in the death care or memorialization industry, in a nine state area of the Northeastern United States, for a period of two years following his termination. (Hearing Exhibit 4; N.T. at pp. 36-37). Section 2(b) of the 2008 Agreement states as follows:

2. Non-Competition and Other Provisions.

b. Covenant Not to Compete After Termination of Employment.

The Employee acknowledges and agrees that Matthews' bronze memorialization and architectural business is international in scope and that Matthews solicits business from and does business with customers located throughout the United States, Canada, Mexico, Europe, Australia and China. As the *District Sales Manager for the Northeast and/or the Eastern Region*, the Employee agrees that he shall be responsible for directing, coordinating and managing all sales activities and initiatives for the Bronze Division of Matthews in the states [sic] of: Pennsylvania, New York, West Virginia, Virginia, Maine, New Hampshire, Massachusetts, Connecticut and New Jersey (the "Sales Territory"), and for a period of two (2) years after termination of the Employee's employment, and at any location within the Sales Territory, the Employee will not, directly or indirectly, engage in, consult with, or have any interest in any business, firm, person, partnership or corporation, whether as employee, officer, director, agent, security holder, creditor, consultant, or otherwise, which engages in a business competitive with any of the bronze memorialization and/or architectural business of Matthews.

(Hearing Exhibit 4 at pp. 5-6).

Section 2(c) of the 2008 Agreement is even more restrictive. Section 2(c) effectively prohibits Mr. Irwin from competing in the death care or memorialization industry throughout the entire world, with no geographical limitations, for a period of two years following his termination, stating as follows:

2. Non-Competition and Other Provisions.

c. Customer Non-Solicitation. The Employee acknowledges and agrees that, for a period of two (2) years after the termination of the Employee's employment, the Employee will not have direct or indirect contact with any of the Bronze Division of Matthews' then-current customers, with any of the Bronze Division of Matthews' former customers, or with any prospective customers to which the Bronze Division of Matthews has submitted bids or proposals or from which the Bronze Division of Matthews has actively solicited business, where that contact has either of the following purposes (which need not be the sole or primary purpose): (1) selling or otherwise providing any type of product or service that the Bronze Division of Matthews is in the business of selling or otherwise providing, or (2) encouraging the current, former, or prospective customer to cease business with Matthews, or to curtail its business with Matthews, or not to commence doing business with Matthews.

(Hearing Exhibit 4 at pp. 6-7). Although Section 2(c) is labeled as a "Customer Non-Solicitation" provision, a careful reading of Section 2(c) reveals that it is another non-competition restrictive covenant.²

Matthews International attempted to have Mr. Irwin sign a third employment agreement upon termination, titled "*Confidential Separation Agreement and General Release*" (the "Release"). (Hearing Exhibit 5; N.T. at pp. 33-34). Mr. Irwin refused to sign the Release. (N.T. at pp. 26-27). The Release contained additional non-competition restrictive covenants similar to those he had signed after receiving his promotion in 2008 that would have seriously restricted his ability to work in the death care or memorialization industry. (Hearing Exhibit 5, Section 8, at pp. 5-6).

After his termination, Irwin began receiving unemployment compensation. (N.T. at p. 42). He also engaged in a job search that included enrolling in the Pennsylvania Career Link program and going to seminars, but he was never offered any outplacement from those efforts. (N.T. at pp. 28-29). In addition, he pursued contacts with other employers in the death care industry. (*Id.*). Significantly, in October of 2009, at a National Funeral Directors Association trade show convention, Mr. Doyle, who was Mr. Irwin's direct supervisor at Matthews from approximately June 2008 to January 2009, told an employee of Biondan North America, Inc. ("Biondan"), another supplier of memorial products in the death care industry, that Mr. Irwin "probably wouldn't be in the industry" because he had a "non-compete" with Matthews. (Hearing Exhibit 11 at pp. 9-11).

Shortly before his termination, Mr. Irwin received an inquiry from Biondan concerning a potential job opportunity. (N.T. at pp. 28-29, 35). After his termination, he began employment negotiations with Biondan, disclosing the existence of the non-competition covenants and providing a copy of the 2008 Agreement. (*Id.*). On November 11, 2009, Biondan provided a written job offer to Mr. Irwin to work as a Sales Manager in the “Western half of the United States and in Canada” at an annual salary of \$70,000 subject to Mr. Irwin obtaining a judicial determination that an acceptance of that offer did not breach the 2008 Agreement. (Hearing Exhibit 7). On its face, the Biondan offer of employment was open for acceptance until December 31, 2009. (*Id.*).

On January 13, 2010, after the first Biondan offer had expired, Mr. Irwin received a similar \$70,000 offer from Biondan’s parent company, Biondan SpA, to work as a Sales Manager for “the United States and Canada.” (Hearing Exhibit 8). The Biondan SpA offer was also subject to Mr. Irwin obtaining a judicial determination that an acceptance of that offer did not breach the 2008 Agreement. (*Id.*). The Biondan SpA offer was open for acceptance only until March 1, 2010. (*Id.*). The introductory paragraph of the Biondan SpA written offer dated January 13, 2010 states:

Dear Stuart Irwin:

It is my pleasure to extend to you an Offer of Employment on behalf of Biondan SpA (hereinafter “Company”). **This within Offer of Employment is open for acceptance until March 1, 2010, and is subject to you obtaining a judicial determination that an acceptance of this Offer of Employment does not breach the terms of a non-competition agreement entered into with Bronze Division of Matthews International Corporation (hereinafter “Matthews”) and signed on November 27, 2008.**

(*Id.*) (emphasis added). Matthews International’s witness, Mr. Newcombe, testified at the Hearing that he considered Biondan SpA to be a competitor and that acceptance of an offer from a competitor would cause Matthews International to litigate if necessary to protect its “interests.” (N.T. at pp. 88, 90-92).

At the Hearing, the following testimony of Mr. Irwin transpired:

Q. What would be the impact on your career path if you were unable for a two-year period to work in the death care industry?

A. Well, both of these companies are offering good offers, and I don’t know if they will be around two years from now, and I may not be able to get back into the industry in the capacity that I would like to. Two years is a long time, and a lot can change in that amount of time. I would like to go back to work.

Q. Are you working right now?

A. No, sir.

Q. How is that impacting you?

A. I hate it. I used to get up in the morning with a sense of pride, and I don’t have that right now.

(N.T. at pp. 32-33).

Following the Court’s issuance of the Preliminary Injunction Order on February 26, 2010, Mr. Irwin accepted the employment offer of Biondan SpA that was to expire after March 1, 2010. (*See* Plaintiff’s Response to Defendant’s Application for Suspension of Injunction Pending Appeal at Paragraph 5, and Verifications thereto).

D. DISCUSSION

The Supreme Court of Pennsylvania has stated that appellate review of “...a trial court’s order granting or denying preliminary injunctive relief is highly deferential.” *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004) (citation omitted). “This highly deferential standard of review states that in reviewing the grant or denial of a preliminary injunction, an appellate court is directed to examine the record to determine if there were any apparently reasonable grounds for the action of the court below.” *Id.* (internal quotations omitted). As the Supreme Court of Pennsylvania reiterated in *Warehime*:

There are six ‘essential prerequisites’ that a party must establish prior to obtaining preliminary injunctive relief. The party must show: 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest. The burden is on the party who requested preliminary injunctive relief...

Id., 860 A.2d at 46-47 (citation omitted).

Here, this Court has evaluated each of the preliminary injunction prerequisites set forth in *Warehime*. We find that Mr. Irwin has met all of the elements necessary to establish entitlement to preliminary injunctive relief.

1. Immediate and Irreparable Harm

Mr. Irwin met his burden of proving irreparable harm absent entry of preliminary injunctive relief as a result of Mr. Irwin’s inability to accept the offer of employment extended to him on behalf of Biondan SpA. The plain language of the Biondan SpA offer dated January 13, 2010 makes clear that the offer was open for acceptance only until March 1, 2010, and was subject to Mr. Irwin obtaining a judicial determination that an acceptance of this offer did not breach the terms of the 2008 Agreement. The harm was immediate as the Biondan SpA offer was to expire at the end of the day on March 1, 2010 (within days of the Hearing on February 25, 2010).

We find that Mr. Irwin would have faced immediate and irreparable harm if Matthews International had not been preliminarily enjoined from enforcing the non-competition provisions at issue. *See Allegheny Anesthesiology Assoc. v. Allegheny General Hospital*, 826 A.2d 886, 893 (Pa.Super. 2003) (preliminary injunction was necessary to prevent immediate and irreparable harm to nurses who had an important interest in being able to earn a living in their chosen profession). *See also Goldhaber v. Foley*, 519 F.Supp. 466, 475 (E.D.Pa. 1981) (removal of court reporters from their established careers constituted irreparable harm). By the time a permanent injunction is ruled upon, there may no longer exist any offers of employment for Mr. Irwin in his established

career. The course of Mr. Irwin's career would have been irreparably harmed without the issuance of preliminary injunctive relief. The preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by monetary damages.

2. Balance of the Harms

Generally, a court's determination of the reasonableness of a restrictive covenant involves a balancing of the competing interests of the employer's need for protection against the hardship of the restriction to be imposed upon the former employee. *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 734 (Pa.Super. 1995), *alloc. denied*, 637 A.2d 285, *cert. denied*, 115 S.Ct. 904 (1995). As demonstrated at the Hearing, enforcing the restrictive covenant against Mr. Irwin would impose serious hardship on him and his family. "[In] weighing...the employer's need for protection...against the hardship of the restriction to be imposed upon the employee," undue hardship to the employee may be found where the employee "...may encounter difficulty in transferring his particular experience and training to another line of work, and...may find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer." *Brobston*, 667 A.2d at 734, quoting *Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838, 846 (Pa. 1957).

In *Brobston*, the Superior Court of Pennsylvania was "...called on to determine whether enforcement of a two-year, three hundred mile 'non-competition' covenant in a employment contract is reasonable where the former employee was terminated for poor performance and the employer's proprietary business information was already protected under injunctive enforcement of a 'non-disclosure' covenant of the same agreement." *Id.* at 730. The Superior Court reversed the trial court's decision to enforce the non-competition covenant of the agreement. *Id.* at 731. The *Brobston* appellate court was of the opinion that because the trial court properly "...granted equitable relief vis-a-vis the confidential information, the trial court's enforcement of the non-competition covenant would be unnecessary to protect [employer's] interests and be unfairly oppressive to [employee's] ability to earn a living." *Id.* at 735. The Superior Court of Pennsylvania found the employee's firing to be an important factor by stating:

[t]he employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.

Id. The *Brobston* appellate court continued this line of reasoning in a footnote:

This conclusion would remain the same even if it were determined that Brobston was legitimately terminated for economic reasons. The same reasoning applies under that scenario, i.e., where an employer determines that its "bottom-line" is best protected without the employee on the payroll. However, it must be kept in mind that reasonableness is determined on a case-by-case basis. (citation omitted)

Id., Footnote 6.

The *Brobston* appellate court further stated:

It bears noting that there is a significant factual distinction between the hardship imposed by the enforcement of a restrictive covenant on an employee who voluntarily leaves his employer and that imposed upon an employee who is terminated for failing to do his job. The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer. (citation omitted)

Id. at 735-736.

The *Brobston* appellate court determined that, in deciding a request for preliminary injunctive relief, a court should consider the circumstances surrounding the former employee's termination, a factor which affects both the legitimacy of the employer's interests and the degree of hardship imposed upon the departing employee, stating as follows:

Accordingly, because the circumstances under which the employment relationship is terminated are an important factor to consider in assessing both the employer's protective interests and the employee's ability to earn a living, i.e. the reasonableness of enforcing the restrictive covenant, [the former employee's] firing should have been included in the trial court's determination of reasonableness.

Id. at 737.

In *All-Pak, Inc. v. Johnson*, 694 A.2d 347 (Pa.Super. 1997), the Superior Court of Pennsylvania emphasized that in *Brobston*: "We held that the fact that the employee was terminated, rather than quit voluntarily, was an important factor when considering the enforceability of a restrictive covenant.... We emphasized, however, that the reasonableness of enforcing such a restriction is determined on a case by case basis." *Id.* at 352. Accordingly, this Court does interpret *Brobston* as creating an absolute and automatic bar, as a matter of law, to enforcement of non-competition covenants against a terminated employee. However, here, the termination of Mr. Irwin was found to be a determining factor considered by this Court in assessing the reasonableness of enforcing the restrictive covenants under the facts and circumstances of this case.

The facts and circumstances of this case are very similar to those in *Brobston*. Here, as in *Brobston*, the appellate court is asked to consider a similar situation of an employer terminating an employee deemed worthless to its legitimate business interests, but then seeks to impose restrictions upon the terminated employee's future conduct with its competitors. Following the rule set forth in *Brobston*, because Matthews International terminated Mr. Irwin for economic reasons beyond Mr. Irwin's control, it faces no significant harm if he goes to work for a competitor. As in *Brobston*, it would be similarly unreasonable to allow Matthews to "retain unfettered control" over Mr. Irwin after it effectively discarded him as worthless to its legitimate business interests. For economic reasons, Matthews International decided to restructure its sales organization, thus eliminating Mr. Irwin's sales position. Matthews International determined that its "bottom-line" was best protected without Mr. Irwin on the payroll.

Further, Mr. Irwin received the lowest of all possible talent assessments from Matthews International. The unfavorable comments specific to Mr. Irwin's inferior performance as a sales manager included that he *screws up everything he touches* and is *not*

respected by customers. Therefore, the need of Matthews International to protect itself from Mr. Irwin working for a competitor or soliciting its customers is diminished by the fact that Irwin's worth to the corporation was presumably insignificant. Based on his poor talent assessment, it would be logical to conclude that Matthews International has economic reasons to allow Mr. Irwin to work for a competitor.

Even assuming the preliminary injunction was improperly granted, the only harm that is at risk for Matthews International is of a monetary nature, namely the possibility that customers for its services will shift their business away from Matthews while this action is pending. Given that Matthews believed that its customers did not respect Mr. Irwin, the issuance of a preliminary injunction is unlikely to result in any hardship for Matthews International. The relative harm, if any, to Matthews is insignificant.

We find that denying the preliminary injunction would have imposed a significant hardship on an unemployed Mr. Irwin. Denying the preliminary injunction would have effectively required Irwin to cease his business relationships with any of Matthews International's current, former or prospective competitors and to refrain from soliciting any current, former or prospective customers of Matthews International. Here, because the combined geographical scope of the non-competition covenants is unlimited, denying the injunctive relief sought by Mr. Irwin would have effectively prevented him from working in the specialized death care industry throughout the entire world and from thereby making a living in his established line of work. He may have encountered serious difficulty in transforming his particular experience and training to another line of work, and hence his ability to earn a livelihood would have been seriously impaired.

3. Status Quo

Mr. Irwin would have faced immediate and irreparable harm in the absence of an injunction to preserve the status quo until the merits of the case could be heard and decided. The status quo at issue is this: Mr. Irwin is able to work in a trade or industry that he chooses, and more specifically, in a field or industry for which he is educated, skilled and experienced. Matthews International is the party who changed the status quo by firing Irwin and then asking him to abide by a third set of non-competition restrictive covenants contained in the Release presented to him upon termination. It is clear from the record and submissions presented to this Court that Matthews had no intention of releasing Mr. Irwin from his non-competition covenants. The issuance of the preliminary injunction preserved the status quo by allowing Mr. Irwin to accept the open offer from Biondan SpA and go back to work in his chosen field.

4. Likelihood of Success on the Merits

The purpose of Irwin's request for declaratory and injunctive relief is to obtain a judicial determination that the non-competition restrictive covenants contained in his employment agreements with his former employer are unenforceable. Such a judicial determination is warranted under Pennsylvania case law and Pennsylvania's Declaratory Judgment Act, 42 Pa.C.S. § 7531 et seq. The purpose of a declaratory judgment action "...is to afford relief from uncertainty and insecurity with respect to legal rights, status and other relations." *Keystone Aerial Surveys, Inc. v. Pa. Prop. & Cas. Ins. Guar. Ass'n*, 777 A.2d 84, 88 (Pa.Super. 2001) (citation omitted), *aff'd*, 574 Pa. 147, 829 A.2d 297 (2003); see 42 Pa.C.S.A. § 7541. "The prime purpose of the Declaratory Judgment Act is to speedily determine issues that 'would...be delayed, to the possible injury of those interested if they were compelled to wait the ordinary course of judicial proceedings.'" *Osram Sylvania Products, Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846, 849 (Pa.Super. 2004) (citation omitted).

Indeed, a proceeding for declaratory judgment is a proper form of action for challenging the validity of restrictive employment agreements. See *Wilshire v. Penn Overall Supply Co.*, 323 A.2d 239 (Pa.Super. 1974) (reversing order of lower court that denied petition of dismissed employee for a declaratory judgment to have a non-competition agreement ruled null and void); See also *Allegheny Anesthesiology Assoc.*, 826 A.2d at 889 (affirming order of chancellor that granted a preliminary injunction sought by nurses working at hospital to declare non-competition covenants in their employment agreements to be unenforceable).

Under Pennsylvania law, because restrictive covenants restrain an employee's trade, they "...are strictly construed against the employer." *All-Pak*, 694 A.2d at 351. "If an employment contract containing a restrictive covenant is entered into subsequent to employment, it must be supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status." *Modern Laundry & Dry Clean v. Farrer*, 536 A.2d 409, 411 (Pa.Super. 1988). Since Mr. Irwin received a promotion and "new consideration" for entering into the 2008 Agreement, it may have been supported by adequate consideration.³ However, the inquiry of whether sufficient consideration exists to support the 2008 Agreement does not end the controversy. The quintessential question of whether, under these highly oppressive circumstances, enforceability of the non-competition covenants is reasonable in light of Irwin's termination, remains. See *Brobston*, 667 A.2d at 733.

Further, we cannot ignore the Supreme Court of Pennsylvania's admonition that "...restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co. Inc.*, 570 Pa. 148, 808 A.2d 912, 917 (Pa. 2002). When covenants are included in agreements for the purpose of "...eliminating or repressing competition or to keep the employee from competing so that the employer can gain an economic advantage, the covenant will not be enforced." *Id.* at 920-921. Considering the highly oppressive circumstances and the over-reaching terms of the non-competition covenants at issue, we find that enforcement of them would be an unreasonable restraint of trade unnecessarily preventing Mr. Irwin from earning a living in the industry he knows.

Matthews International has painstakingly argued that the activity Mr. Irwin seeks to restrain is not actionable, and therefore, Mr. Irwin cannot show a reasonable chance of success on the merits. However, this position contradicts the plain language of Section 4(c) (*Inadequacy of Legal Remedies*) and Section 4(i) (*Forum Selection*) of the 2008 Agreement, which expressly contemplate this Court's imposition of both injunctive and declaratory relief. Section 4(c) of the 2008 Agreement states that a threatened breach by Mr. Irwin would give rise to temporary injunctive relief as follows:

4. Miscellaneous.

c. Inadequacy of Legal Remedies. The Employee acknowledges that any breach or **threatened breach** by the Employee of any covenants contained in this Contract would cause irreparable harm to Matthews and that money damages would not, alone, provide adequate remedy to Matthews. Matthews shall have the rights and **remedies to be independent of each other and severally enforceable, including through temporary injunctive relief**, temporary restraining order and/or permanent injunctive relief, all without requirements for posting or provision of any bond or other security, which requirements are hereby expressly waived by Employee...(emphasis added).

Further, Section 4(i) of the 2008 Agreement specifically contemplates an action in this very Court for a declaration of rights under that agreement by stating as follows:

4. Miscellaneous.

i. Forum Selection. Any civil action to enforce this Agreement, or for a declaration of rights under this Agreement, shall be brought in and only in the Court of Common Pleas of Allegheny County Pennsylvania, or... (emphasis added)

Finally, Matthews International has demonstrated through its vigorous activity in defense of this litigation that an actual controversy exists between the parties concerning the enforcement of these covenants. This includes: (1) attempting to have Mr. Irwin sign a third non-competition agreement (i.e. the Release) upon his termination; (2) informing a competitor of Matthews at a conference of the National Funeral Directors that Mr. Irwin is subject to a “non-compete”; (3) indicating that it would litigate the “non-compete” if necessary; (4) pursuing its Request Quash the Preliminary Injunction Hearing; (5) pursuing its Preliminary Objections to the Complaint for Declaratory Judgment and Injunctive Relief; (6) applying for Suspension of Injunction Pending Appeal; (7) appealing the Preliminary Injunction Order; and (8) not negotiating or settling this matter.

Mr. Irwin’s right to relief in the form of a preliminary injunction is clear. The wrong is manifest. Mr. Irwin is likely to succeed on the merits of his declaratory judgment action to have certain non-competition covenants declared as unenforceable.

5. Reasonably Suited to Abate the Offending Activity

The Preliminary Injunction Order is reasonably suited to abate the offending activity of Matthews International. On the one hand, it prevents unreasonable enforcement of the non-competition covenants at issue under the facts and circumstances of this case. On the other hand, the Preliminary Injunction Order is crafted in such a way so that Matthews International still has the ability to enforce, if necessary, any of the remaining provisions in the 2008 Agreement to protect its *legitimate* business interests, including those related to confidentiality, non-disclosure, employee non-solicitation and intellectual property.⁴

6. Public Interest

There is no reason to believe that a preliminary injunction in this case will adversely affect the public interest. The public does not have an interest in paying for Mr. Irwin’s unemployment compensation. The public does not have an interest in preventing Mr. Irwin from working in his chosen trade. The public does not have an interest in restraining competition in the death care or memorialization industry.

E. CONCLUSIONS OF LAW

1. Plaintiff established the immediate and irreparable harm requirement for preliminary injunctive relief.
2. Greater injury would result from denying the preliminary injunction than from granting it.
3. The preliminary injunction properly restores the parties to the status quo.
4. Plaintiff is likely to prevail on the merits of his declaratory judgment action to have certain non-competition restrictive covenants declared as unenforceable.
5. The preliminary injunction is reasonably suited to abate the offending activity.
6. The preliminary injunction will not adversely affect the public interest.

BY THE COURT:
/s/Ward, J.

Dated: May 10, 2010

¹ Sections 2(b) (*Covenant Not to Compete After Termination of Employment*) and 2(c) (*Customer Non-Solicitation*) are the operative non-competition provisions of the 2008 Agreement that Mr. Irwin requested that the Court declare as unenforceable. (Brief in Support of Motion for Preliminary Injunction, pp.7-8).

² Section 4(j) (*Captions*) of the 2008 Agreement states, “The captions of the paragraphs of this Agreement are for convenience only and shall not affect in any way the meaning and interpretation of this Agreement or any provisions hereof.”

³ As acknowledged by counsel for both sides on record at the conclusion of the Hearing, the 2008 Agreement contains an integration clause in Section 4(1) (*Entire Agreement*), which states as follows:

4. Miscellaneous.

1. *Entire Agreement*. This agreement constitutes the entire and only understanding and agreement between the parties with respect to the subject matter of this Agreement and, except as expressly set forth in this Agreement, may be superseded or amended only by a writing signed by each of the parties. All prior or contemporaneous understandings, discussions or agreements with respect to the subject matter are expressly superseded by this agreement.

Based on the foregoing language and a careful reading of the entirety of both employment agreements, we find that the covenants in the 1994 Agreement are no longer enforceable as its provisions are superseded by the applicable provisions in the 2008 Agreement.

⁴ Section 1 (*Confidentiality*) of the 2008 Agreement is an extensive five-paragraph section, prohibiting use or disclosure of confidential information, including: (a) *Employee’s Access to Confidential Information*, (b) *Employee’s Obligation Regarding Matthews Business Information: Injunctive Relief*, (c) *Covenant Not to Use or Disclose Confidential or Non-Public Business Information of Matthews*, (d) *Return of Matthews Information and Property*, and (e) *Employee’s Obligation Regarding Information Concerning Internal Business Matters*. Section 2 (*Non-Competition and Other Provisions*) of the 2008 Agreement contains paragraph (d) *Employee Non-Solicitation* prohibiting employee solicitation or inducement of any Matthews’ employee to leave their employment. Section 3 (*Intellectual Property*) of the 2008 Agreement is an extensive three-paragraph section prohibiting use or disclosure of intellectual property, including: (a) *Employee Inventions and Discoveries*, (b) *Employee Assistance with Patent, Trademark, and Copyright Registration*, and (c) *Exclusion*. Mr. Irwin does not oppose or contest the contractual provisions regarding confidentiality, employee non-solicitation or intellectual property.