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PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

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Christopher Belajac v. Allegheny County Housing Authority

Statutory Appeal—Review of Decision of Hearing Officer for Public Housing Authority—Eligibility for Section 8 Housing—HUD Regulations—Conviction of Crime—Sex Offense—Minor Victim—Mentally Challenged Applicant

1. HUD Regulation Section 982.553(a)(2)(ii) permits housing authority to deny applicant or tenant eligibility for Section 8 housing if applicant engages or has engaged in crime which threatens health, safety, and right to peaceful enjoyment of premises by other tenants or neighborhood residents.

2. Court will re-instate eligibility for Section 8 tenant where sole basis for decision of Hearing Officer to revoke such eligibility was acceptance of belief of investigator that any sex offender should be barred from Section 8 housing.

3. Despite permissive authority to disqualify Section 8 tenant, Housing Authority may not eject him in light of the following factors: Section 8 tenant is severely mentally challenged; tenant's mother who submits his Section 8 documents, unintentionally failed to report his criminal conviction; local chief of police testified on behalf of tenant.

4. Court will sustain appeal of Section 8 applicant (denied continued eligibility for subsidized housing) where Hearing Officer failed to make any finding based on HUD regulation.

(Norma M. Caquatto)

Michael E. Moser for Plaintiff.
Renee L. Mielnicki for the Housing Authority.
No. SA 08-1403. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., August 31, 2009—The Allegheny County Housing Authority ("the Authority") appeals from our Order dated June 29, 2009 granting the statutory appeal of Christopher Belajac. The Authority had terminated Belajac's Section 8 benefits and we reinstated them. We had filed an Amended Memorandum in Support of our Order and much of that is re-stated herein.

ISSUES

In its Statement of Matters Complained of on Appeal, the Authority raises five issues on appeal, fully quoted below:

> 1. The trial court committed an error when it held that neither the hearing officer nor the ACHA exercised discretion and considered the circumstances prior to terminating Appellant from the program.
>
> 2. The trial [court] committed an error of law when it held that the hearing officer and the ACHA were required to exercise discretion and consider the circumstances prior to terminating Appellant from the program.
>
> 3. The trial court committed an error of law and abused its discretion when it substituted its discretion for administrative discretion.
>
> 4. The trial court committed an error of law when it held that the applicable regulations and law did not permit termination of Appellant from the program.
>
> 5. The trial court erred when it held that there was no evidence to support a decision to terminate Appellant from the program.

We have combined those into the following three topics:

> 1. The Court did not substitute its own discretion for that of the Authority.
>
> 2. The Court did not make any "holding" regarding the exercise or non-exercise of discretion by the Hearing Officer or the Authority.
>
> 3. The applicable regulations, when applied to the Findings of Fact below, required that Belajac's Section 8 benefits continue.

DISCUSSION

1. The Court did not substitute its own discretion for that of the Authority.

There is nothing in the Amended Memorandum to suggest that we did anything other than review the Record below. A review of that Record revealed that it is bereft of any support for the decision below except for the lay opinion in the Investigating Officer regarding what the regulations *should* be. We merely rejected that layperson's view and instead applied the existing regulations.

This is not in any sense equivalent to a substitution of our *discretion* for that of the Authority. Rather, we carried out our obligation, sitting on appeal, to accept the Findings of Fact of the Hearing Officer and apply the *correct law* to those facts.

2. The Court did not base its decision on the exercise or non-exercise of discretion by the hearing officer and the Authority.

Although this question has arisen in other statutory appeals that have been assigned to us, it was not an issue here. Our Amended Memorandum expressly noted "the fact" that the Authority had "the power to terminate [the Section 8 benefits of] the Appellant." We then went on to discuss the law and the factual findings of the Hearing Officer. Since we cannot guess what Items 1 and 2 of its Statement may have been based on, we are unable to comment further.

3. The applicable regulations, when applied to the Findings of Fact below, required that Belajac's Section 8 benefits continue.

The Findings of Fact made by the Hearing Officer reveal that Appellant's mental challenges are severe due to a brain injury, that his mother handled his Section 8 paperwork and unintentionally failed to report the criminal conviction that underlies this dispute. The Hearing Officer also credited the support of the Chief of Police and others "who attest to [Appellant's] character and do not wish to see him removed from the Section 8 program." See Letter Decision dated November 10, 2008, from the Hearing Officer to Appellant, page 2, "Decision," ¶1.

The Decision of the hearing officer reveals she simply accepted the fact that Allegheny County Housing Authority has the power

to terminate the Appellant and then adopted the view of the Investigating Officer that was stricter than the applicable regulations.
In ¶4 of her Decision the hearing officer states:

> 4. HUD Regulation §982.553(a)(2)(ii) provides that the housing authority may prohibit admission to the program if the housing authority determines that the member engaged in, or has engaged in during a reasonable time before the admission, criminal activity which may threaten the health, safety and right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity.

And then in ¶10 of the Decision the hearing officer states the Investigating Officer's opinion of what the law ought to be:

> 10. When the ACHA was asked at the hearing about its views as to whether a non-lifetime registrant should be terminated, the Investigating Officer expressed her view that a sex offender of any kind should not be permitted to continue on Section 8 assistance, especially in this case where the victim was 5 years old. Thus, both in general and based on the circumstances of this case, the ACHA has requested to terminate Tenant's participation in Section 8.

Lastly, in ¶11 of the Decision, the hearing officer stated, in effect, that the Investigating Officer's opinion of what the applicable rules should be, constituted "valid reasons" for ACHA's Decision to terminate Appellant's Section 8 assistance.

The ACHA offered no other reason for the termination of *this* person's Section 8 benefits except an opinion that its own rules should be different than they are.

The *sole* basis for the decision of the Hearing Officer was a *non-existent* regulation, promulgated by an Investigating Officer and not by HUD. We properly sustained the appeal and reinstated the benefits.

BY THE COURT:
/s/Friedman, J.

Dated: August 31, 2009

Jagadisan Viswanathan v. ABB, Inc.

Preliminary Objections—Sufficiency of Pleadings

1. Plaintiff filed three amended complaints, alleging at least three purported theories of liability: breach of contract, violation of Pennsylvania Uniform Trade Secrets Act, and a more novel "misappropriation of intellectual property."

2. After receiving the third amended complaint, (which was actually the sixth attempt by plaintiff to state a cause of action), defendant filed preliminary objections in the nature of a demurrer.

3. Plaintiff failed to support any claims or cite any statute or authority recognizing a cause of action for "misappropriation of intellectual property."

4. Plaintiff's complaint plainly evidences that the intellectual property that is the subject of the underlying issues was never maintained by plaintiff in any manner consistent with protection of trade secret. As such, plaintiff has not articulated a cause of action for finding a violation of Pennsylvania Uniform Trade Secrets Act.

5. Plaintiff at oral argument on the preliminary objections alluded to a possible breach of contract claim, but that claim cannot survive objections. The purported contract is only a proposal, and does not in any way appear to be entered into for any benefit specific to plaintiff. In addition, in plaintiff's responses to prior preliminary objections, plaintiff conceded that "the complaint does not allege any breach of contract."

6. After six opportunities to state a cognizable cause of action, and upon plaintiff's failure to do so, the court sustained defendant's preliminary objections.

(Daniel McIntyre)

Jagadisan Viswanathan, *pro se.*
Mark D. Shepard for Defendant.
No. GD 08-023511. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

ORDER OF COURT AND MEMORANDUM OPINION

Colville, J., July 6, 2009—AND NOW this 6th day of July, 2009 upon consideration of Defendant ABB, Inc.'s Preliminary Objections to Plaintiff's Third Amended Complaint, it is hereby ORDERED that the entirety of Plaintiff's Complaint is dismissed with prejudice.

The procedural history of this matter is noteworthy. The instant Third Amended Complaint constitutes, in fact, the sixth iteration of the Plaintiff's complaint. Defendant, today, argues its second set of preliminary objections but has been required to prepare four sets of preliminary objections to the Plaintiff's prior complaints. Plaintiff has, for the most substantial part of this litigation, been unrepresented by counsel, and upon review of the current and prior complaints, haphazardly supported and randomly directed his ever-evolving theories of liability.

In particular, this court can discern at least three purported theories of liability that Plaintiff has variously advanced against ABB, Inc.: breach of contract, violation of the Pennsylvania Uniform Trades Secret Act, and a more novel "misappropriation of intellectual property." Unfortunately, Plaintiff appears to have advanced and abandoned each of these theories at different times in his pleadings.

First, with respect to Plaintiff's asserted claim for "misappropriation of intellectual property," Plaintiff utterly fails to support this claim with any statutory or case law authority recognizing such a cause of action under Pennsylvania law. As such, this court

is compelled to grant the preliminary objections to any purported claim for misappropriation of intellectual property. Second, with respect to Plaintiff's purported claim for violation of the Pennsylvania Uniform Trade Secrets Act, Plaintiff's complaint plainly evidences that the intellectual property, which is the subject of the underlying dispute, was never maintained by Plaintiff in any manner consistent with the protection of a trade secret. In all material respects, Plaintiff knowingly, voluntarily and freely shared the subject intellectual property with the Defendant placing no restrictions upon its use. As such, Plaintiff has not articulated a cause action sufficient for a finding of a violation of the Pennsylvania Uniform Trade Secret Act. Finally, although Plaintiff at oral argument on the instant Preliminary Objections, and only in response to prodding by the court, suggested that he had adequately pled a breach of contract claim (specifically, see paragraphs 70 through 80 of the Third Amended Complaint), this claim cannot survive Preliminary Objection. Upon review, it appears that Plaintiff, might at best, contend that he is an intended beneficiary of what he purports to be a contract between ABB and Sunset Software Technology. However, the purported contract (in reality only a proposal, which Plaintiff asserts was subsequently informally agreed to "in principle" by ABB) does not in any material respect appear to be entered into for the benefit of any intended third party beneficiary, and plainly not for the specific benefit of Plaintiff. More significantly, in pleadings in response to the Defendant's earlier preliminary objections to the First Amended Complaint, Plaintiff, himself, specifically conceded that "the complaint does not allege any breach of contract," Plaintiff's Answer to Defendants Amended Preliminary Objections, page 5. (filed February 12, 2009) It appears that it was in response to this written concession, as well as oral representations made at oral argument before Judge Wecht, that Judge Wecht stated in a March 24, 2009 Order of Court that the "Defendant's Preliminary Objection relating to a breach of contract claim is moot as Plaintiff did not allege a breach of contract; …"

Inasmuch as Plaintiff has had six opportunities to state a cognizable cause of action, but has been unable to do so, this court concludes that it is appropriate to prohibit the Plaintiff from filing any further complaints based upon the same factual circumstances as those alleged in his preceding complaints.

BY THE COURT:
/s/Colville, J.

Mary McLane v. STORExpress, Inc., et al.

Multiple Amended Complaints—Substantive Inconsistencies—Procedural Defects—Dismissal with Prejudice—Breach of Contract—Pa.R.C.P. 1033—Discretionary Leave to Amend—Multiple Irrelevant Averments—Pro Se Plaintiff

1. Plaintiff will suffer dismissal of Second Amended Complaint where 1) Plaintiff did not ask for leave to amend; 2) final version of complaint specifically avers that no contract between Plaintiff and Defendants existed which contradicts averments in prior two versions of complaint; 3) Plaintiff failed to heed Court's warnings in prior two orders allowing leave to amend that a) she should restrict her amended complaint to count for breach of contract for damage to her personal property and b) her failure to comply would result in dismissal with prejudice.

2. Second Amended Complaint which fails to state clearly its claim for relief, and which contains large amounts of impertinent matter, and which states multiple factual allegations in each paragraph will be dismissed with prejudice.

3. Although discretionary leave to amend as stated in Pa.R.C.P. 1033 has been interpreted by PA appellate authority to grant Plaintiff liberal right to amend, right to amend will not be granted where Plaintiff did not request leave to amend her third attempt at drafting a complaint.

(Norma M. Caquatto)

Mary McLane, *pro se.*
Mark Clement for Defendants.
No. GD 08-17605. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Folino, J., September 2, 2009—For the third time, Plaintiff failed to draft a procedurally or substantively valid complaint; this Court was thus forced to dismiss Plaintiff's "Second Amended Complaint" with prejudice. Not only has Plaintiff violated two prior Court orders, but she is simply not able or not willing to comply with our procedural rules or to state a cause of action. I recommend affirmance.

On August 22, 2008, Plaintiff Mary McLane filed her initial complaint in this matter. The confused, 38-page complaint names, as Defendants, STORExpress, Inc. and a variety of identified and unidentified employees of the company. Basically, Ms. McLane alleges that she rented eight "self-storage" units from STORExpress; the complaint then recites a long list of problems with: the STORExpress facilities, the way STORExpress uses its resources, the manner in which STORExpress has treated her and the manner in which STORExpress treats its other customers.

According to this initial complaint, STORExpress violated Ms. McLane's constitutional rights, committed a breach of contract and acted negligently because, among other things, STORExpress: 1) gives to its "commercial" tenants more time to access property than the "residential" tenants; 2) at certain times in the day, does not have an on-duty employee available to handle possible emergencies; 3) has an elevator that will sometimes break down; 4) has cargo-doors that, at times, will malfunction and not allow Ms. McLane access to her belongings; 5) only recently has installed a bathroom; 6) does not spray for "insects, roaches, flies[or] spiders"; 6) has "band rooms" (which do not belong in a self-storage facility); 7) does not have heating and air-conditioning on every floor; 8) rented her two units that were slightly smaller than what was contracted and 9) will, "many times," not have free coffee available for its tenants.

The crux of the complaint, however, appears to be the following: on July 27, 2008, STORExpress cut the locks off of Ms. McLane's eight storage rooms and transferred all of her belongings elsewhere; this was done, Ms. McLane averred, despite the

fact that she was current on her rental payments. As with Plaintiff's other claims, Ms. McLane alleged that these actions violated her constitutional rights, constituted a breach of contract and caused her "great emotional distress." The complaint sought damages in excess of $1,000,000.[1]

A quick view of the complaint shows that its procedural and substantive problems are many. For example: the Complaint is not divided into separate counts; almost all of the paragraphs contain two or more material allegations of fact; the allegations contain a multitude of "impertinent matter"; the buried "*ad damnum*" clauses request haphazard monetary damages; the necessary contract is not attached to the complaint; almost all of the claims have no basis in law; as shown below, many of the claims, even according to Plaintiff's own averments, have no basis in fact, and the complaint is not verified. Hence, after Defendants filed preliminary objections to the complaint, this Court (speaking through the Honorable Paul F. Lutty) sustained the preliminary objections and struck the complaint in its entirety. Moreover, Judge Lutty's Order specified: "Plaintiff may file an amended complaint *limited to a breach of contract action for damage to her personal property.*" Order of Court, dated October 22, 2008, Lutty, J. (emphasis added).

Ms. McLane responded to Judge Lutty's Order with an amended complaint that—both legally and socially speaking—was *even more* objectionable than the first. Although the Amended Complaint was verified and did attach the written contract between the parties, Ms. McLane refused to limit her complaint to a "breach of contract action for damage to her personal property." *Id.* Rather, from what this Court can see, Ms. McLane simply reprinted her original, unanswerable, 38-page Complaint, doubled the requested money damages and then *added* 21 unanswerable pages to the screed.

Further, located right in the middle of this Amended Complaint is an odd digression in which Ms. McLane explains how our nation has gone wrong. This social commentary first laments the decline of the gold standard and then blames every ill of the United States upon the "Jews; Negros; Italians; Chinese, etc."—groups of people who, from Ms. McLane's understanding, "were not to [have been] allowed into the United States" in the first place. Amended Complaint, at 26. Plaintiff follows this discourse with a story of how the Pittsburgh Public Library removed its single typewriter from public use; this anecdote, Ms. McLane implies, is emblematic of our failing society. She writes:

> And on Thursday, November 2008, the manager at the said downtown Pittsburgh, Pa. library decided to remove the typewriter there because a black (negro) young man refused to relinquish the only (one) typewriter—even though he had been typing on it for four (4) hours; he said it was because he was black.
>
> [ ]which fits right in with what herein Plaintiff has been saying—if the negroes do not get their way, they cause a fuss, yell racist, swear.
>
> This is what comes of giving to a group of people (who were never to have been in the United States of America) the status of being *special*.
>
> They are owed NOTHING. And just as with the typewriter, they have destroyed the public schools which they attend.
>
> So, shortly, the United States of America will cease to exist. It is a failed experiment.

Amended Complaint, at 29A-B (emphasis in original).

Next, Ms. McLane's writing jumps to the various "rackets" that exist in the United States (such as the "gambling racket," the "alcohol racket" and the "charities racket") and, finally, transitions to the issue of implanting "human genes in pigs and pig genes in humans." Amended Complaint, at 29B-C.

Understandably, Defendants again filed preliminary objections to Plaintiff's complaint and, this time, the Court placed an ultimatum upon Plaintiff. In the Order dated March 11, 2009, this Court (speaking through the Honorable Christine A. Ward) sustained Defendants' preliminary objections, struck Plaintiff's Amended Complaint and specifically ordered:

> Plaintiff is granted *one last opportunity* to amend her complaint within thirty (30) days of the date of this court's Order, consistent with Judge Lutty's Order of October 22, 2008. The amended complaint shall consist of a count for breach of contract for damage to her personal property. *Failure to comply with this order shall result in dismissal with prejudice.*

Order of Court, dated March 11, 2009, Ward, J. (emphasis added).

Unfortunately, Ms. McLane did not heed Judge Ward's Order. Rather, Ms. McLane's "Second Amended Complaint" contains repeated allegations that the Defendants violated her constitutional rights, committed various torts against her and caused her "great emotional pain and upset." *See, e.g.*, Plaintiff's "Second Amended Complaint," at 4 & 5. Moreover, and oddly, Ms. McLane's "Second Amended Complaint" avers, over and over again, that there *never was a contract* between herself and STORExpress. *See, e.g.,* Plaintiff's "Second Amended Complaint," at 6 ("There is NO contract by and between herein Plaintiff, Mary McLane and herein Defendant, STORExpress, Inc."); 8 ("The Agreement/contract was never completed…thus no contract exists…"); 9 (the contract is "NULL AND VOID and none of the terms and conditions of said contract apply to herein said MARY McLANE"); 9-10 ("All of the contracts by and between herein Plaintiff…[and] herein Defendant…[are] invalid, non-binding, null and void as a contract").

And, added to these substantive problems, the very same procedural errors that were present in Ms. McLane's "original" and "amended" complaints are present here. Simply put, this complaint is (again) unanswerable: every paragraph in the complaint contains a multitude of factual allegations; it is not clear which paragraphs attempt to state a claim for relief; in almost every instance, it is unclear what "relief" Plaintiff actually does seek and the Complaint is replete with "impertinent matter."

Therefore, the Defendants once again filed preliminary objections to the pleading: the Defendants requested that Plaintiff's "Second Amended Complaint" be dismissed with prejudice. I agreed that the complaint should be dismissed with prejudice and, on June 4, 2009, this Court entered an Order to that effect; Plaintiff has now filed this meritless appeal. The ensuing discussion will explain first why I dismissed Plaintiff's "Second Amended Complaint," and second why I did not afford Plaintiff leave to amend.

I was forced to dismiss Plaintiff's "Second Amended Complaint" for a variety of independent reasons; First, I dismissed the pleading because the complaint violates two prior orders of Court. As was explained above, Plaintiff's initial complaint contained an assortment of outlandish claims. She alleged that the Defendants violated her constitutional rights, breached a

contract with her and caused her "great emotional distress" because they did such things as: only recently installed a bathroom; failed to have heating and air-conditioning on every floor and "many times" failed to have free coffee available for their tenants. Further, the rambling complaint was just not answerable. Thus, after receiving Defendants' preliminary objections, Judge Lutty struck the unanswerable complaint and, in an attempt to help focus Plaintiff, ordered that she limit her amended complaint to "a breach of contract action for damage to her personal property." Order of Court, dated October 22, 2008, Lutty, J.

Plaintiff ignored Judge Lutty's order: she simply *reprinted* her initial complaint and then added 21 pages to her original pleading. Therefore, after the Defendants again filed preliminary objections, Judge Ward ordered:

> Plaintiff is granted one last opportunity to amend her complaint within thirty (30) days of the date of this court's Order, consistent with Judge Lutty's Order of October 22, 2008. The amended complaint shall consist of a count for breach of contract for damage to her personal property. Failure to comply with this order shall result in dismissal with prejudice.

Order of Court, dated March 11, 2009, Ward, J. (emphasis added).

Yet, for the second time, Plaintiff unmistakably ignored an order of Court: again, Plaintiff failed to limit her complaint "to a breach of contract action for damage to her personal property." Instead (and again), Plaintiff's "Second Amended Complaint" alleges that the Defendants violated her constitutional rights, committed various torts against her person and caused her "great emotional pain and upset." Not only do these claims have no basis in law, but their inclusion plainly violates the terms of both Judge Lutty's and Judge Ward's orders. And, as was made clear by Judge Ward's March 11, 2009 Order, "dismissal with prejudice" was required for such a violation.

Secondly (and independent of the above reason), I dismissed Plaintiff's "Second Amended Complaint" because it is just not answerable. As stated above: every paragraph in the complaint contains multiple factual allegations; it is not clear which paragraphs attempt to state a claim for relief; in almost every instance, it is unclear what "claim" or what "relief" Plaintiff actually does seek and every paragraph in the complaint contains varying amounts of "impertinent matter."

Finally, I was forced to dismiss Plaintiff's complaint for another independent reason: none of the claims have any basis in law or in fact. To be sure, from reading Plaintiff's earlier attempts, Plaintiff's only conceivable claim could have been one for breach of contract. Yet, in Plaintiff's "Second Amended Complaint," Plaintiff repeatedly avers that *there is no contract* between herself and STORExpress. Therefore, as the "Second Amended Complaint" states no valid cause of action, I was required to dismiss the pleading.

And, with my dismissal, I did not afford Plaintiff leave to amend her complaint.

It is true that, although the amendment of pleadings is a matter placed within the trial court's discretion, as a general rule leave to amend should be liberally granted. *Kilian v. Allegheny County Distribs., Inc.*, 185 A.2d 517, 519 (Pa. 1962). This "general rule" is currently embodied in Pennsylvania Rule of Civil Procedure 1033, which declares: "A party, either by filed consent of the adverse party or by leave of court, may at any time…amend his pleading." Pa.R.Civ.P. 1033. Yet, as our Supreme Court has held, neither Rule 1033 nor Pennsylvania case law *requires* "a court to *sua sponte* order…a party to amend his pleading." *Werner v. Zazyczny*, 681 A.2d 1331, 1338 (Pa. 1996). And, here, Plaintiff *never asked* this Court for leave to amend her complaint. *See* "Plaintiff's Answer to Defendants' Preliminary Objections to Plaintiff's Second Amended Complaint," filed June 4, 2009. Thus, under both *Werner* and Rule 1033, Plaintiff cannot now argue that she should have (yet again) been allowed to amend her complaint: the issue was never raised before this Court. *Id.*; *see also Kalenevitch v. Finger*, 595 A.2d 1224 (Pa.Super. 1991)(holding: issues not raised before the trial court are waived).

Moreover, even if Plaintiff did request leave to amend, that request would have been denied. This denial would have been based upon at least three independent reasons. First, pursuant to Judge Ward's March 11, 2009 Order, Plaintiff was given "one last opportunity" to amend her complaint; and, as Judge Ward made clear, a "[f]ailure to comply…*shall* result in dismissal with prejudice." Order of Court, dated March 11, 2009, Ward, J. (emphasis added). Plaintiff failed to comply with Judge Ward's Order—dismissal with prejudice was, therefore, mandatory.

Also, this was Plaintiff's third attempt at drafting a procedurally proper complaint and, in each attempt, Plaintiff failed miserably. Certainly, Plaintiff's "Second Amended Complaint" was not dismissed for mere "technical" procedural violations. Rather, just like Plaintiff's first two attempts, the current complaint is simply unanswerable. As our Superior Court has held, "[s]eriatim amendments [to a complaint] should not be allowed absent a showing of reasonable entitlement to repeated restatements of an alleged cause of action." *Halliday v. Beltz*, 514 A.2d 906, 909 (Pa.Super. 1986). Far from showing any "reasonable entitlement" to an amendment, Plaintiff has shown that she is either unable or unwilling to draft an "answerable" complaint. Further amendment should not be permitted.

Finally, Plaintiff's third attempt fails substantively: as explained above, the "Second Amended Complaint" has no basis in law or fact. According to our Superior Court, even where leave to amend is requested, that leave may be denied "[w]here the initial pleading reveals that the complaint's defects are so substantial that amendment is not likely to cure them, and that the *prima facie* elements of the claim or claims asserted will not be established." *Feingold v. Hill*, 521 A.2d 33, 39 (Pa.Super. 1987). Here, Plaintiff's only conceivable cause of action is for "breach of contract." Yet, Plaintiff's "Second Amended Complaint" repeatedly avers that "no contract exists" between herself and STORExpress. And, by making these factual averments, it is clear that "amendment would serve no useful purpose even if granted": Plaintiff has shown that she has no substantive claim in this case. *Halliday*, 514 A.2d at 910.

Accordingly, this Court recommends that the Superior Court uphold the contested order and affirm the final judgment entered in this case.

Date Filed: September 2, 2009

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[1] The initial complaint also sought injunctive relief to prohibit STORExpress from destroying or otherwise disposing of her property. And, on August 28, 2008, this Court (speaking through the Honorable Robert P. Horgos) granted, in part, Ms. McLane's preliminary injunction request. According to Judge Horgos's Order, STORExpress was required to: "provide the keys to the storage unit forthwith," allow Plaintiff "access to the storage unit during normal business hours" and "not dispose or damage any of Plaintiff's property." Order of Court, dated August 28, 2008, Horgos, J.

Robert B. Mostoller v. Grandview Cemetery Association

Writ of Summons—Rule to File Complaint—Judgment of non pros—Landlord/Tenant—Pro Se Plaintiff—Pa.R.A.P. 1925(b)

1. Plaintiff's Complaint will be dismissed with prejudice where 1) Plaintiff did not comply with prior order of court to more narrowly draft Complaint and 2) Plaintiff did not ask for leave to amend.

2. Plaintiff who was ruled to file complaint and failed to do so, and who did not respond to Defendant's preliminary objections, and against whom Defendant sought and obtained a judgment of non pros, will suffer dismissal of complaint.

3. Plaintiff/Appellant waives right to appeal by untimely filing of statement of errors complained of an appeal. Pa.R.A.P. 1925(b) as interpreted by *Com. v. Castille*, 888 A.2d 775 (Pa. 2005).

(Norma M. Caquatto)

Robert B. Mostoller, *pro se.*
Kyle M. Baxter for Defendant.
No. GD 07-012507. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Folino, J., September 4, 2009—On June 9, 2009, this Court sustained Defendant's preliminary objections and dismissed Plaintiff's Complaint with prejudice; Plaintiff now appeals to the Superior Court.

I.

On June 14, 2007, Plaintiff Robert Mostoller instituted the current action by writ of summons. Six months later, Plaintiff still had not filed a complaint in the matter; thus, on December 11, 2007, Defendant Grandview Cemetery Association served a "rule to file complaint" upon Plaintiff. Plaintiff did nothing and, on January 11, 2008, a judgment of *non pros* was entered against Plaintiff.

Five days after the judgment of *non pros* was entered, Plaintiff filed a "Petition for Relief from the Judgment of Non Pros"; attached to the petition was Plaintiff's proposed complaint. According to this proposed complaint, Plaintiff was renting an apartment from the Defendant when, one day, the Defendant broke into Plaintiff's apartment, threatened Plaintiff, ordered Plaintiff to leave the apartment, disposed of Plaintiff's possessions and changed the locks on the apartment.

The proposed complaint contained one count, which was entitled "Violations of the Landlord and Tenant Act of 1951, as amended and/or common law requirements before possession and seizure of property." Yet, found under this one "count" were a variety of possible claims, including claims for: 1) unlawful eviction; 2) unlawful taking and retention of property; 3) unlawful destruction of property; 4) violating Plaintiff's right to use the "common facilities of the premises"; 5) violating Plaintiff's right to receive visitors and 6) violating "various common law procedures…[for] obtain[ing] possession" of the property. Plaintiff sought "replevin of all property taken by the defendants"; monetary damages for the retention of his property; monetary damages for the destruction of his property; remuneration for Plaintiff's lost "business income" and punitive damages.

Oral argument on Plaintiff's "Petition for Relief from the Judgment of Non Pros" was heard before the Honorable Stanton R. Wettick. Although I was not privy to what was said or admitted to during that oral argument, Judge Wettick's Order was precise: Judge Wettick partially granted Plaintiff's "Petition for Relief," but expressly limited Plaintiff's claims for relief. Specifically, Judge Wettick's August 21, 2008 Order reads: "the Petition for Relief from Judgment of Non-Pros is *partially* GRANTED [; Plaintiff] may pursue *only* his claims *to recover any property* of [Plaintiff's] left on the premises occupied or controlled by defendant that defendant should have returned or made available to [Plaintiff]." Order of Court, dated August 21, 2008, Wettick, J. (emphasis added).

Plaintiff did not obey Judge Wettick's Order: the complaint Plaintiff filed in the action was *identical* to the proposed complaint that was before Judge Wettick. *See* "Complaint With Notice To Defend," filed by Plaintiff Robert B. Mostoller, docketed April 13, 2009 (hereinafter "Plaintiff's Complaint"). Thus, Plaintiff *refused* to limit his complaint to the "recover[y of] any property…left on [Defendant's] premises." Order of Court, dated August 21, 2008, Wettick, J. Instead, Plaintiff included the claims described above, such as: unlawful eviction; violating Plaintiff's right to use the common areas; etc. Because of this, the Defendant filed preliminary objections to Plaintiff's Complaint; within these preliminary objections, the Defendant argued that, since Plaintiff violated Judge Wettick's Order, "Count I" of the Complaint must be struck with prejudice. "Defendant's Preliminary Objections to Plaintiff's Complaint," filed on behalf of Defendant Grandview Cemetery Association, docketed May 6, 2009, at ¶ 15.

Plaintiff did not respond to the preliminary objections and Plaintiff did not appear for the scheduled June 9, 2009 oral argument. *See* Order of Court, dated June 9, 2009, Folino, J. (memorializing that the preliminary objection was "Not Opposed"). And, since Plaintiff's Complaint plainly violated Judge Wettick's Order, I struck "Count I" of the Complaint; moreover, since "Count I" was the only count in the Complaint, I necessarily dismissed the entire Complaint. And finally, since Plaintiff did not appear at oral argument, did not oppose the preliminary objections and did not request leave to amend, I dismissed the Complaint with prejudice. Order of Court dated June 9, 2009, Folino, J.

Then, after Plaintiff appealed his case to the Superior Court, I ordered Plaintiff to file a Rule 1925(b) "statement of errors complained of on appeal." Pa.R.App.P. 1925(b). This Order was docketed on July 15, 2009 and gave Plaintiff 21 days from "the date this Order has been entered" to comply with the mandates of Rule 1925(b). Unfortunately, Plaintiff waited until August 11, 2009—or, 27 days after the relevant order had been docketed—to file his Rule 1925(b) Statement.

II.

The appeal is now before the Superior Court. In my view, this appeal is meritless for at least two separate reasons. First, I was forced to dismiss Plaintiff's Complaint because the sole "count" in the Complaint unmistakably violates a prior order of court; and, since "Count I" "fails to conform to law or rule of court," the count had to be stricken. Pa.R.C.P. 1028(a)(2). Moreover, since the *only* count in the Complaint was stricken, the entire Complaint had to be dismissed.

Further, I dismissed the Complaint with prejudice because Plaintiff never asked this Court for leave to amend his complaint; in fact, Plaintiff neither responded to the preliminary objections nor appeared in court at oral argument. Hence, pursuant to our Supreme Court's opinion in *Werner v. Zazyczny*, Plaintiff cannot argue that I should have granted him leave to amend his complaint: he never requested such relief from this Court. 681 A.2d 1331, 1338 (Pa. 1996) (stating and holding: "petitioner's claim fails because he never requested that the [court] allow him leave to amend [his complaint]. Appellant fails to cite to any case law, and we can find none, requiring a court to *sua sponte* order or require a party to amend his pleading."); *see also Kalenevitch v. Finger,*

595 A.2d 1224 (Pa.Super. 1991)(holding: issues not raised before the trial court are waived).

Secondly, and in any event, all of Plaintiff's appellate issues have been waived: Plaintiff's Rule 1925(b) "statement of errors complained of on appeal" was untimely. *Commonwealth v. Castillo*, 888 A.2d 775 (Pa. 2005) (holding: a court has no discretion to consider any issue raised in an untimely Pa.R.App.P. 1925(b) statement). For these reasons, I recommend affirmance.

Date Filed: September 4, 2009

Antonio Perri v. Alexis Comunale

Landlord/Tenant—Equitable Distribution—Hearsay—Agency—Indispensable Party

1. Landlord/Wife is not an indispensable party to an action by Landlord/Husband against Tenant for unpaid rent where interim equitable distribution Consent Order had awarded possession of premises to Landlord/Husband.

2. Tenant's argument that Landlord/Wife's alleged oral authorization to discontinue part of rental payments failed because without Landlord/Wife in Court, alleged oral authorization is unexcepted hearsay.

(Norma M. Caquatto)

Antonio Perri, *pro se.*
Severin A. Russo for Defendant.
No. AR 08-5217. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., September 9, 2009—This is an interesting landlord tenant matter in which I entered a Non-Jury Verdict in favor of Plaintiff, Antonio Perri, a/k/a Tony Perri ("Tony"), and against Defendant, Alexis Comunale, ("Comunale") in the amount of $2,600 for past due rent.

Comunale has filed a timely Motion for Post Trial Relief. The parties filed Briefs and I heard Argument on August 19, 2009.

The facts are simple. Tony and his former wife, Josephine ("Josephine"), own and owned, certain real property at 613 Beaver Avenue in the Borough of Sewickley, as well as other rental property in the East Liberty section of Pittsburgh. Comunale was a tenant in that building, under an oral month-to-month lease for many years. She vacated the premises in December 2007.

Tony and his wife, Josephine, fell into marital discord. Review of Family Division records shows their first Court filing was on May 5, 1996. Ultimately, they divorced on January 26, 2007, but a distribution of marital properties had not yet occurred. It seems that an effort at equitable distribution was, and is, underway, and on April 13, 2006, a Consent Order was entered whereby the parties were to cooperate in selling the realty. Under that Order, Josephine would have possession and limited use of the East Liberty property, and Tony would have possession and limited use of the Sewickley property. At that time, the rent paid by Comunale was $850 a month.

According to Comunale, in March 2006, Josephine told her to pay the rent by issuing 2 separate checks, one for $650, and the other for $200, payable to Josephine alone. Comunale said this "two check" procedure was at the direction of Josephine's attorney, an explanation I question. (N.T. p. 33). It appears that Tony was aware of this practice, and tolerated it for awhile in the interest of some degree of harmony as well as to avoid alimony. (N.T. p. 12). The aforesaid April Order also contemplated that Josephine would keep any rents paid on the Sewickley property until April 30, 2006, after which a real estate management company was to collect the rents, and after paying expenses, the net income on *both* properties was to be divided equally between them. This never occurred.

It appears that Tony and Josephine attempted to offer the Sewickley property for sale and, according to Tony, Comunale bid, unsuccessfully, on it. Thereafter, in or about October 2006, she stopped paying the rent by the two checks, and paid only $650 to Tony. She contended that Josephine had authorized her to do so. (N.T. p. 33). Comunale did not call Josephine as a witness, and I rejected the aforesaid testimony as hearsay. Nevertheless, I obviously heard what Comunale had to say, and did not accept it. (N.T. p. 33).

Comunale has asserted that I erred in (1) applying the hearsay rule to her contention that Josephine was acting as Tony's agent when she told her to discontinue the $200 a month rental payment; and (2) entering any verdict at all because Josephine was an indispensable party—i.e. should have been a plaintiff, and thus, I had no jurisdiction to hear the case.

For this second proposition, defense counsel cites *DeCoatsworth v. Jones*, 639 A.2d 792 (Pa. 1994). In that case, the facts show that husband and wife, who were estranged, separately conveyed their interests in certain real estate to a third party. The husband later brought suit for fraud against that third party, and one of the issues before the Pennsylvania Supreme Court was whether the wife had to be joined as an indispensable party. On that issue, the Supreme Court held that the husband and wife, by jointly conveying their interest in the property, severed the tenants by entireties status; and that since husband was only seeking personal damages to himself, and not the "entireties" interest prior to the conveyance, the wife was not an indispensable party. As such, it appears that *DeCoatsworth* is not supportive of Comunale's argument.

Here, I believe the facts of this case, and the Consent Order between Josephine and Tony are the significant factors. First, the Order of April 17, 2006 gave Perri *possession* of the Sewickley property. Thus, he could clearly sue Comunale without Josephine's joining. Further, and by reason of that Order, the alleged agency relationship between Josephine and Tony is a nullity since the only agent contemplated, (but, which was never realized) was an independent management company. Moreover, Tony disputed any such authorization.

Finally, it is not lost on me that the division of the rent into 2 separate checks payable to Josephine, alone, began in March 2006, one month *before* the entry of the Consent Order, and continued for six months until Comunale's effort to buy the building failed. Only then did she stop paying $850 a month for the property. As a result, I do not believe her when she says Josephine told her to discontinue the $200 payment. While defense counsel showed proper indignation at my suggesting complicity between her and Josephine, the facts are indisputable. Further, Josephine did not appear at trial. Thus, I am satisfied with my verdict, and the Motion for Post Trial Relief is DENIED, and my verdict is AFFIRMED.

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

Dated: September 11, 2009

Gloria Proctor v.
Liberty Furnace Co., Inc.

Arbitration—Failure to Appear for Hearing—Local Rules

1. Plaintiff failed to appear for the Arbitration Hearing that was scheduled for May 1, 2009. Defendant did appear for the hearing.

2. The Local Rule 1303 (a)(2), Failure to Appear for Hearing stipulates the following:

> (1) If a party fails to appear for a scheduled arbitration hearing, the matter may, if all present parties agree, be transferred immediately to a Judge of the Court of Common Pleas for an *ex parte* hearing on the merits and entry of a non-jury verdict, from which there shall be no right to a trial *de novo* on appeal.

This rule is in conformity with the state rule, Pa. R.C.P. 1303.

3. Plaintiff was provided with adequate notice of the hearing and notice appears in Plaintiff's complaint.

4. The court entered a Non-Jury Verdict in favor of Defendant and against the Plaintiff. This verdict was upheld on post-trial motion.

(Danielle Rawls)

Plaintiff, *pro se*.
Defendant, *pro se*.
No. AR 09-1966. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

O'Reilly, J., October 7, 2009—The case came before me while I was the sitting Motions' Judge on May 1, 2009 under the standard Rules of Court[1] that pertain to those Arbitration matters where one (1) party does not appear for the scheduled hearing.

In this instance, the Plaintiff, Gloria Proctor ("PROCTOR") failed to appear for the Arbitration Hearing that was scheduled for May 1, 2009 on her complaint against the Defendant, Liberty Furnace Co., Inc. ("LIBERTY FURNACE"). LIBERTY FURNACE did appear on that date and time.

> Our Local Rules provide as follows:
>
> Local Rule 1303(a)(2) Failure to Appear for Hearing.
>
> (1) If a party fails to appear for a scheduled arbitration hearing, the matter may, if all present parties agree, be transferred immediately to a Judge of the Court of Common Pleas for an *ex parte* hearing on the merits and entry of a non-jury verdict, from which there shall be no right to a trial *de novo* on appeal.

Additionally, the Note that follows this Local Rule states as follows:

> Note: This local rule results in the loss of the right to a trial *de novo* on appeal, as described in the local rule. A dismissal or judgment which results from this local rule will be treated as any other final judgment in a civil action, subject to Pa. R.C.P. 227.1.

This Local Rule is in conformity with the State Rule, Pa. R.C.P. 1303, which states in pertinent part:

> (b) When the board (of arbitrators) is convened for hearing, if one or more of the parties is not ready the case shall proceed and the arbitrators shall make an award *unless* the court….(2) hears the matter if the notice of hearing contains the statement required by subdivision (a)(2) and all parties consent.

In Allegheny County, the Notice referred to in this Rule clearly states:

> DUTY TO APPEAR AT ARBITRATION HEARING
>
> If one or more of the parties is not present at the hearing, THE MATTER MAY BE HEARD *AT THE SAME TIME AND DATE* BEFORE A JUDGE OF THE COURT WITHOUT THE ABSENT PARTY OR PARTIES. *THERE IS NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.*
>
> NOTICE: YOU MUST RESPOND TO THIS COMPLAINT WITHIN TWENTY (20) DAYS OR A JUDGMENT FOR THE AMOUNT CLAIMED MAY BE ENTERED AGAINST YOU BEFORE THE HEARING.
>
> IF ONE OR MORE OF THE PARTIES IS NOT PRESENT AT THE HEARING, THE MATTER MAY BE HEARD IMMEDIATELY BEFORE A JUDGE WITHOUT THE ABSENT PARTY OR PARTIES. THERE IS *NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.*

Indeed, this Notice does appear in PROCTOR's Complaint. Therefore, and pursuant to these rules and procedure, I heard this matter on that date. As standard protocol, I placed this matter on the Record. *Hayes v. Donohue Designer Kitchen, Inc.*, 818 A.2d 1287 (Pa.Super. 2003). The only party appearing before me was LIBERTY FURNACE. (N.T., 5/1/09, p. 2). The Record reflects that I stated "(W)ell, there is no plaintiff (PROCTOR) here, and there is no evidence that can be offered against Mr. Lubovitz or Liberty Furnace." (N.T., 5/1/09, p. 3). LIBERTY FURNACE acknowledged that there was no counterclaim. (N.T., 5/1/09, p. 3). Accordingly, I entered a Non-Jury Verdict in favor of LIBERTY FURNACE and against PROCTOR. That was the extent of my involvement in this case.

Subsequently, I learned that PROCTOR filed an Appeal to the Superior Court. A review of the docket shows that PROCTOR had filed post trial motions which were heard and denied by my colleague, Judge R. Stanton Wettick, pursuant to our Local Rules. Apparently, from reading her pleading, PROCTOR attempted to offer an excuse for her failure to appear at the scheduled arbitration hearing. However, Judge Wettick, for reasons unknown to me, did not find merit to those reasons, nor any grounds to afford her the relief she requested.

Again, as to my involvement in this matter, I adhered to Pa. R.C.P. 1303 and Local Rule 1303(a)(2) when a party fails to appear for a scheduled Arbitration Hearing. It is clear that PROCTOR did not appear as required. As such, I entered an appropriate Non-Jury Verdict against her.

This is what I did and why I did it.

I have provided a copy of this Opinion to Judge Wettick, who may wish to file his own Opinion in regard to the denial of PROCTOR's Motion for Post-Trial Relief.

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

Dated: October 7, 2009

[1] Pa. R.C.P. 1303 and Allegheny County Local Rule 1303(a)(2).

Commonwealth of Pennsylvania v. Jeffrey Johnson

Criminal Conspiracy to Commit Burglary—Uniform Firearms Act—Post-Conviction Relief Act

1. Defendant was sentenced to an aggregate term of imprisonment of not less than 4 years and not more than 8 years. The jury convicted Defendant of one count of criminal conspiracy to commit burglary and four counts of violating the Uniform Firearms Act based upon evidence that the Defendant and another person agreed to burglarize a residence and stole 5 firearms from that residence.

2. Defendant filed post-sentencing motions seeking a modification of the sentence due to extraordinary efforts at rehabilitation and challenging the weight and sufficiency of the evidence to convict. The motions were denied.

3. The Court found that Defendant's post-trial motions were filed a day late and thus, the motion was properly denied. In addition, the Court held that the allegations in Defendant's 1925(a) Statement of Matter Complained Of On Appeal were too vague, and thereby waived for appellate review.

(Danielle Rawls)

Gerald Johnson for the Commonwealth.
William Brandstetter, II for Defendant.
No. CC 200613986. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., June 30, 2009—This is a direct appeal wherein the defendant, Jeffrey Johnson, appeals from the judgment of sentence of May 9, 2007. After a non-jury trial, the defendant was convicted of one count of criminal conspiracy to commit burglary and four counts of violating the Uniform Firearms Act. The convictions stem from evidence adduced at trial demonstrating that the defendant and another person agreed to burglarize a residence and, in doing so, stole 5 firearms from that residence. On May 9, 2007, this Court sentenced the defendant to four consecutive terms of imprisonment of not less than one year nor more than two years for each of the convictions under the Uniform Firearms Act. This Court sentenced the defendant to a concurrent term of imprisonment of not less than one year nor more than two years at the criminal conspiracy conviction. The resulting sentence was an aggregate term of imprisonment of not less than 4 years nor more than 8 years. On May 22, 2007, the defendant filed post-sentencing motions seeking a modification of the sentence due to the defendant's extraordinary efforts at rehabilitation, challenging the sufficiency of the evidence to convict and claiming that the verdict was against the weight of the evidence. These motions were denied by operation of law. The next filing in this case by defendant was on August 20, 2008 when he filed a pro se petition pursuant to the Post-Conviction Relief Act. Counsel was appointed for the defendant and a counseled petition seeking direct appeal rights was then filed on December 15, 2008. The Commonwealth responded to this petition by noting that the defendant failed to timely file a post-sentence motion and that, pursuant to Pa.R.Crim.P. 720(A)(3), the defendant failed to file a timely Notice of Appeal.[1] The Commonwealth conceded defense counsel's ineffectiveness and consented to the reinstatement of the defendant's appeal rights. On April 15, 2009, this Court reinstated the defendant's appeal rights and this appeal followed.

The defendant filed a 1925(b) Statement of Matters Complained Of On Appeal alleging, verbatim, the following claims of error:

> The evidence was insufficient as a matter of law to support a finding of guilt;
>
> The verdict was against the weight of the evidence; and
>
> The trial court abused its discretion by denying the Defendant's post-trial motions that were deemed denied by operation of law.

For the reasons that follow, none of these claims merit a recitation of the facts and the judgment of sentence should be affirmed.

This Court addresses first defendant's claim that this Court erred by denying his post-sentence motion by operation of law. Upon a review of the procedural history of this case, it is evident that the defendant failed to file a timely post-sentence motion and, therefore, denial of the motion was proper. Pursuant to Pa.R.Crim.P. 720(A)(1), a written post-sentence motion must be filed no later than 10 days after the imposition of sentence. See also *Commonwealth v. Green*, 863 A.2d 613, 615 (Pa.Super. 2004). The record is clear that sentencing in this case occurred on May 9, 2007. The defendant filed his motion on May 22, 2007. Although the tenth day for proper filing did occur on a Saturday (May 19, 2007), the defendant should have filed his post-sentencing motion on or before May 21, 2007, the first business day after the weekend. As recognized by the Commonwealth in stipulating to the reinstatement of the defendant's appellate rights, the post-sentence motion was untimely. Therefore, the motion was properly denied.

The defendant's next two issues relate to the sufficiency of the evidence and the weight of the evidence. Pennsylvania courts have explained that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Commonwealth v. Dowling*, 778 A.2d 683 686 (Pa.Super. 2001); see also *Commonwealth v. Seibert*, 799 A.2d 54 (Pa.Super. 2002). In such circumstances, the vague issues raised on appeal are deemed waived. *Lineberger v. Wyeth*, 894 A.2d 141, 148 (Pa.Super. 2006). As set forth in *Commonwealth v. Reeves*, 907 A.2d 1, 2-3 (Pa.Super. 2006):

> There is a common sense obligation to give the trial court notice as to what the trial court should address in its Rule 1925(a) opinion. While there is a middle ground that counsel must travel to avoid having a Rule 1925(b) statement so

> vague that the trial judge cannot ascertain what issues should be discussed in the Rule 1925(a) opinion or so verbose and lengthy that it frustrates the ability of the trial judge to hone in on the issues actually being presented to the appellate court, *see Kanter v. Epstein,* 2004 Pa.Super. 470, 866 A.2d 394 (Pa.Super. 2004), that is not an onerous burden to place on counsel. It only requires using a little common sense.

Germane to this case, general claims of insufficiency of evidence or weight of evidence that do not articulate the specific elements that an appellant deems weren't established at trial are too vague and result in a waiver of the issues raised on appeal. See *Commonwealth v. Williams*, 959 A.2d 1252, 1257-1258; (Pa.Super. 2008). In *Williams*, the Superior Court was evaluating a 1925(b) statement that posed the following question:

> Was there not insufficient evidence to sustain the charges of Murder, Robbery, VUFA no license, and VUFA on the streets. [sic] Thus, denying petitioner due process of law?

The Superior Court held that this statement was too vague and, therefore, the issue of sufficiency was waived on appeal:

> Similarly, Appellant herein failed to articulate the specific elements of any crime which he deems the evidence presented at trial failed to sufficiently establish. Though the Commonwealth did not object to Appellant's defective 1925(b) statement on this issue, the trial court indicated in its Opinion that Appellant's failure to list any reasons he believes that the evidence was insufficient to sustain the charges created a situation in which this is issue is too ambiguous to be effectively reviewed by the trial court and should be dismissed. Trial Court Opinion, filed June 26, 2007, at 7. As such, in light of *Flores, supra,* we find Appellant has waived this issue.

Williams, 959 A.2d at 1257-1258; see also *Commonwealth v. Flores*, 921 A.2d 517, 522-523 (Pa.Super. 2007)(a 1925(b) statement stating that "[t]he evidence presented was insufficient to prove beyond a reasonable doubt that the appellant committed the above-captioned offenses" and that "the testimony of Sondra Coble, Julienne Briggs, and Atlas Simpson was insufficient to prove beyond a reasonable doubt that the appellant committed the above-captioned offenses" did not properly preserve a sufficiency of the evidence claim for appellate review.); *Reeves*, 907 A.2d at 3 (a Rule 1925(b) statement that stated, "[t]he evidence was insufficient to support the verdict on the charge of securing execution of documents by deception" was insufficient and the issue was, therefore, waived.); *Seibert*, 799 A.2d 54 (Appellant's weight of the evidence issue waived for having filed a vague 1925(b) statement claiming only that "the verdict of the jury was against the weight of the credible evidence as to all of the charges.")

In this case, the defendant's 1925(b) statement was woefully short of what is required in such a statement.[2] The defendant's bald allegations that "[t]he evidence was insufficient as a matter of law to support a conviction and finding of guilt" does not identify which convictions he challenges or which elements of any of his convictions were not proved by the Commonwealth. Likewise, the allegation that "[t]he verdict was against the weight of the evidence" does not provide any guidance as how the weight of the evidence did not support the verdict rendered in this case. These allegations are too vague and, pursuant to the authority set forth above, this Court believes these issues are waived for appellate review.

Accordingly, the judgment in this case should be affirmed.

BY THE COURT:
/s/Mariani, J.

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[1] Pa.R.Crim.P. 730(A)(3) provides that if the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence.

[2] It should be noted that the trial and sentencing transcripts were filed in this Court in December, 2008. The defendant's 1925(b) statement was filed in May, 2009. The defendant and his counsel had plenty of time to review the transcripts prior to the filing of the 1925(b) statement.

Commonwealth of Pennsylvania v. Antwan Peterson

Motion to Suppress—Motion for Judgment of Acquittal—Sufficiency of Evidence

1. After a non-jury trial, defendant was convicted of possession of heroin, possession of a small amount of marijuana, possession of drug paraphernalia, and conspiracy.

2. Defendant filed a timely notice of appeal, stating that the trial court erred when it denied defendant's motion for judgment of acquittal relative to criminal conspiracy, that it erred when it denied defendant's motion to suppress based upon the police officers not having probable cause to enter defendant's residence, and that it also erred when it denied another motion to suppress arguing that defendant was intoxicated and incapable of giving knowing, intelligent and voluntary consent.

3. The search of defendant's residence was consensual, as evidenced by, among other things, defendant signing a written consent to permit police officers to search his residence.

4. There is no evidence that defendant was intoxicated. Even if there were such evidence, Pennsylvania courts have explained that "intoxication by use of drugs or alcohol is insufficient, and in and of itself, to render consent involuntary."

5. Any error relative to the motion for judgment of acquittal at the close of the government's case is unavailable on appeal due to the fact that the defendant presented a defense. The court interpreted defendant's claim of error as a challenge to the sufficiency of evidence at trial.

6. When determining sufficiency of the evidence, it is within the discretion of the fact finder to believe all, part, or none of the evidence. Taken in light most favorable to the Commonwealth, the evidence presented was sufficient to support a convic-

tion of conspiracy.

(Daniel McIntyre)

Lawrence E. Sachs for the Commonwealth.
Patrick K. Nightingale for Defendant.
No. CC 200605370. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., July 10, 2009—This is a direct appeal wherein the defendant, Antwan Peterson, appeals from an order denying post-sentencing motions filed in this case. After a non-jury trial, the defendant was convicted of possession of heroin, in violation of 35 P.S. 780-113(a)(16), possession of a small amount of marijuana, in violation of 35 P.S. 780-113(a)(31), possession of drug paraphernalia, in violation of 35 P.S. 780-113(a)(32) and conspiracy, in violation of 18 Pa.C.S.A. 903(a)(1). Relative to the conspiracy conviction, this Court sentenced Mr. Peterson to a term of imprisonment of one year less one day to two years less two days, followed by a period of 5 years probation. No further penalty was imposed on the other counts of conviction.

On December 11, 2008, Mr. Peterson filed a timely Notice of Appeal. On December 18, 2008, the Court received a Concise Statement Of Matters Complained Of On Appeal Pursuant to Pa.R.A.P. 1925(b) raising the following issues:

1. The trial court erred when it denied Defendant's Motion for Judgment of Acquittal relative to Criminal Conspiracy where the record failed to support the trial court's verdict that Defendant entered into an agreement with either of his co-defendants to distribute narcotics and/or engaged in an overt act in furtherance of said agreement;

2. The trial court erred when it denied Defendant's Motion to Suppress where evidence of record indicated that Officer Holland entered Defendant's residence uninvited, without probable cause and without any exigent circumstances to justify his intrusion into Defendant's residence.

3. The trial court erred when it denied Defendant's Motion to Suppress where evidence of record indicated that Defendant was highly intoxicated and incapable of a knowing, intelligent and voluntary consent.

The credible facts of this case adduced during the suppression hearing are as follows:[1] On December 21, 2005, Officer Holland from the City of Pittsburgh Bureau of Police conducted a traffic stop of a vehicle driven by Antonio Childs. Based on prior experience, Officer Holland had knowledge that Childs' driver's license was suspended. Upon making the stop, Officer Holland observed Childs reach down to his lap. Officer Holland ordered both the driver and the passenger to raise their hands. Both men complied. Officer Holland observed marijuana "blunt" between Childs' legs. Mr. Childs was then placed under arrest. Officer Moss was with the passenger, Jeremy Powell. The passenger advised Officer Moss that the marijuana "blunt" found near the driver belonged to him.

At this point, Mr. Childs asked Officer Holland if Officer Holland would give the car keys to Childs' cousin and Mr. Childs pointed to a residence located at 2318 Atmore Street, a residence within sight distance of the traffic stop. Officer Holland took the keys, walked over to the residence and gave the keys to the resident of that building. Once Officer Holland returned to the scene of the traffic stop, he advised the remaining officers that he was able to smell burnt marijuana at the residence where he just dropped off the keys. Back-up officers were dispatched to the area.

The officers then decided that they would proceed back to the residence and attempt to obtain consent to search the residence or secure the residence to obtain a search warrant. Upon arriving at the residence, the officers approached the front door. Officer Holland knocked on the door. The defendant, Mr. Peterson, responded and opened the door. Once the door was opened, the officers detected a strong odor of marijuana emanating from the residence. Mr. Peterson advised the officers that he was the resident of 2318 Atmore Street. The Officers advised the Mr. Peterson that they wished to discuss the marijuana smell with him. Mr. Peterson opened the front door for the officers and went over to his couch and sat down, leaving the front door open for the officers to enter. Officer Moss testified that Mr. Peterson voluntarily permitted the officers to enter the residence. Due to the existence of smoke and the nature of the smell of the smoke, it was clear to the officers that the defendant had been smoking marijuana in the residence.

After the officers entered the residence, Officer Moss advised Mr. Peterson that he could insist that officers get a search warrant to search the residence or he could consent to a search of the residence. Officer Moss reviewed a City of Pittsburgh Field Contact Report containing a "Consent to Search" form. Mr. Peterson initialed various portions of this form and he ultimately signed the form. The form indicated that Mr. Peterson consented to a search of his residence. Officer Moss testified that Mr. Peterson voluntarily executed the agreement, he appeared to understand his rights and he did not demonstrate any signs of intoxication. Mr. Peterson gave the officers permission to search the entire house.

The police officers then began conducting a search of the residence. The defendant advised the officers that Childs and Powell resided on the third floor of the residence. Indicia of residency for each of these men was found on the third floor. The police searched all three floors of the residence. At no time did the defendant advise the officers that they could not search the entire residence. While in the residence, the officers also noticed two stamp bags of heroin and Mr. Peterson admitted that those bags of heroin belonged to him. The defendant admitted that the marijuana found in the residence was his. Upon searching the defendant, the officers discovered the defendant's driver's license, which contained the address of the residence where the search occurred. As a result of the search, guns and drugs were found in the residence. This Court denied the suppression motions.

The defendant challenges this Court's denial of his suppression motions alleging that the search was conducted without a warrant, without probable cause, without exigent circumstances and the defendant did not consent to the search. For the following reasons, the defendant's challenge fails.

The Fourth Amendment to the United States Constitution protects the right of people in this country to be secure against "unreasonable searches and seizures." U.S. Const. Amend. IV. Thus, pursuant to the protections of the Fourth Amendment, before a police officer may conduct a search, he must generally obtain a warrant that is supported by probable cause and authorizes the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S.Ct. 2041 (1973). A search warrant is not required, however, when a person with the proper authority consents to the search. See *Id.* at 219, 93 S.Ct. at 2043-44; *Florida v. Jimeno*, 500 U.S. 248, 250-51, 114 L. Ed. 2d 297, 111 S.Ct. 1801 (1991); *Commonwealth v. Strickler,* 563 Pa. 47, 757 A.2d 884, 888 (Pa. 2000); *Commonwealth v. Kemp*, 961 A.2d 1247, 1260 (Pa.Super. 2008) A person has authority to consent to a search when that person has a possessory or privacy interest in the area to be searched.

To establish a valid consensual search, the prosecution must first prove that the consent was given during a legal police inter-

action, or if the consent was given during an illegal seizure, that it was not a result of the illegal seizure; and second, that the consent was given voluntarily. *Commonwealth v. Cleckley*, 558 Pa. 517, 528, 738 A.2d 427, 433 (1999); *Commonwealth v. Reid*, 811 A.2d 530, 544 (Pa.Super. 2002); *Commonwealth v. Strickler*, 757 A.2d 884, 888-901; see also *Florida v. Royer*, 460 U.S. 491, 497, 501-07, 75 L. Ed. 2d 229, 103 S.Ct. 1319 (1983); *Dunaway v. New York*, 442 U.S. 200, 219, 60 L. Ed. 2d 824, 99 S.Ct. 2248 (1979). As set forth in Strickler,

> In connection with such inquiry, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances. *See generally Robinette II*, 519 U.S. at 40, 117 S.Ct. at 42. As noted, while knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *See Schneckloth*, 412 U.S. at 227-28, 93 S.Ct. at 2041; *Cleckley*, 558 Pa. at 527, 738 A.2d at 433. Additionally, although the inquiry is an objective one, the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will), are to be taken into account.

757 A.2d at 901-902.

In *Commonwealth v. Kemp*, 961 A.2d 1247 (Pa.Super. 2008), the Superior Court explained:

> As noted, the *Strickler* Court promulgated a non-exclusive list of factors to be employed in determining whether a seizure occurred for purposes of the Constitution. We conclude that the following factors outlined therein are pertinent to a determination of whether consent to search is voluntarily given: 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including its degree of coerciveness; 8) whether the person has been told that he is free to leave; and 9) whether the citizen has been informed that he is not required to consent to the search. *Id.* at 898-99.

961 A.2d at 1261.

In this case, there was no excessive police conduct. The credible evidence, as set forth above, indicates that the search of the defendant's residence was consensual. Officer Moss testified in this case that he and other officers knocked on Mr. Peterson's door and that Mr. Peterson answered the door. Mr. Peterson was advised that the officers wanted to speak to him about the odor of burning marijuana emanating from his residence. Mr. Peterson left the door open and sat down on a sofa in his residence. He permitted the officers to enter his residence. He further executed a written consent to permit the officers to search his residence. There was overwhelming credible evidence adduced at the suppression hearing demonstrating that Mr. Peterson consented to the police officers' entry into his residence. Therefore, the entry into and the search of Mr. Peterson's residence was valid.

The defendant also argues that he was highly intoxicated and incapable of providing a knowing, intelligent and voluntary consent to the search of his residence. Pennsylvania courts have explained that "intoxication by use of drugs or alcohol is insufficient, in and of itself, to render [consent] involuntary." *Commonwealth v. Rickabaugh*, 706 A.2d 826, 835 (Pa.Super. 1997); *Commonwealth v. Barone*, 383 Pa.Super. 283, 288, 556 A.2d 908, 910 (1989). Even in light of this high standard, the record in this case is devoid of any evidence that the defendant was intoxicated. The only evidence of record that the defendant ingested any intoxicating substance was the fact that the odor of burning marijuana existed in his residence. Officer Moss specifically testified that the defendant did not appear intoxicated at all during his interaction with the defendant. Therefore, this claim fails.

Mr. Peterson next challenges this Court's denial of his motion for judgment of acquittal concerning his conspiracy conviction. This Court interprets the defendant's claim of error as a challenge to the sufficiency of evidence at trial and not just as a challenge to the Court's denial of his motion for judgment of acquittal at the close of the Commonwealth's case. This Court believes that any claim of error relative to the motion for judgment of acquittal at the close of the government's case is unavailable on appeal due to the fact that the defendant presented a defense in his case.[2] However, because the defendant may raise the issue of sufficiency of evidence after trial, the sufficiency of the evidence to convict will be addressed herein.

The defendant specifically claims that the Commonwealth did not present sufficient evidence that the defendant entered into an agreement with his co-defendants to distribute narcotics nor did the evidence demonstrate that the defendant committed an overt act in furtherance of the conspiracy. When presented with a claim that the evidence was insufficient to sustain a conviction,

> an appellate court, viewing all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth as the verdict winner, must determine whether the evidence was sufficient to enable the fact finder to find that all of the elements of the offenses were established beyond a reasonable doubt.

Commonwealth v. Hawkins, 549 Pa. 352, 366, 701 A.2d 492, 499 (1997).

Furthermore, "[t]he Commonwealth may sustain its burden by proving the crime's elements with evidence which is entirely circumstantial and the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence." *Commonwealth v. Passmore*, 857 A.2d 697, 706 (Pa.Super. 2004); *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa.Super. 1997).

Relative to the defendant's claim, the trial court record contains the following facts: After the denial of the suppression motions, Mr. Childs and Mr. Peterson proceeded to a non-jury trial. None of the evidence from the suppression hearing was incorporated in the defendant's non-jury trial.[3] The credible evidence adduced at the non-jury trial disclosed that upon the arrest of Mr. Childs and Mr. Powell, Mr. Childs asked that his keys be taken to the residence of Mr. Peterson. A search of Mr. Childs revealed $645 found in his pocket. While being interviewed at the scene, Mr. Childs admitted to the police officers that he was unemployed and couldn't get a legitimate job.

The officers took Mr. Childs' keys to 2318 Atmore Street. While there, the officers noted the odor of marijuana. Mr. Peterson opened the door and permitted the officers to enter the residence. Mr. Peterson acknowledged living at that residence. Upon entering the residence, officers found a marijuana cigar and two stamp bags of heroin on the television stand. Mr. Peterson admitted these items were his. During the search of the residence, Mr. Peterson's driver's license was obtained showing he resided at 2318 Atmore Street.

Officers conducted a search of the second floor of the residence. On this floor, officers recovered a 9mm handgun and 5.36 grams of crack cocaine. Currency in the amount of $130 currency was found on that floor along with a police scanner, sandwich bags and a digital scale.

Officers also conducted a search of the third floor of the house. During that search, officers found a loaded rifle with a sawed-off stock, along with 571 stamp bags of heroin having a street value between $4,500-$11,400. Pill bottles and a parking ticket found in the room were in the name of Antonio Childs. There was a bed in the room and the room appeared as though someone was residing there. The drugs and weapons found in this room were not concealed and were found near one of the windows in the room.

Evidence was adduced that Mr. Peterson was unemployed yet he was found with over $150 in cash on his person at the time of his arrest. The evidence was questionable, at best, as to whether Mr. Childs and Mr. Powell were employed at the time of their arrest yet they contributed to the overall rent for the residence. Trial evidence also established that Mr. Peterson was required to travel through the second floor bedroom where the contraband was found in order to use the bathroom facilities in his residence. The testimony of Mr. Peterson's girlfriend, Latice Dixon, indicated that she and Mr. Peterson had discussed her suspicions that drug activity was occurring in the residence. Mr. Peterson has advised her that he was going to do nothing about the drug activity until "after Christmas."

Allegheny County Police Detective Todd Naylor testified in this case as an expert witness. He testified that the quantities of crack cocaine and heroin found in the defendant's residence were of an amount indicative of an intent to sell. No implements of personal use were found.

In *Commonwealth v. Bricker*, 882 A.2d 1008, 1017 (Pa.Super. 2005), the Superior Court stated that to sustain a conviction of criminal conspiracy:

> 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 done in furtherance of the conspiracy. Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.
>
> Additionally, an agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Additionally, an overt act need not be committed by the defendant; it need only be committed by a co-conspirator. *Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa.Super. 2002).

This Court believes that the evidence was sufficient to convict Mr. Peterson of the charged conspiracy. A substantial quantity of crack cocaine and heroin and weapons were found in Mr. Peterson's residence. Money, sandwich bags, a digital scale and a police scanner were also found in the residence. These items were not concealed in his residence and were accessible to Mr. Peterson. These items are indicative of an intent to distribute the drugs.

This Court believes that the evidence was sufficient to demonstrate that Mr. Peterson, Mr. Childs and Mr. Powell all resided in the residence and were each involved in drug trafficking. Mr. Childs was found with $645 on his person despite the fact that he admitted to the police officers that he was unable to obtain a legitimate job. Mr. Peterson was unemployed yet he was found with over $150 in cash on his person at the time of his arrest. As set forth above, there was also evidence that Mr. Peterson was required to travel through the second floor bedroom where contraband was found in order to use the bathroom facilities in his residence. He clearly has access to the areas of the residence where the drugs and guns were found. Moreover, the testimony of Mr. Peterson's girlfriend demonstrated that Mr. Peterson had knowledge of the drug-related activity and affirmatively opted to permit it to continue.

This Court also credits the testimony of Detective Naylor. The amounts of crack cocaine and heroin found in the defendant's residence were of a quantity indicative of an intent to sell. Moreover, Mr. Peterson's own counsel introduced evidence that one of Mr. Peterson's co-defendants, Mr. Powell, pled guilty to conspiring with Mr. Peterson and Mr. Childs to commit the same crime for which Mr. Peterson was convicted.

This Court believes that the facts set forth above demonstrate that Mr. Peterson agreed with two other persons who resided with him to possess the crack cocaine and heroin for the purposes of selling it. The drugs, guns, a digital scale and plastic baggies were located in an area of the residence over which Mr. Peterson had access and control. There was currency found on the defendant, Mr. Childs and in the residence despite the fact that neither of these men were gainfully employed. This evidence, along with the other evidence cited above, was sufficient to withstand a motion for judgment of acquittal relative to the conspiracy charge.

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

BY THE COURT:
/s/Mariani, J.

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[1] The defendant has raised issues relating to this Court's denial of his suppression motion as well as issues relating to the sufficiency of the evidence at trial. This Court first conducted a suppression hearing and then a separate non-jury trial. The facts adduced at each hearing were not identical and due to the fact that the issues raised on appeal require a review of each record independently, to the extent that some of the same facts were elicited during each proceeding, some of those facts are repeated herein during this Court's discussion of each particular issue.

[2] After moving for a judgment of acquittal at the close of the Commonwealth's case, the defendant presented a formal defense. This Court does not believe that any claim or error relative to the denial of that motion is cognizable on appeal. See *Commonwealth v. Ilgenfritz*, 353 A.2d 387 (Pa. 1976)("Where criminal defendant did not rest after adverse ruling to his demurrer, but elected to put in case in defense, correctness of ruling on demurrer was not available issue on appeal.)

[3] As a result, some evidence that was introduced during the suppression hearing is again recited herein as the evidence was also introduced at trial and is germane to the resolution of the issue raised by the defendant relating to this Court's denial of his motion for judgment of acquittal.

Commonwealth of Pennsylvania v. Shawn Odell Melvin

Criminal Conspiracy—Fraud

1. Defendant was convicted by a jury of one count of Access Device Fraud, 18 Pa.C.S.A. §4106 (a)(1) and one count of Criminal Conspiracy, 18 Pa.C.S.A. §903(a)(1). Court imposed a sentence of two to four years of imprisonment. Defendant appealed.

2. Over a two month period and during a short courtship between victim and Defendant, Defendant stole two bank cards from her purse and proceeded to make purchases without authorization. In addition, Defendant also stole a digital camera and a DVD player from her residence.

3. The victim confronted the Defendant and offered him a chance to repay her. He admitted taking the items and promised to repay her. When he did not repay, she faxed a letter to the Clairton Police Department which detailed the events and listed the items the Defendant had stolen from her.

4. Based upon certain bank transactions made on March 27, 2007 at a local store, the officer on the case requested that the store hand over its security videotapes, as well as a cash register receipt. On that day, the Defendant was spotted with a co-conspirator purchasing items with the credit card.

5. On appeal, Defendant alleged that there was insufficient evidence to support the convictions for access device fraud and conspiracy and that the Court abused discretion when it imposed its sentence.

6. The victim did not know the co-conspirator, nor did she ever authorize the co-conspirator to use her debit card. Likewise, the security camera confirmed that it was the Defendant and his co-conspirator that were purchasing various items with the bank card and the co-conspirator signed the victim's name to the cash register receipt.

(Danielle Rawls)

Michael W. Streily for the Commonwealth.
Patrick K. Nightingale for Defendant.
No. CC200707560. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., October 6, 2009—On March 5, 2008, Appellant proceeded to a jury trial presided by this Court. The jury convicted Appellant of one (1) count of Access Device Fraud, 18 Pa.C.S.A. §4106(a)(1) and one (1) count of Criminal Conspiracy, 18 Pa.C.S.A. §903(a)(1).

On May 28, 2008, this Court imposed a sentence of two (2) to four (4) years imprisonment. Appellant filed timely post-sentence motions, which were denied. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant lists three issues within his concise statement, which have been clarified by this Court as follows:

I. There was insufficient evidence to support the conviction for Access Device Fraud.

II. There was insufficient evidence to support the conviction for Criminal Conspiracy.

III. The Court abused its discretion when it imposed a sentence of two (2) to four (4) years incarceration.

FINDINGS OF FACT

On Sunday March 25, 2007, Diane Marie Stolar went shopping at the Family Dollar store in Clairton, Allegheny County. Trial Transcript, 3/5/08 at 23. (hereafter "T.T. A") When she exited the store, Appellant approached her, engaged her in a conversation, and asked her to go out for a drink. (T.T. A 23) Ms. Stolar accepted Appellant's invitation and the two went to the Village Inn for drinks. (T.T. A 24)

After having several drinks, Appellant and Ms. Stolar went to Ms. Stolar's house to have a few more drinks. (T.T. A 25) Appellant stayed overnight at Ms. Stolar's house. (T.T. A 25)

The next morning Ms. Stolar made breakfast for Appellant and later (1:00 PM) left him alone inside her house while she took her mother out for her birthday. (T.T. A 25-26) Ms. Stolar returned to her home that evening at 6:00 PM and Appellant was still present. (T.T. A 26)

Appellant and Ms. Stolar planned to watch some movies on DVD that evening. (T.T. A 26) Ms. Stolar had two DVD players in her home: one downstairs in her game room, which she didn't use; and one upstairs in her living room. (T.T. A 26) However, since Ms. Stolar had a larger TV downstairs in the game room area, the two decided to watch the movie downstairs. (T.T. A 27) Appellant told Ms. Stolar that he needed to take the DVD player from the upstairs living room down into the game room, because the DVD player in the game room was not working. (T.T. A 27) Then, Appellant informed Ms. Stolar that neither of her DVD players were working. (T.T. A 27) Consequently, they left the two DVD players downstairs in the game room and they went upstairs to watch TV. (T.T. A 27) Appellant left before Ms. Stolar went to bed that night around midnight. (T.T. A 28)

The following morning, Tuesday, March 27, 2007, Ms. Stolar picked up a co-worker and drove to work. (T.T. A 28) On the way, they stopped at a Get Go to purchase breakfast sandwiches. (T.T. A 28) When Ms. Stolar reached into her purse to retrieve her bank card to pay for the breakfast sandwiches, she noticed that her bank card was missing. (T.T. A 28) Ms. Stolar searched her purse and her car but could not find the bank card. (T.T. A 28) She had not given anyone authorization to take her card or use it. (T.T. A 38) Thus, she called the issuing bank, National City, and reported the bank card stolen. (T.T. A 28) Ms. Stolar was able to inform National City Bank that her last bank card transaction was a purchase at the Olive Garden on Monday March 26, 2007. (T.T. A 35) The ensuing bank card deductions from her account from March 26-30, 2007, were not authorized by Ms. Stolar. (T.T. A 34) Unauthorized transactions were deducted from Ms. Stolar's account on March 29, 2007, for $92.55, $25.50, $14.00, and $7.00. (T.T. A 46-47) An additional unauthorized transaction was deducted from Ms. Stolar's

account on March 30, 2007, for $92.87. (T.T. A 47) National City Bank did not hold Ms. Stolar liable for these fraudulent transactions. (T.T. A 37-38)

On Tuesday evening, Appellant came to Ms. Stolar's house. Ms. Stolar asked Appellant if he had taken her bank card, but Appellant replied that he had not taken it and didn't know anything about it. (T.T. A 28) The two eventually got into a fight over the stolen bank card, which caused Appellant to start to leave the house. (T.T. A 29) At that point, Ms. Stolar noticed that there was $80 in cash missing from her purse. (T.T. A 29) Ms. Stolar accused Appellant of taking the cash, since no one else had been in her home that evening. (T.T. A 29) Appellant then grabbed Ms. Stolar's cell phone out of her purse and raised his fist to punch her in the face. (T.T. A 29, 55) Ms. Stolar ordered him to get out of her house and threatened to call the police if Appellant hit her. (T.T. A 29)

Appellant kept Ms. Stolar's cell phone and left the house. (T.T. A 29) Ms. Stolar had her cell phone disconnected. (T.T. A 30) Appellant proceeded to call Ms. Stolar numerous times on her home phone and at work. (T.T. A 30)

On March 29, 2007, Thursday, Ms. Stolar went to get her blood pressure medicine refilled at Giant Eagle. When she looked into her purse to get the Master Card which she used to pay for her prescriptions, she noticed that the card was gone. (T.T. A 30, 50) Ms. Stolar reported this card stolen and had it canceled. (T.T. A 50) The Master Card issuing bank informed Ms. Stolar that someone had attempted to make a non-prescription purchase using that card on March 27, 2007, and that the transaction was denied. (T.T. A 50-51)

The theft of this second bank card prompted Ms. Stolar to check her home and determine if anything else had been taken by Appellant. (T.T. A 30) Ms. Stolar inventoried her home and discovered that a digital camera and one of her DVD players was missing. (T.T. A 30-31)

Upset about what had transpired, Ms. Stolar decided to write Appellant a letter and ask him how he could tell her that he loved her and then turn around and steal from her. (T.T. A 31) She left the letter at his mother's address, as it was the only residence where Ms. Stolar knew Appellant often stayed. (T.T. A 31) Upon receipt of the letter, Appellant telephoned Ms. Stolar, apologized for taking her belongings, and requested that she allow him to repay her rather than filing charges with the police. Ms. Stolar agreed to this arrangement. (T.T. A 31)

Ms. Stolar waited for Appellant to repay her until April 2, 2007. When Appellant failed to repay her by that date, Ms. Stolar faxed a letter to the Clairton Police Department which detailed the events and listed the items Appellant had stolen from her. (T.T. A 35-36, 40) Officer David Villotti of the Clairton Police Department received and reviewed the fax submitted by Ms. Stolar. Trial Transcript March 6, 2008 at 3. (hereafter "T.T. B") Officer Villotti had Ms. Stolar come to the Clairton Police Station to submit a written statement. (T.T. A 40, T.T. B 4) Ms. Stolar also submitted a list of stolen items to her homeowner's insurance carrier, Traveler's Insurance. (T.T. A 36-37) Traveler's reimbursed Ms. Stolar for her loss, minus a $250 deductible. (T.T. A 37)

Based upon the bank card transactions at a local Unimart, Officer Villotti requested that store's security videotapes for the dates in question. (T.T. B 4) The Unimart supplied the security videotape for March 27, 2007, as well as a cash register receipt from that date at 3:12 AM, signed with Ms. Stolar's name. (T.T. B 5, 9) The security videotape captured Appellant and his co-conspirator, Valerie Murray, purchasing items inside the Unimart at 3:10 AM. (T.T. B 10-11, 30) The videotape showed Valerie Murray signing Ms. Stolar's name to the register receipt. (T.T. B 30)

Ms. Stolar did not know Valerie Murray and did not authorize Ms. Murray to use her debit card or to sign her name for debit card purchases. (T.T. B 32)

DISCUSSION

I.

Appellant claims that there was insufficient evidence to support the conviction for Access Device Fraud. Specifically, Appellant argues that the Commonwealth did not prove that Appellant used Ms. Stolar's bank card to make unauthorized purchases. This claim is without merit.

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

After Ms. Stolar reported the theft to the Clairton Police, Officer Villotti was able to obtain the security videotape which coincided with the March 27, 2007, unauthorized transactions on Ms. Stolar's bank printout. The Unimart also supplied the cash register receipt from that date at 3:12 AM, signed with Ms. Stolar's name. (T.T. B 5, 9) Appellant admitted that the security videotape captured Appellant and his co-conspirator, Valerie Murray, purchasing items inside the Unimart at 3:10 AM. (T.T. B 10, 12, 30) The videotape showed Valerie Murray signing Ms. Stolar's name to the register receipt. (T.T. B 30)

Moreover, Appellant admitted to Ms. Stolar that he stole her bank card from her purse and then proceeded to make purchases with the bank card, without Ms. Stolar's authorization. (T.T. A 31) He offered to make amends for stealing from her by repaying her. (T.T. A 31)

Ms. Stolar did not give Appellant permission to use her bank card, nor to make purchases on her behalf. The evidence was sufficient to establish that Appellant did use the bank card without Ms. Stolar's permission. *See Commonwealth v. Alexendar*, 722 A.2d 698, 700-701 (Pa.Super. 1998)(defendant properly convicted where he handed retail clerk a stolen credit card in order to pay for camera supplies). Consequently, Appellant's claim in this regard is without merit.

II.

Next, Appellant claims that there was insufficient evidence to support a conviction for conspiracy. This claim is without merit.

Using the standard of review for sufficiency claims as set forth in Issue I, the reviewing Court must consider the evidence in the light most favorable to the Commonwealth, as verdict winner, including all reasonable inferences drawn from the evidence. The reviewing court may not substitute its judgment for that of the fact finder; but rather to discern whether sufficient evidence supports the verdict, mindful of the fact that the fact finder was free to believe all, part, or none of the evidence presented. *Commonwealth v. Hartle*, 894 A.2d at 803-804.

Ms. Stolar did not know the co-conspirator, Valerie Murray, nor did she ever authorize Ms. Murray to use her debit card. (T.T.

B 32) Clearly, Ms. Murray obtained the stolen debit card from Appellant, who admitted that he took the card from Ms. Stolar's purse without her permission. (T.T. A 31)

The Unimart security videotape confirms that Appellant and his co-conspirator Murray were at the Unimart together, purchasing various items with Ms. Stolar's bank card. (T.T. B 10, 12, 30) Ms. Murray then signed Ms. Stolar's name to the cash register receipt, without Ms. Stolar's authorization to do so. (T.T. B 30)

The evidence was sufficient to support a conviction for conspiracy where Appellant and his co-conspirator purchased items, together, at the Unimart, using Ms. Stolar's bank card. *Commonwealth v. Ridgley,* 365 A.2d 1283, 1285-1286 (Pa.Super. 1976)(evidence sufficiently established conspiracy with respect to unauthorized use of credit cards, where co-defendant admitted that she and defendant were together when she used the stolen bank cards to make unauthorized purchases)

This claim is without merit.

III.

Finally, Appellant claims that this Court abused its discretion when it imposed a sentence of two (2) to four (4) years incarceration. This claim is without merit.

A claim that a particular sentence imposed 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.*

In calculating the appropriate sentence to be imposed, this Court considered the presentence report, the sentencing guidelines, the rehabilitative needs of Appellant, the nature of the events and the protection of the community.[1] Sentencing Transcript, May 21, 2008 at 9-10 (hereafter "S.T.") Particularly, this Court noted that Appellant's prior attempts at rehabilitation have been unsuccessful. (S.T. 10) Moreover, previous probationary sentences did not result in Appellant mending his ways and leading a law-abiding lifestyle. (S.T. 9) This Court concluded that Appellant's continued criminal conduct warranted a sentence of total confinement, and that anything less would be inappropriate in Appellant's case. (S.T. 9) Consequently, this Court imposed a standard range sentence of two (2) to four (4) years incarceration.

The sentence imposed by this Court was appropriate under the circumstances, and this Court did not abuse its discretion in imposing the sentence. *Commonwealth v. Marts*, 889 A.2d 608, 614-616 (Pa.Super. 2005) (sentence imposed was not an abuse of discretion where trial court reviewed presentence report and considered the seriousness of the offense, its impact on the community and defendant's rehabilitative needs) Appellant's claim is without merit.

CONCLUSION

For the reasons set forth herein, Appellant's sentence should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: October 6, 2009

[1] The guideline ranges were as follows: (1) Access Device Fraud, mitigated (18 months), standard (21-30 months), aggravated (30 months); (2) Criminal Conspiracy, mitigated (18 months), standard (21-30 months), aggravated (30 months).

Commonwealth of Pennsylvania v. Clarence Merle Green

Forgery—Identity Theft—Fraudulently Obtaining Public Assistance—Insurance Fraud

1. Defendant was sentenced to 18 to 36 months incarceration for a count of Forgery, 18 Pa.C.S.A. §4101(a)(2), Identity Theft, 18 Pa.C.S.A. §4120(a) and (c)(1)(ii), and Fraudulently Obtaining Public Assistance, 62 P.S. §481. Defendant then filed a timely appeal. On appeal, the court affirmed the convictions of the trial court.

2. Defendant was unemployed and did not have his own health insurance. He, in turn, falsely identified himself as his brother when being enrolled in a hospital for triple-bypass surgery. Defendant used his brother's social security number and birth certificate to procure medical coverage and signed his brother's name to financial eligibility forms which were used to determine whether he could receive state supplied medical assistance.

3. Defendant attempted to argue that his actions were justified because he had missed a court date due to illness and could not get appropriate treatment in prison.

4. Finally, despite Defendant's assertion that he was denied a fair trial and the opportunity to present his defense due to lack of jury instruction as to justification, the court determined that Appellant did have another, lawful, option to obtain medical assistance. Testimony by the doctor who treated him in prison and the fact that he received treatment from Mercy Hospital after he was in jail, proved that Defendant's contention that he would not have received appropriate care in jail was false.

(Danielle Rawls)

Michael W. Streily for the Commonwealth.
Frank W. Ralph for the Defendant.

No. CC200610711. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., October 8, 2009—Appellant proceeded to a jury trial on December 4, 2007. On December 7, 2007, a jury convicted Appellant of Forgery, 18 Pa.C.S.A. §4101(a)(2) and (c), Identity Theft, 18 Pa.C.S.A. §4120(a) and (c)(1)(ii), and Fraudulently Obtaining Public Assistance, 62 P.S. §481.

Appellant was sentenced on March 7, 2008 to eighteen (18) to thirty-six (36) months incarceration at each count, to be served consecutively. Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant's Concise Statement lists the following four (4) issues for appellate review:

> 1. The evidence was insufficient to find Appellant guilty of Forgery where there was no evidence establishing that he acted with the intent to defraud or injure another.
>
> 2. The evidence was insufficient to find Appellant guilty of Identity Theft where proof was lacking that he possessed or used identifying information of another to further an unlawful purpose.
>
> 3. The evidence was insufficient to find Appellant guilty of Public Assistance Fraud since proof was lacking that he willfully made any false statement or representation, impersonated another, or failed to disclose a material fact in applying for public assistance.
>
> 4. The Court erred, thereby denying Appellant a fair trial and the opportunity to present his defense, when it refused to instruct the jury on the defense of justification.

FINDINGS OF FACT

On September 28, 2004, Appellant was suffering from what he believed to be an asthma attack. Trial Transcript 12/4 - 7/07 at 321. (hereafter "T.T.") Despite attempts to nurse himself during the night, Appellant woke up the next morning on September 29, 2004 still feeling very ill. (T.T. 321) Appellant missed a court date that morning because he did not feel well enough to attend. (T.T. 321) An arrest warrant was issued for Appellant due to the fact that he missed his court hearing. (T.T. 322)

That evening, at 10:30 PM, Appellant woke up and was unable to breathe. (T.T. 321) He was sweating and experiencing pain down the left side of his body. (T.T. 321) Assuming he was having a heart attack, Appellant began to drive himself to the hospital. (T.T. 322) On the way, Appellant telephoned his friend, Denise Davis, and informed her that he believed he was having a heart attack. (T.T. 323) Ms. Davis directed Appellant to stop at her house so that she could drive Appellant to the hospital. (T.T. 323)

When Appellant arrived at Ms. Davis' house, Ms. Davis pushed Appellant to the passenger's seat of his vehicle and drove Appellant to Forbes Regional Hospital in Monroeville. (T.T. 324) At the emergency room entrance, Ms. Davis stopped the car and summoned assistance to get Appellant into the hospital. (T.T. 325) Forbes Regional staff took Appellant from the car into the hospital and an examining room on a wheelchair. (T.T. 325)

Appellant identified himself to the hospital staff as Kevin Green, who is his younger brother. (T.T. 326) Appellant did not want to use his own name because he had missed his court hearing that morning, and there was an arrest warrant issued for him. (T.T. 326) When hospital personnel interviewed Appellant regarding whether he had health insurance, he informed them that he did not have health insurance. (T.T. 328) Thereafter, he completed the hospitalization forms using the name Kevin Green. (T.T. 328) Appellant used his brother's name without the permission or authorization of his brother. (T.T. 350)

The doctors discovered that Appellant had three blocked arteries and planned emergency triple-bypass surgery the next day. (T.T. 65, 67) Appellant was transferred from Forbes Regional Hospital to West Penn Hospital, where he underwent emergency triple-bypass surgery. (T.T. 331) After the surgery, Appellant received follow-up treatment from Dr. Frank Kush. (T.T. 336-337)

Ms. Deborah Schlereth, a financial counselor for West Penn Hospital Association, spoke with Appellant on the night he was admitted into the hospital because he was admitted under a self-pay or uninsured status. (T.T. 70, 73) After speaking with Appellant, Ms. Schlereth determined that he was unemployed and uninsured. (T.T. 73, 75) Appellant directed Ms. Schlereth to the hospital cafeteria to discuss the situation with his fiancée, Denise Davis. (T.T. 75)

Ms. Schlereth located Denise Davis and attempted to get forms signed to facilitate the process of applying for medical assistance to cover Appellant's medical treatment and hospital stay. (T.T. 77, 84) Based upon information supplied by Denise Davis, Ms. Schlereth prepared several forms purporting to verify that Kevin Green had not filed tax returns for the prior two years, and that Ms. Davis provided financial support to Kevin Green, due to limited income. (T.T. 78-84) Ms. Davis then signed the forms on behalf of Appellant, listing the name "Kevin Green." (T.T. 78, 84)

Ms. Schlereth submitted the forms to a caseworker with the Pennsylvania Department of Welfare, Raymond Legine, for a determination of whether Appellant was eligible to receive medical assistance from the state. (T.T. 167) After reviewing the documents, Mr. Legine approved a "Kevin Green" as eligible to receive medical assistance, based upon the information and supporting identifying documents submitted to him. (T.T. 172, 174)

Edward Green, a Pittsburgh Police Detective for fifteen (15) years who was assigned to the Bureau of Alcohol, Tobacco and Firearms and Explosives (ATF) Federal Task Force for six (6) years, had been given the task of executing the arrest warrant which had been issued for Appellant when he failed to appear for his court date in September 2004. (T.T. 24) In an attempt to locate Appellant, Detective Green spoke with several of Appellant's family members and friends who refused to divulge Appellant's whereabouts. (T.T. 27-32, 44-45, 49) Detective Green's investigation revealed that Appellant had a brother named Kevin Green who resided in Wilkinsburg. (T.T. 29)

Unable to locate Appellant by questioning his family and friends, Detective Green obtained a search warrant for the home telephone of Appellant's father, Clarence Green, Sr. (T.T. 32, 46) The search warrant revealed multiple telephone calls coming to Clarence Green, Sr.'s home from West Penn Hospital. (T.T. 32, 46) Detective Green used this information to contact the various departments at West Penn Hospital and to ask if Appellant was a patient. (T.T. 32-33) After learning that Appellant was not

a patient at any of the hospital's locations, Detective Green expanded his inquiry to determine if any other member of Appellant's family was a patient at the hospital. (T.T. 33) The last hospital that Detective Green contacted was West Penn Hospital located in the Friendship area of the City of Pittsburgh, and it was confirmed that Kevin Green was a patient at the hospital. (T.T. 33)

Detective Green went to that hospital and learned that Kevin Green had undergone open-heart surgery. (T.T. 33, 46) He then showed a photo of Kevin Green to the hospital staff, who stated that the man in the photograph was not the individual who had received open-heart surgery. (T.T. 34) When the staff was shown a picture of Appellant, they confirmed that the individual in the photograph was the patient admitted under the name Kevin Green, who was recovering from open-heart surgery. (T.T. 34)

In an attempt to gather more information, Detective Green obtained a medical writ so that the hospital could provide him with the medical records for the patient admitted under the name Kevin Green. (T.T. 35) The records indicated the dates on which Appellant (listed as Kevin Green) was scheduled for follow-up care with Dr. Frank Kush. (T.T. 35) On those dates, undercover officers were stationed in the waiting area and the hospital was surrounded, so that Detective Green could attempt to execute the arrest warrant on Appellant and take him into custody. (T.T. 35) Appellant did not appear for his first two scheduled appointments, but did appear for his follow-up appointment on February 2, 2005. (T.T. 35-36, 47) Appellant continued to use the name "Kevin Green" for his appointment, and continued to sign his medical paperwork with that name. (T.T. 36, 47) At that time, Detective Green and other agents apprehended Appellant in the waiting room of Dr. Kush's office. (T.T. 37)

Upon his arrest at Dr. Kush's office, Appellant admitted to the officers that he had been using his brother's name, Kevin Green, to receive medical treatment from West Penn Hospital. (T.T. 37-38) Kevin Green was not aware that Appellant had used his identity to obtain medical treatment. (T.T. 164) Mr. Green had not authorized Appellant to use his name or social security number to obtain medical assistance. (T.T. 164)

Appellant was searched incident to the arrest, and was found to possess a social security card bearing the name Kevin Green, as well as the birth certificate of Kevin Green. (T.T. 38-39) Appellant informed the arresting officers that he knew he was wanted by the authorities and that he had planned to turn himself in to authorities as soon as he was medically fit. (T.T. 40)

Detective Elvira Beverly Reeves, employed as a detective with the District Attorney's Office for thirty-one (31) years, and serving in the Insurance Fraud Unit for six (6) years, was contacted by Detective Green regarding possible insurance fraud. (T.T. 108-109) Detective Reeves was supplied the information regarding Appellant's use of the name and identity of Kevin Green to procure medical coverage. (T.T. 109) Detective Reeves located the names Denise Davis and Toni D. Anderson on the medical forms, along with a telephone number. (T.T. 110) Detective Reeves contacted Ms. Anderson (also known as Denise Davis) who confirmed that Appellant had suffered a heart attack and that she suggested that he admit himself to the hospital using his brother's name (Kevin Green) because there were outstanding warrants for Appellant's arrest. (T.T. 112, 114, 118)

Detective Reeves also contacted Kirk Williams, an agent/supervisor at the Commonwealth of Pennsylvania Inspector General's Office, to continue the investigation of potential misuse of state funds by Appellant by receiving medical assistance from the state by using his brother's name. (T.T. 184-185) Mr. Williams determined that the Pennsylvania Department of Public Welfare had paid $40,343.44 in medical treatment from September 29, 2004 through December 31, 2004, on behalf of Appellant, who had used the alias and identification of Kevin Green. (T.T. 185)

Linda Larner, the director of Patient Financial Services for West Penn Allegheny Health System, was eventually alerted to the fact that Appellant had falsely identified himself as Kevin Green, that an outstanding bill after applying the medicaid payment was $32,739, and that Appellant was unable to pay for the remaining bill for medical services. (T.T. 201-202) When Ms. Larner's investigation revealed that Appellant did not have any insurance, she followed hospital policy and discounted the remaining bill by 50%. After applying the discount, the outstanding balance for medical services rendered to Appellant between Forbes Regional and West Penn Hospital totaled $16, 369.50. (T.T. 202)

Dr. Michael Patterson, an Internist with the Allegheny County Health System, serves as Chief Medical Officer at the Allegheny County Jail. (T.T. 56) His duties include overseeing all of the medical care that is provided to the inmates, as well as to provide direct medical care. (T.T. 56) Dr. Patterson and the other three staff doctors provide treatment in the jail and determine when it is necessary to transfer inmates to a referral hospital for more complex treatment. (T.T. 57) Treatments requiring a hospital stay would include implantation of pacemakers, bypass surgery for the heart, and the treatment of individuals who have suffered a heart attack. (T.T. 57) Consequently, after Appellant was arrested and lodged in the Allegheny County Jail, Dr. Patterson monitored Appellant's condition and insured that he received appropriate treatment through Mercy Hospital for complications that existed after Appellant had open-heart surgery. (T.T. 61-62)

DISCUSSION

I.

Appellant claims there was insufficient evidence to sustain the conviction for forgery. This issue is without merit.

The standard of review when the sufficiency of the evidence has been raised has been stated by the Superior Court in the following manner:

> In reviewing the sufficiency of the evidence, we view all the evidence admitted at trial in the light most favorable to the Commonwealth, as verdict winner, to determine whether there is sufficient evidence to enable the fact-finder to find every element of the crime established beyond a reasonable doubt. This Court is not free to substitute its judgment for that of the fact-finder; if the record contains support for the convictions they may not be disturbed. Lastly, the fact-finder is free to believe some, all, or none of the evidence.

Commonwealth v. Hartle, 894 A.2d 800, 803-804 (Pa.Super. 2006). (citations omitted)

Appellant argues that the Commonwealth did not sufficiently establish that Appellant uttered the forged hospital documents with the intent to defraud or to injure anyone. The totality of Appellant's conduct may be considered to determine whether an intent to defraud existed. *Commonwealth v. Myer,* 489 A.2d 900, 904 (Pa.Super. 1985).

Appellant was unemployed and did not have his own health insurance. (T.T. 73, 75) Appellant admitted that he used his

brother's name to receive medical treatment from West Penn Hospital, and that he signed his brother's (Kevin Green) name to financial eligibility forms which were used to determine whether he could receive state supplied medical assistance. (T.T. 37-38, 167, 328, 350) He used Kevin Green's social security card and number to perpetuate the fraud. (T.T. 38-39) Based upon the identity and attending information provided on those forms, the state deemed "Kevin Green" eligible to receive financial assistance. (T.T. 37) The Department of Public Welfare paid West Penn Hospital Association $40,343.44 for medical treatment provided to Kevin Green. (T.T. 184-185) The remaining outstanding bill due and owing to West Penn Hospital was $32,739, which the hospital discounted by 50% as is their policy when treating uninsured patients. Thus the outstanding balance still due to West Penn Hospital is $16,369.50. (T.T. 201-202) Appellant perpetrated this fraud to multiple medical professionals at two different hospitals and a doctor's office, as well as enlisting an accomplice to facilitate and complete this fraud.

Consequently, Appellant's overall conduct in using his brother's identity and supporting documents to apply for Medicaid and to obtain medical services from West Penn Hospital Association constituted an intent to defraud. *Commonwealth v. Myer*, 489 A.2d at 904.

II.

Next, Appellant claims that the evidence was insufficient to find him guilty of Identity Theft.

The standard of review as set forth in Issue I is incorporated by reference for purposes of this discussion. *Commonwealth v. Hartle, supra.*

Appellant specifically claims that there was insufficient proof that he possessed or used identifying information of another to further an unlawful purpose. The record belies this claim.

A person is guilty of identity theft if he possesses or uses identifying information of another, without authorization, to further an unlawful purpose. 18 Pa.C.S.A. §4120(a). Appellant admitted that he used Kevin Green's name and identifying information, without authorization to do so, in order to obtain state provided medical assistance. (T.T. 37-38, 350) Kevin Green was not aware that Appellant had used his identity to obtain Medicaid benefits until well after the fact. (T.T. 164) He had not authorized Appellant to use his identity in order to receive public assistance. (T.T. 164) Thus, the Commonwealth established that Appellant used Kevin Green's identity without authorization.

Moreover, as established in the discussion for Issue I, Appellant forged Kevin Green's name in order to receive Medicaid benefits from the Department of Public Welfare. Consequently, Appellant used Kevin Green's identity in order to commit that forgery, and to commit public assistance fraud, as will be established within the discussion for Issue III. The evidence sufficiently established that Appellant committed identity theft. 18 Pa.C.S.A. §4120(a). *Commonwealth v. Myer*, 489 A.2d at 904.

III.

In his third issue Appellant challenges the sufficiency of the evidence to support a conviction for public assistance fraud.

The standard of review for a sufficiency of the evidence claim as outlined in the discussion for Issue I is incorporated by reference herein. *Commonwealth v. Hartle, supra.*

Appellant argues that the Commonwealth did not provide sufficient evidence to establish that he willfully made any false statement or representation, impersonated another, or failed to disclose a material fact in applying for public assistance. This claim is without merit.

By his own admission, Appellant was admitted to West Penn Hospital using the name of his brother, Kevin Green. Appellant admitted that he used Kevin Green's name and identifying information, without authorization to do so, in order to obtain state provided medical assistance. (T.T. 37-38, 350) Kevin Green was not aware that Appellant had used his identity to obtain Medicaid benefits until well after the fact. (T.T. 164) He had not authorized Appellant to use his identity in order to receive public assistance. (T.T. 164)

Appellant was unemployed and did not have his own health insurance. (T.T. 73, 75) Appellant admitted that he used his brother's name to receive medical treatment from West Penn Hospital, and that he signed his brother's (Kevin Green) name to financial eligibility forms which were used to determine whether he could receive state supplied medical assistance. (T.T. 37-38, 167, 328, 350) Based upon the identity and attending information provided on those forms, the state deemed "Kevin Green" eligible to receive financial assistance. (T.T. 37) The Department of Public Welfare paid West Penn Hospital Association $40,343.44 for medical treatment provided to Kevin Green. (T.T. 184-185)

Appellant purposely pretended to be Kevin Green in order to obtain public assistance. The evidence sufficiently supports the jury's verdict. *See generally, Commonwealth v. Soltis,* 457 A.2d 562 (Pa.Super. 1983).

IV.

Finally, Appellant contends that he was denied a fair trial and the opportunity to present his defense, when the Court refused to instruct the jury on the defense of justification.

A trial court's decision not to give a specific jury instruction is subject to an abuse of discretion standard of review. *Commonwealth v. Sasse*, 921 A.2d 1229, 1238 (Pa.Super. 2007). A trial court is not required to give an instruction on a specific defense unless that defense was properly raised during trial and is supported by the record. *Id.* Moreover, to preserve a challenge to the denial of a requested jury instruction, a defendant must first lodge the objection with the trial court. *Commonwealth v. Corley*, 638 A.2d 985 (Pa.Super. 1994)

Appellant made a specific request that the trial court give an instruction on justification. (T.T. 405) This Court entertained argument from Appellant's counsel and the Commonwealth, and concluded that Appellant was not entitled to a jury instruction on justification under the facts and circumstances of this case. In determining whether an instruction on justification was proper in Appellant's case, this court considered whether Appellant's unlawful acts (i.e., using Kevin Green's identity, and forging his name, to obtain public assistance) were necessary to avoid a greater harm or evil, and that he had no other lawful options. *Commonwealth v. Capitolo*, 498 A.2d 806, 808-809 (Pa. 1985). Under the facts of this case, Appellant did have another, lawful, option to obtain medical assistance.

Dr. Patterson clarified for the court that part of his duties involve assessing the medical treatment provided to inmates at the Allegheny County Jail and determining if it is necessary to transfer inmates to a referral hospital for more complex treatment. (T.T. 57) Dr. Patterson specified that treatment requiring a hospital stay would include bypass surgery, as well as treat-

ment for individuals who have suffered a heart attack. (T.T. 57) In fact, after Appellant was arrested and lodged in the Allegheny County Jail, Dr. Patterson monitored Appellant's condition and insured that he received appropriate treatment through Mercy Hospital for complications that developed as a result of Appellant's open-heart surgery. (T.T. 61-62) Consequently, Appellant's contention that he would not have received proper treatment in jail was disproven not only through Dr. Patterson's treatment, but also by virtue of the fact that Appellant received treatment from Mercy Hospital after he was incarcerated.

The only "greater harm" that Appellant sought to avoid was his perceived harm of being arrested for an outstanding warrant. Thus Appellant was not entitled to a jury instruction on justification as a matter of law, and this Court did not err in refusing to give such an instruction. *Commonwealth v. Capitolo,* 498 A.2d at 809.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: October 8, 2009