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PLJ

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OPINIONS

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**Commonwealth of Pennsylvania v.
Audrey E. Quel**

Theft—Waiver—Circumstantial Evidence

No. CP-02-CR18578-2008. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—December 1, 2010.

OPINION

For two days in December, 2009, this Court presided over a jury trial in which the Defendant, Audrey Quel, was accused of taking money from various student groups at a local high school. After an hour and 40 minutes of deliberations, Quel was found guilty of theft by deception, theft by unlawful taking and theft by failure to make required disposition of funds. Quel's bond was revoked.

On December 23, 2009, the Court ordered Quel to be released from the county jail and placed on electronic home monitoring until her sentencing on March 11, 2010.

At sentencing, the Court imposed incarceration of 11 and a half to 23 months in the county jail followed by 7 years of probation. She was also directed to make restitution in the amount of \$29,310.20.

Later in the day, on March 11th, Attorney Michael Foglia entered his appearance and filed a motion seeking reconsideration of the sentence and a post-sentence motion raising three claims: "the evidence was insufficient to sustain the verdict"; "the verdict was against the weight of the evidence"; and "[d]efense counsel was ineffective to the extent that he failed to call character witnesses on behalf of the defendant". Post Sentencing Motion, paragraphs 1, 2 and 3 (March 11, 2010).

On March 18, 2010, the Court directed Quel's lawyer to supplement its ineffective assistance of counsel claim with "pertinent transcripts, an affidavit or signed statement from trial counsel" and otherwise comply with the law on failure to call character witnesses as set forth in *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007).

On March 30, 2010, this Court granted the motion for reconsideration. This order also released Quel from the county jail and placed her again on electronic home monitoring.

On April 6, 2010, the defense supplemented its previous accusation of ineffective assistance of counsel. It provided the Court with pertinent trial transcripts (pgs. 165-170) and an Affidavit from Quel's trial lawyer, Daniel Goodyear.

On April 7, 2010, the Court directed the government to file a written response no later than April 20, 2010. The government complied a day early. Within its response, the government highlights some perceived deficiencies of Quel's submission.

The scheduled hearing for April 21, 2010, did not take place. It was continued until June 28, 2010. While the Court anticipated receiving more evidence, the defense and the prosecution choose only to orally advanced their respective positions. After an in-chambers discussion with counsel, the Court reconvened. The Court granted the sentence reconsideration motion and then sentenced Quel to 23 months of house arrest.

On July 6, 2010, the Court issued a written order denying Quel's post-sentence motion wherein she raised a sufficiency claim, a weight claim and an ineffective assistance of counsel claim. On July 23, 2010, a *Notice of Appeal* was filed and a few days later Quel was directed to file a Concise Statement of Matters Complained of on Appeal no later than August 19, 2010. Quel filed her Concise Statement on the due date.

Quel raises three claims on appeal. She initially argues that the guilt determination is against the weight of the evidence. She then attacks the sufficiency of the evidence. Her final assertion of error is a claim of ineffective assistance of counsel. Each assertion of error will be addressed although in a different sequence.

Sufficiency of the Evidence

Quel complains the evidence was not sufficient to support the verdicts. Quel claims that for each of the three different theft convictions the government's proof was lacking. An overview of the evidence provides the context in which those specific claims of insufficiency can be reviewed.

The government's case was the epitome of a prosecution upon which circumstantial evidence controlled the outcome. There was no evidence that anyone saw Quel take money. However, there was an abundance of circumstances that put the money in Quel's pocket.

Quel began her job as assistant secretary/bookkeeper for the Moon School District in August, 2007. Her job required multi-tasking. One job function was to account for, deposit and generate records for the various student groups who may raise money throughout the school year. The process worked in rather simplistic fashion. A student group would conduct a fundraiser like selling hoagies. When the money was collected from that function a particular type of deposit envelope would be completed by a representative of that student group and/or the group's sponsor, traditionally a member of the teaching staff. The deposit envelope required the contents to be broken down by the number of twenty dollar bills, ten dollar bills, five dollar bills, one dollar bills, coins and checks. When the deposit envelope was completed, it was delivered to Quel or, if she was not present, given to a member of the secretarial staff or the administrative staff (i.e. principal or his assistant). Whether by Quel herself, or by someone else, the deposit envelope was then placed in the "safe" which was located inside a "safe room". At an appropriate time during her workday, Quel would then retrieve the deposit envelope and verify its contents. She would count the money and verify what was numerically reflected on the outside of the envelope matched what was actually inside the envelope. With very few exceptions, Quel found the money inside the envelope matched the figure on the outside of the envelope.

The next step in the process is where the defense's theory breaks down. According to Quel, the next step in the process was to complete a bank deposit slip, put the money and the deposit slip inside a special plastic deposit bag complete with the bank's logo on it, return it to the safe to await pick-up by a school district driver/courier. The next step according to Quel was to then enter the amount deposited by a particular student group into a computer software program. The software program used was "Quicken". The Quicken program kept track of all the student groups and maintained running balances of how much money each group had. This sequence, according to Quel, would prohibit her from then going back inside the bank deposit plastic bags and removing any money. Contributing to this is the fact that the reports from Quicken always matched the numerical reflection of the money inside the student group delivered deposit envelopes.

The government's theory, however, had more persuasive punch. After Quel would verify the money received matched the numerical reflection on the outside of the deposit envelope, she would enter that figure into Quicken. This ensured that each student group's running balance in Quicken would be consistent with each groups own record keeping. Only after that task was completed, would Quel then complete the bank deposit slip. It is at this point, where cash could be diverted from the student generat-

ed deposit envelope to Quel's own pocket. Contributing to this opportunity of theft is that the actual bank deposit slips which were placed inside the plastic deposit bags were never returned to Quel. Those went to the central office. The central office, for some reason, had no access to the Quicken program. Quel was the only person who had the password for that program.

With this factual overview now complete, Quel's specific insufficiency accusations can be addressed.

Theft by Unlawful Taking

Pennsylvania defines theft by unlawful taking as having four elements. Those elements are: (1) the defendant took control over movable property; (2) the movable property was someone's else's; (3) the taking was unlawful; and, (4) the taking was with the intent to deprive the owner of his property. Pa. SSJI (Crim) 15.3921A; *see also*, Trial Transcript, pg. 242. Quel's attack on her conviction for unlawful taking is a hybrid assertion. Quel says the government did not present sufficient evidence that she "unlawfully took control of the movable property of another." Concise Statement, 7(b), (Aug. 19, 2010). The Court views this assertion as questioning the government's proof as to the first and third elements for those elements have the language which Quel uses in her Concise Statement.

The government's evidence more than satisfies what the law requires to sustain a conviction for theft. Quel had control of the money from the time each student group left it with her until she placed the money into the specially designed deposit bag for pick-up by the courier. While this part of Quel's control of the money was lawful, the diverting of cash from the student deposit envelopes to her own pocket was not. The strength of the circumstantial evidence more than supported the jury's guilt determination.

Theft by Failure to Make Required Disposition

Pennsylvania defines theft by failure to make required disposition of funds as having three elements. Those elements are: (1) the defendant obtained property; (2) the property was obtained through an agreement or subject to a known legal obligation to make a specific disposition of that property; and, (3) the defendant intentionally dealt with the property obtained as her own and did not make the required disposition. Pa. SSJI (Crim) 15.3927B; *see also*, Trial Transcript, pg. 241. Quel asserts the government's proof was lacking on element three as she says the government did not "establish...that [she] failed to make deposits as per her employment responsibilities and instead intentionally dealt with the property...as her own." Concise Statement, 7(b), (Aug. 19, 2010).

The government's evidence was more than sufficient to prove this crime. Quel's job responsibilities included receiving money raised from various student groups, accounting for it, preparing reports of such deposits, completing the necessary paperwork to have that money deposited into a bank account and preparing the bag for deposit by the school's courier. The expert testimony of Peter Vancheri and Jacqueline Weibel demonstrated that certain deposits were not made or were not completely made. This testimony, when viewed in conjunction with that from school officials and the defendant herself that she was the single person responsible for doing these tasks, creates an unbreakable chain of circumstantial proof that Quel took cash and never made the deposit she was obligated to make by virtue of her position.

Theft by Deception

Pennsylvania defines theft by deception as having three elements. Those elements are: (1) the defendant intentionally obtained or withheld property; (2) the property was the property of another; (3) the defendant committed the deception with regard to the property. Pa. SSJI (Crim) 15.3922A; *see also*, Trial Transcript, pg. 240. Quel asserts the government's proof was lacking on elements one and three. Concise Statement, 7(c), (Aug. 19, 2010) ("[T]he Commonwealth failed to establish...Quel either obtained or withheld currency of another. Further, the Commonwealth failed to prove the necessary element of deception.").

The government's evidence was more than sufficient to prove this crime. Quel's deception was to match up the balance for each student group in the Quicken program with what was reflected on the outside of that group's deposit envelope. This created the appearance that all things financial were in order. As was demonstrated at trial, the financial affairs of the student groups were not in order. As mentioned earlier, the circumstantial evidence showed Quel removed cash from what was actually deposited with the bank between the time she verified the contents of each student groups deposit envelope and when she completed the deposit slip and placed the remaining monies in the blue, plastic deposit bag for the school's courier to pick and actually make the deposit. The money Quel took was property of another and her deception was necessary in order for her to maintain possession and use of that money.

Weight of the Evidence

Quel also claims the jury's guilt determination was against the weight of the evidence. Our Rules of Procedure require such claims be raised by motion. Pa.R.Crim.P. 607(A)(3) ("A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial: in a post-sentence motion."). Quel made the following assertion: [t]he verdict was against the weight of the evidence. Post Sentencing Motion, paragraph 2, (March 11, 2010). Rule 607(A)(3) has been complied with, but is that the only rule which must be followed? This Court thinks not.

Pa.R.Crim.P. 575 addresses motions and answers. Section (A) of that rule sets forth certain requirements for motions. Sub-section (2)(c) of that rule provides that "[t]he motion shall state with particularity the grounds for the motion, [and] the facts that support each ground....". Pa.R.Crim.P. 575(A)(2)(c). Sub-section (A)(3) says that the "failure, in any motion, to state...a ground therefor shall constitute a waiver....". Pa.R.Crim.P. 575(A)(3).

Here, the only assertion regarding the evidence's weight was – the verdict was against the weight of the evidence. There is no particularity. There are no facts set forth in support. This one-sentence assertion is not what Rule 575(A)(2)(c) contemplated and justifies this Court's conclusion that the weight claim has been waived.¹

Ineffective Assistance of Counsel (IAC)

Quel's final assertion of error is not leveled directly at the trial court but at her previous lawyer. Quel claims her 6th Amendment right to the assistance of counsel was violated. According to Quel, the abridgment of her right happened when her prior lawyer did not call any character witnesses to testify on her behalf at trial.

To prevail on an ineffectiveness claim, Quel must show that such ineffectiveness "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Our appellate courts have interpreted this standard to require three things: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (Pa. 1987)". *Commonwealth v. Carson*, 913 A.2d 220, 233 (Pa. 2006), *accord*, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to satisfy any one of the three

prongs of the test for ineffectiveness requires rejection of the claim. *Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (Pa. 2006).

When one raises a failure to call a potential witness claim, “the performance and prejudice requirements of the *Strickland* test” are established,² if: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.” *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007). All five requirements are a must.

A review of the procedural history just as it pertains to the IAC claim is of great assistance to the Court’s conclusion. The IAC claim first appears on the Court’s radar screen in a March 11th post-sentence motion. While clearly not in compliance with *Washington*, the Court excused the disconnect given new counsel just getting involved. A week later, the Court directed Quel’s counsel to supplement its initial IAC filing and made specific reference to our state Supreme Court’s 2007 decision in *Washington*. On April 6th, Quel’s lawyer filed a supplement. Attached to the supplement were two documents: (A) trial transcript snippet; and (B) trial lawyer affidavit, which had attached to it a hand written 4 page listing of names and other notations next to certain names. Of note, is that Quel’s lawyer also referenced the *Washington* decision and its five requirements. The government filed a response to the IAC claim on April 19th. The government’s position was that the various predicates from *Washington* have not been satisfied by the evidentiary presentation to date. Over 2 months later, the parties convene before this Court for a hearing. Surprisingly, Quel takes no additional steps to supplement her filings. Equally surprising, is the lack of effort to distinguish or soften the blow, if you will, of its pleading deficiencies highlighted by the government’s written response.

The aforementioned procedural history allows this Court to focus upon the *Washington* predicates and reach the conclusion that the IAC claim fails. Based upon this record, the Court does not even know if the witnesses set forth in the hand written attachment to the trial lawyer’s affidavit even exist. Quel never testified that each particular witness existed. Her trial lawyer did not testify that each particular witness existed as a result of him talking with each or through some other manner. None of these witnesses testified or, as far as the Court knows, even appeared at the June 28th hearing. Their availability on the trial date is an enormous unknown. Equally absent from this record is the sum and substance of what each of these particular witnesses would have testified to. As stated earlier, not one witness testified at the June 28th hearing. Also absent is any documentation setting forth their proposed testimony. Pa.R.Crim.P. 902(A)(15) (“Any documents material to the witness’s testimony shall also be included in the petition....”). To the extent these evidentiary black holes can be interpreted to be credibility calls, this Court is making them, and making them against Quel. *Commonwealth v. Small*, 980 A.2d 549, 561 f.n.4 (Pa. 2009) (“Nonetheless, when confronted by claims alleging ineffectiveness by trial counsel for failure to call a witness, we encourage PCRA courts to facilitate appellate review by making credibility findings.”). These three deficiencies make discussion of the prejudice prong an academic exercise.³

BY THE COURT:
/s/Williams, J.

¹ The Court gains support for its conclusion from the Superior Court’s recent *en banc* decision in *Commonwealth v. Dixon*, 997 A.2d 368 (Pa. Super. 2010). In *Dixon*, the Court affirmed the trial court’s conclusion that Rule 581(D) was not satisfied. *Id.*, at 374. Rule 581(D) requires particularity, the articulation of grounds and facts in support of those grounds. Pa.R.Crim.P. 581(D). Given the similarity of the language between Rule 581(D) and 575(A)(2)(c), this Court believes the result should be the same.

² *Commonwealth v. Johnson*, 966 A.2d 523, 536 (Pa. 2009).

³ The Court does find that requirement (3) from *Washington* – counsel knew or should have know – to have been satisfied.

Commonwealth of Pennsylvania v. Rafael Gary

3rd PCRA—Life Sentence on Juvenile—Untimely

No. CC 9516250, 9603768. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—December 2, 2010.

OPINION

The Defendant has appealed from this Court’s Order of September 7, 2010, which dismissed his third pro se Post Conviction Relief Act Petition without a hearing. A review of the record reflects that because the Petition was untimely filed, this Court lacks the jurisdiction to address it.

The Defendant was charged with Criminal Homicide,¹ Aggravated Assault,² Possession of a Prohibited Offensive Weapon,³ Criminal Attempt⁴ and Criminal Conspiracy⁵ in relation to the August 22, 1995 killing of Elizabeth Turner and shooting of Irene Kirk in the West End section of the City of Pittsburgh. At the time of the crime, the Defendant, who was born on December 15, 1977, was 17 years and 8 months old. The Defendant was tried as an adult and a jury trial was held before this Court from July 31 to August 5, 1996. At the conclusion of the trial, the Defendant was convicted of First-Degree Murder and all other crimes. On October 7, 1996, the Defendant appeared before this Court and was sentenced to a term of life imprisonment plus a consecutive term of ten (10) to twenty (20) years. The judgment of sentence was affirmed by the Superior Court on February 10, 1998 and the Pennsylvania Supreme Court subsequently denied allowance of appeal on June 29, 1998.

On July 7, 1999, the Defendant filed a pro se Post Conviction Relief Act Petition. Counsel was appointed and an Amended Petition followed. On May 30, 2000, after giving the appropriate notice, this Court dismissed the Amended Petition without a hearing. That Order was affirmed by the Superior Court on May 29, 2001.

On April 29, 2005, the Defendant filed a second pro se PCRA Petition. After finding that the Petition was untimely and giving the appropriate notice, this Court dismissed the Petition without a hearing on May 25, 2005. No appeal was taken.

The Defendant took no further action until July 13, 2010, when he filed a third pro se PCRA Petition. He averred a time-bar exception to the Post Conviction Relief Act on the basis of *Graham v. Florida*, 130 S.Ct. 2011 (2010), which, he claimed, held that the

imposition of life sentence upon a juvenile constituted cruel and unusual punishment and was prohibited by the 8th Amendment. This Court reviewed *Graham* and determined that its holding actually applied only to non-homicide offenses. See *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010). Upon finding that *Graham* did not apply, this Court determined that the Defendant did not satisfy the time-limitation exception of Section 9545(b)(iii) of the Post Conviction Relief Act and the Petition was therefore untimely. After giving the appropriate notice, this Court dismissed the Petition without a hearing on September 7, 2010. This appeal followed.

Pursuant to 42 Pa.C.S.A. §9545(b), any and all PCRA Petitions, “including a second or subsequent petition, shall be filed within one year of the date the judgment of sentence becomes final...” 42 Pa.C.S.A. §9545(b)(1). In this case, the Defendant’s judgment of sentence became final on September 28, 1998, ninety (90) days after the Pennsylvania Supreme Court’s ruling, when he failed to petition for certiorari to the United States Supreme Court. Therefore, in order to be timely, any PCRA Petitions should have been filed by September 28, 1999. The instant Petition, filed on July 13, 2010, is well outside of that time limitation. However, the Defendant has averred a retroactive Constitutional right exception to that time limitation.

The Post Conviction Relief Act states, in relevant part:

§9545. *Jurisdiction and proceedings.*¹

(b) *Time for filing petition.* –

(1) *Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment became final, unless the petition alleges and the petitioner proves that:*

(iii) *the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided by this section and has been held by that court to apply retroactively.*

42 Pa.C.S.A. §9545(b)(iii).

In his pro se PCRA Petition, the Defendant relied on *Graham v. Florida*, 130 S.Ct. 2011 (2010), for the proposition that the imposition of a life sentence on a juvenile violated the 8th Amendment’s prohibition of cruel and unusual punishment. However, as noted above, a careful reading of *Graham* revealed that its holding only applied to non-homicide offenses, which was not the case here. Because *Graham* did not establish a new constitutional right applicable to this case (let alone apply it retroactively), the Defendant failed to establish an exception to the time limitation provisions of the Post Conviction Relief Act.⁶

Inasmuch as the Defendant has failed to satisfy the requirements of the retroactive Constitutional right exception to the Post Conviction Relief Act, his Petition was properly classified as untimely. See *Commonwealth v. Wojtaszek*, 951 A.2d 1169 (Pa.Super. 2008). “Given the fact that the PCRA’s timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner.” *Commonwealth v. Mazzarone*, 856 A.2d 1208, 1210 (Pa.Super. 2004). See also *Commonwealth v. Bennett*, 842 A.2d 953, 956 (Pa.Super. 2004) and *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). As such, this Court is bound by the time limitation provisions of the Act and, therefore, properly dismissed the Defendant’s third Post Conviction Relief Act Petition.

Accordingly, for the above reasons of fact and law, this Court’s Order of September 7, 2010 must be affirmed.

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

Date: December 2, 2010

¹ 18 Pa.C.S.A. §2501 - CC 9516250

² 18 Pa.C.S.A. §2702(a)(1) - CC 9603768

³ 18 Pa.C.S.A. §908 - CC 9603768

⁴ 18 Pa.C.S.A. §901 - CC 9603768

⁵ 18 Pa.C.S.A. §903 - CC 9603768

⁶ Neither is this Court persuaded by the two “Pennsylvania Supreme Court” cases referenced in the Defendant’s Concise Statement of Matters Complained of on Appeal; the case of *Commonwealth v. Batts*, 974 A.2d 1175 (Pa.Super. 2009) remains pending in the Pennsylvania Supreme Court and this Court was unable to locate an applicable pending case under the “cited” caption of “Cunningham.” Rather, the current law of this Commonwealth on this point is proscribed by *Commonwealth v. Carter*, 855 A.2d 885 (Pa.Super. 2004), in which our Superior Court held that the imposition of a life sentence on a juvenile tried as an adult and convicted of murder does not constitute cruel and unusual punishment. See *Commonwealth v. Carter*, 855, A.2d 885, 892 (Pa.Super. 2004).

Commonwealth of Pennsylvania v. Terrence Allen

3rd Degree Murder—Hearsay—Waiver—Lesser Included Offense

No. CC 200707863. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—December 16, 2010.

OPINION PROCEDURAL HISTORY

On October 24, 2008 Appellant was convicted by a jury of one count of Third Degree Murder, 18 Pa.C.S. § 2502(c).¹ He was sentenced on February 19, 2009 to twenty to forty years incarceration. On February 27, 2009 Appellant filed a post-sentence motion, which was denied by operation of law on July 17, 2009. He filed a timely Notice of Appeal to the Superior Court of Pennsylvania on August 14, 2009. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), an order was entered September 21, 2009,

directing counsel to file a concise statement of errors on appeal within twenty-one days from the date of the order. On September 30, 2009 Appellant timely filed an amended concise statement. This appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant's Amended Concise Statement raises the following eight issues for review by the Superior Court of Pennsylvania:

1. The trial court committed reversible error when it permitted Detective Dale Canofari to offer hearsay testimony from Trudy Williams, over objection, which was unnecessary and had the sole effect of being offered for the truth of the matter asserted therein.
2. The trial court committed reversible error when it permitted the Commonwealth to offer testimony by Trudy Williams, over objection, from a preliminary hearing that was irrelevant to the ultimate issue and unfairly prejudicial.
3. The trial court committed reversible error when it permitted Detective J. R. Smith to provide his summary of a recorded statement by Trudy Williams that was cumulative, irrelevant, highly prejudicial, and not the best evidence.
4. The trial court committed reversible error when it allow[ed] Stephanie Anna Ramaley to testify, over objection, to irrelevant circumstances surrounding Trudy Williams that served only to confuse and prejudice the jury.
5. The trial court committed harmful error when it permitted incompetent testimony regarding Trudy Williams, namely those issues raised in paragraphs 1 through 4 herein, which was cumulatively irrelevant and highly prejudicial.
6. The trial court committed reversible error when it permitted Detective William Kelsch to testify regarding the use of his canine partner in the arrest of Mr. Allen because the probative value of that evidence was not outweighed by its prejudicial affect [sic].
7. The trial court committed reversible error when it refused to instruct the jury on aggravated assault, a lesser included offense, where there was a rational basis and sufficient evidence for the jury to have acquitted Mr. Allen of third-degree murder.
8. The trial court abused its discretion when sentencing Mr. Allen by using language supporting the elements of first-degree murder, showing a partiality, bias, or ill-will against the Appellant.

FINDINGS OF FACT

On the morning of October 10, 2006 Appellant was in the rear parking area of his mother's (Trudy Williams) and step-father's (victim Terrance Williams) home at 325 Charles Street, in the Beltzhoover section of the City of Pittsburgh. Trial Transcript October 21-24, 2008 at 47, 69, 96, 98, 226, 264, 265 (hereafter "T.T."). Appellant was awaiting the arrival of his step-father, who was being driven home by Ms. Williams after being released from the Fayette County Prison to a half-way house after serving a period of incarceration for an aggravated assault conviction in which Appellant was the victim. (T.T. 60, 98, 221, 264-66.) Appellant harbored ill-will and hostility toward the victim from that incident in which he was stabbed multiple times, and Appellant had told his mother that he was going to get his step-father when he came home from prison. (T.T. 60, 221, 264-266.) Although Appellant's mother had not told Appellant himself that the victim was being released and coming home that day, she had told her daughter and another son that her husband was being released from prison. (T.T. 162, 266.)

Appellant's mother, who picked up her husband at the prison, parked in the parking area at the rear of her house, and they exited their van. (T.T. 60, 96-87, 95, 98, 264, 265, 325.) As Appellant's mother started toward the house with her husband following, she heard her husband shout, "Terrence, Terrence." (T.T. 264.) She turned around, and observed her son, Terrence Allen (Appellant), confronting her husband with a gun. (T.T. 67, 107, 264.) Although Appellant was wearing a mask and a black head covering, she recognized her son by his eyes, and because she was familiar with his build and walk. (T.T. 51, 60, 67, 107, 201, 213-14, 232, 236-37, 264, 267.) She tried to block Appellant's way by holding up her hands, saying, "No. No. No. No. Don't do this." (T.T. 61, 264.) While Appellant's mother engaged her son, her husband attempted to escape by crawling through the van to the other side, running between two houses toward the front of his house, and then crossing to the opposite side of Charles Street. (T.T. 61, 264, 265.)

Appellant got past his mother and pursued the victim onto Charles Street, to the front of Knoxville Middle School, and Appellant's mother followed. (T.T. 41, 61, 69, 228, 264-65.) There Appellant shot at the victim twice and the victim fell to the ground, landing partially on the sidewalk and partially in the street. (T.T. 49, 51, 61, 221, 228.) At this point, Appellant's mother caught up with the pair and attempted to restrain her son, stating, "Don't do this. Don't do this. It's not worth it." (T.T. 228, 229, 265.) Appellant took four or five steps away from the victim, then came back to the victim, and shot him twice in the leg while he was lying on the ground. (T.T. 51, 61, 221, 229.) Appellant again turned away from the victim, walking toward the houses on Charles Street, but again returned, and although his mother continued to try and block his path, Appellant shot the victim twice more in the legs before running from the scene. (T.T. 51, 221, 229, 230, 231, 238, 265.) A witness who had observed the shooting and heard Appellant's mother screaming, called the police and rendered aid until the police and medics arrived. (T.T. 229, 230, 231, 233, 234, 265.)

When City of Pittsburgh paramedics arrived they observed that the victim had several penetrating injuries to his lower extremities, upper leg, groin area, and right arm, and that he had lost a significant amount of blood. (T.T. 71, 73, 75-76.) His color was gray, he had no pulse, and he did not appear to be breathing. (T.T. 71.) The medics began treating the victim at the scene, supporting his breathing by using a "bag-held mask," immobilizing him, and cutting off his clothing to assess his wounds. (T.T. 72-73, 103.) They placed the victim into the ambulance, and while en route to Mercy Hospital attempted to administer IV fluids, but were unsuccessful because the victim's blood pressure was so low. (T.T. 72.) After the victim experienced a cardiac arrest in the emergency room, the trauma doctor performed a thoracotomy to resuscitate him. (T.T. 305, 306, 308, 311-12.) The victim remained in Mercy Hospital for approximately four weeks, where he underwent multiple surgeries to treat his gunshot injuries, including vascular repair of the popliteal artery in his right leg, which was the source of the victim's blood loss; orthopedic stabilization of a fractured femur; and a right lower extremity fasciotomy. (T.T. 303-06, 311-13, 317-18, 323.) During his hospitalization the victim also contracted pneumonia. (T.T. 319, 333.)

The victim was discharged to SCI Laurel Highlands in stable condition on November 7, 2006. (T.T. 329, 336.) When he arrived at the prison by ambulance, he had a nasogastric tube for feeding, was unable to rollover or sit up on his own, and was breathing through his mouth. (T.T. 336, 338, 394.) At 1:00 a.m. on November 11, 2006, a nurse began administering a breathing treatment to the victim using a nebulizer. (T.T. 339, 343.) Twenty minutes later, when the nurse returned to check on him, the victim was found

without vital signs, and efforts to resuscitate him were unsuccessful. (T.T. 340-41.) The cause of death was acute myocardial infarction as a result of a sequela of gunshot wounds to the lower extremities. (T.T. 352, 374, 393, 400.) The sequela included massive blood loss, multiple blood transfusions, and an episode of respiratory arrest. (T.T. 308, 353, 400.) The manner of death was homicide. (T.T. 375, 403.)

DISCUSSION

I.

Appellant initially argues that the trial court committed reversible error when it permitted Detective Dale Canofari to offer hearsay testimony from Trudy Williams, over objection, which was unnecessary and had the sole effect of being offered for the truth of the matter asserted therein. This issue is without merit.

The law is well-established in Pennsylvania that

[t]he admissibility of evidence is a matter for the discretion of the trial court and a ruling thereon will be reversed on appeal only upon a showing that the trial court committed an abuse of discretion. “An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.”

Commonwealth v. Sherwood, 982 A.2d 483, 495 (Pa. 2009) (quoting *Commonwealth v. Dillon*, 925 A.2d 131, 136 (Pa. 2007)) (internal citations omitted).

Pursuant to Pennsylvania’s Rules of Evidence, “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). Conversely, “an out of court statement which is not offered for its truth, but to explain the witness’ course of conduct is not hearsay.” *Commonwealth v. Carson*, 913 A.2d 220, 258 (Pa. 2006) (quoting *Commonwealth v. Sneed*, 526 A.2d 749, 754 (Pa. 1987)). The Pennsylvania Courts have repeatedly upheld the introduction of out-of-court statements to demonstrate the course of conduct undertaken by police based on those statements. *Commonwealth v. Collazo*, 654 A.2d 1174, 1178 (Pa. Super. 1995) (collecting cases). The Supreme Court of Pennsylvania, addressing the admissibility of testimony to explain a witness’ course of conduct, has held that, “[t]he trial court, in exercising discretion over the admission of such statements, must balance the prosecution’s need for the statements against any prejudice arising therefrom.” *Commonwealth v. Chmiel*, 889 A.2d 501, 532-33 (Pa. 2005).

Here, Detective Canofari testified that Trudy Williams informed police at the scene of the shooting that her son, Terrence Allen, shot her husband, and as a result of this information Detective Canofari sent patrol vehicles to Appellant’s home to search for him, sent detectives to the hospital to take Ms. Williams’ statement, and subsequently secured an arrest warrant for Appellant. (T.T. 85-86.) Appellant’s counsel timely objected to this testimony on the basis that it was hearsay, and the trial court sustained his objection. (T.T. 84.) Nevertheless, the trial court properly permitted Detective Canofari’s testimony for the limited purpose of explaining the actions he took in the course of his investigation. *Commonwealth v. Douglas*, 737 A.2d 1188, 1195 (Pa. 1999) (no error in admission of officers’ testimony that a witness identified the defendant from a photo array where the identification was offered to establish the information on which the police secured an arrest warrant for the defendant, and not to prove that the defendant was the shooter); *Commonwealth v. Whiting*, 668 A.2d 151, 158 (Pa. Super. 1995) (no abuse of discretion admitting police officer’s testimony that a witness identified the defendant after being shown a composite drawing where testimony was offered to explain the course of the officer’s conduct).

Significantly, the trial court immediately instructed the jury regarding Detective Canofari’s testimony as follows:

Ladies and gentlemen, this detective can relay what Ms. Trudy Williams allegedly said to [Sergeant] DeVault and which was communicated to him only for the purpose of establishing his course of conduct. Not for the truth of the matter that Mr. Allen shot the person.... The distinction is that [that] still has to be proved, but it is admissible to show the police course of conduct.

(T.T. 84.) Under Pennsylvania case law such a limiting instruction was proper. *Commonwealth v. Dargan*, 897 A.2d 496, 502 (Pa. Super. 2006) (appellate court will not attribute error where the jury receives an instruction from the trial judge explaining the purpose for which it may consider certain evidence).

In addition, although a statement identifying Appellant as the individual who shot the victim may be construed as highly prejudicial because of its incriminating nature, here, the prejudicial impact of Detective Canofari’s statement was minimal because this Court had already admitted Ms. Williams’ statement that it was her son who shot her husband on the grounds that it qualified as an excited utterance, and because Ms. Williams was available for cross-examination. (T.T. 51.) See Pa.R.E. 803(2). *Commonwealth v. Jones*, 658 A.2d 746, 751 (Pa. 1995) (no abuse of discretion where trial court allowed testimony of police officer that merely related matters covered by the declarant’s own testimony).

Furthermore, after Ms. Williams recanted her statement at trial, the taped interview of her account of the shooting recorded at the hospital on the morning of the shooting, in which she identified Appellant as her husband’s assailant, was properly admitted as a prior inconsistent statement. See Pa.R.E. 803.1(1)(c). *Commonwealth v. Hardy*, 918 A.2d 766, 777 (Pa. Super. 2007) (admission of hearsay testimony of police officer constituted harmless error where it was cumulative of untainted, properly admitted, and substantially similar testimony of other witnesses).

Consequently, Appellant’s claim is without merit.

II.

Appellant next argues that the trial court committed reversible error when it permitted the Commonwealth to offer the preliminary hearing testimony of Trudy Williams at trial. Appellant claims that such testimony was irrelevant to the ultimate issue and unfairly prejudicial. This issue is meritless.

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

Pursuant to Rule 401 of the Pennsylvania Rules of Evidence, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.” Pa.R.E. 401. The Supreme Court of Pennsylvania has interpreted the concept of relevance as follows: “Evidence is relevant if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact.” *Commonwealth v. Kennedy*, 959 A.2d 916, 923 (Pa. 2008). Rule 403 of the Pennsylvania Rules of Evidence provides: “Although relevant, evidence may be excluded if its probative value is outweighed by

the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Pa.R.E. 403.

As a preliminary matter, it is well established Pennsylvania law “that a party complaining, on appeal, of the admission of evidence in the [c]ourt below will be confined to the specific objection there made.” *Commonwealth v. Cousar*, 928 A.2d 1025, 1041 (Pa. 2007) (quoting *Commonwealth v. Boden*, 159 A.2d 894, 900 (Pa. 1960)). The reviewing court will not consider a new theory for an objection raised at trial. *Commonwealth v. Duffy*, 832 A.2d 1131, 1136 (Pa. Super. 2003). Review of the trial transcript in the instant case reveals that Appellant objected to the admissibility of Ms. Williams’ preliminary hearing testimony on the ground that it was irrelevant, and not on the ground that the evidence was unfairly prejudicial. (T.T. 163-65, 168, 171.) Because the grounds for objection proffered in Appellant’s 1925(b) statement differ from those raised by Appellant at trial, his argument that the evidence was unfairly prejudicial is waived, and this Court will only address his argument that the preliminary hearing testimony was irrelevant. *Cousar*, 928 A.2d at 1041 (appellant failed to preserve issue for appeal where objection raised at trial addressed the relevance of evidence and the issue raised on appeal challenged the evidence pursuant to Rule of Evidence 404(b)); *Commonwealth v. Rovinski*, 704 A.2d 1068, 1075 (Pa. Super. 2007) (issue of prejudicial impact of testimony waived for appellate review where objection to testimony voiced at trial was based on its relevance and not its prejudicial impact).

In the instant case Trudy Williams told Sergeant DeVault at the scene how her husband had been shot by Appellant. (T.T. 60-61.) She repeated her account of the events in a taped statement she gave to homicide detectives at Mercy Hospital, where her husband had been taken for treatment. (T.T. 263-68.) Subsequently, at Appellant’s preliminary hearing on May 18, 2007, Ms. Williams denied telling the police that it was Appellant who shot her husband, and denied or could not remember that she gave the police a taped statement at Mercy Hospital on the day of the shooting. (T.T. 183, 184-85, 191-92, 195.) At trial, Ms. Williams testified that she did not remember her testimony at Appellant’s preliminary hearing. (T.T. 153-54.) She further testified that she did not remember telling the detectives with whom she spoke at Mercy Hospital or paramedic Chief Carlson that the person who shot her husband was her son (Appellant). (T.T. 150, 156.) As a result of Ms. Williams’ testimony at trial, the Commonwealth read a portion of her preliminary hearing testimony into the record, and played the taped statement she gave to the detectives at Mercy Hospital on the day of the shooting. (T.T. 170-94; 263-68.)

Appellant questions the relevance of the preliminary hearing testimony of Trudy Williams that the Commonwealth had read into the record at trial. (T.T. 170-94.) The substance of Ms. Williams’ preliminary hearing testimony read into the record at trial was: (1) she had a history of consistently failing to appear to testify on the dates the preliminary hearing was scheduled; and, (2) she did not make statements to police at the hospital about the identity of the assailant who shot her husband. (T.T. 165.) Immediately prior to the admission of her preliminary hearing testimony, Ms. Williams testified repeatedly that she did not remember any specific events that took place when her husband was shot. (T.T. 146-63.)

Because the taped statement Ms. Williams gave to police at Mercy Hospital shortly after the shooting recounted the events that occurred during the shooting, and implicated Appellant as the assailant, her preliminary hearing testimony was relevant to determine her credibility relating to the substantive facts in this case, including her identification of Appellant as the shooter. See generally, *Commonwealth v. Baez*, 759 A.2d 936, 940 (Pa. Super. 2000) (written statement signed and adopted by witness admissible for impeachment and as substantive evidence where witness denied making statement at trial); *Commonwealth v. Brewington*, 740 A.2d 247, 252 (Pa. Super. 1999) (where witness recanted earlier statements and testimony implicating defendant in murder, Commonwealth properly introduced evidence of the witness’ gang affiliation to explain his asserted reason for changing his testimony at trial).

Accordingly, this issue is meritless.

III.

Appellant also argues that the trial court committed reversible error when it permitted Detective J. R. Smith to provide his summary of a recorded statement by Trudy Williams that was cumulative, irrelevant, highly prejudicial, and not the best evidence. This issue is waived.

Pursuant to Rule 302 of the Pennsylvania Rules of Appellate Procedure, “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a). In interpreting Rule 302, the Supreme Court of Pennsylvania has declared that “issues are preserved when objections are made timely to the error or offense.” *Commonwealth v. Baumhammers*, 960 A.2d 59, 73 (Pa. 2008).

Review of the record in the instant case reveals that Appellant did not object to the admission of Detective Smith’s testimony immediately prior to or at anytime during his testimony. (T.T. 197-215.) This failure to lodge a contemporaneous objection precludes Appellant from now appealing its admission. *Baumhammers*, 960 A.2d at 73 (those issues where Appellant failed to assert a timely objection were considered waived by the court); *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278, 1287 (Pa. Super. 2004) (issue not preserved for appeal where no contemporaneous objection raised before trial court).

Therefore, Appellant’s claim as to this issue is waived.

IV.

Appellant further argues that the trial court committed reversible error when it allowed Stephanie Anna Ramaley (Kapourales) to testify, over objection, to irrelevant circumstances surrounding Trudy Williams that served only to confuse and prejudice the jury. This issue is meritless.

The standard of review for the admissibility of evidence as set forth in Issue I is incorporated by reference for purposes of this discussion. *Commonwealth v. Sherwood*, *supra*. Also incorporated by reference for purposes of this discussion is the standard for determining the admissibility of evidence as set forth in Issue II. *Commonwealth v. Kennedy*, *supra*.

Ms. Kapourales’ testimony chronicled the efforts by the Commonwealth to secure the appearance of Trudy Williams at Appellant’s preliminary hearing, up to and including her eventual arrest under a material witness warrant. (T.T. 239-60; Pa.R.Crim.P. 522.) This testimony was relevant to provide a context, as well as to impeach, both Ms. Williams’ trial and preliminary hearing testimony which were both inconsistent with her prior statements to police in which she identified Appellant as the individual who shot her husband. Ms. Kapourales’ testimony clarified for the jury the reluctance of Ms. Williams to testify against her son, and any perceived prejudice to Appellant was outweighed by the probative value of that testimony. See generally, *Commonwealth v. Randall*, 758 A.2d 669, 676-78 (Pa. Super. 2000) (trial court did not err in allowing the testimony of assistant district attorney who represented the Commonwealth at the defendant’s preliminary hearing where testimony was offered to describe fearful demeanor of witness at preliminary hearing).

Accordingly, this issue is without merit.

V.

Appellant additionally argues that the trial court committed “harmful error” when it permitted incompetent testimony regarding Trudy Williams, namely those issues raised in his first four claims above, which was cumulatively irrelevant and highly prejudicial. This claim is meritless.

The law is well-established in Pennsylvania that “no number of failed claims may collectively attain merit if they could not do so individually.” *Commonwealth v. Laird*, 988 A.2d 618, 647 (Pa. 2010).

In the instant case this Court determined that three of Appellant’s four individual claims of error above were meritless. Thus, these claimed errors could not have any cumulative prejudicial effect. *Commonwealth v. Miller*, 987 A.2d 638, 672 (Pa. 2009) (holding that issue of cumulative prejudicial effect of errors was without merit where alleged errors raised by the defendant did not warrant relief individually); *Commonwealth v. Cam Ly*, 980 A.2d 61, 97 (Pa. 2009) (same).

Therefore, Appellant’s claim as to this issue is meritless.

VI.

Next, Appellant argues that the trial court committed reversible error when it permitted Officer William Kelsch to testify regarding the use of his canine partner in the arrest of Mr. Allen because the probative value of that evidence was not outweighed by its prejudicial effect. This issue is waived.

As previously discussed in Issue II, and incorporated by reference herein, the reviewing court will not consider a new theory for an objection raised at trial. *Commonwealth v. Duffy*, *supra*.

Here, although Appellant filed a motion in limine seeking to exclude evidence of Appellant’s flight from police on April 8, 2007, the day he was apprehended, his motion made no reference to Officer Kelsch’s use of a canine partner to apprehend Appellant. (Def.’s Mot. in Limine.) Moreover, Appellant failed to specifically object to Officer Kelsch’s testimony that he deployed his canine partner to apprehend Appellant. (T.T. 77-78; 380-81.) Appellant raised this issue in a post-sentence motion, however, raising the issue in the post-sentence motion did not preserve it for purposes of this appeal. *Baumhammers*, 960 A.2d 59, 73 (Pa. 2008) (rejecting the defendant’s argument that objections raised in the lower court by virtue of having been set forth in post-sentence motions are preserved for appeal).

Accordingly, this issue is waived.

VII.

Appellant also argues that the trial court committed reversible error when it refused to instruct the jury on aggravated assault, a lesser included offense, where there was a rational basis and sufficient evidence for the jury to have acquitted him of third-degree murder. This issue is meritless.

The Supreme Court of Pennsylvania has held that “there can be no conviction (or acquittal) of assault and battery or of aggravated assault and battery on an indictment and trial for murder or for murder and voluntary manslaughter.” *Commonwealth v. Comber*, 97 A.2d 343, 346 (Pa. 1953). Therefore, the trial court did not err in refusing to give an instruction on aggravated assault. *Commonwealth v. Kennedy*, 412 A.2d 886, 890 (Pa. Super. 1979), *overruled on other grounds*, 453 A.2d 927 (Pa. 1982) (where the cause of the victim’s death was at issue in a prosecution for murder/voluntary manslaughter, the refusal of the trial judge to charge on aggravated assault as a lesser included offense of murder and/or voluntary manslaughter was not error in light of the Pennsylvania Supreme Court’s holding in *Comber*).

Consequently, Appellant’s claim as to this issue is without merit.

VIII.

Finally, Appellant argues that the trial court abused its discretion when sentencing him by using language supporting the elements of first-degree murder, i.e., “lying in wait,” that demonstrated a partiality, bias, or ill-will against Appellant. This issue is without merit.

A trial court abuses its discretion when it imposes a sentence that is “manifestly unreasonable,” or when the sentence it imposes is the result of “partiality, prejudice, bias or ill will.” *Commonwealth v. Crork*, 966 A.2d 585, 590 (Pa. Super. 2009). An abuse of discretion claim is only reviewable where a substantial question is raised as to whether the sentence imposed is appropriate under the Sentencing Code. Pa.R.A.P. 2119(f); *Commonwealth v. Ventura*, 975 A.2d 1128, 1133 (Pa. Super. 2009). A substantial question is raised where it is alleged that the court considered an impermissible sentencing factor. *Commonwealth v. Macias*, 968 A.2d 773, 776 (Pa. Super. 2009).

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); *Macias*, 968 A.2d at 777. In determining whether a particular sentence is clearly unreasonable or unreasonable, the reviewing court must consider the nature and circumstances of the offense, the history and characteristics of the defendant, the trial court’s opportunity to observe the defendant and review the presentence report, the findings on which the court based its sentence, and the sentencing guidelines. 42 Pa.C.S.A. §9781(d); *Macias*, 968 A.2d at 777.

Appellant was sentenced to twenty to forty years imprisonment for his conviction for third degree murder which is the statutory maximum. 18 Pa.C.S. § 1102(d). In determining this sentence this Court considered the presentence report, the sentencing guidelines, and the various statutory factors that constitute the individualized sentencing scheme in this Commonwealth. 42 Pa.C.S. §9721(b). The court noted that it specifically considered the rehabilitative needs of Appellant, the impact of the crime on the victims and on society, and whether Appellant poses a danger to society. Sentencing Transcript, February 19, 2009, at 22 (hereafter “S.T.”). See 42 Pa.C.S. §9721(b). Specifically, this Court stated the following considerations:

Unreflected in the prior record score, of course, is the juvenile history where he assaulted a teacher, assaulted a teacher, assaulted a Pittsburgh School police officer, and, of course, the final incident where he was shot by Officer Kelsch when Officer Kelsch believed that [Appellant] was about to shoot him, and [Appellant] had that opportunity and was obviously ready to do so.

But, in any event, as to the charge of third-degree murder, the Court notes that Mr. Terrence Allen in effect laid in wait for over four years for Mr. Terrence Williams to be released from prison, who was in prison ostensibly—or not ostensibly, but for an incident between himself and Mr. Terrence Allen, that he made his mother an unwitting acces-

sory to this crime of murder, that he shot the victim multiple times and, in fact, chased him down and shot him in the middle of a city street, in plain view of his mother, making his mother a witness to this crime, and he ignored the pleas of his own mother as she begged for the life of one Terrence Williams, that Mr. Terrence Williams suffered a lingering and painful death that resulted in his dying in a prison hospital a couple of weeks after this incident.

The Court notes there's apparently expressed and unexpressed complete lack of remorse for this crime. Given the opportunity to do so today and in the past, Mr. Terrence Allen's failed to do so.

The Court finds that Mr. Terrence Allen acted upon an unforgiving heart and deserves no forgiveness from this Court or from society. The Court finds that those above factors are all aggravating factors, of course, in this sentencing proceeding today.

The Court finds in the totality of the picture of Mr. Terrence Allen, he has a propensity for anger, society deserves protection from Mr. Allen.

(S.T. 22-24.)

Although a jury convicted Appellant of third degree murder rather than first degree murder in the instant case, this Court's description of the actions of Appellant as "lying in wait" was a completely accurate description of the facts in this case. See *Commonwealth v. Hunter*, 554 A.2d 550, 557 (Pa. Super. 1989) (sentence imposed was not abuse of discretion where mitigating facts that resulted in the trial court finding defendant guilty of third degree murder rather than first degree murder did not alter fact that defendant had pursued victim following an argument and shot and killed him without justification). Thus, the reasons advanced by this Court in sentencing Appellant did not demonstrate a partiality, bias, or ill-will against Appellant, and the sentence imposed was appropriate under the circumstances. Therefore, this Court did not abuse its discretion in imposing the sentence. *Macias*, 968 A.2d at 778 (when weighing whether to impose a standard or mitigated range sentence, a sentencing court is not prohibited from taking into consideration the facts of the crime and how those facts supported a potentially more serious sentence); *Commonwealth v. Miller*, 965 A.2d 276, 280 (Pa. Super. 2009) (mere reference to potential risks faced by respondents to a fire, in case where charge of arson had been *nolle prossed*, did not indicate that the court specifically considered the charge of arson and enhanced the defendant's sentence based on that charge).

Appellant's claim is without merit.

CONCLUSION

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

BY THE COURT:
/s/Borkowski, J.

¹ Appellant was acquitted of one count of First Degree Murder, 18 Pa.C.S. § 2502(a), and one count of Criminal Attempt Homicide, First Degree, 18 Pa.C.S. § 901(a).

Commonwealth of Pennsylvania v. David Malcolm Ward

Robbery—No Fear of Imminent Bodily Injury

No. CC 200600351. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—December 27, 2010.

OPINION

On November 25, 2008, the appellant, David Malcolm Ward, (hereinafter referred to as "Ward"), was found guilty of the crime of robbery, following a jury trial.¹ A presentence report was ordered and the Commonwealth, on December 2, 2008, filed its notice of intention to seek a mandatory sentence of not less than ten nor more than twenty years as a result of the fact that Ward's conviction was his second conviction for the crime of robbery and, accordingly, was his second strike under the Three Strike Provision of the Sentencing Code. 42 Pa.C.S.A. §9714(a)(1).²

Sentencing took place on February 17, 2009, at which time Ward was sentenced to the mandatory sentence of not less than ten nor more than twenty years. Following sentencing, Ward was advised of his right to file post-sentence motions or a direct appeal to the Superior Court, or both. Ward did not file any post-sentence motions but, rather, elected to pursue a direct appeal to the Superior Court. Following sentencing Ward's trial counsel was permitted to withdraw and Ward's current appellate counsel was appointed to represent him. Ward was given several extensions to file a concise statement of matters complained of on appeal. In the statement that he did file, he raised three claims of error. Initially, Ward claims that the Commonwealth did not prove beyond a reasonable doubt that he placed the victim in fear of immediate, serious bodily injury. Ward also maintains that this Court abused its discretion in failing to sustain an objection to a question that allegedly called for speculation. Finally, Ward maintains that this Court abused its discretion in allowing Ward's criminal history to be given to the jury.

On December 16, 2005, Martin Dowling, (hereinafter referred to as "Dowling"), was working as a cashier at the On-The-Go Market, which is located at the intersection of West Liberty Avenue and Pioneer Avenue, in the Borough of Dormont. At approximately 10:30 p.m., he was behind the counter when an individual who asked for two packs of Newport cigarettes approached him. Dowling got the cigarettes and as he was giving them to the customer, he asked if the customer wanted anything else and he responded that he wanted the money in the cash register. Dowling told him to get out of the store, to which, the customer responded that he had a gun and then made a movement of putting his arm into his waistband. He then told Dowling to put the money in a bag. Since Dowling was unable to hit the panic button in order to alert his fellow employees as to what was going on, he then felt compelled to turn over the money to the customer, who he subsequently identified as Ward.

Ward fled the building and began to run up West Liberty Avenue while Dowling chased after him. Ward initially ran up West Liberty Avenue and then turned off of that street into an alley. Dowling pursued him and lost sight of Ward when he ran down the alley but then saw him again as he emerged from behind the strip center known as Dormont Village. Dowling noticed that Ward was no longer wearing the black plaid flannel shirt that he had had on when he robbed Dowling.³ Dowling was unable to catch Ward so he returned to the mini-mart and met with the police.

As a result of the investigation done by the Dormont Police, Ward became a suspect as the individual who committed this robbery. Ward agreed to meet with the Dormont Police on December 31, 2005, and after being given his Miranda rights, he gave his first version of what happened, that being that he went into the store, asked for cigarettes and was given too much change; two hundred fifty dollars too much. When asked if he would put this statement in writing, he agreed to do so and began to write out his statement only to stop, cross it out, and then write that he had received two hundred fifty dollars from Dowling in payment for a drug deal for crack cocaine. Ward was subsequently arrested and charged with this robbery.

Ward's initial claim of error is that the Commonwealth did not prove beyond a reasonable doubt that he had placed the victim in fear of immediate, serious bodily injury at the time of the commission of this crime. Ward was charged with the crime of robbery, which is defined as follows:

§ 3701. Robbery

(a) Offense defined.—

(1) A person is guilty of robbery if, in the course of committing a theft, he:

- (i) inflicts serious bodily injury upon another;
- (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury;
- (v) physically takes or removes property from the person of another by force however slight; or
- (vi) takes or removes the money of a financial institution without the permission of the financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(3) For purposes of this subsection, a "financial institution" means a bank, trust company, savings trust, credit union or similar institution.⁴

In reviewing the record that was generated in this case, it is clear that Ward is correct that the Commonwealth did not prove all of the elements of this particular offense. While the Commonwealth did prove that a theft occurred, it did not prove that the victim was placed in fear of immediate, serious bodily injury. The victim in this case never stated that he was in fear of immediately bodily injury but, rather, said he was in fear for the safety of his co-workers.

Q. What happened then?

A. When he motioned that he had a gun, I had no choice but to Give him the money and comply.

Q. Were you afraid at this point?

A. Basically for the girl I was working with and the girl behind there because they had no idea what was going on.

Q. You were afraid for their safety?

A. Yes.

Jury Trial Transcript of November 24, 2008, Lines 21-25, page 30, lines 1-4, page 31.

It is apparent that the victim was never in fear for his own safety since he told Ward to get out of the store when Ward initially demanded the money and then proceeded to run after him and chase him down West Liberty Avenue in an attempt to catch him, despite the fact that Ward said that he had a gun. The victim also testified that he never saw Ward produce a gun but only saw Ward's gesture of reaching into his waistband. The record in this case clearly indicates that the Commonwealth did not prove the elements of the offense and had Ward made a motion for judgment of acquittal at the conclusion of the Commonwealth's case or filed post-sentencing motions raising this issue, this Court would have granted his motions.

In light of the disposition of Ward's first issue, it is not necessary to deal at length with Ward's remaining issues. His second claim is that this Court abused its discretion in failing to sustain an objection as to a question which called for speculation; however, when one looks at the question to which that objection is made, it is clear that the Commonwealth was not asking Ward to speculate when he was cross-examined. Ward was asked if he had any reason why Sergeant Burke and Dowling would both deny that they had seen Ward's driver's license photo. The question was designed to see if there was any animus between Ward and these particular individuals and not to speculate as to a possible motive to lie.

Finally, Ward has maintained that this Court abused its discretion when it allowed the certified copy of his conviction for robbery to be admitted as an exhibit. The problem with this contention is that Ward testified during his direct examination that he had previously been convicted of a robbery and this only confirmed that fact and established the date for that robbery so that the jury could have that information since it was instructed that the only reason that it was given that information was to assess Ward's credibility and they should consider the nature of the crime and when it occurred, in determining if it in fact affected Ward's credibility.

Dated: December 27, 2010

¹ The first jury empanelled to hear Ward's case was unable to reach a verdict and was declared a hung jury on August 9, 2007.

² § 9714. Sentences for second and subsequent offenses

(a) Mandatory sentence.—

(1) Any person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a minimum sentence of at least ten years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Upon a second conviction for a crime of violence, the court shall give the person oral and written notice of the penalties under this section for a third conviction for a crime of violence. Failure to provide such notice shall not render the offender ineligible to be sentenced under paragraph (2).

³ This shirt was subsequently recovered from a yard abutting the alleyway where Dowling saw Ward run.

⁴ 18 Pa.C.S.A. §3701.

Commonwealth of Pennsylvania v. Mario Plowden

Suppression—Terry Stop—Disorderly Conduct

No. CC 200807470. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—December 27, 2010.

OPINION

On August 26, 2009, following a non-jury trial, the appellant, Mario Plowden, (hereinafter referred to as "Plowden"), was convicted of one count of possession with intent to deliver a controlled substance; one count of possession of a controlled substance; and, two summary offenses, those being, driving while operating privileges had been suspended or revoked for an alcohol-related offense and failing to stop at a stop sign. Plowden was found not guilty of the charge of resisting arrest; however, he was found guilty of the lesser-included offense of disorderly conduct. On August 27, 2009, Plowden was sentenced to a mandatory period of incarceration of not less than three nor more than six years for his second conviction of the crime of possession with intent to deliver a controlled substance and he was also sentenced to a concurrent ninety day sentence for his conviction for driving under suspension for an alcohol-related offense and these periods of incarceration were to be followed by a period of probation of three years, during which he was to undergo random drug screening. In addition, Plowden was also fined the mandatory sum of one thousand dollars for driving under suspension for an alcohol-related offense. No further penalty was imposed upon him for his conviction of the crime of disorderly conduct.

Plowden did not file post-sentencing motions but, rather, elected to take a direct appeal from the imposition of the sentence imposed upon him. In response to the notice of that appeal, this Court directed that he file a concise statement of matters complained of on appeal in accordance with the directive contained in Pennsylvania Rule of Appellate Procedure 1925(b). In complying with that directive, Plowden has asserted three claims of error with respect to the trial of this case. Initially, Plowden maintains that this Court erred when it denied his suppression motion since the police did not have probable cause or reasonable suspicion to stop and to frisk him after his removal from the car following the traffic stop. Plowden next maintains that Plowden erred in denying his suppression motion when the patdown exceeded the scope of a *Terry* frisk when the police reached into Plowden's pants to remove the baggie containing crack cocaine. Finally, Plowden maintains that the evidence was insufficient to support a conviction for the crime of disorderly conduct.

On February 19, 2008, at approximately 12:15 a.m., Officer Michael Saldutti, (hereinafter referred to as "Saldutti"), of the Pittsburgh Police Department, was on routine patrol in the East Liberty Section of the City of Pittsburgh. Saldutti was in his marked Pittsburgh Police car, stopped at a red light at the intersection of North Negley Avenue and Black Street, when he observed a red Isuzu SUV traveling on Hay Street. At the intersection of Hay Street and North Negley Avenue, there is a stop sign that the Isuzu went through. The red Isuzu then proceeded along Hay Street at a high rate of speed with Saldutti in pursuit. Saldutti was able to catch up with the vehicle as it turned from Hay Street onto Stanton Avenue and he turned on his lights and siren and was able to effectuate a traffic stop at the intersection of Stanton Avenue and North Negley Avenue.

Saldutti pulled directly behind the red Isuzu and in addition to having his takedown lights on, he turned on a spotlight that he had on his vehicle and directed it to the passenger compartment. Saldutti observed only the driver of the vehicle and noticed that he was a large individual.¹ As Saldutti was looking into the passenger's compartment, he observed the driver leaning back in his seat and his upper body was pushed back against the seat and his body was leaning to the left. He also observed the driver's right arm and shoulder moving up and down and it appeared that he was reaching behind his back into his waistband. Saldutti radioed for backup.

As Saldutti was approaching the driver's side of the car, he told the driver to keep his hands on the steering wheel. Saldutti made this request in light of his belief that the driver was attempting to conceal a weapon in his waistband in the back. Saldutti asked the driver for a driver's license; however, he was only able to produce a Pennsylvania identification card, which identified him as Plowden and he told Saldutti that he did not have a driver's license. During this conversation, Saldutti noted that he kept on moving backward and forward in his seat and he was wiggling around in his seat. Saldutti waited until a backup officer arrived before he asked Plowden to get out of the vehicle so that he could perform a patdown on him light of his concern that Plowden may have a weapon and the furtive gestures that he was making during the time of this stop. Saldutti's concern that Plowden may have had a weapon on him was premised not only by the furtive movements that he was making including Plowden's attempt to reach into the waistband of the rear of his pants but, by the fact that the stop was taking place in a high crime area early in the morning,

where during the past several weeks, numerous armed robberies had occurred.

When Saldutti's backup arrived, he asked Plowden to get out of the car and place his hands on the roof, and Saldutti began a patdown to see if, in fact, he had a weapon. Saldutti immediately went to the waistband area of the back of Plowden's pants and felt what he believed to be a plastic baggie containing a large piece of crack cocaine and several smaller pieces of crack cocaine. Saldutti advised Plowden that he was going to be placed under arrest for possession with intent to deliver a controlled substance and then attempted to handcuff him. Plowden began to struggle with Saldutti and attempted to get back into the Isuzu. Officer Novak, Saldutti's backup, attempted to place a handcuff on Plowden's other arm and Plowden continued to struggle with him. Saldutti then told Plowden that he was going to spray him at which point, Plowden then cooperated with them. Saldutti then gave Plowden his options to either personally remove the baggie from his pants or to have that removed by the jail guards at the Allegheny County Jail. Plowden agreed that he would remove it and once he was uncuffed, he removed the plastic bag from his pants that contained crack cocaine.

Initially, Plowden maintains that this Court erred in the denial of his suppression motion since the police did not have either probable cause or reasonable suspicion to stop and to frisk Plowden after he was removed from the car during a traffic stop. It is well-settled that the standard for review of suppression matters is that the reviewing Court must determine whether the factual findings of the suppression Court are supported by the record and assuming that there is support in the record for those findings, the reviewing Court is bound by those findings and may reverse only if the legal conclusions drawn therefrom are in error. *Commonwealth v. Shiflet*, 431 Pa. Super. 444, 636 A.2d 1169 (1994). The citizens of this Commonwealth are protected from unlawful searches and seizures not only by the Fourth Amendment of the United States Constitution, but also by Article I, Section 8 of the Pennsylvania Constitution. The case law developed under these constitutional provisions recognizes that there are three separate categories of interaction between citizens and the police. The first of these is a mere encounter or request for information that need not be supported by any level of suspicion; however, it carries no official compulsion to stop or to respond. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 13, 1975 L.Ed.2d. 229 (1983); see, also, *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d. 389 (1991). The second interaction involves an investigative detention and that must be supported by reasonable suspicion. While it subjects a suspect to a stop and a period of detention, it does not involve such coercive conditions as to constitute the equivalent of an arrest. *Berkemer v. McCarthy*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d. 317 (1975). The third interaction involves an arrest or custodial detention, which must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); see also, *Commonwealth v. Rodriquez*, 532 Pa. 62, 614 A.2d 1378 (1992).

In *Commonwealth v. Chase*, 599 Pa. 89, 60 A.2d 102 (2008), the Pennsylvania Supreme Court recognized that the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protects the citizens of the Commonwealth from unreasonable searches and seizures. It also holds that a vehicle stop constitutes a seizure of a vehicle under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 135 L.Ed.2d. 89 (1996). The ultimate question, however, is whether or not the seizure was reasonable. In viewing Saldutti's stop of Plowden's vehicle in light of the three potential interactions permitted by this Commonwealth, it is clear that the stop of Plowden's vehicle was a seizure; however, it was reasonable. Saldutti observed Plowden go through a stop sign and then proceeded at a high rate of speed before he was stopped. Saldutti had witnessed a motor vehicle violation for which he was going to cite Plowden; however, it was Plowden's activities in the car when Saldutti was parked behind him that raised suspicions in Saldutti's mind that Plowden might be armed. These activities included moving around in the driver's seat, tilting his body to the left and attempting to reach behind him with his right arm and put his right arm in the waistband of his pants. In addition to seeing these furtive motions, Saldutti was patrolling an area that had recently been the subject of numerous armed robberies. Being concerned for his safety, Saldutti conducted a *Terry* patdown.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), the United States Supreme Court set forth the balance that must be established between an individual's expectation of privacy and freedom from unlawful search and seizure and a police officer's safety as follows:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck v. State of Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 226, 13 L.Ed.2d 142 (1964); *Brinegar v. United States*, 338 U.S. 160, 174-176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949); *Stacey v. Emery*, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878).^{FN23} And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar v. United States*, *supra*.

In using this balancing test, it is clear that a reasonable basis existed to suspect that Plowden might have been armed. Saldutti was patrolling in an area which had recently been the subject of a number of burglaries, and that Plowden had made numerous furtive movements prior to Saldutti approaching the car and while Saldutti was initially talking to him. Those movements included tilting his body to the left and attempting to reach into his waistband in the back of his pants and appearing to push something down those pants. Saldutti did not attempt to do the *Terry* patdown until such time as his backup officer arrived in light of his fears that Plowden had a weapon and because of Plowden's physical size. Further heightening Saldutti's suspicions, were the facts that when he asked Plowden for a driver's license², he could not produce one since he only had a Pennsylvania identification card.

At the time of the hearing on Plowden's suppression motion, he maintained that the decision in the case of the *Commonwealth v. Reppert*, 814 A.2d 1196 (Pa. Super. 2002) was dispositive of his case.

On multiple occasions, our Courts have applied this standard in the context of motor vehicle stops during which police have ordered a motorist or his passengers to disembark. See *Commonwealth v. Freeman*, 563 Pa. 82, 757 A.2d 903, 906-07 (2000); *Commonwealth v. Sierra*, 555 Pa. 170, 723 A.2d 644, 646 (1999) (plurality opinion); *Commonwealth v. Donaldson*, 786 A.2d 279, 285-86 (Pa. Super. 2001); *Commonwealth v. Lopez*, 415 Pa. Super. 252, 609 A.2d 177, 181-82 (1992); *Commonwealth v. Elliott*, 376 Pa. Super. 536, 546 A.2d 654, 660 (1988). Our Supreme Court has recognized expressly that an officer conducting a valid traffic stop may order the occupants of a vehicle to alight to assure his own safety. See *Freeman*, 757 A.2d at 907 n. 4 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) and *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997)). Once the primary traffic stop has con-

cluded, however, the officer's authority to order either driver or occupant from the car is extinguished. See *Sierra*, 723 A.2d at 647 (citing *Parker*, 619 A.2d at 738) (limiting police authority following a traffic stop). Thus, if subsequently the officer directs or requests the occupants to exit the vehicle, his show of authority may constitute an investigatory detention subject to a renewed showing of reasonable suspicion. See *Donaldson*, 786 A.2d at 285 n. 4 (concluding that officer's "request" following conclusion of traffic stop, that driver exit vehicle, could not be viewed as discretionary and therefore constituted investigatory detention).

The matter of when a traffic stop has concluded or otherwise given way to a new interaction does not lend itself to a "brightline" definition. Thus, in *Freeman*, our Supreme Court defined multiple relevant circumstances on the basis of which we may recognize the end of a traffic stop and the commencement of another interaction. See 757 A.2d at 906-07. The Court enumerated the following circumstances:

the existence and nature of any prior seizure; whether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review (for example-the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them or directed their movement, the content or manner of interrogatories or statements, and "excesses" factors [sic] stressed by the United States Supreme Court); geographic, temporal and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search.

In *Commonwealth v. Reppert*, *supra.*, the basis for determining that the initial police interaction with the vehicle had ceased was the fact that there was no further investigation being done with respect to the traffic violation but, rather, the police demand to a passenger in the vehicle to exit that vehicle constituted a new interaction not with the driver, but with another occupant of that vehicle. In Plowden's case, Saldutti had seen the motor vehicle violation, that being Plowden's failure to stop for a stop sign and witnessed him driving at a high rate of speed and was about to approach Plowden's vehicle to obtain owner's and operator's information necessary to document those infractions when he observed numerous furtive activities, including Plowden's attempt to reach inside his rear waistband in an attempt which Saldutti believed to be either to hide a gun or drugs. When Saldutti requested Plowden's driver's license, he could not produce it since it had been suspended and Saldutti learned that the suspension resulted from a conviction for driving under the influence of alcohol or a controlled substance, that presented him with another motor vehicle violation, that being driving under suspension for an alcohol-related offense. His interaction with Plowden had not ended since even before he had identified who Plowden was, he suspected that Plowden might be armed and dangerous. When viewing these suspicions in light of the facts that were known to Saldutti, it was a reasonable suspicion and afforded him the right to conduct a *Terry* patdown.

Plowden next maintains that this Court erred in denying the suppression motion when the police exceeded the scope of the *Terry* search by reaching into Plowden's pants and extracting a baggie of crack cocaine. Plowden also maintains that Saldutti had no ability to determine from a *Terry* patdown that he was in possession of a plastic bag containing crack cocaine. The initial problem with this current contention is that Saldutti did not retrieve the plastic bag but, rather, Plowden did. Saldutti testified that once Plowden was out of the car he patted him down immediately going to the rear waistband in an attempt to determine what Plowden was attempting to hide. Saldutti felt what he believed to be a plastic bag containing one piece of crack cocaine and several smaller pieces. Saldutti further testified that once he felt the object in Plowden's waistband he immediately knew that it was a controlled substance and he did so by virtue of his experience in making numerous drug-related arrests.

Plowden now maintains in his appeal that Saldutti could not determine that the object that he felt during his *Terry* patdown constituted contraband or a controlled substance. In *Commonwealth v. Stevenson*, 560 Pa. 345, 744 A.2d 1261, 1264-1265 (2000), the Pennsylvania Supreme Court acknowledged the scope of a *Terry* search and also the plain feel doctrine.

It is well-established that a police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). Moreover, if the officer has a reasonable suspicion, based on specific and articulable facts, that the detained individual may be armed and dangerous, the officer may then conduct a frisk of the individual's outer garments for weapons. *Id.* at 24, 88 S.Ct. at 1881. Since the sole justification for a *Terry* search is the protection of the officer or others nearby, such a protective search must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26, 88 S.Ct. at 1882. Thus, the purpose of this limited search is not to discover evidence, but to allow the officer to pursue his investigation without fear of violence. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).^{FN3}

FN3. The question of whether the officers in the instant cases had reasonable suspicion to stop and frisk Appellants is not at issue in this appeal.

Recently, however, the United States Supreme Court considered the question of whether an officer may also properly seize non-threatening contraband "plainly felt" during a *Terry* frisk for weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Answering the question in the affirmative, the *Dickerson* Court adopted the so-called plain feel doctrine and held that a police officer may seize non-threatening contraband detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object. *Dickerson*, 508 U.S. at 373-75, 113 S.Ct. at 2136-37. As *Dickerson* makes clear, the plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent. *Id.* at 375, 113 S.Ct. at 2137; *Commonwealth v. E.M./Hall*, 558 Pa. 16, 735 A.2d 654, 663 (1999). Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband. *Id.* If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object. *Id.*; see also *Commonwealth v. Graham*, 554 Pa. 472, 485-86, 721 A.2d 1075, 1082 (1998) (opinion announcing the judgment of the Court) (if officer needs to conduct further search to determine incriminating character of object, seizure of object is not justified under plain feel doctrine).

In the instant case, Saldutti had indicated that immediately upon touching the object in Plowden's waistband he knew it was a baggie containing pieces of crack cocaine and, in fact, identified those pieces by saying that there was one large piece and several smaller pieces. Saldutti further testified that he was able to make this identification based upon numerous searches he had made during the arrests of drug suspects. Saldutti's testimony and his experience in making these patdowns and finding controlled substances was unchallenged by Plowden at the time of the suppression hearing. Based upon the credible testimony that was presented at the time of that suppression hearing, it was clear that Saldutti had identified a baggie containing several rocks of crack cocaine, one substantially larger than the others, and, that he had made this identification by virtue of his prior experience in making drug arrests. It was also clear that he did not retrieve the bag but the bag was retrieved by Plowden.

Plowden's final contention of error is that the evidence was insufficient to find him guilty of the charge of disorderly conduct. In reviewing a claim that the evidence was insufficient to support a verdict, the Appellate Court must determine whether the evidence and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as the verdict-winner, are sufficient evidence to establish all of the elements of the offense which the defendant has been convicted and they have been proven beyond a reasonable doubt. *Commonwealth v. Miller*, 572 Pa. 623, 819 A.2d 504 (2002).

In Plowden's case he was originally charged at the time with resisting arrest; however this Court at the conclusion of the testimony, found him not guilty of that crime but, rather the crime of disorderly conduct.

Disorderly conduct is defined in the Pennsylvania Crimes Code as follows:

§ 5503. Disorderly conduct

(a) **Offense defined.**—A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

- (1) engages in fighting or threatening, or in violent or tumultuous behavior;
- (2) makes unreasonable noise;
- (3) uses obscene language, or makes an obscene gesture; or
- (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.³

Once Saldutti located the bag containing the suspected crack cocaine he told Plowden that he was under arrest and attempted to handcuff him. Saldutti was only able to get his right arm cuffed when Plowden began to pull away from him in an effort to attempt to get back in the vehicle. Officer Novak attempted to cuff his right hand but, again, Plowden refused to be compliant and continued in his efforts to get back in the motor vehicle in an obvious attempt to get away from these Officers. It was only after Saldutti advised Plowden that he was going to spray him that Plowden became compliant. The actions undertaken by the three hundred ten pound Plowden necessitated that two officers attempt to arrest and to detain him. His actions in response to being cuffed obviously created a public inconvenience, recklessly created a risk when he engaged in reckless and tumultuous behavior. In viewing the facts in the light most favorable to the Commonwealth, it is clear that Plowden engaged in disorderly conduct when he was informed that he was being arrested. See, *Commonwealth v. Thompson*, 922 A.2d 926 (Pa. Super. 2007).

CASHMAN, J.

Dated: December 27, 2010

¹ Plowden is 5' 6" and three hundred ten pounds.

² Plowden's license had been suspended as a result of his conviction of driving under the influence of alcohol or a controlled substance.

³ 18 Pa.C.S.A. §5503.

Commonwealth of Pennsylvania v. Virgil Greer

PCRA—Ineffective Assistance of Counsel

No. CC 200414970. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—December 27, 2010.

OPINION

On November 19, 2007, the appellant, Virgil Greer, (hereinafter referred to as "Greer"), was convicted of first-degree murder in the death of Charlene Washington. On February 13, 2008, Greer was sentenced to life in prison without the possibility of parole. On March 14, 2008, Greer filed a timely appeal to the Superior Court and subsequently discontinued that appeal on June 9, 2008. Greer filed a pro se petition for post-conviction relief on August 14, 2008, and his current appellate counsel was appointed to represent him connection with that petition. A hearing was held on that petition at which both Greer and his trial counsel, John Elash, testified. Following that hearing, this Court entered an Order denying his petition for post-conviction relief and Greer filed the instant appeal.

Greer was directed to file a concise statement of matters complained of on appeal and in complying with that directive, Greer raises three claims of error. Initially, Greer maintains that this Court erred when it denied his petition for post-conviction relief in not finding that his trial counsel was ineffective for not requesting a mistrial as a result of the comment made by Detective Dennis Logan, which purportedly touched upon Greer's right to remain silent. Greer also maintains that his trial counsel was ineffective in preventing him from testifying with the threat that if he did testify, that his trial counsel would quit. Finally, Greer maintains that his trial counsel was ineffective for failing to file a suppression motion with respect to Greer's confession to Detective Logan

when Greer specifically asked him to file such a motion.

In 1995, Charlene Washington, (hereinafter referred to as "Washington"), lived in the Broadhead Manor Complex in the West End of the City of Pittsburgh. Washington's younger brother, James Washington, was a manager at a local McDonald's Restaurant and he would see her on a fairly frequent basis when she would come into his restaurant. In addition to these visits, James Washington would also stop by his sister's apartment on his day off since he was worried about her continued use and abuse of drugs. On April 18, 1995, James Washington decided to visit his sister's apartment since he had not seen her in a couple of weeks. When he reached the apartment, he called out for her to open the door. Getting no response, he looked around and saw an open window and climbed through the window and once again called for his sister. When he was on the first floor in the living room, he noticed that a sliding glass door in the living room was partially opened. He proceeded up the steps to the bedroom, again calling out for his sister and, again, he got no response. When he went into her bedroom, he saw her lying on the bed unresponsive. As he got closer he noticed blood on the sheets of the bed and the numerous stab wounds of her body. James Washington then left her apartment and went to the Housing Authority Police building and told them what he had found.

The autopsy that was performed on Washington revealed that she had twenty stab wounds in the neck and chest area which resulted in the perforation of her right lung and right kidney. There were additional stab wounds to the neck; however, they did not appear to have hit any major blood vessels or arteries. It was the opinion of Dr. Leon Rosen, who performed the autopsy, that the cause of death was multiple stab wounds that Washington sustained to her chest and that the manner of death was a homicide.

When the police processed the crime scene, they took into evidence the sheets from Washington's bed and submitted them to the Crime Lab. A DNA analysis was done of the blood stains on those sheets and it was determined that in addition to Washington's blood, some of the bloodstains contained the blood of another individual. Homicide Detectives assigned to this case interviewed Washington's neighbors and acquaintances and people with whom she had intimate or sexual relationships; however, they were unable to come up with a suspect and eventually this homicide became a cold case.

On October 21, 2004, Homicide Detectives assigned to the cold case unit received a letter from the Crime Lab indicating that that Lab had been notified of a potential match to the other blood stains found on Washington's sheets. The Crime Lab had submitted those stains to a national database and the database indicated that there was a possible DNA match with Greer. Homicide Detectives Smith and Rush located Greer and asked him to come to Homicide headquarters. Prior to having Greer come to headquarters, they received a search warrant that enabled them to have blood drawn from Greer so that a definitive DNA analysis could be done. On October 22, 2004, Greer was at the police headquarters and was given his Miranda rights and submitted to the blood draw. That blood draw ultimately confirmed that Greer's blood was on Washington's sheets.

After submitting to the blood draw, Greer was interviewed by Detective Dennis Logan, (hereinafter referred to as "Logan"), and during the course of the interview he gave Logan five different stories with respect to his involvement in this homicide. Initially, he told Logan that he did not know the victim and he was never present in her apartment. When confronted with the fact that his blood was in her apartment, he then told Logan that he did know the victim and that she babysat for his daughter since she was a friend of his girlfriend. When he was told that his blood was found in the stains on Washington's sheets, he then told Logan that he did know Washington and that he had consensual sex with her.

Greer's fourth version of what happened in Washington's apartment was that he had seen her outside of her apartment and she was holding two cans of beer. She offered him one beer and suggested that they go to her apartment to drink that beer. While drinking the beer and engaging in idle conversation, Greer agreed to have sex and they went into her bedroom and were having sex when two black males came into her house and they began to attack her. She then used Greer as a shield against these individuals and he was able to get away from these individuals, grab his clothes and then run out of the apartment. He also told Logan that he had cut his finger on the beer can.

Finally, Greer told Logan that he had arrived on the night of the murder in the West End by bus with his daughter Robin. He was taking his daughter back to her mother when he ran into Washington. She told him that the child's mother was not home but would be home shortly. During their conversation, his daughter began playing with the other children outside and Greer continued his conversation with Washington. Washington had two beers and she offered one to him and she suggested that they go to her house. Greer told his daughter where he was going and that he would be right back. Once they had finished drinking the beer, Washington asked Greer if he had any money and he said yes and then she said she would be willing to have sex with him for \$20.00. They went upstairs, had sex, and Washington asked for her \$20.00, Greer told her that he was only going to pay \$10.00. She became mad, pulled a knife and then came after him. He was able to wrestle the knife away from her and then stabbed her; however, he did not remember how many times he did stab her. Greer then got dressed and took the bus back to his residence in Elizabeth. He also told Logan that he was cut by the knife and not by the beer can.

Logan asked Greer to put his statement on tape and he agreed to do that; however, while they were setting up the tape equipment and getting other Detectives to be witnesses to this taped confession, Greer changed his mind. Greer was given Logan's notes to read and was asked if they were correct. Greer made a couple of corrections by scratching out the information on the form and inserting the correct facts and Greer initialed those changes and signed each panel of the note form. Greer was then arrested and charged with Washington's murder.

Greer's initial claim of error is that this Court erred in failing to grant him the relief under the Post-Conviction Relief Act when his counsel was ineffective for failing to object to what he perceives to be Logan's comment on his right to remain silent. The comment which Greer finds offensive is as follows:

Q. Like he went in, had sex, bludgeoned and stabbed this woman and then calmly went down, picked up his daughter, went on the bus and went home; is that right?

A. Well, you used the word calmly. Your client said after he killed Ms. Washington he went and got the bus and went home. But how calm he was, I mean, your client would have to answer that.

Trial Transcript, page 221, lines 14-21.

In order to be entitled to relief under the Post-Conviction Relief Act, a petition must meet the eligibility requirements set forth in 42 Pa.C.S.A. §9543(a):

(a) General rule.— To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

- (i) currently serving a sentence of imprisonment, probation or parole for the crime;
- (ii) awaiting execution of a sentence of death for the crime; or
- (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

Greer's petition is timely filed and he has asserted claims of the ineffectiveness of his counsel, which if proven, would provide the basis for the relief he has requested. To demonstrate his counsel's ineffectiveness, Greer was required to plead and to prove the three-prong test set forth in *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (1999).

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

In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d. 106 (1965), the United States Supreme Court held that when a defendant does not testify at the time of trial, the Fifth Amendment of the United States Constitution precludes the government from attempting to use the defendant's post-arrest silence as substantive evidence of his consciousness of guilt. The Supreme Court expanded on that decision in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and determined that when a defendant was advised of his Miranda rights and chose to remain silent and then testified at the time of trial, he could not be impeached by making reference to the fact that he had refused to talk to the police after being given his Miranda rights. The United States Supreme Court wanted to ensure that post-arrest silence could not be equated to a tacit admission of guilt.

In *Commonwealth v. Dravec*, 424 Pa. 582, 227 A.2d 904, 906 (1967), the Pennsylvania Supreme Court explained its rationale for the abandonment of the tacit admission rule as follows:

The Superior Court, in affirming the conviction of the defendant, declared that it was bound by *Commonwealth v. Vallone*, 347 Pa. 419, 32 A.2d 889, which pronounced the proposition:

'The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made.'

This rule, which has become known as the tacit admission rule, is too broad, widesweeping, and elusive for precise interpretation, particularly where a man's liberty and his good name are at stake. Who determines whether a statement is one which 'naturally' calls for a denial? What is natural for one person may not be natural for another. There are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?[FN1]

FN1. In his funeral oration on Roscoe Conkling, Robert G. Ingersoll said: 'He was maligned, misrepresented and misunderstood, but he would not answer. He was as silent then as he is now-and his silence, better than any form of speech, refuted every charge.' George Bernard Shaw said: 'Silence is the most perfect expression of scorn.' The immortal Abraham Lincoln summed up his philosophy on this subject in characteristic fashion: If I should read much less answer, all the attacks made upon me this shop might as well be closed for any other business.'

The untenability of the tacit admission rule is illustrated in the following startling proposition. A defendant is not required to deny any accusation levelled at him in a trial no matter how inculpatory. He may be charged with the most serious of offenses, including murder and high treason. A cloud of witnesses may testify to circumstances, events, episodes which wrap him in a serpent's embrace of incrimination, but no inference of guilt may be drawn from his fail-

ure to reply or to take the witness stand. Indeed, and properly so, if the prosecuting attorney or the judge makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him, and a verdict of guilt follows, a new trial is imperative. And yet, under the Vallone holding, an accusatory statement made in any place chosen by the accuser, whether on the street, in the fields, in an alley or a dive, if unreplied to, may be used as an engine in court to send the defendant to prison or to the electric chair.

How so incongruous a doctrine ever gained solemn authoritativeness might well be a subject for a long article in a law review. Especially when one reflects on the fact that the rule is founded on a wholly false premise. One can understand how a principle of law built on solid rock might incline to slant from the perpendicular because of over-heavily superstructure piled on it as it rises higher and higher into the realm of hypothesis, but the tacit admission rule has no solid foundation whatsoever. It rests on the spongy maxim, so many times proved unrealistic, that silence gives consent. Maxims, proverbs and axioms, despite the attractive verbal packages in which they are presented to the public, do not necessarily represent universal truth.

In the instant case, Greer did not testify and the comment made by Logan may have been a comment on his post-arrest silence.

To be entitled to relief on the claim of trial counsel's ineffectiveness, Greer must prove that the underlying claim is of arguable merit, that his counsel's performance lacked a reasonable basis and that his counsel's ineffectiveness caused him prejudice. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203 (2001). Prejudice in the context of the claim of the ineffectiveness of counsel means that Greer must demonstrate that there is a reasonable probability or likelihood that but for his counsel's error, the outcome of his case would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999). Failure to establish any prong of this test will defeat any claim of the ineffectiveness of counsel. *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717 (2000). In *Commonwealth v. Smith, Pa.*, 995 A.2d 1143, 1156 (2010), the Pennsylvania Supreme Court reviewed a claim of the ineffectiveness of trial counsel for failing to request a mistrial when there was a reference to the defendant's post-arrest silence and determined that that reference was harmless error and, accordingly, did not demonstrate prejudice to the defendant.

"An impermissible reference to an accused's post-arrest silence constitutes reversible error unless shown to be harmless.... Because of its nature, an impermissible reference to the accused's post-arrest silence is innately prejudicial." *Commonwealth v. Costa*, 560 Pa. 95, 742 A.2d 1076, 1077 (1999) (citation omitted). To violate this rule, the testimony must clearly refer to post-arrest silence. *Commonwealth v. Mitchell*, 576 Pa. 258, 839 A.2d 202, 213 (2003). If such reference clearly did not contribute to the verdict, however, the error may be deemed harmless. *Id.*, at 214-15 (citing *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 166 (1978) (factors to consider in determining whether error is harmless include: whether error was prejudicial, and if prejudicial, whether prejudice was de minimis; whether erroneously admitted evidence was merely cumulative of other untainted, substantially similar evidence; or whether evidence of guilt was so overwhelming, as established by properly admitted and uncontradicted evidence, that prejudicial effect of error was insignificant)).

As previously noted, Greer did not testify in this case but, rather, his versions of his involvement in Washington's death were related by Logan during his testimony both on direct and cross-examination. During the protracted and lively cross-examination of Logan by Greer's trial counsel, Elash asked Logan that after bludgeoning and stabbing the victim, that if Greer "calmly went down, picked up his daughter and went home." In response to that question, Logan responded that he had never used the word "calmly" but, rather, Elash had and the only way that somebody would know his state of mind is that Greer would have to describe how calm he was. While that statement does tangentially touch upon Greer's post-arrest silence, it does not give rise to the prejudice that is necessary to be proven by Greer. The comment was not directed toward his admission that he killed Washington or any fact set forth in Greer's confession but, rather, went to his state of mind and the manner in which he left her apartment. This statement was not elicited by the Commonwealth but, rather, was elicited as a result of the cross-examination of Logan by Greer's counsel. Logan's testimony is contained in sixty-two pages of the trial transcript, forty-three of which involve his cross-examination by Elash. When this statement is viewed in the light of the entire testimony of Logan, it is clear that it was insignificant and did not result in prejudice to Greer.

Greer's defense in this case was predicated upon his belief that the Commonwealth could not prove beyond a reasonable doubt that Greer had committed this homicide. The fact that Logan commented on upon a word used by Greer's counsel to talk about Greer's state of mind in no way prejudices him, which would indicate that the result in this case would have been different. Had the comment never been made or a curative instruction had been requested and given, the result in Greer's case would not have changed. The Commonwealth presented the jury with evidence of the fact that there was a one in twenty-two quintillion chance that the blood on the sheets, other than Washington's, was not Greer's and also presented the jury with Greer's confession as to how he committed this homicide. Whether he was calm, dispassionate or nervous leaving Washington's residence was of no moment and that question by Greer's counsel and the response to it did not cause Greer any prejudice.

Greer's second claim of error is that his trial counsel was ineffective by depriving him of his right to testify when he threatened to quit representing him if Greer, in fact, testified. Both Greer and Elash testified at the hearing on his petition for post-conviction relief. Greer testified that the only reason he decided not to testify at the time of trial was that Elash had told him that if he did, Elash would stop representing him. Greer also indicated that he did not believe that he was properly prepared to testify since Elash and his co-counsel only asked him about bits and pieces of his purported testimony and never prepared him to testify and to be cross-examined. Greer further testified that he was told to answer "yes" to all of the questions that this Court asked him when it went through a colloquy concerning his right to testify and his right to present character testimony. Elash testified that he recommended that Greer not testify since Greer had provided him with six different stories with respect to Greer's possible involvement in the death of Washington. Five of the stories were similar to the stories that he had given to Logan; however, the sixth was by far the most damaging. The sixth version that he gave to Elash was that he was so high on cocaine that he did not remember anything about the night that Washington was killed. Elash believed that not only would the jury find him to be incredible with respect to Washington's death but, also, he would not be a sympathetic witness since he would be admitting that he committed another crime by his use of cocaine.

It is abundantly clear that the trial strategy adopted by Elash in this case that the Commonwealth could not prove its case beyond a reasonable doubt was the only possible one that might have been successful. Greer would have been subjected to a grueling cross-examination with respect to his numerous stories concerning Washington's death and his inability to remember what

happened on that night in light of his use of cocaine. Additionally, the record contradicts his contention that he did not clearly and voluntarily make the decision not to testify in this case. Although Greer maintains that he was advised to answer all of the questions that this Court asked of him by saying “yes”, the record clearly demonstrates that that is not what happened. A review of the colloquy in this case shows that Greer was asked whether or not anyone forced, threatened or coerced him into making his decision not to testify and he answered unequivocally that he had not been. He was also asked whether or not he had any mental illness or disability, which would affect his ability to make that decision, and again, he answered “no”. Greer was also asked whether or not he had any drugs or alcohol during the previous forty-eight hours before making this decision and again, he answered “no”. The colloquy that this Court conducted with him clearly demonstrates that his decision not to testify was freely and voluntarily made and was not the product of some coercion or threat made by his counsel. As Elash observed, he had to be forceful with Greer in making his opinions known, especially when it came to the question of whether or not Greer should testify.¹

Greer’s final contention of error is that his trial counsel was ineffective in failing to litigate a motion to suppress with respect to the confession that Greer gave to Logan. Greer maintains that he requested that Elash file a suppression motion since he believed that he had been threatened by homicide detectives into speaking with them and that he had invoked his right to counsel after he had been given his Miranda warnings. Elash, on the other hand, stated that he did not believe that there was a basis for the filing of a suppression motion and that even if he did, it would be nothing more than a dress rehearsal for Logan’s testimony at the time of trial. It was Elash’s belief that Greer’s interests would be better served by him confronting Logan before a jury rather than providing Logan with an opportunity to prepare his testimony in advance, especially in light of the fact that there was no reasonable basis for the filing of that motion.

In reviewing the record in this case, it is clear that Greer was advised both orally and in writing of his Miranda rights and, in fact, executed the form waiving those particular rights. Shortly after the execution of that form, he was interviewed by Logan and at the end of that interview; he reviewed Logan’s notes, made corrections to those notes, and then signed Logan’s notes. At one point Greer even agreed to have his final statement tape-recorded. The record in this case does not disclose any type of threat or the indication that Greer invoked his right to counsel. As with Greer’s other contentions of error, this claim is clearly without merit.

CASHMAN, J.

Dated: December 27, 2010

¹ Interestingly enough, at no time during Greer’s testimony at his hearing on his petition for post-conviction relief did he ever deny that he had killed Washington or offer a version of the testimony that he would have presented had he testified at the time of trial.