

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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## OPINIONS

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**Commonwealth of Pennsylvania v.  
Michael Nixon**

*Criminal Appeal—DUI—Suppression—Sufficiency—Calibration of Equipment—Confrontation*

No. CC 200515919. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Borkowski, J.—September 9, 2011.

**OPINION**

**PROCEDURAL HISTORY**

On July 10, 2005, Appellant was charged with one count each of: Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S.A. §3802(a)(1); Driving Under the Influence of Alcohol or Controlled Substance (.10% to less than .16%), 75 Pa.C.S.A. §3802(b); and summary offenses of violating a General Lighting Requirement (inoperable plate light), 75 Pa.C.S.A. §4303(b); and Turning Movements and Required Signals (failure to activate turn signal), 75 Pa.C.S.A. §3334(a). Appellant filed a Motion to Suppress which, after a series of hearings, was denied by the Court on September 29, 2008. On that same date the Court denied a motion for a jury trial. On January 12, 2009, Appellant proceeded to a non-jury trial where the Court found Appellant guilty on all four (4) counts. Appellant was sentenced at the first count of the criminal information to a period of five (5) days intermediate punishment as well as six (6) months probation, and a fine of \$500.00 and the costs of prosecution. No further penalty was assessed at the second count. At the summary counts, Appellant was ordered to pay the state mandated fine of \$25 each. This timely appeal followed.

**STATEMENT OF ERRORS ON APPEAL**

The Appellant alleges the following errors on Appeal:

1. The Trial Court erred as a matter of law in finding that Sgt. Wasniewski had the requisite reasonable suspicion to stop defendant's vehicle and also had the requisite probable cause to arrest the defendant for driving under the influence of alcohol or unsafe driving.
2. The Trial Court erred as a matter of law in permitting the breath test results of defendant reported by the RBT IV Alco-Sensor to be introduced into evidence by Sgt. Wasniewski when a stipulation of fact indicated the device was certified and calibrated at temperatures ranging from 20 centigrade to 27 centigrade, when the simulator solution is required to be tested at 34 centigrade plus or minus .2 centigrade. The Commonwealth also failed to introduce one of the required certificates of accuracy or calibration before introducing the test results.
3. The Trial Court erred as a matter of law in finding defendant guilty of violating Section 3802(b) when the Commonwealth failed to call Jerry Richey. This issue was set forth in defendant's Motion for Exclusion of Plaintiff's Unconstitutional Use of Testimonial Documents in Violation of the Defendant's Right of Confrontation (U.S. Constitution, Sixth Amendment) which was filed April 23, 2009. Since the filing of that motion, the United States Supreme Court has decided in favor of the defendant in a decision on June 25, 2009 in the case of *Massachusetts v. Melendez-Diaz*, which supports the defendant's right to confront crime lab witnesses against him.
4. The Trial Court erred as a matter of law in denying defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and the Pennsylvania Constitution. Counsel recognizes the Superior Court decision in *Commonwealth v. Harriott*, 919 A.2d 234 (Pa. Super. 2007), appeal denied 594 Pa. 686, 934 A.2d 72 (2007), but the downgrading of the new DUI law to first offenses as ungraded misdemeanors with a maximum penalty of six months was done specifically to avoid or eliminate a defendant's right to a jury trial in a criminal proceeding involving a serious crime.
5. The Trial Court erred as a matter of law in finding that the Commonwealth had met its burden of proof beyond a reasonable doubt that the defendant was incapable of safely driving his motor vehicle. To the contrary, the defendant drove his vehicle in a safe manner, never leaving his lane of travel on windy, snaky, dark road, and maintaining the posted speed of 25 m.p.h. while a police car was immediately behind him. The defendant's testimony that he used his turn signal in turning left onto Connor Road is supported by the fact that the police officer drove by the road and did not follow the defendant into the plan of homes on Connor Road. The police officer's statement on cross-examination during the suppression hearing after defendant had made the alleged left turn onto Connor Road without a turn signal was that "I was coming back up to Connor Drive because, like I said, it's a neighborhood with a lot of dead-end streets. Something didn't seem right to me." This statement is merely a hunch or speculation by the police officer and does not rise to the level of reasonable suspicion or probable cause for the stop.
6. The Trial Court erred as a matter of law in finding that the Commonwealth met its burden of proof beyond a reasonable doubt in convicting defendant of driving with a blood alcohol level between .10% and .159% when the Commonwealth failed to introduce any testimony regarding the required documents of certification, including the certificates of accuracy and calibration and the temperature of the simulator solution at which the machine was tested by Jerry Richey, the Allegheny County Crime Lab Technician charged with certifying and calibrating the machine in question.
7. The Trial Court erred as a matter of law in denying defendant's Motion for Judgment of Acquittal for lack of sufficient evidence to prove either of the DUI counts against the defendant.
8. The Trial Court erred as a matter of law in denying defendant's renewed Motion for Judgment of Acquittal.

**FINDINGS OF FACT**

On July 10, 2005, Sergeant Terry Wasniewski, a nine year veteran of the South Park Police Department was on routine patrol in South Park Township, Allegheny County. (SHT: 4, 10)<sup>1</sup>. At approximately 3:30 A.M., Sgt. Wasniewski came upon Appellant's vehicle which was traveling on Piney Fork Road. (SHT: 5, 6, 10). Sgt. Wasniewski traveled behind Appellant's vehicle for approximately two (2) miles until they came to the intersection of Piney Fork Road and Connor Road. (SHT: 4, 15, 18). At this juncture Appellant made a wide left turn without signaling into a neighborhood of dead end streets. (SHT: 4, 15, 18). Sgt. Wasniewski went further on Piney Fork Road, turned around and went back towards the intersection where Appellant had turned. (SHT: 5, 16, 18). As he did

so, Appellant turned back onto Piney Fork Road in front of Sgt. Wasniewski's vehicle. (SHT: 5, 16, 18).

Sgt. Wasniewski also noticed that the license plate light of Appellant's vehicle was inoperable. (SHT: 5). Having observed two (2) violations of the Motor Vehicle Code, Sgt. Wasniewski conducted a traffic stop of Appellant's vehicle as they turned onto Triphammer Road. (SHT: 4, 5, 15, 18, 21, 29).

Upon approaching the vehicle and having initial contact with Appellant, Sgt. Wasniewski noted that Appellant's eyes were glassy and bloodshot. (SHT: 6, 25). He also detected an odor of alcohol emanating from the Appellant's breath. (SHT: 6, 25). Upon engaging in further conversation, Sgt. Wasniewski noted Appellant's speech was slurred and Appellant admitted to having been drinking. (SHT: 6, 25). When Appellant stepped out of the vehicle, the sergeant's partner noted the presence of an open bottle of beer in the driver's side door.

Sgt. Wasniewski proceeded to administer field sobriety tests to Appellant. (SHT: 7). Appellant failed the walk and turn, as well as the one leg stand test. (SHT: 8). During the walk and turn, Appellant was unable to maintain his balance, he missed his heel toe, stepped off the line, raised his arms and conducted an improper turn by spinning on both feet. (SHT: 8). During the balancing test, Appellant swayed, used his arms to balance, and put his foot on the ground for balance. (SHT: 8, 28). Based on the totality of the circumstances, Sgt. Wasniewski concluded that Appellant was under the influence and unfit to operate his vehicle safely. (SHT: 9).

Sgt. Wasniewski proceeded to transport Appellant to the South Park Police department where he administered a breathalyzer to the Appellant. (TT: 3, 4)<sup>2</sup>. The first breathalyzer test read .120 and the second read .118. (TT: 9). Appellant was then formally arrested and charged as stated hereinabove.

## DISCUSSION

### I.

Appellant argues that the Trial Court erred as a matter of law in finding that Sgt. Wasniewski had the requisite reasonable suspicion to stop defendant's vehicle and also the requisite probable cause to arrest the defendant for driving under the influence of alcohol or unsafe driving. This claim is without merit.

The officer in this case witnessed two (2) violations of the vehicle code, thus beyond reasonable suspicion, he possessed probable cause to stop Appellant's vehicle, and upon further observation he possessed the requisite probable cause to arrest Appellant for Driving Under the Influence (DUI). (SHT: 4, 5, 15, 18). The determination of whether a vehicle stop is constitutionally permissible is very fact specific. Until recently, there existed some incongruity among appellate decisions as to whether to apply a reasonable suspicion or probable cause standard to vehicle code stops. *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1116 (Pa.1995)(equating 75 Pa.C.S.A. §6308 (b) "articulable and reasonable grounds" with a probable cause standard); *See also Commonwealth v. Chase*, 960 A.2d 108(Pa. 2008)(Supreme Court approved the *Sands'* focus on the investigative nature of a stop based on reasonable suspicion under section 6308(b)), *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001), *Commonwealth v. Sands*, 887 A.2d 261 (Pa.Super.2005) (upheld the constitutionality of "reasonable suspicion" standard set forth in the 2004 amendment to section 6308(b) as applied to vehicle stops based upon an officer's reasonable suspicion of DUI).

However, in the instant case the evolution of case law with regard to vehicle stops needs no lengthy discussion because the Trial Court found as a fact that Sgt. Wasniewski witnessed a vehicle code violation, left turn without signaling, giving him probable cause to stop Appellant's vehicle. (SHT: 4, 15, 18). Sgt. Wasniewski's testimony was uncontradicted and found to be credible. He was able to articulate specific facts possessed by him at the time of the stop that provided probable cause to believe that Appellant was in violation of the vehicle code. (SHT: 4, 15, 18).

Once the officer determined that he witnessed a violation of the vehicle code, he possessed the requisite constitutional authority to stop Appellant. *Gleason*, 785 A.2d at 986. Upon stopping Appellant's vehicle for the violation, Sgt. Wasniewski discovered that Appellant appeared to be operating his vehicle under the influence of alcohol. Specifically, Sgt. Wasniewski noted that Appellant's eyes were glassy and bloodshot. (SHT: 6, 25). He also detected an odor of alcohol emanating from Appellant's breath. (SHT: 6, 25). Upon engaging in conversation, Sgt. Wasniewski further noted Appellant's slurred speech. (SHT: 6, 25). Appellant admitted to having been drinking and when Appellant stepped out of the vehicle the sergeant's partner noticed the presence of an open bottle of beer in the driver's side door. (SHT: 6). The officers then administered field sobriety tests, which Appellant failed. (SHT: 7-9). Appellant was transported to the police station where Appellant's first breathalyzer test result was .120, and the second result was .118. (TT: 9).

Appellant's argument lacks merit for two reasons. First, 75 Pa.C.S.A. §6308 (b) of the vehicle code, which has been upheld by the Pennsylvania Supreme Court, states that an officer only needs to have "reasonable suspicion" that a vehicle code violation has occurred or is occurring to stop the vehicle. *See Commonwealth v. Feczko*, 10 A.3d 1285 (Pa.Super. 2010). Secondly, Appellant's failure to use his turn signal in violation of 75 Pa.C.S.A. §3334 gave rise to probable cause for the officer to stop the vehicle. *See Commonwealth v. Angel*, 946 A.2d 115 (Pa.Super. 2008) (failure to use turn signal was a proper basis to stop a vehicle).

As the Trial Court found that Sgt. Wasniewski possessed probable cause to stop Appellant's vehicle, any additional information or observations made by the officer regarding additional violations were legally permissible. When he approached Appellant's vehicle to obtain his license and registration information and to inform him of the basis for the stop, he determined that Appellant appeared to be operating his vehicle while under the influence of alcohol. (SHT: 6, 25). The standard for probable cause to arrest for DUI has been articulated as follows:

Probable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver has been driving under the influence of alcohol or a controlled substance. Additionally, probable cause justifying a warrantless arrest is determined by the totality of the circumstances. Furthermore, probable cause does not involve certainties, but rather the factual and practical considerations of everyday life on which reasonable and prudent persons act

*Commonwealth v. Angel*, 946 A.2d 115, 118 (Pa.Super. 2008). (citations and quotations omitted)

Certainly Sgt. Wasniewski had probable cause/reasonable suspicion to stop Appellant's vehicle, and under the totality of the circumstances test, the Trial Court properly found that Sgt. Wasniewski possessed the requisite probable cause to arrest Appellant for driving under the influence of alcohol. This issue is without merit.

### II.

Appellant alleges that the Trial Court erred in permitting the breath test results reported by the RBT IV Alco-Sensor to be intro-

duced into evidence when a stipulation of fact indicated the device was certified and calibrated at temperatures ranging from 20 centigrade to 27 centigrade, when the simulator solution is required to be tested at 34 centigrade plus or minus .2 centigrade. Appellant also alleges that the Commonwealth also failed to introduce a required certificate of accuracy or calibration. This issue is without merit.

There is a legal presumption that when the manufacturer places the simulator solution on the market the manufacturer thereby certifies that the product will operate as intended. *Commonwealth v. Little*, 512 A.2d 674, 678 (Pa. Super. 1986); *Commonwealth v. Starr*, 739 A.2d 191, 197 (Pa. Super. 1999). In this case, the Alco-Sensor manufacturer indicates that the simulator solution is intended to be tested at 34 centigrade. (Manual: 5)<sup>3</sup>. The legal presumption of the accuracy of the temperature of the simulator solution is further evident in that the device is not designed to provide any written proof of the temperature of the solution at the time of use. (TT: 14). Sgt. Wasniewski testified that the only indication of the simulator solution temperature is found on a digital display on the device. (TT: 14).

There is a stipulation of fact that the RBT IV Alco-Sensor was certified and calibrated at temperatures ranging from 20 centigrade to 27 centigrade when the simulator solution is required to be tested at 34 centigrade plus or minus .2 centigrade. (Exhibit A); (TT: 15)<sup>4</sup>. It is notable that the temperature of the device and the temperature of the simulator solution are two different numbers with different requirements. (TT: 8). The Alco-Sensor supervisor's manual requires that the temperature of the device be between 10 centigrade and 40 centigrade. (Manual: 6); (TT: 8, 13, 14). To calibrate the device, the device temperature must be between 23 centigrade and 27 centigrade. (Manual: 10). If the device temperature is not in this range the device will block the calibration procedure. (Manual: 10); (TT: 10). Here, the record indicates that the device temperature was between 23 centigrade and 27 centigrade at times of calibration and during all other testing the device was between 20 centigrade and 27 centigrade as stipulated. (Exhibit A); (Exhibit 2); (TT: 8, 9, 15-21)<sup>5</sup>. These stipulated temperatures fall within the manufacturer's required 10-40 centigrade for use and 23-27 centigrade for calibration. (Manual: 6, 10); (TT: 13, 14, 22).

In addition to the manufacturer mandated device temperature, as set out above, the Alco-Sensor supervisor's manual further requires that the temperature of the simulator bath solution be 34 centigrade. (Manual 5); (TT: 14, 22). Here, there is no written proof of the temperature of the simulator solution at the time of use. Sgt. Wasniewski testified that the temperature of the simulator solution is not present on any of the printouts. (TT: 14). Rather, the temperature of the simulator solution is verified on a digital display on the machine at the time of testing. (TT: 14). In addition to the supervisor's manual explaining the temperature requirements, Sgt. Wasniewski testified to the difference between the temperature of the simulator solution and the temperature of the unit. (Manual: 5, 6, 10); (TT: 8, 14).

With regard to the simulator solution, "the machine need[s] to be placed out of service and re-calibrated only if...the simulation test exceeded the prescribed deviation during a calibration test" or if it malfunctions during an accuracy inspection test or during an actual breath test of a suspect. *Commonwealth v. Hoopes*, 722 A.2d. 172, 176 (Pa. Super. 1998); *Commonwealth v. Mickley*, 846 A.2d 686, 691 (Pa. Super. 2004). In *Hoopes*, the court judged the accuracy of the simulator solution based on the deviation during calibration testing. *Hoopes* at 173-174. It is presumed that the temperature of the simulator solution is accurate unless the simulation test yields a result outside of the range prescribed by the Pa. Code. *Id.* Here, the device did not fail any of the tests. In accordance with the Pa. Code, the technician must perform:

67 Pa. Code § 77.24 (2) One simulator test using a simulator solution designed to give a reading of .10% to be conducted immediately after the second actual alcohol breath test has been completed....the breath test device will be removed from service if:

(ii) the simulator test yields a result less than .090% or greater than .109%

67 Pa. Code § 77.25 (1) an average deviation test shall be conducted to determine the accuracy of the instrument in the following manner:

(i) A total of five simulator tests shall be conducted using a simulator solution which is designed to give a reading of .10%

(2) the breath test equipment shall be removed from service if:

(ii) one or more of the five tests yields a result less than .090% or greater than .109% or the average deviation, derived from adding the absolute value of the differences between the results of the five tests and the constant value of .100 and dividing the total of these absolute values by 5 exceeds .005.

67 Pa. Code § 77.26 (1) Calibration testing a breath test device shall consist of conducting three separate series of five simulator tests. One of the series of tests shall use simulator solution designed to give a reading of .10%. One of the series of tests shall use simulator solution designed to give a reading of .05%. The last series of tests shall use simulator solution designed to give a reading above .10% which is a multiple of .05%.

(4) The breath test equipment does not pass the calibration procedure and shall be removed from service if:

(ii) (A) The average deviation derived by adding the absolute value of the differences between the results of the five tests and the constant value of the reading that the simulator solution is designed to give, and dividing the total of these absolute values by 5 exceeds .005

(ii) (B) One or more of the five tests yields a reading which is more than .010 below the reading that the simulator solution is designed to give, or which is more than .009 above the reading that the simulator solution is designed to give.

67 Pa. Code § 77.24 (2); 67 Pa. Code § 77.25 (1); 67 Pa. Code § 77.25 (2); 67 Pa. Code § 77.26 (1); 67 Pa. Code § 77.26 (4).

Here, as in *Hoopes*, the machine did not fail during any tests. *Hoopes* at 174. In this case, in accordance with 67 PA. Code § 77.26(b)(1), a .05 solution was tested when the device was operating at 23 centigrade. (TT: 18). A .10 solution was tested at 26 centigrade and a .15 solution was tested at 27 centigrade. (TT: 18, 19).

Additionally, in accordance with 67 Pa. Code § 77.25, an accuracy of inspection test was conducted upon the RBT IV Alco-Sensor that was used to perform the alcohol breath test on Appellant. Commonwealth Exhibit 1 contains the corresponding certificate of accuracy as well as the accuracy test results. (TT: 5).

67 Pa. Code § 77.26 requires annual calibration of breath test equipment. The certificates of accuracy and calibration or a log of

calibration are the presumptive evidence of accuracy as referred to in 75 Pa. C.S.A. § 1547. Defense Exhibit B is a log of calibrations and Defense Exhibit A is a record of accuracy and calibration tests. (TT: 15, 22). Commonwealth Exhibit 1 includes the record of an average deviation test which passed the required standards and the corresponding certificate of accuracy as well as a certificate of calibration and a corresponding calibration test which passed the required standards. (TT: 5). Since the device provided results within the statutory range for the calibration test as well as Appellant's test, the results are admissible. *Mickley*, 846 A.2d at 691. Consequently, Appellant's claim is without merit.

### III.

Appellant alleges that the Trial Court erred as a matter of law in finding the defendant guilty of violating 75 Pa.C.S.A. § 3802(b) when the Commonwealth failed to call Jerry Richey who certified and calibrated the breath testing device. This issue is without merit.

The Confrontation Clause of the U.S. Constitution protects a criminal defendant's right to confront witnesses against him. *Crawford v. Washington*, 541 U.S. 36 (2004). In *Melendez-Diaz*, the Court held that lab reports used as evidence of a defendant's guilt are considered testimonial statements which are subject to the Confrontation Clause of the United States Constitution. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531-2534, 3539-3542 (2009). Consequently, lab reports are only admissible when the defendant has the opportunity to cross-examine the lab-analyst at trial. *Id.*, *Commonwealth v. Barton-Martin*, 5 A.3d 363, 365, 368 (Pa. Super. 2010).

In *Melendez-Diaz*, the U.S. Supreme Court determined that the defendant had the right to confront the lab-technician responsible for performing forensic analysis of the cocaine seized. *Melendez-Diaz* at 2532. Similarly, in *Barton-Martin* the Superior Court found that the defendant had a right to confront the lab analysts responsible for preparing the lab reports. *Barton-Martin* at 5 A.3d at 365, 368. Unlike *Barton-Martin* where the Commonwealth merely presented testimony from the custodian of records, in this case the Commonwealth fulfilled their burden under the confrontation clause by summoning to trial Sgt. Wasniewski. *Barton-Martin* at 5 A.3d at 368. Sgt. Wasniewski administered Appellant's breathalyzer test and was able to testify to the procedures and protocols used to test Appellant's breath. Jerry Richey was not involved in the performance or analysis of Appellant's breathalyzer test. Consequently, Appellant does not have a right to confront Jerry Richey. Based upon Sgt. Wasniewski's testimony and Appellant's opportunity to cross-examination Sgt. Wasniewski, the BAC results used to convict Appellant were properly admitted.

To be convicted of 75 Pa.C.S.A. § 3802(b) (high rate of alcohol), the Commonwealth was required to prove, beyond a reasonable doubt, that Appellant's BAC within two hours after operating a vehicle was between 0.10 and 0.159%. The Commonwealth was able to prove this portion of their case by presenting Appellant's breathalyzer report, as well as the testimony of Sgt. Wasniewski who administered Appellant's BAC test. As Appellant had the opportunity to confront the technician responsible for administering his BAC test, this issue is without merit.

### IV.

Appellant alleges that the Trial Court erred as a matter of law in denying his right to a jury trial under the Sixth Amendment to the United States Constitution and the Pennsylvania Constitution. This issue is without merit.

Recently, the Superior Court of Pennsylvania reiterated that there is no constitutional right to a jury trial for offenses that bear a maximum incarceration of six months or less. See: *Commonwealth v. Harriott*, 919 A.2d 237 (Pa. Super. 2007); *Commonwealth v. Kerry*, 906 A.2d 1237, 1239, 1240 (Pa. Super. 2006). Similarly, where a defendant is tried for multiple offenses that do not individually allow for imprisonment exceeding six months, there is no right to a jury trial, even if multiple convictions could yield an aggregate incarceration above six months. *Harriott* supra; *Kerry* supra. To date, appellate courts continue to reiterate that the right to a jury trial only exists when a defendant faces an individual charge that could lead to imprisonment exceeding six months. *Harriott* supra; *Kerry* supra. Here Appellant was charged with violating 75 Pa.C.S.A. § 3802 (a)(1) and (b), as well as 75 Pa.C.S.A. §4303(b) and 75 Pa.C.S.A. § 3334(a); none of these carry a penalty of incarceration that exceed six months. Consequently Appellant's claim is without merit.

### V.

Appellant alleges that the Trial Court erred as a matter of law in finding that the Commonwealth had met its burden of proof beyond a reasonable doubt that the defendant was incapable of safely driving his motor vehicle. This issue is without merit.

The Pennsylvania Supreme Court in *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009) has held that 75 Pa.C.S.A. §3802(a)(1) can be proven by the following: the behavior of the defendant; manner of driving and ability to pass field sobriety tests; demeanor; including that toward the investigating officer; physical appearance, including bloodshot eyes and other physical signs of intoxication; odor of alcohol; and, slurred speech.

In the instant case, the Trial Court has detailed the evidence presented at trial herein (Findings of Fact), and respectfully incorporates that section for present purposes.

Briefly, the Commonwealth established that: (1) Appellant committed a moving violation; (2) there was an odor of alcohol emanating from Appellant's breath; (3) his eyes were glassy and bloodshot; (4) his speech was slurred; (5) there was an open bottle of beer in the driver's side door; (6) Appellant admitted to drinking; (7) Appellant failed two (2) field sobriety tests; (8) Appellant's BAC breathalyzer results were .120 and .118; and, (9) Sgt. Wasniewski formed the opinion that Appellant was under the influence to a degree that rendered him incapable of safely operating a motor vehicle.

The Trial Court concluded that the direct and circumstantial evidence presented by the Commonwealth proved that Appellant drove a vehicle after imbibing a sufficient amount of alcohol to render him incapable of safely driving beyond a reasonable doubt. See *Commonwealth v. Mobley*, 14 A.3d 887 (Pa. Super. 2011) (evidence sufficient under §3802(a)(1) where defendant failed to stop at a stop sign, failed field sobriety tests, officer observed a strong odor of alcohol emanating from defendant's vehicle and defendant had slurred speech).

Appellant's claim is without merit.

### VI.

Appellant alleges that the trial court erred as a matter of law in convicting him of driving with a blood alcohol level between .10% and .159% when the Commonwealth failed to introduce any testimony regarding the required documents of certification, including the certificates of accuracy and calibration and the temperature of the simulator solution at which the machine was tested. This issue is without merit.

As for the certificates, Commonwealth Exhibit 1 includes the record of an average deviation test which passed the required

standards and the corresponding certificate of accuracy as well as a certificate of calibration and a corresponding calibration test which passed the required standards. (TT: 5). The certificates of accuracy and calibration or a log of calibration are the presumptive evidence of accuracy as referred to in 75 Pa. C.S.A. §1547. Furthermore, as the device did not malfunction during the calibration test which preceded Appellant's test or during Appellant's test, the results are presumed accurate and legally admissible. *Mickley*, 846 A.2d at 691.

As for the temperature of the simulator solution, Sgt. Wasniewski, in his testimony, differentiated between the temperatures of the device and simulator solution. The device manual corroborates his testimony. (Manual: 5, 6, 10); (TT: 13, 14, 22). Sgt. Wasniewski's testimony regarding the simulator solution and device as well as the certificates and Appellant's breathalyzer results are sufficient evidence to convict Appellant. Consequently, Appellant's claim is without merit.

#### VII. & VIII.

Appellant alleges that the trial court erred as a matter of law in denying Appellant's Motion for Judgment of Acquittal for lack of sufficient evidence to prove either of the DUI counts against Appellant and the Trial Court erred as a matter of law in denying Appellant's renewed Motion for Judgment of Acquittal. These issues are without merit.

The standard applied in reviewing the denial of a Motion for a Judgment of Acquittal is whether the evidence if believed by the fact finder is sufficient to support the verdict. *Commonwealth v. McCurdy*, 943 A.2d 299, 300-302 (Pa. Super. 2008). In this case, there was sufficient evidence to convict Appellant.

Here, the Appellant was charged with violating 75 Pa.C.S.A. §3802(a)(1) -"General impairment:

An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802 (a)(1).

Additionally, Appellant was charged with violating 75 Pa.C.S.A. §3802 (b)-High rate of alcohol:

An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(b).

As to the latter, to be convicted of 75 Pa.C.S.A. § 3802(b) (high rate of alcohol), the Commonwealth must prove, beyond a reasonable doubt, that Appellant's BAC within two hours after operating a vehicle was between 0.10 and 0.159%. *Commonwealth v. Duda*, 923 A.2d 1138 (Pa. 2007). Here, the Commonwealth was able to prove this portion of their case by presenting the Appellant's breathalyzer test results as administered by Sgt. Wasniewski.

To be convicted under the general impairment section of the motor vehicle code, 75 Pa.C.S. § 3802(a)(1), the Commonwealth must prove beyond a reasonable doubt that Appellant was under the influence of alcohol to a degree that rendered him incapable of safe operation at the time he was stopped. *Commonwealth v. Gruff*, 822 A.2d 773 (Pa. Super 2003); *Commonwealth v. O'Byron*, 820 A.2d 1287 (Pa. Super. 2003). The Commonwealth was able to establish this charge through the testimony of Sgt. Wasniewski who initiated the traffic stop, observed the effects of alcohol, and administered the field sobriety and BAC tests on Appellant.

The Trial Court has detailed that evidence hereinabove (Findings of Fact) and respectfully incorporates that section for present purposes.

Briefly stated it was demonstrated that: (1) Appellant committed a moving violation; (2) there was an odor of alcohol emanating from Appellant's breath; (3) his eyes were glassy and bloodshot; (4) his speech was slurred; (5) there was an open bottle of beer in the driver's side door; (6) Appellant admitted to drinking; (7) Appellant failed two (2) field sobriety tests; (8) Appellant's BAC breathalyzer results were .120 and .118; and, (9) Sgt. Wasniewski formed the opinion that Appellant was under the influence to a degree that rendered him incapable of safely operating a motor vehicle.

Based on that evidence there was certainly sufficient evidence to convict Appellant of the charges. See *Commonwealth v. Sullivan*, 864 A.2d 1246 (Pa. Super. 2004) (when determining sufficiency of the evidence claims we must determine whether the evidence and all reasonable inferences therefrom viewed in the light most favorable to the verdict winner was sufficient to enable the factfinder to find every element of the crime charged beyond a reasonable doubt).

Appellant's claim is without merit.

#### CONCLUSION

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

BY THE COURT:

/s/ Borkowski, J.

Date: September 9, 2011

<sup>1</sup> The letters SHT followed by numerals refer to pages of the Suppression Hearing Transcript dated July 28, 2008. The suppression hearing testimony was incorporated for purposes of the subsequent non-jury trial on January 12, 2009.

<sup>2</sup> The letters TT followed by numerals refer to pages of the Non-Jury Trial Transcript of Proceedings dated January 12, 2009.

<sup>3</sup> The word "Manual" followed by numerals refers to the Alco-Sensor IV/RBT IV Supervisors Manual dated January 26, 2001.

<sup>4</sup> Exhibit A refers to a four page print out of the South Park police department's RBT IV breath test records of calibration tests and accuracy tests dated June 3, 2002 - June 20, 2006. The temperatures on this print out refer to the temperature of the hand held device at the time of testing.

<sup>5</sup> Exhibit 2 refers to a one page receipt of Appellant's breathalyzer test results. The receipt indicates that the temperature of the device was 20 centigrade at the time of testing and the device was properly tested for accuracy prior to conducting Appellants tests.

**Commonwealth of Pennsylvania v.  
Joseph Draxinger**

*Criminal Appeal—Sentencing (Discretionary Aspects)—Sufficiency—Reap*

No. CC 200812608, 201006731. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Borkowski, J.—September 14, 2011.

**OPINION**

**PROCEDURAL HISTORY**

As to matter presided over by The Honorable Edward J. Borkowski (Trial Court) Appellant was charged by criminal information (CC 200812608)<sup>1</sup> with: two (2) counts of Aggravated Assault<sup>2</sup>; one (1) count of Persons Not To Possess A Firearm<sup>3</sup>; one (1) count of Resisting Arrest<sup>4</sup>; two (2) Counts of Recklessly Endangering Another Person<sup>5</sup>; and, one (1) count of Disorderly Conduct<sup>6</sup>. The Persons Not To Carry Firearms charge was severed for purposes of trial and later decided in a non-jury trial.

Appellant proceeded to a jury trial on January 4 – January 6, 2010, and on January 6, 2010 Appellant was found guilty of Resisting Arrest, Disorderly Conduct, and two (2) counts of Recklessly Endangering Another Person.

Sentencing was scheduled for April 7, 2010 pending preparation of a pre-sentence report.

On April 7, 2010 prior to sentencing Appellant proceeded in a non-jury manner on the severed firearms charge and was found guilty of that charge.

On that same date Appellant was sentenced to serve a period of incarceration of five (5) to ten (10) years on the Persons Not To Possess Firearms charge. He was sentenced to serve a consecutive period of incarceration of one (1) to two (2) years on the charge of Resisting Arrest, and two (2) concurrent, one (1) to two (2) year periods of incarceration on the two (2) Recklessly Endangering Another Person charges. Thus the aggregate sentence was six (6) to twelve (12) years incarceration.

This timely appeal followed.

**STATEMENT OF ERRORS ON APPEAL**

On Appeal Appellant complains as follows:

I. This court abused its discretion in imposing an unreasonable and excessive sentence that did not comport with the Sentencing Code for the reasons set forth in the Motion To Reconsider Sentence. Specifically, the imposition of the statutory maximum sentence for Person Not To Possess a Firearm, and a consecutive term of 1 to 2 years for Resisting Arrest, was based on factors already accounted for in the prior record and offense gravity scores, as well as on allegations against the defendant for which he was not convicted, and the court erred in not giving consideration to the defendant's efforts to rehabilitate himself and be a godfather and grandfather, his circumstances at the time of the alleged offenses, including his suicidal mental state, his alcoholism, his history of mental illness, and his age.

II. The evidence was insufficient to establish the REAP convictions insofar as the Commonwealth failed to prove beyond a reasonable doubt that the defendant engaged in conduct which placed the police in danger of death or serious bodily injury. Specifically, the evidence did not establish that the defendant shot at the officers insofar as no physical evidence in the form of casings or pellets was discovered, and the officers' testimony and that of the defendant supports the defendant's claim that he was trying to shoot himself and no one else.

**FINDINGS OF FACT**

On April 10, 2008 at approximately 9:14 P.M. Joseph Draxinger (Appellant) assaulted his girlfriend in the Zodiac Bar in the City of Clairton, Allegheny County. (Trial Transcript, January 4-6, 2010 at pages 29, 30, 147) (hereafter "TT") Appellant immediately fled the bar and proceeded to a nearby (50 yards) building which housed his first floor apartment. That building was accessed by a narrow, dark alley that was adjacent to the bar. (TT: 30, 35, 147) Clairton Police Officers Creely, Zenkovich, and Pugar responded to the assault call and arrived at the bar at 9:20 P.M. (TT: 30, 147-150) Upon observing Appellant's girlfriend's injuries and interviewing persons present, the officers exited the bar to pursue Appellant. (TT: 30, 37, 147-148)

Officer Creely was the first to approach the building, and upon reaching the bedroom window of Appellant's apartment he observed Appellant pull out a shotgun from underneath a bed. (TT: 37-38, 147) Officer Creely alerted his fellow officers to the presence of the weapon and the officers took cover as best they could in such a dangerous circumstance. (TT: 39-41, 147-150)

Officer Creely announced the police presence by banging on the window. (TT: 39-40) Appellant did not immediately respond but thereafter stated, "Bad things are going to happen. Get the fuck out of here. I'm not coming out. You need to leave." (TT: 40) Appellant then discharged the shotgun inside the apartment. (TT: 40) Officer Creely was able to move a short distance from the window, but he was still within twenty (20) – thirty (30) feet of the window, and in a vulnerable and exposed position because of the characteristics of the alley. (TT: 40-45)

While those events were unfolding Allegheny County Police Officer Justin Doyle arrived to provide assistance to the Clairton officers. (TT: 87-89) Officer Doyle managed to find his way safely to Officer Creely, and after a brief exchange with Creely it was decided that Doyle would pull his unmarked vehicle into the alley. This was designed to provide cover for the officers, and to light the very dark alley and the window of Appellant's apartment. (TT: 44-45, 82, 90, 110)

Officer Doyle drove his vehicle into the alley to within eighteen (18) to thirty (30) feet of Appellant's apartment and rejoined Officer Creely. (TT: 44-45, 82, 90) Nonetheless both officers remained in a precarious and dangerously exposed position as they were isolated on the left side of Appellant's building and within range of Appellant. (TT: 40, 53-55, 90-92, 149-150)

In an effort to neutralize or at least minimize Appellant's advantage, Officer Doyle, shielding himself with his car door, attempted to shine the spotlight of his vehicle into the window of the apartment. (TT: 46, 90) Officer Creely was next to Doyle as he undertook this action. (TT: 55, 91-92, 109)

Appellant then smashed out the window and pointed the shotgun out the window at the two (2) officers who were approximately (20) feet away. (TT: 45-47, 55, 90-91, 131) Appellant fired two (2) shots at the officers who at that juncture feared for their lives. (TT: 55, 90-91, 131) Following the shots the officers safely repositioned themselves behind the vehicle which had been impacted by pellets from the fired shotgun. (TT: 93-98, 127, 179-190)

A two (2) hour standoff ensued whereafter Appellant exited the apartment unarmed and challenged the officers to "come and

get me". (TT: 230) Appellant refused to obey commands to get on the ground, and physically and violently engaged the officers who attempted to place him into custody. (TT: 229-244) Three (3) to four (4) officers were unable to subdue Appellant, and it was not until he was tasered that the officers were able to control and cuff Appellant. (TT: 229-235)

Upon entry into the apartment the police observed the shotgun, spent cartridges, and multiple live rounds inside. (TT: 157-159) The weapon was a single barrel 12-gauge shotgun with a magazine capable of holding two (2) cartridges, in addition to one in the chamber. (TT: 177-179) There was no question as to its potential lethality. (TT: 132-135, 194) Appellant was arrested and charged as set forth hereinabove.

## DISCUSSION

### I.

Appellant claims that the Trial Court abused its discretion by imposing an unreasonable and excessive sentence that did not comport with the sentencing code. This claim is without merit.

It is well established that:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. A sentencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding the crime. However, the choices must be consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the of the defendant.

*Commonwealth v. Devers*, 546, A.2d 12, 13 (Pa. 1988)

Further the Pennsylvania Supreme Court has stated that, "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. Walls*, 926 A.2d 957, 961 (Pa. 2007)

Here Appellant was sentenced to an aggregate term of six (6) to twelve (12) years incarceration. The period of five (5) to ten (10) years imposed on the firearms charge was the statutory maximum for a first degree misdemeanor, nonetheless the sentence was a standard range sentence because of defendant's prior record score of five (5). Similarly, the consecutive term of one (1) to two (2) years for the Resisting Arrest charge (second degree misdemeanor) was a statutory maximum sentence that also constituted a standard range sentence in this circumstance.

Despite Appellant's claim to the contrary, a review of the entire record will confirm that the Trial Court took into account all factors mandated by statute and law, and that the Trial Court did not abuse its discretion in sentencing Appellant in the manner that it did. *Commonwealth v. Griffin*, 804 A.2d 1, 7 (Pa. Super. 2002) (sentencing judge's decision will not be disturbed absent a manifest abuse of discretion). The fact that both sentences were standard range sentences and also statutory maximum terms is not an indication that an abuse of discretion occurred, rather that circumstance is merely a reflection of Appellant's profound and enduring history of assaultive behavior. *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1263-1264 (Pa. Super. 2005) (no error in imposing the statutory maximum sentence of twenty (20) to forty (40) years which was also in the standard range where the record supported the conclusion that the trial court was fully informed and fashioned an appropriate sentence consistent with relevant sentencing factors).

Specifically, the Trial Court recognized and took into consideration: (1) the statutorily mandated factors that characterize Pennsylvania's individualized sentencing philosophy pursuant to 42 PA.C.S. § 9721(b); (2) the sentencing guidelines; (3) the pre-sentence report which detailed the Appellant's background and extensive criminal history; and, (4) the particular aspects of the present offenses for which he stood convicted. (Sentencing Transcript, April 7, 2010 Pages 12-13) (Hereafter "ST") *Walls*, 926 A.2d at 966-967 (sentencing court properly took into account applicable factors and thus sentence should not be disturbed by reviewing court)

Despite Appellant's claim the record clearly reveals that the Trial Court recognized and correctly applied the fact that much of Appellant's criminal history was reflected in his prior record score of five (5). (ST: 13, 17-18) However, as it is directly related to the statutorily recognized factor of protection of community, the court believed it important to acknowledge and explicitly make part of the record the fact that Appellant had a significant history of assaulting and/or resisting law enforcement officers which dated back to 1983. (ST: 13-14, 17-18), *Commonwealth v. Tirado*, 870 A.2d 362, 367-368 (Pa. Super. 2005) (sentences for burglary, and assault on a police officer, although outside the guidelines were proper where defendant had an extensive criminal history and there was a need to protect the community from the defendant). Fairly considered in the context and entirety of the sentencing record it is clear that the Trial Court did not impermissibly factor into its sentence matters accounted for in Appellant's prior record score.

The Trial Court also listened closely and considered the testimony Appellant's son. (ST: 7-8) Despite its positive and emotional nature, Appellant's son acknowledged Appellant's long-standing history of substance abuse and criminality. This testimony actually confirmed the Trial Court's determination that the chronicity of Appellant's substance abuse and assaultive behavior made the protection of society and the law enforcement community a predominant and heavily weighted factor in imposition of the sentence. This was so noted on the record, and consistent with the court's sentencing obligation and authority. (ST: 13-14, 17-18) *Tirado*, 810 A.2d at 367-368.

Further the Trial Court, stated and the pre-sentence report confirmed, that attempts to maintain Appellant in the community, as well as subjecting him to shorter periods of incarceration, failed to correct or deter his assaultive conduct. (ST: 14-15) Similarly, rehabilitative efforts in the area of drug, alcohol, and mental health counseling failed to correct or deter his assaultive conduct or modify his substance abuse. (ST: 14-15) See *Commonwealth v. Palmer*, 463 A.2d 755, 761-762 (Pa. Super. 1983) (sentencing court properly assessed defendant's need and potential for rehabilitation, his criminal history, and potential for violence).

Thus the Trial Court correctly concluded that Appellant posed a real and present danger to the community, especially police officers in the community, and that a substantial period of state incarceration was warranted. (ST: 16) *Commonwealth v. Burtner*, 453 A.2d 10, 11-12 (Pa. Super. 1982) (sentence not found excessive or disturbed on appeal where it did not exceed that statutory limits and where the sentencing colloquy clearly demonstrated that the sentencing court carefully considered all relevant evidence relevant to a determination of a proper sentence).

Appellant's claim is without merit.

## II.

Appellant claims that the evidence was insufficient to establish the Recklessly Endangering Another Person (REAP) convictions. This claim is without merit.

The Pennsylvania Superior Court has stated that:

The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part, or none of the evidence. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

*Commonwealth v. McClendon*, 874 A.2d 1223, 1228-1229 (Pa. Super. 2005)

Pursuant to 18 Pa. C.S. § 2705 a person commits the crime of Recklessly Endangering Another Person if he, "Recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury". 18 Pa. C.S. § 2705. The crime requires: (1) a mens rea - recklessness; (2) an actus reus - some conduct; (3) causation - which places; and (4) the achievement of a particular result-danger to another person of death or serious bodily injury. *Commonwealth v. Trowbridge*, 395 A.2d 1337, 1340 (Pa. Super. 1978) (the crime of REAP is a crime of assault that requires the creation of danger - the actual present ability to inflict harm.)

The Trial Court has set forth a detailed recitation of facts herein (Findings of Fact) and respectfully incorporates that for purposes of the present discussion.

Here, from a distance of twenty (20) to thirty (30) feet, Appellant leveled a 12-gauge shotgun at two (2) uniformed police officers and discharged two (2) rounds at them. (TT: 40-47, 53-56, 76-83, 92-108, 127-135, 194) This clearly meets the legal requirements of REAP. See e.g. *Commonwealth v. Hartzell*, 988 A.2d 141, 143-144 (Pa. Super. 2009) (it is not difficult to conclude that discharging a weapon numerous times in the vicinity of others constitutes a sufficient danger to satisfy the REAP statute), citing *Commonwealth v. Reynolds*, 835 A.2d 720 (Pa. Super. 2003) (the act of merely pointing a loaded gun at another is sufficient to support a conviction for REAP). The record here clearly supports the REAP verdict, and Defendant's claim is without merit.

Nonetheless, Appellant raises three (3) matters that he claims reflect on the sufficiency of the evidence. These matters as stated and evaluated either ignore evidence of record, or ignore the plain fact that the matter has been resolved by the fact-finder. Thus the issues may be dealt with rather summarily as follows hereinbelow.

First, Appellant claims that no casings were discovered. This notion is belied by a close reading of the record. Officer Keith Zenkovich testified that upon entry into Appellant's apartment he saw two (2) spent cartridges on the floor. (TT: 162) The spent cartridges were not recovered by virtue of an administrative oversight, but their existence was established based on Officer Zenkovich's testimony. (TT: 162)

Appellant's second claim that no discharged pellets were discovered is accurate, nonetheless that perceived shortcoming did little to erode the compelling testimony of Officers Creely and Doyle. Their testimony as to the actual discharge of the weapon in their direction was corroborated by the damage to the previously undamaged police vehicle. (TT: 126-132, 181-186) That damage was attributable to shotgun pellets, and there was a reasonable explanation as to the lack of recovery of spent pellets. (TT: 126-132, 181-186)

Finally, Appellant's claim that he was, "trying to shoot himself and no one else", is contradicted by overwhelming and compelling evidence. At some point earlier that evening Appellant may have possessed some suicidal ideation. Nonetheless his own words, "The cops came and interrupted that. It brought me to my senses", clearly reflected a change of mind and focus. (TT: 325) His attention then turned toward the police and ensuing assaultive behavior. That behavior was characterized by Appellant firing two (2) shots at uniformed officers, and violently resisting arrest following a two (2) hour standoff. (TT: 319, 325), *Hartzell*, 988 A.2d 143-144.

Appellants' claims as to the sufficiency of the evidence are without merit.

## CONCLUSION

For the aforementioned reasons, the designation of the imposed by the Trial Court should be affirmed.

BY THE COURT:

/s/ Borkowski, J.

Date: September 14, 2011

<sup>1</sup> The case was originally assigned to the Honorable Randal Todd, who after presiding over several proceedings/matters recused himself on April 27, 2009.

<sup>2</sup> 18 Pa.C.S. § 2702(a) 3 and (c)

<sup>3</sup> 18 Pa.C.S. § 6105(a) 1, (b)

<sup>4</sup> 18 Pa.C.S. § 5104

<sup>5</sup> 18 Pa.C.S. § 2705

<sup>6</sup> 18 Pa.C.S. § 5503

**Commonwealth of Pennsylvania v.  
Thomas Taylor**

*Criminal Appeal—Sufficiency—Sentencing—Presentence Report—Aggravated Assault*

No. CC 200915084. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Borkowski, J.—September 30, 2011.

**OPINION**

**PROCEDURAL HISTORY**

Appellant, Thomas Taylor, was charged by Criminal Information (CC 200915084) with two (2) counts of Aggravated Assault: 18 Pa.C.S. 2702 (a) 1, (caused or attempted to cause serious bodily injury) and, 18 Pa. C.S. § 2702 (a) 4, (caused or attempted to cause bodily injury with a deadly weapon).

Appellant proceeded to a jury trial on March 9-10, 2010, after which he was found guilty of both charges.

A sentencing hearing was held on June 10, 2010, and Appellant was sentenced to a period of incarceration of seven (7) to fifteen (15) years on the first count of Aggravated Assault. No further penalty was imposed at the second Aggravated Assault conviction.

This appeal followed.

**STATEMENT OF ERRORS ON APPEAL**

Appellant raises the following issues on appeal, and they are set forth verbatim as Appellant frames them:

1. The Trial Court erred when it took into consideration at sentencing Appellant's previous pre-sentence report from 1990 in addition to the pre-sentence report prepared in aid of sentencing for this manner.
2. The evidence in this case was insufficient to sustain the Appellant's conviction beyond a reasonable doubt for two (2) counts of Aggravated Assault.

**FINDINGS OF FACTS**

In September of 2009 Appellant was residing (boarding) with his brother, John Taylor, on Flagler Street in the City of McKeesport, Allegheny County. (TT: 36-37, 70) Appellant had developed an alcohol and anger problem that at times disrupted that household. (TT: 33-34)

On the afternoon of September 12, 2009 a third brother, Nathaniel Taylor, visited John Taylor's home. Nathaniel originally went there to work on his truck, and afterwards he and John were seated at the dining room table talking and playing cards. (TT: 33-34) Appellant had been drinking that afternoon and was in an angry and confrontative mood. (TT: 33-35, 66, 69-70) Appellant interjected himself into the conversation between John and Nathaniel, talking about "killing things", including John's two (2) German Shepard dogs. (TT: 35, 70) John and Appellant became involved in a heated verbal exchange that resulted in a physical scuffle between the two brothers. (TT: 36-37, 70-71) The scuffle was brief and did not result in injury to either brother, and at its conclusion John removed himself to the upstairs of the residence. (TT: 36, 71) Some water had spilled during the scuffle and clean-up efforts were being made when Helen Taylor, a sister, arrived at the residence. (TT: 62-63) Helen was informed of the altercation between her brothers and sat down at the dining room table with Nathaniel. (TT: 63) Appellant again interjected himself and began to argue with Nathaniel about "minding his own business", and who "won the fight". (TT: 36-37, 63) When Nathaniel told him that John won the fight, Appellant left the dining room. He returned shortly thereafter and stood next to Nathaniel, who was still seated at the dining room table shuffling a deck of cards. (TT: 38, 63) Appellant told Nathaniel to "say something", to which Nathaniel said, "what"; whereupon Appellant stabbed him with a knife in the upper right side of the chest. (TT: 38, 63) The knife was approximately twelve (12) inches in length and had been retrieved by Appellant when he left the room. (TT: 37, 63) Appellant ran into the kitchen, threw the knife in a trashcan and returned to the dining room. (TT: 41, 72, 77) Blood began to ooze from Nathaniel's chest wound, and Helen Taylor called 911 and put pressure on the wound until the medics arrived. (TT: 64) Nathaniel was life flighted to Presbyterian University Hospital. (TT: 42, 65) He was hospitalized for six (6) days for treatment of the stab wound of the chest. (TT: 43) During the hospitalization and as a result of the treatment he developed a serious infection of the groin and leg for which he was still being treated at the time of trial. (TT: 43-44) Appellant was arrested and charged with the assault of Nathaniel as noted hereinabove.

**DISCUSSION**

**I.**

Appellant alleges that the Trial Court erred at sentencing when it took into consideration Appellant's previous presentence report from 1990 in addition to the presentence report prepared in aid of sentencing for this matter. This issue has no merit.

On March 10, 2010, immediately following the entry of the guilty verdicts in this matter, the Trial Court set sentencing for June 10, 2010, and ordered that a presentence report be prepared by the Allegheny County Department of Probation. (TT: 134) Pa.R.Crim.P. 702 (Aids in Imposing Sentence)

On June 10, 2010 the Trial Court was in possession of, and had reviewed, two (2) presentence reports. Those reports in fact, by virtue of their content and information, amounted to one (1) comprehensive presentence report: (1) a presentence report regarding Appellant prepared in 1990 for the Honorable James F. Clark of the Allegheny County Court of Common Pleas, Criminal Division; and, (2) a supplemental or updated report that covered the period of time from 1990 until June 10, 2010, prepared for the Trial Court. S.T. at 2-3.<sup>1</sup> This is a common and accepted practice in Allegheny County, and did not prejudice Appellant as the Trial Court took into account the age of the offense and information set forth in the 1990 report, and the Trial Court gave Appellant the opportunity to make any corrections or additions to the reports. (ST: 3-4, 7-8)

The comprehensive history as set forth in both reports, and taken into consideration by the Trial Court, is completely consistent with the Trial Court's sentencing obligation. The Superior Court has mandated that, "when imposing sentence a court is required to consider the particular circumstances of the offense and the character of the defendant. In considering these factors, the court should refer to the defendant's prior criminal record, age, personal characteristics and potential for rehabilitation." *Commonwealth v. Widmer*, 667 A.2d 215, 223 (Pa, Super. 1995) (citations and quotations omitted), see also 42 Pa. C.S. § 9721 (b) (General standards)

Thus the Trial Court, as required by law, properly inquired into Appellant's history and background. No error can be ascribed

to the Trial Court's use of the earlier presentence report, as its review was consistent with the Trial Court's sentencing obligation. This claim is without merit.

## II.

Appellant claims that the evidence in this case was insufficient to sustain Appellant's conviction beyond a reasonable doubt for two (2) counts of Aggravated Assault. The Superior Court has stated that the applicable Standard of Review as follows:

The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part, or none of the evidence. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

*Commonwealth v. McClendon*, 874 A.2d 1223, 1228-1229 (Pa. Super. 2005)

### A. Aggravated Assault, 18 Pa.C.S. § 2702 (a) 1

Pursuant to 18 Pa. C.S. § 2701 (a) 1 a person may be convicted of Aggravated Assault if he, "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life". 18 Pa.C.S. § 2702 (a) 1. "Serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of function of any bodily member or organ". 18 Pa.C.S. § 2301.

In this case the Trial Court, in conjunction with this count of the information and its disjunctive nature, submitted an instruction to the jury to indicate which, if any, type of Aggravated Assault they found Appellant guilty of. (TT: 113-114) Consistent with that instruction and their evaluation of the evidence, the jury determined that the Appellant was guilty of attempting to cause serious bodily injury to the victim. (TT: 127). See also Reproduced Record at "Verdict Slip".

In *Commonwealth v. Gruff*, 822 A.2d 773, 776 (Pa. Super. 2003) the Superior Court stated that, "for aggravated assault purposes, an "attempt" is found where the accused, with the required specific intent, acts in a manner which constitutes a substantial step toward perpetrating a serious bodily injury upon another". *Gruff*, 822 A.2d at 776.

The Trial Court has set forth a detailed recitation of facts herein (Findings of Fact) and respectfully incorporates that by reference for purposes of the present discussion. Briefly stated however, here Appellant was intoxicated, and confrontative that afternoon. He became agitated with the victim's "attitude", and statement that John had won the fight between the two brothers. Appellant left the dining room where the victim was seated, secured a twelve (12) inch knife, returned to the dining room, and stabbed the victim in the upper right chest. This conduct clearly evinced the required specific intent to cause serious bodily injury to the victim. As the Superior Court has stated with presently applicable acumen,

The intent to cause serious bodily injury – the only element of aggravated assault at issue here – may be proven by direct or circumstantial evidence. Where one does not verbalize the reasons for his actions, we are forced to look at the act itself to glean the intentions of the actor. Where the intention of the actor is obvious from the act itself, the finder of fact is justified in assigning the intention that is suggested by the conduct.

*Commonwealth v. Hall*, 830 A.2d 537, 542 (Pa. 2003) (citations and quotations omitted)

Here there was sufficient evidence for the jury to determine that Appellant attempted to cause serious bodily injury to Nathaniel Taylor. This claim is without merit.

### B. Aggravated Assault, 18 Pa.C.S. § 2702(a)(4)

Aggravated Assault, 18 Pa. C.S. § 2702(a)(4) is defined as follows: "A person is guilty of Aggravated Assault if he attempts to cause or intentionally or knowingly cause bodily injury to another with a deadly weapon". 18 Pa.C.S. § 2702(a)(4).

Here the jury found Appellant guilty of causing bodily injury to the victim with a deadly weapon. (TT: 127). See also Reproduced Record at "Verdict Slip". "Bodily injury" is defined as "impairment of physical condition or substantial pain". 18 Pa.C.S. § 2301 (Definitions). The victim suffered a stab wound to the chest that required being life flighted to Presbyterian Hospital and hospitalization of six (6) days. (TT: 43) Thus it cannot be reasonably questioned that the victim suffered bodily injury, or that the knife, twelve inches in length, used in this instance was a deadly weapon. 18 Pa.C.S. § 2301 (deadly weapon includes any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or serious bodily injury).

Finally, in regard to the intent provision, the Superior Court has stated, "with respect to the intent requirement of each section we examine the defendant's words and conduct to determine whether the record supports a finding of the requisite intent". *Gruff*, 822 A.2d at 779-780

The Trial Court has set forth the Appellant's conduct hereinabove (Section II-A) and incorporates that by reference for purposes of the present discussion. Consistent with the jury's verdict there can be no question as to the Appellant's intent to cause serious bodily injury, let alone cause bodily injury to the victim. Consequently, Appellant's claim is without merit.

## CONCLUSION

For the aforementioned reasons, the designation of the imposed by the Trial Court should be affirmed.

BY THE COURT:  
/s/Borkowski, J.

Date: September 30, 2011

<sup>1</sup> S.T. refers to the Sentencing Transcript of June 10, 2010

**Commonwealth of Pennsylvania v.  
Anton Patterson**

*Criminal Appeal—Homicide—Hearsay—Waiver—Testimony About Gang Retaliation*

No. CC 200812665. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Borkowski, J.—September 27, 2011.

**OPINION**

**PROCEDURAL HISTORY**

Appellant was charged by Criminal Information (CC 200812665) with one (1) count each of: Criminal Homicide<sup>1</sup>; Robbery<sup>2</sup>; Carrying a Firearm Without A License<sup>3</sup>; Possession Of A Firearm By A Minor<sup>4</sup>; and Criminal Conspiracy<sup>5</sup>.

Appellant proceeded to a jury trial on July 15-17, 2009 whereupon he was found guilty of all charges, including First Degree Murder at the Criminal Homicide count.

On November 10, 2009 Appellant was sentenced to serve a sentence of life without the possibility of parole on the charge of First Degree Murder, and consecutive periods of incarceration of seven (7) to fourteen (14) years on the Robbery charge, four (4) to eight (8) years on the Conspiracy charge, and two (2) to four (4) years on the Carrying A Firearm Without A License charge. No further penalty was imposed on the Possession of A Firearm By A Minor.

This timely appeal followed.

**STATEMENT OF ERRORS ON APPEAL**

Appellant raises the following issues on appeal, and they are set forth exactly as Appellant states them:

I. The trial court erred in admitting testimony by Shawn Ruffin that a third person – Robert Agurs – told him that “I was just with your man Tone [the defendant] and he just murdered someone.” [pages 219 through 222 of the trial transcript] the Commonwealth had, prior to trial, filed a motion in limine seeking to admit this testimony and argument was also made, on the record, during trial about this evidence [see pages 11-12 and 215-218]. Defendant avers that this statement was devoid of the special rationale that usually accompanies these types of statements, i.e.,” that the rationale for the exception lies in the special reliability that is furnished when excitement suspends the declarant’s powers of reflection and fabrication.” *Commonwealth v. Blackwell*, 494 A.2d 426 (Pa. Super. 1985). In this case, in accordance with the Commonwealth’s argument for admission of the statement, the declarant was more than just an observer; he was a participant and thus his motivation must be questioned and thus the inherent reliability and truthfulness of the statement questioned. In addition, contrary to the Commonwealth’s argument, this statement was offered to prove the very matter at issue, i.e. that this Defendant shot the victim. Thus, because of this statement and the very unavailability of the declarant for cross-examination as a declarant as well as an eyewitness, Defendant was denied his constitutional right to cross-examine that witness and to confront the witness against him.”

II. The trial court erred in limiting evidence, by granting the Commonwealth’s motion in limine, that the victim, at the time of his death, possess \$197 on his person, as well as an empty black holster and a permit to carry a firearm.

III. The trial court erred in permitting the Commonwealth to question the only eyewitness – Keisha Davis – about her fears of retaliation from gangs in the neighborhood. [see page 98 of the trial transcript] This evidence was not relevant in that there was not testimony that this Defendant was in any way connected with any named gangs, nor was there any evidence of any intimidation or retaliation by or on behalf of the defendant. Even if relevant, the testimony was unduly prejudicial and any perceived relevance was outweighed by its prejudicial effect.

IV. The verdict was contrary to the evidence and against the weight of the evidence. Keisha Davis testified that the person who shot the victim was standing behind her and she was facing the victim. The physical evidence clearly shows that the victim was shot from behind. Additionally, the face of the shooter was covered and only his eyes were showing: that is all that she could see. Her ability to make an identification from that limited observation was all but impossible.

V. On May 17, 2010 [after Defendant had filed this original Concise Statement of Matters Complained of on Appeal] the United States Supreme Court decided the case of *Graham v. Florida*, 130 S.Ct. 2011 (2010). In that case, the Supreme Court held unconstitutional a Florida statute that permitted the imposition of a life sentence without parole on a juvenile for an offense that was not a homicide offense and went on to hold that the Eighth Amendment’s proscription against cruel and unusual punishment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime. In so holding that decision calls into doubt the validity of other state statutes, including the Pennsylvania statute at 42 Pa.C.S.A. §6355(a); 18 Pa.C.S.A. § 3121(e)(2) and 61 Pa. C.S.A. § 6137(a).

VI. Defendant avers that the evidence on the entire record is insufficient to sustain a conviction for any and/or all of the offenses of which he was found guilty.

**FINDINGS OF FACTS**

On August 4, 2008 at 11:30 P.M. Anthony Rivers (victim) telephoned Keisha Davis and asked if he could visit her at her home. (TT: 66-68)<sup>6</sup> The victim and Ms. Davis had met several months earlier and had become friends. (TT: 66-68) Ms. Davis resided in a townhouse on Columbo Street in the Garfield section of the City of Pittsburgh, Allegheny County. (TT: 67) The victim did not live in Garfield and traveled by car to Ms. Davis’s residence arriving at 11:53 P.M. (TT: 68) When the victim arrived Ms. Davis came out of her residence and the two stood and talked on the sidewalk next to the victim’s vehicle. (TT: 68, 72) As they talked Appellant and another person approached and Appellant demanded a gold chain and cross the victim was wearing. (TT: 72-74, 102)

The chain and cross hung loosely around the victim’s neck, and the cross was somewhat distinctive because of its large size and features. (TT: 78-79, 102) Without giving the victim the opportunity to comply, the second actor removed the chain and cross from around the victim’s neck. (TT: 72-77, 106, 109) Immediately after the second actor removed the chain and cross, Appellant shot the victim in the head with a .40 caliber Glock semi-automatic pistol. (TT: 77, 170, 233-234) Appellant and the second actor immediately fled the scene in the direction from where they approached. (TT: 83-84, 117) The projectile traveled through the victim’s head; entering behind the left ear, fragmenting during its travel, and exiting behind the victim’s right ear. (TT: 55-59) The victim collapsed

to the ground and despite prompt response from medics he was pronounced dead at the scene at 12:45 A.M. (TT: 58-59) The subsequent autopsy confirmed that the victim died from the gunshot wound to the head and associated internal trauma. (TT: 55-59)

Although Appellant was wearing a surgical mask that covered part of his face, Keisha Davis had an opportunity to view Appellant's face, his stature, and listen to his voice during this episode. Ms. Davis did not know Appellant's name, but she recognized Appellant as a person who lived in the neighborhood and with whom she had had contact with over the years she lived there. She also knew Appellant from the fact that they had attended the same high school, and Appellant had approached her on multiple occasions in an attempt to date her. (TT: 75-80, 83-85, 102-103, 126, 138) Ms. Davis provided the aforementioned information to the police and subsequently identified Appellant from a high school yearbook. (TT: 92-93)

On August 5, 2008 an arrest warrant was issued for Appellant, as well as a search warrant for his residence, which was located very close to the scene of the shooting. (TT: 208-210, 253, 302) The gold chain and cross worn by the victim was recovered from a shoebox in Appellant's bedroom, and Appellant was arrested and charged as noted hereinabove. The second actor was never apprehended or identified.

## DISCUSSION

### I.

Appellant alleges that the trial court erred in admitting testimony from Shawn Ruffin that a third person (Robert Agurs) told him that, "I was just with your man Tone and he just murked someone." This claim is without merit.

It is well established that the admissibility of evidence is solely within the discretion of the trial court and the trial court's decision will be reversed only if the trial court has abused its discretion. *Commonwealth v. Seilhamer*, 862 A.2d 1263, 1270 (Pa. Super. 2004).

The Trial Court admitted the statement as an excited utterance pursuant to Pa.R.E. 803(2): "A statement relating to startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Pa. R.E. 803(2), *Commonwealth v. Barnes*, 456 A.2d 1037 (Pa. Super. 1983).

The Pennsylvania Supreme Court has stated that in order for a statement to be admitted under this exception it must be shown that: (1) the declarant witnessed an event sufficiently startling and so close in point of time as to render the declarant's reflective thought processes inoperable; and, (2) the statement was a spontaneous reaction to that startling event. *Commonwealth v. Pronkoske*, 383 A.2d, 858, 860 (Pa. 1978).

Instantly there is no question that a startling event – the shooting of an unarmed man as he stood talking to a friend outside her residence – occurred. *Commonwealth v. Washington*, 692 A.2d 1018 (Pa. 1997) *cert. denied* 523 U.S. 1123 (1998) (witnessing a murder is clearly a unexpected and shocking event) The question that confronted the Trial Court was whether the declarant had personal knowledge of the startling event. See TT at 11-12, 216-218, *Commonwealth v. Pronkoske*, 383 A.2d at 860 (for declaration about the event to be admissible it must appear that the declarant perceived the event that he is talking about).

The Pennsylvania Supreme Court has stated that the circumstances surrounding the event may establish that the declarant was in a position to observe a defendant's actions. *Commonwealth v. Counterman*, 719 A.2d 284, 299 (Pa. 1998), *cert. denied* 528 U.S. 836 (1999).

In the present case Shawn Ruffin testified that he was in close proximity to the shooting and after hearing the gunshot that killed the victim he saw Robert Agurs coming from the area of the shooting. (TT: 221, 228) While others were moving toward the scene of the shooting out of curiosity, Agurs was hastily leaving the scene in its immediate aftermath, and it was then that he made the statement. (TT: 221-222) According to Ms. Davis there were only four (4) persons in the immediate area when the shooting occurred: Appellant, an unidentified accomplice, the victim, and Ms. Davis herself. (TT: 73) Despite their best efforts the police could not locate Agurs in the aftermath of the shooting, nor was he able to be located for purpose of the trial itself. (TT: 12) It was clear to the Trial Court that Agurs was either: (1) a person in the area who Ms. Davis did not see; or more likely, (2) the second actor who was as shocked as Ms. Davis that Appellant shot the victim despite the victim's lack of resistance and the ease with which the robbery was accomplished.

Given the proximity of time and place, as well as the surrounding circumstances, the Trial Court determined that there was sufficient corroborating evidence that the statement met the requirements of the excited utterance hearsay exception. (TT: 215-217) *Commonwealth v. Counterman*, 719 A.2d at 299, *Commonwealth v. Hood*, 872 A.2d 175, 181-182 (Pa. Super. 2005) (circumstances indicated sufficient corroborating evidence that two (2) unidentified 911 callers actually witnessed the event and their statements were admissible as excited utterances). This issue is without merit.

### II.

Appellant alleges that the Court erred in granting the Commonwealth's Motion in Limine regarding items (an empty holster, a firearms permit, \$197.00) that were found on the victim at the time he was shot. This issue is without merit.

A close reading of the record in this matter clearly indicates that this is not an issue that merits much discussion. The Commonwealth filed a Motion In Limine regarding the aforementioned items alleging that they were irrelevant. Prior to trial the Trial Court discussed the issue with both counsel, and initially reserved ruling on the motion but after further discussion granted the motion to a limited extent. (TT: 9-11) The Trial Court recognized that the evidence might become admissible depending on the strategy of defense counsel and/or how the evidence in the case developed. (TT: 11) This ruling did not prejudice Appellant as the Trial Court left that evidentiary door open for either party to pursue. (TT: 11) Pa. R.E. 103 (Rulings on Evidence); see generally *Commonwealth v. Bobin*, 916 A.2d 1164, 1166 (Pa. Super. 2007).

Neither party sought to introduce the evidence during the course of trial, consequently no further discussion is necessary. This claim is without merit.

### III.

Appellant next alleges that, "the trial court erred in permitting the Commonwealth to question the only eyewitness - Keisha Davis - about her fears of retaliation from gangs in the neighborhood". This claim is without merit.

Initially it must be noted that a question was posed and answered as follows: Q: "Are you familiar with the Garfield Bloods? "; A: "Yes"., an objection was then lodged by defense counsel and the Trial Court precluded further inquiry into the area. (TT: 97-98) The Court stated, "You can ask her. I mean, she already stated that she is in fear of retaliation from groups or persons in the neighborhood. Limit it to that". (TT: 98)

Prior to that question and answer, the victim, in the context of explaining her testimony given at the preliminary hearing, testified that she was nervous at that time; and that stemmed from her being labeled a "snitch" and being subject to retaliation in

the neighborhood. (TT: 96) *Commonwealth v. Whitfield*, 419 A.2d 27, 29 (Pa. Super. 1980) (evidence of witness's fear of retaliation from gangs was admissible to explain delay in reporting crime). See also *Commonwealth v. Brewington*, 740 A.2d 247, 251-252, (Pa. Super. 1999).

It is clear that the Trial Court prohibited any testimony regarding gang activity or Appellant's affiliation with the same, and that the testimony was limited to Ms. Davis explaining her earlier testimony. (TT: 97-98) See *Brewington*, 740 A.2d at 251. (no error where defense counsel's objection was sustained, the witness did not answer and counsel did not request relief at trial) (noting also that evidence of gangs and gang membership is admissible to explain the conduct of a Commonwealth witness). This issue is without merit.

#### IV.

Appellant alleges that the verdict was against the weight of the evidence and that the Trial Court abused its discretion by not granting Appellant's post-sentence motion for a new trial for that reason. This claim has no merit.

The Pennsylvania Supreme Court has stated as follows:

A claim alleging the verdict was against the weight the evidence is addressed to the discretion of the trial court. Accordingly, an appellate court reviews the exercise of the trial courts discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well settled that the jury is free to believe all, part, or none of the of the evidence and to determine the credibility of witnesses, and a new trial based on a weight of the evidence claim is only warranted where the jury's verdict is so contrary to the evidence that it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

*Commonwealth v. Houser*, 18 A.3d 1128, 1135-1136 (Pa. 2011) (citations and quotations omitted).

The Trial Court has set forth a detailed summary of the facts hereinabove (Findings of Facts) and respectfully incorporates that for purposes of the present discussion. *Supra* at pp. 5-8

Briefly stated the fact finder accepted the testimony of eyewitness Keisha Davis. Ms. Davis testified that: (1) she was standing with the victim when Appellant and a second actor approached and demanded the victim's gold chain and cross; (2) she recognized the Appellant's voice; (3) she recognized the Appellant's face although it was partially covered by a surgical mask; (4) she recognized Appellant by virtue of his stature; and, (5) her recognition was firmly based on her face-to-face contacts and communication with him in the community where they both lived and attended the same high school. See *supra* at pp. 5-7, *Commonwealth v. Brown*, 23 A. 3d 544, 557-558 (Pa. Super. 2011) (no error in trial court's determination that the verdict was not against the weight of the evidence where victim's identification of defendant was reliable under the totality of the circumstances). See also *Commonwealth v. Baker*, 614 A.2d 663 (Pa. Super. 1992) (first-degree murder conviction supported by identification of defendant as participant and shooter in robbery).

Here it cannot be said that the trial court abused its discretion in denying Appellant's Motion For a New Trial based on his claim that the verdict was against the weight of the evidence. *Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000) (because the trial judge has had the opportunity to hear and see the evidence presented an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination whether a verdict is against the weight of the evidence).

This claim is without merit.

#### V.

Appellant claims that the validity of Pennsylvania statutes: 42 Pa. C.S.A. § 6355(a) (Transfer to Criminal Proceedings); 18 Pa. C.S.A. § 3121(c)(2) (Sentences); and, 61 Pa.C.S.A. § 6137(a) (Parole, General Criteria for Parole), have been called into question by the United States Supreme Court decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Florida statute that permitted imposition of life sentence without parole on juvenile for a non-homicide offense was unconstitutional as violative of Eighth Amendment).

The decision in *Graham v. Florida*, by its explicit terms and discussion, is limited to application of the United States Constitution Eighth Amendment's Cruel and Unusual Punishments Clause to prohibiting a juvenile to be sentenced to life without parole for a non-homicide crime. *Graham*, 130 S. Ct. 2021-2034.

Consequently this United States Supreme Court decision has no applicability herein. Appellant's claim is without merit.

#### VI.

Appellant attempts to raise issues as to: (1) the sufficiency of evidence; and, (2) sentencing, by incorporation of his post sentence motion in his Concise Statement of Matters Complained Of On Appeal (Concise Statement). These claims have been waived.

In his Concise Statement Appellant states that, "Defendant incorporates herein the matters raised in the Post Sentence Motion filed previously as set forth herein". Concise Statement of Matters Complained Of On Appeal Pursuant To Pa.R.A.P. 1925(b) at page 3. The Superior Court does not accept this practice and has stated, "we do not condone the Commonwealth's incorporation by reference of its Motion for Reconsideration. A Rule 1925(b) statement should include a Concise Statement of each issue to be raised on appeal". *Commonwealth v. Smith*, 955 A.2d 393, 395 (Pa. Super. 2008)

Given the manner in which Appellant has framed his sufficiency and sentencing issues the Pennsylvania Superior Court has commented, and consequently decided this present issue, as follows,

It has been held that when the trial court directs an appellant to file a concise statement of matters complained of on appeal, any issues that are not raised in such a statement will be waived for appellate review. Similarly, when issues are too vague for the trial court to identify and address, that is the functional equivalent of no concise statement at all. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Thus, Rule 1925 is a crucial component of the appellate process. When the trial court has to guess what issues an appellant is appealing, that is not enough for meaningful review.

*Smith*, 955 A.2d at 393 (citations and quotations omitted).

These issues have been waived.

#### CONCLUSION

For the aforementioned reasons, the designation of the imposed by the Trial Court should be affirmed.

BY THE COURT:  
/s/Borkowski, J.

Date: September 30, 2011

<sup>1</sup> 18 Pa.C.S. § 2501(a)

<sup>2</sup> 18 Pa.C.S. § 3701(a)(1) i, ii

<sup>3</sup> 18 Pa.C.S. § 6106

<sup>4</sup> 18 Pa.C.S. § 6110.1

<sup>5</sup> 18 Pa.C.S. § 903

<sup>6</sup> “TT” refers to the trial transcript of July 15-17, 2009

## Commonwealth of Pennsylvania v. Cameron Basking

*Commonwealth Appeal—Suppression—Defects in Search Warrant/Affidavit*

No. CC 201013467. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Mariani, J.—November 1, 2011.

### OPINION

This is a direct appeal wherein the Commonwealth of Pennsylvania appeals from the order granting suppression of evidence. The Commonwealth has certified that the Court’s order substantially handicapped the Commonwealth’s ability to proceed in this case. The issue asserted by the Commonwealth on appeal is whether this Court erred in concluding that a factual omission in the affidavit of probable cause that the person engaged in drug dealing was not the defendant was a material defect defeating a finding of probable cause, thereby resulting in the suppression of all evidence obtained as a result of the execution of the search warrant. Because the general and vague wording in the affidavit was such that a false inference could easily be drawn that the defendant was one of the persons engaged in drug transactions in an alley outside of the two-unit apartment building which contained what was believed to be his residence, the omission of the fact that he was not among those engaged in the alleged drug activity in the alley was significant. However, the order for suppression of the evidence was not limited to that reason. This Court’s ruling was based on the lack of probable cause in the affidavit attached to the application for the search warrant. The order granting suppression should be affirmed.

The “Application for Search Warrant and Authorization” presented to the issuing authority in this case set forth the following information under the pre-typed sub-heading of “SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED:”

1400 Marlboro Avenue (Rear) Pittsburgh PA 15221. This is a two-story, red brick, two-unit structure. There are numerous windows on the front side of the structure as well as two exterior doors. The house numbers are clearly displayed on the front as well. The rear apartment is accessed by a white exterior door with half moon glass. This door leads into a vestibule and to another (directly in front) door which is the specific apartment door.  
Cameron Baskin[sic] B/M DOB:09/23/1989

Also on the “Application For Search Warrant and Authorization,” under the heading, “NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED:” was the following information:

Owner: Darwin Coleman      Occupant: Cameron Baskin[sic] B/M 09/23/89

The “Affidavit Of Probable Cause” attached to the “Application For Search Warrant And Authorization” set forth the following information:

Your affiant is Detective Joseph Lewis is [sic] a member of the Pittsburgh Bureau of Police currently assigned as a detective in the Narcotics Unit.

Your affiant, Detective Lewis, has been a Pittsburgh Police Officer since January 2000. He has been assigned to the Narcotics Unit as a Detective since July 2004. Prior to being assigned to Narcotics, Detective Lewis worked in the Zone 2 Station where he worked as a uniformed patrolman and a plainclothes officer. Detective Lewis has made and/or participated in several hundred drug arrests, conducted surveillance, and has written several narcotics search warrants. Your affiant has been involved in undercover purchases of illegal narcotics with your affiant purchasing drugs hand to hand from drug dealers. In addition to standard state mandated police training, your affiant has received additional training in narcotics including Top Gun Undercover Narcotics Investigation Course as well as several other courses relating to narcotics investigations. Your affiant has worked jointly in narcotics investigations with other agencies and was assigned as a Task Force Officer at the ATF office for four and a half years.

Recently, your affiant was contacted by an informant who had provided information in the past which lead[sic] to an arrest and seizure of narcotics. This confidential informant (CI) provided new information that a black male named “CC” was selling illegal narcotics from two separate locations, and has in fact purchased heroin from “CC” from these locations on several occasions. The one location was in the Northside of Pittsburgh, namely the Perrysville Avenue area. The other location was in the alley behind the 1400 block of Marlboro Avenue Wilksburg, PA 15221. This CI knows what illegal narcotics are because she/he has purchased, possessed and used the substances on numerous occasions. The CI stated that when she/he calls “CC” she/he is provided which location to meet with “CC” for the purpose of purchasing illegal narcotics.

In the last 48 hours, your affiant meet [sic] with CI and a phone call was placed to (412) 294-3939. This is the phone number that CI has used to communicate with "CC" in the past. "CC" stated to CI to come to the Wilksburg location (Alley behind 1400 block of Marlboro Street[sic]). After receiving this information, your affiant met with Narcotics Detectives to formulate plans to conduct a controlled purchase of illegal narcotics. Detectives went to the area to perform surveillance of the location and the surrounding area.

Your affiant formulate[sic] a plan were[sic] Detective Lewis was to drive an undercover vehicle with the CI riding as a passenger in the vehicle. The CI was searched for money, contraband and any forms of paraphernalia prior to leaving for the location. Your affiant and CI drove to the location. While in route to the location, surveillance Detectives observed a dark colored Lincoln arrive at the location and parked[sic]. This vehicle was occupied by two black males and they exited the vehicle and entered the rear door of 1400 Marlboro Avenue. Approximately two minutes later, surveillance Detectives observed two additional black males walk up to 1400 Marlboro Avenue and also entered the rear door.

Surveillance units observed one of the males, who they observed entering the rear of 1400 Marlboro Avenue, exit the same door and walk to the alley (Copley Way) behind this location. Detectives observed a silver vehicle, driven by a white female, drive down Copley Way and stop next to this male. The male approached the vehicle and a drug transaction was observed. A couple minutes later a green vehicle drove down Copley Way and this male performed a drug transaction with the white male driver of this vehicle. Another silver vehicle drove down Copley Way and this male performed a drug transaction with the white male driver.

As Detective Lewis and CI were a couple minute[sic] from arriving at the location, surveillance Detectives observed this same male exit from the rear of 1400 Marlboro Avenue and walk to Copley Way. He crossed over Blenheim Street and he stood on the side of the road on Copley Way. Detective Lewis and CI arrived at the location where this black male approached their vehicle. This male held his hand out and Detective Lewis handed him a quantity of US currency and this male handed Detective Lewis illegal narcotics. Detective Lewis and the CI left the location and traveled to a predetermined location where the CI was debriefed and released.

After the transaction was completed with Detective Lewis, surveillance Detectives observed said black male walk directly to 1400 Marlboro Avenue and again enter the same rear door.

Detective researched the address, vehicle information and persons associated with said sources. Detectives identified several individuals and retrieved photographs of these individuals and they were shown to CI. CI was able to identify Cameron Baskin[sic] (DOB 09/23/1989) as the person he knows to be "CC".

Based on the above information, your affiant respectfully requests a search warrant for 1400 Marlboro Avenue (rear entering apartment) Wilksburg, PA 15221 and the person of Cameron Baskin[sic] (DOB 09/23/1989).

Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution each require that search warrants be supported by probable cause. *Commonwealth v. Jones*, 988 A.2d 644, 655 (Pa. 2010). "The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause." *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 899 (Pa.1991) (quoting *Commonwealth v. Miller*, 513 Pa. 118, 518 A.2d 1187, 1191 (Pa. 1986)). "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Commonwealth v. Thomas*, 448 Pa. 42, 292 A.2d 352, 357 (Pa. 1972).

"Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search". *Commonwealth v. Davis*, 466 Pa. 102, 351 A.2d 643 (1976). The standard for determining whether the requisite level of probable cause exists for the issuance of a search warrant is the "totality of circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). See *Commonwealth v. Gray*, 509 Pa. 476, 484, 503 A.2d 921 (1985). Specifically,

A magistrate is to make a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and basis of knowledge' of person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Commonwealth v. Jones*, 542 Pa. 418, 668 A.2d 114, 117, (1995) citing *Gray*, 503 A.2d 925, quoting *Gates*, 462 U.S. at 238-39.

Rule 205 of the Pennsylvania Rules of Criminal Procedure, entitled, "Contents of Search Warrant," provides, in pertinent part:

Each search warrant shall be signed by the issuing authority and shall:

- (1) specify the date and time of issuance;
- (2) identify specifically the property to be seized;
- (3) name or describe with particularity the person or place to be searched;

\*\*\*\*

(7) certify that the issuing authority has found probable cause based upon the facts sworn to or affirmed before the issuing authority **by written affidavit(s) attached to the warrant;**

\*\*\*\*

(emphasis supplied).

Rule 206 of the Pennsylvania Rules of Criminal Procedure entitled, "Contents of Application for Search Warrant," provides, in pertinent part:

Each application for a search warrant shall be supported by written affidavit(s) signed and sworn to or affirmed before an issuing authority, **which affidavit(s) shall:**

- (1) state the name and department, agency, or address of the affiant;
  - (2) identify specifically the items or property to be searched for and seized;
  - (3) **name or describe with particularity the person or place to be searched;**
  - (4) **identify the owner, occupant, or possessor of the place to be searched;**
  - (5) specify or describe the crime which has been or is being committed;
  - (6) set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe that the items or property identified are evidence or the fruit of a crime, or are contraband, or are or are expected to be otherwise unlawfully possessed or subject to seizure, **and that these items or property are or are expected to be located on the particular person or at the particular place described;**
- (emphasis supplied)

The information contained in an affidavit must be viewed "in a common sense, non-technical manner and deference must be accorded to the issuing magistrate". *Jones*, 668 A.2d at 117. The magistrate's finding of probable cause must be limited to the four corners of the affidavit. *Commonwealth v. Stamps*, 493 Pa. 530, 427 A.2d 141, 141 (1981). "In determining whether a search warrant is supported by probable cause, **appellate review is confined to the four corners of the affidavit.**" *Commonwealth v. Galvin*, 603 Pa. 625, 985 A.2d 783 (2009) (citation omitted) (emphasis supplied).

There is no information in the affidavit of probable cause that specifically links the defendant to the rear apartment located at 1400 Marlboro Avenue. The rear apartment of 1400 Marlboro Avenue is not even mentioned in the affidavit of probable cause.<sup>1</sup> The only mention of the defendant by name is contained in the second to last paragraph of the affidavit in that the confidential informant was able to identify Cameron Baskin [sic] as being "C.C." after looking at a photograph of him. "C.C." was not specifically described as being any of the persons engaged in any surveilled drug activity. The identification of "C.C." was made only after detectives associated him with "said sources". The term, "said sources," is vague and, upon review of the affidavit, this Court was unable to determine what relationship, if any, the defendant had with the building located at 1400 Marlboro Avenue, let alone a specific apartment located within that building.<sup>2</sup>

Indeed, the only information that there are two apartments located at 1400 Marlboro Avenue comes from the application for the search warrant, not from within the affidavit of probable cause. Ironically, the information on the face of the application provides an additional basis why there was no probable cause to support the issuance of the warrant. The information on the face of the application indicates that 1400 Marlboro Avenue is comprised of two apartments and that the entrance door to the rear apartment is located inside the building, in a vestibule. The exterior door of the rear of the building leads into that vestibule. Therefore, the information in the affidavit of probable cause that several persons were observed to have entered the rear door only indicates that persons entered the vestibule. There is no indication that anyone entered either apartment. There is not even any indication that there was a lock on the exterior door of the building. To put it another way, while the information in the affidavit of probable cause may have arguably given a basis to search the vestibule of the rear portion of 1400 Marlboro Avenue, nothing in the affidavit of probable cause supports the issuance of a warrant that would allow for the entering through the rear exterior door of the apartment building and then entering the separate door to the rear apartment for the purpose of conducting a search and seizure.

The information set forth in the affidavit of probable cause, without reference to the information set forth on the application for the search warrant, makes no connection whatsoever between the rear apartment of 1400 Marlboro Avenue and the activity occurring in the alley behind 1400 Marlboro Avenue and/or the defendant. The affidavit of probable cause, therefore, does not "set forth specifically the facts and circumstances which form the basis for the affiant's conclusion...that [evidence and/or contraband] are or are expected to be located...at the particular place described," as required by Rule 206(6) of the Pennsylvania Rules of Criminal Procedure. Inasmuch as the determination of whether a search warrant is supported by probable cause is confined to the four corners of the affidavit, the affidavit fails to support the issuance of the warrant.

In *Commonwealth v. Ruey*, 586 Pa. 230, 892 A.2d 802 (2006), the Commonwealth conceded that a search warrant application for medical records of the defendant regarding treatment on a certain date was deficient because the affidavit of probable cause lacked any information concerning why the trooper who applied for the search warrant believed that the particular hospital identified on the application for the search warrant (University of Pittsburgh Medical Center) had conducted a BAC test on the defendant or even that the defendant had been transferred to that particular hospital for treatment. The application for the warrant did identify the specific hospital under the heading "Specific Description of Premises and/or Person to be Searched." The Affidavit of Probable Cause attached to the application did not indicate any connection between the hospital and the events described in the affidavit. After obtaining the medical records pursuant to the admittedly defective warrant application, the Commonwealth submitted a second application for search warrant. The affidavit of probable cause attached to the second application contained the facts missing from the first affidavit. The Commonwealth obtained the same medical records pursuant to the second search warrant.

Madame Justice Newman wrote the opinion announcing the judgment of the Court in which Justice Baer joined. In her opinion, Justice Newman found that the magisterial district judge who authorized the first search warrant "could reasonably have inferred the specific place to be searched and items to be seized from the face of the application of the original warrant identifying the particular hospital as the place to be searched and which records were to be seized." Justice Newman concluded that suppression of evidence was, therefore, not warranted in that case.

Justice (now Chief Justice) Castille filed a concurring opinion which was joined by Justice Saylor and Justice Eakin. Justice Saylor filed a concurring opinion that was joined by Justice Castille. Justice Saylor wrote that:

The Fourth Amendment requires that the government establish a nexus among the four factors of time, crime, objects, and place (citation omitted). In the present case, the Commonwealth acknowledges as a 'glaring flaw' in the first affidavit of probable cause the affiant officer's failure to attest that appellant was ever transported to, or treated at, the University of Pittsburgh Medical Center; thus, facially omitting the essential connection to place (footnote omitted).

In a footnote in his concurring opinion, Justice Castille (joined by Justice Eakin) indicated:

I am persuaded by Justice Saylor's view; it appears that there was 'a missing link' in the affidavit on this point.<sup>3</sup>

Justice Saylor, Justice Castille and Justice Eakin concurred in the judgment in *Ruey*, but only because the medical records were obtained pursuant to the issuance of the second search warrant. Justice Nigro did not participate in the decision of the case and Justice Cappy filed a dissenting opinion. Accordingly, the opinion announcing the judgment of the Court authored by Justice Newman in *Ruey* carries no precedential value. The Pennsylvania Supreme Court's decision in *Calvin*, in which the Court again indicated that appellate review of a search warrant for probable cause is **confined to the four corners of the affidavit**, was a unanimous decision issued three and a half years after the decision in *Ruey*.

It is this Court's view that the requirement that probable cause be set forth within the four corners of the affidavit, which is still the law in Pennsylvania, as has been articulated by the Pennsylvania Supreme Court in the *Calvin* case in 2009, requires that probable cause exist within the four corners of the affidavit and not outside of it even if the information outside the affidavit is attached to it on the face sheet of the application.<sup>4</sup>

The door to what was believed to be the defendant's home was located on the inside of the vestibule, not the outside of the building. There was no information contained in the affidavit which identified the rear apartment of 1400 Marlboro Avenue as a place connected to the alleged illegal conduct occurring in the alley. The defendant was not one of the persons engaging in that conduct. There existed no probable cause within the four corners of the search warrant affidavit which could justify the search which occurred in this case.

Accordingly, the judgment should be affirmed.

BY THE COURT:

/s/Mariani, J.

Date: November 1, 2011

<sup>1</sup> The rear apartment of 1400 Marlboro Avenue is described in the **application** for the search warrant only.

<sup>2</sup> "Said sources" includes "vehicle information" without specifying the vehicle involved or whether the vehicle was registered to someone whose address was 1400 Marlboro Avenue.

<sup>3</sup> The "point" referred to by Justice Castille was whether the averments made to the magisterial district judge in the first affidavit where sufficient to establish a belief that evidence of a crime would likely be found at University of Pittsburgh Medical Center.

<sup>4</sup> With all due respect to former Justice Newman and Justice Baer, this Court believes that allowing the language in Rule 206(6) of the Pennsylvania Rules of Criminal Procedure to be expanded to include information set forth only on the application for the search warrant and not within the four corners of the affidavit(s) invites the blurring of clear lines set out in the Rules of Criminal Procedure and would discourage, rather than encourage, compliance with a rule of procedure which is designed to protect fundamental Constitutional rights.

## Commonwealth of Pennsylvania v. Erin Brooks

*Commonwealth Appeal—Waiver—Failure to File Timely Rule 1925 Statement*

No. CC 200905393. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Williams, J.—September 26, 2011.

### OPINION

This opinion addresses a rather unique circumstance: what happens when the government misses the court ordered deadline to file a *Concise Statement of Errors Complained of on Appeal*?

First, let's set the stage. On May 26, 2011, this Court granted the defendant's Motion to Suppress and excluded from the government's case-in-chief all evidence obtained after Mr. Brooks was patted down.<sup>1</sup> On June 23, 2011, the government filed a timely *Notice of Appeal*.<sup>2</sup> Six days later, the Court issued an order directing the government to file its *Concise Statement* no later than July 20, 2011. July 20th passed without any filing from the government. Twenty-three (23) days later, on August 12, 2011, the government filed two documents: *Petition for Permission to File Concise Statement of Errors Complained of on Appeal Nunc Pro Tunc*; and, *Concise Statement of Errors Complained of on Appeal*.<sup>3</sup> The *Nunc Pro Tunc Petition* sets forth the following excuse:

5. For reasons not yet to be determined, the Court's order was not directed to the attention of your petitioner pursuant to District Attorney's Office policy and procedures as related to the Appellate Unit.

6. Ordinarily, once a Commonwealth appeal has been filed, any correspondence or order of court related to the case is immediately logged into the Appellate unit's computerized data base, marked with the initials of the attorney assigned to the case in the upper left hand corner of the document, and placed in that attorney's mail box.

7. On August 11, 2011, your petitioner received a telephone call from the Court's staff asking about the status of the instant case. It was only upon reviewing the file in response that to [sic] inquiry that your petitioner discovered the Court's order had been received by the District Attorney's Office and placed in the file. Notably, the order did not have the notations and initials of any attorney in the upper left hand corner.

*Nunc Pro Tunc Petition*, paragraphs 5-7 (August 12, 2011).

On August 18, 2011, this Court issued an order requesting written argument from both parties "regarding the government's failure to comply with the Court's 1925(b) order." Order, (August 18, 2011). The order also made some observations.

"The Court is aware of *Commonwealth v. Grohowski*, 980 A.2d 113 (Pa. Super. 2009) ("Therefore, we hold that the rule enunciated in *Burton*, permitting the late filing of a 1925(b) statement applies to the Commonwealth as well as to the represented criminal defendant."), but is troubled by the majority opinion not even mentioning, let alone not addressing, our

Supreme Court decisions of *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998) and *Commonwealth v. Castillo*, 888 A.2d 775 (Pa. 2005) (“[W]e reverse the Superior Court and re-affirm the bright-line rule first set forth in *Lord* that ‘in order to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925.’”). This failure to acknowledge defect is noticed by Judge Klein’s dissent. *Grohowski*, 980 A.2d at 116. More recently, our Supreme Court reviewed this area of the law in *Commonwealth v. Hill*, 16 A.3d 484 (Pa. 2011). This Court is also aware of changes to Pa.R.A.P.1925(b) in the past few years. The Court desires discussion from counsel on the topics identified.”

Order, (August 18, 2011). Both lawyers complied by submitting written argument.<sup>4</sup>

The government’s position follows<sup>5</sup>. It recognizes the bright line rule from *Lord* and *Castillo* but it says the Supreme Court “modified that rule...when it adopted the amended Rule 1925...on May 10, 2007.” Government Memo, pg. 1 (September 2, 2011). The amendment, according to the government, gave trial court judges the power to decide when failure to comply with its orders directing the filing of concise statements waives issues for appeal.” *Id.*, at 3. As for the *Grohowski* decision, the government disavows any application. “Notably, *Commonwealth v. Grohowski*, 980 A.2d 113 (Pa. Super. 2009), has no application to the instant case as the parties there filed their concise statements late without leave of court...” *Id.*, at 3. “While the majority in *Grohowski* found that provision should be read to apply to any ‘appellant’, not just criminal defendants,...the Commonwealth here makes no claim for relief under that provision. Rather, it is subsection (b)(2) of the Rule that the Commonwealth asserts provides this Honorable Court with the authority to grant the Commonwealth the” relief it is seeking. *Id.* The government’s final argument is that its failure is not jurisdictional and can be extended for good cause shown. In support, it references Pa.R.A.P. 1925(b)(2) and Pa.R.A.P. 902(a).<sup>6</sup>

Mr. Brooks’ global argument is that the rules are the rules and everybody should play by the same set.<sup>7</sup> In particular, he advocates for the brightness of *Lord* and *Castillo* to shine upon these facts and declare the government’s suppression issue to have been waived. Brooks Memo, pg. 2 (September 6, 2011). Brooks’ rebuttal highlights the government’s reliance upon facts outside of the record as satisfying the extraordinary circumstances envisioned by Rule 1925(b)(2). Brooks Reply Memo, pgs. 1, 2 (September 9, 2011).<sup>8</sup>

For the reasons set forth below, the Court finds the defense arguments to have a greater level of persuasion.

The government provides a 3 paragraph excuse for not complying with the Court’s due date. The excuse is heavily dependent upon the internal workings of the District Attorney’s Office of Allegheny County. Obviously, these assertions appear nowhere in the record as of June 23rd when the NOA was filed. The question then becomes: does a trial court have the power to receive such assertions after its jurisdiction has been divested by the filing of an appeal? The last sentence of Rule 1925(b)(2) provides the answer. It states : “[i]n extraordinary circumstances, the judge may allow for the filing of a Statement ... nunc pro tunc.” Pa.R.A.P. 1925(b)(2). The plain and ordinary import of this provision is that a trial court may allow for a tardy filing when extraordinary circumstances have been presented.

The Rules of Criminal Procedure provide no definition of “extraordinary circumstances” and case law is equally unhelpful.<sup>9</sup> But this Court does not tackle the issue of whether “extraordinary circumstances” have been presented. Why? Because to do so would be akin to talking about “the cart, before the horse”.

There is no “Petition” practice in criminal court. At least our Rules of Criminal Procedure do not recognize it. Our Civil Rules of Procedure speak on the topic. Rule 206.1 allows for “petitions” in specified situations and requires the “material facts” to be set forth. Pa.R.C.P. 206.1(b). The *Comment* to the rule states that facts that do not appear of record must be verified. Our Criminal Rules have a similar provision under Part F titled, MOTION PROCEDURES. Pa.R.Crim.P. 575(A)(2)(g) provides that “[i]f a motion sets forth facts that do not already appear of record in the case, the motion shall be verified by the sworn affidavit of some person having knowledge of the facts or by the unsworn written statement of such a person...”. To the extent the government’s pleading is mislabeled (Petition as opposed to Motion), the Court find Rule 575(A)(2)(g) to have application in this situation.

The government’s request for nunc pro tunc relief is in direct violation of Rule 575(A)(2)(g). As mentioned previously, the excuse facts consume three paragraphs. The government’s motion, however, does not contain a sworn affidavit or an unsworn statement. Neither of which is a demanding requirement. *Commonwealth v. Johnson*, 931 A.2d 781,784 (Pa. Comwlth. 2007) (“At a minimum, our rules and case law mandate *Johnson* properly allege, *under oath*, lawful possession of the currency. Pa.R.Crim.P. 575(A)(2)(g).”) (emphasis in original). The cold, hard record shows no collection of facts upon which this Court can conclude the government has satisfied its obligation to show extraordinary circumstances. Therefore, the Court finds the “extraordinary circumstances” contemplated by Pa.R.A.P. 1925(b) has not been met from a legal standpoint based upon the paucity of facts.

Of equal influence to this Court are discussions on this topic from our state Supreme Court. In *Berg v. Nationwide Mutual Insurance Co.*, 6 A.3d 1002,1003 (Pa. 2010), the Court tackled the issue of “whether an appellant’s failure to personally serve on a trial judge a court-ordered statement of errors complained of on appeal, in accordance with Pa.R.A.P. 1925, results in waiver of all issues, where the court’s order itself does not comply with Rule 1925.” In concluding

“that the specific facts of this case compel a departure from the strict application of waiver contemplated by Rule 1925(b), we note that the case sub judice illustrates the importance of the trial court’s adherence to the requirements set forth in Pa.R.A.P. 1925(b)(3). Although the amendments to Rule 1925(b) were intended, in part, to address the concerns of the bar raised by cases in which courts found waiver because a Rule 1925(b) statement was either too vague or so repetitive or voluminous that it did not enable the judge to focus on the issues likely to be raised on appeal, see Pa.R.A.P. 1925 Comment, **compliance by all participants**, including the trial court, is required if the amendments and the rule are to serve their purpose.

*Id.*, at 1012 (emphasis added). In addition to the “compliance by all command”, there is another aspect of *Berg* which deserves some attention. The operative facts about serving the trial judge were not, in the eyes of the lead opinion, an issue because “[a]ll of Appellants’ assertions regarding what occurred at the prothonotary’s office on January 17, 2008 were contained, and sworn and attested to under penalty of perjury, in Appellants’ Petition to Modify the Record,...”. *Id.*, at 344.<sup>10</sup>

Acceptance of the underlying facts by the lead opinion in *Berg* is where this case differs. Here, there are no facts of record to justify the extraordinary relief the government is seeking. While Lady Justice wears blindfolds, if she were to peek at the record here, she would see no facts justifying a tardy filing, just a tardy filing. As such, this Court finds Justice Bear’s dissent to be quite persuasive. Justice Bear reviewed the history of Rule 1925(b), its recent amendments, the bright-line rule of *Lord*, *Butler*, *Castillo*, and *Schofield*, and some case law that appears to soften the bright-line rule. After this cogent discussion, he concluded

“that, despite the revisions recently made to Rule 1925, the bright-line waiver rule of *Lord* and its progeny remains valid and binding upon all litigants, without exception. [ ] To guarantee the proper and uniform administration of justice throughout the Commonwealth, litigants should follow Rule 1925 to its letter, or be faced with waiver...”.

*Id.*, at 1020.

In conclusion, the Court finds the rules of appellate and criminal procedure apply with equal force and vigor to both parties. The government has disregarded an order and a rule of procedure and these two wrongs do not equal a right. The government has waived any and all issues it intended to raise on appeal to our Superior Court.

All matters that needed resolution have been resolved. The Department of Court Records shall complete the process of preparing the certified record and forwarding it to the Prothonotary of the Superior Court.

BY THE COURT:  
/s/Williams, III, J.

<sup>1</sup> The order was accompanied by an 8 page opinion making factual findings and conclusions of law pursuant to Pa.R.Crim.P. 581(I).

<sup>2</sup> The government’s NOA contained a certification that the order effectively terminated the prosecution and referenced *Commonwealth v. Dugger*, 486 A.2d 382 (Pa. 1985).

<sup>3</sup> Given the facts of the matter and the Court’s conclusion, the government’s assertion of error is straightforward : Whether the trial court erred in suppressing tall evidence obtained following the officer’s stopping of appellee’s vehicle due to the fact that the officer conducted a Terry frisk of appellant’s person, which was not supported by reasonable suspicion that appellee had a weapon?

<sup>4</sup> Mr. Brooks availed himself of the rebuttal opportunity this Court anticipated by filing a Reply Brief on September 9, 2011.

<sup>5</sup> The Court appreciates the government distinguishing *Commonwealth v. Hill*, 16 A.2d 484 (Pa. 2011) and agrees with its non-application to the present facts. It was only referenced as our Supreme Court’s latest discussion on this topic in a general sense.

<sup>6</sup> The Court disagrees with the government on the applicable standard. The “extraordinary circumstances” applies to nunc pro tunc filings such as the present matter. The government’s reference to a lower burden of ‘good cause shown’ applies to requests to supplement or amend an already filed Concise Statement. Pa.R.Crim.P. 1925(b)(2).

<sup>7</sup> Brooks’ secondary source in support is two-fold : the book, *All I Really Need to Know I Learned In Kindergarten* written by Robert Fulghum and first published in 1988; and his unnamed kindergarten teacher from St. Elizabeth Grade School. The Court confesses to not having read the book, but has memories that match those of Brooks’ counsel from his early days of education in the City of Pittsburgh public schools.

<sup>8</sup> Brooks’ argument against these outside of the record facts is significant based upon the comments found in the various opinions issued in *Berg v. Nationwide*, *supra*.

<sup>9</sup> In the usual case, a party seeks permission to file something after the deadline has passed. That party must show more than “mere hardship”. *Nagy v. Best Home Services*, 829 A.2d 1166,1167-1168 (Pa. Super. 2003). It must show that the delay in filing was caused by “extraordinary circumstances”. *Commonwealth v. Stock*, 679 A.2d 760,763-64 (Pa. 1996). These “extraordinary circumstances” were limited, at one time, to situations that arose as a result of “fraud or a breakdown in the court’s operations”. *West Penn Power Co. v. Goddard*, 333 A.2d 909,912 (Pa. 1975). Our Supreme Court in *Bass v. Commonwealth Bureau of Corrections, et al.*, 401 A.2d 1133,1135 (Pa. 1979) expanded the limited set of circumstances that would allow a tardy filing to include where “an appellant, an appellant’s counsel, or an agent of appellant’s counsel had failed to file a notice of appeal on time due to non-negligent circumstances.” These “non-negligent circumstances” is meant to apply only in “unique and compelling cases in which appellant has clearly established that she attempted to file... but unforeseeable and unavoidable events precluded her from actually doing so.” *Criss v. Wise*, 781 A.2d 1156,1160 (Pa. 2001).

The Court recognizes the limitations of this case law to our situation. All deal with the jurisdiction piercing act of filing a notice of appeal.

<sup>10</sup> The Court is aware of Justice Castille’s concurring opinion regarding the “facts”.

“I also have some concern regarding whether the essential facts underlying the issue of service are properly of record, given that the trial court denied appellants’ Petition to Modify the Record, which would have provided record support for counsel’s current averments. Appellants challenged that denial in the Superior Court, the Superior Court did not engage the issue, and appellants did not renew that issue in seeking review here, making the trial court’s decision on the Petition to Modify presumptively final. Technically, then, counsel’s averments are ‘non-record.’ However, I recognize the practical difficulties in creating a Rule 1925 ‘record’ where the finding of waiver necessarily occurs after the appeal has been taken. In addition, a review of the trial court’s decision on this issue satisfies me that its denial did not involve a determination that the facts concerning counsel’s interactions with the trial court prothonotary, which were attested to by an officer of the court, were untrue; the court, rather, deemed them essentially irrelevant to its basis for finding waiver. Again, this is a peculiar case, and I am satisfied to follow the Court in assuming the accuracy of the ‘non-record’ averments concerning post-appeal circumstances, for purposes of deciding this appeal.”

*Berg*, 6 A.3d at 1013. Justice Saylor takes a contrary view.

“I depart from the lead’s acceptance of Appellants’ factual averments contained in their Petition to Modify the Record, see, e.g., Opinion Announcing the Judgment of the Court, slip op. at 3-4 & n.5, particularly as it appears that at least some of these representations are inconsistent with the trial judge’s understanding. Accordingly, to the degree it is necessary to address the facts, I would remand the case for a hearing to develop a factual record and appropriate findings.”

*Berg*, 6 A.3d at 1014. It is worth nothing that dissenting Justice Bear agrees with the lead opinion on this factual issue. “I also join the OAJC in crediting the account of the events that occurred in the Berks County Prothonotary’s Office January 17, 2008.” 6 A.3d at 1017.

**Commonwealth of Pennsylvania v.  
Andrew G. Ashby**

*Criminal Appeal—Sentencing (Discretionary Aspects)—Waiver—Mandatory Sentence—Taint of Juror—Joinder of Trials*

No. CC 201000918, 201004697. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Rangos, J.—November 9, 2011.

**OPINION**

On December 21, 2010, Appellant, Andrew G. Ashby, was convicted by a jury of his peers of two counts of Robbery—Serious Bodily Injury and two counts of Criminal Conspiracy. Appellant was sentenced to the mandatory five to ten years of incarceration on the first robbery count and a mitigated range sentence of three to six years incarceration on the second robbery count consecutive. Appellant was sentenced to probation consecutive to his incarceration, with terms of three years for each count, to be served consecutively. Post sentence motions were denied on July 26, 2011 and Appellant filed a Notice of Appeal on August 9, 2011. Appellant filed a Statement of Errors Complained of on Appeal on August 23, 2011.

**MATTERS COMPLAINED OF ON APPEAL**

Appellant raises the following ten issues on appeal:

The trial court erred in denying Appellant’s Post Sentencing Motions since Appellant’s aggregate sentence of 8-16 years imprisonment was manifestly excessive due to the imposition of consecutive sentences, and the trial court failed to state adequate reasons on the record for the instant sentences.

The trial court erred in denying Appellant’s Post Sentencing Motions since the trial court abused its discretion in imposing a mandatory minimum sentence of 5 years at 4697-2010 since the Commonwealth did not establish, by a preponderance of evidence, that Appellant visibly possessed a firearm.

The trial court erred in denying Appellant’s Post Sentencing Motions since the trial court erred in failing to determine if the jury had been tainted after the jurors notified the trial court, during deliberations, that a person, who was not a juror, had influenced jury members regarding the instant trial. Furthermore, trial counsel Jose Hernandez-Cuebas was ineffective for failing to demand inquiry.

The trial court erred in denying Appellant’s Post Sentencing Motions since the evidence was insufficient to convict Appellant of the North Side robbery and the Mt. Lebanon robbery.

The trial court erred in denying Appellant’s Post Sentence Motions since Appellant’s convictions of the North Side robbery and the Mt. Lebanon robbery were against the weight of the evidence.

The trial court erred in denying Appellant’s Post Sentence Motions since Appellant is entitled to time credit from 1/4/10, the date he was arrested, to 1/21/11, the date he made bond, at 918-2010, and from 3/4/10, the date of arrest, to 1/21/11, at 4697-2010.

The trial court erred in denying Appellant’s Post sentence Motions since the trial court erred in permitting joinder of the two robbery cases, and trial counsel was ineffective for failing to object to the joinder of the two robbery cases.

The trial court erred in denying Appellant’s Post Sentence Motions since trial counsel was ineffective for presenting virtually no defense, and for coercing Appellant not to testify at his jury trial.

The trial court erred in denying Appellant’s Post Sentencing Motions since trial counsel was ineffective for failing to communicate a plea offer.

The trial court erred in denying Appellant’s Post Sentencing Motions since trial counsel was ineffective for failing to notify Appellant of the Sentences he was facing if convicted of either robbery.

Statement of Errors to be Raised on Appeal, p. 3.

**HISTORY OF THE CASE**

The charges against Appellant stem from two separate incidents. The first incident occurred on December 21, 2009, between 6:00 and 6:30 p.m. (TT 43) Justin Schvabenitz testified that he was exiting a convenience store and returning to his car, a Chevy Suburban. (TT 44) He observed a dark blue or black Chevy Colorado<sup>1</sup> with an extended crew cab and dark-tinted windows parked perpendicular behind his car. (TT 45-46) He went to unlock his car and heard an unknown individual whisper to him to turn around. (TT 45) Schvabenitz turned and looked into the open window of the truck behind him, where he observed a man in the front passenger seat pointing a gun at him. *Ibid.* The gunman demanded his wallet and money. *Ibid.* Schvabenitz gave him the money. *Ibid.*

The driver of the vehicle exited, grabbed Schvabenitz’s wallet, and threw it into the parking lot. *Ibid.* The passenger then demanded his telephone and keys. (TT 50) Schvabenitz gave the telephone to the passenger and the keys to the driver. *Ibid.* The driver also threw the keys into the parking lot. The two assailants ordered him to the ground and told him to keep his head down or they would shoot him. (TT 51) They then retrieved his wallet and keys and drove away, exiting the parking lot at a high rate of speed. *Ibid.* Schvabenitz identified Appellant in court as the passenger of the vehicle. (TT 52-53) In addition, Detective Michael Benner testified that Schvabenitz identified Appellant from a photo array presented to him on January 13, 2010. (TT 98<sup>2</sup>)

The second incident also occurred on December 21, 2009. (TT 118) Daniel Winschel testified that he was walking out of a friend’s apartment, carrying a guitar and an amplifier. (TT 120) A black pickup truck approached and stopped directly behind him. *Ibid.* The driver of the truck told Winschel to give him the keys to his vehicle. (TT 121) Winschel became nervous and fumbled his keys for approximately ten seconds, while the driver repeatedly told him to give him the keys. (TT 122) Winschel eventually freed the keys from his belt loop as the driver was stepping out of the truck. (TT 123) Winschel gave the keys to the driver of the truck. The driver also demanded Winschel’s cell phone, which Winschel gave to him. (TT 124)

Winschel testified that he saw a gun sticking out of the sleeve of the passenger’s hoodie. (TT 125) The passenger demanded Winschel’s wallet, and Winschel complied. (TT 126) The driver put Winschel up against his car and rooted through his pockets. *Ibid.* The driver took the guitar and amplifier and drove off in what looked like a black Chevy Avalanche. (TT 128-129) Winschel saw the license plate and said that the number was YVV-5741, although he said he was not sure of the last two numbers. (TT 129,

131) Winschel identified Appellant in court as the driver. (TT 124)

Officer James Skalican, of the South Park Township Police Department, testified that, shortly after Winschel reported being robbed, he observed a dark blue, almost black, GMC Canyon truck with darkly tinted windows and bearing a license plate of YVV-5740. (TT 169-171) The officer observed part of a handgun protruding from the back seat of the vehicle. (TT 171) He ran the license plate number through County Dispatch and discovered the vehicle was registered to Appellant. *Ibid.*

#### DISCUSSION

This Court declines to address the issues raised by Appellant relating to ineffective assistance of counsel as they are more appropriate to be raised in a petition for collateral relief. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002); *Commonwealth v. Barnett*, 25 A.3d 3716 (Pa.Super. 2011).

Appellant alleges error in permitting joinder of the two robbery cases.<sup>3</sup> Joinder is governed by Rule 582 of the Pennsylvania Rules of Criminal Procedure, which states:

Offenses charged in separate indictments or informations may be tried together if...the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or...the offenses charged are based on the same act or transaction.

Pa.R.Crim.Pro. 582.

While evidence of a prior bad act is not admissible to show bad character or a propensity to commit a criminal act, see Pa.R.E. 404, this general proscription is subject to numerous exceptions if the evidence is relevant for some legitimate evidentiary reason and not merely to prejudice the defendant. *Commonwealth v. Billa*, 555 A.2d 835, 838 (Pa. 1989). Exceptions that have been recognized as legitimate bases for admitting evidence of a defendant's distinct crimes include, but are not limited to: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design such that proof of one crime naturally tends to prove the others; (5) to establish the identity of the accused where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other; (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "res gestae" exception). *Ibid.* citing Pa.R.E. 404(b); *See also Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988). This list is by no means exhaustive. *See Commonwealth v. Watkins*, 843 A.2d 1203, 1215 n. 1 (Pa. 2003). Additional exceptions are recognized when the probative value of the evidence outweighs the potential prejudice to the trier of fact. *Commonwealth v. Claypool*, 495 A.2d 176 (Pa. 1985) For example, an additional exception, explaining a delay in reporting a crime, was recognized in *Commonwealth v. Dillon*, 925 A.2d 131, 139 (Pa. 2007). As this non-exhaustive list of exceptions illustrates, evidence of prior crimes or acts may be admitted for any legitimate purpose, so long as the evidence is not offered "merely to prejudice the defendant by showing [her] to be a person of bad character." *Commonwealth v. Horvath*, 781 A.2d 1243, 1245 (Pa.Super. 2001)

Evidence regarding these crimes had several legitimate purposes under which each could be admitted in a trial for the other, including evidence of a common scheme, plan or design. Evidence of a common scheme, plan, or design involving various similarly situated complaints is relevant to bolster the credibility of those complaints. *Commonwealth v. Hacker*, 959 A.2d 380, 381 (Pa.Super. 2008). The two crimes had a similar plan or design: *i.e.*, on the night in question, to locate and approach a driver who was alone at his car, from the rear, and at gunpoint demand money, keys and other valuables, and to make a get-a-way in a dark blue or black pickup truck. Identification in one count tended to establish identification in the other. Since the evidence is admissible and jury confusion is highly unlikely, joinder was appropriate.

Appellant alleges that the evidence was insufficient to convict as to all counts of the information. The vagueness of this statement makes it difficult for this Court to address this issue.

When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.

In other words, a Concise Statement which is too vague to allow the court to identify the issue raised on appeal is the functional equivalent of no Concise Statement at all.

*Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa.Super. 2001). Even if this Court could correctly guess the issues being raised by Appellant, the vagueness of Appellant's Concise Statement renders the issues waived. *Commonwealth v. Heggins*, 809 A.2d 908, 912 (Pa.Super. 2002).

Appellant's next issue, that the verdict was against the weight of the evidence, is also without merit. The standard for a "weight of the evidence" claim is as follows:

Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and [her] decision will not be reversed on appeal unless there has been an abuse of discretion.... The test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail.

*Commonwealth v. Taylor*, 471 A.2d 1228, 1230 (Pa.Super. 1984). *See also, Commonwealth v. Marks*, 704 A.2d 1095, 1098 (Pa.Super. 1997) (citing *Commonwealth v. Simmons*, 662 A.2d 621, 630 (Pa. 1995)).

The evidence supported a finding that Appellant committed both robberies. The victims identified Appellant as their assailant both in and out of court. The license plate and description of the vehicle used in the commission of the offenses matched Appellant's vehicle. Based on the evidence presented at trial, the verdict does not so shock the conscience as to necessitate a new trial. As such, Appellant's claim is without merit.

Next, Appellant asserts that this Court erred in failing to determine if the jury had been tainted. During deliberations, the jury submitted several questions, all of which were fact-based questions. This Court responded by instructing the jury that the record was closed and that the Court could not supply additional information to them. (TT 285-286)

Two of the jury questions suggest that one or more of the jurors may have observed someone connected to the case outside of

the courtroom. Regarding those questions, the Court proposed the following instruction:

Court: To the extent that there are two questions which appear to suggest that one or more jurors may have observed somebody outside of the courtroom, either in the hallways or as they were coming or going to the jury room, or outside of the building while they were coming or going, somebody related to the case may have [behaved] in some way that they now have an impression of, I would instruct them that, no, they cannot consider anything that they learned or observed outside the courtroom in coming to their decision, that they must base their decision on the facts and evidence as it was presented here in the courtroom. (TT 286)

Next the Court inquired as to whether either counsel objected to the jury being so instructed. Both counsel indicated that they did not have an objection to this instruction. The Court then instructed the jury consistent with that proposed answer. (TT 288) Having not objected at trial, the issue is waived.

Appellant asserts that the sentence imposed by this Court was manifestly excessive, unreasonable, and an abuse of discretion. Appellant alleges that the Court erred in sentencing consecutively and in failing to state adequate reasons on the record for the instant sentences.

Before addressing the alleged sentencing errors, this Court notes that Appellant must first establish that a substantial question exists that the sentence imposed is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa.Super. 1995). The determination of whether a particular issue constitutes a “substantial question” can only be evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa.Super. 1988). It is appropriate to allow an appeal “where an appellant advances a colorable argument that the trial judge’s actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process.” *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa.Super. 1987).

Appellant has not established a substantial question for appellate review. The decision to sentence consecutively or concurrently rests within the discretion of the trial court. *Commonwealth v. Pass*, 914 A.2d 442, 446-7 (Pa.Super. 2006). A decision to enter a consecutive sentence is neither inconsistent with a specific provision of the sentencing code nor contrary to the fundamental norms which underlie the sentencing process.

Assuming, *arguendo*, that Appellant had raised a substantial question, the standard of review with respect to sentencing is whether the sentencing court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). A court will not have abused its discretion unless “the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Ibid*. It is not an abuse of discretion if the appellate court may have reached a different conclusion. *Grady v. Frito-Lay, Inc.*, 613 A.2d 1038, 1046 (Pa. 2003).

This Court considered numerous factors in sentencing Appellant, including the sentencing guidelines and the presentence report, as well as the testimony at the sentencing hearing. Regarding the pre-sentence report, the Pennsylvania Supreme Court has held:

Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors.... Having been informed by the pre-sentence report, the sentencing court’s discretion should not be disturbed.

*Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa.Super. 1988).

On the first Robbery count, this Court sentenced Appellant to a five to ten year sentence which was a mandatory sentence as he was convicted of visibly possessing a gun during the commission of a crime of violence. The testimony at trial supported that finding by a preponderance of evidence. (Sentencing Tr. 5) On the second Robbery count, this Court sentenced Appellant to a mitigated range sentence of three to six years consecutive. Upon consideration of the Pre-Sentence Report<sup>1</sup>, and the fact that Appellant was convicted of robberies involving separate victims, this Court sentenced Appellant consecutively. Since the Court on the record indicated it had considered the Pre-Sentence Report in sentencing Appellant, the requirement that the Court state its reasons for imposing sentence is met. *Commonwealth v. Brown*, 741 A.2d 726, 735 (Pa.Super. 1999). Regardless, considering the totality of the circumstances, the sentence was not excessive or unreasonable.

Lastly, Appellant challenges the computation of time credit for both cases. On January 4, 2010, Appellant was charged with robbery based on the incident with the victim Schavabenitz. Appellant made bond on January 15, 2010. Upon making bond, Appellant was released into the custody of Butler County Jail, where Appellant was serving an unrelated sentence. On March 4, 2010, Appellant was charged with robbery stemming from the incident involving the victim Winschel. Appellant did not make bond on this case but was nonetheless discharged from Allegheny County Jail to Butler County Jail on April 11, 2010 to serve the balance of his sentence in Butler County.

During the pendency of these cases, Appellant was then transported back and forth between the two facilities. This Court gave him time credit for the periods of time he spent in Allegheny County Jail in advance of his trial. Specifically, this Court granted credit on the Schavabenitz robbery case for the following dates: 1/4/10-1/15/10, 5/7/10-5-/17/10, 7/28/10-8/10/10 and 10/8/10-12/22/10. Likewise, this Court credited Appellant on the Winschel robbery for the periods of 3/4/10-4/11/10 and 10/8/10-12/22/10. These times reflect the period Appellant spent in Allegheny County jail awaiting his trial. Appellant is not entitled to time credit for any period spent in Butler County Jail serving an unrelated sentence. To grant time credit for either robbery while Appellant was serving an unrelated sentence would give Appellant an impermissible volume discount. *See Commonwealth ex rel. Bleecher v. Rundle*, 217 A.2d 772 (Pa.Super. 1966).

#### CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:  
/s/Rangos, J.

<sup>1</sup> The witness testified that he had become familiar with this type of vehicle as he was considering purchasing it at one time. He testified that it was substantially similar to the less-popular GMC Canyon. The only difference the witness noted between the two models was the company insignia on the front of the cars. (TT 46-47)

<sup>2</sup> The date in the trial court transcript appears to be in error, as it lists the date as 1/13/09, prior to the commission of the offense.

<sup>3</sup> This Court notes that the issue of joinder was argued before the Honorable Jeffrey Manning on December 16, 2010. At that time, Judge Manning gave the Commonwealth the option to try Appellant and his alleged co-conspirator together on one robbery or to try both of Appellant's robbery cases together without the co-conspirator. The Commonwealth choose the latter and the case was reassigned, following jury selection, to this Court. (TT 4, Transcript of December 10, 2010, J. Manning 49)

<sup>4</sup> As this Court noted during sentencing, the Pre-Sentence Report included a history of four Criminal Attempt Burglaries (F-1's), as well as several other crimes, including Carrying a Firearm Without a License. (Sentencing Tr. 9)

## Commonwealth of Pennsylvania v. Glen King

*Criminal Appeal—PCRA—Rule 600—Ineffective Assistance of Counsel—Alibi Witness—Photo Array*

No. CC 20021837. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
McDaniel, P.J.—September 15, 2011.

### OPINION

The Defendant has appealed from this Court's Order of February 28, 2011, which denied his Post Conviction Relief Act Petition following an evidentiary hearing. A review of the record reveals that the Defendant has failed to raise any meritorious issues and, therefore, this Court's Order must be affirmed.

The Defendant was charged with a single count of Robbery<sup>1</sup> in connection with an armed purse-snatching which occurred in the evening hours of October 3, 2002 on Larrimer Avenue in the City of Pittsburgh. Following a non-jury trial before the Honorable Cheryl Allen, the Defendant was adjudicated guilty and on November 1, 2004, Judge Allen sentenced him to the mandatory term of imprisonment of five (5) to ten (10) years. Timely Post-Sentence Motions were filed and denied by Judge Allen on April 6, 2005.

The Defendant appealed to the Superior Court, which affirmed the judgment of sentence on May 26, 2006. His subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on September 29, 2006.

No further action was taken until February 22, 2007, when the Defendant filed a pro se Post Conviction Relief Act Petition. Counsel was appointed and an Amended Petition followed on October 22, 2007.

On January 22, 2008, this Court<sup>2</sup> entered an Order dismissing the Defendant's Amended Petition without a hearing. His subsequent Motion for Reconsideration was also denied on August 19, 2008.

On October 10, 2008, the Defendant filed a second pro se PCRA Petition, in which he alleged that this Court's dismissal of his previous Petition was improper in that he was not given Notice of this Court's intent to dismiss it. In light of the Defendant's averment, this Court entered an order granting him collateral relief in the form of the vacation of its January 22, 2008 Order of Dismissal. The appropriate Notice of Intent to Dismiss was then given, and the Amended Petition was eventually dismissed on February 17, 2009.<sup>3</sup> A direct appeal was taken, and on July 6, 2010, the Superior Court vacated this Court's Order of February 17, 2009 and remanded the case to this Court for an evidentiary hearing on the first PCRA Petition. The mandated hearing was held on February 28, 2011, after which this Court concluded that there were no meritorious claims and dismissed the Defendant's PCRA Petition. This appeal followed.

On appeal, the Defendant raises a number of issues, all of which are couched in terms of the ineffective assistance of counsel. All are meritless.

It is well-established that in order "to be eligible for relief based on a claim of ineffective assistance of counsel, a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error." *Commonwealth v. Gibson*, 19 A.3d 512, 525-26 (Pa. 2011). "Counsel can never be found ineffective for having elected not to raise a meritless claim." *Commonwealth v. Williams*, 615 A.2d 716, 721 (Pa. 1992).

#### 1. Rule 600 Claim

The Defendant initially argues that both trial and appellate counsel were ineffective for failing to raise a Rule 600 speedy trial claim. As this Court noted in its previous opinion, because the Defendant was incarcerated before trial, the Commonwealth had 180 days from the filing of the charges within which to bring him to trial. Pa.R.Crim.Pro. 600(a)(2). Excluded from this time are delays caused by the defendant's or his counsel's unavailability or continuances requested by the defense.

In the instant case, the charges were filed on November 7, 2002, and trial commenced on October 8, 2004, 701 days later. The record reflects the following delays and continuances:

Beginning Date of Delay	End Date of Delay	Party Requesting Delay	Excludable Days
3/28/03	7/9/03	Defendant	103
4/3/03	7/31/03	Commonwealth	0
7/31/03	11/10/03	Defendant	102
11/7/03	1/14/04	Defendant	68
1/14/04	4/28/04	Defendant	105
4/28/04	8/18/04	Defendant	112
8/18/04	8/24/04	Court	0
8/24/04	10/8/04	Defendant	45
<b>TOTAL</b>			<b>535</b>

The record reflects that, for various reasons, the Defendant was responsible for a delay of 535 days. Therefore, by this Court's calculation, he was brought to trial within 166 days ( $701 - 535 = 166$ ), which is clearly within the 180 days permitted by Rule 600. This claim is meritless and, therefore, counsel was not ineffective for failing to raise it.

## 2. Cross Examination of Victim

The Defendant also asserts that trial counsel was ineffective in failing to conduct a thorough cross-examination of the victim, particularly in regard to his height, facial hair and skin color. He asserts that the physical description given by the victim did not match his physical characteristics, and counsel should have conducted cross-examination into these points.

At trial, the following occurred during the cross examination of the victim, Lilia Thompkins:

Q. (Mr. Roselli): Let's talk about the description you gave to police. You told police he was five foot six?

A. (Ms. Thompkins): Five six to five seven.

Q. How tall are you, ma'am?

A. I'm six foot.

Q. You're six foot?

A. I said he came right here to me, about right like this (indicating), and he had close-cropped hair. He had on a yellow shirt and black jeans.

Q. So obviously the person who committed this offense was much shorter than you?

A. Not much shorter than me, but shorter than me.

Q. Five to six inches?

A. Yeah.

Q. This is very important. We're talking about the fact that your description was that the person who committed this crime was clean-shaven?

A. Yes.

Q. You're sure of that?

A. Yes.

Q. Are you as sure of that as you are picking him out as a person who committed this crime?

A. Yes.

Q. You had an ample opportunity to view the perpetrator and he did not have facial hair?

A. He did not have it.

Q. You testified that the perpetrator, also, had light skin?

A. Brown skin.

Q. Brown skin?

A. Yeah. I wouldn't call him dark.

Q. Do you remember your description to police as being light skinned?

A. I don't know. It's been two years.

Q. If I show you a copy of the report, would that refresh your recollection?

A. Sure.

(Short pause.)

Q. So you remember telling the police he was a light-skinned male?

A. Uh-huh. Well, you know, light to me is maybe not what is light to you, but I wouldn't call him a dark-skinned man. He's about my complexion. I'm not dark skinned.

Q. Do you call yourself light-skinned?

A. Not dark.

Q. But not light?

A. Brown skin.

Q. At some point you're contacted by police to go observe a photo array?

A. Yes...

...Q. That's the photo array right there?

A. Yes.

Q. You would agree with me that everyone in this photo array has facial hair?

A. Uh-huh.

Q. And you would, also, agree with me that this photo array does not include bodies; just faces?

A. Uh-huh.

Q. It's impossible to make a determination as to how tall any one of these individuals are or how much they weigh?

A. Uh-huh, yes.

Q. You would, also, agree with me that's a black and white photo array?

A. Yes.

Q. The black and white photo – does the black and white photo hinder your ability to determine shades of darkness?

A. Or shades of color.

Q. Yeah.

A. Yeah.

Q. You would agree it's much more difficult to determine light skin versus dark skin through a black and white photo?

A. Yeah.

Q. Would you agree?

A. Yeah.

Q. Thank you.

(Trial Transcript, p. 45-48).

This Court's review of the record reveals that trial counsel *did* cross-examine the victim regarding her identification of the perpetrators height, skin color and facial hair. The Defendant's apparent dissatisfaction with the outcome of this cross-examination does not change the fact that Mr. Roselli did conduct cross-examination regarding the victim's identification of the perpetrator. In this Court's view, the cross-examination was adequate and covered all of the important points of the identification. Inasmuch as appropriate cross-examination was conducted, this claim is meritless.

### 3. Alibi Witness

The Defendant also argues that trial counsel was ineffective for failing to present the testimony of an alibi witness, and that appellate counsel was ineffective for failing to present this issue on appeal. Again, this claim is meritless.

Generally, "trial counsel will not be deemed ineffective for failing to call a witness to testify unless the PCRA Petition demonstrates: (1) the witness existed; (2) the witness was available; (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 was so prejudicial to petitioner to have denied him or her a fair trial." *Commonwealth v. Brown*, 18 A.3d 1147, 1160-61 (Pa.Super. 2011). "Ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." *Commonwealth v. O'Bidos*, 849 A.2d 243, 249 (Pa.Super. 2004).

The Defendant now asserts that a woman named Nicole Spratt would have provided an alibi through her testimony that she talked to the Defendant at 11:40 p.m. – the time of the robbery – when she returned from the hospital following a miscarriage. (E.H.T. p. 15). Ms. Spratt never appeared at trial or at the evidentiary hearing, nor did she ever provide an affidavit outlining the substance of any potential alibi testimony. Although Mr. Roselli had a handwritten note with her name on it in his trial notebook, both he and Mr. Coffey testified that the Defendant never brought up the potential of an alibi defense or told them that Nicole Spratt could provide alibi testimony. (E.H.T. p. 9, 26-27).

Under these circumstances, it is clear that the Defendant has not even approached the requisite elements of this claim of ineffective assistance of counsel. The only evidence or testimony in support of this claim is the Defendant's assertion that Nicole Spratt would have testified as an alibi witness; there has been no affidavit from Ms. Spratt to this effect, nor has she appeared at any of the various proceedings. Both trial and appellate counsel testified that they were not notified that there was a potential alibi defense or that Ms. Spratt was an alibi witness – otherwise, both said they would have presented her testimony. Given the fact that there is no record that Ms. Spratt was available and willing to testify, that her testimony would have helped the Defendant or that counsel knew of her potential testimony, there is no basis for a finding of ineffectiveness. This claim must fail.

### 4. Rule 622 Motion (Speedy Verdict)

Next, the Defendant argues that counsel were ineffective for failing to raise a Rule 622 claim relating to a speedy verdict. Again, this claim is meritless.

Pursuant to Pa.R.Crim.Pro. 622, "a verdict shall be rendered in all non-jury cases within 7 days after trial." Pa.R.Crim.Pro. 622(a). In the instant case, trial concluded on October 8, 2004 and Judge Allen rendered her verdict on October 22, 2004, 14 days later.

At the PCRA Hearing, both trial counsel, Giuseppe Rosselli, Esquire, and appellate counsel, Scott Coffey, Esquire, testified that they were aware of the Rule 622 violation but did not pursue a claim so as not to anger Judge Allen before she rendered her verdict. (Evidentiary Hearing Transcript, p. 7, 27). In addition, Mr. Rosselli testified that he received a call from Judge Allen's staff acknowledging that the verdict was going to be outside of the seven (7) days and Mr. Roselli replied that the judge should take the time she needed. (E.H.T. p. 7). Judge Allen did then render her verdict within a week. The Defendant's time to file post-sentence motions was not affected, nor did he lose any appellate rights.

Under these circumstances, the Defendant has not demonstrated the necessary prejudice to sustain a claim of the ineffective assistance of counsel. This claim is meritless.

### 5. Motion to Suppress Photo Array

The Defendant also argues that trial counsel was ineffective in failing to file a motion to suppress the photo array. He argues that the array was unduly suggestive in that it contained pictures of men with braided hair (he did not have braids) and men with lighter skin color than his. Careful review of the record reveals that a motion to suppress was filed by then-counsel David Hoffman, Esquire.

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In addition, the issue of the suggestiveness of the photo array was actually raised and adjudicated on direct appeal, where the Superior Court found that the array was not unduly suggestive and that the trial court did not err in denying the Motion to Suppress, noting “the individuals portrayed in the array are strikingly similar.” (Superior Court Opinion, May 26, 2006, p. 11). Inasmuch as this claim has been previously litigated, it is not cognizable at this time. 42 Pa.C.S.A. §9544(a). This claim must also fail.

*6. Failure to Raise Sufficiency Claim*

Finally, the Defendant asserts that appellate counsel was ineffective for failing to raise a sufficiency of the evidence claim along with the weight of the evidence claim on direct appeal.

A sufficiency claim challenges whether the evidence presented – viewed in the light most favorable to the Commonwealth – “establishes each material element of the crimes charged and the commission thereof by the accused, beyond a reasonable doubt.” *Commonwealth v. DiPanfilo*, 993 A.2d 1262, 1264 (Pa.Super. 2010). A weight claim, on the other hand, “concedes that sufficient evidence exists to sustain the verdict, but questions which evidence is to be believed.” *Commonwealth v. Morgan*, 913 A.2d 906, 909 (Pa.Super.2006).

At the evidentiary hearing, attorney Coffey testified that he did not raise the sufficiency claim because this case presented “strictly a weight of the evidence issue.” (E.H.T. p. 26). Upon review of the record, this Court agrees with Mr. Coffey’s assessment and notes that the evidence presented at trial was more than sufficient to sustain the guilty verdict; in this regard, any challenge to the sufficiency of the evidence would have been pointless as the claim was sure to be denied. This claim must fail.

Accordingly, for the above reasons of fact and law, this Court’s Order of February 28, 2011 must be affirmed.

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

Date: September 15, 2011