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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Megan Batykefer

Criminal Appeal—Sufficiency—Sentencing (Discretionary Aspects)—Void for Vagueness—Sex with a Student who was 18

Institutional Sexual Assault statute does not criminalize constitutionally protected conduct, so is not overbroad.

No. CC 201500182. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—January 5, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, Megan Batykefer, was charged by criminal information (CC 201500182) with one count of institutional sexual assault.[1]

On August 6, 2015, Appellant appeared before the Trial Court for a stipulated nonjury trial. The Trial Court took the matter under advisement. On August 13, 2015, the Trial Court found her guilty, and in conjunction with that filed an Opinion and Order of Court regarding Appellant's challenge to the constitutionality of 18 Pa. C.S. § 3124.2(a.2)(1).

On November 10, 2015, Appellant was sentenced by the Trial Court to eight to twenty-three months incarceration, followed by three years of probation. As a result of Appellant's conviction, she was also required to register as a sex offender under SORNA for twenty-five years.

On November 20, 2015 and December 21, 2015, Appellant filed post-sentence motions to reconsider, which were denied by the Trial Court on March 15, 2016.

Appellant filed a timely notice of appeal on April 12, 2016. The Superior Court dismissed Appellant's appeal on June 3, 2016, but reinstated Appellant's appeal on June 20, 2016. Following several petitions for extension of time, Appellant filed her Concise Statement of Errors on November 15, 2016.

STATEMENT OF ERRORS ON APPEAL

Appellant raises the following issues on appeal, and they are presented below exactly as Appellant presented them (in a "bulleted" format):

> • The evidence was insufficient as a matter of law to prove Ms. Batykefer was guilty of Sexual Intercourse with a Student, pursuant to 18 Pa. C.S. § 3124.2(a)(21).
>
> • The trial court erred as a matter of law in determining that 18 Pa.C.S.A. § 3124.2(a.2)(1) relating to institutional sexual assault is enforceable and not unconstitutionally vague.
>
> • The trial court erred as a matter of law [in] determining that 18 Pa.C.S.A. § 3124.2(a.2)(1) relating to institutional sexual assault is enforceable and not unconstitutionally overbroad upon a basis that it punishes a substantial amount of conduct protected by the United States and Pennsylvania Constitutions.
>
> • 18 Pa. C.S. § 3124.2(a)(21) is overly broad and in violation of the 14th Amendment because it aims to criminalize and prohibit lawful sexual conduct between two adults who consented.
>
> • That activity of adults engaging in consensual sexual relations is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.
>
> • The activity of adults to engage in a consensual relationship is a fundamental right protected by Article 1, Section 9 of the Pennsylvania Constitution.
>
> • The Trial Court erred in denying the Supplemental Post-Sentence Motion to modify the Petitioner's sentence and impose a shorter period of incarceration.
>
> • The sentence imposed is excessive and unjustly harsh under the circumstances.

FINDINGS OF FACT

In 2014, Appellant was employed as a rowing coach at North Allegheny High School, in Wexford, Allegheny County. The male victim was a senior at that high school, and a member of the rowing team. Appellant and the victim engaged in sexual intercourse multiple times from April through June of 2014. These encounters occurred after the victim turned eighteen, but before he graduated from high school on June 13, 2014.[2]

DISCUSSION

Appellant raises seven unnumbered "bulleted" claims in her Concise Statement. For the clarity of analysis and convenience of all parties, the Trial Court has numbered Appellant's arguments, and consolidated those claims that are properly considered together. Furthermore, while Appellant cites both 18 Pa. C.S. § 3124.2(a)(21) and 18 Pa.C.S.A. § 3124.2(a.2)(1), the Trial Court assumes that Appellant at all times meant to cite to 18 Pa. C.S. § 3124.2(a.2)(1) when referencing institutional sexual assault of a student, as that is the section of the penal statute under which Appellant was charged and convicted.

I.

Appellant alleges in her first claim that the evidence was insufficient to sustain Appellant's conviction at 18 Pa. C.S. § 3124.2 (a.2)(1). This claim is without merit.

The standard of review for sufficiency of the evidence claims has been stated thusly:

> 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.

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005). The subsection with which Appellant was charged defines institutional sexual assault as follows:

> [A] person who is a volunteer or an employee of a school or any other person who has direct contact with a student at a school commits a felony of the third degree when he engages in sexual intercourse, deviate sexual intercourse or indecent contact with a student of the school.

18 Pa. C.S. 3124.2(a.2)(1).

Notably, Appellant has failed to state which element was not proven beyond a reasonable doubt. Nonetheless, it is apparent from the record that the evidence established beyond a reasonable doubt that Appellant's conduct constituted institutional sexual assault. The statute defines the term "employee" as:

> An independent contractor who has a contract with a school for the purpose of performing a service for the school, a coach, an athletic trainer, a coach hired as an independent contractor by the Pennsylvania Interscholastic Athletic Association or an athletic trainer hired as an independent contractor by the Pennsylvania Interscholastic Athletic Association.

18 PA. C.S. § 3124.2(a.2)(2)(ii)(A)(II). The definition of "employee" clearly encompasses Appellant's position as a contracted rowing coach at North Allegheny High School, and thus Appellant was subject to the prohibitions proscribed therein. While "student" is not defined by the statute, there is no question that the victim in this case was a student at North Allegheny High School when the sexual relationship between Appellant and the victim began. Finally, both Appellant and the victim acknowledged that they were involved in a sexual relationship. Thus, the evidence was sufficient to establish that Appellant committed institutional sexual assault. *See* 18 Pa. C.S. 3124.2(a.2)(1).

Appellant's claim is without merit.

II.

In Appellant's second, third, fourth, fifth, and sixth bulleted claims, Appellant challenges the constitutionality of 18 Pa. C.S. § 3124.2(a.2)(1). Specifically, Appellant alleges that 18 Pa. C.S. § 3124.2(a.2)(1) is: (A) unconstitutionally vague; and (B) unconstitutionally overbroad because it criminalizes conduct which is protected as a fundamental right by the Pennsylvania and United States constitutions, namely lawful sexual conduct between two consenting adults. The Trial Court discussed these claims at length in its Opinion and Order of Court, August 13, 2015, and incorporates that by reference for present purposes.

The Pennsylvania Supreme Court has stated the standard for analyzing the constitutionality of criminal statutes as follows:

> [W]e begin our analysis by recognizing that there is a strong presumption in the law that legislative enactments do not violate the constitution. Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. As a matter of statutory construction, we presume the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth. A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution; all doubts are to be resolved in favor of a finding of constitutionality.

Commonwealth v. Mayfield, 832 A.2d 418, 421 (Pa. 2003) (citations and quotations omitted) (discussing the constitutionality of 18 Pa. C.S. § 3124.2(a); sexual relations between Department of Corrections employees and inmates).

A.

Appellant first claims that the statute is unconstitutionally vague. The standard for reviewing a criminal statute for unconstitutional vagueness is well settled:

> [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.... [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the essential of due process of law. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due process is satisfied if the statute provides reasonable standards by which a person may gauge his future conduct.

Commonwealth v. Mayfield, 832 A.2d 418, 422 (Pa. 2003) (citations and quotations omitted).

The subsection with which Appellant was charged defines institutional sexual assault as follows:

> [A] person who is a volunteer or an employee of a school or any other person who has direct contact with a student at a school commits a felony of the third degree when he engages in sexual intercourse, deviate sexual intercourse or indecent contact with a student of the school.

18 Pa. C.S. § 3124.2(a.2)(1).

> The statute defines the term "employee" as:
>
> An independent contractor who has a contract with a school for the purpose of performing a service for the school, a coach, an athletic trainer, a coach hired as an independent contractor by the Pennsylvania Interscholastic Athletic Association or an athletic trainer hired as an independent contractor by the Pennsylvania Interscholastic Athletic Association.

18 Pa. C.S. § 3124.2(a.2)(2)(ii)(A)(II).

The definition of "employee" clearly encompasses Appellant's position as a contracted rowing coach at North Allegheny High School, and thus Appellant was an "employee" for purposes of the statute. While "student" is not defined by the statute, the plain meaning of that term clearly encompasses individuals in twelfth grade attending high school, and thus the victim was a "student" for purposes of the statute. The statute does not require that the student be a minor, but rather proscribes sexual relations between an employee of a school and a student of the school. The statute is not vague, but rather clearly sets forth the persons prohibited from engaging in sexual activity with any student at a school. Thus, an ordinary person could understand what conduct was prohibited by the statute.

Simply put, as applied to Appellant's circumstance and conduct, the statute could not be clearer, and the Trial Court properly found that the statute was not unconstitutionally vague. *See Mayfield*, 832 A.2d at 422-423 (institutional sexual assault statute clearly prohibited defendant's conduct even though "employee" and "inmate" were undefined in that subsection as county corrections officer was unquestionably an employee and the victims were unquestionably inmates at the time of the sexual relations).

Appellant's claim is without merit.

B.

Appellant next challenges the statute as unconstitutionally overbroad because it criminalizes an activity protected by the Pennsylvania and United States constitutions as a fundamental right. The standard for reviewing a criminal statute for unconstitutional overbreadth is well settled:

> A statute is overbroad if by its reach it punishes a substantial amount of constitutionally-protected conduct. If the overbreadth of the statute is substantial, judged in relation to its legitimate sweep, it may not be enforced against anyone until it is narrowed to reach only unprotected activity. The function of overbreadth adjudication, however, attenuates as the prohibited behavior moves from pure speech towards conduct, where the conduct falls within the scope of otherwise valid criminal laws that reflect legitimate state interests.

Mayfield, 832 A.2d at 425. The statute criminalizing institutional sexual assault does not implicate First Amendment concerns, and thus a claim that the statute is overbroad will only be addressed as applied to Appellant's conduct. *Mayfield*, 832 A.2d at 424-425. A statute will be considered overbroad where the statute authorizes the punishment of constitutionally protected conduct. *Commonwealth v. Kitchen*, 814 A.2d 209, 212-213 (Pa. Super. 2002) (discussing the constitutionality of 18 Pa. C.S. §§ 6312(b) and (d) where defendant took nude photographs of his sixteen-year-old girlfriend).

While the United States Supreme Court has held that there is a due process right of consenting adults to engage in private sexual conduct free from governmental interference, that case specifically did "not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Just as sexual contact between correctional staff and inmates is not constitutionally protected because it is "rife with the possibility of coercion, both subtle and overt," the relationship between a high school coach and a student who is also on the team that the coach oversees is similarly rife with influence of position and age disparity. *Mayfield*, 832 A.2d at 425-426.

As such, there is no constitutional protection for school employees to engage in sexual relations with their students. While the victim acknowledges that it was a consensual sexual relationship, the purpose of the statute is to protect students from such undue and coercive influence. The clear design and overriding purpose of this statute is the protection of the student and the school environment. The protective purpose entirely removes from the student, because of age (immaturity) and circumstance, the decision making component of sexual contact. The statute appropriately places that responsibility entirely and squarely on the shoulders of the person, who by maturity and professional position, is responsible for avoiding such activity.

Accordingly, Appellant's conduct here is not constitutionally protected, and the statute is not overbroad. *Mayfield*, 832 A.2d at 425-426; *see also Kitchen*, 814 A.2d at 213 (finding consent irrelevant in child pornography case where defendant took nude photographs of sixteen-year-old girlfriend given that the child pornography statute is protective in purpose).

Appellant's claim is without merit.

III.

Appellant alleges in her final claim that the Trial Court erred in denying Appellant's post-sentence motion to modify her sentence because her sentence is excessive and "unjustly harsh under the circumstances." A defendant challenging the discretionary aspects of her sentence must satisfy a four-part test in order to invoke the Superior Court's jurisdiction to review the claim:

> (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (quotations and citations omitted). Notably, Appellant has failed to state how her sentence is excessive. Moreover, Appellant failed to preserve her discretionary sentencing claim. Appellant filed three post sentence motions: two on November 20, 2015, and one on December 21, 2015. Appellant failed to seek a reduction in her sentence or challenge her sentence in any of these motions. Following the third post sentence motion, Appellant did not file any additional supplemental post sentence motions raising any sentencing claims, and the Trial Court denied Appellant's post sentence motions (regarding the weight of the evidence and the constitutionality of the statute) on March 15, 2016. As such, Appellant failed to preserve this claim, and Appellant's sentencing claim is waived.[3]

CONCLUSION

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

BY THE COURT:
/s/Borkowski, J.

Date: January 5, 2017

[1] 18 Pa. C.S. § 3124.2(a.2)(1).

[2] At Appellant's nonjury trial, there was no dispute regarding the conduct involved, and Appellant acknowledged that she engaged

in consensual sexual activity with the male victim multiple times during April, May, and June of 2014. The sole basis for her requesting an acquittal was premised on the alleged unconstitutionality of the statute under which she was charged.

[3] Even if the Superior Court were to address Appellant's claim, it is clear that her sentence was not excessive or unjustly harsh. Prior to sentencing Appellant, the Trial Court considered the guidelines, Appellant's pre-sentence report, including her mental health history, and statements made on her behalf, and fashioned a sentence accordingly. Sentencing Transcript, November 10, 2015, pp. 12-15. The guidelines specifically were: probation in the mitigated range, three to twelve months incarceration in the standard range, and eighteen months in the aggravated range. The statutory limits were forty two to eighty four months incarceration. Appellant's sentence of eight to twenty three months incarceration, followed by three years probation, was within the guidelines.

Commonwealth of Pennsylvania v. Regis Seskey

Commonwealth Appeal—Sentencing (Legality) Sentencing (Discretionary Aspects)—Homicide

Must every juvenile with a homicide conviction be sentenced to life in prison?

No. CC 1992-13783. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.

OPINION

This is the second appeal from the government after the Court conducted a *Miller*/*Montgomery* sentencing proceeding and announced its decision on November 16, 2016.[1] The Court felt a sentence of 13 to 26 years followed by 5 years of probation was a reasonable sentence.

The Commonwealth disagrees. Its position is one of legality and discretion being abused. The government feels Mr. Seskey's maximum sentence must be life in prison. *Statement of Errors*, ¶ 2(a) (Dec. 6, 2016).[2] Its second argument is very much tied to the first. One might even say it is the same argument but just packaged in a different way. The government says this Court abused its discretion when it imposed its 13 to 26 year sentence followed by 5 years of probation for it "will not give [Mr. Seskey] the structured environment that" he needs. *Statement of Errors*, ¶ 2(b) (Dec. 6, 2016).

The government's primary argument concerns the legality of the sentence. According to the government, every *Miller*/*Montgomery* resentencing must have a maximum of life in prison as the back end number. Support for its position comes exclusively from our Supreme Court's decision in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013).[3]

Batts is a first degree murder case as is the present matter. From this congruency, the government argues that any sentence following *Miller*/*Montgomery* must have "life" as the maximum sentence. By virtue of the sentence imposed here, the Court disagrees. Strip *Miller* and *Montgomery* to its core and you reach the same conclusion – Mr. Seskey was entitled to an individualized sentence. The individual aspect does not just deal with the minimum sentence but it also contemplates the back-end number. "A sentencing practice that results in every juvenile's sentence with a maximum term of life, …, does not reflect individualized sentencing." *Songster v. Beard*, CV 04-5916 (E.D.Pa. Aug. 17, 2016). "Placing the decision with the Parole Board, with its limited resources and lack of sentencing expertise, is not a substitute for a judicially imposed sentence. Passing off the ultimate decision to the Parole Board in every case reflects an abdication of judicial responsibility and ignores the *Miller* mandate." *Id.*, at pg. 5. As made clear in *Montgomery*, a life sentence for a juvenile should be a rare occurrence and only after the government shows the person is permanently incorrigible or irreparably corrupt. *Montgomery*, 136 S.Ct. at 734. Considering the government's evidence did not show Mr. Seskey satisfying either of those standards, the sentencing court "must impose a maximum sentence less than life to reflect that finding". *Songster*, at pg. 6. This Court did just that.

There are other contributing reasons as to why the sentence was selected. These reasons are set forth in the *Songster* opinion and will be referenced here. Despite it not being a binding precedent, its analysis strikes me as being reasonable and I am influenced by it. The statue which applied to Mr. Seskey's sentencing has been declared unconstitutional. Our Legislature's response was to look forward and not back. By its own admission, 18 Pa.C.S.A. § 1102.1(a) only applies to those individuals convicted after June 24, 2012. Mr. Seskey was sentenced in March, 1994 for an October, 1992 homicide. As such, "there is no statutory sentencing scheme that applies to those juveniles who were convicted of first degree murder prior to June 25, 2012." *Songster*, at pg. 6. An important point here is that only the Legislature can establish the penalty for a crime. 18 Pa.C.S.A. § 107(b). Given the "Pennsylvania dilemma" as described in *Songster*, this Court provided Mr. Seskey the individualized sentencing hearing, including the establishment of a maximum sentence less than life, which has long been a hallmark of Pennsylvania sentencing practice.

The government's second argument is a reworking of the first but now it says the sentencing imposed will not provide the necessary structure that Mr. Seskey needs. When his sentence was pronounced, Mr. Seskey had about 22 months before he would reach his maximum date. The Court felt then, as it does now, that Mr. Seskey will need the services the DOC provides prisoners as they near their release date. That is why the sentence was not for time served. In addition, his 5 years of community supervision will not be without support. The family support Mr. Seskey has was quite impactful. Unlike many others leaving an extended stay in a D.O.C. facility, he has a place to stay and it is a nice place by many standards. He has salt-of-the-earth people in place to help him deal with whatever issue may arise. The time frame left to serve his maximum of 26 years followed by the 5 years of community supervision was a sufficient but not greater than necessary component to his sentence.

Our Department of Court Records shall now forward the certified record to the Superior Court of Pennsylvania.

BY THE COURT:
/s/Williams, J.

[1] The government's first effort tripped getting out of the starting blocks. On November 22nd, the government filed a *Notice of Appeal*. However, 5 days earlier, Mr. Seskey had sought post-sentence relief. As this Court set forth in a December 5th order, the

pendency of Seskey's PSM made the government's NOA in violation of our Rules of Criminal Procedure. Perhaps, in recognition of that conclusion, the government filed the current NOA. It was docketed just 24 hours after the court's December 5th order denying the post-sentence motions was filed.

During the preparation of this opinion, the government filed a *Praecipe to Discontinue Appeal* and on December 12th, the Superior Court granted the government's request. *See*, 1783 WDA 2016.

[2] The *Statement of Errors* was docketed at 9:40 a.m. on December 6th. Obviously, this SOE was meant for the first government appeal. The Court will use it as the government's SOE for this second appeal.

[3] There was an unpublished memorandum decision from our Superior Court before this 2013 decision from our Supreme Court. The Superior Court decision, *Commonwealth v. Batts*, 974 A.2d 1175 (Pa. Super. 2009), is referred to as "Batts I". The Supreme Court decision from 2013 is referred to as "Batts II". After the case returned to the common pleas court, "Batts III" was generated by our Superior Court at *Commonwealth v. Batts*, 125 A.3d 33 (Pa. Super. 2015), *appeal granted in part*, 135 A.3d 176 (Pa. 2016). On December 7, 2016, oral argument was heard before our state Supreme Court. The anticipated opinion will likely carry the label of "Batts IV".

Commonwealth of Pennsylvania v. James Hart

Criminal Appeal—SORNA—Ineffective Assistance of Counsel—Nolo Plea Withdrawal—Waiver of PCRA Relief—Invasion of Privacy

*As SORNA registration is a collateral consequence of conviction, there is not requirement to discuss registration prior to plea.**

No. CC 201510022. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—January 17, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, James Hart, was charged by criminal information (CC 201510022) with one count of invasion of privacy.[1]

On June 1, 2016, Appellant pled *nolo contendere* to one count of invasion of privacy, and was sentenced that same day to one year probation.

On June 9, 2016, Appellant filed a motion to withdraw his plea, which the Trial Court denied on June 21, 2016.

On July 19, 2016, Appellant filed a motion to reconsider his motion to withdraw his plea, which the Trial Court denied on July 25, 2016.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant raises the following issues on appeal, and they are presented below exactly as Appellant presented them:

1. This Court erred when:

(i) the Defendant was allowed to enter a plea of *nolo contendre* that was not knowing, voluntary and intelligent because he was not advised by his attorney, the Court, the attorney for the Commonwealth or the Allegheny County Probation Department in advance of his plea or sentencing, or at that the time of his sentencing, that Invasion of Privacy ((18 Pa.C.S. § 7501.1) ("IOP")) is a Sex Offender Registration and Notification Act ("SORNA") offense;

(ii) it denied the Defendant's Post-Sentence Motion to Withdraw *Nolo Contendre* Plea and his Motion to Reconsider, in circumstances where there was a fundamental breakdown in the customary practices and procedures of the Allegheny County Court of Common Pleas that resulted in a due process violation because the Defendant entered a plea without first being advised: (a) that IOP was an offense mandating SORNA registration; (b) the incidents of registration under SORNA; and, (c) the length of time for which he would be required to register under SORNA;

2. The Defendant further alleges that Defendant's plea counsel provided ineffective assistance of counsel by failing to advise him that IOP was a SORNA offense.[FN1]

[FN1: Due to the relatively short sentence imposed on Defendant (12 months' probation), Defendant believes by the time his direct appeal is decided, this Court would lack jurisdiction to consider claims under the PCRA because Defendant will no longer be under sentence. Accordingly, Defendant is seeking unitary review of this claim pursuant to *Commonwealth v. Baker*, 72 A.3d 652 (Pa. Super. 2013), having waived any right to seek collateral review in exchange for the ability to pursue this record-based claim of ineffective assistance on direct appeal. *See Praecipe* and *Defendant's Waiver of Right to Post-Conviction Relief Act Review* filed on August 15, 2016.

FINDINGS OF FACT

In May 2015, Appellant resided with his wife, M.H., their son, and his nineteen-year-old stepdaughter, M.L., in O'Hara Township, Allegheny County. On May 26, 2015, at approximately 5:00 A.M., M.L. took a shower and entered her second floor bedroom wearing only a towel. She closed the bedroom door and removed the towel. As she stood nude in her bedroom, she noticed a shadow out of the corner of her eye by the window. When she approached the window, she saw Appellant climbing down a ladder that was outside her bedroom window. M.L. knocked on the window, but Appellant continued to climb down the ladder and walk towards the front of the house.

M.L. quickly dressed, ran to her mother's bedroom, and explained to her mother what had happened. Her mother immediately confronted Appellant about the incident, to which Appellant replied, "I don't know what I was doing, I'm very sorry." Appellant apologized several more times, and offered to pay for anything M.L. wanted, including an apartment for M.L. M.H. told Appellant

that their relationship was over, and made him leave the residence.

M.L. proceeded to her nursing school classes for the day, and at approximately 8:45 P.M., went to the O'Hara Township police station and filed a report against Appellant. Appellant was subsequently arrested and charged as noted hereinabove.[2]

DISCUSSION

I.

Appellant alleges in his first claim that the Trial Court erred when it allowed Appellant to enter a plea of *nolo contendere* that was not knowing, intelligent, or voluntary. This claim is without merit.

Here, Appellant pled no contest to one count of invasion of privacy and was sentenced on the same date to a negotiated term of one year probation. At that time the collateral consequences of his plea, including registration under the Sex Offender Registration Notification Act ("SORNA"), were not discussed. Appellant was subsequently notified by the probation office that he was required to register under SORNA as a consequence of his conviction. Appellant claims that his plea was not knowing, intelligent, or voluntary because he was not informed that his no contest plea would subject him to the registration requirements of SORNA.

Initially, it must be noted that a plea of *nolo contendere* is treated the same as a guilty plea for purposes of determining whether the plea was knowing, intelligent, and voluntary. *Commonwealth v. Boatwright*, 590 A.2d 15, 19 (Pa. Super. 1991). A valid plea colloquy must cover the nature of the charges, the factual basis of the plea, the defendant's right to a jury trial, the presumption of innocence, the sentencing ranges for all charges, and the sentencing court's discretion to deviate from any recommended sentence. *Commonwealth v. Reid*, 117 A.3d 777, 782–783 (Pa. Super. 2015). The law presumes that a defendant who enters a plea is aware of what he is doing, and bears the burden of proving that the plea was not knowing, intelligent, and voluntary. *Reid*, 117 A.3d at 782–783. A defendant does not need to be pleased with the outcome of his decision to plead; rather, what is required is that the decision to plead be knowingly, intelligently, and voluntarily made. *Reid*, 117 A.3d at 782–783.

Here, Appellant completed an extensive written colloquy, as well as an on-the-record oral colloquy. Those colloquies exhaustively covered all matters required by law. (P.T. 9-13). *Reid*, 117 A.3d at 782–783. SORNA registration is not considered a criminal punishment, but is rather a collateral consequence of a defendant's plea to certain, enumerated offenses, and is not an area subject to mandated discussion at the time of entry of a plea. *See Commonwealth v. Leidig*, 956 A.2d 399, 406 (Pa. 2008); *Commonwealth v. Benner*, 853 A.2d 1068, 1070 (Pa. Super. 2004). Failure to advise a defendant of the SORNA registration requirement will not invalidate a defendant's plea. *Benner*, 853 A.2d at 1071. While Appellant was not advised of this collateral consequence of his plea, that does not render his otherwise valid plea unknowing, unintelligent, or involuntary. *See Benner*, 853 A.2d at 1071 (SORNA registration is a collateral consequence of plea and failure to advise defendant of consequence does not invalidate plea).

The record here clearly establishes that Appellant entered a knowing, intelligent, and voluntary plea and thus Appellant's claim is without merit.

II.

Appellant alleges in his second claim that the Trial Court erred when it denied Appellant's motion to withdraw his plea, and motion to reconsider his motion to withdraw his plea. This claim is without merit.

The standard of review for the withdrawal of a plea of *nolo contendere* is the same as for a withdrawal of a guilty plea. *Commonwealth v. Lewis*, 791 A.2d 1227, 1230-1231 (Pa. Super. 2002). The court may grant a motion to withdraw a plea after sentencing if the defendant proves "manifest injustice" through an involuntary, unknowing, or unintelligent plea. *Commonwealth v. Pollard,* 832 A.2d 517, 522 (Pa. Super. 2003).

To avoid manifest injustice, the trial court conducts a written and/or oral colloquy to ensure the defendant understands the consequences of the plea, including the range of possible sentences, the presumption of innocence, and the right to trial. *Pollard*, 832 A.2d at 522-523; *Commonwealth v Rush*, 909 A.2d 805, 810 (Pa. Super. 2006) (completion of written and oral colloquy by the defendant indicated a voluntary guilty plea). Similarly, the voluntary nature of a plea can be inferred from the defendant's benefit in accepting a plea bargain. *Pollard*, A.2d at 524; *see also Commonwealth v. Shekerko*, 639 A.2d 810, 814 (Pa. Super. 1994) (voluntary nature of plea must be determined based on totality of circumstances).

Appellant argues that "there was a fundamental breakdown in the customary practices and procedures of the Allegheny County Court of Common Pleas that resulted in a due process violation because the Defendant entered a plea without first being advised: (a) that invasion of privacy was an offense mandating SORNA registration; (b) the incidents of registration under SORNA; and, (c) the length of time for which he would be required to register under SORNA." Concise Statement of Matters Complained of on Appeal. As discussed hereinabove, Appellant entered into a knowing, intelligent, and voluntary plea, regardless of the fact that he was not specifically apprised of the collateral consequence of SORNA registration. *See supra*, pp. 5-7. Contrary to Appellant's assertions, the Pennsylvania Supreme Court has specifically held "a defendant is not entitled to withdraw a plea if the trial court fails to inform, or even misinforms the defendant regarding the [sex offender] registration requirements." *Leidig*, 956 A.2d at 400. As such, the Trial Court did not err in denying Appellant's motion to withdraw his plea, and motion to reconsider.

Appellant's claim is without merit.

III.

Appellant alleges in his third claim that trial counsel was ineffective for failing to advise Appellant that invasion of privacy was a SORNA offense. This claim is without merit.

Absent extraordinary circumstances, ineffective assistance of counsel claims should be deferred for review under the Post Conviction Relief Act, and not on direct appeal. *Commonwealth v. Holmes*, 79 A.3d 562, 576 (Pa. 2013). The Pennsylvania Supreme Court granted two limited exceptions to this rule:

> We recognize two exceptions, however, both falling within the discretion of the trial judge. First, we appreciate that there may be extraordinary circumstances where a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice; and we hold that trial courts retain their discretion to entertain such claims.
>
> [...]

> Second, with respect to other cases and claims, including cases such as *Bomar* and the matter *sub judice*, where the defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, on post-verdict motions and direct appeal, we repose discretion in the trial courts to entertain such claims, but only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant's knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence, including an express recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA. In other words, we adopt a paradigm whereby unitary review may be available in such cases only to the extent that it advances (and exhausts) PCRA review in time; unlike the so-called *Bomar* exception, unitary review would not be made available as an accelerated, extra round of collateral attack as of right.

Holmes, 79 A.3d at 563-564 (citations and quotations omitted). Applying the *Holmes* standard, Appellant has expressly waived his right to PCRA review, and has demonstrated procedural good cause in raising the claim on appeal, rather than waiting to file it as a PCRA claim, given that he was only sentenced to one year of probation. *Commonwealth v. Burno*, 94 A.3d 956, 971 (2014) (in assessing whether a defendant has demonstrated good cause, the court should consider the short length of a defendant's sentence, and the effect of that on his realistic prospect of being able to pursue the same ineffective assistance of counsel claim under the PCRA). Here, the Trial Court finds unitary review appropriate to expedite the disposition of Appellant's ineffective assistance of counsel claim.

The standard of review for ineffective assistance of counsel claims is well settled:

> Counsel is presumed effective, and the appellant has the burden of proving otherwise. Appellant establishes ineffectiveness of counsel with a demonstration that: (1) the underlying claim is of arguable merit; (2) counsel's action or inaction was not grounded on any reasonable basis designed to effectuate Appellant's interest; and (3) there is a reasonable probability that the act or omission prejudiced Appellant in such a way that the outcome of the proceeding would have been different. If the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue. Also, if the prejudice prong of the ineffectiveness standard is not met, the claim may be dismissed on that basis alone and there is no need to determine whether the arguable merit and client's interests prongs have been met.

Commonwealth v. D'Collanfield, 805 A.2d 1244, 1246-1247 (Pa. Super. 2002) (citations and quotations omitted). Here, counsel failed to advise Appellant that he was pleading *nolo contendere* to a crime that was subject to SORNA. Appellant's counsel acknowledges that he failed to apprise Appellant of the SORNA consequences of pleading no contest to invasion of privacy and that there was no reasonable strategic basis for failing to so advise Appellant. Finally, Appellant alleges that he was prejudiced because he would not have entered a plea of *nolo contendere* had he known he would be subject to SORNA registration. However, SORNA registration constitutes a collateral consequence of a plea. *Leidig*, 956 A.2d at 406. The Pennsylvania Supreme Court has held that counsel cannot be deemed ineffective for failing to advise a defendant of collateral plea consequences. *Commonwealth v. Abraham*, 62 A.3d 343, 353 (Pa. 2012). Because SORNA is a collateral consequence, failure to advise Appellant of his registration requirement does not constitute ineffective assistance of counsel. *See Abraham*, 62 A.3d at 353.

Appellant's claim is without merit.

CONCLUSION

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

BY THE COURT:
/s/Borkowski, J.

Date: January 17, 2017

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[1] 18 Pa. C.S. § 7507.1(a)(1).

[2] At Appellant's plea proceeding, upon agreement of all parties, the Trial Court incorporated the Affidavit of Probable Cause and the transcript of the preliminary hearing as the factual basis and summary of Appellant's plea. Plea and Sentencing Transcript, June 1, 2016, p. 11 (hereinafter "P.T.").

Commonwealth of Pennsylvania v. Antoine Ward

Criminal Appeal—Homicide—Suppression—Sufficiency—Self Defense—Sentencing (Legality)—Spoilation of Evidence—Scope of Expert Reports

Multiple claims relating to two homicide convictions, including spoilation of evidence (car) and legality of sentence for third degree murder.

No. CC 201401839. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—January 18, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, Antoine Ward, was charged by criminal information (CC 201401839)[1] with two counts of criminal homicide,[2] one count of carrying a firearm without a license,[3] and one count of person not to possess a firearm.[4]

On October 15, 2015, Appellant proceeded to a jury trial, at the conclusion of which Appellant was found guilty of first degree murder, third degree murder, and carrying a firearm without a license.

On February 24, 2016, Appellant was sentenced by the Trial Court as follows:

Count one: third degree murder – life imprisonment;

Count two: first degree murder – life imprisonment;

Count four: carrying a firearm without a license – two to four years incarceration.

Each sentence was imposed consecutive to each other.
Appellant filed post-sentence motions on March 7 and 8, 2016, which were denied by the Trial Court on June 1, 2016.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant's claims are set forth below exactly as Appellant presented them:

a. The court erred in failing to grant suppression of any inculpatory statements made by Mr. Ward on January 31, 2014. Mr. Ward was initially arrested on January 28, 2014, at his probation officer's office. Probation Officer Teeter knew that Mr. Ward had been questioned in connection to the shooting, as homicide detectives had called Teeter to inform him of such. Ward was taken to the Allegheny County Jail on the 28th. On January 31, 2014, police transferred Mr. Ward from the jail to Pittsburgh police homicide offices for additional questioning. Mr. Ward was not provided with his *Miranda* rights until several hours after questioning began, when officers determined to make a video of his statement. At the suppression hearing, officers maintained that Mr. Ward was "not a suspect" in the homicide, which is a farcical statement. By all objective evidence, Mr. Ward was in custody at that time, and subject to a custodial interrogation. A police officer's subjective belief that a defendant is not in custody is not what controls; rather, it is whether a reasonable man would feel free to leave the situation. Mr. Ward was taken directly form the jail and was clearly not free to leave the premises at any time. Police failed to explain Mr. Ward's constitutional rights to him at the appropriate time, prior to questioning, in violation of both the U.S. Constitution (Amend. IV, V and XIV) and the concomitant rights under the Pa. Constitution. Accordingly, all evidence flowing from that point in time must be suppressed, including his statement.

b. The evidence is insufficient to support the guilty verdicts in this case. Mr. Ward testified that the shootings happened in self-defense. Once he put that defense into play, the Commonwealth is required to disprove the theory beyond a reasonable doubt. *Commonwealth v. Bullock*, 948 A.2d 818 (Pa. Super. 2008). Here, there were no witnesses to the shooting other than the victims and the defendant, no videos, and no other testimony at all to support the claim of the Assistant District Attorney – that this was a drug deal gone bad. Rather, all the evidence, both Mr. Ward's testimony and the forensic evidence, supported the self-defense claim. The Commonwealth may not sustain its burden of proof in this instance solely on the disbelief of the defendant's testimony. *Commonwealth v. Torres*, 766 A.2d 342, 345 (Pa. 2001). Where there are two equally compelling scenarios for the finder of fact to consider, neither one is proven. *See Commonwealth v. Knee New*, 47 A.2d 450, 468 (Pa. 1946) ("when a party on whom rests the burden of proof in either a criminal or a civil case, offers evidence consistent with two opposing propositions, he proves neither."). The Commonwealth simply failed to disprove the self-defense claim. Mr. Ward's conviction should be vacated and his judgment of sentence reversed.

c. Mr. Ward's rights to due process of law and a fair trial (under U.S. Constitutional Am. XIV and Article 1, Section 9 of the Pa. Constitution) were violated when forensic evidence from the crime scene (the automobile) was admitted despite the defense not having a fair and equal opportunity to permit an independent expert evaluation of the evidence. The car was disposed of despite counsel's objection, multiple states conferences on the discovery issue and two formal motions for discovery specifically indicating that the car must be available for expert review. The car was ordered to be preserved for defense expert's evaluation, as the evidence was solely within the Commonwealth's control. The Commonwealth failed to preserve the evidence, twice. This evidence was materially exculpatory in that it provided a basis to establish that the physical evidence was consistent with Mr. Ward's description of the incident, and that it provided physical evidence to support the theory of justification. Experts retained by the defendant needed to examine this evidence to provide helpful testimony with respect to the crime scene. Expert criminalist Frederick Wentling stated that the photographs of the vehicle were insufficient to provide a full and thorough basis for formulating his opinion regarding the physical evidence contained in the vehicle. Eventually, the car ended up in the United Arab Emirates. Transference of the car despite the agreement between the District Attorney's Office, defense counsel, and the police, and despite being informed that a Court Order would be required to keep the car available to defense experts, neither Detective McGee nor ADA Berquist took any steps to obtain the court order and preserve the evidence. This is evidence of the Commonwealth's bad faith. The Commonwealth should have been precluded from offering any testimony or documentary evidence from the crime scene because it was hidden from the defense. At a minimum, the jury should have received a cautionary instruction regarding the spoliation of the evidence. Mr. Ward should receive a new trial.

d. The court erred in permitting the Commonwealth's expert, Dr. Xu, from testifying outside the scope of his expert reports, and also permitting testimony from Dr. Xu that he admitted during trial was not an opinion made to a reasonable degree of medical certainty. Dr. Xu provided testimony regarding the trajectory of bullets and closeness of weapons to the victims (stippling) without any medical or legal basis; basically he estimated values not based upon any scientific evidence. NT at 556-569. Again, the jury was not given any cautionary instruction about his testimony exceeding his technical expertise, nor was the offending testimony stricken from the record. Mr. Ward must be given a new trial.

e. The life sentence for the murder in the third degree charge is illegal. The Commonwealth provided notice that it intended to invoke the mandatory sentencing provision at 42 Pa.C.S. § 9715(a), which mandates a sentence of life imprisonment for third degree murder when the defendant had previously been convicted of murder or voluntary manslaughter. At the time of sentencing, Mr. Ward had not been previously convicted of murder or voluntary manslaughter. Rather, the first degree murder conviction arose from the same criminal episode as the third degree murder conviction. This should not be deemed a § 9715 prior offense. Any current caselaw to the contrary is wrongly decided.

FINDINGS OF FACT

On January 23, 2014, at 7:12 P.M., Appellant called Jason Eubanks to purchase an "eight-ball" of crack cocaine. Appellant and

Jason Eubanks knew each other for many years, and Appellant often purchased crack from Eubanks and resold it. Eubanks was at a bar in the Mount Oliver section of Allegheny County when Appellant called, and Eubanks told Appellant, "I'm on my way. I'm waiting for my girl [Cheralynn Sabatasso] to pick me up and I'll be there in a minute." (T.T. 180-181, 185-186, 192, 201-202, 226-227, 273-274, 300, 309-310).[5]

Eubanks left the bar shortly thereafter when Sabatasso arrived in her vehicle. Sabatasso and Eubanks drove to Appellant's residence at 302 Rochelle Street to pick up Appellant. (T.T. 310). Once in the vehicle, Appellant asked Eubanks to front him the eight-ball, as he had in the past, because he did not have any money at the moment. Appellant asked Sabatasso to drive to his mother's home so that he could pick up his "tax papers" (W-2 form), and show Eubanks that he would have funds to pay him for the drugs. Sabatasso complied; Appellant went into his mother's home to retrieve the W-2 form and returned to the rear passenger seat of Sabatasso's vehicle with two pieces of mail. Appellant opened the mail, but neither contained Appellant's W-2 form. (T.T. 140, 212-215, 217, 228, 315, 702).

Eubanks and Appellant began to argue about Appellant being unable to pay. Additionally, Sabatasso was upset with Appellant as he had told Eubanks that she was cheating on him, and the three also argued about that. The arguments escalated as Sabatasso drove Appellant back toward his home on Rochelle Street. As Sabatasso approached the intersection of Grimes Avenue and Zara Street, Appellant pulled out his firearm and shot Sabatasso in the head. The bullet entered the bone behind her right ear, perforated that bone, traveled through the jugular vein and carotid artery, fractured her skull, and exited the left side of her face. This gunshot wound was fatal and Sabatasso died within minutes. (T.T. 311, 316, 634-639)

Eubanks reached over the front seat and attempted to wrestle the firearm away from Appellant, but Appellant maintained control of the firearm, and shot Eubanks twice in the head, both of which inflicted fatal wounds. The first bullet entered Eubanks' head near his left ear, fractured his skull, and stopped at the back of his neck. The second bullet entered Eubanks' right cheek, perforated his nasal center, transected his brainstem, and lodged in the base of his skull. This gunshot wound caused immediate death. A resident of Grimes Avenue heard the gunshots and called 911 to report hearing gunfire outside her home. (T.T. 52, 54-55, 147-148, 316-317, 552, 557-558, 562, 564-566).

Appellant fled the scene on foot and ran through neighbors' yards until he reached his home at 302 Rochelle Street. Once inside his home, Appellant changed clothes and unloaded the firearm. He placed the nine remaining bullets in a knotted sock, and hid the firearm under a loose floorboard in the kitchen. (T.T. 79, 140, 228-229, 317-319, 392-393).

Officers responded to the 911 call and found that Sabatasso's vehicle had drifted onto a curb, where it came to its final resting place in front of a telephone pole. Both Sabatasso and Eubanks were pronounced dead at the scene. Sabatasso was found seated in the driver's seat, with a phone in her lap. Eubanks was found in the front passenger seat, leaning over the seat back and toward the rear of the vehicle. The vehicle was photographed and partially processed at the scene, and then towed to the auto squad garage, with the victims inside, for further processing. (T.T. 58, 67-70, 97, 113-126, 147).

Officer Thomas Lockard and his canine partner, Gerix, responded to the scene, and followed Appellant's footprints in the snow. The trail began at the scene with a single set of fresh footprints that left the area and traversed through several neighborhood yards. When the trail entered the street, several sets of footprints combined together, but Gerix continued to follow a scent from the initial set of footprints. Gerix led his partner to the front yard of 306 Rochelle Street, where he stopped momentarily. After police arrived to 306 Rochelle Street, Gerix returned to the sidewalk, and then directly to the front door of Appellant's residence at 302 Rochelle Street, and stopped. Additional police responded to the area, and officers "canvassed" both 306 and 302 Rochelle Street. At 302 Rochelle Street, police briefly interviewed Appellant, Nichelle Goodnight, Maureen Ward, and John Davis. The police left the immediate area without taking any further action at that time. Following the police departure, Appellant walked to the end of Rochelle Street, and threw the sock containing the 9mm cartridges over the hillside. (T.T. 74, 78-83, 87, 99, 320, 382, 388-390).

During the subsequent investigation, detectives examined Eubanks' cell phone, and found a call was placed to Eubanks shortly before the shooting, from a cell phone number belonging to Nichelle Goodnight, Appellant's girlfriend. Detectives also learned that Appellant was the person who actually possessed and used that cell phone. Additionally, detectives recovered the two letters addressed to Appellant that he had left behind in the back seat of Sabatasso's vehicle. On January 25, 2014, Appellant was brought to the homicide office for questioning. Appellant told detectives that he saw Eubanks the day before the shooting, and spoke with him the evening of the shooting, but did not see him that night. Appellant consented to a search of the cell phone records, and that search revealed that Appellant had called Eubanks three times the evening of the shooting. (T.T. 226-228, 258, 272-273, 282-283, 297-300).

On January 31, 2014, Appellant was arrested and provided a statement to police wherein he acknowledged his presence in the vehicle, but stated that the shootings were accidental and in self-defense. (T.T. 226-227, 258, 272-273, 282-283, 297-300, 305, 309-320). With information provided by Appellant, the officers recovered the hidden 9mm Glock pistol from Appellant's home, and a sock of nine cartridges at the end of Rochelle Street. The firearm was test-fired, and the test cartridge casing was compared to a cartridge case recovered from within the vehicle. It was determined that the recovered cartridge case was discharged from that firearm. (T.T. 381-395, 607-608, 614-618). Appellant was charged as noted hereinabove.

DISCUSSION

I.

Appellant alleges in his first claim that the Trial Court erred in denying his motion to suppress the statement he gave to the police on January 31, 2014. This claim is without merit.

The Pennsylvania Supreme Court has enunciated the standard of review for a trial court's denial of a motion to suppress as follows:

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct …. [W]e must consider only the evidence of the prosecution and so much of the evidence of the defense as remains uncontradicted when read in the context of the record as a whole. Those properly supported facts are binding upon us and we may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009) (citations and quotations omitted). The Commonwealth bears the burden during a suppression hearing to establish that a statement made by the defendant during a custodial interrogation was made after a voluntary and knowing waiver of a defendant's *Miranda* rights. *Commonwealth v. Harrell,* 65 A.3d 420, 434 (Pa. Super. 2013). The Superior Court has outlined the admissibility of such statements as follows:

> A confession obtained during a custodial interrogation is admissible where the accused's right to remain silent and right to counsel have been explained and the accused has knowingly and voluntarily waived those rights. The test for determining the voluntariness of a confession and whether an accused knowingly waived his or her rights looks to the totality of the circumstances surrounding the giving of the confession. . . . When assessing voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion.

Harrell, 65 A.3d at 433-434 (citations and quotations omitted).

Appellant alleges that his statement should have been suppressed because he was not provided with his *Miranda* warnings until several hours after questioning began, when Appellant agreed to make a videotaped statement. The Trial Court held a suppression hearing on February 18, 2015, wherein the Trial Court heard the testimony of parole agents Donald Teeter and Brian Wettik, detectives Robert Shaw, Robert Provident, and Michael Reddy, as well as Appellant.

The Trial Court determined that Appellant's assertions that he was not given *Miranda* warnings until well into the interview on January 31, 2014, as well as his claim that the police did not give him those warnings because they did not believe he was a suspect, were not credible. The Court made findings of fact and conclusions of law, that included: (1) on January 28, 2014, Appellant reported to the parole office consistent with the conditions of his parole; (2) while there, parole agent Donald Teeter discovered three parole violations, and found contraband (Suboxone strips) on Appellant's person; (3) Appellant was transported to the Allegheny County Jail for those parole violations and the new drug possession charges; (4) on January 31, 2014, he was transferred from the jail to the homicide office, where he was placed under arrest for the murders of Cheralynn Sabatasso and Jason Eubanks; (5) Detective Provident read Appellant his *Miranda* rights using a standard *Miranda* rights form; (6) Appellant completed and signed the form, and provided a statement; (7) Appellant was given the opportunity to videotape his statement, which he agreed to do; and (8) at the beginning of the taped statement, Detective Provident provided a second set of *Miranda* warnings. (Pretrial Motions Transcript, February 18, 2015, at 150-152, 178, 180-186, 188, 191, 194).

The record supports the Trial Court's findings and conclusions that Appellant voluntarily provided a statement to the detectives after waiving his *Miranda* rights, and thus the Trial Court properly denied Appellant's motion to suppress his statement. *See Commonwealth v. Watkins*, 750 A.2d 308, 314 (Pa. Super. 2000) (based on the totality of the circumstances, court properly found that defendant, who read and waived his *Miranda* rights, and did not allege any physical or psychological intimidation by the police, gave a voluntary statement). Appellant's claim is without merit.

II.

Appellant alleges in his second claim that the evidence was insufficient to disprove his claim of self-defense. This claim is without merit.

The standard of review for claims challenging the sufficiency of evidence to disprove a claim of self-defense is well-settled:

> In assessing this claim, we must view the evidence in the light most favorable to the Commonwealth as verdict winner. The conviction must be upheld if, accepting as true all the evidence which could properly have been the basis for the verdict, the finder of fact could reasonably find that appellant's claim of self-defense had been disproved beyond a reasonable doubt.

Commonwealth v. Coronett, 455 A.2d 1224, 1228 (Pa. Super. 1983) (citations omitted). Once a defendant introduces evidence of self-defense, the Commonwealth bears the burden of disproving the self-defense claim beyond a reasonable doubt. *Commonwealth v. Houser*, 18 A.3d 1128, 1135 (Pa. 2011). In this regard, the Superior Court has held:

> In order to negate a claim of self-defense, the Commonwealth must establish any one of the following elements beyond a reasonable doubt: (1) that appellant did not reasonably believe it was necessary to kill in order to protect himself against death or serious bodily harm, (2) that appellant provoked the use of force, or (3) that appellant had a duty to retreat and that retreat was possible with complete safety.

Commonwealth v. Hunter, 554 A.2d 550, 553 (Pa. Super. 1989). In evaluating a self-defense claim, the jury is not required to believe the testimony of a defendant raising such a claim. *Houser*, 18 A.3d at 1135.

Here, Appellant testified that Eubanks produced the firearm, he and Eubanks struggled over the firearm, the firearm discharged accidentally during this struggle, striking and killing Sabatasso, and he subsequently shot and killed Eubanks in self-defense. (T.T. 700-712). However, the jury rejected Appellant's account, and found that Appellant intentionally shot two unarmed individuals in the head. Thus, the jury properly found that the Commonwealth disproved Appellant's theory of self-defense beyond a reasonable doubt. *Commonwealth v. Hunter*, 554 A.2d 550, 555 (Pa. Super. 1989) (defendant's testimony that he shot the victim provided a sufficient evidence of malice, and fact that no weapon was found on victim provided sufficient evidence that defendant was not acting in self-defense).

Appellant's claim is without merit.

III.

Appellant alleges in his third claim that the Trial Court erred in failing to exclude forensic evidence pertaining to the vehicle where the shootings occurred. This claim is without merit.

Prior to trial, Appellant sought to have the vehicle preserved for potential further testing by the defense. When it was discovered that the vehicle had been sold and transported to the United Arab Emirates, and was thus no longer available, Appellant filed a motion to suppress the vehicle and all evidence derived therefrom. The Trial Court held several status conferences and hearings regarding the vehicle, including on May 9, 2014; May 4, 2015; July 23, 2015; and July 29, 2015.

Appellant alleges that his state and federal due process rights were violated because the vehicle was materially exculpatory and potentially useful to the defense, and that the Commonwealth acted in bad faith when it failed to preserve the vehicle. Evidentiary rulings are within the sound discretion of the trial court, and will not be overturned on appeal absent a clear abuse of discretion. *Commonwealth v. Gray*, 867 A.2d 560, 569-570 (Pa. Super. 2005). The standard of review for a due process violation under state or federal law is well-settled in Pennsylvania:

> [T]he Due Process Clause of the Fourteenth Amendment requires defendants be provided access to certain kinds of evidence prior to trial, so they may be afforded a meaningful opportunity to present a complete defense. This guarantee of access to evidence requires the prosecution to turn over, if requested, any evidence which is exculpatory and material to guilt or punishment, and to turn over exculpatory evidence which might raise a reasonable doubt about a defendant's guilt, even if the defense fails to request it. If a defendant asserts a *Brady* or *Agurs* violation, he is not required to show bad faith.
>
> There is another category of constitutionally guaranteed access to evidence, which involves evidence that is not materially exculpatory, but is potentially useful, that is destroyed by the state before the defense has an opportunity to examine it. When the state fails to preserve evidence that is potentially useful, there is no federal due process violation unless a criminal defendant can show bad faith on the part of the police. Potentially useful evidence is that of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant. In evaluating a claim that the Commonwealth's failure to preserve evidence violated a criminal defendant's federal due process rights, a court must first determine whether the missing evidence is materially exculpatory or potentially useful.

Commonwealth v. Chamberlain, 30 A.3d 381, 402 (Pa. 2011) (citations and quotations omitted).

Here, the homicides occurred within Cheralynn Sabatasso's vehicle on January 23, 2014. The vehicle was secured on that date and towed to the police auto squad for processing. Extensive photographs were taken and evidence was collected from the vehicle both at the scene and at the auto squad. On February 8, 2014, the vehicle was transported to the police impound facility. (P.T. 13-14).[6]

On March 12, 2014, Appellant filed a formal motion for discovery, requesting "inspection of and copies of reports pertaining to [. . .] physical evidence." The Commonwealth provided photographs and reports regarding the vehicle. These reports did not contain any opinions as to trajectory of bullets, but rather documented general observations of items discovered within the vehicle. (P.T. 59).

On March 25, 2014, Detective McGee signed a Request for Chief's Release to return the vehicle to the Sabatasso family because the processing of the vehicle was complete and the family requested return of the vehicle. Assistant District Attorney Michael Berquist authorized the return and the vehicle was subsequently transported to the residence of Sabatasso's mother. Shortly thereafter, Sabatasso's estate transferred ownership of the vehicle to the insurance company, and on May 5, 2014, the family requested that the vehicle be transported to Coparts, a local salvage yard. Pittsburgh police complied and the vehicle was transported to the salvage yard. (P.T. 14-17, 37).

On May 13, 2014, Appellant's trial attorney Christopher Patarini, along with his investigators, met with Detective McGee at Coparts to examine the vehicle. At that time, Appellant's investigators took more photographs of the vehicle at the direction of a potential defense expert, Fred Wentling, who was corresponding with the defense team via Skype. On May 13, 2014, Attorney Patarini called ADA Berquist to request that the vehicle be transferred back into police custody. ADA Berquist relayed this request to Detective McGee, who assigned this responsibility to Detective Sherwood. (P.T. 17-18, 29, 38-40).

At some point in time, because the insurance company now owned the vehicle, Detective McGee was told that a court order would be needed in order to transfer the vehicle back to police custody. ADA Berquist requested the necessary information from Detective Sherwood for the court order, but never received a response. A court order was never issued. ADA Berquist was under the impression that the police were taking care of re-securing the vehicle. In the meantime, Coparts assured Detective McGee that they would store the vehicle, covered, as long as the police needed; the vehicle remained at Coparts. (P.T. 18, 41-42, 47).

On May 23, 2014, The Trial Court ordered discovery for scientific evidence to close on June 29, 2014, absent exigent circumstances. On July 2, 2014, Appellant filed a Supplemental Motion for Specified Discovery, requesting opinion evidence and scientific reports.

On November 25, 2014, the insurance company sold the vehicle and it was transported to the United Arab Emirates. Coparts did not notify the police, the Commonwealth, or Appellant that the vehicle had been sold and transported abroad. (P.T. 19).

On March 25, 2015, the Commonwealth's expert, Detective Blase Kraeer, authored a blood spatter analysis report that included opinions regarding the trajectory of the bullets. Detective Kraeer did not independently examine the vehicle, but rather based his report and opinions on photographs and evidence taken from the vehicle during initial processing. All of that information had been provided to Appellant during the early phases of the discovery process (P.T. 44).

On April 29, 2015, Attorney Patarini met with Martin Aronson (Office of the Public Defender Investigator) and Arthur Young (forensic DNA expert). During this meeting, Attorney Patarini called Detective McGee ostensibly to set up a time to examine the vehicle, but in the same conversation cancelled the request to examine the vehicle. Detective McGee testified that Attorney Patarini cancelled the request because an expert witness thought it would be a waste of time to inspect the vehicle. However, Attorney Patarini denied making such a statement. (P.T. 19-20).

On May 4, 2015, the Trial Court conducted a status conference on the case, and granted an extension for the time frame in which scientific discovery had to be produced. On that date Attorney Patarini requested that the vehicle be made available for inspection by his expert, Fred Wentling, and the Commonwealth agreed to set that up. Sometime after that, the Commonwealth learned from Coparts that the vehicle had been sold and shipped to the United Arab Emirates.

On May 5, 2015, Attorney Patarini arranged for Wentling to come to Pittsburgh to examine the firearm and vehicle. On May 6, 2015, Detective Provident notified Attorney Patarini that the vehicle had been sold and transported to the United Arab Emirates. On May 7, 2015, Wentling came to Pittsburgh and examined the firearm. On May 11, 2015, the prosecution confirmed that the vehicle had been sold and was no longer available. Finally, on July 15, 2015, Appellant filed a motion to suppress the vehicle and all evidence derived therefrom.

Under due process analysis, Appellant must establish either that the evidence was materially exculpatory or potentially useful. Appellant attempts to avail himself of both avenues of analysis, as he alleges in his Concise Statement that the vehicle was both materially exculpatory and potentially useful. However, Appellant's allegation that examination of the vehicle may have yielded evidence in support of his self-defense claim fails to establish that the vehicle was exculpatory. Rather, Appellant has established only that the evidence was potentially exculpatory, and thus his claim must be examined under the second prong as it is potentially useful evidence. *See Chamberlain*, 30 A.3d at 402-403 (evidence will be considered as potentially useful when the defendant's argument amounts to an allegation that the evidence could have been subjected to tests, and the results of those tests may have

exonerated the defendant). Furthermore, Appellant had available to him the exact same evidence that Detective Kraeer utilized in forming his opinion.

Under the second prong, a due process violation will only be found if the police acted in bad faith regarding the destruction of the evidence. Here, the police reasonably believed that the vehicle was being held at Coparts. The Commonwealth was not notified of the sale to the United Arab Emirates, and did not purposefully destroy the vehicle or take any measures to render it unavailable for inspection. The vehicle remained in police custody for over two months, and was available for defense inspection for eight months. At all times the Commonwealth was cooperative and accommodating to the several "half-steps" that Appellant made toward examination of the vehicle. Based on this course of conduct, the record does not support a finding that the police acted in bad faith. *See Commonwealth v. Chamberlain*, 30 A.3d 381, 398 (Pa. 2011) (where blood evidence was submitted to the crime lab for testing, returned to police custody, and subsequently lost and inadvertently destroyed amongst boxes of evidence, and where there was no indication that the evidence was exculpatory, the court found that although the Commonwealth negligently handled the blood evidence by not maintaining proper safekeeping, the Commonwealth acted in good faith).

Appellant's claim is without merit.

IV.

Appellant alleges in his fourth claim that the Trial Court erred in permitting Dr. Xu, an expert witness in forensic pathology, to testify beyond the scope of his autopsy report for Jason Eubanks. This claim is without merit.

Specifically, during the direct examination of Dr. Xu, Appellant's attorney objected to Dr. Xu testifying to: (1) the distance from the muzzle to Eubanks' skin based on stippling; (2) the trajectory/path/direction of the bullet; and (3) the lethality of the gunshot wounds to the head. Appellant's trial attorney alleged that these matters were beyond the scope of the autopsy report. In each instance, the Trial Court overruled Appellant's objections. The matters allegedly outside the scope of the report were either found within the report, or based on information that is generally and regularly relied upon by medical experts.[7]

In this regard, the Pennsylvania Supreme Court has held that "[a]n expert opinion may be based on inadmissible facts or facts not in evidence, including other expert opinions and hearsay statements, as long as such facts are of a type reasonably relied on by experts in that profession." *Commonwealth v. Towles*, 106 A.3d 591, 605 (Pa. 2014) (citations omitted). Following review of the autopsy report, the Trial Court held that:

> I'll incorporate my previous remarks at sidebar which are of record. I'll also note to Pennsylvania Rule Criminal Procedure in the Comment 573. Pursuant to paragraphs B(2)(b), C(2), the trial judge has the discretion upon motion to order an expert who is expected to testify at trial prepare a report. That report has been prepared without the necessity of such direction. The judge should determine on a case-by-case basis whether the report should be prepared.
>
> Now importantly, for example, to prepare a report ordinarily would not be necessary when the expert is known to the parties and testifies about the same subject on a regular basis.
>
> That applies in this instance that we have discussed at sidebar. There's nothing that you haven't -- you have heard today that you have not confronted on probably [a] hundred times during the course of your experience.
>
> So it's sufficient in detail in terms of the autopsy report; whether you call it trajectory or pathway, both pathway and the trajectory are described upon close examination [of the autopsy report].

(T.T. 574-575). The Trial Court properly overruled Appellant's objection, and permitted Dr. Xu to testify to matters based on his report, and regularly relied upon by medical experts, and testified to during the course of homicide trials. *See Commonwealth v. Vandivner*, 962 A.2d 1170, 1180 (Pa. 2009) ("a medical witness may express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence, but which the expert customarily relies upon in the practice of his profession").

Appellant's claim is without merit.

V.

Appellant alleges in his final claim that his life sentence for third degree murder under 42 Pa. C.S. § 9715 is illegal. This claim is without merit.

Here, Appellant was tried for the criminal homicide of Cheralynn Sabatasso and Jason Eubanks in a single jury trial, and at the conclusion of that trial he was found guilty of one count of third degree murder, and one count of first degree murder. At Appellant's sentencing hearing on February 24, 2016, Appellant faced sentencing for both the first degree murder conviction, and the third degree murder conviction. Appellant was sentenced to life imprisonment on the first degree murder conviction, and pursuant to 42 Pa. C.S. § 9715, Appellant was sentenced to life imprisonment for the third degree murder based on his first degree murder conviction.

Pursuant to 42 Pa. C.S. § 9715, "any person convicted of murder of the third degree in this Commonwealth who has previously been convicted at any time of murder [. . .] in this Commonwealth [. . .] shall be sentenced to life imprisonment." 42 Pa. C.S. § 9715. Notwithstanding Appellant's assertion that "any current caselaw to the contrary is wrongly decided," the plain language of the statute is unambiguous, and the Pennsylvania appellate courts have held that "the timing of the primary conviction is not relevant as long as the defendant has been convicted of the initial murder or manslaughter at the time of sentencing on the second murder." *Commonwealth v. Thompson*, 106 A.3d 742, 761 (Pa. Super. 2014). As such, the Trial Court properly sentenced Appellant to a life sentence for his third degree murder conviction under 42 Pa. C.S. § 9715, given that Appellant, at the time of his sentencing, had previously been convicted of murder. *See Thompson*, 106 A.3d at 761-762 (where defendant was convicted of two counts of third degree murder, court properly imposed mandatory term of life imprisonment for second third degree murder conviction).

Appellant's claim is without merit.

CONCLUSION

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

BY THE COURT:
/s/Borkowski, J.

Date: January 18, 2017

[1] Appellant was originally charged with a notice of the Commonwealth's intent to seek the death penalty. The notice of intent to seek the death penalty was rescinded on October 9, 2015.

[2] 18 Pa. C.S. § 2501.

[3] 18 Pa. C.S. § 6106(a)(1).

[4] 18 Pa. C.S. § 6105(a)(1). This count was severed prior to trial.

[5] The designation "T.T." followed by numerals refers to Volumes I and II of the Trial Transcript, October 15-22, 2015. Volume I (pp. 1-578); Volume II (pp. 579-897).

[6] The designation "P.T." followed by numerals refers to Proceedings Transcript, July 23, 2015.

[7] As to the stippling distance, the autopsy report included the presence of stippling, and the three feet range between the muzzle and the skin is a range that is regularly testified to and accepted in the field of forensic pathology, and the statement regarding the presence of stippling put Appellant's attorney on notice that the witness would likely testify regarding this widely-accepted stippling/distance range. (T.T. 554, 556). Dr. Xu's testimony regarding "trajectory" was in fact referring to the path of the bullet once it entered the body, and this was clarified following Appellant's objection. (T.T. 558-561). As to Appellant's claim that the report did not state that the head wounds were fatal, the autopsy report stated that the cause of death was gunshot wounds to the head. (T.T. 561-562).

Borough of Bellevue v.
Lois J. Mortimer and Thomas J. Mortimer

Real Estate Tax Collection

Court granted in part and denied in part Rule to Show Cause Why Judgment Should not be Entered on Delinquent Real Estate Taxes after hearing disputed testimony. Court credited testimony that taxes paid even though docket showed taxes as delinquent and rejected effort to supplement evidentiary record after hearing closed.

No. GD-13-016512. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 9, 2016.

MEMORANDUM ORDER

This Matter involves the claim by the Borough of Bellevue for various alleged unpaid real estate taxes claimed to be due to it by the owner of Real Property at 43 Union Avenue, Bellevue, PA 15202 in the Borough of Bellevue, Lot and Block 025-K-00253.

Procedurally, the case is before me on the return day of a Rule to Show Cause why Judgment should not be entered for want of Sufficient Affidavit of Defense to Writ of Scire Facias Sur Tax Claim. I heard evidence at a hearing on May 23, 2016.

The writ was issued on January 21, 2016 and the Defendants filed an Affidavit of Defense on February 23, 2016 wherein they denied that any taxes were owed and unpaid.

The writ is based on calculations of the Borough's appointed tax collector, Jordan Tax Service, Inc. The writ has attached to it an Exhibit A, which purports to be the Jordan Tax Service calculations showing a gross amount due of $10,931.89 including interest through February 12, 2016.

The defendants herein are designated as Lois J. Mortimer and Thomas J. Mortimer. Thomas J. Mortimer is appearing *pro se* and Lois Mortimer is represented by Attorney Mark Gesk.

Attorney Gesk presented a document dated April 28, 2003 and bearing the time stamp of the Sheriff's office showing Borough taxes liened for the period 1996 through 2002 for the gross sum of $3,503.30 and applicable to the subject property, the docket number is GD-02-14608. Attached thereto is a Praecipe to Satisfy the aforesaid taxes at the same docket number. Gesk therefore asserts the taxes for that period are satisfied.

I note that the Plaintiff in that case was GLS Capital, Inc. assignee of the County of Allegheny. It also appears that the satisfaction occurred when GLS was attempting to expose for Sheriff Sale the subject property for the taxes that GLS had bought. Nevertheless, the taxes were satisfied for the period disclosed. Therefore I accept the documents presented and find that the Borough Taxes for the period 1996 through 2002 were satisfied and that they are no longer owed and are struck from the claim here being made.

Counsel for the Borough, by letter of May 24, 2016 attempted to explain the satisfaction and to recite facts contradictory of the Exhibit to which opposing Counsel appropriately objected. I did not keep the record open for later submissions and the objection is well taken. Further the claim set out in the Defense Exhibit attached to the letter is $3,503 for a sale set for May 5, 2003. The document submitted by the Borough shows on October 27, 2003 the amount realized was $3,621.40. The difference is $118, probably due to interest since May 5, 2003 – approximately 5 months. Thus, I reject the document sent after the record closed. Even looking at the attachments to that letter which purport to be from the public docket, I find nothing that negates the clear language and monetary amounts of the satisfaction piece. Thus, I strike the Borough's claim through 2002.

The remaining claim by the Borough is for the periods 2003, 2004 and 2014. Those amounts total $3,521.06. The Borough also seeks an additional $1,346.00 for attorney fees, and $212.50 in expenses for a grand total of $5,079.06. During the May 23, 2016 hearing, Mr. Mortimer testified that he worked intensely on his father's taxes every year. He explained that he went through each Delinquent Tax Docket ("DTD") and found out which were satisfied. I they were not, then they were paid. He stated that it makes no sense that his father would have paid the Allegheny County, water, State, Federal and the School District taxes but not the Borough. Mr. Mortimer offered an exhibit captioned "Search Results for Mortimer" which contains the work "sat" handwritten in the margin. He contends that means that it was satisfied.

The records show that Bellevue had an individual serving as its delinquent tax collector at least through 2010. (N.T. 32, 40). In 2010, Jordan Tax Service was appointed delinquent tax collectors and received from the individual collector all the records he had (N.T. 32-33). Other than the 2014 claim, which accrued while Jordan was the delinquent collector, all the others are based on records from the prior delinquent tax collector. The property owner has strenuously testified that he paid all the taxes and the current problem is due to some delinquent tax collector, other than Jordan, failing to mark as satisfied the taxes liened for 2003 and 2004.

The evidence presented with respect to the satisfaction for the periods 1996 through 2002 suggests that the prior delinquent tax collector was less than diligent in entering payment of delinquent taxes on the docket. Thus, I am receptive to the testimony of Tom Mortimer that the taxes for 2003 and 2004 were indeed paid. Counsel for the Borough astutely pointed out that the presence of alleged liened taxes is *prima facie* evidence that they are valid and the taxpayer has to overcome this presumption. Here, the case was filed in 2013, 10 years *after* the 2003 and 2004 were liened. Given this passage of time, I am satisfied to credit Mortimer when he avers the 2003 and 2004 taxes were paid.

With respect to 2014 taxes, however, I credit the testimony of the Jordan Tax Service representative that the 2014 taxes remain unpaid. I will therefore find in favor of the Borough on the 2014 claim.

With respect to what Mortimer must actually pay, the original claim is for $10,931.89 as of January 13, 2016. This includes costs, interest, service fees and attorney fees. The actual delinquent amount as shown on the attachment to the Borough's complaint is $3,624.92 face amount plus $362.50 in penalty, $4,399.25 in interest, $200 in costs and $858.68 in service expense and, attorney's fees in the amount of $1,346.00.

I have found that only the 2014 taxes are still due. The face amount is $373.60. The penalty on that amount is $37.36; interest $24.91; lien cost is $25.00; and $46.09 service expense for a preliminary total for 2014 to be $506.96. I will assess, an attorney's fee of $500 and therefore award $1,006.96 to the Borough against Mortimer. In addition, record costs paid to file the Complaint are awarded.

I find that Mr. Mortimer has presented sufficient evidence to support my findings.

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

Dated: December 9, 2016

Eastern Alliance Insurance Group a/s/o Keith Wachter, a/k/a Assignee of Keith Wachter v. R.A.M.E., Inc., R.D. Stewart Co., Veterinary Ventures, LP

Workers Compensation—Subrogation

Court sustained preliminary objections to subrogation complaint by insurer because injured employee had not initiated a claim against tortfeasor within the statute of limitations. Under Section 319 of the Workers' Compensation Statute, a right of action against a third-party tortfeasor remains in injured employee.

No. GD-15-22535. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—January 4, 2017.

OPINION

Plaintiff Eastern Alliance Insurance Group a/s/o Keith Wachter, a/k/a Assignee of Keith Wachter, commenced this civil action against Defendant R.A.M.E., Inc., R.D. Stewart Co., Veterinary Ventures, LP based upon an incident which occurred on December 23, 2013. Mr. Wachter, an employee of J.B. Mechanical, was injured as a result of falling off of a ladder while working on a renovation project at the Pittsburgh Veterinary Hospital. The Pittsburgh Veterinary Hospital is owned by Defendant Veterinary Ventures, LP. Defendant Veterinary Ventures contracted with Defendant RD. Stewart to act as prime contractor on the job. Defendant R.D. Stewart contracted with J.B. Mechanical to provide heating, ventilation and air condition services and with Defendant R.A.M.E. to provide roofing services in conjunction with the renovation project. Plaintiff Eastern Alliance, as the insurer for J.B. Mechanical, alleges that it paid Mr. Wachter's medical bills and lost wages in the amount of $243,784.13. Plaintiff Eastern Alliance seeks subrogation from Defendants for the amount it expended in workers' compensation benefits.

Defendants filed Preliminary Objections pursuant to Pennsylvania Rule of Civil Procedure 1028(4) based upon the failure to state a cause of action upon which relief may be granted. Rule 1028(4) permits a party to file preliminary objections, in the form of a demurrer, to test the "legal sufficiency of a pleading."

When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems. Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011).

The Supreme Court of Pennsylvania has made clear that the right of action against a third-party tortfeasor under Section 319 of the Workers' Compensation Statute, governing subrogation, remains in the injured employee. *Liberty Mutual Insurance Company. a/s/o George Lawrence v. Domtar Paper Co.*, 113 A.2d 1230, 1240 (Pa. 2015). The Workers' Compensation Statute does not confer on workers' compensation carriers the right to pursue subrogation directly against a third-party tortfeasor when the compensated injured employee has taken no such action. *Id.* at 1237-1238. Here, Defendants claim that just like in *Liberty Mutual.* (Supra), Plaintiff has no independent ability to bring a subrogation claim directly against the Defendants because Mr. Wachter, did not elect to file suit in his own right. They further assert that Plaintiff has no rights as an "assignee" of Mr. Wachter because any rights that Mr. Wachter had were terminated when the statute of limitations lapsed on the underlying claim on December 23, 2015. The incident occurred on December 23, 2013 and therefore the statute of limitations ran on his claim on December 23, 2015. There is a two year statute of limitations on cases involving recovery of damages for personal injury founded on negligent or tortious conduct. 42 Pa. C.S.A. Section 5524. Mr. Wachter executed an Assignment of Rights agreement on March 3, 2016. Thus the passage of time and the non-action by Mr. Wachter warrants the grant of the Preliminary Objections.

Accordingly on October 4, 2016, I sustained all Defendants' Preliminary Objections and dismissed Plaintiff's Amended Complaint finding that the statute of limitations has run and the *Liberty Mutual* case controls.

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

Dated: January 4, 2017