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PLJ

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Tangibl Development Company II, LLC & Tangibl LLC v. IMG Midstream, LLC

Arbitration

Court overruled preliminary objections seeking to enforce arbitration clause. Parties entered two contracts contemporaneously, only one of which contained arbitration clause. The claimed breach of contract involved the contract without an arbitration clause, precluding arbitration.

No. GD-16-011143. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, S.J.—January 3, 2017.

OPINION

INTRODUCTION

Defendant (hereinafter "IMG") appeals from our order dated October 24, 2016, which overruled one of its preliminary objections to Plaintiffs' Complaint (which was based on one contract among the parties) and denied its motion to compel arbitration in the State of Delaware (under a different contract among some of the parties hereto and other non-parties). The contracts, although executed on the same date, have totally different dispute resolution provisions and that is what has given rise to the instant dispute. The remaining preliminary objections abide the outcome of this appeal, which is interlocutory and appealable as of right.

FACTS PERTINENT TO JURISDICTION

According to the Complaint, Tangible LLC "provides technical, managerial, and regulatory expertise to various different types of businesses across the nation" and Tangibl II "is a sister corporation…, formed by certain principals of Tangibl LLC to develop and construct electrical-generation facilities initially at or near conventional gas wells, and then ultimately at or near Marcellus Shale gas wells." The electricity generated by these facilities would then feed into the system ("PJM") that coordinates the movement of wholesale electricity in Pennsylvania and several nearby states. When necessary, Plaintiffs will be referred to separately as Tangibl LLC and Tangibl II.

IMG was created by others who had taken an interest in Plaintiffs' idea and agreed to fund it. IMG was "to oversee the development of the power-generating facilities and ultimately operate them throughout PJM." Plaintiffs were "to support IMG in a wide variety of technical, commercial, and regulatory areas including civil and electrical engineering, rates and regulation, and financing and construction of the electrical generation facilities."

On February 1, 2012, both Plaintiffs and IMG entered into the contract now at issue, the Development Services Agreement ("DSA"). The DSA is attached as Exhibit 1 to the Complaint. Pursuant to the DSA, IMG was to pay a Monthly Fee to Plaintiffs for the services of certain named individuals, "the Developer Principals," according to a formula set forth in the DSA. For most of the relationship, the Monthly Fee ranged "from an initial high of approximately $47,000 to a low of approximately $38,000." The DSA also permitted IMG to lower one aspect of the formula ("the Utilization Factor") which could lower the Monthly Fee as well; however, if the original Utilization Factor was reduced by more than 65%, Plaintiffs could "terminate the DSA for good cause." (¶ 25)

In addition, IMG could "engage additional Tangibl personnel as consultants to augment the services provided by [the] Developer Principals." In this case, IMG would be obligated to pay Plaintiffs "additional fees above and beyond the Monthly Fee for any [such] consulting services provided." (¶ 27)

The first electrical-generation facility contemplated by the parties' partnership opened in October 2015 in Susquehanna County; the second opened in May 2016 in Bradford County. (¶¶ 30-31) "Two additional facilities are under construction and twenty more are in varying stages of development." (¶ 32)

The contractual dispute among the parties came to a head in early April 2016, when IMG proposed a cut of roughly 50% in the Monthly Fee, which Plaintiffs said would force them to terminate the DSA for good cause. In early May 2016, despite having the contractual right to terminate the DSA for convenience, IMG informed Plaintiffs that it "was terminating ... the DSA for alleged defaults by [Plaintiffs]." (¶ 41) IMG also refused to pay the balance due to-date to Plaintiffs because of the alleged defaults. Plaintiffs contend this assertion of defaults was a sham, done simply to deprive them of what they had earned.

Plaintiffs eventually filed the instant action on June 22, 2016 and IMG responded with Preliminary Objections, including the one that is the subject of this appeal, the alleged existence of an agreement for alternative dispute resolution, i.e. for arbitration, under Pa.R.C.P. 1028(a)(6). IMG contends that the applicable arbitration clause is found in a different contract, "the Opco LLC Agreement," which was entered into by Tangibl II, IMG, and others who are not parties hereto. The Opco LLC Agreement was executed on the same day as the DSA, and is referred to in both agreements as one of "the [two] Definitive Agreements."

We denied the motion to compel arbitration as to Tangibl LLC because it was not even a party to the Opco LLC Agreement, and as to both Plaintiffs because the contract allegedly breached is the DSA, which does not contain an agreement to arbitrate. We also noted that the Opco LLC Agreement had no relevance to the dispute unless and until a breach of the DSA was found to have occurred, at which point it might have evidentiary value regarding the amount of damages awardable to Plaintiffs. IMG has contended that the fact that it could be used to measure some of the damages for breach of the DSA meant that the arbitration clause in the Opco LLC Agreement should also be enforced as though it had been included in the DSA. We failed to see the logic of that position, and entered the order now on appeal.

ISSUES RAISED ON APPEAL

IMG raises two main issues with four subsidiary issues in its Rule 1925(b) Statement. It seems to suggest that it should be allowed to raise more at a later date because it "cannot readily discern the basis" for our decision since we only filed a short memorandum to explain our order. We believe that the basis was and is quite clear and no additional issues should be permitted to be raised that do not fairly flow from the Statement filed. We also note that we agree with IMG that the order is immediately appealable as of right and will not discuss this further. See IMG 1925(b) Statement, item I.

We have summarized the issues raised as follows:

1. Whether the arbitration clause in the Opco LLC Agreement is so broad that it includes breaches of the DSA.
2. Whether the fact that damages awardable for breaches of the DSA might be calculated under the Opco LLC Agreement is the same as a claim "under, arising out of, or relating to the Opco LLC Agreement."
3. Whether IMG's possible *defense* to the Complaint, that Plaintiffs allegedly breached the Opco LLC Agreement, mandates the arbitration of IMG's alleged breaches of the DSA.

4. Whether Tangibl LLC is bound by the arbitration clause in the contract to which it is not a party because "(i) Tangibl LLC's claims, and IMG's defenses, rely on the Opco LLC Agreement; (ii) Tangibl LLC has a close, agency relationship to its sister corporation Tangibl II; and (iii) under established Pennsylvania law, the two interconnected, simultaneously negotiated and executed agreements must be read and enforced together."
5. Whether the alternative exclusive venue provision (in state or federal courts in Delaware) that is part of the Opco LLC Agreement's arbitration clause also controls the venue of cases arising under the DSA.
6. Whether we should at least have compelled arbitration of Tangibl II's claims under the DSA because Tangibl II is a signatory to the Opco LLC Agreement and its broad arbitration provision.

We will discuss issues 1-4 together; issues 5 and 6 need only brief discussion.

DISCUSSION

1. **The applicable dispute resolution clause is the one found in the contract that was allegedly breached, not the one contained in a different contract involving only some of the same individuals or parties.**

While it is indeed true that Pennsylvania courts favor arbitration, that is so only when there is a *clear agreement to arbitrate*. IMG would have us ignore the dispute resolution clause in the contract allegedly breached, the DSA, and supplant it with a different clause from a different contract among different parties merely because both were executed on the same day. The two contracts have two quite different alternate dispute resolution clauses which relate only to disputes under the contract in which the clause appears.

The dispute resolution clause in the DSA is found at Section 9.1(c), Ex. 1 to Plaintiffs' Complaint. The dispute resolution clause in the Opco LLC Agreement is found at Section 11.10, Ex. B to Defendant's Preliminary Objections Raising Questions of Fact. Neither dispute resolution clause expressly nor implicitly relates to the other contract. In fact as IMG points out, *both* contracts are "Definitive Agreements." They are of equal import. That being so, it seems clear that Plaintiffs should not be compelled to arbitration simply because another contract, involving only one of the Plaintiffs, requires the arbitration of disputes that arise under that separate contract.

It should go without saying that "the two interconnected, simultaneously negotiated and executed agreements [can] be read and enforced together" by a judge and not only an arbitrator, as IMG contends in item II.4 of its 1925(b) Statement. The dispute resolution clauses themselves, however, *cannot* both be "read and enforced together" where one does not provide for arbitration at all and the other mandates it. Plaintiffs must not be deprived of their right to pursue their claims under the DSA in the Pennsylvania courts since they did not give up their right to do so in a state court and did not agree to arbitration of such disputes. Furthermore, it must not be forgotten that IMG *agreed* to proceed in a state court regarding alleged breaches of the DSA.

2. **The venue clause in the Opco LLC Agreement is not invoked merely because its arbitration clause was found not to apply to disputes under the DSA.**

The arbitration clause in the Opco LLC Agreement was not found to be *invalid*. Rather, it was found to be *inapplicable* to a different contract, the DSA. The venue provision is not invoked in this action.

3. **Tangibl II's claims do not arise under the Opco LLC Agreement; they are a consequence of the breach of the DSA, to which Tangibl II is a party. The Opco LLC Agreement has, at most, only evidentiary value in this action.**

Again, the DSA is the contract allegedly breached. The mere fact that Tangibl II is also a party to the Opco LLC Agreement does not mean that the arbitration clause in that agreement supersedes the Dispute Resolution provision of the DSA which does not call for arbitration.

CONCLUSION

The order complained of was correctly entered. IMG's Motion to Compel Arbitration was properly denied. The contract allegedly breached, the DSA, contains no agreement to arbitrate disputes that arise thereunder. Rather, IMG agreed that disputes under the DSA would be resolved via a non-jury trial in a state court. Plaintiffs were entitled to choose the jurisdiction and venue of Pennsylvania and Allegheny County. Our order should be affirmed.

BY THE COURT:
/s/Friedman, S.J.

Date: January 3, 2017

Commonwealth of Pennsylvania v. Al-Tarq Sharif Ali Byrd a/k/a James Byrd

Commonwealth Appeal—Suppression—POSS/PWID—Vehicle Search—Auto Exception to Warrant Requirement—Jail Recordings

When a gun is found in plain view in car, and gun was the reason for stopping the car, officers are not justified in additional search of vehicle without a warrant.

No. CC 201502875, 201603369. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—January 11, 2017.

OPINION

The Commonwealth has appealed from this Court's Orders of October 31, 2016, which granted the Defendant's Pre-trial Motions to Suppress. However, a review of the record reveals that the Commonwealth has failed to present any meritorious issues on appeal and, therefore, this Court's Orders should be affirmed.

The Defendant was charged at CC 201502875 with Persons Not to Possess Firearms,[1] Carrying a Firearm Without a License,[2] three (3) counts of Possession with Intent to Deliver[3] and three (3) counts of Possession of a Controlled Substance[4] and at CC 201603369 with Rape (Unconscious Victim),[5] two (2) counts of Involuntary Deviate Sexual Intercourse (Unconscious Victim),[6] two (2) counts of Aggravated Indecent Assault (Unconscious Victim),[7] two (2) counts of Terroristic Threats,[8] Stalking,[9] Indecent Assault (Unconscious Person),[10] Invasion of Privacy[11] and Persons Not to Possess Firearms.[12] The Defendant filed Pre-trial Motions to Suppress in both cases and a hearing was held on this motions on October 31, 2016. At the conclusion of the hearing, this Court

granted the Defendant's Motion to Suppress in its entirety at CC 201603369 and granted the Motion to Suppress at CC 201502875 in part with respect to the 20 stamp bags of heroin found in the lockbox, the bulletproof vest and the two (2) cell phones and was denied in all other respects. Having asserted that their prosecution of the above-captioned cases is substantially handicapped due to this Court's rulings, the Commonwealth has appealed.

On appeal, the Commonwealth challenges this Court's Orders granting the Defendant's Motions to Suppress. Its claims are addressed as follows:

1. Vehicle Search

The Commonwealth first challenges this Court's Order granting the Defendant's Motion to Suppress in part because it alleges that the officers had probable cause to search the vehicle. This claim is meritless.

It is well-established that "when the Commonwealth appeals from a suppression order, [the appellate court] follow[s] a clearly defined standard of review and consider[s] only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusion of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts." *Commonwealth v. Miller,* 56 A.3d 1276, 1278–79 (Pa.Super. 2012).

The uncontradicted evidence presented at the suppression hearing established that on February 23, 2015 at approximately 6:00 p.m., Officer Ross Weimer of the McKeesport Police Department was dispatched to 807 Leech Street for a call of a female receiving threatening calls with a suspect parked outside the residence in a grey F-150 truck. When Officer Weimer arrived at the residence, he noted a grey F-150 truck parked a few houses away. Upon entering the residence, he spoke to Ms. Velez, who told him that a man known to her as "Reek" had threatened to kill her, had a gun and was parked outside her house. Ms. Velez pointed out the grey truck previously referenced. Officer Weimer approached the truck, which initially drove directly at him but did stop on command. The driver, later identified as the Defendant, initially opened the window 2-3 inches and eventually opened it all the way. Officer Weimer detected a strong odor of marijuana through the open window. Officer Weimer described the Defendant as acting in a nervous manner with shaking hands and rapid breathing and called for back-up. When Officer Krejdovsky arrived, Officer Weimer asked the Defendant to exit the vehicle and although he eventually opened the door, he refused to get out. Officer Weimer pulled him out of the truck and a struggle ensued during which Officer Krejdovsky slipped on some ice and fell down a small hill. The Defendant continued to struggle with Officer Weimer and was eventually able to break free after shedding his coat and shirt. The Defendant ran and Officer Weimer chased him and attempted to use his taser, but he missed the Defendant. The Defendant eventually slipped on some ice near Officer Weimer's police vehicle and suffered a seizure while on the ground. Medics were called to attend to the Defendant. Officer Krejdovsky testified that he observed a gun magazine under a piece of cloth on the front seat of the truck and he lifted the cloth to discover a .40 caliber handgun.

Also introduced into evidence was a stipulation that 20 stamp bags of heroin were found in an unlocked lockbox on the passenger seat of the vehicle, a bulletproof vest was found in the back seat of the vehicle and two (2) cell phones and a scale were also found in the vehicle (their location was not specified). Also stipulated to was that upon his arrest, 44 individually wrapped bags of marijuana, 10 individually wrapped bags of powder cocaine, four (4) bags of crack cocaine and $205.00 were found in the Defendant's pockets. The Commonwealth did not present any evidence regarding how the search of the truck was effectuated, but rather argued that it was appropriate due to the automobile exception to the search warrant requirement or, alternately, a search incident to arrest.[13]

> At the conclusion of the suppression hearing, this Court made the following findings:
>
> THE COURT: Okay. The officers were told that the defendant had a gun in his possession. They did what they were supposed to. They went out and investigated. They smelled marijuana. The defendant was nervous, uncooperative, tried to run, and the officers acted. According to the defendant's constitutional right [sic], the gun was found in plain view.
>
> When the defendant was searched, the 44 bags of marijuana, the ten bags of cocaine, the four bags of crack and the two something else were on his person and are not suppressed. However, the 20 bags in the lockbox, the vest and the two phones, the suppression is granted.

(Suppression Hearing Transcript, p. 64).

Pennsylvania Courts did not recognize an automobile exception to the search warrant requirement until 2014. In *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), our Supreme Court held that "the prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required. The constant and firm requirement for probable cause is a strong and sufficient safeguard against illegal searches of motor vehicles, whose inherent mobility and the endless factual circumstances that such mobility engenders constitute a per se exigency allowing police officers to make the determination of probable cause in the first instance in the field." *Commonwealth v. Gary*, 91 A.3d 102, 138 (Pa. 2014). In determining whether probable cause to search a vehicle exists, our courts "apply a totality of the circumstances test. Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." *Commonwealth v. Orr*, 2016 WL 5266674, p. 6 (Pa.Super. 2016). "The evidence required to establish probable cause for a warrantless search must be more than a mere suspicion or a good faith belief on the part of the police officer… '[t]he level of probable cause necessary for a search of an automobile is the same as that which would be necessary to obtain a warrant from an issuing magistrate'… probable cause also requires a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Commonwealth v. Parra*, 2015 WL 6736549, p. 2 (Pa.Super. 2015), internal citations omitted.

Here, as this Court noted in its findings at the conclusion of the hearing, the police had been summoned for a call of an individual threatening a woman and in possession of a gun. When Officer Weimer attempt to speak to the Defendant, he acted strangely and then attempted to run away. A gun was found in plain view on the driver's seat. The information given to the police (that the Defendant had made threats against a woman and had a gun) was sufficient to support the actions taken by the police in removing the Defendant from the vehicle (and then finding the gun in plain view), but they did not give rise to any probable cause that would justify their warrantless search of the vehicle. The police did not receive information that the Defendant was in

possession of or selling drugs or conducting any drug activity from his vehicle. The Commonwealth's argument is, essentially, that the Defendant is a bad guy and that is enough probable cause to justify the search of the vehicle. The officers did not see any drug paraphernalia in plain view and though Officer Weimer detected an odor of marijuana, there was a large amount of marijuana found on the Defendant's person when he was eventually subdued. The officers did not observe the Defendant buying, selling or otherwise transferring drugs to another person. The officers did not observe the Defendant weighing or packaging drugs for sale. The officers did not see the Defendant exchanging money with anyone. The officers did not observe the Defendant engaged in any behavior typically noted in a drug transaction. The totality of the circumstances supported a finding of probable cause for the crimes of terroristic threats and possession of a firearm only, *not* that drugs were being held and/or sold from the vehicle.

Under the particular factual circumstances of this case, this Court was well within its discretion in finding that there was no probable cause to support the search of the Defendant's vehicle and so appropriately suppressed the evidence discovered therein. This claim must fail.

2. Jail Visit Recordings

The Commonwealth also argues that this Court erred in suppressing the recordings of the Defendant's jail visit conversations. Again, this claim is meritless.

After the Defendant was arrested on the charges at CC 201502875 discussed above, he was released on bail but in June, 2015, was detained in the Allegheny County Jail by the Ohio Parole Authority. Between June, 2015 and February, 2016, the Defendant received multiple visits from his fiancee, Dana Heaps. The conversations that took place during those visits were recorded. While reviewing the recordings, it was determined that the Defendant had discussed a recording he made of a sexual encounter with Heaps while she was unconscious. Apparently, the Defendant did not like that Heaps took the medication Seroquel, so he took the medication away from her and gave it to her as he felt was appropriate. On one occasion, he gave her a greater dose than was prescribed, causing her to pass out. While she was unconscious, the Defendant engaged in oral, anal and vaginal sex with her and recorded the encounter on his cell phone. During one Heaps' visits to the Defendant at the Allegheny County Jail, the Defendant discussed the medication and the recording of the sexual encounter with her. Upon review of the recorded jail visit conversation, Heaps was interviewed by police and the charges were filed.

The Defendant sought suppression of the jail visit recordings in light of our Supreme Court's decision in *Commonwealth v. Fant*, 146 A.3d 1254 (Pa. 2016), which held that inmate visits using a closed-circuit phone system were not "telephone calls" and thus did not fall within the correctional facility telephone call exception to the Wiretap Act. After a hearing on the matter, this Court granted the Defendant's Motion to Suppress.

The evidence presented at the suppression hearing established that inmate visits at the Allegheny County Jail are conducted over a closed-circuit system using telephone receivers. A visitor arriving at the Allegheny County Jail is taken to a visitor room with windowed cubicles, chairs and a telephone receiver. The inmate is escorted to a room on the other side of the visitor window with a telephone receiver below the window. There are no cubicles or walls on the inmate side. The inmate picks up the receiver, enters his or her jail telephone ID number and then the visitor picks up his or her receiver. Before the parties are connected, a recording stating that the visit "may be monitored or recorded" is played. (S.H.T., p. 13). There is nothing in the inmate handbook which indicates that the visits are recorded and there was no testimony regarding whether the Defendant heard the recording before each visit. Ms. Heaps testified that she heard the recording indicating that the conversation "may be monitored or recorded" at each visit, but received no written documentation indicating that the conversations would be monitored or recorded.

Pennsylvania's Wiretapping and Electronic Surveillance Control Act states, in relevant part:

> ***§5703. Interception, disclosure or use of wire, electronic or oral communications***
>
> *Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:*
>
> *(1) intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;*
>
> *(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or*
>
> *(3) intentionally uses or endeavors to use the contests of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.*
>
> *and*
>
> ***§5704. Exceptions to prohibition of interception and disclosure of communications***
>
> *It shall not be unlawful and no prior court approval shall be required under this chapter for:*
>
> *…(4) A person, to intercept a wire, electronic or oral communication have given prior consent to such interception.*
>
> *…(14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:*
>
> *(i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:*
>
> *(A) Before the implementation date of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.*
>
> *(B) Unless otherwise provided for in this paragraph, after intercepting or recording a telephone conversation, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.*

(C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge any conversation between an inmate and an attorney.

(iii) Persons who are calling into a facility to speak to an inmate shall be notified that the call may be recorded or monitored.

(iv) The superintendent, warden or a designee of the superintendent, warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

18 Pa.C.S.A. §5703-§5704.

In *Commonwealth v. Fant*, 146 A.3d 1254 (Pa. 2016), our Supreme Court addressed the recording of jail visits in light of the Wiretapping and Electronic Surveillance Control Act. In Fant, the defendant was incarcerated at the Clinton County Correctional Facility when various inmate visit conversations were recorded and used to obtain additional evidence against him. At the time, Clinton County Correctional Facility used a visiting procedure virtually identical to Allegheny County Jail's procedure. The defendant filed a pre-trial Motion to Suppress, averring that the recordings were obtained in violation of the Wiretap Act, but the Commonwealth argued that they fell within the correctional facilities exception to the Act. The Supreme Court engaged in an extensive analysis of whether the use of telephone receivers in the visit procedure constitutes a "telephone call" for purposes of the Wiretap Act and eventually concluded that it did not, holding that inmate visit conversations using telephone receivers "are not 'telephone calls' and they are not subject to the county correctional facility "telephone" exception under the Wiretap Act." *Commonwealth v. Fant*, 146 A.3d 1254, 1265 (Pa. 2016).

At the suppression hearing, the Commonwealth conceded that the telephone jail visit system was not a "telephone call". Of note was the testimony from Sam Pastor, an Investigator from the Internal Investigations Office of the Allegheny County Jail, which indicated that since the *Fant* decision, the procedure for inmate visits has changed and the conversations are no longer being recorded. Although this is instructive, it is, for terms of this analysis, somewhat beside the point, given the Commonwealth's concession that the recordings did not fall within the county correctional facility telephone call exception to the Wiretap Act.

Rather, the Commonwealth argues that the recordings fall within the two-party consent exception of the Wiretap Act. In support of its arguments, the Commonwealth presented the testimony of Ms. Heaps, who testified that she heard a recorded statement stating that the conversation "may be monitored or recorded" prior to the connection of each visit call. Even though Ms. Heaps was never informed of the policy in writing or gave her consent in writing, the Commonwealth presumes that by beginning to speak after the recorded statement, she signified her consent. This Court accepts the Commonwealth's presumption for purposes of this analysis.

Nevertheless, the Commonwealth has failed to present any evidence indicating that the Defendant heard the recording. It is not outside the realm of possibility that the Defendant did not have the receiver to his ear when the recording played, and therefore may not have heard it. The Commonwealth conceded that the Defendant was not provided with a written statement or agreement regarding consent to be recorded, and similarly conceded that there was no such provision in the inmate handbook.

At the conclusion of the suppression hearing, this Court made the following findings:

THE COURT: But there is no direct evidence of what Mr. Byrd may have known.

MR. SACHS: Well, Mr. Pastor testified that both parties hear this on every visitation. And he's got to have the phone up to his ear when he's punching in - he picks up the phone and he punches in his ID number and it says the call is being processed.

THE COURT: Well, but he doesn't have to have the phone to his ear.

…

THE COURT: Actually the inmates in the Allegheny County Jail are told, as I heard on the recording that you played, may be subject to recording. May be monitored or recorded.

MR. SACHS: I said it's almost identical. What the federal -

THE COURT: There's a big difference between "is" and "may be".

…

THE COURT: The court finds that you have not proven the consent of Mr. Byrd in this case. Relying on the Fant decision, the jail visit conversations will be suppressed.

(S.H.T., pp. 33, 36, 38).

By failing to establish that the Defendant was aware of the recording and consented to it, the Commonwealth has not satisfied the requirements of the two-party consent exception to the Wiretap Act. As such, this Court correctly determined that the recordings were obtained in violation of the Wiretapping and Electronic Surveillance Control Act, and was therefore well within its discretion in granting the Defendant's Motion to Suppress. Again, this claim is meritless.

Accordingly, for the above reasons of fact and law, this Court's Orders of October 31, 2016, granting the Defendant's Motions to Suppress must be affirmed.

BY THE COURT:
/s/McDaniel, J.

Date: January 11, 2017

[1] 18 Pa.C.S.A. §6105(a)(1)

[2] 18 Pa.C.s.A. §6106(a)(1)

[3] 35 P.S. §780-113(a)(30)

[4] 35 P.S. §780-113(a)(16)

[5] 18 Pa.C.S.A. §3121(a)(3)

[6] 18 Pa.C.S.A. §3123(a)(3)

[7] 18 Pa.C.S.A. §3125(a)(4)

[8] 18 Pa.C.S.A. §2706(a)(1)

[9] 18 Pa.C.S.A. §2709.1(a)(1)

[10] 18 Pa.C.S.A. §3126(a)(4)

[11] 18 Pa.C.S.A. §7507.1(a)(1)

[12] 18 Pa.C.S.A. §6105(a)(1)

[13] The Commonwealth has abandoned its argument of search incident to arrest for purposes of this appeal. Indeed, our Supreme Court has held that a search of a vehicle is not justifiable as a search incident to an arrest. See *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995).

Commonwealth of Pennsylvania v. Taevon Maurice Carr

Criminal Appeal—Sufficiency—Sentencing (Legality)—Inchoate Crimes—Attempted Homicide—Prejudicial Statement

Court errs in imposing sentence for attempted homicide and conspiracy; both inchoate crimes based on one offense.

No. CC 201312279. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Todd, J.—January 9, 2017.

OPINION

This is an appeal by Defendant, Taevon Maurice Carr, from the judgment of sentence of April 6, 2016 after Defendant was found guilty on January 15, 2016 of two counts of Criminal Attempt Homicide in violation of Pa.C.S.A. § 901(a), Criminal Conspiracy to Commit Homicide in violation of 18 Pa.C.S.A. § 903(c), two counts of Reckless Endangering Another Person in violation of 18 Pa.C.S.A. § 2705 and one count of Possession of a Firearm by a Minor in violation of 18 Pa.C.S.A. § 6110.1(a). Defendant filed Post Trial Motions that were denied by an order of April 19, 2016. Defendant filed his Notice of Appeal on May 19, 2016. On May 24, 2016 an order was entered directing Defendant file his Concise Statement of Matters Complained of on Appeal within twenty-one (21) days. On September 27, 2016 Defendant filed his Concise Statement which set forth the following:

> "A. The lower court erred when it denied the Motion for a Mistrial when one of the two victims, Irvin Green, blurted out in front of the jury that Parrish Linnen, Mr. Carr's codefendant, had been charged previously with criminal homicide and "beat it", thereby denying Mr. Carr a fair trial. The jury could have determined that Mr. Linnen had a propensity for violence, and found Mr. Carr guilty by association with his codefendant, and was free to surmise that he too previously had been charged with homicide. The curative instruction was insufficient to overcome the prejudicial impact of the statement.
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> B. The evidence was insufficient as a matter of law to sustain the conviction of Criminal Attempt Homicide with respect to Tashawna Sutton insofar as she testified that she never saw Mr. Carr shoot at her or anyone else. The other victim, Irvin Green, testified that he heard Parrish Linnen tell Dakota Halcomb to kill Tashawna Sutton. Mr. Green heard gunshots, but did not see who was firing at them. He only reportedly saw Mr. Carr when he was loading his gun. For these reasons, the Commonwealth failed to prove that Mr. Carr had the specific intent to kill Ms. Sutton, or that his actions constituted a substantial step towards the commission of the crime of Criminal Attempt Homicide as to Ms. Sutton.
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> C. The lower court improperly convicted and sentenced Mr. Carr for two inchoate crimes, Criminal Attempt - Homicide (18 Pa.C.S. § 901) and Criminal Conspiracy (18 Pa.C.S. § 903). The court imposed terms of imprisonment at both counts of Criminal Attempt - Homicide, and also imposed a term of imprisonment for the one count of Criminal Conspiracy. Convictions and sentences for two inchoate crimes directed to the commission of the same crime is prohibited by 18 Pa.C.S. § 906."

BACKGROUND

This matter arises out of the shooting of Irvin Green and Tashawna Sutton on August 1, 2013 in Clairton, Pennsylvania. The evidence at trial established that Green and Sutton left their home on Wylie Avenue in the early morning hours of August 1 to walk to a nearby banking machine to withdraw money from Green's account. (T., p. 99) Green and Sutton walked up Wylie Avenue to its intersection with Miller Avenue and turned right on Miller Avenue toward the banking machine. As they were walking on Miller Avenue, Defendant and Dakota Holcomb crossed the street in front of them. (T., p. 101) Both Green and Sutton knew Defendant and Holcomb but did not speak with them. Green and Sutton continued onto the banking machine and after withdrawing the money, walked back up Miller Avenue to Wylie. As they turned onto Wylie Avenue, they again saw Defendant and Holcomb standing on Wylie Avenue but they were now accompanied by Parrish Linnen and a fourth unidentified man. (T., pp. 105, 197) As soon as Green and Sutton turned onto Wylie Avenue, the four men turned and began walking down Wylie Avenue towards Green and Sutton's home but shortly thereafter Green and Sutton lost sight of them. (T., pp. 105-106,197) Green and Sutton continued onto their house and as Sutton was unlocking the front door they began hearing gun shots and both Green and Sutton were immediately struck by

the gun fire. (T., pp. 109 – 110) Green testified that he fell but then started to get up and as he did he turned and saw three men coming out of the darkness from across the street walking closer to his house as they continued shooting. (T., p. 109-110) Green testified that all three had guns in their hands and he watched as they continued firing at him and Sutton as they approached within a few feet of them. Green identified Defendant, Linnen and Holcomb as the shooters. Green testified that he could clearly see their faces by the light from his front porch and he watched as they reloaded their guns. (T., p. 111) Green testified that he was shot six times and Sutton, who was also shot several times, fell to the ground just off their porch. (T., p. 113) Green testified that he then ran towards Sutton's mother' home, which was about five houses away, and was pursued by Defendant and Linnen. When he reached the house he turned and was shot by Defendant in the shoulder and he fell to the ground. While lying on the ground, Defendant stood over him and shot him in the face while Linnen was standing directly behind him. (T., pp. 114-115) Green testified repeatedly that he immediately recognized Defendant and Linnen and that he knew them from having lived in the Clairton area for much of his life and knowing their families.

Sutton also testified that as she began to open the door to their home she heard gun fire and was immediately hit. (T., p. 203) She fell to the ground and then tried to get up and as she did she was shot in the chest by Linnen. (T., p. 204) As she lay on the ground, Holcomb then stood over her pointing his gun and repeatedly pulled the trigger but it didn't fire. She then heard Linnen say "Fuck that bitch. She is dead anyway." (T., p. 206) She then saw Defendant and Linnen and chase Green as he ran down the street. As she lay on the ground she called 911. (T., p. 207) Sutton also testified that she knew Defendant and Linnen from living in Clairton and specifically testified that she had seen Defendant in the community "thousands" of times. (T., p. 193) On cross examination Sutton acknowledge that she did not see Defendant shooting. (T., p. 223)

The Commonwealth also presented the testimony of Sergeant Keith Zenkovich of the Clairton Police Department who testified that he arrived on the scene shortly after the shooting. After Green was placed into an ambulance Zenkovich asked Green who shot him and he stated he was shot by Defendant and "P. Money." (T., p. 260) Zenkovich then went to the ambulance that Sutton was in and she indentified the shooters as Defendant and Linnen. (T., p. 261)

The Commonwealth also presented the testimony of Detective Steven Hitchings of the Allegheny County Police who also testified that he spoke to Green at the hospital later that morning and he again identified Defendant and Linnen as the shooters. (T., p. 276) Hitchings also created a photo arrays and returned to the hospital and presented the arrays to Green from which Green immediately identified Defendant and Linnen as two of the shooters. (T., pp. 280, 283)

As noted above, Defendant was convicted of two counts of Criminal Attempt Homicide, Conspiracy, and two counts of Recklessly Endangering Another Person. On April 6, 2016 Defendant was sentenced to two concurrent sentences of 15 to 30 years for the criminal attempt homicide convictions, a consecutive sentence of 10 to 20 years for conspiracy and a concurrent sentence of 9 to 18 months for possession of a firearm by a minor.

DISCUSSION:

In his first issue on appeal, Defendant claims that it was error to dismiss the motion for a mistrial made by Linnen's counsel when Green stated in front of the jury during cross examination that Linnen had previously been charged with criminal homicide. Defendant asserts that the jury could have determined that Linnen had a propensity for violence and found Defendant guilty by association with Linnen and was free to surmise that he too previously had been charged with homicide. Defendant asserts that the curative instruction was insufficient to overcome the prejudicial impact of the statement.

During cross examination Linnen's counsel repeatedly attempted to discredit Green's identification of Linnen by eliciting testimony about Green's extensive criminal history, his drug usage and addiction and the fact that he was being treated for paranoid schizophrenia at the time of the shooting. (T., pp. 133 – 143) In addition, Linnen's counsel attempted to discredit Green's testimony that he could identify Linnen because Green knew him from the years they lived in the same community. Linnen's counsel attempted to establish that there were extended periods of time when Green was incarcerated and, therefore, could not have seen or been around Linnen. In response to questions concerning when both he and Linnen were in the Clairton community the following exchange took place:

> "Q. Now, you would agree with me there is a four-year period of time you're not in Clairton, correct?
>
> A. Yeah.
>
> Q. 2008-2012, correct?
>
> A. Yes, sir. *Man, I know he was incarcerated for six years. I know I was incarcerated for six years and he ain't seen him and he ain't seen me*, but I know him.
>
> Q. *Did you just testify that my client has been incarcerated for six years?*
>
> A. Yeah. Yes, sir.
>
> Q. *So let's narrow that down.* When possibly could you have seen Parrish Linnen in the projects?
>
> A. Way before he even got arrested. *Way before he got arrested for the homicide that he beat."* T., pp. 143-144) (Emphasis added)

At that point Linnen's counsel made a motion for a mistrial stating:

> "The basis is this individual, without my solicitation, I did not solicit the nature of my client's underlying charge, blurted out that he knew my client before he was arrested for the homicide that he beat." (T., p. 144)

In response the Commonwealth argued that the statement was elicited by questioning from Linnen's counsel; that Linnen's counsel could observe the outrage that the Green exhibited during his testimony concerning the attack on him and Sutton; and, that given repeated questioning about the opportunities to observe Linnen in the community, including specific question questioning about when Linnen was incarcerated, it was not unpredictable that Green might make statements about Linnen's criminal history. The motion for a mistrial was denied and the jury was immediately given the following cautionary instruction:

> "Ladies and Gentleman of the Jury, there was a statement made by the witness on the stand concerning one of the Defendants and brought reference to a prior matter involving a homicide. I want you to disregard that. It's hearsay and not admissible and you should pay no attention to it." (T., pp. 147 – 148)

Clearly Green's reference to Linnen's previous arrest for a homicide was inadmissible. However, not all testimony or references to unrelated criminal conduct of a defendant is a basis for a mistrial. In *Commonwealth v. McEachin*, 537 A.2d 883 (Pa. Super. 1988) the Court stated:

> There is no *per se* rule that requires a new trial for a defendant every time there is reference to prior criminal activity. *Commonwealth v. Heaton*, 504 Pa. 297, 472 A.2d 1068 (1984). "[W]e have never ascribed to the view that all improper references to prior criminal activities necessarily require the award of a new trial as the only effective remedy." *Commonwealth v. Williams*, 470 Pa. 172, 178, 368 A.2d 249, 252 (1977)…. An immediate curative instruction to the jury may alleviate any harm to the defendant that results from reference to prior criminal conduct. [citations omitted] … "[W]hether the exposure of the jury to improper evidence can be cured by an instruction depends upon a consideration of all the circumstances." *Commonwealth v. Richardson*, [496 Pa. 521, 526, 437 A.2d 1162, 1165 (1981)]. *Com. v. McEachin*, 371 Pa. Super. 188, 198–200, 537 A.2d 883, 888–89 (1988)

In determining whether a mistrial should be granted, consideration must also be given to the nature of the reference and whether the testimony was intentionally elicited by the prosecutor. *Commonwealth v. Satzberg*, 516 A.2d 758, 762 (1986) In this case it is clear that the testimony at issue was not elicited in any manner by the Commonwealth. In addition the statement made no reference to Defendant. There is no basis to believe that the jury would associate Defendant with the homicide that Linnen was allegedly charged with. The statement specifically referred to Linnen and did not implicate Defendant in any manner. Defendant did not request a mistrial nor did he request a separate curative instruction as it was clear that Green's statement applied only to Linnen. In addition, during the final charge the jury was specifically instructed that:

> "You heard testimony throughout the trial potentially concerning other possible criminal activities involving both Defendants. This testimony is not evidence against these Defendants, nor does it have any relevance in this case before you now. You must disregard this testimony in its entirety." (T., p. 442-443).

Based on all of the circumstances, there was no error in failing to grant the mistrial. and there is no merit to the claim that Defendant was denied a fair trial.

Defendant next argues that the evidence was insufficient as a matter of law to sustain the conviction of criminal attempt homicide with respect to Tashawna Sutton because she testified that she never saw Defendant shoot at her or anyone else. Defendant also contends that Green testified that he heard Linnen tell Halcomb to kill Tashawna Sutton. Defendant also contends that Green heard gunshots, but did not see who was firing at them and only saw Defendant when he was loading his gun. As a result of the foregoing, Defendant contends that the Commonwealth failed to prove that Defendant had the specific intent to kill Sutton, or that his actions constituted a substantial step towards the commission of the crime of criminal attempt homicide as to Sutton.

When reviewing a sufficiency of the evidence claim the evidence must be viewed in the light most favorable to the Commonwealth, as verdict winner, to determine if there is sufficient evidence to enable a fact-finder to find every element of the crime charged beyond a reasonable doubt. *Commonwealth v. McNair*, 603 A.2d 1014 (1992). It is exclusively within the province of the fact-finder to believe none, some or all of the evidence presented. *Commonwealth v. Henry*, 569 A.2d 929, 939 (1990); *Commonwealth v. Jackson*, 485 A.2d 1102 (1984). If the fact finder reasonably could have determined from the evidence presented that all of the necessary elements of the crime were established, then that evidence will be deemed sufficient to support the verdict. *Commonwealth v. Wood*, 637 A.2d 1335, 1343 (1994); *Commonwealth v. Hopkins*, 747 A.2d 910, 914 (Pa. Super. 2000)

> Criminal attempt is defined in 18 Pa.C.S.A. §901 as follows:
>
> **(a) Definition of attempt.--**A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. 18 Pa.C.S.A. § 901

The elements of the crime of attempt are an intent to commit a specific crime and any act constituting a substantial step toward the commission of that crime. *Commonwealth v. Fierst*, 257 Pa.Super. 440, 390 A.2d 1318 (1978). The intent to commit a crime may be inferred from the actions of the defendant in light of all attendant circumstances and even though direct evidence thereof is lacking. *Commonwealth v. Chance*, 458 A.2d 1371, 1374 (1983) *Commonwealth v. Cross*, 331 A.2d 813, 814 (1974) To prove a charge of attempted homicide, the Commonwealth must establish that the accused took a substantial step toward committing homicide, with the specific intent to kill. Such specific intent may reasonably be inferred from an accused's use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Hobson*, 604 A.2d 717 (1992). The offense of attempted homicide is completed by the discharging of a firearm at a person with intent to kill, even if no injury is suffered. *Commonwealth ex rel. Robinson v. Baldi*, 106 A.2d 689 (1954).

In the present case there is more than sufficient evidence to establish that Defendant was guilty of criminal attempt homicide as to Sutton. Although Sutton testified that she did not see Defendant firing his weapon, she unequivocally identified him as being one of the participants in the shooting. While his mere presence at the scene would not be sufficient to prove the intent to kill, her testimony, in combination with Green's testimony, establishes Defendant's intent. Green specifically identified Defendant as walking towards them with the other men firing repeatedly the weapon he held in his hand and that both he and Sutton were struck multiple times as they stood on the porch. Clearly the specific intent to kill Sutton can be inferred from Defendant's repeatedly firing of a firearm in the direction of the Sutton.

> Q. Now to this point during this encounter, did you see who it was that was shooting at you, sir?
>
> A. No. Because they were still in the dark, still in the dark. They was coming across the street. Whenever I fell on one knee, I looked, and they was coming across the street. We had our porch light on. Our porch light was on on the front and was on the side. The closer they got to our house, the way better you could see. *They walk right up from the cutoff from the houses across the street off the curb into the middle of the street still firing at us.* I was on one knee and then I got hit again and I fell. *Then Tashawna started -- they started lighting Tashawna up. Tashawna fell right on top of me and she started crying, screaming: Oh My God.* Then like I am looking at her but there was nothing I could do. Just nothing I could do. She got up. She tried to get up, and by this time, they're on our sidewalk in front of our house and I am looking at all three of them.
>
> Q. *You say "all three of them," who are the people we are talking about?*

A. *Taevon, Parrish and Dakota.*

Q. What were they doing then at this point?

A. *They were still shooting.* When they got all the way up on the lawn – – when they got all the way up like four or 5 feet away from us they was out of bullets.

Q. How do you know that was the case?

A. Because they pulled their clips out of their pockets and they put their clips in their gun and they had bullets in their pocket and reloaded the clips. I watched this with my own eyes.

Q. *Did each of them have a gun?*

A. *All three of them had a gun.* (T., pp. 110-111)

Defendant's contention that there is no evidence that would establish his intent to commit homicide as to Sutton is clearly contradicted by Green's testimony. The fact that Sutton did not see Defendant firing his weapon does not negate Green's unequivocal testimony that he saw all three of the men, including Defendant, shooting at them. In addition, the fact that the Commonwealth did not establish specifically which of the several bullets that struck Sutton were fired from Defendant's gun does not require a finding that the evidence was insufficient to convict Defendant of Criminal Attempt Homicide as to Sutton.

Defendant next asserts that he was improperly convicted and sentenced for two inchoate crimes of criminal attempt homicide and criminal conspiracy related to the attempted homicide. As noted above, Defendant was sentenced to two concurrent sentences of 15 to 30 years for the convictions for the criminal attempt homicide convictions and a consecutive sentence of 10 to 20 years for conspiracy to commit homicide. Defendant should not have been sentenced for both the inchoate crimes of criminal attempt homicide and the criminal conspiracy related to the attempted homicides. Sentences for more than one inchoate crime related to the same crime are prohibited by 18 Pa.C.S.A. §906 which provides:

> A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct designed to commit or to culminate in the commission of the same crime. 18 Pa.C.S.A. § 906

Therefore, the sentence imposed must be corrected.

BY THE COURT:
/s/Todd, J.

Commonwealth of Pennsylvania v. Zachary Blair

Criminal Appeal—Guilty Plea—Sentencing (Discretionary Aspects)—Simple Assault

Court ordered probation to be served following sentence in another case which had not yet been imposed.

No. CC 201500922. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—January 19, 2017.

OPINION

This is a direct appeal wherein the defendant, Zachary Blair, appeals from the judgment of sentence of April 28, 2016. The defendant pled guilty to simple assault on December 16, 2015 and at that time he was facing unrelated homicide charges at a different case number. The defendant requested that his sentencing be delayed because of a concern that the Commonwealth of Pennsylvania would seek the death penalty in the homicide case and there was a concern as to how the simple assault case would affect the death penalty case. The Commonwealth of Pennsylvania eventually opted not to seek the death penalty in the homicide case. On April 28, 2016, this Court sentenced the defendant. The defendant had not yet been sentenced on the homicide case. This Court sentenced defendant to a term of two years' probation upon his release from custody on the homicide case. Though defendant did not challenge the sentence at the time it was imposed, the defendant filed a timely appeal of the sentence claiming that this Court erred when it imposed the probationary sentence consecutively to a sentence that has not yet been imposed.

This Court believes that the defendant's claim does not have merit. The defendant was incarcerated pending trial on the homicide case. The Court ordered that the probationary period was "effective upon release from custody." The Court did not order that the defendant's probation begin consecutively to any other sentence. The Court did not intend that the defendant's probation be concurrent to his being detained in the Allegheny County Jail due to a denial of bail or his failure to make bail on the homicide case. Rather, the defendant's probation was to begin upon his release from custody, whether by the defendant's making bail during the pendency of the homicide case, a dismissal of the homicide case or an acquittal of the homicide charges, or the completion of any sentence issued relative to the homicide case. The Court does not believe that the defendant should have been placed on probation during his pre-trial detention in the Allegheny County Jail for the homicide case, as such would be inconsistent with the purpose of a probationary sentence and would otherwise be meaningless.

Should the Honorable Superior Court find that this Court's sentence is improper, the Superior Court should vacate the judgment of sentence and order a new trial.

BY THE COURT:
/s/Mariani, J.

Date: January 19, 2017

Commonwealth of Pennsylvania v. Gene Livingston

Criminal Appeal—Suppression—VUFA—Mere Encounter—Safety Check—Inventory Search—Constructive Possession

Sleeping defendants in running car were properly detained and furtive movements supported escalating the detention.

No. CC 2015-13189. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—January 19, 2017.

OPINION

This is a direct appeal wherein the defendant, Gene Livingston, appeals from the denial of his post-sentencing motions. After a non-jury trial, Mr. Livingston was convicted of being a person not to possess a firearm, in violation of 18 Pa.C.S.A. §6105(a). He was sentenced to a period of imprisonment of not less than 9 months nor more than 18 months to be followed by a period of probation of two years.

The credible evidence presented at trial established that the following events transpired:

Officer Ryan Coll of the McKees Rocks Police Department was on duty on November 8, 2015. At approximtely 3:55 a.m., he received a dispatch that three males were passed out in a Ford Escort in the parking lot of a CoGo's convenience store in McKees Rocks. When he arrived at the CoGo's, Officer Coll observed the Ford Escort but there were actually six people inside the vehicle. The Ford Escort was a small vehicle. The vehicle's engine was running. There was one male in the driver's seat, one male in the front passenger seat and three females and one male in the rear seats of the vehicle. All six people were sleeping. Sir John Withrow was in the driver's seat. Gene Livingston, who was a large man, was in the front passenger seat. McKees Rocks police officer Roche arrived on the scene. He proceeded to the driver's side window. Officer Coll remained at the front passenger window. Due to the officers' fear that serious injury could occur to one of the occupants or a pedestrian if the vehicle was accidentally placed into gear by one of the sleeping occupants, both officers began to knock on the windows. Despite the knocking, none of the occupants woke up. After unsuccessfully attempting to wake the occupants, Officer Roche checked to see if the passenger door was unlocked. The passenger door was unlocked so he opened the door, reached into the vehicle, turned the engine off and removed the keys from the ignition. Mr. Livingston opened his eyes briefly then went back to sleep. Eventually, the officers were able to wake Mr. Withrow and Mr. Livingston. Officer Roche returned to his patrol vehicle to run a background check on Mr. Withrow and Mr. Livingston through dispatch. Officer Coll remained with the vehicle. While Officer Roche was checking with dispatch, Officer Coll observed Mr. Livingston reaching with his left hand towards the center console of the vehicle. Mr. Withrow was also observed making movements with his right hand toward the console. Officer Coll could not see what they were reaching for. Officer Coll ordered both males to show their hands and to stop making movements.

Mr. Livingston continued to move around inside the vehicle. Fearing for his safety, Officer Coll ordered Mr. Livingston out of the vehicle. He also ordered Mr. Livingston to sit on the sidewalk. At this point, Officer Roche returned to the vehicle. Based on Officer Roche's background check, officers learned that Mr. Withrow's driver's license was suspended. Due to that fact, Officer Coll called for a tow truck. Officer Roche asked Mr. Withrow to exit the vehicle. Mr. Withrow refused to exit the vehicle. Mr. Withrow began to take his jacket off and again reached toward the center console. Officer Roche then physically removed Mr. Withrow from the vehicle. After Officer Roche conducted a pat-down search of Mr. Withrow for weapons, Mr. Withrow consented to a search of his person. Heroin and crack cocaine were discovered. Mr. Withrow was taken into custody and placed into Officer Roche's patrol vehicle. The remaining occupants of the vehicle woke up. They were each checked by other officers who responded to the scene and told they were free to go.

Officer Coll was about to begin conducting an inventory search of the vehicle before the tow truck arrived. Prior to beginning the inventory search, Officer Coll noticed a firearm on the top of the console between the driver's and front passenger's seats. The firearm was in plain view and he was able to observe it from outside the vehicle. He did not see the firearm when he turned the ignition off. He immediately took possession of the firearm and he found it to be loaded. At this point, Mr. Livingston was also placed under arrest. At the conclusion of trial, Mr. Livingston was convicted of of being a person not to possess a firearm as a misdemeanor of the first degree. This timely appeal followed.

Mr. Livingston challenges this Court's denial of his motion to suppress. Mr. Livingston claims that he was unlawfully detained because Officer Coll did not have probable cause or reasonable suspicion to detain him. The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, thereby ensuring the "right of each individual to be let alone." *Commonwealth v. Blair*, 394 Pa. Super. 207, 575 A.2d 593, 596 (Pa.Super. 1990). To secure this right, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. See *Commonwealth v. Beasley,* 2000 PA Super 315, 761 A.2d 621, 624 (Pa. Super. 2000). The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75L.Ed.2d 229 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an investigative detention, must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Commonwealth v. Ellis,* 541 Pa. 285, 662 A.2d 1043, 1047 (1995). Finally, an arrest, or 'custodial detention', must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriguez*, 532 Pa. 62, 614A.2d 1378 (1992).

As set forth above, a mere encounter between police and a citizen need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond. See *Beasley*, 761 A.2d at 624. No constitutional provision prohibits police officers from approaching citizens in public to make inquiries of them.

If, however, the police action becomes too intrusive, a mere encounter may be regarded as an investigatory detention or seizure. See *Id.* To determine whether a mere encounter rises to the level of an investigatory detention, it must be discerned whether, as a matter of law, police have conducted a seizure of the person involved. See *Commonwealth v. Mendenhall*, 552 Pa. 484, 715 A.2d 1117, 1119 (Pa. 1998).

An investigative detention occurs when a police officer temporarily detains an individual by means of physical force or a show of authority for investigative purposes. See *Ellis*, supra; see also *Commonwealth v. Lopez*, 415 Pa. Super. 252, 258, 609 A.2d 177,

180, appeal denied 533 Pa. 598, 617 A.2d 1273 (1992). See also *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994). Such a detention constitutes a seizure of a person and thus activates the protections of the Fourth Amendment and the requirements of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In order to determine whether a particular encounter constitutes a seizure or detention, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." *Lewis*, 535 Pa. at 509, 636 A.2d at 623 (quoting *Florida v. Bostick*, 501 U.S. 429, 439, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991)). Moreover, it is necessary to examine the nature of the encounter. Circumstances to consider include, but are not limited to, the following: the number of officers present during the interaction; whether the officer informs the citizen he or she is suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. See *Beasley*, 761 A.2d at 624.

If police interaction is deemed an investigatory detention, it must be supported by reasonable suspicion that criminal activity is afoot. In such a situation, an officer is justified in briefly detaining the suspect in order to investigate. *Commonwealth v. Packacki*, 901 983, 988 (Pa. 2006); see also *Commonwealth v. E.M.*, 558 Pa. 16, 735 A.2d 654, 659 (Pa. 1999)(police officer may conduct brief investigatory stop of individual if officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot). Police officers are permitted to conduct a vehicle stop if the officer has reasonable suspicion to believe that a violation of the Motor Vehicle Code is occurring or has occurred. *Commonwealth v. Holmes,* 14 A.3d 89, 95 (Pa. 2011). Police officers may request both drivers and their passengers to exit a lawfully stopped car or to remain in a lawfully stopped car without reasonable suspicion that criminal activity is afoot. In such situations, it is not unreasonable for an officer to request that the passengers in a lawfully stopped car exit the vehicle so that the safety of the officer is, if not insured, at least better protected. *Commonwealth v. Pratt,* 930 A.2d 561, 564 (Pa.Super. 2007).

The motion to suppress was properly denied. The interaction between the police officers and Mr. Livingston began as a mere encounter. The officers responded to a police dispatch advising them that three males were "passed out" in a running vehicle in the CoGo's parking lot at 3:55 a.m.. The officers responded to the scene and initially began to conduct a welfare check to determine whether the occupants of the vehicle were in any physical distress. The officers repeatedly attempted to wake the occupants by knocking on the windows of the vehicle but the occupants would not wake up. In an effort to erase any risk of physical harm that could result if one of the occupants accidentally shifted the vehicle into gear, Officer Coll opened the car door and turned off the ignition. The officers had duty to check on the safety of the occupants of the Ford Escort, See *Commonwealth v. Conte*, 2007 PA Super 232, 931 A.2d 690, 693-694, (Pa.Super. 2007)("Indeed, our expectation as a society is that a police officer's duty to serve and protect the community he or she patrols extends beyond enforcement of the Crimes Code or Motor Vehicle Code and includes helping citizens….."). The police officers were well within their province to approach the vehicle, attempt to make contact with the occupants and attempt to diffuse any dangerous situation that affected the safety of the occupants or the public. There was nothing unlawful about the officers approaching the vehicle and turning the ignition off.

Soon after the ignition was turned off, both Mr. Livingston and Mr. Withrow woke up. The officers obtained the identity of both men and Officer Roche returned to his vehicle to conduct a background check of the men. While Officer Roche was running the background check, both men began to make furtive movements toward the center console of the vehicle. After Mr. Livingston ignored Officer Coll's demand to show his hands and stop moving around the interior of the vehicle, Officer Coll removed Mr. Livingston from the vehicle and had him sit on the sidewalk. Mr. Withrow was determined to have been driving with a suspended driver's license. He refused to voluntarily exit the vehicle and was then forcibly removed from the vehicle. As he was being removed from the vehicle, Mr. Withrow continued to make movements toward the center console. He was placed into custody at that point. The actions of each defendant warranted the police officers fearing for their safety and/or a belief that the defendants were attempting to conceal contraband in the console. The unusual furtive actions of Mr. Livingston and Mr. Withrow, combined with their refusal to submit to the officers' requests, created sufficient reasonable suspicion to permit the police officers to conduct an investigatory detention.

Once all of the other occupants were removed from the vehicle, Officer Coll determined he was going to conduct an inventory search. However, prior to the inventory search and right after Mr. Livingston and Mr. Withrow were removed from the vehicle, Officer Coll observed, in plain view, the firearm resting on the top of the console. Mr. Livingston does not challenge the fact that Officer Coll observed the weapon in plain view. Accordingly, the motion to suppress was properly denied.

The defendant's next claim of error is that the evidence was insufficient to prove that he possessed the firearm. Relative to this claim of error, the standard of review for sufficiency of the evidence claims is well settled:

> the standard we apply in 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 proof [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 the 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. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003). In addition, "[a]ny 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." *Commonwealth v. Cassidy*, 668 A.2d 1143, 1144 (Pa.Super. 1995). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super 2006).

Possession can be found by proving actual possession, constructive possession or joint constructive possession. *Commonwealth v. Heidler*, 741 A.2d 231, 215 (Pa.Super. 1999). Possession can be proved by circumstantial evidence. *Commonwealth v. Bentley*, 276 Pa. Super. 41, 46, 419 A.2d 85, 87 (1980). In *Commonwealth v. Carroll,* 510 Pa. 299, 302, 507 A.2d 819, 821 (1986) citing Whitebread and Stevens, *To Have and To Have Not,* 58 U.Va.L.Rev. 751, 755 (1972), the Pennsylvania Supreme Court explained that "[t]he purpose of the constructive possession doctrine is to expand the scope of possession statutes to encompass those cases

where actual possession at the time of arrest cannot be shown but where the inference that there has been actual possession is strong." Constructive possession is "the ability to exercise a conscious dominion over the contraband, the power to control the contraband and the intent to exercise that control." *Commonwealth v. Macolino*, 503 Pa. 201, 206, 469 A.2d 132, 134 (1983). Constructive possession may be found in one or more actors where the item in issue is in an area of joint control and equal access. *Commonwealth v. Murdrick*, 510 Pa. 305, 507 A.2d 1212 (1986). In *Macolino*, this Court further determined that "an intent to maintain a conscious dominion may be inferred from the totality of the circumstances . . . . [and], circumstantial evidence may be used to establish a defendant's possession of drugs or contraband." *Macolino*, 503 Pa. at 206, 469 A.2d at 134. (citations omitted). See also *Commonwealth v. Dargan*, 897 A.2d 496, 504 (2006); *Commonwealth v. Bricker*, 882 A.2d 1008, 1014 (Pa.Super. 2005); *Commonwealth v. Kirkland*, 2003 PA Super 279, 831 A.2d 607, 610 (Pa. Super. 2003), *appeal denied*, 577 Pa. 712, 847 A.2d 1280 (Pa. 2004); *Commonwealth v. Petteway*, 2004 PA Super 109, 847 A.2d 713, 716 (Pa. Super. 2004); *Commonwealth v. Parker*, 2004 PA Super 113, 847 A.2d 745, 750 (Pa. Super. 2004).

In this case, the Commonwealth proved beyond a reasonable doubt that the defendant possessed the firearm in question. Both men were in a deep sleep when the officers approached the Ford Escort. As soon as they were awakened by the officers, both men ignored the warnings of the police officers and made repeated furtive movements toward the center console of the Ford Escort. Mr. Livingston specifically ignored demands that he show his hands and not make any movements inside the vehicle. Despite these demands, he reached toward the center console. Mr. Withrow continued to reach toward the center console as he was being removed from the vehicle. The firearm was recovered within inches of where both men were sitting in the vehicle. Both men had the power and ability to control the firearm. Their repeated movements toward the location where the firearm was found proves their intent to maintain control over the firearm. This Court believes this evidence was sufficient to convict Mr. Livingston of the possessory gun charge filed against him.

Accordingly, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: January 19, 2017