PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,930

PLJ Editorial Staff

Opinion Selection Policy

Opinions selected for publication are based upon precedential value or clarification of the law. Opinions are selected by the Opinion Editor and/or committees in a specific practice area. An opinion may also be published upon the specific request of a judge.

Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. All opinions submitted to the Pittsburgh Legal Journal (PLJ) are printed as they are received and will only be disqualified or altered by Order of Court, except it is the express policy of the Pittsburgh Legal Journal (PLJ) not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

In Re: Petition of Gregory A. Beluschak and at Least Five (5) Electors of the First Ward of the City of Clairton to Appoint Gregory A. Beluschak, a Registered Elector in and Resident of the First Ward of the City of Clairton, to fill the Current Vacancy on Clairton City Council for the First Ward of the City of Clairton, Allegheny County, Pennsylvania

Re: Petition of Richard L. Lattanzi, Raymond A. Kurta and Five (5) Electors of the First Ward of the City of Clairton to Appoint Raymond A. ("Tony") Kurta to fill the Vacancy on Clairton City Council Due to the Passing of Councilman John A. Lattanzi on October 24, 2016

Election Law

Court evaluated Clairton Charter to hold that, when vacancy on City Council arose due to death of council member, appointed member was to serve balance of deceased member's term without having to first stand for election.

No. GD-16-23932 and GD-16-23965 consolidated at GD-16-23932. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—February 14, 2017.

MEMORANDUM ORDER

I conducted a hearing on January 17, 2017 involving the filling of a vacancy on the City Council in the City of Clairton caused by the death of Councilman, John A. Lattanzi. I appointed one, Raymond A. Kurta (Kurta) to the vacancy.

An issue arose as to duration of the appointment, that is, whether it was for the remainder of the deceased Councilman's term which would be until the first Monday in January, 2020 *or* whether the vacancy was to be placed on the ballot for the Municipal Election in 2017 and the winner of that election in May 2017, would serve out the balance of the term.

I gave Counsel 20 days to file briefs on this issue and they have filed able and insightful briefs in support of their contending positions.

Counsel for Beluschak argues that the vacancy must be on the ballot for the upcoming May 2017 primary. He bases that argument on the introductory sentence to the relevent section of the Clairton Charter at 2404(a) which reads:

> " … If a vacancy shall occur in any elective office in the municipality for any reason set forth in this Charter, the remaining members of the Council shall fill such vacancy by appointing a person eligible under the **Charter to hold such office until a successor is elected at the next municipal election. Such successor will serve the remainder of the unexpired term** … "
> (emphasis from Beluschak)

However, Counsel for Kurta cites to the second sentence of that section which reads:

> " … If the Council shall fail to fill such vacancy within forty-five (45) days after the vacancy occurs, then the Court of Common Pleas of Allegheny County shall, upon petition of the Council or of any five (5) electors of that ward of the municipality whose Council seat is vacant, *fill the vacancy in such office by the appointment of an eligible resident of the municipality for the unexpired term of office …* "

Beluschak argues that the first sentence should be controlling while Kurta argues the second sentence is controlling. Beluschak also argues that principals of Statutory Construction require the first sentence to take priority over the second, because that is the *only* way to achieve consistency between the two.

I fail to see how "consistency" is achieved by choosing the first sentence over the second. When consistency cannot be achieved and there is *direct* contradiction between parts of a statue, what is to be done?

We need to consult the Rules of Statutory Construction, 1 Pa.C.S.A. 1901 et seq at Section 1934. That section reads:

> " … Except as provided in Section 1933 of this title (relating to particular controls general. Whenever in the same statute several clauses are irreconcilable, the clause last in order of date *or position* shall prevail … "

Obviously, the second sentence then prevails by reason of its position and Kurta is to serve the remainder of the deceased Councilman's term.

To a like effect is the March 30, 2010 court order from my colleague, the Honorable Joseph M. James in the case of GD-10-4905 which also involved this City and this Charter. Judge James found an appointee to a vacancy on Council would serve the remainder of the term.

Beluschak also argues that the Home Rule Charter Legislation, which enables Home Rule Charters, "pre-empts" the Clairton in matters of filling vacancies. See 53. P.S. Sec. 2962.

Kurta however, cites the same legislation at 53.Pa C.S. Sec. 2961 for the proposition that powers of a municipality with a Home Rule Charter "Shall be liberally construed". Further, any limitations imposed by the Home Rule law apply only to matters of "statewide concern" involving the health, safety, security and general welfare of all inhabitants of the State. *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa 2004).

The filling of a vacancy in Clairton is not a matter of statewide concern and thus there is no pre-emption.

Based on the foregoing, I am satisfied that Kurta is to serve the balance of the term of the deceased, John A. Lattanzi and he need not seek election in the May 2017 Primary.

An appropriate order is attached.

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

February 14, 2017

ORDER OF COURT

AND NOW to wit this 14th day of February, 2017, upon consideration of the foregoing petitions it is hereby Ordered, Adjudged and Decreed that Raymond A. Kurta shall be appointed to fill the vacancy on Clairton City Council for the unexpired term of Councilman, John A. Lattanzi, deceased, which shall run until the first Monday in January, 2020.

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

Commonwealth of Pennsylvania v. Ryan Metz

Criminal Appeal—Suppression—Sufficiency—corpus delicti—VUFA Charges

While 18 Pa.C.S. § 6115(a) does not expressly create an offense for "selling" a firearm, the act falls under the category "giving or otherwise delivering" a firearm.

No. CC 2015-12158. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—January 6, 2017.

OPINION

This is a direct appeal from the judgment of sentence entered on February 29, 2016, following a non-jury trial held on February 17, 2016. The Defendant was charged with Carrying a Firearm without a License (18 Pa C.S. §6106(a)(1)) and Criminal Attempt – Loaning or Lending or Giving a Firearm (18 Pa. C.S.A. §901(a)). Prior to his non-jury trial, the Defendant filed a motion to suppress evidence. A suppression hearing was held on February 11, 2016, and the motion was subsequently denied. The suppression hearing transcript was incorporated into the record at the February 17, 2016 non-jury trial, along with the evidence of non-licensure, and the affidavit of probable cause. (Non-Jury Trial Transcript (hereinafter "TT"), 2/17/16, pp. 8-10). After considering the evidence presented at the suppression hearing and the evidence admitted during the bench trial, the court found the Defendant guilty of both offenses.

On February 9, 2016, the Defendant was sentenced to a period of incarceration of 11 months, 29 days to one (1) year, 11 months, 28 days. The Defendant also received a consecutive two (2) year period of probation and was found to be eligible for alternative housing. The Defendant filed a timely post-sentence motion, which was heard on April 26, 2016, and subsequently denied. This timely appeal followed.

On October 24, 2016, the Defendant filed a timely[1] Concise Statement of Errors Complained of on Appeal ("Concise Statement"), raising the following four (4) issues for review:

> a. The trial court erred in not suppressing the evidence when the police officers had no reasonable suspicion to detain Mr. Metz and testified only to generalized suspicions that he was engaged in criminal activity and Mr. Metz was not free to leave or otherwise terminate the encounter.
>
> b. The evidence was insufficient to establish beyond a reasonable doubt that Mr. Metz was guilty of Carrying a Firearm without a License since the police testified that the bag containing the firearm was clear thus enabling him to see through the bag, thus the weapon was not concealed.
>
> c. The evidence was insufficient to establish beyond a reasonable doubt that Mr. Metz was guilty of Criminal Attempt of Loans On, Lending or Giving a Firearm under 18 Pa. C.S. §6115(a), when the only evidence was Mr. Metz's statement that he was planning on selling it, when selling a firearm is not listed as a prohibited act under 18 Pa. C.S. §6115. Additionally, there are exceptions to the act that make a loaning, lending or giving a firearm to individuals identified under §6115(b) lawful and there was no evidence presented by the Commonwealth showing that the alleged transferee would have been prohibited from purchasing the gun.
>
> d. The trial court erred in admitting Mr. Metz's statements (that were in the affidavit of probable cause and ***not*** stipulated to by Mr. Metz) that he was meeting with someone to sell the gun, when the *corpus delicti* of the crime of criminal attempt to loan, lend or giving a firearm to another person was not established and the only evidence of this act was his statement; and, there was no independently established evidence as to justify the consideration of his statements. A criminal conviction may not be based on the extra-judicial confession or admission of the defendant unless it is corroborated by independent evidence establishing the *corpus delicti. See Commonwealth v. May*, 301 A.2d 368 (Pa. 1973); *Commonwealth v. Leamer,* 295 A.2d 272 (Pa. 1972); *Commonwealth v. Palmer,* 292 A.2d 921, 922 (Pa. 1972).
>
> (Concise Statement, pp. 2-3).

The Defendant's allegations of error lack merit. For the reasons that follow, the reviewing court respectfully should uphold this court's suppression ruling, as well as the Defendant's convictions and sentence.

I. FACTUAL BACKGROUND

On September 25, 2015, Detective Matt Tracy of the Pittsburgh Police Department, along with Officers Shipp and Messner, were assigned to work the plain clothes "90" car unit in the North Side area of the city. (Suppression Hearing Transcript (hereinafter "HT"), 2/11/16, pp. 3-4, 7-8, 15). The officers were focusing their attention on certain parts of the North Side where they had received multiple complaints of drug-dealing and firearm activity, as well as shootings. (HT, p. 3). On that particular day, they were in and around Federal Street, a location where Detective Tracy had personally made over fifty (50) arrests relating to narcotics and firearms. (HT, pp. 3-4).

At approximately 2:00 p.m. that afternoon, the officers were patrolling Hazlip Way, an alley near Federal Street, in their unmarked vehicle when they observed an unknown white male in the alley. (HT, pp. 4, 7-9). The alley is a public car through-way

with no storefronts. (HT, pp. 10-11, 13). The officers noticed that the male, later identified as the Defendant, was approximately 10 yards down the alley and was talking on his cell phone. (HT, pp. 4, 8-9). Based on their training and experience, the officers believed that a narcotics transaction "was about to occur" involving the Defendant, given his particular location and behavior. They, therefore, decided to encounter the Defendant. (HT, pp. 4-5, 9-10, 14-15).

The officers drove past Hazlip Way, out of the Defendant's view, and parked their vehicle. (HT, pp. 8-9). Detective Tracy and Officer Shipp then exited the vehicle, approached the Defendant with their badges displayed around their necks, and identified themselves as police officers. (HT, pp. 4-5, 8-11). Officer Shipp spoke with the Defendant while Detective Tracy focused his attention on the Defendant's behavior and mannerisms. (HT, pp. 10-11). The Defendant was asked what he was doing in the area, and although there are no storefronts in the alley, he stated that he was waiting for a friend who was "in the store." (HT, pp. 4-5, 11). The nearest store is a small market on Federal Street, two (2) corners away. (HT, pp. 11-12).

As Officer Shipp and the Defendant were talking, Detective Tracy observed that the Defendant appeared nervous. (HT, p. 5). He also noticed that the Defendant was holding a "brownish, plastic grocery bag" in his right hand. (HT, pp. 5-6, 12). The bag "was somewhat see-through," and Detective Tracy observed that there was "a heavy object" inside of it. (HT, pp. 5-6). After looking further at the bag, Detective Tracy was able to see "the outline of a firearm." (HT, p. 6). At that point, it was clear to Detective Tracy that the heavy object in the bag was a small firearm so he took possession of the bag and alerted Officer Shipp of the presence of the firearm. (HT, pp. 6, 12-13). Once he took hold of the bag, Detective Tracy noted that the bag was heavy, and he could "feel there was a firearm inside of it." (HT p. 6).

After being informed of the presence of the firearm, Officer Shipp immediately asked the Defendant whether he had a license to carry the firearm. (HT, p. 12-13, 16-18). After admitting that he did not have a license for the firearm, the Defendant was detained in handcuffs while the officers "ran the firearm" and confirmed that the Defendant did not have a valid license. (HT, pp. 6-7, 12-13, 16-18). Detective Tracy recovered the firearm from the bag after the Defendant admitted his non-licensure status. (HT, pp. 6, 12-13, 16, 18).

Officer Messner Mirandized the Defendant in Detective Tracy's presence, and the Defendant thereafter admitted that he had obtained the firearm "at one of his construction jobs and he was just trying to make a little extra money to sell the firearm to another male." (HT, p. 7). The Defendant also stated that he "brought [the firearm] down to Hazlip St[reet] to trade to an unknown male for $150.00 because he needed money" and "he knew he shouldn't have been carrying the gun." (Affidavit of Probable Cause -Commonwealth's Exhibit 2); (TT, pp. 9-10,).

II. DISCUSSION

A. The Defendant's motion to suppress evidence was properly denied because the totality of the circumstances established that the officers engaged in a lawful encounter with the Defendant that subsequently transpired into a lawful detention and arrest.

The Defendant first challenges this court's ruling on his suppression motion. Our appellate court has explained the standard of review for the denial of a suppression motion as follows:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted....Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where ... the appeal of the determination of the suppression *686 court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Haslam, 138 A.3d 680, 685-86 (Pa. Super. 2016) (quoting *Commonwealth v. McAdoo*, 46 A.3d 781, 783–84 (Pa. Super. 2012). Furthermore, "the scope of review from a suppression ruling is limited to the evidentiary record that was created at the suppression hearing." *Haslam, supra*, at 686 (citing *In re L.J.*, 79 A.3d 1073, 1087 (Pa. 2013)).

The Defendant first contends that this court erred by denying his suppression motion because "the police officers had no reasonable suspicion to detain Mr. Metz and testified only to generalized suspicions that he was engaged in criminal activity and Mr. Metz was not free to leave or otherwise terminate the encounter." (Concise Statement, p. 2). The Defendant's first allegation of error is wholly without merit, as it relies on the erroneous assumption that the officers required any requisite level of suspicion to approach the Defendant.

It is well-settled that the "[i]nteraction between citizens and police officers, under search and seizure law, is varied and requires different levels of justification depending upon the nature of the interaction and whether or not the citizen is detained." *Commonwealth v. DeHart*, 745 A.2d 633, 636 (Pa. Super. 2000). "The three levels of interactions are: mere encounter, investigative detention, and custodial detention." *Id.* at 636. As our appellate court has explained:

> A mere encounter can be any formal or informal interaction between an officer and a citizen, but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it carries no official compulsion to stop or respond.
>
> In contrast, an investigative detention, by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest. Since this interaction has elements of official compulsion it requires reasonable suspicion of unlawful activity. In further contrast, a custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest.

Id. (internal citations and quotation marks omitted).

"To determine whether a mere encounter rises to the level of an investigatory detention, [a court] must discern whether, as a matter of law, the police conducted a seizure of the person involved." *Commonwealth v. Reppert,* 814 A.2d 1196, 1201 (Pa. Super. 2002). To do this,

> a court must consider all the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person that he or she was not free to decline the officer's request or otherwise terminate the encounter. Thus, the focal point of our inquiry must be whether, considering the circumstances surrounding the incident, a reasonable [person] innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes.

Reppert, supra, at 1201–1202 (internal citations and quotations omitted).

In determining whether the police conduct in this case was lawful, it is crucial to note that "[b]oth the United States and Pennsylvania Supreme Courts have held that the approach of a police officer followed by questioning does not constitute a seizure." *Commonwealth v. Coleman*, 19 A.3d 1111, 1116 (Pa. Super. 2012) (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (["We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual [and] ask to examine the individual's identification"]); *Florida v. Royer*, 460 U.S. 491, 497 (1983) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen"); *Commonwealth v. Smith*, 836 A.2d 5, 11 (Pa. 2003) ("[T]he mere approach of police followed by police questioning … does not amount to a seizure[.]"); *In re D.M.*, 781 A.2d 1161, 1164 (Pa. 2001) (noting that "the police may approach anyone in a public place to talk to him, without any level of suspicion"); *Commonwealth v. Au*, 42 A.3d 1002 (Pa. 2012) (holding that a request for identification did not transform mere encounter into investigative detention).

The uncontroverted facts presented at the suppression hearing, when viewed in the light most favorable to the Commonwealth, unequivocally established that the interaction began as a mere encounter, which transformed into a lawful investigative detention upon Detective Tracy's observation of the firearm, and ended in a lawful arrest upon confirmation of the Defendant's admitted non-licensure status.

Mere Encounter

Given that a police officer can approach an individual, ask questions, and even request identification without any suspicion of criminal activity, and given the circumstances surrounding the initial interaction between the Defendant and the officers, it is clear that the officers engaged in a lawful mere encounter when they initially approached the Defendant.

Indeed, after observing the Defendant in the alley, the officers did not pull into the alleyway but rather parked their vehicle on a separate street away from the Defendant. (HT, pp. 4-5, 8-9). There is no evidence that the officers blocked the Defendant's path or constrained his movement as they approached. (HT, pp. 9-10). In fact, the testimony showed that the officers merely approached the Defendant, as he was in front of them. (HT, p. 10). They did not circle around him or split up and surround him. (HT, p. 9). Moreover, the officers did not activate the lights on their vehicle or otherwise engage in any show of authority other than simply announcing their identity as plain-clothed police officers. (HT, pp. 4-5, 8-11). The officers did not even request identification from the Defendant, but simply asked what he was doing in the area. (HT, p. 5). They did not brandish their weapons or issue any commands for the Defendant to stop, and there is no evidence that the officers spoke in an authoritarian tone or otherwise engaged in any intimidating or coercive behavior that would have led a reasonable person in the Defendant's shoes to believe he was not free to terminate the encounter. (HT, pp. 4-5, 9-11); *See Au, supra*, at 1008. Additionally, the encounter was incredibly brief, as the time between the officers' initial approach and the seizure of the bag was approximately 30 seconds. (HT, p.14).

While there is no indication that the officers ever informed the Defendant that he was free to leave, the lack of any such statement does not transform the mere encounter into an investigative detention. *See e.g., Au, supra*, at 1008-09 ("We also appreciate that the arresting officer could have informed [the defendant] that he was free to leave and had the right to refuse the request for identification, which might have ameliorated the potential for perceptions of restraint or coercion. In this area of Fourth Amendment law, however, the United States Supreme Court has eschewed bright-line rules in favor of the totality assessment."); *Drayton*, 536 U.S. at 203 (2011) (finding the Eleven Circuit erred by adopting a *per se* rule that, in the absence of warning passengers that they may refuse cooperate, any evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed). Since the officers' initial approach was a lawful mere encounter, no Fourth Amendment violation occurred on that basis.

Investigative Detention

The lawful mere encounter between the officers and the Defendant subsequently transformed into a lawful investigative detention upon Detective Tracy's observation of the outline of a firearm inside of the "somewhat see-through" "brownish plastic grocery bag." (HT, pp. 5-6). At that point, Detective Tracy's seizure of the bag was justified for officer safety purposes because he possessed a reasonable, "particularized, objective basis" to believe that the Defendant was armed and potentially dangerous. *See Commonwealth v. Grahame*, 7 A.3d 810, 814-17 (Pa. 2010); *Ybarra v. Illinois*, 444 US 85, (1979) (noting that pursuant to *Terry v. Ohio*, "a law enforcement officer, for his own protection and safety, may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted.").

Indeed, considering Detective Tracy's background, training, and experience, the fact that he has had over fifty (50) firearm and drug related arrests in that area alone over the course of his career, the Defendant's nervous behavior, and the fact that the Defendant was carrying a firearm inside of a non-transparent bag, Detective Tracy had reason to suspect that the Defendant was unlawfully carrying a *concealed*[2] firearm and that he could be dangerous. Because Detective Tracy had specific, articulable reasons to conclude that his life and/or safety may be at risk, he was entitled to disarm the Defendant by seizing the bag as they investigated whether the Defendant was in lawful possession of the weapon that was contained therein.[3] Because he had reasonable suspicion to believe that the Defendant was armed and potentially dangerous, Detective Tracy was also justified in retrieving the firearm from inside of the bag as a protective search under *Terry. See Grahame, supra*, at 817.

The court notes that, in addition to the seizure of the bag and firearm being justified under *Terry*, the seizure of the firearm could also have been justified as a search incident to arrest. Indeed, the evidence presented at the suppression hearing demonstrated that Detective Tracy did not recover the weapon from inside of the bag until ***after*** the Defendant admitted he did not have a valid license to carry. Specifically, the testimony established that, after Detective Tracy announced the presence of the gun, Officer Shipp immediately asked the Defendant whether he had a license to carry, and the Defendant admitted that he did not. (HT, pp. 16, 18). Officer Shipp also testified that the Defendant was detained in handcuffs ***after*** he confirmed his non-licensure, and Detective Tracy testified that he did not retrieve the firearm from inside of the bag until after Officer Shipp detained the

Defendant. (HT, p. 6, 13 16). Thus, at the time that the firearm was recovered from inside of the bag, the officers already had probable cause to arrest the Defendant for his unlicensed possession of a concealed firearm so the weapon inevitably would have been seized incident to his lawful arrest in any event.[4] Accordingly, because the totality of the circumstances established that the police conduct in this case was lawful, the Defendant's motion to suppress evidence was properly denied, and the Defendant's first allegation of error should be rejected.

B. The evidence was sufficient to sustain the Defendant's convictions for Carrying a Firearm without a License and Criminal Attempt.

The Defendant next challenges the sufficiency of evidence supporting his convictions. It is well-established that a "claim challenging the sufficiency of the evidence is a question of law." *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). Our appellate courts have explained that

> [e]vidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 625 A.2d 1167 (Pa. 1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 333 A.2d 876 (Pa. 1975). *Widmer, supra*, at 751.

"[T]he court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." *Commonwealth v. Chambers*, 599 A.2d 630, 633 (Pa. 1991). In applying this test, an appellate court "may not weigh the evidence and substitute [its] judgment for the fact-finder." *Commonwealth v. Troy*, 832 A.2d 1089, 1092 (Pa. Super. 2003). Furthermore,

> 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.

Troy, supra, at 1092.

Carrying a Firearm without a License

Subject to exceptions which are inapplicable to this case, 18 Pa. C.S.A. §6106(a)(1) provides that "any person who carries a firearm in any vehicle or any person who carries a firearm *concealed on or about his person*, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree." 18 Pa. C.S.A. § 6106(a)(1) (emphasis added).

The Defendant's challenge to his firearm conviction is entirely centered on the issue of concealment. The Defendant argues that the Commonwealth failed to prove concealment beyond a reasonable doubt "since the police testified that the bag containing the firearm was clear thus enabling him to see through the bag . . . ." (Concise Statement, p. 3). The Defendant's argument is inherently flawed because it is not premised on an accurate statement of fact.

Contrary to the Defendant's assertion, Detective Tracy never testified that the **bag** was "clear." The relevant portions of his testimony are as follows:

> Q: What happened once you approached the Defendant?
>
> A: Once we approached him, we began to speak with him. . . . As we were talking with him, I began to - - he had a bag in his right hand. It was a plastic - - **brownish**, plastic grocery bag.
>
> Q: Was it possible to see into the bag?
>
> A: Yes. It was **somewhat see-through** so you could see what object is in [the] bag. At that time, I noticed there was a **heavy object** in the bag, **which I looked further into**, while Officer Shipp was talking to him and I observed the **outline** of a firearm.
>
> Q: Did you manipulate the bag in any way?
>
> A: At that point in time, I didn't. It was just an observation.
>
> Q: How did you know it was a firearm?
>
> A: I could **see through** the bag, and **it was clear it was a small firearm**.

(HT, pp. 5-6) (emphasis added).

When viewed in the light most favorable to the Commonwealth as the verdict winner, Detective Tracy's testimony established that the bag was a "**somewhat** see-through" "**brownish** plastic grocery bag" that, *unlike a clear Ziploc bag*, was capable of containing items that are not readily visible or immediately apparent. (HT, pp. 5-6) (emphasis added). Although Detective Tracy testified that he ultimately "could see-through the bag" and that "it was clear it was a small firearm," the detective's testimony cannot logically be read as stating that the *bag itself* was clear or transparent. A straightforward and logical reading of the phrase "it was clear it was a small firearm" leads to the conclusion that the "it" referred to the *heavy object inside of the bag*, and not the bag itself. The detective's testimony must be viewed as a whole, and his use of the word "clear" cannot be divorced from its appropriate context.

The conclusion that the bag was not clear is further bolstered by the fact that the weapon was not observed until the detective was right next to the Defendant and was studying the Defendant's behavior, demeanor, and the bag that he was holding. Moreover, Detective Tracy never testified that he immediately recognized a firearm inside of the bag; to the contrary, the detective testified

that at first, he only noticed that there was a *heavy object* inside of the bag, and that he had to "look further" at the bag before he saw the outline of a firearm. (HT, pp. 5-6).

Having clarified the detective's testimony, the court turns to the more pointed issue of what constitutes concealment under 18 Pa. C.S.A. §6106(a)(1). In *Commonwealth v. Butler*, 150 A.2d 172, 173 (Pa. Super. 1959), the court stated that "the issue of concealment depends upon the particular circumstances present in each case." The court notes that 18 Pa. C.S.A. § 6102 ("Definitions") does not define the terms "conceal" or "concealed." However, the plain meaning of the term "conceal" as defined by the Miriam-Webster Dictionary, means: (1) to prevent disclosure or recognition of, or (2) to place out of sight.[5]

After considering the particular circumstances of the present case, and after viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient to conclude that the Defendant was unlawfully carrying a concealed weapon on or about his person. The Defendant was not openly holding the weapon, nor was the weapon contained in a clear, transparent container which would have allowed the weapon to be readily seen. Unlike a Ziploc bag, the brownish tint to the Defendant's colored grocery bag prevented the items contained therein from being immediately recognizable. That conclusion is supported by the fact that Detective Tracy only noticed a heavy object inside of the bag at first. It was only after he focused more of his attention on the object that he was able to make out the ***outline*** of a weapon. The fact that an experienced detective was ultimately able to recognize the outline of the object as a firearm does not support a finding that the weapon was being openly carried.

The court also notes that the Defendant admitted to Officer Messer that "he knew he shouldn't have been carrying the gun" which also demonstrates that the Defendant himself believed that he was carrying a concealed weapon. (Affidavit of Probable Cause, p. 2); (TT, p. 9 -Commonwealth's Exhibit 2). Thus, the Defendant's act of housing the weapon inside of a non-transparent, colored bag, combined with the fact that the gun was not noticed until Detective Tracy made it his task to study the Defendant and his bag, was sufficient evidence to prove concealment beyond a reasonable doubt. *Compare Commonwealth v. Williams*, 346 A.2d 308, 310 (Pa. Super. 1975) ("In the instant case there is *no evidence whatsoever as to any attempt* by appellant to conceal any weapon; and, therefore, we must conclude that the evidence was insufficient to sustain appellant's conviction as to Section 6106.") (emphasis added). The court notes that in other jurisdictions, proof of partial concealment is sufficient to prove concealment, and absolute invisibility of the weapon is not a prerequisite to proving concealment. *See e.g., State v. Almalik*, 534 N.E.2d 898, 902 (Ohio. App. Ct. 1987); *Ensor v. State*, 403 So.2d 349, 354 (Fl. 1981); *People v. Charron*, 220 N.W.2d 216, 218 (Mich. App. Ct. 1974); *Powell v. State*, 184 So.2d 866, 868 (Miss. 1966). Accordingly, the evidence was sufficient to prove concealment beyond a reasonable doubt and the Defendant's conviction under §6106(a) should be upheld.

Criminal Attempt

The Defendant's challenge to his criminal attempt conviction is three-fold. He contends that the evidence is insufficient to sustain his conviction because: (i) the only evidence is the Defendant's statement that he was "planning on selling it"; (ii) "selling a firearm is not listed as a prohibited act" under the statute; and (iii) the Commonwealth did not present evidence to negate any of the exceptions set forth in §6115(b). (Concise Statement, p. 3). This argument also lacks merit.

Pursuant to 18 Pa. C.S.A. §901(a), "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." Thus, the pertinent inquiry in this case is whether the Defendant took a substantial step in committing an offense under §6115(a). 18 Pa. C.S.A. §6115(a) provides as follows:

> **(a) Offense defined**.-- No person shall make any loan secured by mortgage, deposit or pledge of a firearm, nor, except as provided in subsection (b), shall any person lend or **give a firearm to another or otherwise deliver a firearm** contrary to the provisions of this subchapter.
>
> **(b) Exception. --**
>
> (1) Subsection (a) shall not apply if any of the following apply:
>
> (i) The person who receives the firearm is licensed to carry a firearm under section 6109 (relating to licenses).
>
> (ii) The person who receives the firearm is exempt from licensing.
>
> (iii) The person who receives the firearm is engaged in a hunter safety program certified by the Pennsylvania Game Commission or a firearm training program or competition sanctioned or approved by the National Rifle Association.
>
> (iv) The person who receives the firearm meets all of the following:
>
> (A) Is under 18 years of age.
>
> (B) Pursuant to section 6110.1 (relating to possession of firearm by minor) is under the supervision, guidance and instruction of a responsible individual who:
>
> (I) is 21 years of age or older; and
>
> (II) is not prohibited from owning or possessing a firearm under section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).
>
> (v) The person who receives the firearm is lawfully hunting or trapping and is in compliance with the provisions of Title 34 (relating to game).
>
> (vi) A bank or other chartered lending institution is able to adequately secure firearms in its possession.
>
> (2) Nothing in this section shall be construed to prohibit the transfer of a firearm under 20 Pa.C.S. Ch. 21 (relating to intestate succession) or by bequest if the individual receiving the firearm is not precluded from owning or possessing a firearm under section 6105.
>
> (3) Nothing in this section shall be construed to prohibit the loaning or giving of a firearm to another in one's dwelling or place of business if the firearm is retained within the dwelling or place of business.
>
> (4) Nothing in this section shall prohibit the relinquishment of firearms to a third party in accordance with 23 Pa. C.S. § 6108.3 (relating to relinquishment to third party for safekeeping).

18 Pa. C.S.A. §6115(a) (emphasis added).

The first two prongs of the Defendant's argument can be dismissed in fairly short order. First, the Defendant's statement, combined with the surrounding circumstances, was sufficient to constitute a substantial step in violating §6115(a). Detective Tracy testified that, after the Defendant was Mirandized, he admitted to the officers that he "was just trying to make a little extra money to sell the firearm to another male." (HT, p. 7). The affidavit of probable cause, which was incorporated[6] into the record at the bench trial as Commonwealth's Exhibit 2, indicates that the Defendant told Officer Messer that he had brought the firearm "down to Hazlip St[reet] to trade to an unknown male for $150.00 because he needed money." (Commonwealth's Exhibit 2). Thus, the Defendant admitted that his presence in the alleyway at that given date and time was for the purpose of *giving or otherwise delivering* a firearm, for a specific dollar amount, to an individual that he specified was male. Viewing this evidence and the surrounding circumstances in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient to demonstrate that the Defendant took a substantial step in violating §6115(a).

Second, while the statute does not specifically reference "selling" a firearm, the basic act of selling a firearm still necessarily entails *giving or otherwise delivering* a firearm to another person, regardless of whether the individual stands to profit from the transaction. Moreover, while the statute does not specifically list the sale of a firearm as a prohibited act, it certainly does not list the sale of a firearm as an exception to the offense either. 18 Pa. C.S.A. §6115(b).

In this court's estimation, the more interesting argument is whether the Commonwealth was required to negate the exceptions under §6115(b) beyond a reasonable doubt. The Superior Court of Pennsylvania's decision in *Commonwealth v. Banellis*, 682 A.2d 383 (Pa. Super. 1996), provides substantial guidance in this regard. In *Banellis*, the defendant was convicted of 75 Pa. C.S. §3323(b), which provides in relevant part:

> §3323. Stop signs and yield signs.
>
> (b) Duties of stop signs. – **Except when directed to proceed by a police officer** or appropriately attired persons authorized to direct, control or regulate traffic, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line. . . .

75 Pa. C.S. §3323(b) (emphasis added). On appeal, the defendant challenged "whether the language of the statutory exception found in §3323(b) of the Pennsylvania Vehicle Code is an *integral part of the definition of the offense*, and, as such, whether the Commonwealth had the burden of negating the exception by producing evidence that no police officer was directing traffic through the stop sign." *Bannellis, supra*, at 384.

The Superior Court ultimately reversed, as it agreed that the language "except when directed to proceed by a police officer" was an integral part of the offense and that the Commonwealth was, therefore, required to produce evidence negating the exception as part of its burden of proof. *Id.* at 385, 387. Among other things, the Superior Court was persuaded by the wording of the statute and the fact that the "except clause" was "*not divorced from the definition of the offense.*" *Id.* at 387-88 (emphasis added). It found that the "language of the exception aids in a more clear and accurate description of the offense." *Id.* at 388.

In reaching its conclusion, the Superior Court distinguished between "except clauses" and provisos/distinct clauses. The Superior Court relied on *Commonwealth v. Lopez*, 565 A.2d 437 (Pa. 1989), where the Pennsylvania Supreme Court found that the "except clause" language in 18 Pa. C.S.A. §6106(a) was an integral part of the offense for which the Commonwealth has the burden of proving. *Lopez, supra*, at 439; *Bannellis, supra*, at 386-87. Section 6106(a) provides that "[n]o person shall carry a firearm in any vehicle or concealed on or about his person, **except in his place of abode or fixed place of business**, without a license therefor as provided in this subchapter." §6106(b) of the statute is entitled "exceptions" and states that the "provisions of subsection (a) shall not apply to" a list of **10 exceptions** to subsection (a). 18 Pa. C.S.A §§6106(a) & (b). The *Bannellis* court noted that "[u]nlike subsection (a), subsection (b) clearly evidences a distinction between the elements of the offense and its exceptions since this subsection is divorced from the definitional section of the crime." *Bannellis, supra*, at 386.

Against that backdrop, the Defendant's argument must fail. Given the wording of the statute, the "Exceptions" clause set forth in §6115(b) is not an integral part of the offense, but rather a distinct clause. Unlike §6106(a) and §3323(b), where the "except clauses" were "clearly a part of the definitional section" of those offenses, the "Exceptions" listed in §6115(b) are completely divorced from the definitional section of that offense, as is the case with §6106(b). *Bannellis, supra,* at 387 (citing *Lopez, supra*, at 440).

Indeed, even if one completely removed the language "except as provided in subsection (b)" the definition of the offense under §6115(a) remains fully intact. 18 Pa. C.S.A. §6115(a) ("No person shall make any loan secured by mortgage, deposit or pledge of a firearm, nor . . . shall any person lend or give a firearm to another or otherwise deliver a firearm contrary to the provisions of this subchapter. "). Unlike §3323(b) and §6106(a), the "except as provided in subsection (b)" language of §6115(a) does not "aid in a more clear and accurate description of the offense." *Bannellis, supra*, at 387-88. Accordingly, since the exceptions under §6115(b) are not an integral element of the offense, the Commonwealth was not required to disprove them beyond a reasonable doubt. Accordingly, the Defendant's conviction for criminal attempt to commit an offense under 18 Pa. C.S.A. §6115(a) is supported by sufficient evidence, and it respectfully should be upheld.

C. This court did not err in admitting the Defendant's statement based on the *corpus delicti* rule

Finally, the Defendant challenges the admission of his statement based on the *corpus delicti* rule. It is well-settled that the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Commonwealth v. Freidl,* 834 A.2d 638, 641 (Pa. Super. 2003). "A finding that the court abused its discretion requires proof of more than a mere error in judgment, but rather evidence that the law was misapplied or overridden, or that the judgment was manifestly unreasonable or based on bias, ill will, prejudice or partiality." *Isralsky v. Isralsky,* 824 A.2d 1178, 1186 (Pa. Super. 2003).

The court first notes that this issue should be deemed waived on appeal, as this court's admission of the Defendant's statement was never challenged on *corpus delicti* grounds before this court. There was no objection at the suppression hearing when Detective Tracy testified to the Defendant's statement (HT, p. 7), and while the Defendant did initially object to the admission of the affidavit of probable cause at the non-jury trial, that objection was not based on any legal ground and it essentially was withdrawn after counsel conceded that he and the assistant district attorney had previously agreed that the affidavit would be entered into evidence during the stipulated non-jury trial. (TT, pp. 9-10).

Moreover, the basis for the stated objection did not at all reference a *corpus delicti* issue – counsel simply stated that he "believe[d] that the suppression incorporation would be sufficient" and that he did not "feel the need for the affidavit of probable cause given that the lab would be controlling." (HT, pp. 9-10). The Defendant's post-sentence motion argument as to the Defendant's statement also failed to specifically raise a *corpus delicti* challenge to the court's admission of the statement. (Post-Sentence Motion, filed 2/29/16); (Post Sentence Motion Hearing Transcript ("MHT"), 4/26/16, pp. 3-5). The Defendant's argument generally attacked the sufficiency of evidence supporting his §6115(a) conviction, and the Defendant did not at any point before this court challenge the propriety of this court's ruling which admitted his statement into evidence.

In the event that the Defendant's final contention is deemed preserved for appeal, it still fails on the merits as the Defendant cannot prove that this court abused its discretion in admitting his statement. As explained by our appellate court, "the *corpus delicti* rule begins with the proposition that a criminal conviction may not be based upon the extra-judicial confession of the accused *unless it is corroborated by independent evidence establishing the corpus delicti." Commonwealth v. Ahlborn*, 657 A.2d 518, 520-21 (Pa. Super. 1995).

In the present case, the Defendant's statement was corroborated by independent evidence which established the *corpus delicti* of the crime. The Defendant was found in possession of the firearm he intended to sell and he had placed that same firearm in a bag, which further evinces his intent to transfer or otherwise deliver it to another person. Additionally, he was observed talking on the phone while waiting in an alleyway. That, coupled with his nervous behavior, was sufficient independent evidence to corroborate his statement that his presence on that date, time, and location was for the purpose of selling a firearm. Accordingly, this court did not abuse its discretion in admitting the statement, and this argument should be rejected on appeal.

III. CONCLUSION

Based on the foregoing reasons, this court did not err in denying the Defendant's suppression motion. The evidence presented during the stipulated non-jury trial was sufficient to support both of the Defendant's convictions, and this court did not abuse its discretion in admitting the Defendant's statement.

BY THE COURT:
/s/Lazzara, J.

Date: January 6, 2017

[1] The Defendant requested and received an extension of time to file his Concise Statement because he was awaiting transcripts.

[2] The issue of concealment is discussed in section (II)(B) of this Opinion.

[3] Officers would be creating an unnecessary and dangerous opportunity for an individual to access their weapon if they allowed the individual to remain armed during the inquiry into licensure status.

[4] The court notes that after the Defendant admitted that he did not have a valid license to carry the firearm, the Defendant was placed in handcuffs and subsequently Mirandized -- at which point a lawful custodial detention was no doubt taking place. (HT pp. 6-7, 16-17).

[5] http://www.merriam-webster.com/dictionary/conceal (last visited 11/29/2016).

[6] Although the Defendant claims he did not stipulate to the admission of the exhibit, his initial objection to the admission of the exhibit was based on his "belief" that the suppression transcript would be sufficient and because he did not "feel the need" for the affidavit of probable cause to come in since "the lab test would be controlling." (TT, pp. 9-10). Counsel then quickly walked back his objection and conceded that prior to the non-jury trial, it was his understanding with the assistant district attorney that the affidavit of probable cause would be admitted at the trial, and that such agreement contributed to both parties' decision to proceed with a stipulated non-jury trial. (TT, pp. 9-10).

Commonwealth of Pennsylvania v. Giante Alex Hilliard

Commonwealth Appeal—Sufficiency—Hearsay—Habeas Petition—Dying Declaration—Excited Utterance—Confrontation

When victim cannot identify defendant, and does not remember hospital identification, police officer's testimony, alone, cannot support a prima facie case.

No. CC 201513040. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Todd, J.—January 17, 2017.

OPINION

This is an appeal by the Commonwealth from an order of May 26, 2016 granting Defendant's Petition for Writ of Habeas Corpus dismissing all charges after a hearing held on March 23, 2016. The Commonwealth filed a Notice of Appeal on June 21, 2016. On June 22, 2016 an order was entered directing the Commonwealth to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On June 27, 2016 the Commonwealth filed its Statement of Errors Complained of on Appeal setting forth the following claim:

> "a. This Honorable Court erred in ruling that the evidence was insufficient to support the charge of aggravated assault and criminal attempt (homicide). Dying declarations and excited utterances remain legitimate exceptions to the hearsay rule and have not been found to be incompetent proof that cannot be considered by a trial court in determining whether a *prima facia* case exists to go forward with charges. Nothing contained in the decisions of *Crawford v. Washington*, 541 U.S. 36 (2004) or *Davis v. Washington*, 547 U.S. 813 (2006) renders the Commonwealth's evidence insufficient or incompetent to support a *prima facia* case. Dying declarations and excited utterances do not violate the Confrontation Clause."

BACKGROUND

Defendant was charged with attempted murder and aggravated as a result of the shooting of Anthony Baltimore on August 22, 2015. At the preliminary hearing on October 20, 2015 Baltimore testified that he was walking to work when he heard a vehicle pull up beside him and he was hit nine times by shots fired from inside the vehicle. (P.H.T., p. 6) He testified that he could not see the person who shot him, stating: "I mean when the shots are coming out of a car, you ain't going to be looking into it." (P.H.T., p. 6) On cross-examination Baltimore testified as follows:

"Q. Mr. Baltimore, you indicated that you could not identify anybody that shot you. Is that correct?

A. Yes sir.

Q. You are testifying to that here today under oath. Is that correct?

A. Yes sir.

Q. You indicated that you did not see who it was that shot you?

A. No, sir. No, sir." (P.H.T., p. 7)

He further testified that the person that he saw had a hoodie over their head and he could not even tell if it was a male or female. (P.H.T., pp. 7-8) He also testified that he did not recall making any statements in the hospital. (P.H.T., p. 9)

The Commonwealth then called Detective Edward Fallert who testified that he was at police headquarters when he got a call regarding the shooting and was told that the victim was being taken from the scene of the shooting in Hazelwood to the hospital. When he got to the hospital Baltimore was being treated in the triage unit before being taken to surgery. (P.H.T., p. 10) Fallert was told that Baltimore had internal bleeding, had lost a lot of blood internally and they were rushing him to the operating room for surgery. (P.H.T., p. 18) He also testified that when he asked Baltimore who shot him he stated that the Defendant, Giante Hilliard, shot him.

Defense counsel made repeated objections to Detective Fallert's testimony on the basis that the testimony was hearsay and was in violation of the confrontation clause. The magistrate allowed the testimony on based on *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015), *appeal granted, Commonwealth v. Ricker*, 135 A.3d 175 (2016) which held that the rules of criminal procedure allow hearsay evidence alone to establish a prima facie case. The magistrate also allowed the admission of the hearsay statement as an excited utterance finding that the Baltimore. (P.H.T., p. 18)

Defendant filed a Petition for Writ Of Habeas Corpus in which he alleged that the only evidence that identified Defendant as the shooter was the inadmissible hearsay testimony of Detective Fallert and that the admission of Detective Fallert's would also be a violation of the United States Constitution Sixth Amendment Confrontation Clause. Defendant asserted that Fallert's statement was neither admissible as an excited utterance pursuant to Pa.R.E. 803(2) or a dying declaration pursuant to Pa.R.E. 804(b)(2). In response the Commonwealth argued that Baltimore's statement was admissible either as an excited utterance or a dying declaration and that the statement was "non-testimonial" and, therefore, did not violate the Sixth Amendment Confrontation Clause. After review of the preliminary hearing transcript and a hearing and upon consideration of the briefs an order was entered on May 26, 2016 granting the Writ of Habeas Corpus. This appeal followed.

DISCUSSION

In its Concise Statement the Commonwealth asserts that it was error to rule that the hearsay statement identifying Defendant as the person who shot the victim was inadmissible as either a dying declaration or excited utterance to establish a *prima facie* case against Defendant. In addition, the Commonwealth asserts that the use of the hearsay testimony did not violate the Confrontation Clause as discussed in *Crawford v. Washington*, 541 U.S. 36 (2004) or *Davis v. Washington*, 547 U.S. 813 (2006).

A petition for writ of *habeas corpus* is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. *Commonwealth v. Engle*, 847 A.2d 88, 90 (Pa.Super.2004). In *Commonwealth v. Hendricks*, 927 A.2d 291 (2007) the Court described the habeas corpus proceeding as follows:

> "Although a habeas corpus hearing is similar to a preliminary hearing, in a habeas corpus proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the offense charged. A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt. Rather the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury. *Commonwealth v. Keller*, 823 A.2d 1004, 1010–11 (Pa.Super.2003) (citations omitted). "In determining the presence or absence of a *prima facie* case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa.Super.2001) (citation omitted).
> *Commonwealth v. Hendricks*, 927 A.2d 289, 291 (2007)

The Commonwealth contends that Baltimore's statement identifying Defendant is admissible as an exception to the hearsay rule as an excited utterance. Pa.R.E. 803(2) provides as follows:

> **(2) Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

In its brief in opposition to the Petition for Writ of Habeas Corpus, the Commonwealth relied on *Commonwealth v. Barnyak*, 639 A.2d 40 (Pa. Super. 1994) which the Commonwealth indicated was factually analogous to instant case. In *Barnyak*, the defendant shot his wife who was subsequently transported to the hospital. Approximately an hour and ten minutes later she was interviewed by a police officer at the hospital. In addition, her son and a nephew, who were also at the hospital, made statements about the shooting to the police. The victim and her son later refused to testify at trial and the trial court allowed the police officer to testify as to the statements made by the victim and her son as excited utterances as an exception to the rule against hearsay evidence. On appeal the Superior Court found that the statements were properly admitted as excited utterances even though the statements

were made over an hour after the incident and the victim had been transported to the hospital. The Superior Court noted, however, the following testimony that was offered to support the argument that the statements were made while the victim and her relatives were in an excited state:

> "Dr. Howard Bursh, the emergency room physician who treated Ms. Dixon shortly thereafter,[2] testified that she was pale and obviously frightened. N.T. 3/11/93 at 16. Her pulse was elevated; her blood pressure was markedly elevated; and her pupils were dilated. *Id.* Dr. Bursh administered an injection of an antianxiety agent because Ms. Dixon seemed to be "really panic stricken." *Id.* at 25. The emergency room nurse, Judy Pleskonko, further testified that Ms. Dixon was crying and saying she could not believe this had happened to her. *Id.* at 27–28. When Trooper Yuhouse arrived to interview Ms. Dixon, her son, and her nephew, he observed that all of them were excited and upset that Ms. Dixon had been shot. *Id.* at 42. Nurse Pleskonko testified that Ms. Dixon was still upset when she left treatment from the emergency room at 4:45 a.m.
> 4 Considering the involvement of Ms. Dixon and her son in the shooting incident, and considering the mother/son relationship between the two, we have no difficulty finding that their statements at the hospital were declarations made while experiencing overpowering emotion caused by a shocking event. Therefore, the trial court did not abuse its discretion by admitting them as excited utterances." *Commonwealth v. Barnyak*, 639 A.2d 40, 43–44 (1994)

In the present case there is no testimony that would establish that the victim was in an excited state at the time that he was interviewed by Detective Fallert. The only testimony regarding his condition was that Detective Fallert was told that he had internal bleeding and that they were rushing him to the operating room for surgery. In its brief in opposition to the Petition for Writ of Habeas Corpus, the Commonwealth stated:

> "Here, Pittsburgh Bureau of Police Detective Fallert spoke to the victim as the victim was "being treated in the triage unit before being transported to surgery." Preliminary Hearing Transcript ("PHT"), at 10. Detective Fallert observed that "[t]here were at least eight or nine doctors, medical personnel working on him. He had his clothes removed. He was hooked up to a couple different machines." *Id.* at 17. Detective Fallert learned that the victim was experiencing internal bleeding and required emergency surgery. *Id.* at 18. Therefore, he "went in and quickly asked him who had shot him [.]" *Id.* The victim responded that the individual who at shot him was defendant Giante Hilliard. *Id.* at 19" (Commonwealth's Response To Defendant's Brief In Support of Habeas Corpus Petition, p. 3)

The above cited testimony relied upon by the Commonwealth provides no information concerning the state of mind of the declarant and essentially assumes that since there was a flurry of activity related to the treatment of the victim's injuries that any statements made by the victim were made while under the stress of the shooting.

In *Commonwealth v. Keys*, 814 A.2d 1256, 1257 (2003) the trial court admitted the statement of a victim made to a police officer as an excited utterance after she was assaulted by her husband. In *Keys* the facts were stated as follows:

> "On July 12, 2000, Keys, while at home, reportedly held a three-foot long sword to his wife's neck, threatening to cut her throat. Keys then was said to have dragged his wife by her hair and prevented her from leaving the home. Keys' wife, allegedly held overnight against her will, escaped the next day, ran at least eight to ten blocks and contacted the police. Officer Marcus Dingle arrived and observed that Keys' wife was visibly upset and angry. In response to the officer's query, she recounted the incident. The officer noted that her voice and behavior were distraught and erratic. The officer subsequently arrested Keys and recovered the sword from Keys' bedroom." *Commonwealth v. Keys*, 814 A.2d 1256, 1257 (2003)

At trial, Key's wife did not testify and her statements to Officer Dingle were admitted, over objection, as excited utterances. On appeal the Superior Court reversed stating:

> "Upon consideration of the aforementioned factors in light of the surrounding circumstances, we find that the statements of Keys' wife do not qualify as an excited utterance and the trial court abused its discretion by ruling otherwise. First, thirty minutes elapsed between the end of the startling event and the statements of Keys' wife. Second, the statement was elicited eight to ten blocks away from the scene of the startling event. Third, the utterance was in response to the officer's query.[1] Finally, the utterance is a narrative of overnight events, not a single reaction to a single startling episode. Most importantly, the admission of the hearsay served to deny the accused the right of confronting and cross-examining the sole eyewitness against him." *Commonwealth v. Keys*, 2003 814 A.2d 1256, 1258-59 (2003)

Although the Court specifically recognized that an excited utterance could be made in response to a question, it nonetheless found that given all of the other circumstances in the case, including the fact that the admitted statement would deny the accused the right to confront the only witness against him, the statement should not be admissible as an excited utterance.

In the present case the circumstances do not support a finding that the statement was an excited utterance. The statement was not made at the scene of the shooting but at the hospital at least 20 or more minutes after the event. The statement was not made spontaneously but was made in response to questioning by Detective Fallert. There was no evidence of any kind that describes Baltimore's demeanor, state of mind or behavior at the time statement was made. In addition, the Commonwealth did not offer any evidence, such as the medical evidence offered in *Barnyak* as referred to above, which would establish that Baltimore was in an excited state at the time that he gave the statement. Therefore, Baltimore's statement to Detective Fallert was not properly admitted as an excited utterance.

The Commonwealth next argues that Baltimore's statement was admissible as a dying declaration. Pa.R.E. 804 provides in relevant part:

> **Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness**
>
> Currentness
>
> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(2) Statement Under Belief of Imminent Death.

A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Addressing initially the issue of whether or not the declarant was "unavailable," the Commonwealth argues that Baltimore was unavailable because he testified that he did not remember what he told police officers at the hospital. Specifically, the Commonwealth refers to the following exchange from the preliminary hearing;

Q. Do you recall what you told [the officers] about who shot you?

A. No, sir. (P.H.T. at 6)

However, Rule 804, in setting forth the criteria for determining whether or not a witness is unavailable states in subparagraph (3) that the witness must testify "to not remembering the subject matter." In this case, Baltimore did testify that he remembered the subject matter, which was the shooting. He testified that he recalled walking to work, recalled the car pulling up beside him, recalled looking into the car not being able to identify any of the occupants of the car and recalled that at least one of the occupants of the vehicle had a hoodie covering their face. The subject matter for which the declaration is relevant is not making a later statement about the underlying incident but the underlying incident itself. The Commonwealth does not cite any authority that supports the position that when a declarant testifies that he recalls the event but does not recall giving a later statement about the event that this establishes that the declarant is "unavailable" for purposes of Rule 804. The basis for the admissibility of a "dying declaration" is the indicia of reliability believed to attach to a statement made by someone who believes they are about to die about the "cause or circumstances" of their impending death. It would appear, therefore, that the "subject matter" is the "cause or circumstances" of the declarant's impending death, not whether the declarant recalls making a later statement. In this case Baltimore appeared at the preliminary hearing and testified that he recalled the events surrounding the shooting. Therefore, Baltimore is not "unavailable" for purposes of rule 804.

The Commonwealth also argues that despite the fact that Baltimore did not die his statement is nonetheless admissible as a dying declaration based on the fact that Rule 804(b)(2) does not explicitly provide that the declarant must in fact die. Cases addressing the admission of a dying declaration indicate, however, that the death of the declarant is a condition for the admission of the declaration. In *Commonwealth v. Starks*, , 450 A.2d 1363, 1365 (Pa. Super. 1982) the Court stated:

> "The Supreme Court has "never held that simply because a declarant did in fact die is enough to make the statement into a 'dying declaration' so as to be excepted from the hearsay rule." *Commonwealth v. Little*, 469 Pa. 83, 87, 364 A.2d 915, 918 (1976). The law is clear that a purported dying declaration shall not be admissible unless it is clearly established that the declarant: (1) was dying in fact; (2) believed such to be true; and (3) did die as a result of that mortal condition. Appellant did not do so and, therefore, the trial court properly exercised its discretion in excluding the alleged dying declaration. *See Commonwealth v. Knable*, 369 Pa. 171, 176, 85 A.2d 114, 117 (1952)" *Commonwealth v. Starks*, 450 A.2d 1363, 1365 (1982)

In *Commonwealth v. Priest*, 18 A.3d 1235, 1241 (2011) the Superior Court also stated:

> A statement is a dying declaration and, therefore, admissible hearsay if the declarant believes he or she is going to die (which can be inferred from the surrounding circumstances), death is imminent, and death actually results. "[W]hen a person is faced with death which he knows is impending and he is about to see his Maker face to face, is he not more likely to tell the truth than is a witness in Court who knows that if he lies he will have a locus penitentiae, an opportunity to repent, confess and be absolved of his sin?" *Commonwealth v. Chamberlain*, 557 Pa. 34, 731 A.2d 593, 595, 597 (1999) (citations and quotation omitted). *See Commonwealth v. Griffin*, 453 Pa.Super. 657, 684 A.2d 589 (1996). *Commonwealth v. Priest*, 18 A.3d 1235, 1241 (2011)

The Court also stated in Priest:

> "Furthermore, the lapse of six hours between [Mr.] Odom's statements and his actual death is not determinative of the issue as to whether statements were admissible under the dying declarations exception to the hearsay rule. In the case of *Commonwealth v. Griffin*, [*supra*], the victim was shot in the arm, which severed a major artery. Police came upon the victim lying on the ground, bleeding heavily, and drifting in and out of consciousness. *Id.* The victim asked the officers to get him to a hospital, asked the officers to "just let me die," and identified [Appellant], Aaron Griffin, as his assailant. *Id.* The victim died as a result of his injuries, but not for three days following his identification. *Id.* at 592–93. The Superior Court held as follows:
>
> "[A]ppellant would have us rule that the victim's statement could not serve as a dying declaration because the victim did not actually die until three days after the statement was made. However, Appellant cites us no case with such a holding, and in fact ignores several decisions to the contrary."
>
> *Id.* at 593 [(citations omitted)]. *Commonwealth v. Priest*, 18 A.3d 1235, 1241–42 (2011)

While it appears that various courts have addressed the issue of the time between the dying declaration and the death of the declarant, the Commonwealth has not pointed to any authority that holds that a statement made by a declarant that has not died is admissible.

Finally, the Commonwealth asserts that the statement is not violate Confrontation Clause In *Crawford v. Washington*, 541 U.S. 36 (2004), a U.S. Supreme Court dealt with the issue of whether or not the admission of hearsay is a violation of the Sixth amendment Confrontation Clause. The Court held that issue is controlled by whether or not the statement is "testimonial" or "nontestimonial." If it is nontestimonial it is admissible. If it is testimonial is it not admissible. The distinction between the two was described in a *Commonwealth v. Allshouse* , 36 A.2d 163 (2012):

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.
>
> They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Commonwealth v. Allshouse*, 614 Pa. 229, 244, 36 A.3d 163, 172 (2012)

In this case, the determination has to be made whether or not the statement made to Detective Fallert was made in the course of an interrogation where the primary purpose was to enable the Pittsburgh Police to address an ongoing emergency involving not only the actual victim but also the police or the public at large. If it was made in response to questions in order to deal with an ongoing emergency, then it is nontestimonial and, if otherwise subject to a valid hearsay exception, it is admissible. If, however, the statement was in response to interrogation to establish or prove past facts, that is the identity of the shooter, then it is testimonial and is not admissible. In considering the factors to decide the issue the Court stated:

> "Although the existence—actual or perceived—of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings. In determining the primary purpose of an interrogation, a court must also objectively evaluate the circumstances surrounding the interrogation, including the formality and location, and the statements and actions of both the interrogator and the declarant." *Commonwealth v. Allshouse*, 36 A.3d 163, 175-76 (2012)

In the present case, there was no evidence presented about an ongoing emergency, just the fact that the shooting had only occurred about twenty minutes to a half hour earlier and appeared to be some type of drive by shooting. Detective Fallert was not at the scene of the shooting and there was no evidence presented as to what continued activity, if any, was occurring at the scene. The Commonwealth argued that at the time of the statement the police did not have a suspect in custody and was, therefore, seeking information to meet an ongoing emergency. However, this argument could be made about every case where there is no suspect in custody, even if the statement was made hours, days or even weeks after the crime. Without additional evidence as to why this interrogation was conducted to address an ongoing emergency, such as the status of the crime scene, the potential for other victims or the status of the police pursuit of any perpetrators, it would appear that the statement is not part of resolving an ongoing emergency and is testimonial. Even assuming, however, the statement is nontestimonial, the Commonwealth has nonetheless failed to establish that the statement fell within a recognized exception to the hearsay rule. Therefore, the Petition for Writ of Habeas Corpus was appropriately granted.

BY THE COURT:
/s/Todd, J.

Commonwealth of Pennsylvania v. Brandon M. Wise

Criminal Appeal—Theft—Guilty Plea—Sentencing (Discretionary Aspects)—Multiple Cases Tried Together

A sentence of 67-174 months is not excessive based upon defendant's lengthy criminal history and refusal to conform his conduct to the law.

No. CC 201511027, 200514410, 201514411, 200515213, 2016,00434. 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, Brandon M. Wise, appeals from various judgments of sentence of May 16, 2016 which became final upon this Court's denial of defendant's post-sentencing motions on October 13, 2016.

At CC No. 201511027, the defendant pled guilty to various counts of violating 18 Pa.C.S.A. §§4106(a)(1), 4106(a)(3), 4101(a)(3), 3934(a), 3925(a) and 4101(a)(2). The charges stemmed from the defendant's arrest for breaking into various vehicles, stealing identification cards and credit cards and using the credit cards at various retail establishments. The defendant was sentenced to a term of imprisonment of not less than 18 months nor more than 48 months at one count of violating 18 Pa.C.S.A. §§4106(a)(1). He was sentenced to a three-year term of probation at one other count and he received no further penalty at the remaining counts. At CC No. 201514410, the defendant pled guilty to various counts of violating 18 Pa.C.S.A. §§3925(a), 4914(a), 5505 and 35 Pa.C.S.A. §780-113(a)(32). These convictions stemmed from a traffic stop in which the defendant was found to be in possession of a stolen wallet. The defendant also provided a false name to the officers and was determined to be high on heroin and he possessed heroin and a hyperdermic needle. Relative to the conviction at 18 Pa.C.S.A. §3925(a), this Court imposed a term of imprisonment of not less than three months nor more than six months to be served consecutively the sentence imposed at CC No. 201515213. At CC No. 201514411, the defendant pled guilty to various counts of violating 18 Pa.C.S.A. §3925(a) and 75 Pa.C.S.A. §§3733, 3736 and 3323. These convictions arose from the defendant being arrested while driving a stolen vehicle and fleeing from the police. Relative to the conviction at 75 Pa.C.S.A. §3733(a), this Court imposed a term of imprisonment of not less than twelve months nor more than thirty-six months to be served consecutively the sentence imposed at CC No. 201515213. At CC No. 201515213, the defendant pled guilty to various counts of violating 18 Pa.C.S.A. §§4106(a)(1), 5506, 4101(a)(3), 3934(a) and 3925(a). The convictions resulted from the defendant's arrest for breaking into various vehicles, stealing identification cards and credit cards and using the credit cards at various retail establishments. The defendant was sentenced to a term of imprisonment of not less than 18 months nor more than 48 months at one count of violating 18 Pa.C.S.A. §§4106(a)(1). Finally, at CC No. 201600434, the defendant pled guilty to various counts of violating 18 Pa.C.S.A. §§4106(a)(1), 5506, 4101(a)(3) and 3925(a). The convictions again resulted from the defendant's arrest for breaking into various vehicles, stealing credit cards and using the credit cards at various retail establishments. The defendant was sentenced to a term of imprisonment of not less than 12 months nor more than 36 months at one count of violating 18 Pa.C.S.A. §§4106(a)(1). The aggregate sentence was to a term of imprisonment of not less than 67 months nor more than 174

months. In this timely appeal, the defendant claims that his sentence was manifestly excessive because this Court did not consider the defendant's need for medical treatment for his mental illness.

A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." *Commonwealth v. Boyer*, 856 A2d 149, 153 (Pa. Super. 2004), citing *Commonwealth v. Kenner,* 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See *Commonwealth v. Flores*, 921 A.2d 517, 525 (Pa.Super. 2007), citing *Commonwealth v. Busanet*, 817 A.2d 1060, 1076 (Pa. 2002).

A "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Boyer*, supra, quoting *Commonwealth v. Moore*, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense, as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.... " *Boyer*, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant' character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." *Commonwealth v. Walls*, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it "must provide a written statement setting forth the reasons for the deviation ...." *Id.,* 926 A.2d at 963.

Moreover, "the sentencing court must state its reasons for the sentence on the record." *Boyer*, supra at 154, citing 42 Pa.C.S.A. § 9721(b). The sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the presentence report; thus properly considering and weighing all relevant factors. *Boyer*, supra, citing *Burns*, supra, citing *Commonwealth v. Egan*, 451 Pa.Super. 219, 679 A.2d 237 (1996).

Additionally, the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court. Challenges to the exercise of this discretion ordinarily do not raise a substantial question. *Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa.Super. 2006). *Commonwealth v. Lloyd,* 878 A.2d 867, 873 (Pa. Super. 2005), appeal denied, 585 Pa. 687, 887 A.2d 1240 (2005) (citing *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995). Title 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa. Super. 2005) (citing *Commonwealth v. Graham,* 661 A.2d 1367, 1373 (1995)). "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." *Commonwealth v. Perry,* 883 A.2d 599 (Pa. Super. 2005), quoting *Commonwealth v. Wright*, 832 A.2d 1104, 1107 (Pa.Super.2003); see also *Commonwealth v. L.N.*, 787 A.2d 1064, 1071 (Pa.Super.2001), appeal denied 569 Pa. 680, 800 A.2d 931 (2002). As the Superior Court has stated in *Commonwealth v. Mastromarino*, 2 A.3d 581, 587 (Pa.Super. 2010), "[t]hus, in our view, the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case."

The record in this case supports the sentence imposed by this Court. The sentencing record reflects that this Court considered the presentence report, the testimony of the defendant, and the comments presented at the guilty plea and at sentencing and all other relevant factors. The defendant did not object to the substance of the information contained in the presentence report. Moreover, at CC Nos. 201511027 and 201515213, this Court imposed mitigated range sentences of not less than 18 months nor more than 48 months. At CC Nos. 201514410 and 201600434, this Court imposed mitigated range sentences of not less than 12 months nor more than 36 months. At CC No. 201514410, this Court imposed a standard range sentence of not less than 6 months nor more than 12 months. While the sentences were imposed consecutively, this Court was well within its province to do so.

The circumstances of the offenses of conviction persuaded this Court that the imposed sentence was appropriate. There were five separate informations filed against the defendant charging him with serious theft related offenses. The offenses were fueled by illegal drug use and the demand for money to financially support the drug use. The defendant has a very serious and lengthy criminal history involving theft, loitering, burglary and access device related offenses. The defendant has demonstrated an acute propensity to break into vehicles of others, commit thefts from those vehicles and then further harm his victims by fraudulently using the victim's credit cards. The defendant has served various prior state prison sentences and has been on probation, including state probation, for a substantial part of his adult life up and until the time of sentencing. Neither probation nor prison has dissuaded the defendant from maintaining a criminal lifestyle. This Court was most concerned that the defendant had been provided with multiple chances to conform his conduct to the law but he repeatedly chose not to seize those opportunities. The defendant was a substantial risk to the public and this Court believed that a substantial period of incapacitation would protect the public from further crimes of defendant. The defendant did not present credible evidence of any mental health issues sufficient to sway this Court that a lesser sentence was appropriate. While there was some evidence of mental health issues, those issues did not, in this Court's view, mitigate his conduct. This Court believes that the facts of this case, as summarized at sentencing and set forth during the guilty plea, warranted the individual sentence imposed by this Court. The record reflects the reasoning for the individual sentence and the sentence should not be disturbed.

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

BY THE COURT:
/s/Mariani, J.

Date: January 19, 2017

Commonwealth of Pennsylvania v. Wesley Connor

Criminal Appeal—Weight of the Evidence—Sufficiency—Harassment—Disorderly Conduct

The disorderly conduct statute is not a catch-all offense for every case where there is a fight, it must occur in public.

No. CC 2016-03254. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—February 17, 2017.

OPINION

Mr. Connor's non-jury trial on two summary charges was held on October 25th and 26th of 2016. Following his sentence of 90 days probation, he sought relief by motion. He claims the weight of evidence does not support the Court's guilt determination and he levels an attack on the sufficiency of the government's evidence.

Mr. Connor was found guilty of harassment and disorderly conduct. His weight challenge does not specify which of these crimes he is attacking. Despite the lack of precision, the argument does not persuade. This case was all about who the Court was to believe. The government presented 3 witnesses: the victim, the victim's teenage son and a police officer. The victim, Shalan Morgan, told the Court Mr. Connor struck her in the face. "We was outside in front of my house and Mr., Connor turned around,…, and punched me in my face." Transcript, pg. 11. The force of the blow caused her knee to buckle and hit the ground. *Id.* She then went after him. Grabbing his jacket and punching him. *Id.* Eventually, cooler heads prevailed and both went into Ms. Morgan's home. The peacefulness did not last long. Ms. Morgan was in her bedroom with Mr. Connor. There, he hit her again and she fell onto her bed. *Id.*, at 11-12. Ms. Morgan's 16 year old son saw the events in the bedroom. "I saw my mom on the bed and he was punching her." *Id.*, at 35. Her one cheek "was swollen", she had "a split lip" and her "ankle was twisted". *Id.*, at 14.

The elements of harassment were satisfied and done so in a convincing way that the Curt's does not feel anyone's sense of justice would be shocked. Ms. Morgan provided very real reasons as to why she was less than honest at the preliminary hearing. Those reasons also forced her son to tell a different story at the preliminary hearing. The reasons behind the lies were believed by this Court and, as such, did not make her and her son a witness not worthy of belief.

Connor's disorderly conduct argument is element specific. According to him, the government's evidence did not show any "public inconvenience". Post Sentence Motion, paragraph 12 (Nov. 14, 2016). He even goes on to state that "all of the alleged conduct for which Mr. Connor was charged occurred *inside* of his home." *Id.* (emphasis added). As set forth earlier, that statement is contradicted by the record. The first attack of Ms. Morgan took place outside "in front of [her] house". Transcript, pg. 11. This act was followed by Ms. Morgan responding with some force of her own and then Mr. Connor attempting to telephone the police. *Id.*

While the defense does itself no favors in advancing a position that the record does not support, the Court cannot get around the lack of evidence on the "public" element in the disorderly conduct crime. The best the government has to offer on this element is that quoted already – the first beating took place outside in the front of Ms. Morgan's house. Was it on the porch? Was it on the front stoop? Was it on the stairs leading to the porch? Was it in the front yard? Did you get access to the front yard after opening a gate? All of these questions and similar inquiries cannot be answered by a critical review of the government's evidence.[1]

In closing, the Court finds a statement from our state Supreme Court over 50 years ago to be quite appropriate when thinking about this case and the government's evidentiary presentation.

> "The crime of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which breed in the ferment of a community. It has a specific purpose; it has a definitive objective, it is intended to preserve the public peace; it has thus a limited periphery beyond which the prosecuting authorities have no right to transgress any more than the alleged criminal has the right to operate within its clearly outlined circumference."

Commonwealth v. Greene, 189 A.2d 141, 145 (Pa. 1963).

The conviction for harassment should be sustained whereas the conviction for disorderly conduct should be reversed and its sentence of 90 days probation should be vacated.[2]

By virtue of this opinion, the previously scheduled hearing for March 2, 2017, is HEREBY CANCELLED.

BY THE COURT:
/s/Williams, J.

---

[1] The Court was aided in its decision by its review of the following decisions: *Commonwealth v. Fedorek*, 946 A.2d 93, 100 (Pa. 2008); *Commonwealth v. Meyer,* 431 A.2d 287 (Pa. Super. 1981); *Commonwealth v. Whritenour*, 751 A.2d 687 (Pa. Super. 2000); *cf. Commonwealth v. Lawsom,* 759 A.2d 1 (Pa. Super. 2000).

[2] The government, had it known the nuances of its case, may have been better served by amending its information to a second count of harassment to address the outside the front porch conduct and have the first count address the inside the house conduct and forget about trying to squeeze these facts under the disorderly conduct umbrella.