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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Jesse Jones

Criminal Appeal—Homicide—Sufficiency—Weight of the Evidence—Sentencing (Discretionary Aspects)—Imperfect Self-Defense

Voluntary manslaughter defendant's aggregate sentence of 10 to 20 years is not excessive given the defendant's criminal history.

No. CC 2016-0959. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Flaherty, J.—June 29, 2017.

OPINION

Defendant Jesse Jones ("Defendant") appeals from this Court's September 16, 2016 Order of Sentence.

On September 24, 2015, Defendant was charged with one count of criminal homicide under 18 Pa.C.S.A. §2501(a); one count of person not to possess a firearm under 18 Pa.C.S.A. §6105(a)(1); and tampering with or fabricating physical evidence under 18 Pa.C.S.A. §4910(1) in relation to the September 23, 2015 death of Cameron Johnson. Defendant waived his right to a jury trial, and the matter proceeded to a nonjury trial on June 9, 2016. Thereafter, this Court found him guilty of voluntary manslaughter, person not to possess a firearm, and tampering with physical evidence. This matter proceeded to sentencing on September 16, 2016 whereupon Defendant was sentenced to serve a total of ten (10) to twenty (20) years in a state correctional institution followed by twelve (12) months of probation. Defendant's specific sentence is as follows: 6 ½ years to 13 years for voluntary manslaughter; 3 ½ years to 7 years for person not to possess to run consecutive to the sentence for voluntary manslaughter; and 12 months probation for tampering with physical evidence. Defendant filed timely post-sentence motions, which were denied on October 5, 2016.

Thereafter, on November 3, 2016, Defendant filed a timely Notice of Appeal. Defendant was directed to file a Concise Statement of Errors Raised on appeal. On February 28, 2017, Defendant filed said Concise Statement wherein he raised the following allegations of error:

1. The evidence was insufficient to sustain the verdict of voluntary manslaughter when the Commonwealth failed to prove beyond a reasonable doubt that Defendant was not justified in shooting the victim.
2. The verdict was contrary to the weight of the evidence.
3. The sentence imposed was manifestly excessive, unreasonable, and an abuse of discretion.

The facts as found by this Court are as follows: On September 23, 2015, Cameron Johnson (hereinafter "Victim") was driving a dark-colored Buick Lucerne down Juniper Drive in the Mooncrest Housing Plan in Moon Township, Pennsylvania. (T. p. 139). At that same time, Defendant was walking down Juniper Drive wearing a black hooded sweatshirt and a black baseball hat. (T. p. 88). Victim pulled his vehicle over in front of Defendant, put the vehicle in park, and began to exit the vehicle. (T. p. 141, Video). As Victim began to exit his vehicle, Defendant extended his arm and discharged the firearm he was carrying at Victim five times. (T. p. 141, Video). Only a few seconds had passed between Victim opening the car door and Defendant discharging the firearm. (T. p. 141, Video). Defendant shot Victim in the upper back as he was exiting the vehicle, and continued to shoot at Victim while he attempted to get away, as is evidenced by the shattered back windshield of Victim's vehicle. (T. p. 74). Victim's attempt to get away was not successful, as he had been fatally shot and crashed his vehicle into a tree. (T. p. 71). Victim was pronounced dead at the scene and transported to the Allegheny County Medical Examiner's Office for an autopsy. (T. p. 193-94). According to the stipulation reached by the parties, Victim died from a penetrating gunshot wound to the trunk. (T. p. 195). The fatal gunshot wound entered through the left upper back of Victim, penetrated the lower left lung, descending aorta, lower lobe of right lung, right diaphragm, and the right lobe of the liver. (T. pp. 194-95). This wound caused Victim to bleed to death internally. (T. p. 195).

Jerome Smith, a resident of 197 Juniper Drive, saw Defendant running up Juniper Drive with a small silver handgun in his hand, immediately after he heard the shots fired. (T. p. 89). Defendant was wearing a black hooded sweatshirt and a black baseball cap. (T. p. 89). Defendant then immediately ran between the houses on Juniper Drive, through the woods and onto Oak Drive where he resided. (T. pp. 48; 141, Video). Another resident of Oak Drive, Daniel Forbus, testified that he was outside in his front yard when he heard what sounded to be a small caliber gun discharge multiple times. (T. p. 38). He then witnessed Defendant run out of the woods and stop near the stone wall behind the property. (T. p. 43). When Defendant came out of the woods, he was not wearing a hat. (T. p. 52). Defendant briefly spoke to Mr. Forbus, stating, "he was messing with me," then went into his house. (T. p. 42). Five minutes later, Defendant got into the back seat of Sarah Linger's vehicle, laid down, and left. (T. p. 48).

Police arrived on the scene within seconds of the shooting, as they were already there serving an arrest warrant on another resident of Juniper Drive. (T. pp. 57-63; 68-79). Moon Township Officer Justin Blair testified that he was approaching the front of 203 Juniper Drive when he heard a radio call that a car crashed into a tree at the end of Juniper Drive near the bend to Oak Drive. (T. p. 71). When he approached the vehicle, he found Victim unresponsive in the driver seat. (T. p. 72). He pulled Victim out of the car, and ran to get the AED machine and mask. (T. p. 73). When he returned, Officer Kavanshansky was performing life-saving measures, but was unsuccessful. (T. p. 73). The vehicle had a shattered back windshield. (T. p. 74). There was no weapons found on Victim or in the vehicle. (T. p. 79).

Jason Clark of the Allegheny County Medical Examiner's Office, Mobile Crime Unit testified that a Jimenez firearm was recovered from the stone wall behind 267 Oak Drive, and a black Cav baseball hat and black hooded Russell sweatshirt were recovered in a trash can behind 265 Oak Drive. (T. pp. 14-15). The Jimenez firearm was tested by Raymond Everett of the Allegheny County Medical Examiner's Office, Firearms Division. (T. p. 184, 188). The Jimenez firearm was found to be in good operating condition. (T. p. 188). He test fired the gun and compared them to the five (5) spent .25 caliber cartridge cases that had been recovered at the location where Defendant discharged the firearm. (T. p. 190). All were matches to the Jimenez firearm recovered from the brick wall. (T. p. 190). He also compared the test-fired bullets with the bullet recovered from Victim, but could not say to a reasonable degree of scientific certainty that the bullets matched. (T. p. 191-92). He testified that the bullets had the same class and characteristics (i.e.—6 lands and grooves with a right hand twist), but they "did not have a sufficient amount of agreement or disagreement to render an identification or elimination." (T. p. 192).

Defendant was ultimately apprehended in Charleston, West Virginia. (T. p. 198). The Allegheny County Sheriff's Office, along with the U.S. Marshall's Task Force, followed Sarah Linger on November 21, 2015 to the address where Defendant was found. (T. p. 199). After being taken into custody on November 23, 2015, Defendant was lodged in a West Virginia Correctional Facility. (T. p. 203). There, Defendant spoke with Allegheny County Police Homicide Detective Tom Foley, who presented Defendant with

his Miranda Rights Waiver Form. (T. p. 205). Defendant waived his Miranda Rights and made a verbal statement to police. He stated that he began staying in the Mooncrest Housing Development around July 4, 2015. (T. p. 207). While he was there, he began a serious relationship with Sarah Linger. (T. p. 207). Ms. Linger had "one or two children" to Victim. (T. p. 208). Defendant stated that Ms. Linger felt that Victim was upset about her relationship with Defendant and that Victim began to convey threats to Ms. Linger concerning Defendant. (T. p. 208). Defendant had never met or seen Victim prior to September 23, 2015. (T. p. 208). Due to the threats, Defendant purchased a gun off the streets two or three weeks prior to the shooting. (T. p. 208).

On the date of the shooting, Defendant stated that Ms. Linger was supposed to meet with Victim to exchange custody of their son. (T. p. 209). Defendant was not with Ms. Linger at that time, and stayed home. (T. p. 209). Defendant stated that "at some point he was walking down the road and he saw a few people that he knew." (T. p. 209). He stated that Victim's car came up in "a fast fashion or a hurried fashion and pulled up on the curb in front of him." (T. p. 209). He stated that a black male got out of the car and said "something to him to the effect of 'meet your maker.'" (T. p. 209). At that point, Defendant pulled the gun out of his hooded sweatshirt and started shooting toward the car. (T. p. 210). Defendant then ran in the opposite direction. (T. p. 210). Defendant admitted to hiding the gun in the brick wall and his clothing in a garbage can. (T. p. 211). Defendant stated that Ms. Linger drove him to a friend's house in Coraopolis where he stayed for a short period before fleeing to West Virginia. (T. p. 211).

Counsel for Defendant did not challenge the evidence as to the person not to possess charge. (T. p. 6).

In an effort to provide this Court with evidence concerning Defendant's state of mind on the date in question, Defendant presented the testimony of Sarah Linger. Ms. Linger has two children with Victim and is the girlfriend of Defendant. (T. p. 225). She also drove Defendant from his house on the date of the shooting and maintained contact after he fled the jurisdiction. (T. p. 199). Evidence was presented as to text message conversations that were between Ms. Linger and Victim where he made menacing statements concerning Defendant. (T. pp. 234-241). As of the date in question, there had been no threatening text messages for a period of approximately two weeks. Neither Ms. Linger nor Defendant contacted the police in an effort to obtain any protection.

Defendant's first issue on appeal is that the evidence was insufficient to sustain a verdict of voluntary manslaughter, as the Commonwealth failed to prove beyond a reasonable doubt that Defendant was not justified in shooting Victim. Voluntary manslaughter, as applied in this matter, is defined as follows: "a person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable." 18 Pa.C.S.A. §2503(b).

In this instance, Victim's previous comments toward Defendant through Ms. Linger were menacing. He, indirectly, threatened Defendant's physical safety. On September 23, 2015, Victim aggressively pulled his vehicle in front of Defendant while Defendant was walking down the street. This action, coupled with the history of menacing statements, created a subjective fear in Defendant that Victim may be there to physically assault him. However, objectively, this fear was unreasonable. As shown on the video evidence played before this Court, the interaction between Defendant and Victim on September 23, 2015 was a mere second or two. Victim was not armed, and there was no interaction between Defendant and Victim before Defendant began to shoot him. Defendant was not confronted with deadly force, and there was no evidence presented to show that Victim used any force whatsoever against Defendant on September 23, 2015. Further, Defendant was in a position to retreat, but failed to do so, as he was walking down a public street where he, admittedly, knew many people. As such, the Commonwealth proved beyond a reasonable doubt that Defendant was not justified in shooting Victim, and this Court found him guilty of voluntary manslaughter.

Defendant's second issue on appeal is that the verdict rendered was contrary to the weight of the evidence. As noted by the Pennsylvania Supreme Court, when making a challenge to the verdict on the basis that it was against the weight of the evidence, a defendant concedes that there was sufficient evidence to sustain a conviction for that crime. *Commonwealth v. Widmer*, 560 Pa. 308, 319 (2000), citing *Commonwealth v. Whiteman*, 336 Pa.Super. 120 (1984). A challenge to weight of the evidence does not take the facts in the light most favorable to the verdict winner, rather, the correct inquiry is as follows: "notwithstanding all the facts, certain facts are clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.* At 320. The evidence before this Court was that Victim had previously made menacing comments concerning Defendant to Ms. Linger, Defendant's paramour. This was all through text messages exchanged between Victim and Ms. Linger. There was no evidence of direct threats made by Victim to Defendant. Defendant had never met or seen Victim before he shot and killed him. On September 23, 2015, Victim aggressively pulled his car over in front to Defendant as he was walking down the street. Victim had not completely exited his vehicle before Defendant began shooting at him. Defendant was, at no point, confronted with deadly force. As such, Defendant's use of deadly force was not justified. There were no facts presented to this Court that would support a finding that the shooting of Victim was justified. As such, the verdict, as rendered by this Court, was appropriate.

Lastly, Defendant asserts that the sentence imposed was manifestly excessive, unreasonable, and an abuse of discretion in that the sentence did not take into consideration Defendant's rehabilitative needs. This Court sentenced Defendant to a period of incarceration of 6 ½ years to 13 years for voluntary manslaughter; 3 ½ years to 7 years for person not to possess a firearm, and 12 months of probation for tampering with physical evidence. Each of these sentences fell within the middle of the standard range of the sentencing guidelines,[1] and were to run consecutive to each other. Thus, Defendant's total sentence was ten (10) to twenty (20) years confinement in a state correctional institution followed by twelve (12) months of probation. The Pennsylvania Superior Court addressed a sentencing court's authority to sentence consecutively in *Commonwealth v. Austin*, 66 A.3d 798 (Pa. Super. 2013) as follows:

> Generally, Pennsylvania law 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. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. In fact, this Court has recognized the imposition of consecutive, rather than concurrent, sentences may raise a substantial question only in the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and length of imprisonment. That is 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 on its face to be, an excessive level in light of the criminal conduct at issue in the case.

Commonwealth v. Austin, 66 A.3d 798, 808-09 (Pa. Super. 2013) (citations omitted). In this matter, Defendant was convicted of voluntary manslaughter, person not to possess a firearm, and tampering with physical evidence. Voluntary manslaughter involves the most serious of offenses, that being taking the life of another human being. At the time of this offense, Defendant was a convicted felon, and prohibited from possessing a firearm. Defendant had illegally purchased the firearm and had been carrying it on his person for at least two to three weeks prior this incident. Voluntary manslaughter and person not to possess a firearm are considered to be serious crimes in the Commonwealth of Pennsylvania, as they are both graded as felonies. Further, they were not part of one criminal act or adventure, rather they were separate crimes committed approximately two to three weeks apart.

A significant factor to this Court was the timing of Defendant's previous incarceration. Defendant was a convicted felon for crimes committed in West Virginia where he received a nine (9) year prison sentence. While this Court did not consider Defendant's alleged indiscretions while he was incarcerated, this Court cannot help but to consider that Defendant was released from confinement on July 4, 2015; purchased a firearm approximately two months later; and killed Victim on September 23, 2015. Defendant does not appear to be amenable to rehabilitation, as he returned to a life of crime shortly after he was released from confinement. For these reasons, this Court's aggregate sentence of ten (10) to twenty (20) years was not, on its face, manifestly excessive and is consistent with the overall principles of the sentencing code.

Based upon the foregoing, this Court's September 16, 2016 Order of Sentence should be affirmed.

BY THE COURT:
/s/Flaherty, J.

[1] The standard range for voluntary manslaughter was 66-84 months; Defendant was sentenced to 78 months. The standard range for person not to possess a firearm was 36-48 months; Defendant was sentenced to 42 months. The standard range for tampering with physical evidence was restorative sanctions to 2 months; Defendant was sentenced to 12 months of probation.

Commonwealth of Pennsylvania v. Che King

Criminal Appeal—POSS/PWID—Accident Involving Death or Personal Injury—Ex-Parte Communication—Victim Impact

The defendant who drove his car into a pedestrian, killing him, had no valid license; a 5 to 10 year sentence was thus appropriate.

No. CC 201506852, 201416587. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—June 29, 2017.

OPINION

This is a direct appeal wherein the defendant, Che King, appeals from the judgment of sentence of March 29, 2017 which became final when this Court denied the defendant's post-sentence motion on April 10, 2017. At CC No. 201506852, the defendant pled guilty to Accidents Involving Death/Personal Injury, in violation of 75 Pa.C.S. §3742(a), Accidents Involving Death/Injury – Not Properly Licensed, in violation of 75 Pa.C.S. §3742.1(a) and various summary offenses. He was sentenced to a term of imprisonment of not less than five years nor more than 10 years relative to the conviction of Accidents Involving Death/Personal Injury and a three-year term of probation relative to the Accidents Involving Death/Injury – Not Properly Licensed conviction. At CC No. 201416587, the defendant pled guilty pursuant to a plea agreement to violating 35 Pa.C.S.A. §780-113(a)(30) and this court imposed an agreed-upon sentence of a term of imprisonment of not less than two years nor more than four years. Both sentences were ordered to begin on February 18, 2016. On appeal, the defendant claims that this Court abused its discretion by relying on an *ex parte* communication from the victim's family in the automobile accident case in imposing sentence. The record does not support the defendant's claims and, therefore, this appeal is meritless.

The instant prosecution arose after the defendant caused a fatal auto accident when he drove his Mercedes Benz automobile into a pedestrian, Albert Kruska, in the City of Pittsburgh. After striking Mr. Kruszka, the defendant sped from the scene. At the time of the accident, the defendant did not have a valid driver's license. He had many previous convictions for driving under suspension and he had a lengthy criminal history. Notably, the defendant had very poor vision and should not have been driving, even if he did have a valid license.

It was later determined that the defendant's mother owned the vehicle involved in the accident. The defendant enlisted his mother to help conceal the fact that he had driven the vehicle on the date of the accident. His mother lied to the police and told them that someone stole her vehicle when she, in fact, knew the defendant drove the vehicle at the time of the accident.

The presentence report submitted to the Court dated of February 16, 2016 was twenty pages in length. That presentence report also made reference to a separate, seven-page presentence report for the defendant dated June 20, 2000, which was prepared for another member of this Court involving the defendant's guilty plea to felony drug charges. The defendant was sentenced for those drug charges to a term of incarceration of 24 to 48 months in a state correctional institution. That report also indicates that the defendant was ordered to serve a separate sentence of nine to 18 months of incarceration to run consecutively to the drug case sentence for violating probation at a separate felony robbery case for which he had already served a sentence of 11 ½ to 23 months of incarceration.

Because of the defendant's extensive criminal history, the defendant's sentencing guidelines for the offense of "accident involving death" were based on a prior record score of 5. The offense gravity score was 9. The recommended standard sentencing range was, therefore, 48 to 60 months.

The presentence report also contained very emotional victim impact statements from Mr. Kruska's wife and children. Various members of the victim's family submitted letters to the Court at the original sentencing hearing. The content of the letters was similar to the victim impact statements set forth in the presentence report.

The defendant was initially sentenced on February 18, 2016. At that time, the Court sentenced the defendant to a term of imprisonment of not less than five nor more than 10 years. The defendant was also ordered to serve a period of three years' probation

following his term of incarceration. Because the combined time for the term of incarceration and probation was 13 years, the sentence exceeded the statutory maximum. On appeal, the Superior Court ordered this court to resentence the defendant. See Com. V. King, No. 466 WDA 2016 and No 467 WDA 2016 (Superior Ct. PA).

Defendant does not make an argument that his sentence was excessive but rather that this Court relied on an *ex parte* communication in sentencing the defendant. In his post-sentence motion filed on April 10, 2017, at par. 5 [sic], the defendant contended that he was entitled to relief because:

> "A. … Judge Mariani read an *ex parte* communication from the victim's relative which is contrary to the law.
>
> B. …the letter contained, among other things, personal attacks on counsel and counsel's representation of the Defendant in violation of 42 Pa.C.S. §9738 as well as the Sixth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution".

See Defendant's Post-Sentencing Motions filed on April 10, 2017.

The defendant was resentenced on March 29, 2017. The transcript of the resentencing hearing indicates, at page 5, that the Court presented counsel with a copy of a letter which was received by the Court from Debra Kruska (the victim's wife) approximately three weeks before that hearing.[1] Defendant's counsel objected to the letter as an attack on him and that the letter was beyond the scope of anything about sentencing.[2] The Court overruled the objection.

To the extent that the defendant's argument could be construed that his sentence was excessive, this Court will address that argument as well. As the record reflects, this Court relied on the circumstances of this case, the information contained in the presentence report, including the victim impact statements, information presented at the defendant's sentencing and resentencing hearings, and the defendant's extensive criminal history.

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's 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).

The record in this case does not support any interpretation that this Court relied on an *ex parte* communication in sentencing the defendant. The record supports the sentence imposed by this Court. The sentencing record reflects that this Court considered the presentence report, the testimony and comments presented during the guilty plea colloquy, and at sentencing and resentencing, and all other relevant factors. The defendant did not object to the substance of the information contained in the presentence report.

As specifically explained on the record at sentencing and resentencing, this Court imposed a sentence at the high end of the standard range because the defendant's conduct resulted in the death of an innocent pedestrian, the defendant had a long history of driving without a driver's license, the defendant induced his mother to lie to the police to cover up his crime, and the defendant also knowingly drove a vehicle while suffering from serious vision impairment. This Court also considered the defendant's prior offenses and multiple terms of incarceration which, in this court's view, did not deter the defendant from committing the serious criminal offenses involved in this case. The circumstances of the offenses of conviction and the defendant's background, as summarized at sentencing, and resentencing, the presentence report and the facts set forth during the guilty plea colloquy warranted the individual sentence imposed by this Court at each count. The sentence of incarceration is within the standard range. The record reflects the reasoning for the individual sentence and the sentence should not be disturbed.

This Court is unaware as to whether counsel has sought to make a copy of the subject letter an exhibit for the record of this appeal.

The Court's view of the letter differs from counsel's expressed view. The third sentence of the letter does criticize defense counsel unfairly and inappropriately. However, the majority of the letter contains information commonly set forth in victim impact statements and somewhat mirrors information set forth in the presentence report. It should be noted that this court appointed defense counsel to this case and, therefore, this Court disregarded the unfair criticism of defense counsel because it was not appropriate and because it was contrary to this Court's opinion of defense counsel and his role in providing the legal representation to which the defendant is entitled.

BY THE COURT:
/s/Mariani, J.

Date: June 29, 2017

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

Criminal Appeal—Commonwealth Appeal—Prosecutorial Misconduct—Mistrial—Dismissal of Charges

ADA contacted potential character witness the night before trial; witness felt threatened and intimidated; court dismissed the charges sua sponte after declaring a mistrial.

No. CC 201614138. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—June 29, 2017.

OPINION

The Commonwealth has appealed from this Court's Order of March 20, 2017,[1] which dismissed the charges with prejudice following this Court's *sua sponte* declaration of a mistrial due to prosecutorial misconduct. However, a review of the record reveals that the Commonwealth has failed to present any meritorious claims on appeal and, therefore, this Court's Order should be affirmed.

This case has a complex procedural history. The Defendant was originally charged at CC 201502875 with Persons Not to Possess Firearms,[2] Carrying a Firearm Without a License,[3] three (3) counts of Possession with Intent to Deliver[4] and three (3) counts of Possession of a Controlled Substance[5] and at CC 201603369[6] with Rape (Unconscious Victim),[7] two (2) counts of Involuntary Deviate Sexual Intercourse (Unconscious Victim),[8] two (2) counts of Aggravated Indecent Assault (Unconscious Victim),[9] two (2) counts of Terroristic Threats,[10] Stalking,[11] Indecent Assault (Unconscious Person),[12] Invasion of Privacy[13] and Persons Not to Possess Firearms.[14] The Defendant filed Pre-trial Motions to Suppress in both cases and a hearing was held on this motions on October 31, 2016. At the conclusion of the hearing, this Court granted the Defendant's Motion to Suppress in its entirety at CC 201603369 and granted the Motion to Suppress at CC 201502875 in part with respect to the 20 stamp bags of heroin found in the lockbox, the bulletproof vest and the two (2) cell phones and was denied in all other respects. Having asserted that their prosecution of the above-captioned cases was substantially handicapped due to this Court's rulings, the Commonwealth appealed and those cases remain pending in our Superior Court at Docket Nos. 1817 WDA 2016 and 1818 WDA 2016, respectively.

Meanwhile, the Defendant proceeded to a jury trial on the Persons Not to Possess Firearms charge at CC 201502875, which had been severed from the other charges and for which the evidence was not suppressed. That charge was re-captioned at CC 201614138, the within case. A jury trial was held before this Court from November 28-30, 2016. In the early morning hours of December 1, 2016, this Court received an email message containing a voice recording from Brandy Wilson, who was set to testify as a character witness for the Defendant, indicating that she had been threatened by Assistant District Attorney Lawrence Sachs, Esquire. After a hearing outside the presence of the jury on December 1, 2016, this Court declared a mistrial *sua sponte* on the basis of manifest necessity due to ADA Sachs' prosecutorial misconduct. Following subsequent hearings on February 13 and March 20, 2017, which included testimony from Ms. Wilson reading ADA Sachs' threats, this Court dismissed the charge with prejudice. This appeal followed.

On appeal, the Commonwealth avers that this Court erred in declaring a mistrial and subsequently dismissing the charges. This Court will address its decision to declare a mistrial and its subsequent dismissal of the charges separately, as follows:

Initially, with regard to this Court's decision to declare a mistrial, it is well-established that "it is within a trial judge's discretion to declare a mistrial *sua sponte* upon the showing of manifest necessity and absent an abuse of that discretion, [the appellate court] will not disturb his or her decision." *Commonwealth v. Hoovler,* 880 A.2d 1258, 1260 (Pa.Super. 2005). "The Pennsylvania courts have not adopted a clear-cut definition of 'manifest necessity'; instead, they have determined the existence or nonexistence of 'manifest necessity' by reviewing the particular circumstances of each case." *Commonwealth v. Anderson*, 439 A.2d 720, 722 (Pa.Super. 1981). Indeed, "there can be no rigid rule for finding manifest necessity since each case is individual…Moreover, as a general rule, the trial court is in the best position to gauge potential bias and deference is due the trial court when the grounds for the mistrial relate to jury prejudice… From his or her vantage point, the trial judge is the best arbiter of prejudice because he or she has had the opportunity to observe the jurors, the witnesses and the attorneys and evaluate the scope of the prejudice." *Commonwealth v. Walker*, 954 A.2d 1249, 1255-1256 (Pa.Super. 2008).

On November 30, 2016, the Defendant, who was representing himself at trial with the assistance of stand-by counsel Brandon Herring, Esquire, announced his intention to call present the testimony of Brandy Wilson as a character witness the following day. (T.T. p. 166-171). Because he was incarcerated and consequently lacked the capacity to issue and serve a subpoena on Ms. Wilson for her appearance the following day, this Court's staff contacted Ms. Wilson using a phone number provided by the Defendant and she agreed to appear the following morning, December 1, 2016. (T.T. p. 180).

When this Court arrived in chambers on December 1, 2016, she was informed by her staff that Ms. Wilson had left a voice-recorded email for this Court wherein she stated that she had been contacted by Assistant District Attorney Sachs the previous day, November 30, 2016 who threatened her and attempted to intimidate her from testifying. In her message, she stated that she felt afraid of ADA Sachs and feared possible retaliation by him:

> During the phone conversation I advised him that - the same information that I was provided. That I was contacted, that I didn't confirm anything yet.
>
> I'm actually pretty freaked out that he was calling me since he was, you know, the ADA. I advised him that because I'm a new employee that I couldn't come in because of the simple fact that I was going to get fired. I said that if I needed to come in, in order for me to come in that I would need subpoenaed.
>
> He proceeded to basically scare me to the point where I do not want to participate in this trial. I am not sure what to believe at this point. I have a bad feeling about the whole situation simply because I do not want any type of repercussions against me because of my participation in the trial.
>
> He advised me that he feels - that he feels that Mr. Byrd is the most dangerous man that he has ever met or ever seen. He asked me if I knew how or why he was in jail up in Ohio. I said that as far as I knew it was drug related, but I said that I believe that everybody deserves a second chance.
>
> He proceeded to tell me that the situation was an armed - an aggravated kidnap and an armed robbery that him and other people were involved with, you know. I might not be saying this completely accurate.

As far as I can remember, he went into very big details about the cases saying that he had duct-taped a man up and kidnapped him, and basically interrogated him until they got the information that they wanted, and went to another location and robbed the place, armed robbery, and then proceeded to tell me he was also a murderer involved in a shooting in Duquesne that led to the death of three people.

Obviously, not knowing anything about it freaked me out. Not knowing who to believe in this case, I advised Mr. Sachs that, you know, I wanted our conversations to stay between me and him simply because at this point I was really freaked out.

I advised him that I only knew Mr. Byrd for a few months before he got re-incarcerated. He cut me off and was like, yeah, I know a lot about you. He talked about the fact of my financial hardship, about a break-up, and told me that he knows a lot more about me than he should, which really freaks me out because that means I'm being watched at this point just for being in contact with Mr. Byrd.

…

With that being said, you know, when being put in the middle of a situation where you don't really know anything, you just have to try to go with your gut with it.

For me I'm just scared of any type of retaliation. I don't want - you know corruption can be on all levels. Me not knowing the history of ADA Sachs and the fact that I'm being watched and my children are being watched really freaks me out.

You know, he did say to me that, you know, he feels that I'm a good person, which I believe I am. I believe I am a model citizen. I am 32 years old with three children. I'm a single mother. I work hard. I provide for my children. I abide by the laws. My record is completely clean. I have traffic violations. That is it.

If anything happened to me, my children would be split into different homes, and my well-being and the well-being of my children outweighs anybody in my life. Friend, family or foe. I will protect me and my children over anybody in this world.

So me being scared of the situation I don't want to be part of it. You hear about corruption all the time with the DEA's Office, ADA's Office, police officers.

You know, I do believe that the majority of people who are in power who are public servants are good. But you still have those people who are not. You never know.

So I'm just fearful that - excuse me - that if I participate as a character witness that anything could happen. You know, something could be planted on me. I could get pulled over for complete bullcrap. That is not something that I'm willing to risk for anybody.

So I wanted to put this on record with Judge I believe it's McDaniels or Kerri who called me. I want to put this on the record simply because if something happens to me in the future, I want it to be documented of this current situation because at this point I am very fearful for my safety, the safety of my children, my family, my friends, all because of me being associated with somebody who's incarcerated. It seems like to me the ADA's Office is desperately trying to continue to have Mr. Byrd incarcerated for life.

So I just don't want to take that risk. If there's anything that you need from me as far as verbal communication like over the phone or through emails, I don't have a problem with that, with it being directly with Judge McDaniels and Kerri. I believe her last name is O'Connell.

As long as it is documented about the conversation that I had today with Mr. Sachs. I feel that that's wrong. The whole situation, calling me, scaring me into not coming. Even if I was subpoenaed I wouldn't want to be there.

I feel like the information that I was given about Mr. Byrd shouldn't have been given to me by him. Whether he was trying to make it seem like to scare me, to, you know, make his character - make Mr. Byrd look threatening to wards me, making me feel that tI can't trust him or, you know, being fearful of what he could do to me or my children. I don't' know if that's what Mr. Sachs was trying to do, but whatever he was trying to do it worked because I am not trying to participate whatsoever.

So if you choose to email me back and let me know that you got his recording so then that way I could put this on the record for my safety and the safety of my children.

I'm not sure - if there's anything else that I forgot to say I will do another recording, but I believe I covered everything. Like I said, you can respond back to me through the email.

I appreciate your time and listening this this recording and documenting the events that have occurred today.

Thank you.

(Hearing Transcript, 12/1/16, p. 5-12).

This Court then heard testimony from ADA Sachs (represented at the hearing by Deputy District Attorney Mike Streily, Esquire), who admitted to contacting Ms. Wilson, telling her about the Defendant's prior offenses and telling her he believed the Defendant was the most dangerous person he had ever met:

Q. (Mr. Streily): Sir, what was your intent in making that phone call?

A. (Mr. Sachs): My intent was to determine what basis she had to be able to testify as a character witness for Mr. Byrd because I had known from all recordings I have listened to she hadn't known him that long. It didn't appear that she had a lot of contact with anybody who would be within his circle other than his mother and perhaps his brother.

I wanted to know if she was aware of what his prior convictions were and whether that would change her opinion of his reputation. That was the essence of why I was calling her.

Also, I meant to find out whether she was, in fact, going to appear. Almost - the conversation only lasted two or three minutes. She indicated in fairly short order that she wasn't going to appear.

Then the rest of the conversation was merely to ask her these questions and find out what she knew in case she changed her mind or her circumstance had changed.

Q. Now, you indicated earlier in conversation she said she was not going to appear. Did she tell you why she was not going to appear?

A. She said that she couldn't get off work, and she couldn't afford to lose her job. It was a new job for her.

Q. Sir, what was your belief as to the character trait of Mr. Byrd that she was going to testify to?

A. Honestly, I'm not certain what she was supposed to testify to, whether it was for his honesty or his peaceable nature in the community. Because this case, although it's a gun charge, but there is a lot of testimony about what generated the police response, which was a terroristic threats situation.

So I wasn't certain exactly what she would testify to. I wanted to find out what her basis was.

Q. Did you disclose to her during that conversation any information about your belief as to past activity of Mr. Byrd that might have been of a criminal or violent nature?

A. Yes. I asked her if she was aware of the circumstances of his Ohio conviction. She told me that he had told her that it was a drug-related case, and I explained what the charges were, what he was convicted of.

I explained that he had been conceited of an aggravated assault in Duquesne. I think she must have confused that there were three people killed. He did three years is what I told her.

…

Q. (Mr. Herring): The witness indicated on that recording that you had informed her that Mr. Byrd was one of the most dangerous people that you had ever met or something to that effect. Correct?

A. (Mr. Sachs): Yes.

Q. Did you, in fact, say that to her?

A. Yes.

Q. What was the legitimate purpose of telling her that in relation to her coming to Court and being a witness?

A. We were discussing him, and she had already indicated that she wasn't planning on coming, and we were just having a conversation at that point.

Q. We can agree that you wouldn't have been permitted to ask her a question related to your opinion of Mr. Byrd during the course of the trial; correct?

A. Absolutely.

Q. So there was no -

A. Yes. I agree.

Q. So there was no legitimate purpose for editorializing to her your opinion of Mr. Byrd while you were contacting her about being a character witness; correct?

A. I wouldn't necessarily agree with that, that it was not legitimate. It was a conversation about him.

…

Q. Mr. Sachs, in that recording, the witness, despite having been told by you that Mr. Byrd had all of these convictions, but I believe it was your conduct that as going to be directed towards her in relation to knowing about her family.

Did you reference the jail recordings that you had listened to in relation to Mr. Byrd's case?

A. I believe I told her that's how I - why I knew about her, what I knew about her.

I mean I never told her that she was under surveillance. She wasn't under surveillance. Everything I know about her is from having had to listen to these jail recordings.

Q. But you had, in fact, told her several things about her family, and you told her that you knew more information about her than you should? Did you say that to her?

A. In response to when she was telling me about herself, I said, yes, I know about these things. I know about this. I know about that. It was all as a result of listening to these recordings. That's why I know more about her than I should.

Q. You did, in fact, use those words in speaking with the witness?

A. Yes. I believe I did. Yes.

(H.T. pp. 17-20, 22-23, 24-25).

A careful examination of Mr. Sachs' testimony reveals that despite Mr. Sachs' denials of wrongdoing, it comports entirely with Ms. Wilson's message to this Court in that after and despite her telling Mr. Sachs that she was unable to appear due to her

employment situation, he continued on to detail the Defendant's convictions with the intent to change her opinion regarding his reputation in order to prevent her from testifying and told her he knew more about her than he should. It was clear from her message to this Court that Ms. Wilson was scared and given the nature of her conversation with ADA Sachs, it is easy to understand why.

At the conclusion of the hearing, this Court placed its findings on the record. It stated:

THE COURT: I find the caller, although not cross-examined, to have been well spoken and articulate.

I see no legitimate reason Mr. Sachs would tell her about the details of the Ohio case. He said that he knew more about her than he should.

I find it hard to believe that she said that she had financial problems and a recent break-up. I believe that Mr. Sachs told her that.

I believe that he told her that the Defendant shot people in Duquesne. He said that he was dangerous.

I believe that it's the perception of the witness in this case that matters, and her perception is that Mr. Sachs and/or the D.A.'s Office is corrupt, possibly she was afraid for her life and for her children, and the witness has not appeared. For manifest necessity I am going to declare a mistrial in this case.

I have been on the bench for 31 years. In that 31 years I have never once banned anyone from my courtroom including people like Paul Gettleman.

However, Mr. Sachs, you are banned from my courtroom. I can no longer trust you. I find you to be sneaky. I find you to be able to backdoor people, and you're not allowed in my courtroom.

Thank you.

(H.T., p. 25-26).

Thereafter, at the hearing on whether to dismiss the charges, this Court heard testimony from Ms. Wilson, who testified that she felt threatened and feared retaliation from ADA Sachs, and that, based on the content of the conversation, believed that he was watching her:

THE COURT: You're the Brandy Wilson that had a phone conversation with Mr. Sachs regarding Mr. Byrd?

MS. WILSON: Yes.

THE COURT: And he, in fact, did call you. How did you feel about that conversation with Mr. Sachs?

MS. WILSON: I was nervous about it. I was scared. I originally didn't want to say anything, because I didn't want any type of back lash towards me.

…

THE COURT: Okay. You thought if you had any back lash, it would not have been from Mr. Byrd, but it would have been from?

MS. WILSON: From Mr. Sachs.

…

Q. (Mr. Dutkowski): Did Mr. Sachs speak with you about you being a character witness for Mr. Byrd?

A. (Ms. Wilson): Yes.

…

Q. In the course of the call, did Mr. Sachs threaten you at all? How would you describe the conversation?

A. It was more indirect. He stated things like: Yeah, I know a lot more about you than I should. King of like a chuckle. He hinted on knowing my situation with a case that I had against my ex.

He stated about my financial situation. So I didn't put two and two together that he got it from our phone calls. I immediately went into: Oh, My God. I am being watched. What does he know about me? I tried to play kind of coy with him, like I was on his side to try and find out what he knew about me.

So he asked where I worked, and I told him, because it's public knowledge where I work. But he just continued to be like: Oh yeah. Like he said two or three times: I know more about you than I probably should, and he chuckled.

(Motions Hearing Transcript, 3/20/17, pp. 3, 4, 5-6).

In this particular case, the Assistant District Attorney contacted a defense witness directly and threatened and intimidated her with the intent to prevent her from testifying on the Defendant's behalf. The import of his actions cannot be understated. The guarantee of a fair trial is a fundamental principle of our justice system and any attempts to interfere with that are nothing less than an attack on the entire justice system itself.

As this Court stated at the December 1, 2016 hearing, it found ADA Sachs' actions to be underhanded and "sneaky" and his subsequent explanation to this Court lacking in credibility. His actions were an affront to this Court and to the Defendant and were intended to deny the Defendant a fair trial. Mr. Sachs' actions were, as this Court determined, so egregious as to necessitate the entry of a mistrial, *sua sponte*, as a manner of manifest necessity. Given the particular facts and circumstances of this case, this Court was well within its discretion in granting the mistrial.

Similarly, this Court was also well within its discretion in dismissing the charges with prejudice.

In the seminal case of *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), our Supreme Court discussed a trial court's decision to prohibit a retrial after the entry of a mistrial for prosecutorial misconduct. In *Smith*, it was revealed that the prosecutor withheld the fact that the Commonwealth's chief witness received favorable treatment at a sentencing hearing on a different matter in exchange for his testimony agains the defendant. It was also revealed that the prosecutor knowingly withheld physical evidence obtained at the victim's autopsy and also failed to disclose its existence to the defense as required by *Brady v. Maryland*, 373 U.S. 83 (1963). Because the exculpatory information and evidence was not discovered until after the trial had concluded, the defendant's conviction was reversed but the defendant sought to prevent a re-trial on the grounds of double jeopardy. On review, our Supreme Court found that the intentionally prejudicial conduct of the prosecutor operated to bar a retrial. As the Court stated:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992).

Here, ADA Sachs' actions were as or more egregious than those of the prosecutor in *Smith*. ADA Sachs contacted a defense witness directly, questioned whether she was intending to testify for the Defendant, and despite her response that she was unable to attend due to her job, intimated that he knew details of her personal and financial situation with the intent to prevent her from changing her mind and testifying in a manner that left her scared, feeling threatened and afraid of retaliation against herself and her family by ADA Sachs. Such behavior cannot stand. ADA Sachs' actions were knowing and deliberate and were intended to deprive the Defendant of a fair trial. ADA Sachs has been banned from this Court's courtroom, but that is not a sufficient remedy for the prejudice incurred by the Defendant. Under these circumstances, this Court was required to dismiss the charge with prejudice and it did not err when it did so. See *Smith, supra*.

Insofar as ADA Sachs' actions in contacting and attempting to frighten and intimidate a defense witness were deliberate and intended to deprive the Defendant of a fair trial, this Court was well within its discretion in both granting a mistrial *sua sponte* for manifest necessity and in subsequently dismissing the charge against the Defendant with prejudice. These claims must fail.

Accordingly, for the above reasons of fact and law, this Court's Order of March 20, 2017, which dismissed the charges against the Defendant with prejudice must be affirmed.

BY THE COURT:
/s/McDaniel, J.

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[1] The Commonwealth's Notice of Appeal indicates it is appealing from this Court's Order of March 20, 2017; No Orders were entered on April 25, 2017, as the Commonwealth's Concise Statement avers.

[2] 18 Pa.C.S.A. §6105(a)(1)

[3] 18 Pa.C.s.A. §6106(a)(1)

[4] 35 P.S. §780-113(a)(30)

[5] 35 P.S. §780-113(a)(16)

[6] This information is not at issue in this appeal, but as its procedural history is entwined with the instant case, it is presented for a complete understanding of the matter

[7] 18 Pa.C.S.A. §3121(a)(3)

[8] 18 Pa.C.S.A. §3123(a)(3)

[9] 18 Pa.C.S.A. §3125(a)(4)

[10] 18 Pa.C.S.A. §2706(a)(1)

[11] 18 Pa.C.S.A. §2709.1(a)(1)

[12] 18 Pa.C.S.A. §3126(a)(4)

[13] 18 Pa.C.S.A. §7507.1(a)(1)

[14] 18 Pa.C.S.A. §6105(a)(1)

Commonwealth of Pennsylvania v. Darrin Hardy

Criminal Appeal—Suppression—Sufficiency—VUFA—False Id—Seeks Reversal

A defendant may only be liable for giving false ID to police if he is told that he is the subject of an official investigation.

No. CC 2016 03 278. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—July 21, 2017.

OPINION

The law said Darrin Hardy was not allowed to possess a firearm. The government accused him of doing that very act on February 12, 2016. They also charged him of providing false information about who he was.

Eight months later, the parties gathered for a suppression hearing. Mr. Hardy was seeking to exclude a firearm and any incriminating statements he may have made from the collection of evidence the government was planning to use against him. Omnibus Pretrial Motion, paragraphs 4, 5 (June 24, 2016). His reasons for suppression were: (1) arrest was not supported by probable cause; (2) there was no search warrant and no applicable exception applied; (3) there was no probable cause or reasonable suspicion to believe he was armed and dangerous. OPM, paragraph 6 (a-d).

To rebut the assertions of illegality, the government relied upon the testimony of two law enforcement officers – Troy Garrett and Randy Grossman. Both are with the Allegheny County Sheriff's Department. However, before they even took the stand, the defense limited the scope of the suppression hearing to a single issue – the suppression of the statement for the false identification charge. Transcript, pg. 3. This is significant because the Concise Statement filed on May 22nd makes no mention of wanting to litigate the statement issue. The Concise Statement talks exclusively of a bad inventory search. Concise Statement, 13(a). This disconnect amounts to a waiver of any suppression related arguments.[1]

Mr. Hardy also takes exception to the sufficiency of the government's evidence. He begins by stating the evidence merely showed he was present and nothing more. Concise Statement, 13 (b). He also claims the government failed to show constructive possession. *Id*. Through the power of circumstantial evidence the government showed Mr. Hardy was more than just present in the car where a gun was found. The manner in which the gun was found suggested his possession as the butt of the gun was "facing the passenger side door" and "the barrel was facing the rear side of the vehicle." Transcript, pg. 34. The location of the gun also contributes as it was right under the front passenger seat. His giving a phony name also contributed to the collection of circumstances that was sufficient to convict.

Mr. Hardy transitions from the gun to the false identification conviction. In his eyes, the government's evidence was lacking on one element – being informed by an officer that he was the subject of an official investigation. Concise Statement, paragraph 13(c).

Pennsylvania's false identification to law enforcement statute reads as follows:

> A person commits an offense if he furnishes law enforcement authorities with false information about his identity after being informed by a law enforcement officer who is in uniform or who has identified himself as a law enforcement officer that the person is the subject of an official investigation of a violation of law.

18 Pa.C.S.A. § 4914. Our state Supreme Court interpreted this statute as requiring three elements be satisfied before one can be found guilty of this crime.

> "First, if the law enforcement officer is not in uniform, the officer must identify himself as a law enforcement officer.
>
> Second, the individual must be informed by the law enforcement officer that he is the subject of an official investigation of a violation of law.
>
> Third, the individual must have furnished law enforcement authorities with false information after being informed by the law enforcement officer that he was the subject of an official investigation of a violation of law."

In re D.S., 39 A.3d 968,974 (Pa. 2012). The element which Mr. Hardy believes is lacking in proof is the second – being informed by an officer that he is the subject of an official investigation. Concise Statement, 13 (c). Officer Garrett testified that he "did not tell [Mr. Hardy] he was under official investigation". Transcript, pg. 12. On cross-examination, Officer Grossman testified that Mr. Hardy "was detained and going to be taken to the jail for fingerprinting". Not happy with that answer, counsel choose a different route to get the answer she was seeking. After refreshing his recollection with the preliminary hearing transcript, Officer Grossman confirmed that Mr. Hardy was informed about the official aspect of this investigation AFTER Mr. Hardy gave him a phony name. Transcript 17. Our law - *In re: D.S.* – requires just the opposite. To sustain a conviction for giving law enforcement false information about their identity, the citizen must be informed they are subject to an investigation. It is only after that purpose is communicated to the person and then followed by false identification information can a conviction be sustained. The sequence required by our precedent is not part of this record. The conviction for false identification to a law enforcement official should be reversed.[2]

BY THE COURT:
/s/Williams, J.

[1] Also persuasive to the Court's conclusion is the manner in which the proceeding was conducted. The cross-examination of Officer Garrett did not touch upon the inventory search of the vehicle. Transcript, pgs. 10-12. A similar tactic was employed on cross-examination of the second witness, Officer Grossman. Transcript, pgs. 15-17.

[2] The Court's sentence on the false ID count was "no further penalty". As such, the Court's sentencing scheme has not been compromised.