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# OPINIONS

## ALLEGHENY COUNTY COURT OF COMMON PLEAS

# PLJ

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# Opinions

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# Riverview School District v. Riverview Education Association, PSEA/NEA

*Employment—Labor Arbitration*

*Denying petition to vacate arbitration award and affirming arbitrator's decision to reduce penalty against grievant for sexual harassment from termination to nine months suspension without pay.*

No. GD-16-013976. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Brien, S.J.—July 16, 2018.

**OPINION ON REMAND**

I affirmed the Arbitrator's Award in this labor arbitration case. The facts as found by the Arbitrator are set forth in detail at pages 2 - 9 of the Opinion of the Commonwealth Court filed January 5, 2018. It is not necessary for me to restate them here. That Court remanded this case to me "for further clarification of whether [the Grievant's] actions constituted sexual harassment and, if so, why the Arbitrator's award does not violate public policy in light of the allegations raised by the District." (Opinion at 19). Jurisdiction was relinquished. What prompted the remand was my Order denying the District's Petition to Vacate Arbitration Award, which Order concluded that the Award "drew its essence from the parties' collective bargaining agreement and did not violate public policy." My Order went on to explain that the "Grievant's misconduct, while serious, was not so egregious that public policy prohibited his reinstatement with a lengthy suspension."[1]

As the Commonwealth Court, on pages 12 – 13 of its remand opinion indicated:

> Grievance awards are reviewed under the deferential essence test, which requires an award to be confirmed if (1) the issue as properly defined is within the terms of the agreement; and (2) the award can be rationally derived from the agreement. *Fraternal Order of Transit Police v. Southeastern Pennsylvania [Transportation] Authority*, 114 A.3d 893, 898 (Pa. Cmwlth. 2015). A reviewing court will not second-guess the arbitrator's fact-finding or interpretation as long as the arbitrator has arguably construed or applied the CBA. *Id.* Indeed, this Court will only vacate an arbitrator's award under the essence test "where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." *Slippery Rock University of Pennsylvania, Pennsylvania State System of Higher Education v. Association of Pennsylvania State College & University Faculty*, 71 A.3d 353, 358 (Pa. Cmwlth. 2013).
>
> However, in *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association, PSEA/NEA (Westmoreland I)*, 939 A.2d 855, 865 (Pa. 2007), our Supreme Court adopted a public policy exception to the essence test that permits a reviewing court to consider whether the arbitrator's award violates an established public policy. Under the public policy exception to the essence test, an arbitration award may be set aside if it violates a "welldefined, dominant" public policy "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 866. In deciding whether to apply the public policy exception, the court must consider (1) the nature of the employee's conduct leading to his or her discipline; (2) whether the employee's conduct implicates a welldefined, dominant public policy; and (3) whether the arbitration award poses an unacceptable risk that it will undermine the implicated policy. *Slippery Rock University of Pennsylvania*, 71 A.3d at 363. An arbitration award that explicitly conflicts with a well-defined public policy must be vacated. *Id.*

(Citation omitted).

> Under 29 C.F.R. § 1604.11 (a):
>
> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Subsection (b) goes on to explain:

> In determining whether alleged conduct constitutes sexual harassment, ... the record as a whole and ... the totality of the circumstances [must be considered], such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.[2]

When the following examples of the Grievant's conduct are viewed in the totality of his interaction with the Victim, they compel the conclusion that such conduct was "of [a] sexual nature":[3] placing his hand on her knee; kissing her head; expressing his desire for a "romantic relationship"; referring in a letter to the "numerous times he felt like kissing [her] and didn't"; and telling her that "if not for their respective spouses, they would be together." (Commonwealth Court Opinion at 6).

As stated by the Commonwealth Court in its Opinion in the instant case, the Victim "explained that [the Grievant] regularly engaged in non-work-related, personal conversations, and routinely invaded her personal space to the point where she asked him to step back ... [The Victim] noted that several times she received gifts that made here uncomfortable or [the Grievant] would place his hand on her knee or kiss her head, to which she implored him to leave her alone." (Slip Opinion at 4). Other invasions of her personal space caused the Victim to tell him that his conduct was "upsetting and out of line." *Id.* at 5. As further noted by the Commonwealth Court, [the Victim] "had trouble sleeping and sought counseling from the Center for Victims." *Id.* at 3. Thus, the Grievant persisted, over a period of two years, in a course of unwelcome conduct designed ultimately to get a female colleague and one-time friend into bed. The cumulative effect of this obsessive behavior created a "hostile[] or offensive working environment"[4] for the Victim and caused her much anxiety. This was obvious sexual harassment.[5] This conclusion, however, does not end the analysis, but only begins it.

The real question in this case is not whether Grievant is guilty of sexual harassment, but whether the Arbitrator's Award violates the established and dominant public policy against sexual harassment by reducing the penalty from termination to nine months suspension without pay. Several appellate courts reviewing an arbitration award determined or assumed that a co-worker

was the victim of sexual harassment. Neither the court in those cases nor the Commonwealth Court in the instant case held that sexual harassers must **always** be terminated. In fact, as I noted in my pre-remand order, one Commonwealth Court case says the opposite. See *Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees,* 956 A.2d 4 77, 487 (Pa. Cm with. 2008). The question in the instant case then becomes whether the Arbitrator's penalty, given the totality of the harasser's conduct and its effect on the Victim, is so lenient that it poses an unacceptable risk of undermining the well-defined and dominant public policy against sexual harassment in the workplace.

In *Philadelphia Housing Authority,* the grievant abused the victim co-worker verbally and physically over a period of months. The arbitrator described his conduct as "lewd, lascivious and extraordinarily perverse." 52 A.3d at 1120. Our Supreme Court, in reviewing the Commonwealth Court's opinion, characterized the conduct as "facially criminal." *Id.* at 1125. After the grievant was fired, the arbitrator reinstated him with back pay. Our Supreme Court affirmed the Commonwealth Court's decision vacating the award, concluding that "the arbitrator's award forcing PHA to take [the grievant] back with full pay - **without any sanction at all** – violates a well-defined and dominant public policy against sexual harassment in the workplace, a public policy which is grounded in both federal and state law against sex discrimination in employment…" *Id.* at 1123 (bold print added). The Court continued explaining its rationale as follows:

> Although a labor arbitrator's decision is entitled to deference by a reviewing court, it is not entitled to a level of devotion that makes a mockery of the dominant public policy against sexual harassment. . . In our view, the rational way to approach the question is to recognize the relationship between the award and the conduct; and to require some reasonable, calibrated, defensible relationship between the conduct violating dominant public policy and the arbitrator's response.

*Id.* at 1127 - 1128.

In *Neshaminy School District v. Neshaminy Federation of Teachers,* 171 A.3d 334 (Pa. Cmwlth. 2017), the grievant:

> directed sarcastic and sexually explicit comments toward [the victim] "all day, every day," which made her uncomfortable. In particular, [the victim] recalled when [the grievant]: "invited [her] to sit on his lap in lieu of a chair"; "told her it was taking all of his self-control not to kiss her"; and responded "[s]o, I shouldn't slap your a[**]" when [the victim] specifically asked him to stop his behavior "because their 9th grade students were starting to comment about a possible relationship between the two." [The victim] characterized [the grievant's] behavior as being "so continuous that she ... consider[ed his comments] as white noise or mere background to her work environment." [The victim] explained that she "felt helpless and did not complain because she was new on the job and had to rely on [the grievant] for subject matter content for which she was unfamiliar" and, therefore, had "to laugh off his commentary" because she "wanted a job."

*Id.* at 336 (record citations omitted).[6] The arbitrator found that the grievant's "behavior had a deleterious effect on [the victim] and 'created a working environment which she reasonably found harassing, hostile, and offensive.'" *Id.* The Commonwealth Court further explained:

> Based on these determinations, Arbitrator issued the Award, which reinstated [the grievant] with back pay, minus the 20-day suspension and unemployment compensation received, if any. Upon [the grievant's] reinstatement, the Award authorized District to require him to undergo reasonable sexual harassment training. District filed a petition to vacate the Award with common pleas, which common pleas granted on February 23, 2016.

*Id.* at 337. After noting that the grievant had committed the harassing conduct in front of students, the Commonwealth Court, in affirming the lower court's vacating the award, held:

> [S]uspending [the grievant] for only [20] days as a result of th[is] aforementioned conduct would not only provide an unacceptable risk of undermining [the District's] policies, but ... would effectively neuter those policies.
>
> Additionally, while Arbitrator imposed a 20-day suspension and authorized District to require [the grievant] to undergo reasonable sexual harassment training, reinstating him to the same work place pending his **possibly** receiving training on why his actions were inappropriate with the **hope** that he will change his personality and learn the error of his ways is similar to the reinstatement with conditions in *Westmoreland II.* As we stated there, this result "defies logic and violates public policy."
>
> For these reasons, there is not a "reasonable, calibrated, defensible relationship between" [the grievant's] continuous, hostile, offensive, and deleterious conduct "violating dominant public policy and the [A]rbitrator's response" to reinstate [the grievant] to the classroom, even with the condition that the District could require him to attend reasonable sexual harassment training after his reinstatement. As such, the Award "betrays a lack of appreciation for the dominant public policy" against sexual harassment, *id.*, and "demonstrate[s] a tolerance, rather than intolerance for" such behavior "in direct contravention of public policy."

*Id.* at 341 (bold print in original; citations omitted).

In *Weber Aircraft, Inc. v. General Warehousemen and Helpers Union Local 767,* 253 F.3d 821 (5th Circuit 2001), a worker sexually harassed three female co-workers and was discharged.[7] The arbitrator commuted his penalty to an eleven-month suspension without pay. The district court vacated the award. In reinstating the arbitrator's award, the Fifth Circuit held that it did not violate public policy.

In *Westvaco Corporation v. United Paperworkers International Union, AFL-CIO,* 171 F.3d 971 (4th Circuit 1999), the grievant committed outrageous conduct as set forth by the court's factual summary:

> [The grievant] worked for Westvaco for nearly twenty years before his discharge on January 10, 1997. His termination was prompted by a sexual harassment complaint filed by a co-worker .... [The victim] complained to the company that [the grievant] called her at home and left a message consisting of heavy breathing and panting or slurping sounds. [He] ended the message with the words "Love you, baby."

> In response to [her] complaint, Westvaco conducted an investigation. The company learned from [her] that despite her objections, [the grievant] had addressed her for the past year as "foxy mama" and "foxy lady." In addition, [he] would visit (her] office and stare at her for periods of ten to twenty minutes. When [she] objected, [he] would either deny that he was staring at her or ignore her objections. Matters escalated in November 1996. After helping [the victim] carry a box of candy from her car, [the grievant] asked for a kiss. When [she] refused, [he] stated, "I am serious, I want some tongue." [She] asked him to leave, and he did. Later that day, [he] observed [the victim] bending over and commented, "Oh, nice position, Jacquie." [The victim] told the company that she did not report (him] earlier because she did not want to "make waves" and she thought she could handle the problem herself.

*Id.* at 972-973.

The arbitrator reinstated the grievant and imposed a nine-month suspension without pay. The Fourth Circuit held as follows:

> The district court found that (the grievant's] reinstatement after nine months violated the public policy against sexual harassment and vacated the arbitral award. By so doing, the district court improperly substituted Its own judgment for that of the decision maker contractually selected by the parties--the arbitrator. Because the arbitrator acted within his authority and the award did not violate public policy, we reverse and remand with directions to reinstate the arbitral judgment.

*Id.* at 972.

In deciding whether the Grievant in the instant case was terminated for just cause, the Arbitrator was not required to give the deference to the school district's decision that I am required to give to his decision. I would have affirmed the Arbitrator's penalty even had he upheld the Grievant's discharge. The Arbitrator's erroneous finding of no sexual harassment does not change my conclusion that the substantial penalty he imposed did not make a "mockery of the dominant public policy against sexual harassment."[8] *Philadelphia Housing Authority,* supra, at 1125. Nor did it "undermine[]" said policy. His misconduct, while serious, was not as egregious as the misconduct in *Philadelphia Housing Authority, Neshaminy School District or Westvaco Corporation,* supra. There was no groping or grinding. His comments to the Victim were not nasty or vulgar. In short, he neither physically nor verbally abused her. Further, as the Grievant and the Victim were co-equal employees of the district, he was not attempting to exploit a superior position. While these factors are not dispositive on the issue of whether he sexually harassed her, they may properly be considered in determining the propriety of the penalty imposed by the Arbitrator mutually chosen by the District and the union.[9] Here, there is a "reasonable, calibrated, defensible relationship between the conduct violating public policy and the (A]rbitrator's response." *Philadelphia Housing Authority,* supra, at 1128.

On page 18 of its remand Opinion in the instant case, the Commonwealth Court noted that the District alleges Grievant's actions "violated its own Unlawful Harassment Policy and that it had a duty to protect [the Victim], its employee, from sexual harassment under Title IX, the PHRA, and seclion 1122(a) of the School Code, which duty has been usurped by the Arbitrator's award directing [the Grievant's] reinstatement." The federal prohibition against discrimination in Title IX, 20 U.S.C.A. §1681 (a), prohibits sex-based discrimination from any education program or activity that receives federal financial assistance. There are exceptions which are not applicable to the instant matter. Riverview School District is subject to the federal prohibition against sexual discrimination.

Sex-based discrimination in employment violates the Pennsylvania Human Relations Act, 43 P.S. §§953, 955. Individuals are guaranteed the opportunity to obtain the employment for which they are qualified without discrimination because of their sex. It is an unlawful discriminatory practice for an employer to refuse to hire, employ, compensate, tenure, or apply terms and conditions of employment because of an individual's sex.

The District argues that reinstatement of the Grievant would compel it to violate the state and federal prohibition against sex-based discrimination. However, reinstatement of the Grievant after a nine month unpaid suspension would not violate the prohibition against sex-based discrimination. As I previously explained, termination is not always required in response to sexual harassment. The District agrees and states on page 18 of its post-remand brief as follows:

> The Commonwealth has not issued a broad policy which requires termination of employment in every instance of an employee engaged in sexual harassment. Such a pronouncement is not found in Title VII, the EEOC or the PHRA.

The District argues, however, that the Commonwealth has adopted a policy against reinstatement of teachers that have been found to have engaged in sexual harassment. The District cites *Bethel Park School District v. Bethel Park Federation of Teachers,* 55 A.3d 154 (Pa.Cmwlth 2012) and *Neshaminy School District,* supra, as support. *Bethel Park* is inapposite because it involved the unwelcome touching of students. There I wrote that the arbitrator found that "multiple complaining twelve year old female students 'testified truthfully' that [the teacher-grievant] 'h[e]ld their hands for protracted periods of time or would caress their backs, necks and shoulders,' which 'made them uncomfortable.'" I went on to say that the arbitrator "characterized Grievant's actions as 'grievous misconduct.' Further, this conduct occurred after Grievant was explicitly instructed not to touch students after having been previously accused of committing identical or similar conduct." Opinion of O'Brien, J, p.1; footnotes omitted. I vacated the arbitrator's award which had reinstated the grievant. The Commonwealth Court affirmed. *Neshaminy* does not control because it involved far more egregious facts and a lenient arbitration award and thus is distinguishable from the instant case.

The District also argues that pursuant to the Pennsylvania Public School Code, 24 P.S. §11-1122, immorality is a valid cause for termination of a contract entered into with a professional employee. The District claims that sexual harassment is immoral and is a reason for termination and that the Arbitrator's award should therefore be vacated. As discussed above, however, the Arbitrator had the authority to substitute a reasonable penalty.

In view of the forgoing, I enter the following:

ORDER OF COURT

AND NOW, wit this 16th day of July, 2018 the Petition to Vacate filed by the Riverview School District is denied and the Award of the Arbitrator is affirmed as to the penalty imposed.

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

[1] I respectfully disagree with the Commonwealth Court's interpretation that I found that the Grievant's " 'misconduct' [did] not violate public policy." (Commonwealth Court Opinion at 17). What I said was the Arbitrator's **reducing the penalty** did not violate public policy.

[2] These sections of the code were cited with approval in *Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees,* 52 A.3d 1117, 1127 (Pa. 2011).

[3] 29 C.F.R. §1604.11(a).

[4] 29 C.F.R. §1604.11(a).

[5] As the Commonwealth Court pointed out on pages 10-11 of its Opinion in the instant case, "[t]he Arbitrator emphasized that cases of sexual harassment generally 'involve an individual transgressor who by virtue of either supervising or managerial authority, either engaged in such conduct, or an employer who allowed such conduct to take place without intervention.' (Arbitrator's Decision at 66.)" As the cases cited infra demonstrate, at least part of the Arbitrator's conclusion of no sexual harassment was based on a clearly erroneous understanding of the law.

[6] The dissent pointed out that the grievant's harassing conduct occurred over the course of a year. Id. at 343.

[7] The Fifth Circuit's Opinion gave no details of the harassment.

[8] I cannot agree with the school district that "the Commonwealth has, in fact, developed a public policy against reinstatement for teachers" in sexual harassment cases. (District's brief on remand, at 18). In the *Neshaminy School District* case, an *en banc* decision, the Commonwealth Court could easily have so ruled, but explicitly held that "suspending [the grievant] for only [20] days" violated public policy.

[9] The Commonwealth Court points out that "[i]n June of 2012, [the Grievant] had been admonished by the Superintendent and directed to maintain proper, professional boundaries with a different female colleague." (Opinion at 2). That the Grievant may have previously interacted similarly with another female co-worker concerns me. No details, however, of his conduct toward that worker are found in the record. (See Arbitration Award, pp. 20, 22-23). It is therefore difficult to attach much significance to the prior conduct.

## John Halbleib, d/b/a Halbleib Automotive v. Tag Towing & Collision, t/a Brian Haenze, The Auto Gallery, Brian Haenze

*Motor Vehicle—Vicarious Liability*

*Denying an employee's Motion for Post-Trial Relief and concluding an employer cannot be held vicariously liable for an employee's injuries where the employee was not acting within the course or scope of his employment while operating employer's tow truck.*

No. AR-16-5207. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Brien, S.J.—August 1, 2018.

**OPINION**

FACTUAL AND PROCEDURAL HISTORY

This case is before me on plaintiff's Motion for Post-Trial Relief. During trial plaintiff was represented by counsel and defendants were *pro se*. The evidence relevant to the Motion adduced at trial was as follows: On April 22, 2016, a tow truck owned by defendant The Auto Gallery and Accessories, LLC, (Auto Gallery) rear-ended and damaged plaintiff's tow truck as both trucks were participating in a funeral procession for a deceased fellow tow truck driver. (TT at 9-10, 73) Auto Gallery's truck was being driven by Ryan Kahle, who was employed by defendant Tag Towing & Collision, LLC, (Tag Towing) on the day of the collision. (TT at 74) Defendant Brian Haenze is the sole member of both Auto Gallery and Tag Towing. (TT at 5, 73) There was no testimony regarding the extent to which Haenze permitted Kahle or any other employee to use the tow trucks for their own personal use. Nor was there evidence presented to establish whether Haenze had prior knowledge that Kahle was driving the tow truck in the funeral procession on the date of the accident, or whether he had previously driven it in a funeral procession. In response to my questioning, Haenze stated he was liable to plaintiff, but disputed the amount of damages claimed by plaintiff. (TT at 32-33) On March 26, 2018, I issued the following non-jury verdict in favor of the defendants:

> AND NOW, to wit, this 26th day of March, 2018 the Court finds for defendants. Plaintiff did not establish that Ryan Kahle, at the time of the accident, was acting within the course and scope of his employment with any defendant, or that he was furthering the interests of any defendant. Therefore, vicarious liability against no defendant was established.

DISCUSSION

Plaintiff's first assignment of error is found in paragraphs 7 through 9 of his Motion:

> 7. Plaintiff respectfully disagrees with this verdict and asserts that testimony elicited during the March 26, 2018 bench trial was sufficient to establish vicarious liability.
>
> 8. Specifically, Ryan Kahle's testimony conclusively established that 1) he was working for TAG Towing & Collision when the accident occurred, and

2) the vehicle he was operating at the time of the funeral procession accident was owned by TAG Towing & Collision (sic).

9. Although the "magic words" of vicarious liability were not spoken by Mr. Kahle, the clear import of his testimony was that he was acting in the course and scope of his employment and furthering the interests of TAG Towing & Collision by participating in an industry event marking the death of a fellow tow truck operator.

(Original quotation marks).

As indicated above, Tag Towing's employee Kahle rear-ended the truck owned by plaintiff while both trucks were participating in a funeral procession. In *Costa v. Roxborough Memorial Hospital*, 708 A.23 490, 493 (Pa. Super. 1998), the court stated the well known black letter law in this area:

> It is well settled that an employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment. *Fitzgerald v. McCutcheon*, 270 Pa.Super. 102, 41 O A.2d 1270, 1271 (1979) …. The conduct of an employee is considered "within the scope of employment" for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; [and] (3) it is actuated, at least in part, by a purpose to serve the employer[.]

No evidence was produced at trial that Haenze gave permission to Kahle to drive the truck in the funeral procession, or even that Haenze was aware that Kahle intended to do so. Further, no evidence was produced that Kahle had ever driven the truck in any other funeral procession, with or without Haenze's knowledge. It cannot be inferred that one of Kahle's duties was driving the truck in a funeral procession or that such conduct was "actuated … by a purpose to serve [his] employer," Tag Towing. Id. Therefore, plaintiff did not prove that Kahle was acting within the course and scope of his employment at the time of the accident.

Plaintiff's next argument is found in paragraph 10 of his Post-Trial Motion:

10. Further, during the course of the bench trial, Defendant Haenze never argued that 1) Ryan Kahle was not authorized to attend the funeral procession during the course of his employment on April 22, 2016, or that 2) Ryan Kahle's presence in the funeral procession was in any way outside the course and scope of his employment with TAG Towing & Collision.

While this is true, it was not incumbent upon Haenze to make any arguments concerning vicarious liability. A defendant need not establish the absence of vicarious liability; rather, a plaintiff seeking to establish vicarious liability has the burden of proving by a preponderance of the evidence that a defendant is responsible for the acts of another. Plaintiff failed to do so in this case.

Plaintiff's next argument is found in paragraphs 11 through 14:

11. More importantly, at numerous points during the March 26, 2018 bench trial, Defendant Haenze (the owner of Defendents TAG Towing & Collision and The Auto Gallery who represented all Defendants on a *pro se* basis) expressly admitted that his businesses were liable for the damage to the Plaintiff's tow truck.

12. To this end, towards the conclusion of the trial, Defendant Haenze specifically admitted that the Defendants' were responsible for the cost of damage to the pin connecting the Halblieb tow truck's doghouse to the boom as a result of the April 22, 2016 collision.

13. In conjunction with his admissions, Defendant Brian Haenze *never* disclaimed his business' liability for the collision and *only* contested the amount of damages claimed by the Plaintiff.

14. As a result, the Defendants' own in-court admissions of liability obviated any need for the Plaintiff to establish vicarious liability in this case beyond the above-described testimony of Ryan Kahle.

(Original emphasis).

Plaintiff points to the following exchange between Haenze and me at trial to support his contention that defendants' liability was established:

> THE COURT: If your guy was driving your truck and he hit this tow truck, are you agreeing – I just want to be clear. Do you agree that you should be liable for some amount of money?
>
> MR. HAENZE: Yes.
>
> THE COURT: The issue in this case is how much do you owe?
>
> MR. HAENZE: Correct.
>
> THE COURT: Is that true?
>
> MR. HAENZE: Yes, Your Honor.

(TT at 32-33) Plaintiff argues these statements by Haenze "had the effect of limiting the issues involved to damages. Thereafter, it was reasonable for the plaintiff to rely upon that admission with the knowledge that the issue of liability no longer required proof." Plaintiffs supplemental brief, section IV(C)(5).

It is well established that a party is bound by an admission of fact, but not by a statement concerning a legal conclusion. "For an averment to quality as a judicial admission, it must be a clear and unequivocal admission of fact. Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *Century Surety Co. v. Essington auto Center, LLC*, 140 A.3d 46 (Pa. Super. 2016).

The following language was cited with approval in *Cogley v. Duncan*, 32 A.3d 1288, 1292 (Pa. Super. 2011):[1]

> The general rule is that admission of fact in pleadings are admissible, but that the pleader's conclusions of law are not admissions of facts in issue. Whether an allegation is of fact or law is determined by the context disclosing the circumstances and purpose of the allegation. *In perhaps the broad sense, the statement that a party is liable to another*

> *is a statement of fact, but the same words are in general use as a statement of law, and when intended to be so used[,] the statement may not be treated as an admission of fact.*

(Emphasis added). In the instant case, Haenze's statement in open court that he was liable to plaintiff should be treated no differently than if he had pleaded the same in a written filing.

The problem with plaintiff's reliance argument is that as of the time of my exchange with Haenze, plaintiff had already called all of his liability witnesses, namely, Kahle, Dave Dittler (a passenger in plaintiff's truck damaged in the accident) and himself. Plaintiff's final witness, Joseph Pippi, was called as an expert in tow truck repair. (TT at 36-72) His testimony was essentially limited to establishing the cost of restoring plaintiff's truck to its condition before the accident. It is difficult to see how plaintiff relied on Haenze's statement concerning liability.[2] Moreover, if plaintiff believed damages was the only issue to be decided by the court, he presumably would have pointed this out during closing argument. Instead, he argued, through counsel, alternative theories of liability before addressing damages. (TT at 136-137) Moreover, if plaintiff forewent presenting evidence establishing vicarious liability based on the incorrect legal conclusion of a layperson, he presumably would have made an offer of proof of such evidence in his post-trial papers.

Plaintiff cites *Salvitti v. Throppe*, 23 A.2d 445 (Pa. 1942), to support his argument that defendants are bound by Haenze's in-court concession that he is liable in some amount for the damage to plaintiff's truck. There the jury found that a truck driver negligently caused injuries to plaintiffs and rendered a verdict against defendant, the truck driver's employer. During trial plaintiffs were permitted to testify the defendant and his driver "admitted [to them] that the accident was their fault, and promised that 'everything would be taken care of.'" Id. at 446. Our Supreme Court rejected defendant's argument that the admission of this testimony was error, holding "[t]he acknowledgement by a party that it was he who was at fault is admissible as a declaration against interest." Id. *Salvitti* provides plaintiff no basis for post-trial relief. First, the court did not hold that defendant was bound by his acknowledgment of liability, but only that his statement was admissible, the weight of which was the jury's province. Second, there seemed to be no dispute in *Salvitti* that the truck driver was acting within the scope of his employment.

*Beardsly v. Weaver,* 166 A.2d 529 (Pa. 1961), is likewise unavailing to plaintiff. There plaintiff suffered injuries while riding in a car driven by defendant over a railroad crossing. A few weeks after the accident plaintiff gave a written statement to defendant's insurance company which tended to exonerate defendant. The trial judge admitted the statement and the jury found for defendant. The trial judge then awarded plaintiff a new trial on the basis that the admission of plaintiff's statement was error, concluding that the statement "was inadmissible because it contained an opinion or a conclusion of the [plaintiff], rather than a statement of fact." Id. at 531. The Supreme Court reversed the granting of a new trial, holding that "[t]he opinion aspect of the writing is not significant, but what is important is that therein is contained an implied assertion of fact which is inconsistent with plaintiff's asserted cause of action against the defendant." Id.

Plaintiff's reliance on *Jewelcor Jewelers and Distributors v. Corr,* 542 A.2d 72 (Pa. Super. 1988), is also misplaced. There the trial judge in an accounting malpractice case permitted a defendant, E & W, to call expert witnesses to contradict E & W's previous witnesses, who had admitted in their testimony to serious errors in an audit prepared by the defendant. The witnesses who had admitted the errors were former employees of defendant. The trial judge allowed the testimony over the objection that the former employees' testimony constituted judicial admissions. In holding that the trial judge had not erred, the Superior Court stated as follows: "A principle element of a 'judicial admission' is that the fact has been admitted for the advantage of the admitting party. The admissions here were only an acknowledgement of the *fact* that errors were detected in the 1974 audit. E & W did not contest that fact." Id. at 76; emphasis added.

In accordance with the foregoing, I enter the following:

ORDER OF COURT

AND NOW, to-wit this 1st day of August, 2018, plaintiff's Motion for Post-Trial Relief is denied and judgment is entered for defendants.

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

[1] The Cogley court was quoting *Srednick v. Sylak*, 23 A.2d 333, 337 (Pa. 1941).

[2] My ruling on plaintiff's post-trial motion may well have been different had plaintiff demonstrated detrimental reliance.

## Commonwealth of Pennsylvania v. Patrick I. Onesko

*Criminal Appeal—Sufficiency—Intent—Sex Offenses—Waiver—Prosecutorial Misconduct—Jury Instruction—Solicitation*

*Issues arising from convictions related to soliciting minors to engage in sexual activity.*

No. CC 5351-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bicket, J.—July 23, 2018.

**OPINION**

On December 7, 2017, following a jury trial, Appellant was found guilty of one count of Criminal Solicitation-Involuntary Deviate Sexual Intercourse with Person Less than 16 Years of Age; one count of Unlawful Contact with a Minor- Sexual Offense; and two counts of Corruption of Minors. Following a lengthy sentencing hearing, Appellant was sentenced on March 1, 2018. Appellant's post sentencing motions were denied by this Court on March 8, 2018, and on April 12, 2018, Appellant filed a Notice of Appeal. Following a sixty (60) day extension to file his Concise Statement of Matters Complained of on Appeal, Appellant filed same on July 9, 2018.

The evidence presented at trial established the following facts: During the months of January and February 2017, Appellant, Patrick I. Onesko, who was 27 years of age at the time, contacted A.G., and T.S. (collectively, the "victims"), ages 14 and 15, through a social media platform known as Snapchat. A.G. and T.S. are friends who were aware Appellant was contacting both of them at the same time. Appellant went by the username "Alaniabp5" and claimed to be a 15 year-old female from Bethel Park High School. During his conversations with the victims, Appellant later claimed to be two different teenage boys from the victims' school, South Fayette High School. Appellant would frequently initiate conversations with the victims, despite the victims repeatedly referring to Appellant as a "pedophile" and indicating that they suspected Appellant was not being truthful repeatedly requesting a photograph of Appellant. Later, Appellant admitted to his true identity, a 26 year-old former assistant football coach at South Fayette High School, identifying himself as "Coach O" and subsequently sending a photograph of himself. Appellant requested the victims not go to the police and also requested A.G. to text him outside of Snapchat to confirm his (Appellant's) identity. Throughout his conversations with the victims, Appellant requested that A.G. describe his genitals, asking A.G. what his penis "was like" and further asking if he (Appellant) could guess the size of it. Additionally, Appellant propositioned T.S. with oral sex, writing to the minor "I will suck your cock." Appellant also told T.S. that he had a photograph of T.S.'s older brother's genitals. Once the conversations became sexually explicit, the victims alerted their parents who then notified the police.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises the following four (4) issues on appeal:

1. The evidence was insufficient as a matter of law to support Appellant's conviction for Solicitation -Involuntary Deviate Sexual Intercourse with a Child Less than 16 Years Old (IDSI).

2. The evidence was insufficient as a matter of law to support Appellant's conviction for Unlawful Contact with a Minor.

3. The prosecutor engaged in prosecutorial misconduct when he stated that Appellant was "grooming" the victims.

4. The Court's instruction on Unlawful Contact with a Minor was inaccurate because the instruction was vague and overbroad.

DISCUSSION

Appellant's first issue raised on appeal challenges the sufficiency of the evidence to support a guilty verdict of Solicitation-Involuntary Deviate Sexual Intercourse with a child less than 16 (IDSI). The standard to a challenge of the sufficiency of the evidence has been stated as follows:

> [The Superior Court must] determine if the: Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering all the evidence admitted at trial, and drawing all reasonable inferences therefrom in favor of the Commonwealth as the verdict-winner. The trier of fact bears the responsibility of assessing the credibility of the witnesses and weighing the evidence presented. In doing so, the trier of fact is free to believe all, part, or none of the evidence. The Commonwealth may sustain its burden by means of wholly circumstantial evidence, and we must evaluate the entire trial record and consider all evidence received against the defendant.

*Commonwealth v. Brown,* 48 A.3d 426, 430 (Pa. Super. 2012). Appellant alleges the Commonwealth failed to establish the elements of solicitation under 18 Pa.C.S. §902(a), which defines solicitation as follows:

> **(a) Definition of solicitation.**--A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

Appellant argues that the Commonwealth failed to establish that Appellant had the requisite intent under the statute and further argues that the Commonwealth failed to prove the Appellant commanded, encouraged or requested T.S. to engage in IDSI. The Pennsylvania Supreme Court has clarified the statute by explaining:

> The purpose of the solicitation statute is to hold accountable those who would command, encourage, or request the commission of crimes by others. [ ... ]The statute requires proof of such encouragement, but with the intent to accomplish the acts which comprise the crime, not necessarily with intent specific to all the elements of that crime, much less those crimes with elements for which scienter is irrelevant. Appellee intentionally encouraged the specific conduct which comprised this crime. The encouragement was with the intent of facilitating or promoting commission of that conduct. That is sufficient to satisfy the requirements of the solicitation statute.

*Commonwealth v. Hacker,* 15 A.3d 333, 336 (Pa. 2011). Here, the evidence established that Appellant intended to facilitate IDSI with a minor when he stated to T.S. "I will suck your cock[.]" The minor responded "Is this a joke[?] Wtf is wrong with you[?]" to which Appellant responded "No just being honest[.]" Appellant's intent is clear by his own words; Appellant's statement ("No[,] just being honest") is evidence of his intent to facilitate and commit the act. Furthermore, the facts establish that Appellant was aware he was speaking with a minor child as Appellant himself initially pretended to be a 15 year-old girl as a ruse to engage the boys to speak with him. Moreover, Appellant continuously sent messages and contacted the two minors over the course of two months further showing his intent to facilitate or promote the illicit conduct with T.S.

Appellant additionally argues that his statement that he will perform oral sex on a minor does not qualify as "encourage, request or commands" as required by the statute. This court disagrees. In *Commonwealth v. Cauto*, the Superior Court stated,

> Deviate sexual intercourse, like prostitution, requires participation of a partner. The police officers in *Wilson* were not solicited to commit the crime of prostitution but to participate in the sexual activity without which the crime of prostitution could not be committed. Likewise, [Victim] was not requested to commit the crime of involuntary deviate sexual intercourse, but was asked to participate in appellant's conduct without which appellant could not have committed involuntary deviate sexual intercourse. This is precisely what is prohibited by 18 Pa.C.S. § 902(a): a request to engage in specific conduct which would constitute complicity in the commission of an underlying offense.

535 A.2d 602, 607 (Pa. Super 1987); *see also Commonwealth v. Morales*, 601 A.2d 1263 (Pa. Super 2014)(Appellant's proposition to minor victim asking him whether he wanted oral sex constituted criminal solicitation). Appellant's statement to T.S. was clearly a request or encouragement or an invitation that T.S. engage in oral sex with Appellant. That is to say, Appellant requested T.S. be the "partner" required to complete the crime of IDSI.

Appellant's second issue raised on appeal challenges the sufficiency of the evidence to support his conviction for Unlawful Contact with a Minor under 18 Pa.C.S. §6318(a)(1), which defines the offense as follows:

> Offense defined.--A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

Specifically, Appellant alleges the Commonwealth failed to establish that Appellant was in contact with a minor for the purpose of engaging in IDSI. However, the facts do not support Appellant's contention. Appellant repeatedly contacted T.S. with the knowledge that he was a 15 year-old high school boy. Appellant's true intentions were not immediately revealed when Appellant began his conversations with T.S., as Appellant first hid his identity pretending to be a 15 year-old girl from a neighboring high school. After revealing his identity, Appellant messaged T.S. and propositioned to give him oral sex. Taking the facts in the light most favorable to the Commonwealth, there is no other rational purpose for a 26 year-old man to contact a 15 year-old boy and offer to engage in oral sex with him. Accordingly, the Commonwealth properly established the necessary elements to sustain a conviction for Unlawful Contact with a Minor.

Appellant's third issue raised on appeal alleges the prosecutor engaged in prosecutorial misconduct when the prosecutor stated that Appellant was "grooming" the victims in his closing argument. Specifically, the Appellant alleges the evidence presented in the case does not support the prosecutor's use of the term "grooming" as it is a "term of art." This Court notes initially that Appellant failed raise any objection during the trial and therefore, this issue is waived on appeal. However, assuming *arguendo* that the Superior Court does not agree that the issue is waived, this Court will address Appellant's third issue raised on appeal. The standard of review for prosecutorial misconduct with respect to closing arguments has been stated as follows:

> With specific reference to a claim of prosecutorial misconduct in a closing statement, it is well settled that in reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they were made. Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial. This Court has observed that in defining what constitutes impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards. Section 5.8 provides:
>
> Argument to the jury.
>
> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> In addition, we note the following:
>
> It is well settled that a prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. Further, prosecutorial misconduct does not take place unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. Prosecutorial misconduct is evaluated under a harmless error standard.
>
> We are further mindful of the following:
>
> In determining whether the prosecutor engaged in misconduct, we must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair. It is settled that it is improper for a prosecutor to express a personal belief as to the credibility of the defendant or other witnesses. However, the prosecutor may comment on the credibility of witnesses. Further, a prosecutor is allowed to respond to defense arguments with logical force and vigor. If defense counsel has attacked the credibility of witnesses in dosing, the prosecutor may present argument addressing the witnesses' credibility.

*Commonwealth v. Judy*, 978 A.2d 1015, 1019-20 (Pa. Super 2009) (internal citations, quotations and brackets omitted). This Court believes the evidence does support the prosecutor's theory that Appellant was "grooming" the victims. Appellant initially posed as a 15 year-old girl from Bethel Park High School in attempt to get the victims to engage with him. Appellant initially spoke to the victims about non-threatening things, such as golf, as a way to find common ground with the victims. Appellant finally revealed his true identity after he believed that the conversations may lead to something more believing he had the young boys' trust, at which point, Appellant stated "I will suck your cock" to T.S. and asked A.G. to describe his genitals. The facts and evidence presented in this case support a reasonable inference that Appellant was "grooming" the victims. Notwithstanding the foregoing, the prosecutors statement did not create an "unavoidable effect ... to prejudice the jurors by forming in their minds a fixed bias and hostility

toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict." *Id.*

Appellant's final issue raised on appeal relates to the Unlawful Contact with a Minor jury instruction provided by this Court. Specifically, Appellant alleges this Court's jury instruction was vague and overly broad. This Court initially notes that the jury instruction given was the standard jury instruction for Unlawful Contact with a Minor. Appellant alleges the instruction was vague and overly broad because the instruction referred to "unlawful sexual contact." Counsel for Appellant objected to the instruction because he alleged the term "unlawful sexual contact" "most of the time" refers to "in-person contact." Trial Transcript p. 303 (12/5-7/2018). However, the instruction defines contact as "direct" or "indirect" contact "by any means." Thus, the jury instruction properly defined and explained the term "contact" thereby curing any confusion the jury may have had with respect to the type of contact required for Unlawful Contact with a Minor.

CONCLUSION

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

BY THE COURT:
/s/Bicket, J.

## Commonwealth of Pennsylvania v. Jordan Johnson

*Criminal Appeal—Suppression—VUFA—Vehicle Stop—Automobile Exception*

*Passenger challenges search of her purse following traffic stop for speeding.*

No. CC 2017-10529. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bicket, J.—August 1, 2018.

**OPINION**

Jordan Johnson, Appellant, was charged with Carrying a Firearm without a License, Carrying a Loaded Weapon, and Disorderly Conduct following an incident that occurred on July 29, 2017. On or about January 25, 2018, defense counsel for Appellant filed a Motion to Suppress. On February 26, 2018, a hearing on Appellant's Motion to Suppress was held before the undersigned. This Court denied Appellant's Motion to Suppress and the matter proceeded to a non-jury trial whereby the Appellant was found guilty of Carrying a Firearm without a License (Count 1) and Carrying a Loaded Weapon (Count 2). Appellant was sentenced to a period of 12 months of probation for Count 1 and no further penalty for Count 2. On May 8, 2018, Appellant's Post-Sentencing Motions were denied by this Court and, on June 7, 2018, Appellant filed a Notice of Appeal. On July 9, 2018, Appellant filed her Concise Statement of Matters Complained of on Appeal.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges this Court erred in denying her Motion to Suppress. Specifically, Appellant alleges that the search of Appellant's purse was in violation of her rights under the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution.

DISCUSSION

The facts presented at the suppression hearing established the following. Trooper James R. Sellers has been a Pennsylvania State Trooper for approximately three years and, prior to that, he was employed as a local law enforcement officer for approximately four years. Hrg. Tran. P. 4 (02/26/18). On July 28, 2017, Trooper Sellers was performing speed enforcement on State Route 28 in Allegheny County when he observed a vehicle traveling at 82 m.p.h. in a 55 m.p.h. zone. *Id.* at 5. Trooper Sellers initiated a traffic stop of the vehicle. *Id.* Trooper Sellers then verified that the driver of the vehicle had a valid license. *Id.* Appellant was seated in the rear passenger seat of the vehicle. *Id.* Immediately upon making contact with the vehicle and its occupants, Trooper Sellers observed a smell of marijuana coming from the vehicle. *Id.* at 6. Trooper Sellers testified that the front seat passenger, Taalibe Glover, admitted that they had been smoking in the vehicle shortly before the traffic stop. *Id.* Additionally, Glover admitting to having marijuana on his person and provided a small bag of marijuana to Trooper Sellers. *Id.* at 6. At that time, Trooper Sellers requested permission from the driver to search the vehicle, and the driver consented. *Id.* at 6-7. Trooper Sellers testified that had the driver refused to consent, he would have conducted the search of the vehicle in any event on the basis of probable cause that there was additional marijuana in the vehicle. *Id.* at 8. While searching the vehicle, Trooper Sellers observed a black leather purse in the backseat. *Id.* at 7. Trooper Sellers observed a black Smith and Wesson 38 Special inside of the purse. *Id.* Trooper Sellers then requested dispatch to run the serial number of the gun, which was returned with no record of sale. *Id.* Trooper Sellers then asked Appellant if the purse and gun belonged to her to which she conceded they both did. *Id.* After running Appellant's information, Trooper Sellers determined that Appellant did not possess a permit to carry a concealed firearm. *Id.* Appellant was then arrested and charges were filed against her. *Id.*

Appellant appeals this Court's denial of her Motion to Suppress, which challenged the legality of the search of her purse under the 4th Amendment to the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution, which prohibit unreasonable searches and seizures. The standard of review for the denial of a Motion to Suppress is well-settled under Pennsylvania law:

> An appellate court's 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 when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, the appellate court is bound by those findings and may reverse only if the court's legal conclusions are erroneous. Where ... the appeal of the determination of the suppression 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 plenary review.

*Commonwealth v. Jones*, 121 A.3d 524, 526-27 (Pa. Super. 2015) (internal citations and quotation marks omitted) (citing *Commonwealth v. Jones*, 988 A.2d 649, 654 (2010)).

Appellant alleges that her rights against unreasonable search and seizures were violated when Trooper Sellers searched her purse without a warrant and that no exception to the warrant requirement applied. The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amend. IV. Article I, Section 8 of the Pennsylvania Constitution states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA Constitution Art. I, § 8. "As a general rule, for a search to be reasonable under the Fourth Amendment or Article I, Section 8, police must obtain a warrant, supported by probable cause and issued by an independent judicial officer, prior to conducting the search. This general rule is subject to only a few delineated exceptions, including the existence of exigent circumstances." *Commonwealth v. Gary*, 625 Pa. 183, 191, 91 A.3d 102, 107 (2014)(internal citations omitted). One exception to the warrant requirement is known as the "automobile exception," which was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Gary, supra. Commonwealth v. Byrd*, 185 A.3d 1015, 1023 (2018). As explained by the Superior Court in Byrd,

> "In *Gary* ... the Pennsylvania Supreme Court ... adopt[ed] the federal automobile exception to the warrant requirement, which allows police officers to search a motor vehicle when there is probable cause to do so and does not require any exigency beyond the inherent mobility of a motor vehicle. The prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required. The consistent and firm requirement for probable cause is a strong and sufficient safeguard against illegal searches of motor vehicles, whose inherent mobility and the endless factual circumstances that such mobility engenders constitute a per se exigency allowing police officers to make the determination of probable cause in the first instance in the field.

*Id.* (internal citations and quotations omitted).

Additionally, the Superior Court held in *In re I.M.S.*, 124 A.3d 311, 316 (Pa. Super. 2015) that when an officer possesses probable cause to search a vehicle for contraband, the officer may search any container found therein where the contraband could be concealed. *See also Commonwealth v. Runyan,* 160 A.3d 831, 837 (Pa. Super. 2017) (same holding). Thus, in the instant case, if Trooper Sellers possessed probable cause to search the vehicle for marijuana, he would be justified in searching the vehicle absent a warrant and in searching every compartment or container therein which might contain the contraband. The standard for probable cause is well established under Pennsylvania law:

> Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require only a probability, and not a prima facie showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

*Com. v. Thompson*, 985 A.2d 928, 931 (Pa. 2009)(internal citations and quotations omitted).

This Court finds that Trooper Sellers was justified in conducting the warrantless search of Appellant's purse under the "automobile exception". Specifically, Trooper Sellers testified that upon approaching the vehicle, he immediately smelled an odor of marijuana. Upon speaking with the occupants, one of the passengers admitted the occupants had been smoking marijuana shortly before the stop. Additionally, the passenger admitted to having a small amount of marijuana on his person and provided the marijuana to Trooper Sellers. Appellant alleges the Trooper's probable cause ceases to exist at this point. This Court disagrees. Trooper Seller testified there is frequently a "second stash" in cases where drugs are found in a vehicle. Furthermore, to accept Appellant's position would allow a person to avoid further vehicle searches by turning over a small amount of drugs and avoid an officer finding evidence of potentially more serious crimes.

Based upon the aforementioned facts, this Court finds that Trooper Sellers possessed probable cause to search the vehicle (and thus Appellant's purse) for marijuana under the "automobile exception".

CONCLUSION

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

BY THE COURT:
/s/Bicket, J.