

# PITTSBURGH LEGAL JOURNAL

## OPINIONS

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*Appellant's PCRA petition was not timely filed and no exception to the timeliness requirement applied where appellant did not establish new facts by listing proposed character witnesses who were available to him at trial. Accordingly, PCRA counsel had no obligation to address individual issues raised by appellant in counsel's "no merit" letter as the court has no power to address the merits of an untimely petition. Additionally, the court did not err by failing to serve appellant with an Order stating its intent to dismiss twenty days in advance of dismissal when a copy was mailed to his appointed counsel of record.*

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*Criminal Appeal*

*The sentence in this case was neither excessive, unreasonable or the result of an abuse of discretion.*

*\*This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

# PLJ

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## OPINIONS

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## Commonwealth of Pennsylvania v. Ferdinand Fitzgerald

### *Commonwealth Appeal—Proffered Evidence*

#### *No error to not allow the proffered evidence.*

No. CC 202005078. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Todd, J.—October 5, 2021.

### OPINION

This is an appeal by the Commonwealth of Pennsylvania from the dismissal of charges against Defendant, Ferdinand Fitzgerald, on May 6, 2021 following a non-jury trial. On June 1, 2021 the Commonwealth filed a Notice of Appeal. On June 21, 2021 a 1925(b) order was entered directing the Commonwealth to file its Concise Statement of Matters Complained of on Appeal. On July 6, 2021 the Commonwealth filed its Statement of Error Complained of on Appeal and set forth the following:

"To the extent that the trial court ruled that the admission of the proffered evidence, absent any testimony from the victim, would be violative of the Confrontation Clause, was such a ruling an error of law? And if the court instead ruled that the proffered evidence would not be sufficient to establish the defendant's guilt as to the crimes charged, did the court err in not permitting the Commonwealth to present that evidence in its entirety for the court's consideration?"

### BACKGROUND

In this case Defendant, Ferdinand Fitzgerald, was charged regarding an alleged assault on May 2, 2020 with Terroristic Threats in violation of 18 Pa.C.S.A. §2706(a)(1); simple assault in violation of 18 Pa.C.S.A. §2701 (a)(1); simple assault in violation of 18 Pa.C.S.A. §2701(a)(3); strangulation in violation of 18 Pa.C.S.A. §2718(a)(1); and unlawful restraint in violation of 18 Pa.C.S.A. §2902(a)(1). At the time of the nonjury trial on May 6, 2021, Commonwealth indicated on the record that the alleged victim was not located and was not available to testify without further explanation. (T., pp. 2-3) Defense counsel made a motion to dismiss the case based on the fact that the use of any hearsay statements from the victim without the opportunity to cross examine the victim would be a violation of the confrontation clause. (T., p. 3) In response the Commonwealth indicated that the case was listed for a preliminary hearing at which time it was waived and that Defendant "did have the opportunity to cross-examine on that date and they chose not to and waived the issue." (T., p. 3). The Commonwealth further indicated that it did not intend to introduce any evidence of statements made by the victim to the police during an investigation or in furtherance or anticipation of prosecution. (T., p. 3) Further, in its offer of proof, the Commonwealth indicated that it intended to play the 911 call, presumably made by the victim, which it submitted was not in violation of the confrontation clause as it was "made in an emergency situation to non-police personnel." (T., p. 4) In addition the Commonwealth indicated that it intended to offer still photographs from the officers' body cameras and the observations of the officers on scene. Finally, the Commonwealth proposed to offer a portion of the body camera video that documents "interaction between the victim and the EMS that arrives." (T., p. 4) In response defense counsel also indicated that the circumstances and the content of the 911 call, presumably made by the victim, would not be subject to cross examination and any photos or videos from the officers' body cameras would be submitted to establish causation of any injuries of the victim without the ability to cross examine the victim regarding either the content or the facts or circumstances regarding statements or images appearing on the body cameras. Based on the Commonwealth's offer of proof and the Defendant's objections, the motion to dismiss was granted and this appeal followed.

### DISCUSSION

In its concise statement, the Commonwealth asserts that it was error to dismiss the case because the proffered evidence was not in violation of the confrontation clause even in the absence of any testimony from the victim. In *Commonwealth v. Milburn*, 72 A.3d 617, (Pa. Super. 2013) the Court discussed the confrontation clause as follows:

Under the Confrontation Clause, a defendant has the right to confront any witnesses against him. Prior to the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court took the view that "the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule." *Williams v. Illinois*, — U.S. —, 132 S.Ct. 2221, 2223, 183 L.Ed.2d 89 (2012); see *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). However, the *Crawford* Court held, "Testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, supra at 59, 124 S.Ct. 1354 Since dissemination of the *Crawford* decision, the Supreme Court has handed down a number of decisions that interpret whether a statement is testimonial in nature and thus subject to *Crawford*. See *Williams*, supra at 2223 (collecting cases). *Commonwealth v. Milburn*, 72 A.3d 617, 620–21 (2013)

In *Davis v. Washington*, 547 U.S. 813, 821–23, 126 S. Ct. 2266, 2273–74, 165 L. Ed. 2d 224 (2006) and its companion case, *Hammon v. Indiana*, the Supreme Court discussed the confrontation clause in the context of the admission of statements made to a 911 operator. The Court stated:

"The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See *id.*, at 51, 124 S.Ct. 1354. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

In *Davis*, the Supreme Court developed the “primary purpose” test to evaluate out-of-court statements and to distinguish between statements that are testimonial and nontestimonial.

In *Commonwealth v. v. Dyarman*, 73 A.3d 565, 572 (2013) the Pennsylvania Supreme Court stated:

In *Davis*, the Supreme Court distinguished between two types of statements that can be made to a police officer: one category of statements is nontestimonial, the other is testimonial. The Supreme Court articulated the distinction as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Commonwealth v. Dyarman*, 73 A.3d 565, 572 (2013)

In *Commonwealth v. Williams*, 103 A.3d 354, (Pa. Super. 2014) the Superior Court further discussed the *Davis* decision as follows:

The *Davis* Court considered companion cases (*Davis v. Washington* and *Hammon v. Indiana*<sup>4</sup>), one of which involved admission of a victim's statement to a 911 operator. *Davis*, 547 U.S. at 817–18, 126 S.Ct. 2266. The victim described an ongoing domestic disturbance. *Id.* When the victim told the operator her assailant ran out the door, the operator instructed the victim to stay on the line and answer questions. *Id.* at 818, 126 S.Ct. 2266. Thereafter, the operator gathered more information about the perpetrator and the circumstances of the assault. *Id.* Within four minutes of the 911 call, police arrived to find the victim “shaken” and “frantic.” *Id.* The trial court admitted a recording of the 911 call into evidence over the defendant's Confrontation Clause objection. *Id.* at 819, 126 S.Ct. 2266. In *Hammon*, two police officers traveled to the site of a domestic disturbance and interviewed the wife after the disturbance was over. *Id.* at 819–20, 126 S.Ct. 2266. The victim filled out and signed a battery affidavit while the defendant was detained in a separate room. *Id.* The victim did not testify at trial, but the police officer testified about the contents of the victim's interview and authenticated the affidavit. *Id.* at 820, 126 S.Ct. 2266.

In considering these two cases, the *Davis* Court distinguished testimonial and nontestimonial hearsay: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 822, 126 S.Ct. 2266. The Supreme Court confirmed that the protection of the Confrontation Clause attaches only to testimonial hearsay. *Id.* at 823–25, 126 S.Ct. 2266.

The Court in *Williams* also stated:

Concerning the 911 call in *Davis*, the Supreme Court noted that 911 operators are not law enforcement officers, but they may be “agents of law enforcement when the conduct interrogations of 911 callers.” *Id.* at 823 n. 2, 126 S.Ct. 2266. “For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.” *Id.* “The question before us [ ... ] then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.” *Id.* at 826, 126 S.Ct. 2266.

In the present case, the Commonwealth's offer of proof regarding the 911 call did not set forth relevant facts or circumstances related to whether or not the call was made in the context of an “ongoing emergency” such as who made the call, the time of the call in relation to any circumstances or events or even the nature of the exchange between the caller and the 911 operator that would establish that the call qualified as one that was nontestimonial. Further, the offer of proof regarding the body camera video that refers to the interaction between the victim and the EMS personnel that arrived on the scene at some later point in time also does not offer facts that support that the statements or interactions between the victim and the EMS personnel was nontestimonial in nature and not subject to the confrontation clause.

The Commonwealth also asserted that the victim was not available and the Defendant had the opportunity to cross examine the victim at a preliminary hearing but waived the hearing. A witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Commonwealth v. Dyarman*, 73 A.3d 565, 568–69 (2013) However, when a defendant has had a full and fair opportunity to cross-examine a witness at a preliminary hearing confrontation, within the meaning of the Sixth Amendment, has been accomplished. *Commonwealth v. Wholaver*, 989 A.2d 883, 904 (2010) In this case, however, the Commonwealth did not indicate that it intended to offer the actual transcript of testimony from a preliminary hearing that had been held at which the Defendant either conducted cross examination or waived the opportunity to conduct any cross examination at the hearing. Therefore, there was no basis to find that Defendant's waiver of the preliminary hearing allowed the admission of evidence that was not presented at a preliminary hearing or any other proceeding at which the witness appeared and was actually available for or subject to cross examination.

The Commonwealth also asserts in its concise statement that it was error to not allow the proffered evidence even if in violation of the confrontation clause and then find the Defendant not guilty if the evidence was insufficient. However, given the offers of proof by the Commonwealth, the unavailability of the victim and the lack of any testimony subject to cross examination, the dismissal of the charges was appropriate.

BY THE COURT:  
/s/Todd, J.

## Commonwealth of Pennsylvania v. Richard Bone

### *Criminal Appeal—PCRA—Timeliness Exceptions*

*Appellant's PCRA petition was not timely filed and no exception to the timeliness requirement applied where appellant did not establish new facts by listing proposed character witnesses who were available to him at trial. Accordingly, PCRA counsel had no obligation to address individual issues raised by appellant in counsel's "no merit" letter as the court has no power to address the merits of an untimely petition. Additionally, the court did not err by failing to serve appellant with an Order stating its intent to dismiss twenty days in advance of dismissal when a copy was mailed to his appointed counsel of record.*

No. CP-02-CR-02091-2013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.  
Rangos, J.—September 28, 2021.

### OPINION

On August 29, 2013, a jury found Richard Bone (hereinafter Appellant) guilty of the following offenses: Involuntary Deviate Sexual Intercourse, Unlawful Contact With a Minor, Aggravated Indecent Assault, Statutory Sexual Assault, Endangering the Welfare of a Child, Corruption of Minors, and two counts of Indecent Assault of Child under the age of 16.<sup>1</sup> Appellant was sentenced on November 26, 2013 to an aggregate sentence of 10 to 20 years of incarceration. Appellant filed a post sentence motion which was denied on December 6, 2013. Appellant did not file a direct appeal.

Appellant filed a pro se PCRA petition on December 17, 2020. Appointed counsel filed an Amended PCRA Petition on April 1, 2021 and this Court on June 22, 2021 issued its Notice of Intent to Dismiss. This Court dismissed the PCRA Petition without a hearing on July 19, 2021. During the appeal period, on August 10, 2021, counsel for Appellant filed a Motion to Withdraw and a Turner/Finley "No Merit" letter. This Court granted the motion and indicated in the Order that Appellant had to file a Notice of Appeal of the dismissal of the PCRA petition by August 18, 2021. Instead, on August 17, 2021, Appellant filed a pro se Motion to Reconsider the 7/19/21 Order denying PCRA Relief. This motion was denied on August 19, 2021. On August 23, 2021, Appellant filed a Notice of Appeal and on September 13, 2021, filed his Statement of Errors Alleged on Appeal.

### MATTERS COMPLAINED OF ON APPEAL

Appellant, in his Concise Statement of Errors Complained of on Appeal, lists two allegations of error. Appellant alleges this Court erred by failing to serve upon Appellant the Notice of Intent to Dismiss as required by R.Crim.P. 907. In addition, Appellant alleges this Court erred in permitting counsel to withdraw where the Turner/Finley "No Merit" letter was defective. (Concise Statement of Matters Complained of on Appeal, p. 1-2)

### DISCUSSION

Appellant first alleges that this Court dismissed his PCRA petition without first serving Appellant an Order stating its intent to dismiss twenty days in advance of dismissal. Appellant is incorrect. This Court issued an Order on June 22, 2021, putting Appellant on notice that this Court intended to dismiss the PCRA petition without a hearing and that Appellant had twenty days to respond to the Order. Since Appellant was represented by appointed counsel at the time, the Order was sent to counsel. Appellant does not allege that counsel was ineffective for failing to communicate the Notice of Intent to Dismiss and the record does not reflect any support for such a claim.

Appellant next alleges PCRA counsel, in his "No Merit" letter, failed to address each issue Appellant wished to raise on appeal. This allegation is without merit. PCRA counsel determined that the PCRA petition was untimely filed and no exception to the timeliness requirement applied. Since this requirement is jurisdictional in nature, counsel need not make any further inquiry.

Before addressing the merits of the issues raised, Appellant must establish that his PCRA petition is timely filed. 42 Pa.C.S. § 9545(b). "A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final." *Commonwealth v. Brown*, 111 A.3d 171, 175 (Pa. Super. 2015). The "one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals." *Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002). "A judgment is deemed final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Commonwealth v. Brown*, 111 A.3d at 175 (see 42 Pa.C.S. § 9545 (b) (3)).

On November 26, 2013, this Court sentenced Appellant. No Post Sentence Motion or direct appeal followed. As a result, Appellant's judgment of sentence became final on December 26, 2013, and he had until December 26, 2014 to file a timely PCRA petition. Appellant filed his PCRA Petition on December 17, 2020, nearly six years beyond the time limit. As such, his Petition is untimely on its face.

Three statutory exceptions to the timeliness provisions allow for limited circumstances under which the late filing of a petition will be excused. *Commonwealth v. Brown*, 111 A.3d at 175 (see 42 Pa.C.S. 9545 (b) (1) (i-iii)).

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545 (b). Appellant alleges subsection (ii) applies to him. Appellant is incorrect. Appellant has not established new facts by listing proposed character witnesses who were available to him at his trial in 2013. As such, his Petition is untimely without exception. See *Commonwealth v. Balance*, 203 A.3d 1027 (Pa. Super. 2019)

The PCRA court has no power to address the merits of an untimely PCRA petition. *Commonwealth v. Brown*, 111 A.3d at 176 (citing *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783 (Pa. 2000)). Appellant's PCRA petition is time-barred pursuant to 42 Pa.C.S. § 9545 (b) and no exception to the timeliness requirement applies. Therefore, this Court had no jurisdiction over any other



issues raised by Appellant and this Court did not err in permitting PCRA counsel to withdraw.

CONCLUSION

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

BY THE COURT:

/s/Rangos, J.

Date: September 28, 2021

**Commonwealth of Pennsylvania v.  
Jawan Johnson\***

*Criminal Appeal*

*The sentence in this case was neither excessive, unreasonable or the result of an abuse of discretion.*

No. CC CP-02-CR-0001843-2020, CP-02-CR-0010236-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Todd, J.—January 4, 2022.

OPINION

This is an appeal by Defendant, Jawan Johnson, following his conviction on February 21, 2020 for attempted homicide and other offenses related to a shooting and robbery which took place on July 11, 2017. On February 21, 2020, after a jury trial, Defendant was found guilty of Criminal Attempt-Homicide (18 Pa.C.S. § 901); Robbery - Inflict Serious Bodily Injury (18 Pa.C.S. § 3701(A)(1)(i)); Aggravated Assault (18 Pa.C.S. § 2702(A)(1)); and, Firearms Not to be Carried Without a License (18 Pa.C.S. § 6106(A)(1)). Defendant was also found guilty by the Court of Possession of Firearm Prohibited (18 Pa.C.S. § 6105(A)(1)). On August 19, 2021 Defendant was sentenced of 20 to 40 years imprisonment for Criminal Attempt-Homicide, a consecutive 10 to 20 years' imprisonment for Robbery - Inflict Bodily Injury, and a concurrent 3 to 6 years imprisonment for Firearms Not to be Carried Without a License, as well as a concurrent 5 to 10 years' imprisonment for Possession of Firearm Prohibited. On August 19, 2020 post trial motions were filed and new counsel was assigned on August 20, 2020. On October 14, 2020 Supplemental Post Trial Motions were filed and on October 20, 2020 the motions were denied. A timely direct appeal was not filed, however, following a PCRA petition, Defendant's direct appeal rights were reinstated by an order of June 22, 2021. On July 15, 2021 Defendant filed a Notice of Appeal. On July 26, 2021 an order was entered directing Defendant to file his Concise Statement of Matters Complained of on appeal pursuant to Pa.R.A.P. 1925(b). On August 17, 2021 Defendant filed his Concise Statement which set forth the following:

"A. The court abused its discretion in sentencing Mr. Johnson and in denying the post-sentence motion to modify sentence. Although the court appropriately sentenced Mr. Johnson as a second-strike offender, the total aggregate sentence of 30 to 60 years' imprisonment was manifestly excessive and unreasonable insofar as the sentence was disproportionate to Mr. Johnson's conduct, the court did not consider the sentencing guidelines, and offered no meaningful consideration of the sentencing factors other than the seriousness of the offenses, and failed to account for Mr. Johnson's rehabilitative needs, resulting in sentence that was unreasonable and contrary to the fundamental norms of the Sentencing Code."

BACKGROUND

This matter arises out of the shooting and robbery of the victim, on July 11, 2017. The evidence at trial established that the victim got on a Port Authority bus at the Swissvale station and got off the bus at the Homewood station, a ride of only a few minutes. (T., p. 182) During the ride she noted the Defendant seated across from her and he was wearing a purple shirt, black sweatpants and a United States Post office baseball type hat. (T., p. 187) While on the bus she took approximately \$600.00 out of her purse to count because she intended to deposit the money into an ATM. (T., p. 187) The victim believed that Defendant was able to observe her counting the money. (T., p. 188) When the bus reached the Homewood station the victim descended the steps and was walking on North Homewood Avenue when she felt a presence behind her and turned to see Defendant pointing a gun at her chest. (T., pp. 190 – 191) Defendant demanded that the victim give him the money in her purse and then shot her in the chest and she collapsed to the ground. Defendant then approached the victim and stood over her and shot her a second time, striking her in the arm. (T., pp. 192-193) Defendant then took the victim's purse and fled. The victim then made it to a nearby business where help was summoned. The victim testified that she sustained severe injuries that included a collapsed lung and injuries to internal organs, and she was required to undergo multiple surgeries including removal of portions of her liver and gallbladder. (T., pp. 194-196). She was also left with permanent scars on her stomach, chest, back, side and arm. (T., p. 199)

Video from the Port Authority and other cameras in the area showed the victim and Defendant while on the bus and in the street before the shooting and some of Defendant's movements after the shooting but did not capture the shooting itself. These video's included images of Defendant discarding a hat found near the scene that matched the hat worn by the shooter. (T., pp. 85 – 112) A still image from the videos were circulated on local media to aid in identifying the shooter. (T., pp. 112 -113) Two days after the shooting, on July 13, 2017, Defendant contacted police and informed detectives that he was the individual shown in the picture on television. (T., p. 133) Defendant was interviewed by detectives that day and while he acknowledged that he was on the bus with the victim he denied shooting or robbing the victim and stated when he got off the bus he heard a shot being fired and then ran from scene. (T., p. 143)

While the victim was still in the hospital, she was shown a photo array and identified Defendant as the shooter. (T., pp. 197 – 198) In addition a witness to the shooting, who was standing across the street at the time, also identified Defendant from a photo array as the shooter. (T., pp. 209, 215 -218) A subsequent search of Defendant's residence failed to discovery any physical

evidence related to the crime. (T., p. 160) Defendant's counsel argued in closing that the victim misidentified Defendant as the shooter because Defendant's face and clothing were the last things that she recalled seeing while on the bus just prior to the shooting and, in the panic of the shooting, did not adequately observe the actual shooter. Counsel also argued that the fact that Defendant admitted that he was at the scene and fled, upon hearing a shot, was insufficient evidence to convict him. (T., pp. 239 – 242) The jury found Defendant guilty of all charges.

A Presentence Report was obtained and reviewed and a sentencing hearing was held on August 19, 2020. At the hearing Defendant's counsel requested a sentence at the lower end of the guidelines and concurrent sentences. (T., p. 8) The Commonwealth referred to the serious and permanent nature and extent of the physical and emotional injuries sustained by the victim who was only 17 years old at the time of the shooting. The injuries caused her to spend weeks in the hospital and she was left with permanent scarring on various parts of her body. The Commonwealth also noted that Defendant had previously served a sentence for an armed robbery and was only released and on probation for three months before again committing the instant shooting and robbery. (T., pp. 9-10) The Commonwealth also noted Defendant's criminal history as set forth in the Presentence Report which included several instances of violence, robbery and assault as well as noncompliance with court orders. The Commonwealth requested a sentence of 30 to 60 years. (T., pp. 10 -11)

The Presentence Report indicated that Defendant became involved in the juvenile system beginning at age 13 related to a theft by unlawful taking and in the years thereafter had petitions filed related to aggravated assault, failure to comply, failure to appear resulting in the issuance of a warrant, robbery and harassment. Over a period of several years he had periods of detention and underwent programs at Shuman Center, Summit Academy and Vision Quest Academy and was involved in the Community Intensive Supervision Project and Wesley Spectrum. He also participated in an Industrial Trade Program. He underwent mental health evaluations and had group and individual therapy and an individualized service plan. During this time there were also periods where he was placed in high-risk electronic home monitoring. The report indicated that throughout this time, while there were some signs of adjustment and improvement there were, however, many instances of noncompliance, some of which resulted in the issuance of warrants. In April 2012 Defendant was arrested for robbery and firearms violations. On March 18, 2013 Defendant plead guilty to Robbery-Serious Bodily Injury, Criminal Conspiracy, Carrying a Firearm without a license, Persons not to possess a firearm and Possession of a Firearm by a minor and was sentenced to two and half to five years and three years of probation. He was released on April 3, 2017. The presentence report also discussed his family history, including a history of abuse, his history of drug and alcohol use as a juvenile and his history of depression, anxiety, impulse control disorder and ADHD.

In his statement at the sentencing hearing, Defendant acknowledged his extensive history and involvement in the juvenile and criminal justice system but stated that throughout that time he was never afforded the help that he needed. (T., p. 13) He testified that he was never taught nor learned right from wrong during his childhood and that due to his periods of confinement he was forced to look up to and learn from criminals. Defendant stated that since his arrest for the instant offenses he completed a course "Thinking for a Change" and now understands that his past behavior was wrong. He also stated that he now has a fiancée and other family support to assist him upon his release. (T., p. 15)

In imposing the sentences at issue, it was noted the instant offense was committed just three months after being released from the prior sentence of five years for armed robbery. (T., p. 16) The lengthy juvenile criminal history was recognized. The fact that the current offense arose from a shooting in broad daylight and the fact that, given the nature and extent of the victim's injuries, she was fortunate to have survived. (T. 16) While Defendant's difficult family history as detailed in the Presentence Report was recognized, it was also noted that despite the many years of involvement in the juvenile system and its related programs, Defendant's criminal conduct continued. (T., p. 17)

## DISCUSSION

In his appeal, Defendant contends that although he was appropriately sentenced as a second-strike offender, the total aggregate sentence of 30 to 60 years imprisonment was manifestly excessive and unreasonable in that the sentence was disproportionate to the offense and did not consider the sentencing guidelines. Further, Defendant contends that there was no meaningful consideration of the sentencing factors other than the seriousness of the offenses and the sentence failed to account for Defendant's rehabilitative needs, all of which resulted in a sentence that was unreasonable, excessive and contrary to the fundamental norms of the Sentencing Code. The Sentencing Code, 42 Pa.C.S.A. §9721, provides in pertinent part, as follows:

"In selecting from the alternatives set forth in subsection (a), the 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." 42 Pa. C.S.A. § 9721 (b)

In this case the factors set forth in the code were properly considered in imposing the sentence. When a presentence report is obtained it is presumed that the sentencing court reviewed and considered the report and weighed all relevant factors in fashioning the defendant's sentence. *Commonwealth v. Fowler*, 893 A.2d 758, 767 (Pa.Super.2006). In addition to the detailed information set forth in the Presentence Report, Defendant's statement at sentencing, as discussed above, was fully considered. Defendant engaged in a shooting and robbery of the victim in broad daylight and was motivated to commit this crime of opportunity by nothing more than seeing the young woman counting her money on the bus. Defendant not only shot the victim in the chest but, as she lay helpless on the ground shot her a second time, all of which demonstrated a complete disregard for the victim's life. Defendant's callousness in committing the shooting and robbery is further demonstrated by the fact that he did so in broad daylight in a neighborhood setting. It is also extremely relevant to the sentence that Defendant committed this violent crime only three months after being released from state prison after a five-year sentence imposed by this Court for a previous armed robbery.

The gravity of the offense as it relates to the impact on the life of victim was also considered. The victim, who was a high school student at the time, suffered severe injuries that required an extended hospitalization and surgeries to remove portions of her liver and gallbladder, which will impact her throughout her life. The gunshot wounds also left her with permanent scars her chest, back and arm.

The protection of the public and the community as a whole was also considered in that Defendant was carrying a gun in his backpack and had no hesitancy in using it to shoot and rob the victim. In addition, Defendant's ongoing threat to the community is demonstrated by not only his actions in this case but his history in the juvenile and adult criminal system. There is no doubt

that Defendant poses a significant threat to the community based on the violent nature of his criminal history. Defendant's rehabilitative needs were also considered. His difficult childhood and family history was recognized; however, it was also noted that throughout his involvement in the juvenile system he was afforded numerous programs including at Summit Academy, the Community Intensive Supervision Program, Vision Quest Academy, as well as family therapy, an anger management course, an individual service plan, group therapy, individual therapy and educational programs. Defendant also underwent mental health evaluations. While the presentence report indicates that there were periods when Defendant appeared to have adjusted and done well, indicating an ability to do so, he nonetheless ultimately returned to his prior criminal behavior. In his testimony at sentencing Defendant indicated that during his pretrial incarceration he had re-evaluated his life, realized his mistakes and now had support from his family which would assist with the help that he needed. However, as noted at sentencing, despite years of detention, incarceration and involvement in numerous programs, "nothing seems to help." (T., p. 17) Given all of the evidence and factors to be considered in imposing a sentence, the sentence in this case was neither excessive, unreasonable or the result of an abuse of discretion.

BY THE COURT:

/s/Todd, J.

*\*This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*