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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

Allegheny Jury Verdict Reporter

The Pittsburgh Legal Journal provides the ACBA members with a quarterly report of jury verdicts from the Civil Division of the Court of Common Pleas of Allegheny County. The verdicts which appear in the Pittsburgh Legal Journal, a supplement of the Lawyers Journal, under the heading "Allegheny Jury Verdict Reporter" are provided by court staff from the assignment room.

Each jury verdict is then assigned for review of the pleadings and preparation of a brief summary of the case and identification of the parties, counsel, and witnesses.

No attempt is made to select, choose, emphasize, highlight, or categorize the results of lawsuits tried to verdict, either by plaintiff, defendant, result, or any other category. The purpose of this project is to report all results tried by jury to verdict.

Capsule Summaries

The Pittsburgh Legal Journal provides the ACBA members with precedent-setting, "Capsule Summaries" or a brief description of opinions from the Family Division of the Court of Common Pleas of Allegheny County.

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Thomas S. White, Mark G. Trombetta, M.D., Robert E. Faust, Leonard C. Highley, and H. Scott Hawkins v. Township of Upper St. Clair, Robert Crown t/d/b/a Crown Communications, and Barbara Crown, his wife

Laches

1. Plaintiff, along with other residents who are no longer plaintiffs, filed suit against Defendants challenging a communications tower constructed in a local park. Plaintiffs sought declaratory judgment, injunctive relief and a writ of mandamus to have the tower removed and the lease to construct the tower declared null and void. The trial court granted summary judgment and preliminary objections. The overriding theory for dismissal was whether Plaintiffs had standing to pursue the matter. Commonwealth Court determined that Plaintiffs did have standing and remanded the case to consider defenses not yet addressed and to resolve disputed issues of fact.

2. Defendants asserted, *inter alia,* laches. On remand, the Court ordered a reverse bifurcation on the defenses of waiver, estoppel, and laches and dismissed the complaint based on laches.

3. In April 1996, Township Commissioners held a meeting, open to the public, where they enacted a local ordinance directing township officials to enter into a lease with Defendant Crown to build the tower in Boyce Park. The *Pittsburgh Post Gazette*, on April 10, 1996, published the new ordinance. In June 1996, Defendants Crown and Township reached an agreement to build the tower and lease the property. This agreement was available for public review. Construction of the tower commenced and was time consuming, noisy and, attracted onlookers to the site. On August 28, 1996, a local newspaper published an article about the tower, the lease relating to the construction of the tower, and that Allegheny County had deeded the park property where the tower was being built to the Defendant Township "strictly for public and recreational use." On September 20, 1996, a Township resident circulated an eight-page newsletter to residents about the tower. The newsletter was marked "urgent." Plaintiff and his wife received a copy of the newsletter and forwarded it to Township Commissioners noting objections to the tower. Further, Plaintiff testified that he first noted the tower being constructed on October 2, 1996. On October 5, 1996, Plaintiff wrote a Township Commissioner complaining about the tower. On November 20, 1996 Plaintiff filed a complaint.

4. Laches bars relief when a complaining party fails to exercise due diligence in obtaining information upon which to institute an action and the lack of promptness prejudices another. *Stilp v. Hafer,* 718 A.2d, 290, 292, 294 (Pa. 1998). In this case, Plaintiff exhibited a lack of due diligence because despite having knowledge about the tower's construction, Plaintiff did not threaten to initiate a law suit nor did he file a law suit until after the tower was constructed. Further, Defendants were prejudiced by this inaction because they completed construction. Had Plaintiff been diligent in filing his action, assuming the validity of his complaints, the project would have been terminated.

(Margaret M. Cassidy)

David F. Toal and Robert W. Kennedy, Jr. for Plaintiff.
Charles P. McCullough for Upper St. Clair Township.
Eric G. Soller for Robert Crown, t/d/b/a Crown Communications and Barbara Crown.

No. GD 96-016806. In the Court of Common Pleas for Allegheny County, Pennsylvania, Civil Division.

OPINION

BACKGROUND

O'Brien, J., June 19, 2008—The factual allegations, theories of relief and procedural history of this declaratory judgment/equity action can be found in *White v. Township of Upper St. Clair,* 799 A.2d 188 (Pa.Cmwlth. 2002). By Order dated June 8, 2007, I ordered that trial would proceed by reverse bifurcation on the defenses of waiver, estoppel and laches. Trial began on October 17, 2007 and ended on October 19, 2007. After reviewing proposed factual findings and legal conclusions by the parties, I found that Leonard C. Highley, the sole remaining plaintiff unreasonably delayed this action to the prejudice of defendants and dismissed the Complaint based on laches. Post-trial motions were denied in an Order dated February 29, 2008.[1]

DISCUSSION

> Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another…. The test for due diligence is not what a party knows, but what he might have known by the use of information within his reach…. Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act.

Stilp v. Hafer, 718 A.2d 290, 292, 294 (Pa. 1998). A party asserting laches must prove it by clear, precise and unequivocal evidence. *Board of Education v. Philadelphia Federation of Teachers,* 397 A.2d 1273 (Pa.Cmwlth. 1979).

This dispute revolves around the construction of a 350-foot high communications tower on .428 acres of approximately 475 acres that comprise Boyce Park in the Township of Upper St. Clair. The tower was built by the Crown defendants ("Crown") pursuant to a ground lease between Crown and the Township dated June 28, 1996. Excavation and clearing of the property, as well as other preparation work, began in the summer of 1996. Actual construction began on October 1, 1996, and the tower was completed by October 12, 1996. On November 14, 1996, plaintiff, along with other township residents who are no longer plaintiffs, filed a Praecipe for Writ of Summons. On November 20, 1996, they filed a Complaint seeking declaratory and injunctive relief to have the lease declared null and void and to have the tower removed. The record reveals clear, precise and unequivocal evidence that Mr. Highley is guilty of laches.[2]

On April 1, 1996, at a meeting open to the public, commissioners enacted Ordinance No. 1710, which directed township officials to enter into a lease agreement with Crown to build the tower in the park. Enactment of the Ordinance was published in the *Pittsburgh Post Gazette* on April 10, 1996.

On June 28, 1996, Crown and the Township signed the 25 year commercial lease which, *inter alia,* specifically provided for the erection of a 350-foot communications tower. The lease was available for public inspection at all relevant times.

The extensive preparation work for the tower, including

excavation and drilling 40-foot holes for the pouring of the foundation, was time consuming and noisy and attracted onlookers.

On August 28, 1996, an article on the tower appeared in *The Advertiser,* a newspaper distributed in the South Hills section of Allegheny County, including Upper St. Clair Township. The article, which referred to the commercial lease and the planned size of the tower, mentioned that Allegheny County had deeded the park to the Township "strictly for public and recreational use."

On or about September 20, 1996, Matthew McLaughlin, a Township resident, circulated an eight page newsletter to residents of Deerfield Manor, a section of the Township. The newsletter, which was marked "urgent," was devoted entirely to the planned construction of the tower. Mr. McLaughlin opined in the newsletter, *inter alia,* that such a tower would violate the deed restrictions. Plaintiff and his wife, as residents of Deerfield Manor, received the newsletter and discussed it. Mrs. Highley cut out a clip-and-mail form from the newsletter and sent it to the Township Board of Commissioners, indicating her objection to the proposed tower.

Plaintiff testified that he first saw the tower being constructed on October 2, 1996. On October 5, he sent a letter to a Township commissioner complaining of same.

It is clear from the above factual recitation that the planned construction of the tower "might have [been] known [to plaintiff] by the use of information within his reach" months before work on the tower began. *Stilp, supra,* at 294. Moreover,

> [b]y no later than October 5, 1996, plaintiff Highley was actually aware: (a) that Crown Communications was constructing a commercial tower in Boyce Park; (b) that the construction was pursuant to a Ground Lease under which Crown was to pay $2,400 per month to the Township; (c) that the Township authorized construction of the tower pursuant to ordinances passed in April and May of 1996; (d) that the parcel of land on which the Crown tower was to be constructed was subject to a deed restriction limiting use to recreation, conservation and historic purposes; and (e) the reasons provided by the Township for the need for the new communication tower.

Defendants' joint proposed findings of fact, no. 15.

Despite all of the above, plaintiff neither threatened to bring legal action to prevent the tower's construction nor demanded that construction cease. Instead, he waited until a month after the tower was finished before filing suit. Had plaintiff been diligent (and assuming the validity of his arguments regarding the legality of the tower), the project would have been nipped in the bud. Crown would not have spent well over a million dollars to put the tower in Boyce Park and the Township would not have switched its reliance from the old tower to the new tower for its police and emergency communications system. Thus, the record amply demonstrates that plaintiff's lack of due diligence has prejudiced defendants.

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

Dated June 19, 2008

[1] Plaintiff filed the instant appeal from this Order. Judgment has not been entered.

[2] I agree with plaintiff that his failure to object to the construction of a 180-foot high communications tower in the park in 1991 implicates neither the doctrine of equitable estoppel nor the doctrine of waiver. I further agree that any waiver by Allegheny County cannot defeat plaintiff's claims.

Joseph Tierney and Rita Tierney, his wife v. Zoning Hearing Board of the Municipality of Monroeville, Municipality of Monroeville and James Kirkpatrick and Joyce Kirkpatrick, his wife

Zoning—Variance—Setback Requirements—R-1 Residential Zoning District

1. Kirkpatricks applied for a variance to construct a one-story addition that would encroach five (5') feet into the required fifteen (15') side yard.

2. Tierneys, owners of property on the side closest to the proposed addition, expressed public safety concerns that emergency personnel would not have enough space to get between their house and the Kirkpatricks' house in case of an emergency.

2. The Board determined that Kirkpatricks satisfied the criteria needed to obtain a dimensional variance.

3. On appeal, the Court determined that the Board erred and reversed its decision because the Municipalities Planning Code 53 P.S. §10910.2(a) requires applicant to prove, *inter alia*, unique physical conditions peculiar to the property and unnecessary hardship. They were successfully using their property as a single-family dwelling unit.

(Lynn E. MacBeth)

Robert W. Kennedy for Tierneys.
Robert J. Wracher for Zoning Hearing Board of the Municipality of Monroeville.
Craig H. Alexander for the Municipality of Monroeville.
James and Joyce Kirkpatrick, *pro se.*

No. SA 07-001081. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., July 7, 2008—This appeal arises from the decision of the Zoning Hearing Board of the Municipality of Monroeville ("Board") dealing with Property located at 1312 Knollwood Drive in the Municipality of Monroeville, owned by Intervenors, James and Joyce Kirkpatrick. The Property is located in an R-1 residential zoning district. The Kirkpatricks sought a variance pursuant to Section 510.3 of the Zoning Code of the Municipality of Monroeville ("Code") in order to build a one-story, 25 feet by 13 feet addition onto their existing home on the Property. The proposed addition would increase their living space and would encroach five feet into the required fifteen feet side yard. The Kirkpatricks' Property is located on a corner lot and is subject to a thirty foot front yard setback on two sides and a sewer easement runs through the rear yard. Appellants

Joseph and Rita Tierney own property directly abutting the Kirkpatricks' Property on the side closest to the proposed addition. At a hearing in front of the Board, the Tierneys expressed public safety concerns relating to the Kirkpatricks' proposed addition. They noted that due to high ground elevation, trees and structures in their subdivision are susceptible to lighting strikes and fires. They are worried that emergency personnel would not have enough space to get between their house and the Kirkpatricks' house in case of an emergency. The Board determined that the Kirkpatricks satisfied the criteria needed to obtain a dimensional variance. It is from that decision that the Tierneys appeal.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

The Board erroneously granted the Kirkpatricks' request for a dimensional variance from Section 510.3 of the Code. The standards for granting a variance are set forth in the Municipalities Planning Code ("MPC") 53 P.S. §10910.2(a):

> 1. That there are unique physical conditions peculiar to the property and that the unnecessary hardship is due to those conditions;
>
> 2. That because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the zoning ordinance and that a variance is needed to enable reasonable use of the property;
>
> 3. That the unnecessary hardship has not been created by the applicant;
>
> 4. That the variance is not detrimental to the public welfare; and
>
> 5. That the variance is the minimum variance that will afford relief and is the least modification of the regulation at issue.

The Kirkpatricks failed to satisfy their burden of proof to obtain a side yard variance. The only reason given for the proposed addition was the desire for additional floor space. They are currently successfully using their Property as a single-family dwelling unit. Our Supreme Court has held that "the mere desire to provide more room for a family member's enjoyment fails to constitute the type of "unnecessary hardship" required by the law of this Commonwealth." *Larsen v. Zoning Board of Adjustment*, 672 A.2d 286, 290 (Pa. 1996).

Based upon the foregoing, there are no facts in this case to support the granting of a dimensional variance. Therefore, the Board's decision is reversed.

ORDER OF COURT

AND NOW, this 8th day of July, 2008, based upon the foregoing Opinion, the decision of the Zoning Hearing Board of the Municipality of Monroeville is reversed.

BY THE COURT:
/s/James, J.

David Hertzog v. Zoning Board of Adjustment of the City of Pittsburgh and City of Pittsburgh

Zoning—Building Permit—Legally Nonconforming Setback —Local Neighborhood Commercial Zoning District (LNC) —Second Story Addition Blocking Adjacent Owner's View —Residential Compatibility Standards

1. Property owner applied for occupancy and building permit to construct a second story addition on an existing two-story commercial building in a Local Neighborhood Commercial Zoning district (LNC).

2. The Zoning Board of Adjustment granted property owner's request. Adjacent property owner appealed, stating that expansion is subject to the Residential Compatibility Standards requiring minimum side setback of fifteen (15') feet for commercial buildings.

3. Adjacent property owner claimed that the view from his second floor window will be of a blank wall, and it will be difficult to maintain the original clapboard siding on the residence if the proposed addition is constructed.

4. The appeal was denied because the proposed expansion is for a lawful permitted use in the zoning district, the only existing building footprint (creating non conforming setbacks) is nonconforming, and the addition does not violate any section of the Code.

(Lynn E. MacBeth)

Tammy L. Ribar for David Hertzog.
Lawrence H. Baumiller for Zoning Board of Adjustment and City of Pittsburgh.

No. SA 08-000083. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., August 18, 2008—This appeal arises from the decision of the Zoning Board of Adjustment of the City of Pittsburgh, (hereinafter "Board") dealing with a commercial building owned by Big Air Development LLC (hereinafter "Big Air") and located at 415 Gettysburg Street in the 14th Ward of the City of Pittsburgh (hereinafter "Subject Property"). The Subject Property is located in a Local Neighborhood Commercial (hereinafter "LNC") zoning district and conforms to the primary use standards for LNC. The Subject Property is an irregularly shaped lot with a partial two-story structure that has a 3.75-inch setback from the south-westerly property line. This setback is legally nonconforming.

On August 31, 2007, Big Air submitted an application for an occupancy and building permit for permission to construct an 11 x 20 foot extension to the second floor of the existing two-story Commercial Building. On September 21, 2007, the Building Permit was issued to Big Air.

On October 5, 2007, David Hertzog (hereinafter "Appellant"), the owner of 419 Gettysburg Street in the 14th Ward of the City of Pittsburgh, an adjacent property to the Subject Property, filed an Application for Appeal from the Decision of the Zoning Administrator approving the Building Permit. On December 20, 2007, the Board rendered a written decision denying the Appellant's Appeal. This timely appeal followed.

Where the trial court takes no additional testimony, the

scope of review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987).

An abuse of discretion will be found only where the findings are not supported by substantial evidence. *Larson v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286, 288 (Pa. 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Hearing Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

There is no dispute that the structure is legally nonconforming. The Appellant contends since the Subject Property is situated in an LNC and is immediately adjacent to an R2-L zoning district, its expansion is subject to the Residential Compatibility Standards, (hereinafter "RCS") which require a minimum side setback of fifteen feet (15') for Commercial Buildings. Furthermore, the Appellant contends that the view from the Appellant's second floor window on the southeast side of his residence will be of a blank wall and it will be difficult to maintain the original clapboard siding on the residence if the proposed addition is constructed.

The Board determined that Pursuant to the City of Pittsburgh Zoning Code Section 921.03.D.1., the Subject Property may be enlarged, expanded or extended by right so long as such expansion does not increase the degree of nonconformity. The Board relied upon *Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh*, 828 A.2d 1033 (Pa. 2003). The Board found that the proposed second story addition will not expand or increase the degree of nonconformity with the requirements of the RCS, nor will it make the structure nonconforming in any other respect.

The proposed expansion is for a lawful permitted use in the zoning district. The height is permitted, the use is permitted, and only the existing building footprint (creating nonconforming setbacks) is nonconforming. A review of the record and applicable Zoning Code also shows that the addition does not violate any section of the Code. Therefore, the decision of the Board is affirmed and the appeal is dismissed.

ORDER OF COURT

AND NOW, this, 21st day of August, 2008, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Zoning Board of Adjustment of the City of Pittsburgh is hereby affirmed and the Appeal is dismissed.

BY THE COURT:
/s/James, J.

Carol Palmer v. Black Box Corporation of Pa.; Thomas Yancich; Marshall Limetti; Timothy Huffmeyer; Michael McAndrew; and Fred Young

Wrongful Discharge—Conspiracy

1. Plaintiff filed an action asserting that she was not paid overtime wages as required under the Pennsylvania Minimum Wage Law, Section 333 101 *et seq.*; that she was wrongfully discharged when she raised the failure to pay the overtime; and, that the individual Defendants conspired in her termination.

2. Defendants, except Defendant Young, filed preliminary objections to Plaintiff's claims that she was wrongfully discharged in retaliation for raising overtime pay issues and that Defendants could not conspire with Defendant Blackbox since they were employee-agents of Defendant Blackbox. Defendants did not raise preliminary objections to Plaintiff's claim that she was not properly paid overtime wages.

3. Defendants asserted that Plaintiff cannot maintain a wrongful discharge action where she has statutory relief through the Fair Labor Standards Act.

4. Preliminary objections were overruled because even though a statutory remedy may be available to the Plaintiff, that remedy did not include damages for wrongful discharge. Additionally, although employees, as agents of their corporate employer, cannot conspire with the corporation, Plaintiff stated she was suing Defendants in their individual capacities.

(Margaret M. Cassidy)

Joseph H. Chivers for Plaintiff.
Jeremy A. Mercer and *Thomas R. Johnson* for Defendants.

No. GD 07-027138. In the Court of Common Pleas for Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., August 28, 2008—This matter involves the five count complaint filed by Plaintiff, Carol Palmer, ("Palmer") against Defendants, Black Box, Inc., Thomas Yancich, ("Yancich"), Marshall Limetti ("Limetti"), Timothy Huffmeyer, ("Huffmeyer"), Michael McAndrew, ("McAndrew"), and Fred Young, ("Young"), ("Black Box" or Individual Defendants, Respectively).

Palmer claims, as an employee of Black Box, she was not paid overtime wages that were due under the Pennsylvania Minimum Wage Law, 43 P.S., Section 333 101 *et seq.* (Count I). When she complained to her supervisor, she was terminated. While she was told her termination was due to job elimination, she contests that, and avers this to be a sham, and that other people are still doing the work she used to do. She further claims that her discharge was in retaliation for her raising the overtime question, and is, therefore, a wrongful discharge, and contrary to PA Public Policy. (Count II). She also claims that the individual Defendants all conspired against her to bring about her termination. (Counts III, IV and V).

Defendants, save Young, all filed Preliminary Objections to Counts II through V, but not to Count I. In essence, Black Box argues that there can be no termination against public policy when that employee has *any* other statutory relief available to her, to-wit, an action under Federal Law, the Fair Labor Standards Act, ("FLSA"). Their starting point is *Phillips v. Babcock & Wilcox,* 503 A.2d 36 (Pa.Super. 1986). That case involved a discharge because an employee had filed a Workers' Compensation Claim yet got no relief in Court because he was a member of a Union that had gone to arbitration for him. The Honorable John Brosky writing for the Court said: "we hold that an action for the tort of wrongful discharge is available only when the employment relationship is at will" 503 A.2d at 38. In this, he alluded to ***Geary v.***

United States Steel Corporation, 319 A.2d 174 (Pa. 1974), a Pa. Supreme Court Case as a "very narrow exception," to the at-will doctrine, but did recognize a cause of action where "a clear mandate of public policy has been violated by the terminator." 503 A.2d at 37.

Based on the language in *Geary*, one would think that termination for seeking the protections of the Workers' Compensation Law would indeed be a clear violation of public policy. The *Phillips* Court (Consisting of Judges Brosky, Rowley and Spaeth, of which Spaeth dissented), however, opined otherwise.

Further, while the facts of *Phillips* show that *Phillips*' union did indeed seek arbitration, which resulted in his restoration to his job, that is by no means certain. Unions are *not* required to take every case to arbitration, and consideration of union finances and lay person's evaluation of the case come into play. See *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). A grievance process cannot substitute for going to the Prothonotary, paying a filing fee, and having your case heard as of right.

Defendants, here, in their excellent and able brief want to take *Phillips* one step further and equate *any other statutory* remedy that Plaintiff may have with a collective bargaining agreement. In *Spierling v. First American*, 737 A.2d 125 (Pa.Super. 1999), a discharged nurse / administrator was found to have no cause of action for wrongful discharge as against public policy. She had been asked by Federal investigators to report any evidence of Medicare fraud by her employer. She did so and was fired because of it. Nevertheless, the Superior Court, again in an opinion authored by the Honorable John Brosky, found no cause of action because (1) Spierling was under no statutory duty to report fraud, and (2) her employer did not ask her to commit a crime. Judge Beryle Schiller dissented from that ruling.

Spierling, whatever its value, does NOT stand for the proposition asserted by Defendants, that is, a plaintiff has no cause of action if there is *any* statutory remedy out there. Defendants support for this assertion is found only in Common Pleas Court opinions, which I have read, and do NOT find persuasive, and a few Federal District Court opinions which are equally unpersuasive, and not binding on me in any case. Counsel has cited to *Coyle v. Madden*, (2003 WL 2299922 (E.D. PA. 2003) and its reliance on *Jacques v. AK20 Intil, Inc.*, 619 A.2d 748, (Pa.Super. 1993). Analysis of those cases sheds no light on our issue here. *Jacques* sought to bring an age discrimination case as a common law tort rather than follow the age discrimination law, and the procedures thereunder. That has no application here since Palmer is being fired because she sought the benefits of the Pa. Minimum Wage Law. Thus, I find no precedential value in *Jacques*. Of interest though is that this is an opinion of U.S. District Judge Schiller, the dissenter in *Spierling*.

Moreover, Jacques involved Summary Judgment, not Preliminary Objections, and substantial facts had been developed on which the Trial Court based its ruling.

Finally, I have considered the Superior Court case of *Signora v. Liberty Travel*, 886 A.2d 284 Pa.Super. (2005) appeal denied., 919 A.2d 958, (Pa. 2007), which involves similar issues including wrongful discharge, and claims for violations of the Pennsylvania Minimum Wage Act, and the Pennsylvania Wage Payment and Collection Law, 886 A.2d 284, at 288. I am aware that the verdict therein, and the opinion of the Superior Court is based on a default judgment being taken against *Liberty Travel,* and thus, it never had the opportunity to raise the issues being raised here. However, *Liberty Travel* fought the default judgment tooth and nail, including an evidentiary hearing before the Trial Judge who had granted the default; appeal to the Superior Court; Petition for Allowance of Appeal to the Supreme Court, and then an effort to raise it again before the Superior Court reviewing the damages awarded. See 886 A.2d 284 at 289, 290.

Under the foregoing circumstances, I cannot believe that the Superior Court, or the Supreme Court would not take action, even in a default case, where the cause of action did not even exist. That they did not leads me to OVERRULE Defendants' Preliminary Objections to the wrongful discharge count.

As to the conspiracy counts, counsel for the defense has appropriately cited *Grose v. Proctor & Gamble,* 866 A.2d 437 (Pa.Super. 2005), for the proposition that employees, as agents of a corporation, cannot conspire with that corporation. The theory is that the corporation and its employees/agents are one, hence there, can be no conspiracy. Counsel for Palmer does not contest that argument, but simply states that the individual Defendants are being sued only in their individual capacity. Indeed, they are so identified in the body of the complaint.

Therefore, after review and analysis, and bearing in mind the standard to be applied when ruling on Preliminary Objections, the Preliminary Objections of Defendants are OVERRULED, and they are to answer within 30 days.

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

Dated: August 28, 2008

Joan McCauley v. Daniel W. Pituch, DMD, M.D.; Stephen J. Miloser, DMD; and Jefferson Regional Medical Center

Medical Malpractice—Dental Malpractice—Summary Judgment—Requirement of Expert Reports

1. After the entry of appearance and withdrawal of appearance of numerous attorneys on Plaintiff's behalf over a period of several months, Plaintiff failed to timely produce expert reports supporting her claims of dental and medical malpractice. The Court entered an order requiring Plaintiff to produce said expert reports within 60 days. Plaintiff requested no extension of time beyond the 60 days.

2. Several weeks after Plaintiff failed to produce the reports by the 60 day deadline, leave to file motions for summary judgment was granted to the Defendants. Defendants' motions for summary judgment were granted by the motions judge because Plaintiff was unable to supply expert reports supporting Plaintiff's theories of liability.

3. Plaintiff's numerous complaints concerning the unfairness she perceived at the summary judgment argument and in the entire course of litigation are irrelevant and without merit. Plaintiff was unable and remains unable to supply expert reports in support of Plaintiff's position. Said expert reports are necessary for Plaintiff to make out her prima facie case. Because Plaintiff failed to provide expert reports, the Defendants were entitled to summary judgment.

(Elizabeth A. Farina)

Joan McCauley, *pro se.*
Francis Garger for Stephen J. Miloser, DMD.
Jason J. Zivkovic for Daniel W. Pituch, DMD, M.D.
Richard J. Federowicz and *Terry J. Yandrich* for Jefferson Regional Medical Center.

No. GD 05-015482. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., September 11, 2008—The Plaintiff in the captioned dental malpractice action has appealed from this Court's Orders of April 7, 2008, in which we granted the three Defendants' Motions for Summary Judgment and dismissed Plaintiff's claims against each of them, with prejudice. Based on the procedural history set forth below, it was proper for us to consider the Motions for Summary Judgment on that date. Based on the substance of the Motions and of Plaintiff's response, it was proper to grant the Motions, and would have been improper to deny them.

On April 7, 2008, the date of the argument on the Motions for Summary Judgment, a new attorney, Daniel W. Ernsberger, had entered a Praecipe for Appearance on behalf of Plaintiff, and appeared at the argument on her behalf.

According to the docket entries, the Honorable R. Stanton Wettick of this Court had entered an order on June 15, 2007, allowing Plaintiff's counsel at that time, Kenneth D. Perkins, to withdraw, and staying all proceedings in the matter for 60 days to allow her the opportunity to obtain new counsel. No other attorney entered an appearance on behalf of Plaintiff until Mr. Ernsberger did so in April 2008. However, Plaintiff indicates in her Statement of Matters Complained of on Appeal that, in February 27, 2008, she had obtained an Attorney Thiel as counsel. No appearance was entered then and there is no contention that Judge Wettick's 60-day time-frame was met. In addition, there is no indication that Plaintiff asked Judge Wettick for more time.

On November 16, 2007, Judge Wettick entered three separate orders regarding each of the three Defendants, requiring Plaintiff to produce expert reports within 60 days (roughly, by January 16, 2008), and stating that "[t]his is the last extension unless pltf. has an attorney who requests more time."

Two weeks after the deadline for Plaintiff's expert reports had passed, on January 29, 2008, the Honorable Eugene B. Strassburger III of this Court entered orders granting Defendants Miloser and Jefferson Regional Medical Center leave to file Motions for Summary Judgment. On March 3, 2008, Judge Strassburger granted Defendant Pituch leave to file a Motion for Summary Judgment. All three of those Motions for Summary Judgment were granted by the undersigned in April 2008.

On May 2, 2008 Plaintiff, *pro se*, filed a Motion for Reconsideration. We denied the Motion without requiring an Answer and without prejudice to Plaintiff's right to appeal. She then filed the instant appeal.

In her Statement of Matters Complained of on Appeal, Plaintiff raises numerous issues. Issues 1, 2 and 3 relate to the actions of Judge Wettick, while issue 5 relates to Judge Strassburger. Both Judge Wettick and Judge Strassburger have filed Opinions discussing the aspects of the case with which they dealt.

The portions of Plaintiff's Statement of Matters Complained of on Appeal which arguably relate to the undersigned are fully quoted below:

> 4. APRIL 7, 2008 ARGUMENT HEARING
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> Dr. Levin's expert report did find below [*sic*] the standard of care with defendant Dr. Pituch for his failing to give me "informed consent." (I contend I did not consent to the surgical procedures and I am unable to retrieve a copy of the consent form I signed.) I believe at the April 7, 2008 Argument hearing it was in error that the total case was dismissed against defendant Dr. Pituch. Defendant Dr. Pituch's own supplemented "consult notes" states he had no intention of doing the procedure of a Lefort 1 in order for me to utilize his wrongly placed dental implants. In fact, defendant Pituch's records recommend against the procedure of a Lefort 1, his notes indicate that I am too damaged for a major surgical movement of my skull. Per Dr. Wessel's March 2008 letter submitted in my reconsideration I was left with the only option of a Lefort 1 major surgery after defendant Pituch's placement of dental implants in the roof of my mouth.
>
> 6. CONCEALMENT AND OR DISREGARD FOR MY REQUESTS FOR PRODUCTION OF DOCUMENTS AND DISCOVERY
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> Defendants' counsel withheld medical records and radiographs they obtained from my signed medical release authorizations. This information was needed for expert reports. After the April 7, 2008 Argument hearing in front of the Honorable Judge Friedman Attorney Ernsberger requested from the defense counsels [*sic*] copies of my radiographs. On April 22, 2007 [*sic*] Attorney Ernsberger received 10-radiographs films from defense counsel. I had requested these same films/records from defense counsel with a properly filled out release and they were not provided to me. Dr. Levin did not have them available for my expert report. Missing from the radiographs that Attorney Ernsberger received from defense counsel on April 22, 2008 was a 1988 Ceph scans pre-orthodontic which showed a proper Class 1 dental occlusion. March 26, 2008 Dr. Buzzato gave me a copy of this 1988 Ceph scan and told me I was indeed a proper Class 1 dental occlusion before defendant Pituch's 2003 surgery. Dr. Buzzato told me he provided copies to the attorneys for the defendants in November 2006. Again, Dr. Levin did not have this evidence available when he wrote my report.
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> 7. OTHER RELEVANT MATTERS OF MY APPEAL
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> • Defense counsel did not honor my Request for Production of Documents.
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> • In correspondences defense counsel wrote my requests for Discovery was too "voluminous" and did not honor my requests.
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> • Defendant Dr. Pituch signed a verification form and gave false answers.
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> • Dr. Pituch did not list all of his surgical procedures on my operative report.
>
> • Due to Dr. Pituch's $30,000.00 Addison Grant my patient file was kept separate. I had great difficul-

ty retrieving my records.

• Dr. Pituch performed unnecessary surgical procedures to apply against his grant that caused harm.

• Dr. Pituch also billed Medicare for some of the same surgical procedures he billed against the grant.

• Dr. Pituch billed the Addison Foundation for treatment not used.

• Defendant Dr. Miloser submitted false billing statements related to my treatment plan. My original billing statements are completely different than what Miloser submitted for this case.

• Defendant Dr. Miloser billed me approximately $17,500 plus interest for "planned" treatment, his share of the grant. After his associate Dr. Pituch's surgery the treatment plan could not be done. I was left in such a complex painful state.

• Dr. Miloser, a general dentist, could offer me no assistance yet prolonged my suffering by not referring me to a Prosthodontist where I later learned my only choice of treatment was a major skull revision surgery.

• Dr. Miloser for this case submitted false colored lab photos of dental models, which were not of my anterior teeth.

• Jefferson Medical Center refuses to supply me with a copy of my original 1-page consent form and a list of attending doctors of my surgery.

The Motions for Summary Judgment submitted by the three Defendants were based primarily on the contentions with which the undersigned agreed, that Plaintiff's expert reports are inadequate. Defendant Dr. Miloser, the prosthodontist, argues that the two expert reports prepared by Dr. Wessel on Plaintiff's behalf are not critical of any dentist or oral surgeon, and do not address causation. Dr. Miloser also argues that the expert report prepared by Dr. Levin does not mention the conduct of Dr. Miloser. As to the Breach of Contract claim, Dr. Miloser argues that, under the law, a physician is not a guarantor or warrantor of a cure in the absence of a special contract. He argues that there is no evidence that such a contract was entered into or ever existed.

Defendant Dr. Pituch, the oral surgeon, also argued in his Motion for Summary Judgment that his treatment of Plaintiff is not criticized in the expert reports filed. In Dr. Levin's expert report, his only criticism of Dr. Pituch is based on Pituch's alleged failure to advise Plaintiff that additional surgery might have been required if she was not satisfied with the procedure Dr. Pituch was to perform. Dr. Levin stated that "if the maxillary advancement had been performed prior to implant placement [Plaintiff] would not have required the initial fabrication of the overdenture which resulted in her jaw pain and feeling of limited space for her tongue." (Report of Dr. Lawrence M. Levin dated January 11, 2008, page 6, attached as Exhibit A to Defendant Pituch's Motion for Leave of Court to File Motion for Summary Judgment.) However, Pituch notes that Plaintiff testified at her deposition that even if Pituch had discussed the possibility of that surgery with her, she would not have agreed to undergo it because she was too old for that type of surgery. Therefore, Pituch argues, any failure to discuss this option with Plaintiff was moot.

With regard to the Motion for Summary Judgment of Defendant Jefferson Medical Center, Jefferson argues that unless a hospital's negligence is obvious, an expert is required to establish that there was a deviation from the standard of care and that the deviation was a substantial factor in bringing about the Plaintiff's harm. Defendant Jefferson argues that there was no criticism of it in the expert reports presented by Plaintiff.

The date of the argument on the Motions for Summary Judgment was the date by which the Plaintiff should have come forward with sufficient expert evidence to support her claims. She also caused herself serious problems by her failure to comply with the orders of Judge Wettick. Although people such as Plaintiff who are *pro se* are given some leeway, in the end Plaintiff must bear the consequences of her inability to timely comply with the rules and orders of court.

Although Plaintiff's claims contain much that is disturbing, if true, we were constrained to grant the Motions based upon the record before us at that time.

BY THE COURT:
/s/Friedman, J.

Dated: September 11, 2008

Cornerstone Land Development Company of Pittsburgh, LLC v. H & R Excavating, Inc.

Apparent Authority—Contract Recission—Contractor and Sub-Contractor Payment Act

1. Defendant sought bids to have a sanitary sewer and pumping station built. Plaintiff submitted a proposal on its letterhead signed by one its employees Edward Johnson. Defendant signed the proposal and sent it back. Plaintiff began work on the project with Johnson working on the project. Johnson told Defendant that he was a partner in the Plaintiff company. Johnson also provided Defendant with certificates for liability insurance for Plaintiff company and for Johnson Contracting. Johnson also told Defendant that payments should be made to Johnson Contracting. Defendant issued three checks for work on the station to Johnson Contracting. Plaintiff eventually contacted Defendant for payment for the work and Defendant explained it has been paying Johnson.

2. Initially, Plaintiff and Defendant tried to settle the matter. Plaintiff determined that project completion would require two men working for two days. Plaintiff also sought payment from Defendant for the entire project as originally quoted. Defendant disagreed on the amount of time; would not pay Plaintiff for the amount it had paid Johnson; and, claimed that due to Plaintiff's negligent work a pump had to be replaced.

3. Plaintiff filed an action seeking payment on the contract as well as a claim under Contractor and Sub Contractor Payment Act, 73 P.S. 501, *et seq.* for remedial and punitive damages.

4. Defendant claimed that Johnson had apparent authority to act on behalf of Plaintiff since he signed and presented the original contract; he managed the job and the crew; and

he held himself out to be an owner of Plaintiff. The Court found that Johnson did have apparent authority based on these particular facts and, Plaintiff must pursue Johnson for these funds.

5. The Court determined that the contract was mutually rescinded since both Plaintiff and Defendant stopped performance and each wanted additional terms, yet could not agree on the terms.

6. The Court concluded that Plaintiff was responsible for the pump that was damaged since Defendant hired Plaintiff to complete and manage the project and it was, therefore, incumbent upon Plaintiff to care for the equipment needed for the project. Further, the Court concluded that Plaintiff should be responsible to complete the project and that Defendant would have to pay the labor to Plaintiff to complete the project.

7. In analyzing the Contractor and Sub Contractor Payment Act, the Court stated that the act allows for sub contractors to recover counsel fees and interest on payments due to the sub contractor that have not been paid by the contractor. 73 P.S. 512. These payments are only required if the contractor had no reasonable basis to refuse to pay. See 73 P.S. 511 and 512. Since Defendant did have a reasonable basis to dispute payment counsel fees and interest are not mandated. Last, the Contractor and Sub Contractor Payment Act allows for counsel fees and expenses to be awarded to the "substantially prevailing party." 73 P.S. 512. In this case, since both parties appeared to have been victimized by Johnson, counsel fees and expenses are not appropriate.

(Margaret M. Cassidy)

Joseph A. Hulton for Plaintiff.
Frederick B. Gieg, Jr. for Defendant.

No. AR 07-3979. In the Court of Common Pleas for Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

O'Reilly, J., September 12, 2008—I heard this appeal from Arbitration on August 21, 2008. It involves a construction contract that Plaintiff, Cornerstone Land Development Company of Pittsburgh, LLC ("Cornerstone") had with Defendant, H& R Excavating, Inc., ("H&R"), as well as fraud perpetrated upon Cornerstone by one of its own employees, Edward Johnson ("Johnson") in connection with that contract.

The construction project was a sanitary sewer and pumping station being built by H&R for the Northern Blair County Sanitary Authority, and was known as the Pinecroft Pump Station. H&R solicited proposals for performance of the labor only on the pump station. Cornerstone submitted such a proposal dated December 15, 2006, signed by Johnson on Cornerstone letterhead. That proposal was for $17,165. (Plaintiffs Exhibit 1). H&R's business manager, Marcie Rhodes liked the proposal and made some handwritten notations on it, signed it, and sent it back to Cornerstone. (Plaintiffs Exhibits 2 and 3). That document became the contract between the parties.

Work began in January, 2007, and the crew provided by Cornerstone consisted of Johnson, Ron Eley & Chuck McKernan. Johnson carried on all interaction between Cornerstone and H&R, and told Mrs. Rhodes that he was a partner in Cornerstone. The record does not reflect if he ever mentioned the real owner of Cornerstone, one Frank Zokaites.

The record also does not reflect any conversation or correspondence between Zokaites, and H&R such as an introduction of the company, or anything else indicating that Zokaites was the real owner. Further, Johnson provided a certificate of Liability Insurance wherein Cornerstone is insured, and Johnson Contracting is as an additional insured. (Defendant's Exhibit 16). While testimony was offered that this certificate did not mean what Rhodes thought it meant, in fact it listed both companies and supports Rhodes belief that Johnson had authority to act for Cornerstone.

On January 2, 2007, by correspondence on Johnson Contracting letterhead, Johnson told H&R and Rhodes that this job would be "run through" his company, Johnson Contracting, and progress payments then due should be paid to it. (Plaintiffs Exhibit 4). Johnson later issued an invoice for progress payments (Plaintiffs Exhibit 6), and Mrs. Rhodes issued three H&R checks to Johnson. The first one was on January 9, 2007, for $3450; the second, on February 2, 2007, for $4200. (Plaintiff's Exhibit 7); and a third check for $563.34 was also issued on January 23, 2007.

On February 22, 2007, Zokaites contacted H&R because he had received no payment for work done to date, and spoke with Rhodes for the first time. Presumably, payroll records had been maintained by Johnson so Zokaites knew the job was progressing. She told him she had paid Johnson. Zokaites advised that Johnson was not his partner, and that the money should not have been paid to his "company." He also faxed to her his certificate of formation of Cornerstone from the Pennsylvania Department of State of the Commonwealth proving his ownership, and showing it to have been formed as a Limited Liability Company on August 25, 2006, and that its Principal Office being 375 Golfside Drive, Wexford, PA 15090, which is also the office for other Zokaites Companies.

Some elements of that conversation are in sharp dispute as to whether Rhodes acknowledged any "fault" in issuing the checks to Johnson. Zokaites testified she said "that she should have known better, and that she questioned it." (Plaintiff's Exhibit 9). Rhodes denied these statements and maintained she accepted no responsibility for any payment made in error. Zokaites also faxed to Rhodes correspondence of January 25, 2007, with the 1st invoice for progress payments of $11,212.22 with Johnson's name on it on behalf of Cornerstone. (Plaintiff's Exhibit 9a). This fax was on letterhead from Zokaites Contracting, Inc., another Company owned by Zokaites.

Johnson purportedly has disappeared, and Zokaites sued H&R, and H&R filed a cross claim against Johnson. Prior thereto, however, Zokaites and Rhodes entered into some negotiations to try to solve the problem and get the project completed. An exchange of settlement proposals occurred, but foundered over H&R's unwillingness to pay to Zokaites half of the amount already paid to Johnson, or agree to help each other in trying to get the other half from Johnson. Rhodes was adamant that she wanted no future lawsuit with anyone, and asked Cornerstone to return to the job site. Cornerstone refused and withdrew from the job.

According to Zokaites, there were only 2 days of work left on the project for 2 men, and he wanted the entire contract price paid to him, to-wit, $17,465, notwithstanding the payments to Johnson. H&R was willing to pay only what might remain due to Zokaites after the work was completed by them, and less a claim for damage to equipment it had.

H&R, via a letter from Rhodes, seems to agree with the amount of work left to be done. Two to three days plus a half-

day for start and testing—per Rhodes letter of March 8, 2007. (Plaintiffs Exhibit 18). Her son, Matthew Rhodes questioned that estimate, and testified that in fact H&R finished the Cornerstone work, which included re-doing some of its work, at a cost of $16,000. Spirited cross-examination occurred over this point.

H&R also claimed that due to Cornerstone's negligence, a pump to be used in the project had to be replaced because the Johnson crew had left it out in the rain. This pump had a cost of $3,208, and that amount should be deducted from whatever is due Cornerstone.

Cornerstone also has made a claim under the Contractor and Sub Contractor Payment Act, (73 P.S. §501, *et seq.*) for all the remedial and punitive elements contained therein amounting in excess of $30,0000.

Analysis

H&R contends Johnson had apparent authority to act on behalf of Cornerstone particularly since he signed and presented the proposal; and ran the job and the crew and held himself out as an equity owner in Cornerstone.

Under these circumstances, I am persuaded that he did have apparent authority, and Cornerstone must look to him rather than H&R for the funds already paid. In this respect, I credit Rhodes when she denies accepting responsibility for the apparently erroneous payment.

I also find a mutual rescission of the contract since both wanted additional terms to which neither would agree.

Evaluating the testimony, I find that the contract was virtually completed, and accept the testimony of McKernan that 2 days work for two men remained, plus 1/2 day for start up, and testing. I do not, however, accept his excuse for leaving the pump out in the rain, and failing to tell H&R staff to guard against water damage. In this regard, I accept testimony from Zokaites that H&R hired them because they, H&R, did not know how to do this work. Thus, McKernan should have taken some kind of action, or at least given a warning about the hazards of leaving this type of pump out in the open. I, therefore, will give a credit for this pump.

Another question is what labor rate to use in calculating the balance due Cornerstone on a public sewer project. I raised the question of whether it was a prevailing wage job; that is subject to paying prevailing wages as determined by the Pennsylvania Department of Labor and Industry under The Prevailing Wage Act (43 Pa.C.S.A. §165.1, *et seq.*). Mrs. Rhodes said that it was, and the applicable wage rate had been sent to Cornerstone *after* the contract was awarded. Zokaites testified that it was *not* a prevailing wage job, for Cornerstone, because it was for less than $25,000. He also denied receiving any prevailing wage rates from H&R.

Under the circumstances, I credit Zokaites when he says no wage rates were received. Since the proposal was to provide installation only, the wage rates must necessarily be provided before the proposal can be made.

However, when Cornerstone pulled off the job, and H&R had to finish it, their labor was paid at the prevailing rate. I believe the amount of work they claim was needed is excessive, but I will find 2 days for completion by two men plus 1/2 day for start up and testing. My recall of testimony is that wages paid by Cornerstone was $13 an hour for mechanics, and $18 an hour for Johnson, the crew chief. Accordingly, my calculations are as follows:

- The two days would be 32 "mechanic" hours times ($13) to equal $516.

- The half-day for testing and start up would be done by the crew chief and would be 4 hours x $18 = $272.

- The total would be $588.

- The gross contact of $17,465 less $588 equals $16,877 less the amount paid to Johnson of $8,213 equals $8663.36 less $3,208 for the damaged pump equals $5,455.36.

Net Due $5,455.36

I make no ruling as to whether this was or was not a Prevailing Wage job since that is not before me and my verdict here should not be construed as a judicial determination on this point.

Cornerstone has also sought payment under the above referenced Contractor and Sub-Contractor Payment Act. That Act provides that subcontractors can recover counsel fees, and interest on payments due it, but not paid by the contractor 73 P.S. §512. That law, however, provides for such payments only if the contractor has no reasonable basis for its refusal to pay. See 73 P.S. §511 and 512. I find that here there was such a reasonable basis for H&R to dispute the claim of Cornerstone, and thus, I will award no costs or fees. I am cognizant of Section 512(b) relative to counsel fees and expenses being awarded to the "substantially prevailing party." However, I find no "substantially prevailing party." Here, Johnson seemingly victimized both parties and an award of counsel fees to either side is inappropriate.

My verdict, therefore, is as set forth above, to-wit, $5,455.36 to Cornerstone and against H&R. Inasmuch as I have found no liability by H&R for the funds paid to Johnson, its cross-claim against Johnson is DENIED as moot. An appropriate verdict form is attached.

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

Dated: September 12, 2008

NON-JURY VERDICT

AND NOW, to-wit, this 12th day of September, 2008, for the reasons set forth in my MEMORANDUM of this date, I find in favor of the Plaintiff, Cornerstone Land Development Company of Pittsburgh, LLC. and against the Defendant, H&R Excavating, Inc. in the amount of $5,455.36. In addition, I hereby DENY the Cross-Claim as moot.

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

John A. Zarra, Jr. and Marsha Zarra, his wife v. Royal Numico, N.V., t/d/b/a General Nutrition Corporation, Michael K. Meyers, Joseph Fortunato, Eileen D. Scott, Marilyn Renkey, Gary R. Kelly, James Sander, William E. Watts, Anthony Kuniak and David Heilman

Defamation—Definition of "Publication"—Conditional Privilege—Loss of Consortium

1. Plaintiff was investigated by Defendants for alleged

violations of Defendant Employer's corporate code of ethics concerning alleged improprieties committed by Plaintiff while employed as Senior Vice President of Loss Prevention with Defendant Employer. Plaintiff was accused of improperly transmitting Defendant Employer's funds to Plaintiff's mother. The investigation was initiated when counsel for a former subordinate employee under Plaintiff contacted Defendant Employer's legal department, and provided documentation to Defendant Employer suggesting that Plaintiff was improperly channeling funds to his mother.

2. Defendant Employer's legal department passed the documentation on to Plaintiff's former immediate supervisor, Defendant Employer's Human Resources Officer, and Defendant Employer's CEO, so they could conduct a "very close investigation."

3. Plaintiff had an opportunity to rebut the allegations with his own evidence but provided only vague affidavits. Plaintiff refused to resign from employment, so Defendant Employer terminated his employment. Defendant Employer distributed a company-wide memorandum stating that Plaintiff had "retired," without any other details.

4. Transmission of the letter and other documentation from the former employee's attorney to Defendant Employer's legal department, then to Defendant Employer's Human Resources Officer, Defendant Employer's CEO, and Plaintiff's former supervisor, was a conditionally privileged publication. Said transmission was solely for the purpose of investigating allegations of Plaintiff's theft from Defendant Employer.

5. There was no evidence that Defendants abused that privilege or acted with malice in publishing the information. There is no evidence that the information was transmitted beyond those persons whose involvement was required for the legitimate investigation. Publication of this information was properly limited and protected by the conditional privilege, therefore no liability for defamation attached.

6. Plaintiff may not put on evidence relating to Plaintiff-wife's loss of consortium, when Plaintiffs pled no count for loss of consortium in the complaint or within the statutory period.

(Elizabeth A. Farina)

Mark J. Bushnell for Plaintiff
Gordon W. Schmidt, Brad A. Funari, and *Gerald J. Stubenhofer, Jr.* for Defendants.

No. GD 02-022529. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Horgos, J., September 19, 2008—Plaintiffs, John Zarra and Marsha Zarra, his wife, filed an action against Defendants, Royal Numico, N.V., t/d/b/a General Nutrition Corporation, Michael K. Meyers, Joseph Fortunato, Eileen D. Scott, Marilyn Renkey, Gary R. Kelly, James Sander, William E. Watts, Anthony Kuniak and David Heilman, seeking damages for alleged defamation, invasion of privacy—false light, invasion of privacy—intrusion upon seclusion and intentional infliction of emotional distress.

Defendants filed Preliminary Objections to the Complaint which the Honorable Cynthia A. Baldwin sustained in part and overruled in part by Order dated February 27, 2003. Judge Baldwin dismissed Count I as to Defendants William E. Watts (Watts) and Michael K. Meyers (Meyers) for failure to state a claim of defamation against them. Count III, Plaintiffs' claim of invasion of privacy—intrusion upon seclusion, and Count IV, intentional infliction of emotional distress, were dismissed. The claims which remained for trial were Count II, invasion of privacy—false light against Watts and Meyers and Count I, defamation and Count II, invasion of privacy false light against Defendants, Royal Numico, N.V., t/d/b/a General Nutrition Corporation (GNC), Meyers, Joseph Fortunato (Fortunato), Eileen D. Scott (Scott), Marilyn Renkey (Renkey), Gary R. Kelly (Kelly), James Sander (Sander), Watts, Anthony Kuniak (Kuniak) and David Heilman (Heilman).

After the pleadings were closed, Defendants filed a Motion for Summary Judgment which was denied by the Court on February 26, 2007 and the case proceeded to trial. Following the presentation of Plaintiffs' case, the Court granted Defendants' Motion for a Compulsory Nonsuit by Order dated March 12, 2007 and dismissed Plaintiffs' Complaint with prejudice. Plaintiffs timely filed a Motion to Remove Compulsory Nonsuit which was denied by Order dated September 6, 2007. Plaintiffs' appeal to the Pennsylvania Superior Court followed.

The cause of action arose from an investigation into allegations that Plaintiff, John Zarra (Zarra), violated GNC's Code of Ethical Business Conduct while he was employed as GNC's Senior Vice President of Loss Prevention. GNC initiated the investigation in response to a letter sent by counsel for a former GNC employee to the GNC legal department suggesting that Zarra had channeled GNC funds to his mother, Catherine Zarra, through a GNC outside loss prevention vendor, Safeguard Security. The letter dated August 15, 2002 was written by attorney Bradley Franc (Franc) who advised that he represented Joseph Welsh (Welsh), a former employee in GNC's loss prevention department who had been terminated from his employment.

The correspondence from Franc included a copy of a letter from Safeguard's Ronald Smyth (Smyth) addressed to Zarra at his home and enclosed invoices which Smyth and Zarra had allegedly "discussed over the phone" and were being resubmitted for payment. Included with the correspondence were copies of cashier's checks from Safeguard to Catherine Zarra and copies of express mail shipping receipts from Safeguard to Catherine Zarra. Franc stated that "the payments to Mrs. Zarra exceed $10,000…over a three month period which would annualize to payments in excess of $40,000 per annum." (Defendants' Motion for Summary Judgment, Ex. B).

William Dunn, an Assistant General Counsel at GNC, forwarded the letter to his direct supervisor, Sander, who testified that he "wanted a very close investigation" into the matter and included only those who "need[ed] to know what was being reviewed." (Deposition of James Sander, 8/18/05, p. 88). He discussed the letter with Fortunato, Zarra's immediate supervisor, Scott, GNC's Human Resource officer, and Meyers, the CEO of GNC. (Sander Depo, pp. 88-89). Fortunato agreed that the investigation should be "contained" because Zarra was "in a high level position." (Deposition of Joseph Fortunato, 9/13/05, p. 233). Fortunato discussed the letter with Scott and subsequently conducted the investigation of the claims made against Zarra. (Sander Depo, pp. 90-91).

Zarra was given an opportunity to respond to the allegations contained in the Franc letter and to provide documen-

tation to show that his mother had provided the services for which she was paid and that she actually worked for Safeguard. Zarra provided no invoices or records but did provide three Affidavits which were vague and Fortunato did not find them credible. Even if Zarra had been able to substantiate the services rendered for Safeguard by his mother, such a relationship was in violation of GNC's "code of ethics in relationship to conflict of interest." (Fortunato Depo, p. 252).

Zarra was subsequently offered the opportunity to resign which he did not do and his employment was terminated by GNC on September 30, 2002. Following the termination, Scott sent a company-wide memorandum stating that Zarra had retired. (Trial Transcript, pp. 442, 446-451, hereinafter Tr.). No other details of Zarra's departure from GNC were provided in that memorandum. In a letter written only to Zarra dated October 15, 2002, Scott informed him that he had "elected involuntary termination" because he had failed "to produce any credible evidence to legitimize the series of transactions between Safeguard Security and your mother, Catherine Zarra," and that "this leads invariably to the conclusion that you conducted yourself in a manner contrary to the interest of GNC." (Defendants' Motion for Summary Judgment, Ex. L). The Employee Separation Report prepared by Scott states that the reason for Zarra's discharge was a "violation of company policy." (Defendants' Motion for Summary Judgment, Ex. L).

Following the termination of his employment, Zarra filed the within action seeking damages for injuries including loss of reputation, loss of employment, lost wages and benefits, out of pocket expense, pain and suffering and medical and psychiatric conditions requiring treatment. He did not file an action for wrongful termination.

Plaintiffs filed a Statement of Errors Complained of on Appeal which sets forth 16 alleged errors and incorporates their 19 page Motion to Remove Compulsory Nonsuit which contains 63 paragraphs. The Court will attempt to respond to all of Plaintiffs' allegations of error although some overlap or are redundant and need not be separately analyzed.

Plaintiffs first argue that a prima facie case of defamation was made on the evidence that Defendants Sander and Kelly published the August 15, 2002 Franc letter to Fortunato who in turn published the letter to Meyers, Scott and Renkey. Plaintiffs argue that further publication occurred when Renkey sent the Employee Separation Report stating that Zarra had engaged in unethical conduct to several GNC employees and an outside vendor. Plaintiff's claim that Scott's memo stating that Zarra had retired which was sent at the same time as a memo stating that employees should not engage in conduct which creates a conflict of interest, together with the other publications, were sufficient to establish a prima facie case of defamation.

The evidence of this conduct by Defendants, however, is not sufficient in these circumstances to establish a prima facie case of defamation. Under Pennsylvania law, in an action for defamation the Plaintiff must prove:

> (1) the defamatory character of the communication; (2) its publication by the Defendants; (3) its application to the Plaintiff; (4) an understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient that the communication is intended to apply to Plaintiff; (6) special harm to the Plaintiff; and (7) abuse of a conditionally privileged occasion.

Davis v. Res. for Human Development, Inc., 770 A.2d 353, 357 (Pa.Super. 2001).

A statement is defamatory if it tends to harm the reputation of another and to "lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Thomas Merton Center v. Rockwell International Corp.*, 497 Pa. 460, 442 A.2d 213 (1981). It is, however, well-settled that communications made "on a proper occasion, from a proper motive, in a proper manner and based upon reasonable cause are privileged." *Davis, supra*. 770 A.2d at 358.

The Pennsylvania Superior Court has further explained that proper occasions giving rise to conditional privilege exist when: (1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest in the public is involved. *Vargo v. Hunt*, 581 A.2d 625, 627 (Pa.Super. 1990). Whether a communication is privileged is a question of law for the court. *Miketic v. Baron*, 675 A.2d 324, 327 (Pa.Super. 1996).

Once the communication in question is deemed conditionally privileged, it is the plaintiff's burden to show that the defendant abused the conditional privilege. *Davis, supra*. 770 A.2d at 359. In order to prove abuse of the privilege, the plaintiff must show that the communication was "actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose. *Id*."

First, Plaintiffs argue that the Defendants shared with each other a letter written by counsel for the former employee in which allegations of wrongdoing were made against Zarra. None of these Defendants is alleged to have written the letter and none of the Defendants is alleged to have falsely commented upon the letter. Similarly, none of these Defendants is alleged to have shared the letter with anyone outside of GNC or Safeguard. The testimony at trial showed only that the Defendants who initiated the investigation and those who took part in the investigation performed their job duties in an appropriate and responsible manner. Contrary to Plaintiffs' underlying allegations that there was malice involved, there was no testimony showing any malice. Moreover, there was no evidence at all that Defendants Kelly, Meyers, Heilman, Watts or Kuniak ever made any publication whatsoever about the statements. There was no cause of action stated for defamation or invasion of privacy—false light against any of these individuals.

Even if the communications at issue could meet the definition of defamation, the Court must determine whether the alleged statements upon which Plaintiffs' defamation claims are based were made in connection with the GNC investigation of Zarra and are privileged and, if so, have Plaintiffs met their burden to prove that Defendants abused the privilege.

Serious allegations of a conflict of interest and possible dishonesty were made against Zarra from an apparently reliable source accompanied by documentary evidence suggesting that Zarra was somehow involved in the channeling of GNC funds to his mother. The investigation was initiated and conducted by senior managers at GNC as well as GNC attorneys. As earlier discussed, deliberate measures were taken to conduct a close investigation among high ranking employees of GNC on a "need-to-know basis."

These communications made prior to Zarra's termination

which Plaintiffs claim were defamatory were made in connection with the investigation of Zarra. During his deposition, Zarra testified that all of the individual Defendants were involved in the investigation into his conduct. (Deposition of John A. Zarra, Jr., 11/17/06, pp. 80-82).

Here, each of the Defendants shared an interest in Zarra's performance in his position as Senior Vice President of Loss Prevention for GNC. It is undisputed that counsel for GNC received credible information supported by documentary evidence that suggested that Zarra was possibly engaged in channeling GNC funds to his mother. If GNC's legal department had not referred the matter to senior management, they would have been derelict in fulfilling their obligations to the company. The investigation and communications at issue were directly related to the allegations of improper conduct by Zarra. The individuals involved had a legitimate interest in the matter. A conscious decision was made by management to limit the scope of the investigation and the number of individuals involved. The only individuals who participated were considered necessary for a complete investigation. The communications at issue were therefore conditionally privileged because the circumstances resulted in the investigation by GNC management employees who had a common interest in Zarra's conduct and who reasonably believed that other senior staff members were entitled to know and needed to know the underlying allegations against Zarra in order to examine the factual basis of the allegations.

Having determined that the communications were conditionally privileged, the Court must determine if the conditional privilege was abused by Defendants. The Pennsylvania Superior Court has explained abuse of privilege:

> Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.

Miketic v. Baron, 450 Pa.Super. 91, 675 A.2d 324, 329 (1996) (quoting *Beckman v. Dunn*, 276 Pa.Super. 527, 419 A.2d 583, 588 (1980)).

While Plaintiffs suggest that the investigation was triggered by malice, there is no credible evidence to support Plaintiffs' suggestion. The Court has already discussed the limited purpose, scope and number of individuals involved in the investigation as well as the reasonable basis for the investigation. There is again no evidence that the investigation or communications exceeded the scope necessary to accomplish the purpose of the investigation. Plaintiffs have not produced credible evidence to support a contrary finding. The Court accordingly found that the communications at issue were conditionally privileged and that the privilege was not abused.

Plaintiffs also complain that several of the Court's rulings on evidentiary matters were improper. Plaintiffs set forth a series of evidentiary rulings in their Statement of Errors Complained of on Appeal and refer the Court to certain paragraphs in their Motion to Remove Compulsory Nonsuit in support of the allegations of error. Because of the number of errors alleged and the incorporation of the lengthy Motion to Remove Compulsory Nonsuit, the Court finds many of these allegations vague and confusing. Plaintiffs first argue that the Court improperly precluded the admission of written documents authored by Fortunato and alleged oral statements made by Fortunato to Zarra. Plaintiffs argue that the oral and written statements which were excluded were relevant to show Fortunato's improper motives of malice, spite or negligence which would defeat Defendants' asserted conditional privilege. The Court found that the probative value of the oral statements attributed to Fortunato by Zarra were outweighed by the danger of unfair prejudice, confusing issues and misleading the jury. These were not statements that in any way formed the basis of Plaintiffs' defamation claim against Fortunato or the other Defendants and were properly precluded under Pennsylvania Rule of Evidence 403.

There were no facts on the record prior to trial to support Plaintiffs' allegations that Fortunato made the statements which Zarra attributed to him. Zarra never testified regarding the statements in his deposition nor did Marsha Zarra, his wife, testify that Fortunato had ever made any of the statements.

Plaintiffs complain that the Court did not admit a performance evaluation of Zarra's successor done two years after Zarra's termination. This document was completely irrelevant to the issues in the case. Similarly, a memorandum authored by Fortunato regarding Zarra's successor's promotion was irrelevant because it dealt with the focus and procedures of the Loss Prevention Department after Zarra's termination. This evidence had no bearing on Zarra, the investigation, Zarra's termination and the claims asserted in his Complaint.

Plaintiffs argue that it was error for the Court to exclude Zarra's testimony regarding his perception of hostilities between the Retail Operations Department and the Loss Prevention Department as well as Zarra's testimony concerning his present sense impressions of "serious problems concerning a $20 million reset that Fortunato was managing" in 2002. (Plaintiffs' Statement of Errors Complained of on Appeal, paragraph 9). These complaints are without merit. The Court found that the testimony regarding Zarra's impression of inter-department hostilities was speculative and lacked a proper foundation. Plaintiffs cite to the trial transcript but the Court finds nothing on the pages cited to support Plaintiffs' assertions and arguments.

Plaintiffs complain that the Court improperly excluded their Exhibit 2, which was Welsh's rebuttal to his performance evaluation. Plaintiffs argue that this was a business record which was an exception to the hearsay rule. A review of the transcript, however, shows that Plaintiffs failed to establish any foundation to claim that this document was a business record. (Tr. p. 201). Because Plaintiffs failed to establish the document as a business record, the Court properly found it inadmissible as hearsay.

Plaintiffs further argue that the Court erred by excluding Zarra's testimony concerning Welsh's statements in a conversation with Fortunato as well as testimony regarding Welsh's feelings about his relationship with Fortunato. Objections to such testimony were properly sustained because the testimony was hearsay and questions regarding Welsh's perceptions of his relationship with Fortunato called for speculation.

Plaintiffs further complain that the Court improperly excluded evidence regarding retail operations personnel fabricating complaints regarding the third party vendor, Safeguard Security. Basically, Zarra was asked what motivation other individuals had to potentially lie. Not only was the question posed confusing, it called for nothing but speculation. No factual foundation had been laid for such a question

and it was properly excluded.

Plaintiffs further argue that the Court erred when it excluded evidence relating to alleged damages suffered by Plaintiff, Marsha Zarra, arising from her claim of loss of consortium. Plaintiffs, however, failed to plead a count for loss of consortium in their Complaint. Loss of consortium is the loss of services, society and conjugal affection of one's spouse. *Hopkins v. Blanco*, 224 Pa.Super. 116, 302 A.2d 855 (1973), aff'd, 457 Pa. 90, 320 A.2d 139 (1974). It is a separate and distinct cause of action arising from the impact of one spouse's physical injuries on the other spouse's marital privileges and amenities. *Kowal v. Commonwealth, Department of Transportation*, 100 Pa.Cmwlth. 593, 515 A.2d 116, 119 (1986). Here, Marsha Zarra failed to plead a cause of action for loss of consortium and evidence of damages based upon loss of consortium was properly excluded.

Finally, Plaintiffs argue that the Court improperly denied Plaintiffs' motion to amend their pre-trial statement to include a report of Plaintiffs' psychiatric expert, Victor G. Stiebel, M.D. On the morning of trial, Plaintiffs sought to supplement their pre-trial statement with Dr. Stiebel's report while Defendants' expert reports were submitted with the Defendants' pre-trial statement. (Tr. p. 23). Plaintiffs did not seek an extension of time from the Court in which to respond to Defendants' reports and instead waited until the morning trial was to begin to seek to supplement their pre-trial statement. The Court denied Plaintiffs' motion and advised counsel for Plaintiffs that it would reserve ruling on the question of whether the Stiebel report could be admitted in rebuttal. This was clearly not an erroneous ruling by the Court.

For all of the foregoing reasons, the Court properly denied Plaintiffs' Motion to Remove Compulsory Nonsuit.

BY THE COURT:
/s/Horgos, J.

Choice Chiropractic and Wellness Center, P.C. v. Dr. Adam Rathfon, and Rathfon Family Chiropractic, LLC

Covenant Not to Compete

1. Plaintiff employed Defendant as a chiropractor. At the time Defendant was hired, he signed a non-compete agreement. Defendant left Plaintiff's employment and started his own chiropractic practice. Plaintiff sued alleging breach of the non-compete agreement.

2. The non-compete agreement prohibited Defendant from engaging in a competitive business with Plaintiff for two years in certain zip codes or within a six mile radius of Plaintiff's office where Defendant was assigned to work. At the time Defendant signed the agreement, Plaintiff only had one office on McKnight Road.

3. Plaintiff alleged that Defendant opened his own office within six miles of Plaintiff's Wexford office, where Defendant primarily worked.

4. Defendant asserted that he and Plaintiff never negotiated a new non-compete agreement when the Wexford office was opened.

5. The Court denied Plaintiff's request for summary judgment because there were disputed material facts. Specifically, there was a factual dispute regarding signing of the contract; which offices were considered in the contract since no Wexford office existed at the time the contract was signed; and on-going negotiations between the parties when Defendant's employment ended that "may impact the good faith of each party." Last, the Court noted that covenants not to compete are not favored in Pennsylvania.

(Margaret M. Cassidy)

Jeffrey T. Morris for Plaintiff.
John K. Foster, III for Defendants.

No. GD 07-021602. In the Court of Common Pleas for Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., September 22, 2008—This case matter involves a non-competition clause in an employment contract. It is before me on the Motion for Summary Judgment filed by Plaintiff, Choice Chiropractic and Wellness Center, P.C. ("Choice") against Defendant, Dr. Adam Rathfon, and Rathfon Family Chiropractic, LLC., ("Rathfon"). Specifically, Choice hired Rathfon as a chiropractor in its McKnight Road office, which at the time was its *only* location. At his time of hiring, Rathfon signed an Associate Doctor Agreement ("Agreement") effective September 8, 2005, whereby he agreed, *inter alia*, to not engage in any competitive business within two years of his separation from Choice in certain enumerated U.S. Postal Service Zip Codes, or "within 6 miles radius of any chiropractic office of Choice Chiropractic…to which employee was assigned,"…"within the last year of employment." (See page 2 of the Agreement under subheading "Covenant not to compete and Confidentiality Provision.").

The above section in the agreement also provided for liquidated damages in the amount of $4000 per month for 24 months for any violation of the covenant not to compete.

Choice alleges that Rathfon left his employ with Choice on March 17, 2007, and shortly thereafter formed Rathfon Family Chiropractic, became associated with it, and began practicing chiropractic medicine at an office less than 6 miles from Choice's Wexford Office, to-wit, Rathfon Family Chiropractic at 730 Parkwood Drive, Cranberry Township, PA 16066. It is also alleged that Rathfon worked primarily in the Wexford office.

Rathfon denies the aforesaid allegation and contends he was terminated by Choice. He further denies the critical averments of paragraph 18 as to distance–6 miles–and the office at which he worked–Wexford.

Rathfon further defends that when the covenant not to compete was entered, the only office operated by Choice was on McKnight Road, and no new agreement was negotiated when the Wexford office was opened. Rathfon has also filed a Counter-Claim for Choice's continued use of his image as a staff member on its website advertising.

Choice has sought Summary Judgment in this case. The standard in granting Summary Judgment is that no reasonable dispute of material facts exists and the non-moving party is entitled to every reasonable inference from those facts. Here, there are disputes of fact as to the circumstances of the signing of the contract, and also that no Wexford Office exited at that time. It also appears that some negotiations were on-going between the parties when the termination

occurred that may have an impact on the good faith of each party. Finally, covenants not to compete are not favored in Pennsylvania.

Accordingly, the Choice has not met the standard of "no dispute of material fact" and this Summary Judgment is DENIED.

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

Date: September 22, 2008

Merry Lee Conway v. Billie Jo Streyle, the City of Pittsburgh and Mitchell A. Hahne

Enforcing Personal Injury Settlement Agreement

1. Plaintiff appealed the Court's order enforcing a settlement in a personal injury case.

2. In March 2002 Plaintiff was injured in a motor vehicle accident. In January 2004 she filed a complaint against Defendants for injuries she sustained in the accident. On March 14, 2005, Plaintiff placed her case at issue and, the case was scheduled for trial on November 5, 2007. On November 5, 2007, the Court continued the case for settlement. On May 22, 2008 Defendants presented a Motion to Enforce Settlement. The Court allowed Plaintiff's counsel to withdraw from the case. After a hearing on the enforcement motion, the Court entered an order enforcing the settlement agreement and deeming that Plaintiff executed the releases.

3. Plaintiff appealed the Court's decision alleging that she had never given her former counsel or the Court permission for any settlement amount. Further, Plaintiff maintains that all damages in a personal injury case should be discussed and agreed upon by all parties prior to settlement and, in this case they were not discussed. Plaintiff also asserted that as a result of the forced settlement, she is prohibited from discussing the case but, since it is the City of Pittsburgh disbursing public funds, in accordance with Pennsylvania's Right to Know Act, the public has a right to know the case details.

4. The Court stated the settlement agreement must be enforced based on the evidence from the settlement hearing which demonstrates that the parties agreed upon the essential terms of the agreement and intended to be bound by the terms. First, Plaintiff's counsel, whom the Court found credible, testified that the Plaintiff had given him authority to accept $25,500 as settlement. Second, Plaintiff testified that she "agreed in part, not in total" with the agreement. The Court noted that Plaintiff's testimony contradicted her concise statement of matters complained of where she stated that she never gave permission at any time for settlement of any amount.

5. The Court explained that Plaintiff's dissatisfaction with the terms of the settlement agreement is not a basis to void the agreement. Additionally, Plaintiff had refused to sign the releases. The Court found that since the material terms of the settlement were agreed upon, Plaintiff's refusal to sign the releases is not relevant.

(Margaret M. Cassidy)

Christopher T. Sichok for Plaintiff.
David M. McQuiston for Defendant.

No. GD 04-1830. In the Court of Common Pleas for Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, J., September 24, 2008—This appeal arises from this court's order of July 1, 2008, enforcing a settlement in this personal injury case filed by Plaintiff Merry Lee Conway against Defendants Billie Jo Streyle, the City of Pittsburgh, and Mitchell Haune. The relevant facts are as follows:

On March 8, 2002, Plaintiff was involved in a motor vehicle accident. Plaintiff filed her complaint on January 27, 2004 alleging injuries sustained in the accident. On March 14, 2005, Plaintiff placed her case at issue and the case was scheduled to be called for trial on November 5, 2007. On November 5, 2007, the Honorable Timothy Patrick O'Reilly continued this case for settlement. On May 22, 2008, Defendants presented a Motion to Enforce Settlement to this court. I issued a rule to show cause upon Plaintiff to show why the parties' settlement agreement of $25,500 should not be enforced. This court also allowed Plaintiff's counsel to withdraw his appearance. After a hearing before this court on June 30, 2008, this court entered an order dated July 1, 2008, enforcing the settlement agreement and deeming the releases to have been executed by Plaintiff.

On July 29, 2008, Plaintiff filed an appeal. On August 5, 2008, this court ordered Plaintiff to file a concise statement of matters complained of on appeal pursuant to Pa. Rule of Appellate Procedure 1925(b). Plaintiff filed her concise statement and amended concise statements on September 2 and 3, 2008.

Plaintiff asserts the following issue:

> It is her position that permission was never given, implied, requested or expressed by her to former Counsel or to court at any time for settlement of any amount. She maintains that all assertions, including medical damages, loss of earnings, student loan default, long term needs, and all common practice damages due in a personal injury case are to be discussed and agreed upon by all parties before the settlement. As a result of forced settlement, plaintiff is prohibited from discussing the case. However, in accordance with the provisions set forth in Pennsylvania's Right to Know Act the public has a right to know the details of the case because the City of Pittsburgh is obligated to disburse public funds.

It is a well-settled doctrine that settlement agreements are a highly favored judicial tool. *Miller v. Clay Township*, 555 A.2d 972, 973 (Pa.Cmwlth. 1989). Pennsylvania law is clear that "[i]f parties agree upon essential terms and intend them to be binding, 'a contract is formed even though they intend to adopt a formal document with additional terms at a later date.' The intent of the parties is a question of fact which must be determined by the fact-finder." *McDonnell v. Ford Motor Co.*, 643 A.2d 1102, 1105-6 (Pa.Super. 1994). "The fact-finder is free to believe all, part or none of the evidence and Superior Court will not disturb credibility determinations of the court below." *In re Sweeney*, 625 A.2d 426, 430 (Pa.Super. 1997).

At the hearing before this court on June 30, 2008, Plaintiff's former counsel, John Rushford, Esq., credibly

testified that Plaintiff had given him authority to accept $25,500 as settlement in this case. (Hearing Transcript of June 30, 2008 "HT" 5, 6). Plaintiff testified, however, that her concerns were related to her health insurance coverage. (HT 13) Plaintiff indicated that she was interested in some "creative way of managing this." (HT 14). When asked whether she agreed to settle for $25,500, she answered, "I agreed in part, not in total." (HT 15)

Plaintiff's own testimony directly contradicts her statement in her concise statement where she indicates, "It is her position that permission was never given…at any time for settlement of any amount." *See* Amended Answers to Matters Complained of on Appeal. While this court acknowledges that Plaintiff may be having difficulty obtaining health insurance coverage, that relief would not even have been available to Plaintiff had she not settled her case and gone to trial instead. A jury could merely award monetary damages in this personal injury case.

Furthermore, Plaintiff's dissatisfaction with the terms of a settlement agreement is not a basis to void obligations under the settlement agreement. *See New Charter Coal Co. v. McKee,* 191 A.2d 830 (1963). This court has previously held that buyer's remorse is not grounds to overturn a valid settlement. *See Dick Corp. v. Dukes-Sparks,* GD 05-12124 (December 20, 2005), *aff'd* 907 A.2d 1142 (Pa.Super. 2006).

Plaintiffs refusal to sign a final release is also not relevant to the enforceability of the settlement agreement. *See Mazzella v. Koken,* 739 A.2d 531, 537 (Pa. 1999). In her Answer to Defendant's Petition to Enforce Settlement, Plaintiff states, "There is no written agreement between her and her former counsel, nor is there a written settlement agreement between her former counsel and counsel for the Defendants. Plaintiff has refused, and still refuses, to sign Releases submitted by counsel for Defendants." Since this court has held that the material terms of the settlement were agreed upon, Plaintiff's failure to execute the releases is not relevant.

For the foregoing reasons, the Superior Court should affirm this court's order of July 1, 2008 enforcing the settlement.

BY THE COURT:
/s/Strassburger, A.J.

Dated: September 24, 2008

Commonwealth of Pennsylvania v. William David Blick

PCRA—Ineffective Assistance of Counsel—Alibi Instruction —Expert Demonstration—Character Evidence

1. Defendant's PCRA Petition claiming ineffective assistance of counsel following his conviction of Murder of the Second Degree, Arson and Recklessly Endangering Another Person was denied. Defendant alleged that trial counsel was ineffective for failing to request an alibi instruction, failing to object to a fire demonstration and failing to present character evidence.

2. Defendant's claim of ineffectiveness for failing to request an alibi instruction does not have arguable merit. An alibi instruction is only warranted if the Defendant presents evidence that puts him at a different location from that of the crime scene at the time period when the crime was committed. Defendant testified that he was in the location of where the fire was started when it was started. Defendant's argument that there was evidence that placed another person in the vicinity of the fire at the same time was irrelevant to whether or not an alibi instruction was warranted.

3. Defendant's claim that counsel was ineffective for failing to object to the introduction by the Commonwealth of an expert's demonstration that contradicted Defendant's defense has no arguable merit. The demonstrations were properly admitted and any objection to admissibility would have been overruled. Defendant's arguments regarding the variables that would affect the outcome of the demonstration go to the weight not to the admissibility of the evidence.

4. Defendant's claim that counsel was ineffective for not presenting character witnesses failed because witnesses proffered by the Defendant as character witnesses would have presented testimony that was inadmissible, as their personal opinions as to Defendant's good character were not based on Defendant's reputation in the community. Witnesses who could have provided admissible character evidence, who were not called, does not constitute ineffective assistance if the decision was reasonably based and was not the result of sloth or ignorance of available alternatives. Testimony that the Defendant was a "nice guy" and "peaceful" would not likely have affected the outcome of the trial as there was no evidence presented that tended to show that Defendant knew that anyone was living in the residence when he set fire to it.

(C. Kurt Mulzet)

Mark Clark for the Commonwealth.
Robert E. Stewart for Defendant.

No. CC 200011996. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

MEMORANDUM OPINION AND ORDER OF COURT

Manning, J., August 12, 2008—Before the Court is the defendant's Post Conviction Relief Act Petition. The defendant was found guilty, following a jury trial, of three counts of Murder of the Second Degree, two counts of Arson, and one count of Recklessly Endangering Another Person. On May 18, 2001 he was sentenced three concurrent terms of life imprisonment on the Homicide counts and concurrent terms of not less than one or more than two years on the reckless endangerment counts. No sentences were imposed to the Arson counts because they merged with the Homicide counts. Following sentence, defendant retained new counsel, Robert E. Stewart, who filed Post-Sentence Motions, which were denied. The defendant filed a timely Notice of Appeal to the Superior Court. In an Opinion and Order dated January 2, 2004, the Superior Court affirmed the Judgment of Sentence, declining to address the ineffective assistance of counsel claims in light of the decision of the Pennsylvania Supreme Court in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), which held that ineffectiveness of counsel claims should first be raised in the trial court. The Superior Court affirmed the judgment of sentence without prejudice to the defendant's right to raise the ineffective assistance of counsel claims in the trial court. When the matter was returned to this Court, defendant filed the instant PCRA Petition, raising the following claims of inef-

fective assistance of counsel:

> 1. That trial counsel was ineffective for failing to call character witnesses;
>
> 2. That trial counsel was ineffective for failing to object to the fire demonstration;
>
> 3. That trial counsel was ineffective for failing to adequately cross examine a witness from the Coroner's Office;
>
> 4. That trial counsel was ineffective for failing to request an alibi instruction;
>
> 5. That trial counsel was ineffective in failing to object to testimony regarding the use of an arson dog;
>
> 6. That trial counsel was ineffective in failing to adequately cross examine witness Thomas Hitchings; and
>
> 7. That trial counsel was ineffective in failing to present expert testimony concerning the cause of the fire.

A hearing on these claims was held and counsel requested time, following the hearing, in which to file a Brief.[1] Counsel filed his brief on July 2, 2008 and the Commonwealth responded on July 10, 2008.

Claims asserting ineffectiveness of counsel must satisfy three requirements. Defendant must "plead and prove": "(1) that his claim has arguable merit; (2) that counsel's actions or inaction was not the product of a reasonable strategic decision; and, (3) that he suffered prejudice because of counsel's action or inaction." *Commonwealth v. Pursell*, 724 A.2d 293, 304 (1999). Whether appellant can be said to suffer "prejudice" in this context is by alleging and proving "there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." *Commonwealth v. Pierce*, 786 A.2d 203, 213 (2001).

The alibi instruction claim fails to meet the first part of this test, that the underlying claim has arguable merit. An alibi instruction is only warranted if "…the defendant presents evidence which covers the time period when the crime was committed and which puts him at a different location than that of the crime scene." *Commonwealth v. Poindexter*, 646 A.2d 1211, 1218 (Pa.Super. 1994). The evidence presented at trial placed the defendant at the scene of the crime at about the time it was committed. He was at the Homeville Fire hall, which is located at 3900 Greensprings Lane. The fire was at 3732 Greensprings Lane, less than a five minute walk away. He testified that he left the fire hall to walk to Stumpf's Bar, located at 3704 Greensprings Lane. This would have taken him past the fire scene, which was on the same side of the street as the fire hall and the bar. He testified that after seeing that the bar was closed, he went to the back porch of 3732, knocked on the door and, when he left, may have thrown a lit cigarette on the porch. He then walked back to the fire hall. Minutes later the alarm in the fire hall rang and when the defendant went outside, he could see that 3732 Greensprings Lane was in flames.

The evidence presented by the defendant not only failed to place him at another location at the time of the crime, *it placed him at the location of the crime, in the precise portion of that location (the back porch) where the fire was started when it was started.* The close proximity between the fire hall and the home and the fact that the defendant was away from the fire hall minutes before the fire was noticed, makes it impossible to conclude that he so removed from where the crime was committed that he could not have committed it.

The defendant argues that he was entitled to an alibi instruction because there was other evidence that placed another person in the vicinity of the fire at the approximate time that it was started. This evidence that another person was also in close enough proximity to start the fire was irrelevant to whether or not an alibi instruction was warranted. Because the *defendant* was in the location where the crime was committed at the time that it was committed, regardless of whether other persons were also there, he was not entitled to an alibi instruction. Had one been requested, it would not have been given. Accordingly, because an instruction would not have been given if requested, counsel was not ineffective for not requesting one.

The defendant's next claim is that counsel was ineffective for failing to object to the introduction by the Commonwealth of evidence of a demonstration its expert performed that tended to show that a fire could not have been started on the rear porch simply by the defendant having dropped a lit cigarette, as he testified he may have done. Again, there is no merit to the claim that underlies the allegation of ineffectiveness. The evidence pertaining to these demonstrations was properly admitted and any objection to its admissibility would have been overruled. The decision to admit the results of experiments, like the decision to admit other forms of evidence, is ordinarily one for the trial court's discretion, reviewable only for an abuse of that discretion. See generally *McCormick on Evidence,* §202, at 485-86 & n.17 (2d ed. 1972). Authority is unanimous that test results of experiments are admissible if the conditions under which the experiment was conducted are "substantially similar" to the conditions involved in the commission of the crime. See *Commonwealth v. Craven*, 443, 11 A.2d 191, 195 (1940). 13 *Wharton's Criminal Evidence,* §624, at 225 (13th ed.); *McCormick*, *supra*, at 485-88. Accepting defendant's argument that variables such as the age of the carpet on the porch; the possibility that the former resident had "wiped things off with towels and placed them on the porch" or that there may have been grease on the carpet may have affected the test results, these facts were brought out to the jury and fully exploited on cross-examination and the extent to which the actual conditions may have deviated from the test conditions was a consideration for the jury in determining the weight to be accorded the evidence. This Court is satisfied from a review of the record that the conditions under which the experiments were conducted were substantially similar to the facts presented at trial, including the defendant's testimony concerning his dropping of a lighted cigarette on the porch. The experiments were therefore probative of the truthfulness of defendant's testimony and the likelihood that the fire was started accidentally by the defendant. Accordingly, the defendant failed to meet the first prong of the test for ineffective assistance of counsel; that the underlying claim was of arguable merit.

Moreover, the record from the PCRA hearing established that counsel had a reasonable basis for not objecting even if there was some arguable merit. Counsel testified that he argued to the jury that the unknown male who several other witnesses placed at the scene of the fire may have been responsible for starting the fire. Accordingly, whether the fire could have been started accidentally was not particularly material to the defense theory that someone else started the fire.

In addition, counsel related that he feared that if he chal-

lenged the evidence of the demonstrations, the Commonwealth would redo the demonstrations, curing the discrepancies between the conditions in the experiment and the conditions at the crime scene, but that the results would be the same. Obviously, he believed that it was better to not object to the demonstration and then point out to the jury, during cross-examination and in closing argument, why the differing conditions made the demonstrations unreliable than to move to bar evidence of the demonstrations only to have the Commonwealth redo them with more similar conditions. The defendant's failure to establish that counsel did not have a reasonable basis for failing to object to evidence of the demonstrations is another reason why this claim must be dismissed.

Finally, the defendant claims that counsel was ineffective for not presenting character witnesses. To establish that counsel was ineffective for not calling certain witnesses, a defendant must prove the existence and availability of the witnesses, counsel's actual awareness of, or duty to know of the witnesses, the witnesses' willingness and ability to cooperate and appear on the defendant's behalf, and the necessity for the proposed testimony. *Commonwealth v. Stanley*, 632 A.2d 871, 872 (1993).

The defendant testified that counsel discussed the issue of character witnesses with him and said that he would talk to his parents. Defendant's father testified that he did not discuss character evidence with defense counsel. Defendant's mother provided conflicting testimony at the PCRA hearing regarding discussions with defense counsel over the issue of presenting character evidence. First, during her direct examination, she said that counsel did not discuss character evidence with her during the trial. Later, during cross-examination, she stated the she did discuss character witnesses with trial counsel at the time of the defendant's trial but that counsel told her that he did not believe that character evidence is generally effective.

Trial counsel had a different recollection. He said at the PCRA hearing that he had a discussion with the defendant regarding character evidence and he explained to the defendant his view on the efficacy of character evidence in the context of the defendant's case. He said that he did not believe that under the particular circumstances of this case character evidence would have an impact. He further stated that it was the defendant's decision whether or not to call character witnesses and had the defendant wanted to pre-sent such evidence, he would have presented it. Based on his advice, the defendant agreed with the tactical decision not to present character evidence. Moreover, both counsel and the defendant agreed that the defendant did not present counsel with the names of any potential character witnesses, although counsel recalled that they talked generally about calling friends and family members of the defendant. He asked the defendant about presenting a clergy member, but the defendant did not identify any clergy who could have testified as a character witness.

This Court finds the testimony of counsel to be credible. He discussed with the defendant whether or not to call character witnesses. He explained to the defendant his view that in this case having friends and family members testify that the defendant was peaceful and law abiding would not have had an impact. Counsel suggested that perhaps a minister or pastor would have an effect, but the defendant could not provide him with the name of any such person. Based on this discussion, the defendant elected to follow his attorney's advice and not present character evidence.

With regard to three of the witnesses proffered by the defendant as character witnesses, the Court finds that the underlying claim does not possess arguable merit because their testimony did not constitute admissible evidence. Character evidence is limited to his general reputation for the particular trait or traits of character involved in the commission of the crime charged." *Commonwealth v. Luther*, 463 A.2d 1073, 1077 (1983). Personal opinion as to a defendant's good character or other comments as to a defendant's character that are not based on the defendant's reputation in the community are not admissible. Character testimony is hearsay evidence of what persons other than the witness have said about the defendant's character. Brian McClaren stated that he never had any discussions with other persons about whether the defendant was a violent person or not. He simply stated that he never knew the defendant to have been in a fight. His personal knowledge that the defendant had never been in a fight would not have been admissible, as it was not based on what other persons had told this witness. It was not reputation evidence and was therefore not admissible. Adam Seipel also offered *his* opinion that the defendant was a peaceful person and that he never knew the defendant to have ever been in a fight. This was also not reputation evidence and would not, therefore, have been admissible at trial. Christine Valeriano admitted on cross-examination that she did not "converse specifically" with any other person about the defendant, but that she knew the same people in the community. Her testimony would also, therefore, not have been admissible, as it was not based on the defendant's reputation in the community.

With regard to the other two proffered witnesses, Albert Murzyn and Robert Gerzi, although they would have provided admissible character evidence in that Murzyn would have testified that the defendant had the reputation for being a "nice guy" and Gerzi would have testified that the defendant had a reputation for his peaceful nature, the Court finds that counsel had a reasonable basis for advising the defendant that presenting such testimony would not have had an impact. A decision by counsel not to take a particular action does not constitute ineffective assistance if that decision was reasonably based, and was not the result of sloth or ignorance of available alternatives. *Commonwealth v. Collins* 545 A.2d 882, 886 (1988). See also: *Commonwealth v. Christy*, 515 A.2d 832, 837 (1986), *cert. denied,* 481 U.S. 1059, 107 S.Ct. 2202, 95 L.Ed.2d 857 (1987); *Commonwealth v. Twiggs*, 331 A.2d 440, 443 (1975). "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Commonwealth v. Lee* 585 A.2d 1084, 1089 (1991), quoting *Strickland v. Washington*, *supra*, 466 U.S. at 668 (1984). The relevant inquiry in cases such as this is whether counsel's failure to pursue a particular defense theory was reasonable. See: *Commonwealth v. Blair*, 421 A.2d 656, 660 (1980) ("The decision not to present a particular defense is a tactical one and will not be deemed ineffective stewardship if there is a reasonable basis for that position."), e.g. *Commonwealth v. Davenport*, 431 A.2d 982 (1981) (counsel's choice of self-defense theory over that of voluntary intoxication was reasonable); *Commonwealth v. Garcia*, 535 A.2d 1186 (1988) (strategy seeking acquittal rather than one seeking verdict of manslaughter was effective assistance of counsel).

The evidence presented at trial did not tend to establish that the defendant intended to hurt anyone when he set the

fire. The Court granted the defendant's Motion for Judgment of Acquittal as to the charges of first degree murder because of the absence of any such evidence. Rather, the evidence tended to show, and the Commonwealth argued, that the defendant set this fire so that he could participate in putting it out as a volunteer fireman. There was no evidence presented that tended to show that he knew anyone was living in the residence or that he intended to harm anyone. At best, the evidence established that he acted with reckless disregard to the possibility that others, including firemen might be hurt in putting out the fire. Under these circumstances, testimony that the defendant was a "nice guy" and "peaceful" would not likely have affected the outcome of this trial and counsel was reasonable in so advising the defendant.

For the same reasons, the defendant could not establish prejudice. Again, because the evidence tended to show that he did not intent to harm anyone, evidence that he was a peaceable, "nice" person, offered by his friends, was not the type of evidence that would have been reasonably likely to change the outcome of the proceedings.

For these reasons, the following Order will be issued:

ORDER OF COURT

AND NOW, this 12th day of August, 2008 the defendant's Post Conviction Relief Act Petition is The Defendant is advised of the following:

1. He has the right to appeal this Order and must do so within thirty (30) days of the date of this Order;

2. He has the right to the assistance of counsel in the preparation of any appeal;

3. If he is indigent, he has the right to proceed on appeal without the payment of costs and with court appointed counsel as provided for in Pa. R. Crim. P. 122;

The Office of Court Records shall serve copies of this Order upon counsel for the defendant by regular mail and upon the Office of the District Attorney of Allegheny County by interoffice mail pursuant to Pa. R. Crim. P. 114 (B).

BY THE COURT:
/s/Manning, J.

[1] Defense counsel also stipulated at the hearing that he was limiting his request for relief to the claims involving the alibi instruction, the fire demonstration and the failure to present character evidence. These were the only claims briefed by the parties and the other claims are considered by this Court to have been withdrawn.

Commonwealth of Pennsylvania v. Richard Jasek Commonwealth of Pennsylvania v. Justin Shaw

Nolle Prosequi—Dismissal—Witnesses not Appearing—Service of Subpoena

1. The Court dismissed the instant prosecution rather than granting prosecution's Petition for a *Nolle Prosequi* due to the fact that the Commonwealth's victim-witnesses did not appear for trial.

2. After one (1) continuance, the case was called. The prosecution stated that it was not prepared to proceed because it did not have the necessary witnesses. The victims-witnesses had been subpoenaed and contacted prior to the trial date. It was subsequently learned that there was no evidence that the subpoenas were personally served on the victims-witnesses.

3. The prosecution requested a *nolle prosequi* but did not ask for a continuance. At the time, the prosecution did not know why the witnesses were not present. The Commonwealth did not request a continuance and, therefore, the issue was waived. Further, at the time the Court dismissed the case no one advised the Court that the witnesses were unavailable, only that they had not appeared.

4. A subpoena left with an adult at the residence of the witness is not proper service pursuant to 42 Pa.C.S.A. 5904, and, therefore, is not enforceable against the witness.

(C. Kurt Mulzet)

Christopher Stone for the Commonwealth.
William Difenderfer for Richard Jasek.
Laura Gutnik for Justin Shaw.

No. CC200706629; No. CC200707183. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., August 20, 2008—The Commonwealth appeals this Court's order of November 21, 2007 denying the Commonwealth's petition for nolle prosequi in the above case and its subsequent dismissal of the instant prosecution. The Commonwealth alleges that this Court abused its discretion in dismissing the instant prosecution rather than granting the prosecution's petition for a nolle prosequi or a continuance of the trial due to the fact that the Commonwealth learned that its victim-witnesses were not available for trial and it was learned that they were not properly served with trial subpoenas. For the reasons set forth below, the order dismissing the charges should be affirmed.

The instant cases against each defendant were filed on February 15, 2007. After being held for court, the cases were consolidated and were originally listed for trial on October 30, 2007. On October 29, 2007, this Court granted a continuance requested by the Commonwealth, over defense objection, to permit the Commonwealth to obtain the medical records that the Commonwealth deemed were important to its case. The trial was then specially listed by this Court to occur on November 21, 2007 at 9:00 a.m. This date, which was the day before the Thanksgiving holiday, was specially selected because Defendant Jasek was incarcerated on a probation detainer resulting from this case and because all parties assured the Court they would be prepared to proceed to trial.

On November 21, 2007, the case was called to commence on two separate occasions, the last time being at 9:50 a.m. At that point, the Court asked Assistant District Attorney Christopher Stone whether the Commonwealth was prepared to proceed. ADA Stone responded that he was not prepared to proceed because he did not have "the necessary witnesses."[1] ADA Stone advised the Court that the witnesses, Paul Weimer and Robert Weimer, were subpoenaed and were contacted prior to the trial date about their appearance at trial. ADA Stone advised that he could provide no reason why the Weimers failed to appear for trial. ADA Stone specifically advised the Court that the Commonwealth

was unable to proceed to trial without the missing witnesses. Counsel for each defendant then moved to dismiss the case. ADA Stone orally moved for a nolle prosequi. The defense objected to the grant of a nolle prosequi because of its concern that the Commonwealth would simply refile the charges and subject Defendant Jasek to being rearrested and subjected to incarceration while awaiting trial on the subsequent arrest. Counsel for Defendant Shaw feared that her client would be rearrested and subjected to incarceration as well. This Court then provided ADA Stone with the opportunity to present argument as to why the prosecution should not be dismissed. ADA Stone responded by advising the Court:

> All I can say is this: I cannot present any good reason why my witnesses are not here now. I do not know of any as I stand here. My officer does not know of any good reason why they are not here.

Relying on the Commonwealth's assertion that it could not prove its case beyond a reasonable doubt, the Commonwealth's failure to provide any "good reason" why its witnesses were absent from trial, Defendant Jasek's current incarceration and the potential incarceration of each defendant upon the refilling of the charges, this Court dismissed the instant prosecution.

The Commonwealth then filed a motion to reconsider the dismissal of this case. This Court convened a hearing on that motion. At the hearing, the Commonwealth presented the testimony of case officer Michael Hasson, a detective with the West Mifflin Police Department. Detective Hasson testified about the general protocol governing the service of trial subpoenas for cases in which he is the case officer in the Court of Common Pleas. He explained that once a case is held for court, the West Mifflin Chief of Police is sent the trial subpoenas from the Allegheny County District Attorney's Office. With respect to subpoenas for West Mifflin police officers, those subpoenas are placed in the officers' respective mailboxes at the police station. The officers receive their subpoenas directly from the Chief of Police. With respect to trial witnesses, he testified that the practice of the West Mifflin Police Department was that constables (in this case, Constable Parkinson) would obtain trial witness subpoenas from either the Chief of Police or the dispatcher and the constable would then serve the subpoenas on the trial witnesses. If a constable had difficulty serving a subpoena, the constable would inform the case officer and the case officer would then attempt to locate the witnesses.

Detective Hasson testified that he was never advised by the constable of any difficulties in subpoenaing the Weimers. However, according to Detective Hasson, other Commonwealth witnesses did appear for trial on that date, including himself. Detective Hasson testified that on the morning of trial, upon realizing that the Weimers did not appear for trial, he attempted to contact Paul Weimer by telephone, without success. He did leave a message on Paul Weimer's answering machine. He made no effort whatsoever to contact Robert Weimer. He explained that he was informed by Constable Parkinson that the Weimers were served with the trial subpoenas for the November 21, 2007 trial date.

Constable Parkinson also testified at the hearing. He testified that he routinely serves trial subpoenas on trial witnesses. He testified that his typical protocol with regard to the service of subpoenas is that he appears at police stations and obtains an envelope bearing his name containing trial subpoenas for witnesses in various cases. He then serves them. He testified that with respect to the October 30, 2007 and November 21, 2007 trial dates, he obtained trial subpoenas for the Weimers from the West Mifflin Police Department. He testified that, relative to the October 30, 2007 trial date, he served trial subpoenas on adult males at the separate residences of Paul Weimer and Robert Weimer. He testified that on November 13, 2007, he delivered subpoenas to adult males at each of the Weimers' residences relative to the November 21, 2007 trial date. Relative to each of these subpoenas, Constable Parkinson completed service returns for the subpoenas directed to the Weimers. Constable Parkinson testified that he never identified the adult males who were served with the subpoenas nor did he make any efforts to identify the persons served with the subpoenas. He could not testify that the persons served were or were not the Weimers. He could not identify one way or the other whom he served with trial subpoenas but he was certain that he served adult males at those residences.

Paul Weimer testified at the hearing as well. Robert Weimer did not testify. Paul Weimer testified that he was never served with a trial subpoena for the November 21, 2007 trial date and he, therefore, did not appear for trial. He testified that he resides at his residence with his son, aged 19. He explained that his brother, Robert Weimer, resides with his wife, his son, aged 20, and daughter. Further, on cross-examination, he testified that he was advised on October 29, 2007 by the Assistant District Attorney assigned to the case at that time that the case scheduled for October 30, 2007 was likely going to be postponed. He testified that, prior to that time, he was not aware of an October 30, 2007 trial date at all. He testified that he made one phone call to the Assistant District Attorney to confirm a trial date after October 29, 2007 but the Assistant District Attorney did not return his telephone call. He testified that he and Robert Weimer were in "Atlantic City" on the November 21, 2007 trial date.

Assistant District Attorney Deana Shirley testified during the hearing. She testified that on September 4, 2007 she sent letters to Paul Weimer and Robert Weimer that a trial date of October 30, 2007 was set by the Court and that they would be receiving subpoenas to appear on that date. She further testified that she requested that subpoenas be prepared for the Weimers and other witnesses. She testified that she knew that Constable Parkinson was to deliver the subpoenas for the October 30, 2007 trial date. Contrary to Paul Weimer's testimony, she testified that she personally spoke with Paul Weimer and advised him of the October 30, 2007 trial date prior to that date and in a separate conversation, she advised him of the postponement of the October 30, 2007 trial date before that date. She also testified that on September 4, 2007 she sent Paul Weimer a letter advising him of the October 30, 2007 trial date. She further testified that Assistant District Attorney Christopher Stone requested that subpoenas be prepared for the Weimers for the November 21, 2007 trial date. Upon completion of the hearing, this Court refused to reconsider its dismissal of the instant prosecution.

Among the issues raised by the Commonwealth in its statement of matters for appeal, the Commonwealth alleges that this Court should not have dismissed the instant prosecution when the Commonwealth requested either a continuance or a nolle prosequi after it was determined whether the witnesses were unavailable on the day the case was called for trial and it was subsequently learned that they were not properly served with their subpoenas.

Initially, it must be noted that the Commonwealth never requested a continuance of the trial on November

21, 2007. This Court believes, therefore, that to the extent the Commonwealth suggests that this Court erred in not grant-ing such relief, this claim is waived. See Pa.R.A.P. 302(a) (stating that "issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); *Commonwealth v. Lawson*, 789 A.2d 252, 253 (Pa.Super. 2001)(explaining that "even issues of constitutional dimension may not be raised for first time on appeal."); *Commonwealth v. Cain*, 906 A.2d 1242, 1244; (Pa.Super. 2006).

This Court also takes issue with the Commonwealth's assertion that this Court dismissed this case after it was determined that the Weimers "were not available on the day the case was called for trial." At the time the Court dismissed this case, nobody advised this Court, and certainly no evidence was presented, that the Weimers were not available to testify. On the contrary, ADA Stone advised this Court that the Weimers had been subpoenaed and he could provide no good reason why they had not appeared. He specifically advised that they had been contacted prior to the November 21, 2007 trial date about that date.

Additionally, even after the Commonwealth had an opportunity to develop a record, it was clear to this Court that the Commonwealth could not demonstrate that the Weimers were unavailable on the day of trial. Rather, the failure of the Weimers to appear was either a result of the Weimers simply not wanting to appear or a breakdown in the Commonwealth's own subpoena protocol.[2] The service of subpoenas in criminal cases is governed by 42 Pa.C.S.A. 5904 which provides:

> § 5904. Subpoena of witnesses
>
> (a) METHOD OF SERVICE.—In addition to any other method of service provided by law, a subpoena may be served upon a witness in a criminal proceeding by registered or certified mail, return receipt requested, or by first class mail.
>
> (b) PROOF OF SERVICE.—A completed return receipt shall be prima facie evidence of service of the subpoena.
>
> (c) DURATION.—A subpoena shall remain in force until the termination of the criminal proceeding.
>
> (d) BENCH WARRANTS.—Upon proof of service of a subpoena, the court may issue a bench warrant for any witness who fails to appear in response to a subpoena. However, such warrant cannot be issued if service has been by first class mail.

This Court is not aware of any authority that permits service of trial subpoenas by leaving a subpoena with an adult at the residence of the witness. Said service is not endorsed in 42 Pa.C.S.A. 5904 nor is it endorsed in any rule of Criminal Procedure.[3] Therefore, this Court does not believe that the subpoenas served by Constable Parkinson, if served on adults other than the trial witnesses, were enforceable against the Weimers.[4] The Commonwealth must bear the burden of its failure to properly obtain trial witnesses and this Court does not believe the Commonwealth can sustain any burden of establishing that a Commonwealth witness was unavailable when it failed to properly secure that witness for trial in the first instance.[5] *See Commonwealth v. Johnson*, 592 A.2d 706, 710 (Pa.Super. 1991); *Commonwealth v. Hughes*, 389 A.2d 623, 625-626 (Pa.Super. 1978)(In context of Rule 600 [then Rule 1100] claims, Commonwealth is not duly diligent when it fails to properly subpoena witnesses).

This Court properly denied the nolle prosequi. "The grant of a petition for nolle prosequi lies within the sound discretion of the [trial] Court, and its action will not be reversed in the absence of an abuse of discretion." *Commonwealth v. Stivala*, 435 Pa.Super. 176, 645 A.2d 257, 261 (Pa.Super. 1994), *appeal denied*, 540 Pa. 581, 655 A.2d 513 (1994) (quoting *Commonwealth v. DiPasquale*, 431 Pa. 536, 541, 246 A.2d 430, 432 (1968)). A court must evaluate two factors in evaluating a request for a nolle prosequi: "(1) whether the reason given by the Commonwealth for requesting the nolle prosequi is valid and reasonable, and (2) whether the defendant, at the time the nolle prosequi is requested, has a valid speedy trial claim." Both the Commonwealth and the defense should be given an opportunity to present argument on the motion. *Commonwealth v. Rega*, 856 A.2d 1242, 1246 (Pa.Super. 2004); *Commonwealth v. Reinhart*, 466 Pa. 591, 353 A.2d 848 (1976), *cert. denied*, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed. 2d 167 (1976).

In this case, the Commonwealth sought and was granted one previous continuance, over defense objection. On the specially listed trial date, the Commonwealth was again unprepared to proceed due to the fact that the Weimers failed to appear. Rather than seek a continuance of the trial date, the Commonwealth simply moved for a nolle prosequi on the sole basis that necessary witnesses did not appear, not that they were unavailable. Upon being asked by the Court to justify the absence of its necessary witnesses, the Commonwealth did not provide a remotely valid justification. Instead, it responded that it had no "good" reason. At that time, according to the Commonwealth, the Weimers were contacted and subpoenaed to attend the trial.

Later it was determined, as set forth above, that the Weimers may not have been properly served with the trial subpoenas. The failure to properly ensure the appearance of a Commonwealth witness is the responsibility of the Commonwealth and this Court does not believe the Commonwealth can shirk this obligation by simply shifting blame to a constable, its constable, especially in light of the fact that this process has been tacitly adopted by the Commonwealth and implemented by the constable over time.[6] If the method of service of trial subpoenas was not proper, the Weimers were not required to be in Court on November 21, 2007 and this Court rejects the Commonwealth's assertions that the Weimers were unavailable. Rather, the record indicates that the Commonwealth did not take the steps necessary to secure the Weimers attendance at trial and on the day of trial, the Commonwealth could provide no good reason why the Weimers failed to appear. The reasons supplied by the Commonwealth for the nolle prosequi were insufficient to justify the relief it sought.

While this Court is convinced that the utter lack of support for a nolle prosequi supports the denial of that request, the Court is also instructed to consider any speedy trial considerations. This case was filed on February 15, 2007 and the nolle prosequi was denied on November 21, 2007. For purposes of speedy trial concerns, trial of this matter could have occurred any time prior to February 15, 2008 without violating the defendants' speedy trial rights.[7] Pa.R.Crim.P 600. The Commonwealth, however, never sought a continuance and did not seek to schedule a trial prior to February 15, 2008. However, had this Court granted the nolle prosequi and the Commonwealth subsequently refiled the charges, the defendants would still have been required to be brought to trial before February 15, 2008. *Commonwealth v. Meadius*, 870 A.2d 802 (Pa. 2005). (When Commonwealth

withdraws a criminal complaint and then files a second complaint containing the same charges, the Commonwealth must bring the defendant to trial within 365 days of the filing of the original complaint when the serial filing is brought about because the Commonwealth does not exercise due diligence). This Court believes that the speedy trial considerations do not impact the analysis of the questions presented in this case.

In sum, the Commonwealth asserted that it was unable to go forward, which this Court interprets to mean that the Commonwealth could not meet is burden to make out a prima facie case, without those witnesses. The Commonwealth never provided a valid or reasonable basis to grant the nolle prosequi. See *DiPasquale,* (Supreme Court held that the rights of the defendant required that a *nolle prosequi* be denied, thereby compelling the Commonwealth to go to trial where Commonwealth had been granted numerous continuances, and, when the case was finally called for trial, the Commonwealth indicated that it would not be able to make out a *prima facie* case against the defendant and defendant's right to speedy trial would be denied if nolle prosequi granted). Due to the Commonwealth's lack of any reason to grant the nolle prosequi and the Commonwealth's failure to request a continuance, the petition for nolle prosequi was denied and the charges against the defendants were dismissed.

BY THE COURT:
/s/Mariani, J.

[1] The Commonwealth's candid acknowledgement that it could not proceed without necessary witnesses was construed by this Court as an admission by the Commonwealth that it could not prove its case beyond a reasonable doubt.

[2] The Court finds it particularly peculiar that both Weimers claim to have not received trial subpoenas despite the fact that the subpoenas were served on adult males at the Weimer's residence on two separate occasions.

[3] This Court believes the purpose of the Rule is to provide the specific means of service required to trigger sanctions for a witness' failure to appear.

[4] There is no question that Constable Parkinson believed he properly served the Weimers and the Commonwealth shared this belief. He completed a proof of service with respect to each of the Weimers. Notably, Robert Weimer was not called as a witness by the Commonwealth at the hearing convened pursuant to the Commonwealth's motion for reconsideration. Consequently, there is no basis to positively conclude that he was not the adult male who was actually given the trial subpoena by Constable Parkinson on November 13, 2007. Considering the Commonwealth's admission that it had no good reason why the Weimers failed to appear for trial on November 21, 2007, the Commonwealth could have sought to enforce the subpoena by seeking a bench warrant to secure the attendance of the witnesses. See 42 Pa.C.S.A. 5904(d). Rather than pursue that option, however, it sought a nolle prosequi.

[5] Assuming, *arguendo*, that service on an adult male residing at the Weimers' residence was sufficient, the record before this Court would be that properly served witnesses ignored the subpoenas and chose to travel to Atlantic City rather than appear for trial. The Commonwealth would be saddled with this development and it would certainly provide no justification to grant a nolle prosequi under the facts of this case.

[6] It should be noted that the Commonwealth's motion for reconsideration did not claim that the service of the trial subpoenas was defective. On the contrary, implicit in the allegation at paragraph 15 of the Commonwealth's motion is the acceptance, by the District Attorney's Office, of the manner of service effectuated by Constable Parkinson since the Commonwealth alleges that someone would have been available at the residences of the Weimers to receive the subpoena. According to the testimony of Constable Parkinson, someone was, indeed, present at both residences and did receive the subpoenas.

[7] It is recognized that the defendants were not incarcerated on this case.

Commonwealth of Pennsylvania v. Eric Rasmussan

IDSI—Certainty of Date of Crime—Use of Prior Testimony

1. Defendant was convicted of Involuntary Deviate Sexual Intercourse (IDSI), Statutory Sexual Assault, Aggravated Indecent Assault, Indecent Assault, Indecent Exposure, Indecent Contact with a Minor, and Corruption of Minors.

2. The Court held that the victims' testimony that the sexual assaults perpetrated by the Defendant occurred sometime between August 2003 and September 2003 fixed the date of the commission of the offenses with reasonable certainty.

3. The Court also held that the Defendant could not use the transcript of the preliminary hearing testimony of the victim as substantive evidence in the case because of Defendant's failure to admit the transcript into evidence.

4. The fact that the prosecutor argued during closing arguments that Defendant's failure to produce phone records weakened defense counsel's suggestion that the victim in this case was repeatedly contacting the Defendant during the relevant time period, did not alter the Commonwealth's burden of proof.

(C. Kurt Mulzet)

Laura Ditka for the Commonwealth.
Gregory Schwab for Defendant.

No. CC200315654. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., August 20, 2008—This is a direct appeal wherein the defendant, Eric Rasmussan, appeals from the judgment of sentence of August 24, 2007. After a non-jury trial, this Court found the defendant guilty of three counts of Involuntary Deviate Sexual Intercourse, one count of Statutory Sexual Assault, one count of Aggravated Indecent Assault, one count of Indecent Assault, one count of Indecent Exposure, one count of Indecent Contact with A Minor, and one count of Corruption of Minors. This Court sentenced the defendant to an aggregate sentence of 7½-15 years' imprisonment. The defendant filed a timely Statement of Errors Complained of on Appeal raising the following issues:

a. The Judgment of Sentence must be reversed where the Commonwealth failed to fix the date of

> the commission of the offenses with reasonable certainty in violation of the United States and Pennsylvania Constitutions.
>
> b. The verdict rendered was contrary to the weight of the evidence presented.
>
> c. It was error to not allow the defense to use the Preliminary Hearing Testimony as Substantive Evidence as it was prior testimony, provided under oath, and as such it is not Hearsay and it is proper to allow such testimony to be used as substantive evidence.
>
> d. It was error for the Commonwealth to claim that Mr. Rasmussan bore the burden of producing records showing that Ms. Cale was calling his cell phone repeatedly and it was error for the Court to comment that such evidence would have been corroborative.

The credible evidence adduced at the non-jury trial of this case established the following facts: The victim testified that she was sexually assaulted by the defendant on four different occasions in August, 2003 and September, 2003. The victim in this case testified that when she was 13 years old, she first encountered the defendant on an internet instant message and through email.[1] The defendant was 24 years old at this time. The instant messages were sent by the defendant. The defendant began sending the victim emails of a sexual nature, including requests to have sex. At first the victim did not take the emails seriously as she believed they could have been sent by her friends. Within a period of several weeks to a couple of months, in June, 2003, the defendant approached the victim at the Dravosburg Firefighter's Fair in Dravosburg, Pennsylvania. The victim was 14 years old at this time. The defendant approached the victim at the fair and struck up a conversation with her. The victim did not know the defendant and did not realize he was the person with whom she was corresponding via the internet. The defendant told the victim he would call her at 11:00 p.m. that night. The victim had never provided her telephone number or her email address to the defendant. The victim returned home from the fair that night and her cellular telephone rang at 11:00 p.m. that night. She did not answer the call. After that day, she continued to receive instant messages and emails from the defendant. One day, the victim and a friend were walking down the street near the victim's home and the defendant drove by in his vehicle. The defendant said "hi" to the victim and drove off. The victim and her friend returned to her friend's house.

Thereafter, on another occasion, the defendant again followed the victim near the victim's home. The defendant pulled up alongside the victim and told her to get in his vehicle. She got in the front passenger seat of the vehicle. The defendant drove the victim behind an abandoned building where he told the victim to get in the back seat of the vehicle. The defendant began to undress the victim. She asked that he stop but he continued to undress her. Once he had the victim undressed, the defendant had sexual intercourse with the victim and he forced the victim to orally touch his penis. The victim began crying. The defendant told the victim to stop crying. After about 15-20 minutes, the defendant drove the victim to the place where he picked her up. At this point, the defendant advised the victim not to disclose what occurred or he would hurt her or hurt her family.

On another occasion, the victim encountered the defendant driving a vehicle while she was walking to a friend's house. Again, he ordered her to get into his vehicle. Fearing the defendant, she complied. The defendant again took the victim behind the abandoned building and had sexual intercourse with the victim in his vehicle. He also touched her breasts and he forced the victim to touch his penis with her hands and he ordered her to orally touch his penis. After approximately 15-20 minutes, he took the victim to the place where he picked her up and dropped her off.

On the third occasion, the defendant again picked the victim up in his vehicle while she was walking along the street. He again took her behind the abandoned building and forced her to perform oral and vaginal intercourse. The victim began crying on this occasion. The defendant yelled at the victim and began hitting her in the face and leg. When this incident was over, the defendant dropped the defendant off where he picked her up.

Similar events occurred a fourth time. This time, however, the victim began crying and told the defendant she did not want to perform oral sex. The defendant pulled the victim's hair and told her to stop crying. The defendant performed oral sex on the victim as well. He also digitally penetrated the victim with his fingers. When he dropped the victim off after this encounter, he specifically advised the victim not to tell anyone what occurred.

After a bench trial, this Court convicted the defendant of Counts 1, 2 and 3, all involving counts of Involuntary Deviate Sexual Intercourse. This Court found the defendant not guilty of Count 4, a charge of Involuntary Sexual Deviate Intercourse. The Court found the defendant guilty of Count 5, Statutory Sexual Assault, Count 6, Aggravated Indecent Assault, Count 7, Aggravated Indecent Assault, Count 8, Indecent Exposure, Count 9, Unlawful Contact with Minors and Count 11, Corruption of Minors. The defendant was found not guilty of Count 10, Terroristic Threats.

The defendant first claims that the Commonwealth failed to fix the date of the commission of the offenses with reasonable certainty and, therefore, his conviction was obtained in violation of the United States and Pennsylvania Constitutions. This allegation is without merit. Due process does require that the date of the commission of an offense be fixed with reasonable certainty. *Commonwealth v. Devlin*, 460 Pa. 508, 333 A.2d 888 (1975). In *Devlin*, the appellant was accused of sexually abusing a mentally retarded man. The trial evidence indicated that the crime occurred some time during a 14-month period between February 1971 to April 1972. Citing the inability to prove an alibi defense, as well inability to impeach the accuser, the Supreme Court explained:

> Therefore, we cannot enunciate the exact degree of specificity in the proof of the date of a crime which will be required or the amount of latitude which will be acceptable. Certainly the Commonwealth need not always prove a single specific date of the crime. Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused. Here, the fourteen-month span of time is such an egregious encroachment upon the appellant's ability to defend himself that we must reverse.

Id., at 516, 333 A.2d at 892 (footnote and citations omitted). Balancing these considerations, the *Devlin* Court determined that the period between February 1971 and April 1972 did not fix the date of offense with reasonable certainty.

The holding of *Devlin* has been interpreted by other

courts. In *Commonwealth v. Groff,* 378 Pa.Super. 353, 384 Pa.Super. 648, 548 A.2d 1237 (Pa.Super. 1988), the Superior Court determined that where the victim of molestation was six years old, "the summer of 1985" was defined with reasonable certainty such that it did not run afoul of *Devlin.* Specifically, in *Groff*, the Court explained:

> We note that the Commonwealth would clearly prevail if appellant had been convicted of *repeatedly* abusing the victim during the summer of 1985. Case law has established that the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct. S*ee, e.g., Commonwealth v. Shirey,* 333 Pa.Super. 85, 481 A.2d 1314 (1984); *Commonwealth v. Robinson,* 316 Pa.Super. 152, 462 A.2d 840 (1983); *Commonwealth v. Niemetz,* 282 Pa.Super. 431, 422 A.2d 1369; *Commonwealth v. Yon,* 235 Pa.Super. 232, 341 A.2d 169 (1975).

Groff, 548 A.2d at 1242 (emphasis in original).

Other cases recognize that the concerns of Devlin are alleviated when a victim can fix the time an offense occurred. See *Commonwealth v. G.D.M.,* 926 A.2d 984; (Pa.Super. 2007). (In case involving ongoing, repeated abuse over approximately a seven-month span from September 1997 through March 1998, dates of offense were fixed with sufficient certainty when victim indicated that he remembered when the abuse began because it was contemporaneous with his beginning kindergarten, and he remembered when it terminated because that was when appellant was arrested).

In this case, the victim testified twice during trial that she first met the defendant in June, 2003 and that the sexual assaults perpetrated by the defendant occurred sometime between August, 2003 and September, 2003. While the victim was unable to remember every detail that occurred during the sexual assaults, she did recall that she was first contacted by the defendant through internet instant messaging when she was 13. She testified that she first met the defendant at a "Fireman's Fair" in Dravosburg, Pennsylvania in June, 2003 when "she just turned 14." The Information filed in this case set forth the time period of August 1, 2003 through September 30, 2003 as the dates of the commission of the offenses. This Court believes that the victim's testimony concerning sexual assaults that occurred between August, 2003 and September, 2003, when she was 13 or 14 years' old, provides a date and time period of the assaults which is far more certain that those recognized in *Groff* and *G.D.M.,* above. Accordingly, this claim of error is without merit.

The defendant next claims that this Court's verdict was so contrary to the weight of the evidence that the verdict shocks one's sense of justice. As forth in *Criswell v. King,* 834 A.2d 505; 512. (Pa. 2003)

> Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury's verdict was contrary to the weight of the evidence claim is the trial judge—decidedly not the jury.

834 A.2d at 512. *Armbruster v. Horowitz,* 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown,* 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994)). Although *Criswell* spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder, in this case, this Court. *Commonwealth v. Jarowecki,* 923 A.2d 425, 433 (Pa.Super. 2007). This Court was free to believe all, some or none of the evidence. *Id.* A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one's sense of justice. *Id.* See also *Commonwealth v. Habay,* 934 A.2d 732, 736-737 (Pa.Super. 2007).

The Defendant does not challenge whether the evidence was sufficient to convict him of the offenses of conviction. Rather, he claims that the verdict was against the weight of the evidence because the victim's testimony was vague and the victim was incredible. The Court here concluded that, after considering and weighing all the evidence, the victim's testimony at trial was credible. Her testimony, which is recounted above, supported the verdict. This evidence was supported in the record and the verdict was not against the weight of the evidence.

The defendant next claims that it was error to not allow the defense to use the transcript of the preliminary hearing testimony as substantive evidence in this case, as it was prior testimony, provided under oath, and as such it is not hearsay and it is proper to allow such testimony to be used as substantive evidence. The defendant claims that the transcript was admitted into evidence in this case. This claim should be rejected.

During the trial, defense counsel marked a number of exhibits for identification at trial. Among them was a copy of a preliminary hearing transcript, which was marked for identification purposes as Defense Exhibit "Z." Repeatedly during cross-examination, defense counsel attempted to refresh the victim's recollection by showing her portions of the preliminary hearing transcript. At the close of evidence in this case, the following exchange occurred between the Court and defense counsel:

> Counsel: In the event I've already done so, I'll move all defense exhibits.
>
> The Court: I believe they have been moved and admitted. Exhibits S, T, U, R. They're all admitted.

Notably, the Commonwealth did not object to the admission of Exhibits S, T, U and R. During closing arguments, defense counsel attempted to argue that the victim's trial testimony differed from her preliminary hearing testimony. The Commonwealth objected on the basis that the preliminary hearing transcript had not been admitted as evidence in this case. The defense responded that the transcript was a "certified preliminary hearing transcript." This Court then addressed defense counsel as follows:

> Even if it's certified, you didn't offer it into evidence in and of itself. I would have asked the Commonwealth if they would stipulate to it but you made no offer either way.

Defense counsel did not contest this Court's comments.

The crux of this allegation of error is that the preliminary hearing transcript was admitted into evidence and, therefore, the defense should have been permitted to rely on

it as evidence. However, the transcript was not admitted into evidence. Defense counsel marked the preliminary hearing transcript as Defense Exhibit "Z" for identification purposes during the course of the trial. He never once indicated that he wanted to admit Defense Exhibit "Z" into evidence at trial. The fact that the exhibit was not admitted is supported by the fact that the Commonwealth was not given an opportunity to object to the admission of that exhibit during the trial and the Commonwealth lodged a timely objection to the defense argument that the Court could consider the transcript as evidence. Additionally, defense counsel did not contest the Court's statements to defense counsel that the exhibit had not been admitted. Accordingly, the record does not support the contention that the preliminary hearing transcript was admitted as evidence. This claim should be rejected.[2]

The defendant next claims that it was error for the Commonwealth to claim that Mr. Rasmussan bore the burden of producing records showing that Ms. Cale was calling his cell phone repeatedly and it was error for the Court to comment that such evidence would have been corroborative. The defendant believes that the brief discourse during closing arguments concerning this matter improperly shifted the burden of proof and the presumption of innocence enjoyed by the defendant. This claim is wholly without merit.

During trial, the defense called Jennifer Agnew as a witness, presumably to demonstrate that it was the victim who was pursuing the defendant rather than the defendant stalking the victim. Ms. Agnew testified that she was the defendant's girlfriend during the relevant time period. She testified that on various dates while she and the defendant were together in July, 2003, someone repeatedly called the defendant's cell phone. Ms. Agnew did not know this person. She said the defendant told her who the person was. In Ms. Agnew's words, "this person kept calling and calling and calling." Ms. Agnew testified that she told this person "to quit F-ing calling" the defendant.[3] In her closing argument, the Assistant District Attorney stated:

> I would suggest to you that if Eric Rasmussan had a cell phone that [the victim] was calling in excess of hundreds of time, 20-some times, according to Jennifer Agnew, then where are those records? They're his records. All he has to do is call his company and get them and we would have absolute proof. And then the Court could say, "Well, this girl is not credible."
>
> In its final comments before pronouncing the verdict, this Court stated:
>
> It is the Commonwealth's burden. It's not the defense's burden. It would perhaps be somewhat corroborative if there were phone records, but the defendant has no duty to bring them forward. Ms. Ditka is not suggesting that they do. She's simply saying it would have supported better their testimony than–the testimony is not so persuasive standing on its own.

The Court then convicted the defendant as set forth above. This Court understood the argument being made by the ADA. She was arguing that there was no solid evidence of record to support defense counsel's suggestion that the victim in this case was actually contacting the defendant during the relevant time period. This sort of argument does not alter the Commonwealth's burden of proof. See *Commonwealth v. DeJesus*, 580 Pa. 303; 860 A.2d 102, 111(Pa. 2004)(in responding to defense counsel's argument, prosecutor's comments suggesting that defense could have presented a prison log to demonstrate who contacted witnesses in prison did not alter burden of proof or production). Moreover, this Court noted on the record that the defendant bore no burden of proof and it was the Commonwealth's sole burden of proof. The facts demonstrate that this claim of error should be rejected. *Id.* at 110.

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

BY THE COURT:
/s/Mariani, J.

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[1] At the time of trial, the victim was 17 years old.

[2] Defense counsel never sought to lay a proper evidentiary foundation to admit the transcript nor does the record suggest that a stipulation was reached to admit the transcript.

[3] Ms. Agnew never provided a clear indication of who the caller was. Moreover, this Court did not find Ms. Agnew to be a credible witness. Her answers were not specific and she was and evasive and argumentative.

Commonwealth of Pennsylvania v. Michael Leon Hudson

PCRA—Ineffective Assistance of Counsel—Alibi Witness—Hearsay—Pa. R.A.P. 2119(f)

1. The Court denied Defendant's Petition for Post-Conviction Relief in which Defendant maintained that his trial counsel was ineffective for failing to present a known alibi defense witness at the time of trial, for failing to object to hearsay statements made by one of the victims as to the identity of the Defendant and for failing to file a Rule 2119(f) Statement thereby waiving his right to challenge the discretionary aspect of his sentencing. Defendant had been convicted of Burglary, Robbery, Criminal Conspiracy and Simple Assault.

2. Trial counsel testified that no alibi witness was presented because the Defendant did not ever mention to trial counsel that Defendant had an alibi witness, the Defendant did not say anything about an alibi witness during the trial, and never told appellate counsel of any potential alibi witnesses. Therefore, neither trial counsel nor appellate counsel could have been ineffective for failing to put on an alibi defense.

3. Hearsay statements made by one of the victims were introduced during cross-examination in support of Defendant's misidentification defense. Defendant cannot complain that trial counsel should have objected at the time the statement was repeated during redirect examination of the witness.

4. Appellate counsel admits that he failed to file a Statement pursuant to Pennsylvania Rules of Appellate Procedure Rule 2119(f) raising a question with respect to the discretionary aspect of sentencing, thereby waiving Defendant's right to challenge the discretionary aspect of sentencing. However, the Court found that the outcome on the appeal, had it been perfected properly, would have been

no different. Defendant was a repeat offender, who had been sentenced in fifteen (15) prior convictions; Defendant and co-conspirators had threatened to kill small minor children, who had been held hostage during the commission of the crime.

(C. Kurt Mulzet)

Mark Clark for the Commonwealth.
Thomas N. Farrell for Defendant.

No. CC199704573. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., August 21, 2008—The appellant, Michael Leon Hudson, (hereinafter referred to as "Hudson"), has filed the instant appeal as a result of the denial of his petition for post-conviction relief following a hearing. In his statement of matters complained of on appeal, Hudson has raised three claims[1] of the ineffectiveness of his trial and appellate counsel. Initially, Hudson maintains that his trial counsel was ineffective for failing to present a known alibi defense witness at the time of trial. He next maintains that his trial counsel was ineffective for failing to object to certain hearsay statements made by one of the victims as to the possible identity of the perpetrators of the crimes for which Hudson was convicted. Finally, Hudson maintains that his appellate counsel was ineffective for failing to file a Rule 2119(f) statement, thereby waiving his right to challenge the discretionary aspect of his sentencing. The facts of Hudson's case were originally set forth in this Court's Opinion in his direct appeal as follows:

On February 16, 1997, three men, at gun point, forced their way into a home occupied by Mabel McKenzie, Oneaca Bonifate, Valerie Budzinski and Tiffany Eger, located on Graham Street in the Garfield Section of the City of Pittsburgh. There were also a number of minor children who resided in the residence. The three men, with the use of a handgun and threatening remarks, corralled all of the occupants of the residence into the dining room area and required that they either sit or lay on the floor. One of the men kept watch over the occupants of the residence while the other two ransacked the house looking for various items of personal property. After approximately a half hour filled with threats, during which the firearm was pointed at various people in the residence, including the minor children, the three men exited the residence with various items, which belonged to the occupants.

The police were immediately called and Officer Gregory Woodall of the City of Pittsburgh Police took an initial report. Thereafter, the incident was assigned to two Pittsburgh detectives who conducted interviews at the residence. Subsequent to the interviews, one of the occupants contacted the detectives and indicated that a friend, identified at trial as "Steve," had heard on the street that three individuals, defendant, Michael Hudson, (hereinafter referred to as "Hudson"), defendant, Ronald Jenkins, (hereinafter referred to as "Jenkins"), and Jacob Hornbuckle, (hereinafter referred to as "Hornbuckle"), were involved in the incident. With this information, the detectives created a photo array and presented the photo array to three of the four adult occupants of the residence.[2] The occupants of the residence were able to identify Hudson, Jenkins and Hornbuckle as the perpetrators involved. Jenkins was arrested and charged with four counts of robbery, one count of burglary and one count of criminal conspiracy. Hudson was also arrested and charged with one count of burglary, four counts of robbery, one count of criminal conspiracy, and four counts of simple assault.

On April 19, 1999, a jury was empanelled before this Court and on April 22, 1999, both Hudson and Jenkins were convicted of all charges filed against them. A presentence report was submitted on each of the defendants and after a consideration of the presentence reports, the guidelines and the particular facts of this case, wherein small minor children were threatened at gunpoint, this Court sentenced both Jenkins and Hudson to a period of incarceration of not less than 35 years nor more than 70 years.

In order to be entitled to post-conviction relief a petitioner must establish his eligibility pursuant to Section 9543(a) of that Act,[3] which provides as follows:

> **(a) General rule.—**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) currently serving a sentence of imprisonment, probation or parole for the crime;
>
> (ii) awaiting execution of a sentence of death for the crime; or
>
> (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
>
> (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> (v) Deleted.
>
> (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
>
> (vii) The imposition of a sentence greater than the lawful maximum.
>
> (viii) A proceeding in a tribunal without jurisdiction.
>
> (3) That the allegation of error has not been previ-

ously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

In reviewing Hudson's claims in light of these eligibility requirements, it is clear that his petition has been timely filed and that the allegations of the ineffectiveness of his trial counsel would establish a basis upon which, if proven, he would be entitled to relief. In addition to meeting these requirements, Hudson must also establish that his claims have not been previously litigated. In *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994), the Pennsylvania Supreme Court decided that a petitioner could not relitigate claims previously decided under the guise of the claim of the ineffectiveness of his counsel. See also, *Commonwealth v. Abu-Jamal*, 574 Pa. 724, 833 A.2d 719 (2003). However, in *Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564 (2005), the Pennsylvania Supreme Court recognized that there is a separate and distinct claim that is being asserted when the claim of the ineffectiveness is being made even as it pertains to an issue that has been previously litigated since the claim that is being raised is the stewardship of the petitioner's counsel which affects his rights under the Sixth Amendment of the United States Constitution and under Article I, Section 9 of the Pennsylvania Constitution.

In reviewing a claim of ineffectiveness it is well settled that the law presumes that counsel was effective and that the petitioner asserting that claim of ineffectiveness bears the burden of proving it. *Commonwealth v. Khalil*, 806 A.2d 415 (Pa.Super. 2002). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standards for the performance and prejudice for evaluating the conduct of counsel. These standards were adopted by the Pennsylvania Supreme Court in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987), and require that a defendant prove a three-prong test, the first being that the claim currently being asserted has arguable merit; second, that counsel had no reasonable basis for his action or omission; and, third, that the defendant was prejudiced by his counsel's conduct. In *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (1999), the Supreme Court set forth the burden of proof imposed upon a petitioner in establishing the claim of ineffectiveness.

> To show ineffective assistance of counsel which so undermined truth-determining process that no reliable adjudication of guilt or innocence could have taken place, post-conviction petitioner must show: (1) that claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is reasonable probability that outcome of proceeding would have been different.

The standard for review of an order denying a petition for post-conviction relief is whether or not the record supports the PCRA Court's determination and whether that determination is free of legal error. *Commonwealth v. Allen*, 557 Pa.Super. 135, 732 A.2d 582 (1999). A PCRA Court's findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Carr*, 768 A.2d 1164 (Pa.Super. 2001).

Initially, Hudson maintains that his trial counsel was ineffective for failing to call an alibi witness who would have testified that Hudson was present with her throughout the entire evening when the crimes for which he was convicted were committed. Pursuant to Pennsylvania Rule of Criminal Procedure 902(a)(15), a petitioner seeking relief pursuant to the Post-Conviction Relief Act must attach to his petition a signed certification as to every intended witness that the petitioner seeks to call at the time of his hearing.[4] In the instant case, Hudson met the certification requirement when he attached the certification of his girlfriend, Tiffany Williams, and provided the substance of her testimony, which would have established an alibi for Hudson at the time these crimes were committed. However, at the time of the hearing on his petition, Williams was neither called nor was she present at the hearing. The only witnesses that were called on Hudson's behalf were his trial and appellate counsel.

His trial counsel, Leslie Perlow, (hereinafter referred to as "Perlow"), testified that Hudson's defense was predicated upon the misidentification of Hudson as one of the perpetrators by the various victims. She testified that when the Commonwealth had rested that she presented no witnesses because the defense was predicated on this idea of misidentification. She presented no alibi witnesses because she was not aware of any, nor did Hudson ever mention to her that he had such witnesses. Even when she advised this Court and the jury that she had no witnesses, Hudson did not say anything to her about a potential alibi witness. Had she known about an alibi witness, she would have called that individual; despite her belief that such testimony would be inconsistent with the misidentification defense that Hudson was pursuing at the time of trial.

Similarly, Hudson's appellate counsel, Martin Dietz, (hereinafter referred to as "Dietz"), did not raise the claim of the ineffectiveness of Hudson's trial counsel since he was also unaware of any potential alibi witnesses. Dietz testified that he spoke with Hudson and that Hudson never mentioned any potential alibi witnesses. In speaking to Hudson's trial counsel and in reviewing her file, he was never advised of any potential alibi witnesses. Since he had no information about any potential alibi witness, he did not raise that issue in the context of the ineffectiveness of trial counsel on appeal. Hudson did not testify at the time of trial nor did he present any witnesses who would have indicated that Williams would have provided exculpatory alibi testimony for him. In light of the fact that neither Hudson's trial nor appellate counsel was advised of his potential alibi witness, they could not have been ineffective for failing to put forth this alibi defense.

Hudson next maintains that his trial counsel was ineffective for failing to object to the hearsay statements made by one of the victims, Mabel McKenzie, (hereinafter referred to as "McKenzie"), when she stated that she learned of the names of the perpetrators of the robbery from her boyfriend. The problem with this contention, however, is that Hudson introduced the hearsay statements, which form the basis of the claim of the ineffectiveness of trial counsel, during the cross-examination of McKenzie. *Trial Transcript*, page 56-62, 90. Hudson's trial counsel introduced this information in support of her misidentification defense. To suggest that his trial counsel should have objected to the information when it was repeated in a redirect examination of McKenzie is ludicrous.

Hudson's final contention of error is that his appellate counsel was ineffective for failing to file a Rule 2119(f) statement, thereby waiving Hudson's right to challenge the discretionary aspects of sentencing. Pennsylvania Rule of Appellate Procedure 2119(f) provides as follows:

> **(f) Discretionary aspects of sentence.** An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Failure to comply with this requirement waives appellant's right to challenge the discretionary aspect of sentencing. *Commonwealth v. Faulk,* 928 A.2d 1061 (Pa.Super. 2007). To permit the review of the discretionary aspect of sentencing, a claim must raise a substantial question that the sentence was either inconsistent with the specific provision of the Sentencing Code or it was contrary to the fundamental norms which underlie the sentencing process. *Commonwealth v. Shugars,* 895 A.2d 1270 (Pa.Super. 2006).

Hudson's appellate counsel, Dietz, testified that while he intended to raise a question with respect to the discretionary aspect of sentencing, he did not comply with the dictates of Pennsylvania Rule of Appellate Procedure 2119(f), and that he had no reason to explain why he did not. In order for Hudson, however, to succeed on this claim that his appellate counsel was ineffective, he must establish by the preponderance of the evidence that but for his appellate counsel's failure to file the required statement, he would have been granted a new sentencing hearing on his direct appeal. *Commonwealth v. Kimball,* 555 Pa. 299, 724 A.2d 326 (1999).

A Trial Court has broad discretion in fashioning a sentence and a sentence will not be reversed absent an abuse of that discretion. *Commonwealth v. Boyer,* 856 A.2d 149 (Pa.Super. 2004).

> An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, bias or ill-will.
>
> *Commonwealth v. Reynolds*, 835 A.2d 720, 732 (Pa.Super. 2003).

When an excessive sentence claim is based upon a deviation from the Sentencing Guidelines, a reviewing Court must look for an indication that the sentencing Court understood the suggested ranges of sentencing. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa.Super. 2003). The Court, in fashioning its sentence, must take into consideration the protection of the public, the rehabilitative needs of the defendant, the gravity of the particular offenses as it relates to the impact on the lives of the victims and the community; and, so long as a Court states of record the factual basis and reasons for which it deviated from the Sentencing Guidelines, that sentence will not be reversed. *Commonwealth v. Mouzon, supra.* While a sentencing Court must be aware of the Guidelines, it is not restricted by those Guidelines since are merely advisory. A sentencing Court may sentence a defendant outside those Guidelines as long as it puts forth, on the record, the reasons for doing so. *Commonwealth v. Walls,* 592 Pa. 557, 926 A.2d 957 (2007).

This Court was aware of the Sentencing Guidelines that were applicable to Hudson's case and, in fact, read those Guidelines into the record which demonstrated that the mitigated range of the crime of robbery was thirty months, the standard range, thirty-six months to sixty, and the aggravated range, sixty-six. This Court also had the benefit of a presentence report that was prepared in aid of sentencing since it noted that this was Hudson's sixteenth case in the criminal justice system in Allegheny County. In addition, this Court put on the record the reasons for imposing the sentence that it did when it stated as follows:

> As Mr. Clark observed, I recall this case rather vividly. There was a bunch of small children being held hostage and being held as the bargaining chips so a few people can go in to steal not only their possessions but also their contraband, their drugs; and based upon your statements, the statements of your co-conspirators, you were willing to kill those kids in order to accomplish that objective.
>
> That doesn't sound like an individual who was good with children, nor does it sound like an individual who cares for children…
>
> *Sentencing transcript,* pp. 26-27, lines 18-4.
>
> The reason for that is very simple. These go outside the aggravated range. You put in jeopardy, at risk, young children. You broke into the sanctity of somebody's home. You terrorized people.
>
> DEFENDANT JENKINS: Not me.
>
> THE COURT: You did. You terrorized people. You did it with no particular remorse. It is not as though either one of you are unfamiliar with the criminal justice system because, Mr. Jenkins, you are a 10-time loser; and Mr. Hudson, you are a 16-time loser.
>
> *Sentencing Transcript.* Pp. 29-30, lines 17-3.

It was obvious from the presentence report that Hudson was a repeat offender who was incapable of rehabilitation since it did not work in fifteen prior sentencings. The impact upon the victims and their children was dramatic in light of the fact that Hudson and his co-conspirators threatened to kill these children if they did not keep quiet. The sentence imposed by this Court was neither unduly harsh nor excessive and the outcome on the direct appeal had it been perfected properly would have been no different. Accordingly, Hudson's appellate counsel could not have been ineffective for failing to advance a non-meritorious claim.

BY THE COURT:
/s/Cashman, J.

Dated: August 21, 2008

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[1] In Hudson's concise statement of matters complained of on appeal there are four purported issues that are identified; however, in paragraph one there is a catchall phrase for the issues set forth in paragraphs two, three and four.

[2] One of the residents, Valerie Budzinski, was unable to discuss the incident with the detectives due to employment obligations.

[3] 42 Pa.C.S.A. §9543(a).

[4] (15) if applicable, any request for an evidentiary hearing. The request for an evidentiary hearing shall include a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony. Any documents material to the witness's testimony shall also be included in the petition;...

Commonwealth of Pennsylvania v. Dion Tolliver-Hardman

Possession with Intent to Deliver—Motion for Judgment of Acquittal—Search Warrant

1. Defendant was convicted of Possession with Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, Possession of Drug Paraphernalia and Criminal Conspiracy. The Court denied the Defendant's Motion for Judgment of Acquittal and his post-sentencing motions in which the Defendant alleged that the Commonwealth failed to present evidence of Defendant's possession of a controlled substance or intent to deliver and that the Defendant was not present at the time that the search was conducted on premises owned by another individual.

2. Defendant, while under surveillance, was observed in numerous transactions meeting with a visitor at a building owned by a third party, and then entering a locked apartment area of the building using keys. Moments later, the Defendant would reappear with the visitor leaving the premises. A confidential informant was used to make controlled buys from Defendant. A search warrant was obtained and the premises were searched when the Defendant was not present.

3. In reviewing a claim that the evidence was insufficient to support a conviction, a reviewing Court must determine whether the evidence and all reasonable inferences drawn from the evidence when viewed in the light most favorable to the Commonwealth as the verdict winner supports the finding that all of the elements of the offense have been proven beyond a reasonable doubt. The Defendant told the police that he was selling drugs, but indicated that he was only "selling crack cocaine." The Commonwealth produced sufficient testimony from the police officers and lay witnesses to establish that Defendant was engaged in drug trafficking.

(C. Kurt Mulzet)

Deborah Jugan for the Commonwealth.
Alan R. Patterson for Defendant.

No. CC200613641. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., August 21, 2008—The appellant, Dion Hardman, (hereinafter referred to as "Hardman"), was originally charged with three counts of delivery of a controlled substance, five counts of possession with intent to deliver a controlled substance, five counts of possession of a controlled substance, one count of possession of drug paraphernalia, one count of criminal conspiracy and one count of violation of the Uniform Firearms Act—person not to possess firearm. Hardman elected to proceed with a non-jury trial and at the commencement of that trial, the Commonwealth withdrew one count of delivery of a controlled substance, one count of possession with intent to deliver a controlled substance and one count of possession of a controlled substance. Following two days of testimony, this Court granted his motion for judgment of acquittal with respect to the charge of the violation of the Uniform Firearms Act; however, convicted him on all of the remaining charges. There were mandatory minimum sentences required to be imposed as a result of the weight of the drugs that were found to be under Hardman's control and also the fact that the residence where he stored these drugs was within the proscribed distance from a school. Hardman was sentenced to an aggregate sentence of five to ten years to be followed by an aggregate period of probation of ten years. Hardman filed a timely post-sentencing motion, which motion was denied and from which he has filed the instant appeal.

In filing his concise statement of matters complained of on appeal, Hardman has claimed that this Court erred in failing to grant his motion for judgment of acquittal of all charges and also in failing to grant his post-sentencing motions. The predicates for both motions are the same in that Hardman has alleged that the Commonwealth failed to present any evidence that Hardman ever possessed a controlled substance, possessed that substance with the intent to deliver it, and that Hardman was not present at the time that the search was conducted that discovered this evidence on the premises owned by another individual and that numerous individuals had access to that premises. In order to understand these claims of error, it is necessary that a review of the facts of Hardman's case be made.

In early March, 2006, a joint task force consisting of undercover officers of the City of Pittsburgh and agents of the Attorney General's Office of Pennsylvania undertook an investigation to determine whether or not drug trafficking was occurring at Tri-State Auto, located on Frankstown Avenue in the City of Pittsburgh. Tri-State Auto was a business owned by Joseph Owens. The business was conducted on the first floor of the building, which also housed two apartments to which access was made through the back of the building. Mr. Owens had previously been the subject of another narcotics trafficking investigation that was undertaken by the Attorney General's Office in 2002. During the March 2006 investigation and surveillance, the focus shifted from Owens to Hardman since he became the individual who appeared to be making the drug transactions from the apartments located in the building housing Tri-State Auto. Members of the surveillance team saw Hardman engage in numerous drug transactions where an individual would appear at the Tri-State Auto business, meet with Hardman and then Hardman would then unlock the entry to the apartment area of the building and the two individuals would disappear and then several moments later reappear with the visitor leaving the premises. In light of this continuous activity, it was determined that controlled buys could be made from Hardman.

On March 30, 2006, a confidential informant was given five hundred dollars in official funds and after being searched to make sure he had no other items on him, was sent to Tri-State Auto for the purpose of making a controlled buy. This individual was kept in sight the entire time from when he left the task force agents until he returned to the designated area for the purpose of being searched with the one exception being when he went inside the Tri-State Auto building. Owens and Hardman let the confidential informant into that building. When he was searched on his return, he had two baggie corners which also tested positive for

crack cocaine; one weighed six point four grams and the other one, six point six grams for an aggregate weight of thirteen grams.

A second controlled buy took place on April 5, 2006, when Hardman used a set of keys to let the confidential informant into the apartment area of the building. When the confidential informant was subsequently searched following a controlled buy, he had one baggie corner of crack cocaine that had twelve point nine grams.

The third controlled buy took place on May 4, 2006, and again resulted in the purchase by the confidential informant of cocaine. Hardman was initially charged with these offenses; however, the District Attorney's Office withdrew those charges at the time of trial since they formed the basis for the search warrant that was issued and subsequently executed on May 5, 2006.

On that date, the task force went to Tri-State Auto to effectuate the search warrant. When they arrived at the premises, they noticed that a woman later identified as Davonne Woodbury, (hereinafter referred to as "Woodbury"), was looking out the second floor window. After knocking three times and yelling to Woodbury to open the door, and getting no response, they used force to open the door and then went up the staircase to the second floor where there were two apartments. Again they knocked on the door of the apartment in which Woodbury was and requested her to open it. After waiting several moments, she came to the door and partially opened that door, only to look out and not to let anyone in. The task force then opened the door and once inside noticed that she had her hand on a thirty-eight-caliber revolver that was on a shelf; that revolver had five live rounds in it. During the search of that apartment, they also found a nine-millimeter Intratec semi-automatic weapon, which was also loaded.[1] A further search of the residence found twenty-one live rounds for a thirty-eight-caliber, sixteen assorted rounds of ammunition, numerous "diaper baggies" which apparently had been used for the packaging of drugs, and a home drug test kit. A search of the bedroom which Woodbury described as being Hardman's disclosed three baggie corners of crack cocaine weighing approximately fifteen point four grams; one Ziploc bag of marijuana containing four hundred fifty-one grams; three bags of brown powder suspected to be a cutting agent to heroin; one Ziploc bag of suspected heroin, which did not test positive; and one bag of white powder, which was suspected to be a cutting agent for cocaine.

Following the search of the second apartment where no drugs were found, but a police scanner and surveillance system were found, Woodbury was arrested and taken into custody. When interviewed by the police after being given her warnings, she advised them that she had been evicted from her apartment in Wilkinsburg and Hardman allowed her to stay at this residence. Hardman had access to both of these apartments. He resided in one and Owens resided in the other. She also told the police that when she was being transported for her formal arraignment with Hardman, he asked her if the police had found the dope at his apartment. Hardman, who was serving a sentence at a halfway house in McKees Rocks, was arrested and subsequently brought to police headquarters. After being given his Miranda rights, he told the police that he was selling crack cocaine from his apartment and he knew that the thirty-eight revolver was there but it was not his, since he liked to use a forty-five semi-automatic and his weapon was hidden somewhere along the Port Authority bus way that he used to get from the half-way house in McKees Rocks to Tri-State Auto on Frankstown Avenue.

During the course of the search of this apartment, a letter was found addressed to S. K., Hardman's street name, with the address of 6564 Frankstown Avenue, Pittsburgh, Pennsylvania 15206. In addition, there was a package of letters found in the closet that were all addressed to Hardman, although they had a different mailing address. Finally, there was a colorful printed jacket which one of the officers identified as a jacket that Hardman wore on one occasion when they were doing the surveillance of the Tri-State Auto business.

Pursuant to Pennsylvania Rule of Criminal Procedure 606,[2] Hardman made a motion for judgment of acquittal both at the conclusion of the Commonwealth's case and at the conclusion of all of the evidence. Both of those motions were denied. Hardman also filed a post-sentencing motion raising the question of whether or not the verdicts were against the weight of the evidence, which motion was also denied. As previously noted, the predicates for these motions were the same.

In reviewing a claim that the evidence was insufficient to support a conviction, a reviewing Court must determine whether the evidence and all reasonable inferences drawn there from when viewed in the light most favorable to the Commonwealth as the verdict-winner supports the finding that all of the elements of the offense have been proven beyond a reasonable doubt. *Commonwealth v. Miller,* 572 Pa. 623, 819 A.2d 504 (2002). A reviewing Court considering a claim that the Trial Court erred in failing to grant a motion for judgment of acquittal on the basis of the insufficiency of the record must evaluate the entire trial record and consider all of the evidence actually received. "The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence but any question of doubt is for the trier-of-fact unless the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances." *Commonwealth v. Seibert,* 424 Pa.Super. 242, 622 A.2d 361, 363 (1993). In examining the entire record to determine the sufficiency of the evidence, the weight to be accorded to each witness' testimony, whether or not that testimony is to be believed in all or in part or be rejected in its entirety, is within the province of the fact-finder. *Commonwealth v. Proetto,* 771 A.2d 823 (Pa.Super. 2001).

In rejecting Hardman's request for a motion for judgment of acquittal on the basis of the insufficiency of the evidence, this Court acknowledged that Hardman was not present at the apartment at the time it was searched. Despite this fact, there was unequivocal testimony from all of the police officers that were involved in this investigation that Hardman was present at the Tri-State Auto building and had keys to access the apartment portion of that building. All of the officers testified to the numerous individuals who appeared at the Tri-State Auto building and met with Hardman, and sometimes with Hardman and Owens, for brief periods of time which indicated to those officers that drug transactions were taking place. In addition to these observations, there were three controlled buys initiated by the task force, which resulted in the purchase of crack cocaine from Hardman.

The Commonwealth presented testimony from Woodbury that Hardman had keys to the apartment section of the Tri-State Auto building and allowed her to use his apartment since she had been evicted from her own. The Commonwealth also presented testimony of Owens who indicated that Hardman had access to the apartment and used it as his own. The letter that was sent to S.K. at the Frankstown Avenue address corroborated this testimony

and numerous letters addressed to Hardman at a different address that were found in the closet to his apartment. More importantly, the Commonwealth presented the drugs that were purchased during the controlled buys that were made by the confidential informants employed by the drug task force.

While it is acknowledged that other individuals had keys to the apartment section of the Tri-State Auto building, the testimony presented by the Commonwealth that Hardman was engaged in drug transactions was supported by Hardman's own admissions. Hardman told the police that he was selling drugs from that apartment; however, he indicated that he was only selling crack cocaine. These admissions, coupled with all of the testimony presented by the Commonwealth, clearly demonstrated that the evidence was more than sufficient to sustain his convictions for the violations of the Controlled Substance, Drug, Device & Cosmetic Act.

Hardman's second contention of error is that the verdicts that were rendered in this case were against the weight of the evidence. A motion for a new trial alleging that the verdicts were against the weight of the evidence is addressed to the discretion of the Trial Court. *Commonwealth v. Cousar,* 593 Pa. 204, 928 A.2d 1025 (2007). When considering a motion for a new trial on the basis that the verdict is against the weight of the evidence, a Trial Court's discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will. *Commonwealth v. Dupre,* 866 A.2d 1089 (Pa.Super. 2005). When considering whether or not to grant a new trial on the basis that the verdict is against the weight of the evidence, the verdict must be so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Washington,* 825 A.2d 1264 (Pa.Super. 2003). In considering whether or not the verdict is contrary to the weight of the evidence, a trial Judge does not sit as the thirteenth juror, but, rather, the role of the trial Judge is to determine that notwithstanding all of the facts, certain facts are clearly of greater weight that to ignore them or to give them equal weight with all of the facts is to deny justice. *Commonwealth v. Hunter,* 768 A.2d 1136 (Pa.Super. 2001). A motion for a new trial on the basis that the verdicts were contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict, therefore, a Trial Court is under no obligation to view the evidence in the light most favorable to the verdict-winner. *Commonwealth v. Hunter, supra.*

Applying these standards to the record generated in connection with Hardman's case, it is clear that the verdicts in this case are not contrary to the weight of the evidence and clearly and unequivocally establish that Hardman was in the business of selling drugs. The Commonwealth produced sufficient testimony from the investigating police officers and the lay witnesses to establish what Hardman acknowledged in his confession to the police and that was that he was engaged in drug trafficking. As with Hardman's other claim of error, this claim had no merit and his motion for judgment of acquittal on the basis that the verdicts were against the weight of the evidence clearly was properly denied.

BY THE COURT:
/s/Cashman, J.

Dated: August 21, 2008

[1] When this weapon was sent to the Crime Lab it was initially found to be inoperable; however, it was subsequently determined that the weapon had been taken apart and put back together incorrectly. When it was assembled correctly, that weapon became operable.

[2] **Rule 606. Challenges to Sufficiency of Evidence**
(A) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in one or more of the following ways: (1) a motion for judgment of acquittal at the close of the Commonwealth's case-in-chief; (2) a motion for judgment of acquittal at the close of all the evidence; (3) a motion for judgment of acquittal filed within 10 days after the jury has been discharged without agreeing upon a verdict; (4) a motion for judgment of acquittal made orally immediately after verdict; (5) a motion for judgment of acquittal made orally before sentencing pursuant to Rule 704(B); (6) a motion for judgment of acquittal made after sentence is imposed pursuant to Rule 720 (B); or (7) a challenge to the sufficiency of the evidence made on appeal. (B) A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made. (C) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.

Commonwealth of Pennsylvania v. Gerard Von Haynes

Incorrect Identification of Case on Appeal—Clerical Error—Suppression of Evidence—Totality of the Circumstances—Definition of "Voluntary"—Sufficiency of the Evidence

1. Defendant's submission and re-submission of Statements and Amended Statements of Matters Complained of On Appeal pursuant to Pa. R.A.P. 1925(b), containing incorrect docket numbers but otherwise correct captions constituted mere clerical errors. The Court proceeded to consider the substance of the Defendant's appeal notwithstanding potential issues of timeliness arising out of the misfilings on the docket.

2. The Defendant's confession was voluntarily made and not eligible for suppression, because the credible evidence showed that: Defendant voluntarily appeared at the police department, Defendant was provided with Miranda Warnings, Defendant understood those warnings and decided to continue providing a statement, and the detective advised Defendant that he did not have to give a statement, and if he chose to give a statement, he could stop at any time.

3. The evidence was sufficient for a conviction of second-degree murder (felony murder) for a killing in the course of the commission of a robbery when: Defendant admitted he and others agreed to rob the victim and used firearms to do so, Defendant admitted he pulled his own 9mm firearm and

shot the victim in the victim's side, expert testimony established cause of death from a 9mm bullet, and a 9mm spent casing was found at the scene.

4. Evidence is sufficient for conviction for a violation of the Uniform Firearms Act, 19 Pa.C.S.A. §6106(a), when the Defendant admitted to possessing a firearm, the Defendant admitted the firearm was carried on his hip prior to the shooting, and the Defendant was not eligible to carry a firearm.

(Elizabeth A. Farina)

Edward J. Borkowski for the Commonwealth.
J. Richard Narvin for Defendant.

No. CC200414609 and 200500127. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., August 21, 2008—This is a direct appeal wherein the defendant, Gerard Von Haynes, appeals from the judgment of sentence of February 12, 2007. At CC200414609, the defendant was charged with criminal homicide. At CC200500127, the defendant was charged with robbery, violation of the Uniform Firearms Act, possession of an instrument of a crime and criminal conspiracy. After both cases were tried to the same jury, the jury returned a verdict of guilty against Mr. Von Haynes as to the charges of second-degree murder, violation of the Uniform Firearms Act, robbery, possession of an instrument of a crime and criminal conspiracy. This Court sentenced Mr. Von Haynes to a mandatory term of life imprisonment on the second-degree murder conviction and to terms of imprisonment totaling 16 to 32 years as to the other charges, to run concurrent to the term of life imprisonment.

On March 14, 2007, Mr. Von Haynes filed a Notice of Appeal at CC200414609 (homicide case). At that same case number, the Court issued an order directing counsel to file a Concise Statement Of Matters Complained Of On Appeal.

The Court thereafter received a Statement Of Matters Complained Of On Appeal pursuant to Pa.R.App.P. 1925b, bearing the case caption: "Commonwealth of Pennsylvania v. Gerard Von Haynes, CC200502270."[1] In that document, Mr. Von Haynes, through his counsel, alleged that the matter was on appeal to the Superior Court as a result of his conviction before a jury of second-degree murder and related charges, specifically referring to a mandatory life sentence. The document also referred to additional sentences rendered at CC200500127 for robbery, violation of the Uniform Firearms Act and possession of an instrument of crime. The Statement further alleged that the Court erred in denying Mr. Von Haynes' motion to suppress his statement. It also alleged that the evidence was insufficient to support the verdict for the conviction of the violation of the Uniform Firearms Act. Finally, it was alleged that the evidence was insufficient to support the verdict of second-degree murder.

This Court began preparing its opinion relative to the decisions made in the homicide and related charges that were presented to the jury. Some time before June 23, 2008, this Court, through its secretary, advised counsel by telephone that the Statement of Matters Complained Of contained a case caption with a case number different from the case numbers for the cases presented to Mr. Von Haynes' jury. In addition, counsel was advised that there was no notice of appeal specifically filed for the case number 200500127 (robbery, et al. case).

On June 23, 2008, this Court received an amended Statement Of Matters Complained Of Pursuant to Pa.R.App.P. 1925b containing a caption with Mr. Von Haynes' name and CC200502770 and CC200500127. Again, the Court, through its secretary, contacted counsel for Mr. Von Haynes to advise that the most recently filed document contained an inaccurate case number and omitted a relevant case number.

On August 13, 2008, this Court received a document entitled, "Amended Statement of Matters Complained of Pursuant to Pa.R.App.P. 1925b" containing case numbers 200414609 and 200500127. On August 18, 2008, this Court received a document entitled, "Amended Notice of Appeal." The Amended Notice of Appeal contained case numbers 200414609 (homicide case) and 200500127 (robbery, et al. case).[2]

In this appeal, Mr. Von Haynes challenges this Court's refusal to suppress his confession and the sufficiency of evidence relative to the second-degree murder and Uniform Firearms Act convictions.

During the suppression hearing, the following facts were adduced: On October 14, 2004, Mr. Von Haynes was interviewed by City of Pittsburgh Homicide Detective Dennis Logan in the interview room in the City of Pittsburgh Homicide office. At the time the interview was conducted, Mr. Von Haynes was not under arrest and was specifically advised that he was free to leave. Mr. Von Haynes indicated that he understood he was free to leave but he indicated that he wanted to stay and answer any questions that Detective Logan asked him. Detective Logan was dressed in a suit and was not displaying any firearms during the interview. Mr. Von Haynes was offered food or drink and the opportunity to use the restroom. Mr. Von Haynes was advised that the detective was investigating a homicide. Mr. Von Haynes was presented with a form advising him of his rights. Mr. Von Haynes provided his name and address. He provided his uncle's telephone number due to the fact that he did not have his own telephone and he provided his educational history. Detective Logan read Mr. Von Haynes a verbatim recitation of the rights form and advised Mr. Von Haynes that he was not compelled to answer any questions posed to him. If, however, he did choose to answer questions, Detective Logan further advised that all such answers could be used against him in a trial. He provided Mr. Von Haynes with an opportunity to consult with counsel, private or appointed. He also advised Mr. Von Haynes that he could stop answering questions at any time. Mr. Von Haynes indicated that he understood his rights and still wished to answer questions. At that point, Mr. Von Haynes provided a statement to Detective Logan whereby Mr. Von Haynes admitted his involvement in the murder of the victim in this case. Detective Logan made handwritten notes during the interview. Mr. Von Haynes reviewed those notes and made some changes. Detective Logan modified his notes and Mr. Von Haynes initialed those changes. Mr. Von Haynes also affixed his signature seven times to Detective Logan's notes. Mr. Von Haynes was arrested.

Mr. Von Haynes testified that he was picked up by police officers, placed in the back of a police vehicle and transported to the Homicide Office for questioning. Mr. Von Haynes testified that he didn't know the contents of the rights form before he signed it. Mr. Von Haynes testified that Detective Logan never advised him he had the right to counsel. Mr. Von Haynes also testified that he was never advised he had the right to refuse questioning. Mr. Von Haynes testified that Detective Logan never advised him of his Miranda rights. He also testified that he did not read the rights form before he signed it. Mr. Von Haynes did admit reading Detective Logan's notes and affixing his signature

to those notes and initializing the notes.

At trial, Victor Weedn, M.D., a forensic pathologist, testified that that the victim died as a result of being shot. He testified that the manner of death was homicide. Robert Levine, a ballistics expert testified that a discharged 9-millimeter cartridge was found at the scene. He also testified that a 9-millimeter bullet was taken from the victim. At trial, Detective Logan testified about the substance of Mr. Von Haynes' confession. In his confession, Mr. Von Haynes admitted that he and other persons agreed to rob the victim for money. He admitted that he and others used firearms in the commission of the attempted robbery. He admitted that he and the others approached the victim and one of the other actors held a .38 caliber revolver on the victim. During the course of the robbery, the victim attempted to grab the weapon and a struggle ensued. Mr. Von Haynes then pulled his own 9-millimeter firearm from his hip and shot the victim in his "side." The jury convicted Mr. Von Haynes of all charges.

Mr. Von Haynes' first claim of error is that this Court erroneously failed to suppress his confession because the confession was not voluntary. It is well-settled that "the standard for determining whether a statement is voluntary is based on the totality of the circumstances and considers, among other things, whether the defendant was coerced or manipulated or promised something in exchange for his confession; essentially, we attempt to determine whether the defendant freely made the decision to give the statement. *Commonwealth v. Nester,* 551 Pa. 157, 709 A.2d 879 (Pa. 1998). The Pennsylvania Supreme Court has explained:

> When deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary. Voluntariness is determined from the totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. The Commonwealth has the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily.

Id. at 882 (internal footnote and citation omitted).

The factors a court utilizes to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. *Commonwealth v. Levanduski,* 907 A.2d 3 (Pa.Super. 2006) citing *Commonwealth v. Mannion,* 1999 Pa.Super. 25, 725 A.2d 196, 200 (Pa.Super. 1999) (*en banc*) (internal citations omitted).

In this case, the Commonwealth has clearly met its burden. This Court believed as credible the testimony of Detective Logan that he properly provided Mr. Von Haynes with Miranda warnings. His testimony demonstrated that Mr. Von Haynes voluntarily appeared at the police department offices and that he was advised of his Miranda warnings. He testified that Mr. Von Haynes understood those warnings and yet decided to continue providing a statement. Moreover, Detective Logan testified that he told Mr. Von Haynes that he did not have to give a statement and that, even if he chose to give one, he could stop at any time. See *Commonwealth v. Ogrod,* 576 Pa. 412; 839 A.2d 294, 320-321 (2003). There was no evidence of coercion or threats by any law enforcement officers. Detective Logan's testimony was credible and it demonstrated that Mr. Von Haynes' confession was voluntary. In addition, Mr. Von Haynes initialed changes to and signed Detective Logan's notes of the interview. This claim of error is meritless.

Mr. Von Haynes next challenges the sufficiency of the evidence relative to his convictions for second-degree murder. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May,* 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert,* 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff,* 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.* Credibility determinations must be given great deference. The trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon,* 820 A.2d 1287, 1290 (Pa.Super. 2003).

"Murder of the second degree is a criminal homicide committed while a defendant was engaged as a principal or an accomplice in the perpetration of a felony." *Commonwealth v. Lambert,* 795 A.2d 1010 (Pa.Super. 2002). 18 Pa.C.S.A §2502(b). Title 18 Pa.C.S.A §2502(d) defines perpetration of a felony as:

> the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

18 Pa.C.S.A §2502(d); *Commonwealth v. Gladden,* 445 Pa.Super. 434, 665 A.2d 1201, 1209 (Pa.Super. 1995) *(en banc), appeal denied,* 675 A.2d 1243 (Pa 1996).

As set forth in *Lambert*, "[t]he malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." *Id.* citing *Commonwealth v. Mikell,* 556 Pa. 509, 729 A.2d 566, 569 (Pa. 1999); *Commonwealth v. Holcomb,* 508 Pa. 425, 498 A.2d 833, 855 (Pa. 1985), *cert. denied,* 475 U.S. 1150, 106 S. Ct. 1804, 90 L. Ed. 2d 349 (1986). The elements of second-degree murder do not require that the murder be foreseeable. The only requirement is that the accused participate in conduct as a principal or an accomplice in the perpetration of a felony. *Lambert*, 795 A.2d at 1023.

Moreover, a defendant is culpable for second-degree murder if that defendant is an accomplice. Where the evidence demonstrates that someone other than the actual killer conspired to commit the underlying felony and an act by the actual killer caused the death of the victim in furtherance of the underlying felony, the accomplice is culpable for second-degree murder. *Lambert* at 1023; *Commonwealth v. Middleton,* 320 Pa.Super. 533, 467 A.2d 841, 848 (Pa.Super. 1983); *Commonwealth v. Waters,* 491 Pa. 85, 95, 418 A.2d 312,

317 (1980) *Commonwealth v. Allen,* 475 Pa. 165, 379 A.2d 1335, [1977]; *Commonwealth v. Banks,* 454 Pa. 401, 311 A.2d 576 (1973); *Commonwealth v. Williams,* 443 Pa. 85, 277 A.2d 781 (1971); *Commonwealth v. Redline,* 391 Pa. 486, 137 A.2d 472 (1958). In fact,

> When an actor engages in one of the statutorily enumerated felonies and a killing occurs, the law, via the felony murder rule, allows the finder of fact to infer the killing was malicious from the fact the actor was engaged in a felony of such a dangerous nature to human life because the actor, as held to the standard of a reasonable man, knew or should have known that death might result from the felony.

Commonwealth v. Legg, 491 Pa. 78, 82, 417 A.2d 1152, 1154 (1980); *Middleton*, 467 A.2d at 848. See also, *Commonwealth v. Johnson,* 336 Pa.Super. 1, 485 A.2d 397, 401 (Pa.Super. 1984). See *Commonwealth v. Melton,* 406 Pa. 343, 178 A.2d 728, 731 (Pa. 1962), *cert. denied,* 371 U.S. 851, 9 L. Ed. 2d 87, 83 S. Ct. 93 (1962), (not only the killer, but all participants in a felony, including the getaway driver, are equally guilty of felony murder when a killing by a felon occurs.)

The predicate felony alleged in this case is robbery. The robbery statute provides, in relevant part:

> (1) A person is guilty of robbery if, in the course of committing a theft, he:
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> (i) inflicts serious bodily injury upon another;
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> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
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> (iii) commits or threatens immediately to commit any felony of the first or second degree;
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> (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
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> (v) physically takes or removes property from the person of another by force however slight.
>
> (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa.C.S.A. §3701.

A review of the record reflects that Mr. Von Haynes was involved in the perpetration of a robbery, an enumerated felony in 18 Pa.C.S.A. §2502(d), when the killing of the victim occurred. The evidence in this case clearly supported the verdict of second-degree murder. Mr. Von Haynes admitted that he and other persons agreed to rob the victim for money. He admitted that he and others used firearms in the commission of the attempted robbery. Mr. Von Haynes admitted that he pulled his own 9-millimeter firearm and shot the victim in his "side." There was expert testimony that the cause of death was from a 9-millimeter bullet. A 9-millimeter spent shell casing was found at the scene. This evidence was sufficient to demonstrate that Mr. Von Haynes, while attempting to rob the victim, shot the victim and caused the victim's death and that he participated with others in the commission of the crime. The evidence was sufficient to convict and this claim of error is without merit.

Mr. Von Haynes next challenges his conviction for violating the Uniform Firearms Act. The crime of carrying a firearm without a license is set forth in 18 Pa.C.S. §6106(a), which states:

> Any person who carries a firearm in any vehicle or any person who carries a firearm on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this Chapter commits a felony of the third degree.

In order to convict a defendant for carrying a firearm without a license, the Commonwealth must prove: "(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that where the firearm was concealed on or about the person, it was outside his home or place of business." *Commonwealth v. Parker,* 847 A.2d 745 (Pa.Super. 2004) citing *Commonwealth v. Bavusa,* 2000 Pa.Super. 85, 750 A.2d 855, 857 (Pa.Super. 2000), *affirmed*, 574 Pa. 620, 832 A.2d 1042 (2003) (citations omitted).

Mr. Von Haynes admitted to possessing a firearm. He was not licensed to do so. Mr. Von Haynes' own statements were that the firearm was carried on his hip prior to the shooting. This Court believes that evidence is sufficient to convict Mr. Von Haynes for a violation of the Uniform Firearms Act.

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

BY THE COURT:
/s/Mariani, J.

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[1] According to the computer docket of the Court of Common Pleas of Allegheny County, criminal case number 200502270 involved the charge of receiving stolen property filed against Michael Franklin, which was disposed of on June 23, 2008 before Judge Cheryl Allen (now Superior Court Judge) of this Court. Criminal case number 200502270 was not related to Mr. Von Haynes' cases.

[2] This Court issues the within opinion regarding the substance of Mr. Von Haynes' appeal, not-withstanding the potential timeliness issue arising based on the procedural history outlined above. It appears that counsel for Mr. Von Haynes intended to appeal both cases presented to the jury despite the fact that counsel did not correctly file an appeal at both relevant cases. The Court finds that the problems presented by the improper filings were clerical in nature.

Commonwealth of Pennsylvania v. Robin Lyn Kaczynski

Sentencing—Sentencing Guidelines—Statutory Maximum

1. Defendant pled guilty to three counts of DUI and related summary offenses. Defendant's criminal history included fifteen arrests in seventeen years, including six DUIs, seven drug charges, and one charge of being a habitual offender. Defendant's driver's license had also been suspended in 1993, and would not be eligible for restoration until 2021.

2. The court did not err in sentencing Defendant to the statutory maximum, outside of the sentencing guidelines, in light of Defendant's criminal history, Defendant's neighbor's testimony that Defendant continuously disrupted the neighborhood with her intoxicated behavior, and the obvious need to protect society from Defendant's inability and unwilling-

ness to address her substance abuse problems and continuous reckless behavior.

3. The Court set forth sufficient explanation on the record for departing from the sentencing guidelines when the Court discussed these reasons for over two pages on the sentencing transcript and over two pages of the transcript for defendant's hearing on motion for modification. The Court's stated reasons for departing from the guidelines include: the Defendant's addictive personality, inability to control her actions, lengthy criminal history, and constant disruption of the community.

4. Defendants' guilty plea was a mere acceptance that she could not successfully defend against the Commonwealth's evidence. Her plea demonstrated no genuine acceptance of responsibility and did not qualify to mitigate against the other factors.

(Elizabeth A. Farina)

Shaun Ann Byrne for the Commonwealth.
Jeffrey M. Murray for Defendant.

No. CC2006-12594. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., August 25, 2008—On September 5, 2007, the appellant, Robin Lyn Kaczynski, (hereinafter referred to as "Kaczynski"), entered a plea of guilty to three counts of driving under the influence of alcohol and the summary offenses of driving while her operator's privileges have been suspended for an alcohol-related offense and being involved in an accident with an unattended vehicle. A presentence report was ordered in aid of sentencing and on December 5, 2007, Kaczynski was sentenced to a period of incarceration of not less than two and one-half nor more than five years for her plea of guilty to the charge of driving under the influence of alcohol and a consecutive sentence of sixty to ninety days for driving under suspension for an alcohol-related offense. Kaczynski filed a timely motion to modify her sentence and a hearing was held on that motion, which motion was denied. Following the denial of her motion for modification of sentence, Kaczynski filed a timely appeal to the Superior Court.

Kaczynski was directed to file a concise statement of matters complained of on appeal and in complying with that directive, has suggested that this Court abused its discretion in sentencing Kaczynski to a period of incarceration of two and one-half to five years, which is the statutory maximum for driving under the influence. In particular, Kaczynski has suggested that this Court abused its discretion since the sentence imposed was in excess of the guideline ranges for her case. She has also suggested that the sentence was manifestly excessive and unreasonably inconsistent with the sentencing goals of the Sentencing Code. Kaczynski further has suggested that this Court abused its discretion for failing to place sufficient reasons on the record for the sentence that it entered and, finally, that it abused its discretion in not taking into account her acceptance of responsibility for her conduct.

The record in the instant case reveals that on August 8, 2006, the Monroeville Police Department received a call with respect to an erratic driver that was at 306 Interlaken Drive in Monroeville. The police responded to that call and found that Kaczynski was the driver of a vehicle that had struck a parked vehicle and a mailbox, in the process of attempting to "turf" several lawns near her residence. The Commonwealth also presented a witness, James Brown, who indicated that Kaczynski's conduct was not unusual since this happened on a fairly regular basis and the police were often called to her home because of her conduct. Kaczynski was asked to perform a series of field sobriety tests, all of which she failed. In light of her failure of these tests and her attitude with the police, it was the arresting officer's opinion that she was incapable of the safe operation of a motor vehicle. She was taken to Forbes Regional Hospital where she was asked to submit to a blood draw for the purpose of determining her blood alcohol level, which she refused. It was noted that at the time that she was operating her vehicle Kaczynski's license had been suspended as a result of a 2003 DUI conviction.

While Kaczynski has asserted four claims of error committed by this Court in sentencing her, they all involve the same issue, and that is whether or not this Court abused its discretion in sentencing her to the statutory maximum for her plea of guilty to the crime of driving under the influence. It is well-settled that a reviewing Court will not disturb the sentence imposed by a Trial Court absent a manifest abuse of discretion. *Commonwealth v. Boyer,* 856 A.2d 149 (Pa.Super. 2004). In *Commonwealth v. Walls,* 592 Pa. 557, 926 A.2d 957, 961 (2007), citing, *Grady v. Frito-Lay, Inc.,* 576 Pa. 546, 839 A.2d 1038, 1046 (2003), the Pennsylvania Supreme Court defined an abuse of discretion as follows:

> "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous."

If a sentence is within the Sentencing Guidelines, that sentence must be affirmed unless it is determined that the sentence is unreasonable. 42 Pa.C.S.A. §9781(c)(2).

When considering a challenge to the discretionary aspect of sentencing, a four-part analysis must be made before one can reach the merits of that claim. *Commonwealth v. Martin,* 611 A.2d 731 (Pa.Super. 1992), set forth the analysis is required to be done by a reviewing Court: 1) whether the present appeal was timely filed; 2) whether the issue raised on appeal was properly preserved; 3) whether the appellant has filed a statement pursuant to Pennsylvania Rule of Appellate Procedure 2119(f); and, 4) whether an appellant has raised the substantial question that her sentence is not appropriate under the Sentencing Code. An appellant raises a substantial question when she can articulate a plausible argument that the sentence imposed was in contravention of the provisions of the Sentencing Code. *Commonwealth v. Goggins,* 748 A.2d 721 (Pa.Super. 2000). It is unquestioned that Kaczynski's appeal was timely filed and that the issues that she wished to raise were preserved. This Court cannot address the question of whether or not she has complied with Pennsylvania Rule of Appellate Procedure 2119(f) since it is not privy to that statement. However, it is clear that Kaczynski has raised a substantial question since she has asserted that this Court failed to adequately set forth the reasons for imposing the sentence that it did and that assertion would raise a substantial question. *Commonwealth v. Fowler,* 893 A.2d 758 (Pa.Super. 2006).

When considering the claim that Kaczynski's sentence was excessive because it is based upon a deviation from the Sentencing Guidelines, a reviewing Court must look for an indication that the sentencing Court understood the suggested range of sentencing. *Commonwealth v. Mouzon,* 828 A.2d 1126 (Pa.Super. 2003). In fashioning a sentence, a trial Court must take into consideration the needs for the protec-

tion of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the lives of the victims and the community. After taking into consideration all of these factors as required by the Sentencing Code, if the sentencing Court states on the record the factual basis for the imposition of that sentence and the reasons why it is deviating from the Sentencing Guidelines, that sentence will not be reversed. *Commonwealth v. Mouzon, supra.* While a sentencing Court must consider the Sentencing Guidelines, they are not bound by those Guidelines since they are advisory and may sentence an individual in excess of those Guidelines along as it states its reasons on the records for doing so. *Commonwealth v. Walls, supra.*

In this case, while the indictment was erroneous in that it graded the driving under the influence charges as ungraded misdemeanors, the guidelines that were submitted to this Court correctly rated this offense as a misdemeanor in the first degree since this was Kaczynski's third conviction for driving under the influence within the preceding ten years. The guidelines for her case showed a mitigated range sentence of nine months; a standard range sentence of twelve to eighteen months; and, an aggregated range sentence of twenty-one months. While this was Kaczynski's third DUI for the purpose of calculating the guidelines, it was her sixth DUI when her extensive criminal record was reviewed. At the time of the entry of her plea, Kaczynski's counsel waived her right to a presentence report and wanted to proceed to sentencing on that date. He advised this Court that while this was her second DUI for the purpose of sentencing, she, in fact, had six DUIs on her record. When this Court heard that information, coupled with the testimony of Kaczynski's neighbor that he had witnessed this incident which was just another continuing escapade in her alcoholic behavior, which required the police to routinely visit her house, this Court decided to order a presentence report.

That presentence report revealed that beginning in 1990 through the date of the presentence report of December 3, 2007, that Kaczynski had been arrested fifteen times. Those fifteen times[1] included six DUIs, eight driving under suspension, seven drug charges, and one charge of being a habitual offender. Her driver's license record revealed that her driver's license had been suspended since May 20, 1993, and she was not entitled to have it restored until November 1, 2021. This presentence report revealed a continuous, ongoing pattern that she used and abused not only alcohol, but also drugs. Despite the numerous opportunities which she had been given, not only for her driving under the influence charges, but for her conviction of the violation of the Controlled Substance, Drug, Device & Cosmetic Act, Kaczynski had failed to take advantage of the opportunities given to her to rehabilitate her from her addictions. Her five prior driving under the influence convictions all had sentences which required her to have an alcohol evaluation and then to undergo treatment for her alcoholism. Either Kaczynski was unwilling or unable to address these problems since she continued to engage in her reckless behavior.

This Court, while recognizing that the guidelines called for a significant period of incarceration, which envisioned state time, believed that they were not appropriate for Kaczynski. This Court, in fashioning her sentence, recognized the need to protect society since she continually ignored the fact that she was not permitted to operate a motor vehicle, since her license had been suspended since 1993, continued to accumulate additional driving under the influence charges in addition to charges for the violation of the Controlled Substance, Drug, Device & Cosmetic Act. With respect to her rehabilitative needs, it is clear that when given the opportunity, she has either failed to take advantage of the opportunities given to her, or she believes that she did not need such rehabilitation. With respect to Kaczynski's claim that this Court abused its discretion in not imposing the guidelines, there was no abuse of discretion in imposing the statutory maximum since her extensive criminal record militated against a guideline sentence. As previous noted, the guidelines are advisory and a sentencing Court is not required to impose a guideline sentence as long as it sets forth the reason why it departs from the guidelines. *Commonwealth v. Walls, supra.* The reasons for the departure in this case were obvious and fully set forth.

Kaczynski's second claim of error is that this Court abused its discretion in imposing the statutory maximum since it did not take into consideration the need to protect the public, the gravity of the offense as it relates to the impact on the victim and the community, and the rehabilitative needs of the defendant. As previously noted, Kaczynski had five opportunities to attempt to undergo rehabilitation for her obvious alcoholism. These five prior opportunities obviously failed since she continued to operate a motor vehicle despite the fact that she was not permitted to do so and when she operated her motor vehicle, she was either under the influence of alcohol or a controlled substance. The impact upon the community was underscored by the testimony of Brown who stated not only that he witnessed this current incident but, also, that he was witness to the fact that the Monroeville Police were called numerous times to Kaczynski's home for what appeared to be problems emanating from her alcohol abuse. In fashioning Kaczynski's sentence, this Court took into consideration all of the factors set forth in the Sentencing Code and came up with the only appropriate sentence for Kaczynski's continuing activity.

Kaczynski's third claim of error is that this Court did not place sufficient reasons on the record at the time of sentencing or at the time of the hearing on her motion for modification of her sentence for deviation from the guidelines, which would justify the imposition of the statutory maximum sentence. Even a cursory review of the transcripts of her sentencing hearing and the hearing on her petition for modification of her sentence shows the frivolous nature of this contention. At the time of sentencing the Court devoted two and one-half pages outlining the reasons why it imposed the sentence that it did. *Sentencing Transcript,* pp. 9-11. At the time of the hearing on her motion for modification, this Court once again devoted more than two and one-half pages to explaining its reasons for imposing the statutory maximum. This Court recognized that Kaczynski has an addictive personality and has been unable to control it. She has had five prior opportunities at rehabilitation, none of which have worked. She continued to accrue DUI convictions in addition to convictions for the violation of the Controlled Substance, Drug, Device & Cosmetic Act. She had eight convictions for driving under suspension and she committed several other crimes which one could only believe were fueled by alcohol or drugs. Her ability to control her addictions to alcohol and drugs mandated the imposition of the sentence and this Court fully outlined the reasons why it imposed that sentence both at the time she was originally sentence and, at the time of the hearing on her motion for modification of sentence.

Finally, Kaczynski has maintained that this Court did not take into account her acceptance and responsibility for

her actions when it formulated its sentence. Kaczynski's acknowledgement of responsibility, while factoring and considering a sentence, is not determinative of that sentence. Her acknowledgement of responsibility was more so because of the fact that she could not successfully defend against these charges since the Commonwealth had an eyewitness to her erratic driving and bizarre behavior and then had an expert witness who offered the opinion that because of her level of intoxication, that she was incapable of the safe operation of a motor vehicle. Her acknowledgement of responsibility for her actions was only an acknowledgement of the inevitable and, that is, had she gone to trial she would have been convicted of these charges. While this Court did consider that factor, it did not consider it to be a mitigating factor in the formulation of her sentence. As previously observed, there were numerous factors that gave rise to the conclusion that the only sentence that would be taken into consideration was the protection of the public, her rehabilitative needs and the impact of her actions on herself and society would be a sentence of total confinement of the maximum sentence of a period of incarceration of not less than two and one-half to five years. As with all of Kaczynski's other claims of error, this claim is also without merit.

BY THE COURT:
/s/Cashman, J.

Dated: August 25, 2008

[1] The presentence report revealed the following criminal record for Kaczynski:

1990	Harassment (summary offense) (guilty)
1993	Driving under the influence; possession of a small amount; two counts of possession of a controlled substance; one count of driving under suspension (guilty)
1994	Driving under the influence; driving under suspension (guilty)
1994	Possession with intent to deliver; possession; possession of drug paraphernalia; criminal conspiracy
1995	Driving under the influence; driving under suspension (guilty)
1998	Being involved in an accident involving damage to property; Driving under suspension (guilty)
1999	Being involved in an accident involving damage to property (guilty)
2000	Being an habitual offender; driving under suspension (guilty)
2002	Possession; restriction on alcohol beverages (guilty)
2002	Driving under the influence; driving under suspension (guilty)
2003	Driving under the influence; driving under suspension (guilty)
2006	Harassment (withdrawn)
2006	Theft; driving under suspension (guilty)
2006	Driving under the influence; driving under suspension; being involved in an accident of unattended property (guilty) (current case)
2007	Theft; receiving stolen property (nolle prossed)

Commonwealth of Pennsylvania v. Casey Lee Shepard

Suppression of Evidence—Validity of Traffic Stop—Totality of the Circumstances

1. The officer observed a center light on the back of Defendant's pick up truck that did not light when the other brake lights were engaged. The officer suspected said light to be burnt out or non-functioning in violation of the vehicle code and conducted a traffic stop.

2. The officer approached the vehicle and attempted to speak with Defendant, but asked Defendant to step outside the vehicle because Defendant's voice was too soft and the roadway was too loud for the officer to hear the Defendant. As Defendant stepped out of the vehicle, multiple baggies of suspected heroin fell out of Defendant's lap.

3. The traffic stop was proper and suppression of the suspected heroin was not merited because the totality of the circumstances showed that the officer had a reasonable suspicion that a provision of the Motor Vehicle Code was being violated because the officer observed what he perceived to be a non-functioning center brake light.

4. The Defendant's later testimony that the center light illuminated the truck bed and was not a brake light does not impact the court's finding of reasonable suspicion, when the officer had 15 years of experience as a police officer, had made numerous stops involving non-operational centrally mounted rear-stop lights, and the officer's perception that the light in question was a brake light was reasonable.

(Elizabeth A. Farina)

Anthony J. Christmas for the Commonwealth.
Aaron Sontz for Defendant.

No. CC2006-16772. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., September 4, 2008—The appellant, Casey Lee Shepard, (hereinafter referred to as "Shepard"), filed the instant appeal as a result of his convictions following a non-jury trial of the crimes of possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia. Shepard was sentenced to a period of probation of one year, which included the requirement of random drug screening. Shepard filed timely post-trial motions which were denied by operation of law on April 29, 2008 and he then filed a timely appeal in which he has raised one

issue, that being that this Court erred in failing to grant his suppression motion since the police officer had neither probable cause nor reasonable suspicion to effectuate a motor vehicle stop.

On August 3, 2006, at approximately 7:20 p.m., Officer Todd McCollum, (hereinafter referred to as "McCollum"), a fifteen-year veteran police officer was on routine patrol in the East Liberty Section of the City of Pittsburgh near Baum Boulevard, when he observed a light blue, Ford Ranger pickup truck with an extended cab that he believed to have a burnt out stop light. McCollum and his partner observed this vehicle make several stops and while both the stop lights on the right and left sides of the vehicle were operational, the light in the middle of the cab portion of the truck did not illuminate. McCollum, after witnessing this vehicle make several stops, decided to pull this vehicle over for a motor vehicle violation, that being having a burnt out light. Due to the inclement weather, the volume of traffic and the fact that Shepard, who was the driver of this truck, was reluctant to make eye contact with him, McCullom had difficulty hearing Shepard's responses to his questions. McCullom asked Shepard to step out of the vehicle and when he did, several rectangular objects fell from his shorts; those objects appeared to be individual packets of heroin. Shepard then stated that "you got me" and that "he couldn't believe that he was that stupid." The nineteen baggies recovered from Shepard were submitted to the Allegheny Crime Lab and they tested positive for heroin.

The only issue raised by Shepard in his current appeal is his contention that this Court erred in failing to grant his motion to suppress when McCollum had neither probable cause nor reasonable suspicion to effectuate a motor vehicle stop. The standard scope of review of a Trial Court's denial of a motion to suppress is set forth in *Commonwealth v. Fulton*, 921 A.2d 1239, 1242 (Pa.Super. 2007) as follows:

> When we review the ruling of a suppression court, we must ascertain whether its factual findings are supported by the record and whether the inferences and legal conclusions drawn from those facts are reasonable. *Commonwealth v. Lewis*, 535 Pa. 501, 504, 636 A.2d 619, 621 (1994). Where the defendant challenges an adverse ruling of the suppression court, we will consider only the evidence for the prosecution and whatever evidence for the defense that remains uncontradicted in context of the whole record. *Id.* If there is support on the record, we are bound by the facts as found by the suppression court, and we may reverse that court only if the legal conclusions drawn from these facts are in error. *Id. Commonwealth v. Petroll*, 558 Pa. 565, 574-575, 738 A.2d 993 (1999).

Both Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution, protect a citizen of the Commonwealth of Pennsylvania from unwarranted seizures by law enforcement or officials. *Commonwealth v. Petroll*, 558 Pa. 565, 738 A.2d 993 (1999). A police officer, if he has reasonable suspicion to believe that a motor vehicle violation has occurred may initiate an investigatory vehicle stop. Reasonable suspicion exists where the officer is able to articulate specific observations which, when considered with the reasonable inferences derived therefrom, lead to the reasonable conclusion, in light of the officer's experience, that criminal activity is afoot and the person seized was engaged in that criminal activity. Considering whether or not reasonable suspicion exists, a Court must consider the totality of the circumstances.

Section 6308(b)[1] of the Pennsylvania Motor Vehicle Code, provides the authority for a police officer to make an investigatory motor vehicle stop wherein he has a reasonable suspicion to believe that a violation of that Code has occurred. That Section provides as follows:

> **(b) Authority of police officer.—**Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

Unlike Shepard's contention that the probable cause standard is needed, it is only necessary for a police officer to articulate the facts which would provide the basis for his reasonable suspicion to suspect that a motor vehicle violation is occurring or has occurred. *Commonwealth v. Steinmetz*, 440 Pa.Super. 591, 656 A.2d 527 (1995). In effectuating this type of motor vehicle stop, it is not necessary to establish the actual violation of the Motor Vehicle Code but, rather, to demonstrate the reasonable basis for the officer's belief that the vehicle or driver is in violation of the Motor Vehicle Code. *U.S. v. Johnson*, C.A.3 (Pa.) 1995, 63 Fed.3d 242. See also, *Commonwealth v. McElroy*, 428 Pa.Super. 69, 630 A.2d 35 (1993).

In the instant case, McCollum noticed what appeared to be a burnt out brake light, which was located in the center of the cab to Shepard's pickup truck. Section 4303(b)[2] of the Motor Vehicle Code sets forth the requirements of the rear lighting of a motor vehicle as follows:

> **(b) Rear lighting.—**Every vehicle operated on a highway shall be equipped with a rear lighting system including, but not limited to, rear lamps, rear reflectors, stop lamps and license plate light, in conformance with regulations of the department. If a vehicle is equipped with a centrally mounted rear stop light, a decal or overlay may be affixed to the centrally mounted rear stop light if the decal or overlay meets all applicable State and Federal regulations.

In this case McCollum believed that Shepard's vehicle was equipped with a centrally mounted rear stop light. In his fifteen years as a police officer, McCollum had made numerous stops where the centrally mounted rear stop light was not operational. In this case, while both the right and left stop lights were operational, McCullom believed that the centrally mounted light was not operational when he effectuated the stop. At the time of the hearing on Shepard's motion to suppress, he testified that the reason that the central mounted light did not come on was because it was not a stop light but, rather, a light that was used to illuminate the bed of his truck. This light was not connected to the braking system of this vehicle.

In reviewing this case in light of the totality of the circumstances, it is clear that McCullom had a reasonable belief that that centrally mounted light was, in fact, a brake light as opposed to a light used to illuminate the bed of the

truck. Since he had a reasonable belief to stop that motor vehicle, and he articulated those reasons, it is clear that the stop of the motor vehicle was neither in violation of Article I, Section 9 of the Pennsylvania Constitution or the Fourteenth Amendment of the United States Constitution and, accordingly, Shepard's motion to suppress was properly denied.

BY THE COURT:
/s/Cashman, J.

Dated: September 4, 2008

[1] 75 Pa.C.S.A. §6308(b).

[2] 75 Pa.C.S.A. §4303(b).