ERIE COUNTY LEGAL JOURNAL

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Reports of Cases Decided in the Several Courts of Erie County for the Year 2017

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ERIE, PA

JUDGES
of the
Courts of Erie County
during the period covered
by this volume of reports

COURTS OF COMMON PLEAS

HONORABLE JOHN J. TRUCILLA ---------- President Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ELIZABETH K. KELLY ---------- Judge
HONORABLE JOHN GARHART ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR. ---------- Judge
HONORABLE ROBERT A. SAMBROAK, JR. (deceased 3/2/17) -- Judge
HONORABLE JOHN J. MEAD ---------- Judge
HONORABLE JOSEPH M. WALSH, III, ---------- Judge

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CHRISTOPHER KLINGENSMITH
v.
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

To sustain a suspension of operating privileges under 75 Pa. C. S. §1547, PennDOT must establish that the licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. Once PennDOT meets this burden, the licensee must then establish that the refusal was not knowing or conscious or that the licensee physically was unable to take the test.

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

The law is well established that anything less than a licensee's unqualified, unequivocal assent to submit to chemical testing constitutes a refusal under 75 Pa. C. S. §1547. A refusal need not be expressed in words, but can be implied from a motorist's actions.

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

Police officers are not required to spend effort either cajoling the licensee or spend time waiting to see if the licensee will ultimately change his mind. Before a refusal may be recorded, police officers must fulfill their affirmative duty to convey to a licensee the certainty of a suspension upon his refusal to submit to a chemical test, but police officers have no duty to ensure that a licensee understands the consequences of refusing a chemical test.

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

Only when PennDOT meets its burden of proving that a motorist was given a "meaningful opportunity" or a "reasonable and sufficient opportunity" to comply with the chemical testing requirement of the Implied Consent Law may a court conclude that a motorist's failure to complete the requested test constitutes a refusal.

TRANSPORTATION LAW / REFUSAL / KNOWING AND CONSCIOUS

A hearing impairment can prevent a licensee from knowingly and consciously refusing to submit to chemical testing. While the Pennsylvania Commonwealth Court has acknowledged that a hearing impairment can prevent a knowing and conscious refusal, the Commonwealth Court has also held that if a licensee has a medical condition which could affect his ability to consent to or perform the test, if police officers are not notified of the medical condition, the licensee is precluded from relying upon that condition or inability as an affirmative defense to the license suspension. Simply put, when the police officer cannot usually ascertain a medical problem, the licensee has a duty to advise the officer of the medical problem.

SEARCH AND SEIZURE / REASONABLENESS / CONSENT

The United States Supreme Court's prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

SEARCH AND SEIZURE / EXCLUSIONARY RULE

Violations of privacy interests under the Fourth Amendment mandates suppression of evidence under the "Exclusionary Rule," a judicially-created sanction specifically designed as a "windfall" remedy to deter **future** Fourth Amendment violations. The sole purpose of the exclusionary rule is to deter misconduct by law enforcement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. 11060 - 2016

Appearances: Elliot J. Segel, Esq. for the Plaintiff
Denise H. Farkas, Esq. for the Defendant

OPINION

Domitrovich, J., December 19, 2016

The instant matter is before this Trial Court on Christopher N. Klingensmith's (hereafter referred to as "Appellant") appeal from the Pennsylvania Department of Transportation's (hereafter referred to as "PennDOT") suspension of his operating privileges for a period of twelve (12) months by Notice dated March 17, 2016 as a result of Appellant's refusal to submit to chemical testing, pursuant to 75 Pa. C. S. §1547(b)(1)(i). As to the three (3) issues raised by Appellant in his license suspension appeal, this Trial Court concludes: (1) Appellant's conduct did constitute a refusal to submit to chemical testing; (2) Appellant's refusal to submit to chemical testing was a knowing and conscious refusal, and Appellant cannot rely on his hearing loss as an affirmative defense to the license suspension as Appellant had a duty to inform and advise the police officers of his hearing loss; and (3) the United States Supreme Court's decision in Birchfield does not apply to civil penalties imposed under Pennsylvania's implied consent law for a refusal to submit to chemical testing.

After this Trial Court heard testimony before the Court and reviewed the Memoranda of Law from counsel, this Trial Court makes the following Findings of Fact and Conclusions of Law:

On February 27, 2016 around 3:30 a.m., City of Erie Police Patrolman Christopher O'Connell, together with Patrolman Shields in a two-man police unit, was dispatched to a motor vehicle accident at 330 East 29th Street, Erie, Pennsylvania 16504. Specifically, the dispatch operator indicated a vehicle had struck the side of a house, causing minor damage. As Patrolman O'Connell and Patrolman Shields arrived at the scene, the police officers observed the driver of the vehicle, identified as Appellant Christopher N. Klingensmith, in the area. When Appellant approached Patrolman O'Connell and Patrolman Shields, Appellant admittedly and verbally stated: "I'm sorry, guys. I was driving. I'm drunk, but I'm only a block away from my house." Patrolman O'Connell observed signs of Appellant's intoxication, including a strong odor of alcoholic beverages, bloodshot, glassy eyes, slurred speech and unsteady balance. Appellant did not advise either Patrolman O'Connell or Patrolman Shields in any manner that he [Appellant] had any hearing loss or any similar medical condition.

Shortly thereafter, City of Erie Police Patrolman John Wilson, having received the same dispatch Patrolmen O'Connell and Shields received, arrived on the scene. Patrolman

Wilson also observed signs of Appellant's intoxication, including a strong odor of alcoholic beverages, bloodshot, glassy eyes, slurred speech and unsteady balance. Patrolman Wilson requested Appellant submit to field sobriety testing, including the "one leg stand" test, the "walk-and-turn" test, and the "finger-to-nose" test, to which Appellant complied. Appellant did not inform Patrolman Wilson prior to or during the field sobriety tests in any manner that he [Appellant] had any hearing loss or any similar medical condition. Patrolman Wilson instructed Appellant verbally on each test and demonstrated each test personally; however, Appellant did not wait until he was instructed to start, but started performing each test before the instructions and demonstrations were completed. Dr. Rick A. Fornelli, M.D., acknowledged, in his November 3, 2016 deposition, Appellant's conduct of starting a field sobriety test before Patrolman Wilson instructed Appellant to begin is potentially a sign of intoxication. *See Notes of Testimony, Deposition of Rick A. Fornelli, M.D., November 3, 2016, page 48, lines 14-19.* Based upon Patrolman Wilson's training and experience, his initial observations of Appellant's demeanor and Appellant's performance of each field sobriety test, Patrolman Wilson concluded Appellant was under the influence of alcohol. Appellant was then placed under arrest for Driving under the Influence of Alcohol by Patrolman O'Connell at the request of Patrolman Wilson.

Appellant was placed in the back of a patrol vehicle and Patrolman O'Connell read Appellant the DL-26 "O'Connell Warnings" form verbatim in its entirety. During Patrolman O'Connell's reading of the DL-26 "O'Connell Warnings" form, Appellant interrupted Patrolman O'Connell, who had to speak over Appellant. After reading the DL-26 "O'Connell Warnings" form, Patrolman O'Connell requested Appellant submit to a chemical test of blood, to which Appellant stated: "No, I don't understand." Appellant did not inform Patrolman O'Connell prior to or during the reading of the DL-26 "O'Connell Warnings" form that he [Appellant] had any hearing loss or any similar medical condition. Patrolman O'Connell then radioed to dispatch and reported that Appellant refused to submit to chemical testing.

Thereafter, Appellant was taken to the City of Erie Police Department booking center to be processed. Patrolman O'Connell, who was present for Appellant's questioning, stated Appellant verbally answered every question and did not indicate in any manner that he [Appellant] had any hearing loss or any similar medical condition.

By Notice dated March 17, 2016, PennDOT suspended Appellant's operating privileges for a period of twelve (12) month due to his refusal to submit to chemical testing, pursuant to 75 Pa. C. S. §1547(b)(1)(i). Appellant, by and through his counsel, Elliot J. Segel, Esq., filed a Petition for Appeal from a Suspension of Operating Privilege/Denial of Driver's License/ Suspension of Motor Vehicle Registration on April 14, 2016. A hearing was scheduled for June 29, 2016. Attorney Segel filed a Motion for Continuance of License Suspension Appeal Hearing on June 16, 2016, which was granted by this Trial Court the same day, continuing the License Suspension Appeal hearing to September 28, 2016. Appellant filed an Addendum to License Suspension Appeal on July 18, 2016. Attorney Segel filed a second Motion for Continuance of License Suspension Appeal Hearing on September 26, 2016, which was granted by this Trial Court on September 27, 2016, continuing the License Suspension Appeal hearing to November 21, 2016.

A deposition of Rick A. Fornelli, M.D., an otolaryngologist, was scheduled for November 3, 2016, at which Elliot J. Segel, Esq., appeared on behalf of Appellant Christopher N.

Klingensmith, and Denise H. Farkas, Esq., appeared on behalf of PennDOT. Dr. Fornelli first acknowledged Appellant had no complaints with hearing in his left ear and audiometric testing indicated normal hearing in Appellant's left ear. *See N.T., November 3, 2016, page 14, lines 16-18; page 17, lines 1-3; page 29, lines 13-14.* Dr. Fornelli indicated his assessment was Appellant had developed sudden hearing loss in his right ear, which is considered an "otolaryngic emergency," and is sometimes viral in nature. *See id, page 20, lines 2-6.* Dr. Fornelli commented that not only does Appellant have hearing loss, but has loss of sensitivity for speech and to understand words. *See id, page 31, lines 4-9.* Dr. Fornelli indicated, based upon the documented treatment, examination and testing of Appellant, Appellant's statement that he [Appellant] "did not understand" could be consistent with hearing loss or impairment. *See id, page 37, lines 17-23.* However, Dr. Fornelli acknowledged Appellant had only "ringing" and a reduction of hearing in his right ear. *See id, page 39, lines 2-5.* Based upon a review of the December 10, 2012 test results, Dr. Fornelli stated Appellant's hearing in his right ear had improved. *See id, page 43, line 24 – page 45, line 3.* Dr. Fornelli admitted he did not observe Appellant on February 27, 2016, including how much alcohol Appellant had consumed that evening. *See id, page 47, lines 8-14.* Dr. Fornelli acknowledged Appellant's actions of starting the field sobriety tests before being instructed to do so can be a sign of intoxication. *See id, page 48, lines 14-19.* Ultimately, Dr. Fornelli could not state with reasonable medical certainty that Appellant's actions on the night of February 27, 2016 were not caused by Appellant's intoxication. *See id, page 49, lines 6-9.*

This Trial Court conducted a full hearing on September 28, 2016. Thereafter, Appellant's counsel, Elliot J. Segel, Esq., agreed to submit a Memorandum of Law within ten (10) days from the date of the hearing, and counsel for PennDOT, Denise H. Farkas, Esq., agreed to submit a Responsive Memorandum of Law within ten (10) days after receipt of Attorney Segel's Memorandum. Attorney Segel submitted his Memorandum of Law on November 28, 2016. Attorney Farkas submitted her Responsive Memorandum of Law on December 8, 2016. Attorney Segel submitted a Reply to Commonwealth's Brief in Support of License Suspension on December 12, 2016. Attorney Farkas submitted a Reply to Attorney Segel's Reply on December 14, 2016.

1. PennDOT has satisfied all four (4) prongs of its burden of proof, and Appellant has failed to rebut PennDOT's evidence.

To sustain a suspension of operating privileges under 75 Pa. C. S. §1547, PennDOT must establish that the licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. *Finney v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensi*ng, 721 A.2d 420, 423 (Pa. Commw. Ct. 1998).

PennDOT has met the first prong of its burden based upon the statements made by Appellant that he [Appellant] "was driving" and "was drunk," Patrolman O'Connell's and Patrolman Wilson's observations of Appellant's intoxication and Appellant's unsatisfactory performance of the field sobriety tests. Furthermore, Appellant does not contest he was asked by Patrolman O'Connell to submit to a chemical test and was warned by Patrolman

O'Connell that refusal might result in a license suspension; therefore, PennDOT has satisfied the second and fourth prong of its burden. However, Appellant argues his conduct did not constitute a refusal to submit to chemical testing.

The law is well established that anything less than a licensee's unqualified, unequivocal assent to submit to chemical testing constitutes a refusal under 75 Pa. C. S. §1547. *See id at 423.* A refusal need not be expressed in words, but can be implied from a motorist's actions. *See id.* Furthermore, "police officers are not required to spend effort either cajoling the licensee or spend time waiting to see if the licensee will ultimately change his mind." *McKenna v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 72 A.3d 294, 300 (Pa. Commw. Ct. 2013). Before a refusal may be recorded, police officers must fulfill their affirmative duty to convey to a licensee the certainty of a suspension upon his refusal to submit to a chemical test, but police officers have no duty to ensure that a licensee understands the consequences of refusing a chemical test. *See id.*

After Appellant was arrested for Driving under the Influence of Alcohol on February 27, 2016, Patrolman O'Connell read to Appellant the DL-26 "O'Connell Warnings" form verbatim in its entirety. *See Dr. Fornelli Exhibit 3, page 3.* The DL-26 "O'Connell Warnings" form read to Appellant on February 27, 2016 conformed with the requirements of 75 Pa. C. S. §1547(b)(2), as it informed Appellant that if he refused to submit to chemical testing, his operating privileges would be suspended and he would be subject to the criminal penalties pursuant to 75 Pa. C. S. §3804(c). *See 75 Pa. C. S. §1547(b)(2)(i)-(ii).* By virtue of reading the DL-26 "O'Connell Warnings" form to Appellant, Patrolman O'Connell fulfilled his affirmative duty as required by the case law. *See McKenna,* 72 A.3d at 300. When asked to submit to chemical testing, Appellant stated "No, I don't understand." At this point, based upon the relevant case law, Patrolman O'Connell had no responsibility to "cajole" Appellant into submitting to chemical testing, nor did Patrolman O'Connell have any responsibility to ensure Appellant fully understood the consequences listed in the DL-26 "O'Connell Warnings" form. *See id.* As Appellant's conduct did not demonstrate an "unqualified, unequivocal assent to submit to chemical testing," Appellant's conduct constituted a refusal to submit to chemical testing.

Appellant also argues he was not provided a "meaningful opportunity" to submit to chemical testing and, therefore, his conduct cannot constitute a refusal. Only when PennDOT meets its burden of proving that a motorist was given a "meaningful opportunity" or a "reasonable and sufficient opportunity" to comply with the chemical testing requirement of the Implied Consent Law may a court conclude that a motorist's failure to complete the requested test constitutes a refusal. *Nardone v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 130 A.3d 738, 749 (Pa. 2015). Appellant cites to *Nardone,* to *Solomon v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 966 A.2d 640 (Pa. Commw. Ct. 2009), and to *Todd v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 723 A.2d 655 (Pa. Commw. Ct. 1999), in support of this argument.

In *Nardone*, the appellant, after being requested by police officers to submit to a chemical test of blood, requested alternative tests of breath and/or urine due to an injury to his arm. *Nardone*, 130 A.3d at 741-742. The encounter between the appellant and police officers was no more than sixty (60) seconds. *See id at 751.* The Pennsylvania Supreme Court held

the appellant's conduct constituted a refusal as the appellant "demonstrated an intractable unwillingness to consent to the official request that he submit to a chemical test of his blood." *See id at 751*. Furthermore, in *Solomon*, the appellant, after being requested by police officers to submit to a chemical test of blood, responded with a short expletive and stated "Do what you've got to do," after which he was deemed to have refused. *See Solomon*, 966 A.2d at 641. The Pennsylvania Commonwealth Court held the appellant was not provided a "meaningful opportunity," stating:

> Although Solomon's expletives were inappropriate, his response as a whole was certainly ambiguous and not an explicit refusal. Solomon's response could have been fairly taken to mean go ahead with the chemical test. The officer should have made an attempt at that point to confirm whether Solomon would submit to testing. Instead, the officer escorted him out of the room and immediately deemed a refusal. This fact further illustrates PennDOT's failure to prove that Solomon was offered "a meaningful opportunity to comply."

Id at 643. Finally, in *Todd*, the appellant submitted to a chemical test of breath, but was deemed by police officers to have refused after failing to give an adequate breath sample following three (3) attempts. *See Todd*, 723 A.2d at 656. The Pennsylvania Commonwealth Court held the appellant's conduct constituted a refusal where the appellant was given a reasonable opportunity to provide an adequate breath sample. *See id* at 659.

The cases cited by Appellant are distinguishable from the instant license suspension appeal. Appellant in the instant license suspension appeal did not submit to any chemical testing. *See id.* Furthermore, Appellant in the instant license suspension appeal did not give an ambiguous response requiring further attempts by police to confirm the meaning of the response. *See Solomon*, 966 A.2d at 643. Finally, Appellant in the instant license suspension appeal did not cite a medical condition and request an alternative chemical test. *See Nardone*, 130 A.3d at 741. In the instant license suspension appeal, Appellant, after being read the DL-26 "O'Connell Warnings" form verbatim in its entirety and being requested to submit to a chemical test of blood, stated explicitly "No, I don't understand." As stated above, Patrolman O'Connell had no responsibility to ensure Appellant understood the consequences of a refusal. *See McKenna*, 72 A.3d at 300. Appellant's response of "No" to chemical testing was an unambiguous, explicit refusal to submit to chemical testing, and Patrolman O'Connell properly recorded Appellant's conduct as a refusal and had no duty to further explain the consequences of the refusal when Appellant stated "I don't understand."

Based upon the testimony and evidence presented, as well as relevant statutory and case law, this Trial Court concludes Appellant's conduct did constitute a refusal to submit to chemical testing; therefore, PennDOT has satisfied the third prong of its burden.

2. Appellant's refusal to submit to chemical testing was a knowing and conscious refusal, and Appellant cannot claim his hearing loss as an affirmative defense to a knowing and conscious refusal as Appellant had a duty to inform and advise the police officers of his hearing loss.

A hearing impairment can prevent a licensee from knowingly and consciously refusing to

submit to chemical testing. *Landsberger v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 717 A.2d 1121, 1124 (Pa. Commw. Ct. 1998). While the Pennsylvania Commonwealth Court has acknowledged that a hearing impairment can prevent a knowing and conscious refusal, the Commonwealth Court has also held that if a licensee has a medical condition which could affect his ability to consent to or perform the test, if police officers are not notified of the medical condition, the licensee is precluded from relying upon that condition or inability as an affirmative defense to the license suspension. *See id.* Simply put, when the police officer cannot usually ascertain a medical problem, **the licensee has a duty to advise the officer of the medical problem.** *Larkin v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 531 A.2d 844, 847 (Pa. Commw. Ct. 1987).

Appellant argues he has significant hearing loss in his right ear, which prevented him on February 27, 2016 from understanding the consequences of refusing to submit to chemical testing, thereby preventing him from making a knowing and conscious refusal. However, during the entire encounter, Appellant never indicated to Patrolman O'Connell, Patrolman Shields or Patrolman Wilson he [Appellant] had any hearing loss which would prevent him from understanding the consequences of a refusal to submit to chemical testing. When Patrolmen Wilson requested Appellant submit to field sobriety testing, Appellant complied, but did not indicate in any manner that he [Appellant] had any hearing loss or any similar medical condition. When Patrolman Wilson was instructing Appellant verbally and demonstrating personally each field sobriety test, Appellant again did not indicate in any manner that he [Appellant] had any hearing loss or any similar medical condition. When Appellant was arrested and Patrolman O'Connell read the DL-26 "O'Connell Warnings" form verbatim in its entirety, Appellant did not indicate in any manner that he [Appellant] had any hearing loss or any similar medical condition. Finally, when Appellant was taken to the City of Erie Police Station booking center, Appellant did not indicate in any manner that he [Appellant] had any hearing loss or any similar medical condition, even when asked by the booking officer. Hearing loss is not easily ascertainable and neither Patrolman O'Connell nor Patrolman Wilson noted any hearing issues from Appellant; therefore, Appellant had the duty to inform and advise the police officers expressly of his hearing loss. *See id.* As Appellant did not inform and advise the police officers expressly, Appellant cannot rely on his hearing loss as an affirmative defense to the license suspension.

Furthermore, at the deposition on November 3, 2016, although Rick A. Fornelli, M.D., a licensed otolaryngologist, testified Appellant's statement that he [Appellant] "did not understand" could be consistent with hearing loss, *see N.T., November 3, 2016, page 37, lines 17-23*, ultimately Dr. Fornelli could not state with reasonable medical certainty that Appellant's actions on the night of February 27, 2016 were not caused by Appellant's intoxication. *See id, page 49, lines 6-9.* On February 27, 2016, Appellant admitted to Patrolmen O'Connell and Shields that he "was drunk." Therefore, Appellant has not been proven definitively that his hearing loss, and not his intoxication, was the primary cause of Appellant's inability to understand the consequences of refusing to submit to chemical testing.

Based upon the testimony and evidence presented, as well as relevant statutory and case law, this Trial Court concludes Appellant had a duty to inform and advise Patrolman O'Connell,

Patrolman Shields and Patrolman Wilson of his hearing loss which would prevent him from understanding the consequences of a refusal to submit to chemical testing and Appellant failed to inform and advise either Patrolman O'Connell, Patrolman Shields or Patrolman Wilson in any manner that he [Appellant] had any hearing loss or any similar medical condition; therefore, Appellant cannot rely on his hearing loss as an affirmative defense to the license suspension.

3. The United States Supreme Court's decision in Birchfield v. North Dakota does not apply to civil penalties under Pennsylvania's implied consent law for a refusal to submit to chemical testing.

On June 23, 2016, the United States Supreme Court, in deciding the case of *Birchfield v. North Dakota*, 136 S. Ct. 2160 (U.S. 2016), held the Fourth Amendment requires a search warrant in order to draw blood for chemical testing and motorists cannot be punished criminally for refusing to submit to chemical tests of blood. Appellant argues the holding in *Birchfield* renders Appellant's alleged refusal as "unknowing and invalid."

First, the United States Supreme Court clearly indicated the *Birchfield* decision does not concern civil penalties under implied consent laws for a refusal to submit to chemical testing. As the United States Supreme Court stated in *Birchfield*: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.* at 1285.

Furthermore, the traffic stop of Appellant's vehicle on February 27, 2016 occurred four (4) months before the United States Supreme Court's decision in *Birchfield* was entered on June 23, 2016. *Birchfield* has not been held to apply retroactively to cases occurring before June 23, 2016. To give *Birchfield* retroactive effect would be against long-standing judicial precedent in Pennsylvania. The issues decided in *Birchfield* involve privacy interests in one's blood and the need for protection of those interests by requiring police to obtain a search warrant before the taking of an individual's blood for chemical testing. Violations of privacy interests under the Fourth Amendment mandates suppression of evidence under the "Exclusionary Rule," a judicially-created sanction specifically designed as a "windfall" remedy to deter **future** Fourth Amendment violations. *See Davis v. United States*, 131 S. Ct. 2419, 2433-34 (U.S. 2011) [emphasis added]. The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. *Id* at 2432. In the instant license suspension appeal, the actions of Patrolman O'Connell did not constitute police misconduct; rather, Patrolman O'Connell requested Defendant submit to a chemical test of blood in reliance that his [Patrolman O'Connell's] actions were proper and lawful based on legal precedent as it existed on February 27, 2016. Exclusion of evidence in such a case is not warranted where the police were acting in reasonable reliance on binding legal precedent. *See id* at 2429. The decision in *Birchfield* aims only to deter police misconduct in criminal cases, i.e. taking blood for chemical testing without securing a search warrant, from June 23, 2016 forward, and logically does not apply to police conduct occurring prior to *Birchfield*.

For all of the foregoing reasons, this Trial Court enters the following Order and reserves to add further Findings of Fact and Conclusions of Law if necessary:

ORDER

AND NOW, to wit, this 19th day of December, 2016, after consideration of the testimony and evidence received at the License Suspension Hearing on November 21, 2016, the Memoranda of Law filed by each counsel and an independent review of the relevant statutory and case law, and for all the reasons set forth above in this Trial Court's Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that Appellant's License Suspension Appeal is hereby **DENIED** as this Trial Court finds (1) Appellant was arrested for Driving Under the Influence of Alcohol by a police officer who had reasonable grounds to believe Appellant was operating or was in actual physical control of the movement of a vehicle while driving under the influence of alcohol; (2) Appellant was asked to submit to a chemical test; (3) Appellant refused to submit to chemical testing; and (4) Appellant was specifically warned that a refusal to submit to chemical testing would result in the suspension of his operating privileges. Therefore, PennDOT has proven all four prongs of its burden, of which Appellant did not rebut. This Court also finds that the Appellant failed to sustain his burden of proof that the Appellant was incapable of making a knowing and conscious refusal. The Department of Transportation is hereby authorized to reinstate the twelve (12) month suspension of Appellant's operating privileges imposed by Notice dated March 17, 2016.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA
v.
DWAYNE GOLSTON

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / BURDEN OF PROOF

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence and has been defined as "the burden of producing satisfactory evidence of a particular fact in issue and the burden of persuading the trier of fact that the fact alleged is indeed true."

CRIMINAL PROCEDURE / SEARCH & SEIZURE / STANDING

Any defendant charged with a possessory crime has automatic standing to challenge a search and seizure under Article I, §8 of the Pennsylvania Constitution.

CRIMINAL PROCEDURE / SEARCH & SEIZURE / SEIZURE OF PERSONS

Under current constitutional jurisprudence, there are three categories of interactions between police officers and citizens. The first is a mere encounter (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an investigative detention, must be supported by reasonable suspicion; said detention subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or custodial detention must be supported by probable cause.

CRIMINAL PROCEDURE / SEARCH & SEIZURE / INVESTIGATIVE DETENTION / REASONABLE SUSPICION

To establish grounds for reasonable suspicion, the police officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity.

CRIMINAL PROCEDURE / SEARCH & SEIZURE / INVESTIGATIVE DETENTION / REASONABLE SUSPICION

In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. The totality of the circumstances test does not limit a trial court's inquiry to an examination of only those facts that clearly indicate criminal conduct; rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

CRIMINAL PROCEDURE / SEARCH & SEIZURE / CUSTODIAL DETENTION / PROBABLE CAUSE

To determine whether probable cause exists, a trial court must consider "whether the facts and circumstances which are within the knowledge of the police officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.

CRIMINAL PROCEDURE / SEARCH & SEIZURE / CUSTODIAL DETENTION / PROBABLE CAUSE

When a trial court examines a particular situation to determine if probable cause exists, a trial court must consider the totality of the circumstances, and should not concentrate on each individual element. Probable cause does not involve certainties, but rather the factual and practical considerations of everyday life on which reasonable and prudent men act.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. CR 2218 - 2016

Appearances: Jared M. Trent, Assistant District Attorney, on behalf of the Commonwealth
Jason A. Checque, Esq., on behalf of Dwayne Golston (Defendant)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., January 11th, 2017

After thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony and evidence presented during the December 20th, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At or around 10:30 a.m. on June 15th, 2016, Patrolman Kyle Caldwell of the Millcreek Police Department, in full dress uniform and in a marked patrol vehicle, was dispatched to the Erie Bank, located at 2035 Edinboro Road, Erie, Pennsylvania 16509, due to "suspicious activity."
2. After arriving at the Erie Bank, Patrolman Caldwell made contact with Erie Bank staff, who indicated a black male, wearing a tan sports coat and a derby style hat, attempted to cash eight thousand dollar and 00/100 ($8,000.00) in savings bonds.
3. This black male attempted to cash the savings bonds using an identification card that could not be verified by Erie Bank staff, and the transaction was refused.
4. Erie Bank staff indicated to Patrolman Caldwell that this same black male had attempted to cash these savings bonds at Erie Bank one (1) week prior.
5. Erie Bank staff informed Patrolman Caldwell that, after the transaction was refused, the black male left Erie Bank and traveled west across Edinboro Road.
6. Patrolman Caldwell, based upon his own personal knowledge that another bank, i.e. PNC Bank, located at 2069 Interchange Road, Erie, Pennsylvania 16509, was in close proximity to the west of Erie Bank, traveled to PNC Bank looking for the black male.
7. Upon arriving at PNC Bank, Patrolman Caldwell looked through PNC Bank's front windows and observed an individual matching the description of Erie Bank staff, i.e. a black male wearing a tan sports coat and a derby style hat.
8. After making this observation, Patrolman Caldwell entered PNC Bank, approached the black male and asked for his identification, which the black male provided voluntarily.

9. During the encounter with this black male, Patrolman Caldwell did not draw his firearm, Patrolman Caldwell did not tell the black male he was not free to leave, and the black male did not ask Patrolman Caldwell if he was free to leave at any point.
10. The black male provided an identification card to Patrolman Caldwell listing the name "Andrew J. Peele," with a birth date of December 16th, 1934 and a license number of RT546671. This Trial Court notes that this black male initially identified himself as "Andrew J. Peele."
11. Patrolman Caldwell radioed the dispatch officer with the license number RT546671, which was verified as belonging to a white female in Lyndhurst, Ohio.
12. Patrolman Caldwell then radioed the dispatch officer with the listed name "Andrew J. Peele" and the date of birth, both of which could not be verified by the dispatch officer.
13. Patrolman Caldwell questioned the black male about the savings bonds, after which the black male provided one (1) of the savings bonds voluntarily.
14. The savings bond provided by the black male listed the name "Andrew J. Peele" with an address in Tucson, Arizona.
15. Patrolman Caldwell radioed the dispatch officer with the information listed on the savings bond, which was verified as belonging to "Andrew J. Peele," an elderly white male living in Tucson, Arizona.
16. Patrolman Caldwell questioned this black male as to his identity, after which the black male now identified himself voluntarily as Dwayne Golston and indicated voluntarily that he found the eight (8) savings bonds on top of a urinal in a White Castle restaurant in Chicago, Illinois.
17. Thereafter, Patrolman Caldwell placed Defendant under arrest.
18. On August 5th, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant with Forgery (18 Pa. C. S. §4101(a)(2)); Access Device Fraud (18 Pa. C. S. §4106(a)(1)(ii)); Receiving Stolen Property (18 Pa. C. S. §3925(a)); Identity Theft (18 Pa. C. S. §4120(a)); and Possessing Instruments of Crime (18 Pa. C. S. §907(a)).
19. On October 28th, 2016, Defendant, by and through Attorney Checque, Esq., filed an Omnibus Pre-trial Motion.
20. A hearing on Defendant's Motion to Suppress was held on December 20th, 2016, during which this Trial Court heard testimony from Patrolman Kyle Caldwell and heard argument from both counsel. Defendant appeared and was represented by his counsel, Jason A. Checque, Esq., and Assistant District Attorney Jared M. Trent appeared on behalf of the Commonwealth.

CONCLUSIONS OF LAW

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h*). The Commonwealth's burden is by a preponderance of the evidence. *Commonwealth v. Bonasorte*, 486 A.2d 1361, 1368 (Pa. Super. 1984); *see also Commonwealth v. Jury*, 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden

of persuading the trier of fact that the fact alleged is indeed true.").

1. Patrolman Kyle Caldwell possessed sufficient reasonable suspicion to initiate an investigative detention of Defendant Dwayne Golston and developed sufficient probable cause to place Defendant under arrest, based upon the totality of the circumstances. [1]

Under current United States and Pennsylvania constitutional jurisprudence, there are three (3) categories of interactions between police officers and citizens. The first is a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. *Commonwealth v. Roberts*, 133 A.3d 759, 771 (Pa. Super 2016). The second, an "investigative detention," must be supported by reasonable suspicion; said detention subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *See id.* Finally, an arrest or "custodial detention" must be supported by probable cause. *Id.*

First, Patrolman Caldwell's investigative detention of Defendant at PNC Bank was properly supported by sufficient reasonable suspicion. "To establish grounds for 'reasonable suspicion'… the police officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity." See *Commonwealth v. Fulton*, 921 A.2d 1239, 1243 (Pa. Super. 2007) (*quoting Commonwealth v. Little*, 903 A.2d 1269, 1272 (Pa. Super. 2006)). In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. *See Roberts* at 771. The totality of the circumstances test does not limit a trial court's inquiry to an examination of only those facts that clearly indicate criminal conduct; rather, **even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.** *See id* [emphasis added].

Patrolman Caldwell has worked for the Millcreek Police Department for nine (9) years and has investigated numerous allegations similar to the allegations presented in the instant criminal case. Upon arriving at Erie Bank, bank staff informed him an individual was attempting to cash eight thousand dollars and 00/100 ($8,000.00) in savings bonds with an identification card which could not be verified and "looked suspicious." Erie Bank staff also provided Patrolman Caldwell with a description of the individual – a black male with a tan sports coat and a derby style hat. Patrolman Caldwell acknowledged based on his experience investigating similar allegations, he would proceed to another bank, and the PNC Bank located on Interchange Road was in close proximity to Erie Bank to the west. Upon arriving at PNC Bank, Patrolman Caldwell looked through the front windows and observed a black male with a tan sports coat and a derby style hat. These initial facts provided to Patrolman Caldwell, although innocent, clearly warranted further investigation by Patrolman Caldwell. *See id.*

Thereafter, Patrolman Caldwell initiated an encounter with the black male, later identified

[1] The Commonwealth also argues that Defendant Dwayne Golston does not have standing to challenge the alleged improper search and seizure. However, in Pennsylvania, any defendant charged with a possessory crime, including receiving stolen property, has automatic standing to challenge a search and seizure under Article I, §8 of the Pennsylvania Constitution. See *Commonwealth v. Gordon*, 683 A.2d 253, 256 (Pa. 1996). As Defendant has been charged with Receiving Stolen Property, he has automatic standing to challenge the alleged improper search and seizure.

as Defendant Dwayne Golston, and asked Defendant for identification, which Defendant provided voluntarily. After examining the identification card, Patrolman Caldwell requested verification of the license number "RT546671" from the Millcreek Police Department dispatch officer, who verified said license number belonged to a white female from Lyndhurst, Ohio. Patrolman Caldwell then requested verification of the listed name, "Andrew J. Peele," and the date of birth, both of which could not be verified. After Patrolman Caldwell questioned Defendant about the savings bonds, Defendant provided one (1) of the savings bonds voluntarily. Patrolman Caldwell requested verification of the name listed on the savings bond, "Andrew J. Peele," and the Tucson, Arizona address on the savings bond. The dispatch officer verified the individual named "Andrew J. Peele" was an elderly white male who lives at the Tucson, Arizona address. After Patrolman Caldwell questioned Defendant regarding his identity, Defendant identified himself voluntarily as Dwayne Golston and indicated voluntarily that he found the savings bonds on top of a urinal in a White Castle restaurant in Chicago, Illinois. Based upon the totality of the facts set forth above, coupled with Patrolman Caldwell's experience investigating similar allegations, this Trial Court concludes Patrolman Caldwell had sufficient reasonable suspicion to detain Defendant in order to investigate possible criminal activity by Defendant. *See Commonwealth v. Williams*, 73 A.3d 609 (Pa. Super. 2013) (reasonable suspicion was found where police officer had thirteen (13) years' experience investigating criminal offenses committed by pickpockets, had prior contact with the suspect on numerous occasions in connection with forgery and theft offenses, the suspect lied in response to the officer's inquiry regarding what the suspect was doing, and the suspect provided the officer with a false name).

Furthermore, Patrolman Caldwell's arrest of Defendant was properly supported by sufficient probable cause. To determine whether probable cause exists, a trial court must consider "whether the facts and circumstances which are within the knowledge of the police officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." *See Commonwealth v. Ibrahim*, 127 A.3d 819, 824 (Pa. Super. 2015) (*quoting Commonwealth v. Rodriques*, 585 A.2d 988, 990 (Pa. 1991)). When a trial court examines a particular situation to determine if probable cause exists, a trial court must consider the totality of the circumstances, and should not concentrate on each individual element. *See Commonwealth v. Wright*, 867 A.2d 1265, 1268 (Pa. Super. 2005). "Probable cause does not involve certainties, but rather 'the factual and practical considerations of everyday life on which reasonable and prudent men act.'" *See id (quoting Commonwealth v. Romero*, 673 A.2d 374, 376 (Pa. Super. 1996)).

During his encounter with Patrolman Caldwell, Defendant provided Patrolman Caldwell voluntarily with an identification card. Patrolman Caldwell attempted to verify Defendant's identity using various pieces of information listed on this identification card, including the name, birth date and license number; however, the license number was verified as belonging to a white female in Lyndhurst, Ohio, while the name and birth date could not be verified. After further questioning from Patrolman Caldwell regarding the savings bonds, Defendant provided one (1) of the savings bonds voluntarily. Patrolman Caldwell then attempted to verify Defendant's identity using pieces of information on the savings bond, including the name and address. The Millcreek Police Department dispatch officer verified the listed name

of "Andrew J. Peele" as belonging to an elderly white male living at the Tucson, Arizona address listed on the savings bond. Thereafter, Defendant identified himself voluntarily as "Dwayne Golston" and discussed voluntarily how he came to possessing of eight (8) one thousand dollar and 00/100 ($1,000.00) savings bonds. Based upon (1) Defendant's possession of a fraudulent identification card and the eight [8] savings bonds, which were the basis for the allegations made by Erie Bank staff; (2) Patrolman Caldwell's initial inability to verify Defendant's identity; (3) Defendant's voluntary statements made at the scene; and (4) Patrolman Caldwell's experience investigating similar allegations, this Trial Court concludes Patrolman Caldwell had sufficient probable cause to arrest Defendant for the crimes charged in the Criminal Information.

For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 11th day of January, 2017, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony presented during the November 22nd, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law, and the Findings of Fact and Conclusions of Law set forth above pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-trial Motion is hereby **DENIED**.

BY THE COURT:
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
GEORGE DESMOND JOHNSON, Defendant

CRIMINAL PROCEDURE / SEVERANCE

Pursuant to the Pennsylvania Rules of Criminal Procedure, a court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or Defendant Johnsons being tried together.

CRIMINAL PROCEDURE / SEVERANCE

The Pennsylvania Supreme Court has set forth a three-part test to guide a trial court in deciding a motion to sever: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant will be unduly prejudiced by the consolidation of offenses.

CRIMINAL PROCEDURE / JOINDER

Consolidation of informations requires only that there are shared similarities in the details of each crime. To establish similarity, several factors to be considered are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed.

CRIMINAL PROCEDURE / JOINDER

The traditional justification for permissible joinder of offenses or consolidation of indictments appears to be the judicial economy which results from a single trial. The argument against joinder or consolidation is that where a defendant is tried at one trial for several offenses, several kinds of prejudice may occur: (1) the defendant may be confounded in presenting defenses, as where his defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find.

EVIDENCE / RELEVANCE / PRIOR ACTS, CRIMES AND WRONGS

The Pennsylvania Supreme Court has held remoteness is but another factor for the Court to consider in determining whether the prior crime tends to show that the same person committed both crimes, and whether the degree of similarity between the two incidents necessary to prove common identity of the perpetrator is thus inversely proportional to the time span between the two crimes.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. CR 1591 of 2016 and CR 1595 of 2016

Appearances: D. Robert Marion, Jr., Esq., for the Commonwealth
Keith H. Clelland, Esq., for the Defendant

OPINION

Domitrovich, J., September 30, 2016

The instant matter is currently before this Trial Court on George Desmond Thompson's (hereafter referred to as "Defendant") *pro se* Motion for Severance of Trials, filed on July 27, 2016 at the above-referenced dockets. At the time of the hearing on September 9, 2016, Keith H. Clelland, Esq., entered a limited appearance for Defendant as stated on the record. On defense counsel's issue as to whether the above-referenced dockets should be severed, defense counsel argues the above-referenced dockets should be severed because he alleges a joint Criminal Jury Trial would prejudice Defendant unfairly and the jury would be incapable of separating the facts from each case to make a fair and proper determination regarding guilt or innocence of Defendant at each individual docket. Defense counsel also argues the above-referenced dockets are too remote in time to be tried together and alleges no commonality in witnesses or alleged victims exists to support joinder of both dockets.

CR 1591 of 2016

1. On February 12, 2016, Darvel Overton, the alleged victim, was on Rosedale Avenue in Erie, Pennsylvania. *Notes of Testimony, Preliminary Hearing, May 9, 2016, pg. 6, line 22 – pg. 7, line 5.*
2. Specifically, Mr. Overton was near 723 or 725 Rosedale Avenue, outside of a friend's house. *Id, pg. 7, lines 20-25.*
3. On that day, Mr. Overton recognized George Johnson and indicated he and Mr. Johnson were not on good terms. *Id, pg. 8, lines 2-16.*
4. Mr. Johnson and another unnamed individual allegedly pulled up to Mr. Overton's friend's house, exited that vehicle and started shooting at Mr. Overton, although Mr. Overton did not recognize the shooter. *Id, pg. 8, lines 18-24.*
5. Both Mr. Johnson and the other unnamed individual allegedly returned to that vehicle and placed the vehicle in reverse down Rosedale Avenue towards 7th Street. *Id, pg. 9, lines 2-11.*
6. Fifteen (15) to twenty (20) minutes before the shooting, Mr. Overton and Mr. Johnson allegedly had an argument near 8th and Reed Streets. *Id, pg. 9, line 21 – pg. 10, line*
7. Specifically, Mr. Johnson had allegedly threatened Mr. Overton, who did not remember specific words used by Mr. Johnson. *Id, pg. 10, lines 3-9.*
8. The nature of the argument between Mr. Johnson and Mr. Overton allegedly stemmed from a "prior beef" between the two men two (2) years ago. *Id, pg. 11, lines 19-23.*
9. In a conversation with Officer Patrick Ginkel at the scene, Mr. Overton identified George Desmond Johnson as the individual in the car, but Mr. Overton did not say Mr. Johnson was the actual shooter. *Id, pg. 12, lines 5-13.*
10. On June 22, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant George Desmond Johnson with Criminal Conspiracy-Aggravated Assault (18 Pa. C. S. §903(a)(1)); Aggravated Assault (18 Pa. C. S. §2702(a)(1)); and Terroristic Threats (18 Pa. C. S. §2706(a)(1)).
11. Defendant, *pro se*, filed the instant Motion for Severance of Trials on July 27, 2016.
12. The Commonwealth filed its Written Response to Defendant's Motion on August 2, 2016.
13. A hearing on Defendant's Motion was held on September 9, 2016, at which this

Trial Court heard argument from counsel. Assistant District Attorney D. Robert Marion, Jr. appeared on behalf of the Commonwealth, and Keith H. Clelland, Esq., appeared in a limited capacity on behalf of Defendant George Desmond Johnson solely to provide oral argument for this Motion

CR 1595 of 2016

14. Officer Patrick Ginkel had an interaction with George Johnson on March 18, 2016. *Id, pg. 17, lines 19-21.*
15. Specifically, George Johnson was a wanted individual and had a known warrant for the prior case (CR 1591 of 2016). *Id, pg. 17, lines 23-24.*
16. Officer Ginkel received information from an off-duty officer that Mr. Johnson was at a certain location; thereafter, Officer Ginkel approached said area and Mr. Johnson was viewed in said area. *Id, pg. 17, line 24 – pg. 18, line 2.*
17. Mr. Johnson was placed in custody and, during a search of the vehicle that Mr. Johnson was in at the time, a loaded firearm was found. *Id, pg. 18, lines 6-12.*
18. Two (2) individuals were inside the vehicle at the time, with Mr. Johnson being the driver and the other occupant as the passenger, and the firearm was "down between the passenger seat and the center console, so just to the right of Mr. Johnson." *Id, pg. 18, lines 13-23.*
19. A background check was conducted on the firearm, which returned the firearm as "stolen" from the Meadville/Conneaut Lake area. *Id, pg. 18, line 24 – pg. 19, line 2.*
20. Mr. Johnson did not have a license to carry a concealed weapon in a vehicle or on his person. *Id, pg. 19, lines 16-18.*
21. Officer Ginkel encountered the vehicle driven by Mr. Johnson at a gas station at 6th and Parade Streets. *Id, pg. 20, lines 13-15.*
22. Officer Ginkel acknowledged he did not initially observe the firearm; rather, it was Officer Pularski, another officer who appeared at the scene, observed the firearm. *Id, pg. 23, lines 10-16.*
23. Officer Ginkel indicated the firearm was "in a position where the driver could have been the one to stuff it [the firearm] down in that area." *Id, pg. 24, lines 6-8.*
24. On June 22nd, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant George Desmond Johnson with Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)); Receiving Stolen Property (18 Pa. C. S. §3925(a)); Driving While Operating Privilege Suspended or Revoked (75 Pa. C. S. §1543(a)); and Prohibited Offensive Weapons (18 Pa. C. S. 908(a)).
25. Defendant, *pro se*, filed the instant Motion for Severance of Trials on July 27, 2016.
26. The Commonwealth filed its Written Response to Defendant's Motion on August 2nd, 2016.
27. A hearing on Defendant's Motion was held on September 9, 2016, at which this Trial Court heard argument from counsel. Assistant District Attorney D. Robert Marion, Jr. appeared on behalf of the Commonwealth, and Keith H. Clelland, Esq., appeared in a limited capacity on behalf of Defendant George Desmond Johnson solely to provide oral argument for this Motion.

LEGAL ANALYSIS

Pursuant to the Pennsylvania Rules of Criminal Procedure, a court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or Defendant Johnsons being tried together. *Pa. R. Crim. P. 583*. The Pennsylvania Supreme Court has set forth a three-part test to guide a trial court in deciding a motion to sever: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant will be unduly prejudiced by the consolidation of offenses. *Commonwealth v. Jordan*, 65 A.3d 318, 328 (Pa. 2013).

The evidence of each of the offenses would not be admissible in a separate trial for the other, as the factual scenarios of each Criminal Information are significantly different. At docket no. CR 1591 of 2016, Darvel Overton stated on February 12, 2016, Defendant George Johnson and another unnamed allegedly individual pulled up to Mr. Overton's location on Rosedale Avenue, allegedly exited their vehicle and an unnamed individual began shooting at Mr. Overton. In contrast, at docket no. CR 1595 of 2016, Officer Patrick Ginkel, who had received information concerning Defendant's location, arrived at the location, arrested Defendant, who had an arrest warrant for the prior incident (CR 1591 of 2016) and searched Defendant's vehicle, during which a firearm was found. Further, Defendant's alleged possession of a firearm at docket no. CR 1595 of 2016 cannot be introduced in order to prove the crimes charged at docket no. CR 1591 of 2016, as the alleged victim, Darvel Overton, indicated Defendant George Desmond Johnson was not the alleged shooter.

Consolidation of informations requires only that there are shared similarities in the details of each crime. *See Commonwealth v. Newman*, 598 A.2d 275, 278 (Pa. 1991). "To establish similarity, several factors to be considered are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." *Commonwealth v. Robinson*, 864 A.2d 460, 481 (Pa. 2004) (*quoting Commonwealth v. Rush*, 646 A.2d 557, 561 (Pa. 1994)). These two (2) Criminal Informations contain a few similarities, namely a firearm and Defendant's presence near said firearm. However, these two (2) crimes happened approximately five (5) weeks apart. Furthermore, the crimes charged in each Criminal Information share no similarities whatsoever – the Criminal Information at docket no. CR 1591 of 2016 charges Defendant with Criminal Conspiracy, Aggravated Assault and Terroristic Threats, whereas the Criminal Information at docket no. CR 1595 of 2016 charges Defendant with Firearms not to be carried without a License, Receiving Stolen Property, Driving while Operating Privilege Suspended or Revoked and Prohibited Offensive Weapons. As the elapsed time between the crimes and the manner of the manner in which the crimes were committed are significantly different, similarity of the Criminal Informations has not been established and these two (2) Criminal Informations must be severed.

Secondly, the Pennsylvania Superior Court has held in *Commonwealth v. Janda*, 14 A.3d 147 (Pa. Super. 2011):

> The traditional justification for permissible joinder of offenses or consolidation of indictments appears to be the judicial economy which results from a single trial. The argument against joinder or consolidation is that where a defendant is tried at one

> trial for several offenses, several kinds of prejudice may occur: (1) the defendant may be confounded in presenting defenses, as where his defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find.

Janda at 155. Consolidation of these two (2) Criminal Informations would cause significant problems with the jury's determination of Defendant's guilt or innocence. First, the jury could certainly use the evidence presented in one Criminal Information against Defendant in determining guilt or innocence in the other Criminal Information, as the jury could see these offenses as a single prolonged incident, rather than two separate and distinct incidents. In addition, the jury could certainly cumulate all of the evidence in determining guilt or innocence, rather than separating and analyzing the evidence presented for each Criminal Information individually. As the risk of jury confusion and cumulating of evidence is significant, these two (2) Criminal Informations must be severed.

Finally, Defendant Johnson argues the two (2) incidents are "too remote in time" and that there is no commonality in witnesses or alleged victims. The Pennsylvania Supreme Court has held remoteness is but another factor for the Court to consider in determining whether the prior crime tends to show that the same person committed both crimes, and whether the degree of similarity between the two incidents necessary to prove common identity of the perpetrator is thus inversely proportional to the time span between the two crimes. *See Commonwealth v. Donahue*, 549 A.2d 121, 127 (Pa. 1988). The incidents described in the Criminal Informations at docket nos. 1591 of 2016 and 1595 of 2016 are separated in time by five (5) weeks approximately. Furthermore, there is no degree of similarity between the two (2) incidents – one incident involved an alleged shooting and the other incident involved a firearm seized following Defendant's arrest via warrant issued for Defendant's alleged involvement in the prior incident (CR 1591 of 2016). Defendant may also have difficulty presenting defenses at a consolidated criminal jury trial, as his defense to one charge may be inconsistent with his defenses to the others. *See Janda*, 14 A.3d at 155 (Pa. Super. 2011). Finally, Defendant's alleged possession of a firearm at docket no. CR 1595 of 2016 could not be introduced in order to prove the crimes charged at docket no. CR 1591 of 2016, as the alleged victim, Darvel Overton, indicated Defendant George Desmond Johnson was not the alleged shooter. Therefore, as Defendant would be unduly prejudiced in consolidating cases, these two (2) Criminal Informations must be severed.

Therefore, for all of the reasons set forth above and others stated on the record, this Trial Court enters the following Order:

ORDER

AND NOW, to-wit, this 30th day of September, 2016, after the scheduled hearing on September 9th, 2016 regarding the Motion for Severance of Trials, filed on July 27th, 2016 by George Desmond Johnson, *pro se*, after hearing argument from Assistant District Attorney D. Robert Marion, Jr., and Keith H. Clelland, Esq., who appeared in a limited capacity on behalf of Defendant George Desmond Johnson for this Motion solely to provide

oral argument without officially entering an appearance for Defendant, after thorough consideration of relevant statutory and case law and for all of the reasons set forth above, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant Johnson's Motion for Severance of Trials is hereby **GRANTED**. The Criminal Informations at docket nos. CR 1591 of 2016 and CR 1595 of 2016 shall be tried in two (2) separate criminal jury trials.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA
v.
RICHARD LEE BARNETT, Defendant

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / BURDEN OF PROOF

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence and has been defined as "the burden of producing satisfactory evidence of a particular fact in issue and the burden of persuading the trier of fact that the fact alleged is indeed true."

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / LEGITIMATE EXPECTATION OF PRIVACY

To prevail on a motion to suppress, the defendant must show that he has a privacy interest which has been infringed upon. A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy. Whether defendant has a legitimate expectation of privacy is a component of the merits analysis of the suppression motion. *Id.* The determination whether defendant has met this burden is made upon evaluation of the evidence presented by the Commonwealth and the defendant.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / LEGITIMATE EXPECTATION OF PRIVACY

An expectation of privacy is present when the individual, by his conduct, exhibits an actual (subjective) expectation of privacy, and that the subjective expectation is one that society is prepared to recognize as reasonable. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances. Additionally, a determination of whether an expectation of privacy is legitimate or reasonable entails a balancing of interests.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / LEGITIMATE EXPECTATION OF PRIVACY

If the evidence shows there was no privacy interest, the Commonwealth need prove no more; in terms of the trial court's review, it need go no further if it finds the defendant has not proven a reasonable expectation of privacy.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / LEGITIMATE EXPECTATION OF PRIVACY

Only when a defendant has the ability and right to exclude others from entrance to an internal area would a reasonable expectation of privacy arise.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / LEGITIMATE EXPECTATION OF PRIVACY / COMMON AREA

Generally, a subjective expectation of privacy as to that which is located in an area of common access will be deemed to be unreasonable.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION - NO. CR 1321 of 2015

Appearances: Jeremy C. Lightner, Assistant District Attorney, for the Commonwealth
Michael A. DeJohn, Esq., on behalf of Richard Lee Barnett (Defendant)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., November 8, 2016

After thorough consideration of the entire record regarding Defendant's Motion to Suppress *Nunc Pro Tunc*, including, but not limited to, the testimony and evidence presented during the October 4, 2016 Suppression Hearing and the Memoranda of Law submitted by counsel, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On April 19, 2015 between 8:00 a.m. and 4:00 p.m., City of Erie Police Officers Mark Nelson and Steven DeLuca, together with three (3) other City of Erie Police Officers, arrived at 601 ½ East 13th Street, Erie, Pennsylvania 16503.

2. Officers Nelson and DeLuca knocked on the door and made contact with the resident of 601 ½ East 13th Street, identified as Keosha Qualls.

3. Officers Nelson and DeLuca advised Ms. Qualls they were looking for Richard Lee Barnett (hereafter referred to as "Defendant," who was wanted on felony warrant and who was believed to be residing at 601 ½ East 13th Street at the time.

4. Officers Nelson and DeLuca asked Ms. Qualls for her consent to search her apartment, and Ms. Qualls, who was very cooperative, did provide her consent to a full search of her apartment.

5. Defendant was not found by Officers Nelson, DeLuca or the other City of Erie Police officers in the apartment.

6. Ms. Qualls stated there was a basement, shared by other members of the apartment complex and accessible by a common hallway and stairwell.

7. According to Ms. Qualls, "anyone had access to the basement."

8. Ms. Qualls gave her consent to search the basement, stating she "didn't believe Defendant was there."

9. The basement area was unfinished and used as a storage area for the neighbor's items.

10. There was no indication that someone was living in the basement as there was no bed, television, refrigerator, closet, clothes or other personal items.

11. During a search of the basement, Officers DeLuca and Bielak located Defendant, who was hiding in the basement, and took Defendant into custody.

12. A handgun was located on a box near Defendant's location in the basement, and the handgun was photographed and retrieved as evidence.

13. After Defendant was taken into custody, Keosha Qualls was taken into custody for "Hindering Apprehension" and was interviewed at the City of Erie Police Department.[1]

[1] According to Officers Nelson and DeLuca, who conducted the interview with Keosha Qualls at the City of Erie Police Department, the audio/video recording of Ms. Qualls' interview was unsuccessful due to a malfunction with the recording system.

14. Ms. Qualls, who did sign a Miranda Warnings form prior to the interview, said Defendant had a Coach bag with firearms inside and gave her consent to a search of the basement for a second time.

15. During this second search of the basement, Officer DeLuca found two (2) additional handguns, which had been placed underneath some boxes near where Defendant had been found and taken into custody, but did not find a Coach bag with firearms.

16. On June 17, 2015, the District Attorney's Office filed a Criminal Information, charging Defendant with one count of Receiving Stolen Property (18 Pa. C. S. §3925(a)); three counts of Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)); one count of Possession of a Small Amount of Marijuana (35 P.S. §780-113(a)(31)(i)); one count of Possession of Drug Paraphernalia (35 P.S. §780-113(a)(32)); and one count of Possession of Firearm with Altered Manufacturer's Number (18 Pa. C. S. §6110.2(a)).

17. On September 7, 2016, Defendant, by and through his counsel, Michael A. DeJohn, Esq., filed Motion to Suppress *Nunc Pro Tunc*.

18. A hearing on Defendant's Motion to Suppress *Nunc Pro Tunc* was held on October 4, 2016, during which this Trial Court heard testimony from Officer Mark Nelson, Officer Steven DeLuca and Keosha Qualls; received evidence and heard argument from both counsel. Defendant appeared and was represented by his counsel, Michael A. DeJohn, Esq., and Assistant District Attorney Jeremy C. Lightner appeared on behalf of the Commonwealth.

19. Following the October 4th Suppression Hearing, this Trial Court requested counsel submit Memoranda of Law regarding the relevant issues in this Suppression Hearing.

20. Attorney DeJohn submitted his Memorandum on Law on October 18, 2016.

21. Assistant District Attorney Lightner submitted his Memorandum of Law on October 26, 2016.

CONCLUSIONS OF LAW

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h).* The Commonwealth's burden is by a preponderance of the evidence. *Commonwealth v. Bonasorte,* 486 A.2d 1361, 1368 (Pa. Super. 1984); *see also Commonwealth v. Jury*, 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.").

A. Defendant Richard Lee Barnett did not demonstrate successfully he had a "legitimate expectation of privacy" in the basement area of 601 ½ East 13th Street.

To prevail on a motion to suppress, the defendant must show that he has a privacy interest which has been infringed upon. *Commonwealth v. Benson*, 10 A.3d 1268, 1272 (Pa. Super. 2010). A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy. *See id* (*citing Commonwealth v. Burton*, 973 A.2d 428, 435 (Pa. Super. 2009)). Whether defendant has a legitimate expectation of privacy is a component of the merits analysis of the suppression motion. *Id.* The determination whether defendant has met this burden is made upon evaluation of the evidence presented

by the Commonwealth and the defendant. *Id.*

Regarding what constitutes a "legitimate expectation of privacy," the Pennsylvania Superior Court has held:

> An expectation of privacy is present when the individual, by his conduct, exhibits an actual **(subjective) expectation of privacy**, and that the **subjective expectation** is one that society is **prepared to recognize** as reasonable. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances. Additionally, a determination of whether an expectation of privacy is legitimate or reasonable entails a balancing of interests.

Commonwealth v. Caple, 121 A.3d 511, 517 (Pa. Super. 2015) (*citing Commonwealth v. Brundidge*, 620 A.2d 1115, 1118 (Pa. 1993)). If the evidence shows there was no privacy interest, the Commonwealth need prove no more; in terms of the trial court's review, it need go no further if it finds the defendant has not proven a reasonable expectation of privacy. *Commonwealth v. Enimpah*, 106 A.3d 695, 702 (Pa. 2014).

First, there is no evidence to demonstrate Defendant has a subjective expectation of privacy in the basement area of 601 ½ East 13th Street. During his search of the basement area, City of Erie Police Officer Steven DeLuca stated he did not observe any signs someone was living in the basement area, such as a bed, television, refrigerator, closet, clothes or other personal items. Keosha Qualls, Defendant's girlfriend who resides at 601 ½ East 13th Street, indicated the basement area is shared by other tenants of the property by a common hallway and stairwell. As stated by Ms. Qualls, "anyone had access to the basement." Ms. Qualls acknowledged she did not store any of her items in the basement and was unsure of what was stored in the basement, but believed some of the neighbor's possessions were stored in the basement. There was no evidence presented to demonstrate Defendant was also living in the apartment or had any real interest in the apartment or other areas of the apartment building. Based upon the evidence presented, Defendant has not demonstrated a subjective expectation of privacy in the basement area of 601 ½ East 13th Street.

Assuming *arguendo* Defendant has demonstrated successfully a subjective expectation of privacy in the basement of 601 ½ East 13th Street, this expectation of privacy is not one that society would deem reasonable. Only when a defendant has the ability and right to exclude others from entrance to an internal area would a reasonable expectation of privacy arise. *Commonwealth v. Reed*, 851 A.2d 958, 962 (Pa. Super. 2004) (*citing Katz v. United States*, 389 U.S. 347 (1967)). The entryway into the basement area of 601 ½ East 13th Street does not have a door; therefore, there was no way to exclude others from entering the basement. Furthermore, as stated above, the basement area was accessible to all tenants of the apartment building by a common hallway and stairwell and was available to all tenants for storage of personal items. "Generally, a subjective expectation of privacy as to that which is located in an **area of common access** will be deemed to be unreasonable." *Commonwealth v. Grundy*, 859 A.2d 485, 489 (Pa. 2004) (*quoting Commonwealth v. Carelli*, 546 A.2d 1185, 1192 (Pa. Super. 1988) [emphasis added]. Therefore, Defendant has not demonstrated an expectation of privacy in the basement area of 601 ½ East 13th Street which society would deem reasonable, as others could not be excluded from access to the basement area and said basement area was an area of common access to all tenants of the apartment building.

Therefore, this Trial Court concludes Defendant has not demonstrated successfully he had a legitimate expectation of privacy in the basement area of 601 ½ East 13th Street. For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 8th day of November, 2016, after thorough consideration of the entire record regarding Defendant's Motion to Suppress *Nunc Pro Tunc*, including, but not limited to, the testimony and evidence presented during the October 4, 2016 Suppression Hearing and the Memoranda of Law submitted by counsel, as well as an independent review of the relevant statutory and case law and the Findings of Fact and Conclusions of Law set forth above pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED**, **ADJUDGED AND DECREED** that Defendant's Motion to Suppress *Nunc Pro Tunc* is hereby **DENIED**.

BY THE COURT:
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

CODY RUBINOSKY

EVIDENCE / WEIGHT & SUFFICIENCY

The standard of review in a sufficiency of the evidence challenge is to determine if the Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering all the evidence admitted at trial, and drawing all reasonable inferences therefrom in favor of the Commonwealth as the verdict-winner. This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. In applying this standard, the appellate courts bear in mind that the Commonwealth may sustain its burden by means of wholly circumstantial evidence; that the entire trial record should be evaluated and all evidence received considered, whether or not the trial court's rulings thereon were correct; and that the trier of fact, while passing upon the credibility of witnesses and the weight of the proof, is free to believe all, part, or none of the evidence.

CRIMINAL OFFENSES / WEAPONS / POSSESSION

Possession can be found by proving actual possession, constructive possession or joint constructive possession.

CRIMINAL OFFENSES / WEAPONS / CONSTRUCTIVE POSSESSION

The Pennsylvania Superior Court has held constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. The Court has defined constructive possession as "conscious dominion." The Court subsequently defines "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances.

CRIMINAL OFFENSES / WEAPONS / CONSTRUCTIVE POSSESSION

In order to prove a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had both the ability to consciously exercise control over it as well as the intent to exercise such control. Intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be used to establish a defendant's possession of drugs or contraband.

EVIDENCE / IMPEACHMENT / CONSCIOUSNESS OF GUILT

The conduct of an accused following a crime, including "manifestations of mental distress," is admissible as tending to show guilt.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION - NO. CR 2253 of 2015

APPEARANCES: Laurie A. Mikielski, Esq., on behalf of Cody Rubinosky, Appellant
Michael E. Burns, Esq., for the Commonwealth, Appellee

OPINION

Domitrovich, J., April 13, 2016

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Cody Rubinosky (hereafter referred to as "Appellant") from his conviction by jury trial and from the Sentencing Order entered on January 26, 2016 by Judge John P. Garhart.[1] The sole issue before this Trial Court is whether the evidence was sufficient as a matter of law to establish Appellant's guilt beyond a reasonable doubt as to the element of "Possession" for Counts 1 and 2 of the instant docket.

Factual and Procedural History

On July 27, 2015, Pennsylvania State Troopers Joshua Zeigler and Jonathan Casey were patrolling around the area of Peach Street and Downs Drive, in full uniform and in a marked patrol vehicle, when they initiated a traffic stop on a dark-colored 2003 Cadillac sedan with an expired registration. *Notes of Testimony, Jury Trial, November 20, 2015, page 16, line 3 – page 17, line 19; page 58, lines 12-18.* The traffic stop was initiated in the northeast corner of the Walmart parking lot. *N.T., pg. 58, lines 16-18.* Upon initiating the traffic stop, the driver, later identified as James Bigley, and the front seat passenger, later identified as Christine Kennelly, stayed with the vehicle, but the backseat passenger, later identified as Appellant Cody Rubinosky, quickly exited the vehicle and "made a beeline," i.e. walked briskly, towards Walmart. *N.T., pg. 18, lines 9-22; pg. 59, lines 4-15*. Trooper Casey went after Appellant, while Trooper Zeigler remained with Mr. Bigley and Ms. Kennelly. *N.T., pg. 19, lines 3-6*. Trooper Casey shouted "State Police!" multiple times to Appellant, who did not stop, and upon reaching Appellant informed him "he [Appellant] was involved in the traffic stop" and had to return to the vehicle. *N.T., pg. 60, lines 1-5*. Initially, Appellant did not comply and related to Trooper Casey "the only things that belong to him [Appellant] were on his person and nothing in that vehicle belonged to him [Appellant]." *N.T., pg. 60, lines 14-20.*

While Trooper Casey was speaking with Appellant, Trooper Zeigler spoke with Mr. Bigley and Ms. Kennelly. Trooper Zeigler noticed "track marks" on Mr. Bigley's and Ms. Kennelly's arms and asked if there was anything illegal in the vehicle, to which they responded there was drug paraphernalia in the vehicle. *N.T., pg. 19, lines 11-14.* This gave Trooper Zeigler probable cause to initiate a search. *N.T., pg. 19, lines 16-18.* When Trooper Casey brought Appellant back to the vehicle, Appellant was "extremely irate and acting kind of indignant." *N.T., pg. 19, line 23 – pg. 20, line 1*. While Mr. Bigley and Ms. Kennelly had a "calm demeanor," Appellant was "real upset, trying to distance himself from the vehicle and obviously indicating 'nothing in the vehicle belonged to him.'" *N.T., pg. 21, lines 9-18; pg. 70, lines 7-12*. Both troopers noticed a dark-colored or black backpack located in the back seat of the vehicle where Appellant had been seated. *N.T., pg. 20, lines 10-20; pg. 30, lines 11-16; pg. 68, lines 13-18*. Based upon the information Trooper Zeigler received from Mr. Bigley and Ms. Kennelly regarding drug paraphernalia in the vehicle, Trooper Zeigler "obtained probable cause to search the vehicle, which was related to Trooper Casey," but

[1] Judge Garhart had signed the above-referenced Sentencing Order on behalf of Judge Shad F. Connelly, who presided over the criminal trial, but is now retired. The undersigned judge was assigned the instant criminal action by the Erie County Court Administrator to handle this appeal.

did not conduct the probable cause search of the vehicle himself. *N.T., pg. 19, lines 11-18; pg. 61, line 23 – pg. 62, line 8*. Along with various forms of drug paraphernalia, a Stallard Arms JS-9 9mm firearm was found in the backpack that was positioned in the middle rear of the vehicle. *N.T., pg. 62, lines 10-13*. Appellant was "doing a lot of pacing," and when the firearm was located, his pacing "began to intensify," his "demeanor changed drastically," and he was "acting really nervous." *N.T., pg. 21, lines 21-24*. Upon discovering the firearm, Trooper Casey notified Trooper Zeigler that he found the firearm and had removed the magazine from the firearm. *N.T., pg. 36, lines 14-20; pg. 64, lines 19-24*. During the traffic stop, Ms. Kennelly indicated to both Pennsylvania State troopers several times that the firearm belonged to Appellant and further indicated Appellant does carry around a black backpack. *N.T., pg. 41 lines 1-3, 21-22; pg. 64, lines 4-6.*

When asked to provide identification, Appellant failed to produce any identification and stated his name was "Corey Francis Gulnac" and his birth date was 11/26/1989; however, upon investigation, Trooper Casey determined this information was false. *N.T., pg. 22, lines 11-24; pg. 66, line 19 – pg. 67, line 21*. When Trooper Casey confronted Appellant and asked whether he provided false information, Appellant continued to state "No, my name is Corey Francis Gulnac and that's my name;" however, in a side conversation, Ms. Kennelly identified Appellant as "Cody Rubinosky." *N.T., pg. 23, lines 9-19*. Appellant later admitted to providing false identification to Trooper Casey, but maintained "nothing in the vehicle belonged to him, including the drug paraphernalia and the firearm." *N.T., pg. 69, lines 19-23; pg. 88, lines 18-25*.

Appellant was charged with one count of Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms, in violation of 18 Pa. C. S. §6105(a)(1); one count of Firearms Not to be Carried without a License, in violation of 18 Pa. C. S. §6106(a)(1); and one count of False Identification to Law Enforcement Authorities, in violation of 18 Pa. C. S. §4914(a). A Criminal Jury Trial was presided over by Judge Shad F. Connelly on November 20, 2015, at which the Commonwealth presented testimony and evidence to the jury.[2] The Commonwealth introduced two (2) exhibits in particular – Commonwealth's Exhibit 1, which the Stallard Arms model JS-9 9mm firearm, black in color, found in the black backpack in the center rear of the vehicle; and Commonwealth's Exhibit 2, which was a firearm functionality test indicating the firearm found in the vehicle was functional and capable of discharging the types of ammunition for which it was designed and manufactured. *N.T., pg. 71, lines 4-6; pg. 72, lines 11-14.* The jury found Appellant "Guilty" on all three (3) charges. A sentencing hearing was held on January 26, 2016 before Judge Connelly, and Judge Garhart signed the following Sentencing Order:

- Count 1: sixty (60) to one hundred twenty (120) months of incarceration, consecutive to the sentence imposed at docket no. CR 446 – 2012;
- Count 2: forty-two (42) to eighty-four (84) months of incarceration, concurrent to Count 1 of the instant docket; and
- Count 3: six (6) to twelve (12) months of incarceration, concurrent to Count 2 of the instant docket.

[2] According to the Notes of Testimony from the Criminal Jury Trial, Appellant's counsel did not present testimony or evidence to the jury. S*ee N.T., pg. 92, line 24 – pg. 93, line 2.*

On February 23, 2016, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court. This Trial Court filed its 1925(b) Order on March 2, 2016. Appellant filed his "Statement of Matters Complained of on Appeal" on March 22, 2016.

Legal Argument

1. The Commonwealth presented sufficient evidence to prove beyond a reasonable doubt Appellant "possessed" a firearm, and the jury properly found Appellant "Guilty" at Count 1: Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms, in violation of 18 Pa. C. S. §6105(a)(1); and at Count 2: Firearms Not to be Carried without a License, in violation of 18 Pa. C. S. §6106(a)(1), based upon the evidence presented.

The standard of review in a sufficiency of the evidence challenge is to determine if the Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering all the evidence admitted at trial, and drawing all reasonable inferences therefrom in favor of the Commonwealth as the verdict-winner. *Commonwealth v. Hopkins*, 67 A.3d 817, 820 (Pa. Super. 2013). This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Parker*, 847 A.2d 745, 750 (Pa. Super. 2004). In applying this standard, the appellate courts bear in mind that the Commonwealth may sustain its burden by means of wholly circumstantial evidence; that the entire trial record should be evaluated and all evidence received considered, whether or not the trial court's rulings thereon were correct; and that the trier of fact, while passing upon the credibility of witnesses and the weight of the proof, is free to believe all, part, or none of the evidence. *See Commonwealth v. Reed*, 990 A.2d 1158, 1162 (Pa. 2010).

Possession can be found by proving actual possession, constructive possession or joint constructive possession. *See Commonwealth v. Gutierrez*, 969 A.2d 584, 590 (Pa. Super. 2009) (*quoting Commonwealth v. Heidler*, 741 A.2d 213, 215 (Pa. Super. 1999)). Regarding "constructive possession," the Pennsylvania Superior Court has held:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances.

Commonwealth v. Cruz, 21 A.3d 1247, 1253 (Pa. Super. 2011) *(citing Parker*, 847 A.2d at 750). In order to prove a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had both the ability to consciously exercise control over it as well as the intent to exercise such control. *Gutierrez*, 969 A.2d at 591. Intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be used to establish a defendant's possession of drugs or contraband. *See id.*

After a thorough review of the facts and circumstances of the instant criminal action, together with a thorough review of relevant case law, this Trial Court concludes the

Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Appellant "possessed" a firearm, and the jury properly found Appellant "Guilty" as to Counts 1 and 2 based upon the evidence presented. The facts and circumstances, considered in their totality, clearly establish Appellant had both the ability to exercise consciously his control over the firearm as well as his intent to exercise this control. First, the location of the firearm indicates Appellant's constructive possession of said firearm. The firearm was located inside a black backpack, and said backpack was located "in the center of the back seat directly adjacent to where the defendant [Appellant] was seated," according to Troopers Zeigler and Casey. No other individuals were seated in the rear of the vehicle besides Appellant at the time of the traffic stop. Furthermore, during the traffic stop, the front seat passenger, Christine Kennelly, indicated to both Pennsylvania State troopers that both the firearm and the black backpack belonged to Appellant, and there was no evidence or statements from the other occupants in the vehicle that led the troopers to believe the firearm might have belonged or been in the possession of the other occupants. Finally, according to Trooper Jonathan Casey, the firearm was found with a magazine inside, which was eventually removed by Trooper Casey. A firearm functionality test, admitted at trial as Commonwealth's Exhibit 2, indicated the firearm was functional and capable of discharging the types of ammunition for which it was designed and manufactured.

Appellant's actions before and during the traffic stop also demonstrated his constructive possession of the firearm. The conduct of an accused following a crime, including "manifestations of mental distress," is admissible as tending to show guilt. *Commonwealth v. Hughes*, 865 A.2d 761, 792 (Pa. 2004). When the traffic stop was initiated by Troopers Zeigler and Casey, Appellant quickly exited the vehicle and briskly walked towards Walmart. Trooper Casey stated "State Police" several times to Appellant, who would not stop. When Trooper Casey made contact with Appellant, Appellant became irate, uncooperative and continuously stated "nothing in the vehicle belonged to him." Upon being brought back to the vehicle, Appellant became extremely irate, acted indignant and continued to state "nothing in the vehicle belonged to him." Appellant began pacing during Trooper Casey's search of the vehicle, and when the firearm was discovered, Appellant's pacing intensified, his demeanor changed drastically and he began acting very nervous. When asked for identification, Appellant gave the name "Corey Francis Gulnac" and the birthdate 11/26/89 and repeatedly gave this information; however, through an investigation, Trooper Casey determined this information was false. Christine Kennelly identified Appellant as "Cody Rubinosky" in a side conversation with the troopers. Appellant ultimately admitted to Trooper Casey the information he gave was false. These facts and circumstances, considered in their totality, evidence Appellant's "consciousness of guilt" regarding his possession of the firearm. *See Cruz*, 21 A.3d at 1253 (Pa. Super. 2011) ("consciousness of guilt" regarding firearms offenses was shown by Defendant giving police officer five or six different names and multiple birthdates); *see also Commonwealth v. Micking*, 17 A.3d 924, 926 (Pa. Super. 2011) (Appellant's behavior of extreme nervousness, shaking and trembling exhibited a "consciousness of guilt" regarding firearms offenses).

Therefore, in consideration of the totality of the facts and circumstances, together with a thorough review of relevant case law, this Trial Court concludes the Commonwealth produced sufficient evidence for the jury to find beyond a reasonable doubt that Appellant

constructively possessed the firearm found inside the vehicle, as Appellant had both the ability to exercise consciously his control over the firearm as well as the intent to exercise this control. This Trial Court concludes Appellant's issue is without merit.

Conclusion

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court deny Appellant's appeal.

BY THE COURT
/s/Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA

v.

MARKEL JOVAN HALL

CRIMINAL LAW / RIGHT TO COUNSEL / RIGHT TO APPEAR PRO SE

A criminal defendant has the constitutional right to counsel, and a constitutional right to dispense with counsel and represent himself.

CRIMINAL LAW / CAPACITY AND REQUISITES TO PROCEEDING PRO SE

To exercise the right to self-representation, a defendant must demonstrate he knowingly, voluntarily and intelligently waives his right to counsel.

CRIMINAL LAW / REQUISITE TO PROCEEDING PRO SE / TRIAL COURT TO CONDUCT PROBING COLLOQUY

When a defendant seeks to waive the right to counsel, the trial court must conduct probing inquiry whether the defendant is aware of the right to counsel and the significance and consequences of waiving that right.

CRIMINAL LAW / REQUISITE TO PROCEEDING PRO SE / MINIMUM ELEMENTS OF TRIAL COURT COLLOQUY

Pa.R.Crim.P. Rule 121(A)(2)(a)-(f) sets forth minimum requirements of colloquy by trial court or issuing authority in determining whether criminal defendant knowingly, voluntarily and intelligently waives the right to counsel.

CRIMINAL LAW / PROCEEDING PRO SE / APPOINTMENT OF STANDBY COUNSEL

Pursuant to Pa.R.Crim.P. Rule 121(D), when a defendant's waiver of counsel is accepted, standby counsel may be appointed.

CRIMINAL LAW / PROCEEDING PRO SE / APPOINTMENT OF STANDBY COUNSEL

The Pennsylvania Rules of Criminal Procedure do not mandate the appointment of standby counsel, which is a matter within the trial court's discretion.

CRIMINAL LAW / PROCEEDING PRO SE / APPOINTMENT OF STANDBY COUNSEL

While it is generally advisable to appoint standby counsel when a defendant waives the right to counsel and elects to proceed *pro se*, the appointment of standby counsel is not always necessary.

CRIMINAL LAW / PROCEEDING PRO SE / APPOINTMENT OF STANDBY COUNSEL

Where none of the complicating factors which support the appointment of standby counsel are present, the appointment of standby counsel is not required.

CRIMINAL LAW / PROCEEDING PRO SE / APPOINTMENT OF STANDBY COUNSEL, FACTORS TO CONSIDER

Factors the trial court may consider in determining whether to appoint standby counsel may include: whether the defendant has exhibited unruly or disruptive behavior and whether the defendant poses a risk of engaging in unruly behavior, suggesting a potential need for standby counsel to assume control of the defense; whether the defendant is the sole defendant at the trial; the anticipated duration of the trial; whether the case is a capital case; and whether the trial will present complicated issues of law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 864 OF 2015

Appearances: District Attorney's Office for the Commonwealth
Markel Jovan Hall, *pro se*

OPINION

BRABENDER, J. February 2, 2017

This matter is before the Court on Appellant's *pro se* Notice of Appeal and Amended Notice of Appeal, following remand by the Superior Court of Pennsylvania to permit Appellant to file a Rule 1925(b) Statement.[1] A Rule 1925(b) Statement was filed on January 19, 2017, and this Opinion follows. For the reasons set forth below, the judgment of sentence should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns Appellant's waiver of court-appointed trial counsel, and request for standby counsel. The relevant background is summarized herein.

By Criminal Information filed May 21, 2015, Appellant was charged with a number of theft-related offenses, including Robbery and Conspiracy to Commit Robbery for a home invasion which occurred on October 17, 2014. In February, 2015, Appellant applied for a public defender. James A. Pitonyak, Esq. was appointed as counsel. At the Commonwealth's request, the trial, originally listed for the July, 2015 term of court, was continued to the September, 2015 term.

On August 31, 2015, Appellant filed a Motion to Proceed *Pro Se*, expressing dissatisfaction with counsel. On September 1, 2015, Attorney Pitonyak filed a Motion to Withdraw as Counsel and to Schedule a *Pro Se* Colloquy.

On September 4, 2015, a hearing was held before the Honorable Shad Connelly, now retired, on the Motion to Proceed *Pro Se* and the Motion to Withdraw as Counsel. The Court explained to Appellant that, by proceeding on the Motion to Proceed *Pro Se*, Appellant was discharging his court-appointed attorney, and representing himself, thus waiving his right to counsel. *Transcript of Proceedings, Motion to Withdraw as Counsel and Pro Se Colloquy, September 4, 2015 (Tr. 9/4/15), pp. 2-3*. The Court advised Appellant he would "be bound just like an attorney would be bound to follow all the rules of evidence, all the rules of procedure, and all the Court deadlines for filing." *Tr. 9/4/15, p. 3.*

The following colloquy took place:

> The Court: Well, let's go ahead with the colloquy here. We have to do this for the record.
>
> Ms. Hirz: Okay. Sir, you understand you have, as the Judge indicated, you have a right to be represented by an attorney and a free one if you can't afford one, correct:
>
> Mr. Hall: Yes.

[1] On April 27, 2016, the Court filed a 1925(a) Opinion concluding Appellant's issues were waived for failure to file a court-ordered statement of errors complained of on appeal. The Superior Court determined waiver had not occurred, because the giving of written notice of the entry of the Court's 1925(b) order was not recorded on the docket. On December 22, 2016, the Superior Court remanded the matter for re-entry and proper notice of a Rule 1925(b) order. *See Commonwealth v. Hall, Unpublished Memorandum filed December 22, 2016 at 326 WDA 2016.*

Ms. Hirz: All right. And you do know the nature of the elements of the charges against you, correct?

Mr. Hall: Yes.

Ms. Hirz: And you're aware of any possible range of sentences, fines, and any penalty that can be imposed if you are found guilty or plead guilty, correct, sir?

Mr. Hall: Yes.

Ms. Hirz: All right. You understand, as the Judge indicated, you represent yourself, you are still required to follow the Rules of Criminal Procedure and evidence and an attorney will be more familiar with these rules than you, correct?

Mr. Hall: Yes.

Ms. Hirz: All right. You understand there may be defenses to these charges, which counsel would be aware of, and if they are not raised at that time, you would lose your right and they would be permanently lost if they were not raised, do you understand that?

Mr. Hall: Yes.

Ms. Hirz: You understand if errors or rule violations occur and you don't object to them at the right time, you would lose your right to object permanently, correct?

Mr. Hall: Yes.

Ms. Hirz: You're voluntarily giving up your right to be represented by an attorney today, correct?

Mr. Hall: Yes.

Ms. Hirz: And have you been forced or pressured in any way or have promises been made that have influenced your decision to waive your right to be represented?

Mr. Hall: No.

Ms. Hirz: No. All right. Sir, I'm going to have you sign on the line marked defendant.

(Whereupon, defendant complies.)

Ms. Hirz: And just for the record, Your Honor, this is Attorney Strasser's case and he indicated that he would be objecting to any continuance and wanted

Mr. Hall to understand that the Commonwealth would object to any continuance in this matter. And it is scheduled to go to trial this term.

The Court: Do you understand that, Mr. Hall?

Mr. Hall: Yes, I understand that. And I will not be ready to go to trial this term, sir, due to the fact that I'm proceeding *pro se* at this point.

The Court: Well, if you're going to ask for a continuance, you have to do so in writing, set forth the reasons you have, and submit it to the Court.

Mr. Hall: Yes, Your Honor.

The Court: All right. The Court would order that the Motion to Withdraw as Counsel filed by Mr. Pitonyak is granted, the Motion to Proceed *Pro Se* by Mr. Hall is granted. The case right now is scheduled for the September term, unless and until the Court orders it be continued.

Mr. Pitonyak: Thank you, Your Honor.

Ms. Hirz: Thank you, Your Honor.

Tr. 9/4/15, pp. 4-6. Having determined Appellant's waiver of counsel was knowing, voluntary and intelligent, the Court entered on the docket written Orders granting the Motion to Proceed *Pro Se* and the Motion to Withdraw as Counsel.

On September 8, 2015, Appellant, *pro se*, filed a Motion to Continue Trial, requesting additional time to prepare for trial. *C*oncurrently, Appellant filed a Petition for Immediate Release on Nominal Bail, based upon his period of confinement. Appellant averred that, if the petition for release was granted, he would be immediately transferred to SCI Albion on a state parole detainer, where Appellant would have greater resources to assist him with trial preparation.[2]

On September 16, 2015, Judge Connelly granted Appellant's request for a continuance. The case was rescheduled for the November, 2015 term of court. On September 21, 2015, the Court granted the Petition for Release on Nominal Bond.

On October 26, 2015, correspondence from Appellant to Judge Connelly was filed with the Clerk of Courts requesting, *inter alia*, appointment of standby counsel and issuance of subpoenas for trial witnesses. On October 28, 2015, Appellant filed an Omnibus Pre-Trial Motion for Relief.

On October 29, 2015, Judge Connelly conducted a hearing to address Appellant's inquiry regarding appointment of standby counsel. Judge Connelly reminded Appellant that on September 4, 2015, the Judge granted Appellant's request to proceed *pro se*. Judge Connelly advised Appellant he had the right to hire counsel; and with regard to standby counsel, directed Appellant to submit a written motion to the Court. *Transcript of Proceedings, Pro*

[2] Subsequently, on September 15, 2015, the Court directed the Commonwealth to respond to Appellant's Petition for Release on Nominal Bail. On September 21, 2015, the Commonwealth filed a response to the petition for release.

Se Colloquy, October 29, 2015 (Tr. 10/29/15), pp. 2-3.

On October 30, 2015, Judge Connelly dismissed the Omnibus Pre-Trial Motion for Relief as Untimely. On November 5, 2015, Appellant filed a Writ for Standby Counsel, citing lack of knowledge of the law.

Due to the impending retirement of Judge Connelly, the case was reassigned to the undersigned. On November 10, 2015, the Court addressed Appellant's Writ for Standby Counsel, Appellant's oral Motions in Limine, and other pre-trial matters. *Transcript of Proceedings, November 10, 2015 (Tr. 11/10/15), pp. 2-25.* During the proceedings, Appellant confirmed he wanted to proceed *pro se*.

> The Court: Okay. You're listed as *pro se* or representing yourself; is that what you want to do?
>
> The Defendant: Yes.

Tr. 11/10/15, p. 3.

Appellant advised he remained indigent; he could not afford a lawyer; and he had determined, "okay, I'll just represent myself and I'll just get standby counsel, I have no problem with it." *Tr. 11/10/15, p. 5*.

Appellant informed the Court he wanted to proceed to trial, regardless whether standby counsel was appointed.

> The Defendant: Okay, well, if standby counsel is not granted, I'm still proceeding to go to trial.
>
> The Court: So you definitely want to go to trial?
>
> The Defendant: Yes.
>
> The Court: You're in jail now?
>
> The Defendant: Yes. Yes. I'm just asking for standby counsel.

Tr. 11/10/15, p. 7.

The Court denied the request for standby counsel. Due to Appellant's *pro se* status, on November 10, 2015, the Court itself conducted voir dire. *Tr. 11/10/15, pp. 15-16.*

After a two-day jury trial on November 12, 2015 and November 13, 2015, Appellant was found guilty of one count each of Criminal Conspiracy, Robbery, Burglary, Theft By Unlawful Taking or Disposition, Receiving Stolen Property, Simple Assault and Criminal Trespass.[3]

On February 1, 2016, Appellant was sentenced to an aggregate of 42 to 84 months (three and one-half to seven years) of incarceration as follows:

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[3] 18 P.S. §§903/3701(a)(1)(iv), 18 P.S. §3701 (a)(1)(iv), 18 P.S. 3502 (a)(1), 18 P.S. 3921(a), 18 P.S. 3925(a), 18 P.S. 2701(a)(3) and 18 P.S. 3503(a)(1)(i), respectively.

Count 1: Criminal Conspiracy – 12 to 24 months of incarceration, plus costs and restitution.

Count 2: Robbery – Merged with Count 1.

Count 3: Burglary – 24 to 48 months of incarceration, followed by 60 months of probation, state supervised, consecutive to Count 1.

Count 4: Theft By Unlawful Taking or Disposition – Merged with Count 3.

Count 5: Receiving Stolen Property – Merged with Count 3.

Count 6: Simple Assault – 6 to 12 months of incarceration, consecutive to Count 3.

Count 7: Criminal Trespass – Merged with Count 3.

On February 1, 2016, the Court granted the Appellant's Motion for Trial Transcripts.

On February 2, 2016, Appellant filed a Post-Sentence Motion, which the Court denied on February 3, 2016. On February 10, 2016, the Appellant filed a Request for Sentence Modification, which the Court denied on February 16, 2016.

On March 1, 2016, Appellant timely filed Notice of Appeal from the Order of February 3, 2016 denying the post-sentence motion. On March 14, 2016, Appellant filed an Amended Notice of Appeal from the Order of February 3, 2016 denying the post-sentence motion.[4]

On March 23, 2016, this Court held a hearing pursuant to *Commonwealth v. Grazier*, 713 A.2d 81, 82 (Pa. 1998), to determine whether waiver of appellate counsel was knowing, intelligent and voluntary. The Court determined Appellant's waiver of counsel was knowing, intelligent and voluntary. *Transcript of Proceedings, Grazier Hearing, March 23, 2016 (Tr. 3/23/16), pp.1-5.*

On March 24, 2016, the Court entered an Order permitting Appellant to proceed *pro se* on direct appeal. Concurrently, the Court issued a 1925(b) Order directing Appellant to file a 1925(b) statement within twenty-one (21) days. Appellant did not file a 1925(b) Statement within the requisite period. Thus, the Court, in its 1925(a) Opinion, found Appellant waived any appellate issues.

On December 22, 2016, the Superior Court remanded the matter for re-entry and proper notice of a Rule 1925(b) Order. See *Commonwealth v. Hall, Unpublished Memorandum filed December 22, 2016 at 326 WDA 2016*. On December 29, 2016, the Court entered another 1925(b) Order, and the docket reflects proper notice of the order was given.

On January 19, 2017, Appellant filed a 1925(b) Concise Statement of Matters Complained of on Appeal. Distilled, Appellant claims his constitutional rights were violated because inadequate colloquies were conducted regarding his request to proceed *pro se* at trial. In addition, Appellant claims it was error not to appoint standby counsel.

[4] It is unclear why Appellant filed the Amended Notice of Appeal.

DISCUSSION

Just as a criminal defendant has a constitutional right to counsel, so too does the defendant have "a long-recognized constitutional right to dispense with counsel and to defend himself before the court." The right to self-representation, however, is not absolute. Thus, to exercise this right, the defendant must demonstrate that he knowingly, voluntarily and intelligently waives his right to counsel. *Commonwealth v. Brooks*, 104 A.3d 466, 474 (Pa. 2014)(internal citations omitted).

To ensure that a waiver is knowing, voluntary, and intelligent, the trial court must conduct a "probing colloquy," which is "a searching and formal inquiry" as to whether the defendant is aware both of the right to counsel and of the significance and consequences of waiving that right. *Commonwealth v. Starr*, 664 A.2d 1326, 1335–36 (Pa. 1995).

Pennsylvania Rule of Criminal Procedure 121(A)(2)(a)-(f) sets forth the minimum information the judge or issuing authority must elicit in determining whether a defendant's waiver of the right to counsel is knowing, voluntary, and intelligent. *Pa.R.Crim.P. 121(A)(2)*. The Rules of Criminal Procedure provide that, "[w]hen the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant." *Pa.R.Crim.P. 121(D)(emphasis added)*. The Rules do not mandate appointment of standby counsel. *See Pa.R.Crim.P. 121*.

Appellant's claim the waiver of counsel colloquy conducted September 4, 2015 was defective and violated Appellant's Sixth Amendment rights is belied by the record.

The on-the-record colloquy conducted on September 4, 2015 satisfied the requirements of Pa.R.Crim.P. 121. See *Tr. 9/4/15, pp. 4-6; Pa.R.Crim.P. 121(a)(2)(a)-(f)*. In fact, the colloquy exceeded the requirements of Rule 121 in that Appellant was additionally and specifically asked whether the decision to waive counsel was voluntary; whether Appellant had been forced or pressured to waive counsel; and whether any promises were made that influenced the decision to waive counsel. See *Tr. 9/4/15, pp. 4-6*. Further, Judge Connelly informed Appellant he would be bound just like an attorney would be bound to follow all rules of evidence, all rules of procedure, and all Court deadlines for filing. *Tr. 9/4/15, p. 3*.

Appellant's claim his constitutional rights were violated on October 29, 2015 when a hearing was convened by Judge Connelly to address Appellant's request for standby counsel is likewise belied by the record. Judge Connelly advised Appellant that Appellant previously informed the Court he wished to proceed *pro se*, and "[t]hat's what you got." The Court instructed Appellant to make a written motion to the Court about standby counsel for the Court's consideration. *Tr. 10/29/15, p. 3*.

Appellant's claim his constitutional rights were violated on November 10, 2015, are baseless. A fully sufficient waiver of counsel colloquy was conducted on September 5, 2015. At no time on November 10, 2015 did Appellant withdraw his waiver of counsel. Appellant did not object to proceeding to trial *pro se*, nor did he indicate any desire to revisit his waiver of counsel. Appellant expressed no second thoughts about proceeding *pro se*. Appellant maintained he wished to proceed to trial immediately regardless whether standby counsel was appointed. Appellant did not seek to revisit his waiver, and there was no requirement that the Court revisit the waiver of counsel issue s*ua sponte*. The record establishes Appellant did not withdraw his prior waiver of counsel. Under these circumstances, a second waiver of counsel colloquy was not required. *See Commonwealth v. Blakeney*, 946 A.2d 645, 656

(Pa. 2008).

With regard to the request for standby counsel, the determination whether to appoint standby counsel was a matter within the Court's discretion. *See Pa.R.Crim.P. 121*. No abuse of discretion occurred. While it is generally advisable to appoint standby counsel when a defendant waives the right to counsel and elects to proceed *pro se*, it was not necessary in this case. The factors to consider as outlined in the comments to Rule 121 and case law were not present.

During the exchange between the Court and Appellant on November 10, 2015, Appellant did not exhibit any unruly or disruptive behavior. The Court ascertained Appellant was not at risk of engaging in unruly behavior. In the instant case, standby counsel was not needed to assume control of the defense. *See Comments to Pa.R.Crim.P. 121; Commonwealth v. Abu-Jamal*, 720 A.2d 79, 109 (Pa. 1998)

Also, Appellant was the sole defendant at this trial; no co-defendant was tried with Appellant. Further, duration of the trial was short; the evidentiary portion of the trial lasted just one day. Moreover, this was not a capital case, and the trial did not present complicated issues of law. *See Comments to Pa.R.Crim.P. 121*. None of the complicating factors which support appointment of standby counsel were present. *See Comments to Pa.R.Crim.P. 121*.

There was no abuse of discretion in not further postponing the trial of this matter for the appointment of standby counsel.

CONCLUSION

For the reasons stated herein, this appeal must be dismissed, and the judgment of sentence should be affirmed. The Clerk of Courts is hereby directed to transmit the record to the Superior Court.

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

IN THE INTEREST OF R.M., A Minor

JUVENILE / DELINQUENCY / BURDEN OF PROOF / DISPOSITION

Under the Juvenile Act, the trial court has broad discretion in determining an appropriate disposition. A trial court's disposition will not be disturbed on appeal absent a manifest abuse of discretion.

JUVENILE / DELINQUENCY / RESTITUTION

Under the Juvenile Act, the court has the authority to award restitution where a juvenile has been adjudicated delinquent. The court has broad discretion in deciding whether to impose restitution as part of apportioning responsibility and accountability, considering the nature of the delinquent act and subject to the juvenile's ability to pay.

JUVENILE / DELINQUENCY / RESTITUTION

Restitution is appropriate where there is a causal connection between the total losses sustained by the victim and the juvenile's role in the burglary and receipt of the victim's stolen property.

JUVENILE / DELINQUENCY / RESTITUTION

Where there are multiple juveniles who are responsible for the victim's losses, the court should consider the proportion of the damage caused by each juvenile.

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE / BURDEN OF PROOF

The standard of review for a sufficiency of the evidence claim is "whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt." The appellate court may not reweigh the evidence and substitute its judgment for that of the trial court. Additionally, "the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances."

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE / BURGLARY

In order for there to be sufficient evidence of burglary, the Commonwealth is not required to allege or prove the particular crime the juvenile intended to commit after his entrance into a building by criminal means. When a juvenile enters a building by criminal means, the court may infer that the juvenile intended a criminal purpose based on the totality of the circumstances.

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE / RECEIVING STOLEN PROPERTY

A passenger in a stolen vehicle may be convicted of theft by receiving stolen property if they are in joint or constructive possession of the stolen vehicle, which is appropriate when the totality of circumstances indicate that the occupants of the vehicle were acting in concert. When a passenger from a stolen vehicle flees the vehicle to avoid arrest, the court may infer the dominion and guilty knowledge necessary to convict the passenger of receiving stolen property.

JUVENILE / DELINQUENCY / PLACEMENT

Under the Juvenile Act, the court has broad discretion in determining the appropriate disposition of a delinquent juvenile. As part of the disposition, the court may commit the child to an institution, youth development center, camp, or other facility for delinquent children.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
JUVENILE DIVISION – DELINQUENCY
No. 7 of 2016

Appearances: Jonathan W. Neenan, Esq. for the Commonwealth
Jason A. Checque, Esq. for R.M.

MEMORANDUM OPINION

Trucilla, J.

July 1, 2016: This matter is before the Court upon the appeal of R.M. (hereinafter "Appellant") from this Court's Order dated March 9, 2016. For the reasons set forth below, the appeal should be dismissed.

FACTUAL & PROCEDURAL HISTORY

A. Procedural History

On January 19, 2016, the Commonwealth filed Allegations of Delinquency against Appellant charging him with the following delinquent acts: Allegation 13, Aggravated Assault (in violation of 18 Pa. C.S. § 2702(a)(3)); Allegation 14, Burglary (in violation of 18 Pa. C.S. § 3502(a)(4)); Allegation 15, Criminal Trespass (in violation of 18 Pa. C.S. § 3503(a)(1)(i)); Allegation 16, Receiving Stolen Property (in violation of 18 Pa. C.S. § 3925(a)); Allegation 17, Resisting Arrest or Other Law Enforcement (in violation of 18 Pa. C.S. § 5104); Allegation 18, Theft by Unlawful Taking or Disposition (in violation of 18 Pa. C.S. § 3921(a)); Allegation 19, Receiving Stolen Property (in violation of 18 Pa. C.S. § 3925(a)); and Allegation 20, Disorderly Conduct (in violation of 18 Pa. C.S. § 5503(a)(4)).

A Delinquency Hearing was scheduled before the Honorable Daniel J. Brabender for January 26, 2016. On January 22, 2016, Appellant, represented by Jason A. Checque, Esquire, filed a Motion to Continue, seeking to continue the Delinquency Hearing due to a scheduling conflict and additional time needed to gather medical records and interview witnesses. Judge Brabender granted Appellant's Motion to Continue, and a Delinquency Hearing was scheduled for February 4, 2016 at 1:30 p.m. before this Court.

On February 4, 2016, the day of the Delinquency Hearing, Appellant filed another Motion to Continue, seeking to continue the Delinquency Hearing due to Appellant's medical appointment at 2:30 p.m. This Court denied Appellant's Motion to Continue. However, this Court spoke with Appellant's medical personnel and agreed to make Appellant available between 3:00 p.m. and 3:30 p.m. so that Appellant could attend his medical appointment. Accordingly, the Delinquency Hearing was held on February 4, 2016. The Commonwealth, represented by Jonathan W. Neenan, Esquire, called its first two witnesses, Officer Gabriel Carducci and Officer Nicholas Bernatowicz. After the two officers testified, the Court

recessed and the trial was continued so that Appellant could attend his scheduled medical appointment. On February 11, 2016, the Court reconvened. The Commonwealth called Officer Jason Russell and the victims, Destiny Belle and Latasha Barnett. Following this testimony, the Commonwealth rested its case. Counsel for Appellant made a Motion for Judgment for Acquittal for Allegation 14, Burglary and Allegation 16, Receiving Stolen Property. The Court denied Appellant's request and the matter proceeded.

The Court subsequently conducted a colloquy with Appellant concerning his constitutional rights, including his right not to testify. Appellant informed the Court of his desire to testify on his own behalf and forego his constitutional right to remain silent. The Court found that Appellant knowingly and voluntarily waived his right not to testify. Following Appellant's testimony, Appellant rested. Both Appellant and the Commonwealth made a closing statement.

Following the conclusion of the Delinquency Hearing, the Court stated its findings of fact on the record. The Court did not find the testimony of Appellant credible. The Court found that Commonwealth's witnesses were credible. The Court found that the Commonwealth had proven beyond a reasonable doubt that Appellant had committed: Allegation 13, Aggravated Assault; Allegation 14, Burglary; Allegation 15, Criminal Trespass; Allegation 17, Resisting Arrest or Other Law Enforcement; Allegation 18, Theft by Unlawful Taking or Disposition; and Allegation 20, Disorderly Conduct. The Court held that Allegation 19, Receiving Stolen Property, merged with Allegation 18, Theft by Unlawful Taking or Disposition. The Court held in abeyance its ruling on Allegation 16, Receiving Stolen Property, to allow counsel for Appellant the opportunity to submit a brief on the issue of whether a person who is a passenger in a stolen vehicle could commit the crime of Receiving Stolen Property with respect to the stolen vehicle.

On February 17, 2016, Counsel for Appellant submitted a Motion to Reconsider Adjudication(s) of Delinquency. In addition to addressing the issue relating to Allegation 16, Receiving Stolen Property as it related to being a passenger in a stolen vehicle, Appellant also asked this Court to reconsider Allegation 13, Aggravated Assault; Allegation 14, Burglary; and Allegation 15, Criminal Trespass.

A Dispositional Hearing was held on February 23, 2016. The Court heard arguments from Appellant and the Commonwealth regarding Appellant's Motion to Reconsider Adjudications of Delinquency. The Court sustained its findings that Appellant committed Allegation 14, Burglary and Allegation 15, Criminal Trespass. The Court further found that the Commonwealth had proven beyond a reasonable doubt that Appellant committed Allegation 16, Receiving Stolen Property. This Court granted Appellant's request regarding Allegation 13 and thereby amended Aggravated Assault to Simple Assault. After considering the Court Summary and statements of the parties, the Court then found Appellant in need of treatment, supervision, and rehabilitation and, consequently, adjudicated him delinquent. The Court ordered Appellant to be placed at Loysville Youth Development Center (hereinafter "Loysville") for two to three months, with a possible transition to George Junior Republic if Appellant was on positive status at Loysville. Also the Court ordered Appellant to pay $1,620.99 in restitution. In an Order dated February 25, 2016, the Court modified its previous Order and thereby ordered Appellant to pay restitution in the amount of $1,361.00.

On March 4, 2016, Appellant filed Post Dispositional Motions, which included a "Motion

to Reconsider Juvenile's Motion to Reconsider Adjudications of Delinquency," "Motion for [sic] Reconsider Juvenile to Pay Restitution," and "Motion to Reconsider Placement at Loysville YDC." On March 8, 2016, this Court issued an Order denying Appellant's Motions.

Appellant filed the instant Notice of Appeal on April 8, 2016.[1] On April 19, 2016, this Court ordered Appellant to file a concise statement of matters complained of on appeal, pursuant to Pa. R.A.P. 1925(b), within twenty-one days. On May 11, 2016, Appellant filed his "Statement of Matters Complained of on Appeal."

The Court will now address the relevant facts of the instant case.

B. Factual History

The Commonwealth first called Officer Gabriel A. Carducci, a patrolman with the City of Erie Police Department, to testify. *Delinquency Hearing Transcript* (hereinafter "*D.H.T.*"), February 4, 2016 at 4-5. Officer Carducci testified that while working third shift at approximately 1:00 a.m. on Monday, January 18, 2016,[2] during a routine patrol in the City of Erie, he spotted a late model white Ford Explorer at West 18th Street and Liberty Street. *Id.* at 6, 12, 37. The Ford Explorer matched the description of a vehicle that had been reported stolen within the previous few days. *Id.* at 6. Officer Carducci testified that the description of the vehicle had been given to him on roll call for several days. *Id.* Officer Carducci turned his police cruiser around so he could follow the Ford Explorer. *Id.* at 6-7. By the time he turned around, the Ford Explorer was no longer visible. *Id.* at 7. On this particular late evening and early morning, there had been a severe snow storm, and Officer Carducci was able to catch up to the Ford Explorer by following the vehicle's tracks in the fresh snow. *Id.* Due to the inclement weather and early morning hours, there were not many vehicles on the road and it was therefore easier to follow the tracks of the Ford Explorer. *Id.* at 12-13, 37. Officer Carducci spotted the Ford Explorer again at 20th Street and Sassafras Street within five minutes. *Id.* at 7. He began following the vehicle, and called on the radio to report he was following a vehicle matching the description of the Ford Explorer that had been reported stolen. *Id.* Another Erie Police Department vehicle occupied by Office Nicholas Bernatowicz crossed paths with the Ford Explorer on State Street, and the Ford Explorer began to rapidly accelerate. *Id.* at 8-9. Officer Carducci activated his emergency lights and sirens as he continued to follow the Ford Explorer. *Id.* at 10. In an apparent attempt to evade police, the Ford Explorer went through traffic lights and stop signs at a speed of upwards of fifty miles per hour in a twenty-five mile per hour zone. *Id.* at 11, 14. At 245 East 22nd Street, the driver of the vehicle lost control, hit a tree, and the Ford Explorer came to a stop. *Id.* at 14.

Officer Carducci observed two people exit the vehicle: a driver, who went northbound, and a front seat passenger, who went southbound. *Id.* at 14-15. Officer Carducci exited his vehicle and chased the driver of the vehicle. *Id.* at 15. Officer Bernatowicz gave chase to the passenger of the vehicle. *Id.* Officer Carducci apprehended the driver of the vehicle, J.G. *Id.* at 16. Officer Carducci returned to the Ford Explorer, and was able to identify the owner

[1] This Court was not, however, served a copy of the Notice of Appeal until April 19, 2016, eleven days after the Notice of Appeal was filed and Counsel for Appellant certified that he served this Court.

[2] The Court takes judicial notice that Monday, January 18, 2016 was Martin Luther King, Jr. Day.

of the vehicle as Latasha Barnett. *Id.* at 17-18. He also verified that this Ford Explorer was the same vehicle that had been reported stolen by using the vehicle's identification number. *Id.* at 18. Finally, Officer Carducci testified that Appellant's booking sheet listed the items Appellant had on his person, which included a prescription pill bottle for Venlafaxine belonging to Latasha Barnett. *Id.* at 34.

The Commonwealth next called Officer Nicholas Bernatowicz, a patrolman and SWAT operator with the City of Erie Police Department. *Id.* at 43-44. Officer Bernatowicz testified that he responded to Officer Carducci's radio call around 1:00 a.m. while he was working third shift. *Id.* at 46. He was on East 24th Street headed toward State Street. *Id.* at 46-47. Officer Bernatowicz saw the Ford Explorer coming down the hill on State Street as he went through the intersection of State Street and East 24th Street. *Id.* at 47. Officer Bernatowicz saw that there were two black males in the vehicle, and identified Appellant as the person sitting in the front passenger seat. *Id.* at 47-48. The Ford Explorer went through the intersection without stopping, and began to accelerate at a high rate of speed. *Id.* at 49. Officer Bernatowicz turned his vehicle around, turned on his emergency lights and siren, and pursued the Ford Explorer. *Id.* at 49, 62. Officer Carducci's vehicle was directly behind the Ford Explorer, and Officer Bernatowicz's vehicle was directly behind Officer Carducci's vehicle. *Id.* at 49-50. Officer Bernatowicz observed the Ford Explorer lose control and hit a tree. *Id.* at 50. As Officer Bernatowicz was pulling up to the scene of the crash, he saw two people exit from the vehicle. *Id.* at 50, 64. As the driver ran north and Appellant ran south, Officer Bernatowicz pursued Appellant and Officer Carducci followed the driver. *Id.* at 50-51.

Officer Bernatowicz cleared the Ford Explorer and found no other occupants. *Id.* at 51, 64. Next, Officer Bernatowicz, in full police uniform, gave chase to Appellant. *Id.* at 51, 57. Officer Bernatowicz gave Appellant verbal commands to stop, but Appellant did not comply. *Id.* at 51. Instead, Appellant ran south toward an alley. *Id.* Appellant was ahead of Officer Bernatowicz, but Officer Bernatowicz was able to follow Appellant because he could easily identify Appellant's footprints in the recent snowfall. *Id.* at 52. Officer Bernatowicz followed the footprints west through a backyard, over two fences, and through an alley. *Id.* at 51-52, 65. In the alley, the footprints led to a vehicle with an open door, and went in one side and out the other. *Id.* at 51-52, 65, 67. Officer Bernatowicz cleared the open vehicle with the help of Officer Jason Russell who joined him in the pursuit of Appellant at the open vehicle. *Id.* at 51. The Officers continued to follow the footprints over fences, across a park, and ultimately to a single car detached garage located at 2224 Holland Street. *Id.* at 52, 65, 69. Officer Bernatowicz testified that Appellant did not live at 2224 Holland Street. *Id.* at 61. In total, the Officer Bernatowicz pursued Appellant for one and a half to two blocks. *Id.* at 51-52, 66. At no point during the chase did Appellant stop, despite being pursued by two uniformed police officers and their repeated verbal commands. *Id.* at 67.

The footprints led into the garage. *Id.* at 52. Officer Bernatowicz gave Appellant commands from outside the garage to show his hands. *D.H.T.*, February 11, 2016 at 10, 21. As he did not receive a response, Officer Bernatowicz went through the partially open man door to the garage with his weapon drawn and turned left. *D.H.T.*, February 4, 2016 at 53, 68. The garage was pitch black, but Officer Bernatowicz had a flashlight attached to his weapon. *Id.* at 53, 55, 74. Appellant was standing in the left corner of the garage.

Id. at 53. Officer Russell entered the garage after Officer Bernatowicz. *Id.* at 53, 71-72. Officer Bernatowicz testified that Appellant was six to seven feet away, had a black object in his right hand, and stood at a "bladed stance" with half his body turned away from Officer Bernatowicz. *Id.* at 54-55, 69, 72-73. Officer Bernatowicz repeatedly commanded Appellant to show him his hands. *Id.* at 55. Appellant failed to comply, turned his back towards Officer Bernatowicz, and reached towards the waistband of his pants.[3] *Id.* at 55, 71. Officer Bernatowicz re-holstered his weapon, approached Appellant, and grabbed ahold of him. *Id.* at 56. Appellant attempted to get free from Officer Bernatowicz's grasp and to escape through the man door. *Id.* at 56, 77. Officer Bernatowicz could feel force as Appellant struggled and resisted arrest, ultimately striking Officer Bernatowicz in the right knee. *Id.* at 56-57, 77-78. Officer Bernatowicz got Appellant to the ground, where Appellant continued to struggle and tried to break free. *Id.* at 57, 80. Appellant moved his hands underneath him, in a further attempt to resist arrest. *Id.* at 57. With the help of Officer Russell, Officer Bernatowicz was able to get Appellant's hands behind his back and handcuff him. *Id.* at 57-58, 80. While Appellant was on the ground, Officer Bernatowicz gave him repeated commands to stop resisting, to release his hands from under his body, and to let go of objects he was holding. *Id.* at 58. Officer Bernatowicz and Officer Russell conducted a search incident to arrest of Appellant. *Id.* at 59-60. They recovered multiple items, including a prescription pill bottle that was found in Appellant's left pocket. *Id.* at 60. The booking sheet indicated that the pill bottle contained Venlafaxine belonging to Latasha Barnett. *Id.* at 34.

The Commonwealth next called Officer Jason Russell, a patrolman with the City of Erie Police Department. *D.H.T.*, February 11, 2016 at 4. Officer Russell testified that on January 18, 2016, he was working third shift. *Id.* at 5. He heard Officer Carducci's radio broadcast that the Ford Explorer was eluding him and joined in the pursuit. *Id.* at 5-6. Officer Russell heard on the radio that the Ford Explorer had crashed in the 200 block of East 24th Street and that both occupants had fled from the vehicle on foot. *Id.* at 6. He stopped his vehicle in the 200 block East 25th Street to establish a perimeter. *Id.* Officers Carducci and Bernatowicz were already at the scene. *Id.* Officer Russell assisted Officer Bernatowicz in the pursuit of the passenger of the Ford Explorer, and joined Officer Bernatowicz at the vehicle in the alley. *Id.* at 6-7. The Officers cleared the vehicle, and followed the footprints westbound. *Id.* at 7. Officer Russell testified that they scaled two fences and followed the footprints across Holland Street into a park, leading to a garage at 2224 Holland Street. *Id.* at 7-8. The footprints led to the garage's man door, located at the corner of the garage. *Id.* at 8.

Officer Russell heard Officer Bernatowicz give the individual inside the garage commands to show his hands while both officers were outside the garage. *Id.* at 21. As was testified to by Appellant, Appellant heard police voices outside of the garage but did not come out, and instead backed into the corner of the garage. *Id.* at 67-69. As no one exited the garage, Officer Bernatowicz entered the garage through the man door, followed by Officer Russell.

[3] It is worthy to note that in spite of Appellant's conduct and level of defiance, Officer Bernatowicz established a factual predicate that may have warranted the use of deadly force. This Court recognized that this issue is thankfully not before the Court and it is only because of the sound judgment and exercised experience of a seasoned veteran. As noted, the Court found that the conduct of the officers, especially Officer Bernatowicz, was particularly commendable.

Id. at 8. Officer Russell cleared the back corners of the garage as Officer Bernatowicz focused on the individual inside the garage. *Id.* at 8-9. Officer Russell heard Officer Bernatowicz ordering the individual to show his hands and get on the ground. *Id.* at 9-10. When Officer Russell finished clearing the back corners of the garage, he turned around and saw Officer Bernatowicz in contact with the individual. *Id.* at 23-24. Officer Russell identified R.M. as the individual in the garage at 2224 Holland Street. *Id.* at 9. Officer Russell testified that Officer Bernatowicz closed the distance between himself and R.M. and then grabbed Appellant in an attempt to handcuff him. *Id.* at 10. Officer Russell testified that Appellant was not compliant, and that Appellant was trying to get through or around Officer Bernatowicz. *Id.* at 9. Officer Russell holstered his weapon and helped Officer Bernatowicz get Appellant to the ground. *Id.* Appellant struggled on the ground and resisted the officers. *Id.* Officer Russell got Appellant's left arm out from underneath him, while Officer Bernatowicz got Appellant's right arm out from underneath him, and the two were able to handcuff Appellant. *Id.* at 10-11. Officer Russell did not see any objects in Appellant's hand. *Id.* at 23. No weapons were found on Appellant or in the garage. *Id.* at 29. Officer Russell testified that he and Officer Russell performed a search incident to arrest of Appellant and found an orange pill bottle in Appellant's left pocket. *Id.* at 11-12. The pill bottle listed the name Latasha Barnett and identified the prescriptive drug as Venlafaxine. *Id.* at 18.

The Commonwealth then called Destiny Belle, the owner of the one-car garage located at 2224 Holland Street. *Id.* at 34-35. Ms. Belle testified that she was sleeping in the early morning hours of January 18, 2016, when her children woke her up because they saw, from their bedroom window, police officers outside of their garage. *Id.* at 35, 40-41. Ms. Belle testified that she knew Appellant because he was her son's friend and had been over to her house on multiple occasions. *Id.* at 36, 39. Ms. Belle had always given Appellant permission to come into her house, but had never given him permission to be in her garage at 1:00 a.m. *Id.* at 41-43. Ms. Belle testified that she had not given Appellant permission to be in her garage on January 18, 2016. *Id.* at 37. Ms. Belle testified that no one had permission to be in her garage that night, and that her garage was not open to the public nor was it abandoned. *Id.* at 35-36.

The Commonwealth called its last witness Latasha Barnett, the owner of the Ford Explorer. *Id.* at 44-45. Ms. Barnett testified that she owned a 2013 pearl white Ford Explorer. *Id.* at 45. The Ford Explorer was titled in her name, with Maurice Martin, the father of her children, as the co-owner. *Id.* at 46, 55. Ms. Barnett reported her Ford Explorer stolen on January 16, 2016. *Id.* at 45. Ms. Barnett testified that the last time she saw the vehicle before it was stolen was at 12:00 a.m. on January 16, 2016 when it was parked in front of her house at 242 East 25th Street. *Id.* at 45-46. Ms. Barnett testified that she does not know Appellant. *Id.* at 46. Ms. Barnett stated that Mr. Martin had permission to use the vehicle, but that Appellant did not have permission to use the vehicle. *Id.* at 46, 56. Ms. Barnett had never seen Appellant before, and had not seen Appellant get into the vehicle. *Id.* at 49. Ms. Barnett testified that on January 18, 2016, she received a call from the City of Erie Police Department that they had recovered her vehicle. *Id.* at 45. When Ms. Barnett saw her Ford Explorer after January 18, 2016, it was totaled. *Id.* at 47. Ms. Barnett testified that she kept jewelry, car seats, two televisions, games, and her medication in her vehicle. *Id.* at 47-48. Ms. Barnett testified that she kept her medication in the center console of her vehicle. *Id.* at 49.

After the Commonwealth rested, Appellant waived his right to remain silent and testified in his own defense. *Id.* at 61, 65. Appellant admitted that he knew the Ford Explorer was stolen. *Id.* at 84. Appellant admitted that he was the passenger in the stolen Ford Explorer. *Id.* Appellant also admitted to possessing Ms. Barnett's prescription pill bottle for Venlafaxine. *Id.* at 79. Appellant admitted to knowing he was being chased by police officers from 24th Street and Sassafras Street. *Id.* at 83. Appellant further admitted that he was trying to "get away" from the officers. *Id.*

Despite having previously been to Ms. Belle's house, Appellant conceded that he did not have permission to be on her property at approximately 1:20 a.m. or in her garage. *Id.* Appellant testified that once inside the garage, he leaned on the man door for five to ten minutes before he heard police voices outside. *Id.* at 67-69. Appellant heard commands and a police officer say "Is anyone inside the garage?" *Id.* at 69, 84. Appellant testified that he did not respond or go outside, but instead started to go towards the corner of the garage. *Id.* at 69, 82.

Appellant testified that three officers came into the garage. *Id.* at 69. Appellant identified Officers Bernatowicz and Russel as two of the officers that came into the garage. *Id.* at 70. Appellant did not provide a name for the third officer. *Id.* According to Appellant, all three officers had their weapons drawn. *Id.* at 69, 71-72. Appellant said that when the officers entered the garage, he put his hands up in the air and immediately got down on the ground. *Id.* at 71, 73. Appellant testified that Officer Russell picked him up off the ground and then threw him to the ground. *Id.* at 71. According to Appellant, the three officers proceeded to stomp on him, kick him, and punch him in his ribs. *Id.* Appellant testified that Officer Bernatowicz stomped on his right hand with his boot, and that the officers kicked him in his face. *Id.* at 74-75. Appellant denied striking any of the officers. *Id.* at 80. Appellant testified that police officers from the City of Erie Police Department took him to the hospital on January 18, 2016 and that his hand was broken. *Id.* at 76-77, 88-89. The Court questioned Appellant about this alleged police brutality. *Id.* at 85-87. The Court asked Appellant if he received any stitches, to which he replied no. *Id.* at 86. The Court asked Appellant if he broke any ribs, to which he replied no. *Id.* The Court asked if his eyes were swollen shut from being kicked in the face, and Appellant again responded no. *Id.* at 86-87. The Court did not find Appellant's testimony regarding the alleged police brutality credible. *Id.* at 111. The Court later found that the trauma to Appellant's right hand was a result of Appellant's struggle, defiance, and resistance to his arrest, not the result of police brutality. *Id.* at 114.

DISCUSSION

Appellant raises three issues on appeal. The Court will address each issue *in seriatim.*

A. Sufficiency of Evidence

In his first issue raised on appeal, Appellant states:

> Appellant avers and believes that the verdict goes against the sufficiency of the evidence for the following allegations:
>
> a) Appellant avers and believes that the trial court erred when it adjudicated Appellant delinquent and subsequently denied Appellant's Post-Dispositional Motions for Allegation 14 (Burglary) because Appellant did not have the intent to commit the crime of burglary and/or the evidence does not substantiate the crime of burglary and/or the Commonwealth cannot meet the "beyond a reasonable doubt" burden of proof

for purposes of the aforementioned adjudication of delinquency;

b) Appellant avers and believes that the trial court erred when it adjudicated Appellant delinquent and subsequently denied Appellant's Post-Dispositional Motions for Allegation 15 (Criminal Trespass) because the Appellant did not have the intent to commit the crime of criminal trespass and/or the evidence does not substantiate the crime of criminal trespass and/or the Commonwealth cannot meet the "beyond a reasonable doubt" burden of proof for purposes of the aforementioned adjudication of delinquency; and

c) Appellant avers and believes that the trial court erred when it adjudicated Appellant delinquent and substantially denied Appellant's Post-Dispositional Motions for Allegation 16 (Receiving Stolen Property) because the Appellant did not have the intent to commit the crime of receiving stolen property and/or the evidence does not substantiate the crime of receiving stolen property and/or the Commonwealth cannot meet the "beyond a reasonable doubt" burden of proof for purposes of the aforementioned adjudication of delinquency.

App.'s 1925(B) Statement at ¶ 1.

The standard of review for a sufficiency of the evidence claim is well-settled:

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. Ct. 2002) (quoting *Commonwealth v. Hennigan*, 753 A.2d 245 (Pa. Super. Ct. 1996)) (internal citations and quotations omitted); *See also, Commonwealth v. Ratsamy*, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

A person commits Burglary in violation of 18 Pa. C.S. § 3502(a)(4) when he "enters a building or occupied structure, or separately secured or occupied portion thereof that is not adapted for overnight accommodations in which at the time of the offense no person is present," with the intent to commit a crime therein. 18 Pa. C.S. § 3502(a)(4). It is a defense to Burglary if, at the time of the commission of the offense, the building or structure was abandoned, the premise was open to the public, or the actor is licensed or privileged to enter. 18 Pa. C.S. § 3502(b). Stated simply, "[a] person is guilty of burglary if he or she enters a

building or occupied structure with the intent to commit a crime therein, unless he or she is licensed or privileged to enter." *Lambert*, 795 A.2d at 1015.

> The intent to commit a crime after entry may be inferred from the circumstances surrounding the incident. While this intent may be inferred from actions as well as words, the actions must bear a reasonable relation to the commission of a crime. ***Once one has entered a private residence by criminal means, we can infer that the person intended a criminal purpose based on the totality of circumstances***. The Commonwealth is not required to allege or prove what particular crime a defendant intended to commit after his forcible entry into the private residence.

Id. at 1022 (internal citations omitted; emphasis supplied).

The Commonwealth proved beyond a reasonable doubt each element of Burglary. The Commonwealth first established that Appellant entered a building not adapted for overnight accommodations: Destiny Belle's garage. Appellant himself admitted that he entered Ms. Belle's garage in the middle of the night, and further admitted that he entered the garage to "get away" from police officers. *D.H.T.*, February 11, 2016 at 67, 79, 82-83. Appellant did not raise any defense to Burglary, and the record reflects that no defense exists. Ms. Belle testified that she had not given Appellant permission to be in her garage on that night, no one had permission to be in her garage that night, her garage was not open to the public, and her garage was not abandoned. *Id.* at 35-37. Appellant himself admitted that he did not have permission to enter the garage. *Id.* at 83. The Commonwealth was not required to allege or prove what particular crime Appellant intended to commit after his entrance by criminal means. *Lambert*, 795 A.2d at 1022. The record reflects that Appellant entered the garage in the middle of the night without license, privilege, or permission. These actions permit the inference that Appellant intended a criminal purpose. *See Lambert, supra*. For these reasons, Appellant's argument that there was insufficient evidence for Burglary lacks merit.

A person commits Criminal Trespass in violation of 18 Pa. C.S. § 3503(a)(1)(i) when he, knowing that he is not licensed or privileged to do so, "enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof." 18 Pa. C.S. § 3503(a)(1)(i). It is a defense to Criminal Trespass if the building or structure was abandoned, the premise was open to the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises, or the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain. 18 Pa. C.S. § 3503(d).

The Commonwealth proved beyond a reasonable doubt each element of Criminal Trespass. Again, the Commonwealth established that Appellant entered a building: Destiny Belle's garage. Appellant himself admitted that he entered Ms. Belle's garage in the middle of the night. *D.H.T.*, February 11, 2016 at 67. Ms. Belle testified that her garage was not abandoned, that no one was permitted to be in her garage, and specifically Appellant was not permitted to be in her garage. *Id.* at 35-37. Appellant did not testify that he thought that Ms. Belle would permit him to be in her garage in the middle of the night. In fact, Appellant admitted that he did not have permission to enter the garage that night. *Id.* at 83. Therefore, no defense to Criminal Trespass is present in this case. Consequently, Appellant's second insufficiency of evidence claim lacks merit.

A person commits the crime of receiving stolen property in violation of 18 Pa. C.S. § 3925(a) when "he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner." 18 Pa. C.S. § 3925(a). "Receiving" is defined as "acquiring possession, control or title, or lending on the security of the property." 18 Pa. C.S. § 3925(b). "To convict [A]ppellant of theft by receiving stolen property, the Commonwealth was required to prove beyond a reasonable doubt that the car had been stolen, that [A]ppellant had been in possession of it, and that he had known or had reason to know it was stolen." *In re Scott*, 566 A.2d 266, 267 (Pa. Super. Ct. 1989).

The Commonwealth proved beyond a reasonable doubt each element of receiving stolen property. First, the Commonwealth established that the vehicle was stolen. The Commonwealth offered testimony to prove that Latasha Barnett was the owner of the Ford Explorer in question. Officer Carducci testified that the vehicle identification number from the Ford Explorer that he gave chase to matched the vehicle identification number from the vehicle that Latasha Barnett reported stolen. *D.H.T.*, February 4, 2016 at 18. Second, the Commonwealth proved that Appellant was in joint and constructive possession of the stolen Ford Explorer. The evidence reflects that Appellant was the passenger in the Ford Explorer. In fact, Appellant himself admitted that he was the passenger in the Ford Explorer. *D.H.T.*, February 11, 2016 at 84. Additionally, Appellant was in possession of Latasha Barnett's pill bottle, which she testified she kept in the center console of her Ford Explorer. *Id.* at 49. The fact that Appellant had the pill bottle illustrates that he had dominion and control over the vehicle under a theory of joint and constructive possession. Third, the Commonwealth established that Appellant knew that the vehicle was stolen. Appellant admitted on the stand that he knew the Ford Explorer was stolen. *Id.* at 84.

Appellant has argued that he cannot be guilty of receiving stolen property because he was only a passenger in the stolen vehicle and did not drive the stolen vehicle. This argument is without legal merit. The case sub judice is almost factually identical to *In re Scott, supra.* In *Scott*, police officers observed a car speeding, going through a stop sign, and ultimately striking two parked vehicles. 566 A.2d at 267. The driver and the passenger of the vehicle leaped from the vehicle and ran in different directions. *Id.* Officer Panikowski pursued the passenger of the vehicle as he ran down an alley. *Id.* Officer Panikowski lost sight of the passenger, but moments later saw the passenger walking towards him. *Id.* Officer Panikowski apprehended the passenger, who he identified as Andre Scott. *Id.* The vehicle was found to have been stolen. *Id.* Scott testified that he had not been a passenger in the vehicle and had not run from the police. *Id.* Scott was adjudicated delinquent for, *inter alia*, receiving stolen property. *Id.* at 266.

Since there was no evidence that Scott had been driving the stolen vehicle, the Commonwealth contended that Scott had been in joint or constructive possession of the vehicle. *Id.* at 267. The Superior Court held that it was not fatal to the Commonwealth's case if they could not prove that a passenger in a stolen vehicle actually drove the vehicle. *Id.* at 268. In *Scott* the Court stated that where "the trier of fact finds that appellant was either driving or riding in a vehicle he knew was stolen" and "attempted to escape with his companion… there is a sufficient basis for the fact finder to apply the doctrine of joint

possession, which is appropriate when the '…totality of the circumstances justify a finding that all of the occupants of the vehicle were acting in concert.'" *Id.* (citing to *Commonwealth v. Murray*, 371 A.2d 910 (Pa. Super. Ct. 1977)). "Under this doctrine, **it is immaterial that appellant may not have been behind the wheel of the stolen vehicle**." *Id.* (emphasis supplied). The *Scott* Court went on to state that: "[W]here a passenger in a stolen vehicle flees for the purpose of avoiding arrest, a fact finder may infer therefrom the dominion and guilty knowledge necessary to convict." *Id.* at 269. Based on these standards, the Superior Court held that there was sufficient evidence to convict Scott of theft by receiving stolen property. *Id.*

Scott makes clear that a passenger of a vehicle can be convicted of theft by receiving stolen property. In this case, Appellant was in joint or constructive possession of stolen the Ford Explorer. Appellant, like Scott, fled from the vehicle to avoid arrest. Appellant admitted that he was trying to "get away" from the police officers. *D.H.T.*, February 11, 2016 at 83. This fleeing allows the fact finder to infer guilty knowledge. *See In re Scott*, 566 A.2d at 266. However, this inference is not even necessary in this case because Appellant admitted that he knew the vehicle he was a passenger in was stolen. *D.H.T.*, February 11, 2016 at 83-84. Appellant had the dominion and guilty knowledge necessary to convict him of theft by receiving stolen property. Thus, there was sufficient evidence to support Appellant's adjudication and his claim of insufficiency thereby warrants dismissal.

B. Restitution

In his second issue raised on appeal, Appellant argues:

> Appellant avers and believes that the trial court erred when it determined that Appellant owed restitution for damages to the motor vehicle, for damages to any tangible property located within the motor vehicle (except with regards to Allegations 18 and 19), and/or for damages to any tangible property not located in the motor vehicle (except with regards to Allegations 18 and 19), especially with the trial court's finding that Appellant was adjudicated delinquent at Allegation 16 (Receiving Stolen Property).

App.'s 1925(B) Statement at ¶ 2.

The Pennsylvania Supreme Court has held:

> [O]ne of the purposes of the Juvenile Act is to hold children accountable for their behavior. Accordingly, the Juvenile Act authorizes the court to "order [ ] payment by the child of reasonable amounts of money as fines, costs or restitution as deemed appropriate as part of the plan of rehabilitation concerning the nature of the acts committed and the earning capacity of the child." 42 Pa.C.S.A. § 6352, Disposition of delinquent child, (a) General rule.-(5). Consistent with the protection of the public interest and the community, the rehabilitative purpose of the Juvenile Act is attained through accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community. Thus, the policies underlying the Juvenile Act and its restitution provision, as well as the plain language of Section 6352, serve to invest the juvenile court with a broad measure of discretion to apportion responsibility for damages based upon the nature of the delinquent act and the earning capacity of the juvenile.

In re M.W., 725 A.2d 729, 732–33 (Pa. 1999). Trial courts have broad discretion in awarding

restitution. *In re D.G.*, 114 A.3d 1091, 1098 (Pa. Super. Ct. 2015). "In reviewing an order of restitution, discretion is abused where the order is speculative or excessive or lacks support in the record." *Id.* at 1097.

Appellant is not objecting to the calculation of restitution that he was ordered to pay, but rather is objecting to the fact that he has to pay any restitution other than for the pill bottle. Counsel for Appellant has never raised an objection this Court's calculation of the amount of restitution. For the reasons set forth below, Appellant's argument that he is not responsible for any restitution other than for the pill bottle is without merit.

The Court acted within its broad discretion in awarding restitution in this case. Ms. Barnett's Ford Explorer was totaled when it hit a tree during the police chase on January 18, 2016. *D.H.T.* February 11, 2016 at 47. As recognized previously, this Court found Appellant responsible for Receiving Stolen Property of the Ford Explorer. Additionally, a number of items contained in the Ford Explorer were damaged or never found, including: jewelry (bangles and three rings), $250.00 cash, two booster seats, 40 caliber clip with ammunition, two DS XL hand games, two RCA portable televisions, and kids games. These were itemized by the victim, Latasha Barnett, and the receipts were set forth on the record. *Dispositional Transcript* ("D.T."), February 23, 2016 at 10-12. The Court was also provided receipts of items documenting the amount of loss to Ms. Barnett. The Commonwealth argued that the loss to the victim was $3,241.99, and that Appellant should be responsible for half ($1,620.99). *Id.* at 10-12, 25. After hearing arguments from Attorney Neenan and Attorney Checque at the February 23, 2016 Dispositional Hearing, the Court ordered Appellant to pay $1,620.99. *Id.* at 10-12, 25-26. However, as stated on the record, the Court reviewed the receipts again and on February 25, 2016 modified the restitution order and lowered the amount of restitution to $1,361.00. *See* February 25, 2016 Order attached as Exhibit 1. This illustrates the Court's willingness to be fair and not arbitrary in its award. This amount also signified that this adjusted loss amount was half of the total loss as determined by the Court. The total loss was to be split with Appellant's co-defendant, J.G. Restitution is within the sound discretion of the Court. *See In re D.G., supra*. This record is saturated with facts illustrating that this Court considered not only the statements of the victim regarding her loss, but also receipts admitted by the Commonwealth to support the value of the items which were missing. The Court also reduced the value of the items and, out of fairness to Appellant, only ordered he pay half of the amount as opposed to holding him jointly and severally liable. The Court also considered Appellant's ability to pay and placed him at Loysville where he would be able to earn restitution. *D.T.* at 32, 34.

As discussed above, there was sufficient evidence to adjudicate Appellant delinquent for theft by receiving stolen property in regards to the motor vehicle. Appellant exercised dominion and control over the Ford Explorer and the items in the Ford Explorer. Accordingly, it was appropriate that Appellant pay a one-half share of the restitution for the damages to the motor vehicle and for the items located within the motor vehicle at the time of the theft. The amount of $1,361.00 represents a fair and reasonable amount for Appellant to pay as a foreseeable consequence of his criminal actions regarding the Receiving Stolen Property of the vehicle. This amount reasonably accounts for the victim's loss, and is an adequate measure of accountability for Appellant. Accordingly, this claim is without merit.

C. Placement

In his third and final issue, Appellant states:

> Appellant avers and believes that the trial court erred when it determined that Appellant's best placement option was Loysville Youth Development Center (YDC) near Loysville, Pennsylvania, which is further from the Juvenile's home county than other placements that could accomplish the same "treatment, supervision and rehabilitation" goals such as George Junior Republic near Grove City, Pennsylvania, especially in this particular case as Juvenile's mother and sisters visited Juvenile on a daily basis while Juvenile was detained and/or the denial process was ongoing.

App.'s 1925(B) Statement at ¶ 3.

The Juvenile Act "grants the juvenile court broad discretion in determining the appropriate disposition for a delinquent child," which the Superior Court will not disturb absent a manifest abuse of discretion. *In re D.C.D.*, 124 A.3d 736, 739 (Pa. Super. Ct. 2015), appeal granted, 134 A.3d 50 (Pa. 2016). If a child is found to be delinquent, the Court may commit "the child to an institution, youth development center, camp, or other facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Department of Public Welfare." 42 Pa. C.S. § 6352(a)(3).

In placing Appellant at Loysville Youth Development Center, the Court considered Appellant's need for treatment, supervision, and rehabilitation, including his need for a structured environment. The current acts that Appellant was adjudicated delinquent on are serious crimes. Three of the acts for which Appellant was adjudicated delinquent are felonies: Burglary (Allegation 14), Criminal Trespass (Allegation 15), and Receiving Stolen Property (Allegation 16). Moreover, Appellant had committed six past delinquent acts: Defiant Trespass (in violation of 18 Pa. C.S. § 3505(b)(ii)),[4] Simple Assault (in violation of 18 Pa. C.S. § 2701(a)(1)),[5] Harassment (in violation of 18 Pa. C.S. § 2709(a)(1)),[6] Disorderly Conduct (in violation of 18 Pa. C.S. § 5503(a)(3)),[7] Terroristic Threats (in violation of 18 Pa. C.S. § 2706(a)(1)),[8] and Disorderly Conduct (in violation of 18 Pa. C.S. § 5503(a)(1)).[9] In fact, Appellant had previously been placed out of his home for acts of delinquency. On August 11, 2015, Appellant was placed at the Cornell Abraxas Leadership Development Program (hereinafter "Abraxas"). It is not lost on the Court that Appellant had been discharged from Abraxas on December 12, 2015, just over a month before he committed the delinquent acts that are the subject of this appeal. *D.T.* at 2.

Also in this matter, the Court indicated that it had read and considered the Court Summary and made it part of the record. *Id.* at 3. The Court considered that Appellant needed a program with a strong educational component, which Loysville offers. *Id.* at 32, 34. The Court also considered that Appellant would be able to earn restitution at Loysville. *Id.* at 32, 34. The Court did take into account Appellant's request to be placed closer to home so

[4] At Juvenile Docket 216 of 2014.

[5] At Juvenile Docket 93 of 2015.

[6] At Juvenile Docket 93 of 2015.

[7] At Juvenile Docket 295 of 2015.

[8] At Juvenile Docket 322 of 2015.

[9] At Juvenile Docket 322 of 2015.

that his family could visit him. *Id.* at 33-34. The Court ordered that Appellant remain at Loysville for only two to three months, with a possible transition to George Junior Republic if Appellant was on positive status at Loysville. *Id.* at 38. Again, the Court considered in great detail the juvenile's need for treatment, supervision, and rehabilitation, and balanced those considerations with the need to protect the community and to account for the impact on the victim and the need to financially compensate her. Accordingly, the Court did not abuse its broad discretion in placing Appellant at Loysville.

CONCLUSION

For the reasons set forth above, R.M.'s appeal should be dismissed.

BY THE COURT:
/s/ **Hon. John J. Trucilla, President Judge**

IN RE:
U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE FOR PENNSYLVANIA HOUSING FINANCE AGENCY, Plaintiff
v.
BRYAN J. WATTERS, Defendant

FAMILY LAW / MARITAL RIGHTS IN REAL PROPERTY SUBJECT TO MORTGAGE FORECLOSURE

During marriage, husband acquired real estate without wife's involvement because of her poor credit rating. Deed, mortgage and note were in husband's name only. Parties have divorce pending when a mortgage foreclosure action is filed and wife is not a party to it. Over one year after the sheriff's sale, wife files to intervene in the foreclosure and petitions to strike or open the judgment.

Wife has an equitable interest in the property but is not a "real owner" required to be a party to the foreclosure action.

Wife did not own the property and had no interest in the mortgage or note, so she was not an indispensable party to the foreclosure action.

Wife's Petition to Open Judgment was filed 584 days after receipt of Notice of Default of mortgage was untimely. It also fails to set forth a defense.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 10516-2014

Appearances: Jill M. Wineka, Esquire for the Plaintiff
Stephen H. Hutzelman, Esquire for the Defendant

OPINION

Cunningham, J. June 8, 2016

The Defendant, Bryan J. Watters, and the Proposed Intervener, Diane Watters (together "Appellants"), filed a Notice of Appeal on April 5, 2016 from an Order dated March 9, 2016, denying the Petition to Strike or Open Judgment and the Application for Leave to Intervene. This Opinion is in response to the Statement of Issues to be Raised on Appeal filed April 18, 2016 by Appellants.

BACKGROUND

On June 7, 2006, Bryan J. Watters (the "Defendant") signed a Note and Mortgage for $73,071.00 to purchase real property at 831 Rice Avenue, Girard, Pennsylvania 16417 (the "Property"). The Mortgage was assigned from the original mortgagee, American Home Mortgage, to Pennsylvania Housing Finance Agency (PaHFA) and subsequently assigned to U.S. Bank National Association, as Trustee for the PaHFA (the "Plaintiff").

At the time the Defendant purchased the Property, he was married to Diane Watters (the "Petitioner"). *Hearing Transcript March 8, 2016* ("*H.T.*"), *p. 13*. Because of Petitioner's credit rating, she was intentionally not a party to this purchase or the mortgage. *H.T. p. 14*. The Petitioner did not sign the Note or Mortgage and her name did not appear on the deed when title was transferred to the Defendant's name. *H.T. p. 13*. On April 16, 2013, the

Defendant filed for divorce from the Petitioner. *H.T. p. 14*. After separating, the Defendant moved from the Property and the Petitioner continued to reside there. *See H.T. p. 14*.

The Defendant failed to pay the mortgage payment due June 1, 2013 and defaulted on all subsequent installments. The Plaintiff filed an action in mortgage foreclosure on February 28, 2014. *H.T. p. 14*. On March 10, 2014, the Petitioner was served with a copy of the Complaint as an occupant of the Property secured by the Mortgage. *H.T. p. 14*. The Defendant was personally served with the Complaint on March 13, 2014. *H.T. p. 14*.

On April 11, 2014, notices that the Defendant must vacate or pay within 10 days were mailed to the Property and to the Defendant at his new address. *Plaintiff's Brief in Opposition to Petition, p. 2*. When no action was taken, the Plaintiff filed a Praecipe for a Default Judgment against the Defendant.

A Sheriff's sale was scheduled for July 25, 2014. A copy of the Notice of Sale was mailed to the Petitioner at the property address. *H.T. p. 15*. The Petitioner received the Notice of Sale and attempted to work with the bank to stave off the foreclosure. *H.T. p. 15*. As a result of the Petitioner's actions, the Sheriff's sale was continued to August 22, 2014. *H.T. pp. 15*. The Sheriff's sale was postponed a second time to October 17, 2014 after the Plaintiff became aware the Petitioner was attempting to obtain financing to purchase the home from the Defendant. *H.T. p. 15-16*.

The Sheriff's sale occurred on October 17, 2014 and the Plaintiff was the successful bidder. *H.T. p. 15-16*. A deed was recorded November 10, 2014 transferring title to the Plaintiff and extinguishing the Defendant's ownership rights. *H.T. p. 16*.

Over one year later, on December 3, 2015, the Appellants filed a Petition to Open or Strike Default Judgment, Set Aside Sheriff's sale and Application for Leave to Intervene ("Petition"). The Plaintiff filed an Answer on January 8, 2016. After the submission of briefs and oral argument, the Petition was denied *en toto* by Order dated March 9, 2016.

The Appellants filed a Notice of Appeal on April 5, 2016. On April 18, 2016, the Appellants filed a Statement of Issues to be Raised on Appeal raising the following issues, consolidated for clarity:

1. Whether Application to Intervene should have been granted because Diane Watters is a "real owner" of the Property in Pa. R.C.P. 1144(a)(3) and was therefore required to be named as a defendant in the mortgage foreclosure action.
2. Whether actual notice of the foreclosure proceedings by Ms. Watters in this case was sufficient.
3. Whether the Petition to Open or Strike Default Judgment was timely filed.

APPLICATION TO INTERVENE

A. Diane Watters is not a "real owner" required to be joined under Pa. R.C.P. 1144

Appellants argue the Petitioner is a "real owner" and thus was required to be joined pursuant to Pa.R.C.P. 1144(a)(3) in the mortgage foreclosure proceeding against the property at 831 Rice Avenue, Girard, Pennsylvania. "A 'real owner' or 'terre-tenant' is one who claims an interest in the land subject to the lien of the mortgage." *Levitt v. Patrick*, 976 A.2d 581 (Pa. Super. 2009) *citing Bank of Pennsylvania v. G/N Enterprises, Inc.*, 463 A.2d 4, 6 (Pa. Super. 1983). Thus, a real owner is the original mortgagor or one who takes title from the original mortgagor. *Id.* Individuals who have an equitable right to the subject property or those

who claim title antagonistic to the mortgagor are not real owners required to be named as defendants. *See Bradley v. Price*, 152 A.2d 904 (Pa. 1959) *citing Orient Building & Loan Ass'n v. Gould*, 86 A. 863 (Pa. 1913)(analyzing the term "real owner" in the context of notice required by a local rule of a Sheriff's sale subsequent to a mortgage foreclosure).

It is uncontroverted the Petitioner was not named on the Mortgage, Note, or Deed. She was not an original mortgagor and never took title from the original mortgagor. At the time of the foreclosure proceedings, the Petitioner had at most an equitable interest in the property because it was marital property and the divorce was not yet finalized. *See* 23 Pa. C.S. § 3501. An equitable interest in property is not an interest in the land subject to the lien of a mortgage. Thus, the Petitioner is not a real owner required to be joined pursuant to Pa. R.C.P. 1144.

In arguing the Petitioner was required to be joined, Appellants relied on the policies of two title insurance companies which state: "Non-titled spouses are required to join in the execution of a Deed or Mortgage if there is a pending Divorce." This provision simply relates to the ability of divorcing parties to tender title clear of all legal and equitable interests to the satisfaction of typically cautious title insurance companies. These policies do not make the Petitioner a real owner required to be a party to this foreclosure action. In fact these policies are irrelevant to this case.

B. Diane Watters is not required to be joined under any other Rules[1]

Entwined with Appellants' argument the Petitioner was required to be joined under Rule 1144, Appellants argued the Petitioner is a necessary and indispensable party under Pa. R.C.P. No. 2227. A party is indispensable and must be joined when "his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002). Whether an absent party is indispensable is determined by consideration of (1) whether absent parties have a right or interest related to the claim, (2) the nature of the right or interest, (3) whether that right or interest is essential to the merits of the issue, and (4) whether justice can be afforded without violating due process rights of absent parties. *Delaware Cty. v. J.P. Morgan Chase & Co.*, 827 A.2d 594, 598 (Pa. Commw.Ct. 2003).

Upon consideration of these four factors, Diane Watters is not an indispensable and necessary party. Appellants argued the Petitioner had a right related to the mortgage foreclosure because her marriage and pending divorce to the Defendant at the time of the default and Sheriff's sale. This argument is unavailing.

At the time of the mortgage foreclosure, while the divorce was pending, the Petitioner had a right to equitable division of all marital property and thus had an equitable interest in that property. However, the merits of this case can be determined without joining her as a party. The mortgage foreclosure action herein sought liability under the terms of the mortgage. The Petitioner was not a party to the mortgage transaction. The Petitioner was not responsible for mortgage payments and was not liable if the payments were in default. Thus, the Petitioner's

[1] Although the Defendant did not raise any issues related to Rule 2227 or Rule 410 in the Statement of Issues to be Raised on Appeal, and thus each is waived, each will be addressed for completeness as each was part of the argument set forth in the Petition.

interest in the property was not linked to the disposition of the mortgage foreclosure action and the merits can be decided absent the Petitioner as a defendant.

Stated differently, if Petitioner was joined as a defendant, she had a successful defense by simply averring that she was not a party to the mortgage transaction and therefore not liable under the terms of the mortgage.

Notably, the Defendant never sought to join the Petitioner as an additional Defendant despite his ability to do so. The Defendant cannot now seek to capitalize on his failure to join the Petitioner, whom he knew to be living on the mortgaged premises and was his spouse at the time the property was purchased.

In the Petition to Intervene, the Petitioner also argued she was required to be named as a defendant under Rule 410(b)(2), which states "[i]f the relief sought is possession the person so served shall thereupon become a defendant in the action." However, the relief sought in this case was not possession of the property. Instead, this case is a mortgage foreclosure action and therefore Rule 410(b)(3) is applicable, which states "If the relief sought is mortgage foreclosure, the person so served shall not thereby become a party to the action." Hence, the argument the Petitioner was required to be named as a defendant under Rule 410 is without merit.

C. Diane Watters had Actual Notice of the Sheriff's sale

The final issue raised by Petitioner related to the Application to Intervene is whether actual notice of the foreclosure proceedings was sufficient. Undoubtedly, if Petitioner was required to be named as a defendant formal service of process was required. However, this issue is moot because Petitioner was not required to be named as a defendant under Rule 1144, Rule 2227, or Rule 410.

Nonetheless, it is undisputed the Petitioner had actual notice the mortgage was in default, when the Sheriff's sale would occur and all related proceedings. The Petitioner was served with the Complaint as a resident of the property and received notice of the Sheriff's sale. *H.T. p. 15; Petition, para. 13, 18*. The Petitioner also took a number of actions to forestall the Sheriff's sale. The date of the first Sheriff's sale was continued because the Defendant and the Petitioner were working to save the Property. *H.T. p. 15*. The Petitioner was also "contacting the bank back and forth trying to get them to hold off on the Sheriff's sale." *H.T. p. 15*. The Sheriff's sale was once again continued when the Petitioner was seeking to obtain funds to purchase the Property. *H.T. p. 15*. According to the Petitioner, she "was aware of the foreclosure action from the start" and did "everything [she] could possibly think of including sending letters to the courthouse." *H.T. p. 16*. The Sheriff's sale ultimately occurred on October 17, 2014.

Importantly, the Petitioner has failed to set forth any explanation for the delay in filing the Application to Intervene considering she was fully aware of the proceedings. The Petitioner did not seek to intervene before the default judgment was entered. Instead, the Petitioner waited over a full year after the Sheriff's sale, 584 days after the default judgment was entered and 633 days after she originally was given notice of the foreclosure to file the Application to Intervene.

Given this unexplained lengthy period of time, the Application to Intervene was not timely filed. *See Financial Freedom, SFC v. Cooper*, 21 A.2d 1329 (Pa. Super. 2011).

PETITION TO STRIKE OR OPEN JUDGMENT

A default judgment may be opened only if the petition to open the default judgment (1) was promptly filed; (2) shows a meritorious defense to the allegations set forth in the underlying complaint and (3) provides a reasonable excuse or explanation for failure to file a responsive pleading. *Smith v. Morrell Beer Distributors, Inc.*, 29 A.3d 23, 25 (Pa. Super. 2011). In the Statement of Issues to be Raised on Appeal, Appellants only raise the issue of timeliness. However, the Defendant failed to establish any of the three elements.

"The timeliness of a petition to open a judgment is measured from the date that notice of the entry of the default judgment is received." *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 176 (Pa. Super. 2009) While there is no specific time period within which a petition to open a judgment must be filed, in cases where courts have found the petition to be timely filed, the period of delay has normally been less than one month. *Id.* Additionally, the reason for the delay is considered in evaluating the timeliness of the petition. *Id.*

Here, default judgment was entered on April 25, 2014 and notice was sent to the Defendant on April 28, 2014. The Defendant filed the Petition to Open on December 3, 2015—584 days after notice was sent to the Defendant. Thus, the Petition to Strike or Open Judgment is patently untimely. Notably, the Defendant did not provide any reason for failing to file a responsive pleading or any reason for the belated filing of the Petition to Strike or Open Judgment.

Additionally, the Defendant was fully aware that the Petitioner was not joined as a Defendant as he was served with notice of the judgment. The Defendant also knew the Petitioner was attempting to purchase the property from the Defendant. This is not a case where a lack of knowledge of the factual basis for the Petition was recently discovered. Rather, the Defendant knew of the facts on which he is now basing the petition before the Sheriff's sale even occurred. If the Defendant felt the Petitioner's participation was necessary to the action, he could have acted long before the 1 year 7 months he waited to file the Petition to Strike or Open Judgment. As previously discussed, the Petitioner is not a necessary party or required to be named as a defendant pursuant to the Pennsylvania Rules of Civil Procedure.

Hence, the Defendant failed to promptly file a petition to open, has failed to show a meritorious defense to the allegations in the underlying complaint, and has not provided a reasonable excuse or explanation for failing to file a responsive pleading.

CONCLUSION

Appellants' claims are without merit.

BY THE COURT:
/s/ **WILLIAM R CUNNINGHAM, JUDGE**

COMMONWEALTH OF PENNSYLVANIA

v.

TREY DARON GUNTER

CRIMINAL PROCEDURE / WITHDRAWAL OF COUNSEL / ANDERS BRIEF REQUIREMENTS

When court-appointed counsel seeks to withdraw on direct appeal, he or she must submit an *Anders* brief. The *Anders* brief must set forth the procedural history and facts, refer to anything in the record that supports the appeal, set forth counsel's conclusion that the appeal is frivolous, and provide the reasons for concluding that the appeal is frivolous. Counsel should cite both the record and controlling case law and/or statutes.

CRIMINAL PROCEDURE / WITHDRAWAL OF COUNSEL / OBLIGATIONS TO CLIENT

When court-appointed counsel seeks to withdraw on direct appeal, he or she must provide the client with a copy of the *Anders* brief and a letter that advises the client that he or she has the right to retain new counsel to pursue the appeal, proceed with the appeal *pro se*, or raise any points the client deems worthy of the court's attention that are not contained in the *Anders* brief.

CRIMINAL PROCEDURE / GUILTY PLEAS / WAIVER

Where an appellant asserts that he did not enter a knowing, voluntary, and intelligent guilty plea, but fails to raise the issue of the validity of his guilty plea orally before the trial court or in a post-sentence motion, the issue is waived for purposes of appeal.

CRIMINAL PROCEDURE / SENTENCING / CHALLENGES TO DISCRETIONARY ASPECTS

An appellant is not entitled to appellate review of challenges to the discretionary aspects of a sentence as a matter of right. For discretionary aspects of a sentence to be reviewed by an appellate court, the appeal must be timely, the issue must be properly preserved, there must not be a fatal defect in the appellant's brief, and the appellant must raise a substantial question that the sentence is not appropriate under the Sentencing Code.

CRIMINAL PROCEDURE / SENTENCING / CHALLENGES TO DISCRETIONARY ASPECTS

An argument that the sentencing court failed to consider mitigating favors in favor of a lesser sentence does not present a substantial question appropriate for appellate review.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY PENNSYLVANIA
CRIMINAL DIVISION No. 3499 – 2014

Appearances: Brandon J. Bingle, Esquire for the Commonwealth
Emily M. Merski, Esquire for the Defendant

MEMORANDUM OPINION

Trucilla, J.

August 8, 2016: This matter is before the Court upon the appeal of Trey Daron Gunter (hereinafter "Appellant") from this Court's Order dated September 23, 2015. For the reasons set forth below, the appeal should be dismissed.

FACTUAL & PROCEDURAL HISTORY

On January 20, 2015, Appellant was charged by Criminal Information with Criminal Homicide,[1] Aggravated Assault,[2] Recklessly Endangering Another Person,[3] Possessing Instruments of Crime,[4] and Criminal Conspiracy to commit Criminal Homicide.[5] These charges stem from an incident that occurred on November 17, 2014 at an apartment off-campus of Edinboro University. Appellant, a Pittsburgh native, was an Edinboro University student one semester away from graduating. The victim, Tobiah Johnson, had taken Appellant's gun several days earlier. Appellant obtained another gun and, as alleged by the Commonwealth, with the help of Ryan Andrews and Michael Barron, confronted the victim outside of the victim's apartment. The Commonwealth further alleged that Mr. Barron was waiting outside of the victim's apartment, and that when the victim came out, Mr. Barron punched him in his head, knocking him to the ground. Appellant and Mr. Andrews got out of their vehicle and assaulted the victim. When the victim tried to get up, Appellant shot him in his back, killing him.

The Commonwealth and Appellant reached a plea agreement, and a plea colloquy was held on September 23, 2015. Further detail of this plea and its legal merit are set forth *infra* in the "Discussion" portion of this Memorandum Opinion. Following this Court's acceptance of Appellant's plea as knowing, voluntary, and intelligent, the Court ordered a pre-sentence investigative report be completed and a sentencing date was scheduled for February 9, 2016.

At the February 9, 2016 sentencing hearing, the Court made the following items part of the record: post-sentencing and appellate rights form; Pennsylvania Commission on Sentencing guideline calculation; pre-sentence investigative report; Appellant's sentencing memorandums; and the Commonwealth's sentencing memorandum. *Sentencing Transcript* (hereinafter "*S.T.*"), February 9, 2016 at 8-10. The Court also concluded that Appellant was not Recidivism Risk Reduction Incentive (RRRI) eligible. *Id.* at 9. Appellant's counsel, Christopher Capozzi, Esquire, did not object to any of these matters. *Id.* at 8-10.

The Court then called upon Attorney Capozzi, who presented mitigating evidence and character witnesses to supplement his comprehensive sentencing memorandums. Attorney Capozzi first read in to the record a letter written by Appellant's younger sister, Tralaya Trice. *Id.* at 14. He also presented testimony from two character witnesses: Cheryl Rettger, a longtime family friend, and Sandra Trice, Appellant's grandmother who raised him. *Id.* at 15, 34.

In her letter, Tralaya Trice stated that Appellant has had a positive impact on her life. *Id.* at 14. She stated that he was successful at everything he did, from playing sports to attending college. *Id.* Ms. Trice stated that Appellant's actions in the instant matter were out of character. *Id.*

Cheryl Rettger testified that she has known Appellant for over ten years. *Id.* at 16, 19-20. She first met Appellant when he was a fourth grade student at Knoxville Middle

[1] 18 P.S. § 2501(a).

[2] 18 P.S. § 2702(a)(1).

[3] 18 P.S. § 2705.

[4] 18 P.S. § 907(a).

[5] 18 P.S. § 903; 18 P.S. § 2501(a).

School, where she was a counselor. *Id.* at 17. The relationship grew from a mentor/mentee relationship into a familial-like relationship. *Id.* at 16, 20. Ms. Rettger stated her family truly embraced Appellant as family. *Id.* at 16, 20-21. Ms. Rettger described Appellant as a peaceful, loving, compassionate, hardworking, personable, and helpful person. *Id.* at 20-21. Appellant participated in team sports and was a team player. *Id.* at 21-22. Ms. Rettger stated that things were often difficult for Appellant. *Id.* at 22. Appellant worked hard to be the first person in his family to attend college. *Id.* at 23. Appellant worked at a summer camp, as a lifeguard, and at a restaurant. *Id.* at 24. She also provided insight into Appellant's conduct while incarcerated on this offense. *Id.* at 26. In prison, Appellant is reading books, working on improving his vocabulary, writing his own book, and looking into obtaining education/job training in prison. *Id.* at 26-27. According to Ms. Rettger, Appellant wants to graduate college and get a good job. *Id.* at 27. Ms. Rettger stated that Appellant's actions in the instant matter were not indicative of his nature, history, or potential, and that she believes he can still be a productive member of society. *Id.* at 19, 27-28. Ms. Rettger indicated her willingness to continue to support Appellant. *Id.* at 28.

Following Ms. Rettger's narrative statement to the Court, some of which referenced her letter to the Court, the Court confronted her about how well she really knew Appellant. *Id.* at 28-32. When asked if she knew the victim, who Appellant said was a longtime friend, or Ryan Andrews or Michael Barron, who were also friends, Ms. Rettger said that she did not know any of them. *Id.* at 28-29. The Court pressed Ms. Rettger as to why she did not know Appellant's friends, who were all from Pittsburgh, where she resides. *Id.* at 29. Ms. Rettger could not answer this question. *Id.* at 29-30. While Ms. Rettger may have suspected that Appellant occasionally used marijuana, she did not know that Appellant actually used marijuana on a daily basis. *Id.* at 31-32.

Sandra Trice, Appellant's maternal grandmother, testified that she raised Appellant from age eleven in Pittsburgh, Pennsylvania, along with his brother and sisters. *Id.* at 34. In 2004, the Allegheny County Office of Children and Youth Services (hereinafter "OCY") took custody of Appellant and his siblings and placed them in kinship care. *Id.* at 36. Ms. Trice obtained custody of Appellant and his siblings after five months, and OCY ceased involvement. *Id.* at 37. Appellant lived in public housing with Ms. Trice in rough neighborhoods in Pittsburgh, where he was exposed to violence. *Id.* at 38-40. Ms. Trice testified that several children from their neighborhood were killed as a result of gun violence and that this troubled Appellant. *Id.* at 39-41. According to Ms. Trice, Appellant did not want to live in that environment. *Id.* at 41. Appellant wanted to better himself and remove himself from exposure to gangs, drugs, and violence. *Id.* Ms. Trice stated that Appellant spent a lot of time at school, and also spent a lot of time working. *Id.* As a result, other children would call Appellant "bookworm" and similar names. *Id.* Ms. Trice was disappointed and angry at Appellant for his actions in the instant matter, but said that she would continue to support him upon his release. *Id.* at 41-42.

Attorney Capozzi advocated at the sentencing hearing that Appellant should be sentenced in the mitigated range of the Sentencing Guidelines because Appellant is in many ways an exceptional young man, he lived life as part of society, he accepted responsibility for his conduct, he came from meager and challenging economic circumstances and difficult emotional circumstances, he had only a minor criminal history, and he was on a positive

trajectory before this incident. *Id.* at 51-52, 54. Counsel for Appellant conceded, however, that Appellant did not have a significant or specific mental health diagnosis. *Id.* at 52. Counsel also acknowledged that Appellant had overcome the obstacle of not having a father or mother consistently in his life through the support of his grandmother (Ms. Trice) and family friends like the Rettgers. *Id.* at 53 Attorney Capozzi also asserted that the victim, Tobiah Johnson, had bullied Appellant, his longtime friend, by demeaning him through social media, calling him names, and making other derisive comments. *See Appellant's Sentencing Memorandum* at p. 4-5. Attorney Capozzi argued that because Appellant was called a "runt" and a "bookworm," his foolish and misguided pride led him to eventually murder his longtime friend. *Id.*

When asked by the Court about the impact a murder like this would have on a small town and a close college community, Counsel for Appellant admitted that he could not find a prior shooting that had occurred on or near Edinboro University's campus within the last twenty years. *S.T.*, February 9, 2016 at 64. After Attorney Capozzi made his address, the Court then heard from Appellant. Appellant read a letter onto the record, stating he was sorry for his actions and that he takes full responsibility for his actions. *Id.* at 69-70.

Next, the Court called upon the Commonwealth, who was represented at the sentencing hearing by Brandon J. Bingle, Esquire. *Id.* at 72. Assistant District Attorney Bingle argued that despite the circumstances of Appellant's earlier life, he had a network of support, including Ms. Trice and the Rettgers, to help him succeed and ultimately gain admission into college. *Id.* Attorney Bingle asserted that Appellant's crime had an impact on the Edinboro community and the students of Edinboro University, who were not accustomed to violent crimes occurring in their community. *Id.* at 77-78. The Commonwealth further stated that Appellant was not a law abiding citizen, and that he was engaged in illegal drug activity, including selling illegal drugs, at or near the time of the murder. *Id.* at 81-82. The Commonwealth included in its Sentencing Memorandum a log of text messages to and from Appellant's phone, indicating that Appellant was selling illegal drugs around the time of the murder. *See* Exhibit 1 to Commonwealth's Sentencing Memorandum. The Commonwealth argued that Appellant was likely to reoffend because past behavior is indicative of future behavior. *S.T.*, February 9, 2016 at 86.

The Court then addressed Appellant and engaged in a more detailed colloquy with Appellant. *Id.* at 88-104. Appellant testified that he bought a gun, a .40 caliber, in March of 2014 at Edinboro Outdoors. *Id.* at 88. This was the first gun that he had ever purchased, and Appellant stated that he purchased it with the intention to shoot it at a shooting range. *Id.* at 101. Appellant testified that he shot the gun at a shooting range weekly, and that this was during the same time period that he smoked marijuana. *Id.* at 101-102. On November 17, 2014, Appellant went to the Edinboro Police Department and reported his .40 caliber stolen. *Id.* at 88. Appellant believed that the gun had been stolen almost a week earlier, on or about November 10, 2014 or November 11, 2014. *Id.* at 90. When Appellant reported his gun stolen, he did not tell the police who he believed had taken the gun, even though he believed the victim, Tobiah Johnson, had taken it. *Id.* at 88. The Court asked Appellant to explain why he did not provide the Edinboro Police Department with the name of Tobiah Johnson. *Id.* at 89. He said that because he and Mr. Johnson were longtime friends, he felt they could work it out. *Id.* Appellant further admitted that he never thought about the

consequence of someone else using his gun to harm someone or that his gun could be used in other criminal activity. *Id.* at 89.

The Court confronted Appellant with information regarding his attempt to replace his stolen .40 caliber prior to reporting to the police that the firearm had been stolen. *Id.* at 90. It was revealed that Appellant tried to buy a .38 caliber Smith and Wesson and ammunition at Edinboro Outdoors on November 13, 2014 and again on November 14, 2014, four and three days, respectively, prior to the murder. *Id.* Appellant was not able to buy a gun or ammunition at Edinboro Outdoors because he was put on a "research hold." *Id.* at 91. Appellant then went to the Keystone Armory, which was another gun shop not far from Edinboro, to try to purchase a .38 caliber Smith and Wesson, but was again denied. *Id.* When asked by the Court why he wanted to buy a .38 caliber handgun, instead of a .40 caliber as he had previously owned, Appellant admitted that he wanted a smaller handgun so that he could conceal the handgun on his person. *Id.* at 91-92.

In response to a question asked by the Court, Appellant testified that on November 17, 2014, he made the decision to get his gun back. *Id.* at 92. The Court asked Appellant who went with him to the apartment to confront Mr. Johnson. *Id.* at 93. Appellant refused to answer the question and invoked his privilege against self-incrimination. *Id.* The Court recognized that Appellant is of slight physical size: Appellant testified that he is five feet and four inches tall and 145 pounds. *Id.* at 93-94. Further, the police reports reveal, and Appellant stated, that Mr. Johnson was much bigger than him. *Id.* at 94. In fact, Tobiah Johnson was approximately five feet and ten inches tall and over 200 pounds. *Id.* The size difference became relevant because the Court was curious as to how this much smaller Appellant was able to get the much larger victim, Tobiah Johnson, to the ground and in a position to shoot him in the back. The Court asked Appellant how he got Mr. Johnson to the ground, and Appellant again invoked his privilege against self-incrimination. *Id.* The Court asked if Appellant knew Michael Barron, who the Commonwealth alleges "sucker punched" Mr. Johnson in the face and got him to the ground on the night of the murder, and Appellant again invoked his privilege against self-incrimination. *Id.* at 94-95. The Court, knowing that Mr. Barron was listed as six feet and four inches tall and approximately 256 pounds from the police report, reasonably inferred that Mr. Barron was present to physically assist Appellant. *Id.* at 95. Appellant admitted that he used a handgun and shot Mr. Johnson in the back, but denied that he hit the victim in the head with the butt of his gun as the Commonwealth alleges. *Id.* at 97-98. The Court asked what gun he used to murder Mr. Johnson. *Id.* at 98. Appellant testified that he shot the victim with a 9mm. *Id.* at 99. However, Appellant then refused to tell the Court where he obtained the 9mm or where he believed the 9mm was now located. *Id.* at 99-101. Again, Appellant displayed an ongoing reluctance to provide details of the murder to the Court.

With regard to his illegal drug activity, Appellant stated that he first tried marijuana when he was twelve years old, and that it became a daily habit once he became a junior in high school. *Id.* at 103. He stated that the Rettgers did not know that he smoked marijuana daily. *Id.* Appellant's maternal grandmother, Ms. Trice, knew that Appellant smoked marijuana, and asked him to stop. *Id.* at 104. Appellant admitted that he did not stop, and that he continued to smoke marijuana on a daily basis throughout college. *Id.* The Court also offered Appellant an opportunity to provide his version or explain the text messages provided by

the Commonwealth that indicated a likelihood of drug dealing. *Id.* at 92. When questioned about the Commonwealth's allegation that Appellant was dealing drugs around the time of the murder, Appellant invoked his privilege against self-incrimination, and refused to offer an explanation for the text messages. *Id.* The Court, as stated on the record, was left with the plain meaning of the text messages, which were clearly indicative of Appellant being engaged in drug activity. *Id.*

The Court stated that it considered the statements of counsel, references of character, the record of those in attendance at the sentencing hearing, the Sentencing Guidelines, the pre-sentence investigative report, OCY records, Appellant's sentencing memorandums, and the Commonwealth's sentencing memorandum. *Id.* at 104. The Court stated that it considered the nature of the offense, the gravity of the offense, the need for public protection, Appellant's level of remorse and likelihood of rehabilitation, and the impact on this small community. *Id.* at 104-105. Based on these facts and evidence, the Court found that Appellant was not committed to living a crime free life. *Id.* at 105. Appellant demonstrated he is beholden to the culture of drug activity, involving drug use and gun violence, and those who are immersed in it. *Id.* Appellant's unwillingness to answer the Court's questions regarding the circumstances of the murder forced the Court to conclude that Appellant was neither remorseful nor prepared to fully accept responsibility for his actions. *Id.* at 105-106.

The Court then sentenced Appellant to incarceration for a minimum period of fifteen years (180 months) and a maximum period of forty years (480 months). *Id.* at 106. This sentence was in the standard range of the Sentencing Guidelines. *Id.* Appellant was also ordered to pay costs and restitution in the amount of $2,517.00. *Id.*

On February 18, 2016, Appellant, through Attorney Capozzi, filed a Motion to Modify Sentence, requesting a downward modification of the sentence imposed. Appellant claimed that the Court manifestly abused its discretion in sentencing Appellant, improperly considered Appellant's assertion of his Fifth Amendment privilege against self-incrimination, and did not consider Appellant's fear of retaliation. On March 11, 2016, the Court issued a Memorandum Opinion and Order denying Appellant's Motion to Modify Sentence, exhaustively addressing these issues.

At the same time that Attorney Capozzi filed the Motion to Modify Sentence, he also filed a Motion to Withdraw or Be Appointed as Counsel for the Defendant. On February 19, 2016, the Court issued an Order granting Attorney Capozzi's Motion to Withdraw or Be Appointed as Counsel for the Defendant and allowing Attorney Capozzi to withdraw. The Order provided that counsel was to be appointed for Appellant. Appellant filed a *pro se* Petition for Appointment of Counsel for Appeal Purposes on February 18, 2016. On February 22, 2016, the Court issued an Order granting Appellant's *pro se* Petition. Appellant filed two additional *pro se* motions seeking the appointment of counsel, one on March 19, 2016 and one on April 4, 2016. In an April 21, 2016 Order, the Court denied these motions as moot.

Emily M. Merski, Esquire was appointed as Appellant's counsel. On May 10, 2016, Appellant, through Attorney Merski, filed a Petition for Reinstatement of Right to Appeal. Appellant asserted that the Erie County Public Defender's Office did not receive a copy of the February 22, 2016 Order granting his Petition for Appointment of Counsel for Appellate Purposes. Therefore, no appellate attorney was assigned and a timely Notice of Appeal was

not filed. Out of fairness to Appellant, the Court granted Appellant's Petition and reinstated Appellant's rights to appeal on May 11, 2016. Appellant filed a Notice of Appeal on June 9, 2016. On June 15, 2016, the Court issued an Order directing Appellant to file a concise statement of matters complained of on appeal within twenty-one days. Appellant timely filed his Statement of Matters Complained of on Appeal on June 28, 2016.

DISCUSSION

Appellant raises two issues on appeal. The Court will address each issue in seriatim.

A. Guilty Plea

In his first issue raised on appeal, Appellant states:

> The Defendant/Appellant argues that his plea of guilty made before this Honorable Court was not made knowingly or voluntarily.

Appellant's Statement of Matters Complained of on Appeal at ¶ 6.

"One who pleads guilty consents to a waiver of treasured rights." *Commonwealth v. Shekerko*, 639 A.2d 810, 813 (Pa. Super. Ct. 1994). For a guilty plea to be valid, the law is clear that it must be knowingly, voluntarily, and intelligently entered. *Commonwealth v. Pollard*, 832 A.2d 517, 522 (Pa. Super. Ct. 2003); *Shekerko*, 639 A.2d at 813. For a court to accept a defendant's guilty plea, the court "is required to conduct an on-the-record inquiry during the plea colloquy." *Pollard*, 832 A.2d at 522. The Superior Court of Pennsylvania has held:

> A guilty plea colloquy must include an inquiry into whether: (1) the defendant understands the nature of the charge to which he is pleading guilty; (2) there is a factual basis for the plea; (3) the defendant understands that he has the right to a jury trial; (4) the defendant understands that he is presumed innocent until found guilty; (5) the defendant is aware of the permissible range of sentences; and (6) the defendant is aware that the court is not bound by the terms of any plea agreement unless it accepts the agreement.

Shekerko, 639 A.2d at 813; *see also Commonwealth v. Willis*, 369 A.2d 1189, 1189-90 (Pa. 1977). "Our law presumes that a defendant who enters a guilty plea was aware of what he was doing. He bears the burden of proving otherwise." *Pollard*, 832 A.2d at 523 (internal citations omitted). Accordingly:

> [w]here the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. A defendant is bound by the statements he makes during his plea colloquy, and may not assert grounds for withdrawing the plea that contradict statements made when he pled.

Commonwealth v. Stork, 737 A.2d 789, 790–91 (Pa. Super. Ct. 1999) (internal citations omitted).

In the case *sub judice*, the Commonwealth, represented at the plea colloquy by Roger Bauer, Esquire, informed Appellant of his rights. *Plea Transcript* (hereinafter "*P.T.*"), September 23, 2015 at 2-4. The Understanding of Rights Prior to Guilty Plea was signed by Appellant, his attorney, and Assistant District Attorney Bauer and was made part of the record. *Id.* at 10-11, 14-15. The Commonwealth, on the record, informed Appellant, *inter alia*, of his right to trial by jury, that he was presumed innocent until proven guilty,

that the Court was not bound by the terms of the plea agreement, and that the maximum penalties were a $50,000.00 fine and forty years of incarceration. *Id.* at 2-4, 9. These rights were set forth in the Understanding of Rights Prior to Guilty Plea. *See* Appellant's Statement of Understanding of Rights Prior to Guilty Plea is attached to this Memorandum Opinion as Exhibit 1. Then, in the presence of the Court, Attorney Bauer reviewed with Appellant his rights, the maximum penalty he faced ($50,000.00 in fines and forty years of incarceration), and the plea agreement. *Id.* at 9. The plea agreement was to amend Count One, criminal homicide, to murder of the third degree and *nolle prosequi* the remaining charges. *Id.* Additionally, for purposes of the Sentencing Guidelines, the deadly weapons enhancement would apply. *Id.* at 9-10. Attorney Bauer then reviewed Appellant's Statement of Understanding of Rights Prior to Guilty Plea with Appellant in the presence of the Court. *Id.* Appellant stated that he reviewed the Statement of Understanding of Rights Prior to Guilty Plea with his attorney, that he did not have any questions about his rights, and that he understood everything in the document. *Id.* at 10. Further, Appellant acknowledged that he signed the form that day in the presence of his attorney. *Id.*

The Court then conducted a colloquy to determine whether the plea was knowingly, voluntarily, and intelligently entered. *Id.* at 7-8. Appellant testified that he was not on any medication that would cloud his judgment. *Id.* at 7. Appellant stated that he was twenty-two years old and was a senior in college at the time of his arrest. *Id.* Appellant indicated that he did not have any difficulty understanding the English language and that he was able to communicate completely with his attorney. *Id.* Attorney Capozzi stated that he did not question Appellant's competency or Appellant's ability to understand him. *Id.* at 8. The Court also noted that Appellant was appropriately responsive to the Court's questions. *Id.* at 7. Based on these facts, the Court found Appellant to be competent and thus capable of entering a plea knowingly, voluntarily, and intelligently. Additionally, Appellant was represented by his counsel, Attorney Capozzi, at the plea colloquy. *Id.* at 5. When the Court asked Appellant if he was satisfied with his attorney's representation, Appellant indicated that he was satisfied. *Id.* at 6-7, 14. Appellant also stated that he had sufficient time to discuss the plea with his attorney. *Id.* at 6.

Appellant then pleaded guilty to murder in the third degree:

> MR. BAUER: Mr. Gunter, I have to advise you on the legal and factual basis for your plea. The Commonwealth alleges that on or about November 17, 2014, that you, Trey Darrin [sic] Gunter, did directly or by virtue of your complicity, intentionally, knowingly, or recklessly, and with malice, at 123 Water Street in a parking lot behind apartment number 27-E in the borough of Edinboro, Erie County, cause the death of another human being, specifically Tobiah Johnson, in that you, Trey Darrin [sic] Gunter, did shoot the victim, Tobiah Johnson, resulting in his death, thereby committing the crime of murder in the third degree.
>
> Malice under the law is defined as wickedness of disposition, hardness of heart, cruelty, a recklessness of the consequences, and an extreme indifference to the value of human life.
>
> Do you understand the legal and factual basis for Count One as amended to murder in the third degree?

MR. GUNTER: Yes, sir.

MR. BAUER: How do you plead to Count One?

MR. GUNTER: Guilty.

Id. at 11-12. The Court then engaged in the following colloquy with Appellant:

THE COURT: … Looking at the now amended charge at Count One, Mr. Gunter, you had indicated your plea of guilty and I want to ask you now, is that what you, in fact, did on that date in question as read in this Court?

MR. GUNTER: Yes, sir.

THE COURT: Has anyone in any way promised you something or coerced you in any way to tell me something that wasn't true?

MR. GUNTER: No, sir.

THE COURT: Have there been any promises made to you outside of what has been identified here in this courtroom?

MR. GUNTER: No, sir.

THE COURT: I'm satisfied there's a legal and factual basis to support Count One. I'm also satisfied that his plea of guilty was knowingly and voluntarily entered.

Let me also ask you, with respect to the first sheet, the Understanding of Rights Prior to the Guilty Plea, Mr. Gunter, again, did you have the opportunity to discuss this matter with your attorney, Attorney Capozzi?

MR. GUNTER: Yes, sir.

THE COURT: And outside of the agreement as set forth in paragraph five, has anyone made any other promises not written in that paragraph?

MR. GUNTER: No, sir.

THE COURT: Did you have questions about that?

MR. GUNTER: No, sir.

THE COURT: And again, by signing your name above the word "defendant," does that mean that on this guilty plea and understanding of rights sheet, these rights were read to you, that you understood them, and acknowledged that by signing this plea sheet?

MR. GUNTER: Yes, sir.

THE COURT: Attorney Capozzi, you were present when this plea sheet was explained to him.

MR. CAPOZZI: I was, Judge.

THE COURT: All right. Are you satisfied that there was a thorough explanation of those rights provided to him?

MR. CAPOZZI: I am.

THE COURT: I see your signature. I also note Attorney Bauer's. After reading and reviewing this and listening to the answers provided to me here, I am also satisfied again that this plea was knowingly and voluntarily made and entered, and I will accept it and sign it.

Id. at 13-15. Additionally, Appellant signed the Criminal Information pleading guilty to Count 1, Murder of the Third Degree. *See* signed Criminal Information, attached as Exhibit 2.

Appellant's plea colloquy included all six relevant inquiries. *See Shekerko, supra*. Appellant was informed of the legal and factual basis for his plea. *Id.* at 11-12. Appellant stated that he understood the legal and factual basis. *Id.* at 12. Appellant was also informed of his right to trial by jury, that he was presumed innocent until proven guilty, that the Court was not bound by the terms of the plea agreement, and that the maximum penalties were a $50,000.00 fine and forty years of incarceration. *Id.* at 2-4, 9. Appellant stated that he understood these rights. *Id.* at 9. When the Court asked Appellant if he fully understood the maximum penalties, Appellant responded affirmatively. *Id.* at 14. When Court asked if Appellant had any questions about the penalties, Appellant stated that he did not. *Id.* The Court confirmed that Appellant signed his name on the guilty plea and understanding of rights sheet, Appellant's rights were read to him, and Appellant understood those rights. *Id.* at 14-15. Appellant's counsel stated he was satisfied that there was thorough explanation of rights. *Id.* at 15. Moreover, the Court twice asked Appellant if he was satisfied with his representation, and both times Appellant stated that he was satisfied. *Id.* at 6-7, 14. Therefore, the Court did not err in finding that Appellant's guilty plea was knowing, voluntarily, and intelligently entered.

Appellant may not be pleased with his sentence. However, "[o]ur law does not require that a defendant be totally pleased with the outcome of his decision to plead guilty, only that his decision be voluntary, knowing and intelligent." *Pollard*, 832 A.2d at 524. The plea colloquy in this case clearly demonstrates that Appellant's guilty plea was knowing, voluntary, and intelligent. Consequently, Appellant's first issue is without legal merit.

B. Sentence

In his second issue raised on appeal, Appellant argues:

> Secondly, the Defendant/Appellant argues the trial court abused its discretion and that the sentence is manifestly excessive, clearly unreasonable and inconsistent with the objections [sic] of the Sentencing Code.

COMMONWEALTH OF PENNSYLVANIA

v.

EMMITT J. GRIER, JR.

RULES OF PROFESSIONAL CONDUCT / CANDOR TOWARDS TRIBUNAL

A lawyer shall not knowingly (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal any legal authority in the controlling jurisdiction known to the lawyer directly adverse to the position of the client; or (3) offer evidence that the lawyer knows is false.

CRIMINAL LAW / PARTICULAR TESTS OR EXPERIMENTS

Test results of rape kit, showing lack of semen and foreign pubic hair, were relevant to issue of whether sexual intercourse occurred, and should have been admitted, although inconclusive; competing allegations in case rested on testimonial evidence, and scientific evidence corroborative of defendant's denial of sexual intercourse would have been highly probative of his credibility.

CRIMINAL LAW / ADMISSIBILITY

Relevant, though inconclusive, DNA evidence was admissible, and its weight and persuasiveness were properly matters for the jury to determine.

PCRA / JURISDICTION AND PROCEEDINGS

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions apply: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. Any petition invoking any of the above exceptions to the filing time requirement must be filed within sixty days of the date the claim could have been presented.

PCRA / JURISDICTION AND PROCEEDINGS

The Post-Conviction Collateral Relief Act's timeliness requirements are mandatory and jurisdictional in nature, and no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.

PCRA / SECOND OR SUBSEQUENT REVIEW

Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred. This standard is met only if petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

PCRA / SECOND OR SUBSEQUENT REVIEW

A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided before a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

PCRA / DNA TESTING / POST-TESTING PROCEDURE

After the DNA testing conducted under this section has been completed, the applicant may, pursuant to section 9545(b)(2) (relating to jurisdiction and proceedings), during the 60-day period beginning on the date on which the applicant is notified of the test results, petition to the court for post-conviction relief pursuant to section 9543(a)(2)(vi) (relating to eligibility for relief). Upon receipt of a petition filed under paragraph (1), the court shall consider the petition along with any answer filed by the Commonwealth and shall conduct a hearing thereon. In any hearing on a petition for post-conviction relief filed under paragraph (1), the court shall determine whether the exculpatory evidence resulting from the DNA testing conducted under this section would have changed the outcome of the trial as required by section 9543(a)(2)(vi)

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2646 – 1999
2647 – 1999
2648 – 1999

APPEARANCES: Thomas D. Brasco, Jr., Esq., for Emmitt J. Grier, Jr., Appellant
Michael E. Burns, Esq., for the Commonwealth of Pennsylvania, Appellee

OPINION

Domitrovich, J., August 9, 2016

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Emmitt J. Grier, Jr. (hereafter referred to as "Appellant") from this Trial Court's Order dated May 27, 2016, whereby this Trial Court dismissed Appellant's third (3rd) Petition for Post-Conviction Collateral Relief (hereafter referred to as "PCRA Petition"). Appellant's third PCRA Petition, which argued exculpatory DNA evidence tested by Bode Technology from several Sexual Assault Evidence Collection Kits collected on June 30, 1998 and August 31, 1999 proved Appellant was not the perpetrator of the crimes charged, was patently untimely as it was filed over thirteen (13) years after Appellant's judgment of sentence became final, and Appellant failed to prove any of the three (3) timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1). Furthermore, assuming arguendo Appellant's third PCRA Petition was filed timely, this Trial Court concluded Appellant was not entitled to any relief as Appellant did not plead and prove by a preponderance of the evidence that (1) the DNA evidence would have changed the outcome of his trial if such DNA evidence had been introduced; and (2) that failure to pursue DNA testing prior to or during trial, during unitary review or on direct appeal was not the result of any rational, strategic or tactical decision by Appellant's trial counsel.

Factual and Procedural History

On August 31, 1999, Appellant was arrested and charged with two counts of Rape by Forcible Compulsion, in violation of 18 Pa. C. S. §3121(a)(1), one count of Criminal Attempt – Rape, in violation of 18 Pa. C. S. §901(a), three counts of Unlawful Restraint – Risking Serious Bodily Injury, in violation of 18 Pa. C. S. §2902(1), one count of Kidnapping to

Facilitate a Felony, in violation of 18 Pa. C. S. §2901(a)(2), and one count of Burglary, in violation of 18 Pa. C. S. §3502(a), regarding three separate incidents occurring on June 30, 1998; November 12, 1998 and August 31, 1999. Appellant's counsel, A. J. Adams, Esq., filed a Motion for Competency Evaluation and Continuance on March 8, 2000, which was granted by Judge William R. Cunningham on March 8, 2000. A. J. Adams, Esq., filed a Motion to Withdraw as Counsel on April 18, 2000, citing "a personality conflict." Judge Cunningham granted Attorney Adam's Motion to Withdraw as Counsel on April 20, 2000 and appointed the Erie County Public Defender's Office to represent Appellant. Appellant's counsel, James A. Pitonyak, Esq., filed a Notice of Alibi Defense on May 26, 2000.

A Jury Trial was held before the undersigned judge from June 20th to June 22, 2000. The jury found Appellant guilty of Counts 1 & 2 at docket no. 2646 – 1999, Counts 1 & 2 at docket no. 2647 – 1999[1], and Counts 1, 2 & 3 on 2648 – 1999. On August 10, 2000, this Trial Court sentenced Appellant as follows:

- At docket no. 2646 – 1999:
  - Count 1: seven and one-half (7 ½) to fifteen (15) years' incarceration;
  - Count 2: one (1) to five (5) years' incarceration, consecutive to Count 1;
- At docket no. 2647 – 1999:
  - Count 1: six and one-half (6 ½) to fifteen (15) years' incarceration, consecutive to Count 2 of 2646 – 1999;
  - Count 2: one (1) to five (5) years' incarceration, consecutive to Count 1;
- At docket no. 2648 – 1999;
  - Count 1: four (4) to fifteen (15) years' incarceration, consecutive to Count 2 of 2647 – 1999;
  - Count 2: seven and one-half (7 ½) to fifteen (15) years' incarceration, consecutive to Count 1; and
  - Count 3: one (1) to five (5) years' incarceration, consecutive to Count 2.

Appellant, by and through Attorney Pitonyak, filed a Motion for Judgment of Acquittal/ Motion for a New Trial/Motion for Reconsideration and/or Modification of Sentence on August 15, 2000, which were denied by this Trial Court on August 15, 2000. Appellant, by and through Attorney Pitonyak, filed a Notice of Appeal to the Pennsylvania Superior Court on August 30, 2000. The Pennsylvania Superior Court affirmed Appellant's judgment of sentence on October 2, 2001. Appellant filed a *pro se* Petition for Allowance of Appeal to the Pennsylvania Supreme Court on October 15, 2001, which was denied on May 15, 2002.

Appellant, *pro se*, filed his first PCRA Petition on August 6, 2002. On August 7, 2002, this Trial Court appointed William J. Hathaway, Esq., as Appellant's PCRA counsel and directed Attorney Hathaway to supplement/amend Appellant's first PCRA Petition within thirty (30) days. Following a request for extension of time, which was granted, Attorney Hathaway filed a Supplement to Appellant's first PCRA Petition on October 1, 2002. By Order dated October 3, 2002, this Trial Court directed the Commonwealth to respond to Appellant's first PCRA Petition within thirty (30) days. Assistant District Attorney Chad J. Vilushis filed a Response to Appellant's first PCRA Petition on October 24, 2002. Following

[1] Count 3: Kidnapping to Facilitate a Felony at docket no. 2647 – 1999 was withdrawn by the Commonwealth.

two Evidentiary Hearings on November 27, 2002 and December 23, 2002, this Trial Court dismissed Appellant's first PCRA Petition on January 24, 2003.

On April 10, 2003, upon consideration of correspondence received from Appellant on April 9, 2003[2], wherein Appellant requested his right to appeal the dismissal of his first PCRA Petition be granted *nunc pro tunc*, this Trial Court directed the Commonwealth to respond to Appellant's correspondence within fourteen (14) days. Assistant District Attorney Chad J. Vilushis filed a Response on April 11, 2003 objecting to the reinstatement of Appellant's right to appeal. Following an Evidentiary Hearing on May 19, 2003, this Trial Court granted Appellant's second PCRA Petition, reinstated Appellant's right to appeal the dismissal of his first PCRA Petition *nunc pro tunc* and directed Attorney Hathaway to file said appeal within thirty (30) days. On June 5, 2003, Appellant, by and through Attorney Hathaway, filed a Notice of Appeal to the Pennsylvania Superior Court. On September 23, 2003, Appellant filed a Motion for Appointment of New Counsel, which this Trial Court denied on September 24, 2003. The Pennsylvania Superior Court affirmed the dismissal of Appellant's first PCRA Petition on May 6, 2004. Appellant, by and through Attorney Hathaway, filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on May 18, 2004, which was denied on December 20, 2004.

On January 6, 2005, Appellant filed a *pro se* 42 U. S. C. §1983 claim in the United States District Court for the Western District of Pennsylvania against Superintendent Edward J. Klem, Erie County District Attorney's Office, the Commonwealth of Pennsylvania and the Office of Prothonotary, claiming these parties violated his procedural due process rights by refusing him access to the rape kits for DNA testing. Appellant filed a *pro se* Motion for Summary Judgment on July 28, 2005, which was dismissed as premature by United States District Magistrate Judge Susan Paradise Baxter on August 1, 2005. Edward J. Klem, by and through his counsel, Mary L. Friedline, Esq., filed a Motion to Dismiss on October 4, 2005. The Erie County District Attorney's Office, by and through its counsel, Matthew J. McLaughlin, Esq., Assistant Solicitor for Erie County, filed a Motion to Dismiss on January 23, 2006. On January 24, 2006, United States District Judge Sean J. McLaughlin, who was initially assigned to preside over Appellant's §1983 claim, recused himself and reassigned the matter to Senior United States District Judge Maurice B. Cohill, Jr. Appellant filed a second *pro se* Motion for Summary Judgment on March 30, 2006, and filed a third *pro se* Motion for Summary Judgment on April 10, 2006. On May 15, 2006, Judge Baxter filed her Report and Recommendation, wherein she recommended Edward J. Klem's and the Erie County District Attorney's Office's Motions to Dismiss be granted and Appellant's two Motions for Summary Judgment be dismissed as "an improper attempt to collaterally attack his state court criminal conviction and sentence." By Order dated June 29, 2006, Judge Cohill, Jr. adopted Judge Baxter's Report and Recommendation, granted Edward J. Klem's and the Erie County District Attorney's Office's Motions to Dismiss and denied Appellant's two Motions for Summary Judgment. Appellant filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit on July 26, 2006. On January 12, 2010, the United States Court of Appeals for the Third District, in an Opinion published by Senior United States

[2] Appellant's April 9, 2003 correspondence was treated as Appellant's second PCRA Petition. William J. Hathaway, Esq. consented to assist Appellant.

Circuit Judge Franklin S. Van Antwerpen, vacated Judge Cohill, Jr.'s Order and remanded for further proceedings, holding the case of *Heck v. Humphrey*, 512 U.S. 477 (1994), does not bar a §1983 claim requesting access to evidence for post-conviction DNA testing. On remand, Judge Baxter, in a Report and Recommendation dated September 19, 2011, determined Appellant's procedural due process rights had been violated and recommended Appellant's Motion for Summary Judge be granted. On October 19, 2011, Judge Cohill, Jr. adopted Judge Baxter's Report and Recommendation and granted Appellant's Motion for Summary Judgment, wherein final judgment for Appellant was entered on November 10, 2011. The Erie County District Attorney's Office filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. Prior to a decision being rendered by the United States Court of Appeals for the Third Circuit, the parties agreed upon a Stipulated Order for Post-Conviction DNA Testing and filed a Joint Motion for Entry of Consent Judgment on September 10, 2012. The Erie County District Attorney's Office filed a Motion to Voluntary Dismiss the Appeal, which was granted on September 17, 2012.

The rape kits were submitted to Bode Technology in Lorton, Virginia for testing. A Forensic Case Report dated January 31, 2013 and a Supplemental Forensic Case Report dated October 5, 2014 were both submitted. Upon receiving these Reports, Appellant filed the instant *pro se* PCRA Petition, his third, on January 9, 2015. This Trial Court appointed William J. Hathaway, Esq., as Appellant's PCRA counsel on January 22, 2015. Attorney Hathaway filed a Motion to Withdraw as Counsel on January 28, 2015, citing a conflict. This Trial Court granted Attorney Hathaway's Motion to Withdraw on February 4, 2015, and appointed Thomas D. Brasco, Jr., Esq., as Appellant's PCRA counsel, who was directed to supplement/amend Appellant's third PCRA Petition within thirty (30) days. Following several extensions, Attorney Brasco filed a Supplement to Appellant's third PCRA Petition on January 22, 2016. On January 26, 2016, this Trial Court directed the Commonwealth to respond to the Supplement to Appellant's third PCRA Petition within thirty (30) days. Assistant District Attorney Michael E. Burns filed a Response to Supplement to Motion for Post-Conviction Collateral Relief on February 24, 2016. An Evidentiary Hearing was scheduled for April 18, 2016, where, by Stipulation, counsel only presented oral arguments. Following the Evidentiary Hearing, this Trial Court filed its Notice of Intent to Dismiss Appellant's third PCRA Petition as patently untimely and stating no grounds for which relief may be granted under the Post-Conviction Relief Act, 42 Pa. C. S. §9541 et seq. Appellant filed Objections to PCRA Court's Notice of Intent to Dismiss on May 27, 2016. On May 27, 2016, this Trial Court dismissed Appellant's third PCRA Petition.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on June 10, 2016. This Trial Court filed its 1925(b) Order on June 10, 2016. Appellant filed a Motion for Extension of Time to file Concise Statement on July 1, 2016, which was granted by this Trial Court on July 1, 2016 and provided an additional five (5) days for Appellant to file his Concise Statement. On July 6, 2016, Appellant filed his Concise Statement of Errors Complained of on Appeal.

Legal Argument

In his "Concise Statement of Matters Complained of on Appeal, Pursuant to Pa. R. A. P. 1925(b)," Appellant raises six (6) separate issues on appeal, which this Trial Court addresses and provides its position as follows:

1. Due to the voluntariness and candor of James A. Pitonyak, Esq., Appellant's trial counsel, before this Trial Court, the statements of Attorney Pitonyak, who voluntarily appeared at the November 27, 2002 Evidentiary Hearing, were found credible by this Trial Court and thereby properly considered by this Trial Court.

Pursuant to Pennsylvania Rule of Professional Conduct 3.3 – "Candor Towards The Tribunal," a lawyer shall not knowingly (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal any legal authority in the controlling jurisdiction known to the lawyer directly adverse to the position of the client; or (3) offer evidence that the lawyer knows is false. *See Pa. RPC 3.3(a).*

On November 27, 2002, an Evidentiary Hearing was scheduled; however, counsel agreed there was no need for an Evidentiary Hearing, but only presentation of argument. *See Notes of Testimony, PCRA Hearing, November 27, 2002, pg. 3, lines 19-23*. James A. Pitonyak, Esq., who was Appellant's trial counsel, appeared voluntarily at the hearing by noticing this Trial Court's written schedule on the courtroom door as Attorney Pitonyak was passing by and informed this Trial Court as follows: "I was his lawyer, Judge. I saw this on the board," "I said oh, that name sounds familiar, and it came back to me," and "I just walked by. And as you can see judge, I'm informally today." *pg. 6, lines 16-17; pg. 8, lines 7-8, 11-12*.

Attorney Pitonyak indicated Appellant's own trial strategy was that the incidents of June 30, 1998, and November 12, 1998, were perpetrated by another individual and that the incident of August 31, 1999 was consensual. Furthermore, Attorney Pitonyak credibly stated: "I discussed that matter [DNA testing] with him [Appellant]. And he [Appellant] did not request it himself." *See id, pg. 7, lines 3-6*. Attorney Pitonyak, as a licensed, practicing attorney in good standing with the Commonwealth of Pennsylvania and an "Officer of the Court," has an ethical obligation to make truthful statements of material fact to a tribunal, pursuant to the Pennsylvania Rules of Professional Conduct, and this Trial Court found his statements, offered voluntarily, were credible regarding whether the possibility of DNA testing was discussed with and pursued by Appellant. In addition, at the undersigned judge's inquiry to both counsel, Attorney Hathaway and Assistant District Attorney Chad Vilushis, as to whether Attorney Pitonyak needed to be sworn in, neither then-Assistant District Attorney Vilushis nor Appellant's then-PCRA counsel William J. Hathaway, Esq., requested this Trial Court swear in Attorney Pitonyak. *See id, pg. 9, lines 5-10*. Therefore, upon consideration of the voluntary and credible nature of Attorney Pitonyak's statements to this Trial Court and after review of the Pennsylvania Rules of Professional Conduct, this Trial Court properly considered Attorney Pitonyak's statements as relevant for this Trial Court's determination as to the fourth (4th) prong for PCRA relief eligibility, i.e. whether the failure to pursue DNA testing was the result of any rational, strategic or tactical decision by counsel, being met. *See 42 Pa. C. S. §9543(a)(4)*.

Assuming *arguendo* Attorney Pitonyak's statements are not considered, Appellant is still not entitled to relief under 42 Pa. C. S. §9543(a) because Appellant cannot plead and prove by a preponderance of the evidence the second (2nd) prong of PCRA relief eligibility, i.e. that the DNA test results would likely result in a different outcome at trial if introduced. *See 42 Pa. C. S. §9543(a)(2)(vi)*. Testing was conducted regarding the rape kits collected from the June 30, 1998 incident (docket no. 2648 – 1999) in January of 2013 and in October of

2014. The January 31, 2013 DNA Report indicates "the individual associated with CCB1243-0152-R17 (Emmitt Grier) **cannot be excluded** as a possible contributor of the partial Y-STR profile obtained from the epithelial fraction (EF) of sample CCB1243-0152-E03a." *See Bode Technology Forensic Case Report, January 31, 2013, pg. 2* [emphasis added]. The October 5, 2014 DNA Report indicates "due to the limited data obtained and the possibility of allelic drop out, **no conclusions can be made** on this partial mixture Y-STR profile." *See Bode Technology Forensic Case Report, October 5, 2014, pg. 1* [emphasis added]. Furthermore, following the incidents on June 30, 1998, November 12, 1998 and August 31, 1999, Appellant gave two (2) videotaped voluntary confessions to City of Erie Police detectives for the crimes charged, and these confessions were never challenged or overturned on direct appeal or in subsequent PCRA proceedings. Therefore, even if Attorney Pitonyak's statements are not considered, Appellant is still not entitled to relief as all of the elements of 42 Pa. C. S. §9543(a) have not been pled and proven by a preponderance of the evidence.

2. *Commonwealth v. Hawk* and *Commonwealth v. Crews* are distinguishable from the instant criminal action and, therefore, are inapplicable.

Although Appellant has continuously argued the Pennsylvania Supreme Court's decisions in *Commonwealth v. Hawk*, 709 A.2d 373 (Pa. 1998), and *Commonwealth v. Crews*, 640 A.2d 395 (Pa. 1994), are applicable to the instant criminal action, these cases are clearly distinguishable. In *Hawk*, the defendant, charged with rape, presented testimony from Sarah Gotwald, a forensic scientist of the Pennsylvania State Police Crime Law, regarding DNA test results of a rape kit of the victim. Following an *in camera* hearing, the trial court ruled the DNA evidence was inadmissible, concluding "although the evidence offered by Ms. Gotwald may be logically relevant in enhancing the possibility that intercourse did not occur, it does not enhance the *probability* that there was no intercourse." *Id* at 375. Unlike the instant case, there appears to be no confession presented in the *Hawk* case. The defendant in the *Hawk* case was convicted and sentenced to incarceration for six (6) to twelve (12) years, which was upheld by the Pennsylvania Superior Court. The defendant in the *Hawk* case appealed to the Pennsylvania Supreme Court, arguing the trial court erred in precluding the forensic scientist's testimony. The Pennsylvania Supreme Court reversed, holding the trial court abused its discretion in precluding Ms. Gotwald's testimony regarding the rape kit tests results because the DNA evidence, although inconclusive, was relevant to the issue of whether sexual intercourse occurred, and it was for the jury to determine the weight and persuasiveness of the evidence. *See id* at 376-377.

The decision in *Hawk* was derived from *Commonwealth v. Crews*, 640 A.2d 395 (Pa. 1994), wherein the Pennsylvania Supreme Court upheld a trial court's admission of a DNA expert's opinion that DNA evidence found at the crime scene was "strongly associated" with the defendant's DNA, reasoning "the relevant, though inconclusive, DNA evidence was admissible… [and that] its weight and persuasiveness were properly matters for the jury to determine." S*ee Crews* at 403. Again, unlike the instant case, there appears to be no confession in the *Crews* case.

The factual circumstances in *Hawk* and *Crews*, where DNA evidence was actually presented to a trial court for consideration as to its relevancy, were distinguishable. In the instant criminal action, neither the Commonwealth nor Appellant Emmitt J. Grier, Jr. presented

DNA evidence during Appellant's criminal trial, nor was DNA testing ever conducted on the rape kits obtained from the victim; rather, the Commonwealth in the instant criminal action presented Appellant's two (2) videotaped voluntary confessions provided to City of Erie Police detectives and the eyewitness testimony of the victim, which were never challenged at the trial court level, yet were challenged, but unsuccessfully, on direct appeal and in subsequent PCRA proceedings. Furthermore, the issues in both *Hawk* and *Crews* were raised on direct appeal, not in a second or subsequent PCRA Petition as in the instant case. Therefore, *Hawk* and *Crews* are distinguishable from the instant criminal action, and Defendant remains ineligible for relief under the Post-Conviction Collateral Relief Act for all of the aforementioned reasons.

3. Due to Appellant's federal litigation being initiated in 2005, said federal litigation is not relevant to the timeliness of his third PCRA Petition, and this Trial Court is without jurisdiction to toll the statutory PCRA time period due to federal litigation.

A PCRA petition must be filed within one (1) year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

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

42 Pa. C. S. §9545(b)(1)(i)-(iii). The PCRA's timeliness requirements are mandatory and jurisdictional in nature, and no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner. *See Commonwealth v. Taylor*, 933 A.2d 1035, 1042-43 (Pa. Super. Ct. 2007).

Appellant initiated a federal 42 U. S. C. §1983 claim in the United States District Court for the Western District of Pennsylvania on January 6, 2005, claiming his due process rights were violated by several parties who refused him right of access to evidence for the purpose of DNA testing. Said federal litigation ended on September 17, 2012. Appellant now argues this Trial Court erred by considering the time period of Appellant's federal litigation in deciding whether Appellant's third PCRA Petition was patently untimely. However, Appellant had more than ample opportunities to raise the issue of DNA testing prior to initiating his federal claim. The relevant timeline is shown as follows:

- Appellant was sentenced by this Trial Court on August 10, 2000;
- Appellant appealed his judgment of sentence to the Pennsylvania Superior Court on August 30, 2000, which was affirmed on October 2, 2001;
- Appellant filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on October 15, 2001, which was denied May 15, 2002;
- The time period for filing a Petition for Writ of *Certiorari* to the United States Supreme Court expired on August 13, 2002;

- **The Post-Conviction DNA testing law, 42 Pa. C. S. §9543.1, went into effect on September 2, 2002;**
- **The time period for filing a timely PCRA Petition expired on August 13, 2003**; and
- Appellant filed his federal §1983 claim on January 9, 2005.

As this timeline indicates, Appellant had the benefit of the Post-Conviction DNA testing law, pursuant to 42 Pa. C. S. §9543.1, from September 2, 2002 until August 13, 2003, when the time period for filing a timely PCRA Petition expired on August 13, 2003. In fact, Appellant had the benefit of the Post-Conviction DNA testing well before filing his federal §1983 claim on January 9, 2005, whether pursued in a timely or untimely PCRA Petition. These time periods are well before Appellant initiated his federal 42 U. S. C. §1983 claim. Moreover, this Trial Court is without authorization to have Appellant's federal litigation toll the time period for filing a timely PCRA Petition. Therefore, Appellant's federal §1983 claim is not relevant to the period during which Appellant could have filed a timely PCRA Petition. As Appellant's third PCRA Petition was filed on January 9, 2015, over **eleven (11) years** after the time period for filing a timely PCRA Petition expired, and Appellant did not argue successfully to this Trial Court any of the three (3) timeliness exceptions to said timeliness requirement, this Trial Court was without jurisdiction to consider Appellant's third PCRA Petition.

4. Appellant failed to prove successfully a *prima facie* case pursuant to *Commonwealth v. Lawson* and *Commonwealth v. Palmer*.

Appellant's third PCRA Petition was required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *See Commonwealth v. Palmer*, 814 A.2d 700, 709 (Pa. Super. 2002). As part of its holding in *Palmer*, the Pennsylvania Superior Court has stated:

> Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred…. This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

Id. at 709. Furthermore, in *Palmer*, the Pennsylvania Superior Court stated:

> A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided **before** a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

Id. at 709, fn. 18 [emphasis added].

Appellant failed to prove initially his eligibility for relief under the Post-Conviction Collateral Relief Act and failed to prove one of the three (3) timeliness exceptions applied to his third PCRA Petition. In addition, Appellant failed to demonstrate or even argue either the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate or that he is innocent of the crimes charged.

Furthermore, Appellant failed to seek actively Post-Conviction DNA testing, pursuant to 42 Pa. C. S. §9543.1, in a timely manner, which, as explained above, he had more than ample opportunities to pursue. Finally, the results of the DNA tests did not raise the possibility Appellant was innocent of the crimes charged. Therefore, as Appellant has failed to meet the standards set forth in *Commonwealth v. Lawson* and its progeny, Appellant's third PCRA Petition is barred from review, and this Trial Court properly dismissed Appellant's third PCRA Petition.

5. Appellant's allegation that this Trial Court erred by an alleged "ruling" that Appellant should not seek DNA testing is a vague statement being raised by Appellant for the first time to this Trial Court since the filing of his third PCRA Petition in January of 2015 and in this appeal to the Pennsylvania Superior Court.

Appellant argues this Trial Court allegedly ruled at the time of trial that Appellant "should not seek DNA testing of rape kits because it was not his burden to prove innocence," and therefore denied Appellant due process. Appellant raises this issue for the first time to this Trial Court since the filing of his third PCRA Petition in January of 2015, and to the Pennsylvania Superior Court in this appeal. Furthermore, his allegation is vague as Appellant does not cite the specific alleged "ruling" of this Trial Court and where and when it was made.

However, the fact of the matter remains that Appellant had more than ample opportunities to seek or argue for DNA testing of the Sexual Assault Evidence Collection Kits collected on June 30, 1998 and August 31, 1999 – at the time of trial, during direct appeal to the Pennsylvania Superior Court, by Petition for Allowance of Appeal to the Pennsylvania Supreme Court, by Petition for Writ of *Certiorari* to the United States Supreme Court, and in a timely filed PCRA Petition – and Appellant had these numerous avenues of review.

6. This Trial Court performed its required duty under the PCRA DNA testing law, pursuant to 42 Pa. C. S. §9543.1(f)(3).

The procedure following DNA testing of evidence is outlined as follows:
(f) P*ost-testing procedures*.

(1) After the DNA testing conducted under this section has been completed, **the applicant may**, pursuant to section 9545(b)(2) (relating to jurisdiction and proceedings), **during the 60-day period beginning on the date on which the applicant is notified of the test results, petition to the court for post-conviction relief pursuant to section 9543(a)(2)(vi)** (relating to eligibility for relief).

(2) Upon receipt of a petition filed under paragraph (1), the court shall consider the petition along with any answer filed by the Commonwealth and **shall conduct a hearing thereon.**

(3) In any hearing on a petition for post-conviction relief filed under paragraph (1), **the court shall determine whether the exculpatory evidence resulting from the DNA testing conducted under this section would have changed the outcome of the trial as required by section 9543(a)(2)(vi).**

See 42 Pa. C. S. §9543.1(f) [emphasis added].

Although Appellant, argues that, pursuant to relevant statutory law, this Trial Court must determine whether the DNA evidence should go to a jury, Appellant incorrectly states the requirements of the statute, which is outlined above. Following DNA testing, Appellant petitioned this Trial Court pursuant to §9543(a)(2)(vi)[3] of the Post-Conviction Collateral Relief Act. Thereafter, this Trial Court properly conducted a hearing, pursuant to 42 Pa. C. S. §9543.1(f)(2), and determined whether the exculpatory evidence would have changed the outcome of trial. Ultimately, this Trial Court determined Appellant is not entitled to relief, as (1) the decision not to seek DNA testing was Appellant's rational, strategic or tactical decision by counsel; and (2) the results of DNA testing would not have altered the outcome of trial if introduced.[4] Therefore, this Trial Court followed the statutory requirements and properly decided Appellant is not entitled to relief.

Conclusion

For all of the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm its Order dated May 27, 2016.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

[3] 42 Pa. C. S. §9543(a)(2)(vi) states "that the conviction or sentence resulted from one for more of the following:… 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**.

[4] For a more thorough analysis, see this Trial Court's Notice dated May 3, 2016

COMMONWEALTH OF PENNSYLVANIA

v.

GREGORY ALAN FIKE

CRIMINAL PROCEDURE / SUPPRESSION

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence, i.e. the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.

TRANSPORTATION / EQUIPMENT FOR CHEMICAL TESTING / PERIODIC CALIBRATION

Type "A" alcohol breath test equipment shall be calibrated annually within one (1) year of using the breath test equipment to perform an actual breath test. Calibration testing of a breath test device shall consist of conducting three (3) separate series of five (5) simulator tests, using simulator solution designed to give various percentage readings. The manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices, and such certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer.

VEHICLE CODE / CHEMICAL TESTING / ADMISSIBILITY

75 Pa. C. S. §1547 governs the admissibility of breath test results and requires compliance with the regulations imposed by the Department of Health and the Department of Transportation for annual calibration tests.

VEHICLE CODE / CHEMICAL TESTING / ADMISSIBILITY

Strict compliance with the provisions of 67 Pa. Code §§77.24, 77.26 and 75 Pa. C. S. §1547(c) must be recognized for breath test results to be scientifically and legally admissible.

TRANSPORTATION / CHEMICAL TESTING PROCEDURES

A person to be tested with breath test equipment shall be kept under observation by a police officer or certified breath test operator for at least twenty (20) **consecutive** minutes immediately prior to administration of the first alcohol breath test given to the person, during which time the person may not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked.

TRANSPORTATION / CHEMICAL TESTING PROCEDURES

"Observation" in 67 Pa. Code §77.24(a) does not mean 'eyes on his mouth 100% of the time; rather, the Commonwealth had to prove, by a preponderance of the evidence, that ingestion did not occur.

TRANSPORTATION / CHEMICAL TESTING PROCEDURES

A failure to comply with the required twenty (20) minute pre-test observation period of 67 Pa. Code §77.24 does not affect only the weight of the evidence; rather, the requirements of 67 Pa. Code §77.24 go to the trustworthiness of the evidence. If the pre-test observation period issue is raised, failure to comply does not permit the test results to be admitted as substantive evidence with lessened reliability – it precludes admission.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. CR 1486 of 2016

Appearances: D. Robert Marion, Jr., Esq., on behalf of the Commonwealth
Paul J. Susko, Esq., on behalf of the Defendant

OPINION

Domitrovich, J., March 22, 2017

After thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony and evidence presented during the March 17, 2017 Suppression Hearing, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On July 5, 2015, Pennsylvania State Police Sergeant Kevin Havern conducted the annual calibration test for Lawrence Park Barrack's (hereafter referred to as "Barracks") DataMaster DMT chemical breath test machine no. 132506.
2. The annual calibration test on July 5, 2015 was conducted with simulator solution that had expired on June 11, 2015 at 11:59 p.m. (*see Defendant's Exhibit B, page 4*), and Sergeant Havern sincerely admitted that he used expired simulator solution during the annual calibration test.
3. Sergeant Havern acknowledged he has no relevant education or experience in chemistry or gas chromatography and could not attest scientifically to the viability and reliability of the expired simulator solution.
4. Sergeant Havern sincerely admitted he committed an error or mistake by using expired simulator solution.
5. At 1:24 a.m. on March 5, 2016, Pennsylvania State Police Trooper Cody Williams and Corporal Dave Cannon initiated a traffic stop on a vehicle, which was driven by Gregory Alan Fike (hereafter referred to as "Defendant").
6. Trooper Williams observed Defendant had a strong odor of alcoholic beverages, glassy, bloodshot eyes and very slurred speech.
7. Trooper Williams instructed Defendant to exit the vehicle and perform field sobriety tests, which indicated Defendant was under the influence of alcoholic beverages.
8. At 1:33 a.m., Trooper Williams had Defendant submit to a portable breath test ("PBT"), which also indicated Defendant was under the influence of alcoholic beverages.
9. Defendant was then placed under arrest for Driving under the Influence of Alcohol and was seated in the back of the patrol vehicle while Corporal Cannon moved Defendant's vehicle to a safe location.
10. Trooper Williams admitted he was uncertain where he was seated in the vehicle – the front or the back.
11. Trooper Williams indicated his current policy is to always sit in the back of the patrol vehicle to monitor defendants; however, this current policy was implemented after March 5, 2016.
12. At 1:39 a.m., Defendant was transported to the Barracks, which lasted five (5) to ten (10) minutes.

13. Between 1:44 a.m. and 1:49 a.m., Defendant was seated in the testing room of the Barracks and his information was processed.
14. During his processing, Defendant asked to use the bathroom as his stomach was upset because he was nervous, which Trooper Williams obliged and allowed Defendant to use the bathroom.
15. Defendant was alone in the bathroom for an indeterminate period of time, which Trooper Williams did not monitor.
16. Thereafter, Defendant submitted to two (2) DataMaster DMT chemical breath tests, administered by Sergeant Havern.
17. The first DataMaster DMT chemical breath test occurred at 1:56 a.m. and the second chemical breath test occurred at 1:58 a.m.
18. The mobile video recorder ("MVR") footage, which captured the events from 1:32 a.m. (when Defendant was administered the PBT) until 1:39 a.m. (when Defendant began to be transported to the Barracks), was admitted into evidence. *See Defendant's Exhibit C*.
19. Certificates of Analysis from both Adirondack Environmental Services, Inc. and Guth Laboratories, Inc., demonstrating simulator solution lot no. 13150 was analyzed via gas chromatography and was set to expire on June 11, 2015 at 11:59 p.m., were also admitted into evidence. *See Defendant's Exhibit B, page 3 and 4*.
20. On June 24, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant with Driving under the Influence of Alcohol, General Impairment-Incapable of Safe Driving, 2nd Offense, in violation of 75 Pa. C. S. §3802(a)(1); Driving under the Influence, Highest Rate of Alcohol, BAC 0.16% or Greater, 2nd Offense, in violation of 75 Pa. C. S. §3802(c); Driving on Right Side of Roadway, in violation of 75 Pa. C. S. §3301(a); Driving on Roadways Laned for Traffic, in violation of 75 Pa. C. S. §3309(1); and Careless Driving, in violation of 75 Pa. C. S. §3714(a).
21. Defendant filed five (5) Motions to Extend Pre-trial Deadline between July 21, 2016 and December 19, 2016 to extend the deadline to file Omnibus Pre-trial Motions to January 30, 2017.
22. Defendant filed an Omnibus Pre-trial Motion on January 27, 2017.
23. A hearing on Defendant's Omnibus Pre-trial Motion was held on March 17, 2017, during which this Trial Court heard testimony from Trooper Williams, Sergeant Havern and Defendant Gregory Alan Fike; received evidence, including, but not limited to, observing the MVR footage; and heard argument from both counsel. Defendant appeared and was represented by his counsel, Paul J. Susko, Esq., and Assistant District Attorney D. Robert Marion, Jr. appeared on behalf of the Commonwealth.

CONCLUSIONS OF LAW

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h).* The Commonwealth's burden is by a preponderance of the evidence. *Commonwealth v. Bonasorte*, 486 A.2d 1361, 1368 (Pa. Super. 1984); s*ee also Commonwealth v. Jury*, 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden

of persuading the trier of fact that the fact alleged is indeed true.").

A. The results obtained from the DataMaster DMT chemical breath test on March 5, 2016 are inaccurate as violating the protocol as established in Pennsylvania Code and Statute in that the simulator solution used on July 5th, 2015 had expired on June 11th, 2015 at 11:59 p.m.

Type "A" alcohol breath test equipment shall be calibrated annually within one (1) year of using the breath test equipment to perform an actual breath test. *See 67 Pa. Code §77.26(a)*. Calibration testing of a breath test device shall consist of conducting three (3) separate series of five (5) simulator tests, using simulator solution designed to give various percentage readings. *See 67 Pa. Code §77.26(b)*. The manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices, and such certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer. *See 67 Pa. Code §77.24(d)*. 75 Pa. C. S. §1547 governs the admissibility of breath test results and requires compliance with the regulations imposed by the Department of Health and the Department of Transportation for annual calibration tests. *See 75 Pa. C. S. §1547(c)(1)*.

Sergeant Havern, the certified operator of DataMaster DMT chemical breath test machine no. 132506, located at the Pennsylvania State Police Lawrence Park Barracks, indicated the annual calibration test occurred on July 5, 2015. *See Defendant's Exhibit B, page 2*. Said calibration was the most recent annual calibration test prior to Defendant's chemical breath test. According to the calibration test readout, the expiration date of lot #13150, bottle #89 was June 11, 2015 at 11:59 p.m., twenty-six (26) days before the July 5, 2015 annual calibration test. *See id*. The Certificate of Analysis from Guth Laboratories, Inc. also indicates the expiration date for lot #13150 was precisely June 11, 2015 at 11:59 p.m. *See Defendant's Exhibit B, page 4*. Such precision as to the expiration date demonstrates the need for scientific viability and reliability of the simulator solution and how said scientific viability and reliability is invalidated after the expiration date, as per the Certificates of Analysis from Adirondack Environmental Services, Inc. and Guth Laboratories, Inc. *See id, pages 3 and 4*. Sergeant Havern sincerely admitted he erred in using the expired simulator solution during the July 5, 2015 calibration testing and expressed his sincere embarrassment due to this error, which he ensured would not occur again.

Although the calibration results allegedly indicate DataMaster DMT chemical breath test machine no. 132506 was within the proper deviation range, strict compliance with the provisions of 67 Pa. Code §§77.24, 77.26 and 75 Pa. C. S. §1547(c) must be recognized for breath test results to be scientifically and legally admissible. *See Commonwealth v. Mabry*, 594 A.2d 700, 702 (Pa. Super. 1991). As the annual calibration testing on July 5, 2015 was conducted with expired simulator solution, strict compliance with protocol as enumerated in 67 Pa. Code §77.24, 67 Pa. Code §77.26 and 75 Pa. C. S. §1547(c) was not adhered to and, therefore, this Trial Court concludes DataMaster DMT chemical breath test machine no. 132506 was not properly and legally calibrated. As such, the chemical breath test results obtained on March 5, 2016 cannot be admitted and must be suppressed.

B. Defendant was not under observation for twenty (20) consecutive minutes, pursuant to 67 Pa. Code §77.24.

Assuming *arguendo* the DataMaster DMT chemical breath test machine was properly and legally calibrated, a person to be tested with breath test equipment shall be kept under observation by a police officer or certified breath test operator for at least twenty (20) **consecutive** minutes immediately prior to administration of the first alcohol breath test given to the person, during which time the person may not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked. *See 67 Pa. Code §77.24(a)* [emphasis added]. "'Observation' in 67 Pa. Code §77.24(a) does not mean 'eyes on his mouth 100% of the time;' rather, the Commonwealth had to prove, by a preponderance of the evidence, that ingestion did not occur." *Commonwealth v. Barlow*, 776 A.2d 273, 275-276 (Pa. Super. 2001). "A failure to comply with the required twenty (20) minute pre-test observation period of 67 Pa. Code §77.24 does not affect only the weight of the evidence; rather, the requirements of 67 Pa. Code §77.24 go to the trustworthiness of the evidence." *Id* at 275. "If the pre-test observation period issue is raised, failure to comply does not permit the test results to be admitted as substantive evidence with lessened reliability – it precludes admission." *Id*.

After review of the testimony and evidence, this Trial Court concludes the Commonwealth has failed to demonstrate Trooper Williams and Sergeant Havern had Defendant under observation for twenty (20) **consecutive** minutes, as required by 67 Pa. Code §77.24. Trooper Williams stated the traffic stop of Defendant's vehicle occurred at 1:24 a.m. and the MVR showed Defendant was placed into the patrol vehicle at 1:34 a.m., which is a period of ten (10) consecutive minutes of observation. However, no sufficient testimony or evidence was offered to indicate Defendant was under observation while seated in the patrol vehicle and while being transferred to the Barracks, which commenced at 1:39 a.m. according to the MVR. Trooper Williams did indicate his current policy is to always sit in the back of the patrol vehicle in order to monitor defendants; however, this current policy was implemented after March 5th, 2016.

Furthermore, Trooper Williams stated the drive to the Barracks was between five (5) and ten (10) minutes, which would have had Defendant arriving at the Barracks between 1:44 a.m. and 1:49 a.m. Thereafter, Defendant was seated in the processing and testing room while his information was processed. During processing, Defendant complained of an upset stomach and requested to use the bathroom, which Trooper Williams allowed. Defendant was alone in the bathroom for an indeterminate amount of time, which Trooper Williams did not monitor. The Commonwealth did not prove by a preponderance of the evidence that Trooper Williams observed Defendant for vomiting, regurgitating, eating or drinking while alone in the bathroom. *See Barlow*, 776 A.2d at 275-276. After Defendant returned from the bathroom, the first DataMaster DMT chemical breath test was administered to Defendant at 1:56 a.m. and the second chemical breath test was administered at 1:58 a.m. Therefore, based upon the testimony and evidence provided, this Trial Court concludes the Commonwealth failed to demonstrate Trooper Williams or Sergeant Havern had Defendant under observation for twenty (20) **consecutive** minutes and failed to demonstrate Trooper Williams **knew** Defendant did not vomit, regurgitate, eat or drink during this time period. As the provisions of 67 Pa. Code §77.24 were not adhered to, the chemical breath test results collected on March 5th, 2016 must be suppressed.

Therefore, this Trial Court concludes the chemical breath test results are not admissible and must be suppressed as (1) the July 5th, 2015 calibration test is invalid and the subsequent test results are not admissible as the simulator solution used in the calibration test expired on June 11th, 2015 at 11:59 p.m., which Sergeant Havern sincerely admits was a mistake and error on his part, and, therefore, DataMaster DMT chemical breath test machine no. 132506 was not properly and legally calibrated, and (2) the Commonwealth failed to prove Trooper Williams or Sergeant Havern observed Defendant for twenty (20) **consecutive** minutes prior to administration of the chemical breath tests.

For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 22nd day of March, 2017, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony and evidence presented during the March 17th, 2017 Suppression Hearing, as well as an independent review of the relevant statutory and case law, and as set forth above in the Findings of Fact and Conclusions of Law, pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-trial Motion is hereby **GRANTED**. The chemical breath test results obtained on March 5th, 2016 are inadmissible and are hereby **SUPPRESSED**.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

SIDNEY MARTIN, Plaintiff/Appellant

v.

NANCY GIROUX, SGT. MALONEY, MELANIE KOSINSKI, and DORINA VARNER, sued in their individual and official capacities, Defendants/Appellees

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

SOVEREIGN IMMUNITY / GENERALLY

Pursuant to Section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute.

SOVEREIGN IMMUNITY / GENERALLY

A Commonwealth party is not liable unless (1) the alleged act of the Commonwealth party is a negligent act for which damages would be recoverable under the common law or by statute, pursuant to 42 Pa. C. S. § 8522(a); and (2) the act of the Commonwealth party falls within one of the exceptions listed in 42 Pa. C. S. § 8522(b). The exceptions to sovereign immunity must be strictly construed and narrowly interpreted.

NEGLIGENCE / ELEMENTS

In order to establish a cause of action for negligence, a plaintiff must prove the following elements: (1) a defendant's duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages.

NEGLIGENCE / BREACH OF DUTY

In any negligence action, establishing a breach of a legal duty is a condition precedent to a finding of negligence.

SOVEREIGN IMMUNITY / EXCEPTIONS

Pursuant to 42 Pa. C. S. §8522(b), the exceptions to sovereign immunity include: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways or sidewalks; (5) potholes or other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8)

National Guard activities; and (9) toxoids and vaccines.

CONSTITUTIONAL LAW / EIGHTH AMENDMENT

A prison official violates the Eighth Amendment only when two requirements are met: first, the deprivation alleged must be, objectively, "sufficiently serious," i.e. a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities;" and second, a prison official must have a "sufficiently culpable state of mind," i.e. one of "deliberate indifference" to inmate health or safety. Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

CONSTITUTIONAL LAW / EIGHTH AMENDMENT

Courts have held that a brief interruption in running water by itself does not so deprive an inmate of "the minimal civilized measure of life's necessities" that it constitutes a violation of the Eighth Amendment.

CONSTITUTIONAL LAW / EIGHTH AMENDMENT / SUBJECTIVE RECKLESSNESS

Subjective recklessness, as used in the criminal law, is a familiar and workable standard that is consistent with the "Cruel and Unusual Punishments Clause," and has been adopted as the test for "deliberate indifference" under the Eighth Amendment.

CONSTITUTIONAL LAW / EIGHTH AMENDMENT / LIABILITY

A prison official's duty under the Eighth Amendment is to ensure "reasonable safety;" thus, prison officials who act reasonably cannot be found liable under the "Cruel and Unusual Punishments Clause.

CIVIL RIGHTS / VIOLATION

To be liable in a civil rights violation action, a defendant must have personal involvement in the alleged wrongs. Personal involvement can be shown through allegations of personal direction or actual knowledge or acquiescence, but the allegations must be made with appropriate particularity.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 13495 – 2015

Appearances: Sidney Martin, *pro se*, Appellant
Kemal A. Mericli, Senior Deputy Attorney General, on behalf of Nancy Giroux, Sgt. Maloney, Melanie Kosinski and Dorina Varner, Appellees

OPINION

Domitrovich, J., October 25, 2016

The instant matter is before the Pennsylvania Commonwealth Court[1] on the appeal of

[1] Appellant Sidney Martin originally filed his Notice of Appeal with the Pennsylvania Superior Court; however, by Order dated October 21, 2016, the Pennsylvania Superior Court transferred the instant civil appeal to the Pennsylvania Commonwealth Court, citing the original jurisdiction of the Pennsylvania Commonwealth Court pursuant to 42 Pa. C. S. §761(a)(1)(i).

Sidney Martin (hereafter referred to as "Appellant") from this Trial Court's Order dated August 29, 2016. By said Order dated August 29, 2016, this Trial Court sustained Nancy Giroux, Sgt. Maloney, Melanie Kosinski and Dorina Varner's (hereafter referred to as "Appellees") Preliminary Objections and dismissed Appellant's Civil Complaint with prejudice for the following reasons: (1) Appellees, as Commonwealth parties, have sovereign immunity in the instant circumstances, pursuant to 1 Pa. C. S. §2310, as Appellant failed to demonstrate successfully a negligent act by any of the Appellees for which damages would be recoverable and which falls within any of the exceptions enumerated in 42 Pa. C. S. §8522(b); (2) Appellant failed to demonstrate successfully both the objective and subjective prongs to satisfy an Eight Amendment claim for "cruel and unusual punishment;" and (3) Appellant failed to demonstrate successfully personal involvement by any of the Appellees to satisfy a civil rights violation claim.

Factual and Procedural History

Appellant filed a Civil Complaint on December 16, 2015. Appellant filed a Motion to Compel Service of Original Process by Sheriff's Office on February 24, 2016, which was granted by the Honorable William R. Cunningham on March 2, 2016.

Senior Deputy Attorney General William A. Dopierala entered an appearance on behalf of Appellees on March 17, 2016. Attorney Dopierala filed Preliminary Objections in the Nature of a Demurrer to Appellant's Complaint on March 28, 2016. Appellant filed his Objections to Appellees' Preliminary Objections on April 18, 2016. Attorney Dopierala filed a Brief in Support of Appellees' Preliminary Objections on May 27, 2016. Appellant filed a Brief in Support of Appellant's Objections on August 3, 2016. A hearing on Appellees' Preliminary Objections was scheduled for August 10, 2016, at which this Trial Court heard argument from Appellant *pro se* and from Senior Deputy Attorney General Henry J. Salvi, who appeared instead of Attorney Dopierala, who is now retired. At the time of the hearing, both parties agreed on the record that this Trial Court had original jurisdiction to preside over and rule upon the instant civil action. Following said hearing, and by Opinion and Order dated August 29, 2016, this Trial Court sustained Appellees' Preliminary Objections and dismissed Appellant's Civil Complaint with prejudice.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on September 12, 2016. This Trial Court filed its 1925(b) Order on September 19, 2016. Senior Deputy Attorney General Kemal A. Mericli entered an appearance in the Pennsylvania Superior Court on behalf of Appellees on October 3, 2016. The Pennsylvania Superior Court issued a Rule to Show Cause on October 3, 2016 regarding jurisdiction and possible transfer of the instant civil appeal to the Pennsylvania Commonwealth Court, and directed Appellant to respond by letter to them within fourteen (14) days and explain why the instant civil appeal should not be transferred to the Pennsylvania Commonwealth Court. Appellant filed his Concise Statement of Matters Complained of on Appeal with the Erie County Court of Common Pleas on October 6, 2016. Appellant filed his Response to Rule to Show Cause with the Pennsylvania Superior Court on October 12, 2016. By Order dated October 21, 2016, the Pennsylvania Superior Court transferred the instant appeal to the Pennsylvania Commonwealth Court, citing the original jurisdiction of the Pennsylvania Commonwealth Court pursuant to 42 Pa. C. S. §762(a)(1)(i).

Rationale and Conclusions

Appellant raises eight (8) issues in his *pro se* Concise Statement of Matters Complained

of on Appeal, and this Trial Court consolidates Appellant's issues into the following four (4) issues and addresses them as follows:

A. Whether this Trial Court applied the proper standards governing Preliminary Objections in the nature of a demurrer.

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. *Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Id*. When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. *Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992). All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. *Clevenstein v. Rizzuto*, 266 A.2d 623, 624 (Pa. 1970). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Hoffman v. Misericordia Hospital of Philadelphia*, 267 A.2d 867, 868 (Pa. 1970). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Gabel*, 616 A.2d at 1367 (Pa. 1992).

In Appellant's issues numbered three, four and six of his Concise Statement of Matters Complained of on Appeal, Appellant raises issues regarding "a genuine issue of material fact" in his cause of action and "sufficient evidence of facts to make out a *prima facie* cause of action." Although these standards are proper in other facets of the Pennsylvania Rules of Civil Procedure, they are not applicable to Preliminary Objections in the nature of a demurrer. In its Opinion dated August 29, 2016 and as outlined above, this Trial Court provided the proper standards governing Preliminary Objections in the nature of a demurrer, supported by relevant case law, and applied the proper standards to Appellant's Civil Complaint, supported by arguments which were addressed in this Trial Court's Opinion dated August 29, 2016 and as addressed below.

B. Whether this Trial Court concluded properly that Appellees have sovereign immunity in these circumstances pursuant to 1 Pa. C. S. §2310, where Appellant failed to demonstrate successfully a negligent act by any of the Appellees for which damages would be recoverable and which falls within any of the exceptions enumerated in 42 Pa. C. S. §8522(b).[2]

On September 28, 1978, the Pennsylvania General Assembly enacted the Sovereign Immunity Act, which states:

> Pursuant to Section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the

[2] These issues are derived from Appellant's issues numbered one and two of his *pro se* Concise Statement of Matters Complained of on Appeal, wherein Appellant argues this Trial Court erred in concluding the Appellees were entitled to sovereign immunity.

> General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute.

1 Pa. C. S. §2310. A Commonwealth party is not liable unless (1) the alleged act of the Commonwealth party is a negligent act for which damages would be recoverable under the common law or by statute, pursuant to 42 Pa. C. S. § 8522(a); and (2) the act of the Commonwealth party falls within one of the exceptions listed in 42 Pa. C. S. § 8522(b). *Brown v. Blaine*, 833 A.2d 1166, 1173 (Pa. Commw. Ct. 2003). The exceptions to sovereign immunity must be strictly construed and narrowly interpreted. *Bufford v. Pennsylvania Department of Transportation*, 670 A.2d 751, 753 (Pa. Commw. Ct. 1996).

First, Appellant failed to demonstrate successfully the Appellees committed a negligent act. In order to establish a cause of action for negligence, a plaintiff must prove the following elements: (1) a defendant's duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages. *Talarico v. Bonham*, 650 A.2d 1192, 1194 (Pa. Commw. Ct. 1994). In his Civil Complaint, Appellant asserts generalized allegations of negligence, including "The state and its employees owe inmates a duty of care and this duty was breached" (*see Appellant's Civil Complaint, paragraphs 83 and 101*), and "State employees owed Martin [Appellant] a duty not to be negligent" (*see id., paragraph 88*). However, Appellant has failed to demonstrate a specific duty, supported by relevant statutory and case law, which the Appellees owed to Appellant. Moreover, Appellant has failed to demonstrate a breach of any specific duty. *See Grossman v. Barke*, 868 A.2d 561, 566 (Pa. Super. 2005) (in any negligence action, establishing a breach of a legal duty is a condition precedent to a finding of negligence). In fact, contained in Appellant's Civil Complaint are averments that, during the three (3) day water outage SCI Albion officials provided numerous portable toilets and water coolers for the inmates to use. As Appellant has failed to demonstrate successfully a negligent act, i.e. a specific duty and a breach of that duty, Appellant has not overcome successfully the application of sovereign immunity to Appellees.

Assuming *arguendo* Appellant demonstrated successfully a negligent act by the Appellees, Appellant's allegations do not fall within one of the exceptions to sovereign immunity. Pursuant to 42 Pa. C. S. §8522(b), the exceptions to sovereign immunity include: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways or sidewalks; (5) potholes or other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. *42 Pa. C. S. §8522(b)*. Appellant's allegation that a leak in SCI Albion's water tower resulting in no running water at the prison for several days, which Appellant alleges was caused by the "negligence" of the Appellees, does not fit into one of the above-referenced exceptions to sovereign immunity, and Appellant fails to argue any of the exceptions to sovereign immunity are applicable. Therefore, as Appellant's claims do not fall within one of the exceptions to sovereign immunity pursuant to 42 Pa. C. S. §8522(b), Appellees are entitled properly to sovereign immunity in these circumstances pursuant to 1 Pa. C. S. §2310.

C. Whether this Trial Court concluded properly that Appellant failed to argue

successfully both the objective and subjective prongs for an Eighth Amendment claim of cruel and unusual punishment.[3]

A prison official violates the Eighth Amendment only when two requirements are met: first, the deprivation alleged must be, objectively, "sufficiently serious," i.e. a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities;" and second, a prison official must have a "sufficiently culpable state of mind," i.e. one of "deliberate indifference" to inmate health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." *Id. (quoting Whitley v. Albers*, 475 U.S. 312, 319 (1986)). A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id*.

First, Appellant failed to establish the objective prong for an Eighth Amendment claim for "cruel and unusual punishment," i.e. that Appellant himself was deprived "the minimal civilized measure of life's necessities." The leak in SCI Albion's water tower, which caused a three (3) day water outage at SCI Albion, was not felt solely by Appellant; rather, every inmate was affected by the water outage, as well as all of SCI Albion's administration and staff. Courts have held that a brief interruption in running water by itself does not so deprive an inmate of "the minimal civilized measure of life's necessities" that it constitutes a violation of the Eighth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also Banks v. Mozingo*, 423 F. App'x 123, 127-28 (3rd. Cir. 2011). Moreover, Appellant indicates, both in his Civil Complaint and by his attached Exhibits C, E and G, which are the official responses to Appellant's grievances, portable toilets and water coolers were provided for use by the inmates and staff during the three (3) day water outage. This clearly demonstrates SCI Albion officials did not disregard an "excessive risk to health and safety" of the inmates. As Appellant has failed to demonstrate successfully that he himself was deprived solely of "minimal civilized measure of life's necessities," Appellant has failed to establish the objective prong for an Eighth Amendment claim for cruel and unusual punishment.

Furthermore, Appellant failed to establish the subjective prong for an Eighth Amendment claim for "cruel and unusual punishment," i.e. that the Appellees demonstrated "deliberate indifference" to Appellant's health or safety. As stated above, Appellant asserts allegations of negligence against the Appellees in his Civil Complaint; however, Appellant's allegations of negligence do not satisfy the standard required for an Eighth Amendment claim of "cruel and unusual punishment." *See Farmer*, 511 U.S. at 839-841 (**subjective recklessness**, as used in the criminal law, is a familiar and workable standard that is consistent with the "Cruel and Unusual Punishments Clause," and has been adopted as the test for "deliberate indifference" under the Eighth Amendment). Moreover, Appellant indicates, both in his Civil Complaint and by the attached Exhibits C, E and G, which are the official responses to Appellant's grievances, SCI Albion officials provided portable toilets and water coolers

[3] These issues are derived from Appellant's issues numbered seven and eight of his *pro se* Concise Statement of Matters Complained of on Appeal, wherein Appellant argues this Trial Court erred in concluding Appellant failed to establish successfully an Eighth Amendment claim for "cruel and unusual punishment."

for inmate use during the three (3) day water outage, demonstrating reasonable conduct by SCI Albion officials during an unfortunate event. *See id* at 845 (a prison official's duty under the Eighth Amendment is to ensure "reasonable safety;" thus, prison officials who act reasonably cannot be found liable under the "Cruel and Unusual Punishments Clause.") As Appellant failed to demonstrate successfully "deliberate indifference" on the part of the Appellees or any other SCI Albion official, Appellant failed to establish the subjective prong for an Eighth Amendment claim for cruel and unusual punishment.

D. Whether this Trial Court concluded properly that Appellant had failed to argue successfully personal involvement by any of the Appellees to substantiate a civil rights violation claim.[4]

To be liable in a civil rights violation action, a defendant must have personal involvement in the alleged wrongs. *See Sutton v. Rasheed*, 323 F.3d 236, 249 (3rd Cir. 2003). Personal involvement can be shown through allegations of personal direction or actual knowledge or acquiescence, but the allegations must be made with appropriate particularity. *See Bush v. Veach*, 1 A.3d 981, 986 (Pa. Commw. Ct. 2010) (*citing Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988)).

In his Civil Complaint, Appellant alleged: (1) Appellee Giroux refused to fix a cracked valve in the water tower and denied Appellant's grievance; (2) Appellee Maloney disregarded inmates' safety by telling them to "lock up in their cells" and refusing to let inmates use the portable toilets; (3) Appellee Kosinski denied Appellant's grievance; and (4) Appellee Varner denied Appellant's grievance. First, Appellees Giroux, Kosinski and Varner's responses to Appellant's grievances do not demonstrate actual knowledge. *See id* at 986. Second, Appellee Maloney's alleged actions have no connection to the leak in SCI Albion's water tower and do not demonstrate personal responsibility with the three (3) day water outage. Finally, although Appellant does allege Appellee Giroux had knowledge of the leak in SCI Albion's water tower and allegedly refused to repair the leak, Appellant has failed to allege Appellee Giroux's knowledge of the leak with appropriate particularity, thus failing to demonstrate successfully Appellee Giroux's personal involvement. *See id*. As Appellant failed to demonstrate successfully the Appellees' personal involvement with the three (3) day water outage, Appellant failed to substantiate his civil rights violation claim.

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Commonwealth Court deny said appeal.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

EMIRE ROSENDARY

CRIMINAL LAW / SENTENCES / DISCRETION

A defendant who claims that his sentence is excessive does not challenge its legality; rather, he challenges its discretionary aspects. Sentencing is a matter vested within the discretion of the court and will not be disturbed absent an abuse of that discretion. A sentence must either exceed statutory parameters or be manifestly excessive in order to constitute an abuse of discretion.

CRIMINAL LAW / SENTENCES / REVIEW

Before the Pennsylvania Superior Court will review the merits of a challenge to the discretionary aspects of a sentence, an appellant must meet a four-pronged analysis. Prior to reaching the merits of a discretionary sentencing issue, it must be determined: (1) whether appellant has filed a timely notice of appeal, pursuant to Pa. R. A. P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, pursuant to Pa. R. Crim. P. 720; (3) whether appellant's brief has a fatal defect, pursuant to Pa. R. A. P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, pursuant to 42 Pa. C. S. § 9781(b).

CRIMINAL LAW / SENTENCES / REVIEW

The determination of whether a particular issue constitutes a "substantial question" can only be evaluated on a case by case basis. It is appropriate to allow an appeal where an appellant advances a colorable argument that a trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process.

CRIMINAL LAW / SENTENCES / MITIGATING FACTORS

An allegation that the sentencing court failed to consider certain mitigating factors generally does not necessarily raise a substantial question.

CRIMINAL LAW / SENTENCES / MITIGATING FACTORS

When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of a defendant. In particular, the court should refer to a defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation. Where the sentencing court had the benefit of a presentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding a defendant's character and weighed those considerations along with mitigating statutory factors.

CRIMINAL LAW / SENTENCES / MITIGATING FACTORS

A trial court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of a defendant.

CRIMINAL LAW / SENTENCES / GUIDELINES

An appellant states a substantial question justifying appellate review of the discretionary aspects of his sentence when he alleges that a sentencing court failed to make a legally sufficient contemporaneous statement on the record when imposing a sentence outside the sentencing guidelines.

CRIMINAL LAW / SENTENCES / CONSECUTIVE AND CONCURRENT SENTENCES

A trial court has discretion to impose sentences consecutively or concurrently and, ordinarily, a challenge to this exercise of discretion does not raise a substantial question, except for the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 36 of 2014

Appearances: William J. Hathaway, Esq., for the Appellant
Paul S. Sellers, Esq., for the Commonwealth of Pennsylvania, Appellee

OPINION

Domitrovich, J. December 1, 2016

The instant matter is currently before the Pennsylvania Superior Court on the appeal[1] of Emire Rosendary (hereafter referred to as "Appellant") from the Sentencing Order entered on May 13, 2015 by Judge Shad Connelly, wherein Judge Connelly imposed an aggregate sentence of seven and three-quarters (7 ¾) years to nineteen (19) years' incarceration. Appellant raises two (2) issues on appeal: (1) As to the alleged error regarding affording due weight and deference to mitigating factors, this Trial Court finds Judge Shad Connelly considered properly the factors enumerated in 42 Pa. C. S. §9721 and relevant case law and imposed sentences well within standard range. (2) As to the alleged error regarding the imposition of consecutive sentences without a "legally sufficient contemporaneous statement," this Trial Court finds the sentences imposed by Judge Connelly, including the sentences at Count One and Two imposed consecutively, were not outside of the sentencing guidelines; therefore, a "legally sufficient contemporaneous statement" on the record justifying those sentences was not required.

Factual and Procedural History

On November 18, 2014, Appellant entered a Guilty Plea to the following crimes: Count One – Conspiracy/Robbery, in violation of 18 Pa. C. S. §903; Count Two – Robbery, in violation of 18 Pa. C. S. §3701(a)(1)(ii); Count Three – Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(1); Count Four – Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(1); Count Five – Theft by Unlawful Taking, in violation of 18 Pa. C. S. §3921(a); Count Six – Receiving Stolen Property, in violation of 18 Pa. C. S. §3925(a), Count Seven – Recklessly Endangering Another Person, in violation of 18 Pa. C. S. §2705; Count Eight – Recklessly Endangering Another Person, in violation of 18 Pa. C. S. §2705; Count Nine – Firearms not to be Carried without a License, in violation of 18 Pa. C. S. §6106(a)(1); Count Ten – Possessing Instruments of Crime, in violation of 18 Pa. C. S. §907(a); Count Eleven – Terroristic Threats, in violation of 18 Pa. C. S. §2706(a)(1); and Count Twelve – Terroristic Threats, in violation of 18 Pa. C. S. §2706(a)(1). On February 6, 2015, Appellant, by and

[1] Appellant's direct appellate rights were reinstated *nunc pro tunc* when this Trial Court granted Appellant's first PCRA Petition.

through his counsel, Anthony H. Rodriques, Esq., filed a Presentence Motion to Withdraw Guilty Plea, which was granted by Judge Connelly on February 12, 2015.

Following a Criminal Jury Trial held on March 24, 2015 and March 25, 2015, Appellant was found guilty as to Counts One, Two, Ten, Eleven and Twelve.[2] On May 13, 2015, Judge Connelly sentenced Appellant as follows:

- Count One: thirty-six (36) months to seventy-two (72) months' incarceration;
- Count Two: forty-two (42) months to eighty-four (84) months' incarceration, consecutive to Count One;
- Count Ten: three (3) months to twenty-four (24) months' incarceration, concurrent to Count Two;
- Count Eleven: six (6) months to twenty-four (24) months' incarceration, concurrent to Count Ten; and
- Count Twelve: six (6) months to twenty-four (24) months' incarceration, concurrent to County Ten.

On May 26, 2015, Appellant, by and through his counsel, Anthony H. Rodriques, Esq., filed a Motion for Modification and Reduction of Sentence. On May 29, 2015, Judge Connelly denied Appellant's Motion for Modification and Reduction of Sentence. Neither Appellant nor his counsel filed a direct appeal to the Pennsylvania Superior Court.

Appellant filed his first *pro se* PCRA Petition on May 11, 2016, requesting reinstatement of his direct appellate rights *nunc pro tunc*. By Order dated May 19, 2016, this Trial Court appointed William J. Hathaway, Esq., as Appellant's PCRA counsel and directed Attorney Hathaway to supplement or amend Appellant's *pro se* PCRA Petition within thirty (30) days. On June 15, 2016, Attorney Hathaway filed a Supplement to Motion for Post-Conviction Collateral Relief. By Order dated June 15, 2016, this Trial Court directed the Commonwealth to respond to Appellant's Supplement to Motion for Post-Conviction Collateral Relief within thirty (30) days. On July 13, 2016, Assistant District Attorney Matthew D. Cullen filed the Commonwealth's Response to Supplement to Motion for Post-Conviction Collateral Relief. By Order dated July 22, 2016, this Trial Court scheduled an Evidentiary Hearing for August 17, 2016, but continued said Hearing to August 18, 2016. At the August 18, 2016 Evidentiary Hearing, this Trial Court heard testimony from Anthony H. Rodriques, Esq.; Appellant Emire Rosendary; and Appellant's father, Emire Rosendary, Sr., and heard oral arguments from Attorney Hathaway and Assistant District Attorney Paul S. Sellers, who appeared in place of Assistant District Attorney Cullen. Following the Evidentiary Hearing and by Opinion and Order dated September 6, 2016, this Trial Court granted Appellant's first PCRA Petition, reinstated Appellant's appellate rights *nunc pro tunc* and directed Appellant to file a Notice of Appeal within thirty (30) days from the date of said Order.

Appellant, by and through Attorney Hathaway, filed a Notice of Appeal to the Pennsylvania Superior Court on October 6, 2016. This Trial Court filed its 1925(b) Order on October 6, 2016. Appellant filed his Concise Statement of Matters Complained of on Appeal on October 26, 2016.

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[2] The jury verdict slips for Counts Three, Four, Five, Six, Seven and Eight indicate "Merged by Court – No Verdict" and each verdict slip for these counts was signed by Judge Shad Connelly on March 25, 2015. Furthermore, the verdict slip for Count Nine indicates "Judgment of Acquittal" and was signed by Judge Connelly on March 25, 2015.

Rationale and Conclusions

1. Judge Connelly, after considering properly the factors enumerated in 42 Pa. C. S. §9721 and relevant case law, imposed standard range sentences; therefore, the Sentencing Order dated May 13, 2015 was proper.

A defendant who claims that his sentence is excessive does not challenge its legality; rather, he challenges its discretionary aspects. *See Commonwealth v. Pennington*, 751 A.2d 212, 215 (Pa. Super. 2000). Sentencing is a matter vested within the discretion of the court and will not be disturbed absent an abuse of that discretion. *Commonwealth v. Evans*, 901 A.2d 528, 533 (Pa. Super. 2006). A sentence must either exceed statutory parameters or be manifestly excessive in order to constitute an abuse of discretion. *Commonwealth v. Anderson*, 552 A.2d 1064, 1072 (Pa. Super. 1988).

Before the Pennsylvania Superior Court will review the merits of a challenge to the discretionary aspects of a sentence, an appellant must meet a four-pronged analysis. *See id*. In *Commonwealth v. Hyland*, 875 A.2d 1175 (Pa. Super. 2005), the Pennsylvania Superior Court stated:

> Challenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. Prior to reaching the merits of a discretionary sentencing issue, it must be determined: (1) **whether appellant has filed a timely notice of appeal**, pursuant to Pa. R. A. P. 902 and 903; (2) **whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence**, pursuant to Pa. R. Crim. P. 720; (3) **whether appellant's brief has a fatal defect**, pursuant to Pa. R. A. P. 2119(f); and (4) **whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code**, pursuant to 42 Pa. C. S. § 9781(b).

Id at 1183 [emphasis added].

After this Trial Court granted Appellant's first PCRA Petition and reinstated Appellant's appellate rights *nunc pro tunc*, Appellant filed a timely Notice of Appeal *Nunc Pro Tunc*; therefore, the first prong has been satisfied. Furthermore, Appellant, by and through his then-counsel, Anthony H. Rodriques, Esq., did file a timely Post-Sentence Motion for Modification and Reduction of Sentence, thereby properly preserving the issues presented on appeal and satisfying the second prong.[3] Finally, the issue of whether there is a fatal defect is Appellant's brief, pursuant to Pa. R. A. P. 2119(f), shall be determined by the Pennsylvania Superior Court, as this Trial Court does not have the benefit of Appellant's brief at this time.

However, Appellant has failed to demonstrate a substantial question regarding the sentence he is appealing from. The determination of whether a particular issue constitutes a "substantial question" can only be evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa. Super. 1988). It is appropriate to allow an appeal where an appellant advances a colorable argument that a trial judge's actions were: (1) inconsistent

[3] A review of Appellant's Post-Sentence Motion for Modification and Reduction of Sentence indicates Appellant's Post-Sentence Motion was filed on May 26, 2015, apparently three (3) days after the required ten (10) day time period for filing Post-Sentence Motions expired. However, May 23, 2015, when the ten (10) day time period expired, fell on a Saturday. Furthermore, the following Monday, May 25, 2015, was Memorial Day, a federal holiday wherein the Erie County Courthouse was closed. Therefore, the final business day to file Appellant's Post-Sentence Motion was May 26, 2015. *See 1 Pa. C. S. §1908*.

with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process. *Commonwealth v. Losch*, 535 A.2d 115, 119-120 (Pa. Super. 1987).

In his Concise Statement of Matters Complained of on Appeal, Appellant argues "the Court [i.e. Judge Connelly] failed to afford due weight and deference to the mitigating factors enumerated in that pleading [i.e. the Post-Sentence Motion for Modification and Reduction of Sentence]." An allegation that the sentencing court failed to consider certain mitigating factors generally does not necessarily raise a substantial question. *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa. Super. 2010). In *Commonwealth v. Griffin*, 804 A.2d 1 (Pa. Super. 2002), the Pennsylvania Superior Court held:

> When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of a defendant. In particular, the court should refer to a defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation. Where the sentencing court had the benefit of a presentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding a defendant's character and weighed those considerations along with mitigating statutory factors.

See id at 10. Further, where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code. *Moury* at 171.

At the May 13, 2015 Sentencing Hearing, Judge Connelly had the benefit of a thorough Pre-Sentence Investigation ("PSI") Report, prepared by James M. Bowers, Erie County Probation Officer, which details specifically the offenses charged, Appellant's treatment information, Appellant's social history and any additional comments relevant to the instant criminal case. Furthermore, at the May 13 Sentencing Hearing, Judge Connelly stated the following on the record:

> The Court: All right. The Court has considered the Pennsylvania Sentencing Code, the Presentence report and the Pennsylvania guidelines on sentencing. The Court has also considered the statements of Defense counsel, the defendant [Appellant], and the attorney for the Commonwealth. The Court has considered Mr. Rosendary's age, his background, his character and his rehabilitative needs, the nature, circumstances and the seriousness of the offense, the protection of the community, the impact the offense had upon the victims. The Court would acknowledge the defendant's young age. The Court also notes that the defendant's [Appellant's] mother and father have testified on behalf of the defendant [Appellant].

See Notes of Testimony, Sentencing, May 13, 2015, page 19, lines 4-17. This adheres to the requirements enumerated in 42 Pa. C. S. §9721, which states a trial court "shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of a defendant." *See 42 Pa. C. S. §9721(b); see also Griffin*, 804 A.2d at 10. Therefore, based upon review of the PSI and the transcript of the May 13, 2015 Sentencing Hearing, Judge Connelly clearly

considered all factors, aggravating and mitigating alike, in fashioning an appropriate sentence.

Finally, Judge Connelly's sentences were each well within the standard range of the Pennsylvania Sentencing Guidelines. First, according to Page Five of the PSI, the "Deadly Weapon Enhancement," *204 Pa. Code §303.10(a)*, was applied to Counts One, Two, Eleven and Twelve, as Appellant used a firearm during the commission of the crimes charged. Furthermore, at Count One, Appellant was sentenced to thirty-six (36) months to seventy-two (72) months' incarceration. The standard range, according to the Guideline Sentencing Form and applying the "Deadly Weapon Enhancement," is thirty (30) months to forty-two (42) months; therefore, Appellant was sentenced in the middle of the standard range. At Count Two, Appellant was sentenced to forty-two (42) months to eighty-four (84) months' incarceration consecutive to Count One. The standard range, according to the Guideline Sentencing Form and applying the "Deadly Weapon Enhancement," is forty (40) months to fifty-four (54) months' incarceration; therefore, Appellant was sentenced at the lower end of the standard range. At Count Ten, Appellant was sentenced to three (3) months to twenty-four (24) months' incarceration concurrent to Count Two. The standard range, according to the Guideline Sentencing Form and applying the "Basic Sentencing Matrix," is "Restorative Sanctions" to three (3) months' incarceration; therefore, Appellant was sentenced at the higher end of the standard range.[4] Finally, at Counts Eleven and Twelve, Appellant was sentenced to six (6) months to twenty-four (24) months' incarceration on each count, both of which are concurrent to Count Ten. The standard range for each count, according to the Guideline Sentencing Form and applying the "Deadly Weapon Enhancement," is six (6) months to seven (7) months; therefore, Appellant was sentenced at the lower end of the standard range on each count. Therefore, as all of Appellant's sentences were within the standard ranges, said sentences are deemed appropriate under the Sentencing Code. *See Moury*, 992 A.2d at 171.

2. The sentences imposed by Judge Connelly, including the sentences at Count One and Two imposed consecutively, were not outside the sentencing guidelines; therefore, Judge Connelly was not required to make a "legally sufficient contemporaneous statement" on the record justifying those sentences.

As stated above, before the Pennsylvania Superior Court will review the merits of a challenge to the discretionary aspects of a sentence, an appellant must meet a four-pronged analysis *Hyland*, 875 A.2d at 1183. This Trial Court has already concluded Appellant has met the first, second and third prongs for review by the Pennsylvania Superior Court.

However, Appellant again had failed to raise a substantial question that the sentence Appellant appeals from is not appropriate under the Sentencing Code. *See id*. An appellant states a substantial question justifying appellate review of the discretionary aspects of his sentence when he alleges that a sentencing court failed to make a legally sufficient contemporaneous statement on the record when imposing a sentence **outside the sentencing guidelines**. *Commonwealth v. Wagner*, 702 A.2d 1084, 1086 (Pa. Super. 1997) [emphasis added]. A trial court has discretion to impose sentences consecutively or concurrently and, ordinarily, a challenge to this exercise of discretion does not raise a substantial question,

[4] The "Deadly Weapon Enhancement" was not applied to Count Ten; therefore, Appellant's sentence was imposed according to the Pennsylvania Basic Sentencing Matrix, *204 Pa. Code §303.16*.

except for the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. *Commonwealth v. Moury*, 992 A.2d 162, 171-172 (Pa. Super. 2010).

In his Concise Statement of Matters Complained of on Appeal, Appellant argues "the Court [i.e. Judge Connelly] abused its discretion and committed legal error in refusing to modify the sentencing scheme… to concurrent sentences in that the Court erred in imposing consecutive sentences without a legally sufficient contemporaneous statement in support of the imposition of consecutive sentences." However, a legally sufficient contemporaneous statement is required only if Judge Connelly imposed sentences outside the sentencing guidelines. As discussed thoroughly above, based upon the Pre-Sentence Investigation ("PSI") Report and the Guideline Sentencing Forms, applying the "Deadly Weapon Enhancement" as necessary, Appellant's sentences imposed by Judge Connelly at Counts One, Two, Ten, Eleven and Twelve were all within the standard range. Moreover, none of the sentences went into or beyond the aggravated or mitigated range. The fact that Judge Connelly imposed consecutive sentences at Counts One and Two, yet imposed concurrent sentences at Counts Ten, Eleven and Twelve, does not make Appellant's aggregate sentence unduly harsh and excessive. *See id* at 171 (a trial court is not required to impose the "minimum possible" confinement). Therefore, as the sentences imposed by Judge Connelly were not outside of the sentencing guidelines, no legally sufficient contemporaneous statement was necessary to justify those sentences, and the imposition of consecutive sentences at Counts One and Two was properly within Judge Connelly's discretion.

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm the Sentencing Order entered by Judge Shad Connelly on May 13, 2015.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID H. ELLER

CRIMINAL PROCEDURE / SUPPRESSION MOTIONS

Once a motion to suppress is filed, it is the Commonwealth's burden to prove by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE

The taking of a blood sample from a motorist suspected of DUI is a search governed by the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE

The search of a person's blood may be obtained by the person's consent, provided that the consent is voluntary and there is a total absence of duress and coercion, express or implied.

DRIVING UNDER THE INFLUENCE / CONSTITUTIONAL LAW / 75 PA.C.S.A. § 3804(c)

The criminal penalties contained at 75 Pa.C.S.A. §3804 (c) for refusing to submit to a blood test are not applicable to Pennsylvania Motorists, even though they remain a part of the statute.

DRIVING UNDER THE INFLUENCE / CONSTITUTIONAL LAW / 75 PA.C.S.A. § 1547(b)(2)

The holding in *Birchfield*, renders the duties of a police officer, prescribed by 75 Pa.C.S.A. §1547 (b)(2)(ii), inapplicable as it pertains to a request of a motorist to provide a blood sample as part of a DUI investigation.

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE / STATUTES / TECHNICAL DEFENSES / DURESS / COERCION

A motorist's presumptive knowledge of the Motor Vehicle Code provision imposing criminal penalties for refusing to submit to a blood test, do not rise to the level of duress and/or coercion when the motorist is requested to give a blood sample, as the motorist should also be expected to know the current state of case law invalidating that statutory provision.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 3669 of 2016

Appearances: Grant T. Miller, Esq., for the Commonwealth
Damon C. Hopkins, Esq., for the Defendant

OPINION

Brabender, J., July 7, 2017

The matter is before the Court on the Defendant's Omnibus Pretrial Motion for Relief. Following a hearing, and upon consideration of the parties' briefs, the Motion shall be denied.

FINDINGS OF FACT

1. The Defendant, David Eller, was arrested on December 19, 2016 and the Commonwealth subsequently charged him with Driving Under the Influence (highest rate of alcohol, BAC

0.16% or greater), first offense, a misdemeanor. [1]

2. On February 1, 2017, Defendant filed an Omnibus Pretrial Motion to suppress the blood that was taken from him at the hospital and all test results derived from the blood draw.

3. Within the suppression motion, Defendant claimed his consent to the blood draw was improperly coerced and invalid for two reasons.

a. First, Defendant contends any consent was not properly informed and was improperly coerced because the officer failed to inform him, pursuant to 75 Pa.C.S.A. §1547(b)(2)(ii), that if he refused to submit to chemical testing, then upon conviction or plea for violating 75 PaC.S.A. §3802(a)(l) (concerning DUI, general impairment), he would be subject to the (enhanced criminal) penalties at 75 Pa.C.S.A. §3804(c). Defendant asserts the failure to inform him of the substance of §1547(b)(2) left open the "possibilities of rampant speculation" about the consequences of refusing the test, which worked as a form of improper coercion of consent.

b. Second, Defendant asserts he had presumptive knowledge of the enhanced penalties at 75 Pa.C.S.A. §3804(c), and this caused unconstitutional coercion of his consent to the blood draw. Despite Defendant's acknowledgment *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) and *Commonwealth v. Evans*, 153 A.3d 323 (Pa. Super. 2016) rendered unconstitutional the enhanced penalties provision at 75 Pa.C.S.A. §3804(c), Defendant asserts he had presumptive knowledge of §3804(c) because the Pennsylvania legislature has failed to repeal or amend it subsequent to *Birchfield*.

4. A hearing on the motion was held on March 15, 2017. At the suppression hearing, the Commonwealth presented the testimony of Officer Sebulak. Admitted in evidence as Commonwealth Ex. A was PennDOT form DL-26B (6-16) containing the warnings the officer read verbatim to Defendant.

5. The testimony presented at the suppression hearing established the following:

On December 19, 2016, Millcreek Township Police Officer Scott Sebulak, who has extensive training and experience in investigating DUI cases, was dispatched to Country Fair at the corner of West 26th Street and Zuck Road in Erie, Pennsylvania. The officer had received the report a possibly intoxicated, older white male driver, was sitting in an older Chevy pick-up truck in the parking lot. Upon arrival, Officer Sebulak observed a male stumble and walk toward the vehicle described in the dispatch, and enter the vehicle on the driver's side. After Defendant entered the vehicle, the officer made contact.

Defendant agreed to speak to the officer. The officer informed Defendant of the reason for the dispatch. The officer asked Defendant where he had come from, and where he was headed to. Defendant told the officer he was headed home. While answering the officer's questions in the parking lot, Defendant had some difficulty finding his words and the odor of alcohol emanated from his breath. Defendant admitted he had consumed alcohol and had about three or four drinks; he had driven himself to the parking lot; and was the sole occupant. Defendant estimated he arrived at Country Fair approximately 10 minutes before the officer arrived.

The officer asked Defendant to recite the alphabet, which Defendant was successful at until near the end of the alphabet. Defendant offered to repeat the alphabet; however, the officer advised this was unnecessary. Next, the officer asked Defendant to exit the vehicle

[1] 75 Pa.C.S.A. §3802(c).

to perform field sobriety tests. Defendant exited the vehicle. Defendant demonstrated some balance problems. The officer asked Defendant to perform the walk and turn test and the heel to toe test, both of which the Defendant refused to perform. The officer arrested Defendant for DUI and placed him inside the patrol vehicle.

The officer asked Defendant for the keys to his vehicle, to which the Defendant responded by informing the officer he could not arrest Defendant for DUI if the officer could not locate the keys. The keys were located in Defendant's center console and the truck was secured. During the transport to the hospital, Defendant asked the officer questions including the reason Defendant was stopped; whether Defendant had fallen asleep behind the wheel; and whether the officer was Millcreek Police or Erie Police.

Upon arrival at the hospital, the officer read to Defendant verbatim the warnings on the PennDOT form DL-26B which outlined civil penalties but mentioned no criminal penalties for refusal of a blood test. No other warnings were given. Defendant did not sign the form, but consented to the blood draw. The officer made the notation, "Refused to Sign" on the form. After hospital paperwork was completed, Defendant and the officer went to the hospital lab where Defendant's blood was drawn.

On cross examination, the officer testified warnings he read omitted the statutory language at 75 Pa.C.S.A. §1547(b)(2)(ii) concerning the criminal penalties at 75 Pa.C.S.A. §3804(c). The officer had been previously advised to only read the warnings on the form. The officer did not obtain a warrant for the blood draw.

On redirect examination, the officer testified to the protocol following the Unites States Supreme Court decision in *Birchfield*. As of June, 2016, the PennDOT form DL-26B was revised. Post-*Birchfield*, the procedure has been to only read the warnings on the revised PennDOT form. *See Notes of Testimony; Commonwealth Ex. A.*

6. The hearing on the suppression motion was continued for the submission of briefs. Also, Defendant submitted supplemental correspondence with an attachment on April 17, 2017.

7. Within Defendant's brief, the Defendant explained:

a. The Pennsylvania legislature's failure to remove or modify the enhanced penalties provision for blood test refusals at §3804(c), despite the holdings of *Birchfield* and *Evans*, leaves Pennsylvania drivers to expect they face increased criminal penalties for refusing an officer's request for a blood test. By virtue of a Pennsylvania driver's presumed knowledge of the Motor Vehicle Code, including the enhanced penalties provision at 75 Pa.C.S.A. §3804(c), any consent for a DUl blood test is invalid because there cannot be a 'total absence of duress and coercion, express or implied' while §3804(c) remains in its present form.

b. The Commonwealth's "solution" to the holdings of *Birchfield* and *Evans*, has been to instruct officers to omit from their warnings the substance of §1547(b)(2)(ii) regarding the criminal penalties at 75 Pa.C.S.A. §3804(c). Defendant asserts this approach is deficient because it fails to remove the coercion caused by the mere existence of the penalties provision.

c. In Defendant's view, while 75 Pa.C.S.A. §3804(c) remains in its present form, for consent to chemical testing to be valid, the police must expressly inform a driver that he/she would not face any criminal penalties for refusing a blood test. Absent this, the threat of the criminal penalties at §3804(c) renders any consent to a blood draw invalid as coerced and involuntary.

8. Within the Commonwealth's Brief, the Commonwealth explained:

a. PennDOT form DL-26B (6-16) was amended post-*Birchfield* to eliminate reference to criminal penalties for refusal to submit to a blood test.

b. The factual scenario in *Commonwealth v. Evans, supra*, is distinguishable. In *Evans*, the Superior Court determined the police officer's advisory to Appellant was defective because the police officer advised the Appellant of potential criminal penalties upon refusal to a chemical test. However, in the instant case, the police officer made no mention of any criminal penalties prior to obtaining Defendant's consent to the blood draw.

c. Defendant expressed no qualms about refusing the officer's request to perform Standard Field Sobriety Tests (SFSTs). Taking this fact into consideration under the totality of the circumstances, a reasonable person would be able to determine Defendant's consent to chemical testing of his blood was the product of an essentially free and unconstrained choice.

d. Regarding Defendant's claim his presumed knowledge of the law, specifically 75 Pa.C.S.A. §3804(c), caused unconstitutional coercion of Defendant's consent to the blood draw, it follows Defendant also had presumed knowledge 75 Pa.C.S.A. §1547(b)(2)(ii) was deemed unconstitutional and Defendant faced no criminal penalties for refusing to submit to chemical testing of his blood. Defendant's presumed awareness he faced no criminal penalties for refusal to submit to a blood draw invalidates any argument Defendant's consent was coerced on that basis.

e. Defendant's proposal that, while the current version of §3804(c) remains in place, an officer must inform the driver he/she will not face any criminal penalties for refusing a blood test is fraught with problems. This would require an officer to inform a driver about the unconstitutional nature of a provision, then explain what the statute should, but does not yet provide. The proposal would not be feasible in most situations.

CONCLUSIONS OF LAW

1. "Once a motion to suppress has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights." *Commonwealth v. Wallace*, 42 A.3d 1040, 1047-1048 (pa. 2012). *See also, Pa.R. Crim.P. 581 (H)*.

2. "The Fourth Amendment to the [United States] Constitution and Article I, Section 8 of [the Pennsylvania] Constitution protect citizens from unreasonable searches and seizures." *Commonwealth v. Evans*, 153 A.3d 323, 327 (pa. Super. 2016), citing *Commonwealth v. McAdoo*, 46 A.3d 781, 784 (Pa. Super. 2012).

3. The taking of a blood sample from a motorist suspected of DUI is a search governed by the Fourth Amendment to the United States Constitution, *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184-2185 (2016); *Commonwealth v. Kohl*, 615 A.2d 308, 315 (Pa. 1992), and Article I, Section 8 of the Pennsylvania Constitution, *Commonwealth v. Kohl*, 615 A.2d at 315.

4. The search of a person's blood may be obtained by "seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Birchfield*, 136 S.Ct. at 2184. Also, the search of a person's blood may reasonably occur pursuant to the person's consent, provided the consent is voluntary, as "determined from the totality of

all the circumstances." *Birchfield*, 136 S.Ct. at 2186, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

5. Our courts have recognized:

> In determining the validity of a given consent, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice - not the result of duress or coercion, express or implied or a will overborne - under the totality of the circumstances. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Evans, 153 A.3d at 327, citing *Commonwealth v. Smith*, 77 A.3d 562, 573 (pa. 2013)(internal citations, quotations, and corrections omitted).

6. Implied consent laws which "impose criminal penalties on the refusal to submit to [a blood] test" are unduly coercive and unconstitutional. *Birchfield*, 136 S.Ct. at 2186.

7. 75 Pa.C.S.A. §3804(c), the enhanced penalties provision of the Vehicle Code referenced by Pennsylvania's implied consent statute, 75 Pa.C.S.A. §1547, is a provision which "undoubtedly 'impose[s] criminal penalties on the refusal to submit to [a blood] test.'" *Commonwealth v. Evans*, 153 A.3d at 331, citing *Birchfield*, 136 S.Ct. at 2185-2186.

8. Thus, under controlling case law, motorists in Pennsylvania are not subject to the criminal penalties at 75 Pa.C.S.A §3804(c) for refusing to submit to chemical testing. See *Birchfield*, 136 S.Ct. at 2185-2186; *Commonwealth v. Evans*, 153 A.3d at 331; *Commonwealth v. Giron*, 155 A.3d 635, 640 (Pa. Super. 2017).

9. Since motorists in Pennsylvania are not subject to the criminal penalties at 75 Pa.C.S.A §3804(c) for refusing to submit to chemical testing, Defendant's assertion Officer Sebulak improperly failed to inform Defendant of the substance of 75 Pa.C.S.A. §1547(b)(2)(ii), and thus his consent was not properly informed and was coerced, must fail. Had Officer Sebulak informed Defendant of the substance of §1547(b)(2)(ii), Defendant would have been notified he faced the criminal penalties at §3804(c) upon conviction or plea for violating §3802(a)(1) if he refused to submit to chemical testing. This instruction would have been in direct contravention of the holdings of *Birchfield*.

10. Defendant's argument his consent to the blood draw was coerced by his presumptive knowledge of the enhanced criminal penalties at 75 Pa.C.S.A. §3804(c) is not persuasive. The logical extension of this argument is Defendant likewise had presumptive knowledge of the holdings of *Birchfield*, decided on June 23, 2016. Defendant's presumptive awareness he faced no criminal penalties upon refusal to submit to chemical testing of his blood invalidates any argument his consent was coerced on that basis. There is no evidence Defendant was caused any confusion or coerced by the warnings as read to him by the officer. Further, to render ineffective *Birchfield* and its progeny until the Pennsylvania legislature takes action in this regard would unduly constrain the judicial system.

11. Under the totality of the circumstances, the Commonwealth met its burden in establishing Defendant's consent to the chemical testing of his blood was valid and the product of an essentially free and unconstrained choice. A reasonable person would have understood the warnings read by the officer did not mention or threaten criminal penalties for failure to consent to the test and were not coercive in that respect. The evidence established the officer did not pressure Defendant or act in an overbearing or threatening way toward him. The record reflects an exchange occurred between the officer and Defendant during which Defendant responded to the officer's inquiries. Defendant exhibited some difficulty finding his words, with his balance when he exited his vehicle and in completing the alphabet test at the end. However, Defendant was generally responsive to the officer's questions. Defendant offered to repeat the alphabet test. He declined twice the officer's requests to perform field sobriety tests. Defendant asked a few questions on his own en route to the hospital, and he challenged the officer's authority to arrest him for DUI absent locating the keys to the truck. Objectively, a reasonable person would have understood Defendant was in a compromised state but possessed the faculties to understand the officer's questions and fairly respond, and to refuse requests by an authority figure to perform field sobriety tests and execute the PennDOT form. There is no evidence Defendant was in an emotional state that would have interfered with his ability to voluntarily consent to a blood draw. The Commonwealth sufficiently established Defendant's consent to chemical testing of his blood was "not the result of duress or coercion, express or implied or a will overborne" and was objectively valid.

12. Defendant's Omnibus Pretrial Motion must be denied.

ORDER

AND NOW, to-wit, this 7th day of July, 2017, upon consideration of Defendant's Omnibus Pretrial Motion, and following an evidentiary hearing and the submission of briefs, it is **ORDERED** said motion is **DENIED.**

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

JAQUEL SHAMON TIRADO

HABEAS CORPUS / GROUNDS FOR RELIEF / PRELIMINARY HEARING

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. The Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury.

UNIFORM FIREARMS ACT / FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE

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

UNIFORM FIREARMS ACT / POSSESSION OF FIREARM BY MINOR

A person under eighteen (18) years of age shall not possess or transport a firearm anywhere in this Commonwealth.

UNIFORM FIREARMS ACT / DEFINITIONS

A "firearm" includes "any pistol or revolver with a barrel length less than fifteen inches (15")."

FIREARMS / IN GENERAL

The length of a firearm's barrel represents an indispensable element of the charged offense without proof of which a conviction may not be sustained.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
CR 3831 of 2016

Appearances: Michael E. Burns, Esq. and Jeremy C. Lightner, Esq. for the Commonwealth
Nathaniel E. Strasser, Esq., for the Defendant

OPINION

Domitrovich, J. May 1, 2017

This Trial Court thoroughly considered the evidence and all reasonable inferences drawn therefrom regarding Defendant's Petition for Writ of *Habeas Corpus*, including, but not limited to, the expert testimony presented during the April 19, 2017 Petition for Writ of *Habeas Corpus* hearing and the Notes of Testimony from the November 18, 2016 Preliminary Hearing, as well as an independent review of the relevant statutory and case law.

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. *See Commonwealth v. Landis*, 48 A.3d 432, 444 (Pa. Super. 2012). When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *See Commonwealth v. Santos*,

876 A.2d 360, 363 (Pa. 2005). The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury." *See Commonwealth v. Winger*, 957 A.2d 325, 328 (Pa. Super. 2008).

Defendant Jaquel Shamon Tirado (hereafter referred to as "Defendant") has been charged with Criminal Homicide/Murder, in violation of 18 Pa. C. S. §2501(a); Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(1); Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(4); Recklessly Endangering Another Person, in violation of 18 Pa. C. S. §2705; Firearms not to be carried without a License, in violation of 18 Pa. C. S. §6106(a)(1); Possession of Firearm by a Minor, in violation of 18 Pa. C. S. §6110.1(a); Tampering with or Fabricating Physical Evidence, in violation of 18 Pa. C. S. §4910(1); Possessing Instruments of Crime, in violation of 18 Pa. C. S. §907(a); Criminal Conspiracy-Criminal Homicide/Murder, in violation of 18 Pa. C. S. §903; Criminal Conspiracy-Aggravated Assault, in violation of 18 Pa. C. S. §903; Criminal Conspiracy-Aggravated Assault, in violation of 18 Pa. C. S. §903; and Possession of Firearms Prohibited, in violation of 18 Pa. C. S. §6105(a)(1). However, Defendant's Petition for Writ of *Habeas Corpus* concerns only two (2) of these charges specifically – Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)) and Possession of Firearm by a Minor (18 Pa. C. S. §6110.1(a)) – as to whether sufficient evidence has been introduced to demonstrate this alleged firearm's barrel length was less than fifteen inches (15") and, therefore, support these two (2) firearms charges.

"Any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree." *18 Pa. C. S. §6106(a)(1)*. Additionally, "a person under 18 years of age shall not possess or transport a firearm anywhere in this Commonwealth." *18 Pa. C. S. §6110.1(a)*. Regarding both of these statutes, the definition of "firearm" includes "any pistol or revolver with a barrel length less than fifteen inches (15")…" *18 Pa. C. S. §6102*. The length of a firearm's barrel represents an indispensable element of the charged offense **without proof of which a conviction may not be sustained**. *Commonwealth v. Rapp*, 384 A.2d 961, 962 (Pa. Super. 1978) [emphasis added]; *see also Commonwealth v. Todd*, 384 A.2d 1215, 1217 (Pa. 1978); *see also Commonwealth v. Jennings*, 427 A.2d 231 (Pa. Super. 1981).

At the November 18, 2016 Preliminary Hearing, the Commonwealth only introduced the testimony of City of Erie Police Detective Michael Hertel. According to Detective Hertel, an eyewitness, Ralph Green, who did not testify at the November 18, 2016 Preliminary Hearing, heard shots while sitting on his front porch on East 21st Street and witnessed a black teenager, who was 17-18 years old, approximately 5' 4" and wearing a white shirt and tan pants, placing a handgun into his pants pocket. *See N.T., Preliminary Hearing, November 18, 2016, page 19, lines 23-25; page 20, lines 1-2*. The Commonwealth also introduced evidence that three (3) .32 caliber shell casings and one (1) live .32 caliber round were found on the east side of Cottage Avenue, where the shooting occurred, while two (2) rounds were retrieved from the victim's body, which were analyzed and listed as either .9 millimeter or .38 caliber rounds. *See id, page 7, lines 12-14; page 8, lines 10-13; page 9, lines 2-8*. However, the Commonwealth did not provide any evidence as to a specific description of the firearm Ralph Green observed, such as size, color, etc. Further, the Commonwealth's witness, Detective Michael Hertel, acknowledged several different caliber rounds were discovered

at the scene, none of which were analyzed and matched to a particular firearm, and further acknowledged multiple rounds are consistent with multiple firearms at the scene. *See id, page 33, lines 6-10*. The only testimony regarding the size of the firearm is Ralph Green's statement to Detective Hertel that Mr. Green saw the black male "placing a handgun into his pants pocket;" however, the Commonwealth did not present testimony regarding the type of pants the individual was wearing or a specific description of size and depth of the pocket on those pants. In fact, the Commonwealth did not produce Ralph Green to offer testimony as to his own eyewitness account of the incident. Without more, this evidence presented requires a great deal of speculation as to the size of the firearm and is insufficient to support the two above-referenced firearms charges against Defendant.

Furthermore, at the hearing before this Trial Court on April 19, 2017, the Commonwealth's firearm and toolmark examination expert, Corporal Dale Weimer, offered only testimony as to the average length of most handgun's barrels, i.e. pistols and revolvers (1" – 14"), but could not offer any specific testimony as to a description of this firearm, including barrel length, in the instant criminal case as the Commonwealth's expert witnesses indicated no firearm was recovered in this case. Corporal Weimer also admitted a handgun's barrel length can exceed fifteen inches (15"), whereas these two specific charges – Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)) and Possession of Firearm by a Minor (18 Pa. C. S. §6110.1(a)) – must have a handgun, i.e. pistol or revolver, with a barrel length less than fifteen inches (15"). The Commonwealth again did not produce Ralph Green to offer testimony as to his own eyewitness account of the incident. Without more, this testimony is insufficient to support the two above-referenced firearms charges against Defendant.

The instant criminal case is distinguishable from the Erie County court case of Jameele Hakeem'Ali Williams. In that case, Williams was convicted of, among other charges, Firearms not to be carried without a License (18 Pa. C. S. §6106). Mr. Williams appealed to the Pennsylvania Superior Court, claiming, among other issues, the evidence presented at trial was insufficient to support the conviction for Firearms not to be carried without a License. In his 1925 Opinion, the Honorable Robert A. Sambroak, Jr. found and concluded the Commonwealth presented sufficient evidence based upon the following: (1) the victim's girlfriend saw Williams reach into his pants pocket and pull out a gun; (2) an eyewitness, standing five [5] to seven [7] feet away from Williams, described the firearm as "large, about ten inches [10"] long, and chrome in color;" (3) a firearm and toolmark examination expert, after examination of the markings of several shell casings found at the scene, narrowed the type of gun to a Glock or a gun manufactured by Federal Arms, Smith and Wesson and Storm Lake; and (4) the victim, during an interview with police, described the shooter as carrying a "Glock," and commented "if a gun wasn't a revolver, it was a Glock…" The Pennsylvania Superior Court agreed with Judge Sambroak and affirmed Williams' conviction.

However, in this instant criminal case, key pieces of required evidence are missing to support the charges of Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)) and Possession of Firearm by a Minor (18 Pa. C. S. §6110.1(a)). At both the Preliminary Hearing and Petition for Writ of *Habeas Corpus* hearing, no testimony or evidence was presented regarding a specific barrel description of the handgun allegedly used by Defendant, nor was any testimony or evidence presented demonstrating an analysis of shell casings found at the scene was performed to determine a type of firearm used, unlike the *Williams*

case. As clearly stated by relevant statutory law and case law, a firearm's barrel length is an essential element of the above-referenced charges against Defendant and, without specific evidence to demonstrate a specific barrel length that conforms to the definition of "firearm," these charges cannot be substantiated. *See Rapp,* 84 A.2d at 962.

After a thorough review of the entire record and after review of relevant statutory law and case law, this Trial Court finds and concludes, viewing all of the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth, that the Commonwealth has failed to produce sufficient evidence as to the specific barrel length of the firearm allegedly used by Defendant Jaquel Shamon Tirado to support the charges of Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)) and Possession of Firearms by a Minor (18 Pa. C. S. §6110.1(a)). For all of the reasons as set forth above, this Court enters the following Order:

ORDER

AND NOW, to wit, this 1st day of May, 2017, after thorough consideration of the entire record regarding Defendant's Petition for Writ of *Habeas Corpus*, including, but not limited to, the testimony presented during the April 19, 2017 Petition for Writ of *Habeas Corpus* hearing and the Notes of Testimony from the November 18, 2016 Preliminary Hearing, as well as an independent review of the relevant statutory and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Petition for Writ of *Habeas Corpus* is hereby **GRANTED** to the extent that Count Five: Firearms not to be carried without a License, and Count Six: Possession of Firearm by Minor, of the Criminal Information dated December 22, 2016 are hereby **DISMISSED** for the specific reasons and analysis set forth above in this Trial Court's Opinion.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

DEDRA GRESART, as Plenary Guardian of DESTINY M. GRESART, an adult incapacitated person

v.

BUFFALO & PITTSBURGH RAILROAD INC., a Delaware Corporation; GENESEE & WYOMING, INC., a Delaware Corporation, a/k/a GENESEE & WYOMING RAILROAD SERVICES, INC.; JAMES MURDOCK; and HARRY WACHOB

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / GENERALLY

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test on preliminary objections is whether it is clear and free from doubt from all the facts pled that the pleader will be unable to prove facts legally sufficient to establish his right to relief. When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / RES JUDICATA & COLLATERAL ESTOPPEL

The issues of *res judicata* and/or collateral estoppel are affirmative defenses raised properly as a "New Matter" and are not generally among the grounds allowable for preliminary objections. However, the Pennsylvania Superior Court has allowed the issues of *res judicata* and/or collateral estoppel to be raised as preliminary objections in limited circumstances. Where it is clear that a delay in ruling on preliminary objections asserting *res judicata* and/or collateral estoppel would clearly serve no purpose, a trial court does not err in considering those issues when raised in preliminary objections.

CIVIL PROCEDURE / RES JUDICATA

Technical *res judicata* provides that "where a final judgment on the merits exists, a future lawsuit on the same cause of action is precluded, and requires the coalescence of four (4) factors: [1] identity of the thing sued upon or for; [2] identity of the causes of action; [3] identity of the persons or parties to the action; and [4] identity of the quality or capacity of the parties suing or being sued.

CIVIL PROCEDURE / COLLATERAL ESTOPPEL

Collateral estoppel bars a subsequent lawsuit where (1) an issue decided in a prior action is identical to the issue presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / RES JUDICATA & COLLATERAL ESTOPPEL

Unless the complaint sets forth in detail, either directly or by reference, the essential facts

and issues pleaded by the prior suit, the affirmative defense of *res judicata* must be raised in a responsive pleading under the heading of new matter and not by preliminary objections.

CIVIL PROCEDURE / RES JUDICATA & COLLATERAL ESTOPPEL

The doctrine of *res judicata*/collateral estoppel applies not only to matters decided, but also to matters that could have, or should have, been raised and decided in an earlier action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10646 – 2017

Appearances: Jesse A. Drumm, Esq., on behalf of Dedra Gresart, as Plenary Guardian of Destiny M. Gresart, an adult incapacitated person (Plaintiff)
Scott R. Orndoff, Esq., on behalf of Buffalo & Pittsburgh Railroad, Inc.; Genesee & Wyoming, Inc.; James Murdock; and Harry Wachob (Defendants)

OPINION

Domitrovich, J. July 19, 2017

AND NOW, to-wit, this 19th day of July, 2017, upon consideration of the oral arguments on June 30, 2017 regarding the Preliminary Objections to Plaintiff's Complaint and Brief in Support, filed by Buffalo & Pittsburgh Railroad, Inc., Genesee & Wyoming, Inc., James Murdock and Harry Wachob; and the Preliminary Objections to Defendant's Preliminary Objections and Brief in Support, filed by Dedra Gresart, as Plenary Guardian of Destiny M. Gresart, an adult incapacitated person; and after a thorough review of relevant statutory and case law, this Trial Court finds and concludes as follows:

Procedural History

2006 Elk County, Pennsylvania Civil Action

On August 16, 2006, Dedra Gresart, as Plenary Guardian of Destiny M. Gresart, an adult incapacitated person (hereafter referred to as "Plaintiff"), commenced against Buffalo & Pittsburgh Railroad, Inc., Genesee & Wyoming, Inc. and James Murdock (hereafter collectively referred to as "Defendants") in the Court of Common Pleas of Allegheny County, but the civil action was later transferred to Court of Common Pleas of Elk County, Pennsylvania. *See Gresart ex rel. Gresart v. Buffalo & Pittsburgh R.R., Inc.*, 2016 WL 797059, *1 (Pa. Super. 2016).[1] Plaintiff filed an Amended Complaint and, after Senior Judge Michael E. Dunlavey, who was sitting by assignment in Elk County, Pennsylvania, sustained Defendants' Preliminary Objections, Plaintiff filed a Second Amended Complaint on July 30, 2008. *See id.*

Defendants filed a Motion for Summary Judgment on August 29, 2013. *See id* at *2. After Plaintiff filed a Third Amended Complaint without leave of court and following Defendants' Preliminary Objections, Plaintiff filed a Motion for Leave to File a Third Amended Complaint. *See id*. Following a hearing on December 4, 2013, Senior Judge Dunlavey directed Plaintiff to provide specific record facts supporting "willful or wanton conduct." *See id*. Plaintiff filed a Supplemental Brief, in accordance with Senior Judge Dunlavey's Order, on December 16,

[1] This Pennsylvania Superior Court Opinion, which is an unpublished, non-precedential Opinion, is being cited as relevant under the doctrine of law of the case, *res judicata* and/or collateral estoppel.

2013; thereafter, Senior Judge Dunlavey denied Plaintiff's Motion for Leave to File a Third Amended Complaint on January 9, 2014. *See id*. Following a hearing on Defendants' Motion for Summary Judgment, President Judge Richard A. Masson granted the Motion for Summary Judgment on December 5, 2014. *See id*. Plaintiff appealed timely to the Pennsylvania Superior Court on January 2, 2015, and the Pennsylvania Superior Court affirmed Judge Masson's Order on March 1, 2016. *See id* at *9. Plaintiff filed an Application for Re-argument on March 15, 2016, which was denied by the Pennsylvania Superior Court on May 10, 2016. Plaintiff filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on June 9, 2016, which was denied on October 25, 2016.

2017 Erie County, Pennsylvania Civil Action

On March 3, 2017, Plaintiff filed a Complaint for Compensatory and Punitive Damages this time in the Court of Common Pleas in Erie County, Pennsylvania. On April 3, 2017, Defendants filed Preliminary Objections to Plaintiff's Complaint and also filed an Answer and New Matter to Plaintiff's Complaint contemporaneously.[2] On April 19, 2017, Plaintiff filed Preliminary Objections to Defendants' Preliminary Objections. Plaintiff filed a Reply to Defendants' New Matter on April 28, 2017.

Argument on the parties' respective Preliminary Objections was scheduled for June 30, 2017. This Trial Court heard argument from Plaintiff's counsel, Jesse A. Drumm, Esq., who the Trial Court permitted to participate via telephone, and Defendants' counsel, Scott R. Orndoff, Esq., who appeared in person.

Rationale and Conclusions

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. *Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). The test on preliminary objections is whether it is clear and free from doubt from all the facts pled that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Id*. When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. *Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992). All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. *Clevenstein v. Rizzuto*, 266 A.2d 623, 624 (Pa. 1970). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Hoffman v. Misericordia Hospital of Philadelphia*, 267 A.2d 867, 868 (Pa. 1970). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Gabel*, 616 A.2d at 1367 (Pa. 1992).

Pursuant to the Pennsylvania Rules of Civil Procedure, the issues of *res judicata* and/or collateral estoppel are affirmative defenses raised properly as a "New Matter." *See Pa. R. Civ. P. 1030(a)*. The issues of *res judicata* and/or collateral estoppel are not generally among the grounds allowable for preliminary objections. *See Pa. R. Civ. P. 1028(a)*. However,

[2] Although Plaintiff contends Defendants' filing of an Answer and New Matter to Plaintiff's Complaint waives Defendants' filing of Preliminary Objections and precludes this Trial Court's consideration of Defendants' Preliminary Objections, Defendants' counsel, Scott R. Orndoff, Esq., indicated the Preliminary Objections were filed first and the Answer and New Matter were filed second. According to Attorney Orndoff, the filing of an Answer and New Matter was solely to protect the record.

the Pennsylvania Superior Court has allowed the issues of *res judicata* and/or collateral estoppel to be raised as preliminary objections in limited circumstances. *See Kelly v. Kelly*, 887 A.2d 788 (Pa. Super. 2005) (*res judicata* and/or collateral estoppel are raised properly in preliminary objections where the facts are not in dispute); *see also Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679 (Pa. Super. 1995) (*res judicata* and/or collateral estoppel are raised properly in preliminary objections where neither party objected to those issues being raised in preliminary objections, rather than as a "New Matter"). Where it is clear that a delay in ruling on preliminary objections asserting *res judicata* and/or collateral estoppel would clearly serve no purpose, a trial court does not err in considering those issues when raised in preliminary objections. *See Faust v. Dep't of Revenue*, 592 A.2d 835, 838 (Pa. Commw. Ct. 1991) (holding that sovereign immunity, which is generally not raised properly in preliminary objections, may be raised in preliminary objections in the nature of a demurrer **when it is clear that delaying a ruling would serve no purpose).**

Res judicata encompasses two (2) related, yet distinct principles: technical *res judicata* and collateral estoppel. *J.S. v. Bethlehem Area School District*, 794 A.2d 936, 939 (Pa. Commw. Ct. 2002) (*citing Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.)*, 776 A.2d 362 (Pa. Commw. Ct. 2001)). Technical *res judicata* provides that "where a final judgment on the merits exists, a future lawsuit on the same cause of action is precluded." *Id*. Technical *res judicata* requires "the coalescence of four (4) factors: [1] identity of the thing sued upon or for; [2] identity of the causes of action; [3] identity of the persons or parties to the action; and [4] identity of the quality or capacity of the parties suing or being sued." *Id*.

Similarly, collateral estoppel "bars a subsequent lawsuit where (1) an issue decided in a prior action is identical to the issue presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action." *Id (citing Rue v. K-Mart Corp.*, 713 A.2d 82 (Pa. 1998)).

After a thorough review and comparison of the Civil Complaint filed in the Court of Common Pleas of Erie County on March 3, 2017, attached to Defendants' Preliminary Objections as Exhibit A, and the Second Amended Civil Complaint filed in the Court of Common Pleas of Elk County on July 30, 2008, attached to Defendants' Preliminary Objections as Exhibit D, this Trial Court makes the following analysis as to these two significantly and substantially identical Civil Complaints as to invoke the doctrines of *res judicata* and/or collateral estoppel and bar Plaintiff's Erie County Civil Complaint, including the claims and issues raised therein, from being litigated in Erie County, Pennsylvania. This Trial Court finds and concludes the following essential facts, claims and issues are present in both Civil Complaints filed in Elk and Erie Counties:

- Plaintiffs Dedra and Destiny Gresart are individuals residing at 222 Blaine Avenue, Johnsonburg, Elk County, Pennsylvania 15845. *See Exhibit A, ¶¶1-2; see also Exhibit D, ¶¶1-2;*
- Defendant Buffalo & Pittsburgh Railroad, Inc. is a Delaware corporation with a principal place of business at 1200-C Scottsville Road, Suite 200, Rochester, New York 14624. S*ee Exhibit A, ¶3; see also Exhibit D, ¶3;*

- Defendant Genesee & Wyoming, Inc. is a Delaware corporation with a principal place of business at 20 West Avenue, Darien, Connecticut 06820. *See Exhibit A, ¶4; see also Exhibit D, ¶4;*
- Defendant James Murdock is an adult individual residing at 502 Logan Street, Punxsutawney, Jefferson County, Pennsylvania 15767. *See Exhibit A, ¶5; see also Exhibit D, ¶5;*
- At all relevant times, railroad defendants acted as authorized agents, ostensible agents, servants, employees, contractors, subcontractors, licensees and/or assignees of each other. *See Exhibit A, ¶7; see also Exhibit D, ¶6;*
- At all relevant times, defendant Murdock was an employee, agent, representative and/or servant of defendants, acting within the course and scope of his employment. *See Exhibit A, ¶15; see also Exhibit D, ¶7;*
- At all relevant times, railroad defendants acted by and through their agents, servants, employees, representatives, successors, predecessors, subsidiaries and parents, who were acting in the course and scope of their employment, duties and/or agency. *See Exhibit A, ¶17; see also Exhibit D, ¶8;*
- At all relevant times, railroad defendants owned, possessed, controlled and maintained property along Grant Street near its intersection with Blaine Avenue in Johnsonburg, Elk County, Pennsylvania, upon which it maintained railroad ties and tracks for the purposes of rail transport by locomotive trains. *See Exhibit A, ¶18; see also Exhibit D, ¶9;*
- On August 18, 2004, at or around 1:20 p.m., Destiny Gresart entered onto the railroad tracks. *See Exhibit A, ¶19; see also Exhibit D, ¶10;*
- Destiny Gresart entered onto the railroad tracks from Grant Street near its intersection with Blaine Avenue. *See Exhibit A, ¶21; see also Exhibit D, ¶13;*
- Destiny Gresart did not cross any lines or barricades apprising her of the dangers and risks associated with walking along the railroad tracks along the property. *See Exhibit A, ¶22; see also Exhibit D, ¶14;*
- Destiny Gresart was unaware and unappreciative of any danger or risk associated with walking along the railroad tracks on the property. *See Exhibit A, ¶23; see also Exhibit D, ¶15;*
- As Destiny Gresart traversed the railroad tracks located on the property, she was struck by an oncoming train engine, the same of which was owned by railroad defendants and operated by defendant Murdock. *See Exhibit A, ¶24; see also Exhibit D, ¶16;*
- As a result of the impact, Destiny Gresart was violently thrown several feet into a stone retaining wall abutting the tracks. *See Exhibit A, ¶25; see also Exhibit D, ¶17;*
- At all relevant times, defendants knew, or should have known, of the danger or risk associated with people, including Destiny Gresart and other similarly situated minors, being on or near the railroad tracks located on the property. *See Exhibit A, ¶26; see also Exhibit D, ¶19;*
- As a direct and proximate result of this incident, Destiny Gresart sustained

the following injuries, some or all of which are or may be permanent:

- Severe head trauma that caused her to be in a state of coma;
- Severe impairment of other major life sustaining functions as a result of the head trauma;
- Right tibia fracture;
- Right fibula fracture;
- Left knee cap fracture;
- Foot drop as a result of the trauma to her leg;
- Nervousness, emotional tension anxiety and depression; and
- Inability to sleep due to constant, sever and persistent pain. *See Exhibit A, ¶39(a), (c)-(f), (h)-(j); see also Exhibit D, ¶20(a), (c)-(i);*

- As a direct and proximate result of this incident, Destiny Gresart sustained the following damages, some or all of which are permanent:
  - She had endured and will continue to endure great pain, suffering, inconvenience, embarrassment, mental anguish and emotional and psychological trauma;
  - She has undergone and will continue to undergo extensive medical treatment for her physical injuries;
  - She has been and in the future will unable to enjoy various pleasures of life that she previously enjoyed;
  - She has been permanently deprived of a vital time of her life. *See Exhibit A, ¶40(a)-(c), (f); see also Exhibit D, ¶21(a)-(d).*
- **Count I – Plaintiff v. Buffalo & Pittsburgh Railroad, Inc. & Genesee & Wyoming, Inc. – Negligence**
- Plaintiff's injuries and damages, as set forth above, were a direct and proximate result of defendants' negligence in the following particulars:
  - In failing to post warnings of the potential danger of walking on or near train tracks upon which they operated train traffic;
  - In failing to post well-marked signs or markings that would alert Destiny Gresart and others similarly situated of the dangers or walking near train tracks and that the tracks were actively in use;
  - In failing to erect a fence or other barrier to inhibit entry on to the property;
  - In failing to properly train its employees, agents and/or servants to recognize the existence of dangerous conditions on or near the railroad tracks;
  - In allowing its locomotives to operate at an excessive speed in areas that are known to be frequented by children;
  - In failing to erect sufficient signage to make operators of locomotives aware of the existence of potential pedestrian traffic ahead;
  - In allowing the operators of their locomotives to operate them at unsafe speeds;

- In allowing the operators of their locomotives to operate locomotives in residential areas without sounding proper warnings;
- In failing to recognize and likelihood of children being attracted to the train tracks;
- In failing to inform their employee train operators of the risk of children playing on the train tracks. *See Exhibit A, ¶42(a)-(h), (k); see also Exhibit D, ¶24(a)-(e), (h)-(j), (m);*

- **Count II – Plaintiff v. James Murdock – Negligence**
- Plaintiff's injuries and damages were a direct and proximate result of defendant Murdock's negligence in the following particulars:
  - In failing to follow protocol for operation of a train engine;
  - In failing to properly check for bystanders on the train tracks;
  - In failing to take proper precautionary measures of slowing the train engine down when entering an area known to be frequented by children;
  - In failing to operate the train engine in a safe and proper manner;
  - In failing to properly warn Destiny Gresart of her immediate danger;
  - In failing to operate the locomotive in a condition which would be safe for bystanders along the train tracks;
  - In failing to stop the train in a reasonable amount of time; and
  - In operating the train at an excessive speed. *See Exhibit A, ¶44(a)-(g), (j); see also Exhibit D, ¶34(a)-(h).*

Clearly, the Civil Complaint filed in the Court of Common Pleas of Elk County included essential facts and issues presented in the Civil Complaint filed in the Court of Common Pleas of Erie County; therefore, Defendants' Preliminary Objections, raising the issues of *res judicata* and/or collateral estoppel are proper for this Trial Court's consideration and disposition at this time. *See Kelly*, 887 A.2d at 791; *see also Del Turco v. Peoples Home Savings Association*, 478 A.2d 456, 461 (Pa. Super. 1984) (unless the complaint sets forth in detail, either directly or by reference, the essential facts and issues pleaded by the prior suit, the affirmative defense of *res judicata* must be raised in a responsive pleading under the heading of new matter and not by preliminary objections).

Plaintiff's Erie County Civil Complaint is barred by the doctrine of *res judicata*. First, the identity of the "thing" sued upon is identical in both Civil Complaints, i.e. damages for injuries suffered by Destiny Gresart after she was struck by the locomotive. Second, the identity of the cause of action in both Civil Complaints is also identical, i.e. negligence claims against the Defendants. Although Plaintiff's instant Erie County Civil Complaint amplifies her negligence claim against the Defendants, which was raised identically in her Elk County Civil Complaint, by adding language demonstrating "willful, wanton and reckless" conduct, this is a cause of action that could have, and should have, been raised in the Elk County Civil Complaint. *See BuyFigure.com, Inc. v. Autotrader.com, Inc.*, 76 A.3d 554, 561 (Pa. Super. 2013) (the doctrine of *res judicata*/collateral estoppel applies not only to matters decided, **but also to matters that could have, or should have, been raised and**

decided in an earlier action). In fact, Plaintiff attempted to file a Third Amended Civil Complaint amplifying her negligence claims against the Defendants to include "willful, wanton and reckless" conduct, but Senior Judge Dunlavey in Elk County, Pennsylvania denied Plaintiff's Motion to Amend Complaint, and Senior Judge Dunlavey's decision was affirmed by the Pennsylvania Superior Court on the basis that the essential facts raised by Plaintiff in her Elk County Civil Complaint did not support a finding of "willful, wanton and reckless" conduct. *See Gresart*, 2016 WL 797059, *3. Third, the identities of the persons or parties in both Civil Complaints is significantly similar – Plaintiffs Dedra Gresart and her daughter, Destiny Gresart, are included in both Complaints, as well as Defendants Buffalo & Pittsburgh Railroad, Inc., Genesee & Wyoming, Inc. and James Murdock. Although Plaintiff now names as Harry Wachob as a defendant in her Erie County Civil Complaint, this does not preclude this Trial Court's consideration of Defendants' Preliminary Objections. *See BuyFigure.com, Inc.*, 76 A.3d at 561 (the doctrine of *res judicata* should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose – a second trial on the same cause between the same parties). Finally, the quality or capacity of the parties suing or being sued is identical – Plaintiff Dedra Gresart is the guardian of Destiny Gresart in both Civil Complaints and the Defendants have been sued in both Civil Complaints in their individual capacities. Therefore, all four [4] factors have coalesced for *res judicata*. *Bethlehem Area School District*, 794 A.2d at 936.

Moreover, the dismissal of Plaintiff's Elk County Civil Complaint via summary judgment was appealed to the Pennsylvania Superior Court, who affirmed, and Plaintiff subsequently filed a Petition for Allowance of Appeal before the Pennsylvania Supreme Court, who denied said Petition. As there was a final judgment for Plaintiff's Elk County Civil Complaint, and as the four [4] above-referenced factors have coalesced positively and successfully, Plaintiff's Erie County Civil Complaint is barred by the doctrine of *res judicata*, and Plaintiff cannot be permitted to re-litigate her cause of action in the Erie County, Pennsylvania that was fully and finally disposed of in the Elk County, Pennsylvania, as well as the Pennsylvania Superior and Supreme Courts.

Furthermore, Plaintiff's Erie County Civil Complaint is barred by the doctrine of collateral estoppel. As this Trial Court found and concluded above, the issues presented previously in Plaintiff's Elk County Civil Complaint were identical to the issues presented currently in Plaintiff's Erie County Civil Complaint, i.e. negligence claims against the Defendants and damages for injuries suffered by Destiny Gresart after she was struck by a locomotive. The same parties, with the minor exception of Harry Wachob, were present in both Civil Complaints, and any minor differences in parties do not defeat the doctrine of collateral estoppel. *See BuyFigure.com, Inc.*, 76 A.3d at 561. Plaintiff had a full and fair opportunity to litigate the issues presented in the Elk County Civil Complaint, through Preliminary Objections, expert reports and other pertinent discovery, a Motion to Amend Complaint and a Motion for Summary Judgment, and thereafter appealing to two (2) appellate courts – the Pennsylvania Superior Court and the Pennsylvania Supreme Court by virtue of a Petition for Allowance of Appeal. As the Pennsylvania Supreme Court denied Plaintiff's Petition for Allowance of Appeal and Plaintiff did not appeal to any higher appellate court, the civil action in Elk County, Pennsylvania has resulted in a final judgment on the merits. Therefore, clearly all four [4] factors have been satisfied for collateral estoppel. *Id (citing Rue v. K-Mart*

Corp., 713 A.2d 82 (Pa. 1998)). Plaintiff's attempts to re-litigate in Erie County the issues and claims presented and decided previously in Elk County are in contravention of not only both of the decisions of Senior Judge Dunlavey and Judge Masson of Elk County, Pennsylvania, but also the decisions of the appellate court judges of both the Pennsylvania Superior and Supreme Courts. Therefore, Plaintiff's Erie County Civil Complaint is barred by the doctrine of collateral estoppel.

Therefore, for all of the reasons set forth above, this Trial Court sustains Defendants' Preliminary Objections to Plaintiff's Complaint, overrules Plaintiff's Preliminary Objections to Defendant's Preliminary Objections and enters the following Order:

ORDER

AND NOW, to-wit, this 19th day of July, 2017, upon consideration of the oral arguments on June 30, 2017 regarding Defendant's Preliminary Objections to Plaintiff's Complaint and Brief in Support, and Plaintiff's Preliminary Objections to Defendant's Preliminary Objections and Brief in Support, and after a thorough review of relevant statutory and case law as indicated above in this Trial Court's analysis, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1) Plaintiff Dedra Gresart's Preliminary Objections to Defendants' Preliminary Objections are **OVERRULED**; and
2) Defendants Buffalo & Pittsburgh Railroad, Inc., Genesee & Wyoming, Inc., James Murdock and Harry Wachob's Preliminary Objections to Plaintiff's Complaint are **SUSTAINED**, and Plaintiff's Civil Complaint is hereby **DISMISSED** with prejudice.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

FRANK CHARLES ADIUTORI

HABEAS CORPUS / GROUNDS FOR RELIEF

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury."

CULPABILITY / RECKLESSNESS

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

ASSAULT & BATTERY / CRIMINAL RESPONSIBILITY

To sustain a conviction for Recklessly Endangering Another Person, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
CR 3727 of 2016

Appearances: Mark W. Richmond, Esquire on behalf of the Commonwealth
Gene P. Placidi, Esquire on behalf of the Defendant

OPINION

Domitrovich, J. June 20, 2017

This Trial Court thoroughly considered the evidence and all reasonable inferences drawn therefrom regarding Defendant's Motion for Writ of *Habeas Corpus*, including, but not limited to, the testimony of City of Erie Police Detective Sean Bogart (hereafter referred to as "Detective Bogart") and the surveillance video footage presented during the June 1, 2017 Omnibus Pre-trial Motion hearing and the Notes of Testimony from the November 16, 2016 Preliminary Hearing, as well as an independent review of the relevant statutory and case law.

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. *See Commonwealth v. Landis*, 48 A.3d 432, 222 (Pa. Super. 2012). When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *See Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). The Commonwealth must "show sufficient probable cause

that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury." *See Commonwealth v. Winger*, 957 A.2d 325, 328 (Pa. Super. 2008).

Defendant Frank Charles Adiutori (hereafter referred to as "Defendant") has been charged with Recklessly Endangering Another Person, in violation of 18 Pa. C. S. §2705. Defendant's Motion for Writ of *Habeas Corpus* raises the issue of whether sufficient evidence has been introduced by the Commonwealth to demonstrate Defendant "recklessly engaged in conduct which placed or may have placed another person in danger of death or other serious bodily injury." *See 18 Pa. C. S. §2705.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. *18 Pa. C. S. §302(b)(3).* The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. *Id.* To sustain a conviction for Recklessly Endangering Another Person, the Commonwealth must prove that the defendant had **an actual present ability to inflict harm** and not merely the apparent ability to do so. *Commonwealth v. Maloney*, 636 A.2d 671, 675 (Pa. Super. 1994) [emphasis added].

At the November 16, 2016 Preliminary Hearing, the Commonwealth only introduced the testimony of Detective Bogart. Detective Bogart stated he was assigned to investigate an incident which occurred on August 17, 2016 at approximately 6:20 a.m. at Dee's Cigar Store. *See Notes of Testimony, Preliminary Hearing, November 16, 2016, page 4, lines 5-8.* According to Detective Bogart, an armed robbery occurred at Dee's Cigar Store on that date and time, and he [Detective Bogart] was assigned to investigate the reckless endangerment part of the incident. *See id, page 5, lines 10-14.* Detective Bogart indicated he reviewed surveillance video footage, which was collected by Detective Berarducci. *See id, page 5, lines 18-24.* Detective Bogart stated the surveillance video footage, at 1422 hours and 30 seconds, depicted the armed robber, dressed in dark clothing and a mask, exit Dee's Cigar Store, run northbound on State Street and then eastbound across 17th Street. *See id, page 6, lines 1-5.* Approximately ten (10) seconds later, at 1422 hours and 40 seconds, Defendant is viewed exiting the store with a firearm in his right hand and proceeding to the corner of 17th Street and State Street, and the armed robber is viewed on the northwest corner of 17th Street and French Street. *See id, page 6, lines 11-17.* Detective Bogart stated, once police officers responded to the armed robbery, five (5) PPU brand .380 caliber shell casings were found on the southeast corner of 17th State and State Street. *See id, page 8, lines 10-12.* Detective Bogart acknowledged, according to the initial police report, Defendant had turned over to the responding police officers a Walther .380 caliber firearm with a magazine and two (2) unspent shell casings, PPU brand. *See id, page 10, lines 17-19.* Detective Bogart further acknowledged, according to the initial police report, Defendant had told the responding police officers Defendant had been robbed by a masked individual; that Defendant had chased after the armed robber and that Defendant had fired five (5) shots from the corner of State Street and East 17th Street in the direction of the armed robber after the armed robber fled the scene. *See id, page 11, lines 10-13.* Furthermore, at the June 1, 2017 *Habeas Corpus* hearing, this Trial Court observed the surveillance video footage from August 17,

2016, which clearly showed the armed robber entering Dee's Cigar Store at 1421 hours and 5 seconds and exiting the store at 1422 hours and 29 seconds, traveling north on State Street. The surveillance video then showed Defendant quickly exiting the store at 1422 hours and 38 seconds, following in the direction of the armed robber. The surveillance video indicated Defendant had a firearm in his right hand while chasing after the armed robber.

This Trial Court finds and concludes the Commonwealth presented sufficient evidence at the November 16, 2016 Preliminary Hearing. Detective Bogart's testimony, which was corroborated by the surveillance video footage, indicated Defendant exited Dee's Cigar Store, with a firearm in his right hand, seconds after the armed robber fled the scene and Defendant quickly followed in the direction of the armed robber. According to the police reports, Defendant voluntarily admitted firing five (5) rounds in the direction of the robbery suspect, which was eastward on East 17th Street. Defendant also turned over a Walther .380 caliber firearm with a magazine and two (2) unspent PPU brand shell casings, and five (5) PPU brand .380 caliber shell casings were found on the southeast corner of 17th State and State Street, consistent with Defendant's voluntary statements. Considering not only Defendant's possession, but also his use, of a firearm towards the armed robber, there is sufficient evidence that Defendant had the actual present ability to inflict harm on the armed robber. *See Maloney*, 636 A.2d at 675.

Defendant argued no one was placed in danger of death or serious bodily injury as there were no other people or vehicles in the vicinity where Defendant has fired. Defendant cited to the case of *Commonwealth v. Kamenar*, 516 A.2d 770 (Pa. Super. 1986) as dispositive; however, *Kamenar* is distinguishable from the instant criminal case. In *Kamenar*, the defendant discharged a firearm out of the rear window of a house into a wooded hillside. *See id* at 770. There were no houses or structures on or near the wooded hillside. *See id* at 771. The Pennsylvania Superior Court reversed the defendant's conviction and vacated the defendant's sentence, concluding the *Kamenar* defendant's discharge of the firearm could not have placed any other person in danger of death or serious bodily injury. *See id* at 772. However, the Defendant in the instant case discharged his firearm eastward on East 17th Street. As presented obviously on the surveillance video, vehicles were traveling north and south along French Street, intersecting East 17th Street, and residential and commercial structures were in the direction Defendant in the instant case was shooting. Therefore, the instant criminal case is distinguishable from *Kamenar*, and Defendant in the instant criminal case, while discharging his firearm in the direction of the armed robber on East 17th Street, could have placed other individuals in danger of death or serious bodily injury. The Commonwealth has shown sufficient probable cause to warrant allowing the instant criminal case to go to the jury.

After a thorough review of the entire record and after review of relevant statutory law and case law, this Trial Court enters the following Order:

ORDER

AND NOW, to wit, this 20th day of June, 2017, after thorough consideration of the entire record regarding Defendant's Motion for Writ of *Habeas Corpus*, including, but not limited to, the testimony presented during the June 1, 2017 Omnibus Pre-trial Motion hearing and the Notes of Testimony from the November 16, 2016 Preliminary Hearing, as well as an independent review of the relevant statutory and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Motion for Writ of *Habeas Corpus* is hereby **DENIED** for the reasons set forth in the Opinion attached hereto.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

IN RE: APPEAL OF THE BOARD OF AUDITORS OF MCKEAN TOWNSHIP / 2017 MEETING

SECOND CLASS TOWNSHIPS / TOWNSHIP SUPERVISORS / COMPENSATION

The compensation of supervisors, when employed as roadmasters, laborers, secretary, treasurer, assistant secretary, assistant treasurer or in any employee capacity not otherwise prohibited by this or any other act, shall be determined by the board of auditors, at an hourly, daily, weekly, semi-monthly or monthly basis, which shall be comparable to compensation paid in the locality for similar services.

SECOND CLASS TOWNSHIPS / TOWNSHIP SUPERVISORS / COMPENSATION / LOCALITY

"Locality" is defined as "a definite region in any part of space; geographical position; place; vicinity; neighborhood; community."

SECOND CLASS TOWNSHIPS / TOWNSHIP SUPERVISORS / COMPENSATION / INSURANCE

Supervisors, whether or not they are employed by the township, and their dependents are eligible for inclusion in group life, health, hospitalization, medical service and accident insurance plans paid in whole or in part by the township. Supervisors and their dependents who are over sixty-five (65) years of age are eligible for inclusion in supplemental Medicare insurance coverage paid, in whole or in part, by the township. Their inclusion in those plans does not require auditor approval, but does require submission of a letter requesting participation at a regularly scheduled meeting of the board of supervisors before commencing participation.

SECOND CLASS TOWNSHIPS / TOWNSHIP SUPERVISORS / COMPENSATION / DISCRETION

Auditors have very broad discretion in setting salaries pursuant to [53 P.S. §65606], and no maximum or minimum rates of pay are required by the statute, except that the rates "shall not exceed compensation paid in the locality for similar services... The word 'compensation' under the statute includes more than mere wages; rather, it also includes fringe benefits such as insurance, pension, and medical plans and premiums.

SECOND CLASS TOWNSHIPS / ATTORNEY'S FESS

If in the opinion of the court the final determination is more favorable to the township officer involved than that awarded by the board of auditors, the township shall pay reasonable attorney fees… incurred by the officer in connection with the surcharge proceeding.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 90007 - 2017

Appearances: Gery T. Nietupski, Esq., on behalf of Brian P. Cooper, Janice T. Dennis and Ronald T. Bole, McKean Township Supervisors (Appellants)
Edward J. Betza, Esq., on behalf of Joseph Szymanowski, Delores Renick and Barbara Craig, McKean Township Auditors (Appellees)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J. September 12, 2017

AND NOW, to-wit, this 12th day of September, 2017, after thorough review of the entire record, including, but not limited to, the testimony and evidence presented at the Civil Non-Jury Trials on May 3, 2017 and July 13, 2017; the proposed Findings of Fact and Conclusions of Law submitted by both counsel; and the Supplemental Briefs in Support submitted by both counsel, as well as an independent review of relevant statutory law and case law, this Trial Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. McKean Township is a Pennsylvania municipality organized and existing under the laws of the Commonwealth of Pennsylvania.
2. McKean Township is a Second-Class Township, which operates pursuant to the provisions set forth within the Second-Class Township Code. *See 53 P.S. §65101-68701*.
3. There are twenty-one (21) Second-Class Townships located in Erie County, Pennsylvania.
4. McKean Township is governed by three (3) Supervisors, each of whom is elected by the citizens of McKean Township. *See id, §65402(b)*.
5. The three (3) sitting Supervisors are Brian P. Cooper, Janice T. Dennis and Ronald T. Bole (hereafter referred to as "Appellant Supervisors").
6. McKean Township has three (3) Auditors, each of whom are elected by the citizens of McKean Township. *See id, §§65402(b), 65606*.
7. The three sitting Auditors are Joseph Szymanowski, Delores Renick and Barbara Craig (hereafter referred to as "Appellee Auditors").
8. Appellant Supervisors establish the pay rates for the employees of McKean Township. *See id, §65607(3)*.
9. In addition to their duties as elected Supervisors, for which they are paid a statutorily-imposed stipend, Appellant Supervisors work in various additional capacities as employees of McKean Township.
10. Pennsylvania ethics law prohibits Appellant Supervisors from establishing their own pay rates for these additional duties.
11. Pursuant to Second-Class Township Code, Appellee Auditors are responsible for establishing the pay rates for Appellant Supervisors when the Supervisors are not working in the capacity as "Roadmasters" or "Secretaries." *See, §§65606, 65803 and 65901*.
12. §65606 of the Second-Class Township Code, titled "Compensation of Supervisors," specifically sets forth the process and manner by which the wage rates are determined.
13. On or about January 4, 2017, Appellee Auditors established the 2017 pay rates for Appellant Supervisors.
14. Appellant Supervisor Cooper's compensation was reduced from $23.60/hour (2016) to $20.19 (2017), Appellant Supervisor Dennis' compensation was reduced from $23.60 (2016) to $14.00 (2017), and Appellant Supervisor Bole's compensation of $18.00/hour (2016) remained the same. *See Appellant's Petition, ¶11*.
15. In addition, Appellee Auditors substantially reduced Appellant Supervisors' benefits packages and eliminated Appellant Supervisors' overtime compensation. *See id, ¶12*.
16. On or about February 3, 2017, Appellant Supervisors filed the present appeal.
17. The issue on appeal is whether Appellee Auditors violated the Second-Class Township

Code in establishing the 2017 compensation rates for the three (3) Appellant Supervisors

18. Appellee Auditor Barbara Craig has been an Auditor for McKean Township for three (3) to four (4) years.
19. Appellee Auditor Craig contacted via telephone surrounding Second-Class Townships, including, Amity, Conneaut, Concord, Elk County, Fairview, Girard, Greene, Greenfield, LeBoeuf, North East, Springfield, Union, Venango, Washington, Waterford and Wayne, regarding compensation of Supervisors, including years of service and salary, but did not ask whether or not said Townships cut their Supervisors' compensation.
20. Appellee Auditor Craig stated Appellant Supervisor Dennis' compensation was reduced, although Appellant Supervisor Dennis had been doing "a wonderful job" and Appellee Auditor Craig was not aware of any disciplinary actions.
21. Appellee Auditor Craig stated Appellant Supervisor Cooper's compensation was also reduced. Appellee Auditors determined Appellant Supervisor Cooper would become a salaried employee, although no performance reasons for the reduction were observed or noted as to Appellant Supervisor Cooper.
22. Appellee Auditor Craig was "upset" that Appellant Supervisors hired an independent auditor, Monahan & Monahan, to which she [Craig] wrote a "Letter to the Editor" expressing her disapproval with the outsourcing of auditing work and Appellant Supervisors' "refusal" to supply information relating to expenditures. *See Petitioner's Exhibit 17*.
23. Pursuant to Pa. R. E. 706 and by Order dated June 15, 2017, Aaron Phillips was appointed by this Trial Court as an expert to review possible compensation, payroll and benefits packages for Appellant Supervisors and develop a Report for this Trial Court and for both counsel.
24. In determining compensation and benefits for Appellant Supervisors, Mr. Phillips evaluated information from Second-Class Townships comparable to McKean, i.e. townships of similar size and residential costs, including Franklin, Girard, Greene, North East, Washington and Waterford.
25. Mr. Phillips developed three (3) options in determining compensation - the first option utilized Second-Class Township data from the Northwest region; the second option utilized Second-Class Township data with populations between 4,001 and 8,000; and the final option utilized a custom blend of Second-Class Townships with similar size and populations within Erie County, Pennsylvania.
26. In developing compensation for Roadmaster and Secretary, Mr. Phillips also analyzed and evaluated PSATS data; the experience of each Supervisor in the role of Roadmaster and Secretary in comparison to other personnel in the same role as other Second-Class Townships; and the experience of each Supervisor performing duties similar to Roadmaster and Secretary.
27. Mr. Phillips acknowledged Appellant Supervisors Bole and Cooper have less experience as Roadmasters with McKean Township, but concluded Appellant Supervisors Bole and Cooper have more experience performing duties similar in nature to Roadmaster.
28. Mr. Phillips also concluded Appellant Supervisor Dennis has significantly more experience as Secretary than all other Second-Class Townships' Secretaries.
29. Mr. Phillips ultimately determined Appellant Supervisors Bole and Cooper, as

Roadmasters, would have compensation between $23.79 and $28.55, and Appellant Supervisor Dennis, as a Secretary, would have compensation between $18.91 and $22.69.

30. Mr. Phillips also determined Appellant Supervisors Bole and Dennis, both of whom work part-time, are not eligible for township benefits; however, Appellant Supervisor Cooper is eligible for benefits, which Mr. Phillips determined are currently inferior to benefits offered by other comparable Second-Class Townships.
31. Mr. Phillips stated Appellee Auditors are trying to achieve "parity" with other Second-Class Townships regarding benefits, and recommends a four-year phased-in approach for benefits.
32. Mr. Phillips provided to this Trial Court and to counsel a "McKean Township Compensation and Benefits Review, July 2017" on July 12, 2017.
33. Appellee Auditor Delores Renick has been an Auditor with McKean Township for six (6) years.
34. Appellee Auditor Renick acknowledged Appellee Auditors did not have a stated "methodology" for setting compensation for Appellant Supervisors.
35. Appellee Auditor Renick further acknowledged the Second-Class Township Code Book requires comparing other Second-Class Townships in establishing compensation rates for Appellant Supervisors.
36. Appellee Auditor Renick complained that Appellant Supervisors were being paid "too much," including overtime pay.
37. Appellee Auditor Joseph Szymanowski has been an Auditor for McKean Township since 2016 and was a Supervisor for McKean Township from 1984 to 1988.
38. Appellee Auditor Szymanowski admitted Appellee Auditors did not speak with comparable Second-Class Townships that reduced compensation and benefits.
39. Appellee Auditor Szymanowski indicated Appellee Auditors also reviewed the Pennsylvania State Association of Township Supervisors ("PSATS") in setting compensation rates for Appellant Supervisors.
40. Appellee Auditor Szymanowski believed Appellant Supervisor Bole supported and campaigned for his [Szymanowski's] opponent for Auditor in 2015.
41. According to Appellee Auditor Szymanowski, Appellee Auditors established the compensation and benefits for Appellant Supervisors Bole and Cooper by dividing the average part-time Roadmaster salary and the average full-time Roadmaster salary, and then multiplying that quotient and the salary of the non-elected Roadmaster to arrive at $18.00/hour.
42. According to Appellee Auditor Szymanowski, Appellee Auditors established the compensation and benefits for Appellant Supervisor Dennis by dividing the part-time average Secretary salary and the average full-time Secretary salary, then multiplying that quotient with only the full-time Secretary salary from Green Township ($20.90/hour), a different Second-Class Township.
43. According to Appellee Auditor Szymanowski, Appellee Auditors determined Appellant Supervisor Cooper's compensation by multiplying fifteen percent (15%) to Appellant Cooper's salary ($23.60/hour), arriving at $20.19/hour; however, the reasons for this particular "methodology" are unknown.
44. Appellant Auditor Szymanowski had previously stated that Appellant Supervisors'

benefits packages were "unheard of in this marketplace."

45. Appellant Supervisor Janice Dennis worked as McKean Township Secretary since January of 1984 and her duties include, but are not limited to, maintaining the minutes, ordinances and resolutions, preparing Data Management Reports for the McKean Township Sewer Treatment Plants, preparing Chapter 94 Reports, drafting ordinances and resolutions, preparing Supervisor agendas and minutes, etc.
46. Appellant Supervisor Dennis is in her second (2nd) term as McKean Township Supervisor.
47. At the January 4, 2017 meeting, Appellee Auditor Szymanowski told Appellant Supervisor Dennis that she "couldn't ask questions" as to why the Appellant Supervisors' compensation was reduced.
48. The other McKean Township employees had received a one percent (1%) increase in compensation, which includes a non-elected Roadmaster, and information gathered indicated a two percent (2%) to three percent (3%) for those employees in other Second-Class Townships.
49. When Appellant Supervisors hired an independent auditor, Monahan & Monahan, "as needed," Appellee Auditors became "upset."
50. Appellant Supervisor Dennis stated no financial problems exist in McKean Township, in that there are no budget crises that would negatively affect the McKean Township employees' compensation. No debt issues exist within McKean Township.
51. Appellant Supervisor Ronald Bole has been a McKean Township Supervisor since January 4, 2016 and his duties as "Roadmaster" include setting up roadwork, conducting winter snow cleanup (plowing snow) and operating equipment.
52. Previously, Appellant Supervisor Bole performed construction/septic/driveway work; performed work as a lineman for Penelec; performed work as a general contractor; and assisted in building roads for the township.
53. Appellant Supervisor Bole acknowledged he supported the opponent for Appellee Auditor Szymanowski's Auditor position in 2015, and Appellee Auditor Szymanowski informed him to stop supporting his opponent "or else."
54. Appellant Supervisor Bole's current compensation is $18.00/hour, which is $5.00 less than other comparable Second-Class Townships.
55. Following the January 4, 2017 meeting, Appellant Supervisor Bole's compensation and benefits were frozen.
56. Appellant Supervisor Brian Cooper has been a McKean Township Supervisor and Roadmaster since January of 2012.
57. Previously, Appellant Supervisor Cooper performed work in a mechanic's shop and with heavy equipment, which are similar duties as he performs now as Roadmaster for McKean Township.
58. In addition to his Roadmaster duties stated above, Appellant Supervisor Cooper also performs pipework, road mowing, tree trimming/removal and mechanical work for McKean Township.
59. Following the January 4, 2017 meeting, Appellee Auditors determined the following: Appellant Supervisor Cooper became a salaried employee, his compensation reduced to $20.19/hour and his benefits reduced. Appellant Supervisor Cooper also lost all of his overtime pay.

CONCLUSIONS OF LAW

The compensation of supervisors, when employed as roadmasters, laborers, secretary, treasurer, assistant secretary, assistant treasurer or in any employee capacity not otherwise prohibited by this or any other act, shall be determined by the board of auditors, at an hourly, daily, weekly, semi-monthly or monthly basis, which shall be comparable to compensation paid in the locality for similar services. *53 P.S. §65606(a)*. "Locality" is defined as "a definite region in any part of space; geographical position; place; vicinity; neighborhood; community." *See Black's Law Dictionary*, pg. 939 (6th Ed. 1990). Supervisors, whether or not they are employed by the township, and their dependents are eligible for inclusion in group life, health, hospitalization, medical service and accident insurance plans paid in whole or in part by the township. *See 53 P.S. §6506(c)(1); see also Uremovich v. Commonwealth of Pennsylvania State Ethics Commission*, 566 A.2d 375, 377 (Pa. Commw. Ct. 1989). Supervisors and their dependents who are over sixty-five (65) years of age are eligible for inclusion in supplemental Medicare insurance coverage paid, in whole or in part, by the township. *See id*. Their inclusion in those plans does not require auditor approval, but does require submission of a letter requesting participation at a regularly scheduled meeting of the board of supervisors before commencing participation. *See id*.

"Auditors have very broad discretion in setting salaries pursuant to [53 P.S. §65606], and no maximum or minimum rates of pay are required by the statute, except that the rates "shall not exceed compensation paid in the locality for similar services... " *See id; see also Synoski v. Hazle Township*, 500 A.2d 1282, 1285 (Pa. Commw. Ct.) (*quoting McCutcheon v. State Ethics Commission*, 466 A.2d 283 (Pa. Commw. Ct. .1983)). "The word 'compensation' under the statute includes more than mere wages; rather, it also includes fringe benefits such as insurance, pension, and medical plans and premiums." *See id* at 286.

According to the 2016 Liquids Fuel Allocation, offered into evidence as Petitioner's Exhibit 2, the following Second-Class Townships have similar populations: Conneaut, 4,290; Girard, 5,102; Greene, 4,706; McKean, 4,409; North East, 6,315; Summit, 6,603; and Washington, 4,432. *See Petitioner's Exhibit 2*. A review of the "PSATS 2016 Wages & Benefits Survey Results," offered into evidence as Petitioner's Exhibit 8A, provides the compensation wages for Second-Class Townships with populations between 4,001 and 8,000. First, the hourly rate information for a full-time Roadmaster is: Low - $9.00/hour, Avg. - $23.85/hour, Med. - $23.60/hour and High - $36.46/hour. Second, the hourly rate information for a part-time Secretary is: Low - $16.48/hour, Avg. - $18.84/hour, Med. - $17.24/hour and High - $23.60/hour. *See Petitioner's Exhibit 8A, pg. 10*.

Following the McKean Township meeting on January 4, 2017, Appellee Auditors froze Appellant Supervisor Bole's compensation at $18.00/hour; Appellee Auditors reduced Appellant Supervisor Cooper's compensation from $23.60/hour to $20.19/hour; and Appellee Auditors reduced Appellant Supervisor Dennis' compensation from $23.60/hour to $14.00/hour. A comparison of the 2016 PSATS Survey compensation information and Appellant Supervisors' compensation following the January 4, 2017 township meeting clearly demonstrates Appellant Supervisors' compensation is below the average compensation for a full-time Roadmaster and a part-time Secretary in other Second-Class Townships. Furthermore, Appellee Auditors failed to present a specific methodology for arriving at Appellant Supervisors' compensation. According to Appellee Auditor Szymanowski,

Appellee Auditors divided the average compensation for part-time and full-time Roadmasters and Secretaries, and then multiplied the respective quotients by Appellant Supervisors' current salaries to arrive at the 2017 compensation. However, Appellee Auditors' determination simply reduces Appellant Supervisors' compensation. Appellee Auditors failed to account for "comparable compensation paid in the locality for similar services," pursuant to the Second-Class Township Code. *See 53 P.S. §65606(a)*. Rather, Appellee Auditors "cherry-picked" certain Second-Class Townships that they thought subjectively were comparable to McKean Township. Therefore, although Appellee Auditors have "very broad discretion" in establishing Appellant Supervisors' compensation, *see Synoski*, 500 A.2d at 1285, this Trial Court finds and concludes the determinations made by Appellee Auditors do not adhere to statutory requirements of the Pennsylvania Second-Class Township Code.

Furthermore, the Appellee Auditors' decisions to reduce Appellant Supervisors' compensation and benefits are based upon improper bias and are arbitrary and capricious. First, Appellant Supervisor Bole supported and campaigned for Appellee Auditor Szymanowski's opponent for Auditor in 2015, which created friction between Appellee Auditor Szymanowski and Appellant Supervisor Bole. Second, Appellant Supervisors hired an independent auditor, Monahan & Monahan, to review McKean Township's finances, which became another point of contention between the McKean Township Auditors and Supervisors. Appellee Auditor Craig demonstrated displeasure about this decision to hire an independent auditor by her writing and submitting for publication a "Letter to the Editor," expressing her disapproval with Appellant Supervisors' outsourcing auditing work and Appellant Supervisors' "refusal" to supply Appellee Auditors with information relating to expenditures. Finally, during the January 4, 2017 meeting, Appellee Auditor Szymanowski refused to answer Appellant Supervisors' questions to explain why Appellee Auditors reduced Appellant Supervisors' compensation, thereby providing no rationale or basis for Appellee Auditors' decision-making. Therefore, the clear negativism between Appellee Auditors and Appellant Supervisors was the catalyst for Appellee Auditors reducing Appellant Supervisors' compensation and benefits.

Aaron Phillips, Decision Associates Business Consulting Group, was appointed by this Court, pursuant to Pa. R. E. 706. Mr. Phillips is an expert in human resources; responsibilities/duties and compensation/benefits, and his expertise was necessary to assist the undersigned judge as the trier and finder of fact. Mr. Phillips developed an agreeably and generally acceptable methodology in the field of human resources for determining Appellant Supervisors' compensation and prepared a "Compensation and Benefit Evaluation for McKean Township Supervisors," admitted as Court's Exhibit I. In Mr. Phillips' Evaluation, he analyzed and developed three (3) options in crafting the appropriate ranges of compensation. For the first option, Mr. Phillips utilized Second-Class Township data within the Northwest region; for the second option, he utilized Second-Class Township data with populations between 4,001 and 8,000; and for the final option, he utilized a custom blend of similar size and population Second-Class Townships within Erie County, Pennsylvania. *See Court's Exhibit I pg. 2.*

In developing ranges of compensation for Roadmaster, Mr. Phillips analyzed and evaluated the PSATS data, the "experience in the role in comparison to other personnel in the same role as the other [Second-Class Townships] surveyed" and the "experience in a

role performing duties similar to Roadmaster outside of [McKean Township].” *See id, pg. 3*. Although Appellant Supervisors Bole and Cooper have less experience as Roadmasters with McKean Township than other Second-Class Townships, Mr. Phillips concluded Appellant Supervisors Bole and Cooper have more experience in performing duties similar in nature to their current role as Roadmasters. *See id*. Mr. Phillips recommended this Trial Court consider and establish Appellant Supervisors Bole and Cooper’s compensation as Roadmaster in the range between $23.79/hour and $28.55/hour, and further recommended the Roadmasters’ compensation should be “at or greater than the fiftieth (50th) percentile.” *See id*.

Additionally, in developing ranges of compensation for Secretary, Mr. Phillips analyzed and evaluated the PSATS data and the “experience in comparison to other [Second-Class Townships] surveyed personnel in the same role.” *See id, pg. 3-4*. Mr. Phillips concluded Appellant Supervisor Dennis has “significantly more experience as Secretary than all other [Second-Class Townships’ Secretaries]” and recommended Appellant Supervisor Dennis’ compensation as Secretary have a salary in the range between $18.91/hour and $22.69/hour, with said compensation established near the top of the above-referenced compensation range due to the significant experience. *See id, pg. 4*.

Finally, in recommending benefits for Appellant Supervisors, Mr. Phillips concluded only one Supervisor, Appellant Supervisor Cooper, is eligible for township benefits. *See id, pg. 6*. Appellant Supervisors Bole and Dennis are employed by McKean Township part-time and only receive a supplement to Medicare. *See id*. Regarding township benefits, Mr. Phillips reviewed benefits offered to employees in surrounding Second-Class Townships and compared those benefits offered by other Second-Class Townships to the benefits offered to Appellant Supervisor Cooper, who is eligible for benefits as he is the only Supervisor by McKean Township on a full-time basis. *See id*. After thorough review, Mr. Phillips determined the benefits packages offered by other Second-Class Townships are “by and large much richer” and Appellant Supervisor Cooper’s benefits “illustrate stark differences with most benefits,” including holidays, sick time, required premium contribution for medical, dental and vision insurance and required pension comparison. *See id, attachment #4*. Mr. Phillips concluded although Appellee Auditors were attempting to gain “parity” with township benefits and private sector benefits, he recommended a better process - a “phased-in approach,” which “would allow benefit adjustments to be made over a period of up to four (4) years.” *See id, pg. 7*.

After review of this entire record, including testimony and evidence presented, and review of relevant statutory and case law, this Trial Court finds and concludes the generally acceptable methodology in the field of human resources prepared by Aaron Phillips, Decision Associates Business Consulting Group, is the appropriate methodology for determining Appellant Supervisors’ compensation and benefits. This Trial Court adopts Mr. Phillips’ well-reasoned and objective methodology as its own. This Trial Court also finds and concludes the appropriate compensation rate for Appellant Supervisors Bole and Cooper as Roadmasters is $26.17/hour, which this Trial Court determined by averaging of the compensation ranges recommended by Aaron Phillips for Roadmasters. This Trial Court also finds and concludes the appropriate compensation rate for Appellant Supervisor Dennis as Secretary is $21.75/hour, which this Trial Court determined by averaging of the compensation ranges recommended by Aaron Phillips for Secretaries ($20.80), then averaging the top pay

range ($22.69) with the average of the total range to arrive at the median of $21.75/hour. Furthermore, this Trial Court finds and concludes Appellant Supervisors' benefits packages will be reinstated and the inclusion of said benefits packages for Appellant Supervisors shall not require Appellee Auditors' approval, as statutorily indicated in 53 P.S. §65606(c)(1). In addition, Appellant Supervisors' overtime pay shall be reinstated. Finally, this Trial Court finds and concludes McKean Township shall be responsible for Appellant Supervisors' reasonable attorney fees as this Trial Court's Findings of Fact and Conclusions of law are "more favorable to [Appellant Supervisors] that that awarded by the Board of Auditors." *See 53 P.S. §65915(1).* In the event the parties cannot agree upon an amount appropriately considered as reasonable attorney's fees, this Trial Court will schedule a hearing, at the request of either party, in order to determine the appropriate amount of reasonable attorney's fees for Appellant Supervisors' counsel.

For all of the reasons set forth above, this Trial Court enters the following Order and reserves to enter additional Findings of Fact and Conclusions of Law in the future, if needed:

ORDER

AND NOW, to-wit, this 12th day of September, 2017, after thorough review of the entire record, including, but not limited to, the testimony and evidence presented at the Civil Non-Jury Trial on May 3, 2017 and July 13, 2017; the proposed Findings of Fact and Conclusions of Law submitted by both counsel; and the Supplemental Briefs in Support submitted by both counsel, as well as an independent review of relevant statutory law and case law, and as set forth above in this Trial Court's accompanying Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1) Appellant McKean Township Supervisors Ronald T. Bole and Brian Cooper's compensation as Roadmasters is hereby set at $26.17/hour;
2) Appellant McKean Township Supervisor Janice Dennis' compensation as Secretary is hereby set at $21.75/hour;
3) Appellant Supervisors' benefits packages shall be reinstated, and Appellant Supervisors' inclusion in said township benefits shall not require Appellee Auditors' approval, as statutorily indicated in 53 P.S. §65606(c)(1);
4) Appellant Supervisors' overtime compensation shall be reinstated; and
5) McKean Township shall be responsible for Appellant Supervisors' reasonable attorney fees as this Trial Court's Findings of Fact and Conclusions of Law are "more favorable to [Appellant Supervisors] that that awarded by the Board of Auditors." *See 53 P.S. §65915(1).* In the event the parties cannot agree upon an amount appropriately considered as reasonable attorney's fees, this Trial Court will schedule a hearing, at the request of either party, in order to determine the appropriate amount of reasonable attorney's fees for Appellant Supervisors' counsel.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**range

COMMONWEALTH OF PENNSYLVANIA

v.

MARQUISE MARTELL HENDERSON

HABEAS CORPUS / GROUNDS FOR RELIEF

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury."

PRELIMINARY HEARING / PRIMA FACIE / HEARSAY

Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property. The Pennsylvania Superior Court has upheld Pennsylvania Rule of Criminal Procedure 542(e) consistently and has further concluded a defendant does not have a right to confront witnesses against him at the Preliminary Hearing stage.

CRIMINAL OFFENSES / RECKLESSLY ENDANGERING ANOTHER PERSON

A person commits the offense of Recklessly Endangering Another Person if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. To sustain a conviction for Recklessly Endangering Another Person, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so.

CRIMINAL OFFENSES / TAMPERING WITH/FABRICATING PHYSICAL EVIDENCE

A person commits the offense of Tampering with or Fabricating Physical Evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation.

CRIMINAL OFFENSES / FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE

Any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license, commits the offense of Firearms not to be carried without a License. Absence of a license is an essential element of crime of carrying a firearm without a license.

CRIMINAL OFFENSES / CRIMINAL TRESPASS

As to Count Four, a person commits the offense of Criminal Trespass if, knowing that he is not licensed or privileged to do so, he enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof. "Occupied structure" is defined as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present."

CRIMINAL OFFENSE / RECEIVING STOLEN PROPERTY

A person commits the offense of Receiving Stolen Property if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen.

CRIMINAL RESPONSIBILITY / KNOWINGLY

A person acts knowingly with respect to a material element of an offense when, where the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist.

CRIMINAL OFFENSES / BURGLARY

A person commits the offense of Burglary if, with the intent to commit a crime therein, the person enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present.

CRIMINAL OFFENSES / INTIMIDATION OF WITNESS OR VICTIMS

A person commits the offense of Intimidation of Witnesses or Victims if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge. "Witness" is defined as "any person having knowledge of the existence or nonexistence of facts or information relating to any crime, including but not limited to those who have reported facts or information to any law enforcement officer, prosecuting official, attorney representing a criminal defendant or judge, those who have been served with a subpoena issued under the authority of this State or any other state or of the United States, and those who have given written or oral testimony in any criminal matter."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
CR 1408 of 2017

Appearances: D. Robert Marion, Jr., Esq. on behalf of the Commonwealth
Robert M. Barbato, Jr., Esq., on behalf of the Defendant

OPINION

Domitrovich, J. July 31, 2017

This Trial Court thoroughly considered the evidence and all reasonable inferences drawn therefrom regarding Defendant's Petition for Writ of *Habeas Corpus*, including, but not limited to, the Notes of Testimony from the May 4, 2017 Preliminary Hearing, as well as an independent review of the relevant statutory and case law.

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a Preliminary Hearing by filing a Petition for Writ of *Habeas Corpus*. *See Commonwealth v. Landis*, 48 A.3d 432, 222 (Pa. Super. 2012). When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *See Commonwealth v. Santos*,

876 A.2d 360, 363 (Pa. 2005). The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury." *See Commonwealth v. Winger*, 957 A.2d 325, 328 (Pa. Super. 2008).

Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. *Pa. R. Crim. P. 542(e)*. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property. *Id*. The Pennsylvania Superior Court has upheld Pennsylvania Rule of Criminal Procedure 542(e) consistently and has further concluded a defendant does not have a right to confront witnesses against him at the Preliminary Hearing stage. *See Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015); *see also Commonwealth v. McClelland*, 2017 Pa. Super. 163 (Pa. Super. 2017) (a defendant's due process and confrontation rights are not violated by the Commonwealth introducing and criminal charges being bound over on pure hearsay).

On June 23, 2017, the District Attorney's Office filed a Criminal Information charging Marquise Martell Henderson (hereafter referred to as "Defendant") with Recklessly Endangering Another Person (18 Pa. C. S. §2705), Tampering with or Fabricating Physical Evidence (18 Pa. C. S. §4910(1)), Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)), Criminal Trespass (18 Pa. C. S. §3503(a)(1)(i)), Receiving Stolen Property (18 Pa. C. S. §3925(a)), Burglary (18 Pa. C. S. §3502(a)(1)) and Intimidation of Witnesses or Victims (18 Pa. C. S. §4952(a)(2)). Defendant argues the Commonwealth has failed to produce *prima facie* evidence supporting the offenses charged above and requests this Trial Court dismiss the charges against Defendant.

As to the Count One, a person commits the offense of Recklessly Endangering Another Person if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. *18 Pa. C. S. §2705*. To sustain a conviction for recklessly endangering another person, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so; danger, not merely the apprehension of danger, must be created. *Commonwealth v. Cordoba*, 902 A.2d 1280, 1288 (Pa. Super. 2006).

At the May 4, 2017 Preliminary Hearing, the Commonwealth called Officer James Bielak as a witness. Officer Bielak stated he was dispatched to the area of 17th Street and Cascade Street on September 2, 2016 for reports of shots fired. Upon arriving, Officer Bielak and three (3) other police officers began collecting shell casings in the area. Two (2) separate types of ammunition were collected – 9 mm and .40 caliber. Officer Bielak spoke with a witness, Robert Brookhouser, who indicated he saw a black male, wearing an all-black jumpsuit with white stripes down the side, being shot at by other individuals in a vehicle. The black male ran eastbound away from the vehicle and shot over his shoulder at the other individuals. Officer Bielak stated shell casing were found in a trail heading east on 17th Street. Another unidentified witness informed Officer Bielak that a black male had entered the residence at 939 West 17th Street. Officer Bielak went to said residence and located the owner, Sonya Young, who stated no one should be in her residence other than her nephew. Officer Bielak noticed people moving around the 2nd floor of Ms. Young's residence; thereafter, police officers surrounded Ms. Young's residence, opened the door and gave commands for any

individuals in Ms. Young's residence to exit the residence. A black male wearing an all-black jumpsuit with white stripes appeared from Ms. Young's residence and was identified as Marquise Martell Henderson (hereafter referred to as "Defendant"). The police officers located a .40 caliber firearm in the back of the toilet well in the 2nd floor bathroom of the residence. Based upon the testimony and evidence presented, the Commonwealth established sufficient *prima facie* evidence to support Count One: Recklessly Endangering Another Person.

As to Count Two, a person commits the offense of Tampering with or Fabricating Physical Evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation. 1*8 Pa. C. S. §4910(1)*.

Officer Bielak stated Defendant, who had been observed by witnesses firing a firearm at other individuals while running eastward on 17th Street, was discovered in the residence of 939 West 17th Street. After Defendant and other individuals were requested to exit Ms. Young's residence, police officers searched Ms. Young's residence, during which a .40 caliber firearm was discovered in the back of the toilet well of the 2nd floor bathroom. Officer Bielak also indicated .40 caliber ammunition was found in a trail heading east on 17th Street, towards the residence where Defendant was discovered. Based upon the testimony and evidence presented, the Commonwealth established sufficient *prima facie* evidence to support Count Two: Tampering with or Fabricating Physical Evidence.

As to Count Three, any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license, commits the offense of Firearms not to be carried without a License. *18 Pa. C. S. §6106(a)(1)*. Absence of a license is an essential element of crime of carrying a firearm without a license. *Commonwealth v. McNeil*, 337 A.2d 840, 843 (Pa. Super. 1975).

After recovering the .40 caliber firearm from 939 West 17th Street, Officer Bielak stated he sent this firearm to the lab for firearms testing. Office Bielak also stated, after investigation, that Defendant does not have a permit to carry a firearm and Defendant has a prior conviction in 2015, which prohibits Defendant from possessing a firearm. Based upon Officer Bielak's testimony, the Commonwealth established sufficient *prima facie* evidence to support Count Three: Firearms not to be carried without a License.

As to Count Four, a person commits the offense of Criminal Trespass if, knowing that he is not licensed or privileged to do so, he enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof. *18 Pa. C. S. §3503(a)(1)(i)*. "Occupied structure" is defined as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *18 Pa. C. S. §3501*.

Officer Bielak stated an unknown individual informed him that the individual firing a firearm earlier entered the residence at 939 West 17th Street. Thereafter, Officer Bielak located the owner of the residence, Sonya Young. Ms. Young told Officer Bielak only her nephew was allowed to be present inside her residence; anyone else in the residence did not have her permission to be there. After police officers surrounded Ms. Young's residence and

commanded all individuals inside Ms. Young's residence to exit the residence, Defendant left Ms. Young's residence. Based upon the testimony presented, the Commonwealth established sufficient *prima facie* evidence to support Count Four: Criminal Trespass.

As to Count Five, a person commits the offense of Receiving Stolen Property if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen. *18 Pa. C. S. §3925(a)*. A person acts knowingly with respect to a material element of an offense when, where the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist. *18 Pa. C. S. §302(b)(2)(i)*.

At the May 4, 2017 Preliminary Hearing, the Commonwealth called Detective Todd Manges as a witness. Detective Manges stated he was asked to look into the firearm found at 939 West 17th Street and allegedly possessed by Defendant. Detective Manges stated he ran the firearm through the National Crime Information Center ("NCIC") database, which revealed no record of the firearm as the registered owner won the firearm in a raffle. Detective Manges then called the registered owner, who had reported the firearm stolen two (2) to three (3) days prior to the incident. Based upon the testimony presented, the Commonwealth established sufficient *prima facie* evidence to support Count Five: Receiving Stolen Property.

As to Count Six, a person commits the offense of Burglary if, with the intent to commit a crime therein, the person enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present. *18 Pa. C. S. §3502(a)(1)(ii)*. Again, "occupied structure" is defined as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *18 Pa. C. S. §3501*.

Consistent with this Trial Court finding and concluding above as to Count Four (Criminal Trespass), Defendant was discovered in the residence of Sonya Young following reports of shots fired and a witness observing an individual matching Defendant's description shooting at individuals and running eastward on 17th Street. Furthermore, while inside Ms. Young's residence, evidence indicated a .40 caliber firearm was located in the back of a toilet well. Based upon the testimony and evidence presented, the Commonwealth established sufficient *prima facie* evidence to support Count Six: Burglary.

Finally, as to Count Seven, a person commits the offense of Intimidation of Witnesses or Victims if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge. *18 Pa. C. S. §4952(a)(2)*. "Witness" is defined as "any person having knowledge of the existence or nonexistence of facts or information relating to any crime, including but not limited to those who have reported facts or information to any law enforcement officer, prosecuting official, attorney representing a criminal defendant or judge, those who have been served with a subpoena issued under the authority of this State or any other state or of the United States, and those who have given written or oral testimony in any criminal matter." *18 Pa. C. S. §4951*.

Detective Manges stated he was asked to review Defendant's prison calls, specifically

prison calls made between September 3, 2016 and September 8, 2016. Detective Manges acknowledged the prison calls came from Defendant's prison account and with Defendant's PIN number after Defendant was incarcerated for the above-referenced charges. Defendant made statements such as "I told young boy to take the rap for this shit," "He is going to talk to Big Bro and then to handle witnesses" and "if he go down there, I'm going to beat him and I'm going to make sure that man don't go down there." Detective Manges also stated Defendant made statements about paying witnesses. Based upon the evidence presented, the Commonwealth established sufficient *prima facie* evidence to support Count Seven: Intimidation of Witnesses and Victims.

After a thorough review of the entire record and after review of relevant statutory law and case law, this Trial Court finds and concludes, viewing all of the evidence and all reasonable inferences drawn from the evidence in a light most favorable to the Commonwealth, the Commonwealth produced sufficient evidence to meet its *prima facie* burden that Defendant committed the crimes of Recklessly Endangering Another Person (18 Pa. C. S. §2705), Tampering with or Fabricating Physical Evidence (18 Pa. C. S. §490(1)), Firearms not to be carried without a License (18 Pa. C. S. §6106(a)(1)), Criminal Trespass (18 Pa. C. S. §3503(a)(1)(i)), Receiving Stolen Property (18 Pa. C. S. §3925(a)), Burglary (18 Pa. C. S. §3502(a)(1)) and Intimidation of Witnesses or Victims (18 Pa. C. S. §4952(a)(2)). For all of the reasons above, this Court enters the following Order:

ORDER

AND NOW, to wit, this 31st day of July, 2017, after thorough consideration of the entire record regarding Defendant's Petition for Writ of *Habeas Corpus*, including, but not limited to, the Notes of Testimony from the May 4, 2017 Preliminary Hearing, as well as an independent review of the relevant statutory and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Petition for Writ of *Habeas Corpus* is hereby **DENIED**.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

CAROL MEERHOFF, individually and as Administratrix of the Estate of JEREMY MEERHOFF, deceased, and STEVEN LITTLE, an adult individual

v.

DONALD McCRAY; McCRAY ALUMINUM AND BUILDER'S SUPPLY COMPANY, INC.; THE NORTHWESTERN RURAL ELECTRIC CO-OPERATIVE ASSOCIATION, INC.; FIRST ENERGY CORPORATION, an Ohio Corporation; PENNSYLVANIA ELECTRIC COMPANY t/d/b/a Penelec, a wholly owned Subsidiary of First Energy

CIVIL PROCEDURE / SUMMARY JUDGMENT

After the relevant pleadings are closed, but within such time as not to delay unreasonably the trial, any party may move for summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury. The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party. When the facts are so clear that reasonable minds cannot differ, a trial court may properly enter summary judgment.

NEGLIGENCE / GENERALLY

Negligence is established by proving the following four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. Moreover, in any negligence action, establishing a breach of a legal duty is a condition precedent to a finding of negligence.

EVIDENCE / EXPERT TESTIMONY

Pursuant to Pennsylvania Rule of Evidence 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue: and (c) the expert's methodology is generally accepted in the relevant field. If an expert states an opinion, the expert must state the facts or data on which the opinion is based.

CIVIL PROCEDURE / ADMISSIONS

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rules 4003.1 through 4003.5. Each matter of which an admission is requested shall be separately set forth, and the matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney.

CORPORATIONS / PIERCING THE CORPORATE VEIL

"Piercing the corporate veil" provides a means of assessing liability against a corporation for the actions or inaction of its members and shareholders. The following factors are considered when determining whether to pierce the corporate veil: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs, and (4) use of the corporate form to perpetrate a fraud. Once sufficient evidence exists to apply this doctrine, this doctrine permits holding corporate officers and directors personally liable for the actions of the corporation.

CORPORATIONS / PIERCING THE CORPORATE VEIL

A strong presumption exists in Pennsylvania against piercing the corporate veil; however, courts will not hesitate to impose liability for the acts of a corporation whenever equity requires such be done either to prevent fraud, illegality, or injustice or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime.

NEGLIGENCE – COMPARATIVE/CONTRIBUTORY NEGLIGENCE

As a general rule, in all actions to recover damages for negligence resulting in death or injury to person or property, the fact the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff. The issue of apportionment of negligence should not be submitted to the jury if the plaintiff fails to establish a case of negligence on the defendant's part in the first place.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11079 – 2015

Appearances: Peter D. Friday, Esq., and Kevin S. Burger, Esq., on behalf of Carol Meerhoff, individually and as Administratrix of the Estate of Jeremy Meerhoff, deceased, and Steven Little, an adult individual (Appellants)
Mark E. Mioduszewski, Esq., on behalf of Donald McCray (Appellee)
John B. Fessler, Esq., on behalf of McCray Aluminum and Builder's Supply Company, Inc. (Appellee)
Edward A. Smallwood, Esq., on behalf of Pennsylvania Electric Company t/d/b/a Penelec, a wholly owned subsidiary of First Energy (Appellee)

OPINION

Domitrovich, J. October 31, 2016

The instant matter is before the Pennsylvania Superior Court on the appeal of Carol Meerhoff, individually and as Administratrix of the Estate of Jeremy Meerhoff, deceased, and Steven Little, an adult individual (both hereafter referred to as "Appellant"), from this Trial Court's Opinion and Order dated August 19, 2016. By said Opinion and Order dated August 19, 2016, this Trial Court granted the individual Motions for Summary Judgment of

Donald McCray, McCray Aluminum and Builder's Supply Company, Inc., and Pennsylvania Electric Company, t/d/b/a Penelec, a wholly owned subsidiary of First Energy (hereafter referred to as "Appellees") as this Trial Court concluded: (1) Appellants failed to demonstrate successfully a cause of action for negligence against Appellees Donald McCray, McCray Aluminum and Builder's Supply Company, Inc. and Pennsylvania Electric Company, t/d/b/a Penelec, a wholly owned subsidiary of First Energy; (2) Within the ten [10] day time period allotted after the undersigned judge found Plaintiff's proposed expert, James L. Glancey, Ph.D., unqualified as an relevant expert in this case by Order dated July 14, 2016, Appellants failed to produce a new expert qualified to demonstrate (a) whether Appellee Donald McCray's private, non-commercial residence was equipped with smoke detectors, and (b) whether the fire occurring at Appellee Donald McCray's private, non-commercial residence was electrical in nature; (3) Appellants failed to adhere to the time restraints for filing responses to Appellee McCray Aluminum and Builder's Supply Company, Inc.'s First Set of Requests for Admissions, pursuant to Pennsylvania Rule of Civil Procedure 4014(b), thereby admitting the allegations contained therein; (4) Appellants failed to produce sufficient evidence to "pierce the corporate veil" in order to hold Appellee McCray Aluminum and Builder's Supply Company, Inc. liable for Jeremy Meerhoff and Steven Little's injuries; and (5) Appellants failed to demonstrate successfully the "negligence" of the Appellees was greater than the "wanton comparative negligence" of Jeremy Meerhoff and Steven Little, thereby barring Appellants' recovery.

Procedural History

Appellants filed a Motion to Transfer Venue on April 1, 2015, which was granted and the instant civil action was transferred to Erie County, Pennsylvania.

Appellants filed a Praecipe for Writ of Summons and a Praecipe for Issuance for Rule to File Complaint on April 1, 2015. Appellants filed a Complaint in Civil Action on April 1, 2015. Appellee Pennsylvania Electric Company t/d/b/a Penelec filed an Answer, New Matter and Cross-Claims on April 23, 2015. Appellee McCray Aluminum and Builder's Supply Company, Inc. filed an Answer, New Matter and Cross-Claim on May 22, 2015. Appellee Donald McCray filed an Answer, New Matter and Cross-Claim on May 26, 2015.

By Stipulation on May 11, 2015, all allegations against Appellee Donald McCray and McCray Aluminum and Builder's Supply Company, Inc. for recklessness and punitive damages were withdrawn. By Stipulation on May 15, 2015, First Energy Corporation was dismissed from the instant civil action. By Stipulation on December 21, 2015, Northwestern Rural Electric Cooperative Association, Inc. was also dismissed from the instant civil action.

Appellee Pennsylvania Electric Company t/d/b/a Penelec filed a Motion to Strike Report of James L. Glancey on May 16, 2016. Appellants filed a Response to Defendant Penelec's Motion on May 31, 2016. Following a hearing on June 30, 2016, this Trial Court rescheduled the hearing on Appellees' Motions for Summary Judgment, originally scheduled for August 15, 2016, to July 26, 2016, by agreement of all counsel in order to expedite the hearing on Appellees' Motions for Summary Judgment, and this Trial Court deferred ruling on Appellee Pennsylvania Electric Company t/d/b/a Penelec's Motion to Strike Report of James L. Glancey.

Appellants presented a Motion for Clarification to this Trial Court in Motion Court on

July 14, 2016. At that hearing, this Trial Court, having heard argument and after reviewing relevant evidence, granted Appellee Pennsylvania Electric Company t/d/b/a Penelec's Motion to Strike Report of James L. Glancey and denied Appellants' Motion for Clarification.

Appellee Pennsylvania Electric Company t/d/b/a Penelec filed its Motion for Summary Judgment and a Brief in Support on June 2, 2016. Defendant McCray Aluminum and Builder's Supply Company, Inc. filed its Motion for Summary Judgment and a Brief in Support on June 7, 2016. Defendant Donald McCray filed his Motion for Summary Judgment and a Brief in Support on June 17, 2016. Following the hearing on Appellees' Motions for Summary Judgment on July 26, 2016, and by Opinion and Order dated August 19, 2016, this Trial Court granted Appellee's individual Motions for Summary Judgment and dismissed Appellants' civil action against the Appellees with prejudice.

Appellants filed a Notice of Appeal to the Pennsylvania Superior Court on September 15, 2016. This Trial Court filed its 1925(b) Order on September 19, 2016. Appellants filed their Concise Statement of Errors Complained of on Appeal on October 10, 2016.

Appellants raise nine (9) issues in their Concise Statement of Errors Complained of on Appeal, and this Trial Court consolidates Appellants' issues into four (4) issues:

1. **Whether this Trial Court erred by finding and concluding Appellants failed to establish successfully a cause of action for negligence against Appellees Donald McCray, McCray Aluminum and Builder's Supply Company, Inc. and Pennsylvania Electric Company, t/d/b/a Penelec, a wholly owned subsidiary of First Energy.**

A. Appellee Donald McCray

First, Appellants have failed to establish successfully a cause of action for negligence against Appellee Donald McCray. Negligence is established by proving the following four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. *Grossman v. Barke*, 868 A.2d 561, 566 (Pa. Super. 2005). Absent a duty of care, there can be no negligence. *See Marshall v. Port Authority of Allegheny County*, 568 A.2d 931, 935 (Pa. 1990). Regarding duty of care, the Pennsylvania Supreme Court has stated the following:

> Before a person may be subject to liability for failing to act in a given situation, it must be established that the person has a duty to act; **if no care is due, it is meaningless to assert that a person failed to act with due care**. Certain relations between parties may give rise to such a duty. Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.

Elbasher v. Simco Sales Service of Pennsylvania, 657 A.2d 983, 984-85 (Pa. Super. 1995) (*citing Wenrick v. Schloemann-Siemag Aktiengeselischaft*, 564 A.2d 1244, 1248 (Pa. 1989) [emphasis added]. Moreover, in any negligence action, establishing a breach of a legal duty is a condition precedent to a finding of negligence. *Grossman* at 566.

In their Complaint in Civil Action, Appellants argue Appellee McCray should be held liable for negligence by "failing to install, service, inspect and operate smoke detectors… in the house and premises." In addition, Appellants allege Appellee Donald McCray's private, non-commercial residence was "in violation of Pennsylvania, United States and local fire laws, rules and regulations" due to the lack of smoke detectors. However, Appellants failed to provide any Pennsylvania statute, ordinance, code, case law or other authority requiring private, non-commercial homeowners, such as Appellee Donald McCray, to have smoke detectors installed in their private, non-commercial residences. Absent establishing the alleged duty of care, i.e. a duty to have smoke detectors installed in Appellee Donald McCray's private, non-commercial residence, Appellants' cause of action for negligence against Appellee Donald McCray is meaningless. *See Elbasher* at 984. Moreover, without a duty of care, there can be no breach of said duty, which is a condition precedent to a finding of negligence. *See Grossman* at 566.

Appellants allege Jeremy Meerhoff and Steven Little had permission to use the property as "licensees"; and, therefore, Appellee Donald McCray owed Meerhoff and Little a duty to protect alleged "licensees" from a dangerous condition on the property, i.e. a lack of smoke detectors. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land only if:

a) The possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; and
b) The possessor fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
c) The licensees do not know or have reason to know of the condition and the risk involved.

See Restatement (2nd) of Torts §342; see also Rossino v. Kovacs, 718 A.2d 755, 758 (Pa. 1998). Appellants cite the case of *Echeverria v. Holley*, 142 A.3d 29 (Pa. Super. 2016) to support their allegations. In *Echeverria*, a fire in a two-unit residential property resulted in the deaths of three individuals, and a common law negligence action was brought by the plaintiffs against the defendant landlord for failure to install smoke detectors at that property. *See id* at 32. The trial court in *Echeverria* granted the defendant landlord's preliminary objections and dismissed the plaintiffs' common law negligence claim. *See id* at 33. The trial court later granted summary judgment in favor of the defendant landlord, and the plaintiff's appealed. *See id*. The Pennsylvania Superior Court vacated the trial court's ruling on defendant landlord's preliminary objections, concluding the plaintiffs alleged sufficient facts to support a finding that a dangerous condition, i.e. lack of smoke detectors, was present at the property, and the defendant landlord knew of the dangerous condition and failed to correct it, causing harm to the decedents. *See id* at 36. However, in the instant case, significant differences exist between the facts in *Echeverria* and the facts presented in the instant civil action. Unlike *Echeverria*, Appellee Donald McCray was the owner of a private, non-commercial residence, not a multi-family residential landlord-tenant apartment complex building. Furthermore, as discussed in this Trial Court's Opinion

and Order dated August 19, 2016 and addressed below, Appellants presented no credible evidence to demonstrate Appellee Donald McCray's private, non-commercial residence was not equipped with smoke detectors. Finally, while the Pennsylvania Superior Court in *Echeverria* did acknowledge smoke detectors must be installed in residential landlord-tenant apartment complex properties, pursuant to the Pennsylvania Uniform Construction Code, 35 P.S. §§ 7210.101 *et seq.*, Appellants in the instant civil action failed to provide any statutory authority or case law requiring a private, non-commercial residence owner to install smoke detectors. Therefore, Appellants have failed to establish successfully a cause of action for negligence against Appellee Donald McCray.

B. Appellee McCray Aluminum and Builder's Supply Company, Inc.

Second, Appellants have failed to establish successfully a cause of action for negligence against Appellee McCray Aluminum and Builder's Supply Company, Inc. The party having possession and control of the premises at the time of an incident is legally responsible for the consequences of said incident. *See Pintek v. Allegheny County*, 142 A.2d 296, 301 (Pa. Super. 1958). The Deed to the subject property, located at 41491 State Highway 77, Spartansburg, Crawford County, Pennsylvania 16434, is in the name of Appellee Donald McCray only. Donald McCray also grew hay on the subject property, which he sold to the public. *See Deposition of Donald McCray, January 8, 2016, pg. 117, lines 9-16*. Although a sign for "McCray Aluminum and Builder's Supply Company" was located on the property, Appellee Donald McCray indicated the sign was for advertising purposes only. *See id, pg. 83, lines 12-17; see also Deposition of Dale McCray, March 11, 2016, pg. 41, lines 14-16*. Appellee McCray Aluminum and Builder's Supply Company, Inc. did not operate its business from the subject property and did not keep building supplies, vehicles or equipment on the subject property. *See id, pg. 83, line 18 – pg. 84, line 2*.

Appellants argue that they "pierced the corporate veil" of Appellee McCray Aluminum and Builder's Supply Company, Inc. "Piercing the corporate veil" provides a means of assessing liability against a corporation for the actions or inaction of its members and shareholders. *See Lomas v. Kravitz*, 130 A.3d 107, 126 (Pa. Super. 2015). The following factors are considered when determining whether to pierce the corporate veil: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs, and (4) use of the corporate form to perpetrate a fraud. *Id.* Once sufficient evidence exists to apply this doctrine, this doctrine permits holding corporate officers and directors personally liable for the actions of the corporation. *See Impac Technology, Inc. v. Ellenberg, 2005 Phila. Ct. Com. Pl. LEXIS 322, *13 (Pa. C.P. 2005)*. A strong presumption exists in Pennsylvania against piercing the corporate veil; however, courts will not hesitate to impose liability for the acts of a corporation whenever equity requires such be done either to prevent fraud, illegality, or injustice or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime. *See id*.

Appellants allege Appellees Donald McCray and McCray Aluminum and Builder's Supply Company, Inc. were perceived as the same entity and did business as such, and further allege Appellees Donald McCray and McCray Aluminum and Builder's Supply Company, Inc. commingled assets by paying employees with both personal checks from Donald McCray and business checks from McCray Aluminum and Builder's Supply Company, Inc. However, assuming such evidence exists, said evidence does not rise to a level of "substantial

intermingling of corporate and personal affairs." Furthermore, Appellants offer no evidence as to the other factors applicable to piercing the corporate veil, including undercapitalization, failure to adhere to corporate formalities and use of the corporate form to perpetrate a fraud. The evidence presented by Appellants is insufficient to "pierce the corporate veil" and hold Appellee McCray Aluminum and Builder's Supply Company, Inc. liable for negligence.

As stated above, establishing a duty of care and a breach of that duty are paramount to a cause of action for negligence. *See Elbasher*, 657 A.2d at 984-85; *see also Grossman*, 868 A.2d at 566. Appellants allege Appellee McCray Aluminum and Builder's Supply Company, Inc. was negligent for "failing to install, service, inspect and operate smoke detectors… in the house and premises," which Appellants allege was "in violation of Pennsylvania, United States and local fire laws, rules and regulations." However, Appellants failed to provide any Pennsylvania statutory authority, codes, regulations or case law requiring Appellee McCray Aluminum and Builder's Supply Company, Inc. to have smoke detectors installed in Appellee Donald McCray's private, non-commercial residence. Absent establishing the alleged duty of care, Appellants' cause of action for negligence against Appellee McCray Aluminum and Builder's Supply Company, Inc. is meaningless. *See Elbasher* at 984. Moreover, without a duty of care, there can be no breach of said duty, which is a condition precedent to a finding of negligence. *See Grossman* at 566.

Finally, Appellants have admitted several key averments made by Appellee McCray Aluminum and Builder's Supply Company, Inc. by failing to respond to Appellee McCray Aluminum and Builder's Supply Company, Inc.'s First Set of Requests for Admissions within the time required. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rules 4003.1 through 4003.5. *See Pa. R. Civ. P. 4014(a)*. Each matter of which an admission is requested shall be separately set forth, and the matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney. *See Pa. R. Civ. P. 4014(b)*.

Appellee McCray Aluminum and Builder's Supply Company, Inc. served its First Set of Requests for Admissions upon Appellants on March 17, 2016, three (3) days before the discovery time period was set to expire on March 20, 2016. Although Appellants claim they were not given a significant amount of time to respond, Appellant McCray Aluminum and Builder's Supply Company, Inc.'s First Set of Requests for Admissions was served within the discovery time period. To date, Appellants have still failed to answer Appellee McCray Aluminum and Builder's Supply Company, Inc.'s First Set of Requests for Admissions. Pursuant to Rule 4014(b), several key averments in Appellee McCray Aluminum and Builder's Supply Company, Inc.'s First Set of Requests for Admissions are deemed "admitted," including, but not limited to, (1) Appellee Donald McCray is the sole owner of the subject property located at 41491 State Highway 77, Spartansburg, Crawford County, Pennsylvania; (2) Appellee McCray Aluminum and Builder's Supply Company, Inc. had no ownership in the subject property; (3) no evidence exists indicating the fire at the subject property on October 29, 2012 was started by the actions of any employee of Appellee McCray Aluminum and Builder's Supply Company, Inc.; and (4) the fire at the

subject property on October 29, 2012 was started due to the actions of Jeremy Meerhoff and/or Steven Little. These admissions have been conclusively established and Appellants have not sought to withdraw or amend these admissions. *See Pa. R. Civ. P. 4014(d).*

C. Appellee Pennsylvania Electric Company, t/d/b/a Penelec

Finally, Appellants have failed to establish successfully a cause of action for negligence against Appellee Pennsylvania Electric Company t/d/b/a Penelec. As stated above, establishing a duty of care and a breach of that duty are paramount to a cause of action for negligence. *See Elbasher*, 657 A.2d at 984-85; *see also Grossman*, 868 A.2d at 566.

Appellants failed to establish a breach of a recognized duty by Appellee Pennsylvania Electric Company t/d/b/a Penelec to support a cause of action for negligence. First, Appellants failed to produce any evidence that Appellee Pennsylvania Electric Company t/d/b/a Penelec installed or maintained the subject property's electrical equipment, transformers or utility lines improperly. Furthermore, this Trial Court properly did not qualify Appellants' expert, James L. Glancey, Ph.D., P.E., who merely opined the fire occurring at the subject property on October 29, 2012 was electrical in nature and Appellee Pennsylvania Electric Company t/d/b/a Penelec was negligent for failing to mark properly a guy wire on the subject property without proper electrical engineering methodology, as James L. Glancey is not a qualified electrical engineer (as discussed in more detail below), and Appellants failed to produce a new expert qualified to support Appellants' cause of action. Finally, in his Responses to Appellee Pennsylvania Electric Company t/d/b/a Penelec's First Set of Requests for Admissions, Appellee Donald McCray indicated there was no damage to the power lines at his property existing when he was last there on October 28, 2012 at 4:00 p.m.; he did not observe any existing damage, defect or malfunction of any power line, power pole, guy wire, transformer or other exterior electrical component as of October 28, 2012; and, therefore, he did not report any damage, defect or malfunction of any power line, power pole, guy wire, transformer or other exterior electrical component to Appellee Pennsylvania Electric Company t/d/b/a Penelec on or before October 28, 2012. *See Responses of Defendant, Donald McCray, to Penelec's First Set of Requests for Admissions, Interrogatories and Request for Production, verified June 24, 2015.* These conclusively-established admissions by Appellee Donald McCray support the averments that the electrical equipment on the subject property was properly installed and maintained by Appellee Pennsylvania Electric Company t/d/b/a Penelec, thereby demonstrating adherence to a reasonable duty of care.

Therefore, Appellants have failed to establish successfully a cause of action for negligence against the Appellees.

2. Whether this Trial Court properly denied the admission of Appellants' experts, James L. Glancey, Ph.D., P.E. and Jack R. Vinson, Ph.D., P.E., as not being qualified to provide expert testimony on electrical engineering and whose opinions were not based on proper electrical engineering methodology, and Appellants failed to identify a new expert qualified to support their causes of action against the Appellees without resorting to speculation.

Pursuant to Rule 702 of the Pennsylvania Rules of Evidence, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) The expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
b) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
c) The expert's methodology is generally accepted in the relevant field.

Pa. R. E. 702. Regarding admissibility of expert testimony, the Pennsylvania Superior Court has held:

> Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. It is well settled in Pennsylvania that the standard for qualification of an expert witness is a liberal one. When determining whether a witness is qualified as an expert the court is to examine whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.
>
> The determination of whether a witness is a qualified expert involves two inquiries: When a witness is offered as an expert, the first question the trial court should ask is whether the subject on which the witness will express an opinion is "so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman." If the subject is of this sort, the next question the court should ask is whether the witness has "sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth."

See Kovalev v. Sowell, 839 A.2d 359, 362-63 (Pa. Super. 2003).

In their Pre-trial Narrative Statement, Appellants indicate James L. Glancey, Ph.D., P.E. as an expert witness and attached the Expert Report of James L. Glancey. In his Expert Report, James L. Glancey admitted he examined several pieces of evidence, including civil pleadings filed by the parties, police reports, photographs of the residence, an on-site inspection of the property and depositions of parties and witnesses. James L. Glancey, without proper electrical engineering methodology, concluded the fire occurring on the subject property on October 29, 2012 was electrical in nature and the installation of a reflective marker on the guy wire would have reduced the likelihood an impact on the guy wire by a vehicle.

However, James L. Glancey, Ph.D., P.E. is a registered professional and mechanical engineer, and Appellants' counsel indicated at the time of oral argument that nothing in James L. Glancey's voluminous *curriculum vitae* sets forth any educational, vocational or practical experience in the fields of electrical engineering, which are paramount in the instant civil action. In fact, James L. Glancey's *curriculum vitae* is abound with educational, vocational and practice experience in the fields of mechanical, agricultural, biological and professional engineering, which are separate and distinct from the field of electrical engineering. Furthermore, James L. Glancey's *curriculum vitae* contains no references to education or experience in the field of fire cause/origin. Finally, James L. Glancey's supervisor, Jack R.

Vinson, Ph.D., P.E., also signed James L. Glancey's Expert Report in an attempt to bolster the credibility of James L. Glancey, which this Trial Court found improper as Jack R. Vinson, Ph.D., P.E., was also not an expert qualified in electrical engineering. Absent relevant qualifications in the fields of electrical engineering and/or fire cause/origin, this Trial Court properly concluded James L. Glancey, Ph.D., P.E., a professional and mechanical engineer, does not possess "sufficient skill, knowledge, or experience" in the fields of electrical engineering and/or fire cause/origin which would aid a jury in determining the cause of the fire at the subject property on October 29, 2012. *See id; see also Dambacher v. Mallis*, 485 A.2d 408, 418 (Pa. Super. 1984) (if a witness has neither experience nor education in the subject under investigation, he should be found not qualified). Therefore, by Order dated July 14, 2016, this Trial Court granted Appellee Pennsylvania Electric Company t/d/b/a Penelec's Motion to Strike Report of James L. Glancey, filed on May 16, 2016, and provided Appellants ten (10) days to identify a new expert with relevant education and experience in the fields of electrical engineering and/or fire cause/origin, which, to date, Appellants have failed to provide a properly qualified expert.

This Trial Court's decision to exclude Glancey and Vinson is consistent with the decision by Honorable Norman A. Krumenacker III, President Judge, Cambria County Court of Common Pleas, in the case of *Reed v. Pennsylvania Electric Company, a FirstEnergy Company t/d/b/a Penelec et al.*, docket no. 4521 – 2013, Cambria County Court of Common Pleas. In *Reed*, the Defendants Pennsylvania Electric Company, a FirstEnergy Corporation t/d/b/a Penelec and FirstEnergy Corporation filed a Motion *in Limine* to Preclude Proposed Expert Testimony of the same expert, James L. Glancey, Ph.D., P.E., wherein it was argued James L. Glancey, a mechanical engineer, could not offer opinions regarding electrical distribution systems as James L. Glancey did not possess the requisite knowledge, skill, experience, training or education in the field of electrical engineering. Following a hearing, Judge Krumenacker, agreeing with the averments contained within Defendants Pennsylvania Electric Company, a FirstEnergy Corporation t/d/b/a Penelec and FirstEnergy Corporation's Motion, entered his Order dated February 5, 2016 precluding the expert testimony of James L. Glancey, Ph.D., P.E. in his case and providing those plaintiffs forty-five (45) days to identify a new expert and supply a new Expert Report. Appellants in this instant case attempted to introduce the same expert, James L. Glancey, knowing James L. Glancey was not qualified as an electrical engineering expert and had been excluded in a prior case due to his lack of relevant education and experience.

Therefore, this Trial Court properly excluded James L. Glancey, Ph.D., P.E., a mechanical engineer, as James L. Glancey was not properly qualified to provide opinions in the instant civil action regarding the field of electrical engineering and without proper electrical engineering methodology.

3. Whether this Trial Court erred in concluding Appellants, in failing to present a new expert qualified to testify in the instant civil action, failed to establish (1) the cause and/or origin of the October 29, 2012 fire or (2) whether Appellee Donald McCray's private, non-commercial residence was equipped with smoke detectors, without resorting to speculation.

As addressed above, this Trial Court properly excluded Appellants' expert, James L. Glancey, Ph.D., P.E., a registered mechanical engineer, from testifying because James L. Glancey did not possess relevant educational, vocational or practical qualifications in the fields of electrical engineering and/or fire cause/origin, to form the basis of his "opinion," and this Trial Court concluded James L. Glancey did not possess "sufficient skill, knowledge, or experience" in the fields of electrical engineering and/or fire cause/origin which would aid a jury in determining the cause of the fire at the subject property on October 29, 2012. *See Kovalev*, 839 A.2d at 362-63; *see also Dambacher*, 485 A.2d at 418. The undersigned judge provided Appellants ten (10) days to identify a qualified electrical engineering and/or fire cause/origin expert; however, Appellants failed to identify a new qualified expert in electrical engineering, and, therefore, Appellants' cause of action for negligence against the Appellees rests on speculation and does not give rise to a genuine issue of material fact.

Aside from James L. Glancey, Ph.D., P.E., Appellants identify Deborah A. Waller, P.E., a registered engineer with education and experience in the field of fire safety, in their Pre-trial Narrative Statement. Deborah A. Waller, in her Expert Report, which is based upon review of the parties' civil pleadings, depositions and photographs, concluded solely that: (1) there is "no evidence of any working smoke alarms" in Appellee Donald McCray's private, non-commercial residence; (2) "the lack of smoke alarms substantially increased the risk of burns and fatality to the occupants of the home;" and (3) the presence of properly functioning smoke alarms would have given Mr. Jeremy Meerhoff and Mr. Steven Little an advantage in escaping successfully the home fire that occurred on October 29, 2012." *See Expert Report of Deborah A. Waller, P.E., page 3*. Deborah A. Waller's Expert Report should not be considered as the "scientific, technical, or other specialized knowledge" contained therein would easily be comprehensible by a jury and, therefore, is not beyond that possessed of the average layperson. *See Pa. R. E. 702(a)*. Furthermore, assuming *arguendo* Deborah A. Waller's testimony, as illustrated in her Expert Report, is beyond the ken of the jury, her Report failed to provide facts, data and methodology relied upon to support her conclusion that Appellee Donald McCray's private, non-commercial residence was not equipped with smoke detectors. In addition, Deborah A. Waller, in her Expert Report, does not offer any evidence or conclusions regarding the cause and/or origin of the October 29, 2012 fire.

In contrast, Appellees Donald McCray and McCray Aluminum and Builder's Supply Company, Inc.'s presented Robert G. Ryhal, Ryhal Associates Fire Investigations, who provided a thorough analysis of the circumstances occurring on October 29, 2012. Robert G. Ryhal's Report included (1) an initial examination of the scene on October 31, 2012; (2) a review of the electrical system with Eugene Bartel, P.E.; and (3) a review of relevant police reports, depositions, photographs and videos of the scene, medical records and Appellants' Expert Reports. Regarding the issue of whether smoke detectors were installed in Appellee Donald McCray's private, non-commercial residence, Robert G. Ryhal states "there was no investigation or effort to sift through the debris in order to determine if smoke alarms were present on the day of the fire" and "absent a methodical and organized search, a conclusion that there were not any smoke alarms in the McCray residence is unfounded." *See Report of Robert G. Ryhal, page 15*. Furthermore, Robert G. Ryhal acknowledged several witnesses, including Appellee Donald McCray, Charlene Meerhoff, Dale McCray, James McCray and Clifford McCray all indicated independently that "there was at least one smoke detector in

the house, located above the washer and dryer in the kitchen." *See id*. Regarding the cause of the fire, Robert G. Ryhal stated "there were no viable ignition sources available in the residence, as the electrical power was detached from the house." *See id, page 19*. Robert G. Ryhal further stated "smoking cannot be eliminated as a potential cause of the fire, as Mr. Little testified that Jeremy Meerhoff smoked **a pack or two a day**." *See id*. Ultimately, Robert G. Ryhal concluded "the fire which originated within the McCray residence did not result from an electrical failure" as (1) "the electrical system was terminated;" (2) "the mechanical systems were not energized;" (3) "the theorized power surge is not supported by physical damage to the Penelec transformer or the triplex service feeder, nor feasible for the surge to bypass the grounding system;" and (4) "the only reasonable ignition sources remaining can be attributed to the use of an open flame… or smoking related activities…" *See id, page 24*.

Therefore, this Trial Court properly concluded Appellants cannot establish successfully a cause of action for negligence without resorting to speculation.

4. Whether this Trial Court properly concluded Jeremy Meerhoff and Steven Little's "wanton comparative negligence" greatly exceeded the claims of negligence against the Appellees, thus barring recovery.

As a general rule, in all actions to recover damages for negligence resulting in death or injury to person or property, the fact the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative **where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought**, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff. *See 42 Pa. C. S. §7102(a)* [emphasis added]. The issue of apportionment of negligence should not be submitted to the jury if the plaintiff fails to establish a case of negligence on the defendant's part in the first place. *See Peair v. Home Association of Engola Legion No. 751*, 430 A.2d 665, 669 (Pa. Super 1981) (citing *Powell v. Ouray*, 507 P.2d 1101, 1105 (1973)).

On October 28, 2012, Mr. Meerhoff and Mr. Little had been consuming alcohol in the evening, with Mr. Meerhoff beginning to drink around 6:00 p.m. and Mr. Little beginning to drink around 9:00 p.m. *See Notes of Testimony Deposition of Carol Meerhoff, September 23, 2015, pg. 52, lines 12-16; pg. 55, lines 7-12*. Appellant Carol Meerhoff indicated she purchased a thirty (30) pack of beer earlier in the evening for consumption. *See id, pg. 52, line 22*. After Mr. Meerhoff and Mr. Little had consumed this large amount of beer, Mr. Meerhoff and Mr. Little left Mr. Meerhoff's home around 1:00 – 1:30 a.m. to buy more beer. *See id, pg. 57, lines 16-19*. Sometime after, Mr. Meerhoff and Mr. Little arrived at Donald McCray's property. *See Notes of Testimony Deposition of Steven Little, December 29, 2015, pg. 65, lines 20-24*. While at Donald McCray's property, Mr. Meerhoff and Mr. Little were "race tracking like in a racecar form" and "whipping doughnuts and going in circles." *See id, pg. 68, lines 17-20*. During this time, Mr. Meerhoff and Mr. Little "hit something." S*ee id, pg. 69, lines 6-14*. Thereafter, Mr. Meerhoff and Mr. Little entered Donald McCray's residence, at which time Mr. Little indicated the "lights were on." *See id, pg. 75, lines 8-9*. Mr. Meerhoff and Mr. Little "wrestled around" in Appellee Donald McCray's home for

around fifteen (15) minutes before going to bed. *See id, pg. 77, line 19 – pg. 78, line 19.*

The actions of Mr. Meerhoff and Mr. Little rise far above the level of negligence Appellants have alleged against the Appellees, which, as indicated above, is minimal, if not absent completely. Several photographs were taken at the scene after the fire by Pennsylvania State Police Corporal Matthew Bly, and these photographs depicted tire tracks, damaged electrical wires, a damaged hay wagon and other significant levels of vandalism, all of which was caused by the reckless actions of Mr. Meerhoff and Mr. Little. Several photographs depicted some power lines lying on the ground and the electrical transformer hanging on the power pole with several cables torn off. Furthermore, according to several toxicology reports, Mr. Meerhoff's Blood Alcohol Content ("BAC") was .244%, three (3) times the legal limit of .08%; and Mr. Little's BAC was .12-.13%, with his blood also testing positive for the presence of marijuana. *See Report of Robert G. Ryhal, page 18.*

The "wanton comparative negligence" of Jeremy Meerhoff and Steven Little is also striking in consideration of the condition of the property the day before. Appellee Donald McCray, owner of the property at 41491 State Highway 77, Spartansburg, Crawford County, Pennsylvania 16434, did not observe any damage, defect or malfunction of any electrical equipment on his property on October 28, 2012, nor did he have reason to notify Appellee Penelec of any damage, defect or malfunction of any electrical equipment on or prior to October 28, 2012. *See Responses of Defendant, Donald McCray, to Penelec's First Set of Requests for Admissions, Interrogatories and Request for Production, verified June 24, 2015.*

Therefore, this Trial Court properly concluded Jeremy Meerhoff and Steven Little's "wanton comparative negligence" greatly exceeded the claims of negligence against the Appellees, thus barring recovery.

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Opinion and Order dated August 19, 2016.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**