

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 99-11,014**
:
:
vs. : **CRIMINAL DIVISION**
:
:
NOLAN BURLARK, :
Defendant : **Motion for a New Trial**

OPINION AND ORDER

This matter came before the Court on November 27, 2000 on Defendant's Motion for a New Trial.

The Defendant was found guilty by a jury on November 19, 1999 of Receiving Stolen Property, a misdemeanor of the first degree.

The relevant facts are as follows: Sometime between May 9 and May 10, 1999, an expensive mountain bicycle was stolen out of David Turnbow's garage. Mr. Turnbow lived at 924 Rural Avenue, Williamsport, Pennsylvania. Williamsport Police Officer Roy Snyder responded to the victim's residence on May 10, 1999 to record the report of the theft.

On May 12, 1999 at about 5:54 p.m., Officer Snyder saw an individual riding a mountain bike, which fit the description of the stolen bike, in the area of Cemetery Street and Memorial Avenue, Williamsport. The officer stopped the individual on the bike to inquire about it. The defendant was the individual riding the bicycle. The officer asked the defendant his name and the defendant responded Masir Mashhou. The defendant explained this was his Muslim name. The defendant gave his address as 945 Vine Avenue. The officer inquired how the defendant acquired the bike and the defendant said that he borrowed the bike from his roommate. The officer asked the defendant the name of his roommate and the defendant claimed he didn't know his name. The officer then compared the serial number on the bicycle to

the serial number of the Turnbow bicycle and discovered the bicycle was, in fact, the one stolen from Mr. Turnbow. The defendant and the bicycle were taken to City Hall. Mr. Turnbow was contacted and he identified the bicycle as the one stolen from him. Mr. Turnbow did not know the defendant.

The officer made several efforts to confirm the defendant's story about obtaining the bicycle from a roommate located at 945 Vine Avenue, but he was not able to find or identify another individual. The officer noted that 945 Vine Avenue is a rooming house with common areas such as the kitchen and bath. The defendant provided a vague description of the roommate being a large young black male living at 945 Vine Avenue.

At trial, the defendant testified that his roommate, Michael Fielding, loaned him the bicycle on May 12. He claimed Fielding had been living at the rooming house about a week and one-half and that he didn't know his name at the time. The defendant also asserted he saw Fielding with the bicycle for four to five (4-5) days and that no one else lived in the rooming house but himself and Michael. He said that on May 12 he needed to go to the store and he asked Michael if he could borrow his bike. Michael told him he was holding the bicycle for a friend who was in the military and agreed to loan him his bike. Officer Snyder stopped the defendant when he was returning from the store.

The defendant claimed Michael left the rooming house the day after he told him had been arrested for riding the bicycle and since then he has not seen him. Sometime after he was arrested, the defendant learned Michael's surname by looking at the mail coming to the rooming house. The defendant claimed he told Officer Snyder and another officer that the first name of his roommate was Mike, but Officer Snyder denied that the defendant ever identified the first name of the roommate.

The jury found the defendant guilty of receiving stolen property. The defendant

failed to appear when he was initially scheduled for sentencing, resulting in the issuance of a bench warrant. On September 6, 2000, after the defendant was apprehended on the bench warrant, the Court sentenced the defendant to incarceration in the Lycoming County Prison for a minimum of ten (10) months and a maximum of twenty-three (23) months.

On the day of the defendant's sentencing hearing, the defendant reported, through his counsel, that he had found a witness to verify his claim regarding how he came into possession of the bike in question. The defendant met the witness in the Sheriff's holding cell shortly before the sentencing hearing. As a result, defense counsel filed the Motion for New Trial based on after-discovered evidence on September 22, 2000.

The Court held a hearing on the Defendant's motion November 27, 2000. At the hearing, the defendant called Ronnie Schley as a witness. Mr. Schley, like the defendant, is an inmate at the Lycoming County Prison. Mr. Schley testified that he was at the rooming house at 945 Vine Avenue sometime around May 1999 visiting Mike Fielding. Mr. Schley did not know the defendant at the time, but the defendant was present. Mike had a fancy mountain bike that day. Mr. Schley believes Mike walked out of the house with the bike and talked with the defendant. Mr. Schley was not present for the actual discussion between Mr. Schley and the defendant. However, at that time, Mr. Schley saw the defendant take the bike and ride off. Mr. Schley testified it was his impression that the defendant had permission to ride away on the bike. Mr. Schley testified he recently came in contact with the defendant in the Sheriff's holding cell when the defendant was coming into court for his sentencing hearing.

Defendant Burlark also testified at the hearing. Mr. Burlark testified that Mr. Schley was present the day Mr. Fielding loaned him the bicycle, but he did not know who Mr. Schley was. When the defendant was in the Sheriff's holding cell before his sentencing hearing on September 6, 2000, Mr. Schley also was there. When the defendant saw Mr. Schley, he realized Mr. Schley

was the individual at 945 Vine Avenue the day Mr. Fielding loaned him the bicycle. The defendant testified he told his attorney about this encounter just before the sentencing hearing.

The law regarding after-discovered evidence is warranted is well settled. The Pennsylvania Supreme Court set forth the standard for granting a new trial based on after-discovered evidence as follows:

After-discovered evidence will constitute a basis for the grant a new trial if it:

(1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Colson, 507 Pa. 440, 469, 490 A.2d 811, 826 (1985) (quoting Commonwealth v. Valderrama, 479 Pa. 500, 505, 388 A.2d 1042, 10455 ((1978))).

Commonwealth v. Tizer, 580 A.2d 305, 308 (Pa. 1990).

While Mr. Schley's testimony arguably satisfies the first three requirements for issuance of a new trial based on after-discovered evidence, the Court finds it doubtful that his testimony would be considered by a jury to be of such nature and character that a different verdict would likely result if a new trial is granted. Mr. Schley was not present to hear any purported conversation between the defendant and Mr. Fielding until the defendant obtained the bicycle. Further, the defendant would have difficulty overcoming the following evidence: (1) he was riding an expensive bicycle shortly after it was stolen; (2) he did not know the full name of the roommate who allegedly gave him permission to use the bicycle; (3) he did not give the police the roommate's first name (according to Officer Snyder's testimony); (4) he testified at trial that Mike had the bike four or five days when the bike was stolen only two days earlier (either during the night of May 9 or the early morning of May 10); and (5) he knew the bike did not belong to Michael

because he testified Michael told him he was holding it for an individual who was in the military. The Court also finds it unlikely that Mr. Schley's testimony would lead to a different verdict because the defendant never mentioned in his explanation to the police or his testimony at trial that any third party was present when he obtained the bicycle. Finally, the Court notes that it did not find the defendant's testimony or Mr. Schley's testimony at the hearing for a new trial to be particularly persuasive or credible. Rather, this motion appears to be an after-the-fact defense contrived by two (2) individuals serving time together in the Lycoming County Prison.

Accordingly, the following Order is entered.

ORDER

AND NOW, this _____ day of December 2000, the Court DENIES the defendant's Post-sentencing Motion for a New Trial based on after-discovered evidence.

By The Court,

Kenneth D. Brown, J.

cc: William J. Miele, Esquire (PD)
District Attorney
Work File
Gary Weber, Esquire (Lycoming Reporter)