IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. 98-11,884**
	:	
vs.	:	
	:	
JAMES SNYDER,	:	**Post Conviction Relief Act**
Defendant	:	**Petition (PCRA)**

OPINION AND ORDER

This matter came before the Court on the defendant's Post Conviction Relief Act (PCRA) Petition. The relevant facts are as follows. On or about September 12, 1998, Christopher Bowling and Timothy Clair took a .22 caliber revolver with an off-white handle and a five-inch barrel from John Cohick's truck. Later in the evening, they met up with Crystal Buford. The three individuals began talking about another juvenile who had taken something from Mr. Cohick and had gotten in trouble. Fearing a similar fate, the three individuals discussed returning the revolver to Mr. Cohick. Christopher Bowling left the area believing Clair and Buford were going to return the revolver. Instead, Ms. Buford threw the revolver in the weeds near the creek. Subsequently concerned that a child would find the gun, Ms. Buford called Trevor Fisher. Trevor Fisher and Richard ("Ricky") McAllister went to the area and found the gun lying in the grass. Fisher picked up the revolver and hid it under a rock.

Later Fisher, McAllister, Bowling and the defendant

were talking about the gun. The defendant wanted to see it, so they went to the grassy area near the creek where Fisher hid the gun under a rock. Fisher and Bowling told the defendant that the gun was stolen. The defendant picked up the gun, unloaded it, and put the gun and ammunition in his shirt.

On September 13, 1998, Mr. Cohick realized his revolver was missing and called the police to report it stolen. Mr. Cohick informed the police that the revolver was taken from his truck and also told them there were several teenagers who hung out in the vicinity.

The police interviewed the teenagers, including Fisher, McAllister, Clair and Bowling. Although initially denying or minimizing their involvement, the teenagers eventually admitted to their involvement in the theft and/or disposition of the revolver and told the police the defendant had taken the revolver from the grassy area near the creek.

On October 2, 1998, the police charged the defendant with receiving stolen property under 18 Pa.C.S.A. 3925 and person not to possess a firearm under 18 Pa.C.S.A. 6105. A jury trial was held April 19-20, 1999. The jury convicted the defendant of both charges. The Court sentenced the defendant on June 9, 1999. The defendant filed an appeal from his convictions, but the Pennsylvania Superior Court rejected his

claim and affirmed his convictions in a memorandum decision dated June 30, 2000.

The defendant filed a pro se PCRA petition. In January 2002, James Protasio was appointed to represent the defendant because he was raising claims of ineffectiveness against the public defenders that previously represented him. The Court held a conference on the defendant's PCRA petition. After the conference, the Court gave defense counsel forty-five days within which to file any amended PCRA petition. On April 15, 2002, another conference was held. At the conference defense counsel indicated there were no other issues he wished to raise, so he did not file an amended PCRA petition. Counsel for both parties argued the issues raised in the pro se petition. After the argument, the Court entered an Order giving defense counsel forty-five days within which to submit affidavits or certifications regarding the proposed testimony of Crystal Buford and Melissa Harmon, two individuals that the defendant claimed trial counsel should have called as witnesses on his behalf. As of this date, no such affidavits or certifications have been submitted.

After reviewing the petition, the record and counsels' arguments, it is the Court's intention to dismiss the defendant's PCRA petition without holding an evidentiary hearing.

Counsel is presumed effective and the defendant has the burden of proving otherwise. Commonwealth v. Carson, 559 Pa. 460, 741 A.2d 686, 697 (1999). In order to prevail on an ineffectiveness claim, the defendant must plead and prove the following: (1) the claim is of arguable merit; (2) there was no rational or strategic basis for counsel's act or omission; and (3) prejudice, i.e., the outcome of the trial would have been different but for counsel's act or omission. Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261, 273 (2000); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592 (2000); Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999).

The defendant first claims trial counsel was ineffective for failing to object, request a cautionary instruction, or file an appeal regarding hearsay statements being introduced at trial. The first statements the defendant contends were objectionable hearsay were made by Trevor Fisher. Trevor testified he heard that Crystal Buford and Chris Bowling stole a gun. N.T., 4/19/99 at 16. Trevor also testified "Chris and all of us told him [defendant] that the gun was stolen." N.T., 4/19/99 at 20. These statements were not inadmissible hearsay. Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted." Pa.R.E. 801. These statements were not offered to show who stole the gun. Rather, they were admissible to show that the defendant knew **or had reason to believe** the gun in question was stolen. Therefore, counsel's failure to object to these statements was not erroneous. Moreover, Christopher Bowling admitted he stole the gun in his testimony at the defendant's trial. N.T., 4/19/99 at 26-29. Thus, the defendant cannot show prejudice.

Trevor Fisher also testified that he did not know the defendant's name at first so he asked Ricky [McAlister] because he knew the guy's name. N.T., 4/19/99, at 21. The defendant also contends this testimony was inadmissible hearsay. First, this is not hearsay, because it does not state what someone else said. Instead, Trevor Fisher testified about what he did. Moreover, Trevor Fisher identified the defendant as the person who picked up the gun. Based on this in-court identification, the defendant cannot show prejudice from the admission of this statement.

The defendant contends Chris Bowling testified "Ricky and Trevor told me they were giving the gun to Jamie [defendant]." The Court has reviewed the transcript and has not found any such statement therein. Instead, Chris Bowling testified he saw the defendant pick up the gun and put it in his shirt pocket. N.T., 4/19/99 at 28.

The defendant claims Ricky McAlister also made objectionable hearsay statements in his testimony. Again the Court cannot agree. Ricky McAlister testified that Crystal Buford stole the gun. N.T., 4/19/99 at 38. As with Trevor Fisher's testimony, it was not relevant who stole the gun, only that it was stolen and the defendant knew it was stolen or had reason to believe it was stolen. The owner of the gun testified that it was taken from his truck without his permission and Chris Bowling admitted he stole the gun. N.T., 4/19/99 at 10-13, 26-29.

The defendant next asserts counsel was ineffective for failing to brief and argue that the evidence was insufficient to sustain his conviction for receiving stolen property. This assertion is without merit. To sustain a conviction for receiving stolen property, the Commonwealth must prove three elements: (1) the defendant received, retained or disposed of movable property; (2) the property was stolen; and (3) the defendant received, retained, or disposed of the property either knowing it was stolen or believing the property probably had been stolen. 18 Pa.C.S. §3925(a); Commonwealth v. Foreman, 797 A.2d 1005, 1011 (Pa.Super. 2002); Commonwealth v. Matthews, 429 Pa.Super. 291, 292, 632 A.2d 570, 571 (1993); Commonwealth v. Grekis, 411 Pa.Super. 494, 505, 601 A.2d 1275, 1280 (1992); PaSSJI 15.3925A. The

Commonwealth proved each of these elements beyond a reasonable doubt. John Cohick, the owner of the gun testified a .22 revolver with an off-white handle was taken from his truck. N.T., 4/19/99 at 10-13. The gun was loaded and it worked before it was taken. N.T., 4/19/99 at 11. Nobody had permission to take or possess the gun. N.T., 4/19/99 at 13. Chris Bowling testified he and Tim Clair took the gun from Mr. Cohick's truck. N.T., 4/19/99 at 26-28. Crystal Buford and Tim said they would put the gun back, but they didn't. N.T., 4/19/99 at 27. Instead, Crystal threw the gun in the grass and weeds down by the creek. N.T., 4/19/99 at 17, 27. Crystal called Trevor and Ricky because she was worried a kid would find the gun. N.T., 4/19/99 at 17. Trevor and Ricky found the gun on the grass down by the creek and Trevor hid it under a rock. N.T., 4/19/99 at 17-18. Later, Ricky, Chris, Trevor and the defendant went to the area where the gun was hidden. N.T, 4/19/99 at 19, 28, 37. Chris Bowling told the defendant the gun was stolen. N.T., 4/19/99 at 20, 29. The defendant picked up the gun, unloaded it and put the gun and the ammunition in his shirt pocket. N.T., 4/19/99, 19, 28, 37. No one saw the gun after that and it was never returned to Mr. Cohick. This testimony established each element of receiving stolen property.

The defendant also contends trial counsel was

ineffective for failing to brief and argue on appeal that the Court improperly instructed the jury when it said "it is not necessary that the defendant know the details of the theft nor that he is certain that a theft in fact occurred." This contention also is without merit. First, the claim was waived by failing to object to the charge at trial. Counsel could not raise this issue on appeal because he did not preserve the objection during trial. Furthermore, the charge accurately reflects the law of Pennsylvania. The language complained of comes directly from the suggested standard criminal jury instructions. Pa.SSJI 15.3925A. The defendant does not need to **know** that the item was stolen; it is sufficient if he believes or has reason to know that the property was probably stolen. See Commonwealth v. Foreman, 797 A.2d 1005, 1012-13 (Pa.Super. 2002); Commonwealth v. Worrell, 277 Pa.Super. 386, 391, 419 A.2d 1199 (1980).

The defendant alleges counsel was ineffective for failing to request severance of the receiving stolen property charge from the charge of persons not to possess a firearm. The defendant relies on Commonwealth v. Carroll, 418 A.2d 702 (Pa.Super. 1980). The Court does not believe Carroll stands for the proposition that a person not to possess a firearm charge must be severed in every case. In Carroll, the Superior Court found the trial court abused its discretion in

failing to sever when the defendant made a motion for severance prior to trial. The Superior Court found that introducing evidence of the defendant's unrelated prior violent offenses prejudiced the jury. The court finds Carroll distinguishable for several reasons. First, the defense never requested severance in this case. Since the charges stemmed from the same criminal episode, the Commonwealth was required to charge both offenses in the same criminal information. Second, the jury in this case did not hear any specifics about the defendant's prior criminal record. The Commonwealth and defense stipulated that the defendant had a conviction which prohibited him from possessing a weapon. N.T., 4/19/99 at 59-60. The stipulation did not specify the crime for which the defendant was convicted nor did it mention it was a violent crime.[1] The main issue for both offenses was whether the defendant possessed a firearm. It made sense to try these offenses together because they involved the same factual question, i.e., did the defendant possess Mr. Cohick's revolver? Moreover, the Court gave cautionary instructions regarding the use of the stipulation about the defendant's prior conviction. N.T., 4/20/99 at 51-53. The Court specifically instructed the jury that it could not consider the stipulation for the other elements of persons not to possess a firearm or for any element of receiving stolen

1 The defendant had burglary convictions that precluded him from possessing

property. The Court also explained to the jury that it could not infer the defendant was a bad individual or predisposed to commit another crime as such an inference would be unfair and unwarranted. The law presumes the jury follows the Court's instructions absent evidence to the contrary. Commonwealth v. Hawkins, 549 Pa. 352, 374, 701 A.2d 492, 503 (1997); Commonwealth v. Baker, 531 Pa. 541, 559, 614 A.2d 663, 672 (1992). In light of the facts and circumstances of this case, the Court does not believe the failure to request severance was unreasonable or prejudicial. See Commonwealth v. Payne, 316 Pa.Super. 453, 463 A.2d 451 (1983)(Superior Court found no prejudice from admission of evidence regarding prior conviction relevant to a person on to possess charge where the evidence was not inflammatory and the trial court gave cautionary instructions).

The defendant next asserts trial counsel and appellate counsel were ineffective for failing to impeach the Commonwealth witnesses with prior inconsistent statements and failing to request jury instructions that the inconsistent statements could be considered as impeachment and as substantive evidence. Trial counsel did impeach Trevor Fisher, Chris Bowling and Tim Clair by cross-examining them about prior inconsistent statements. Trevor Fisher testified Crystal Buford stole the gun, but he told the Trooper

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a firearm.

investigating the case that he had no knowledge regarding the theft of the gun. N.T., 4/19/99 at 23-24. Chris Bowling admitted he stole the gun, but acknowledged on cross-examination that when the Trooper talked to him he initially denied he stole it. N.T., 4/19/99 at 27-29, 31-33. Tim Clair testified he and another kid took the gun. N.T., 4/20/99 at 16. On cross-examination, he stated he denied it when he spoke to Trooper Bialecki and that was a lie. N.T., 4/20/99 at 21. Trial counsel also called Trooper Bialecki as a witness and questioned him about prior inconsistent statements made by Fisher, Bowling and Clair. The defense has not provide the Court with a written copy of the alleged inconsistent statements. The Court believes these statements were contained in a police report. Prior inconsistent statements are only admissible as substantive evidence if they are made under oath, are contemporaneous verbatim recordings of an oral statement, or are written statements signed and adopted by the declarant. Pa.R.Evid. 803.1; Commonwealth v. Lively, 610 A.2d 7 (Pa. 1992). A statement noted in a police report generally would not meet these criteria. Therefore, the statements would not be admissible as substantive evidence and counsel would not be ineffective for failing to request an instruction that the statements could be used as substantive evidence.

The defendant also contends counsel was ineffective for failing to assert that his sentence was illegal. Essentially, the defendant asserts his receiving stolen property conviction should have been graded as a misdemeanor, instead of a felony of the third degree. This contention is without merit. The defendant relies on 18 Pa.C.S. §3903(a)(3). This subsection, however, was not in existence until December 15, 1999 and it did not become effective until February 14, 2000. The defendant committed the offense of receiving stolen property on or about September 13, 1998. His trial occurred on April 19 and 20, 1999, and the Court sentenced him on June 9, 1999. Therefore, the defendant's reliance upon section 3903(a)(3) is misplaced. The subsection applicable to the defendant was the 1990 version of section 3903(a.1) which stated:

> Theft constitutes a felony of the third degree if the amount involved exceeds $2000, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.

The Pennsylvania Appellate courts interpreted this section to impose a grading of felony of the third degree to **any** theft charge involving a firearm, **including receiving stolen property**. Commonwealth v. Holzlein, 706 A.2d 848, 851-852 (Pa.Super. 1997). The Crimes Code defines the term

firearm as any "pistol or revolver with a barrel length of less than 15 inches." 18 Pa.C.S. 6102. John Cohick, the owner of the gun, testified the weapon stolen was a .22 revolver with about a five-inch barrel and an off-white handle. N.T., 4/19/99 at 10. Therefore, the property stolen was a firearm and the Court properly graded the defendant's receiving stolen property conviction as a felony of the third degree.

Finally, the defendant asserts counsel was ineffective for failing to file a notice of alibi and/or failing to interview or call potential witnesses Melissa Harman and Crystal Buford. When an ineffectiveness claim involves the failure to call a witness, the petitioner must plead and prove: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Henry, 706 A.2d 313, 329 (Pa. 1997). The defendant cannot meet his burden of proof. The defendant could testify regarding whether he informed counsel of these witnesses, but he cannot testify regarding their availability or what the substance of their testimony would be as such statements would be hearsay. Instead, the petitioner

would need to present testimony from Ms. Harman and Ms. Buford. The defendant cannot present such testimony, however, because he has not complied with the PCRA. Section 9545(d)(1) states:

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. §9545(d)(1). The defendant did not include any certification with his petition. After conference/argument on the petition, the Court gave defense counsel 45 days to submit certifications regarding Ms. Harman and Ms. Buford. See Order of 4/15/02. The defense never submitted any certifications. Without such certifications, Ms. Harman's and Ms. Buford's testimony is inadmissible and the defendant cannot prevail on this claim.

O R D E R

AND NOW, this ___ day of December 2002, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant's Post Conviction Relief Act (PCRA) Petition filed in the above-captioned matter raises no genuine issue of fact and Petitioner is not entitled to post conviction collateral relief. As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order dismissing the petition.

By The Court,

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Kenneth D. Brown, Judge

cc: Kenneth Osokow, Esquire (ADA)
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