IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 03-10, 153**
	:	
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
LEE NATHAN LOOKENHOUSE,:		
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence dated September 19, 2003 and docketed September 22, 2003. The relevant facts follow.

On January 15, 2003 at approximately 4:00 a.m., the defendant entered the Sunoco A-Plus store in Montgomery, Pennsylvania. After using the restroom, the defendant grabbed a Marlboro cigarette display and the 30 packs of cigarettes displayed thereon and ran out of the store. The clerk jumped over the counter and tried to stop him, but couldn't. The defendant got into the passenger side of a forest green sedan and fled. The clerk obtained the license plate number of the vehicle and called 911. The police located the vehicle and attempted to stop it.[1] A high-speed chase ensued. The roads were icy and in poor condition. The vehicle crashed into a snow bank and the police cruiser slid into the rear of the vehicle. Both the driver and the defendant fled on foot. Ultimately, the police apprehended them both.

The police charged the defendant with receiving stolen property, retail theft,

criminal mischief and three counts of recklessly endangering another person. The defense filed a petition for habeas corpus relief, which was granted in part and resulted in the dismissal of the criminal mischief charge and one of the recklessly endangering charges.

After a case-stated trial, the Court found the defendant guilty of receiving stolen property and retail theft, but acquitted him of the remaining recklessly endangering charges. The Court sentenced the defendant to incarceration for a minimum of 6 months and a maximum of eighteen months for receiving stolen property and imposed a concurrent 10-day sentence for the summary retail theft.

The defendant filed a timely appeal. The sole issue raised on appeal is as follows: "The Trial Court improperly sentenced Defendant on both Receiving Stolen Property (M-2) and Retail Theft (S). Instead, the Court should have found that Receiving Stolen Property merged into Retail Theft."

If the defendant had only stolen the 30 packs of cigarettes, his argument might be persuasive; however, under the unique facts of this case, the receiving stolen property and retail theft offenses would not merge into a single retail theft. The defendant stole cigarettes **and the display holding them** from a mini-market. Retail theft only encompasses "merchandise displayed, held, stored or offered <u>for sale</u>." 18 Pa.C.S.A. §3929(a). Theft by receiving stolen property applies to any movable property. 18 Pa.C.S.A. §3925. Although the display was movable property, it was not for sale. Therefore, the theft of the display could not qualify as a retail theft. It could only be theft by receiving stolen property in this case.

The theft of the 30 packs of cigarettes constituted a retail theft. Theft of the

---

1 The police later determined the vehicle was stolen.

display, which held the cigarettes, constituted theft by receiving stolen property. It does not and could not constitute a retail theft, because the display was not for sale. Therefore, these counts could not merge into a single retail theft conviction and the Court properly sentenced the defendant for receiving stolen property. See also N.T. at pp. 59-64.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Robert Ferrell, Esquire (ADA)
Jason Poplaski, Esquire (APD)
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)