IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No.: 03-11,322**
	:	
TERRENCE BAINES,	:	
Defendant	:	

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

Defendant appeals this Court's Order of March 8, 2004 finding him guilty of theft by unlawful taking and receiving stolen property, both misdemeanors of the second degree, and sentencing him to six to eighteen months in the Lycoming County Prison. He raises three issues. First, he claims that the evidence presented to the Court was insufficient to support the Court's verdict of guilty in this case. Second, he claims that his trial counsel was ineffective. Last, he claims that the Court erred in sentencing the Defendant on a misdemeanor two Theft by Unlawful Taking instead of a misdemeanor three Theft by Unlawful Taking because the charge is listed as a misdemeanor three on the criminal information.

The facts of the case are that on July 13, 2003 the Defendant was found inside a van belonging to Steven Shelley, the victim in the case, which was parked directly in front of the victim's home. (N.T. 3/8/2004 at page 7.) The victim ran into the house and yelled for his girlfriend to call the police. When he returned outside about 20 to 30 seconds later, he observed the

Defendant riding a bicycle a short distance from the van. Id. at p. 8. He further observed that the Defendant was carrying his, the victim's, brand new tent under his right arm. Id. at p. 9. He went inside the house again, grabbed his cell phone from his girlfriend, and got into his car to follow the Defendant. Ibid. The victim lost sight of the Defendant for about twenty seconds as he got into his car and made a U-turn, but then saw him again and followed him, talking to police dispatch as he followed. Id. at pp. 9 – 10. The victim continued to follow the Defendant, who was still carrying the tent when he was stopped by police. The tent was recovered. The victim then identified the tent as his and testified that it had been in the van in which he had seen the Defendant. Id. at p. 12.

Defendant claims the Commonwealth failed to present sufficient evidence to show that the Defendant was at the scene of the theft, that he took the tent and to identify him as being the same person the police caught with the tent. The standard applied 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." Commonwealth v. Heberling, 451 Pa. Super. 119, 678 A.2d 794, 795 (Pa.Super. 1996), citing Commonwealth v. Williams, 539 Pa. 61, 650 A.2d 420 (1994). 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." Commonwealth v. Cassidy, 447 Pa.Super. 192, 668 A.2d 1143, 1144 (Pa.Super. 1995) (citations omitted). "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. Vetrini, ___ Pa.Super. _____, 734 A.2d 404 (Pa. Super. 1999), citing Commonwealth v. Valette, 531 Pa. 384, 388, 613 A.2d 548, 549 (1992).

The facts of this case must be considered in the light most favorable to the verdict winner. The Court as the trier of fact is further empowered to judge the credibility of the witnesses and the weight of the evidence. As noted in the transcript of the trial, this Court found the testimony of the victim to be highly credible. The victim testified that he observed the Defendant in his van and was also certain that he was following the same person as that individual rode off on a bicycle carrying the tent that was stolen from the van. Once he began following the Defendant, the victim stated that he did not lose sight of the Defendant and kept watch until after he was stopped by the police. The victim testified that the Defendant was the person stopped by the police. The Defendant was in possession of the

missing tent which was recovered by the police and returned to the victim. The Court finds that this fact enhances the credibility of the victim. He has nothing to gain or lose from his identification of the Defendant because the property has already been returned. Accordingly, the Court finds that the evidence presented by the Commonwealth at trial was sufficient to sustain a verdict of guilty and the Defendant's first claim must therefore fail.

Defendant's second claim is that his trial counsel was ineffective in that he failed to argue the inconsistencies between the value of the tent as listed in the criminal information and the value of the tent as testified by the victim, along with failing to present documentation regarding Defendant's medical condition. Defense counsel is complaining of his own ineffectiveness on appeal. Under current caselaw, the Court should appoint new counsel "unless counsel's self-accusation is clearly meritorious or clearly meritless." See Commonwealth v. Bond, 572 Pa. 588, 600 (Pa. 2002); Commonwealth v. Johnson, 565 Pa. 51, 771 A.2d 751, 756 – 57 (Pa. 2001) (plurality). Further, the Pennsylvania Supreme Court has held that the Court will entertain a claim of ineffective assistance of counsel "by the same attorney who served as trial counsel if reversible error is apparent on the record . . . (but) will not reject such a claim without a remand for appointment of new counsel." Commonwealth v. Fox, 476 Pa. 475, 383 A.2d 199 (Pa. 1978). Therefore, the Defendant's claims of ineffective assistance of counsel must fail insofar as they are brought by the same attorney who represented the Defendant at trial and who now alleges his own ineffectiveness. This

Court believes that the Defendant should have an opportunity to have an independent review of the record by new counsel.

Defendant's final claim is that this Court erred in grading the charge of Theft by Unlawful Taking as a misdemeanor of the second degree. The Court rejects this claim. Testimony during the trial established the value of the stolen tent as "either $58.00 or $59 and change". Notes, supra. at p. 12. The theft of property with a value of at least $50.00 but less than $200.00 is graded by Pennsylvania statute as a misdemeanor of the second degree. See 18 Pa.C.S. § 3903. The Court therefore correctly graded the offense of theft by unlawful taking in this case.

By the Court,

_____ J.
Nancy L. Butts, Judge

xc: DA (CH)
Jason Poplaski, Esquire
Hon. Judge Nancy L. Butts
Gary Weber, Esquire
Diane L. Turner, Esquire