IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-904-2005**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
MAURICE MARSHALL,	**:**	
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 entered on or about March 29, 2006. The relevant facts follow.

On April 20, 2005, at 5:09 p.m. an individual telephoned the Pizza Hut on Pine Street in Williamsport and ordered three large pizzas. The call was taken by manager Laura Downs. Ms. Downs testified the voice seemed to be that of a black male. When she asked the individual for his last name, he hesitated and then said it was Keyes. Ms. Downs prepared a ticked as a result of the phone order. The ticket included the last name, address and phone number of the ordering party, the pizza order and the cost of the order. The ticket was marked as Commonwealth Exhibit 1. The address on the order was 638 Sixth Avenue in Williamsport.

The ticket was given to Patrick Peters, so he could deliver the pizzas to 638 Sixth Avenue. When Mr. Peters knocked on the door, Appellant answered. Mr. Peters told Appellant the amount of money owed for the three pizzas and Appellant started digging in his pockets. Mr. Peters handed the pizzas to Appellant and he put them in the house. When

Appellant turned back around to face Mr. Peters, he pointed a gun at him. Mr. Peters started to back up and Appellant told him "throw it down, throw it down." N.T. at 27. Mr. Peters dropped the bag in which he had carried the pizzas and threw approximately $18 from his pockets onto the porch. Mr. Peters also dropped his keys. Appellant told Mr. Peters to get his keys. Mr. Peters picked up his keys and backed away from Appellant. Appellant then told Mr. Peters to get out of there and Mr. Peters went to his car.

Mr. Peters called 911 on his cell phone to report the robbery. During this incident Mr. Peters was four to five feet away from Appellant and the gun was pointed straight at his face. N.T. at 28. Mr. Peters described the gun as a small, black semiautomatic. It looked like a .22 or .25 caliber. N.T. at 28. He also noted the metal finish on the tip of the gun was worn down to the cylinder. N.T. at 33. At trial, he identified Commonwealth's Exhibit 3 as the weapon used during the robbery and noted it had a worn tip. N.T. at 34. Mr. Peters was afraid for his life. N.T. at 29, 30. In a statement to the police, Appellant indicated he had a BB gun. Mr. Peters indicated the weapon was not a BB gun, because he noted the barrel of the gun was a lot bigger than a BB gun. N.T. at 29. Mr. Peters also described Appellant as having cornrowed braided hair at the time of the incident. N.T. at 30.

At trial and at the preliminary hearing, Mr. Peters identified Appellant as the perpetrator of the robbery. He testified he was certain that Appellant was the individual who robbed him. N.T. at 38.

Mr. Peters was shown a photo array by the Williamsport police on the night of the robbery to see if he could make an identification of the perpetrator. N.T. at 36-37. Officer Ananea of the Williamsport police showed him the array, which was marked

Commonwealth's Exhibit 4 at trial. Mr. Peters circled one photograph in the array as the possible perpetrator of the robbery. Mr. Peters testified no one in the array had cornrowed hair. He told Officer Ananea that he was not sure this was the perpetrator. N.T. at 38. Mr. Peters testified he thought the perpetrator would be in the photo array, so he picked one of the photos. N.T. 38-41.

Mr. Peters admitted the picture of the man he circled was not the same as the perpetrator. However, he felt he had to pick the photograph that most similarly looked like the culprit. N.T. at 41. Of the eight photos shown to him, the picture Mr. Peters picked out looked most like the perpetrator.[1]

Amy Mathers, who resided at 638 ½ Sixth Avenue, was called as a witness by the Commonwealth. She met Appellant once or twice. She testified that he used to wear his hair with braids. She saw him at 638 Sixth Avenue.

Officer Jody Miller of the Williamsport police was called as a witness for the Commonwealth. On May 6, 2005, he served an arrest warrant on Appellant. N.T. at 51-52. Appellant was taken into custody and transported to City Hall, headquarters for the Williamsport police. Officer Miller interviewed Appellant. The interviewed was audio-taped. The interview lasted from 9:00 p.m. to approximately 11:15 p.m. Initially, Appellant denied involvement in the robbery, but he later made admissions to Officer Miller.

Appellant told Officer Miller he received a ride from Noel Moore and Howard Henderson to go to 638 Sixth Avenue. About two minutes after he arrived at the residence, the pizza delivery man showed up. Appellant then pointed the weapon at the delivery man. N.T., at 56. The pizzas were thrown down in the area of the porch and the money was

scattered in the wind. N.T. at 56. He grabbed the pizzas and ran back into the house. He then ran out of the back of the house and down the alley, leaving the pizzas in the alley. He went to a pay phone at a Uni-Mart on High Street and Sixth Avenue and called his friend "Rome" or Romeo Morris. N.T. at 56-57. Rome showed up to give Appellant a ride. They met some friends, Neil Moore and Howard Henderson. The gun was discarded in some type of trash receptacle. N.T. at 57.

During the two hour interview, Officer Miller continually told Appellant he needed to do the right thing. For three-quarters of the time, Appellant denied involvement in the robbery. N.T. at 58. The officer acknowledged that earlier in the interview Appellant told him Romeo Morris committed the robbery. The officer told Appellant he had interviewed Romeo Morris prior to talking to Appellant.[2] Romeo Morris had been arrested by the police on another matter and he incriminated Appellant in the robbery. N.T. at 60. In his confession, Appellant claimed the gun used in the robbery was a BB gun. N.T. at 61.

The gun recovered and identified at trial as Commonwealth Exhibit 3 was recovered by the Williamsport police from Romeo Morris when they arrested him; it was not recovered from Appellant. N.T. at 62.

Appellant admitted he was staying at 638 Sixth Avenue with Randy Barnes. N.T. at 63. Mr. Barnes has an extensive criminal record. N.T. at 63. He was involved in narcotics and "possibly weapons." N.T. at 63.

Officer Frederick Miller of the Williamsport police was one of the officers who responded to 638 Sixth Avenue after the robbery on April 20, 2005. A search warrant

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1 The photo array did not include a photograph of Appellant.
2 Romeo Morris was interviewed on May 3, 2005. Appellant was interviewed on May 6, 2005. N.T. at 66.

was obtained for that residence. Officer Miller took care of logging in property found by other officers during the search of the premises. N.T. at 68. He took possession of all property found by the officers. Two Suscom bills with Appellant's name and the address of 638 Sixth Avenue were found during the search, one of which was admitted into evidence as Commonwealth's Exhibit 8. The officers also found several papers indicating Randy Barnes was an occupant of the residence. N.T. at 73.

Officer Joseph Ananea, the affiant on the warrant for Appellant's arrest, testified that he took the firearm (Commonwealth's Exhibit 3) off of Romeo Morris. Mr. Morris was arrested at 636 Market Street in Williamsport for motor vehicle theft. N.T. at 78.

Officer Ananea testified the firearm had a barrel length of 2 ½ inches. He opined it was operational. N.T. at 81. Officer Ananea found the Pizza Hut delivery ticket laying on the sidewalk near some money outside of 638 Sixth Avenue. N.T. at 81. The officer confirmed Appellant was not included in the photo array shown to Mr. Peters the night of the robbery. N.T. at 85. Randy Barnes' picture was in the photo array, but Romeo Morris' picture was not. N.T. at 85. Officer Ananea had previously arrested Randy Barnes for selling a firearm and for the charge of former convict not to possess a firearm. N.T. at 85-86.

The final Commonwealth witness was Agent Stephen Sorage. Agent Sorage confirmed that he was the officer who arrested Romeo Morris on May 3, 2005 in the 600 block of Market Street. Mr. Morris was wearing a black jacket. Inside the jacket was a small handgun. This handgun was Commonwealth Exhibit 3. Agent Sorage turned the gun over to the officers investigating the robbery in this case. N.T. at 92-93.

The defense did not call any witnesses or present any evidence at trial. The

Court conducted an oral colloquy outside the presence of the jury to determine that Appellant understood his right to testify on his own behalf. After conducting the colloquy, the Court was satisfied that Appellant made a knowing, intelligent and voluntary decision not to testify.

The jury found Appellant guilty of robbery (felony one), robbery (felony two), possessing an instrument of crime, simple assault by physical menace, terroristic threats and two counts of theft (counts 15 and 17). On March 29, 2006, the Court sentenced Appellant to five to ten years incarceration in a state correctional institution for robbery, a felony of the first degree. The Court was required to impose a five year minimum sentence because the Commonwealth requested the mandatory minimum set forth in 42 Pa.C.S.A. §9712 entitled "sentences for offenses committed with firearms." The Court sentenced Appellant to a concurrent six to twelve months on the terroristic threats conviction. All other counts merged for sentencing purposes. Appellant did not file any post sentence motions.

On April 25, 2006, Appellant filed a notice of appeal. In an Order docketed April 27, 2006, the Court directed Appellant to file a concise statement of matters complained of on appeal. Appellant filed his statement on May 12, 2006.

The first issue raised by Appellant is whether sufficient evidence was presented to prove Appellant guilty beyond a reasonable doubt. In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004); Commonwealth v. Ockenhouse, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (Pa. 2000);

Commonwealth v. May, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995).

The robbery charge upon which the Court imposed sentence is defined in the Crimes Code as follows: "A person is guilty of robbery if, in the course of committing a theft, he: … (ii) threatens another with or intentionally puts him in fear of serious bodily injury." 18 Pa.C.S.A. §3701(a)(1)(ii). A person can threaten or put one in fear of serious bodily injury through his conduct without making a verbal utterance or threat. In Commonwealth v. Hopkins, 747 A.2d 910, 914-915 (Pa.Super. 2000), the Pennsylvania Superior Court stated:

> [T]he Commonwealth need not prove a verbal utterance or threat to sustain a conviction under subsection 3701(a)(1)(ii). It is sufficient if the evidence demonstrates aggressive actions that threatened the victim's safety. For the purposes of subsection 3701(a)(1)(ii), the proper focus is on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of 'immediate serious bodily injury.' The threat posed by the appearance of a firearm is calculated to inflict fear of deadly injury, not merely fear of 'serious bodily injury.' A factfinder is entitled to infer that a victim was in mortal fear when a defendant visibly brandished a firearm.

The testimony presented at trial was sufficient to prove robbery beyond a reasonable doubt.[3] Mr. Peters testified that when he delivered the pizzas to 638 Sixth Avenue Appellant took possession of the pizzas, but instead of paying for them he waved a gun Mr. Peters face, had Mr. Peters throw his money on the porch, and ordered him to leave. Mr. Peters also testified that he was afraid for his life.

Appellant next asserts the jury's verdict was against the weight of the evidence. Appellant's counsel orally raised this issue on the record at the time of sentencing. N.T., March 29, 2006, at 7-10. The Court denied the motion.

"The question of weight of evidence is one reserved exclusively for the trier

of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses." Commonwealth v. Solano, 906 A.2d 1180, 2006 Pa LEXIS 1835 (Pa. 2006); see also Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (Pa. 2003). "A trial judge cannot grant a new trial because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion. Instead, a new trial should be granted only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Commonwealth v. Edwards, 903 A.2d 1139, 1148 (Pa. 2006)(citations omitted).

The jury's verdict in this case did not shock the court's sense of justice given the victim's testimony, his positive identification of Appellant at the preliminary hearing and at trial, his reasonable explanation regarding the photo array, and Appellant's statements to the police.

Appellant also contends the trial court erred in sentencing Appellant to the mandatory minimum pursuant to 42 Pa.C.S.A. §9712 in violation of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Appellant's counsel made this argument on the record. N.T., March 29, 2006, at 10-11. The Court denied the motion because the mandatory minimum sentence of five years did not increase or exceed the statutory maximum; therefore, Blakely was inapplicable. The Pennsylvania Superior Court has found that the imposition of the mandatory minimum pursuant to 42 Pa.C.S.A. §9712 does not violate Blakely. Commonwealth v. Mitchell, 883 A.2d 1096 (Pa.Super. 2005),

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3 The Court only addressed the sufficiency of the evidence for robbery, because the terroristic threats sentence is totally concurrent and the Court found the other convictions merged with the robbery for sentencing purposes.

appeal denied 897 A.2d 454 (Pa. 2006). The Court also notes that the imposition of a mandatory minimum sentence for visible possession of a weapon has survived similar constitutional challenges. See McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

The final issue raised by Appellant is the trial court erred in denying Appellant's motion at trial to suppress Appellant's statement. The Court cannot agree. Rule 581(B) states:

> Unless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

Pa.R.Cr.P. 581. Generally, an omnibus pretrial motion must be filed within 30 days after arraignment. Pa.R.Cr.P. 579. Here, Appellant never filed a written motion to suppress evidence. After two Commonwealth witnesses testified in the jury trial in this case, Appellant's counsel asked for a sidebar conference and orally moved to suppress his entire confession. N.T., January 17, 2006, at 49-50. The Court noted it was a Friday and counsel was in right in the middle of the trial. N.T. at 50. Since the request was untimely and it was made in the middle of the jury trial, the Court denied the request. The Pennsylvania Superior Court has held that the failure to raise a suppression issue prior to trial precludes its litigation for the first time at trial, in post-trial motions or on appeal. Commonwealth v. Douglas, 701 A.2d 1376, 1378 (Pa.Super. 1997); Commonwealth v. Collazo, 440 Pa.Super. 13, 17, 654 A.2d 1174, 1176 (Pa.Super. 1995). Therefore, the Court did not err in denying defense counsel's oral request to suppress and Appellant waived any suppression issue.

DATE: _____ By The Court,

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Kenneth D. Brown, P. J.

cc: District Attorney
Public Defender
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)