IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 930-0225
	:	
JOVOHN PIERRE NUNEZ,	:	CRIMINAL ACTION - LAW
	:	
Defendant	:	
	:	1925(a) Opinion

DATE: October 13, 2006

OPINION IN SUPPORT OF THE ORDER OF JUNE 16, 2006 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Commonwealth has appealed this court's June 20, 2006 order granting in part Defendant Jovohn Pierre Nunez's (hereafter "Nunez") Amended Post-Sentence Motion. The court granted Nunez a new trial on the basis that his trial counsel was ineffective for failing to request a jury instruction to address the issue of whether Nunez's statements to police were voluntary made. For the reasons set forth *infra*, the June 20, 2006 order should be affirmed and the appeal denied.

I. BACKGROUND

A. Procedural History

1. Charges, Trial, and Sentence

On May 18, 2005, Officer John G. Heck of the Williamsport Bureau of Police filed a criminal complaint against Nunez. It charged Nunez as follows: Count 1 Possessing Instruments of a Crime, 18 Pa.C.S.A. § 907(a); Count 2 Simple Assault, 18 Pa.C.S.A. § 2701(a)(3); Count 3 Robbery – Serious Bodily Injury, 18 Pa.C.S.A. § 3701(a)(1)(ii); Count 4 Robbery - Bodily Injury,

18 Pa.C.S.A. § 3701(a)(1)(iv); and Count 5 Theft by Unlawful Taking, 18 Pa.C.S.A. § 3921(a). On July 1, 2005, The Commonwealth filed an information charging Nunez with the same crimes.

On October 18 and 19, 2005, a jury trial was held before this court. On October 19, 2005, the jury found Nunez guilty of all charges. The court sentenced Nunez on January 12, 2006. As to Count 1, Possessing Instruments of a Crime, Nunez was sentenced to confinement at a state correctional institution for a minimum of twelve months and a maximum of three years. As to Count 3, Robbery – Serious Bodily Injury, Nunez was sentenced to confinement at a state correctional institution for a minimum of sixty-six months and a maximum of twelve years. The court determined that Counts 2, 3, 4 and 5 merged with Count 3 for purposes of sentencing. The court also determined that the sentences under Counts 1 and 3 were to be served consecutively. The resulting aggregate sentence was a minimum of seventy-eight months and a maximum of fifteen years.

2. <u>Original Post-sentence Motion</u>

On January 20, 2006, Nunez filed a Post-Sentence Motion. In the Post-sentence Motion, Nunez raised three claims. The first was an ineffective assistance of counsel claim based upon trial counsel's failure to request jury instructions regarding how the jury was to properly consider and weigh Nunez's statements to police. Specifically, Nunez asserted the counsel was ineffective for failing to request Pennsylvania Standard Criminal Jury Instruction 3.01 (Defendant's Confession or Admission: General introduction), 3.04 A (Defendant's Confession or Admission: Voluntariness, Prefatory Remarks), 3.04 B (Defendant's Confession or Admission: Voluntariness, Basic Standard), 3.04 C (Defendant's Confession or Admission: Voluntariness – Proof, Totality of

Circumstances), and 3.05 (Defendant's Confession or Admission: Credibility and Weight of a Statement Found Voluntary).[1] The second claim was a challenge to the sufficiency of the evidence. The third claim was a challenge to the weight of the evidence.

A hearing on the motion was scheduled for March 3, 2006. That hearing was continued until March 29, 2006. Nunez requested a continuance of the hearing because his counsel was unavailable. It was granted and the hearing was re-scheduled for April 20, 2006. The April 20, 2006 hearing also had to be continued. New appointed counsel, Donald F. Martino, Esquire, had recently entered his appearance for Nunez. Attorney Martino had been appointed due to the conflict that was created by the ineffective assistance of counsel claim which precluded further representation of Nunez by trial counsel, William J. Miele, Esquire. In an order issued on April 20, 2006, the court permitted Nunez to file an amended post-sentence motion. The court also granted Nunez's request for a thirty-day extension within which the court could decide the post sentence-motion.

3. <u>Amended Post-sentence Motion and June 16, 2006 Order</u>

On May 5, 2006, Nunez filed an Amended Post-sentence Motion. In the Amended Post-sentence Motion, Nunez reasserted his ineffective assistance of counsel, sufficiency of the evidence, and weight of the evidence claims. Nunez added an after-discovered evidence claim, which was based upon evidence that another individual who was incarcerated at the Lycoming County Prison had confessed on numerous occasions to committing the crimes Nunez of which Nunez had been convicted. A hearing regarding the Amended Post-sentence Motion was held on

1 Copies of the standard jury instructions will be attached to this opinion as an appendix.

June 2, 2006. Evidence was taken regarding Nunez's claims of ineffective assistance of counsel and after-discovered evidence. The hearing was recessed until June 15, 2006.

In an order issued June 2, 2006, the court noted that the evidentiary hearing regarding Nunez's Amended Post-Sentence Motion was substantially completed. However, the court recognized that the need for a further evidentiary hearing may arise once counsel for the respective sides had an opportunity to review the transcripts in the case. Counsel had been unable to review the transcripts prior to the June 2, 2006 hearing because the transcripts could not be prepared in time. The court believed that counsel would be provided with the necessary transcripts by June 5, 2006. As such, it ordered and directed that counsel review the transcripts and file briefs or legal memoranda in support of their positions by June 13, 2006. The court then scheduled a conference for June 15, 2006 to determine whether there would be a need for a further evidentiary hearing.

The June 15, 2006 conference was re-scheduled to June 14, 2006. No further evidence was presented at the June 14, 2006 conference. Instead, arguments by Nunez and the Commonwealth were presented.

On June 16, 2006, the court prepared an Order with Memorandum of Reasons in which it denied in part and granted in part Nunez's Amended Post-sentence Motion. The court denied Nunez's sufficiency of the evidence, weight of the evidence, and after-discovered evidence claims. The court granted Nunez's ineffective assistance of counsel claim. The court found that Nunez's trial counsel was ineffective for failing to request jury instructions regarding how the jury should consider and view Nunez's statements to police. As such, the court granted Nunez a new trial and set bail in the amount of $100,000. The Order was signed on June 19, 2006 and delivered to the

Lycoming County Prothonotary's Office that day. The Prothonotary's Office did not process or time stamp the Order until the following day, June 20, 2006.

4. The Commonwealth's Appeal

On July 19, 2006, the Commonwealth filed a notice of appeal. On July 20, 2006, the court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing the Commonwealth to file a concise statement of matters complained of on appeal. On August 7, 2006, the Commonwealth filed its statement of matters.

B. Facts of the Case

1. The Incident

a. The Robbery of Michael James

The events giving rise to the crimes Nunez was charged with and found guilty of occurred on May 18, 2005. At that time Michael James was employed by R.E. Troutman & Sons as a delivery truck driver. Notes of Testimony, 28 (10/18/05). R.E. Troutman & Sons sold potato chips, pretzels, and other snack foods to various stores. Id. at 29. James's job was to deliver the snack foods to those stores and stock the shelves. Ibid. On May 18, 2005, at approximately 11:00 a.m., James was making deliveries to two businesses on Washington Boulevard, Williamsport, Pennsylvania. Id. at 30. James made his first delivery to Joey's Place. Id. at 31. Then he made a delivery to Puffs Tobacco Products (hereafter "Puffs"). Id. at 30. After making his delivery to Puffs, James entered his delivery truck, which was parked in the lot between Joey's Place and Puffs. Id. at 44, 66-67.

Upon entering the delivery truck, James printed out the delivery order for Puffs from his hand held computer. N.T., 31 (10/18/05). He tore the print out off and was in the process of tearing the edges off the print out when he noticed someone coming up to the truck. Id. at 31. James then looked out of the truck and stepped down onto the lower step of the vehicle. Id. at 31, 33.

Once James had stepped down, the individual approaching the truck pointed a handgun at James' face and asked James where the money was, to which James replied that he did not have any. N.T., 33 (10/18/05). James and the individual were about one foot away from each other at this point. Id. at 34-35. The individual held the handgun in his right hand. Id. at 51. It was a small, black with gray trim automatic pistol. Id. at 34, 50. James backed up onto the top step, and the individual followed him in to the delivery truck. Id. at 32. James and the individual were right next to each other. Id. at 33. There was on opening behind James, and the individual told James to go back there. Id. at 32. The individual moved toward James and shoved him. Id. at 32, 36. This caused James to trip and fall over two layers of tubs of chips. Id. at 32, 36.

James landed on his back on the floor of the delivery truck. N.T., 38 (10/18/05). The individual stepped over the tubs of chips toward James. Ibid. The individual leaned forward, pointed the handgun at James' head, and asked James again where the money was. Ibid. At this point, the individual was about two feet away from James. Ibid. James did not have the lights on in the rear of the truck, but it was daylight out and sunlight was coming through the windshield of the truck. Id. at 42. The individual repeatedly asked James where the money was, and James replied each time that he did not have any. Id. at 39. Fearing that he might get shot, James gave

the individual his wallet. Ibid. The wallet contained only five or six one dollar bills and a debit card. Id. at 39-40. The individual turned and went through the wallet. Id. at 41.

The individual was not happy with what he found (or did not find), and said that he could not believe that James did not have any money. N.T., 41 (10/18/05). The individual told James to stay down and he began to leave the truck with the wallet. Id. at 41, 46, 49. As the individual was leaving the truck, he picked up a pack of cigarettes that was lying on the center counsel of the truck. Id. at 49, 170. The incident took place over the course of about one and a half to two minuets. Id. at 46.

After the individual left the delivery truck, James remained prone on the floor of the truck. N.T., 42 (10/18/05). James took a deep breath then slowly got up and moved to the door at the rear of the truck. Ibid. James exited the truck through the rear door and went to Puffs. Ibid. James relayed to individuals inside Puffs what had happened and they called 911. Ibid. At some point, James got on the telephone with the 911 operator and provided a description of the individual who had robbed him. Id. at 41, 44. According to James, the individual was a black male between the ages of 18 and 22, five feet ten inches tall weighing about one hundred and seventy pounds who had a mustache and light beard wearing sneakers, baggy jeans, and a dark blue hooded sweatshirt Id. at 41, 45, 51-52, 55, 57.

b. <u>Richard Callahan, Jr.'s Viewing of the Suspect</u>

Richard Callahan, Jr. was employed by Joey's Place on May 18, 2005. N.T., 61 (10/18/2005). He arrived at Joey's Place around 11:00 a.m. to begin his shift. Id. at 61, 66. As Callahan exited his vehicle he noticed the R.E. Troutman & Sons delivery truck in the parking lot

and saw an individual exit the passenger door of the delivery truck. Id. at 62. Callahan started walking toward Joey's Place when he saw the individual heading in the direction of Joey's Place. Id. at 62. Callahan turned around to see where the individual was and saw him walking down the alley between Joey's Place and Puffs toward Erlich's. Ibid. Callahan described that individual as wearing a pair of light colored, baggy jeans, grayish-white boxers, a reddish-orange shirt, a dark colored sweat-shirt type hooded coat, and sneakers. Id. at 63, 64, 81-83. According to Callahan, the individual who had exited the delivery truck had dark skin, a thin mustache, and a light beard. Id. at 64, 70, 84, 89. Callahan also noted that when the individual exited the delivery truck the hood of his sweatshirt was down. Id. at 64. Callahan also saw a silver object hanging from the side of the individual's pants. Id. at 83-84.

2. <u>The Investigation</u>

a. <u>The Initial Police Response</u>

At 10:55 a.m. a three toned alarm went out over the Lycoming County communications radio regarding the robbery of James. N.T., 115, 120 (10/18/05). The dispatch stated that there had been an armed robbery in the 500 block of Washington Avenue and the suspect was a black male wearing a dark hooded sweatshirt heading in an unknown direction. Id. at 144-45, 167-68. Officer John Heck, Officer Kevin Stiles, Agent David Ritter, and Agent Stephen Sorage, all of the Williamsport Bureau of Police, responded to the three toned alarm. Id. at 107, 120-21, 145, 168. Officer Heck was the first to arrive at the Joey's Place/Puffs crime scene. Officer Heck got there while James was still on the phone with the 911 operator and within about one and a half minuets after the call to 911 had been made. Id. at 42, 43.

When Officer Heck made contact with James, he asked James to describe what happened and to provide a description of the suspect. N.T. 44, 168, 169 (10/18/05). James told Officer Heck that the individual who had robbed him was a black male with a mustache wearing a blue hooded sweatshirt with an orange or red tee shirt underneath. Id. at 168. Officer Heck relayed over the radio the description James had given him to other officers. Id. at 168. Officer Heck then interviewed Callahan. Callahan provided Officer Heck with basically the same description of the suspect that James had. Id. at 172. Just after Officer Heck finished interviewing Callahan, the manager of Puffs approached him and told Officer Heck that he was on the telephone with a Puffs employee who believed she saw an individual matching the description of the suspect. Ibid. That Puffs employee was Susan Bartlow. Officer Heck got on the telephone with Bartlow and tried to determine her location. Ibid. Once Officer Heck had this information, he radioed other units engaged in the search for the suspect that a possible individual matching the description of the suspect might be located in the area of the 500 block of Memorial Avenue. Ibid.

Susan Bartlow was an employee of Puffs Discount Stores on May 18, 2005. N.T., 98 (10/18/05). She worked in the store located on Lycoming Creek Road. Ibid. Bartlow was on her way to work when she noticed that police officers were at the Puffs store located on Washington Boulevard. Id. at 99. Barlow had worked at that store previously and wanted to know why the police were there, so she used her cell phone to contact the store. Ibid. A description of the individual who had exited the delivery truck was relayed to Bartlow. Ibid. While she was on the phone, Bartlow saw an individual matching that description. Id. at 100. Bartlow saw a black male wearing blue jeans, a red or orange shirt, and a black or navy blue hooded sweatshirt in the area of

the Sav-A-Lot store, which is located on the corner of Park Avenue and Hepburn Street in the city of Williamsport. Id. at 100-103. According to Bartlow, the individual had the hood of the sweatshirt up, and she was unable to get a look at his face. Id. at 101, 103. Bartlow followed the individual from the Sav-A-Lot to Memorial Avenue. Id. at 102. Bartlow relayed what she had seen to the individuals at the Puffs store, and they put Officer Heck on the phone. Id. at 102, 172. Bartlow told Officer Heck what area in which she was driving, and he told her to flag down a police officer when she saw one. Ibid. Bartlow was eventually able to flag down a police officer. Ibid. The police officer Bartlow flagged down was Officer Stiles.

b. <u>The Search for the Suspect</u>

Officer Stiles had been on routine patrol in a marked police cruiser when the three toned alarm went out. N.T., 106 (10/18/05). Officer Stiles proceeded to the area of Washington Boulevard and began to search for an individual matching the description that had gone out over the radio. Id. at 107. Officer Stiles expanded his search for the suspect toward the direction of Memorial Avenue. Ibid. When he was in the area of Memorial Avenue and Campbell Street, Officer Stiles was advised over the radio by Officer Heck that he had been in contact with a female who may have spotted an individual matching the description of the suspect. Id. at 107-08. Soon after, Officer Stiles made contact with Bartlow after she flagged him down. Id. at 108. Bartlow provided Officer Stiles with a description of the individual she had seen, and Officer Stiles radioed that description to other officers involved in the search. Ibid.

While this was occurring, Agent Ritter arrived at the crime scene. Agent Ritter made contact with Officer Heck, and he briefed Agent Ritter on the situation. N.T., 121 (10/18/05).

Agent Ritter then made contact with and interviewed James. Ibid. Agent Ritter interviewed James for the purpose of determining where James and the suspect had been so that he would know where the best possible places to locate fingerprints in the delivery truck would be. Id. at 141. Following this interview, Agent Ritter processed the delivery truck for fingerprints. Id. at 121. Agent Ritter was unable to locate any usable finger prints inside or on the outside of the delivery truck. Id. at 121-22.

The search for the suspect came to a head around 11:30 a.m. Agent Sorage had been at City Hall when the three toned alarm went out. N.T., 144-145 (10/15/05). He left City Hall in an unmarked cruiser and headed toward the area west of the 500 block of Washington Avenue. Id. at 145. Between 11:20 and 11:30 a.m., Agent Sorage received information over the police radio that the suspect was wearing a dark hooded sweatshirt and a red-reddish colored shirt. Id. at 145, 146. Agent Sorage began his search for an individual matching the description of the suspect in the area around Park Avenue and Hepburn Street. Id. at 146. Agent Sorage expanded his search to the area around Hepburn and High Streets and then to the area around Memorial Avenue. Ibid. Agent Sorage saw an individual matching a description of the suspect walking west on Memorial Avenue. Ibid. When Agent Sorage spotted the individual, the individual was in the area of the 500 block of Memorial Avenue, just prior to Center Street. Ibid. Agent Sorage radioed in his location, stated that he had observed an individual who matched the description of the robbery suspect, and informed the communications center that he was going to stop the individual. Id. at 147.

Agent Sorage stopped and approached the individual on Memorial Avenue. N.T., 147 (10/18/05). This occurred at 11:28 a.m. Id. at 115. Agent Sorage asked the individual to put down

a bag he was carrying, which he did. Id. at 147. Officer Stiles had been advised over the radio that Agent Sorage had stopped an individual who matched the description of the suspect. Id. at 109. Officer Stiles proceeded to Agent Sorage's location to provide back up and assist in detaining the individual. Ibid. Following Officer Stiles' arrival at the location, Agent Sorage proceeded to pat down the individual. Id. at 147, 148. As a result of the pat down, Agent Sorage found and removed a can of beer from the individual's pocket. Id. at 148. Agent Sorage did not find a handgun, James's wallet, any dollar bills, or a pack of cigarettes on the individual. Id. at 162. Agent Sorage then handcuffed the individual and asked him to have a seat on the curb. Id. at 117, 118, 148. After this, Agent Sorage contacted Officer Heck and told him to transport any witnesses to his location to see if they could identify the individual as the perpetrator. Id. at 148, 149. Agent Sorage had stopped the individual about one mile to one and a half miles away from the scene of the robbery. Id. at 115, 155-156, 175.

c. <u>The Show-up Identification of the Suspect</u>

Upon receiving Agent Sorage's request, Officer Heck transported James and Callahan to the Memorial Avenue location. N.T., 173 (10/18/05). James and Callahan were seated in the back of Officer Heck's police cruiser, with Callahan seated behind Officer Heck. Id. at 46, 48, 67, 173. When Officer Heck approached the location where the individual was being detained, he stopped, or at least slowed down, to allow James and Callahan an opportunity to view the individual. Id. at 50, 69, 149, 173. The individual was handcuffed and standing outside the police cruisers when James and Callahan viewed him. Id. at 51, 69, 110, 117, 118. Both James and Callahan identified the individual as the person who had committed the robbery, Callahan being the first to so indicate.

Id. at 47, 50, 68, 69. Following James and Callahan's positive identification of the individual, Officer Heck transported them back to the scene of the robbery and dropped them off. Id. at 175.

Due to the positive identification, the individual was placed in the back of a police cruiser and transported to the police station at City Hall for booking. N.T., 111,149 (10/18/05). The individual stopped by Agent Sorage, identified by James and Callahan as the robbery suspect, and transported to the police station at City Hall was Nunez. Once Nunez was inside the police station a strip search of his person was conducted. Id. at 111. At that time, Nunez was wearing the following clothing: a blue hooded sweatshirt; a red tee shirt; a black tee shirt, a white tee shirt; a white muscle shirt; blue jeans; white boxer-type underwear, white socks; and sneakers. Id. at 111-12. He had in his possession a bag with $13.97 worth of loose change. Id. at 186-87.

3. <u>The Interviews of Nunez</u>

a. <u>Agent Ritter's Interview of Nunez</u>

The Williamsport Bureau of Police conducted two interviews of Nunez. Agent Ritter conducted the first interview. During the interview, Agent Ritter went through the events of Mr. Nunez's day with him. Id. at 128. According to Agent Ritter, Nunez said that he had awoke some time after 10:00 a.m., got dressed, and talked to his mother, who suggested he go see his aunt who lived on Brandon Avenue. Id. at 128, 130-31. Nunez told Agent Ritter that he had gone to his aunt's house to get some money. Id. at 129, 131. Agent Ritter said that Nunez told him he had arrived at his aunt's house and knocked on the door, but no one answered. Id. at 129. Nunez then said that a neighbor had come out and he briefly spoke to her before leaving. Ibid. After leaving his aunt's house, Agent Ritter said that Nunez told him he went to his uncle's house on Cherry

Street. Id. at 131. Nunez told Agent Ritter that he was able to obtain some change from his uncle. Ibid. Nunez had left his uncle's house and was walking when he was stopped by the police. Id. at 129.

b. <u>Agent Sorage's Interview of Nunez</u>

Agent Sorage conducted the second interview. According to Agent Sorage, Nunez gave several different versions of what occurred during the course of the interview. N.T., 152, 160 (10/18/05). Agent Sorage also said that Nunez's behavior during the interview would range up and down, at times Nunez would be very agitated, very animated, and very excitable. Id. at 152. At one point, Nunez got up out of his chair, yelled at Agent Sorage, and started walking towards Agent Sorage. N.T., 6 (10/19/05). Agent Sorage responded by raising his voice and telling Nunez to back off and get out of his face. Ibid. Nunez backed up and said everything was okay. Ibid.

According to Agent Sorage, the first version of events Nunez gave was that James had dropped the wallet and that Nunez picked it up, but threw it away because there was nothing in it. N.T., 152 (10/18/05). The next version was that he had been walking on Washington Boulevard when he saw an individual running through or close to Brandon Park who was carrying a wallet and counting money. Id. at 153. According to Agent Sorage, Nunez said that the individual he saw in the park was dressed similar to him. N.T., 8 (10/19/05). Agent Sorage said that Nunez identified that individual as Anthony Monroe. N.T., 153 (10/18/05). Agent Sorage also stated that in the next office over from where Nunez was being interviewed there were a number of photographs on the wall. Ibid. One of the photographs was of Andrew Monroe, who is Anthony Monroe's brother. Ibid.

The third version that Nunez gave Agent Sorage was that he had been next to Puffs earlier in the day and had contact with Anthony Monroe there. N.T., 153 (10/18/05). Nunez said that Anthony Monroe asked him to go up to James and ask him if he had change for a twenty dollar bill. Ibid. As to why he did not say this earlier, Nunez said that he thought it would seem funny to be asking a man for change for a twenty dollar bill when he did not have a twenty dollar bill. Ibid. Nunez further stated it was Anthony Monroe who told him to ask James for the change and that he was scared of Monroe because Monroe and his associates carried guns. Id. at 153-54. The fourth version of events that Nunez gave to Agent Sorage was that he had seen James outside of Puffs and had asked him for fifty cents or a dollar so that he could purchase a cigar. Id. at 154. Nunez stated that James said no, and it was at this point that he approached James and said, "What, you won't even give me a buck for a dutchie." Ibid. Nunez told Agent Sorage that after he said this he pushed James and James fell. Ibid. Nunez said it was at this point that James gave him his wallet, which Nunez later disposed of in a dumpster located somewhere between Puffs and the Wendy's restaurant located on Washington Boulevard. Ibid.

Nunez was seventeen years old at the time of the interview by Agent Sorage. N.T., 159 (10/18/05). Agent Sorage's interview of Nunez lasted about three and a half hours. Id. at 161. Over the course of those three and a half hours, Nunez cried and requested to call his mother and to go home. N.T., 69 (10/19/05). Also during the course of the three and a half hour interview, Nunez denied any involvement in the robbery approximately fifty-seven times. Id. at 69, 72. Following the interview, Nunez was arrested, booked, and photographed. N.T., 150-52, 179 (10/18/05).

After the interviews of Nunez were completed, Agents Ritter and Sorage went to the scene of the robbery and the places Nunez said he had been to see if they could locate James's wallet. N.T., 131 (10/18/05). They checked the area around Joey's Place including the alleys, dumpsters, garbage cans, shrubbery, and weeds. N.T., 6 (10/19/05). Despite their efforts, Agents Ritter and Sorage were unable to find the wallet or any other evidence connected to the robbery. N.T., 131-32 (10/18/05).

4. <u>Nunez's Alibi Evidence</u>

On March 18, 2005, Rita Nunez, Nunez's mother, left her apartment at 222 Chatham Street at 6:30 a.m. to go to her job at American Customer Care in Montoursville, Pennsylvania. N.T., 34 (10/19/05). Nunez had awoken that day at about 10:00 a.m. Id. at 18; N.T., 128 (10/18/05). At 10:30 a.m., Nunez called his mother while she was at work. N.T., 35 (10/19/06). According to her, Nunez wanted to know if his aunt, Michelle Veeris, would be home so that he could go over to her residence to do some laundry and have her exchange paper currency for some coins he had. Id. at 35, 36, 43, 44. Ms. Nunez told him that his aunt should be home because she did not have work that day. Id. at 35. Nunez's aunt resided at 317 Brandon Avenue, Williamsport, Pennsylvania. Id. at 45.

Nunez arrived at his aunt's residence and knocked on the door. N.T., 129 (10/15/05). Nunez was knocking on the door very loudly. Id. at 208-209. This drew the attention of Kathy Shaheen. Id. at 208, 217. Shaheen resides at 321 Brandon Avenue, which is two houses away from Veeris's residence. Id. at 203, 205, 215. Earlier that day, at about 8:15 a.m., Shaheen left her residence to go to the American Rescue Workers, which is located at the corner of High and Elmira

Streets in Williamsport, with its specific address being 643 Elmira Street. Id. at 203, 212. Shaheen made contact with one of the case workers at American Rescue Workers, Linda Tokay, at 9:30 a.m. Id. at 199. According to Tokay, Shaheen left the American Rescue Workers at the earliest 10:15 a.m. or at the latest 10:45 a.m. Id. at 201. Shaheen had returned to her residence after leaving the American Rescue Workers and was about to read the newspaper out on her porch when she heard the loud knocking and saw Nunez. Id. at 207, 208.

Nunez said hello to Shaheen, and she told him that no one was home at his aunt's residence. N.T., 209-11, 216-17 (10/18/05). She told him that his aunt and grandmother had left earlier in a taxi. Ibid. Shaheen believed that Nunez's aunt and grandmother had left in the taxi about ten or fifteen minutes before she noticed Nunez knocking on the door. Id. at 219. Nunez left after Shaheen told him that no one was home at his aunt's residence. Id. at 211. Shaheen saw him cross Brandon Avenue and head in the direction of the Herrs Dairy ice cream store. Id. at 211, 217. When he left his aunt's residence, Nunez was carrying a white plastic bag similar to one typically used at a grocery store. Id. at 211.

Melvin Sornberger is a dispatcher with the Billtown Cab Company. N.T., 220 (10/18/05). On May 18, 2005 he dispatched a taxi to 317 Brandon Avenue at 10:37 a.m. Id. at 223. Ann Johnson is the manager of the Billtown Cab Company. Id. at 225. According to her, a driver's log of one of the cab company's drivers indicates that he picked up the individuals at 317 Brandon Avenue at 10:40 a.m. Id. at 226. The driver's log also indicated that he returned the individuals to 317 Brandon Avenue at 11:08 a.m. Id. at 227.

After Nunez left his aunt's residence, he went to his uncle's residence. N.T., 131 (10/18/05); N.T., 19 (10/19/05). Nunez's uncle is Joseph Porter, and he resides at 607 Cherry Street, Williamsport Pennsylvania. N.T., 190 (10/18/05). Porter testified that Nunez was at his residence sometime between 10:00 a.m. and 11:00 a.m. on May 18, 2005. Ibid. While he was there, Porter testified that Nunez made a telephone call to his grandmother's residence. Id. at 192. Porter further testified that he had given Nunez some change. Id. at 191-92. According to Porter, Nunez left his residence a little after 11:00 a.m. Id. at 193.

Rebecca Baity is Nunez's grandmother. N.T., 24 (10/19/05). She resides at 727 High Street, Williamsport, Pennsylvania. Id. at 23. She and her daughter, Michelle Veeris, had gone out together that morning. Id. at 24, 46. When she returned home, Baity discovered that someone had called her from her brother's, Joseph Porter, residence. She knew this because his telephone number came up on her caller id, and it indicated that the call came in at 11:05 a.m. Id. at 25, 31. Baity telephoned Porter to inquire if he was the one who had called her. Ibid. According to Baity, Porter told her that it was Nunez who had called her and that he was no longer there. Ibid. Baity stated that she had telephoned Porter before 11:30 a.m., and that it was probably five to ten minutes after she got home that she called Porter. Id. at 31-32.

II. ISSUES

The Commonwealth's statement of matters asserts five issues. They are:

1. Did the court err in granting a new trial when the order granting a new trial was not entered until more than 150 days after the post sentence motions were filed, a time when the court lacked jurisdiction and the motions should have been denied by operation of law. See Pa.R.Crim 720.

2. Did the court err in granting a new trial based on basic and fundamental error in failing to give a jury instruction on the issue of the voluntariness of the defendants (sic) confession when the concept of basic and fundamental error has been abrogated. See *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974).

3. Did the court err in granting a new trial based on ineffective assistance of counsel when the Commonwealth was not given a full and complete opportunity to cross-examine trial counsel for the defendant when a trial transcript had not been prepared and when prepared counsel was not available to be questioned prior to rendering the courts (sic) opinion.

4. Did the court err in granting a new trial where there was no reasonable probability from the evidence presented that the jury would have determined that the defendants (sic) confession was not voluntary.

5. Did the court err in granting a new trial based on ineffective assistance of counsel in failing to request a jury instruction on the voluntariness of defendants (sic) confession on the basis of harmless error when the defendant almost immediately made statements implicating himself in the commission of the crime.

Commonwealth's Concise Statement of Matters Complained of on Appeal.

III. DISCUSION

The discussion section of this opinion will be divided into three main sections. The first section will address the jurisdiction question raised in the Commonwealth's first issue. The second

main section will address the Commonwealth's second issue regarding the court's purported reliance upon the basic and fundamental error doctrine. The third main section will address the Commonwealth's third, fourth, and fifth issues, which pertain to Nunez's ineffective assistance of counsel claim.

A. The Court's Jurisdiction to Enter the June 20, 2006 Order

The court should be deemed to have had jurisdiction to enter the June 20, 2006 order granting Nunez's Post-sentence Motion because the order should be entered *nunc pro tunc* as of June 19, 2006. Generally, a written post-sentence motion must be filed within ten days of the imposition of sentence. Pa.R.Crim.P. 720(A)(1). Pennsylvania Rules of Criminal Procedure Rule 720(B)(3) governs what is required of a court with regard to the disposition of a post-sentence motion. It provides as follows:

> (3) *Time Limits for Decision on Motion*. The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.
>
> (a) Except as provided in paragraph (B)(3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law.
>
> (b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

Pa.R.Crim.P. 720(B)(3)(a), (b). The time limits set forth in Rule 720(B)(3) are jurisdictional in nature. ***Commonwealth v. Bentley***, 831 A.2d 668, 670 (Pa. Super. 2003). "[A] trial judge's legal authority to even entertain [a post sentence motion] is entirely contingent upon his/her compliance with the time requirements …." ***Ibid.*** A trial court's failure to render a ruling on a post sentence motion within the prescribed time period divests the court of jurisdiction to render a decision at a later date. ***Ibid***.

Nunc pro tunc relief may only be granted in extraordinary circumstances. ***Criss v. Wise***, 781 A.2d 1156, 1159 (Pa. 2001); ***Commonwealth v. Dreves***, 839 A.2d 1122, 1128 (Pa. Super. 2003). *Nunc pro tunc* relief may be granted if a fraud has occurred or if there is a breakdown in the operation of the court through a default of one of its officers. ***Rothstein v. Polysciences, Inc.***, 853 A.2d 1072, 1075 (Pa. Super. 2004); ***Patterson v. Commonwealth***, 587 A.2d 897, 899 (Pa. Cmwlth. 1991).

Pennsylvania Rules of Criminal Procedure Rule 114 governs the filing and docketing of orders in criminal cases. It provides that:

> **(A) Filing**
>
> (1) All orders and court notices promptly shall be transmitted to the clerk of courts' office for filing. *Upon receipt in the clerk of courts' office, the order or notice promptly shall be time stamped with the date of receipt*.
>
> (2) All orders and court notices promptly shall be placed in the criminal case file.
>
> ***
>
> **(C) Docket Entries**

(1) Docket entries promptly shall be made.

(2) The docket entries shall contain:

(a) *the date of receipt in the clerk of courts' office of the order or notice*;

(b) the date appearing on the order or notice; and

(c) the date and manner of service of the order or court notice.

Pa.R.Crim.P. 114 (A), (C) (emphasis added).

The court had one hundred and fifty days within which to decide Nunez's Post-sentence and Amended Post-sentence Motions. Nunez's Post-Sentence Motion was filed on January 20, 2006. On April 20, 2006, the court granted Nunez's request for a thirty day extension of the time period within which to decide the Post-sentence Motion. The one hundred and fifty day time period expired on June 19, 2006.

The court's Order with Memorandum of Reasons denying in part and granting in part Nunez's Post-Sentence Motion was issued on June 19, 2006. The final draft of the Order was prepared on Friday June 16, 2006, which is indicated as the date on the Order with Memorandum of Reasons. The court made a final review of the Order with Memorandum of Reasons on Monday June 19, 2006. Following this review, the court signed the Order on June 19, 2006. Once the Order was signed, the court's secretary, April McDonald, placed the signed order in the box to be delivered to the prothonotary's office by the bailiff. The bailiff delivered the Order to the prothonotary's office on June 19, 2006 before the close of business, but it was not filed until June 20, 2006.

The Prothonotary's Office should have time stamped and docketed the Order with Memorandum of Reasons on June 19, 2006 in compliance with Pennsylvania Rules of Criminal Procedure Rule 114 when it received the Order. The failure to do so resulted in a breakdown of the court's operations. As such, *nunc pro tunc* relief is appropriate. Accordingly, the Order with Memorandum of Reasons granting in part Nunez's Post-sentence Motion should be filed *nunc pro tunc* as of June 19, 2006, which is within the jurisdictional time limits of Rule 720(B)(3).

B. <u>Basic and Fundamental Error Doctrine</u>

The Commonwealth's second issue asserts that the court erred in granting Nunez's Post-sentence Motion on the basis that it was a basic and fundamental error in failing to instruct the jury on the issue of the voluntariness of Nunez's confession. The Commonwealth asserts that the concept of basic and fundamental error has been abrogated by the case of ***Commonwealth v. Clair***, 326 A.2d 272 (Pa. 1974). Under the doctrine of basic and fundamental error, an issue which was not properly preserved before the trial court could be addressed on appeal where the issue constitutes a basic and fundamental error. *See*, ***Commonwealth v. Williams***, 248 A.2d 301, 304 (Pa. 1968). In ***Clair***, the Pennsylvania Supreme Court held that this doctrine would no longer apply to criminal matters. 326 A.2d at 274.

In this court's June 20, 2006 Order with Memorandum of Reasons, we stated:

> The instruction if requested would have been granted and would have included a statement to the effect that the jury would need to determine if the Defendant's confession was voluntary before they could consider it as evidence of the defendant's guilt. Clearly, Defendant's evidence put in issue the voluntariness of his confession. In that situation, the failure of the court to give such an instruction has been held to constitute '… a withdrawal of an issue vital to due process from the consideration of the jury (citations omitted) …

> (T)he trial judge was bound to give proper instructions on the issue of voluntariness even though no specific exception was taken by the Defendant and that failure to do so was basic and fundamental error.' ***Commonwealth v. McLean***, 247 A.2d 640, 644 (Pa. Super. 1968). This makes it clear that trial counsel was ineffective in failing to request the instruction regardless of any trial strategy. Furthermore, such a basic and fundamental error makes an inquiry into whether or not the outcome of the trial would have been different had the requested instruction been given irrelevant.
>
> Nevertheless, it does appear that if the requested instruction had been given there is a reasonable probability the outcome of the trial would have been different.

June 20, 2006 Order with Memorandum of Reasons, 2.

The Commonwealth is correct that the Pennsylvania Supreme Court has abrogated the doctrine of basic and fundamental error. However, the doctrine of basic and fundamental error is not applicable to the issues at hand and the court did not rely upon it in making its decision. The doctrine of basic and fundamental error was a way of addressing an issue on appeal that was not properly preserved before the trial court. The issue of Nunez's trial counsel's ineffectiveness was raised before the trial court in his Post-sentence Motion and his Amended Post-sentence Motion. The doctrine of basic and fundamental error would not be applicable here even if it was still in use.

The court used the term "basic and fundamental error" not to indicate its reliance upon the doctrine, but to underscore the significance of the error that was committed in trial counsel's failure to have the jury instructed on its responsibility to determine the voluntariness of Nunez's confession. The significance of this error will be discussed *infra*. As such, the abrogation of the basic and fundamental error doctrine has no impact upon the court's determination and reasoning in support thereof.

C. Nunez's Ineffective Assistance of Counsel Claim

1. Ineffective Assistance of Counsel Test

In order to establish an ineffective assistance of counsel claim, a defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without a reasonable basis designed to effectuate his interest; and (3) he was prejudiced by counsel's ineffectiveness, i.e., that there is a reasonable probability that but for the act or omission in question, the outcome of the proceeding would have been different. ***Commonwealth v. Brooks***, 839 A.2d 245, 248 (Pa. 2003); ***Commonwealth v. Lambert***, 797 A.2d 232, 234 (Pa. 2001); ***Commonwealth v. Todd***, 820 A.2d 707, 711 (Pa. Super. 2002). A defendant bears the burden of proving all three prongs of the ineffective assistance of counsel claim. ***Commonwealth v. Meadows***, 787 A.2d 312, 320 (Pa. 2001). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." ***Commonwealth v. Bromley***, 862 A.2d 598, 606 (Pa. Super. 2004), *app. denied*, 881 A.2d 818 (Pa. 2005), *cert. denied*, 126 S. Ct. 1089 (U.S. 2006). A court is not required to analyze the elements of an ineffective assistance of counsel claim in any particular order of priority; if a claim fails under any element that court may address it first. ***Lambert***, 797 A.2d at 243, n.9.

2. Arguable Merit

The Commonwealth's fourth and fifth issues assert the same contention. Both issues assert that the jury would not have found Nunez's confession to have been involuntary based upon the evidence presented at trial; therefore, the failure to instruct the jury as to the voluntariness of

Nunez's confession was harmless. As such, the Commonwealth's fourth and fifth issues assert that Nunez cannot satisfy the arguable merit prong of the ineffective assistance of counsel test.

Counsel will not be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Chimel***, 889 A.2d 501, 541 (Pa. 2005); ***Commonwealth v. Payne***, 794 A.2d 902, 906 (Pa. Super. 2002); ***Commonwealth v. Thomas***, 783 A.2d 328, 323-33 (Pa. Super. 2001). With regard to a jury instruction:

> The law is well settled that '[a] trial court is not obligated to instruct a jury upon legal principles which have no applicability to the presented facts. There must be some relationship between the law upon which an instruction is [requested] and the evidence presented at trial.' (citation omitted). However, '[a] defendant is entitled to an instruction on any recognized defense which has been requested, which has been made an issue in the case, and for which there exists evidence sufficient for a reasonable jury to find in his favor.' (citation omitted).

Commonwealth v. Buska, 655 A.2d 576, 583 (Pa. Super. 1995), *app. denied*, 664 A.2d 972 (Pa. 1995) (change in original).

Pennsylvania has long followed the Massachusetts rule with regard to a defendant's confession. *See*, ***Commonwealth v. Motley***, 372 A.2d 764, 768 (Pa. 1977) (citing former Pa.R.Crim.P. 323(j)); ***Commonwealth v. Green***, 347 A.2d 682, 685 (Pa. 1975) (same); ***Commonwealth v. Heckathorn***, 241 A.2d 97, 102 (Pa. 1968); ***Commonwealth v. Epps***, 44 A. 570, 570-71 (Pa. 1899). Under this rule, a defendant may introduce at trial evidence relating to the voluntariness of his statement. ***Commonwealth v. Cunningham***, 370 A.2d 1172, 1179 (Pa. 1977); ***Commonwealth v. Cameron***, 780 A.2d 688, 693 (Pa. Super. 2001), *app. denied*, 890 A.2d 1056 (Pa. 2005). A defendant is permitted to do so even if there has been a pretrial determination by a

judge that the confession was voluntary and admissible at trial. ***Motley***, 372 A.2d at 768; ***Cameron***, 780 A.2d at 693; Pa.R.Crim.P. 581(J) ("If the court determines that the evidence shall not be suppressed, such determination shall be final, conclusive, and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its suppressibility.") When a defendant presents such evidence at trial, the jury "… may not assess the evidentiary weight to be given to the [confession] until it first makes an independent finding that the confession was voluntarily made." ***Cunningham***, 370 A.2d at 1179; *see also*, ***Cameron***, 780 A.2d at 693. Thus, under the Massachusetts rule, a defendant "…is entitled to a second opportunity to test the voluntariness of his statement by introducing evidence at trial relating to voluntariness and have the jury consider the question." ***Cameron***, 780 A.2d at 693.

Nunez's underlying claim is of arguable merit. Under the Massachusetts rule, if a defendant presents evidence which raises a question as to the voluntariness of his confession, then his is entitled to have the jury determine whether the confession was voluntary. Nunez did present evidence which raised a question as to the voluntariness of his statement. The evidence established that Nunez was seventeen years old at the time of the interviews. Nunez presented evidence that Agent Sorage's interview of him lasted three and a half hours. During the course of that interview, Nunez presented evidence that he cried, requested to speak with is mother, and wanted to go home. Nunez also presented evidence that over the course of the three and a half hour interview he denied any involvement with the robbery fifty-seven times. During the interview by Agent Sorage, the version of events that Nunez gave to him went from no

involvement with James to Nunez pushing James and taking his wallet. Taken as a whole, the evidence presented by Nunez could paint a picture of a scared kid in a police interrogation room being questioned about committing an armed robbery who gradually admits to contact with the victim as he is worn down by the police questioning. As such, Nunez was entitled to have the jury determine whether his confession was voluntary before it could assess its validity and weight with regard to the ultimate determination of guilt.

In ***Commonwealth v. Heckathorn***, the defendant was accused of killing a man in his home during a robbery. 241 A.2d at 98. The defendant gave a statement to police admitting that he shot the victim during a robbery. ***Id***. at 99. The defendant was convicted of murder in the first degree and sentenced to life imprisonment. ***Ibid***. On appeal, the defendant asserted, *inter alia*, that his confession was involuntary and that the trial court erred in refusing to submit the question of voluntariness to the jury. ***Id***. at 102.

The Pennsylvania Supreme Court held that the trial court's refusal to submit the question of voluntariness to the jury was error. ***Heckathorn***, 241 A.2d at 102. Citing former Pennsylvania Rules of Criminal Procedure Rule 323(e), the Court noted that a defendant may introduce evidence at trial as to whether his confession was made involuntarily. ***Ibid***. The Court held that if such evidence is presented, then the issue of voluntariness must be considered by the jury. ***Ibid***.

In ***Commonwealth v. McLean***, the defendant was accused of committing rape, robbery, and aggravated assault and battery. 247 A.2d at 641. During the course of the investigation, two police officers interrogated the defendant. ***Ibid***. The defendant admitted a number of important details regarding the alleged crimes. ***Ibid***. Subsequent to his admissions, Defendant was arrested.

Prior to trial, the defendant filed a motion to suppress evidence regarding his admissions. ***McLean***, 247 A.2d at 641. Following a hearing, the trial court denied the motion finding that the confession was voluntary. ***Ibid***. At trial, the defendant denied committing the crimes, denied ever seeing the victim prior to trial, and questioned the circumstances under which his statement was given to police. ***Ibid***. The defendant testified that he was nervous, upset, and scared during the interrogation because his common law wife was losing their baby and the police officers were on both sides of him when they were speaking. ***Ibid***. The defendant testified that the police officers hollered at him and urged him to admit his guilt. ***Ibid***. The defendant then testified that he "… considered he might as well say he was guilty because he couldn't do anything, there was no one to help him, he didn't have an attorney at the time and he was scared." ***Ibid***.

In the charge to the jury, the trial court made no mention of the voluntariness of the defendant's confession. ***McLean***, 247 A.2d at 642. The trial court did not instruct the jury that if they found that the confession was involuntarily made then they must disregard it. ***Ibid***. The jury returned a verdict of guilty. ***Ibid***. On appeal, the defendant asserted that the trial court erred in failing to submit the issue of the voluntariness of his statements to the jury with appropriate instructions. ***Id***. at 641.

The Pennsylvania Superior Court found that the trial court's failure to instruct the jury regarding the voluntariness of the defendant's confession was error and granted the defendant a new trial. ***McLean***, 247 A.2d at 644. The Superior Court noted that the Pennsylvania Supreme Court had endorsed the Massachusetts rule, and thereby required that "… the final appraisal and resolution of the voluntariness of a confession be left to the jury." ***Ibid***. According to the Superior

Court, the Supreme Court had held that if a defendant introduced evidence that his confession was not voluntarily made, then "'… it becomes a question for the jury, who must be instructed that, if they find the confession was not voluntarily made, they must wholly disregard it.'" ***Id***. at 642 (quoting ***Commonwealth v. Simmons***, 65 A.2d 353, 358 (Pa. 1949)) (emphasis in original). As such, the Superior Court held that the trial court's failure to instruct the jury as to the voluntariness of the defendant's confession withdrew a vital issue from the jury's consideration. ***Id***. at 644. The Superior Court further held that the trial court was bound to give the appropriate instructions regarding the issue of voluntariness. ***Ibid***. Accordingly, the failure to provide such instructions to the jury was an error of significant magnitude as to require a new trial. ***Ibid***.

Heckathorn and ***McLean*** demonstrate the importance that Pennsylvania has placed on giving the jury the opportunity to make a determination regarding the voluntariness of a defendant's confession. ***Heckathorn*** held that the voluntariness of a defendant's confession must be submitted to the jury because the jury is the final arbiter of this issue. In order to effectuate this objective, ***McLean*** held that the jury must be instructed as to their duty regarding determining the voluntariness of defendant's confession. The reasoning behind this requirement is simple. If the jury does not know its duty, then it cannot perform its duty.

In the case *sub judice*, the jury was deprived of the opportunity to make a determination regarding the voluntariness of Nunez's confession because it was not informed of its duty in this regard. Nunez's trial counsel did not request any instructions regarding the jury's obligation to determine the voluntariness of his confession and the court gave no such instructions to the jury.

Without these instructions, the jury would not have been aware that it had the duty to make a determination regarding the voluntariness of Nunez's confession.

The significance placed upon informing the jury of its duty to determine the voluntariness of a defendant's confession may be seen in two cases. The first is ***Commonwealth v. Motley***. In ***Motley***, the trial court gave an instruction in its jury charge telling the jury that it had a duty to determine whether the defendant's statement was voluntary. 372 A.2d at 769. The trial court instructed the jury that in determining whether the statement was voluntarily made the jury must consider the totality of the circumstances under which the statement was made. ***Ibid***. The trial court further instructed the jury as to what circumstances may be included in its assessment of the statement. ***Ibid***. The trial court did not instruct the jury that it could consider the failure of the police officers to advise the defendant of his constitutional rights to counsel and to remain silent. ***Ibid***. The Pennsylvania Supreme Court held that this failure was error. ***Id***. at 769, 770. The Supreme Court held that the charge was deficient because "… it clearly fail[ed] to inform the jury that the absence of warnings or advice is a relevant factor in determining the voluntariness of admissions." ***Id***. at 770.

The second case is ***Commonwealth v. Coach***. In ***Coach***, the trial court instructed the jury regarding its duty to determine the voluntariness of the defendant's statements. 370 A.2d 358, 362 (Pa 1977). The trial court instructed the jury that if it determined that the statements were given involuntarily as the result of coercion, then the jury must disregard the statements. ***Ibid***. In making its determination, the trial court instructed the jury that it must consider all of the circumstances attendant upon the giving of the statements. ***Ibid***. With regard to these

circumstances, the trial court did not instruct the jury that undue delay between arrest and arraignment is a factor to be considered in determining the voluntariness of the defendant's statements. ***Ibid***. The Pennsylvania Supreme Court held that the trial court committed reversible error in failing to instruct the jury on this factor. ***Ibid***. The Supreme Court held that the delay between arrest and arraignment is a relevant factor in determining whether a confession is voluntary. Ibid. Accordingly, the jury should have been allowed to consider this factor in making its determination regarding the voluntariness of the defendant's statements.

In both ***Motley*** and ***Coach***, the trial court's charge did not adequately inform the jury of its duty regarding determining the voluntariness of the defendant's confession. While both charges told the jury that they had an obligation to make a determination regarding the voluntariness of the defendant's statement, both charges lacked instruction as to how to perform that duty. In both cases, this lack of instruction was deemed to be significant. Now, if a failure to instruct a jury as to a factor that must be considered in making its determination regarding the voluntariness of a defendant's confession is a significant failure, then, *a fortiori*, a failure to instruct a jury that it had a duty to make such a determination in the first place is a significant failure.

Pennsylvania law requires that if a defendant presents evidence raising the question of the voluntariness of his confession the jury must be given the opportunity to make a determination as to the voluntariness of the confession and the jury must be adequately apprised of its duty so that the opportunity is meaningful. The Commonwealth's assertion that the jury would not have determined that Nunez's confession was involuntary based upon the evidence presented at trial misses the mark. The crucial factor in this case is that the jury was not given the *opportunity* to

make that determination. In ***Heckathorn***, ***McLean***, ***Motley***, and ***Coach***, it was this lack of meaningful opportunity that was the error and required a new trial. Nunez was entitled to have jury be given the opportunity to determine the voluntariness of his confession. Accordingly, Nunez underlying claim is of arguable merit.

3. <u>Reasonable Basis</u>

Having determined that the underlying claim of Nunez's ineffective assistance of counsel claim is of arguable merit, the court will now set forth why the failure of Nunez's trial counsel to request that the jury be instructed as to its duty to determine whether Nunez's statements to police were voluntarily made was without a reasonable basis. In determining whether counsel's course of conduct was without a reasonable basis, the following standard is to be used.

> Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that has some reasonable basis designed to effectuate his client's interests. (citation omitted). Trial counsel will not be deemed ineffective for failing to assert a claim that would not have been beneficial, or failing to interview or present witnesses whose testimony would not have been helpful. (citation omitted). Nor can a claim of ineffective assistance generally succeed through comparing, by hindsight, the trial strategy employed with alternatives not pursued. (citation omitted). A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. (citation omitted).

Commonwealth v. Howard, 719 A.2d 233, 237 (Pa. 1998). Further, "it is well established that the effectiveness of counsel is examined under the standards existing at the time of performance rather than at the point when an ineffectiveness claim is made." ***Commonwealth v. Spotz***, 896 A.2d 1191, 1238 (Pa. 2006). A defendant establishes that a chosen course of conduct was without a

reasonable basis when he demonstrates that the strategy employed by counsel was so unreasonable that no competent lawyer would have chosen that course of conduct. ***Chimel***, 889 A.2d at 540-41.

With regard to a jury instruction, the Pennsylvania Supreme Court has noted:

> The desirability of the instruction is a matter of trial strategy, and will therefore vary from cases to case …. 'It is well settled that whether to object to the trial court's charge, to request clarification of the charge, or to request additional points for charge is one of the tactical decisions within the exclusive province of counsel.' (citation omitted). Quite recently, …, we noted once again that the decision whether to seek a jury instruction to which a defendant is entitled is a matter of trial strategy that lies in the discretion of trial counsel.

Commonwealth v. Hawkins, 894 A.2d 716, 730 (Pa. 2006).

Attorney Miele's failure to request that the court instruct the jury as to its duty to determine if Nunez's statements to Agent Sorage were voluntarily made before it could consider those statements was without a reasonable basis. At the June 2, 2006 evidentiary hearing, Attorney Miele testified that it was a mistake not to request the jury instruction and that he simply "missed it." N.T, 43 (6/2/06). He testified that the failure to request a jury instruction explaining the jury's duty to determine the voluntariness of Nunez's statements was not part of his trial strategy. Id. at 34, 37-38, 43. The statement is supported by Attorney Miele's actions during trial.

Nunez had two objectives at trial: (1) cast doubt upon the eye witnesses' identification of him as the perpetrator and (2) establish his alibi defense. The alibi defense was premised on the fact that at the time of the robbery Nunez was at his aunt's and/or uncle's residence over a mile away from the scene of the robbery. In order to establish his alibi defense, Nunez not only had to

present evidence that placed him at his aunt's and/or uncle's residence at the time of the robbery, but he also had to counter act any evidence which cast doubt upon the validity of his alibi.

At trial, Nunez presented several witnesses in an attempt to establish his alibi. He called Kathy Shaheen to establish that he was at his aunt's residence at 317 Brandon Avenue on the day of the robbery about ten to fifteen minuets after his aunt and grandmother left in a cab. Nunez called Melvin Sornberger and Ann Johnson to establish that a cab picked up Nunez's aunt and grandmother at 317 Brandon Avenue at 10:40 a.m. Defendant called his uncle to establish that he was at his uncle's residence the day of the robbery and that he made a phone call to his grandmother's residence while at his uncle's. Nunez called Rebecca Baity, his grandmother, to establish that the phone call to her residence was made at 11:05 a.m. Nunez presented this evidence to establish that during the time period of 10:50 a.m. to 11:05 a.m., the approximate time of the robbery, he was at his aunt's and/or uncle's residence. This evidence provided a plausible alibi for Nunez.

At trial, Nunez also attacked the evidence that cast doubt upon his alibi. Nunez attacked the eye witnesses' identification of him as the perpetrator. Nunez tried to attack James's identification of him by attempting to impeach him with alleged inconsistencies between his testimony at trial and his testimony at the preliminary hearing, as well as, statements given to the 911 operator. N.T., 52-54, 55, 59 (10/18/05). Nunez tried to attack Callahan's identification of him as the perpetrator by attempting to cast doubt upon his ability to have gotten a good look at the suspect's face and to impeach his credibility with alleged inconsistencies between statements his testimony at trial and statements he gave to police. Id. at 72, 78-81.

Nunez also attacked the statements he made during the interview with Agent Sorage. Nunez brought out that the interview was three and a half hours long, that he was seventeen years old at the time, that he had cried during the interview, that he had requested to speak with his mother, that he said he wanted to go home, and that during the course of the three and a half hour interview he denied any involvement in the robbery fifty-seven times. N.T., 159, 161 (10/18/05); N.T., 69 (10/19/05). In an attempt to explain why he gave four versions of events that eventually placed him at the scene of the robbery, Nunez tried to establish during cross–examination of Agent Sorage that the statements were made as a result of Agent Sorage pressuring Nunez by telling him to tell the truth and that Agent Sorage did not believe Nunez's story. N.T., 160-62 (10/18/05).

It was important to Nunez's alibi defense to attack the statements he made during the interview with Agent Sorage. Over the course of the interview with Agent Sorage, Nunez gave four versions of events as to his involvement with James the day of the robbery. The statements culminated with Nunez having direct contact with James on the day of the robbery in that Nunez allegedly pushed James and took his wallet. Such a statement creates two problems. The first is that it blows a giant hole in Nunez's alibi defense. If a person cannot be in two places at once, then how could Nunez be at his aunt's and/or uncle's residence over a mile away when he is pushing James to the ground and taking his wallet? Nunez's statement creates a significant problem for his alibi defense because now the two people involved in the robbery, James and Nunez, both say that he was there.

The second problem Nunez's statement to Agent Sorage creates is a credibility issue for his alibi witnesses. A majority of Nunez's alibi witnesses were family members or people who knew

him. These people would not want to see Nunez convicted and sent to prison. As such, the jury would likely have been suspicious that the witnesses may have been biased in favor of Nunez and not be totally accurate with their recollection of the day's events. If evidence is brought in, like Nunez's own words, which further cast doubt upon the validity of him being elsewhere at the time of the robbery, then the jury would be even less inclined, if at all, to believe the alibi witnesses.

Nunez's statements to Agent Sorage had the potential to wreak tremendous havoc upon his alibi defense. Nunez's statements created factual and credibility problems. As such, Attorney Miele needed to exclude the statements or mitigate their effect. A jury instruction regarding the jury's duty to determine the voluntariness of Nunez's statements could have accomplished this goal because it was a weapon Attorney Miele could have used to defend against the impact Nunez's statements had upon his alibi defense. A jury instruction delineating how the jury should view Nunez's statements could have allowed the jury to determine that the statements had been involuntarily made and would not be considered by them or, even if the jury did not find the statements to have been involuntary as a matter of law, the jury could have found the circumstances of the statements to have been such that they deserved little, if any, weight.

However, the failure to request such an instruction let the problems created by Nunez's statements go unaddressed. Attorney Miele had presented evidence and raised questions attacking Nunez's statements, but the failure to request the jury instruction prevented the jury from being able to weigh this evidence against the appropriate standard. The failure to request the jury instruction left the jury without a context within which to evaluate the evidence Attorney Miele presented. As such, Attorney Miele's failure to request a jury instruction advising the jury of its

duty to determine the voluntariness of Nunez's statements was not a decision reasonably designed to effectuate Nunez's interests in that it did not help establish Nunez's alibi defense, which in turn adversely impacts upon Nunez's ultimate interest in a jury verdict of not guilty.

The Commonwealth's third issue comes into play as part of the issue of whether Nunez's trial counsel had a reasonable basis not to request the jury instruction. The Commonwealth asserts that it was not given a full and fair opportunity to cross-examine Attorney Miele regarding his failure to request that jury instruction because the trial transcript had not been prepared by the June 2, 2006 evidentiary hearing and Attorney Miele was unavailable before the expiration of the time period during which the court had to decide the post-sentence motions. The court believes that the Commonwealth had a full and fair opportunity to cross-examine Attorney Miele at the June 2, 2006 evidentiary hearing and the lack of the trial transcript to aide in cross-examination was harmless.

At the June 2, 2006 evidentiary hearing, Attorney Miele specifically testified that his failure to request a jury instruction advising the jury of its duty to determine the voluntariness of Nunez's statements to police was a mistake and not a part of a strategic decision. N.T., xxxx (6/2/06). Even if the Commonwealth had the trial transcript at the evidentiary hearing, it is highly unlikely that Attorney Miele's testimony would have been different. The court believes that despite the Commonwealth's argument there is little if any reason for Attorney Miele to be motivated to testify in such a way in order to win a new trial for his former client. The facts of the case and Attorney Miele's actions during the trial support the conclusion that the failure to request the jury instruction was not part of a strategic decision.

As explained earlier, Nunez's statements to Agent Sorage were a significant threat to his alibi defense. Because of this, Attorney Miele needed to use all appropriate measures to combat this threat. A jury instruction advising the jury of its duty to determine the voluntariness of Nunez's statements would have been one of those measures. In light of the damaging nature of Nunez's statements and the protective nature of the jury instruction, it would appear to have been an unreasonable decision by Attorney Miele to intentionally forego the jury instruction.

At trial, Attorney Miele's strategy was to put the voluntariness of Nunez's statements at issue and by doing so get the jury to disregard or give them little weight. Attorney Miele presented evidence that Nunez was seventeen years old at the time of the interview, that Agent Sorage's interview of him lasted three and a half hours, that he cried during that interview, that he requested to speak with his mother, that he said he wanted to go home, and that he denied any involvement with the robbery fifty-seven times. By doing so, Attorney Miele brought attention to the context of Nunez's statements, and, in so doing, to the statements themselves. It would seem incongruous to spotlight for the jury such damaging evidence then fail to provide the jury the lens through which to view that evidence in a favorable light. As such, Attorney Miele's failure to request a jury instruction advising the jury of its duty to determine the voluntariness of Nunez's statements could not be considered a part of his trial strategy when it was in direct contravention of it. Accordingly, the lack of the trial transcript at the June 2, 2006 evidentiary hearing did not deprive the Commonwealth of a full and fair opportunity to cross-examine Attorney Miele.

4. <u>Prejudice to Nunez</u>

Now that the court has explained why Nunez has established the first two prongs of the ineffective assistance of counsel test, the court will explain why Nunez has established the final prong of the test and is entitled to relief. In assessing prejudice, the following must be kept in mind.

> '[A] defendant [raising a claim of ineffective assistance of counsel] is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' (citation omitted). This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in ***Commonwealth v. Story***, 476 Pa. 391, 409, 383 A.2d 155, 164 (Pa. 1978) (citations omitted), states that 'whenever there is a 'reasonable probability' that an error 'might have contributed to the conviction,' the error is not harmless.' This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt is a lesser standard than the ***Pierce*** prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel.'

Commonwealth v. Gribble, 863 A.2d 455, 472 (Pa. 2004) (quoting ***Commonwealth v. Howard***, 645 A.2d 1300, 1307 (Pa. 1994)).

There is a reasonable probability that but for Attorney Miele's failure to request a jury instruction advising the jury of its duty to determine the voluntariness of Nunez's statements the outcome of the trial would have been different. At the close of trial, the jury was presented with two plausible stories. The first story, advanced by the Commonwealth, was that Nunez robbed

James in the back of the delivery truck on May 18, 2005. In support of this conclusion, the Commonwealth presented the eye witness testimony of James and Callahan, both of whom identified Nunez as the perpetrator. The Commonwealth also presented evidence that on May 18, 2005 Nunez was wearing clothing that matched the description of the clothing the perpetrator was wearing – a blue hooded sweatshirt, blue jeans, a red tee shirt, and sneakers. The Commonwealth also presented evidence that Agent Sorage stopped Nunez within a short distance and time of the robbery. Agent Sorage stopped Nunez in the area of the 500 block of Memorial Avenue at 11:28 a.m. This was a distance of approximately one to one and a half miles away from the scene of the robbery, and is a distance Nunez could have covered in the half hour since the robbery occurred.

The second story, advanced by Nunez, was that at the time of the robbery he was a mile away at his aunt's and/or uncle's residence. The three toned alarm went out at 10:55 a.m. James testified that the incident took about one and a half to two minutes. Accounting for the time it took James to get into Puffs and relay what happened to the 911 operator, the robbery occurred at approximately 10:50 a.m.. Nunez presented evidence that he was at his aunt's residence, 317 Brandon Avenue, at around 10:50 a.m. Nunez presented evidence that he was at his uncle's residence at 11:05 a.m. The evidence Nunez presented placed him at either his aunt's or uncle's residence during the time period of 10:50 a.m. to 11:05 a.m. This would be roughly the time period during which the robbery occurred.

Being confronted with theses two stories, the jury needed something to tip the balance one way or the other. That something was Nunez's statements to Agent Sorage. At 1:35 p.m., on October 19, 2005, the jury retired to deliberate. N.T., 105 (10/19/05). At 3:16 p.m., the jury

requested that they be permitted to view the videotape of the interview between Agent Sorage and Nunez. When the court denied this request, the jury sought a transcript of Agent Sorage's trial testimony. Id. at 110-11. The court advised the jury that a transcript could not be provided, but the testimony would be read back to them. The jury was recessed at 3:27 p.m., and returned a verdict at 3:50 p.m. prior to the testimony being read back. The inquiries by the jury indicates that Agent Sorage's interview of Nunez and Nunez's statements where the focus of the jury during its deliberations.

It is this focus that turns Attorney Miele's failure to request a jury instruction prejudicial. The failure to request the instruction allowed the jury to focus on damaging evidence without the proper standard by which to judge that evidence. Without the instruction, the jury was unaware of its duty to determine the voluntariness of Nunez's statements and that it could disregard those statements if it found them to be involuntarily made. This instruction coupled with Nunez's evidence questioning the voluntariness of his statements could have permitted the jury to have found that the statements were involuntarily made and disregarded them. With this done, the jury would be left with the two stories and likely a reasonable doubt as to Nunez's guilt. Accordingly, Attorney Miele's failure to request a jury instruction advising the jury of its duty to determine the voluntariness of Nunez's statements prejudiced Nunez and established the final prong of the ineffective assistance of counsel test, thereby entitling Nunez to relief.

IV. CONCLUSION

The order of July 16, 2006 should be affirmed and the Commonwealth's appeal denied.

BY THE COURT,

William S. Kieser, Judge

cc: Donald F. Martino, Esquire
District Attorney (KO)
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Christian J. Kalaus, Esquire