IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-159-2005**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
RONALD RICHARDSON,	**:**	
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 docketed November 17, 2005 and it Order docketed December 12, 2005, which denied Appellant's "Post-Verdict Motion." The relevant facts follow.

Michelle Dobbs came home from work at approximately 11:00 p.m. on January 12, 2005. Her maroon 1986 Oldsmobile Delta 88, with the keys in the ignition, was parked outside her residence at 808 Cherry Street, Williamsport, Pennsylvania. The next morning, when the car was gone, her husband Ronald Dotson called the police and reported the vehicle stolen.

At approximately 3:30 p.m. that afternoon, Officer Ronald Bachman was dispatched to the area of Rural and Cherry Street due to a motor vehicle accident. Appellant, while driving the Oldsmobile Delta 88, had run through a stop sign and struck a van. Appellant's fiancé and her child were present at the scene when Officer Bachman arrived, but Appellant had left to pick up other children from school. After Appellant returned to the scene, Officer Bachman realized the vehicle Appellant was driving was the one that had been

reported stolen earlier that day. Officer Bachman asked Appellant for the registration of the vehicle. Appellant did not have one, but he produced an expired insurance card and a pay stub addressed to Michelle Dobbs from the glove box. Officer Bachman asked Appellant how he came into possession of the vehicle. Appellant stated he was at his and his fiancé's residence at 632 Second Street when a male cab driver with the street name Black pulled oup and offered him a vehicle for five dollars. Officer Bachman told Appellant the car was registered to a female, and Appellant had nothing to say after that.

Christina Kennedy, a passenger of the van that Appellant struck, overheard Appellant tell a firefighter or other emergency person who responded to the accident scene that he borrowed the car from a friend.

A preliminary hearing was held on January 21, 2005. At the preliminary hearing, Ms. Dobbs and Mr. Dotson testified that they did not give anybody permission to use the vehicle. Appellant, who waived counsel, testified that a neighbor named Barbara introduced him to Mr. Dotson (as Black). Appellant further testified that Mr. Dotson came to their residence around 1:00 or 1:30 a.m. on January 13, 2005 and offered them a car for twenty dollars, but the car had to be back by noon.

A jury trial was held on September 29, 2005. At trial, Ms. Dobbs testified that when she came home from work on January 12 the Oldsmobile Delta 88 was parked at her residence but the next morning her husband woke her up after reporting the vehicle stolen. She stated she did not give anybody permission to take her car or to drive it. She also testified that she did not know Appellant and she had never seen him with her husband. Officer Bachman and Christina Kennedy testified to Appellant's statements at the accident scene.

Appellant's fiancé, Georgianna Lawton, testified that they were asking around about a car so they could go shopping. Their neighbor Barbara, whose last name she did not know, introduced them to a man known as Black. Black came over to their house around 1:00 or 1:30 a.m. on January 13, 2005. Appellant gave Black some cash in exchange for the keys to the car; she was not sure how much cash Appellant gave Black. Appellant was supposed to have the car back around 3:00 p.m. The Commonwealth cross-examined Ms. Lawton about a summary retail theft conviction.

Ann Johnson, the manager of the only cab company in Williamsport testified that the company never had a cab driver named Ronald Dotson or Black.

Officer Bachman testified in rebuttal that he spoke to Ms. Lawton at the accident scene and asked her how Appellant got possession of the car. She said that a cab driver pulled up in front of their house, they gave him five dollars and he got them the car.

The jury could not reach a unanimous verdict on the theft charge, but found Appellant guilty of unauthorized use of a motor vehicle.

The Court sentenced Appellant to pay costs, fines and restitution and to undergo incarceration in a state correctional institution for eight months to two years, with credit for time served.

On October 21, 2005, defense counsel filed a "Post-Verdict Motion."[1] In the motion Appellant asserted: (1) the evidence was insufficient to support the verdict; (2) the verdict was against the weight of the evidence; and (3) he was entitled to a new trial based on discovery violations. The Court entered an Order denying Appellant's motion on December

1 Although the Rules of Criminal Procedure only provide for post sentence motions, the Court simply scheduled argument on the pre-maturely filed motion for a date after sentencing.

12, 2005 and issued an Opinion in support of that Order on December 21, 2005.

Appellant filed a notice of appeal. Appellant first asserts the trial court erred in holding that the Commonwealth did not violate the discovery rules by withholding information that could be used to impeach the credibility of the primary Commonwealth witness, Michelle Dobbs. The Court cannot agree and would rely on it Opinion docketed December 21, 2005, pages 5-7. The Court also notes that although evidence that Ms. Dobbs had forgery-related charges filed against Mr. Dotson relating to him signing her name on some of her checks might have in some way bolstered the defense claim that Mr. Dotson took the car from Ms. Dobbs residence and Appellant did not steal the car, the jury could not reach a verdict on the theft by unlawful taking charge and it was ultimately dismissed by the Commonwealth. The evidence of the forgery-related charges, however, could have enhanced the Commonwealth's case with respect to the unauthorized use charge of which Appellant was convicted, as it may have lent more credence to Ms. Dobbs testimony that she did not give anyone permission to take or use her vehicle and/or could permit the jury to conclude that Mr. Dotson did not have the authority to dispose of Ms. Dobbs property. Furthermore, since Appellant and his fiancé did not know Ms. Dobbs or Mr. Dotson prior to January 13, 2005, and they do not share the same last name, there was no reason for Appellant to believe Mr. Dotson would have the authority to let him drive Ms. Dobbs' vehicle.

Appellant asserts the evidence was insufficient to prove unauthorized use of a motor vehicle beyond a reasonable doubt. The Court cannot agree.

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 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).

A person is guilty of unauthorized use of a motor vehicle if he "operates the automobile . . . of another without consent of the owner." 18 Pa.C.S.A. §3928(a). To establish a violation of this statute, the Commonwealth must show "that the defendant operated the vehicle without the owner's consent and that the defendant knew or had reason to know that he lacked the owner's permission to operate the vehicle." Commmonwealth v. Carson, 405 Pa.Super. 492, 497, 592 A.2d 1318, 1321 (Pa.Super. 1991). "The mens rea burden under the unauthorized use of a motor vehicle is not as strict as the one for receiving stolen property." Id. at 499, 592 A.2d at 1322. Guilty knowledge for receiving stolen property may be inferred from the unexplained possession of recently stolen goods. Commonwealth v. Hogan, 321 Pa.Super. 309, 314, 468 A.2d 493, 496 (Pa.Super. 1983). "Moreover, even if the accused offers an explanation, the trier of fact may consider the possession as unexplained if he determines the explanation is unsatisfactory." Id. at 315, 468 A.2d at 497.

Here, the owner of the vehicle, Michelle Dobbs, last saw it around 11:00 p.m. on January 12, 2005 and it was reported stolen at approximately 9:30 a.m. on January 13, 2005. N.T. at 44, 67. Ms. Dobbs did not know Appellant and did not give him permission to take or use her vehicle. Appellant was involved in an accident with the vehicle around 3:30 p.m. N.T. at 71. Therefore, Appellant was in possession of recently stolen goods.

The testimony presented at trial showed that Appellant and his girlfriend gave

several explanations for Appellant's possession of the vehicle. At the scene of the accident, Christina Kennedy heard Appellant tell a firefighter or medical responder that he borrowed the vehicle from a friend. Appellant told the police that a cab driver named Black pulled up in front the his residence around 1:00 a.m. and offered to let him use the vehicle for five dollars, but the vehicle had to be returned by noon. Appellant testified at his preliminary hearing that a neighbor named Barbara, who lived across the street, introduced him to a man who went by the name "Black." Appellant identified Ms. Dobbs husband, Ronald Dotson, as "Black." Appellant indicated Mr. Dotson offered them the car for $20 at around 1:00 or 1:30 a.m and they had to have the car back by noon. Appellant's fiancé testified at trial that their neighbor Barbara introduced them to "Black." "Black" offered them the car for $20 at around 1:00 or 1:30 a.m. and the car had to be back around 3:00 p.m. Given the inconsistencies in the explanation, the trier of fact could have found it unsatisfactory or even utterly incredible. Since the evidence was sufficient to support an inference of guilty knowledge that the vehicle was stolen, it supports with even greater strength an inference of recklessness with respect to the owner's lack of consent. See Hogan, supra at 316, 468 A.2d at 497.

Even accepting the explanation for the sake of argument, given the circumstances surrounding the offer, Appellant certainly had reason to know either that the vehicle was stolen or his use was unauthorized. The offer was made in the middle of the night. Appellant did not know Black, Mr. Dotson or Michelle Dobbs. In light of the lack of familiarity, the amount paid for the car was low. Who would loan their car to somebody they didn't know for only $5 or $20? Appellant did not know who the owner of the vehicle and he did not look in the glove box to try to determine who owned the vehicle. Moreover,

Appellant's use of the vehicle extended beyond whatever authorization he claimed he had. In light of the foregoing, the evidence was more than sufficient to show recklessness with respect to the owner's lack of consent.

Appellant also contends the verdict was against the weight of the evidence. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only 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. Id. at 806. The issue is not whether there was sufficient evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice. Id. The jury's verdict did not shock the Court's sense of justice. The Court did not find Appellant's explanation credible. Furthermore, as previously stated, even if Appellant's explanation were accepted, the circumstances surrounding Appellant's acquisition of the vehicle should have given Appellant reason to believe the supplier of the vehicle was not its owner and/or did not have authority to let Appellant use it.

The next issue raised by Appellant is whether the introduction by the Commonwealth of summary retail theft charges of defense witness Georgianna Lawton was proper impeachment evidence. Summary retail theft convictions are admissible for impeachment. Commonwealth v. Young, 432 Pa.Super. 318, 638 A.2d 244 (1994). Ms. Lawton admitted that she was convicted of summary retail theft. N.T., at 123-124.

Appellant's final contention is the trial court erred in failing to include a missing witness instruction to the jury because Commonwealth witness Ronald Dotson failed

to appear. This contention is without merit. First, the issue may be waived. The Court does not recall defense counsel requesting a missing witness instruction. The Court has a vague recollection of a discussion in chambers where defense counsel asked the prosecutor if he was going to call Mr. Dotson as a witness and the prosecutor indicated that the Commonwealth could not locate Mr. Dotson because he left the area and went to either Philadelphia or New Jersey after Ms. Dobbs and he split up. Defense counsel may have requested an opportunity to attempt to locate Mr. Dotson so he could call him as a witness, but the Court does not remember defense counsel ever asking for a missing witness instruction. The Court does not know if a court reporter was present in chambers. Even if defense counsel requested a missing witness instruction, such an instruction was not appropriate in this case. In order for the missing witness instruction to apply, the person must be available only to the party against whom the instruction is sought, the person must have special information material to the issue, the person's testimony is not merely cumulative and the party against whom the instruction is sought has no satisfactory explanation for its failure to call the person. See Pennsylvania Suggested Standard Jury Instruction (Criminal) 3.21A; Commonwealth v. Chamberlain, 442 Pa.Super. 12, 18-19, 658 A.2d 395, 398 (Pa.Super. 1995). The instruction does not apply where the witness is not available or not within the control of the party against whom the negative inference is desired. Chamberlain, supra. The Commonwealth attempted to locate Mr. Dotson, but could not find him; therefore, he was unavailable and the missing witness instruction did not apply.[2]

2 The Court notes Mr. Dotson was not located and arrested on the forgery-related charges until April 2006. See CP-41-CR-845-2006.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

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