

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1173-2007
vs. :
: CRIMINAL DIVISION
: CHRISTOPHER MALKOWICZ,
: Appellant : 1925(a) Opinion

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

This opinion is written in support of this Court's judgment of sentence dated April 25, 2008. The relevant facts follow.

In mid to late June 2006, the victim, Larry Stine, was Appellant's sponsor in an Alcoholics Anonymous (AA) twelve step program. Normally, Mr. Stine would meet the people he sponsored at a coffee shop or some other public place and they would not know the location of his home; however, Mr. Stine helped Appellant get a job with his neighbor. When Appellant got kicked out of his residence, Mr. Stine let Defendant store his personal belongings in his garage. Mr. Stine left his garage unlocked so Appellant would have access to his belongings. During this time, Mr. Stine's girlfriend misplaced her key to his residence so his home also was unlocked.

On or about June 22, 2006, Mr. Stine realized that his blue Dodge Caravan was missing. He kept all his keys, including the keys to the van and his storage shed, on hooks inside the doorway of his residence. Inside the van was a Milwaukee porta band saw/hacksaw that Mr. Stine had borrowed from a friend. Mr. Stine called the police, who

found the vehicle with the keys in it about 20 minutes later in a parking lot but the saw was missing. In the ensuing days, Mr. Stine started looking around his house, garage and shed to see if anything else was missing. Three handguns were missing from his house: a .38 caliber double-barrel Derringer, a .22 caliber and a .32 special. A Skil chop saw, a grinder, another power saw, a screw gun and an 18-speed bike were missing from his garage, and a nail gun and a Black and Decker double weld grinder that was still in a box were missing from the shed. Mr. Stine suspected that Appellant took these items and the van. He reported these items missing and told the police his suspicions.

The police attempted to locate Appellant and see what he had to say.

Appellant was living with David Daniels in the Weightman Block apartments. The police went to Mr. Daniels apartment to speak to Appellant. He denied any knowledge of what was taken from Mr. Stine. However, the police also spoke to Mr. Daniels. Mr. Daniels indicated he had seen Appellant in possession of a nail gun, a saw and a bike and some other property and Appellant said he was taking the stuff to the pawn shop. Appellant also asked him if he knew anybody that wanted to buy guns.

The police contacted various local pawn shops about the items taken from Mr. Stine. The police recovered the Skil chop saw from the Williamsport Used Mart. The operator of the Williamsport Used Mart provided the police with a copy of the receipt with Appellant's name and a copy of his photo identification. The Skil saw, the Milwaukee hacksaw and other items were listed on the receipt as items that were brought to the Used Mart by Appellant. Mr. Stine also recovered the 18-speed bike from a pawn shop.

The police arrested Appellant and charged him with burglary, multiple counts of theft and multiple counts of receiving stolen property.

A jury trial was held on January 29-30, 2008. The jury found Appellant guilty of burglary, and three counts of theft related to the Milwaukee hack saw, the Skil chop saw and the Black and Decker grinder. The jury acquitted Defendant of the theft and receiving stolen property charges related to the Dodge Caravan and the three handguns.¹ The Court sentenced Appellant to incarceration in a state correctional facility for 3 to 7 years for burglary.² The three year minimum was in the aggravated range of the sentencing guidelines, because Defendant had many chances for drug and alcohol rehabilitation but did not take advantage of these opportunities and in committing these offenses Defendant breached the trust of his AA sponsor.³

Appellant filed a notice of appeal. In this appeal, Appellant raises three issues: (1) the evidence was insufficient to support the guilty verdict for burglary; (2) the verdict of guilty on the burglary charge was against the weight of the evidence; and (3) the trial court abused its discretion in imposing an aggravated sentence.

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

1 Appellant was not charged with the theft of the bike.

2 The Court imposed underlapping concurrent sentences on the theft convictions.

3 The Court initially sentenced Appellant on April 2, 2008, and treated the burglary as a felony of the second degree. The Commonwealth filed a motion to reconsider sentence to grade the burglary as a felony of the first degree and Defendant filed a post sentence motion to dismiss the burglary due to insufficient evidence. The Court found the evidence was sufficient, granted the Commonwealth's motion and re-sentenced Defendant on April 25, 2008. On May 2, 2008, Defendant filed another post sentence motion in which he claimed the sentence imposed on April 25 was excessive.

1130, 1135 (Pa. 2000); Commonwealth v. May, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 322, 567 A.2d 610, 618 (Pa. 1989)(citations omitted). Circumstantial evidence alone may be sufficient to convict one of a crime. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. May, 540 Pa. at 246, 656 A.2d at 1340; Commonwealth v. Gorby, 527 Pa. 98, 107, 588 A.2d 902, 906 (Pa. 1991).

To prove a burglary occurred, the Commonwealth must show that Appellant entered a building or occupied structure with the intent to commit a crime therein, the building or structure was not open to the public, and the defendant did not have permission or lawful authority to enter. 18 Pa.C.S.A. §3502; PaSSJI 15.3502; Commonwealth v. Alston, 539 Pa. 202, 206, 651 A.2d 1092, 1094 (Pa. 1994)(“the crime of burglary is defined as an unauthorized entry with the intent to commit a crime after entry.”). The evidence and the reasonable inferences to be drawn from the evidence when viewed in the light most favorable to the Commonwealth clearly established Appellant committed a burglary of Mr. Stine’s home. A Black and Decker grinder was stolen from Mr. Stine’s locked shed. N.T., January 29, 2008, at pp. 31-32, 43-44. The keys to the shed were in his house. Id. at 32, 36. Although Appellant was storing some personal items in Mr. Stine’s garage, he did not have permission to enter his home. Id. at 31. Appellant showed up at Mr. Stine’s property uninvited and was acting strangely. Id. at 41. Thereafter Mr. Stine noticed several items missing, including a Milwaukee saw that had been in his van, a Skil Chop saw that had been in his garage and a Black and Decker grinder that had been in his locked shed. The shed

keys were missing from Mr. Stine's house and never recovered. Id. at 136. There was no sign of forced entry into the shed. Id. at 135. The van keys were missing from Mr. Stine's house but were recovered when the police recovered the van. The Milwaukee saw that had been in the van was recovered from the Williamsport Used Mart. The police also obtained documents from the Williamsport Used Mart that showed Appellant sold the Milwaukee saw, the Skil chop saw and a Black and Decker grinder to the Williamsport Used Mart. See Commonwealth's Exhibit 3; N.T., January 29, 2008, at p. 113. From this evidence the jury could reasonably conclude that Appellant entered Mr. Stine's residence, took the shed key, used the key to enter the shed and stole the Black and Decker grinder. Furthermore, although the jury did not find that Appellant stole the van, it found that he stole the Milwaukee saw from the van. The jury could reasonably conclude that Appellant took the keys from Mr. Stine's house to unlock the van and stole the Milwaukee saw even though they did not find that he took the van.

Appellant also claims the verdict was against the weight of the evidence. The Court cannot agree. 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 evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id. The jury's verdict did not shock the Court's sense of justice. Given the facts and circumstances of this case discussed in response to Appellant's sufficiency claim, particularly the receipt and photo identification of Appellant that the police obtained from the Williamsport Used Mart, it was perfectly reasonable for the jury to infer that Appellant entered Mr. Stine's residence and took the keys to the shed and the van so that he could steal various power tools.

Appellant's final issue on appeal is that the Court abused its discretion by imposing an aggravated sentence. The jury found Appellant guilty of burglary of Mr. Stine's house, which is a felony of the first degree. No one was home at the time, so the offense gravity score for this conviction was a seven. Appellant had a prior record score of five, which resulted in a standard minimum guideline range of 24-30 months and an aggravated range of 30-36 months. The Court sentenced Appellant to a minimum of 36 months, at the top of the aggravated range. The Court briefly explained its reasons for the aggravated sentence at both sentencing hearings. See N.T., April 2, 2008, at page 23, line 7 through page 24, line 18; N.T., April 25, 2008, at page 23 line 10 through page 24 line 17. First, Appellant had an extensive criminal history. If every crime were counted, Appellant's prior record score would be higher but the guidelines cap the prior record score at five. Second, Appellant had many chances for drug and alcohol rehabilitation and did not take advantage of those opportunities. He continues to re-offend due to his drug and alcohol problems and, as a result, presents a danger to the community. Third, he breached the trust of his AA sponsor. Mr. Stine normally did not divulge his home address to the people he was sponsoring in AA. Appellant, however, needed a job and Mr. Stine's neighbor needed some painting and repair work done, so Mr. Stine got Appellant a job with his neighbor. When Appellant needed a place to store his belongings, Mr. Stine let him store items in his garage. Appellant did not repay Mr. Stine's kindness but instead entered his home, took his keys and stole power tools from his van, garage and shed. The Court believed these factors justified sentencing Defendant in the aggravated range.

DATE: _____

By The Court,

Kenneth D. Brown, P. J.

cc: Mary Kilgus, Esquire (ADA)
Jeana Longo, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)