COMMONWEALTH OF PA,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 626-2007
	:	
THOMAS COBBS,	:	
Defendant	:	1925(a) OPINION

Date: November 5, 2008

OPINION IN SUPPORT OF THE ORDER OF FEBRUARY 29, 2008 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Thomas Cobbs has appealed this court's sentence of imprisonment in a State Correctional Institution for a cumulative sentence of 58 months to 11 years. This sentence was imposed on January 30, 2008 for the charge of Persons not to Possess Firearms, 18 Pa.C.S. § 6105(a)1, (54 months to 10 years) and the charge of Possession of a Controlled Substance (marijuana), 35 P.S. § 780-113(a)16, (4 months to 1 year, consecutive). This sentence resulted from Mr. Cobbs' conviction at a jury trial held on October 26, 29, and 30, 2007.

Mr. Cobbs' Concise Statement of Matters Complained of on Appeal, filed March 14, 2008, raises the four following issues: 1) the court improperly denied Mr. Cobbs' *pro se* pretrial motions, particularly in failing to suppress evidence on the basis that the search warrant authorizing the search of Mr. Cobbs' residence was invalid; 2) the evidence at trial was insufficient to prove guilt beyond a reasonable doubt; 3) the verdict was contrary to the weight of the evidence; and 4) the sentence imposed was excessive. Mr. Cobbs' appeal should be denied and the verdict and sentence affirmed.

I. FACTS

Testimony at the jury trial held on October 26, 29, and 30, 2007 established the following facts.

On the afternoon of January 16, 2007, Mr. Cobbs appeared as a tenant defendant in a landlord-tenant proceeding before District Magisterial Judge (hereinafter "DMJ") Allen Page. DMJ Page ordered Mr. Cobbs evicted from his residence which he had leased at 927 Henrietta Street in the City of Williamsport. N.T., 10/29/2007, p. 8. Agent Steven Sorage and Agent, then Captain, William Weber, of the Williamsport Bureau of Police were present at this hearing and, at its conclusion arrested Mr. Cobbs on charges of an incident not related to this prosecution. ***Ibid.*** *See also* 10/29/2007, p. 180. Mr. Cobbs' keys to the residence were taken from him at that time. N.T., 10/29/2007, p. 8.

After arresting Mr. Cobbs at 4:34 p.m. that evening Agent Weber called the Communications Center to obtain an incident number in order to procure a search warrant for Mr. Cobbs' residence for evidence relevant to the charges for which he had just been arrested. N.T., 10/26/2007, pp. 183-184, 186. *See also,* Defendant's Exhibit 46. Agent Weber and Agent Sorage then went to the on call DMJ Gerald Lepley to obtain the search warrant for Mr. Cobbs' residence. N.T., 10/26/2007, p. 155. *See also* N.T., 10/29/2007, p. 8-9. The object of search warrant SW-2-07 was to search for video, photos, cameras and digital pictures, and computers and digital storage media in connection with the incident that Mr. Cobbs had been arrested for on January 16, 2007. At about 5:15 p.m. that day, DMJ Lepley issued Agent Weber search warrant SW-2-07, Commonwealth's Exhibit No. 10. N.T., 10/26/2007, pp. 177, 186.

Upon arriving at Mr. Cobbs' residence they found it was secured by Mr. Cobbs' security system, consisting of at least two surveillance cameras both inside and outside. N.T., 10/26/2007, pp. 72-75; 156. In executing the search warrant, on the night of January 16, 2007, Agents Sorage and Weber only secured Mr. Cobbs' residence, meaning they made sure that the doors were locked, the windows were locked, and they placed evidence tape over the doorway to make sure no undetected entry could be made. N.T., 10/26/2007, pp. 156, 157, 172-173. *See also*, N.T., 10/29/2007, pp. 22, 23.

The two Agents, along with other police personnel, returned to Mr. Cobbs' residence at approximately 9:15 a.m. the next day, January 17, 2007, to commence their search pursuant to the January 16 search warrant. Upon their arrival at Mr. Cobbs' residence, they found the evidence tape to be in place and the property secured as they had left it the prior evening, with no evidence of any forced entry. N.T. 3/30/2007, pp. 10, 14. *See also* N.T., 10/26/2007, p. 177. *See also* N.T., 10/29/2007, pp. 22-24.

While conducting the search under warrant SW-2-07, the officers discovered a handgun under a chair cushion and marijuana in plain view. N.T., 10/29/2007, p. 22. Upon finding these items, the search was interrupted and Agent Sorage left Mr. Cobbs' residence to obtain another search warrant. N.T., 10/26/2007, p. 220. *See also,* N.T., 10/29/2007, pp. 22-24. The second search warrant was obtained from DMJ Page, and was numbered SW-4-07, Commonwealth's Exhibit No. 9. This second search warrant, as issued by DMJ Page, authorized a search of Mr. Cobbs' residence for firearms, holsters, ammunition, bullet proof vest, ownership information, indicia of occupancy, marijuana, drug paraphernalia and other controlled substance related items. Agent Sorage returned to Mr. Cobbs' residence with the second warrant and collected the

firearm, which was ascertained to be a Davis .380 Caliber handgun, serial number AP492620. N.T., 10/29/2007, p. 26, 27.

During the search, after the second warrant had been obtained, in addition to seizing the handgun and marijuana numerous other items were seized. Agent Weber logged the complete inventory of all the items seized from Mr. Cobbs' apartment under the first search warrant, number SW-2-07. Defendant's Exhibit 54. (2 pages).

Three items of marijuana were found in Mr. Cobbs' residence. The first item of marijuana, consisting of 1.4 grams was found in plain view, loose on top of an air purifier in the living room. N.T., 10/29/2007, pp. 22, 33-34, 38. The Agents found "the marijuana… laid out in plain sight" while conducting the initial part of the search, the portion of the search that was pursuant to the first search warrant. ***Id***. at 22, 24. The other two items of marijuana were in a Tupperware container in a decorative wooden bucket; some being inside a plastic bag and some being loose. ***Id.*** at 34, 36.

All three items of marijuana resulted in the one charge of Possession of a Controlled Substance. N.T., 3/30/2007, p. 9. Christopher Libus, a forensic scientist supervisor at the Bureau of Forensic Services for the Pennsylvania State Police Wyoming Regional Crime Laboratory established that all three items were, in fact, marijuana with a total weight of 88.3 grams. N.T., 10/26/2007, pp. 119-124.

The handgun was found during the first phase of the search of Mr. Cobbs' residence under a cushion in a black leather chair located in the bedroom; it was a .380 caliber Davis, serial #AP492620, semi-automatic. N.T., 10/29/2007, p. 26-27. A receipt for the sale of a ".380 semi automatic" handgun, Commonwealth's Exhibit No. 7, was found in Mr. Cobbs' safe located in

his bedroom. ***Id***. at 48-49. The receipt was signed "Jesse Evens" under the printed name "Jesse Shane Evens" and the number "25 189 824." ***Ibid.***

All the seized items were found in Cobbs' bedroom and living room areas. N.T., 3/30/2007, pp. 11-14. Agent Weber found women's clothing in Mr. Cobbs' bedroom, though Agent Weber stated that it did not appear that a woman lived there. ***Id***. at 13. Agent Sorage recalled that there were no full-sets of women's clothing, but he had seen women's lingerie in the hallway adjacent to the bathroom. N.T., 10/29/2007, p. 54. The Agents knew from information they gleaned from Cobbs' landlord, Mr. Wyland, that only Cobbs resided in 927 Henrietta Street. N.T., 3/30/2007, pp. 10, 15. As a result of the search of Mr. Cobbs' residence at 927 Henrietta Street on January 17, 2007, Agent Sorage filed charges against Mr. Cobbs of Persons not to Possess Firearms and Possession of a Controlled Substance. N.T., 3/30/2007, pp. 8-9. *See also* N.T., 10/29/2007, p. 72.

Trial testimony from Jesse Evens established that on June 29, 2001 he had bought a .380 handgun at Sauers gun shop, and sometime during 2001 he sold the gun to Mr. Cobbs for fifty dollars. N.T., 10/26/2007, pp. 129-131, 133. Mr. Evens drew up his own receipt for this transaction; the transaction took place "downtown". ***Id.*** at 131-133. Mr. Evens noted that the receipt did not have the purchasers name on it and contained no date. N.T., 10/26/2007, pp. 132-133, 147. The receipt simply stated, "I Jesse Evens sold a .380 semi-automatic handgun to [blank]. It's not stolen. Jesse Shane Evens (sic) 25 189 824." ***Id.*** at 133. The number "25 189 824" handwritten on the receipt delineates Mr. Evens' driver's license number. N.T., 10/29/2007, p. 49. Mr. Evens wrote the receipt himself and then gave the receipt to Mr. Cobbs. N.T., 10/26/2007, p. 133. Mr. Evens testified that the receipt he wrote during 2001 for the sale

of the handgun to Mr. Cobbs was the same receipt that was found on January 17, 2007 during the search of Mr. Cobbs' apartment. ***Id.*** at 131-132. *See also* N.T., 10/29/2007, pp. 49, 51, 53.

Trial testimony from a South Williamsport gun shop owner, John Sauers, established that Jesse Shane Evens had purchased the Davis .380 firearm, serial no. AP492620, on June 29, 2001 using the same driver's license number as stated on the receipt found in Mr. Cobbs' safe. N.T., 10/26/2007, 102-108. *See also,* N.T., 10/29/2007, p. 49-50. *See also,* Commonwealth's Exhibit No. 1. Agent Sorage described the Evens to Mr. Cobbs transaction as "clearly illegal," however, he explained there was no prosecution of Evens because the statute of limitations had run. N.T., 10/29/2007, p. 49-50.

After seizing the Davis .380 firearm from Mr. Cobbs' residence it was tested by Agent Sorage and found to be functional. N.T., 10/29/2007, p. 31-33. It was stipulated by the defendant, Mr. Cobbs, outside the presence of the jury, that he had previously been convicted of a Felony 2, Robbery, in 1986 in Philadelphia and as a convicted felon was not authorized to possess a firearm. N.T., 10/26/2007, pp. 9-18.

II. PROCEDURAL HISTORY

On January 18, 2007, Agent Sorage filed charges against Mr. Cobbs for Persons not to Possess Firearms, 18 Pa.C.S. § 6105(a)(1), and Possession of a Controlled Substance, 35 Pa.C.S. § 780-113(a)(16). A preliminary hearing was held before DMJ Allen Page on March 30, 2007, at which the Commonwealth was represented by Henry Mitchell, Esquire. Cobbs was represented by Jeana Longo, Esquire, of the Public Defender's Office. Mr. Cobbs was held for court on both charges with an arraignment being scheduled for May 7, 2007.

On April 10, 2007, Mr. Cobbs filed a *pro se* motion to suppress evidence and on April 20, 2007, filed two more motions seeking appointment of counsel and discovery of evidence. This court denied the three *pro se* motions by an Order of April 23, 2007 on the basis that Mr. Cobbs was represented by Attorney Longo of the Public Defender's Office, pursuant to Pa.R.Crim.P 576(A)(4). On May 5, 2007, Janan Tallo, Esquire, of the Public Defender's Office, entered an appearance and waived arraignment. At that time a pretrial conference was scheduled for August 7, 2007. On May 7, 2007, Mr. Cobbs filed a *pro se* motion seeking a conflicts attorney to replace Public Defender Longo. Attorney Longo withdrew as counsel on May 7, 2007 and Robert Cronin, Esquire, of the Public Defender's Office, entered an appearance on behalf of Mr. Cobbs and filed a request for pretrial discovery on May 9, 2007.

On May 8, 2007, Mr. Cobbs filed a motion for a "second chair/standby counsel." On May 18, 2007, Mr. Cobbs filed a motion to request that the prior motion be made a request to waive counsel. An order of June 12, 2007was entered denying the Defendant's various requests as to counsel and directing Attorney Cronin to continue his representations and to meet with Mr. Cobbs to prepare for the August 7, 2007 pretrial conference. Mr. Cobbs filed another *pro se* motion to dismiss counsel and appoint conflicts standby counsel asserting Attorney Cronin had not met with him until after the June 12, 2007 order on July 24, 2007. No action was taken on this matter which by Order of July 27, 2007 was referred to Attorney Cronin under Pa.R.Crim.P. 576.

On August 6, 2007, Attorney Cronin filed a Petition for a Writ of Habeas Corpus (as an omnibus pretrial motion) which also incorporated all of Cobb's numerous *pro se* Motions to Suppress. This Habeas Petition also asserted the Commonwealth had failed to present a *prima*

facie case for either charge at the preliminary hearing and requested the court to dismiss both counts for lack of such a showing. This motion was set for a hearing at the August 7, 2007 pretrial conference.

On August 7, 2007, Judge Dudley N. Anderson held a lengthy conference and explored Mr. Cobbs' request to dismiss counsel and represent himself. An Order was entered by Judge Anderson, filed August 23, 2007, stating that Mr. Cobbs was displeased with the Public Defender's Office, that the Public Defender's Office did not have an application for Public Defender services in their file for Cobbs, and that the issue should be rescheduled for further conference. Attorney Cronin was ordered to provide Mr. Cobbs with an application for Public Defender services on that day and directed to instruct Mr. Cobbs that if he desired such services he must fill out and turn in the application. Mr. Cobbs' *pro se* motion as to dismissing counsel dated August 1, 2007, filed August 13, 2007, was dismissed by August 27, 2007 Order of Judge Anderson on the basis of Judge Anderson's August 7, 2007 Order.

In accordance with the August 7, 2007 Order of Judge Anderson this court held a second pretrial conference on October 2, 2007. We ascertained at that time that while Mr. Cobbs had filed an application for representation by the Public Defender's Office as Judge Anderson had strongly suggested, Mr. Cobbs only wanted the Public Defender to be standby counsel to his own *pro se* representation.

A further pretrial hearing was held before Judge Anderson on October 8, 2007. After an extensive colloquy on the record, Judge Anderson authorized Mr. Cobbs to represent himself with Attorney Cronin acting as standby counsel. See Order of October 8, 2007, filed October 20, 2008. Judge Anderson further noted in that October 8, 2007 Order stated that Mr. Cobbs, "…has

at this time withdrawn all other pretrial motions, including those motions formally filed by counsel in this matter." Judge Anderson further directed trial to proceed as previously scheduled.

On October 11, 2007 Judge Anderson denied an oral continuance request. Judge Anderson then proceeded with jury selection on that date, with Mr. Cobbs representing himself during the jury selection process.

This court held a pretrial conference on October 15, 2007. Mr. Cobbs again made a continuance request which was denied and we directed that the case should continue to be scheduled for trial beginning October 26, 2007 as had been announced at the October 11, 2007 jury selection. At this October 15, 2007 conference, this Court also considered motions raised by Mr. Cobbs in a document entitled "Defenses for Jury to View and Hear" signed and dated by Mr. Cobbs on October 7, 2007. As referenced in our October 15, 2007 Order, that document had been submitted to Judge Anderson on October 12, 2007 and on October 15, 2007 we directed that it should be docketed; it was filed of record on October 16, 2007. Mr. Cobbs requested further time to review, prepare and submit the matters raised in his "Defenses…" document, therefore, this Court did not take formal action on those issues on October 15, 2007. The issues raised by Mr. Cobbs in his "Defenses…" document included objections to the preliminary hearing which had been conducted by DMJ Sortman, bias and corruption on the part of DMJ Sortman, DMJ Lepley, and DMJ Page, allegations of bias and corruption against United States Marshalls, the Police Officers involved in his prosecution and by this Court. The document also raised allegations as to ineffectiveness and incompetence of appointed counsel having prejudiced the Defendant.

Significant to the present appeal, Mr. Cobbs had also asserted in his "Defenses…" document violations of the Defendant's rights as to illegal search and seizure. In particular Mr. Cobbs asserted the search warrants were issued without probable cause, the warrants had not been properly signed, the police had entered Mr. Cobbs' residence with the keys seized at his arrest prior to obtaining the first warrant and that as the search the first warrant was invalid the search under the second warrant was also invalid as probable cause for the second warrant had allegedly been found during the initial search under the first warrant.

Mr. Cobbs, on October 22, 2007, filed another untitled motion, dated October 17, 2007. This motion objected to the jury selection and requested selection of a new jury, sought pre-clusion of introduction of Mr. Cobbs' prior record, and asserted bias against all involved in his prosecution process. The document filed October 22, 2007 also again raised issues as to the illegal search and seizure, particularly as to lack of signature of the warrants by the offices and DMJ's Lepley and Page.

On October 25, 2007 with the assistance of standby counsel, the Defendant "*pro se*" filed a motion to recuse the undersigned. That motion asserted the Defendant had commenced a Federal lawsuit against myself as well as Judge Anderson.

At the commencement of trial on October 26, 2007, prior to bringing the jury into the courtroom, the court addressed all of the outstanding issues raised by the various motions. N.T., 10/26/2007, pp. 3-27. The Defendant's various requests were denied with the exception that the Commonwealth was precluded from introducing information concerning the prior record of the Defendant. The court's rulings also denied a Rule 600 Motion which the Defendant had filed on October 25, 2007. ***Id.*** at p. 25-27 and order of October 26, 2007 filed October 30, 2007. *See*

also, other Orders of October 26, 2007 filed October 29, 2007. The Court, in refusing the recusal motion despite being cited a specific Federal lawsuit number by the Defendant, noted that the court had not ever been served with papers or documents. ***Id.*** at p. 22. We have still not been served. As to many of Mr. Cobbs' motions, the court was of the opinion that there were no factual allegations asserted in the various motions but rather unsubstantiated conclusions. ***Id.*** at 19-23.

We must acknowledge that in making our rulings just prior to the start of trial on October 26, 2007 we refused to let Mr. Cobbs proceed with making argument on or presenting information relating to the search and seizure issues raised by Mr. Cobbs in his documents dated October 7, 2007 and October 17, 2007. At the time we stated that those matters have previously been ruled upon. It was our understanding from statements made to the court that Judge Anderson's ruling of October 8, 2007 had denied the suppression issues based upon illegal search and seizure or improperly issued warrants. For some reason, not now recalled nor appearing of record, Judge Anderson's October 8, 2007 Order was never filed until October 20, 2008. Upon finally receiving and reviewing Judge Anderson's October 8, 2007 Order, as this opinion was being prepared we have for the first time ascertained that Mr. Cobbs' motions were not ruled upon by Judge Anderson, but rather that Mr. Cobbs had withdrawn those motions.

Mr. Cobbs' jury trial then proceeded and continued on the dates of October 26, 29 and October 30, 2007. He was assisted at trial by "standby Public Defender counsel" Robert Cronin, Esquire. The jury convicted Mr. Cobbs of both offenses, Persons Not to Possess Firearms and Possession of a Controlled Substance.

Defendant was originally to be sentenced on January 18, 2008 following the completion of a Pre-Sentence Investigation by the Pennsylvania State Board of Probation and Parole. At that time, the Defendant requested to be represented by counsel at sentencing and specifically for counsel outside of the Public Defender's Office. This court granted the request for counsel but did not grant that it be an attorney outside of the Public Defender's Office. N.T., 1/18/2008, pp. 4, 15-19, 20-21.

On January 30, 2008, Mr. Cobbs was sentenced. Under count one, Persons not to Possess Firearms, Mr. Cobbs was sentenced to serve a minimum term of 54 months and a maximum term of 10 years, and to pay a fine in the amount of $500.00. Under count two, Possession of a Controlled Substance, Cobbs was sentenced to serve a minimum term of four months and a maximum term of one year, and to pay a fine in the amount of $100.00. The sentences were imposed consecutively. Under count one, we found the offense gravity score was a nine and the prior record score was a four: although the Commonwealth argued that the correct offense gravity score was a 10 based on the Defendant possessing the weapon with ammunition. N.T., 1/30/2008, p. 19. In determining the appropriate sentence, however, the court found that while the factors which the Commonwealth argued acted to increase gravity score (***Id.*** at pp. 17-22) did not justify raising the offense gravity score to a 10, they nevertheless were aggravating circumstances to be considered in sentencing the Defendant. Those factors included: Mr. Cobbs had ready access to two weapons and ammunition; the weapons and ammunition were maintained in close proximity to a large quantity of marijuana; he had gone to elaborate steps to secure his apartment; and he had gone about an elaborate purchase scheme in obtaining the weapon. Thus, this Court applied a six month aggravating factor to the suggested standard range

minimum sentence although twelve months could have been added for aggravating factors. ***Id.*** at pp. 30-32.

Mr. Cobbs filed a Post Sentence Motion, through Robert Cronin, Esquire acting as counsel, which stated that the sentence was illegal and excessive because it did not take the appropriate factors into consideration. Particularly, the Motion points to the fact that there was a finding made at sentencing that the firearm in question was not loaded; as such, the Standard Sentencing Range was 36 months to 48 months with aggravating and mitigating ranges providing for an additional or reduced 12 months respectively, but that Mr. Cobbs was sentenced, however, to a minimum term of 54 months to a maximum term of ten years. On February 20, 2008, we entered an Order denying Mr. Cobbs' February 11, 2008 Post Sentence Motion requesting his sentence be reconsidered, relying upon our reasoning that was stated on the record at the time of sentencing. For the reasons stated on the record at the time of sentencing and due to the facts that came out during trial, including the fact that the handgun was fully functional even without the clip and the fact that ammunition was present, Mr. Cobbs' Post-Sentence Motion did not pass muster. N.T., 10/29/2007, p. 31. *See also* N.T. 1/30/2008, p. 25.

III. DISCUSSION

Although we will discuss the specific issues Mr. Cobbs has raised in his Statement of Matters Complained of on Appeal, we first wish to state it is our belief that Mr. Cobbs had no real defense to the charges brought against him. The evidence against him was uncontradicted and overwhelming as to guilt. Any error, therefore, was not prejudicial. The only possible defense under the facts presented by the Commonwealth was the possibility that someone else

had placed the firearm and marijuana in his apartment, without Mr. Cobbs' knowledge or awareness of the existence of the items. The trial evidence - which included the inventory receipt for the gun (Commonwealth's Exhibit No. 7), the testimony of Jesse Evens concerning his sale of the gun to Mr. Cobbs, the existence of the marijuana in plain view in Mr. Cobbs' apartment, coupled with Mr. Cobbs' extensive security measures which he had put in effect to secure the inside and outside of his apartment - made such a defense completely un-realistic. Mr. Cobbs did not argue such a defense during his case.

Mr. Cobbs at trial, instead, chose to pursue a defense which amounted to assertions that the prosecution was biased against him and that the search warrants which served the basis of obtaining evidence of his possession of the firearm and marijuana were not valid. Mr. Cobbs never asserted any facts at trial upon which any prosecution bias could be inferred, however, he did present his factual allegations as to the invalidity of the search warrants. Mr. Cobbs did so with a clever intent to disrupt the proceedings constantly ignoring our direction that inquiries as to the validity of the warrants were not issues for the jury. Mr. Cobbs obviously hoped to confuse the jury with the issues in order to obtain some type of sympathetic or anti-police verdict.

It was also clear to this court that Mr. Cobbs, throughout the prosecution, intentionally sought to delay and obfuscate the real issues in this case, primarily through the tactic of his many motions asserting ineffective assistance of counsel. Such motions were not supported by factual allegations.

> "[T]he trial court is vested with sound discretion to determine if appellant's desire to end present counsel's representation is merely a ploy to extend the proceedings, an attempt to circumvent counsel's assessment of frivolity of the instant appeal or a genuine

> desire to proceed pro se, with new counsel or not at all. ***See Commonwealth v. Basemore***, 525 Pa. 512, 522, 582 A.2d 861, 865 (1990) (decision to grant request for change of counsel within sound discretion of trial court and shall not be granted except for substantial reasons); Pa.R.Crim.P. 316(c)."

Commonwealth v. Gonzalez, 587 A.2d 786, 787-788 (1991).

Further evidence of Mr. Cobbs' disruptive intent were his continued assertion of misconduct by judicial officers including DMJ Page and DMJ Lepley, Court of Common Pleas Judge Anderson and this court. Again, such allegations were simply conclusory in nature and without factual allegations, which if they had been true, would have supported any of Mr. Cobbs' claims. Mr. Cobbs pursued this course of obstruction in a clever and calculated manner intending to raise artificial issues for appeal as well as to somehow, in his misguided view, to obtain some type of sympathy verdict from the jury. (See this court's remarks to this effect at sentencing and Mr. Cobbs implicit acknowledgement in his response of "thank you, your honor." N.T., 1/30/08, p.30).

We will now proceed to discuss Mr. Cobbs' specific statement of issues seriatim.

A. The Validity of the Search Warrants Authorizing the Search of Cobbs' Residence.

At trial Mr. Cobbs asserted that his fourth amendment rights were violated by the search and sought to suppress the evidence obtained as a result of the search warrants. During the trial this court did not suppress the evidence because the validity of the search warrant was, or should have been, addressed at prior proceedings, and so the validity of the search warrant was irrelevant at Mr. Cobbs' jury trial. *See inter alia.* N.T., 10/26/2007, pp. 165, 201-202, 228-229. *See also*, Pa.R.Crim.P. 581.

In all of Mr. Cobbs' *pro se* motions his challenge to the search warrants was based upon only two factual contentions: first, the warrants were never signed and thus were improperly issued; second, the police had entered his apartment and discovered the firearm before obtaining the first search warrant. The motions also contained general conclusory allegations of violation of constitutional rights, bias in the issuance of the warrants by the DMJ's and lack of probable cause. The omnibus pretrial motion filed by counsel August 6, 2007 and styled "A Petition for Writ of Habeas Corpus" did not raise any factual issues but adopted and incorporated the "Defendant's Motions to Suppress" (see paragraph 8, 9 and 10 thereof).

Once Mr. Cobbs' obtained the right to represent himself following a hearing before Judge Anderson on October 8, 2007, Mr. Cobbs withdrew all of the prior pretrial motions. Mr. Cobbs essentially refiled those same motions in a document dated October 7, 2007. This would have been prior to his withdrawal of all prior motions made on October 8, 2007. Nevertheless as his October 7, 2007 motion was not presented to Judge Anderson until October 12, 2007 (and not filed until October 16, 2007) we were willing at our pretrial conference of October 15, 2007 to consider that it had not been withdrawn. At that October 15, 2007 pretrial conference, Mr. Cobbs still did not pursue the search warrant issues he had raised. Instead, he stated he wanted more time to consider them. No ruling was made in response to Mr. Cobbs' request. He subsequently filed a document dated October 17, 2007 on October 22, 2007 which, among other allegations, raised issues as to the illegal search and seizure, particularly again the improprieties of DMJ's Lepley and Page. No hearing was held on that specific motion.

At the beginning of trial, when Mr. Cobbs raised the search warrant issues, we had been under the opinion that Judge Anderson had denied them. This was an erroneous assumption on

our part. Instead, we now know Mr. Cobbs withdrew the motions. Regardless as to being denied or withdrawn as of October 8, 2007, there were no suppression issues pending before the court when trial began. Mr. Cobbs had never asserted any reason for not pursuing the initial motions which had raised challenges to the warrants when he withdrew them. His subsequent filings re-asserted the same facts with no new allegations which would have warranted allowing a new challenge to the warrants. Mr. Cobbs filing of these motions after having withdrawn prior motions and particularly at the time the case was ready to proceed to trial before the previously selected jury was an untimely, belated effort on his part to raise suppression issues. Mr. Cobbs has never asserted that the information upon which he challenged the warrant in his motions of October 7 and 17, 2007 was not available or known to him prior to those dates. In fact, Mr. Cobbs raised these factual contentions in his *pro* se filings shortly after arraignment. He had ample prior opportunity to pursue the suppression based upon the facts he had asserted continuously in his other post-arraignment motions. Accordingly, this court would have been justified under Pa.R.Crim.P. 579 and 581 in denying the motions dated October 7 and 17, 2007 on the basis of waiver of these claims by Mr. Cobbs.

Nevertheless, the failure to have had a pretrial hearing as to the suppression issues has caused Mr. Cobbs no harm. There was no factual basis asserted in these motions upon which this Court would have declared any of the warrants invalid or that would have led us to suppress any evidence seized from the search of Mr. Cobbs' residence. We can state this conclusively because Mr. Cobbs did in fact introduce into the record all of the matters he advanced in support of suppressing the evidence seized from his apartment. The evidence clearly established that, contrary to Mr. Cobbs' assertions, the warrants were validly signed and executed by the officers.

This was explained by the testimony of Agent Sorage and Agent Weber. It was also verified by Commonwealth's Exhibits 9 and 10.

In the discovery process Mr. Cobbs and his counsel had been furnished copies of search warrants that had no signatures, for example, Commonwealth's Exhibit No. 8, a copy of an application for search warrant, SW-4-07, issued on January 17, 2007. A copy of this exhibit was given to Mr. Cobbs' counsel and furnished to Mr. Cobbs in discovery. N.T., 10/26/2007, pp. 166-167. The uncontradicted testimony of the Commonwealth at trial was to the effect that the actual search warrants were appropriately signed by the officers and by DMJ Page as to SW-4-07, Commonwealth's Exhibit No. 9 by DMJ Lepley, as to SW-2-07 Commonwealth's Exhibit No. 10. N.T., 10/29/2007, pp. 12-16. The Commonwealth Exhibits No. 9 and No. 10, photocopies of the original warrants, clearly are appropriately signed and dated. The fact that the District Attorney's Office had copies of those warrants in their file which were furnished to Mr. Cobbs, that had not been signed which were furnished to Mr. Cobbs, was used simply as a smoke screen Mr. Cobbs created to assert that the warrants had not been properly executed. N.T., 10/26/2007, pp. 155, 159-167, 190-195. *See also,* N.T., 10/29/2007, pp. 10-16, 20-22, 58-59, 61-68, 75-76, 98-99, 122-123, 125, 134-135.

Mr. Cobbs' further asserted that a Williamsport Police file copy (Defendant's Exhibit No. 46) of the record of the Lycoming County Communications call Agent Weber made approximately one-half hour prior to the issuance of the first search warrant on January 16, 2007 had on it a notation the investigation at Mr. Cobbs' apartment was a weapons law violation was not credible evidence that the police had entered Mr. Cobbs' residence prior to obtaining the first warrant. Rather, this court found the testimony of Agent Weber to be extremely convincing that

his questioned telephone communication to County Communications was for the mere purpose of having that office assign an incident number to the case so that he could proceed with obtaining the issuance of the search warrant. N.T., 10/26/2007, pp. 167-187, especially page 186. Agent Weber credibly explained the process whereby after obtaining the incident number the search warrant was obtained on January 16, 2007 the second search warrant was obtained on January 17, 2007 after the firearm and marijuana were found. ***Ibid.*** It was subsequent to that time that the offense was classified as a firearms offense in the Williamsport Police Department and sometime after the charges were filed and a copy of the County Communication document became part of the police file and then marked with the weapons law offense notation. Defendant's Exhibit 46, is a copy of that log furnished to Mr. Cobbs in discovery. Even a casual inspection of that exhibit clearly shows the "weapons laws" handwriting to be distinctively different than the other handwritten notations referring to the officer and department. These latter notations would be expected to be made when the log was created. The difference in the handwriting supports Agent Weber's testimony. If this court had held a separate hearing on the validity of the search warrant on October 25, 2007 prior to convening the jury trial we would have denied Mr. Cobbs' suppression motions based upon Agent Weber's testimony.

Although the only factually based challenges to the search warrants made by Mr. Cobbs can not be sustained we note his matters complained of on appeal raise some general challenges to the search warrants which we now address.

Pa.R.Crim.P. 205 specifies the necessary components of a valid search warrant:

> "Each search warrant shall be signed by the issuing authority and shall: (1) specify the date and time of issuance; (2) identify specifically the property to be seized; (3) name or describe with particularity the person or place to be searched; (4) direct that the

> search be executed either; (a) within a specified period of time, not to exceed 2 days from the time of issuance, or; (b) when the warrant is issued for a prospective event, only after the specified event has occurred; (5) direct that the warrant be served in the daytime unless otherwise authorized on the warrant, provided that, for purposes of the rules of Chapter 200. Part A, the term "daytime" shall be used to mean the hours of 6 a.m. to 10 p.m.; (6) designate by title the judicial officer to whom the warrant shall be returned; (7) certify that the issuing authority has found probable cause based upon the facts sworn to or affirmed before the issuing authority by written affidavit(s) attached to the warrant; and (8) when applicable, certify on the face of the warrant that for good cause shown the affidavit(s) is sealed pursuant to Rule 211 and state the length of time the affidavit(s) will be sealed.

The Fourth Amendment of the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution prohibit unreasonable searches and seizures. ***Commonwealth v. Beaman***, 880 A.2d 578, 582 (Pa. 2005). *See also* ***In re R.P.*** 918 A.2d 115, 120 (Pa. Super. 2007). Additionally, Pa.R.Crim.P.2003(a) and (b) provide that:

> (a) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits; and (b) At any hearing on a motion for the return or suppression of the evidence, or for suppression of the fruits of evidence obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (a).

Pa.R.Crim.P. 2003(a) and (b). ***Cited in Commonwealth v. Berry***, 2006 Pa. Dist. & Cnty. Dec. LEXIS 545 (Pa. County Ct. 2006). Thus, a search or seizure is not reasonable unless it is conducted pursuant to a search warrant issued by a magistrate upon a showing of probable cause. ***Commonwealth v. Edwards***, 735 A.2d 723 (Pa. Super. Ct. 1999). In other words, a search and seizure is reasonable, lawful, if it is conducted pursuant to a search warrant upon probable cause. ***Cited in Berry***, 2006 Pa. Dist. & Cnty. Dec. LEXIS 545.

A warrant may not be so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize, resulting in the general "rummaging" that is banned by the Fourth Amendment. ***Commonwealth v. Gene Rega***, 933 A.2d 997, 1011 (***citing, Commonwealth v. Santner***, 454 A.2d 24 (Pa. Super. 1982). *See also* ***Marron v. United States***, 275 U.S. 192, 195, (1927)). "A search warrant cannot be used as a general investigatory tool to uncover evidence of a crime." ***Rega***, 933 A.2d 1011 (***citing, In re Casale***, 517 A.2d 1260, 1263 (Pa. 1986). *See also* ***Commonwealth ex rel. Ensor v. Cummings***, 207 A.2d 230, 231 (Pa. 1965)).

In assessing the validity of a description contained in a warrant, a court must initially determine for what items there was probable cause to search. ***Commonwealth v. Grossman***, 555 A.2d 896, 900. "The sufficiency of the description [in the warrant] must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause [to search] and the description in the warrant requires suppression." ***Ibid***.

As to Mr. Cobbs' contentions that the warrants lacked probable cause, the arguments simply is not sustained by the statements in the warrant. This first search warrant, Commonwealth's Exhibit No. 10, SW-2-07, in the Affidavit of Probable Cause clearly recites evidence of a crime of sexual assault that Mr. Cobbs was alleged to have committed in his apartment and the reasons as to why the police believe that the search in that apartment would reveal evidence of his video taping such sexual activities and why it was appropriate for them to search for video, photos, cameras and digital pictures, computers and digital storage media, and storage tape media to substantiate the victim's complaint of being sexually assaulted and video

taped during it, including the fact that she had the opportunity after switching drinks on Mr. Cobbs and Mr. Cobbs becoming unconscious after drinking that she discovered video tapes in his residence showing Mr. Cobbs having sexual relations. This prejudicial material set forth in that Affidavit of Probable Cause was not presented to the jury, being excluded on Mr. Cobbs' objections, and the jury was only presented redacted copies of that Affidavit of Probable Cause.

In carrying out the search, the search under search warrant SW-2-07 on January 17, 2007, the Affidavit of Probable Cause for Commonwealth's Exhibit No. 9, SW-4-07, the second warrant, clearly recites the officers discovery of the marijuana in plain view as well as the firearm and Mr. Cobbs felony conviction for robbery which justified issuing the second warrant to obtain evidence of the possession of marijuana and possession of firearm offenses.

In any case, neither search warrant could have been invalid. As previously described, obtaining the second search warrant was a result of findings pursuant to the first search warrant. Agent Sorage explains the process for obtaining search warrants, as well as what was done in this case as follows:

> [A]fter doing an investigation which gives rise to probable cause, which is the reason which we would want a search warrant for a location, we complete an affidavit of probable cause, which, in fact, is a letter to the Court, requesting the reasons why we want a search warrant. We complete a front face sheet of the application which describes a number of things. It describes the address, the location where we're going and description. That would be 927 Henrietta Street second floor apartment structure. We also include in the application for a search warrant the items which we're looking for and hoping to find at that location. The affidavit of probable cause is why we are looking for those items and why we believe them to be in the location where were going to search… It's a two-step process. Once the search warrant and the application are completed, they're taken to an on-duty assistant district attorney which then reviews the application for the search warrant and the affidavit of probable cause to make sure that the documents are completed

> properly and that there is probable cause for the issuance of the search warrant. If its approved, the assistant district attorney then signs the application for the search warrant. We then would take it to a district justice, which could be any district justice in Lycoming County, for the issuance of a search warrant for the property where we hoped to search… That was done twice in this particular case.

N.T., 10/29/2007, p. 9-10.

The second search warrant was signed by the issuing authority and specified the date and time of issuance, the identity of the property to be seized; the place to be searched, designated by title the judicial officer to whom the warrant shall be returned, and certified that the issuing authority has found probable cause based upon the facts sworn to or affirmed before the issuing authority by written affidavit(s) attached to the warrant. Furthermore, as directed in the search warrant, the search was executed within two days from the time of issuance, and the warrant was served between the hours of 6 a.m. to 10 p.m.

The description for which there was probable cause encompassed the description contained in the warrant. Even though the handgun and the first item of marijuana were found pursuant to a search unrelated to these items, after finding the handgun and the first item of marijuana and before anymore items of marijuana or weapons were searched for, a second search warrant was procured by Agent Sorage. N.T., 3/30/2007, pp. 4, 12. *See also* N.T., 10/26/2007, p. 177. *See also* N.T., 10/29/2007, p. 22. The search warrants complied with Pa.R.Crim.P. 205, Mr. Cobbs has no valid challenge of the validity of the search warrant.

B. Sufficiency of the Evidence

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805 (Pa. Super. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

> 'The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.'

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005) (***quoting Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. ***Commonwealth v. Grekis***, 601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it taken as a whole links the accused to the crime beyond a reasonable doubt. ***Commonwealth v. Robinson***, 864 A.2d 460, 478 (Pa. 2004). In Mr. Cobbs' case, there was more than sufficient evidence to prove that Cobbs was a convicted felon and was in possession of a firearm and was in possession of marijuana. The evidence is both direct and circumstantial.

Agent Sorage's testimony was particularly descriptive, fair, and illuminating on this issue when he stated "I believe the articles were yours, which is why I completed a criminal complaint charging you with those items. I believed you had access to them; you exercised possession over

them[,] they were in your residence; you exercised control over them, and that is why I charged you in a police criminal complaint with possession of a firearm by a person not to possess and possession of a controlled substance being marijuana, a Schedule I controlled Substance." N.T., 10/29/2007, p. 72.

1. Possession of a Controlled Substance

35 P.S. § 780-113 describes the offense Possession of a Controlled Substance as the following:

> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
> (16) Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

Possession of a controlled substance can be established by showing either actual or constructive possession. Actual possession is established by showing that the defendant had the controlled substance on his person, while constructive possession can be proved through showing that the defendant exercised dominion over the substance. ***Commonwealth v. Ocasio***, 619 A.2d 352 (1993). *See also* ***Commonwealth v. Mercado***, 617 A.2d 342 (1992). The Commonwealth is required to prove constructive possession of any controlled substance not found on the defendant's person. ***Commonwealth v. Aviles***, 615 A.2d 398 (1992). *See also* ***Commonwealth v. Bruner***, 564 A.2d 1277 (1989). *See also* ***Commonwealth v. Gill***, 415 A.2d 2 (1980).

Constructive possession is defined as "the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control." ***Commonwealth v. Macolino***, 469 A.2d 132, 134 (1983). The intent required to show a

conscious dominion and control over the controlled substances may be inferentially proven from the totality of the circumstances. ***Commonwealth v. Valette***, 613 A.2d 548 (1992). *See also* ***Ocasio***, 619 A.2d 352. The Pennsylvania Supreme Court, in ***Commonwealth v. Mudrick***, 507 A.2d 1212 (1986), described the concept of "constructive possession" as follows: [It] is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. ***Id***. at 1213.

In ***Macolino***, contraband and otherwise legal items were found in the common bedroom of the Macolinos, a married couple. It was held that constructive possession can be found in one defendant when both the husband and wife have equal access to an area where the illegal substance or contraband is found." ***Macolino***, 469 A.2d 135. On the other hand, in ***Fortune***, police officers went to a private residence pursuant to a search warrant; upon forcibly entry they found heroin on the floor of the kitchen and people in the living room at the front of the house as the defendant walked downstairs in her robe. ***Commonwealth v. Fortune***, 318 A.2d 327 (1974). The evidence was not sufficient to establish that the defendant was guilty beyond a reasonable doubt of the illegal possession of narcotic drugs because there was no evidence that defendant had any knowledge of the presence of the drugs in her home and, significantly, the four persons who were already downstairs had more immediate access to the kitchen then defendant did. ***Id***. The court considered that no narcotic drugs were found anywhere else on the premises and those that were found were not in a place normally accessible only to a resident of a home. ***Id***. at 329.

In Mr. Cobbs' case, though another persons clothes were found in the apartment, it was not enough clothing to suggest that the other person lived with him. Even if someone else did

live there with him, both could be found to be in constructive possession of the marijuana. Furthermore, though some marijuana was found in pain view in the living room, the majority of marijuana found in Cobbs apartment was found in a Tupperware container in a box in Cobbs' bedroom, and was thus accessible only to Mr. Cobbs as the resident of the apartment. If marijuana was only found loose on the air conditioner in the living room, then Mr. Cobbs could try to argue that he did not possess the marijuana because the marijuana was not in a place normally accessible *only* to a resident of a home. This was not, however, the case. Marijuana was also found in a decorative box in Mr. Cobbs' bedroom. N.T., 10/29/2007, pp. 34-36. Because the marijuana was held in Mr. Cobbs' bedroom in an opaque decorative box that could have been used for anything, but was used in Mr. Cobbs' bedroom of his apartment to hold marijuana, the marijuana was in a place normally accessible only to a resident of a home. Because Mr. Cobbs clearly, beyond a reasonable doubt, exercised conscious dominion over the marijuana in the decorative box in his bedroom, that evidence goes to show very strong circumstantial evidence, especially since Mr. Cobbs was the only resident of the apartment, that Mr. Cobbs also possessed the marijuana that was lose on the air conditioner in the living room of his apartment.

Even though Mr. Cobbs was not present at the apartment when the marijuana was found, the apartment was secured by the police shortly after Cobbs was evicted and there was no sign of forcible entry when the search was conducted the next day. An inference must be made, under the totality of circumstances that Cobbs possessed the marijuana found in the January 17, 2007 search of Mr. Cobbs' apartment.

2. Persons not to Possess Firearms

18 Pa.C.S.A. § 6105(a)(1) defines the offense Persons not to Possess Firearms, in pertinent part, as follows: "A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence… shall not possess… a firearm in this Commonwealth." 18 Pa.C.S.A. § 6105(b) enumerates that "Section 3701 (relating to Robbery)" or "[a]ny offense equivalent to [Section 3701 (relating to Robbery] under the prior laws of this Commonwealth or… under the statutes of any other state or of the United States," is an "offens[e that] shall apply to subsection (a)." 18 Pa.C.S.A. § 6105(d) exempts enforcement of this rule to "[a] person who has been convicted of a crime specified in subsection (a) or (b)… may make application to the court of common pleas of the county where the principle residence of the applicant is situated for relief from the disability imposed by this section upon the possession, transfer or control of a firearm. The court shall grant such relief if…"

A criminal background check on Cobbs showed that on May 19, 1986 Cobbs was found guilty of robbery. N.T., 3/30/2007, pp. 7-8. Being convicted of a robbery, Cobbs was not allowed to possess firearms according to 18 Pa.C.S.A. § 6105(a), because robbery is enumerated under 18 Pa.C.S.A. § 6105(b), unless he qualifies for exemption under 18 Pa.C.S.A. § 6105(d). Cobbs presented no evidence, and none was disclosed to this court, that he had ever applied to be exempted from the disability restricting him to possess a firearm under 18 Pa.C.S.A. § 6105(a)(1).

In addition, for the same reasons mentioned in the above section, (b)(1), discussing possession of the items of marijuana, Mr. Cobbs did possess the weapon. Taking in the totality

of circumstances into account, Mr. Cobbs certainly had dominion and control over weapon. The handgun was found in Mr. Cobbs' apartment, of which he was the sole renter. A receipt for the handgun was found in Mr. Cobbs' personal safe in his bedroom. Mr. Cobbs exercised conscious dominion over both the handgun and the receipt for the handgun because both were hidden, one in a chair and the other in a safe, in his apartment in places normally accessible only to a resident of a home. This is especially true since the receipt for the handgun was found in Mr. Cobbs' personal safe. Because Mr. Cobbs certainly had conscious dominion over the receipt of the gun and the gun was in his apartment, the gun too must have been in his possession. An inference must be made that Cobbs possessed the 380 caliber handgun.

C. Weight of the Evidence

It is well settled that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. ***Armbruster v. Horowitz***, 813 A.2d 698, 702 (2002). It is axiomatic that it is the function of the jury as the finder of fact to determine the credibility of the witnesses. ***Commonwealth v. Champney***, 832 A.2d 403, 408 (2003) (***citing Commonwealth v. Johnson***, 668 A.2d 97, 101 (1995)). A new trial should be granted only in truly extraordinary circumstances, *i.e.*, "when the jury's verdict is *so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail*." ***Abruster***, 813 A.2d 703 (emphasis in original). Without specific evidence detailing an "extraordinary circumstance," a jury's finding of fact as to the credibility of witnesses must not be disturbed on appeal.

In Mr. Cobb's case, the jury's finding of guilt was not so contrary to the evidence as to shock one's sense of justice thereby necessitating a new trial. In fact the extensive evidence summarized above was so overwhelming we would have been shocked at an acquittal.

D. Mr. Cobbs' Sentence.

Mr. Cobbs' claim that the sentence is excessive is meritless. There were aggravating circumstances to be considered in sentencing the Defendant, specifically that he had ready access to two weapons and ammunition, kept them in proximity to marijuana, had gone to elaborate steps to secure his apartment, and had gone about an elaborate purchase scheme to obtain the weapon. From these we easily concluded he maintained possession of this weapon to help secure his possession of a large quantity of marijuana. We were justified in applying a six month aggravating factor to the suggested standard range minimum sentence, although as an aggravating factor twelve months could have been added. ***Id.*** at pp. 30-32.

The standard for review of a trial court's sentence is whether or not the trial court abused its discretion. ***Commonwealth v. Hlatky***, 626 A.2d 575 (1993). The court stated on the record its rationale for imposing upon Mr. Cobbs, and this rational is not an abuse of discretion. An abuse of discretion is more than an error in judgment. ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa. Super. 2000). An abuse of discretion occurs only if the record discloses that the court's exercise of judgment with regard to the sentence was manifestly unreasonable or the result of partiality, bias, or ill-will. ***Commonwealth v. Smith***, 673 A.2d 893, 895 (Pa. 1996).

Appellate review of the trial court's determination of sentence is only permitted when the defendant establishes to the appellate court's satisfaction that a "substantial question" exists as to whether the sentence "violates a particular provision of the Sentencing Code or is contrary to the

fundamental norms underlying the sentencing process." ***Commonwealth v. Johnson***, 873 A.2d 704, 708 (Pa. Super. 2005). *See also*, 42 Pa.C.S.A. § 9781(b). "Only where the appellant has provided a plausible argument that the sentence is contrary to the Sentencing Code or fundamental norms underlying the sentencing process does a substantial question exist." ***Commonwealth v. Simpson***, 829 A.2d 334, 336 (Pa. Super. 2003).

If the Court does step outside of the guidelines, then it must indicate, on the record, its reason(s) for doing so. ***Commonwealth v. Royer***, 476 A.2d 453 (1984). "Nevertheless, a lengthy discourse on the trial court's sentencing philosophy is not required." ***Commonwealth v. McAfee***, 849 A.2d 270, 275 (Pa. Super. 2004). Rather, the record as a whole must reflect the court's reasons and its meaningful consideration of the facts of the crime and the character of the offender. ***Commonwealth v. Anderson***, 830 A.2d 1013, 1018, 1019 (Pa. Super. 2003). "Where the statement shows consideration of the defendant's circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates the court had the benefit of a pre-sentencing report, an adequate statement of the reasons for the sentence imposed has been given. ***Commonwealth v. Fenton***, 566 A.2d 260 (1989).

The Supreme Court has stated that "[w]here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors….Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed." ***Commonwealth v. Devers***, 546 A.2d 12, 18 (1988). In Mr. Cobbs' case, the trial court had the benefit of a pre-sentence investigation as evidence by the referral to it on the record. N.T., 1/30/2008, pp. 3, 20.

In his Statement of Matters Complained of on Appeal Mr. Cobbs avers merely, "that the Court's sentence is an excessive sentence." A more detailed complaint was provided in a Post Sentence Motion, filed by and on behalf of Mr. Cobbs' counsel. The Motion explained that the sentence was excessive because it did not take the appropriate factors into consideration. In particular, the Motion averred that there was a finding made at sentencing that the firearm in question was not loaded. Thus, the motion argues that for the offense of Persons not to Possess Firearms, his sentence should have been, according to the Standard Sentencing Range, 36 months to 48 months with aggravating and mitigating ranges providing for an additional or reduced 12 months respectively. The Motion concludes that Mr. Cobbs was, however, sentenced to a minimum term of 54 months to a maximum term of ten years by this court for Persons not to Possess Firearms.

Mr. Cobbs was sentenced on January 18, 2008 and January 30, 2008. He appeared *pro se* on January 18, 2008 and was represented by counsel, Robert Cronin, Esquire, on January 30, 2008. Prior to any sentencing proceedings, the court received a presentence investigation report conducted by the State Board, and a sentence report conducted by the prison. N.T., 1/18/2008, p. 2. The sentence report conducted by the prison stated that Mr. Cobbs had not been a disciplinary problem but that he was, however, written-up on October 30, 2007. N.T., 1/18/2008, p. 2.

On January 18, 2008, the District Attorney's office began its argument and reported that Mr. Cobbs had a prior record score of 4, based on a 1985 felony one robbery conviction. N.T., 1/18/2008, p. 19-20. The court concluded that Mr. Cobbs was entitled to credit for time served as of the date of his arrest on June 16, 2007; Mr. Cobbs was incarcerated since that date. N.T., 1/18/2008, pp. 3-4. No other matters were disposed of on January 18, 2008, due to Mr. Cobbs'

request, on that date, to be represented by appointed counsel; Mr. Cobbs made an oral request that day to have counsel appointed for sentencing, appeal, petition under the Post Conviction Relief Act, and any other petition. N.T., 1/18/2008, p. 7. This last minute request for counsel was confused because Mr. Cobbs requested to have counsel appointed, but also made it clear that he did not want counsel appointed from the Public Defender's office. N.T., 1/18/2008, p. 7. After hearing argument by Mr. Cobbs on why he should have counsel outside the Public Defender's office appointed, it was ordered and directed that the Public Defender's Office of Lycoming County was appointed to represent Mr. Cobbs; thus, sentencing was continued. N.T., 1/18/2008, pp. 15-20.

This court reconvened for sentencing in Mr. Cobbs' case on January 30, 2008. The Commonwealth contended that, in addition to his prior record score being a four, the offense gravity of Mr. Cobbs' conviction was a ten based on the fact that the Mr. Cobbs possessed a weapon with ammunition. N.T., 1/30/2008, p. 19. In determining the appropriate sentence, however, the court did take into consideration the arguments made by First Assistant District Attorney Kenneth Osokow on behalf of the Commonwealth. ***Id.*** at pp. 17-22. And while we found that these matters did not raise the offense gravity score to a 10, they nevertheless were aggravating circumstances. At trial the Commonwealth showed that although the gun had no clip, the gun was fully functional without the clip. N.T. 10/29/2007, p. 31. Agent Sorage personally test-fired the gun without the clip with Captain Lynn of the Williamsport Bureau of Police and found the gun to be fully functional by manually loading a round into the chamber. ***Ibid.*** *See also* Commonwealth's Exhibit No. 15. During the sentencing proceeding, we commented that "the presence of the clip or non-presence of the clip is not an aspect of the

matter." N.T. 1/30/2008, p. 25. We explained our decision regarding the gravity score of Mr. Cobbs' offence, "the difference between a nine and a ten," as Mr. Cobbs not having technical constructive possession of the gun in the way that the gravity score becomes a ten; "because the gun was in the home[,]… Mr. Cobbs' contact with the police in this issue in this case occurred when he's down at the [DMJ]'s office, taken into custody there,… we don't have possession under the factual situation where the significant presence of harm or potential of harm exists." ***Id*** at 26. The gravity score is a nine because Mr. Cobbs was not in a possession to immediately use the gun. ***Id*** at 27.

On January 30, 2008, we listened to arguments from both sides and made a decision which we explained on the record (we had the benefit of a pre-sentence investigation report by the State Board and a sentence report conducted by the prison, we considered Mr. Cobbs' prior record, we considered time served). The court's decision meaningfully considered the facts of the crime and the character of the offender. Under count one, Persons not to Possess Firearms, we found the offense gravity score was a nine and the prior record score was a four. Under count one, Mr. Cobbs was sentenced to serve a minimum term of 54 months and a maximum term of 10 years, and to pay a fine in the amount of $500.00. Under count two, Possession of a Controlled Substance, Mr. Cobbs was sentenced to serve a minimum term of four months and a maximum term of one year, and to pay a fine in the amount of $100.00. The sentences were imposed consecutively. Thus, Mr. Cobbs was correctly sentenced to a cumulative sentence of 58 months to 11 years.

CONCLUSION

Given the overwhelming evidence of Mr. Cobbs' guilt, the jury's verdict of October 30, 2007 and the court's sentence of January 30, 2008 should be affirmed and Mr. Cobbs' appeal dismissed.

BY THE COURT,

William S. Kieser, Judge

cc: Thomas Cobbs-HK5886, SCI Waymart, P.O. Box 256, Route #6, Waymart, PA 18472
DA
PD
Judges
Gary L. Weber, Esquire (Lycoming Reporter)