IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-333-2007**
vs.	**:**	**CRIMINAL**
	:	
JASON McCOY,	**:**	**Order Re Defendant's Post Sentence**
Defendant	**:**	**Motion**

This matter came before the Court on Defendant's Post Sentence Motion. In his motion Defendant raises three issues: (1) the evidence was insufficient to establish the intent element for the theft conviction in that it did not show beyond a reasonable doubt that Defendant had an intent to deprive the owner of his property at the time of the taking; (2) the jury's verdict on the theft charge was against the weight of the evidence; and the sentence imposed by the Court was excessive.

Defendant first asserts that the evidence was insufficient to show he had the intent to deprive the owner at the time of the taking. The Court cannot agree. When reviewing a sufficiency claim, the Court must view the evidence, and all reasonable inferences deducible therefrom in the light most favorable to the Commonwealth as the verdict winner. ***Commonwealth v. Davido***, 582 Pa. 52, 60, 868 A.2d 431,435 (Pa. 2005). With this standard in mind, the relevant facts follow.

On November 8, 2006, Defendant went to a local automobile dealership and inquired about buying a 1999 black Dodge diesel pick-up truck. He told the salesman he would be obtaining financing through his credit union and asked if he could take the truck overnight to get photographs taken for financing purposes. The salesman approved Defendant taking the vehicle for one day. Defendant took the vehicle, but never contacted his credit union and did not bring the vehicle back the next day. The salesman made phone

calls to Defendant. Defendant did not answer, so he left messages but none were returned. The salesman then turned the matter over to the sales manager.

The sales manager then made phone calls to Defendant. The sales manager made contact with Defendant and made arrangements for an appointment the following afternoon, but Defendant failed to keep the appointment. The sales manager informed the general manager about the situation. The police were contacted about the vehicle not being returned. Officer Guyrina called Defendant on November 10 and left a message that the vehicle needed to be returned. He called again on November 11 and left a message for Defendant to return the vehicle or he would be arrested. The general manager also left messages on Defendant's phone, but Defendant did not return those calls either.

At some point Defendant called the sales manager and said he would come in on Saturday. Defendant did not come in on Saturday nor did he return the vehicle to the dealership. However, he called on Saturday and said the truck had broken down and was located on Route 220 at the Thomas Street exit for Jersey Shore. The salesman located the truck off the Jersey Shore exit. The keys were in the ignition and the doors were unlocked. Although the truck was muddy inside and out and the running boards and bumper were damaged from Defendant having gone "off-roading," the truck started right up and the salesman drove it back to the dealership.

The Court finds the evidence taken as a whole was sufficient to prove beyond a reasonable doubt that Defendant had the intent to deprive the owner of his property at the time of the taking. Although Defendant claimed he intended to purchase the vehicle, his actions prove otherwise. Defendant told the salesman he intended to finance the vehicle through his credit union and he asked to take the vehicle overnight to have photographs taken

to get that financing, but he never contacted his credit union and did not return the vehicle the next day. When the sales manager contacted him about returning the vehicle, he made appointments to come in to the dealership, but failed to keep them. He claimed he could not return the vehicle to the dealership on Saturday because it broke down, but when the salesman retrieved it from the Jersey Shore exit, it started right up and the salesman was able to drive it back to the lot. Defendant also claimed he left the keys in the console, but the salesman found them in the ignition. Based on this evidence, the jury could reasonably reject the credibility of Defendant's statement that he intended to purchase the vehicle and find that he intended to deprive the owner of vehicle.

Defendant also claims the verdict was against the weight of the evidence because the evidence did not establish that Defendant had the intent to deprive the owner of the property at the time of the taking. Again, the Court cannot agree.

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. ***Ibid***. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. ***Ibid***. 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. ***Ibid***.

The jury's verdict did not shock the court's sense of justice. Essentially, this case boiled down to credibility battle pitting the witnesses from the automobile dealership

against Defendant and his father. The witnesses from the dealership testified that Defendant told them he was going to obtain financing through his credit union and he wanted to take the vehicle overnight so photographs could be taken to obtain that financing. Defendant testified he never told the salesman he was going to finance the transaction through his credit union and he and his father stated he was getting the money to finance the truck through his father. The dealership witnesses testified Defendant was only approved to take the truck for one day; Defendant claimed he was never told that. The dealership witnesses testified that despite making appointments, Defendant never returned the truck to the dealership. Defendant countered that he was going to bring the truck back on Saturday but it broke down at the one of the Jersey Shore exits of Route 220. However, when the salesman went to retrieve the vehicle, it started right up and he was able to drive it back to the dealership.

Credibility determinations are within the sole province of the jury, which is free to believe all, part or none of the evidence presented. ***Commonwealth v. Diggs***, 597 Pa. 28, 39, 949 A.2d 873, 879 (Pa. 2008); ***Commonwealth v. Cousar***, 593 Pa. 204, 217, 928 A.2d 1025, 1032-33 (Pa. 2007). It did not shock the Court that the jury apparently chose to believe the dealership witnesses and find the defense witnesses were not credible.

Defendant's final contention is that the sentence imposed was excessive. The jury convicted Defendant of theft,[1] a felony of the third degree, and criminal mischief, a misdemeanor of the third degree. The offense gravity score for theft was a five and

1 The manner of the theft is immaterial given the consolidation of theft offenses in section 3902 of the Crimes Code, 18 Pa.C.S.§3902, which states in relevant part: "An accusation of theft may be supported by evidence that is was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment, subject only to the power of the court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise."

Defendant's prior record score was at least a four,[2] resulting in a standard minimum guideline range of nine to sixteen months. The Court imposed a sentence of incarceration in state correctional institution for a minimum of one year and a maximum of three years.[3] The minimum was in the middle of the standard guideline range. With a minimum of one year, the maximum had to be at least two years, but not more than seven years. See 42 Pa.C.S.A. §9756(b)(1); 18 Pa.C.S.A. §1102(3). The three year maximum imposed was toward the bottom of that range. The Court felt the sentence was appropriate in light of the circumstances of the case and Defendant's prior history of forgery, theft and bad check offenses. The Court did not believe a county sentence was appropriate, because Defendant was already serving a state sentence in another case.

O R D E R

AND NOW, this ____ day of June 2009, the Court DENIES Defendant's Post Sentence Motion.

By The Court,

_____
Kenneth D. Brown, P.J.

cc: Paul Petcavage, Esquire (ADA)
Robert Cronin, Esquire (APD)
Work file

2 Defendant's rap sheet showed a felony two forgery, a felony three theft, a DUI, and at least two misdemeanor bad check convictions. There were several additional bad check charges that either were not showing up on the rap sheet or the rap sheet indicated "disposition unreported" that it appeared Defendant had a conviction for: CP-41-CR-2270-1998; CP-53-CR-306-2004; CP-18-CR-002-2005; CP-18-CR-003-2005.
3 The Court imposed a concurrent one to twelve month sentence for criminal mischief. The minimum guideline range for that offense was restorative sanctions (RS) to four months.