

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
<b>v.</b>	:	<b>No. 2000-2008</b>
	:	<b>CRIMINAL DIVISION</b>
<b>LAWRENCE LEWIS, JR.,</b>	:	<b>APPEAL</b>
<b>Defendant</b>	:	

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

The Defendant appeals the Judgment of Sentence entered by this Court on January 8, 2010. The Defendant filed a Notice of Appeal on February 8, 2010, and on February 9, 2010, this Court directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a concise statement of matters complained of on appeal. The Court received the Defendant's concise statement of matters complained of on appeal on March 9, 2010.

The Defendant raises four issues on appeal: 1) the Court erred in denying the mistrial based on the Commonwealth witness taking the Fifth Amendment during her direct examination; 2) the Court erred in denying the requested mistrial based upon questions asked of the Defendant about his failure to contact a potential witness favorable to him which reflected on his failure to call the witness and evoked the information that he was incarcerated; 3) the Court erred in denying the mistrial based on the testimony that the Defendant was arrested at his probation officer's office indicating prior criminal conduct on the part of the Defendant; 4) the Court should have granted a mistrial based on the cumulative effect of the errors alleged and requested mistrials.

***The Court erred in denying the mistrial based on the Commonwealth witness taking the Fifth Amendment during her direct examination***

The Defendant contends that the Court erred when it denied the Defendant's request for a mistrial based on the fact that the Commonwealth's witness invoked the Fifth Amendment during her direct examination. As the Commonwealth's only female witness was Jasmeen Husman, the Court supposes the Defendant is referring to Ms. Husman's testimony in his first issue on appeal. A review of the record reveals that Ms. Husman never invoked the Fifth Amendment during her direct examination. Ms. Husman did however invoke the Fifth Amendment during her redirect examination. Therefore, the Court again supposes that Ms. Husman's redirect examination testimony is the testimony the Defendant references in his first issue on appeal.

Transcripts from the jury trial held November 2, 2009, before the Honorable Nancy L. Butts reveals the following exchange between the Prosecution and the witness Ms. Husman:

Q. Did you know why the Defendant was meeting with Mr. Travers?

A. Can I speak to my lawyer?

THE COURT: Do you have any objection to her speaking to him?

MR. LEONARD: No.

Thereafter Ms. Husman spoke with her attorney and then resumed the stand where Mr. Leonard asked her:

Q. Ma'am, I've been advised by Mr. Lepley that it would be your intention to exercise your privilege under the Fifth Amendment not to answer that question. Am I correct?

A. Yes, sir.

N.T. 11/2/2009. P. 58-59. At trial the Defense Counsel objected to the Prosecution advising that the witness invoked her Fifth Amendment privilege. The Defense Counsel argued that once the Prosecution was aware that Ms. Husman intended to invoke her Fifth Amendment privilege, the subject should have been discussed outside the presence of the jury. The Defense Counsel further argued that the Prosecution's statement that Ms. Husman intended to invoke her Fifth Amendment privilege allowed the jury to draw inferences that Ms. Husman invoked the Fifth Amendment because she was aware that illegal activity was going on. The Defense Counsel stated that Ms. Husman could have invoked the Fifth Amendment for many reasons unrelated to her knowledge of the Defendant's illegal activity. The court in Commonwealth v. Du Val, 307 A.2d 229 (1973) stated that:

...the prosecution, once informed that a witness intends to claim a privilege against self-incrimination, commits error in calling that witness to the stand before the jury where the witness is a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose. Whether or not the prosecution has a good faith belief that the assertion of privilege is legally invalid is irrelevant; that matter can be settled outside the hearing of the jury.

MR. LEONARD: ...I thought that was the proper way to present the evidence. I anticipated the answer being I don't know based on the reports that she didn't know what the activity was going on so I anticipated that answer.

THE COURT: Were you surprised by this answer?

MR. LEONARD: Yes.

N.T. 11/2/2009. P. 60. As the Prosecution was not aware that Ms. Husman planned to invoke her Fifth Amendment right against self incrimination during her testimony, the Court believes its decision to not grant a mistrial was correct.

***The Court erred in denying the requested mistrial based upon questions asked of the Defendant about his failure to contact a potential witness favorable to him which reflected on his failure to call the witness and evoked the information that he was incarcerated***

The Defense Counsel claims that the Court erred when it denied the Defense Counsel's request for a mistrial based upon questions asked of the Defendant about his failure to contact a potential witness favorable to him. The Defense Counsel claims that this line of questioning revealed that the Defendant failed to call this potential witness while exposing the fact that the Defendant was incarcerated. Transcript of the Jury Trial held on November 3, 2009, before the Honorable Nancy L. Butts, reveals the following exchange between the Prosecution and the Defendant:

Q. ... I guess my point is that when you learned what you were charged with then you realized you were with Nicole playing a video game as you're testifying today, is that right?

A. I was at her house, yeah.

Q. My question to you is did you go to her and her brother, whoever was there, and say you guys were present when I was involved in this February 19<sup>th</sup> I remember it vividly?

A. When I got arrested?

Q. Yeah?

A. No, I didn't. I was in jail why would - - how would I go to her house?

N.T. 11/3/2009. P.153. The Court believes it is clear that the Prosecutor did not ask the question quoted above in order to deliberately elicit from the Defendant the fact that the Defendant was incarcerated. In his response to the Prosecutor's statement, the Defendant volunteered the information that he was in jail. The Defendant could have answered the Prosecutor's question about the Defendant's failure to contact potential witnesses many ways without revealing the fact that the Defendant was incarcerated. As it appears that the Defendant volunteered the

information that he was incarcerated without the deliberate prompting of the Prosecutor, the Court believes its decision not to grant a mistrial on this issue was correct.

***The Court erred in denying the mistrial based on the testimony that the Defendant was arrested at his probation officer's office indicating prior criminal conduct on the part of the Defendant***

The Defense Counsel claims that the Court erred when it denied a mistrial based on the testimony that the Defendant was arrested at his probation officer's office, which indicated that the Defendant had a prior criminal history. A review of the transcript from the jury trial reveals that during his testimony, Agent Don Mayes revealed that the Defendant was arrested at the probation department. The transcript reveals the following exchange between the Prosecution and Agent Mayes:

Q. If you know do you know when approximately or definitely when Mr. Lewis was arrested for the cocaine that was delivered on February 19<sup>th</sup> of '08?

A. Well, he was arrested sometime later, couple months down the road because we were still using Mr. Travers as a confidential informant because he had other targets and sources that we were working on. ...I remember Mr. Lewis was arrested at the probation office...

N.T. 11/2/2009. P. 86-87. The court in Commonwealth v. Mumford, 16 Phila. 203, 208 (Phila. Cnty. 1987) makes it clear that:

...as a practical matter, any mere passing reference to an accused's prior criminal activity in the **testimony** of a witness raises only a *potential* reason for the possible declaration of a mistrial, and it is only in those cases in which such **testimony**, either expressly or by reasonable implication, conveys to a jury the fact that the accused has engaged in such activity that a mistrial is warranted.

See Commonwealth v. Banks, 311 A.2d 576 (1973). In the present case, Agent Mayes' statement could hardly be characterized as even a passing reference to the Defendant's prior criminal activity. Agent Mayes merely stated the location of the Defendant's arrest. The

Defendant was not necessarily at the probation officer's office because he was involved in prior criminal activity; there are many reasons why the Defendant could have been at the probation office. However, assuming that Agent Mayes' statement did indeed amount to a passing reference to the Defendant's prior criminal activity, it is clear that the testimony did not convey to the jury, either expressly or by reasonable implication, the fact that the Defendant engaged in prior criminal activity. Therefore, it is clear that the Court was correct in its decision to deny a mistrial based on the testimony from Agent Mayes regarding the location of the Defendant's arrest.

***The Court should have granted a mistrial based on the cumulative effect of the errors alleged and requested mistrials***

The Defense Counsel alleges that the Court should have granted a mistrial based on the cumulative effect of the errors alleged and the requested mistrials. Relevant to this claim is the court's statement in Commonwealth v. Dennis, 950 A.2d 945, 987 (2008) that "... no number of failed claims may collectively attain merit if they could not do so individually." Quoting Commonwealth v. Bracey, 795 A.2d 935, 948 (2001). As the Defense Counsel's claims do not have merit individually, they also do not have merit collectively.

***Conclusion***

As none of the Defendant's contentions have merit, it is respectfully suggested that this Court's Judgment of Sentence of January 8, 2010, be affirmed.

DATE: \_\_\_\_\_

Respectfully Submitted,

Nancy L. Butts, President Judge

xc: DA  
James R. Protasio, Esq.  
Amanda Browning, Esq. (Law Clerk)  
Gary L. Weber (LLA)