

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 387-2008
	:	CRIMINAL DIVISION
SALVATORE GAINEY,	:	APPEAL
Defendant	:	

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

The Defendant appeals the Order of the Court dated January 12, 2011, which denied by operation of law the Defendant's Post-Sentence Motion. The Defendant filed a Notice of Appeal on February 10, 2011, and on February 14, 2011, the 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 on January 18, 2011. This Opinion is delayed due to a holdup in receiving the relevant transcripts.

The Defendant raises several issues on appeal: 1) the Court erred in allowing the Commonwealth to place a witness on the stand to invoke her 5th Amendment right to remain silent after the Commonwealth was informed that the witness was going to utilize her 5th Amendment right; 2) the Court erred by allowing the witness to be questioned after she invoked her 5th Amendment right; and 3) the Court erred by limiting cross-examination of that witness when that witness demonstrated a close relationship to the Defendant.

Background

On December 31, 2007, officers of the Williamsport Bureau of Police were patrolling areas known to be predominately student housing due to a rash of burglaries in the area. The officers were investigating fresh footprints in the snow in the area of Maynard Street and School Alley when they discovered that a window had been broken out of the basement at 213 Maynard

Street. The officers followed the footprints to the front door of 823 Memorial Avenue, and then on to 821 Park Ave, where they came into contact with Williams Adams (Adams) (a/k/a B.J. Adams). Adams was wearing shoes that matched the shoe prints found in the snow and was taken into custody. While officers were still on scene at 823 Memorial Avenue, the front door opened and a black male began to exit from the residence. The black male was holding a gallon-size baggie full of assorted coins. The male was later identified as Salvatore Gainey (Defendant). The Defendant placed his hand on the outside of his front pants' pocket and then put his hand in his pocket, as if he was attempting to grab something from inside his pocket. The officers stopped Gainey and ordered him to keep his hands out of his pockets. Also present inside 823 Memorial Avenue were Darnell Mitchell (Mitchell) and Towanda Johnson (Johnson), both residents of that address. Johnson invited the officers inside of the residence. Once inside the residence, Officer Eric Houseknecht advised the Defendant of his Miranda Rights; however, the Defendant agreed to speak without an attorney. The Defendant admitted to buying the bag of coins from someone known as "Ben." The Defendant relayed that "Ben" had just left 823 Memorial Avenue before the officers arrived, and that it was "Ben's" footprints leading up to, and then away from, the residence. Both the Defendant and Adams were taken into custody and then taken to City Hall. The Defendant identified Adams as "Ben" during a photo array. Adams was later advised of his Miranda Rights and agreed to speak with the police. Adams admitted that he burglarized the residence at 213 Maynard Street about 45 minutes before the police contacted him. Adams admitted that he broke a basement window out of the residence, located on the west side of the street, to gain entry. Adams admitted that he took a large amount of change from the residence and that he then went to his cousin's residence at 823 Memorial Avenue. Adams also stated that he knew that the Defendant had possession of a small black semi automatic handgun and that he thought the Defendant probably stored the handgun at his

girlfriend's residence at 6F Timberland. Based upon this information, Captain Raymond Kontz III (Kontz) of the Williamsport Police Department went to the residence of Latoya Hall located at 750 Edwin Street, 6-F, in Timberland Apartments, to search for the firearm. Upon a search of Hall's residence, the police discovered a small semi-automatic handgun. When confronted with the discovery of the firearm during the search, the Defendant admitting to purchasing the handgun from Adams approximately a week and a half earlier. The Defendant was then charged and later convicted by a jury of Persons Not to Possess Firearms 18 Pa.C.S. §6105.

Discussion

The Court finds that the issues raised on appeal are interrelated and will address them collectively. At trial, the Commonwealth called as a witness Latoya Hall, with whom the Defendant has a child. N.T., 4/23/2010, p. 80. The Defendant believes that the Court erred in allowing the Commonwealth to place Hall on the stand to invoke her 5th Amendment right to remain silent after the Commonwealth was informed that Hall was going to do so. The Court acknowledges that it is improper to allow a witness to take the stand solely to invoke their 5th Amendment right to remain silent. See Commonwealth v. Greene, 285 A.2d 865, 867 (Pa.1971). However, in this case Hall did not invoke the 5th Amendment right on all questions that were asked of her. Hall's testimony provided evidence that the firearm in question existed and evidence as to the location of the firearm. N.T., 4/23/2010, p. 81. Therefore, the Court believes it did not err in allowing Hall to testify while knowing in advance that Hall would invoke the 5th Amendment.

The Defendant also contends that the Court erred by allowing the witness to be questioned after she invoked her 5th Amendment right. During questioning by the Commonwealth, Hall initially invoked her 5th Amendment privilege to avoid answering questions concerning the

circumstances surrounding the police search of her apartment. N.T., 4/23/10, p. 83. However, the Court then allowed the Commonwealth to re-ask the questions so that Hall could simply describe what happened when the police searched her apartment. N.T., 4/23/10, p. 84-87. The Court does not believe this action was in error. It was clear to the Court that the witness was following the instructions given to her by her court appointed counsel. Once counsel explained to her the purpose of the privilege, she was able to answer the questions for the Commonwealth which clearly did not implicate her in a crime.

Finally, the Defendant argues that the Court erred by limiting the cross-examination of Hall when the witness demonstrated that she had a close relationship with the Defendant. A review of the record reveals that the Court did not allow Defense Counsel to cross-examine Hall as to her knowledge of the extent of Adams' peddling habits. N.T., 4/23/10, p. 97. Adams was a third party to this case and not the Defendant. The Court does not see how limiting Defense Counsel's questioning on this subject could be prejudicial to the Defendant. Furthermore, the Defendant himself fails to allege any specific way in which he was prejudiced. Therefore, the Court does not believe this decision was in error either.

It is respectfully suggested that this Court's trial rulings relating to the testimony of Latoya Hall be affirmed on appeal.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

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