

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	DOCKET NO. 1344-2010
	:	DOCKET NO. 81-2011
vs.	:	CRIMINAL DIVISION
	:	
DEBORAH McKISSICK,	:	POST-SENTENCE
Defendant	:	MOTION

OPINION AND ORDER

AND NOW, this 1st day of August, 2012, following oral argument on Defendant's Post-Sentence Motion, it is hereby ORDERED and DIRECTED that the motion is GRANTED in part and DENIED in part. Specifically, Defendant's Motion for Judgment of Acquittal on Counts 1 and 2 of Information No. CR-81-2011 is DENIED. However, as the parties have agreed that Defendant's prior record score should have been calculated as a four (4) instead of a five (5), Defendant's Motion to Modify Sentence is GRANTED. The resentencing of Ms. McKissick is scheduled for **October 9, 2012, at 4:00 p.m.**, in Courtroom No. 3. The Lycoming County Sherriff's Office shall transport Ms. McKissick for the hearing.

I. Procedural and Factual Background

a. Information No. CR-1344-2010

On October 7, 2010, Defendant was charged with two counts of Theft by Unlawful Taking or Disposition (Counts 1 and 2), Criminal Attempt (Count 3), two counts of Identity Theft (Counts 4 and 5), two counts of Forgery (Counts 6 and 7), and two Counts of Theft by Deception (Counts 8 and 9), pursuant to 18 Pa. C.S. §§ 3921(a), 901(a), 4120(a), 4101(a)(2), and 3922(a)(3), respectively. *See* CR-1344-2010 Information. On April 9, 2012, Defendant pled guilty to both counts of Forgery (Counts 6 and 7). *Id.* On March 1, 2012, after a non-jury trial,

the Court found defendant guilty of two counts of Theft by Unlawful Taking or Disposition (Counts 1 and 2), Criminal Attempt (Count 3), one count of Identity Theft (Count 4), and one count of Theft by Deception (Count 8). On April 19, 2012, after a non-jury trial, the Court found Defendant guilty of the remaining two counts, i.e. Identity Theft (Count 5) and Theft by Deception (Count 9).¹

b. Information No. CR-41-2011

On March 3, 2011, Defendant was charged with Theft by Unlawful Taking or Disposition (Count 1), Receiving Stolen Property (Count 2), Theft by Failure to Make Required Disposition of Funds Received (Count 3), and Unauthorized Use of Automobiles and Other Vehicles (Count 4), pursuant to 18 Pa. C.S. §§ 3921(a), 3925(a), 3927(a), 3928, respectively. *See* CR-41-2011 Information. On June 12, 2012, after a non-jury trial, the Court found Defendant guilty of Theft by Unlawful Taking (Count 1), Receiving Stolen Property (Count 2), and Unauthorized Use of a Motor Vehicle (Count 4).²

c. Sentencing

On June 18, 2012, the Court sentenced Defendant. This Court specifically found Defendant to be eligible for RRRI sentencing provisions. The Court calculated Ms. McKissick's sentence as though her prior record score was a five (5); this calculation was based upon the pre-sentence investigation and the Court's own calculations.

d. Post-Sentence Motion

On June 28, 2012, Defendant filed her Post-Sentence Motion. In this motion, Defendant included a Motion for Judgment of Acquittal on Counts 1 and 2 of Information No. CR-81-2011

¹ Upon Defendant's Motion to Sever, the Court severed Counts 1, 2, 3, 4, and 8 from Counts 5, 6, 7, and 9 because two separate victims were involved in the matter.

² At the time scheduled for the non-jury trial, the Commonwealth withdrew the count of Theft by Failure to Make Required Disposition of Funds Received.

and a Motion to Modify Sentence. On July 18, 2012, this Court heard oral argument on the post-sentence motion. At oral argument, the Commonwealth conceded that Defendant's Motion to Modify Sentence should be granted, due to the fact that Defendant's prior record score was improperly calculated as a five (5) by its office, the adult probation office, and the Court.³

II. Discussion

In her motion, Defendants requests the Court to enter a judgment of acquittal as to Count 1 (Theft by Unlawful Taking or Disposition) and 2 (Receiving Stolen Property) of the Information No. 81-2011; the Court will not acquit Defendant of these charges.

In *Commonwealth v. Foster*, 33 A.3d 632 (Pa. Super. Ct. 2011), our Superior Court stated the standard to be applied when a judgment of acquittal is requested. *Id.* at 634-35. In particular, the Court stated: “[a] motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.” *Id.* at 635 (citing *Commonwealth v. Hutchinson*, 947 A.2d 800, 805-06 (Pa. Super. Ct. 2008), *appeal denied*, 980 A.2d 606 (Pa. 2009), (citing *Commonwealth v. Andrulowicz*, 911 A.2d 162, 165 (Pa. Super. Ct. 2006))).

In her Motion for Judgment of Acquittal, Defendant argues that the evidence presented by the Commonwealth was insufficient to sustain a guilty verdict on the counts of theft by unlawful taking or disposition and receiving stolen property. Specifically, regarding the count of theft by unlawful taking, Defendant argues that the evidence does not establish that she had the intent to deprive the owners, Jon and Kelly Jean, of their vehicle. In support of this argument,

³ This discrepancy arose as a result of Defendant's conviction of Forgery in the State of Maryland. These offices determined that Defendant received two (2) points towards her prior record score as a result of this conviction. However, the parties and the Court agree that Defendant should have received only one (1) point towards her prior record score from this conviction because the writing that the conviction was based upon was a check, i.e. a commercial instrument. *See* 18 Pa. C.S. § 4104(c).

Defendant reminds the Court that she made payments to the vehicle's lien holder, Sovereign Bank, while she was in possession of the vehicle, so that the bank did not repossess the vehicle. Additionally, she reminds the Court that the debt on the vehicle was eventually discharge in the Jeans' bankruptcy proceeding, thus, causing the Jeans no monetary loss. In regard to the count of receiving stolen property, Defendant argues that the evidence does not establish that the property was stolen. Defendant claims she merely used the vehicle without the Jeans' consent.

Both of Defendant's claims pertain to the sufficiency of evidence presented during her non-jury trial pertaining to Information No. CR-81-2011. Our Supreme Court has long held that the trier of fact determines the sufficiency of evidence presented during trial. *Commonwealth v. Solano*, 906 A.2d 1180, 1186 (Pa. 2006); *Commonwealth v. Chapney*, 832 A.2d 403, 408 (Pa. 2003). Specifically, that Court has held that "[t]he question of the weight of the evidence is one reserved exclusively for the tier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses." *Id.*

In both of the above-captioned matters, the Court held non-jury trials. Therefore, the sufficiency of the evidence in these matters is at the discretion of this Court. After review of Defendant's post-sentence motion, this Court AFFIRMS its verdicts as to Counts 1 and 2 of Information No. CR-81-2011. Although the Court believes that Defendant's arguments are partially duplicative, it will address each argument in turn.

a. Theft by Unlawful Taking or Disposition

In Pennsylvania, one is guilty of theft by unlawful taking or disposition of movable property "if he unlawfully takes, or exercises unlawful control over, movable property of another, with intent to deprive him thereof." 18 Pa. C.S. § 3921(a). One deprives another of their property when one "withholds property of another permanently" or "disposes of the

property so as to make it unlikely that the owner will recover it.” 18 Pa. C.S. § 3901; *Commonwealth v. Goins*, 867 A.2d 526, 528 (Pa. Super. Ct. 2004). One who maintains unlawful control over another’s movable property can be found guilty of theft, even if the individual did not originally misappropriate the property. *Commonwealth v. Adams*, 388 A.2d 1046, 1048 (Pa. 1978); *Commonwealth v. Shaffer*, 420 A.2d 722, 725 (Pa. Super. Ct. 1980). Additionally, the Court notes that monetary loss is not an element of this crime. *See Commonwealth v. Rosenzweig*, 522 A.2d 1088, 1092 (Pa. 1987).

In this instance, Defendant does not contest the fact that she had unlawful control over the movable property; Defendant argues that she did not have the requisite intent for the crime. This Court cannot agree.

In *Commonwealth v. Newton*, 994 A.2d 1127 (Pa. Super. Ct. 2010), our Superior Court held that “[o]ften, intent cannot be proven directly but must be inferred from examination of the facts and circumstances of the case.” *Id.* at 1132 (citing *Commonwealth v. Pond*, 846 A.2d 699, 707 (Pa. Super. Ct. 2004) (citations omitted)). Therefore, in this instance, the Court must look at the totality of the circumstances to determine if Defendant had the appropriate *mens rea* for the crime, i.e. intent to deprive, by analyzing the evidence and all reasonable inferences derived therefrom. *See id.*

In this instance, Defendant retained the Jeans’ vehicle, without their permission, for a period of approximately nine months. Defendant acquired the vehicle from the Jeans in her practice as a paralegal; however, Defendant acquired this vehicle under the condition that she was going to then surrender the vehicle to Sovereign Bank (also known as Santandar), as a part of the Jeans’ bankruptcy settlement. The Jeans never gave Defendant permission to use the vehicle as her own. Yet, instead of surrendering the vehicle to Sovereign Bank, Defendant used

the vehicle as her own for a period of approximately nine months. Defendant had the vehicle's safety and emissions inspected within days after the Jeans believed they surrendered the vehicle because these inspections were not current. During the course of her nine months of use, Defendant made payments on the vehicle to Sovereign Bank to prevent the vehicle being repossessed. Defendant allowed her boyfriend to drive the vehicle as well. It was not until Defendant was incarcerated and Defendant's boyfriend abandoned the vehicle that law enforcement became aware of Defendant's actions. Specifically, law enforcement officials were called by a business owner when the vehicle was reported as abandoned in his quarry. When law enforcement officials were put on notice of the abandoned vehicle, the Jeans were listed as the record owners.

In this motion, Defendant argues that she intended to return the vehicle to the Jeans. However, Defendant provided no evidence of this intent to return. At the time of the non-jury trial, the parties stipulated to the facts as provided for in the affidavit of probable cause. In this affidavit, there is no evidence that remotely suggests Defendant intended to return the vehicle to the Jeans. In fact, the evidence tends to show that Defendant never intended to return the vehicle. Defendant had the vehicle inspected and made payments on the vehicle for the better part of nine months. Additionally, Defendant's personal belongings were found in the car, and evidence shows that she allowed her boyfriend to drive the vehicle. No evidence suggests that Defendant had any intent to return the vehicle to anyone. Defendant intended to use this vehicle as her own vehicle, and she took every step to ensure that her use would not be discovered. It was not until Defendant was incarcerated that the vehicle was discovered. This Court cannot find that Defendant had any intention to return the vehicle to the Jeans or further surrender the

vehicle to Sovereign Bank. Therefore, the Court affirms its guilty verdict as to Count 1 – Theft by Unlawful Taking or Disposition, at CR-81-2011.

b. Receiving Stolen Property

In *Commonwealth v. Galvin*, 985 A.2d 783 (Pa. 2009), our Supreme Court stated “[r]eciving stolen property is established by proving that the accused ‘intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.’” *Id.* at 792 (citing 18 Pa. C.S. § 3925(a)). *See Newton*, 994 A.2d at 1131. In order to be convicted of this crime, one’s mental state must be “knowing” or believing.” 18 Pa. C.S. § 3925(a); *Newton*, 994 A.2d at 1131. Again, intent may be proven by circumstantial evidence, and the Court must examine the totality of the evidence to determine if the requisite mental state has been proven. *Newton*, 994 A.2d at 1134. Acts of concealment are strong indicators that one acted with the knowledge that property was stolen. *Id.*

In this instance, Defendant argues that the property, i.e. the Jeans’ vehicle, was not stolen. Defendant alleges that the property was only used without the Jeans’ consent. This Court cannot agree.

When viewing the totality of the evidence and Defendant’s efforts to conceal her use of the vehicle, it is evident to the Court that Defendant acted with the knowledge that the vehicle was not only stolen, but stolen by her. The Jeans surrendered the vehicle to Defendant in her capacity as a paralegal; the Jeans anticipated that Defendant would further surrender the vehicle to Sovereign Bank as part of the Jeans’ bankruptcy settlement. Instead of surrendering the vehicle to the bank, Defendant had the vehicle inspected, changed the mailing address in the vehicle registry from the Jeans’ address to the address of her employer, and made payments on

the vehicle to the bank for approximately nine months. Under these facts, this Court cannot find that the vehicle was just merely used without the Jeans' consent; the Court finds that the vehicle was stolen by Defendant. Therefore, the Court affirms its guilty verdict as to Count 2 – Receiving Stolen Property, at CR-81-2011.

III. Conclusion

As previously noted, pursuant to an agreement by the parties, the Court GRANTS Defendant's Post-Sentence Motion in regard to her Motion to Modify Sentence. Ms. McKissick will be resentenced by the Court on **October 9, 2012, at 4:00 p.m.**

However, based upon the foregoing, this Court finds no reason upon which to grant Defendant's Post-Sentence Motion in regard to her Motion for Judgment of Acquittal on Counts 1 and 2 of Information No. CR-81-2011. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this order within thirty (30) days of its date to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in preparation of the appeal; (c) the rights, if...indigent, to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)." Pa. R. Crim. P. 720(B)(4).

ORDER

AND NOW, this 1st day of August, 2012, based upon the reasons stated above, it is hereby ORDERED and DIRECTED that Defendant's Post-Sentence Motion is GRANTED in part and DENIED in part.

BY THE COURT,

Date

Richard A. Gray, J.

RAG/abn

cc: DA (AB)
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