G. Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1398-2007**
vs.	:	
	:	**Opinion and Order re**
THOMAS UNGARD,	:	**Defendant's Post Sentence Motion**
Defendant	:	

OPINION AND ORDER

This matter came before the Court on defendant's post sentence motion. The relevant facts follow.

Defendant was the coordinator of the Lycoming County Drug Task Force (Task Force), which at that time was under the direction and supervision of the Lycoming County District Attorney's office. In July 2006, a reporter informed the District Attorney that Defendant and the Chief of the Williamsport Bureau of Police allegedly used a forfeited Task Force vehicle to go on a fishing trip to Canada. The District Attorney conducted an internal investigation, during which Defendant admitted he drove a forfeited vehicle to Canada and he paid a sum equivalent to the fair market rental value of the vehicle as restitution to the drug forfeiture account. The District Attorney relieved Defendant of his duties as Task Force coordinator and sent a referral letter asking the Attorney General's office to investigate this incident to determine if a prosecution was warranted. The District Attorney noted the officers involved exercised a serious lapse of judgment, but he had no reason to believe this incident was part of a pattern of conduct.

During the course of the Attorney General's investigation, additional incidents of alleged misconduct were discovered. The incidents included allegations that: (1)

Defendant completed or submitted false title documents for "sham" transactions to make it appear that third parties were purchasing forfeited vehicles when, in fact, Defendant was purchasing the vehicles for members of his family; (2) he removed or destroyed Task Force records; (3) he failed to remit to the Task Force funds from the sale or disposition of three vehicles and some exercise equipment; and (4) he obstructed the administration of law by asking or encouraging a witness to lie to the investigator from the Attorney General's Office.

A criminal complaint was filed on June 12, 2007, charging Defendant with five counts of tampering with public records or information, 18 Pa.C.S. §4911, one count of criminal conspiracy (tampering with public records), 18 Pa.C.S. §903, four counts of theft by failure to make required disposition of funds, 18 Pa.C.S. §3927, one count of obstructing the administration of law or other governmental function, 18 Pa.C.S. §5101 and one count of conflict of interest, 65 Pa.C.S. §1103. All the charges were bound over for court after a preliminary hearing.

On November 1, 2007, defendant filed his Omnibus pretrial motion, which included a request for habeas corpus relief. Hearings on this motion were held before the Hon. John K. Riley, Jr. On October 16, 2008, Judge Reilly granted Defendant's request for habeas corpus relief with respect to counts 1, 2, 3, 4, and 7. Judge Reilly also precluded the Commonwealth from introducing Defendant's oath of office at trial and denied the Commonwealth's motion to amend counts 7, 8, 9, and 10. The Commonwealth appealed this decision on October 27, 2008.

On October 25, 2010, the Superior Court affirmed the ruling regarding the

inadmissibility of Defendant's oath of office, but it reinstated the dismissed counts and found the lower court erred in precluding the Commonwealth's request to amend the theft charges. The Superior Court remanded the case to Lycoming County on or about December 2, 2010.

On December 7, 2011, Defendant filed a Motion to Dismiss pursuant to Rule 600. A hearing on this motion was held on April 29, 2011. The Court denied this motion in an Opinion and Order docketed on June 3, 2011.

A jury trial was held July 18-22, 2011. The jury found Defendant guilty of two counts of tampering with or fabricating public records and one count of obstruction of the administration of law.[1]

On October 12, 2011, the Court sentenced Defendant to 18 months probation. That same day, Defendant filed his post sentence motion.[2]

Defendant first asserts that the court erred when it denied his motion to dismiss, which was filed pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure.

Rule 600(A)(3) mandates that trial in a court case shall commence no later than 365 days from the date on which the complaint is filed when the defendant is at liberty on bail. Pa.R.Cr.P. 600(A)(3). Nevertheless, a defendant is not automatically entitled to dismissal at the expiration of 365 days. Instead, the court must determine whether there is

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[1] The Court dismissed the conflict of interest charge on defendant's motion for judgment of acquittal at the end of the Commonwealth's case-in-chief. The jury acquitted Defendant of three counts of tampering with public records and four counts of theft.

[2] Defendant filed a supplemental post sentence motion on October 27, 2011; however , he subsequently indicated he was withdrawing the claim stated therein, see Brief in Support of Defendant's Post Trial Motions,

any excludable time and, if after deducting the excludable time more than 365 days have elapsed, the court must then determine whether the Commonwealth exercised due diligence. Pa.R.Cr.P. 600 (C) and (G). When an appellate court has remanded a case to the trial court and the defendant has been released on bail, "trial shall commence within 365 days after the date of remand." Pa.R.Cr.P. 600(D)(2).

Although the trial in this case occurred well more than 365 days after the filing of the criminal complaint, there were large quantities of excludable time and excusable delay in this case.

The criminal complaint was filed on June 12, 2007. On September 18, 2007, the Lycoming County judges recused themselves from handling this case. Defendant filed an omnibus pre-trial motion on November 11, 2007. Hearing and argument on this motion was held on April 16, 2008 before the Honorable John Reilly, an out-of-county senior judge. After the hearing, Judge Reilly entered an order setting a briefing schedule. Defense counsel's brief was due 90 days from the receipt of the transcripts and the Commonwealth's reply brief was due 10 days thereafter. See Order of April 30, 2008. Defense counsel filed his brief on August 4, 2008 and the Commonwealth filed its reply brief on August 7, 2008. Judge Reilly announced his decision on Defendant's motion on the record at a hearing held on October 16, 2008.

The Court finds the time between the filing of Defendant's omnibus pre-trial motion and the date the judge rendered his decision thereon is excludable time. Defendant's

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p. 49.

omnibus pre-trial motion included a request that several of the charges be dismissed. Clearly, Defendant did not wish to proceed to trial on these charges since he believed the Commonwealth did not present sufficient evidence to establish a prima facie case. Any assertion that this case could have proceeded to trial prior to a ruling on Defendant's motion is disingenuous. Therefore, a delay in the commencement of trial was caused by the filing of the pre-trial motion.

The transcripts, orders and other documents filed of record also show that the Commonwealth exercised due diligence in opposing or responding to the motion. The pretrial motion was not continued by either party. Both parties appeared on April 16, 2008 and the pre-trial motions were heard by Judge Reilly. The Order entered on April 16, 2008 setting a briefing schedule required the Commonwealth to file its reply brief ten days after Defendant's brief was filed. The Commonwealth, however, filed its brief within three days. When the parties appeared before Judge Reilly in October 2008, he made his rulings on Defendant's omnibus pre-trial motion on the record. The Commonwealth did not have any control over the amount of time that it took Judge Reilly to decide Defendant's omnibus pre-trial motion. Since the filing of Defendant's omnibus pre-trial motion delayed commencement of trial and the Commonwealth exercised due diligence in opposing or responding to the motion, this time is excludable under Rule 600(C). Commonwealth v. Hill, 558 Pa. 238, 736 A.2d 578, 587 (1999).

On October 24, 2008, the Commonwealth appealed Judge Reilly's decision, and it was successful in getting the dismissed charges reinstated. The record was not

remanded to Lycoming County until December 2, 2010.

Between the filing of the complaint and the filing of Defendant's omnibus pre-trial motion, 142 days elapsed. The time between the filing of the motion and Judge Reilly's ruling thereon is excludable delay under Rule 600(C). Another 11 days elapsed between Judge Reilly's ruling and the Commonwealth's appeal. Therefore, a total of 153 days passed for Rule 600 purposes prior the Commonwealth filing its appeal. Since this total is less than 365 days, Defendant was not entitled to dismissal prior to the Commonwealth's appeal.

The Commonwealth's timely appeal divested the trial court of the ability to proceed with a trial in this case. Pa.R.App.P. 1701(a). When an appellate court remands a case to the trial court, for whatever reason, and the defendant has been released on bail, trial must commence within 365 days after the date of the remand. Pa.R.Cr.P. 600(D)(2) and Comment. The date of remand is the date as it appears in the appellate court docket. Id. The Superior Court remanded this case back to Lycoming County on December 2, 2010. Therefore, pursuant to Rule 600(D)(2), trial in this case had to commence on or before December 1, 2011. Defendant is not entitled to dismissal pursuant to Rule 600, because trial commenced in this case on July 18, 2011.

In the alternative, the appeal acted as an automatic supersedeas, tolling the running of Rule 600 between the filing of the appeal and the date of remand and rendering that time excusable delay. Commonwealth v. DeBlase, 542 Pa. 22, 665 A.2d 427, 431-32 (Pa. 1995); Jones v. Commonwealth, 495 Pa. 490, 434 A.2d 1197, 1201 (Pa. 1981). Defendant filed his motion to dismiss on December 7, 2010, which was 5 days after the Superior Court

remanded the case to Lycoming County. Adding this 5 days to the 153 days that elapsed for Rule 600 purposes prior to the Commonwealth's appeal, results in a total of 158 days. Since 365 days had not elapsed prior to the date Defendant filed his motion to dismiss, he was not entitled to dismissal of the charges in this case pursuant to Rule 600.[3]

Defendant argues that the Commonwealth had an obligation of due diligence throughout the pendency of the appeal in this case and, since the Commonwealth was not diligent, the time attributable to the Commonwealth's interlocutory appeal is not excusable. Defendant seeks to hold the Commonwealth responsible for delays in the preparation of the transcript of the October 16, 2008 hearing, the Prothonotary's failure to send the record to the appellate court in a timely manner, and various extensions of the briefing schedule and continuances of oral argument in the appellate court. Defendant cited several cases including Commonwealth v. Dixon, 589 Pa. 28, 907 A.2d 468 (2006) and Commonwealth v. Bradford, 2 A.3d 628 (Pa. Super. 2010), appeal granted 608 Pa. 424, 12 A.3d 288 (2011).

Defendant relies on the Dixon case for the proposition that Rule 600 is not tolled during the pendency of an appeal. Dixon, however, is readily distinguishable for several reasons. Dixon involved a defendant's motion for nominal bail, not a motion to dismiss. This distinction is critical because the Commonwealth's diligence or lack thereof is irrelevant to whether a defendant is eligible for nominal bail. Moreover, the

[3] The Commonwealth was diligent in opposing or responding to Defendant's motion to dismiss pursuant to Rule 600. Therefore, the time between the filing of Defendant's motion to dismiss and the Court's decision thereon is excludable delay. Hill, supra; Commonwealth v. Williams, 726 A.2d 389, 392 (Pa. Super. 1999). The Court's order denying Defendant's motion to dismiss was docketed on June 3, 2011. Trial commenced on July 18, 2011. Therefore, for Rule 600 purposes, the total number of days that elapsed between the filing of the complaint and trial in this case was 203 days.

Commonwealth's appeal does not divest the Court of jurisdiction to rule on a bail motion, which would be a matter ancillary to the appeal. See Pa.R.App.P. 1701(b). The reason the Commonwealth has an obligation of due diligence is to ensure that a case is tried in a timely manner. When a case is on appeal, no matter what tracking system the Commonwealth has in place, the case cannot be tried until the appeal is complete and the case is remanded back to the trial court.

Bradford also is readily distinguishable from this case. In Bradford, the district justice failed to forward the relevant paperwork to the Department of Court Records. No action was taken on the case for over a year, and the defendant filed a motion to dismiss. Although an assistant district attorney (A.D.A.) was present for the preliminary hearing, the Commonwealth claimed it did not know the case existed until the defendant filed his motion to dismiss. When reminded by the trial court that an A.D.A. was present for the preliminary hearing, the Commonwealth noted the number of cases it routinely handles and indicated it did not begin monitoring cases until the paperwork was forwarded to the Department of Court Records, which then would transmit certain paperwork or an electronic notice to the District Attorney's office. The Court granted the defendant's motion and dismissed the case.

Defendant claims the Bradford case stands for the proposition that the Commonwealth is somehow responsible for the actions of other offices and it had to monitor the Prothonotary's compliance with the rules for transmitting the record to the appellate court. The Court cannot agree. The Bradford court did not find the Commonwealth was responsible for the district justice's failure; the court merely held that the Commonwealth

could not rely on other offices, such as the district justice or the Department of Court Records, to satisfy the Commonwealth's obligation to track a case and bring it to trial. Although the Commonwealth did not have any control over the district justice forwarding the paperwork, if it had kept a diary or employed some other record-keeping system, the Commonwealth could still have taken steps to forward the case to trial such as preparing the Information, scheduling the case for arraignment or asking the trial court to schedule a trial. In comparison, no matter what record-keeping system the Commonwealth could have had in place, it had no control over the Prothonotary's unexplained failure to transmit the record to the Superior Court in a timely manner. It did not have the responsibility or the ability to transmit the record to the appellate court; that responsibility rested with the Prothonotary and the trial court. Pa.R.App.P. 1931. Similarly, it could not call this case for trial despite the problems with the record being transmitted, because the appeal divested the lower court of jurisdiction to conduct a trial.

Even assuming for the sake of argument that the Commonwealth had an obligation of due diligence during the pendency of the appeal, the Court believes that the only delay that arguably would not be excusable is the delay between November 19, 2008 and January 26, 2009 related to the filing of the transcript. If the Commonwealth had promptly paid the court reporter or informed her that it did not believe payment was required before the transcript could be released,[4] the transcript would have been filed on or about November 19, 2008. As previously discussed, however, the Prothonotary's delay in transmitting the record

[4] See Pa.R.Jud.Admin. 5000.6 and 5000.11(b).

was not within the Commonwealth's control. The Court also does not believe the Commonwealth's requests for extensions of the briefing schedule and continuances of the oral argument date showed a lack due diligence. Due diligence does not require perfect vigilance or punctilious care, but merely a showing that the Commonwealth has put forth a reasonable effort. Commonwealth v. Selenski, 606 Pa. 51, 994 A.2d 1083, 1089 (2010). The reasons given for these requests included circumstances beyond the Commonwealth's control, such as illness of the Commonwealth's attorney and a prior notice of argument on the same date before a panel of an appellate court in another city. Furthermore, if the Superior Court did not think that the Commonwealth offered good reasons for its requests, it would have denied them.

> 'Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule [600] was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.
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> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime. In considering [these] matters ..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Commonwealth v. Tickel, 2 A.3d 1229, 1233 (Pa. Super. 2010), quoting Commonwealth v. Ramos, 936 A.2d 2097, 1100-1101 (Pa. Super. 2007)(en banc).

In light of the foregoing, the Court finds Defendant is not entitled to dismissal pursuant to Rule 600.

Next, Defendant contends the evidence was insufficient to support the jury's verdict on the charge of obstructing administration of law or other governmental function. Specifically, Defendant claims evidence was insufficient because (1) there was no affirmative interference; (2) there was no evidence that Mr. Heffley made the statements to benefit Defendant, as opposed to protecting his own interests; and (3) there was no evidence that Defendant committed an unlawful act. Defendant also asserts the Commonwealth previously indicated the other unlawful act was a crime other than hindering apprehension, but it argued in its closing arguments that the other unlawful act was solicitation to hinder apprehension, which was prejudicial to Defendant because he could not be charged with hindering his own prosecution and he had a renunciation defense to solicitation.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004). Furthermore, circumstantial evidence may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610, 618 (Pa. 1989)(citations omitted).

In order to establish that a defendant obstructed the administration of law or

other governmental function, the Commonwealth must "establish that (1) the defendant had the intent to obstruct the administration of law; and (2) the defendant used force or violence, breached an official duty or committed an unlawful act." Commonwealth v. Goodman, 544 Pa. 339, 676 A.2d 234, 235 (1996); see also PaSSJI (Crim) §15.5101. Contrary to Defendant's assertions, actual obstruction or interference is not required, because an intentional, albeit unsuccessful, attempt to bring about that result is also covered by this offense. Commonwealth v. Trolene 397 A.2d 1200, 1204 (Pa. Super. 1979); PaSSJI (Crim) §15.5101. Moreover, it is Defendant's intent, and not Mr. Heffley's motive in making the statements, that is an element of this offense.[5]

The Commonwealth presented evidence to establish the required elements. In February 2004, Defendant approached Adrian Heffley about taking one of the forfeited Task Force vehicles, a 1996 Chevrolet Lumina, and initially putting it in Heffley's name, but after he received the title to the vehicle, transferring the title to Defendant and his step-son, Stefan June. These transactions were documented on Pennsylvania Department of Transportation (Penn DOT) MV-4ST forms, which were introduced into evidence as Commonwealth's exhibits 37 and 38. The Penn DOT forms indicated that Heffley paid $250 to purchase the vehicle from the Task Force and that Defendant paid Heffley $600 to purchase the vehicle from him. Mr. Heffley testified that he never took possession of the vehicle, he did not insure the vehicle, he did not pay $250 to the Task Force, and Defendant did not pay him

[5] Even if Mr. Heffley's motive or intent was an element of this offense, the jury could find Heffley's motive or intent was to protect Defendant on Heffley's testimony that he did not want Defendant to get into trouble. N.T., July 18-21, 2011, at p. 345.

$600 for the vehicle. N.T., July 18-21, 2011, at pp. 336-338. Defendant's trial testimony also showed that Heffley did not pay $250 to the Task Force for the Chevrolet Lumina and he did not pay Heffley $600 for the vehicle. N.T., July 21, 2011, at pp. 121-124. Instead, Defendant testified that he paid the money to the Task Force, but he did not directly title any of the vehicles to himself because it would have looked awkward. Id. at pp. 82, 122.

During the Attorney General's investigation, Defendant went to Heffley's place of business and asked him what he was going say if someone from the Attorney General's office contacted him. N.T., July 18-21, 2011, at p. 339. To make the transaction appear legitimate, Defendant wanted Heffley to tell the investigators that Heffley got the car, did some work on it to fix it up a bit, and then sold it to Defendant after it was repaired. Id.

When Agent Anthony Fiore spoke to Heffley about these transactions, Heffley told Agent Fiore the story Defendant wanted him to say. Id. at pp. 339, 383-84. Heffley, however, almost immediately became very upset and worried about not having told the truth. Id. at pp. 344-45. He contacted an attorney, who telephoned Agent Fiore either later that day or the next day and told him the truth. Id. at pp. 344-45,; N.T., July 21, 2011 (Agent Fiore), at pp. 41-44. Agent Fiore, however, was unable to speak with Heffley to confirm what the attorney told him until days or weeks later. Id. at p. 43.

Sometime after Heffley spoke to Agent Fiore but prior to him testifying before the grand jury, Defendant told or encouraged Heffley to tell the truth. N.T., July 18-21, 2011, at pp. 345, 348.

From this evidence, a jury could reasonable infer that Defendant had the intent

to obstruct the Attorney General's investigation into this vehicle transaction. Defendant's actions of requesting, encouraging, or entering into an agreement with Heffley that he would lie to the investigators was an unlawful act, as it constituted the crime of solicitation or conspiracy to hinder a prosecution.

Section 5105 of the Crimes Code, which defines hindering prosecution, states in relevant part: "A person commits an offense if, with intent to hinder the apprehension, prosecution, conviction or punishment of another for crime..., he: provides false information to a law enforcement officer." 18 Pa.C.S.A. §5105(a)(5).

Defendant is correct that he could not be charged with this crime because he would be not be hindering the prosecution of another. Nevertheless, his actions were unlawful, because his conduct satisfies the elements for the inchoate crimes of solicitation and/or conspiracy to hinder prosecution.

"A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission." 18 Pa.C.S.A. §902(a).

Defendant requested or encouraged Heffley to provide false information to Agent Fiore to make the sham transaction look legitimate, and Heffley told Agent Fiore the story Defendant wanted him to say. N.T., June 18-21, 2011, at pp. 339-40. Heffley also testified that he did not want Defendant to get into trouble. Id. at 345. This evidence and the

reasonable inferences that can be drawn from it are sufficient to establish Defendant solicited Heffley to commit the crime of hindering prosecution.

Defendant argues that solicitation is not applicable to this case because renunciation is a defense to solicitation. He further argues that the testimony that he told Heffley to tell the truth establishes this defense. The Court cannot agree.

Although renunciation is a defense to solicitation, that defense is not applicable under the facts of this case. The renunciation provision of the solicitation statute states: "It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent." 18 Pa.C.S.A. §902(b).

Quite simply, Defendant did not prevent the crime from occurring. As soon as Heffley told Agent Fiore the story that Defendant asked him to tell, the crime was completed. In fact, Heffley's testimony, viewed in the light most favorable to the Commonwealth as the verdict winner, shows that Defendant did not tell Heffley to tell the truth until sometime after Heffley spoke to Agent Fiore but before Heffley testified before the grand jury. N.T., July 18-21, 2011, at pp. 345, 348.

Defendant also contends that the evidence does not show that he encouraged or requested Heffley to tell the lie, but rather Heffley told him the story he was going to tell the investigators and Defendant merely agreed. In support of this argument, Defendant points to his own testimony and Heffley's testimony on cross-examination. See N.T., July 18-21,

2011, at p. 343 and N.T., July 21, 2011, at p. 125. Defendant, though, is viewing the evidence in the light most favorable to him, rather than in the light most favorable to the Commonwealth.

On direct examination, Heffley testified as follows: "He [Defendant] approached me about, you know, what I was going to say if somebody came to talk to me, and wanted me to say something like I got the car, did some work to it, fixed it up a little bit, and then sold it back to him after it was repaired." N.T., July 18-21, 2011, at p. 339.

The credibility of witnesses is within the sole province of the jury, which is free to believe all, some or none of any witness's testimony. Commonwealth v. Ramtahal, 33 A.3d 602, 607 (Pa. 2011); Commonwealth v. Hanible, 575 Pa. 255, 836 A.2d 36, 40 (2003). The jury was free to believe Heffley's direct examination testimony and reject his testimony on cross-examination as well as Defendant's testimony. Heffley's testimony on direct examination was sufficient to establish that Defendant requested or encouraged Heffley to lie to Agent Fiore.

Even assuming for the sake of argument that this evidence did not establish solicitation, Defendant's actions were still unlawful because the testimony he cites establishes, at a minimum, that he conspired with Heffley to hinder his prosecution.

A person is guilty of conspiracy with another person to commit a crime if with the intent of promoting or facilitating its commission he agrees with such other person that one or more of them will engage in conduct which constitutes such a crime. 18 Pa.C.S.A. §903(a).

Defendant testified that he went to Heffley's place of business and told him that he believed people would be coming to talk to him. Heffley did not think the investigators would come to talk to him, but if they did, he would tell them that he got the car, fixed it up and then resold it to Defendant. Defendant agreed with him or said something like "that sounds good to me, go ahead and tell them that." N.T., July 21, 2011, at pp. 125-126. In other words, Defendant agreed with Heffley that Heffley would lie to the investigators so that the transaction would look legitimate.

Defendant contends he had no intention of hindering the prosecution or obstructing the investigation. The jury, however, was not required to believe Defendant's testimony in this regard and could infer Defendant's intent from the facts and circumstances of this case. Defendant was aware that he was being investigated and knew or reasonably believed that the investigators were going to talk to Heffley about the transaction involving the Chevrolet Lumina. He went to Heffley's place of business to see if the investigators had spoken to him yet. When he was informed they had not, he and Heffley made an agreement that Heffley would tell the investigators that he purchased the vehicle, made some repairs to it and then sold it to Defendant, which they both knew was untrue.

Defendant contends he was prejudiced when the Commonwealth argued in its closing statement that the unlawful act was hindering prosecution because the Commonwealth previously indicated the unlawful act was a crime other than hindering prosecution. This allegation does not entitle Defendant to relief.

Defendant never objected to this, or any other, portion of the

Commonwealth's closing argument. Therefore, this claim is waived. Commonwealth v. Rivera, 603 Pa. 340, 983 A.2d 1211, 1229 (2009)(lack of a contemporaneous objection constitutes a waiver of any challenge to the prosecutor's closing remarks and any claim of prosecutorial misconduct based thereon). Furthermore, the Commonwealth argued that the unlawful act was **solicitation** to hinder prosecution. Although hindering prosecution was the underlying criminal object of the solicitation, solicitation is a separate criminal offense from hindering prosecution. Compare 18 Pa.C.S.A. §902(a)(defining solicitation) and 18 Pa.C.S.A. §5101(defining hindering prosecution).

Defendant also claims the Court erred in failing to define hindering prosecution as part of its instructions to the jury on the charge of obstructing administration of law or other governmental function and utilizing the word "entries" instead of "record" in its instruction on the charges of tampering with public records. Defendant failed to object to these jury instructions; therefore, this claim is also waived. Commonwealth v. Flor, 606 Pa. 384, 998 A.2d 606, 625 (2010)(failure to object to jury instructions results in waiver of any claim of error pertaining to such instructions).

Defendant next alleges that he is entitled to a mistrial because the Commonwealth committed prosecutorial misconduct when, during cross-examination of Defendant, the prosecutor implied that as a police officer or a suspended police officer Defendant had a higher duty than an ordinary citizen to tell Heffley not to lie to the investigators. The Court finds that Defendant has not properly raised or preserved this issue.

During cross-examination, Defendant claimed he did not encourage Mr.

Heffley to lie to investigators; he agreed with what Heffley said he would tell them if they came to talk to him. Then the following exchange took place:

> Q And right then when he says that[,] you as a police officer you say wait, wait, wait this is criminal—
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> **MR. UNGARD:** Objection, Your Honor.
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> **THE COURT:** Wait a minute. Let's just ask the question.
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> **MR. UNGARD:** He—He—
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> **THE COURT:** Just a moment.
>
> **BY MR. SPROW:**
>
> **Q** At that moment you as a police officer say wait a minute
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> **A** I was not a police officer at that time. I was suspended, sir.
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> **THE COURT:** Okay. Just a moment. Let's get the question out.
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> **BY MR. SPROW:**
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> **Q** You [-] as a suspended police officer you say to him hold on a second this is a law enforcement investigation if they come talk to you[,] you cant' be making up stories like that. Is that what you said to him?
>
> **A** No.
>
> **Q** You said that sounds good to me go ahead and tell them that?
>
> **A** Something along those lines.

N.T., July 21, 2011, at p. 126.

The Court never overruled Defendant's objection. The Court was trying to get

Defendant to let the prosecutor finish his question before making his objection. Instead, Defendant interrupted the prosecutor a second time to indicate that he was a suspended police officer at the time he had the conversation Heffley about what he was going to tell the investigators. When the prosecutor made this correction and was able to complete his question, Defendant did not object; he simply answered the question. At that point, the Court believed changing the wording of the question to a suspended police officer resolved Defendant's objection. Defendant neither objected to the re-worded question, nor made a motion to strike or a motion for a mistrial. Therefore, this issue is waived. Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59, 73 (2008)(a defendant cannot properly preserve the claim by raising the issue in a post-sentence motion; instead, he must make a timely and specific objection or the claim is waived).

Defendant also claims the evidence was insufficient to support the verdicts on counts 2 and 4, tampering with public records. This offense is committed if a person does any of the following:

> (1) knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government;
>
> (2) makes, presents or uses any record, document or thing knowing it to be false, and with intent that it be takes as a genuine part of information or records referred to in paragraph (1) of this subsection; or
>
> (3) intentionally and unlawfully destroys, conceals, removes or otherwise impairs the verity of availability of any such record, document or thing.

18 Pa.C.S.A. §4911(a). The Court finds the evidence, viewed in the light most favorable to the Commonwealth, was sufficient to satisfy paragraph (a)(1) and/or (a)(2).

Count 2 concerned the "back end" of the transaction transferring the title of a 1993 Pontiac Grand Am, which had been forfeited to the Drug Task Force. This vehicle was transferred from the Task Force to Defendant's brother-in-law, Brent June, who then transferred it to Defendant.

On February 27, 2003 title for the Grand Am was transferred by from the Lycoming County Office of the District Attorney to Brent June. The Penn DOT MV-4ST form for this "front end" of the transaction, which was introduced as Commonwealth's Exhibit 19, listed the purchase price as $300.

On April 3, 2003, Brent June transferred the title to the Grand Am to Defendant. The Penn DOT MV-4ST form for this "back end" of the transaction, which was admitted into evidence as Commonwealth's Exhibit 20, listed Brent June as the seller, Defendant as the purchaser, and the purchase price as $400.

Brent June testified that he did not pay $300 to the District Attorney's for the vehicle, nor did he receive $400 from Defendant. N.T., July 18-21, 2011, pp. 323-324. Mr. June also testified that he never purchased, possessed, insured, or drove the vehicle. Id. at pp. 321, 323, and 330. Defendant testified that he paid $300 to the Task Force, but he never paid any money to Brent June. N.T., July 21, 2011, at pp. 80-82,120-121.

The testimony presented at trial also showed that it was Defendant's idea to acquire this vehicle for the use of his step-son, Stefan June, but to initially title the vehicle in

Brent June's name, rather than Defendant's name, so that the transaction would look more legitimate. N.T., July 18-21, 2011, at pp. 323, 325; N.T., July 21, 2011, at p. 82. Brent June testified that he would not have titled this vehicle in his name if Defendant had not asked him to do so. N.T., July 18-21, 2011, at p. 331

Clearly, the Penn DOT MV-4ST form for the "back end" of the transaction contained several false entries. It listed Brent June as the owner or seller of the vehicle and the purchase price as $400 when, in fact, Brent June never bought the vehicle or possessed the vehicle and Defendant never paid $400 to June or anyone else. Defendant knew this information was false, since he admitted in his own trial testimony that he paid $300 to the Task Force, but $400 was not paid to anyone for the transfer between Defendant and June. In reality, Defendant purchased the vehicle from the Task Force for $300, but initially had the vehicle titled in Brent June's name because a transfer directly into his name from the Task Force would have looked awkward or inappropriate. Defendant also knew this form would be submitted to Penn DOT and kept in their records for a period of time. N.T., July 21, 2011, at pp. 118-119.

This same evidence shows that Defendant made, presented or used the MV-4ST form to record a sham transaction, knowing that the form was false and with the intent that it be taken as a genuine part of information or records kept by Penn DOT, a government agency.

Count 4 concerns the transaction which transferred title of the 1996 Chevrolet Lumina from Adrian Heffley to Defendant and Stefan June. As previously discussed

regarding the obstruction conviction, Defendant transferred the vehicle from the Task Force to Adrian Heffley, and the purchase price was listed as $250. Then, when Heffley received the title to the vehicle, he transferred it to Defendant and Stefan June. The Penn DOT MV-4ST form for the transfer back end of this transaction listed Heffley as the seller, Defendant and Stefan June as the purchasers and the purchase price as $600. Heffley testified that he never took possession of the vehicle, he did not insure the vehicle, he did not pay $250 to the Task Force, and Defendant did not pay him $600 for the vehicle. Defendant testified that he paid the $250 to the Task Force and no money, other than reimbursement for the sales tax, exchanged hands between Heffley and Defendant. Rather, Defendant purchased the Chevrolet Lumina from the Task Force, but had the vehicle initially titled in Heffley's name to make the transaction look more legitimate.

As with the transactions involving the 1993 Pontiac Grand Am, there were false entries on the Penn DOT MV-4ST form. Heffley never was the owner of the vehicle and never sold it to Defendant for $600. Defendant knew this information was false, but he provided it to the Penn DOT nonetheless. The reason for doing this was so it would look like a third party had purchased the vehicle from the Task Force and would not appear that he was transferring the title from the Task Force to himself.

Defendant argues that the evidence does not prove that the transaction was an illegal straw purchase. Defendant's argument, however, misses the mark. The issue was not whether it was illegal for Defendant to purchase these vehicles; the issue was whether the records or entries made in the records were false. Clearly, Defendant's own testimony

establishes not only that entries on the MV-4ST form were false, but also that: (1) Defendant knew they were false; (2) Defendant knew the form got submitted to Penn DOT for its records; and (3) Defendant wanted it to look like a third party was buying the vehicles from the Task Force and that he was buying the vehicle from a third party when, in fact, he was the person purchasing the vehicles from the Task Force. Therefore, the evidence was sufficient to support Defendant's convictions for tampering with public records.

Defendant next asserts he is entitled to a mistrial because the Court precluded his step-son, Stefan June, from testifying. This claim really is not for a "mistrial," but rather a request for a new trial based on trial court error.

Unfortunately, Defendant's claim is not supported by the record. The Court has reviewed the record and cannot locate any place in the record where it precluded Stefan June from testifying.

Even assuming arguendo that the Court precluded Stefan June from testifying in this case, the Court does not believe such a ruling would be erroneous or entitle Defendant to a new trial. Defendant contends Stefan June's testimony was relevant to show that the two vehicles pertaining to his convictions on counts 2 and 4 were utilized, possessed and maintained by Stefan June, and not Defendant. This testimony, however, was not relevant to any element of the offenses of tampering with public records. The issue was not why Defendant was purchasing these vehicles or who was actually utilizing them. The elements of these charges related to the falsity of the records or the entries made in the records that were submitted to Penn DOT, Defendant's knowledge that the records or entries were false,

and Defendant's knowledge that these records were going to be used or kept by the government. See Pa.SSJI (Crim) §15.4911A. Moreover, Defendant was not prejudiced by the lack of this testimony, because it would have been cumulative to other testimony that was presented at trial. Not only did Defendant testify that the vehicles were purchased for his step-son, Stefan June, but Brent June and Adrian Heffley, who were Commonwealth witnesses, also testified that Defendant was purchasing the vehicles for his step-son Stefan June. See N.T., July 18-21, 2011, at pp. 325, 337-39. Moreover, the MV-4ST for the Chevrolet Lumina showed that it was titled in both Defendant's and Stefan June's names. See Commonwealth's Exhibit 38.

In his final issue, Defendant asserts that the Court lacked jurisdiction over counts 1 through 11, because the referral letter from the District Attorney only requested that the Attorney General investigate the alleged misuse of a forfeited Task Force vehicle, which concerned Defendant utilizing a forfeited Task Force truck to take a fishing trip to Canada. The only count of the Information that related to this incident was Count 12. The Court cannot agree.

The Attorney General's power to investigate criminal offenses emanates from section 205 of the Commonwealth Attorneys Act. 71 P.S. §732-206. Section 205 states, in relevant part: "The Attorney General shall have the power to prosecute in any county criminal court the following cases: ... (3) Upon the request of a district attorney ... who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office." 71 P.S. §732-205(a)(3). When the Attorney General has the

power to investigate a criminal offense, he has not only the services of the Pennsylvania State Police at his disposal, but also the ability to convene and conduct investigating grand juries. 71 P.S. §732-206. "Where properly impaneled, the purpose for which a grand jury is convened does not restrict the grand jury from investigating actions which constitute either criminal activity or probable violations of the criminal laws of the Commonwealth." Commonwealth v. McCauley, 403 Pa. Super. 137, 601 A.2d 277, 269 (1991), citing In re: County Investigating Grand Jury of October 18, 1982 (Appeal of Stout), 501 Pa. 118, 460 A.2d 249 (1983). The grand jury is not required to close its eyes to this other unlawful activity. McCauley, supra, citing Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (1986), appeal denied 513 Pa. 633, 520 A.2d 1384 (1987); see also Commonwealth v. Iacino, 490 Pa. 119, 415 A.2d 61 (1980)(grand jury did not exceed its authority in issuing presentment against defendant regarding improper sale of high-lift owned by state where grand jury had been impaneled to investigate corruption of supervisory personnel of Penn DOT, evidence of improper sale arose in the course of that investigation, and sale had been made possible by the defendant's submission of a false report that the high-lift had been disassembled).

Defendant is too narrowly construing the referral letter and the scope of a proper investigation into the incident involving Defendant's misuse of the forfeited truck. Due to a conflict of interest, the Lycoming County District Attorney sent a referral letter to the Attorney General asking his office to investigate Defendant's alleged misuse of a forfeited Task Force vehicle. The conflict arose, at least in part, because Defendant was the

Coordinator of the Task Force, which operated under the direction or supervision of the District Attorney. The District Attorney noted in his referral letter that his internal investigation of this incident revealed that the alleged misuse had occurred but he had no reason to believe this incident was part of a pattern of conduct. Any investigation into this incident would have been incomplete if the Attorney General did not attempt to determine whether this was, in fact, an isolated incident or whether there was a pattern of misusing or mishandling Task Force property. As is evident from the other charges in this case, the truck that Defendant took on a fishing trip to Canada was not the only forfeited property that was subject to Defendant's access or control. When the investigation revealed that there were other incidents involving the alleged mishandling of Task Force property, neither the Attorney General nor the investigating grand jury were required to turn a blind eye to that conduct. Furthermore, all the charges are based on actions Defendant took as the Coordinator of the Task Force with respect to Task Force property or his efforts to hide his actions; therefore, the same conflict of interest was inherent in all the charges in this case, not merely Count 12. In light of the foregoing, the Court does not believe the Attorney General's investigation improperly exceeded the District Attorney's referral letter. Therefore, the Court had jurisdiction over all the charges and Defendant is not entitled to relief.

ORDER

AND NOW, this 7 day of March 2012, the Court DENIES Defendant's Post Sentence Motions.

The defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the defendant may lose forever his right to raise these issues.

By The Court,

John B. Leete, Senior Judge
Specially Presiding

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