

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	CR-1344-2010; 81-2011
vs.	:	
	:	CRIMINAL DIVISION
DEBORAH MCKISSICK,	:	

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This matter arises out of the actions undertaken by Defendant when she worked as an estate planning and bankruptcy paralegal for a local attorney’s office. The Commonwealth charged Defendant under two criminal informations (CR-1344-2010 and 81-2011); CR-1344-2010 pertains to those actions taken by Defendant against her former clients Ms. Greenbaum and Mr. James, while CR-81-2011 pertains to those actions taken against her former clients Mr. and Ms. Jean. With respect to 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).¹ With respect to CR-81-2011, 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).²

I. Procedural History

The Court held three separate hearings on Defendant’s cases because three sets of victims were involved. The initial case before the Court was at CR-1344-2010. On March 1, 2012, after

¹ These charges were issued pursuant to 18 Pa. C.S. §§ 3921(a), 901(a), 4120(a), 4101(a)(2), and 3922(a)(3), respectively.

² These charges were issued pursuant to 18 Pa. C.S. §§ 3921(a), 3925(a), 3927(a), and 3928, respectively.

a non-jury trial held for the charges pertaining to the victim Ms. Greenabaum, the Court found Defendant guilty of two counts of Theft by Unlawful Taking or Disposition (Counts 1 and 2), Criminal Attempt (Count 3), Identity Theft (Count 4), and Theft by Deception (Count 8).

On April 19, 2012, Defendant pled guilty to both counts of Forgery (Counts 6 and 7) at CR-1344-2010. Based upon Defendant's admissions during her guilty plea, the Court found Defendant guilty of the remaining charges, i.e. Identity Theft (Count 5) and Theft by Deception (Count 9).³

On June 12, 2012, at the time scheduled for a non-jury trial on the charges found at CR-81-2011, the Commonwealth withdrew the charge of Receiving Stolen Property (Count 3). After a non-jury trial, the Court found Defendant guilty of Theft by Unlawful Taking or Disposition (Count 1), Receiving Stolen Property (Count 2), and Unauthorized Use of a Motor Vehicle (Count 4).

The Court initially sentenced Defendant on June 18, 2012. On June 28, 2012, Defendant filed a Post-Sentence Motion. In her motion, Defendant requested a judgment of acquittal as to Counts 1 and 2 at CR-81-2011. The Court denied this request by Opinion and Order dated August 1, 2012. However, in her motion, Defendant also requested a motion to modify sentence. The Court granted this motion. The Court resentenced Defendant on October 24, 2012.

On November 4, 2012, Defendant filed her Notice of Appeal to the Superior Court. On November 26, 2012, Defendant filed her Concise Statement. In her statement, Defendant argues that the Court imposed an excessive and unreasonable sentence and that the Court's verdicts of guilt were both based on insufficient evidence and against the weight of the evidence. The Court will address Defendant's sufficiency claims first.

³ At the time of the guilty plea, the Commonwealth moved to amend the victim of Count 9 at CR-1344-2010 from Mr. James to Bank of America. The Court granted this motion.

I. Sufficiency of the Evidence

This Court finds that the guilty verdicts in these cases were not against the weight of the evidence. 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). Our Supreme Court has long 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.* The Court will first address the sufficiency claims at CR-1344-2010.

a. CR-1344-2010 (Ms. Greenabaum and Mr. James)

As to CR-1344-2010, the Court entered guilty verdicts as to two counts of Theft by Unlawful Taking or Disposition (Counts 1 and 2), one count of Criminal Attempt (Count 3), two counts of Identity Theft (Counts 4 and 5), and two counts of Theft by Deception (Count 8 and 9). Defendant argues that these verdicts were against the weight of the evidence. The Court disagrees.

i. Theft by Unlawful Taking or Disposition

In this matter, the Court found Defendant guilty of two counts of theft by unlawful taking or disposition; one count pertained to a life annuity check issued to Ms. Greenabaum (Count 1), and the other count pertained to a withdrawal from Ms. Greenabaum’s IRA account (Count 2). In Pennsylvania, one is guilty of theft by unlawful taking or disposition of movable property “if [s]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). 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)).

Mr. Flemming, a representative from Susquehanna Bank, testified that the Defendant deposited an annuity check issued to Ms. Greenabaum for \$10,491.17, into Ms. Greenabaum's savings account at Susquehanna Bank; Defendant signed her name on the back of Ms. Greenabaum's check and listed herself as Ms. Greenabaum's POA. R.R., 3/1/2012, pgs. 21-22, 10-1. After depositing the check, Mr. Flemming testified that Defendant transferred the funds into Defendant's account at another institution. R.R., 3/1/2012, pgs. 23-25, 11-1. Additionally, Mr. Flemming testified that Defendant withdrew approximately \$4,682 in cash from Ms. Greenabaum's IRA account. R.R., 3/1/2012, pgs. 27-28, 6-15. Mr. Flemming's testimony was credible. Ms. Greenabaum did not authorize Defendant to perform these transactions, nor did Ms. Greenabaum receive these funds withdrawn by Defendant. R.R., 3/1/2012, pgs. 10-11, 10-4. Therefore, the Court believes that the Commonwealth presented sufficient evidence to sustain its guilty verdicts to Counts 1 and 2 of CR-1344-2010.

ii. Criminal Attempt

Additionally, the Court found Defendant guilty of criminal attempt to commit theft by unlawful taking or disposition. This charge pertains to Defendant's attempted wire transfer from

Ms. Greenabaum's Susquehanna account to Defendant's account at another institution. R.R., 3/1/2012, pgs. 30-32, 20-4. Mr. Flemming testified that Defendant requested the funds to be transferred and that Susquehanna Bank transferred the funds to Defendant's banking institution (Bank of America), however, the funds were returned to Susquehanna Bank because the Bank of America account number that coincided with the transfer was incorrect. *Id.* Based on Mr. Flemming's testimony, the Court believes that the Commonwealth provided sufficient evidence to affirm the Court's guilty verdict to the charge of attempted theft by unlawful taking or disposition found at CR-1344-2010.

iii. Identity Theft

In this matter, this Court found Defendant guilty of two counts of identity theft; one of these counts pertained to Ms. Greenabaum and the other count pertained to Mr. James. The Crimes Code defines identity theft as:

(a) Offense defined. A person commits the offense of identity theft of another person if he possesses or uses, through any means, identifying information of another person *without the consent of the other person* to further any unlawful purpose.

* * * * *

“Identifying information.” Any document, photographic, pictorial or computer image of another person, or any fact used to establish identity, including, but not limited to, a *name*, birth date, Social Security number, driver's license number, nondriver governmental identification number, telephone number, *checking account number*, *savings account number*, student identification number, employee payroll number or electronic signature.

18 Pa. C.S. § 4120 (emphasis added). *See Commonwealth v. Newton*, 994 A.2d 1127, 1134-35 (Pa. Super. Ct. 2010). The Court believes that the Commonwealth provided sufficient evidence to affirm the Court's guilty verdicts on the two counts of identity theft charged in this matter.

a. Ms. Greenabaum⁴

During Defendant's March 1, 2012 non-jury trial, the Court heard testimony regarding Defendant's use of Ms. Greenabaum's identifying information so that Defendant could acquire Ms. Greenabaum's annuity payments for Defendant's personal use. Particularly, the Court heard evidence that Defendant, in her capacity as a paralegal, told Ms. Greenabaum to sign a number of papers for estate planning purposes; among these papers was a power of attorney, naming Defendant as Ms. Greenabaum's POA, which Ms. Greenabaum unknowingly signed. R.R., 3/1/2012, pg. 8, 11-21. Ms. Greenabaum testified that at the time of this signing her son was already appointed as her POA; Ms. Greenabaum also testified that she did not want Defendant to be her POA. *Id.* The Court also heard evidence that Ms. Greenabaum's annuity payments were being mailed to Defendant's home, instead of to Ms. Greenabaum's home, because Defendant filed a change of address form with Ms. Greenabaum's bank (Susquehanna Bank). R.R., 3/1/2012, pgs. 9-10, 23-5, pgs. 13-14, 24-7, and pgs. 16-17, 25-7. Based upon the above-information, the Court believes that Defendant used identifying information of Ms. Greenabaum, including her name and account numbers, without her consent, in order to obtain her annuity payments. The Court respectfully requests affirmation of its guilty verdict as to Count 4 of CR-1344-2010.

b. Mr. James⁵

In this matter, Defendant admitted that she obtained money using Mr. James' credit card information, account, and name. Specifically, Defendant admitted to cashing two checks that drew funds from Mr. James' credit card account without his consent. *See* Order, 4/19/2012. Based upon this information, the Court believes that Defendant used the identifying information

⁴ Count 4 of CR-1344-2010.

⁵ Count 5 of CR-1344-2010.

of Mr. James, including his name and credit card account number, without his consent, in order to obtain funds from his account. The Court respectfully requests affirmation of its guilty verdict as to Count 5 of CR-1344-2010.

iv. Theft by Deception

In this matter, this Court found Defendant guilty of two counts of theft by deception; one count pertained to the actions Defendant took in her dealings with Ms. Greenabaum's annuity and IRA account, and the other count pertained to Defendant's actions dealing with Mr. James' credit card account. The Crimes Code provides that an individual commits theft by deception if "[s]he intentionally obtains or withholds property of another by deception." 18 Pa. C.S. § 3922(a). *See also Commonwealth v. David*, 498 A.2d 975, 976 (Pa. Super. Ct. 1985). One deceives if "[s]he intentionally: (1) creates or reinforces a false impression ... (2) prevents another from acquiring information which would affect his judgment of a transaction; or (3) fails to correct a false impression which the deceiver previously created or reinforced" *David*, 498 A.2d at 976 (citing 18 Pa. C.S. § 3922(a)). In this matter, it is important to note that when funds are deposited into a bank, they cease being the funds of the depositor and become the funds of the banking institution. *David*, 498 A.2d at 977 (citing *Prudential Trust Co.'s Assignment*, 72 A. 798, 799 (Pa. 1909)). The Court believes that the Commonwealth provided sufficient evidence to affirm the Court's guilty verdicts on the two counts of theft by deception charged in this matter.

a, Ms. Greenabaum⁶

In this matter, the Court found Defendant guilty of theft by deception as it pertains to the aggregate amount Defendant fraudulently acquired from Ms. Greenabaum. Defendant withheld the funds of Ms. Greenabaum through the deceptive acquisition of a POA over Ms. Greenabaum.

⁶ Count 8 of CR-1344-2010.

Ms. Greenabaum did not want Defendant to act as her POA; however, Defendant had Ms. Greenabaum sign papers establishing Defendant as such. R.R., 3/1/2012, pg. 8, 11-21. Additionally, the Court received evidence from Ms. Greenabaum that when she asked Defendant why she had not received annuity payments for a few months, Defendant told her that the time lapse pertained to papers that were filed as a part of her estate planning. R.R., 3/1/2012, pgs. 10-11, 10-4. The Court believes that it may find Defendant guilty of theft by deception, as well as theft by unlawful taking or disposition and attempted theft by unlawful taking or disposition, based upon Defendant's actions. *See generally Commonwealth v. Alexander*, 722 A.2d 698 (Pa. Super. Ct. 1998), *appeal denied*, 794 A.2d 359 (Pa. 1999) (where our Superior Court affirmed a finding of guilt on the charges of attempted theft by unlawful taking, attempted theft by deception, attempted forgery, and unlawful use of credit cards). Therefore, the Court respectfully requests the affirmation of its guilty verdict as to Count 9 of CR-1344-2010.

b. Mr. James/Bank of America⁷

In this matter, Defendant admitted that she obtained money from Bank of America by using Mr. James' credit card information, account, and name. Defendant admitted that she forged Mr. James' signature on two of his credit card checks in order to obtain funds from his credit card account held by Bank of America. *See Order*, 4/19/2012. Based upon this information, the Court believes that Defendant intended to deceive Bank of America by knowingly presenting a forged check as authorization to take funds from Mr. James' Bank of America credit card account. Again, the Court believes that it may find Defendant guilty of both the forgery and theft by deception counts as they pertain to Defendants actions. *See generally Alexander*, 722 A.2d 698. The Court respectfully requests affirmation of its guilty verdict as to Count 9 of CR-1344-2010.

⁷ Count 9 of CR-1344-2010.

b. CR-81-2011 (Mr. and Mrs. Jean)

Initially, the Court notes that Defendant's Post-Sentence Motion addressed Defendant's sufficiency challenges to Theft by Unlawful Taking or Disposition (Count 1) and Receiving Stolen Property (Count 2) of CR-81-2011. Therefore, the Court relies its August 1, 2012 Opinion and Order to address the sufficiency challenges to these two counts. Thus, the only remaining guilty verdict for the Court to address at CR-81-2011 is based upon the charge of Unauthorized Use of a Motor Vehicle (Count 4).

The Court believes that sufficient evidence was presented during trial to sustain its guilty verdict as to the Unauthorized Use of a Motor Vehicle charge. In *Commonwealth v. Carson*, 592 A.2d 1318, 1321 (Pa. Super. Ct. 1991), our Superior Court provided that "a conviction for unauthorized use of a vehicle must be predicated on proof that the defendant operated the vehicle without the owner's consent and that the defendant knew or had reason to know that [s]he lacked the owner's permission to operate the vehicle." *Id.* at 1321. In this instance, the facts of the case are not in dispute. Defendant, in her capacity as a paralegal, told the Jeans that they would need to surrender their vehicle as part of their bankruptcy proceeding. Ms. Jeans left the keys to her and her husband's vehicle with Defendant. Around the same date that Ms. Jean left her keys with Defendant, Defendant filed an erroneous voluntary surrender document with the bankruptcy court. Instead of surrendering the vehicle, Defendant took possession of the vehicle and maintained possession, for a period of approximately (9) months. Defendant took the Jeans' vehicle for an emissions inspection and changed the owner's mailing address to the address of her employer. The Pennsylvania State Police eventually recovered the vehicle at a quarry in Loyalsock Township; the State Police received a report that this vehicle was abandoned at the quarry and needed to be removed. When the State Police checked the vehicle's registration, the

Jeans were contacted and this information came to light. The Jeans told the police that the vehicle was surrendered to their attorney in January 2010. Based upon the foregoing information, the Court believes that sufficient evidence was provided to establish that Defendant operated the Jeans' vehicle without their consent and that Defendant knew that she lacked the owner's permission to operate the vehicle. Therefore, the Court respectfully requests that its guilty verdict as to Count 4 of CR-81-2011 be affirmed.

III. Adequacy of Sentence

In addition to alleging that her verdicts were based upon insufficient evidence, Defendant alleges that the Court imposed an excessive and unreasonable sentence. The Court disagrees. In *Commonwealth v. Rodda*, 723 A.2d 212 (Pa. Super. Ct. 1999)(en banc), our Superior Court held:

[s]entencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Id. at 214 (citations omitted)(cited by *Commonwealth v. Coulverson*, 34 A.3d 135, 143 (Pa. Super. Ct. 2011)). Additionally, the Superior Court held in *Commonwealth v. Fullin*, 892 A.2d 843 (Pa. Super. Ct. 2006), that:

[w]hen imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S.A. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant.... And, of course, the court must consider the sentencing guidelines.

Id. at 847-48 (citations omitted).

Initially, when the Court sentenced Defendant, it did so improperly. After granting Defendant's post-sentence motion, the Court resentenced Defendant on October 24, 2012. The sentence presently imposed on Defendant is within the standard guidelines, with the exception of

the aggravation of Count 8 (Theft by Deception) of CR-344-2010. The Court aggravated its sentence on this count because of “the effect [Defendant’s actions had] on the life of someone in [Mrs. Greenbaum’s] status, a widowed senior citizen in a fragile economic and emotional condition.” *See* Order, 10/24/2012, pg. 3. *See also* R.R., 6/18/2012, pgs. 4-5, 14-13. The Court notes that at the time of Defendant’s trial, Ms. Greenbaum was seventy-years-old; she testified that her date of birth is January 27, 1942. R.R., 3/1/2012, pg. 4, 5-9. Throughout Defendant’s course of conduct, she successfully depleted the life savings of Ms. Greenbaum and her late-husband. This fact was heavily considered in aggravating the sentence of Count 8 at CR-1344-2010. Yet, the Court only aggravated Defendant’s sentence on that count; the remainder of the counts were sentenced within the standard guidelines and should be upheld.

Therefore, for the reasons stated above, the Court respectfully requests its sentencing order of October 24, 2012, with the included aggregation, be affirmed.

BY THE COURT,

Date

Richard A. Gray, J.

cc: PD (JL)
DA (AB)
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