

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

**COMMONWEALTH OF PENNSYLVANIA** : **No. CR-357-2012**  
:   
v. :   
: **CRIMINAL DIVISION**  
**BASIL GARCIA,** :   
**Defendant** :

**OPINION AND ORDER**

The Defendant filed a Post-sentence Motion on November 26, 2013.<sup>1</sup> Argument on Defendant’s Motion was held on January 21, 2014.

***Background***

On January 15, 2012, Jennifer Colon (Colon) stole a red Dodge truck from Dennis Mullinger (Mullinger). Colon had stayed at Mullinger’s residence the night before and had taken the keys of the truck from Mullinger’s lunch bag. Mullinger reported the stolen vehicle to police when he noticed the vehicle missing when getting ready for work the next morning. Subsequently, Colon “rented” the vehicle out to Basil Garcia (Defendant) in exchange for a fifty (50) dollar bag of crack cocaine. Colon testified that she checked the truck for any valuables that she could trade for drugs and did not find any firearms. In addition, Colon previously recalled the Defendant talking about a gun that he possessed, which he called “biscuit” or “little biscuit.” Following Colon giving the vehicle to the Defendant, Colon called the Defendant that day to inform him that the vehicle had been stolen and that he needed to “park it.”

On the same day, Officer Jason Dockey (Dockey) of the Williamsport Bureau of Police (WBP) spotted a red Dodge truck that matched the description reported stolen by Mullinger.

---

<sup>1</sup> The Court shall decide a post-sentence motion within 120 days of the filing of the motion. Pa.R.Crim.P. 720(B)(3)(a).

Dockey ran the license plate and confirmed that it was the stolen vehicle prior to activating his emergency lights and sirens. As a result, the red Dodge truck initially slowed down and then rapidly accelerated going northbound on Cherry Street. Dockey and Officer Jeremy Brown (Brown) of WBP pursued the vehicle, which ran through numerous stop signs and travelled speeds in excess of eighty (80) miles per hour. While the truck went westbound on Belmont Avenue it made an evasive maneuver to avoid hitting a patrol unit and instead hit the south side of the street curb, which deflated the vehicle's tires. The truck slowed down and the Defendant jumped out of the driver side of the vehicle while it was still in motion and ran eastbound on Belmont. The truck continued to roll and ultimately came to rest against a tree. The Defendant was later found hiding behind a fence at 509 Vallamont Drive in Williamsport. While Brown was pursuing the Defendant on foot he observed him throw a bag of suspected cocaine, which was collected and introduced at trial. In addition, a yellow sheet of paper was found on the Defendant, which listed prices of cocaine and heroin depending on different quantities. Brown testified that he has seen similar sheets of paper associated with drug investigations.

The Defendant, however, testified that he was going to a Dollar store when Colon spotted him while she was driving the red truck and offered to drive him after she completed her errands.<sup>2</sup> Colon drove to a residence and subsequently told the Defendant that he could take the vehicle himself to the Dollar store. While the Defendant was driving the truck he observed that he was being followed by police and decided to flee because he was on an Intermediate Punishment (IP) sentence and did not want to be sent to state prison for driving without a license. The Defendant testified that he did not know that the vehicle was stolen or that there was a gun in the vehicle, and denied that he threw the crack cocaine from his person while being pursued.

---

<sup>2</sup> The Defendant testified that he was going to buy some food and a phone charger at the dollar store, however, he also stated that he forgot his money and therefore did not have any money to purchase the phone charger.

The red Dodge truck was taken into police custody and searched the next day. During the search, officers found a Jennings 22 pistol and a blunt cigar.<sup>3</sup> The gun was recovered in the passenger right front door of the vehicle. The gun was sent to Wyoming Crime Laboratory and Carol Ritter (Ritter) swabbed the gun, magazine, and cartridges for DNA. While preparing all evidence, Ritter does not talk over the evidence, bleaches her work area, and uses sterile equipment. The swabs from the gun and from the Defendant were then tested for DNA by Joseph Kukosky (Kukosky). Kukosky found a mixture of DNA on the gun, which consisted of the Defendant's and two unknown other's DNA.<sup>4</sup> Further, Kukosky described how the DNA would have gotten on the gun:

LONGO: Now what does that mean some people shed more than others?

KUKOSKY: Some individuals just have skin cells that will shed or come off their hands or whatever body parts more easily than other people.

LONGO: I guess then hypothetically me and Mr. Garcia are sitting at this table and for example there is a piece of paper in between us, even though I'm closer to the paper if Mr. Garcia is shedding more than me is it possible that he would have more DNA material on that piece of paper than me?

KUKOSKY: If he touched it, yes, that's possible.

LONGO: He would have to touch it?

KUKOSKY: Yes, in most cases, yes. It's very – it's would be very hard for us to develop a DNA profile from something that wasn't touched.

.....

LONGO: Is it possible that DNA material could be on the gun without someone actually touching it?

---

<sup>3</sup> Jason Philbin testified that he did not know that the firearm was missing from his residence on George Street, the last time he saw the firearm, until he was contacted by police.

<sup>4</sup> Kukosky stated that it was 140 million, 5.5 million, and 7 million times more times likely that the Defendant's DNA was on the gun when compared to the Caucasian, African-American, and Hispanic populations respectively.

KUKOSKY: I guess anything is possible. I can't say that's impossible, but I know from working and doing this type of work that touch DNA samples in and of themselves are very hard to get results from.

N.T., April 22, 2013, p. 175, 177.

On April 23, 2013, following a jury trial before this Court, the Defendant was found guilty of Fleeing or Attempting to Elude a Police Officer, Unauthorized Use of Automobiles and Other Vehicles, Tampering With or Fabricating Physical Evidence, Criminal Mischief, Possession of a Controlled Substance, Possession of Drug Paraphernalia, Receiving Stolen Property (firearm); and Firearms Not to be Carried Without License. The Defendant was found not guilty of Receiving Stolen Property regarding the red Dodge truck. On November 14, 2013, this Court sentenced the Defendant to an aggregate sentence of sixty-nine (69) months to 138 months in a State Correctional Facility with a consecutive four (4) years of supervision with the Pennsylvania Board of Probation and Parole.

On November 26, 2013, the Defendant filed Post Sentence Motions. The first issue raised by the Defendant was that there was not sufficient evidence to support the jury's guilty verdicts regarding the offenses of Firearms Not to be Carried Without a License and Receiving Stolen Property (firearm). Similarly, the Defendant alleges that the guilty verdicts on the same offenses were contrary to the weight of evidence. In order to have the transcripts prepared, the hearing on the Post-Sentence Motions was held on January 14, 2014. Following a thorough review of the record, the Court finds that the Defendant's motions are without merit for the following reasons.

## *Discussion*

### *Whether the Defendant's guilty verdict was against the weight of the evidence*

The Defendant argues that the guilty verdicts for Firearms Not to be Carried Without a License and Receiving Stolen Property (firearm) were against the weight of evidence. Specifically, the Defendant claims there was no evidence that he was seen with the firearm and that the DNA found on the weapon was not sufficient to establish possession. “The standard to apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find that every element of the crime has been proven beyond a reasonable doubt.” Commonwealth v. Back, 389 A.2d 141 (Pa. Super. 1987). “A new trial should be granted only in truly extraordinary circumstances, i.e., ‘when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.’” Id. (citing Commonwealth v. Brown, 648 A.2d 1177, 1198 (Pa. 1994)).

The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight of the evidence are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock’s one’s sense of justice.

Commonwealth v. Young, 692 A.2d 1112, 1114-15 (Pa. Super. 1997) (citations omitted). “It is well established that the finder of fact is free to believe all, part, or none of the evidence.”

Commonwealth v. Carter, 546 A.2d 1173, 1182 (Pa. Super. Ct. 1988). “[C]redibility determinations are generally not subject to review.” Id.

Regarding Firearms Not to be Carried Without a License, the crime is defined by 18

Pa.C.S. Section 6106, which states:

- (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.
- (2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

Further, “[a] person is guilty of theft if he 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 with intent to restore it to the owner.”

Pa.R.Crim.P. § 3925(a).

Here, the Defendant alleges that the Commonwealth failed to establish that he knew about the firearm and/or ever possessed it. The Commonwealth provided the testimony of Colon, who testified to searching the vehicle before “renting it” to the Defendant and not finding a firearm, which had she found would have sold for drugs. In addition, Colon testified that the Defendant possessed a firearm that he called “biscuit” or “little biscuit.”

Further, DNA results provided by the Commonwealth were additional evidence that the Defendant had possession of the firearm. The Defendant argues that the DNA could have been placed on the firearm while he was driving the vehicle. Viewing the evidence in the light most favorable to the Commonwealth, to arrive at its decision the jury would have found the Defendant’s testimony not credible and that Colon in fact traded the truck to the Defendant for drugs. Based on Colon’s testimony, the Defendant would never have sat on the passenger side of the vehicle, where the firearm was found, and must have placed it there after receiving the

vehicle. As the Defendant was most likely only seated on the driver's side of the vehicle and he did not drive any other passengers, the jury found it unlikely that his DNA, which was found on the firearm, was a result of just shedding skin cells.

Similarly, testimony provided by Kukosky supported the jury's finding that the Defendant had possessed the firearm. Kukosky testified that the testing conducted on the gun was to find touch DNA and that it was unlikely that the DNA found would have been caused by anything besides touching (shedding skin cells or saliva). The testimony of Kukosky supported the Commonwealth's argument that the firearm was possessed by the Defendant and not that he was merely near it.

Finally, the actions of the Defendant fleeing from the police indicate consciousness of guilt. The Defendant testified that he fled because he was on an IP sentence and was driving without a license. The Defendant, however, in the process of fleeing committed serious traffic violations and went in excess of eighty (80) miles per hour. Viewing the evidence in the light most favorable to the Commonwealth, the Defendant was fleeing because he was driving a stolen vehicle and possessed drugs and a gun.

As the Defendant's touch DNA was found on the firearm, Colon testified that she searched the vehicle prior to giving it to the Defendant, and that the Defendant fled from police showing his consciousness of guilt, the guilty verdict for Firearms Not to be Carried Without a License and Receiving Stolen Property (firearm) was not against the weight of evidence.

***Whether the verdicts of guilt were not supported by sufficient evidence***

The Defendant argues that the guilty verdicts for Firearms Not to be Carried Without a License and Receiving Stolen Property (firearm) were not supported by sufficient evidence. The Defendant only claims that the Commonwealth failed to establish that he possessed the firearm.

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Commonwealth v. Karkaria, 625 A.2d 1167 (Pa. 1993). The Commonwealth's burden of proving the elements may be sustained by means of wholly circumstantial evidence. Commonwealth v. Thomas, 350 A.2d 847, 849 (Pa. 1976). A court is required to review the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991).

As stated in the previous section, the Court finds that there was sufficient evidence to find that the Defendant committed the crimes of Firearms Not to be Carried Without a License and Receiving Stolen Property (firearm).

### ***Conclusion***

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is 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)."



**ORDER**

AND NOW, this \_\_\_\_\_ day of February, 2014, based upon the foregoing Opinion, it is hereby ORDERED and DIRECTED that the Defendant's Post Sentence Motion is DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA  
Julian Allatt, Esq.