

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

**COMMONWEALTH OF PENNSYLVANIA** : **CR-258-2018**  
v. :  
: :  
**CLINTON E. LONGENBERGER** : **APPEAL**  
**Defendant** :

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

Clinton Longenberger (Defendant) filed an Omnibus Pretrial Motion petitioning for a Writ of Habeas Corpus and requesting discovery on March 27, 2018. A hearing on the motion took place on July 12, 2018. Defendant challenged Commonwealth's evidence on counts of Theft by Unlawful Taking<sup>1</sup> and Receiving Stolen Property.<sup>2</sup> The Court following the hearing dismissed the charges without prejudice in an Order dated July 12, 2018.

Commonwealth filed a timely Notice of Appeal on August 10, 2018. This Court requested a Concise Statement of Matters Complained of on Appeal, which it received on September 4, 2018. On Appeal the Commonwealth brings forward the following error:

1. The Court erred as a matter of law in determining that the evidence presented by the Commonwealth at the July 12, 2018 *Habeas Corpus* hearing was insufficient to establish a *prima facie* case of Theft by Unlawful Taking and Receiving Stolen Property.

Commonwealth's Concise Statement of Matters Complained of on Appeal 08/04/18, at 1.

**Testimony**

**Human Resources Manager Julie Lynn Smith**

Ms. Smith works at Kellogg Company (Kellogg) in Muncy, PA where Defendant was employed. His employment was terminated on March 9, 2017. N.T. 07/12/18, at 5. In September of 2016 an unnamed employee went to Ms. Smith to inform her Defendant was

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<sup>1</sup> 18 Pa. C.S. § 3921(a).

<sup>2</sup> 18 Pa. C.S. § 3925(a).

selling glue nozzles on EBay. *Id.* at 6-7. Kellogg's factory uses glue nozzles, which Defendant in his position of maintenance mechanic would have had access to. *Id.* at 7-8. After receiving this information, Ms. Smith retrieved the logs showing how many glue nozzles each maintenance mechanic signed out over the past four years and they started marking the incoming glue nozzles. *Id.* The logs showed that during this time two hundred and twenty-five (225) nozzles were signed out by twenty-nine (29) different mechanics. *Id.* at 10. Of those, seventy-nine (79) were signed out by Defendant, which was the highest number out of the mechanics, with the next closest being fifteen (15). *Id.* at 10-11. The investigation showed, Defendant's EBay account was under the name C\_E\_L, which are Defendant's initials. *Id.* at 12. He was selling glue nozzles in groupings of ten (10) and selling/sold approximately forty (40) nozzles. *Id.* She also testified that at Kellogg each mechanic had a cart, which they stocked individually for maintenance needs, some mechanics do more work than others, and three (3) out of the twenty-nine (29) individuals accounted for forty-six percent (46%) of the checked out nozzles. *Id.* at 13-14. Additionally, there is no video surveillance in the storage room, of Mr. Longenberger leaving the facility with nozzles, the nozzles have no serial numbers, and the nozzles could be ordered by anyone on the market, they were not specific to Kellogg. *Id.* at 14-16.

#### **Manager of Plant Maintenance Scott Pequignot**

Mr. Pequignot is in charge of the storage department at Kellogg. *Id.* at 17. The procedure put in place at the plant required a maintenance mechanic to first go to the storage attendant, which had to approve each withdrawal and assign a work number to the part, before one could get a glue nozzle. *Id.* at 18-19, 25. When replaced, the old malfunctioning nozzles were discarded in the trash. *Id.* at 20. The policy at Kellogg is anything including waste may not

leave the facility. *Id.* at 30. He testified he believed there is no legitimate business reason for that many nozzles being checked out. *Id.* at 21. Again he reaffirmed, the nozzles have no serial numbers and are not unique to Kellogg and each time Defendant signed out a nozzle there was a work order number assigned that indicated work to be done on one of the machines. *Id.* at 25-26, 32-33.

#### **Licensed Private Detective Scott Warner**

Mr. Warner was hired by Kellogg to investigate the incident involving Defendant. He conducted an interview with Defendant on March 2, 2017. *Id.* at 36. In that interview, Defendant stated his EBay account was named C\_E\_L and that he had sold glue nozzles for about a year from that account. *Id.* at 37. Defendant either stated it was not relevant where he got the glue nozzles or that he did not get them from this facility, but never told Mr. Warner where he got the nozzles he was selling. *Id.* at 36-37. Defendant also stated the reason for the amount of nozzles he checked out was because he did a lot more work on them than other mechanics. *Id.* at 38. The interview was not recorded and Defendant also sold other mechanic related items on his account. *Id.* at 38-39.

#### **Discussion**

This case differs from a typical Petition for Habeas Corpus in that a preliminary hearing was not originally conducted. Defendant waived his preliminary hearing contingent on his application for ARD. Upon not receiving ARD, the hearing for Defendant's Pretrial Omnibus Motion acted as Defendant's preliminary hearing. *See id.* at 3-4. As such the Commonwealth was required to demonstrate sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and

establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed.

While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Commonwealth v. Ripley*, 833 A.2d 155, 159-60 (Pa. Super. 2003). Moreover, "inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

Defendant argues that Commonwealth provided no evidence "implicating Defendant in a theft," "indicating he removed the property unlawfully," and/or demonstrating "the blue glue nozzles that were being sold on EBay are those owned by Kellogg." Defendant's Memorandum of Law in Support of Omnibus Pretrial Motion 07/11/18, at 3. This Court agrees with Defendant's conclusion.

Theft by Unlawful Taking occurs when an individual "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa. C.S. § 3921(a). Receiving stolen property occurs when an individual "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.” 18 Pa. C.S. § 3925(a). The sufficiency of Commonwealth’s evidence is bounded by two poles. On the one hand, the Commonwealth does not have to establish guilt to a mathematical certainty and may in a proper case rely wholly on circumstantial evidence. On the other hand, guilt must be proved; mere conjecture or surmise is not sufficient.” *Commonwealth v. Herman*, 412 A.2d 617, 619 (Pa. Super. 1979).

The issue this Court finds with the establishment of a *prima facie* case is that the Commonwealth provided no testimony of “movable property of another,” as required by both charges. The testimony as the Court construes it is that Defendant checks out more blue plastic glue nozzles than other maintenance mechanics by a substantial percentage and that he was selling blue plastic glue nozzles on his EBay account. Although the Commonwealth may establish the charges through circumstantial evidence, it must be sufficient a connection rather than mere opportunity. Commonwealth has failed to show or allege that he took them from work through testimony of video evidence and/or eyewitness accounts of this occurring. Commonwealth has failed to provide testimony even alleging Kellogg was missing any blue plastic glue nozzles. Testimony demonstrates that each part taken out by maintenance mechanic goes through a custodial chain and needs a work product number attached to it, which each of Defendant’s withdrawals had and the nozzles used by Kellogg can be purchased by your average person, which a simple Google check confirms. Therefore, Commonwealth’s testimony has failed to show or allege that more likely than not nozzles are the “movable property of” Kellogg.

### **Conclusion**

Based on the foregoing reasoning, this Court found the Commonwealth had not met their burden of presenting a *prima facie* case at the preliminary hearing. As “movable property

of another” is an essential element required to establish the crimes of Theft by Unlawful Taking and Receiving Stolen Property the Omnibus Pretrial Motion was granted and the charges were dismissed.

BY THE COURT,

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Nancy L. Butts, P.J.

cc: DA  
Robert Hoffa, Esq.