

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 98-10,569
	:	
	:	
vs.	:	CRIMINAL
	:	
SCOTT B. FLOOK,	:	
Defendant	:	

ORDER

AND NOW, this ____ day of April, 1999, the Court DENIES the defendant's post trial motions.¹ First, the Court questions its ability to grant a witness immunity. See Commonwealth v. Johnson, 507 Pa. 27, 487 A.2d 1320 (1985). Assuming arguendo that the Third Circuit decision in Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980) is binding on this Court, it finds that the limited exceptions set forth in that case inapplicable to the facts of this case.² In Smith the Third Circuit set forth two situations where a court must immunize the testimony of a defense witness over the prosecutor's objection: (1) when the court finds prosecutorial misconduct by the government's intent to disrupt the fact-finding

¹The Court notes that the defendant withdrew the portion of his motion relating to his allegations that the videotape provided in discovery was different than the one the Commonwealth introduced at trial.

²The Court notes that the Commonwealth failed to file a brief as directed at the conclusion of oral argument. However, since the Court finds the case law cited by the defendant is inapplicable to the facts of this case, the Court denied the defendant's post trial motions despite the Commonwealth's dereliction. The Court sincerely hopes that in the future the Commonwealth will respond in writing to its direction for briefs even if only to state that the cases cited by the defense are distinguishable rather than simply ignoring it.

process; and (2) when the defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity. Here, the defendant has not proven either exception. The Court finds no basis in the record for a claim of prosecutorial misconduct. The Court also finds that the proffered testimony of Mr. Hess is not clearly exculpatory. The testimony presented at trial established that the damage to the victim's vehicle consisted of about four dents which resulted from an individual's body weight on the hood. N.T., December 10-11, 1998, at pp. 20, 24. In his trial testimony, the defendant admitted that he was the individual who ended up on the vehicle's hood. The issue was whether the victim ran into him, knocking him onto the hood or whether the defendant jumped onto the hood. Therefore, the proposed testimony of Mr. Hess to the effect that he struck the vehicle with his picket sign would not clearly exonerate the defendant.³ Also, the Court doubts that the jury's verdict would be different if Mr. Hess's testimony had been

³The Court notes that the defendant stated in his testimony that another picketer struck the hood of the vehicle, the vehicle stopped, and the individual moved off to the side. N.T. at p. 147. According to the defendant's offer of proof, that individual was Mr. Hess. While this would account for one dent, it would not account for all the damage.

presented since there was testimony presented at trial that another individual came in contact with the vehicle. See, N.T., December 10-11, 1998, at pp. 91, 95, 106, 109, 120, 147.

By The Court,

Kenneth D. Brown, J.

cc: Keith O. Barrows, Esquire
District Attorney (DH)
Work file