IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	NO. 97-10,376
vs.	:	97-10,377
	:	97-10,378
RICHARD BANEY	:	
Defendant	:	1925(a) OPINION

Date: June 27, 2001

OPINION IN SUPPORT OF THE ORDER OF JANUARY 7, 1998 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

History

The Defendant has appealed this Court's sentence imposed on January 7, 1998, a cumulative sentence, under three Informations, of a minimum of twenty months and a maximum of eleven years and six months for offenses of theft by deception (18 Pa.C.S. §3922(a)(1) and receiving stolen property (18 Pa.C.S. §4105(a)(1). The evidence at trial revealed that in the time period between September 1996 and October 1996, Defendant engaged in writing at least a dozen checks totaling in excess of $600 on an account standing in the name of he and his paramour, Ms. Edith Wesley. Defendant, or on two occasions, another person (presumably Ms. Wesley) used the checks to obtain merchandise from stores or cash from a bank. The check amounts were relatively small, ranging from $34.34 to $79.97. At the same time Ms. Wesley was also known to be writing checks on that account. In the time period the checks were being written deposits to the account amounted to only $200 before it was closed, after which additional checks were written.

Defendant contended at trial that he was not aware of the extent of Ms. Wesley's check writing and further that he was in transition, changing residences and did not receive

notice the checks had bounced and therefore did not respond and pay them. He introduced testimony that he had written to several of the businesses telling them of his intent to make the checks good. The checks were not made good. Simply stated, the evidence introduced at trial and obviously believed by the jury established these acts constituted theft by deception when the fraudulent checks were issued or cashed and when the money and goods were handed to Defendant, that he had received stolen property.

Defendant was convicted following a jury trial, which concluded on November 19, 1997. The jury found Defendant guilty of:

> Under Information #97-10,376 – involving five checks -- three counts of Theft by Deception and five counts of Receiving Stolen Property; and
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> Under Information #97-10,377 -- involving two checks -- two counts of each Theft by Deception and Receiving Stolen Property; and
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> Under Information #97-10,378 -- involving one check -- one count of Theft by Deception and Receiving Stolen Property.

This Court at the trial also convicted Defendant of seven counts of accompanying summary offenses of issuing bad checks under 18 Pa.C.S. §4106 and four separate bad check summary charges.

Defendant was sentenced under the Informations as follows:

A. Under Information #97-10,376 – five counts of Receiving Stolen Property, each misdemeanors of the second degree a consecutive sentence of three months to two years on each count for a cumulative sentence of fifteen months to ten years. The Court found the Theft by Deception merged with the Receiving Stolen Property charges for purposes of sentencing and in related

summary offense bad check charges entered an adjudication of guilt but imposed no further penalty. The standard sentencing range for Receiving Stolen Property under the applicable sentence guidelines was for a minimum of one to six months based upon an offense gravity score of two and a prior record score of 5. The sentences less were imposed within the standard range.

B. Under Information #97-10,377 -- two counts of Theft, misdemeanors of the third degree, as to each count and consecutive to the prior information to serve under, the first count a minimum of one month and a maximum of six months and as to the second count a minimum of three months and a maximum of six months consecutive for a cumulative under this Information of four months minimum and one year maximum. These offenses carried an offense gravity score of 1 and with a prior record score of 5 the applicable guidelines provided for a standard sentencing range for a minimum sentence of R.S. 26. The sentences imposed were within the standard range for sentences. The other charges were merged for sentencing purposes. This sentence was consecutive to the prior information.

C. Under Information #97-10,378 -- Theft by Deception, a misdemeanor third degree, a minimum of one month and a maximum of six months, consecutive to the sentences imposed under the other Informations. Again, based upon the prior record score of 5 and offense gravity score of 1 the standard sentencing range was R.S. to 6; Defendant was sentenced within the standard range. The other charges were merged for sentencing.

Defendant was made boot camp eligible. He was directed to make restitution. In four separate summary offenses filed under District Justice Transcripts, he was sentenced to pay a fine of $200. Defendant was also directed to pay the costs of prosecution.

After Defendant was sentenced his counsel did not file a timely appeal. On January 31, 2001, this Court granted Defendant's PCCR petition asserting trial counsel had failed to pursue an appeal and permitted Defendant to file an appeal nunc pro tunc.

Discussion

In his statement of matters complained of on appeal, Defendant lists 19 matters. Because many of them involve similar grounds, the like issues will be grouped together for purposes of analysis.

Prosecutorial Misconduct

Defendant cites three different instances of prosecutorial misconduct that he believes entitles him to relief. His first argument is that there was a conflict of interest on the part of the prosecutor.[1] When Defendant filed his petition to proceed nunc pro tunc, he raised virtually identical issues of prosecutorial misconduct. In response, the District Attorney's office filed a brief citing their opposition to granting the petition. The brief also contained a comprehensive analysis of the prosecutorial misconduct charges. The Court found the charges to be meritless based upon the Commonwealth's reasoning in its brief. In the revised petition, the Court sees nothing that alters its previous assessment.

[1] Since Defendant does not elaborate, the Court assumes that the conflict of interest was between the prosecutor and Defendant.

Defendant does cite one instance of prosecutorial misconduct that he had not previously cited. Defendant contends that the prosecution instructed a material witness, Edith Wesley, not to participate in Defendant's defense.[2] The Court is unsure of the basis of this claim. The Court recognizes that at the time of Defendant's trial, Ms. Wesley was also facing criminal charges. N.T., 11-19-97, pp. 62-64. The Court also notes that Ms. Wesley was present at Defendant's sentencing but left without testifying. N.T., 1-7-98, p.8. If the district attorney's office instructed Ms. Wesley not to testify, the Court can find no evidence of this assertion anywhere in the record. It is the Court's conclusion that this claim is meritless.

Ineffective Assistance of Counsel

Defendant cites six different instances in which he maintains his counsel was ineffective. The standard for ineffective assistance of counsel is well settled. To demonstrate that his counsel was ineffective, Defendant has the burden of establishing: 1) the underlying claim is of arguable merit; 2) the particular course of conduct of counsel did not have some reasonable basis designed to effectuate his interests; 3) counsel's ineffectiveness prejudiced him. ***Commonwealth v. Howard***, 645 A.2d 1300, 1034 (1994).

The first instance that Defendant maintains was ineffective assistance of counsel occurred when his attorney failed to demur to the case of the Commonwealth when there was no in-court identification of the Defendant. Though an in court identification is a common practice, the Court knows of no authority that requires it. Indeed, the Court can conceive of scenarios in which the victim would never have actual face to face contact with the perpetrator.

[2] There is a fuller discussion of Ms. Wesley's status in the context of Defendant's charge of ineffective assistance of counsel.

Furthermore, an in court identification that is less than positive, but which is accompanied by independent circumstantial evidence linking the defendant to the offense charged, ordinarily is sufficient to sustain the conviction. ***Commonwealth v. Boone***, 429 A.2d 689 (1981). In this case there was ample independent evidence, both direct and circumstantial, to link Defendant to the offenses. This evidence includes his photo identification number[3] written on the various checks by the different cashiers, a bank statement establishing that the checks came from his account, and his own testimony admitting he wrote the checks. All this evidence renders an in-court identification unnecessary in this case. The Court cannot find that Defendant's counsel was ineffective for failing to object to something that was not an absolute necessity.

Defendant maintains that his counsel was ineffective for failing to object to the testimony of Shana Bower and Mary Lou Beitner on the basis of hearsay and a lack of direct knowledge. Shana Bower was a cashier employed by BiLo at the time of the crimes and Mary Lou Beitner was a cashier employed by Hills Department Store during the same time period. N.T., 11-17-97, pp. 13,31. Quite frankly, the Court does not understand the basis of this assertion. Both testified that they had personally received the worthless checks as evidenced by the fact that both recognized their marks on the checks near Defendant's 'driver's license' number. Both cashiers had personal knowledge of at least one of the transactions in question. ***Id***. at pp. 15 and 32-34. With regard to the hearsay argument, once again the Court is confused. After reviewing the testimony of both Ms. Bower and Ms. Beitner, the Court does not see where either party attempted to enter into the record an out-of-court statement asserted for the

[3] Defendant testified that he did not possess a valid driver's license but had a photograph identification card issued by the Commonwealth, which is similar to a driver's license.

truth of the matter contained in their testimony not objected to during the trial. It is the Court's conclusion that since there was no improper hearsay testimony offered by either witness, Defendant's counsel cannot be ineffective for failing to raise a hearsay objection.

Defendant argues that his counsel was ineffective for failing to demur to the theft by deception charges where no testimony was elicited that the check(s) was ever actually passed. Once again the testimony from the trial is abundantly clear. The Commonwealth produced at least nine different witnesses who testified to accepting a check as payment with Defendant's identification number on it in payment for merchandise. N.T., 11-18-97. For Defendant to argue that his counsel was ineffective for failing to argue that no checks were passed flies in the face of the evidence presented and strains credulity.

Defendant asserts that his counsel was ineffective for not calling Edith Wesley as a witness. To prevail on a claim of ineffectiveness of counsel for failing to call a witness, Defendant must demonstrate: (1) that the witness existed; (2) that the witness was available; (3) that counsel knew, or should have known, of the witness's existence; (4) that the witness was available and willing to testify on Defendant's behalf; and (5) the absence of the testimony prejudiced Defendant. ***Commonwealth v. Purcell***, 724 A.2d 293,306 (1999). There is no doubt that the witness existed, or that Defendant's counsel knew of her existence. In fact, her absence was discussed during the course of the trial. ***N.T.***, 11-19-97, pp. 62-64. In a sidebar conversation, it was disclosed that Ms. Wesley was facing criminal charges and had legal representation. ***Id.*** at pp. 62-63. This disclosure casts serious doubt on Ms. Wesley's willingness to testify on behalf of Defendant. At any rate, in light of the substantial amount of

evidence produced by the Commonwealth, the Court is not persuaded that Ms. Wesley's absence prejudiced Defendant.

Defendant claims that his counsel was ineffective for failing to demur to the theft and receiving stolen property charges on the basis that it is legally impossible to be convicted of both if they are based upon the same transaction or occurrence. 18 Pa.C.S.A. § 3921 (a) provides that a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof. Under 18 Pa.C.S.A. § 3925, a person is guilty of receiving stolen property 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. There is nothing in the elements of these statutes that makes one offense mutually exclusive of the other. In fact, there have been rulings to the contrary. Defendant could be prosecuted in one county for theft by unlawful taking after being sentenced in another for illegally receiving the same item, as sentences merged. ***Com. v. Hudak***, 675 A.2d 1263 (Pa.Super 1996), appeal granted, vacated 694 A.2d 342 (1997). One who is an original misappropriator of properties can be convicted as receiver of stolen property. ***Com. v. Shaffer***, 420 A.2d 722 (Pa.Super. 1980). Crimes of theft by unlawful disposition and theft by receiving stolen property do not merge, although they may be joined in a single indictment. ***Com. v. Bailey***, 378 A.2d 998 (Pa.Super. 1977). Consequently, Defendant's claim that his counsel was ineffective for failing to demur on the basis that it is legally impossible to be convicted of theft and receiving stolen property is meritless.

Defendant argues that his counsel was ineffective for failing to object to the application by the Court of an amendment to the Bad Check statute, which took effect after the date of the crimes. Presumably Defendant refers to the amendment to 18 Pa.C.S.A. §4105, Bad Checks, passed December 20, 1996 and effective 60 days later. The Court agrees that the amendment became effective after the transactions in this case occurred. The Court, however, disagrees the amendment was applied or that it influence the outcome of this case. At pp. 95-96, N.T. 11/19/97 the Court clearly charged the jury in terms of the statutory presumption the issuer is presumed to know a check would not be paid in terms of the pre-1996 amendment – that is, the presumption arises if payment is refused for lack of funds for 30 days after presentation and is not made good within 10 days after receipt of notice. The major change the 1996 amendment made was concerned with how the drawee's notice of refusal may be given. The amendment provided that notice may be given orally or in writing. Furthermore a notice of refusal to pay may be sent by either certified or registered mail and there is a presumption of delivery whether or not the receipt was returned. The amendment does *not* establish a notice requirement as that requirement had already existed. The issue of whether or not Defendant received notice of refusal to pay from the bank were laid to rest by Defendant's own testimony on cross-examination, when after acknowledging receiving many mailed notices concerning at least 38 returned checks and multiple overdraft notices:

> Q. Is it also your testimony that you never had any knowledge that the bank was sending you notices to let you know that your account was in trouble?
>
> A. Yes, that's why we sat down and I went around, that's what I just said, I went around to every notice I got and paid the checks before it got, the only reason we missed these, I missed these

because we were in the process of moving, and it's got just a lot came back return certified as returned and nobody was there.

Q. So, you got, you were aware of the notices being generated by the bank when the checks were returned. Correct?

A. Yes, most of them.

N.T. 11/17/97 at page 70; *see also* pp. 66-75. In light of this and other testimony, the jury found Defendant's explanation not credible.

As to the contention that Defendant also asserts trial counsel was ineffective for failing to demur to the theft and receiving stolen property charges, the Court disagrees. As previously discussed, the facts were certainly legally sufficient to support the charges. A demur would have been denied.

Insufficiency of Evidence

Defendant brings two different claims based on insufficiency of the evidence. The first claim that there was no testimony elicited that there was a check passed at Scot's Lo-Cost. The Court notes the testimony of Nancy Thursby who was the office manager of Scot's Lo-Cost at the time of the offenses. N.T., 11-19-97, pp. 2-8. She testified to the effect that she received two checks back from Woodland Bank with Defendant's name on it for insufficient funds. She further testified that she notified Defendant via phone and certified mail. Consequently, it is the Court's opinion that this claim is meritless.

Defendant maintains that the evidence was insufficient to convict him of both theft and receiving stolen property. Defendant continues that it is legally impossible to be convicted of both charges. Taking this second claim first, the Court has already discussed why it is possible to be convicted of both theft and receiving stolen property. As to the sufficiency

of the evidence to support convictions for both charges, the Court finds this claim meritless. By the Court's count there were at least eleven witnesses who testified that they had either received checks from Defendant in exchange for goods, or attempted to collect on the checks once they had been returned from the bank for insufficient funds. This does not include Defendant's own testimony, which largely corroborated what the other witnesses had to say. N.T., 11-19-97, pp. 49, 51,58-62.

Improper Conviction

Defendant maintains that his conviction of theft and receiving stolen property was improper, whereas the proper charge was bad checks. In its analysis of Defendant's ineffectiveness of counsel claims, the Court reviewed the elements of theft and receiving stolen property and noted that one could be convicted of both. 18 Pa.C.S.A. §4105 entitled 'Bad checks' provides that a person commits this offense if he: (1) issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee; or (2) knowing that it will not be honored by the drawee, issues or passes a check or similar sight order for the payment of money when the drawee is located within this Commonwealth. The Court observes that each of the offenses contains elements that the other two do not. Thus there are no double jeopardy problems as enunciated by ***Blockburger*** or ***Breeland***. ***Blockburger v. U.S.***, 284 U.S. 299 (1932); ***Commonwealth v. Breeland***, 664 A.2d 1355 (1995). Having said this, the Court notes that Defendant could have properly been charged with all three offenses.

Sentencing Claims

Defendant raises several different issues concerning sentencing. For clarity's sake, the Court will consider them together. The first sentencing issue raised by Defendant is that the Court improperly considered "drug allegations against your Defendant." During sentencing, Defendant's counsel said, "I would urge the Court at the particular time that the problems for Mr. Baney occurred at that particular time he also began abusing cocaine and he would tell the Court that at that point his life took an extreme downhill slide …" ***Id.*** at p.6. After Defendant's counsel finished the Court asked Defendant if he had anything to say. Defendant replied, "Well, Mr. Marcello pretty much said everything. Since our separation everything has been downhill. I mean my life has just been a total disaster for the last year." ***Id.*** at p.7. Instead of refuting his counsel's statements, Defendant, in effect, adopted them. The Court-ordered pre-sentence investigation also had verified drug activity being a causative factor in these criminal acts. These facts prompted the Court to make the comment, "nor can I ignore the situation that appeared very clearly to me at least at trial and from my pre-sentence investigation the underlying aspect here, involved drug use and the typical pattern of somehow (being) able to get away with it that is practiced by drug users." N.T., 1-7-98, p.8. Consequently, the Court did properly consider the role that drug abuse played in the Defendant's pattern of criminal activity.

Defendant also charges that at sentencing, the Court improperly denied Defendant the opportunity to introduce evidence of mitigation. Simply stated, the record does not support this allegation. There is nothing in the transcript that suggests Defendant was prohibited from offering any type of mitigating evidence. Once again the Court emphasizes

that when given an opportunity to speak, Defendant merely confirmed what his counsel had already introduced into the record.

Defendant raises three more allegations concerning his sentence. They are: (1) improper application of the sentencing guidelines; (2) manifestly excessive sentence; and (3) imposition of an improper sentence. Because all three of these charges are similar, the Court will consider them as one for analysis.

As noted in History the statement of this Opinion, the Defendant was sentenced in the standard guideline range for all offenses. Under each information the Court merged the offenses of theft by deception and receiving stolen property for sentencing purposes. The Court also decided that the sentences for each check involved should be served consecutively.

The standard for review of a trial court's sentence is whether or not the trial court abused its discretion. ***Com. v. Hlatky***, 626 A.2d 575 (1993). If the Court does step outside of the guidelines, then it must indicate, on the record, its reason(s) for doing so. ***Com. v. Royer***, 476 A.2d 453 (1984). "Where the statement shows consideration of the defendant's circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates the court had the benefit of a pre-sentencing report, an adequate statement of the reasons for the sentence imposed has been given. ***See Com. v. Fenton***, 566 A.2d 260 (1989), ***alloc. denied*** 583 A.2d 792 (1990). In this case, the trial court had the benefit of a pre-sentence investigation as evidence by the referral to it on the record.

Defendant's claim that the sentence is manifestly excessive is equally meritless. Defendant states that his sentence is excessive because there is a significant disparity between his sentence and that of a co-conspirator. The Court presumes that Defendant is referring to

Ms. Wesley. Though the exact disposition of the charges against Ms. Wesley is uncertain, the sentence she received, if any, does not have any bearing on Defendant's sentence. Based on the facts of her case, including the number of offenses of which she was convicted, her prior criminal history and personal background would all be important to her sentence, but her sentence – whatever it may have been – is not relevant in evaluating the propriety of Defendant's sentence. The Court specifically referred to the Defendant's circumstances, especially his involvement in drug use and long history of prior criminal activity. The minimum sentence as structured by the Court confined the Defendant to prison for twenty months, an appropriate standard range sentence sanction. The Defendant's personal circumstances made the need for a long period of supervision following incarceration obvious, since the prior history of Defendant demonstrates his proclivity to abuse alcohol, drugs and otherwise get in trouble when not under supervision. The sentence was structured according to that need.

Finally, Defendant states that an improper sentence was imposed without any further explanation. As previously discussed, Defendant's sentence is proper and the Court believes the claims of impropriety in sentencing to be meritless.

Upon review, the Court finds that Defendant had a fair trial and was properly sentenced. For these reasons, the Court recommends that its decision be **AFFIRMED**.

BY THE COURT:

William S. Kieser, Judge

cc: District Attorney
Matthew J. Zeigler, Esquire
Judges
Suzanne Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)