

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 00-11,588
 :
 REGINALD JOHNSON, :
 :
 :
 Defendant : 1925(a) OPINION

Date: *May 16, 2002*

OPINION IN SUPPORT OF THE ORDER OF DECEMBER 13, 2001 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant has appealed the sentence of this Court imposed on December 13, 2001, which sentenced him to a State Correctional Institution for an aggregate term of a minimum of twelve years and a maximum of twenty-seven years for aggravated assault and related charges. Defendant's aggregate sentence was for various crimes committed when assaulting two individuals, using a knife, on September 25, 2000. Defendant received a mandatory ten (10) year to twenty (20) year sentence for the charge of Aggravated Assault, (Count 1 – causing serious bodily injury, a 1st degree felony) pursuant to the provisions of 42 Pa. C.S. §9714. This Court also imposed an aggravated range sentence upon Defendant for the charge of Possession of Instruments of Crime (Count 5) of a minimum of one and one-half (1-½) years and a maximum of five (5) years, to be served consecutively to the aggravated assault sentence. In addition, Defendant received a further consecutive sentence of six (6) months to twenty-four (24) months, relating to a second victim, for the charge of Simple Assault (Count 6). For the additional charge of Terroristic Threats, Defendant was sentenced to a concurrent minimum of one (1) year and a maximum of five (5) years. The sentences were made effective September 27, 2000, the date Defendant was arrested on the charges.

Defendant had been found guilty on October 18, 2001, following a jury trial, of the foregoing charges and also of Aggravated Assault (use of a deadly weapon), and Simple Assault, (both relating to the victim of the aggravated assault) and two counts of Recklessly Endangering Another Person, (one as to each victim). These last offenses merged for sentencing purposes with the offenses under which Defendant was sentenced. Defendant filed a motion for Reconsideration of Sentence on December 14, 2001, which was denied by an Order filed December 19, 2001, on the basis that all the contentions raised in the Motion had been considered in the sentencing proceeding.

Defendant filed this appeal on December 31, 2001. This Court issued a 1925 (b) Order on January 2, 2002. Defendant filed Statement of Matters Complained of on Appeal on January 11, 2002 and then filed an Amended Statement on January 14, 2002.

The following issues are raised on appeal by the Defendant: (a) the guilty verdicts were against the weight of the evidence as to all counts; (b) the mandatory sentencing provisions under 42 Pa.C.S. §9714 were not applicable to Defendant; (c) the §9714 mandatory sentence was applied without complying with the proof requirements of §9714(d) as to prior record; (d) the jury trial should not have taken place in Defendant's absence and that doing so constituted violations of the rights afforded him under United States and Pennsylvania Constitution and the laws of the Commonwealth of Pennsylvania; (e) the Court abused its discretion, as to aggravated assault (Count 1), in sentencing Defendant beyond the aggravated range, and failed to state adequate reasons for the aggravated range sentence for possession of an instrument of crime; (f) ineffective assistance of counsel; (g) the denial of Defendant's Motion to Suppress the identification of the Defendant and all evidence obtained as a result of a

search warrant that was issued based upon the improper identification of the Defendant; (h) any further issue determined to have merit by defense counsel and Defendant after having been afforded an opportunity to review the record of trial and sentencing.¹ In its following discussion this Court will address these issues by grouping them into the following categories:

1. Pretrial ruling on suppression of identification testimony and evidence obtained by search warrant.
2. Trial issues including insufficiency of the weight of the evidence, conduct of the trial at which Defendant willfully failed to appear, and ineffectiveness of counsel.
3. Sentencing issues, including imposition of the mandatory sentence under 42 Pa. C.S. §9714 and the aggravated range sentence for the Possession of Instruments of Crime offense.

Facts of Case

On September 25, 2000, Christine Gair lived with her boyfriend of five years, Aaron Basey, in a row house at 623-1/2 Lloyd Street, together with her mother Lulubelle Gair and an Aunt. R. Vol. 2, pp. 67, 68 and Vol. 3, pp. 185-186. Basey returned to the home that date between 7:30 p.m. and 8:00 p.m., at least 1-1/2 hours late and this resulted in an argument between he and his girlfriend, which included arguing and screaming and some pushing after which Basey went downstairs and out onto the porch of the home. *Id.*, at pp. 69, 70 and 186, 188. Subsequently, Christine Gair when to a neighbor's house to play cards. *Id.*, at p. 71. Shortly after the argument between Aaron Basey and Christine Gair, her mother, Lulubelle

¹ See, Defendant's Amended Concise Statement of Matters Complained of on Appeal, filed January 14, 2002.

Gair, left the residence and returned within a short time accompanied by Defendant. *Id.*, at pp. 70-74 and 188. Prior to leaving Lulubelle Gair had made a comment to the witness, Rose Elliott, to the effect that she was sick and tired of this “m’fer” (referring to Basey) putting his hand on my daughter. R.Vol. 1, at p. 40. (The Court notes that the word “daughter” appears as the word “door” in the transcript, however, this Court’s notes clearly reflect that the word used by the witness Elliott was “daughter.”) According to Elliott, Lulubelle Gair returned within 10-15 minutes accompanied by Defendant; he went into the house with Lulubelle but within a minute came out on the porch and angrily confronted Basey. *Id.*, at p. 41-43. Defendant’s angry statements to Basey included an assertion that Defendant had been to jail for killing and did not have any problem going back (to jail). *Id.*, at p. 43. *See also* Vol. 3, at pp. 189-191. After Defendant was hollering in Basey’s face, Basey pushed Defendant away from him and Defendant then pulled out a razor-type knife, came forward and slashed Basey across the front of his neck essentially from ear to ear. *Id.*, at p. 48 and Vol. 3, at pp. 189-194. During this encounter between Defendant and Basey, Christine Gair had gotten in between them and in the course of Defendant attacking Basey he also struck Christine Gair in the face, broke her tooth and caused her to bleed. *Ibid.* and also *see* Vol. 2 at pp. 75-78. Soon thereafter Defendant left the porch of the home where the assault had taken place and drove away with Lulubelle Gair. *See, e.g.* Vol. 2, at p. 79.

This attack had been witnessed not only by the victims, Aaron Basey and Christine Gair, but also by Rose Elliott, (Vol. 1, pp. 33-67) a 15-year old neighbor who was also outside on her porch and by her 16-year old brother, Michael Elliott, (Vol. 2, pp. 3-31) and by 17-year old April Harris (Vol. 1, pp. 68-99). Upon responding to the scene Williamsport

Police Department's officers found that they had a chaotic situation but obtained a description that the assailant was a black male approximately 50 years of age, 5'8" to 5'11" stocky build and had been wearing a jean jacket, blue jeans, work boots and thick-frame black glasses and had a bald spot on the top of his head with graying sideburns. *See* among others Vol. 2, at pp. 32-35. They also learned from Lulubelle Gair that the suspect by the name of Reggie lived at 708 Locust Street, the police went to that location and found that he actually lived at 710, the other side of a double house. *Id.*, at pp. 35, 36. Defendant, who Lieutenant Bailey described as being a man fitting the description police had been given at the scene answered the door. Lieutenant Bailey, who had located Defendant at this address then asked other officers to obtain some of the witnesses from the scene and bring them to the Locust Street location to see if they could identify Defendant. *Id.*, at p. 37. The witnesses, Rose Elliott, Michael Elliott and April Harris, were taken by the police to the scene where they were initially somewhat hesitant but then identified Defendant after at least one of them asked the police to have Defendant put on glasses which were obtained from his home. Vol 1, at pp. 51-53, 81-83; Vol. 3, at pp. 14-15. *See also* Vol. 3, at pp. 130-139.

Subsequently, a search warrant was obtained and pursuant to the search a pair of work boots were seized from Defendant's residence, which had a drop of blood on them. *Id.*, at pp. 140-141. A Pennsylvania State Police Forensic Scientist Supervisor did a DNA comparison of this blood spot from the boots with the blood of Christine Gair and found the blood spot was blood of Christine Gair based upon the DNA testing he performed. *See* Vol. 3, at pp. 169-172.

DISCUSSION

1. PRETRIAL ISSUES

a. *Non-Suppression of Defendant's Identification*

Defendant, on January 31, 2002, filed a Motion to Suppress Evidence, including clothing seized from his home and his identification made by three eye witnesses made within an hour of his attack on the victims. Defendant's theory was that, prior to the identifications being made by three witnesses while they were parked in a police car some distance away, the police made him stand on his porch and put on the glasses, and that he had been placed into custody and had not been given legal counsel nor advice that he was entitled to such,. Further, the search warrant to search his home (from which the blood spotted work boots and clothing, obviously identical to that he wore in committing the assault) was obtained solely as a result of the improper identification.

The Honorable Dudley N. Anderson, by an Opinion and Order dated April 11, 2001, filed April 16, 2001, initially granted the suppression motion based on *Commonwealth v. Zogby*, 689 A.2d 280 (Pa. Super. 1997). However, upon reconsideration Judge Anderson found Defendant's identification was proper under the exception to custodial identification, which permits police to give eyewitnesses an opportunity to identify a suspect as the criminal perpetrator through a prompt, pre-incarceration identification procedure prior to the suspect being formally taken into custody. *See* Opinion of the Court, Anderson, J., dated May 10, 2001 and filed May 11, 2001, citing, *Commonwealth v. Gray*, 396 A.2d 790 (Pa. Super. 1979); *Commonwealth v. Aaron*, 386 A.2d 1006 (Pa. Super. 1979); *Commonwealth v. Ray*, 315 A.2d 634 (Pa. 1974). After consultation with Judge Anderson it has been determined that Judge

Anderson believes the reasons for his rulings are adequately set forth in the foregoing opinions.²

This Court also believes valid reasons for Judge Anderson's ruling are adequately set forth in his referenced opinions. Furthermore, the logic and soundness of those decisions are buttressed by the trial testimony of the three witnesses, Rose Elliot, Vol. 1, pp. 33-67; April Harris, Vol. 1, pp. 68-98 and Michael Elliott, Vol. 2, pp. 3-31. These eyewitnesses were taken to Defendant's home as promptly as could be expected, given the situation which confronted the police upon their arrival at the scene. The police had to care for the safety of the victims, preserve the scene, sort out the details of the attack, obtain a description of the assailant, attempt to learn his likely identity and where he might live. The police then had to arrange for the transporting of the eyewitnesses to Defendant's home to permit them the opportunity to verify his identity. The work of the police in doing all of this in an hour or less from the time of the assault is an excellent demonstration of their effectiveness. This is made clear by the testimony of Lt. Bailey, Vol. 2, pp. 31-62 and Officer Donald Mayes, Vol. 2, pp. 127-161.

Defendant's claim that the police improperly suggested to the witnesses that Defendant was the assailant by outfitting him with glasses is without merit as no prejudice occurred as a result. It is clear it was the eyewitnesses who asked the police to have Defendant put on his glasses. The glasses were included in the identification made at the scene and were obtained from in his home. The glasses were placed on the Defendant in order to allow the eyewitnesses to be positive in their identification. *See*, April Harris, Vol. 1, p. 52. The

² As of the preparation of this Opinion a transcript of the suppression hearing has not been ordered by counsel.

testimony of the eyewitnesses also makes clear the eyewitnesses had given accurate descriptions of Defendant to the police even before going to his home to verify he was indeed the assailant. Their trial testimony further demonstrates their identification of his photographs at trial, as being the person who had attacked the victims, was based on their witnessing of the crime.

a. **Validity of the Search Warrant**

The Search Warrant used to obtain Defendant's boots is only challenged on the basis it was issued due to the improper identification of Defendant. The identification was proper. The Search Warrant was valid, and the boots with the victim's blood on them were properly seized from his residence.

2. **TRIAL ISSUES**

a. **Sufficiency of the Evidence**

The Court believes that the transcript of the criminal jury trial held October 18 and 19, 2001 adequately show that the guilty verdict, as to all counts, was not against the weight of the evidence as Defendant alleges.

The testimony of many witnesses, including the two victims, Aaron Basey, the victim of the aggravated assault and Christine Gair, the victim of the simple assault, established that Defendant had sliced the face of Aaron Basey with a knife during the confrontation with Basey. In doing so, Defendant had also struck and injured the victim Christine Gair. *See*, for example, testimony of: Rose Elliot, Vol. 1 pp. 46-47; April Harris, Vol. 1, pp. 73-77; Michael Elliott, Vol. 2, pp. 10-14; Christine Gair, Vol. 2, pp. 74-83; Aaron Basey, Vol. V. 3, pp. 189-194. From this testimony it is clear that Defendant intentionally confronted Aaron Basey,

assaulted him with a knife in a threatening manner and after Basey pushed Defendant away, Defendant came back at Basey and sliced him across his facial area, basically from ear to ear on the front of his neck. This assault left Basey seriously wounded and bleeding. It resulted in permanent scarring to Basey and substantially interfered with his bodily functions. During the course of this encounter with Basey, Defendant also pushed and/or struck the victim Christine Gair. Although the Commonwealth may not have been able to prove striking Christine Gair was intentional, it was clear Defendant's actions were conducted in a reckless way and actually inflicted bodily injury upon Christine Gair, as she sustained a wound that caused her to bleed and a broken tooth. All the elements of the crimes of which Defendant was convicted were established beyond a reasonable doubt by this undisputed testimony.

b. **Conduct of Trial in Absence of Defendant Where Defendant Willfully Failed to Appear for Trial**

Defendant was not present during the course of the jury trial. Defendant chose to remain in prison and directly disobeyed orders of this Court that were communicated to him directing that he should cooperate and appear at trial and, if he did not, the trial would take place in his absence. Defendant avers that his jury trial should not have taken place in his absence and that doing so violated his Constitutional rights and his rights under the laws of the Commonwealth of Pennsylvania. Pursuant to Pennsylvania Rules of Criminal Procedure 602, "The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict and the imposition of sentence." Defendant was ordered to appear for jury selection and trial, by this Court on both October 8, 2001 and October 16, 2001.³ These

³ See Orders, filed October 8 and 16, 2001.

orders were personally served on Defendant by the Sheriff, nevertheless, Defendant voluntarily remained in his jail cell and refused to come to Court. Pursuant to Rule 602 and the notice provided to Defendant by Court Order, this Court believes that Defendants' Constitutional rights and his rights under the laws of the Commonwealth of Pennsylvania were not violated.

The selection of the jury, was scheduled to be held on October 8, 2001. At the time the selection process was to begin, defense counsel and the Lycoming County Sheriff advised the Court that Defendant was at the prison but refused to leave his cell to accompany the Sheriff for the purpose of jury selection. *See* R 10/8/01 at pp. 2-4. At that time the Court instructed defense counsel to proceed to the prison and advise Defendant of his rights and that the Court intended to proceed with jury selection and trial in his absence if he refused to appear. *Id.*, at pp. 4-5. Defendant steadfastly refused to appear for the jury selection. *Id.*, at pp. 5-7. The Court determined that Defendant made a knowing and voluntary decision in this regard. *Id.*, at pp. 7-9. The Court also ascertained, contrary to Defendant's assertions, that there was no intervening appeal prohibiting the trial from proceeding. *Id.*, at pp. 9-10. The Court then proceeded to enter an Order that directed Defendant to appear for jury selection. *See, Id.*, at p. 11 and Order of 10/8/01.

Subsequently, the Court was advised that the Order directing Defendant to appear for trial had been served upon him by a Deputy Sheriff, but nevertheless, Defendant refused to leave his cell and accompany the Deputy to the Courthouse. *Id.*, at pp. 13-15. Only then did the Court proceed with selection of the jury in his absence having been satisfied that Defendant's absence was willful, intentional, and voluntary on his part. The record indicates the jury selection process was delayed at least 1 hour and 36 minutes during the Court's efforts

to attempt to order and encourage Defendant to appear for jury selection. *Id.*, at pp. 2 and 13, indicating an initial opening time at 1:58 p.m. and resumption of the session in which the jury was selected at 3:34 p.m. on that date. The Court also notes that there was an actual intended starting time for jury selection of 1:30 p.m.

The trial of the case commenced on October 17, 2001. Again, Defendant chose to remain in prison rather than to accompany the Sheriff to Court. This was despite a prior Order having been served on Defendant on October 16, 2001, by which this Court specifically directed Defendant to appear and advised him that if he failed to appear the trial would go on without him, that his rights could be prejudiced and that he would be subject to be held in contempt of Court. *See*, Order of October 16, 2001. He was also advised in that Order that if convicted he could face penalties exceeding 50 years in prison. The Order of October 16, 2001, had been entered after the Court had been advised by defense counsel that Defendant had told defense counsel he was not planning to attend the trial.

The Court, at the commencement of trial outside the presence of the jury, noted the efforts made by the Court and defense counsel to persuade Defendant to appear, and it became apparent that Defendant was refusing to cooperate with defense counsel in any way. *See*, Vol. 1 at pp. 2-4. The Court determined that Defendant was able to understand the communications that had been made to him and was making an intentional, voluntary decision not to appear at trial and was willfully disobeying the Court's Orders. *Id.*, at pp. 3-5. The Court also made sufficient inquiry to determine on the record that Defendant was not incompetent but had the competency to participate in his defense. *See*, Vol. pp. 5-9; *see also*, in relation to the foregoing, the testimony of Deputy Sheriff Finnerty at *Id.*, pp. 9-11 and

testimony of Deputy Warden DeParlos, *Id.*, at pp. 13-16. The Court then proceeded to go to trial.

It also appears from the above-referenced record that defense counsel made an extreme effort to convince Defendant to appear for trial. During the course of trial defense counsel again made efforts to convince Defendant to appear to Court, which were frustrated. *See*, Vol. 3 at pp. 253-255. The issue of Defendant's absence was adequately covered by defense counsel's opening remarks (*Id.*, at p. 32). The Court after consultation with counsel and careful consideration also advised the jury at the conclusion of Commonwealth's case that Defendant "Mr. Johnson has been available to come to Court, but has chosen to absent himself from the proceedings. During my instructions following closing arguments of counsel I will instruct you on how you may consider his absence from this proceeding and what weight you may give to it." *See*, Vol. 3 at p. 257. This instruction was given at the time the jury was also advised that a stipulation had been reached that a Commonwealth witness Lulubelle Gair was not available for testimony (she had absconded from parole supervision). The Court then proceeded to appropriately instruct the jury in its concluding charge as follows:

You have been advised that the Defendant, Reginald Johnson, has chosen to absent himself from these proceedings, even though he is available to come to court. You may consider this fact as tending to prove the Defendant's consciousness of guilt. You are not required to do so. You should not make a finding of guilt based upon this fact alone. You should consider and weigh this evidence along with all the other evidence in the case, giving it such effect and weight, if anything, as you believe it deserves.

Vol. 3 at pp. 281-282.

The record thus adequately demonstrates by a clear preponderance of the evidence Defendant knew of his trial date, the possible consequences he faced, the effect his

absence would have on the trial and that he understood these things, yet voluntarily refused to walk out of his jail cell and be transported to the Courtroom. Therefore, he was absent without cause. See *Commonwealth v. Hill*, 737 A.2d 255 (Pa. Super. 1999) and cases cited therein.

Defendant's absence at the trial did not prejudice his case and in fact may have been strategic planning on his part to avoid being identified as the assailant despite overwhelming testimony to the contrary. This Court believes Defendant was given ample opportunity to appear at trial. The Court notes that the only possible issue as to Defendant's guilt was a question of appropriate identification. It is obvious that his failure to appear at trial prevented witnesses from looking him in the face and saying this is the man that committed the crime. The Commonwealth was forced to make use of photographs in order to convince the jury that the individuals were accusing the correct person. This obviously is less effective than the witness identifying the assailant as being the person who is seated in the Courtroom. Accordingly, the Court believes that the decision of the Defendant not to appear was one that was made with the purpose of frustrating the criminal proceedings and also one that was undertaken by Defendant understandingly and voluntarily, albeit against the advice of counsel.

In addition, this Court does not know of any rule or reason why the Court should have had Defendant forcefully taken into physical custody by the Sheriff and transported to the Courtroom. Doing so would have required Defendant to remain shackled or restrained in some way to cause him to stay in the Courtroom and not be a disruptive influence. Given Defendant's attitude and direct disobedience of Orders of this Court to accompany the deputies to the Courtroom, this Court had a reasonable fear that if Defendant should appear he would do nothing but cause disruption and cause endangerment to the deputies and those in attendance at

trial, including potentially the jury. The Court believes that having Defendant appear under those circumstances, when a scene was likely to occur in front of the jury, could have been more harmful to Defendant's rights as opposed to his absolute absence from the Courtroom. Defendant has not been prejudiced by his willful failure to appear.

c. **Ineffectiveness of Counsel**

Defendant also contends that trial counsel, William J. Miele, Esquire, failed to provide adequate legal assistance. Defendant makes no specific allegation of trial counsel's ineffectiveness and therefore we cannot address any specific issue.

This Court recommends that the Appellate Court not consider this claim. Regardless, it is clear from reading the trial record that defense counsel did an immensely commendable and competent job defending Defendant. The effectiveness of defense counsel's efforts are verified in part by the length of time the jury deliberated, taking approximately 1-3/4 hours in which to reach the verdict despite the uncontroverted and overwhelming evidence against him. The jury returned the guilty verdict only after returning to the Courtroom for further instructions concerning elements of the simple assault and recklessly endangering charges. *See*, Vol. 3 at pp. 294-303. Obviously, the jury did not let Defendant's absence have any significant impact upon them or else a verdict would have been returned without concern as to whether specific elements of a crime had been satisfied by the evidence. Such a delay could only have resulted from defense counsel's splendid efforts on behalf of his absent client. Not even Defendant's presence at trial could have in any way assisted defense counsel's efforts. Defendant's assertions of ineffectiveness are without merit. This Court believes that defense counsel was effective and provided Defendant with adequate legal assistance.

3. **SENTENCING ISSUES**

a. **Applicability of the Mandatory Provisions of §9714**

Defendant was sentenced on December 13, 2001. The Court found that the mandatory sentencing provisions of 42 Pa.C.S. §9714 were applicable in determining Defendant's sentence. Defendant had formerly been convicted of murder in 1965. Therefore, because the Defendant was previously convicted of a crime of violence it was proper for him to be sentenced to a mandatory minimum of ten (10) years under §9714. Prior to sentencing, the Court and Defendant were provided with a record of the previous convictions of the offender, which had been filed December 7, 2001. Defendant did not file any notice he was contesting the accuracy of his prior record, however, at sentencing he did not concede his prior conviction. The Commonwealth, at the sentencing hearing, produced records which established Defendant was the person who had previously been convicted of a second-degree murder in 1965, which now would be classified as a third-degree murder offense. This evidence and the Court findings were set forth in the record at the time of sentencing.⁴

b. **Aggravated Range Sentence Reasons**

Defendant also avers that the court abused its discretion by sentencing Defendant beyond the aggravated range for Aggravated Assault, Count 1. The Court order of

⁴ At the time this Order has been filed, the sentencing transcript had not yet been reproduced, apparently for two reasons. First, the Court Reporter for the sentencing hearing resigned from her County position in January 2002. Secondly, it has since been learned that counsel had never ordered the sentencing transcript and had indicated to the Reporter it would not be needed. Counsel, however, has served no notice of an intention to limit the record and has not withdrawn or amended the Concise Statement of Issues Complained of on Appeal to remove the sentencing issues. Therefore, this Court has directed that the sentencing hearing be transcribed and filed on an expedited basis so that the record on appeal will be complete.

December 13, 2001, clearly states that Defendant was sentenced according to the mandatory sentencing provisions of 42 Pa.C.S. §9714 and not based upon aggravating circumstances.

Defendant additionally alleges that the Court failed to state adequate reasons on the record as to why Defendant was sentenced in the aggravated range for possessing an instrument of crime, Count 5. The Court did clearly state in its Sentencing Order of December 13, 2001, that the aggravated range was necessary due to the weapon used to commit the extremely serious offense and was carried intentionally for the purpose of doing so.⁵

This Court is also satisfied that its reasoning for imposing an aggravated range sentence for the offense of Possession an Instrument of Crime, Count 5, a first-degree misdemeanor, was adequately stated to Defendant on the record at the time of sentencing. In summary those reasons included the type of criminal instrument, a deadly weapon and that the weapon was actually used to commit a serious offense (the aggravated assault, under Count 1) and had been carried intentionally by Defendant for the purposes of committing the assault. There is no question it is proper for the Court to consider the facts that the weapon was a deadly weapon – a straight razor-type knife – and was in fact used to commit a crime and the harm actually caused by the weapon. In this case it was used to nearly kill the victim. Granted this offense has as one of its elements that it was possessed with the intent to employ it criminally, however, the nature of that intent can be examined in a specific case and the sentence varied accordingly. In this case the circumstances of the evil intent of the Defendant were evident. He had been summoned to the scene by Lulubelle Gair, the mother of simple assault victim, Christine Gair, in a response to an argument between Christine Gair and her

⁵ See Sentencing Order of December 13, 2001.

boyfriend, Aaron Basey, with whom she had lived for 5 years. Upon arriving at the scene Defendant almost immediately and without provocation angrily confronted Aaron Basey and upon being shoved away instantaneously drew the knife and cut Basey's throat from ear to ear in a vicious attack. This evidence supports this Court's determination not only that Defendant carried the knife intending to use it to commit a crime, but that he came to the scene purposefully carrying the knife to inflict death or serious bodily injury upon Basey, that is with an evil heart and mind and malice aforethought. An aggravated range for possessing the knife with such an evil intent is justified.

CONCLUSION

Accordingly, this Court suggests that Defendant's Appeal be denied.

BY THE COURT,

William S. Kieser, Judge

cc: William Miele, Esquire
Ken Osokow, Esquire
Judges
Suzanne R. Lovecchio (Law Clerk)
Gary L. Weber, Esquire (Lycoming Reporter)