NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RICHARD EDNEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1274 EDA 2012

Appeal from the Judgment of Sentence January 18, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0006256-2010

BEFORE: STEVENS, P.J., BOWES, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: January 11, 2013

Richard Edney appeals from the judgment of sentence of three to six years incarceration followed by two years probation entered after a jury found him guilty of possession with intent to deliver cocaine ("PWID") and acquitted him of conspiracy. We affirm.

Detective Daniel Leicht, a thirteen year member of the Criminal Investigation Division (CID) of the Delaware County District Attorney's Office Narcotics Task Force, was working undercover with a confidential informant (CI) on June 16, 2010. The CI on an earlier date had provided information leading to an arrest and earlier on the same date gave information that resulted in two arrests. At approximately 7:00 p.m., the CI, in the presence

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* Retired Senior Judge assigned to the Superior Court.

of Detective Leicht, placed an order for sixty dollars of cocaine. The seller informed the CI that he would arrive in approximately fifteen minutes in a black Chevy Tahoe. After twenty five or thirty minutes elapsed, the CI made several additional calls to the seller since the seller was late. At one point, the CI told the seller to hurry up. Subsequently, the seller called the CI and Detective Leicht answered and provided directions to his location. Another fifteen minutes passed before the seller called the CI again. Detective Leicht answered and heard an upset male voice say, "Where they at? This has to get done." The detective reiterated his directions. After another fifteen minutes passed, the seller called the CI and told him that they had arrived and were parking outside of Dunkin Donuts.

Detective Leicht saw a black Chevy Tahoe back into a parking space in the Dunkin Donuts lot. The vehicle matched the description that the CI had provided. Two people remained seated inside the Tahoe for approximately five minutes. Detective Leicht then instructed fellow officers to move in on the Tahoe and told the CI to exit the car. After the CI exited, Detective Leicht drove his vehicle over to the Tahoe. Law enforcement had removed the passenger and driver from the vehicle. Appellant was the driver. Police patted down Appellant, placed him in handcuffs, and put him into the rear seat of a police cruiser for two to three minutes. The door to the cruiser remained open and Detective Leicht first approached the passenger, Richard Frisby. Detective Leicht spoke with Mr. Frisby for several minutes before approaching Appellant. He informed Appellant that police

had stopped the vehicle to investigate a drug delivery. According to Detective Leicht, Appellant immediately became upset, looked in the direction of Mr. Frisby, and repeatedly exclaimed, "he had nothing to do with it. He was only there to drive Richard Frisby to see- so Mr. Frisby could sell cocaine to his customer." At this juncture, no narcotics had been recovered, but Appellant was formally arrested. Police did not locate any drugs in the vehicle or on either Appellant or Richard Frisby. The two men, however, were transported to the Sharon Hill Police Department. At that time, Richard Frisby removed from behind his belt a sandwich bag containing both powder and crack cocaine. Police recovered seven hundred and eighty-two dollars from Appellant and one hundred and seventy-two dollars from Mr. Frisby.

The Commonwealth initially charged Appellant with a host of drug violations and conspiracy charges. Appellant litigated several pre-trial motions, including a motion to quash and a suppression motion. The trial court denied these motions and Appellant proceeded to a jury trial on a single count each of PWID and criminal conspiracy to commit PWID. The jury could not reach a verdict and the trial court declared a mistrial. Thereafter, the Commonwealth re-tried Appellant for the same counts. A jury found Appellant guilty of PWID, but acquitted him of the conspiracy charge. The court imposed a mandatory minimum sentence under 18 Pa.C.S. § 7508(a)(3)(i), and sentenced Appellant to three to six years imprisonment to be followed by two years probation. It also assessed

Appellant a fine of $10,000. Appellant filed timely post-sentence motions.[1] The court denied the motions and this timely appeal ensued. Both Appellant and the trial court complied with Pa.R.A.P. 1925. Appellant now presents the following issues for our review.

> A. Did the trial court err when it denied Appellant's motion to quash?
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> B. Did the trial court err when it [d]enied Appellant's motion to suppress?
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> C. Was the evidence sufficient to support Appellant's conviction for possession with intent to deliver?
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> D. Was the verdict against the weight of the evidence?
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> E. Did the court sentence greater than necessary under 42 Pa.C.S. § 9721(b) and (d)?

Appellant's brief at 3.

We begin by noting that Appellant's third issue is a challenge to the sufficiency of the evidence. Since such claims, if successful, result in discharge rather than a new trial, we address that issue at the outset. ***See Commonwealth v. Stokes***, 38 A.3d 846, 853 (Pa.Super. 2011). Our standard and scope of review in analyzing a sufficiency claim are settled.

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the

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[1] Appellant's trial counsel filed a timely post-sentence motion that raised a weight of the evidence claim among other issues; however, Appellant retained new counsel. New counsel then filed a timely motion for reconsideration raising a discretionary sentencing challenge.

> province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***Commonwealth v. Mobley***, 14 A.3d 887, 889–890 (Pa.Super. 2011). Additionally, "in applying the above test, the entire record must be evaluated and all evidence actually received must be considered." ***Commonwealth v. Coleman***, 19 A.3d 1111, 1117 (Pa.Super. 2011).

Commonwealth v. Brown, 52 A.3d 320, 323 (Pa.Super. 2012) (quoting ***Stokes***, ***supra*** at 853-854).

Appellant contends that the Commonwealth did not prove that he constructively or actually possessed the cocaine. He points out that his passenger and co-defendant was in physical possession of the cocaine and therefore, he did not actually possess the narcotic. In addition, Appellant maintains that the drugs were not recovered from his passenger until police transported both men to the police station and that Appellant could not have known of the drugs.

The Commonwealth counters that the circumstantial evidence presented was sufficient to establish constructive possession. It highlights that Appellant told Detective Leicht that he was driving his passenger to deliver cocaine and that the detective overheard the two men discussing the drug transaction via his cell phone conversations. We agree that, viewing the evidence in a light most favorable to the Commonwealth, sufficient

evidence existed to prove Appellant constructively possessed the cocaine and that he and his passenger-accomplice intended to deliver it.

We have delineated the law regarding constructive possession as follows:

> Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control. ***Commonwealth v. Petteway***, 847 A.2d 713, 716 (Pa.Super. 2004). Constructive possession may be established by the totality of the circumstances. ***Commonwealth v. Parker***, 847 A.2d 745, 750 (Pa.Super. 2004). We have held that circumstantial evidence is reviewed by the same standard as direct evidence-a decision by the trial court will be affirmed "so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." ***Commonwealth v. Johnson***, 818 A.2d 514, 516 (Pa.Super. 2003) (citations omitted)

Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa.Super. 2005). Here, Appellant's statement to police that he drove his passenger to deliver the drugs establishes his knowledge that his passenger possessed the narcotics. Additionally, Appellant's act of driving his co-defendant to deliver the drugs aided the co-defendant in his possession with intent to deliver the cocaine. "A person is legally accountable for the conduct of another person when he is an accomplice of that person in the commission of an offense." ***Commonwealth v. Gladden***, 665 A.2d 1201, 1208 (Pa.Super. 1995) (*en banc*). As we outlined in ***Gladden***,

> An accomplice is one who "knowingly and voluntarily cooperates with or aids another in the commission of a crime." ***Commonwealth v. Carey***, 293 Pa.Super. 359, 373, 439 A.2d 151, 158 (1981). ***See***: 18 Pa.C.S. § 306. ***See also***:

> ***Commonwealth v. Jones***, 213 Pa.Super. 504, 508, 247 A.2d 624, 626 (1986). To be an accomplice, "one must be an active partner in the intent to commit [the crime]." ***Commonwealth v. Fields***, ***supra*** 460 Pa. [316] at 319-320, 333 A.2d [745] at 747 [1975]; ***Commonwealth v. McFadden***, 448 Pa. 146, 150, 292 A.2d 358, 360 (1972). "An [accomplice] must have done something to participate in the venture." ***Commonwealth v. Flowers***, 479 Pa. 153, 156, 387 A.2d 1268, 1270 (1978).
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> ***Commonwealth v. Brady***, 385 Pa.Super. 279, 284-285, 560 A.2d 802, 805 (1989). However, "[t]he least degree of concert or collusion in the commission of the offense is sufficient to sustain a finding of responsibility as an accomplice." ***Commonwealth v. Graves***, 316 Pa.Super. 484, 489-490, 463 A.2d 467, 470 (1983). ***See***: ***Commonwealth v. Coccioletti***, 493 Pa. 103, 109, 425 A.2d 387, 390 (1981).

Id. (brackets in original).

Since the evidence demonstrates that Appellant intended to aid in the drug transaction and did, in fact, aid his co-defendant in making that delivery by driving him to the location, there was sufficient evidence to demonstrate Appellant was an accomplice to his co-defendant's possession with intent to deliver. ***See Commonwealth v. Murphy***, 844 A.2d 1228, 1238 (Pa. 2004).

Having disposed of Appellant's sufficiency position, we proceed to examine his remaining issues. Appellant's first claim is that the trial court erred in denying his motion to quash because the Commonwealth failed to establish a *prima facie* case at his preliminary hearing. As the Commonwealth aptly notes, such a position is moot and does not entitle a defendant to relief where he is convicted at trial. ***See Commonwealth v.***

Jones, 929 A.3d 205, 209 (Pa. 2007); ***Commonwealth v. McCullough***, 461 A.2d 1229, 1231 (Pa. 1983).

Next, Appellant asserts that the trial court erred in declining to grant his suppression motion. We evaluate the denial of a defendant's suppression motion under well-established principles. We must consider only the evidence of the prosecution, as the prevailing party below, and any evidence of the defense that is uncontradicted when examined in the context of the record as a whole. ***Commonwealth v. Sanders***, 42 A.3d 325, 330 (Pa.Super. 2012). Further, the suppression court acts as the fact-finder and makes credibility determinations. ***Commonwealth v. Williams***, 2 A.3d 611 (Pa.Super. 2010). This Court is bound by the factual findings of the suppression court where the record supports those findings and may only reverse when the legal conclusions drawn from those facts are in error. ***Sanders***, ***supra*** at 330. We are not bound by the legal conclusions of the suppression court. ***In re T.B.***, 11 A.3d 500, 505 (Pa.Super. 2010).

Appellant argues that his statements to Detective Leicht, that he was only there to drive Mr. Frisby, were attained in violation of his ***Miranda*** rights. In addition, Appellant maintains that he was arrested without probable cause and his arrest should be suppressed. Specifically, Appellant contends that at the time he made his initial statements to Detective Leicht he was in custody and was subject to the functional equivalent of an interrogation. Since Detective Leicht did not provide ***Miranda*** warnings

before Appellant made these statements, he asserts that his admission to driving his co-defendant to deliver drugs should have been suppressed. Appellant also argues that he was arrested without probable cause, however, in relation to this aspect of his argument, Appellant does not contest the seizure of any evidence or that he made any admissions after the alleged illegal arrest; instead, he posits that his arrest should have been suppressed. It is unclear whether Appellant intended to posit that his statements should have been suppressed because he was subject to an illegal arrest when he made them and simply crafted his position poorly.

With respect to Appellant's secondary argument, we note that this Court has cogently pointed out that an illegal arrest cannot itself be suppressed; rather, it is the evidence seized as a result of the illegal arrest. ***Commonwealth v. Standen***, 675 A.2d 1273, 1276 (Pa.Super. 1996). Thus, insofar as Appellant contends that his arrest must be suppressed, such a position is untenable. In contrast, the law does permit the suppression of any statements made as a result of an illegal arrest. To the extent Appellant has argued that he was in custody when he made the incriminating statements herein, we address that issue as it also bears on his ***Miranda*** violation contention.

The Commonwealth argues that Appellant was not subject to an arrest or custodial detention, but an investigative detention. Therefore, the Commonwealth contends that no ***Miranda*** warnings were necessary. It

adds that Appellant was not interrogated, rather, he made a voluntary and spontaneous statement to police. The suppression court concluded that Appellant was subject to an investigative detention and that his placement in the back of a police cruiser for a short period did not constitute an arrest nor did the detective conduct an interrogation. According to the suppression court, police had reasonable suspicion to conduct the investigative detention and Appellant voluntarily stated that he merely drove his co-defendant to deliver the drugs.

Under Pennsylvania law, there exists three categories of interaction between law enforcement officials and a citizen. ***Commonwealth v. Butler***, 729 A.2d 1134, 1137 (Pa.Super. 1999). The categories delineated by the Pennsylvania courts are a mere encounter, an investigatory detention, and an arrest. ***Id***. A mere encounter "carries no official compulsion to stop or to respond[,]" ***Butler***, ***supra*** at 1137, and does not require any level of suspicion. An investigative detention subjects a person to a stop for a period of detention, "but does not involve such coercive conditions as to constitute" an arrest. ***Id***. As our Supreme Court stated in ***Commonwealth v. Gwynn***, 723 A.2d 143 (Pa. 1998) (plurality),

> A police officer may stop and question a person for investigative purposes. ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This investigative detention must be supported by reasonable suspicion that "crime is afoot." ***Id.***; ***Commonwealth v. Hicks***, 434 Pa. 153, 253 A.2d 276 (Pa. 1969). This detention subjects the suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest.

> ***Berkemer v. McCarty****,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

Gwynn, ***supra*** at 148. An arrest or custodial detention, however, requires probable cause. ***Commonwealth v. Goldsborough***, 31 A.3d 299, 306 (Pa.Super. 2011). "Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." ***Commonwealth v. Holton***, 906 A.2d 1246, 1249 (Pa.Super. 2006). Further, we recently explained,

> "[I]nformation received from confidential informants may properly form the basis of a probable cause determination." ***Commonwealth v. Luv****,* 557 Pa. 570, 576, 735 A.2d 87, 90 (1999). "Where ... the officers' actions resulted from information gleaned from an informant, in determining whether there was probable cause, the informant's veracity, reliability and basis of knowledge must be assessed." ***In Interest of O.A.****,* 552 Pa. 666, 676, 717 A.2d 490, 495 (1998). "An informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity." ***Luv****,* ***supra*** at 576, 735 A.2d at 90.

Goldsborough, ***supra*** at 306.

An arrest is "any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest." ***Commonwealth v. Lovette***, 450 A.2d 975, 978 (Pa. 1982); ***Butler***, ***supra*** at 1137. In determining whether a person is under arrest, the focus is an objective one based on the totality of circumstances. ***Butler,***

supra. A court must look to whether a reasonable person would believe they are subjected to a seizure. ***Id***. at 1137 ("The test is an objective one, *i.e.*, viewed in the light of the reasonable impression conveyed to the person subjected to the seizure rather than the strictly subjective view of the officers or the persons being seized.").

When a person is arrested illegally, *i.e.*, without probable cause, evidence seized as a result of the arrest is inadmissible unless the Court finds the subsequently-obtained evidence is not acquired through the exploitation of the illegal arrest. ***See Wong Sun v. United States***, 371 U.S. 471 (1963). In determining whether a statement made following an illegal arrest should be suppressed, a court looks to whether ***Miranda*** warnings were provided, the voluntariness of the confession, the intervention of other circumstances subsequent to an illegal arrest which provide a cause so unrelated to that initial illegality that the acquired evidence may not reasonably be said to have been tainted by that illegal arrest, the temporal proximity of the arrest and the confession, and the purpose and flagrancy of the official misconduct. ***See Commonwealth v. Smith***, 995 A.2d 1143, 1152 (Pa. 2010).

Miranda warnings alone are insufficient to dissipate the taint of an illegal arrest. ***Brown v. Illinois***, 422 U.S. 590 (1975). Of course, once a person is lawfully in custody or under arrest, the prophylactic ***Miranda*** rule is in play and a defendant must be informed of his right to an attorney and

right to remain silent before he can be interrogated. ***Commonwealth v. Gaul***, 912 A.2d 252, 255 (Pa. 2006); ***Commonwealth v. Pakacki***, 901 A.2d 983, 987 (Pa. 2006) ("***Miranda*** warnings are required only when a suspect is in custody"); ***Commonwealth v. DeJesus***, 787 A.2d 394, (Pa. 2001). Concomitantly, custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. ***Gaul***, ***supra*** at 255; ***Commonwealth v. Gonzalez***, 546 A.2d 26, 29 (Pa. 1988); ***see also Commonwealth v. Hoffman***, 589 A.2d 737 (Pa.Super. 1991). Additionally, police conduct which is likely to or designed to evoke an admission constitutes an interrogation. ***Gaul***, ***supra*** at 255.

We must first determine whether the acts of frisking the defendant, placing him in handcuffs, and then putting him in the back of a police cruiser with the door open, and informing him that police were investigating a cocaine transaction constituted the functional equivalent of an arrest. Phrased differently, the question is whether, under the totality of circumstances presented here, a reasonable person would believe he was under arrest? We find that a reasonably objective person who is made to exit his vehicle, frisked, put in handcuffs, and ordered into the back of a police car and is told that police are investigating a drug transaction would believe he is in custody. ***Butler***, ***supra*** at 1137; ***see also id***. at 1138 n.6;

cf. Gwynn, ***supra*** (plurality finding that the defendant not under arrest when he was placed in handcuffs after he attempted to escape from the back of a police car).

Nonetheless, we disagree with Appellant that no probable cause existed to arrest him. Instantly, police had reasonably trustworthy information that the individuals in the black Chevy Tahoe possessed illegal narcotics. Detective Leicht previously worked with the CI in this matter and before the date in question had received information from the CI that led to an arrest. In addition, on the same date, prior to Appellant's arrest, the CI provided information that resulted in the arrest of two other individuals. The CI, in the presence of Detective Leicht, telephoned a person to purchase crack cocaine. The CI indicated that the dealer would arrive in approximately fifteen minutes in a black Tahoe in the parking lot where Detective Leicht and the CI were located.

When no one arrived in the designated period, the CI telephoned the dealer. Another ten or fifteen minutes elapsed when the dealer called the CI. The CI told the dealer his location. However, fifteen more minutes passed and the dealer called again. This time, Detective Leicht answered and gave the dealer directions. Five minutes later, Detective Leicht answered a call from the dealer and attempted to direct him to the parking lot and overheard someone exclaim, "This has got to get done." N.T., 6/7/11, at 25. Finally, a call was placed to the CI indicating that the dealer had arrived and parked in the nearby Dunkin Donuts parking lot.

Detective Leicht observed a black Chevy Tahoe parked in that lot, and no other cars were present.

Based on these circumstances, Detective Leicht had sufficiently reliable information to conclude that the occupants of the Tahoe possessed crack cocaine and intended to deliver that substance. Thus, no illegal arrest occurred. Moreover, we agree with the suppression court and the Commonwealth that no custodial interrogation occurred herein. Detective Leicht did not question Appellant in a manner that was likely to result in an incriminating statement. Rather, Appellant voluntarily provided that he just drove his passenger to deliver the drugs. Since Appellant was not being interrogated by police when he gave this statement, suppression was unwarranted.

Appellant's fourth issue is a challenge to the weight of the evidence. We recently set forth our standard of review in examining a weight claim.

> [W]e may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted). Hence, a trial court's denial of a weight claim "is the least assailable of its rulings." ***Commonwealth v. Diggs***, 949 A.2d 873, 880 (Pa. 2008). Conflicts in the evidence and contradictions in the testimony of any witnesses are for the fact finder to resolve. ***Commonwealth v. Tharp***, 830 A.2d

519, 528 (Pa .2003). As our Supreme Court has further explained,

> A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice."
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> ***Commonwealth v. Widmer***, 744 A.2d 745, 752 (Pa.2000) (citations omitted). In addition, a weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Pa.R.Crim.P. 607; ***Commonwealth v. Priest***, 18 A.3d 1235, 1239 (Pa.Super. 2011). Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion. ***Commonwealth v. Sherwood***, 982 A.2d 48[3], 494 (Pa. 2009).

Commonwealth v. Lofton, 2012 PA Super 267, *2.

Appellant properly preserved the issue in his post-sentence motion and his Pa.R.A.P. 1925(b) statement. Therefore, we examine the issue. Appellant concedes that, in forwarding a weight of the evidence claim, a defendant acknowledges that sufficient evidence exists to sustain the conviction. Nonetheless, Appellant maintains that because he never possessed the drugs, the verdict shocks one's sense of justice. He adds that the drug deal was supposed to involve a tall thin black male and that neither he nor his co-defendant was a tall thin black male. In conflict with his

earlier statement that a weight of the evidence claim admits that sufficient evidence was introduced, Appellant asserts that there was "no evidence presented to substantiate a finding of guilt on the charge of possession with intent to deliver." Appellant's brief at 21.

The Commonwealth responds largely in boilerplate fashion, but does assert that the law enforcement officer herein testified credibly. As Appellant's argument is premised on the purported lack of sufficient evidence and we have previously addressed that issue, Appellant's weight claim must fail. Further, this is simply not a case where certain facts clearly outweigh those used to convict Appellant so as to render the trial court's decision to deny Appellant's weight claim an abuse of its discretion.

The final issue Appellant levels on appeal pertains to the discretionary aspects of his sentence. However, Appellant has not included a Pa.R.A.P. 2119(f) statement within his brief and the Commonwealth has objected. Accordingly, the issue is waived. ***Commonwealth v. Karns***, 50 A.3d 158, 168 (Pa.Super. 2012).

Judgment of sentence affirmed.