NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WILLIAM GARNETT LEE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1879 WDA 2011

Appeal from the Judgment of Sentence December 14, 2010
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0009779-2009

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and MUNDY, J.

MEMORANDUM BY STEVENS, P.J. Filed: February 20, 2013

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Allegheny County a bench trial resulted in Appellant's conviction of Possession with the Intent to Deliver, Criminal Conspiracy, and related offenses. We affirm.

The trial court provides an apt summary of relevant facts and procedural history as follows:

> This is a direct appeal wherein the defendant, William Garnett Lee, appeals from the Judgment of Sentence imposed on December 10, 2010. On October 1, 2010, the defendant was convicted, after a non-jury trial, of possession with intent to deliver crack cocaine, possession of crack cocaine, possession of drug paraphernalia and criminal conspiracy. The defendant failed to appear for his trial and was convicted *in absentia.* Th[e trial] court sentenced the defendant to an aggregate term of imprisonment of not less than 8 years nor more than 16 years. This sentence was based on a 5-10 year mandatory minimum sentence due to the drug/gun enhancement pursuant to 42

Pa.C.S.A. SS 9712.1 and a consecutive term of imprisonment of not less than three years nor more than six years mandatory minimum sentence, due to the fact that the defendant had a prior drug trafficking conviction. Th[e trial] court also imposed a concurrent mandatory minimum term of imprisonment of not less than one year nor more than two years due to the weight of the crack cocaine at issue in this case. The defendant filed a timely Notice of Appeal.

Defendant filed a Concise Statement of Errors alleging that the evidence was insufficient to convict the defendant of possession with intent to deliver crack cocaine, possession of crack cocaine, possession of drug paraphernalia and criminal conspiracy, that the verdict was against the weight of the evidence, that th[e trial] court erred in denying defendant's suppression motion, that [the trial] court erred in denying his right to a jury trial, and that [the trial] court erred in imposing the mandatory minimum sentence for drug offenses committed with the firearms pursuant to 42 Pa.C.S.A. 9712.1.

The credible facts presented at trial demonstrate that on November 19, 2008, officers from the City of Pittsburgh Bureau of Police were executing a search warrant at 2018 DeRaud Street, Apartment 6, in the City of Pittsburgh. Upon gaining entry to the apartment, the officers observed four men in the living room of the residence. As the officers gained entry to the apartment, they observed a male quickly move from the dining room of the apartment toward the living room area. This mail, although also named William Lee, was not the defendant. [fn. Ironically, this case involves two men named William Garnett Lee. The opinion differentiates between them.]. After the officers gained entry to the residence, they observed this male sitting in a recliner in the living room. The defendant was standing behind the love seat. They observed another male, identified as Vester Davis, sitting on a couch in the living room area. A third male, Calvin Frost, was identified sitting on a couch in the living room area. Officers then observed William Lee (not the defendant) throwing a substantial amount of money into the air. According to one officer, it looked as though it was a "rain of money" inside the apartment. The officers then observed Calvin Frost reaching into the cushions of the couch. Officers ordered Calvin Frost to show his hands and the [n] ordered the other men to get on the floor. Calvin Frost made his way to the floor but refused to show his hands. He placed his hands under his body and started to

slide one of his hands underneath the couch. Officer Brian Nicholas heard something slide across the floor under the couch. According to Officer Nicholas, it sounded like a heavy object. The object was discovered to be a handgun. Officer Nicholas approached Calvin Frost and the defendant quickly showed his hands. All of the men inside the apartment were placed in custody.

Crack cocaine and plastic baggie corners were recovered from an end table in the living room. [fn. As explained during the trial, the baggie corners are commonly used to package crack cocaine.] The end table was located next to the sofa chair. A box of sandwich baggies was recovered from the couch in the living room. A small amount of marijuana was recovered from a sandwich baggie on the couch. The previously mentioned handgun was found under the couch.

The officers then searched the residence. Crack cocaine was found on top of the entertainment center in the living room. Two automatic handguns and a box of sandwich baggies were found on top of the kitchen cabinets. A total of four boxes of sandwich baggies were found in the residence. A large bag of suspected crack cocaine was found in the kitchen freezer, although upon laboratory testing it was determined that the substance did not actually contain cocaine base.

A digital scale was found in the room next to the living room. Baggie corners were found with the digital scale. Another digital scale was found in the hallway adjacent to the living room. Nineteen cell phones were recovered from the residence. Cash in the amount of $174 was recovered from the defendant. The other persons in the residence also had cash recovered from them. A police scanner was located in the entertainment center.

After the defendant was arrested, he was transported to the police station. The evidence seized in this case was placed on a table at the police station. After being Mirandized at the police station, the defendant walked by the evidence seized in this case and the defendant advised officers that the large bag of suspected crack cocaine was not real. He indicated that "we sell burn to snaps," which means he sold fake drugs to drug users. Evidence was also admitted that one of the handguns recovered at the scene was stolen.

> The Commonwealth also presented expert testimony. Detective Peter Grbach, the coordinator for the District Attorney's narcotics investigation unit, testified that, based on his training and experience, he believed the crack cocaine found in the residence was possessed with the intent to deliver it. He considered the following facts in rendering his opinion:
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> a. that .75 grams of loose crack cocaine was found on the living room end table;
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> b. that a [k]notted baggie containing 3.25 grams of crack cocaine was found on the end table;
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> c. that 59.37 grams of a chunky white substance that tested negative for crack cocaine was found in the kitchen freezer;
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> d. that a gun was recovered from under the couch and two other firearms were found on top of the kitchen cabinets;
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> e. that a black digital scale and a number of baggie corners were found on a speaker in the living room;
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> f. that 19 cell phones and a police scanner were recovered throughout the residence;
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> g. that three other boxes of sandwich baggies were found in the house;
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> h. that no implements to smoke or ingest drugs were found in the apartment; and
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> [i.] that controlled sales of crack cocaine were made outside the residence.
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> Detective Grbach specifically noted that the lack of any implements to ingest the crack cocaine coupled with the various indicators suggesting that crack cocaine was being packaged in the residence were significant factors leading to his conclusion that the crack cocaine was intended for distribution. He also noted the significance of the firearms as he testified that crack cocaine dealers typically possess firearms due to the violent nature of that business.

Pa.R.A.P. 1925(a) Opinion, dated 7/12/12 at 1-5.

Appellant raises the following issues for our review:

> **I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF POSSESSION WITH INTENT TO DELIVER (PWID) COCAINE, CRIMINAL CONSPIRACY WITH BROTHER LEE, DAVIS, & FROST), POSSESSION OF COCAINE & POSSESSION OF DRUG PARAPHERNALIA?**
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> **II. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE APPELLANT'S CONVICTIONS OF POSSESSION WITH INTENT TO DELIVER (PWID) COCAINE, CRIMINAL CONSPIRACY WITH BROTHER LEE, DAVIS & FROST), POSSESSION OF COCAINE & POSSESSION OF DRUG PARAPHERNALIA WERE AGAINST THE WEIGHT OF THE EVIDENCE?**
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> **III. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE THE TRIAL COURT ERRED IN DENYING APPELLANT HIS RIGHT TO A JURY TRIAL?**
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> **IV. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT WAS SUBJECT TO THE MANDATORY DRUG SENTENCE FOR DRUG OFFENSES COMMITTED WITH FIREARMS, AT 42 PA.C.S. § 9712.1?**
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> **V. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST SENTENCING MOTIONS SINCE THE TRIAL COURT IN DENYING APPELLANT'S SUPPRESSION MOTION SINCE THE TRIAL COURT ERRED IN DENYING APPELLANT'S SUPPRESSION MOTION SINCE HE WAS GIVEN INCOMPLETE *MIRANDA* WARNINGS?**

Brief of Appellant at 4.

In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences

drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno***, ***supra*** at 136.

In order to convict an accused of PWID under 35 P.S. § 780–113(a)(30), the Commonwealth must prove that he "both possessed the controlled substance and had an intent to deliver that substance." ***Commonwealth v. Kirkland***, 831 A.2d 607, 611 (Pa. Super. 2003). Pennsylvania courts interpreting § 780–113(a)(30), as it applies to PWID, have concluded that the Commonwealth must establish *mens rea* as to the possession element. ***Commonwealth v. Mohamud***, 15 A.3d 80 (Pa. Super. 2010). When determining whether a defendant had the requisite intent to deliver, relevant factors for consideration are "the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash[.]" ***Commonwealth v. Ratsamy***, 594 Pa. 176, 934 A.2d 1233, 1237–1238 (2007). Additionally, expert opinion testimony is also admissible "concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use."

Id. at 1238. We held in ***Commonwealth v. Bull***, 422 Pa.Super. 67, 618 A.2d 1019, 1021 (1993), aff'd, 539 Pa. 150, 650 A.2d 874 (1994), cert. denied, 515 U.S. 1141, 115 S.Ct. 2577, 132 L.Ed.2d 827 (1995), that such expert testimony, coupled with the presence of drug paraphernalia, is sufficient to establish intent to deliver.

Where evidence does not place the defendant in direct possession of contraband or paraphernalia, evidence of a criminal conspiracy between the defendant and co-defendants with respect to the criminal enterprise to deliver provides grounds to convict of PWID. In ***Commonwealth v. Holt***, 711 A.2d 1011 (Pa. Super. 1998), this Court addressed the question of whether a defendant was properly convicted of the offense of possession with intent to deliver, where the evidence established the existence of a conspiracy between himself and another individual to possess with intent to deliver a quantity of cocaine stored in a travel bag. The court held, under these circumstances, that the defendant properly was convicted of possession with intent to deliver, reasoning that this conviction "stemmed from his conviction for criminal conspiracy." 711 A.2d at 1017. The court noted: "when the [defendant] was convicted of conspiracy to possess with intent to deliver the [cocaine] in the ... bag, he is also culpable for the crime itself, that is possession with intent to deliver cocaine." ***Id***. Similarly, in ***Commonwealth v. Perez***, 931 A.2d 703 (Pa. Super. 2007), evidence of record showed the defendant was actively engaged in an ongoing conspiracy

with another individual to distribute heroin at the time of his arrest, and the crimes for which he was charged, including possession with intent to deliver, all arose from that conspiracy. Where conspiracy to commit PWID is proven, there is no need to prove constructive possession of contraband.

Here, police recovered a large quantity of counterfeit cocaine and a smaller amount of crack cocaine, various devices such as scales and plastic baggies used for the distribution of drugs, no use paraphernalia, and paraphernalia, and Appellant's volunteered statement that "*we* sell fake to snaps" admitted a conspiratorial enterprise with the other three defendants. As both counterfeit and authentic illegal narcotics were discovered among distribution paraphernalia in the apartment, a reasonable inference was made that the conspiracy among all defendants was to traffic in both counterfeit and illegal narcotics. Therefore, evidence sufficed to support convictions of Possession, Possession with intent to deliver, and criminal conspiracy to commit PWID.

Next, we evaluate Appellant's challenge to the verdict as against the weight of the evidence under settled precepts.

> [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.
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> ***Commonwealth v. Champney***, 574 Pa. 435, 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***, 597 Pa. 28, 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***, 574 Pa. 202, 830 A.2d 519, 528 (Pa.2003). As our Supreme Court has further explained,
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> 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."

Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 752 (Pa.2000) (citations omitted).

A review of Appellant's challenge to the weight of evidence shows he offers no facts of such greater weight as to call into question the verdict. Indeed, he offers no facts at all. Instead, Appellant's weight challenge is simply a reiteration of his failed sufficiency of the evidence argument that evidence of Appellant's involvement in drug trafficking was lacking. As such, Appellant's weight claim fails.

Appellant's next claims that the trial court denied him his right to a jury trial. As noted above in the recitation of fact and procedural history, Appellant was the only one of four co-defendants not present for trial, and so he was tried in *absentia* pursuant to Pa.R.Crim.P. 602(a) (permitting a trial to proceed without attendance of defendant if defendant's absence is

without cause) in a non-jury trial that the four co-defendants had agreed upon during a pretrial conference. A discussion of this decision was held before the commencement of trial:

> **THE COURT:** We are here for a non-jury trial. I have waivers from Mr. Davis, Mr. Frost and Mr. Lee born in August. We do not have a specific waiver of jury trial form prepared by Mr. Lee born in April [Appellant] because Mr. Lee born in April is not present.
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> We had an earlier proceeding in this matter, that is earlier today, in which it was determined that Mr. Lee had notice of this proceeding, that he is not here, and based on other circumstances at that time, the Court finds his failure to be here willful. And pursuant to the Commonweatlh's motion over the objection of Mr. Rothman, [Appellant's] counsel, we are proceeding with this non-jury trial.
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> In that regard, the waiver with regard to that, Mr. Lee, the Court does note that [Appellant] signed a subpoena to appear here today for a non-jury trial. Court finds that document as well as all the other circumstances in this case support the Court's going forward with this non-jury trial. Mr Rothman, you may be heard before II address the rest of the defendants.
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> **MR. ROTHMAN:** Thank you, Your Honor. As counsel for Mr. Lee, I find myself in a difficult position of having a court indicate to me that [it] believe[s] my client has waived [his] right, but I believe my ethical responsibility that would be a right to a jury trial [sic], I don't believe I have the power to waive my client's right.
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> As a result, I am invoking my client's right to proceed to a jury trial in his absence because I cannot discuss with him his method of how to proceed. If the Court feels that his absence here is some sort of implicit waiver and the fact that he had signed a subpoena last time listing it for a non-jury trial, that's fine.
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> I cannot articulate to this Court that any waiver given is knowing, intelligent and voluntary waiver on the part of my client. As a result of that, I am invoking his right to a jury trial.

> **THE COURT:** In that regard, I'm not sure you have – that procedurally you may do that, but assuming that you may , there is case law, Mr. Rothman, recent case law that says when a defendant invokes his right to a jury trial last minute and the Court finds that it's not [sic] done for delay or some other reason that's not acceptable to the Court, he is free to continue to proceed in a non-jury trial.
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> I find that this invocation of your client's right to a jury trial at this time, this case having been listed for a long time as a non-jury trial and his having failed to appear here today as well as the other circumstances that were set forth this morning, permit this Court to proceed with the non-jury in his absence. But your comments are recorded for your client's right[s] purposes.

N.T. 9/16/10 at 6-8.

Our review of party briefs, the trial court opinion, and pertinent caselaw move us to agree with the trial court that, under the factual circumstances of the case as described *supra* in the excerpt, Appellant knowingly went in *absentia* having last agreed with his co-defendants at the conclusion of their suppression hearing to proceed to a non-jury trial. As Appellant affirmatively chose not to take part in his trial after having last indicated to the court his willingness to proceed without a jury trial, we find no error with the court's ruling below and adopt the trial court's rationale, as expressed on pages 14-15 of its Pa.R.A.P. 1925(a) opinion, to that extent.

Next, Appellant contends the court improperly applied a mandatory drug sentence for drug offenses committed with firearms, pursuant to 42 Pa.C.S. § 9712.1. Appellant predicates this claim on the argument that evidence failed to connect him with the other defendants in their illegal

enterprise. Consequently, their possession and control of firearms in furtherance of their enterprise may not be attributed to him, Appellant concludes. Because we have already rejected its logical predicate, this argument fails. Appellant, therefore, may not prevail in his challenge to the application of a mandatory minimum sentence pursuant to Section 9712.1.

Finally, Appellant challenges the denial of his motion to suppress an inculpatory post-arrest statement he made. Specifically, he claims police had unconstitutionally withheld a recitation of his ***Miranda*** rights by the time he admitted "we sell burn [counterfeit drugs] to snaps."

> "Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct."
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> [W]e may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Jones, 874 A.2d 108, 115 (Pa. Super. 2005).

As to one's right against self-incrimination, a person must be informed of his or her Miranda rights prior to custodial interrogation by police. ***Comonwealth v. Sites***, 427 Pa. 486, 235 A.2d 387 (1967). Moreover, the protective provisions of Miranda prohibit the continued interrogation of an interviewee in police custody once he or she has invoked the right to remain silent and/or to consult with an attorney. ***Commonwealth v. Rucci***, 543

Pa. 261, 670 A.2d 1129 (1996). "Interrogation" means police questioning or conduct calculated to, expected to, or likely to evoke an admission. ***Commonwealth v. Brown***, 551 Pa. 465, 711 A.2d 444 (1998). Where an interviewee elects to give an inculpatory statement without police interrogation, however, the statement is "volunteered" and not subject to suppression, notwithstanding the prior invocation of rights under ***Miranda***. ***Id***; ***Commonwealth v. Bracey***, 501 Pa. 356, 461 A.2d 775 (1993); ***Commonwealth v. Abdul–Salaam***, 544 Pa. 514, 678 A.2d 342 (1992). Interrogation occurs when the police should know that their words or actions are reasonably likely to elicit an incriminating response, and the circumstances must reflect a measure of compulsion above and beyond that inherent in custody itself. ***See Commonwealth v. Fisher***, 564 Pa. 505, 769 A.2d 1116 (2001).

At Appellant's suppression hearing, Police Officer Brian Schmitt testified to the circumstances leading to the moment when Appellant made his inculpatory, station house statement. Specifically, Schmitt testified that he began to administer Miranda rights to Appellant through use of a printed rights form. The first part of the form informed Appellant of his rights under the law, of his right to refuse answering any question, and that any answer could be used against him in a court of law. Appellant answered that he understood these rights, and Officer Schmitt recorded this answer on the form.

The next section informed Appellant of his right to talk to a lawyer, to have a lawyer present before deciding whether to answer questions and while he is answering questions, and to have a lawyer appointed if he cannot afford to retain one. When asked if he understood these rights, Appellant answered "Yes, and I want to do that right there." N.T. at 78. Based on this answer, Officer Schmitt ceased asking any more questions from the form and prepared to have Appellant transported to jail.

According to Schmitt, as the two men walked past an area where bags of the drugs recovered from the apartment were being processed, Appellant said "Sir, let me tell you something." Schmitt asked "What?" Appellant replied, "That big bag of crack right there isn't real. We sell burn to snaps." N.T. at 79-80. Appellant continued, again without being questioned, to explain that the big bag was "burn" but that the little bag was real. N.T. at 80.

Appellant now contends that Schmitt's failure to complete the form and obtain Appellant's signature thereto invalidated Appellant's subsequent statement. Officer Schmitt was obligated under ***Miranda*** and its progeny to resume warnings when Appellant began a conversation with him while walking through the station house. Appellant, however, offers no authority in support of this conclusion.

Reviewing the facts under our standard above, we conclude that Officer Schmitt neither spoke to Appellant in a manner reasonably likely to

elicit an incriminating response nor received Appellant's statement under circumstances compelling a statement above and beyond that inherent in custody itself. Indeed, Officer Schmitt had just acceded to Appellant's desire to have a lawyer present by terminating the interview and escorting Appellant out of the interrogation room in preparation for transport to jail. At the moment immediately preceding his statement, therefore, Appellant was under no official compulsion to act or speak with regard to his case. Nor can we construe Officer Schmitt's reply of "what?" under these circumstances as a statement elicited to induce an incriminating statement. Just minutes earlier, Appellant had invoked his rights to counsel, an invocation to which the officer immediately acceded. Appellant's statement just minutes later of "Let me tell you something" as the two were walking did not alert the officer that Appellant was prepared to renounce his invocation and confess. Under the circumstances, the neutral comment could have referred to anything, and Officer Schmitt's single word reply of "what?" was not designed to elicit a confession.

Furthermore, while Appellant never signed a completed written Miranda form, he received specific ***Miranda*** warnings of his rights to remain silent, to be free from compulsory interrogation, to speak to an attorney before an interrogation, and to have an attorney present for consultation during an interrogation. He indicated his full understanding of those rights and invoked his right to an attorney. His decision thereafter, just minutes

later, to volunteer an incriminating statement to Officer Schmitt, who merely replied "what?" to Appellant's opening remarks, were not the product of interrogation in any form. We therefore find no merit to Appellant's bare contention to the contrary.

Judgment of sentence is affirmed.

MUNDY, J. CONCURS IN THE RESULT.

FORD ELLIOTT, P.J.E. FILES A DISSENTING MEMORANDUM STATEMENT.