

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JUSTIN BAATZ	:	
	:	
Appellant	:	No. 700 EDA 2018

Appeal from the Order Entered February 1, 2018  
 In the Court of Common Pleas of Lehigh County Criminal Division at  
 No(s): CP-39-MD-0002886-2017

BEFORE: LAZARUS, J., MURRAY, J., and MUSMANNO, J.

DISSENTING MEMORANDUM BY LAZARUS, J.: **FILED NOVEMBER 20, 2018**

I respectfully dissent. I would vacate and remand for a new hearing in compliance with Pa.R.Crim.P. 588.<sup>1</sup>

Baatz filed a *pro se* motion for return of property, specifically a Ruger handgun he had used to kill another man in self-defense. At the hearing on

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<sup>1</sup> Rule 588 of the Pennsylvania Rules of Criminal Procedure provides, in relevant part:

A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof....

The [J]udge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

the motion, the investigating officer testified that the deceased was found in his vehicle with his own handgun in his lap. N.T. Hearing, 2/1/18, at 7. The Commonwealth did not file charges against Baatz. **Id.** at 5.

The Majority correctly notes that on a motion for return of property, the moving party has the burden of proving ownership or lawful possession of the items. **See Commonwealth v. Pomerantz**, 573 A.2d 1149 (Pa. Super. 1989). The burden then shifts to the Commonwealth to prove, by a preponderance of the evidence, that the property is contraband. **Id.**

Baatz argues that since the Commonwealth brought no charges, it could only retain seized property if it is contraband *per se* or derivative contraband. His argument, however, ignores his initial burden to prove ownership before that burden shifts to the Commonwealth to prove it is contraband. In his petition, Baatz alleged that the “9mm Ruger was neither contraband nor derivative contraband, but [is], instead, the exclusive and lawful property of the Petitioner.” Petition for Return of Property, 11/6/17, at ¶ 7. He did not, however, testify or present any evidence of ownership at the hearing. At a minimum, Baatz had to allege, under oath, lawful ownership of the gun. **See** Pa.R.Crim.P. 575(A)(2)(g); 588; **see also Pomerantz, supra**. As the Majority states, Baatz did not even attempt to submit his petition as evidence. Instead, on appeal, Baatz argues there is “no real dispute as to whether [he] lawfully possessed the gun which was seized.” Appellant’s Brief, at 9. This is

a flawed argument; however, for the following reasons I believe Baatz is entitled to a new hearing.

Rule 588(B) provides in relevant part: "The [J]udge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon." Pa.R.Crim.P. 588(B). In this case, there was no recognition from either the DA or the trial court that petitioner had the burden to first present evidence or testify as to ownership of the firearm. Although Baatz was sworn in at the start of the hearing, along with the Commonwealth witnesses, the court never inquired of Baatz, who appeared *pro se*, as to whether he was prepared to establish entitlement to the property at issue. The hearing consisted of the deputy district attorney presenting the background of this case and questioning one of investigating officers, Detective Vazquez. N.T. Hearing, *supra* at 4-10. The deputy district attorney acknowledged that Baatz had nothing to disqualify him from possessing a firearm, and the other investigating officer, Detective Almonte, acknowledged that Baatz was licensed to carry a firearm. *Id.* at 2, 10. The hearing abruptly concluded with the court's pronouncement: "There is no way I am giving you that gun back. Not happening. Your petition is denied." *Id.* at 11. In my opinion, the court was obligated, at the very least, to ask the *pro se* petitioner if he had anything to say or present with respect to his motion.

I would reverse and remand for a new hearing.