NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JUJUAN PARKER,	:	
Appellant	:	No. 2177 EDA 2012

Appeal from the Judgment of Sentence entered on February 13, 2012 in the Court of Common Pleas of Delaware County, Criminal Division, No. CP-23-CR-0007463-2010

BEFORE: BOWES, GANTMAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED MAY 29, 2013**

Jujuan Parker ("Parker") appeals from the judgment of sentence imposed after a jury convicted him of two counts of third-degree murder. ***See*** 18 Pa.C.S.A. § 2502(c). We affirm.

On the evening of September 5, 2010, Tyrone Thompson ("Thompson") and Jeffrey Joyner, Jr., ("Joyner") were shot to death on the 2700 block of Kane Street in the City of Chester. Eyewitnesses testified that shortly prior to the shooting, they saw a black van, driven by Brian Selby ("Selby"), come to a stop on the 2700 block of Kane Street. Parker was in the passenger's seat of the van. The eyewitnesses saw Selby exit the van and attempt to put a mask on his face. When Selby noticed the group of eyewitnesses watching him, he reentered the van and drove off. Shortly thereafter, the same black van reappeared on the 2700 block of Kane

Street, driven by Parker. Parker stopped the vehicle, whereupon Selby exited and approached the victims. Parker remained in the vehicle. Selby fired eleven shots at the victims, striking each victim five times. Selby then reentered the van, whereupon Parker drove off and fled the scene. Emergency responders transported the victims to a hospital, where they were pronounced dead.

One of the eyewitnesses to the crime, Shanecia Word ("Word"), initially gave a police statement implicating Parker and Selby in the shooting. Subsequently, however, Word recanted her statement. Notable to this appeal, Word did not testify at Parker's jury trial, but she did testify at Selby's separate, subsequent jury trial and stated that the police had coerced her into making a false eyewitness statement. At Parker's trial, a detective involved in the investigation of the shooting testified that his efforts to locate Word for Parker's trial were unsuccessful, despite repeated attempts.

Following the shooting, the police arrested Parker and Selby and charged them each with two counts of criminal homicide and various other offenses. Thereafter, the Commonwealth filed a Petition to sever Selby's case from the Parker case, which the trial court granted. At the close of Parker's trial, the jury found him guilty of two counts of third-degree

murder.[1] Approximately two months after Parker's conviction, the jury in Selby's case acquitted Selby of all charges.

Prior to sentencing in Parker's case, the Commonwealth gave notice of its intent to seek imposition of a mandatory sentence of life in prison under 42 Pa.C.S.A. § 9715 (stating that any person convicted of murder of the third degree and who had been previously convicted at any time of murder or voluntary manslaughter must be sentenced to life in prison). On February 13, 2012, the trial court sentenced Parker to a prison term of 18 to 40 years for his murder conviction regarding the death of Joyner ("the Joyner conviction"). The court then imposed a sentence of life in prison as to Parker's murder conviction regarding the death of Thompson, using the Joyner conviction to apply the mandatory sentencing provision under section 9715.

Parker timely filed a post-sentence Motion alleging that the Commonwealth's failure to present Word as a witness during his trial entitled him to a new trial. According to Parker, Word's recantation of her initial police statement at Selby's trial called into question the truthfulness of the inculpatory testimony of the other eyewitnesses who testified at Parker's trial. After conducting a hearing, the trial court denied Parker's Motion. Parker then filed a timely Notice of appeal.

On appeal, Parker raises the following issues for our review:

[1] The jury also found Parker guilty of two counts of aggravated assault, which merged for sentencing purposes.

> 1. [Whether the Trial] Court erred when it imposed a mandatory sentence of life imprisonment pursuant to 42 Pa.C.S. [§] 9715[? Parker], pursuant to the Commonwealth's evidence presented at trial, acted as an accomplice to the actual killer of the victims, the homicides occurred within seconds of one another[,] and the imposition of a mandatory [sentence of] life [in prison] was not applicable under the facts of this conviction.
>
> 2. The Commonwealth did not call an alleged eyewitness, [] Word, in its case in chief against [Parker]. Subsequent to [Parker's] trial, [] Word recanted her adverse statement during her testimony in the severed trial of [Parker's] co-defendant, [] Selby. The Commonwealth failed to take sufficient steps to locate [] Word for [] Parker['s] trial and knew or should have known that her testimony would be adverse to the Commonwealth and favorable to [Parker]. The content of [] Word's testimony was so significant that [Parker] must be given an opportunity to present her testimony to a finder of fact. [The Trial] Court conducted an evidentiary hearing on this issue and erred when it chose to deny [Parker's M]otion for a new trial.

Brief for Appellant at 4.

In his first issue, Parker argues that the trial court imposed an illegal sentence when it sentenced him to life in prison pursuant to 42 Pa.C.S.A. § 9715, since the mandatory sentencing statute was inapplicable to the facts presented in this case. ***See*** Brief for Appellant at 7-8.

> The scope and standard of review applied to determine the legality of a sentence are well established. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Morris, 958 A.2d 569, 578 (Pa. Super. 2008) (*en banc*) (citation omitted).

Section 9715 states the following, in relevant part:

> **§ 9715. Life imprisonment for homicide**
>
> **(a) Mandatory life imprisonment.** --Notwithstanding the provisions of section 9712 (relating to sentences for offenses committed with firearms), 9713 (relating to sentences for offenses committed on public transportation) or 9714 (relating to sentences for second and subsequent offenses), any person convicted of murder of the third degree in this Commonwealth who has previously been convicted at any time of murder or voluntary manslaughter in this Commonwealth or of the same or substantially equivalent crime in any other jurisdiction shall be sentenced to life imprisonment, notwithstanding any other provision of this title or other statute to the contrary.
>
> **(b) Proof at sentencing.** --Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing ….

42 Pa.C.S.A. § 9715(a), (b).

Here, Parker points out that the trial court relied upon this Court's *en banc* decision in ***Morris, supra***, in holding that section 9715 applied to his case. According to Parker, however, ***Morris*** is inapposite as it is factually distinguishable from the instant case. Brief for Appellant at 8.

In ***Morris***, this Court considered whether the defendant could legally be sentenced to a mandatory term of life in prison pursuant to section 9715 where the trial court convicted the defendant of two separate murders at the same trial and sentenced him on the same date for both counts. At the close of the defendant's trial, the jury found him guilty of two counts of third-degree murder for killing two of his children at different times. ***Morris***,

958 A.2d at 575.[2] On the same date, the trial court sentenced the defendant to twenty to forty years in prison on one of the murder convictions. ***Id.*** The court then imposed a sentence of life in prison as to the second murder conviction, using the first murder conviction to apply the mandatory sentencing provision under section 9715. ***Id.***

In construing the statutory language of section 9715 on appeal, this Court noted at the outset that "section 9715 is explicitly and unambiguously written[.]" ***Id.*** at 579 (citing, *inter alia*, ***Commonwealth v. Lark***, 504 A.2d 1291, 1296 (Pa. Super. 1986) (stating that the statutory language of section 9715 is explicit and should be construed as written)). The ***Morris*** Court then pointed out that, in order to apply section 9715, the trial court must, at sentencing, determine whether the defendant "has previously been convicted *at any time* of murder or voluntary manslaughter in this Commonwealth or of the same or substantially equivalent crime in any other jurisdiction[.]" ***Morris***, 958 A.2d at 579 (emphasis in original) (quoting 42 Pa.C.S.A. § 9715(a)). The Court then held as follows:

> The operative words of the statute are "at any time" and in analyzing these words, we must construe them according to their common usage. At any time clearly means that the order of commission, or conviction, of the offenses requiring a life sentence is immaterial so long as, at [the] time of sentencing on a third[-]degree murder conviction, a defendant has been convicted on another charge of murder or voluntary manslaughter. Therefore, the trial court did not commit legal error in imposing the sentence of life in prison because the plain

[2] The homicides at issue in ***Morris*** were separated by approximately one year. ***See Morris***, 958 A.2d at 572-74.

> language of the statute specifies that the timing of the primary conviction is not relevant as long as the defendant had been convicted of the initial murder or manslaughter at the time of sentencing on the second murder.

Morris, 958 A.2d at 579 (citations, quotation marks and ellipses omitted).

In the instant case, Parker contends that ***Morris*** is distinguishable for the following reasons:

> The deaths of the victims in ***Morris*** were separated by more than one year. In the instant case, the facts do not distinguish which victim was shot first and which victim was the first to die. The evidence established that Selby shot both victims. The trial testimony and exhibits did not establish that Thompson was the first or second victim to be shot and the first or second victim to die. Nor did the Commonwealth attempt to tell the jury the sequence of the shooting and the time when the second victim expired. … The ***Morris*** facts involve two separate incidents. The facts in this appeal involve a single incident. [Parker] was not the actual killer in this case[,] as contrasted by the facts of ***Morris***[,] wherein Morris was the principle and only actor involved in the actual killing. Imposition of the mandatory life sentence provisions of [section] 9715 was improper w[h]ere the sequence of the shootings and deaths [was] not established to any degree.

Brief for Appellant at 8 (paragraph break omitted).

Relevant to this case, the *en banc* ***Morris*** Court, in announcing its holding, expressly overruled the three-judge panel decision of this Court in ***Commonwealth v. Smith***, 710 A.2d 1179 (Pa. Super. 1998), *appeal denied*, 737 A.2d 742 (Pa. 1999). ***See Morris***, 958 A.2d at 580. The *en banc* Court explained its ruling in this regard as follows:

> In ***Smith,*** the defendant was convicted of two counts of third-degree murder after he opened fire on a group of men during a dispute. ***Smith,*** 710 A.2d at 1180. In sentencing the defendant, the trial court did not apply section 9715, and a panel

> of this Court affirmed. ***Id.*** at 1181. The panel concluded that section 9715 was not implicated because the defendant "was found guilty at the same time and by the same jury of two counts of third degree murder arising out of the same incident." ***Id.*** *The panel reasoned that the two convictions were essentially simultaneous* and that section 9715 could not be interpreted to encompass this circumstance. ***Id.*** ("We believe it strains the plain meaning of the statute to interpret 'previously convicted' to encompass this situation.").
>
> The ***Smith*** Court essentially read new requirements into the statutory language. Section 9715 specifically focuses upon whether, at the time of sentencing, a defendant has been previously convicted "at any time." The statute does not state that the two murders must be tried and sentenced separately. Indeed, the plain language of the statute requires that the trial court determine whether a previous conviction exists at the time of sentencing, without giving consideration to when the conviction occurred. Further, *the statute does not make any distinction between convictions that arise from a single criminal episode and multiple criminal episodes.* We are bound by the unambiguous language of this statute and we cannot insert additional requirements that the legislature has not included. ***See*** [***Commonwealth v. Drummond***, 775 A.2d 849, 855-56 (Pa. Super. 2001) (*en banc*)]. Accordingly, because the ***Smith*** Court's decision read requirements into the statute that plainly do not appear, we conclude that its reasoning is flawed and that the decision must be overruled.

Morris, 958 A.2d at 581 (emphasis added).[3]

Based upon the unambiguous holding in ***Morris***, we conclude that Parker's challenge to the legality of his sentence lacks merit. Additionally, we agree with the trial court's following reasoning rejecting Parker's claim that the holding in ***Morris*** is inapplicable where the defendant is convicted of third-degree murder as an accomplice:

[3] The Pennsylvania Supreme Court denied allowance of appeal in the ***Morris*** case. ***See Commonwealth v. Morris***, 991 A.2d 311 (Pa. 2010).

> [Parker's] claim that Section 9715 is not applicable where a defendant is not the "shooter" but an accomplice has no merit. The statute makes no exception for defendants convicted of murder based on a theory of accomplice liability and it would be error for the trial court to graft that exception onto the statute in this case. [***Cf.***] ***Commonwealth v. Dickson***, 918 A[.]2d 95[, 108-09] (Pa. 2007) (by its terms[,] 42 Pa.C.S.A. § 9712, imposing mandatory sentence enhancement on person who "visibly possessed" a firearm during commission of crime of violence, did not apply to unarmed co-conspirator co-defendant where his accomplice brandished a firearm during the commission of a robbery).

Trial Court Opinion, 10/26/12, at 10; ***see also*** 18 Pa.C.S.A. § 306 (assessing equal criminal culpability for an accomplice).

Next, Parker contends that the trial court erred in denying his post-sentence Motion seeking a new trial based upon Word's recantation of her initial police statement, which inculpated Parker in the shooting, and the Commonwealth's failure to call Word as a witness during Parker's trial. ***See*** Brief for Appellant at 9-11. Parker points out that although the Commonwealth presented evidence that the efforts of the police to locate Word prior to his trial were unsuccessful, Word subsequently testified at Selby's trial that the police had coerced her into making a false statement against Selby and Parker. ***Id.*** at 9. According to Parker, the difference between his trial and the trial of Selby, which resulted in Selby's acquittal of all charges, was the absence of Word's testimony from Parker's trial. ***Id.*** at 10. Parker further argues that

> the trial court erred when it found that the Commonwealth made sufficient efforts to locate [] Word before the start of [Parker's] trial. … The trial court erred when it held that the failure to

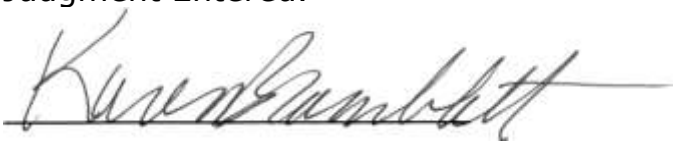
> present the testimony of [Word] did not have an adverse effect upon [Parker's] trial. … [Word's] trial testimony in the Selby case cast doubt on the credibility of the other two eyewitnesses. The prejudice to [Parker] is apparent. The only remedy to cure this defect is [to] award [Parker] a new trial.

Id. at 10-11.

In its Opinion, the trial court adeptly set forth the applicable law, thoroughly addressed Parker's challenge to the denial of his post-sentence Motion, and cogently explained the court's reasons for determining that Parker's claim lacks merit. ***See*** Trial Court Opinion, 10/26/12, at 11-17.[4] Our review confirms that the trial court's sound rationale is supported by the record and the law, and we thus affirm on this basis. ***See id.***

Judgment of sentence affirmed.

Judgment Entered.



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Date: 5/29/2013

[4] On page 13 of its Opinion, the trial court references that the Commonwealth presented evidence of recorded telephone calls made by Parker while in prison, calls which Parker placed using his inmate Telephone Identification Number ("TID") and the TID of another inmate.

J.S13038/13

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-23-CR-7463-2010**
vs.	:	
JUJUAN PARKER	:	

A. Sheldon Kovach, Esquire, on behalf of the Commonwealth
Douglas L. Smith, Esquire, on behalf of the Defendant

OPINION

OSBORNE, J. FILED: 10/26/12

On February 13. 2012, after a jury trial Defendant, Jujuan Parker, was sentenced for two counts of third-degree murder. A sentence of life in prison was imposed for the killing of Tyrone Thompson and a concurrent sentence of 216 to 480 months in prison was imposed for the killing of Jeffrey Joyner, Jr. Post sentence motions were denied on July 12, 2012 after a hearing[1]. Defendant appeals, necessitating this Opinion.

In a "Concise Statement of Matters Complained of on Appeal," Defendant raises the following issues: 1) the Trial Court erred by failing to grant Defendant's motion to suppress evidence of prison phone calls intercepted without Defendant's consent and in violation of

[1] Following the verdict, and after his co-defendant was acquitted, Defendant alleged that trial counsel provided ineffective assistance of counsel at trial. New counsel was appointed to represent him in post-sentence matters and on appeal. Post–sentence motions were filed on Defendant's behalf and a hearing was held on June 26, 2012. New counsel moved, pursuant to Pa.R.Crim.P. 720(B)(3)(b) to allow an additional thirty days' time for the Court to render a decision on the post-sentence motions. That motion was granted, for good cause shown, by Order entered on May 11, 2012.

(34)

Pennsylvania and Federal statutes, 2) the trial court erroneously imposed a life sentence pursuant to 42 Pa.C.S.A. § 9715 where the Defendant acted as an accomplice to the "actual killer" and the killings occurred within seconds of each other and 3) a new trial is warranted because at trial the Commonwealth failed to call an alleged eyewitness to testify.

On Sunday September 5, 2010 Jeffrey Joyner, Jr. and Tyrone Thompson were shot and found lying face down on the street on the 2700 block of Kane Street in Chester, Pennsylvania. Both men were pronounced dead the next day. Witnesses who were on Kane Street at the time of the shooting led the police to conclude that Defendant and Brian Selby caused the death of the victims. Defendant and Selby were charged as co-conspirators and notice that they would stand trial jointly was given. Thereafter, the Commonwealth filed a motion to sever and on November 22, 2011 that motion was granted. A motion to suppress was filed on Defendant's behalf and after a hearing that motion was denied on November 9, 2011. The jury trial began on November 22, 2011 and the verdict was returned on December 7, 2011. Ultimately, Selby stood trial after the verdict was returned in this matter and the jury acquitted him of all charges.

Suppression

During the course of Defendant's trial the jury heard the testimony of twenty-two witnesses, including the investigating officers, the medical examiner and several eyewitnesses. At trial, the jury heard Defendant testify in his own defense and also heard the audio recordings of telephone that calls he made while in custody awaiting trial. In the course of the calls Defendant made statements from which the jury could conclude that Defendant was attempting to interfere with the testimony of eyewitnesses through threats

and intimidation. These calls were the subject of Defendant's pre-trial motion to suppress wherein Defendant claimed that by recording and divulging his telephone conversations the Commonwealth violated both federal and state statues prohibiting wiretapping.

A pre-trial suppression hearing was held on November 9, 2011. Defendant claimed that his prison phone calls were taped and divulged without his consent in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 and the Wiretapping and Electronic Surveillance Act, 18 Pa.C.S.A. § 5701 *et seq.* The Court heard the testimony of Captain John McCarthy, an employee at the George Hill Correctional Facility ("GHCF") who heads the internal affairs division of the investigative division at the facility. N.T. 11/9/11 p. 6. Included among his administrative duties is supervision of the inmate telephone system. Captain McCarthy described the initial booking procedures at GHCF. Upon entering the GHCF each inmate receives a Telephone Identification Number ("TID"). This number is provided on an "Inmate Telephone ID Release Form." See Exhibit CS-1. The form sets forth rules and regulations and provides, in pertinent part, "[t]his document is an agreement between (Inmate Name)...and the Facility...I understand and agree that telephone calls and visitation calls are subject to monitoring, recording and may be intercepted or divulged." Defendant was booked on December 4, 2010. A signed "Inmate Telephone ID Release Form" dated December 4, 2010 for inmate Jujuan Parker was offered into evidence. This form assigned Defendant a TID. Id. at 10-14. After initial booking inmates attend an orientation class where they are issued an "Inmate Handbook." See N.T. 11/9/11 p. 15, 23; Exhibit CS-2. On page number twenty-seven of the handbook the inmate is advised on the rules pertaining to the use of prison telephone, including the following,

"Block phones are recorded and monitored." Id. at 17. Further, when an inmate places a telephone call, for "each and every call," a recording is played after the telephone number is dialed. Id. at 18. This message advises the inmate that "[t]his call may be monitored or recorded." Id. at 19. This recording is played whenever a telephone call is made by in inmate with only two exceptions: when a call is placed to the inmate's attorney or to his or her counselor. Id. at 21.-22. At trial, evidence of eight telephone calls was put before the jury. See N.T. 12/1/11 pp. 141-183; N.T. 12/2/11 pp. 1-33. At the beginning of each telephone call a recorded message plays, and advises the parties to the call that it is coming from GHCF and that the call may be "monitored or recorded." The recipient is then advised that he or she may either accept or reject the call. See Exhibits C-87(c), C-87(d), C-87(e), C-88(c), C-88(d), C-89(c), C-89(d) & C-90(c). Several of these calls were made by the Defendant through the use of the TID assigned to a fellow inmate, Cleveland Taft. See e.g. N.T. 12/1/11 pp. 163-168.; Exhibits C-88(c), C-88(d), C-89(c), C-89(d) & C-90(c).

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (hereinafter "Wiretap Act") prohibits the "interception, disclosure or use of wire, electronic or oral communications," including telephone conversations, unless the interception falls within an exception to the Act. See 18 Pa.C.S.A. §§ 5703 & 5704. See generally Commonwealth v. Proetto, 771 A.2d 823 (Pa.Super. 2001). Section 5704(14) provides the exception that is relevant in this case:

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> (14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record,

> monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:
> (i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:
>
> (A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.

18 Pa.C.S.A. § 5704(14).

In Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2009) the Pennsylvania Supreme court considered whether the Wiretap Act mandated suppression of tape-recorded conversations between the appellant and his parents where, although the parties were aware that their conversations were being recorded, the appellant did not receive prior written notice as called for in Section 5704(14)(i)(A). The court concluded, given that the parties had actual notice, the recordings were appropriately divulged to an investigating detective in the "prosecution or investigation of a crime." The court explained that the privacy rights the Wiretap Act is intended to protect were in fact, fully protected. Additional notice would "would not have afforded [appellant] any greater protection of his right to privacy.....than the actual notice [he]possessed at the time of the conversation." Id. at 79.

The Commonwealth has met its burden of proving by a preponderance of the evidence that the subject recordings were not taken in violation of defendant's rights. See Pa.R.Crim. P. 581(H). See Commonwealth v. Dixon, 997 A.2d 368 (Pa. Super. 2010). The evidence offered by the Commonwealth demonstrated that in each instance both the Defendant and the recipient of the call were advised that the call could be monitored or recorded. In each case the parties were given the option of receiving or ending the call.

Additionally, evidence of the written notice provided through the GHCF's inmate handbook and Defendant's signed "Inmate Telephone ID Release Form" was offered. In light of these circumstances it is clear that the Commonwealth's evidence demonstrated that "actual notice" was given and that the protection the Wiretap Act provides to the Defendant's right to privacy had not been infringed upon, therefore, and suppression was not warranted. See generally Commonwealth v. Fetter, 770 A.2d 762 (Pa.Super. 2001) (fact that tapes were not in the physical custody of deputy district attorney as required by Section 5704(2)(ii) did not warrant suppression where there was no evidence of tampering or discrepancy that resulted from the minor mishandling). Cf. Commonwealth v. Prisk, 13 A.3d 526 (Pa.Super. 2011) (appellant's motion to suppress pursuant to Wiretap Act denied where appellant had no reasonable expectation of privacy; prison visiting room was not "home" within the Act).

Turning to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 , it is clear that Defendant consented to the recording and monitoring of his telephone calls and that under the circumstances present, federal law was not offended. Title III prohibits the interception of "any wire, oral, or electronic communication," including telephone conversations, in the absence of judicial authorization. U.S. v. Rivera, 292 F.Supp.2d 838, 841 (E.D.Va. 2003). Taped inmate telephone conversations come within the purview of this prohibition. Id. Further, Section 2515 of this statute provides that telephone communications intercepted in violation of Title III may not "be received in evidence in any trial...." 18 U.S.C. § 2515. However, when "one of the parties to the communication has given prior consent to such interception," the government may intercept telephone communications without prior judicial authorization. See 18 U.S.C. § 2511(2)(c).

In Rivera, supra, the court concluded, in circumstances much like those present in this case, that the defendant consented to the interception of his prison calls. In Rivera, evidence demonstrated that upon arrival at prison, inmates receive an inmate handbook which "alerts" the inmate to the fact that his or her telephone calls may be monitored or recorded. And, as in this case, after placing a call through the use of an assigned PIN, the inmate hears a recorded prompt that again advises him or her that the call would be monitored. This prompt also advises the inmate that he or she may hang up or continue with the call. The court found that Rivera had both constructive notice, through the inmate handbook, and actual notice, by virtue of the prompt, that his calls were being monitored. By continuing with each call it was "fair and reasonable" to conclude that Rivera consented to the monitoring. Id. Additionally, in Rivera, the court noted that on some occasions the defendant used "code" and made calls with another inmate's PIN, further evidencing the fact that he was aware of the monitoring but nevertheless continued with his calls.

Similarly, inmates at the GHCF receive an inmate handbook alerting them that outside calls will be monitored and each time a call is made the inmate is reminded of this fact. Additionally, to receive a TID number the inmate must execute an "Inmate Telephone ID Release Form" and circumstantial evidence supports the conclusion that, in fact, Defendant executed this form. Finally, Defendant used another inmate's TID in making several of the calls, giving rise to the inference that Defendant knew his calls were being recorded and attempted to avoid detection. All of the foregoing lead to the conclusion that Defendant consented expressly, by executing a release form, and impliedly, through his actions, to the monitoring of his calls. Therefore, the "consent exception" to the federal wiretapping statute

is applicable and the evidence was admissible. See also United States v. Amen, 831 F.2d 373 (2d Cir. 1973).

Sentence Imposed

Prior to sentencing the Commonwealth gave notice of its intent to seek the imposition of a mandatory life sentence pursuant to 42 Pa.C.S.A. § 9715. Section 9715(a) provides: "Notwithstanding the provisions of section 9712 (relating to sentences for offenses committed with firearms), 9713 (relating to sentences for offenses committed on public transportation) or 9714 (relating to sentences for second and subsequent offenses), any person convicted of murder of the third degree in this Commonwealth who has previously been convicted at any time of murder or voluntary manslaughter in this Commonwealth or of the same or substantially equivalent crime in any other jurisdiction shall be sentenced to life imprisonment, notwithstanding any other provision of this title or other statute to the contrary." 42 Pa.C.S.A. § 9715. In his Concise Statement of Errors Complained of on Appeal Defendant claims that, because he was an accomplice to the killings, and not the actual shooter, and because the killings occurred "within seconds" of each other, this section is not applicable.

The evidence at trial demonstrated that on September 5, 2010 Brian Selby shot the victims, Tyrone Thompson, Jr. and Jeffrey Joiner. Defendant was a passenger in a van driven by Selby as the two men stalked the victims. Selby left the vehicle and approached the victims through an alley. Eleven shots were fired. Each victim was hit five times. Defendant then drove the van and circled the area before picking up Selby and driving away from the dying victims. In addition to the testimony of several witnesses supporting this version of

events, Defendant recounted these facts to a fellow inmate, William Morgan, who testified at trial.

In Commonwealth v. Morris, 958 A.2d 569 (Pa.Super. 2008) *appeal denied* 991 A.2d 311 (Pa. 2010) the Superior Court considered whether the defendant could be sentenced to a mandatory term of life in prison pursuant to Section 9715 where he was convicted of two separate murders at the same trial and sentenced on the same date for both counts. Morris was found guilty of killing two of his children at different times. After his jury trial, a sentence of twenty to forty years of incarceration was imposed on one of the third degree murder convictions. The court then imposed a term of life in prison for the second murder conviction, using the fist murder conviction to apply the mandatory sentencing statute. In determining that Section 9715 was applicable and that it authorized the sentence imposed, the Superior Court relied on the plain meaning of the statute noting at the outset that it is "explicitly and unambiguously written,:"

> to apply the statute, the trial court must, at sentencing, determine whether the defendant "has previously been convicted *at any time* of murder or voluntary manslaughter in this Commonwealth or of the same or substantially equivalent crime in any other jurisdiction." 42 Pa.C.S.A. § 9715(a) (emphasis added). The operative words of the statute are "at any time" and in analyzing these words, we must construe them according to their common usage. " 'At any time' ... clearly means that the order of commission, or conviction, of the offenses requiring a life sentence is immaterial so long as, at time of sentencing on a third[-]degree murder conviction, a defendant has been convicted on another charge of murder or voluntary manslaughter." Therefore, the trial court did not commit legal error in imposing the sentence of life in prison because the plain language of the statute specifies that the timing of the primary conviction is not relevant as long as the defendant had been convicted of the initial murder or manslaughter at the time of sentencing on the second murder.

Id. at 580 (emphasis in original). In drawing its conclusion the court expressly overruled Commonwealth v. Smith, 710 A.2d 1179 (Pa.Super.1998), *appeal denied*, 737 A.2d 742

(Pa.1999). Smith is relevant to our discussion. In that case the defendant was found guilty of two counts of third degree murder arising out of the same criminal incident. When the trial court found that Section 9715 was not applicable because the murders arose from one criminal incident, the Commonwealth appealed. A three judge panel found no trial court error, explaining that it believed "it strains the plain meaning of the statute to interpret 'previously convicted' to encompass this situation." The Morris court, sitting *en banc*, recognized that the Smith court viewed the murders as "essentially simultaneous." However, it found the "plain meaning" of the statute's words determinative, and explained, "the statute does not make any distinction between convictions that arise from a single criminal episode and multiple criminal episodes. We are bound by the unambiguous language of this statute and we cannot insert additional requirements that the legislature has not included." Id. at 581. See also Commonwealth v. Vasquez, 753 A.2d 807 (2000).

Defendant's claim that Section 9715 is not applicable where a defendant is not the "shooter" but an accomplice has no merit. The statute makes no exception for defendants convicted of murder based on a theory of accomplice liability and it would be error for the trial court to graft that exception onto the statute in this case. Compare Commonwealth v. Dickson, 918 A2d 95 (Pa. 2007) (by its terms, 42 Pa.C.S.A. §9712, imposing mandatory sentence enhancement on person who "visibly possessed" a firearm during commission of crime of violence, did not apply to unarmed co-conspirator defendant where his accomplice brandished a firearm during the commission of a robbery).

Failure to Call Witness

On February 21, 2012, after sentencing, Defendant filed a motion for a new trial. In support it was alleged that at co-defendant Selby's trial, the testimony of Shanecia Word created a reasonable doubt as to Selby's guilt and as a result, the jury found him not guilty on all charges. He contended that Word's testimony cast doubt on the credibility of the remaining Commonwealth witnesses and that he was denied a fair trial because the Commonwealth failed to secure the testimony of Word. This motion was denied after a hearing.

On appeal, Defendant claims that "the Commonwealth failed to take sufficient steps to locate Ms. Word for the Parker trial and knew or should have known that her testimony would be adverse to the Commonwealth and favorable to this defendant," and that the "content of Ms. Word's testimony was so significant that the defendant must be given an opportunity to present her testimony to a fact finder." Therefore, Defendant concludes, the court erred when it denied his post-sentence motion for a new trial. The shortcomings in this claim are numerous and the evidence of record demonstrates that it has neither a factual nor a legal basis.

The affidavit of probable cause states that three witnesses were together in front of a home on Kane Street shortly before the shooting occurred. In the affidavit, the witnesses are identified only by number. "Witness # 1" and Witness # 2", Geraldine Minor and Stephanie Smith respectively, were called by the Commonwealth to testify at trial. Shanecia Word is identified as "Witness #3" in the affidavit. The witnesses were not identified by name in the affidavit of probable cause due to concern for their safety. See N.T. 12/1/11 p. 118.

Defendant does not claim the Commonwealth withheld the identity of these witnesses. In fact, as early as December 12, 2010, Defendant told Tawana Cottman that he knew Word was one of the witnesses referred to in the affidavit of probable cause. See N.T. 6/26/12 p. 57.

At trial, Geraldine Minor ("Miss Pebbles") testified that she was with Smith and Word on the 2700 block of Kane Street at 11:33 p.m. before the shooting. She saw a black van drive up the street and stop. Selby, known to her as "Itchy," got out of the van and put a black hoodie on. N.T. 11/29/11 p. 163. She called to him, he looked in her direction, got back in to the van and then he drove away. Id. at 164. Smith, Word and Minor joined hands and started praying. Id. at 165. Word went into her house and Minor and Smith ran off. Next, Minor heard shots. Id. at 166. Minor was interviewed by detectives on September 15, 2010. Id. at 167-174. At that time she identified Selby and told detectives that there was one other person in the van. Id. At Selby's trial Minor testified that she was unable to identify that person. Id. at 180. However, on September 10, 2010, at a meeting with her probation officer, Minor said that she saw Selby step from the van and that she saw the Defendant in the van. N.T. 12/1/11 p. 11. Minor's probation officer, Lisa Coladonato, was present when on that same day, Minor related this information to detectives and promised to give a formal statement at a later date. Id. at 12.

Stephanie Smith lived on Price Street in the Highland Gardens section of Chester in 2010 and on September 5, 2010, she was on Kane Street, on the front porch of Shanecia Word's home with Minor and Word. N.T. 11/29/11 pp. 193-200. She saw a black van pull up in front of Word's home and saw Selby trying to put on a mask and then saw him exit the

van from the driver's side. Id. at 201. Smith also saw Defendant in the van. Id. at 202-04. After Selby saw the women he got back in the van and drove off. Id. at 205. Smith had a "weird feeling." She hugged the other women and ran off with Minor. Id at 207, 210. She heard shots fired. Id. at 211. The van reappeared on the upper part of Kane Street with Defendant driving. Id. at 208-19. Smith testified that earlier in the day on September 5, 2010, she was at a barbeque where she saw Selby with a gun in the pocket of his cargo pants. Id. at 23-236. Smith testified at the March 9, 2011 preliminary hearing in this matter. N.T. 11/29/11 p. 227. That evening, after she returned to her home a rock was thrown through her window. She entered the District Attorney's relocation program on March 12, 2011 and was assisted in moving, along with her five children, away from Highland Gardens area. Id. at 227-29. In her testimony she related her fear of the deadly consequences that those who cooperate with police suffer in the Highland Gardens area. Id at 196, 216-18, 225

In addition to the foregoing, the jury heard the testimony of Dustin Broomall and William Morga. They also heard the aforementioned telephone calls that Defendant placed from prison using both his own TID and TID of fellow inmate Cleveland Tate. Audio recordings of telephone conversations between Defendant, his mother and Shenicia Word's sister, Tawana Cottman, were played for the jury. At trial Defendant admitted making those calls and admitted that several were made using his fellow inmate's TID. See N.T. 12/2/11 pp. 176-180., 184, 186. During those conversations Defendant can be heard soliciting the assistance of his mother and Cottman to prevent Word and Minor from testifying at trial. In the course of these conversations Defendant suggests that the witnesses might be killed if

they continue to cooperate and testify at trial. See N.T 12/1/11 pp. 141, 183; N.T. 12/2/11 pp. 1-34.

Detective McFate of the Chester police Department testified at trial. Regarding Word's whereabouts, he testified that after initially interviewing Word at the offices of the Delaware County Criminal Investigation Division ("CID") on October 28, 2010 and speaking to her after that day, relocation of this witness was necessary. N.T. 12/1/11 p. 131. Detective McFate sought and received approval for relocation. He attempted to contact Word on December 8, 2010, but was unable to reach her. A marked police car was sent to her residence but no one answered the door. From December 8, 2010 until the date of trial, attempts to reach Word and to serve her with a subpoena were unsuccessful. Id. at 131-32.

In post-sentence testimony, Detective McFate testified that Word called him after Defendant was arrested and she told him that she was afraid for her own safety and for the safety of her children. See N.T. 6/26/12. Detective McFate made arrangements to relocate Word but was unable to reach he. rHis calls were not returned. He searched for addresses through JNET and PennDot and he went to her residence twice a week. People he spoke with told him that she was moving with her children from house to house. Detective McFate was unable to locate Word or to serve her with a subpoena before Defendant's trial. See N.T. 6/26/12 pp. 20-23

Before Selby's trial, a material witness warrant was issued. Word was taken into custody at the home of her sister, Tawana Cottman, in Chester and after a hearing on December 3, 2011, she was held without bail as a material witness. Detective McFate

denied that at any time he told Word what to include in her statement. He described her as a witness who was concerned for her safety.

On October 28, 2010,Shanecia Word gave a tape-recorded statement to Detectives Joseph McFate and Randy Martin in the offices of the Delaware County Criminal Investigation Division. See Exhibit PSD-1. Word told the detectives that on September 5, 2010, before the shooting she was sitting on her front step with Minor ("Miss Pebbles") and Stephanie Smith. She saw Selby pull up in a van. He got out of the van and took off a black hoodie and gloves. Word, Pebbles and Smith called out, "Yo Itchy" to him and he gave her "a funny look," that led her to suspect "sneaky shit." Selby got back in the van and quickly pulled off. Smith told Word to go into the house. Word was inside her home, "rolling up a blunt" when she heard the "pop pop pop" of the shooting. Id. Word did not identify Defendant or place him at the scene.

At Selby's trial,Word testified that on September 5, 2010,she lived on Kane Street in the Highland Gardens section of Chester. See Exhibit PSD-2 p. 4. She knew Selby as "Itchy" and knew the Defendant as "Apples." Id. at 6-7. She admitted knowing Geraldine Minor and Stephanie Smith. She testified that on the evening of September 5, 2010 at the time of the shooting she was in her home, rolling "weed" in the bathroom. Id. at 11, 13, 23. She insisted that she saw nothing before, during or after the shooting. Id. at 22 She acknowledged her October 28th statement but disavowed its truth. Id. at 24, 55. She testified that detectives "told [her she] had to say the same thing Stephanie and Ms. Pebbles...[said.]" Id. See also id. at 61—66, 71, 73-75. She testified that she gave her October 28, 2010 statement because she "had to" because she was being harassed by

police. Id. at 26 She maintained that she did not see Selby on Kane Street before the shooting but only saw him earlier in the day, at a barbeque. Id. at 27.

In criminal trials the prosecution is not required to call all available witnesses as long as it makes their names and whereabouts available to the defense. See Commonwealth v. Benson, 421 A.2d 383, 391 (Pa.Super. 1980); Commonwealth v. Culbreath, 411 A.2d 809, 810 (Pa.Super. 1979); Commonwealth v. Gee, 467 Pa. 123, 133-34, 354 A.2d 875 (1976). Where the defense is equally able to procure a witness without the Commonwealth's aid, the Commonwealth need not inform the defense of the witness's whereabouts. See Commonwealth v. Ryan, 446 A.2d 277, 281 - 282 (Pa.Super. 1982). Procedures for securing the presence of witnesses are equally available to the Commonwealth and to the defense. See Pa.R.Crim.P. 522 & 545. Finally, the Commonwealth has no duty to produce a witness whose whereabouts is unknown. See Commonwealth v. Detre, 341 A.2d 112 (Pa. 1975); Commonwealth v. Snyder, ~~190~~, 385 A.2d 588, 590 (Pa.Super. 1978).

In Commonwealth v. Detre, supra, the defendant sought relief from a murder conviction, alleging that the trial court committed reversible error by continuing with trial when a witness whom the Commonwealth had subpoenaed failed to appear. The court rejected this claim. Because trial counsel failed to object to the witness's absence or move for a continuance, the issue was waived. Further, once the Commonwealth advised trial counsel that the witness would not appear, it satisfied its obligation to opposing counsel by advising him of the unavailability of the witness.

In this matter, Defendant's claim fails for several reasons. Shanecia Word's testimony, as set forth in Exhibit PSD-2, was cumulative in light of the trial testimony of Stephanie Smith

and Geraldine Minor. Therefore, the Commonwealth was not obligated to call her to testify. Secondly, abundant evidence demonstrated that she made herself unavailable to the Commonwealth, in spite of its diligent efforts to secure her presence at trial. In fact, the record suggests that Defendant was responsible for her absence. From prison, he worked to prevent her from testifying by prevailing upon his mother and Word's sister to contact Word and to advise her against testifying, including threats to Word's life. Given these circumstances, it is reasonable to conclude not only that Defendant may have known of Word's whereabouts but that, in fact, his sources could provide him with access to her that was beyond the Commonwealth's ability. Word was, therefore, equally available to the Defendant. Next, there is no evidence suggesting that, before the verdict was returned in Selby's trial, counsel considered Word's testimony in any way favorable to Defendant or necessary to his case. Trial counsel did not subpoena her, he did not seek a material witness warrant and did not request a continuance to allow time to secure her presence. Accordingly, this issue has been waived. See Commonwealth v. Detre, supra.

Finally, in light of additional extensive evidence of Defendant's efforts to manipulate trial testimony and to threaten the lives of the witnesses against him- evidence that was not before the jury at Selby's trial- it cannot be concluded that the absence of Word's testimony resulted in a verdict of guilty in this matter. Cf. Commonwealth v. Byrd, 417 A.2d 173 (Pa. 1980) (acquittal of one co-conspirator does not require discharge of co-conspirator convicted in separate trial; different verdicts may be result of composition different juries or of different proof offered at each trial). Clearly, the jury in this matter heard significantly more inculpatory evidence, allowing it to find Defendant guilty beyond a reasonable doubt.

In light of the foregoing it is respectfully submitted that judgment of sentence should be affirmed.

BY THE COURT:

Ann Osborne

Ann Osborne, Judge