

IN THE MATTER OF : IN THE COURT OF COMMON PLEAS
 : OF ERIE COUNTY, PENNSYLVANIA
 WILL SMITH : **JUVENILE DIVISION**
 :
 :
 :
 : **Docket No. 1111 of 2004**

EXCEPTIONS TO THE RECOMMENDATION OF THE MASTER

AND NOW, comes the above-named juvenile, Will Smith, by and through her attorney, Ines M. Massella, Assistant Public Defender, and files the within Exceptions to the Recommendation of the Master, and in support thereof states as follows:

1. The above-named juvenile, Will Smith, is 17 years of age, with a date of birth of March 25, 1987.

2. On July 7, 2004, a hearing was held before the Juvenile Court Master on allegations of criminal attempt at theft by unlawful taking, aggravated assault and disorderly conduct.

3. The Master recommended that the allegations of criminal attempt and disorderly conduct be sustained and that the allegation of aggravated assault be dismissed.

4. The undersigned believes and avers that the Master's Findings of Fact and Conclusions of Law were against the weight of the evidence such that the juvenile is entitled to a hearing *de novo* or, in the alternative, is entitled to have the evidence presented reviewed by this court.

5. A "weight" determination, in contrast to an "evidence sufficiency" determination, is addressed to the discretion of the trier of fact and that decision

will not be disturbed absent an abuse of discretion. However, a post-trial weight-of-the-evidence ruling should be reversed if the defense shows that the decision was so contrary to the evidence as to shock one's sense of justice, and as to make the award of a new trial imperative in order that right may be given another opportunity to prevail. ***Commonwealth v. Small***, 741 A.2d 666, 673 (Pa. 1999); ***Commonwealth v. Ragan***, 653 A.2d 1286, 1287 (Pa.Super. 1995).

6. The conscience may be shocked sufficiently, in the legal sense, by the overlooking of a sufficient portion and quantum of the evidence by the trier of fact. ***Commonwealth v. Walker***, 656 A.2d 90, 97 (Pa. 1995).

7. ***Small*** verifies that inconsistencies and inaccuracies in Commonwealth witnesses' testimony can be so major that a new trial must be awarded despite the critically important credibility-assessment function of the trier of fact. ***Id.***

8. Where the evidence offered to support a guilty verdict is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, a jury may not be permitted to return such a finding. However, this principle only applies where a verdict based on the evidence is unreasonable. That is, a new trial may be appropriate where the testimony at trial was "hopelessly contradictory." ***Commonwealth v. Beckham***, 349 Pa.Super. 430, 435-436, 503 A.2d 443, ____ (1986).

9. The testimony of the police officer and the two lay witnesses was inconsistent and, the undersigned argues, hopelessly contradictory throughout. Sergeant Brady testified that when Mr. Stein yelled that someone was trying to

take his gun, he was standing at the open driver's side door of his car with his right side, the side on which he carries his gun, turned to the inside of the car. He further testified that he did not feel anyone pulling at his gun, nor did he sense anyone coming up on him. However, the lay witnesses, James Stein and Stacey Julius, both testified that Mr. Murphy was pulling on the gun with some force. Ms. Julius even testified that Mr. Murphy had unsnapped the strap that held the gun in the holster. Ms. Stein testified that the officer was standing with his front turned to the inside of the police car and his back turned completely to the street. Mr. Julius testified that the officer was down on the ground with his face toward the ground as Mr. Murphy stood over him, straddled him, and yanked repeatedly on his gun.

10. The undersigned believes and avers that the Master overlooked the contradictory statements of the Commonwealth's witnesses. Having overlooked this quantum of evidence, the Master's decision should be deemed to shock the conscience, as there was insufficient evidence to support his findings and conclusions.

11. The undersigned believes and avers that such hopeless inconsistencies cannot be resolved based on failed memory. Moreover, the testimonies are so inconsistent that it is impossible to discern who has lied. On that basis the undersigned believes and avers that the Commonwealth has failed to prove its case beyond a reasonable doubt.

12. Based on the foregoing, the undersigned believes and avers that a hearing or review *de novo* should be granted.

WHEREFORE, the above-named juvenile, Will Smith, respectfully requests that this Honorable Court review the transcript of the Master's hearing and direct that the allegations against the juvenile be dismissed. In the alternative, the juvenile requests that this Honorable Court issue and order setting this matter for rehearing before a Judge of the Juvenile Court Division.

Respectfully submitted,

Dated: July 22, 2004

Ines M. Massella,
Assistant Public Defender
451-6505

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A MINOR : JUVENILE DIVISION
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RULE TO SHOW CAUSE

AND NOW, this ____ day of June 2004, it is hereby ORDERED that a Rule be issued against the Commonwealth to Show Cause why the relief requested in the foregoing Exceptions should not be granted. Said Rule returnable the ____ day of _____, 2004, at _____.M., in Courtroom _____.

BY THE COURT:

Elizabeth K. Kelly, J.

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ORDER

AND NOW, to wit, this _____ day of _____ 2004, it is hereby ORDERED, ADJUDGED and DECREED that the relief requested in the foregoing Exceptions is granted. The Master's Recommendation is rejected and the allegations against the juvenile are dismissed.

BY THE COURT:

Elizabeth K. Kelly, J.

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ORDER

AND NOW, to wit, this ____ day of _____ 2004, it is hereby ORDERED, ADJUDGED and DECREED that the relief requested in the foregoing Exceptions is granted. A rehearing on the allegations of criminal attempt at theft by unlawful taking and disorderly conduct will be held on _____, 2004, at _____.M., in Courtroom _____.

BY THE COURT:

Elizabeth K. Kelly, J.