

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
AARON THOMPSON,	:	
Appellant	:	No. 1395 WDA 2013

Appeal from the Judgment of Sentence September 19, 2012  
In the Court of Common Pleas of Allegheny County  
Criminal Division No(s): CP-02-CR-0007668-2011

BEFORE: GANTMAN, P.J., DONOHUE, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.: FILED: April 14, 2014

Appellant, Aaron Thompson, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas following a bench trial and his convictions for possession with intent to deliver a controlled substance,<sup>1</sup> ("PWID"), simple possession,<sup>2</sup> and possession of drug paraphernalia.<sup>3</sup> He claims that it was futile to object to the admission into

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 35 P.S. § 780-113(a)(16).

<sup>3</sup> 35 P.S. § 780-113(a)(32).

J. S20031/14

evidence of a search warrant during trial and thus this Court should not find waiver. Appellant also challenges the sufficiency of the evidence.

We state the facts and procedural history as gleaned from the record. A confidential informant made a controlled purchase of a large amount of cocaine from Appellant. Based upon that transaction, the police obtained a search warrant for Appellant's residence.

When the police arrived at Appellant's residence, they noticed that the black Audi Appellant drove was not parked outside. The police notified nearby officers to lookout for Appellant's Audi and conduct a stop to effectuate the search. A nearby officer located Appellant's car, initiated a stop, and detained Appellant.

The police subsequently knocked on the door of Appellant's residence, entered, and secured the residence. Appellant was then transported to his home, shown a copy of the search warrant, and informed of his **Miranda**<sup>4</sup> rights. Appellant informed the police that the cocaine was in his bedroom, led the police to his bedroom, and showed the police that the cocaine was in a plastic bag underneath a dresser. N.T. Suppression Hr'g and Non-Jury Trial, 6/12/12, at 34. The police recovered 85 grams of cocaine, a box of plastic bags, rubber gloves, and approximately \$15,000 in cash from the

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<sup>4</sup> **Miranda v. Arizona**, 384 U.S. 436 (1966).

J. S20031/14

bedroom. **Id.** at 35-39. The police also recovered a digital scale from the kitchen.

Appellant was charged with the above crimes and subsequently filed a motion to suppress. At the suppression hearing, the Commonwealth, while examining a police detective, attempted to introduce into evidence the contents of the search warrant. Appellant's counsel objected as follows:

[Appellant's counsel:] My only objection is that it's irrelevant. We're not challenging the search warrant. And I believe it's being used to sway the [c]ourt's opinion one way or the other. But we're challenging the subsequent statements that [Appellant] made at [his home], not the actual search itself, Your Honor.

The Court: Well, I'm going to allow it in, because it may be a foundation for how the [police] got there, what he did, giving rise to what we might have issue about.

**Id.** at 6; **see also id.** at 12 (reaffirming search warrant was admitted into evidence). The court denied the motion to suppress, and the case went to a bench trial.

At trial, the Commonwealth asked the court to incorporate the police detective's testimony from the suppression hearing into the trial record, and the court agreed. **Id.** at 33. Appellant's counsel did not object, and trial commenced. Prior to closing arguments, the Commonwealth moved into evidence all of its exhibits, including the search warrant. **Id.** at 50. Again, Appellant's counsel did not object. Counsel then gave closing arguments. After closing arguments, the court began oral deliberations from the bench and read into the record the affidavit of probable cause in support of the

search warrant. **Id.** at 54-58. Appellant's counsel did not object at this time, either. The court subsequently found Appellant guilty. The court sentenced Appellant to a mandatory sentence of five to ten years' imprisonment, followed by ten years' probation.

Appellant filed a timely post-sentence motion challenging the sufficiency of evidence, the weight of evidence, and the court's denial of his motion to suppress. With respect to the motion to suppress, Appellant limited his challenge to the following:

[Appellant] believes, and therefore avers that this . . . [c]ourt erred in denying [Appellant's] motion to suppress any statements made after the illegal seizure and subsequent search of his person and vehicle subject to the warrantless traffic stop of his [vehicle].

Appellant's Mot. for New Trial and/or Arrest of J., 10/1/12, at 2. Appellant did not challenge the admission of the search warrant or the court's decision to read the affidavit of probable cause in support thereof. On January 16, 2013, the court denied Appellant's post-sentence motion.

Appellant did not file a notice of appeal within thirty days but did file a successful Post Conviction Relief Act<sup>5</sup> ("PCRA") petition requesting reinstatement of his direct appeal and post-sentence motion rights. Order, 4/11/13 (granting Appellant's PCRA petition). On April 18, 2013, Appellant filed a new post-sentence motion, which the court denied on August 5, 2013.

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<sup>5</sup> 42 Pa.C.S. §§ 9541-9546.

Appellant filed a timely notice of appeal on August 27, 2013, and timely filed a court-ordered Pa.R.A.P. 1925(b) statement. The court authored a Pa.R.A.P. 1925(a) decision incorporating by reference its prior decisions dated January 16 and August 5, 2013.

Appellant raises the following issues:

Did the trial court abuse its discretion in admitting the contents of the search warrant, namely the affidavit of probable cause, as it was not relevant and prejudiced [Appellant] when [the trial court] used the affidavit substantively to determine [Appellant's] guilt?

Was the evidence sufficient to establish that [Appellant] constructively possessed, with the intent to deliver, the cocaine recovered during the search of his apartment?

Appellant's Brief at 6.

We summarize Appellant's arguments for both of his issues. Appellant contends the trial court abused its discretion by admitting the search warrant. He anticipates the Commonwealth will emphasize his failure to raise a new objection at the bench trial and when the court read the affidavit of probable cause into the record. Accordingly, Appellant suggests it would have been futile to object.<sup>6</sup> The Commonwealth counters that he failed to raise a contemporaneous objection at trial and thus Appellant has waived the issue *per, inter alia*, Pa.R.A.P. 302(a), which states that "Issues not

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<sup>6</sup> Curiously, Appellant also argues he would have had to anticipate the court would read the affidavit into the record and lodge an objection prior to that occurrence. Appellant raises no argument as to why he did not object during or after the court's recitation of the affidavit.

raised in the lower court are waived . . . .” Appellant lastly states that the Commonwealth did not establish constructive possession of the drugs found in his bedroom. We hold Appellant is not entitled to relief.

Initially, “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). A failure to raise a contemporaneous objection to evidence presented at trial results in waiver of the evidentiary claim on appeal. **Commonwealth v. Bryant**, 855 A.2d 726, 740 (Pa. 2004).

The standard of review for a challenge to the sufficiency of evidence is *de novo*, as it is a question of law. **Commonwealth v. Sanford**, 863 A.2d 428, 431 (Pa. 2004).

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict.

**Commonwealth v. Ratsamy**, 934 A.2d 1233, 1235-36 (Pa. 2007) (citations and quotation marks omitted). “When reviewing the sufficiency of the evidence, an appellate court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt.” **Id.** at 1237 (citation omitted).

Our Commonwealth defines the offense of PWID as follows:

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). "In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." ***Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (*en banc*). In evaluating the sufficiency of evidence for PWID, an appellate court considers the quantity of the contraband, "the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large[ ] sums of cash found in possession of the defendant. The final factor to be considered is expert testimony." ***Ratsamy***, 934 A.2d at 1237-38 (citation omitted).

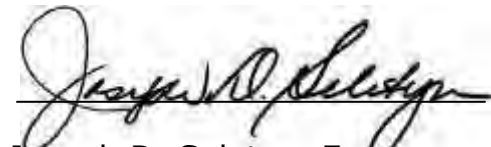
In order to prove that a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had both the ability to consciously exercise control over it as well as the intent to exercise such control. An intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be used to establish a defendant's possession of drugs or contraband.

**Commonwealth v. Gutierrez**, 969 A.2d 584, 590 (Pa. Super. 2009) (quotation marks and citation omitted).

In this case, we hold that Appellant, by failing to object to the introduction of the search warrant at trial and the trial court's reading of the search warrant into the record, waived that issue on appeal. **See** Pa.R.A.P. 302(a); **Bryant**, 855 A.2d at 740. With respect to Appellant's sufficiency challenge, after careful consideration of the parties' briefs, the record, and the decision by the Honorable Joseph K. Williams, III, we affirm on the basis of the trial court's decision. **See** Trial Ct. Op. 8/5/13, at 6 (discussing evidence establishing PWID conviction). Moreover, we note that Appellant has not argued that the evidence seized should have been suppressed. Accordingly, having discerned no error of law, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/14/2014



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IN THE COURT OF COMMON PLEAS  
OF ALLEGHENY COUNTY

ORIGINAL  
Criminal Division  
Dept. of Court Records  
Allegheny County, PA.

DEPT. OF COURT RECORDS  
CRIMINAL DIVISION  
ALLEGHENY COUNTY PA

COMMONWEALTH  
of PENNSYLVANIA

CRIMINAL DIVISION

v.

2011 07 668

1395 WDA 2013

AARON THOMPSON,

Defendant.

Michael Streily, *Assistant D.A. – appeal*  
Timothy LaVoie, *Defense Counsel – appeal*  
Lawrence Sachs, *Assistant D.A. – trial*  
Michael DeRiso, *Defense Counsel – trial*  
Paul Iannetti, *Defense Counsel – trial*

OPINION

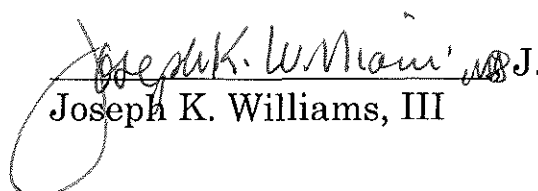
This matter is before the Superior Court of Pennsylvania after PCRA relief was granted. The remedy, bestowed on Mr. Thompson was the reinstatement of his right to appeal and to file post-sentence motions. His post-sentence motions were denied. He then perfected his appeal on August 27, 2013. Thompson filed his *Concise Statement* on September 24, 2013. His arguments are repetitive of those previously addressed. This comment is not meant to demean the claims but a way to emphasize that this Court has already written on the topics.

On August 5, 2013, the Court authored a 7 page opinion addressing his suppression claim by referencing an earlier opinion of

January 16, 2013. Thompson's two evidence based arguments, search warrant and cooperation, see, *Concise Statement*, paragraphs 11(b) and 11(c), were discussed in the Court's August, 2013 opinion. A sufficiency claim appears in his *Concise Statement. See*, paragraph 11(d). It attacks the lack of evidence regarding possession. This argument was rejected in the post-sentence opinion. See, Opinion, pg. 6, (Aug. 5, 2013). Mr. Thompson's final assertion is a weight based challenge. *Concise Statement*, 11(e). The Court discussed this claim in its post-sentence opinion. See, Opinion, pgs. 6-7, (Aug. 5, 2013).

There is nothing more for this Court to do. The Allegheny County Department of Court Records shall submit the certified record of this case to the Superior Court of Pennsylvania in due course.

BY THE COURT :

  
Joseph K. Williams, III

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IN THE COURT OF COMMON PLEAS  
OF ALLEGHENY COUNTY

DEPT. OF COURT RECORDS  
CRIMINAL DIVISION  
ALLEGHENY COUNTY, PA.

ORIGINAL  
Criminal Division  
Dept. of Court Records  
Allegheny County, PA.

COMMONWEALTH  
of PENNSYLVANIA

CRIMINAL DIVISION

v.

CC# 2011-07668

AARON THOMPSON,

Defendant.

Lawrence Sachs, *Assistant D.A.*  
Timothy LaVoie, *Defense Counsel*

OPINION

The matter before the Court is a Post-Sentence Motion (“PSM”). How we arrived at this juncture mandates some explanation.

On June 12, 2012, a suppression hearing was held. Upon the close of testimony, the Court denied the motion. Suppression Hearing Transcript (“SHT”), pg. 27 (June 12, 2012). A non-jury trial was then held. The Commonwealth presented additional testimony, some exhibits and the parties reached some stipulations. The government rested and so did the defense. Trial Transcript, (“TT”), pg. 50.<sup>1</sup>

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<sup>1</sup> The Suppression Hearing testimony and the non-jury testimony are combined in one transcript but the Court has designated its parts to promote clarity. The suppression testimony is contained at pgs. 1-27, and the non-jury trial is pgs. 33-50.

Argument was held followed by the Court's guilty verdict. TT, pg. 58. Mr. Thompson's bond was revoked, TT, 65, and sentencing was deferred. On September 19, 2012, Mr. Thompson appeared with his trial lawyer for sentencing. He received the mandatory minimum sentence of 5 to 10 years in prison followed by 10 years of probation. Sentencing Transcript, pg. 17. (Sept. 19, 2012).<sup>2</sup>

On October 1, 2012, Mr. Thompson's lawyer filed a post-sentence motion. This court directed the rather sparse motions to be supplemented with reference to the law and the facts before December 3, 2012.<sup>3</sup> On January 16, 2013, this Court filed an opinion and issued an order denying the post-sentence motions. No appeal was filed by his lawyer.

On February 20, 2013, the Court issued an order which recognized a letter it had received from Mr. Thompson expressing a desire to appeal. Mr. Thompson's letter was undated. It was received in chambers on February 15, 2013 which was the last day he could have filed a *Notice of Appeal*. This Court's order also recognized that no *Notice of Appeal* had been timely filed.

On March 7, 2013, a *pro se* post conviction relief act petition was filed. Counsel was appointed and he was given until May 13, 2013 to file an Amended PCRA. His petition was filed early. He sought reinstatement of his right to appeal and to file post-sentence motions. After review of the Commonwealth's Answer, the Court granted Thompson the relief he was seeking by an order of April 11, 2013. A week later, Thompson filed his post-sentence, (PSM). The government's response to the PSM claims was docketed on May 28, 2013.

Thompson's current claims focus on a suppression issue, two evidentiary matters, sufficiency of the evidence and the weight of the evidence. No arguments are made about the Court's sentence.

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<sup>2</sup> The sentencing transcript was docketed on October 19, 2012 and has a tracking number of T12-1724.

<sup>3</sup> Trial and Sentencing counsel also sought permission to withdraw. That request was denied with an October 17, 2012 order.

## Suppression

The issue advanced by trial counsel was to seek the exclusion of “the subsequent statements that Mr. Thompson allegedly made at 50G Crawford”. Opinion, pg. 2. (January, 16, 2013). The defense thesis was centered upon the failure to provide warnings emanating from the Miranda decision. Id. The present post-sentence motion repeats that mantra. The Court already put forth its credibility based decision on this topic and it needs no repeating here. See, Opinion (Jan. 16, 2013). The Court takes a moment, however, to identify a new theme that has infiltrated the present PSM. Thompson says under “the totality of circumstances” his statements were not voluntarily made. PSM, paragraph 10 (April 18, 2013). The lack of voluntariness is a broader issue than a failure to give Miranda warnings and one this Court was never presented with. A post sentence motion is not the place to raise new theories of illegality.

## Evidence

Thompson seeks a new trial based upon a pair of evidentiary rulings made by this Court. The first concerns this Court’s admission of the actual search warrant. Thompson also finds fault with law enforcement and his subsequent failure to hold-up his end of the deal. According to Thompson, both of these evidentiary based errors justify a new trial.

### Search Warrant

Very early in the suppression hearing, the Commonwealth authenticated the search warrant. TT, 6. Then, it moved for its admission. Defense counsel objected. His only basis was “that it’s irrelevant”. TT, 6. This Court admitted the document.

“I am going to allow it in, because it may be a foundation for how the detective got there, what he did, giving rise to what we might have issue about.”

TT, 6.

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” Pa.R.E. 401. Review of the search warrant shows what information Det. Steele possessed before interacting with Thompson. This was information that colored the Court’s view as to whether *Miranda* warnings were given. Seeing how that was the key issue, the warrant allowed the Court a peek into all of the circumstances surrounding the interaction.

The suppression testimony was incorporated for purposes of the non-jury trial. TT, 33. At that point, there was no new objection made to the admissibility of the search warrant or any other suppression generated bit of evidence.<sup>4</sup> The Court highlights this finite set of facts on purpose. What the government had to prove for suppression purposes was different than what it had to prove for trial. Given the change in focus, a new objection was necessary if the defense wanted this document excluded from the data set the fact finder could use. The absence of an objection dooms Thompson’s prospect of obtaining review on this issue. See, May, supra; Bruce, supra.

Before leaving this topic, Thompson advances the alternative position that this evidence should have been excluded because of Rule 404(b). PSM, paragraph 11. Rule 404(b) was never advanced by trial counsel as a basis to exclude this evidence. Evidence based errors require a contemporaneous objection. Commonwealth v. May, 887 A.2d 750, 761 (Pa. 2005)(holding that an "absence of contemporaneous objections renders" an appellant's claims waived); Commonwealth v. Bruce, 916 A.2d 657, 671 (Pa.Super. 2007), *appeal denied*, 932 A.2d 74 (Pa. 2007) (holding that a "failure to offer a timely and specific objection results in waiver of" the claim). This challenge based upon Rule 404(b) of our Rules of Evidence has been waived.

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<sup>4</sup> The PSM implies that there was an objection made to the trial court’s use of the search warrant in the non-jury trial setting. PSM, paragraph 11 (“overruling trial counsel’s objection to the admission of the search warrant in the suppression hearing and later the non-jury trial. (TT, 6.)”). The record does not support but obliterates that inference.

## Willingness to Cooperate

The government's only witness during the non-jury trial phase was Det. Mark Steele. He articulated his opinion that the drugs were possessed with the intent to deliver them to another person. TT, 40-41. This evidence was followed by testimony that Thompson agreed to cooperate. TT, 41. When the government wanted to flush out the particulars of that cooperation, Thompson cried. "This isn't relevant to anything". Id. The government's reply was that this evidence was circumstantial evidence.

"[T]he detective has offered an opinion that the person who possessed it possessed it with the intent to deliver. The defense is that, well, maybe they weren't the Defendant's drugs. Although the Defendant led them to the drugs in his house, nevertheless the argument is going to be they are maybe not his drugs. The testimony with respect to his cooperation and what he was willing to provide to them with respect to the information would be circumstantial evidence that the drugs were, in fact, his, that he had sources for the drugs and that he was willing to give them up."

TT, 42. The Court admitted the evidence. TT, 42. That was the right call. In its closing argument, Thompson did what the government predicted. He tried to create doubt that the other person in the house was the possessor of those drugs. TT, 51. Considering it was the government's burden to show Thompson possessed the drugs, this evidence contributed to that goal. In addition, someone who has access to distribution levels of product creates an inference that the present amount was similarly held.

As with previous evidentiary issues, Thompson advances an alternative theory to the admission of the "cooperation evidence". He now claims Rule 408 bars this evidence. PSM, paragraph 12. No objection based upon Rule 408 was made at trial. The issue has been waived. Commonwealth v. Bruce, 916 A.2d 657 (Pa. 2007)(holding that a "failure to offer a timely and specific objection results in waiver of" the claim).

## Sufficiency

Thompson was found guilty of 3 crimes: possession of cocaine with intent to deliver, possession of cocaine, and possession of drug paraphernalia. While his challenge could be more specific, the Court thinks he is challenging all 3 convictions but through various means. He begins his attack by claiming a lack of connection between him and the contraband. PSM, paragraph 13. The Court views this as a challenge to all 3 crimes of conviction considering they all have possession as a common element. His next attack is more limited. He says the evidence did not show he possessed the cocaine with the intent to distribute. PSM, paragraph 13.

The government's evidence satisfied the possession element and Thompson's connection to it. Thompson told them where in the bedroom to look for the cocaine. It was underneath a dresser. TT, 34. Exhibit 2 shows a sizable sum of cocaine. Det. Steele also recovered packing material and gloves. TT, 35; *see also*, Exhibit 3, 10. A digital scale was also recovered. TT, 39-40. It should also be noted that a controlled buy of drugs was conducted with Thompson and immediately after he returned to the very place these items were found. Exhibit 1.

The latter claim - no PWI evidence - is contradicted by the record. Det. Steele provided a believable opinion based upon his experience and involvement with the facts. TT, 41. The Court believed the officer's opinion. Since there was credible, opinion evidence the record shows the cocaine was possessed with a corresponding intent to deliver it to another person.

## Weight of the Evidence

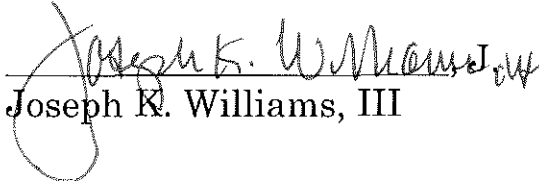
Thompson's last argument is a challenge to the weight of the evidence. In his eyes, the evidence "should shock one's sense of justice." PSM, paragraph 14, pg. 6. Unfortunately, for Thompson, his argument does not move the scales of justice one iota. Det. Steele offered expert testimony that the drugs were possessed with the intent to deliver to another person. Evidence showed Thompson led law enforcement to a



particular location in the home where drugs were recovered. These two highlights, when joined with the other parts of the picture, makes this case a run-of-the-mill case amongst the numerous scenarios that have played out in this courtroom.

A separate order, consistent with the conclusions reached here, will be entered.

BY THE COURT :

  
Joseph K. Williams, III

IN THE COURT OF COMMON PLEAS  
OF ALLEGHENY COUNTY

ORIGINAL  
Criminal Division  
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Allegheny County, PA.

COMMONWEALTH  
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CRIMINAL DIVISION

v.

CC# 2011-07668

AARON THOMPSON,

Defendant.

ORDER

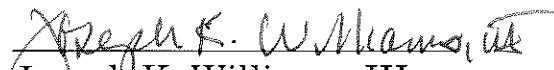
AND NOW, this 5<sup>th</sup> day of August, 2013, the *Post Sentence Motion* filed on April 18, 2013 is hereby DENIED.

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DEPT. OF COURT RECORDS  
CRIMINAL DIVISION  
ALLEGHENY COUNTY, PA.

BY THE COURT :

  
Joseph K. Williams, III