

Appellate Review

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9.1 CHAPTER OVERVIEW

This chapter discusses various aspects of the criminal appeals process pertinent to sexual violence crimes. The first section, section 9.2, defines and discusses particular trial court orders that may be appealed, including: final orders, interlocutory orders appealable as of right, and interlocutory orders appealable by permission. The following two sections describe the necessary procedural steps both the appellant and the trial court must take once a notice of appeal has been filed. The final section discusses appellate court standards of review likely to be applicable to appeals from orders in sexual violence crime cases.

9.2 APPEALABLE ORDERS

A. Final Orders

An appeal may be taken as of right from any final order of a lower court. Pa.R.A.P. 341(a). The purpose of limiting appeals to final orders is to avoid piecemeal appeals. *Commonwealth v. Sartin*, 708 A.2d 121, 122 (Pa. Super. 1998).

1. Definition

Rule 341(b) defines a final order in a criminal matter as any order that disposes of all claims or of all parties, or that is expressly defined as a final order by statute.

(a) Examples of Final Orders

- Judgments of sentence. *Commonwealth v. Heilman*, 876 A.2d 1021, 1026 (Pa. Super. 2005).¹
- Orders of disposition in juvenile cases. *In re M.D.*, 839 A.2d 1116, 1118 (Pa. Super. 2003).²
- Denial of a motion for dismissal on double jeopardy grounds.³ *Commonwealth v. Brady*, 510 Pa. 336, 341, 508 A.2d 286, 288 (1986).

¹ “It is well-established that a criminal defendant may take an appeal only from the judgment of sentence. An appeal from any prior order must be quashed.” *Commonwealth v. McPherson*, 533 A.2d 1060, 1061 (Pa. Super. 1987) (internal citations omitted).

² Although the Juvenile Act does not provide a right of appeal, a juvenile’s right of appeal stems from Article V Section 9 of the Pennsylvania Constitution. *In re J.E.D.*, 879 A.2d 288, 290 (Pa. Super. 2005), *appeal denied*, 586 Pa. 713, 889 A.2d 1216 (2005).

³ Denial of a petition for dismissal on double jeopardy grounds is not appealable where the trial court makes a finding that the petition was frivolous. *Commonwealth v. Brady*, 510 Pa. at 346, 508 A.2d at 291.

- Any pretrial order that serves to put litigants out of court by ending litigation or entirely disposing of a case.

Commonwealth v. Rosario, 538 Pa. 400, 404, 648 A.2d 1172, 1174 (1994).

(b) **Examples of Non-Appealable Orders**

- Generally, pretrial orders are considered interlocutory and not appealable. *Commonwealth v. Matis*, 551 Pa. 220, 230, 710 A.2d 12, 17 (1998).
- Order granting severance of criminal informations is not a final order. *Commonwealth v. Smith*, 518 Pa. 524, 527, 544 A.2d 943, 945 (1988).
- Denial of pretrial *habeas corpus* petitions based on the insufficiency of evidence not appealable, absent a showing of exceptional circumstances. *Commonwealth v. Hess*, 489 Pa. 580, 588–589, 414 A.2d 1043, 1047–1048 (1980).
- Juvenile review order that maintains the status quo. *In re M.D.*, 839 A.2d 1116, 1121 (Pa. Super. 2003).

2. Appeals by the Commonwealth in Criminal Cases

Pennsylvania Rule of Appellate Procedure 341(e) provides that “**Criminal orders.** An appeal may be taken by the Commonwealth from any final order in a criminal matter only in the circumstances provided by law.” Pa.R.A.P. 341(e).

(a) **Habeas Corpus**

Order granting pretrial *habeas corpus* petition is final and appealable by the Commonwealth. *Commonwealth v. Jackson*, 849 A.2d 1254, 1256 (Pa. Super. 2004).

(b) **Severance**

Order granting severance of two or more criminal informations is interlocutory and not appealable. *Commonwealth v. Smith*, 518 Pa. at 527, 544 A.2d at 945.

(c) **Recusal**

Commonwealth was entitled to an interlocutory appeal as of right from trial court’s denial of Commonwealth’s motion for recusal in murder prosecution, where Commonwealth certified in good faith that denial of motion would substantially handicap its prosecution of case. *Commonwealth v. White*, 589 Pa. 642, ___, 910 A.2d 648, 653–655 (2006) (Per Eakin, J., with two justices joining).

B. Interlocutory Orders Appealable as of Right

1. Change of Venue or Venire in Criminal Cases

An appeal may be taken as of right by the defendant or the prosecution from an order changing venue or venire in a criminal proceeding. Pa.R.A.P. 311(a)(3); *See e.g. Commonwealth v. Shoop*, 617 A.2d 351, 352 n.1 (Pa. Super. 1992) (Commonwealth may appeal from order granting change of venue). However, an order denying a petition for a change of venue or venire is not appealable. Pa.R.A.P. 311, note; *Commonwealth v. Swanson*, 424 Pa. 192, 194, 225 A.2d 231, 232-233 (1967).⁴ The note Rule 311(a)(3) states that:

An appeal taken under Rule 311(a)(3) must be filed within ten days of the date the order changing venue or venire was entered. Pa.R.A.P. 903(c)(1)(i).

2. New Trials in Criminal Cases

An appeal may be taken as of right from an order in a criminal proceeding awarding a new trial where (1) the defendant claims that the proper disposition of the matter would be an absolute discharge, or (2) where the Commonwealth claims that the lower court committed an error of law. Pa.R.A.P. 311(a)(6); *Commonwealth v. Campbell*, 421 A.2d 681, 683 (Pa. Super. 1980) (not interlocutory where defendant contended that proper disposition was absolute discharge); *Commonwealth v. McDougall*, 841 A.2d 535, 536-537 (Pa. Super. 2003), *appeal denied*, 579 Pa. 701, 857 A.2d 678 (2004) (Commonwealth permitted to appeal trial court's order as an alleged error of law – trial court had granted defendant's motion to withdraw guilty plea after sentencing).

The granting of a mistrial due to a deadlocked jury is not the equivalent of an award of a new trial and is, thus, not appealable. *Commonwealth v. McPherson*, 533 A.2d 1060, 1062 (Pa. Super. 1987).

3. Appeals by the Commonwealth in Criminal Cases

The Commonwealth may take an appeal as of right from an order that does not end the entire case where it certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution. Pa.R.A.P. 311(d), *Commonwealth v. Dillon*, 863 A.2d 597, 600 (Pa. Super. 2004), *appeal granted*, 584 Pa. 691, 882 A.2d 477 (2005).⁵ Once the required certification is made, the Commonwealth is not required to demonstrate that the prosecution has in fact been handicapped. *Commonwealth v.*

⁴ The note Rule 311(a)(3) states that:

Pa.R.Crim.P. 584 (motion for change of venue or change of venire) treats changes of venue and venire the same. Thus, an order changing venire is appealable by the defendant or the Commonwealth, while an order refusing to change venire is not.

⁵ *See also* Pa.R.A.P. 904(e): “When the Commonwealth takes an appeal pursuant to [Pa.R.A.P.] 311(d), the notice of appeal shall include a certification by counsel that the order will terminate or substantially handicap the prosecution.”

Gordon, 652 A.2d 317, 323 n.8 (Pa. Super. 1994), *affirmed*, 543 Pa. 513, 673 A.2d 866 (1996).

(a) **Suppression Orders**

An order granting a defendant's motion to suppress evidence is appealable pursuant to Rule 311(d). **Commonwealth v. Bender**, 811 A.2d 1016, 1018 (Pa. Super. 2002). The rationale of Rule 311(d) recognizes that, were incriminating evidence suppressed, and a defendant acquitted, the Commonwealth would be precluded from again trying the case due to double jeopardy restrictions.

Commonwealth v. Cosnek, 575 Pa. 411, 416-417, 836 A.2d 871, 873-874 (2003).

Generally, denial of a Commonwealth's motion *in limine* to exclude a defendant's evidence is not appealable. *Id.*, at 419-420, 836 A.2d at 876-877. However, an order that denies a Commonwealth motion to exclude evidence pursuant to the Rape Shield Law, 18 PA.CON.S.TAT.ANN. § 3104, has the same effect as a suppression order and is, therefore, appealable. **Commonwealth v. Jones**, 826 A.2d 900, 907 (Pa. Super. 2003).

(b) **Quashal of Information**

An order quashing a criminal charge is final and appealable as to that charge, since a trial on the remaining charges would permanently preclude trial on the quashed charge. **Commonwealth v. Karetny**, 583 Pa. 514, 527, 880 A.2d 505, 512-513 (2005); **Commonwealth v. Free**, 902 A.2d 565 (Pa. Super. 2006).

(c) **Other Orders**

- Denial of motion requesting that trial judge recuse herself is appealable under Pa.R.A.P. 311. **Commonwealth v. White**, 589 Pa. 642, ___, 910 A.2d 648, 653-655 (2006)(Per Eakin, J., with two justices joining).
- Denial of Commonwealth request for a jury trial is appealable. **Commonwealth v. White**, 589 Pa. 642, ___, 910 A.2d 648, 658-659 (2006)(Per Eakin, J., with two justices joining).
- An order denying a Commonwealth motion for a continuance to secure the presence of a necessary witness is appealable. **Commonwealth v. Matis**, 551 Pa. 220, 233, 710 A.2d 12, 18 (1998).

4. **Collateral Orders**

An appeal may be taken as of right from a collateral order of a lower court. Pa.R.A.P. 313(a).

A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b). An order is collateral if (1) the issue surrounding the disputed order may be addressed without analyzing the ultimate issue in the underlying case, and (2) the issue must involve rights deeply rooted in public policy going beyond the particular litigation at hand. *J.S. v. Whetzel*, 860 A.2d 1112, 1117 (Pa. Super. 2004). An order that falls under Rule 313 is immediately appealable as of right simply by filing a notice of appeal. Pa.R.A.P. 313, note.

(a) Standard of Review

“A court may conduct a balancing test between the nature of the potentially unprotected right and the efficiency interest of the final judgment rule.” *J.S. v. Whetzel*, 860 A.2d 1112, 1117 (Pa. Super. 2004).

(b) Orders in Criminal Cases that are Collateral

- Order denying a motion to dismiss an indictment on double jeopardy grounds is collateral and appealable if the trial court has found that the motion was not frivolous. *Commonwealth v. Brady*, 510 Pa. 336, 341, 508 A.2d 286, 288 (1986).
- Order limiting publicity over court proceedings in criminal case. *Commonwealth v. Lambert*, 723 A.2d 684, 688 (Pa. Super. 1998).

C. Interlocutory Appeal by Permission

The right to an interlocutory appeal taken by permission is set forth by statute:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 PA.CON.S.TAT.ANN. § 702(b). Rule 1311 of the Rules of Appellate Procedure governs petitions for permission to appeal.⁶ *See also* Pa.R.A.P. 312.

⁶ Furthermore, Pa.R.A.P. 312 provides: “An appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 (interlocutory appeals by permission).”

A petition for permission to appeal must be filed within thirty days of the filing of the order in question and must include an application for the trial court to amend its order to expressly state the required language of Section 702(b), specifically:

[T]hat such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.⁷

42 PA.CON.S.TAT.ANN. § 702(b); Pa.R.A.P. 1311. *See also Commonwealth v. Dennis*, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004). Once the trial court has certified the order, the appellate court has full discretion in deciding whether to accept appellate review. *Id.*, at 102-103, 859 A.2d at 1275.

Therefore, an appeal may be taken from an interlocutory order pursuant to a petition for permission to appeal if all of the following elements are satisfied:

- (1) the order involves a controlling question of law;
- (2) there is a substantial ground for difference of opinion regarding the question of law; and
- (3) an immediate appeal would materially advance the ultimate termination of the matter.

The trial court must certify that the three prongs are satisfied, and the appellate court then decides whether to accept appellate review.

Commonwealth v. Dennis, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004).

Where the trial court refuses to amend the order, the petitioner may file a petition for review⁸ with the appropriate appellate court to determine whether the trial court's refusal was so egregious as to justify prerogative appellate correction. Pa.R.A.P. 1311, note. A petition for permission to appeal does not stay the proceedings of the trial court unless the trial court so orders. 42 PA.CON.S.TAT.ANN. § 702(c).

1. Petition for Review

In ***Commonwealth v. Boyle***, 516 Pa. 105, 532 A.2d 306 (1987), the defendant filed a pre-trial motion, which was denied, seeking dismissal of the charges against him on the grounds that the trial court did not have jurisdiction over the case. Following defendant's petition to amend the order to include the language required by Section 702(b), the trial court

⁷ Pa.R.A.P. 1312 specifies that a petition for permission to appeal shall include (1) a statement concerning the appellate court's jurisdiction, (2) the text of the order in question, (3) a concise statement of the case, (4) the controlling question of law (5) a statement concerning why a substantial ground exists for a difference of opinion, (6) copies of the opinions related to the order in question, and (7) the language of pertinent constitutional provisions or statutes.

⁸ *See* Chapter 15 of the Rules of Appellate Procedure (Petition for Review).

failed to act on the petition. Thereafter, defendant filed a petition for review, which the Superior Court granted. On appeal to the Pennsylvania Supreme Court, that Court noted that the effect of the Superior Court's order was (1) to imply that the trial court had abused its discretion, and (2) to supply the certification required by Section 702(b). *Id.*, at 111, 532 A.2d at 309.

In *Commonwealth v. Tilley*, 566 Pa. 312, 780 A.2d 649 (2001), the defendant, through post conviction proceedings, filed a discovery motion seeking “all data” regarding the races of the members of defendant's jury. The trial court granted the motion and the Commonwealth requested that the trial court certify the order for appeal. The trial court refused and the Commonwealth, thereafter, filed a notice of appeal with the Supreme Court⁹ and argued that the Supreme Court could exercise jurisdiction to review the merits pursuant to a petition for review. *Id.*, at 316, 780 A.2d at 651. Upon review of the three principles governing petitions for review, the Supreme Court accepted jurisdiction of the appeal. *Id.*, at 316-317, 780 A.2d at 651-652.

9.3 OPINION IN SUPPORT OF ORDER

A. Pennsylvania Rule of Appellate Procedure 1925

1. Direction to File Statement of Matters Complained of: Pa.R.A.P. 1925(b)

The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Pa.R.A.P. 1925(b).

(a) Generally

The purpose of filing a statement of matters complained of on appeal is to aid trial judges in identifying and focusing upon the disputed issues. *Commonwealth v. Lord*, 553 Pa. 415, 419, 719 A.2d 306, 308 (1998). The statement must be concise, without reference to other documents, and sufficiently specific so that the trial court need not guess which issues the appellant wishes to raise.

Commonwealth v. Dodge, 859 A.2d 771, 774, 783–784 (Pa. Super. 2004), *appeal denied*, 584 Pa. 672, 880 A.2d 1236.

⁹ Since *Tilley* was a capital case, the defendant appealed directly to the Supreme Court pursuant to 42 PA.CON.S.TAT.ANN. § 9711(h).

Where the appellant fails to file a concise statement of matters complained of, it is the trial court's responsibility to order that the appellant do so. **Commonwealth v. Hess**, 570 Pa. 610, 615, 810 A.2d 1249, 1252 (2002). However, it is the appellant's responsibility to properly file the statement with the clerk of courts.

Commonwealth v. Butler, 571 Pa. 441, 446-447, 812 A.2d 631, 634 (2002).

(b) Waiver

Once an appellant is ordered to file a statement of matters complained of, any issues not raised in that statement are waived.

Commonwealth v. Lord, 553 Pa. at 420, 719 A.2d at 309;

Commonwealth v. Berry, 877 A.2d 479, 485 (Pa. Super. 2005), *appeal denied*, 917 A.2d 844 (2007). This "strict waiver" rule is intended to aid the trial court in preparing its legal analysis of the pertinent issues so that there may be meaningful and effective appellate review.¹⁰ **Commonwealth v. Butler**, 571 Pa. at 445, 812 A.2d at 633.

Rule 1925(b) specifies that a party has 14 days from the trial court's order in which to file a statement of matters complained of. Our Supreme Court recently reaffirmed **Butler's** and **Lord's** mandate of automatic waiver, and stated that strict compliance with Rule 1925(b), by way of a timely filed statement, "guarantees a trial judge's ability to focus on the issues raised" on appeal.

Commonwealth v. Schofield, 585 Pa. 389, 393, 888 A.2d 771, 774 (2005); *see also*, **Commonwealth v. Castillo**, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005).

(c) Extension of Time

An appellant must petition the trial court within the fourteen day period under Rule 1925(b), i.e., the time period to file a timely Rule 1925(b) statement, and set forth good cause for an extension of a specific amount of time in which to file the statement, and obtain an order granting the request for the extension before the issues raised in an untimely 1925(b) statement will be preserved for appeal to the Superior Court. **Commonwealth v. Gravely**, 918 A.2d 761, 765 (Pa. Super. 2007).

In the alternative, an appellant who has filed a timely Rule 1925(b) statement, and then for good cause shown discovers that additional time is required to file a supplemental statement, may file a separate petition seeking permission to file a supplemental statement *nunc pro tunc*. **Commonwealth v. Gravely**, 918 A.2d 761, 765 (Pa. Super. 2007).

¹⁰ Waiver of issues on appeal due to counsel's failure to file a statement of matters complained of on appeal is presumptively prejudicial for Post Conviction Relief Act purposes. **Commonwealth v. Halley**, 582 Pa. 164, 171, 870 A.2d 795, 800 (2005).

(d) Exceptions to “Strict Waiver” Rule

- Good faith effort to file an adequate statement under particular circumstances avoids waiver. *Commonwealth v. Moran*, 823 A.2d 923, 926 (Pa. Super. 2003); *Commonwealth v. Parks*, 768 A.2d 1168, 1171–1172 (Pa. Super. 2001).
- Issues will not be waived for failure to file a statement of matters complained of where the appellant was not properly served with order directing the appellant to file the statement. *Commonwealth v. Hess*, 570 Pa. at 618–619, 810 A.2d at 1254–1255.
- Subsequent to *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), the Pennsylvania Supreme Court issued a plurality opinion in *Commonwealth v. Johnson*, 565 Pa. 51, 771 A.2d 751 (2001), indicating that a claim deemed waived due to a failure to include it in a Pa.R.A.P. 1925(b) statement could be raised on direct appeal in the context of an ineffectiveness claim. *See also Commonwealth v. Wade*, 867 A.2d 547 (Pa. Super. 2005).

2. Opinion or Designation of Place in Record of Reasons: Pa.R.A.P. 1925(a)

Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

Pa.R.A.P. 1925(a).

“The purpose of the rule is two-fold. First, it gives the appellate court a reasoned basis for the trial court’s disposition of the challenged orders. Second, it requires the judge to thoroughly consider his decision regarding the post-trial motions, in order to correct any problems that occurred at the trial level. This prevents unnecessary appeals.” *Commonwealth v. Pate*, 617 A.2d 754, 758–759 (Pa. Super. 1992), *appeal denied*, 535 Pa. 656, 634 A.2d 219 (1993). The rule “enables [the appellate court] to conduct effective and meaningful review of lower court decisions.” *Commonwealth v. Thomas*, 674 A.2d 1119, 1120 (Pa. Super. 1996), *overruled on other grounds by, Commonwealth v. Anders*, 699 A.2d 1258 (Pa. Super. 1997) (en banc).¹¹

¹¹ *See also Commonwealth v. Atwood*, 547 A.2d 1257, 1260-1261 (Pa. Super. 1988), *appeal denied*, 521 Pa. 616, 557 A.2d 720 (1989):

To ask this Court to do the exhaustive review of that record [of an extensive trial] with no assistance from the trial judge who sat throughout the proceeding, makes a mockery of appellate review. Our system of appellate review provides an effective expeditious means for fair examination of the issues and resolution of them. It depends, however, on counsel and the trial court adhering to the Rules of Appellate Procedure if the system is not to be paralyzed.

The trial court's opinion should provide a sound basis for its decision and be properly supported by case law. **Commonwealth v. Benchoff**, 700 A.2d 1289, 1293 (Pa. Super. 1997) (two page conclusory response without single citation is inadequate for Rule 1925(a) purposes).

Absent a trial court opinion, or in the face of an inadequate opinion, the proper remedy is for the appellate court to remand for preparation of a Rule 1925(a) opinion. **Commonwealth v. Hood**, 872 A.2d 175, 178 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005). However, if the record from the proceedings in the trial court adequately apprise the appellate court of the trial court's reasoning in relation to the issues raised in the appeal, the appellate court may decline to delay the case further by remanding for the preparation of a 1925(a) opinion, and proceed to review the merits of the appellant's claims. *Id.*; **Commonwealth v. Griffin**, 785 A.2d 501, 504 (Pa. Super. 2001).

9.4 TRANSMISSION OF THE RECORD

A. Duty of the Trial Court: Pa.R.A.P. 1931(b)

Pennsylvania Rule of Appellate Procedure 1931(b) provides:

After a notice of appeal has been filed the judge who entered the order appealed from shall comply with Rule 1925 (opinion in support of order), shall cause the official court reporter to comply with Rule 1922 (transcription of notes of testimony) or shall otherwise settle a statement of the evidence or proceedings as prescribed by this chapter, and shall take any other action necessary to enable the clerk to assemble and transmit the record as prescribed by this rule.

While it is the appellant's duty to order the transcripts necessary for an appeal,¹² it is the duty of the trial court to transmit the record to the appellate court.

Commonwealth v. Williams, 552 Pa. 451, 458, 715 A.2d 1101, 1104 (1998). However, it is the responsibility of the appellant to certify the complete official record for purposes of appellate review. **Commonwealth v. Preston**, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, ___ Pa. ___, 916 A.2d 632 (2007).

It is well established that the appellate courts may only consider facts which have been duly certified in the record on appeal from the trial court.

Commonwealth v. Proetto, 771 A.2d 823, 834 (Pa. Super. 2001), *affirmed*, 575 Pa. 511, 837 A.2d 1163 (2003). Failure to ensure that the certified record contains the materials necessary for appellate review constitutes waiver of the issue. **Commonwealth v. Preston**, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, ___ Pa. ___, 916 A.2d 632 (2007). An item does not become part of the

¹² See Pa.R.A.P. 1911.

certified record merely by copying it and submitting it as part of the reproduced record. *Id.*, at 6.

In circumstances where the evidence or other materials necessary for appellate review are missing from the certified record, but it is undisputed that they were properly before the trial court, the appellate courts have, on a case by case basis, made decisions to review the claims on the merits despite the deficiency in the certified record. *See e.g. Commonwealth v. Pries*, 861 A.2d 951, 952 n.2 (Pa. Super. 2004), *appeal denied*, 584 Pa. 693, 882 A.2d 478 (2005) (document appeared in reproduced record and counsel for both the prosecution and the defendant agreed that the document had been submitted to the trial court); ***Commonwealth v. Johns***, 812 A.2d 1260, 1262 (Pa. Super. 2002) (motion appeared in docket entries but not certified record).

9.5 STANDARD AND SCOPE OF REVIEW ON APPEAL

A. Appeals from Suppression Decisions

1. Denial of a Suppression Motion

The appellate court's 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. ***Commonwealth v. Scott***, 878 A.2d 874, 877 (Pa. Super. 2005), *appeal denied*, 586 Pa. 749, 892 A.2d 823 (2005); ***Commonwealth v. Wright***, 867 A.2d 1265, 1267 (Pa. Super. 2005), *appeal denied*, 583 Pa. 695, 879 A.2d 783 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1047 (2006). Where the prosecution prevailed in the suppression court, the appellate court 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 factual findings of the trial court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. ***Commonwealth v. Bomar***, 573 Pa. 426, 445, 826 A.2d 831, 842 (2003), *cert. denied*, 540 U.S. 1115 (2004). Moreover, the appellate court must defer to the credibility determinations of the trial judge who had the opportunity to observe the witnesses' credibility.

Commonwealth v. Wright, 867 A.2d 1265, 1267 (Pa. Super. 2005), *appeal denied*, 583 Pa. 695, 879 A.2d 783 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1047 (2006).

2. Grant of Suppression Motion

The applicable standard of review in a Commonwealth appeal from an order of suppression is well-settled. In reviewing the ruling of a suppression court which granted a suppression motion, the appellate court must "first determine whether the factual findings are supported by the record, and

then determine whether the inferences and legal conclusions drawn from those findings are reasonable.” *Commonwealth v. Mulholland*, 794 A.2d 398, 400 (Pa. Super. 2002), quoting *Commonwealth v. Luv*, 557 Pa. 570, 575, 735 A.2d 87, 90 (1999) (internal citations omitted).

The appellate court may consider only the evidence of the defendant’s witnesses and so much of the evidence for the prosecution that, when read in the context of the record as a whole, remains uncontradicted.

Commonwealth v. Campbell, 862 A.2d 659, 662 (Pa. Super. 2004), *appeal denied*, 584 Pa. 699, 882 A.2d 1004 (2005). If the evidence when so viewed supports the factual findings of the suppression court, the appellate court will reverse only if there is an error in the legal conclusions drawn from those findings. *Commonwealth v. Rosas*, 875 A.2d 341, 346 (Pa. Super. 2005), *appeal denied*, 587 Pa. 691, 897 A.2d 455 (2006).

B. Appeals from Judgment of Sentence

1. Challenge to the Sufficiency of the Evidence

The standard applied by the appellate court in reviewing a challenge to the sufficiency of the evidence is “whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” *Commonwealth v. Dupre*, 866 A.2d 1089, 1100 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005).

A number of additional standards also apply:

- the appellate court may not weigh the evidence and substitute its judgment for the fact-finder;
- the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence;
- any doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances; and
- the Commonwealth may sustain its burden of proof or proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002).

In making this determination, the appellate court must evaluate the entire trial record and consider all the evidence received. *Commonwealth v. Markman*, ___ Pa. ___, ___, 916 A.2d 586, 598 (2007). Lastly, applying the above standards, it must be acknowledged that the trier of fact while passing upon the credibility of witnesses and the weight of the evidence

produced, is free to believe all, part or none of the evidence. *See Commonwealth v. Bruce*, 916 A.2d 657, 661 (Pa. Super. 2007).¹³

2. Challenge to the Weight of the Evidence

Pa.R.Crim.P. 607 addresses a motion challenging the weight of the evidence:

Rule 607. Challenges to the Weight of the Evidence

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

(B)(1) If the claim is raised before sentencing, the judge shall decide the motion before imposing sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.

(2) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 720(A)(2) or (3), whichever applies.

When a claim is raised before sentencing, the defendant may, but need not, raise the issue again in a post-sentence motion. See Rule 720(B)(1)(a)(iv).

An allegation by the defendant that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Smith*, 853 A.2d 1020, 1028 (Pa. Super. 2004). A challenge to the weight of the evidence, in contrast to a challenge to the sufficiency of the evidence, concedes that there is sufficient evidence to sustain the verdict.

Commonwealth v. Bennett, 827 A.2d 469, 481 (Pa. Super. 2003), *appeal denied*, 577 Pa. 707, 847 A.2d 1277 (2004). As stated above, the remedy for a challenge to the weight of the evidence is a new trial. Pa.R.Crim.P. 607.

In reviewing such a claim, a trial court must determine whether 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. Cesar*, 911 A.2d 978, 986 (Pa. Super. 2006). On appeal from the trial court's decision, the standard of the appellate court is:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration

¹³ The remedy for a challenge to the sufficiency of the evidence is a judgment of acquittal. Pa.R.Crim.P. 606.

to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Hitner, 910 A.2d 721, 733 (Pa. Super. 2006).

An appellant fails to preserve for review a claim that the conviction was against the weight of the evidence by failing to file a motion for a new trial with the trial court. ***Commonwealth v. Snyder***, 870 A.2d 336, 345 (Pa. Super. 2005).

3. Challenge to the Jury Charge/Instructions

[A]ppellate review of a trial court charge must involve a consideration of the charge as a whole to determine whether it was fair and complete. The review does not focus upon whether certain "magic words" were included in the charge. Rather, it is the effect of the charge as a whole that is controlling.

Commonwealth v. Saunders, 529 Pa. 140, 144, 602 A.2d 816, 818 (1992) (citations omitted).

4. Challenge to Sentence

(a) Challenge to the Discretionary Aspects of Sentence

A challenge to the discretionary aspects of a sentence does not entitle an appellant to appellate review as of right. ***Commonwealth v. Bullock***, 868 A.2d 516, 528 (Pa. Super. 2005), *affirmed*, ___ Pa. ___, 913 A.2d 207 (2006). Prior to reaching the merits of a discretionary sentencing issue, the appellate court conducts a four part analysis.

- (1) Whether the appellant has filed a timely notice of appeal in accordance with Pa.R.A.P. 902 and 903.
- (2) Whether the issue on appeal was properly preserved at sentencing or in a motion to reconsider and modify sentence in accordance with Pa.R.Crim.P. 720.
- (3) Whether the appellant's brief adequately states a substantial question or if it contains a fatal defect. In order to satisfy the requirements of 42 PA.CON.S.STAT.ANN. § 9781(b), Pennsylvania Rule of Appellate Procedure 2119(f) mandates that an appellant challenging the discretionary aspects of his sentence set forth in his brief a concise statement of the reasons relied upon for

allowance of appeal.¹⁴ *Commonwealth v. McAfee*, 849 A.2d 270, 274 (Pa. Super. 2004), *appeal denied*, 580 Pa. 695, 860 A.2d 122 (2004). Before reaching the merits of an appellant's argument, the appellate court must review the appellant's Rule 2119(f) statement to determine whether he has presented a substantial question for the court's review.

- (4) Whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 PA.CONS.STAT.ANN. § 9781(b).¹⁵

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

The establishment of a substantial question is a significant element. If a defendant merely asserts that his sentence is inconsistent with the sentencing code or contrary to the fundamental norms underlying the sentencing scheme, without providing an explanation in his statement of the reasons relied upon for allowance of appeal, the appellate court will not conclude that a substantial question has been presented, and therefore will not review the discretionary aspects of his sentence. *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. 2000) (en banc), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000).

The standard of review of the discretionary aspects of a sentence has been well settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

¹⁴ Pa.R.A.P. 2119(f) provides:

(f) Discretionary aspects of sentence. An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

¹⁵ 42 PA.CONS.STAT.ANN. § 9781(b) provides:

The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

(b) **Challenge to the Legality of Sentence**

The law in Pennsylvania makes it clear that an illegal sentence may be appealed as of right:

§ 9781. Appellate review of sentence

(a) Right to appeal.—The defendant or the Commonwealth may appeal as of right the legality of the sentence.

42 PA.CON.S.TAT.ANN. § 9781(a). The standard and scope of review is well settled:

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. Stevenson, 850 A.2d 1268, 1271 (Pa. Super. 2004) (citations omitted).

C. Appeals from PCRA Orders

The standard of review regarding an order denying a petition under the Post Conviction Relief Act, 42 PA.CON.S.TAT.ANN. § 9541 *et seq.*, requires an inquiry into “whether the record supports the PCRA court’s determination and whether the court correctly stated and applied the law.” ***Commonwealth v. DuPont***, 860 A.2d 525, 529 (Pa. Super. 2004), *appeal denied*, 585 Pa. 695, 889 A.2d 87 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2029 (2006). The PCRA court’s findings will not be disturbed unless those findings are unsupported by the record. *Id.*

If the trial court dismisses the PCRA petition without a hearing, the appellate court must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001).