

Appellate Division Newsletter

PUBLIC DEFENDER ERIE COUNTY PENNSYLVANIA

PA SUPREME COURT DISAPPROVES OF HOLDING IN NIEVES... BUT WHAT ABOUT LICENSE SUSPENSIONS?

In **Commonwealth v. Haag**, 981 A.2d 902 (Pa. 2009) the Pennsylvania Supreme Court disapproved of the holdings in **Misner**, **Nieves** and **Stafford** and held that the plain language of section 3806 of the Vehicle Code states that a DUI offender will be sentenced as a second or subsequent DUI offender *only if* he was *convicted* of the prior violation *before* committing the subsequent offense.

The defendant in **Haag** was charged with two DUIs, less than two hours apart. Following the Superior Court holdings in **Nieves** and **Misner**, the trial court sentenced Haag as a first-time DUI offender for his first DUI and as a second-time DUI offender for his second offense. Haag appealed and ultimately sought relief with Pennsylvania's highest court.

The Supreme Court vacated Haag's sentence and remanded to the trial court for re-sentencing recognizing that for Haag to be sentenced as a repeat DUI offender, he would have had to have been *convicted* of his first offense prior to *committing* his second offense. Haag's second offense was committed less than two hours after the first offense. Hence, Haag was obviously not convicted of his first offense prior to committing the second offense. Accordingly, the

trial court should have sentenced Haag as a first time offender for each of the two DUI offenses.

What do we do to assist clients who were sentenced according to the **Nieves** holding? First, if the defendant's appellate rights have not yet expired, a post-sentence motion is appropriate. If appellate rights have expired, a PCRA Petition should be filed.

Note that a challenge to a court's application of a mandatory sentencing provision implicates the legality of a sentence. **Commonwealth v. Stafford**, 932 A.2d 214, 216 (Pa. Super. Ct. 2007). Hence, it is a cognizable issue under the Post Conviction Relief Act. A defendant should complain in his P.C.R.A. petition that he is serving an illegal sentence.

The issue of whether the application of a mandatory minimum sentence implicates a non-waivable challenge to the legality of a sentence as established by **Stafford** is currently being reviewed by the Pennsylvania Supreme Court in **Commonwealth v. Foster**, docket number 7 EAP 2009. **Foster** was argued in October of 2009.

Remember, representation by appointed counsel automatically ends

when a defendant's appellate rights expire. Accordingly, a defendant who was represented by appointed counsel should contact his prison counselor or institution's law library for a blank P.C.R.A. Petition, complete the petition and file it with the county clerk's office as soon as possible.

While a post-sentence motion, an appeal or a P.C.R.A. petition may provide criminal defendants relief through the opportunity to be re-sentenced according to the plain interpretation and application of Section 3806 of the Vehicle Code, challenging the defendant's accompanying license suspension is more complicated. In **Gigous v. Bureau of Driver Licensing**, 1559 C.D. 2008, the Commonwealth Court relied on the holding in **Nieves** and held that Gigous had a prior offense at the time of sentencing (even though he committed the second offense before conviction for the first offense) and affirmed the license suspension. Gigous sought review with the Pennsylvania Supreme Court and the case was held in abeyance until resolution of **Haag**. Assuming that the Supreme Court will follow its decision in **Haag** and reverse **Gigous**, what advice should be given to clients who are subject to license suspensions as a repeat offender under the erroneous holding in **Nieves**? We welcome all suggestions.

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Informant's Tip not Enough to Stop

Do officers have a reasonable suspicion to stop a vehicle when presented with the following facts?

- Informant notified law enforcement that a white male named "Tom" would be at a certain location between 3:30 pm and 5:30 p.m. on a certain date to distribute drugs;
- Police observed Thomas Brown arrive at the location, leave his car and return with a brown paper bag and drive away; and
- There was no indication that the informant was reliable or how the informant came to know the information provided to officers.

The trial judge in **Commonwealth v. Brown**, 952 A.2d 1185 (Pa. Super. Ct. 2008) suppressed the contraband finding the officers did not have reasonable suspicion to justify the vehicle stop. In a decision written by Judge Klein, a panel of the Superior Court agreed. The panel acknowledged that both probable cause and reasonable suspicion depend upon the content of the police information as well as the degree of reliability. Further, when an officer testifies that he had "used" the informant before and not that the informant had provided any information that was found to be accurate, the informant should be considered akin to a tip and corroboration is required to provide reasonable suspicion. The panel concluded with a rule of thumb that "[w]hen the quality of the information is low, the corroboration has to be high."

The Pennsylvania Supreme Court granted the Commonwealth's allocatur at 23 EAP 2009. Stay tuned.

Defense Counsel's Right to Interview Victims (and other Commonwealth Witnesses)

Defense counsel has a right to interview victims and other Commonwealth witnesses. Through Informal Opinion Number 98-134 in response to Ethics Inquiry 98-134, the Pennsylvania Bar Association Legal Ethics Hotline responded to a defense attorney's questions pertaining to the right to interview Commonwealth witnesses.

The defense attorney (hereafter "inquirer") contacted the hotline asking whether he violated ethical rules by attempting to speak with Commonwealth witnesses prior to a preliminary hearing in a criminal matter. Specifically, the inquirer attempted to speak with a Commonwealth witness but was interrupted by the prosecutor who threatened the inquirer with an ethics complaint for attempting to speak with Commonwealth wit-

nesses.

The advisory opinion stated that the inquirer violated no ethical duties by attempting to speak with the Commonwealth witnesses. However, the opinion stated that while inquirer did not violate the Rules of Professional Conduct, the prosecutor did.

The advisory opinion acknowledged that an attorney has a duty to explore all legal avenues of information in representing his client including interviewing witnesses for the opposing party. The duty to interview witnesses is limited to making certain that the witnesses understand that the attorney is not giving them legal advice and the attorney is not a neutral or disinterested observer of the proceedings but rather the attorney representing the defendant.

The advisory opinion acknowledged that an attorney for the Commonwealth is never the attorney for the victim or for the witnesses. Hence, it is improper for a prosecutor to tell a victim or other witness not to speak with defense counsel or attempt to interfere with the defense's attempt to interview witnesses.

In conclusion, the advisory opinion cited Pa.R.P.C. 3.4(d) when it found that the prosecutor likely violated the Rules of Professional Conduct by preventing the inquirer from interviewing prosecution witnesses.