

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA

CRIMINAL DIVISION

No. CC 2018-04773

vs.

GAGNON II HEARING TRANSCRIPT

GERALD THOMAS,

DATE:
February 17, 2022

Defendant.

REPORTED BY:
Aimee P. Adams, RPR
Official Court Reporter

BEFORE:
Hon. Anthony M. Mariani

COUNSEL OF RECORD:

FOR THE COMMONWEALTH:
Autumn Weaver
Adult Probation Office

FOR THE DEFENDANT:
Kenneth Haber, Esq.

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1 P-R-O-C-E-E-D-I-N-G-S

2 - - -

3 (In Open Court.)

4 - - -

5 THE CLERK: Your Honor, now is the time
6 and date set for Gerald Thomas. Mr. Thomas,
7 please stand up. I need you at the
8 microphone. Sir, you got to have a mask on
9 to be in the room. We'll get you one. Go
10 out in the hall. Please stop moving.

11 THE COURT: Everybody be still, please.

12 THE CLERK: Please raise your right
13 hand.

14 (Administered oath.)

15 THE COURT: Thank you. You may be
16 seated. Commonwealth of Pennsylvania versus
17 Gerald Thomas. This is at 2018-04773.
18 Appearing for the Commonwealth?

19 MS. WEAVER: May it please the Court,
20 Autumn Weaver on behalf of Adult Probation.

21 THE COURT: For the defendant?

22 MR. HABER: Kenneth Haber for
23 Mr. Thomas.

24 THE COURT: Ms. Weaver, why are we
25 here?

1 MS. WEAVER: Mr. Thomas comes before
2 you today. He previously had a hearing for
3 new charges at OTN G885281-5 which came
4 before Your Honor on January 27th of this
5 year which was held also as an early
6 probation violation hearing. At that time
7 Your Honor nolle prossed the case.

8 THE COURT: I didn't nolle pros
9 anything.

10 MS. WEAVER: I apologize.

11 THE COURT: I signed an Order on a
12 petition tended by the Commonwealth. Because
13 Mr. Haber did a bang-up job as he always does
14 on the suppression motion, that's what
15 happened. Mr. Haber, you weren't getting
16 enough credit on this.

17 MR. HABER: Not looking for credit,
18 Your Honor.

19 THE COURT: You're looking for
20 something else today, aren't you? All right.
21 All right. You may continue, Ms. Weaver.

22 MS. WEAVER: Your Honor, strike that
23 previous statement. All the charges were
24 nolle prossed on January 27th at that
25 hearing.

1 Mr. Thomas is here today for failure to
2 pay court costs, failure to comply with the
3 special Order of the Court which was ordered
4 for him to secure and maintain a place of
5 employment, pay \$357 to Pittsburgh EMS and
6 not drive a motor vehicle without a license.

7 In accordance with the new charges that
8 came before Your Honor on January 27th, it
9 did list in the police report that the driver
10 of the vehicle was identified as Gerald
11 Thomas which does violate the Court Order and
12 the probation rule.

13 It is also noted that Mr. Thomas had
14 signed a copy of the General Rules and
15 Conditions of Probation/Parole Intermediate
16 Punishment. When he was first placed on
17 probation back in November of 2018 and when
18 he stated -- excuse me.

19 When he signed this piece of paper, he
20 reviewed all the probation rules which does
21 include Number 3. You may not possess any
22 firearm, ammunition or prohibited offensive
23 weapon while you are under Court supervision.
24 This includes on your person, in your
25 residence or in your vehicle.

1 I do have a copy of the rules that are
2 signed for Your Honor. I believe Mr. Haber
3 has a copy as well. If not, I do have a copy
4 for you.

5 This also, Your Honor, is in violation
6 in accordance with those new charges as
7 Mr. Thomas -- when speaking with the officers
8 that stopped him, they had asked him if he
9 had a gun in the car to which he stated, yes.
10 It's in the glove box. It's my brother's.

11 So based on that statement, it does
12 seem that Mr. Thomas was aware that there was
13 a gun in his possession while he was driving
14 that vehicle.

15 THE COURT: Was the gun in his
16 possession?

17 MS. WEAVER: Correct, even if it wasn't
18 his --

19 THE COURT: The evidence wasn't that it
20 was in the glove box. He handed it to them.
21 We had a hearing. This case is a unique case
22 because the evidence was presented in this
23 courtroom in a separate case.

24 People testified. We had evidence
25 presented, and Mr. Haber, using his skill as

1 the fine advocate he is, persuaded the Court
2 that the evidence was obtained improperly
3 and, therefore, had to be suppressed from the
4 case that got us here, that other case.

5 However, we had evidence presented in
6 this room in the presence of the defendant
7 under oath, subject to cross-examination that
8 clearly established the defendant driving a
9 vehicle and being in possession of a firearm.

10 So you're here not just with a report
11 that may or may not be accurate. You're here
12 after we had a full-blown hearing in this
13 room establishing those facts.

14 If you will assume that those facts are
15 established, what recommendation is Probation
16 making, if any, on this case?

17 MS. WEAVER: Well, thank you, Your
18 Honor. Just to note as well on this case, as
19 well as the \$375 that is owed to Pittsburgh
20 EMS, there is a court cost balance of \$2,839.
21 Mr. Thomas has paid \$1,029 toward his court
22 costs.

23 Because of all the information
24 presented to you today, Your Honor, Probation
25 respectfully recommends that the instant

1 probation be revoked and he be sentenced to
2 an appropriate community sentence so that he
3 can be closely monitored or supervised.

4 I do want to note for Your Honor he is
5 currently on a three-year probation which is
6 still effective through September 30th of
7 2023, and he has been detained for Your Honor
8 since March 31st of 2021 which as of today's
9 date gives him 324 days credit.

10 We would further recommend, Your Honor,
11 that Mr. Thomas be required to secure
12 employment, make monthly payments toward his
13 court costs/fines and that Pittsburgh EMS
14 amount that he owes and that he be required
15 to report to the Probation Office twice a
16 month for employment assistance until finding
17 gainful employment as well as adhering to the
18 Court's zero tolerance policy and undergoing
19 random urine screens.

20 THE COURT: All right. Mr. Haber, I
21 have to tell you before you begin -- you may
22 stay seated. Apparently you went dancing the
23 other night and twisted your ankle. Is that
24 what happened?

25 MR. HABER: I wish I twisted it, Your

1 Honor. It's far worse than that.

2 THE COURT: This case has some unique
3 elements to it, and that is what I've already
4 identified.

5 In most instances when we have a
6 probation violation hearing, the probation
7 officer is reading from a report. Generally
8 it's a reliable report for most purposes, but
9 there's times when it is in dispute where the
10 violation is an allegation, not a proven
11 fact.

12 We have in this particular case proven
13 facts in this room in a highly contested and
14 successfully contested by you suppression
15 hearing, but it nonetheless proved that your
16 client was operating a vehicle. That's how
17 the whole thing started and that he had a gun
18 in the car that he said was his brother's,
19 but he handled a firearm in the car.

20 Your client has a substantial history,
21 and I am not in favor of the recommendations
22 that Probation made in this case. I'm
23 looking at State Prison for this young man
24 who won't quit embracing the guns and drugs
25 street life, and he's been given multiple

1 opportunities to do it. He won't conform his
2 conduct to the minimums.

3 So he's out there running around doing
4 things he shouldn't do, hasn't paid EMS, said
5 he was going to do. He had a lot of things
6 he was supposed to do given the opportunity.

7 He has been represented by very able
8 Counsel, you, Mr. Jim Wymard. He has had a
9 lot of opportunities to figure it out, and he
10 won't. Maybe because he chooses not to. He
11 may choose to continue to embrace this life.
12 It looks like that's what he's doing. That's
13 what it looks like to me.

14 Mr. Thomas, I had a 55-year-old man in
15 here a year ago on his fourth possession with
16 intent case. He got probation on the first.
17 He got jail time on the second, and he got
18 prison time on the third and on the fourth
19 one in front of me -- I didn't have any other
20 cases -- he had reached a plea agreement.

21 He was going to be sentenced to two and
22 a half to five years in State Prison. He was
23 55 years old. I asked him, look. You don't
24 have to answer this, but if you would, I
25 would like to be enlightened if you could

1 enlighten me.

2 You lost your freedom for this twice.
3 You are making a deal to go to prison again.
4 Why do you keep doing this? And he very
5 calmly looked at me, and he said, for the
6 money. I don't know if you are that guy or
7 not. I'm not asking you to tell me.

8 What I do know is you won't quit. You
9 won't quit embracing this guns and drugs
10 street life, even given very specific
11 conditions you can't drive without a license.
12 That doesn't apply to you apparently. You
13 can't carry a gun. That doesn't apply to you
14 apparently.

15 The legal reason Mr. Haber has to
16 address is, can I use what happened in your
17 other case because you were represented by
18 him very effectively? You were permitted to
19 cross-examine and challenge the evidence
20 presented by the Commonwealth by Mr. Haber
21 very effectively.

22 So I'm not relying on hearsay. I'm
23 relying on evidence presented in this room
24 while you were present to see it in here,
25 while you were represented very effectively

1 and challenging it.

2 And I think I'm permitted to rely on it
3 and send you to State Prison over it. That's
4 what I think. Mr. Haber, am I right or wrong
5 about that?

6 MR. HABER: If the Court's -- I think
7 the Court is incorrect. I think the evidence
8 was properly suppressed, and I don't think
9 that the evidence establishes the violation
10 of Condition Number 3.

11 THE COURT: Does it establish the
12 violation of the condition, you may not drive
13 without a valid license to do so?

14 MR. HABER: Technically, no, because
15 there's been no evidence he didn't have a
16 license presented at the hearing. You asked
17 the question so I'm answering.

18 THE COURT: Okay. I'll give you a
19 chance to prove he had a license on that
20 date. We can reschedule this hearing.

21 MR. HABER: Well, I don't know whether
22 I can prove that or not. That wasn't
23 something I even anticipated to be honest,
24 Judge. That charge was also nolle prossed,
25 but I don't think the violation of the third

1 condition was established because without
2 actually seizing what was in the car, they
3 don't know exactly what it is, if it's real,
4 if it's not real, if it's fake, if it's
5 something else. Technically they would have
6 to seize it to find that out.

7 THE COURT: I'm not persuaded by that.
8 The little proof at a probation violation
9 hearing is substantially less than proof
10 beyond a reasonable doubt.

11 The officers identified it as a gun.
12 Your client identified it as his brother's
13 gun. Everyone agreed it was a gun. I think
14 I can rely on that. Here's the legal
15 question.

16 There is a case that was decided -- I
17 don't know if it was Superior or Supreme
18 Court -- about a year. It could be a year.
19 It could be five. It's hard to be sure, and
20 there's a case. And I haven't studied it in
21 this context. It says you can't use
22 suppressed evidence on a violation.

23 MR. HABER: Judge, I was going to start
24 with that premise. I think the Court knows
25 that.

1 THE COURT: But it's not a matter of
2 using the gun. It's a matter of your
3 client's acknowledgement that he handled a
4 gun. That evidence is not suppressed.

5 The gun is suppressed but not his
6 statement that he handled a gun, not the
7 evidence that he drove a vehicle with a gun
8 in it. That's not suppressed. That's what
9 the real fine line legal issue is.

10 Is it sufficiently derivative of the
11 suppressed evidence that it can be used, kind
12 of the fruit of the poisonous tree kind of
13 thing? His driving the vehicle is
14 independent of if there's a gun in the car.

15 There's no suppression as to the act of
16 driving. There's no suppression as to his
17 statement that, it's my brother's gun. The
18 suppression was to the physical evidence,
19 wasn't it?

20 MR. HABER: Yes, Judge, but I think
21 under the case law and the facts of this case
22 they are interconnected to the point that you
23 can't separate them.

24 THE COURT: I think you can, but the
25 law may not. Even though I think you can,

1 that doesn't mean that the Appellate Court is
2 going to agree with what I think. You think
3 whatever you want, Judge, but we're the ones
4 who make the call.

5 I think it can be independently
6 evaluated, but I might not be right about
7 that which is why you're going to try to
8 persuade me. Otherwise, he's going to State
9 Prison.

10 I'm not going to keep letting him do
11 what he's doing until he gets killed or kills
12 somebody else over drugs. He's had plenty of
13 chances. See all this stuff in my file on
14 your client with a lot of good lawyers,
15 nobody can persuade him. His family can't
16 persuade him. He keeps wanting to be a
17 street guy. I'm surprised he wasn't driving
18 something with 22s on it.

19 MR. HABER: Judge, I'm not familiar
20 with the stacks of papers in front of Your
21 Honor.

22 THE COURT: You wrote some of it.

23 MR. HABER: I'm sorry?

24 THE COURT: You wrote some of it.

25 MR. HABER: I felt that was old cases.

1 THE COURT: No. That's all of them.

2 MR. HABER: I'm familiar with relative
3 to this case, and I'm familiar with the
4 underlying case that the Court has him on
5 probation for.

6 I mean, again to the extent that the
7 Court finds the conduct in this case to be
8 considered -- which I believe that the Court
9 should not and cannot consider relatively to
10 the firearm -- I don't know that the prior
11 case is similar in nature to this. Was the
12 prior case a narcotics case, Your Honor?

13 THE COURT: Not his first one. If you
14 want to take the chance to address the issues
15 I have identified -- otherwise, I will order
16 a Pre-Sentence Report and consider sending
17 your client to State Prison. Those are the
18 options we have on the table today.

19 MR. HABER: Well, I mean, Judge, I did
20 come prepared to argue that this suppressed
21 evidence cannot be considered by the Court in
22 violating somebody.

23 THE COURT: I tend to agree with you,
24 but I'm off to the side of that. I'm on the
25 other part of it, the driving and his

1 admission that he was in possession of a
2 firearm. That was not suppressed. Both of
3 those are violations. The firearm in
4 particular is a major violation that subjects
5 him to State Prison.

6 If you want to file a brief on
7 derivative evidence, tell me. I don't want
8 to make a mistake. Your guy is going to go
9 to prison if I'm right, or your guy is going
10 to go to State Prison if I'm wrong unless you
11 convince me upfront that I'm wrong.

12 MR. HABER: If that's the option,
13 Judge, I would like the opportunity -- I
14 would say that there's a corpus delicti rule
15 without the body of the crime which they
16 don't have.

17 THE COURT: This isn't a prosecution.
18 This is a probation violation. The standard
19 is much lower, much lower unless you want to
20 give me some law that it isn't.

21 My understanding is the probation
22 violation standard of proof is much lower
23 than trial of proof beyond a reasonable
24 doubt.

25 MR. HABER: My understanding of the

1 standards are, but I'm arguing whether the
2 Court can consider any statements that were
3 made --

4 THE COURT: Positively.

5 MR. HABER: -- relative to an item that
6 doesn't exist.

7 THE COURT: Probation violations I
8 think, if the defendant comes in here and
9 said, Judge, I know you told me I couldn't
10 drink, but last weekend I tied one big time
11 because my buddy did this or that, I can
12 consider that, and I can sentence on that
13 admission. I don't need the bottle of
14 whiskey on him.

15 MR. HABER: If somebody is on
16 probation, say they killed their wife, and
17 there's no --

18 THE COURT: We have corroborating
19 evidence. We have evidence he was driving
20 the vehicle. That's not suppressed at all.
21 That's a violation in and of itself.

22 MR. HABER: I understand that. The
23 Court did not grant suppression on that part
24 of the case. I argue forcefully that it
25 should.

1 THE COURT: This is my 17th year. I
2 completed 16. I'm into my 17th. I'm tired
3 of making ticky-tacky technical decisions and
4 young men walking out the door and getting
5 shot down in the street two months, three
6 months later because they won't quit.

7 I would rather make a technical
8 decision the other way, and at least he's
9 alive. I can't control all of it, but I'm
10 tired of looking on television and seeing
11 people crying into the television because
12 somebody is laying in the street bleeding out
13 over the gun violence over drugs.

14 Your client is embracing this. If I
15 can slow him down a while, I'm going to do
16 it. It's that simple. I don't want to do it
17 illegally. If the law says I can't do it, I
18 won't do it, but if the law says I can, I
19 will because he won't quit. It's just that
20 he won't quit.

21 He has good family supporting him. I
22 remember this stuff, Mr. Haber. Mr. Wymard
23 made a big deal out of his family support.
24 He doesn't even respect his own family. So
25 if he's that strong on being a street tough,

1 we're going to send him to State Prison for a
2 while.

3 Unless you tell me I legally can't do
4 it, I won't. I'll have to hold my breath and
5 hope he gets it the other way, gets the
6 sentence, not get hurt in the street. You
7 want to take a shot at it?

8 MR. HABER: Yes, Your Honor. I mean, I
9 don't think there's going to be a case on
10 point. I did look.

11 THE COURT: Well, we'll call it the
12 Haber rule.

13 MR. HABER: The case on point we ask
14 the Court to consider is the one a few years
15 back where the Pennsylvania Supreme Court did
16 change the law in Pennsylvania that used to
17 be, you can use suppressed evidence to
18 violate somebody, and now you can't.

19 THE COURT: Right.

20 MR. HABER: I think that's clear.

21 THE COURT: That's the Daisey Kates
22 issue. Daisey Kates was a case in which they
23 decided to do the probation violation first
24 even before the trial. Meanwhile, the guy is
25 on probation. He's not allowed to possess

1 drugs anyway, but that was a condition of
2 probation. He violated it. Let's just
3 prosecute him on the violation and not worry
4 if we got the evidence legally on the
5 underlying case. They used to do that.

6 Apparently Philadelphia did that, and
7 the Court says, I don't think you should do
8 it that way anymore. That's what the issue
9 is.

10 Derivative through fruit of the
11 poisonous tree. They didn't address that at
12 all. That's for you to address. All right.

13 Mr. Thomas, I don't think I have
14 changed your mind at all in handling your
15 cases. I don't want you to speak. I just
16 want you to understand something, and I'm not
17 big brother.

18 I can't monitor everybody's conduct,
19 but where I have the ability to do something
20 to make a meaningful impact, I intend to do
21 it if I can do it legally. If the law says I
22 can't, I can't. I can't do it on every case.

23 You're just one guy with your case.
24 I've been looking at a lot of guys standing
25 where you stand. Thirteen of the people are

1 dead. Thirteen that I know of are dead
2 because they went right back to it.

3 Judge Ignelzi who is now in Civil
4 Division gave a 19-year-old man probation on
5 Wednesday on a gun charge because it was his
6 first conviction, adult conviction. He gave
7 him probation on Wednesday. The guy was dead
8 in the streets on Friday. Now that's an
9 extreme case, but that's what we see from
10 here.

11 I don't want to see you dead in the
12 street on Friday or any other day of the
13 week, but you won't quit. I have to put you
14 in the cage, lasso you, corral you, stuff you
15 because you won't quit, but Mr. Haber might
16 say, Judge, in this case you can't do it, and
17 I won't. Then I hold my breath for you, and
18 your mother holds her breath for you.

19 Remember Mr. Wymard gave a big
20 presentation. You have not learned from your
21 family at all.

22 Mr. Haber, 30 or 60 days? He's not
23 going anywhere in the meantime.

24 MR. HABER: I would ask for 30. If I
25 need more time I'll --

1 THE COURT: It's your call. It's not
2 an easy issue. I know you're very thorough.
3 That's one of the reasons this presents well
4 because I know I will get a thorough
5 presentation from his lawyer, you, and we'll
6 figure out what we can do.

7 If we can't, we can't. I think there's
8 good reason for your position, but I think
9 there's pretty good reason for mine, too. So
10 let's see which way it goes. Okay. See you
11 in about 30 days.

12 THE CLERK: Going to continue until
13 March 31st, Judge.

14 MS. WEAVER: Thank you.

15 - - -

16 (Whereupon, the proceedings were adjourned.)

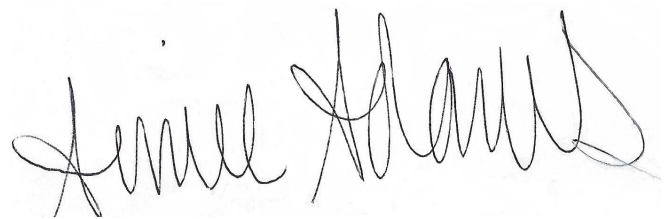
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COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY }

CERTIFICATE OF REPORTER

I, Aimee P. Adams, RPR, an Official Court Reporter, do hereby certify that the evidence and proceedings are contained fully and accurately in the machine shorthand notes taken by me at the hearing of the within cause, and that this is a correct transcript of the same.

A handwritten signature in cursive script, appearing to read "Aimee Adams".

Aimee P. Adams, RPR
Official Court Reporter