more than "shake himself violently, to wiggle and squirm in an attempt to free himself of the officer's grasp." (At page 77) In *Eberhardt*, the Superior Court reversed the conviction of resisting arrest and judgment of sentence because there was no evidence of a substantial risk of bodily injury, and

> "It also cannot be argued that appellant could be found guilty of the second part of Section 5104, namely, employing means justifying or requiring substantial force to overcome the resistance, since appellant was not charged with this part of Section 5104 in the information."

In the case at bar, the evidence clearly established that Mr. Greenawalt engaged in far more than shaking, wiggling and squirming. When the resistance of a defendant is of such magnitude that it requires the best physical efforts of two police officers for a period of between 5 and 10 minutes, and the application of mace to subdue the defendant, then in our judgment that defendant has employed "means justifying and requiring substantial force to overcome the resistance."

We, therefore, find no merit in the defendant's first and third questions. The motions for new trial and in arrest of judgment will be dismissed.

ORDER OF COURT

NOW, this 17th day of September, 1982, the motions of Charles R. Greenawalt, Jr. in arrest of judgment and for a new trial are dismissed.

Sentence is deferred until the Probation Department of Franklin County has prepared and filed a Pre-Sentence Investigation Report.

Upon the filing of the Pre-Sentence Investigation Report the defendant shall appear for sentencing at the call of the District Attorney.

Exceptions are granted the defendant.

COMMONWEALTH v. WEIKEL, C.P. Franklin County Branch, No. 254 of 1981

Criminal Law - Guilty Plea - Withdrawal of Plea - Impeachment of Testimony - Guilty Plea Colloquy

1. Where defendant denies on cross-examination that he made certain statements as part of a prior guilty plea colloquy on a redirect examination he testifies his prior guilty plea was involuntary, the defendant's testimony may be impeached by evidence of guilty plea colloquy presented by the Court Reporter.

2. The defendant opens himself up to cross-examination and rebuttal evidence based on a prior guilty plea colloquy by taking the stand and changing his story.

3. The question of whether a statement was voluntarily made is always a proper issue to present to a jury.

David W. Rahauser, Assistant District Attorney, Attorney for the Commonwealth

E. Franklin Martin, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., September 24, 1982:

On May 20, 1981, a criminal complaint was filed charging the defendant and others with the crimes of burglary, theft, receiving stolen property, and criminal conspiracy. A preliminary hearing was held before District Justice William Stover on August 31, 1981, and he was bound over for trial. On August 10, 1981, the appointment of the Public Defender as counsel for the defendant was revoked due to a conflict of interest, and E. Franklin Martin, Esq. was appointed counsel for Mr. Weikel. On October 7, 1981, he appeared before the undersigned Judge and waived arraignment. On November 16, 1981, on application of defendant's counsel the matter was rescheduled for trial at the January Term of Court. On January 11, 1982, the matter was continued until March 8, 1982.

On March 8, 1982, the defendant with his counsel appeared before the Honorable George C. Eppinger, P.J., and pur-

suant to an agreement with the District Attorney's Office and after having the oath administered to him entered a plea of guilty to the crime of theft, a felony of the third degree. Judge Eppinger entered an order finding that the defendant had voluntarily and understandingly offered to enter the plea, and accepted the same. On March 18, 1982, the defendant's petition for leave to withdraw his guilty plea was presented and an order signed directing the issuance of a rule on the District Attorney to show cause why the guilty pleas should not be withdrawn. The rule was returnable on March 31, 1982 at 9:30 a.m. The District Attorney's Office did not resist the defendant's petition and Judge Eppinger made an order allowing the defendant to withdraw his guilty plea.

The defendant was tried by jury on May 11 and 12, 1982. The defendant took the stand in his own defense and testified inter alia that he did not participate in the burglary of the Firestone Tire Warehouse and the theft of tires. He denied that he was involved with the crime testified to by the Commonwealth's witnesses in the prosecution's case in chief. On cross examination he conceded that he had on March 8, 1982 entered a plea of guilty to the crime of theft of tires at the Firestone Tire Center before Judge Eppinger, but denied that he stated to the Court what he had done. On examination he testified that he withdrew his guilty plea because it was not voluntarily given and that his girlfriend had had a miscarriage just before March 8th, and because of the time the case had been going on and he wanted to get it over with. On rebuttal the Commonwealth called Mrs. Melissa Little, an official court reporter, who had taken the guilty plea colloquy before Judge Eppinger on March 8th. She read from her notes what transpired including the defendant's statement that he had helped load the truck with tires. The jury returned a verdict of guilty of theft. On May 24, 1982 the defendant filed motions for a new trial and in arrest of judgment alleging ten (10) separate grounds for each motion. Briefs were exchanged and argument was heard on September 2, 1982.

In defendant's brief he alleged the following as being the questions involved in his post-trial motions:

> 1. Did the Honorable Court err in allowing the admission made by Defendant after the guilty pleas was allowed to be withdrawn because the guilty plea was involtarily given, since any statements suppressed or withdrawn for reasons for involuntariness are statements made in violation of the Fifth Amendment of the Constitution of the United States and

MCFADDEN First and final account, statement of proposed distribution and notice to the creditors of Ruby E. McFadden and Leona B. Holloway, Executrices of the Estate of Eva L. McFadden, late of Greencastle, Franklin County, Pennsylvania, deceased.

MCFADDEN First and final account, statement of proposed distribution and notice to the creditors of Helen L. Pensinger, Executrix of the Last Willand Testament of Goldie I. McFadden, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, Pa.

10-8, 10-15, 10-22, 10-29

"The Pennwayne Hotel Company, Inc., has filed a certificate of election to dissolve with the Department of State, Commonwealth of Pennsylvania on September 10, 1982."

John Bolan, President

10-29-82

similar provisions of the Constitution of the Commonwealth of Pennsylvania?

2. Did the Honorable Court err in allowing the Court Stenographer, Melissa Little, to read the notes of the guilty plea colloquy made by the Defendant on March 8, 1982?

3. Did the Honorable Court err in allowing the admission made by Defendant after the guilty plea was allowed to be withdrawn for the reason that the guilty plea was not voluntarily given?

4. Did the Honorable Court err in allowing the prosecution's cross-examination of defendant's admissions made in a guilty plea colloquy in the above-captioned matter on March 8, 1982 for the following reasons:

A. The examination was in violation of the Fifth Amendment of the Constitution of the United States and similar provisions of the Constitution of the Commonwealth of Pennsylvania?

B. Said examination was beyond the scope of direct examination?

5. Did the Honorable Court err in not giving Defendant's point for charge?

6. Did the Honorable Court err in summation in the following manner:

A. By stating why President Judge George C. Eppinger allowed the withdrawal of Defendant's prior guilty plea?

B. By advising the jury that the Supreme Court rule provided that the withdrawal of the guilty plea should be liberally allowed?

C. By allowing the jury to decide the voluntariness of Defendant's prior guilty plea?

D. By any mention of Defendant's prior guilty plea?

E. By not charging the jury that the guilty plea was involuntary?

7. Was the verdict against the evidence of trial and/or of record as well as for the reasons and ground hereinafter set

forth in Defendant's motion for arrest of judgment, which is incorporated herein by reference thereto and made a part thereof?

8. Was the verdict against the weight of evidence at trial and/or of record, as well as for the reasons set forth in Defendant's motion for arrest of judgment, which is incorporated herein by reference and made a part hereof?

At oral argument counsel for the defendant stated to the Court and to opposing counsel that the basic issue raised by the eight (8) "Questions Involved" set forth in his brief was, "Whether the defendant's statement given during the guilty plea colloquy was admissible in the trial of the defendant to impeach his testimony after he had been previously granted leave to withdraw that guilty plea." Having heard the defendant's oral arguments and read his brief, we agree that the basic issue as stated by counsel for defendant is correct and we conclude all other grounds asserted for post-trial relief having been neither briefed nor argued have been abandoned.

Preliminarily, it must be noted that the Commonwealth made no effort to introduce the fact of defendant's guilty plea and his incriminating statements made in the guilty plea colloquy in evidence during its case in chief. Only when the defendant took the witness stand and testified that he had no involvement in the burglary of the Firestone Tire Center Warehouse or the theft of the tires from that warehouse was the Commonwealth permitted to introduce in evidence the fact of the guilty plea by way of cross examining him. Only when the defendant denied on cross-examination that he had stated to Judge Eppinger that he was involved in the theft of the tires, and on redirect examination testified that his guilty plea was involuntary in that his girlfriend had just had a miscarriage and he wanted to get the prosecution over with did we conclude that the court reporter who took the guilty plea colloquy would be permitted to read from her notes what the defendant said on March 8, 1982. The jury was instructed in the Court's charge that it could only consider the guilty plea and the defendant's statement made during the colloquy if it first concluded as a matter of fact that the defendant had made the statement attributed to him, and that he had made it voluntarily. As a part of the Court's explanation of the procedures involved in the guilty plea and its withdrawal, it was explained to the jury that the Rules of the Supreme Court of Pennsylvania require the trial courts to be very liberal in allowing a defendant to take back his guilty plea so long as he does so before he is sentenced.

The defendant contends that his constitutional privilege against self-incrimination was violated when the Court permitted the introduction of evidence of the guilty plea, and the incriminating statements made by the defendant as part of the recorded guilty plea colloquy. The defendant also contends the Court erred in permitting the jury to decide the voluntariness of the defendant's guilty plea and incriminating statements, and by advising the jury of the Supreme Court Rule requiring the withdrawal of guilty pleas to be liberally allowed.

Neither counsel for the defendant nor the Commonwealth were able to locate any authority for the position advocated by the defendant or opposed by the Commonwealth. Independent research of the Court has been equally unproductive. We, therefore, must conclude that we are dealing with a novel and unresolved issue of law.

Guidance may be found in the line of cases dealing with the use of court-declared inadmissible statements for purposes of impeachment. In *Harris v. New York*, 401 U.S. 222 (1971), the United States Supreme Court held that a prior inconsistent statement made by a defendant, while inadmissible under *Miranda*, could be properly used to impeach the defendant's credibility once he had elected to take the witness stand on the rationale that the shield of *Miranda* should not be perverted into a license to use perjury by way of a defense. However, in *Commonwealth v. Triplett*, 462 Pa. 244, 341 A. 2d 62 (1975), the Supreme Court of Pennsylvania held that any statement of a defendant which is declared inadmissible for any reason by a suppression court cannot be thereafter used for the purpose of impeaching the credibility of a defendant who elects to testify on his own behalf at trial. Our highest court elected to exercise its power of improving upon the minimum rights guaranteed by the United States Constitution by providing this standard of protection for the rights of the defendant, a standard which is higher than the constitutional minimum declared by the United States Supreme Court. *Commonwealth v. McLaughlin*, 475 Pa. 97, 379 A. 2d 1056 (1977).

The language adopted by the Court in *Triplett* suggests that Pennsylvania courts are to totally disregard the United States Supreme Court decision in *Harris*, supra. However, subsequent cases have interpreted *Triplett* quite narrowly and appear to only apply the *Triplett* holding to situations where a suppression court has ruled a statement to be inadmissible due to a violation of constitutional rights. In *Commonwealth v.*

Mobley, 267 Pa. Super. 29, 405 A. 2d 1287 (1979), the defendant made a statement to the police prior to his arrest that was suppressed because the required *Miranda* warnings were not given. At trial, Mobley chose to take the stand and testify during his direct examination that he told the police the same story as to his whereabouts at the time of the crime as he was testifying to at trial. The prosecution cross-examined the defendant as to the particulars of his suppressed statement to show discrepancies between it and the defendant's trial testimony. On appeal the Superior Court held that *Triplett* was not applicable and "the appellant opened the door and, under these circumstances, the cross-examination was proper." (At page 32.)

In the case at bar, the defendant gave a statement to the court during the guilty plea colloquy implicating himself in the crimes charged. Then during his direct examination at trial, he contradicted the statements made during the colloquy. It was only at this point that the prosecution was permitted to cross-examine him as to his guilty plea colloquy statements. When he persisted in his testimony that he had not stated to Judge Eppinger what he did, the Commonwealth was permitted on rebuttal to introduce the testimony of the court reporter as to what her record showed the defendant said during the colloquy. As the court in *Commonwealth v. Mobley*, supra, held, the defendant opened himself up to such cross-examination and rebuttal evidence by taking the stand and changing the story. The statements made during the guilty plea colloquy were properly used to point out contradictions in the defendant's testimony. When the defendant took the stand he and he alone put his credibility into issue. As the Superior Court held in *Mobley*, the defendant opened himself up to cross-examination and rebuttal by taking the stand and changing the story. Neither the 5th Amendment nor any other provision of Constitutional, Statutory or Common Law creates a license to commit perjury or make a mockery of the system of justice in this Commonwealth or the United States.

The question of whether the statement was voluntarily made is always a proper issue to present to the jury. In our judgment had the court failed to instruct the jury that only if they concluded the defendant voluntarily made his statement to Judge Eppinger as part of his guilty plea colloquy should they consider that statement, that would, indeed, have been reversible error. To have failed to advise the jury that the Rules of the Supreme Court of Pennsylvania require withdrawals of

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on November 15, 1982, an application for a certificate for the conducting of a business under the assumed or fictitious name of THE FASHION BOUTIQUE with its principal place of business at 59 South Gate Mall, Chambersburg, Pa. 17201. The names and addresses of all persons owning or interested in said business are Priscilla K. Nearons, R.D. 2, Shippensburg, Pa. 17257.

Edward I. Steckel
406 Chambersburg Trust Bldg.
Chambersburg, Pa. 17201

11-5

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on or after November 8, 1982, an application for a certificate for the conducting of a business under the assumed or fictitious name of WITTLE SHOP OF CHIPS, with its principal place of business at 5 S. Potomac Street, Waynesboro, Pa. 17268. The names and addresses of all persons owning or interested in said business are Harry L. Naylor, Route 1, Box 62, Cascade, Md., 21719.

11-5

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on the 21st day of October, 1982, for the purpose of obtaining a Certificate of Incorporation of a proposed close business corporation to be organized under Sec. 373 of the Business Corporation Law of the Commonwealth of Pennsylvania, Act of May 5, 1933, P.L. 364, as amended.

The name of the proposed corporation is KYNER'S AUTO SALES, INC.

The purposes for which it is organized are: The sale, lease or exchange of motor vehicles, either at retail or wholesale, and to engage in and to do any lawful act concerning any lawful business for which businessnes may be incorporated under the Business Corporation Law.

William C. Cramer, Esq.
414 Chambersburg Trust Bldg.
Chambersburg, Pa. 17201

11-5

PLEASE NOTE!!!

Our Continuing Legal Education Contact, Attorney Rob Graham (717) 264-1100 has just informed the editor that the notice of PBI Video Presentation, "Collection and Enforcements of Judgments," has been delayed. Thus, we are inserting this brief reminder that the presentation will be made on November 9, 1982, beginning at 8:30 A.M. at the Franklin County Courthouse Jury Assembly Room. Cost: Appears to be $55.00, with reduced charge for Judges, their law clerks, and younger attorneys. Please see Rob for more details.

guilty pleas to be liberally allowed would have represented an incomplete charge and would have been confusing and misleading to the jury.

To permit any defendant to appear in open court accompanied by his counsel and make an on-the-record statement to a judge for the purpose of inducing that judge to accept a guilty plea; to then exercise the privilege granted him by the Rules of Criminal Procedure to withdraw his guilty plea before sentence; and to then permit him to testify at trial in direct contradiction of his prior statement to the court with impunity, and without being confronted with the prior inconsistent statement would be to encourage the perpetration of fraud upon the court and demean the entire judicial system. We have no intention of countenancing such outrageous conduct by giving it the imprimatur of judicial approval at the trial level.

In our judgment no error was committed; the jury's verdict was not contrary to the evidence presented at trial and the defendant's motions for a new trial and in arrest of judgment will be denied.

ORDER OF COURT

NOW, this 24th day of September, 1982, the defendant's post-trial motions in arrest of judgment and for a new trial are denied.

The Probation Department of this Court shall prepare and file a Pre-Sentence Investigation Report. The defendant will appear for sentencing on the call of the District Attorney after the filing of the Pre-Sentence Investigation Report.

Exceptions are granted defendant.

DALEY, ET AL. v. HORNBAKER AND WIFE - C.P. Franklin County Branch, Vol. 7, Page 282

Equity - Forged Signature - Tenant by Entirety - Estoppel of Claim.

1. Where husband and wife owned real estate as tenants by entireties and wife forged husband's name on a deed, the deed was ineffective and after