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PLJ

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Richard W. Schomaker v. Zoning Hearing Board of the Borough of Franklin Park and Borough of Franklin Park and Voicestream Pittsburgh, L.P., d/b/a T-Mobile

Zoning Variance—Dimensional Variance

1. T-Mobile applied to the Borough Council of Franklin Park for a building permit to erect a 150-foot monopole communications tower on a 40 x 40 foot portion of property it leases from Pennsylvania Power/First Energy pursuant to its license to provide communications services to western Pennsylvania and the Zoning Hearing Board (ZHB) granted a dimensional variance.

2. The property of Appellant, Richard W. Schomaker, is to the north of Subject Property with a setback of 62.81 feet to the property line and the residential structure on the Appellant's property is in excess of 300 feet from the proposed monopole. Appellant appeals on the basis that, among other things, the proposed use would be an extension of an illegal non-conforming use and the action of the ZHB was arbitrary, capricious, an abuse of discretion, and contrary to law.

3. A dimensional variance has a more relaxed quantum of proof required to prove unnecessary hardship because a dimensional variance is of a lesser change within the zoning regulations as opposed to a grant for a usage outside the zoning regulations. Courts may consider factors such as economic detriment to the appellant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

4. T-Mobile did not create the existing circumstances. The character of the neighborhood is not affected, as there is an existing utility use on the subject property and the unique topography of the property dictates the only possible location of the monopole. The variance is the minimum variance within the zoning requirements.

(William R. Friedman)

Deborah S. Miskovich for Richard W. Schomaker.
Gary J. Gushard for Zoning Hearing Board of the Borough of Franklin Park.
Robert Max Junker for Borough of Franklin Park.
Alice B. Mitinger for Voicestream Pittsburgh, L.P., d/b/a T-Mobile.

No. S.A. 08-000891. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., June 2, 2009—This appeal arises from the decision of the Zoning Hearing Board of the Borough of Franklin Park, Allegheny County, Pennsylvania dealing with Voicestream Pittsburgh, L.P. d/b/a T-Mobile's (hereinafter "T-Mobile") request for two dimensional variances to construct a 150-foot tall monopole communications tower facility an a 40 x 40 portion of property leased to them by property owners Pennsylvania Power/First Energy (hereinafter "Subject Property"). The variances are a condition to be met for subsequent conditional use approval from the Borough Council. The Subject Property is located at 2402 Rochester Road in Franklin Park and is in an M-1 (Mixed Use) District which permits communications towers as a conditional use.

The Franklin Park Zoning Ordinance sets forth specific criteria for commercial communications towers in the district, of which only one issue is pertinent to this appeal. Section 212-29.Y.5 of the Ordinance provides that "All communications towers shall be set back from any residential property line or public street right-of-way a minimum distance of 200 feet."

T-Mobile applied to the Borough Council of Franklin Park for a building permit to erect a 150-foot monopole communications tower facility on a 40 x 40 foot portion of property it leases from Pennsylvania Power/First Energy pursuant to its license to provide communications services to western Pennsylvania. The Subject Property is currently used for an electric utility substation and associated transmission equipment. This property is located near the intersection of Interstate Routes 79 and 279 in an M-1 District where both commercial and residential uses are located in the vicinity of the leased property. To obtain approval for the permit from Borough Council, T-Mobile needed to meet all conditions of the conditional use, specifically to obtain approval for a dimensional variance from the Zoning Hearing Board of the Borough of Franklin Park (hereinafter "ZHB")

The Appellant, Richard W. Schomaker's, property is to the north of Subject Property with a setback of 62.81 feet to the property line. The residential structure on the Appellant's property is in excess of 300 feet from the proposed monopole. A significant upward slope and a wooded area separates the Appellant's residence from the site of the proposed monopole on the property and the proposed monopole site faces the rear of the Appellant's residence. Interstate 79 is located to the east of the property. There is a setback of 108.62 feet from the site of the proposed monopole to the property's eastern boundary where there is a significant and non-buildable downward slope between the property and Interstate 79.

After several hearings,[1] the Zoning Hearing Board issued its Decision granting a dimensional variance to T-Mobile; 1) from the north line 137.19 feet variance and 2) from the east line 145.38 feet, with the following condition that the monopole be designed and built with the design criteria for collapse upon itself within the setback variances as granted, and subsequent approval of the monopole as a conditional use by Borough Council of Franklin Park.

Appellant, Richard W. Schomaker, appeals the ZHB decision to grant a dimensional variance to T-Mobile on the basis that, among other things, the proposed use would be an extension of an illegal non-conforming use and the action of the ZHB was arbitrary, capricious, an abuse of discretion, and contrary to the law. These arguments are without merit. The existing utility facility owned and operated by Pennsylvania Power is an approved conditional use within an M-1 District. The question before the ZHB, and the only issue that was appealed, was the request for dimensional variances.

Where the trial court takes no additional evidence beyond that heard by the Zoning Hearing Board, its scope of review is limited to determination of whether the ZHB committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

No variance in the strict application of any provisions of this zoning code shall be granted by the Zoning Board of Adjustment unless it finds that all of the following condi-

tions exist:

> 1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to the conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
>
> 2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
>
> 3. That such unnecessary hardship has not been created by the appellants;
>
> 4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use of development of adjacent property, nor be detrimental to the public welfare; and
>
> 5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible the regulation in issue.
>
> In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement to purposes of this act and the zoning ordinance.
>
> The applicant shall have the burden of demonstrating that the proposal satisfies the applicable review criteria.

Pennsylvania Municipalities Planning Code §910.2, 53 P.S. §10910.2

Because a communications tower is a permitted use, the case here involves a request for a dimensional variance and not a use variance. "When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Hertzberg v. Zoning Board of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1989).

A dimensional variance has a more relaxed quantum of proof required to prove unnecessary hardship because a dimensional variance is of a lesser change within the zoning regulations as opposed to a grant for a usage outside the zoning regulation. *Id.* at 47. To justify the grant of a dimensional variance, courts may consider multiple factors:

> 1. The economic detriment to the appellant if the variance was denied;
>
> 2. The financial hardship created by any work necessary to bring the building into strict compliance with zoning requirements; and
>
> 3. The characteristics of the surrounding neighborhood.

Id.

T-Mobile did not create the circumstances, and, in fact, sought other property in the area, including negotiating with Appellant for lease of Appellant's property. The character of the neighborhood is not affected, as there is an existing utility use on the subject property. The unique topography of the property dictates the only possible location of the monopole. The record shows that the variance is the minimum variance possible within the zoning requirements. And, upon approval of a dimensional variance, the proposed use of the property would be consistent with the conditional use criteria of the M-1 District of the Franklin Park Zoning Code and, therefore, not a matter detrimental to the public welfare.

A review of the record shows that there was substantial evidence taken and reviewed. The record does not show that the granting of the dimensional variance was capricious, an abuse of discretion, or an error of law. The variance granted is the minimum variance possible. And, there is no evidence that the Appellant would suffer a detriment if the dimensional variance is granted. Therefore, for the reasons stated above, the June 12, 2008 decision of the Zoning Hearing Board of the Borough Franklin Park is Affirmed.

ORDER OF COURT

AND NOW, to-wit, this 10th day of June, 2009, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Zoning Hearing Board of the Borough of Franklin Park is affirmed.

BY THE COURT:
/s/James, J.

[1] During the course of the hearings, T-Mobile relocated the proposed location of the monopole thereby adjusting the requested dimensional variance so that a variance to the west boundary line was no longer needed.

Betco, Inc. v. B. John Gatesman, Kimberly R. Gatesman, Gatesman Properties, Inc. and National City Bank

Contracts—Award of Attorneys Fees

1. The court is not bound by the parties' contract in determining what is a reasonable amount of attorneys' fees.

2. A party may seek attorneys' fees for the prosecution of a mechanics' lien action; however, that relief may only be awarded in the context of a separate civil action for breach of contract.

(Lynn E. MacBeth)

Paul R. Robinson for Plaintiff.
Steven W. Zoffer for Defendants.

No. GD 07-11167. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION AND ORDER OF COURT

Olson, J., June 16, 2009—This case is currently before the Court on the request of the Plaintiff, Betco, Inc. ("Betco") for attorneys' fees, expenses, interest and penalties. This request is made following the entry of the Order of Court dated January 20, 2009 in which this Court granted Plaintiff's Motion for Summary Judgment on Betco's claim that it is entitled to recover interest, penalties and reasonable attorneys' fees and expenses from Defendant, Gatesman Properties, Inc. ("Gatesman Properties"). *See*

January 20, 2009 Order of Court.[1] Although a hearing was scheduled for the purpose of determining the amount of interest, penalties, fees and expenses that Gatesman Properties owes to Betco, the parties agreed to forgo a hearing and, instead, have the matter decided based upon affidavits, exhibits and briefs.[2] In support of its claim for attorneys' fees and expenses, Betco submitted the Affidavit of Kenneth R. Michael, Esquire ("Michael Affidavit") and the Affidavit of Paul R. Robinson, Esquire ("Robinson Affidavit"). In response to the Affidavits, the Defendants filed a Memorandum of Law in Opposition to Plaintiff's Request for Fees, Interest and Penalties ("Defendants' Memorandum of Law") and Exhibits in support of said Memorandum of Law. In turn, Betco filed a Reply to the Gatesmans' Opposition Regarding the Reasonableness of Plaintiff's Attorneys Fees. The Court has reviewed all of these documents in detail and, based upon a careful review, has determined that Betco is entitled to recover $36,847 in attorneys' fees, $2,646.09 in expenses, $13,568.86 in interest (as of June 15, 2009) and $9,044.29 in penalties (as of June 15, 2009).

A. Attorneys' Fees and Expenses

In support of its claim for attorneys' fees and expenses, Betco submitted affidavits of two (2) lawyers — Kenneth R. Michael, Esquire of the firm of Womble Carlyle Sandridge & Rice, PLLC ("Womble Carlyle") and Paul R. Robinson, Esquire of Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. ("Meyer Darragh").

Mr. Michael's Affidavit avers that he and Womble Carlyle, who serve as Betco's national counsel, were retained to represent the interests of Betco in this litigation. (Michael Affidavit, ¶¶ 1, 5.) Attached to the Affidavit is "Exhibit B" which sets forth the fees of Mr. Michael and Womble Carlyle that were incurred "to first informally request payment of the amounts due and owing by Gatesman Properties, Inc. and then proceed with the mechanics' lien action and the separately required civil lawsuit to collect the principal amount, interest, penalty, and attorney fees due and owing from Gatesman Properties, Inc.". (*Id.*, ¶4.) The total amount claimed by Mr. Michael and Womble Carlyle is $25,076.50.[3] (*Id.*, ¶5; Exhibit B.)

Mr. Robinson's Affidavit avers that he and Meyer Darragh were retained to represent Betco in collecting "the amounts due and owing by Gatesman Properties." (Robinson Affidavit, ¶¶ 1, 5.) Attached to Mr. Robinson's Affidavit is "Exhibit B" which is a set of invoices from Meyer Darragh for services rendered and expenses and costs incurred from April 12, 2007 (when Meyer Darragh was apparently first contacted to represent Betco in the actions involving the Defendants) through December 31, 2008. (*Id.*, ¶3; Exhibit B.) "Exhibit C" to Mr. Robinson's Affidavit sets forth the attorneys' fees and expenses incurred from January 1, 2009 through February 19, 2009. (*Id.*, ¶4; Exhibit C.) The total amount of attorneys' fees sought by Mr. Robinson and Meyer Darragh through February 19, 2009 is $45,683.05 and the total amount of expenses through the same date is $2,646.09. (*Id.*, ¶7; Exhibits B and C.)

In response to the Affidavits submitted on behalf of Betco, the Defendants raise several objections. First, the Defendants argue that, under both the construction contract between Betco and Gatesman Properties and the Pennsylvania Contractor and Subcontractor Payment Act ("PCSPA"), Betco's claim for fees is limited to $4,351.16. Specifically, the Defendants argue that the contract at issue contains a provision regarding the amount of reasonable attorneys' fees that may be recovered by Betco if it must take legal steps to recover payment and that this provision controls. Alternatively, the Defendants argue that, even if Betco is entitled to recover its attorneys' fees under the PCSPA, Betco may only recover "reasonable" fees and the determination of what is "reasonable" is to be made by looking at the contract between the parties. Both of these arguments lack merit. First, this action was commenced by Betco to recover attorneys' fees, expenses, interest and penalties incurred as a result of Gatesman Properties' failure to make payments as required by the contract for the construction of a steel storage shed in Pennsylvania. Accordingly, the contract is governed by the PCSPA which provides in pertinent part that "[t]he owner shall pay the contractor strictly in accordance with terms of the construction contract." 73 P.S. §505(a). If the owner fails to make payments as required by the contract, the PCSPA allows the contractor to recover interest, penalties and attorneys' fees and expenses. *Id.*, §§505(d) (interest), 512(a) (penalty), 512(b) (attorneys' fees and expenses).[4] Section 512(b) of the PCSPA expressly provides:

> **(b) Award of attorney fee and expenses.–** *Notwithstanding any agreement to the contrary*, the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a *reasonable* attorney fee *in an amount to be determined by the court* or arbitrator, together with expenses.

(Emphasis supplied.) 73 P.S. §512(b). Thus, under the PCSPA the substantially prevailing party is entitled to reasonable attorneys' fees in an amount to be determined by the court even if there is an agreement between the parties that states otherwise. Accordingly, even if the contract between Betco and Gatesman Properties contains a provision regarding the amount of attorneys' fees that may be awarded, the contract provision does not control. Instead, the court is to determine the amount of fees that is reasonable. Secondly, the contractual provision does not dictate what is reasonable under the circumstances. In fact, if one were to accept the Defendants' argument, the prefatory language of Section 512(b)—i.e. "[n]otwithstanding any agreement to the contrary"—would be rendered superfluous as the terms of the parties' agreement would, in fact, be controlling. Instead, under the express language of the PCSPA, the determination of what is reasonable is to be made by the court. Further, under Pennsylvania common law, such a determination is within the sound discretion of the court. *Ware v. U.S. Fidelity and Guaranty Co.*, 395 Pa.Super. 501, 509, 577 A.2d 902, 906 (1990). Accordingly, the Court is not bound by the terms of the contract in making its determination of the amount of the attorneys' fees to be awarded to Betco.

The Defendants next argue that the amount of attorneys' fees being sought by Betco is too high as the Affidavits of Messrs. Michael and Robinson contain requests for fees related to the prosecution of Betco's mechanics' lien action. In support of this argument, the Defendants cite to *Artsmith Dev. Group, Inc. v. Updegraff*, 868 A.2d 495 (Pa.Super. 2005) in which the Pennsylvania Superior Court held that a claim for attorneys' fees cannot be part of a mechanics' lien claim under 49 P.S. §1301. Under *Artsmith*, attorneys' fees (and interest) are not recoverable in a mechanics' lien action as "the mechanics' lien statute—as strictly construed—does not authorize a lien for [attorneys' fees and interest]"; instead "[i]tems other than labor and materials are more properly sought in an action for breach of the construction contract." *Id.* at 497. The Defendants argue that *Artsmith* holds that attorneys' fees may only be awarded in the breach of contract case for work done in *that* case and not for work done in the mechanics' lien action. Additionally, the Defendants

argue that the PCSPA does not alter the law with respect to the non-recoverability of fees incurred in the mechanics' lien action as "[t]he PCSPA is very clear that attorney[s'] fees are only available for actions brought under the PCSPA, not for actions brought under the mechanics' lien statute." (Defendants' Memorandum of Law, p. 10.)

Although the Defendants' arguments appear persuasive at first blush, they do not withstand scrutiny for several reasons. First, contrary to the Defendants' argument, the Superior Court did not hold in *Artsmith* that only the attorneys' fees incurred in the prosecution of a breach of construction contract claim are recoverable under the PCSPA, nor did the Superior Court hold that attorneys' fees incurred in the prosecution of the mechanics' lien action cannot be sought in the separate civil action for breach of construction contract. Instead, the Superior Court expressly stated that "the plaintiff is at liberty to proceed against the property [through a mechanics' lien action] at the same time he resorts to a personal action against the defendant [through a breach of construction contract action], though he is limited to one ultimate satisfaction." *Artsmith*, 868 A.2d at 497, n.1. This Court does not read *Artsmith* as standing for the proposition that the plaintiff may *never* recover the attorneys' fees incurred in the prosecution of the mechanics' lien action. Rather, a party may seek attorneys' fees for the prosecution of the mechanics' lien action; however, that relief may only be awarded in the context of a separate civil action for breach of contract.

Further, the procedural history of this case does not lend credence to the Defendants' argument. In this case, Betco filed its mechanics' lien action against Gatesman Properties at the same time that it filed its breach of contract/PCSPA action against the Defendants. The mechanics' lien action was docketed at G.D. No. 07-011168 and this action was docketed at G.D. No. 07-011167. Summary judgment was entered against Gatesman Properties in the mechanics' lien action upon a finding that Betco was owed money for the construction of the storage building. The collateral estoppel effect given to that decision served as the basis for granting summary judgment against Gatesman Properties in this action. *See* Memorandum Opinion and Order of March 11, 2009. The issue of whether Gatesman Properties owed money to Betco for the construction of a storage building had to be litigated first since Betco would only be entitled to an award of attorneys' fees in this action after a finding was made that Betco was entitled to payment for the labor and materials used in the construction. Thus, the issue of Betco's entitlement to payment had to be litigated first and, under the procedural posture of this case, it was litigated in the mechanics' lien case filed at G.D. No. 07-0 11168 as opposed to the civil breach of construction contract/PCSPA case filed at G.D. No. 07-011167. The Defendants are careful not to argue that any provision of the PCSPA specifically precludes a breach of contract claim to recover attorneys' fees incurred in the prosecution of a mechanics' lien action. In fact, it would be a difference without a distinction if this were the case since, as previously discussed, the issue of whether the owner owes the contractor money must be determined at some point and it should not matter whether that issue was determined in a mechanics' lien action or an action for breach of the construction contract and/or the PCSPA. The same work had to be done by the attorneys in order to establish Betco's entitlement to payment and the Defendants do not claim that the attorneys' work on that issue was unnecessary.

Secondly, the Defendants' argument that the PCSPA prohibits recovery of attorneys' fees incurred in the prosecution of the mechanics' lien action also does not withstand scrutiny in light of Judge Wettick's decision in *Richardson v. Sherman*, 26 Pa. D. & C. 4th 193 (Pa. Com. Pl. 1996) in which Judge Wettick concluded that Section 12 of the PCSPA (73 P.S. §512) "applies to *any* litigation commenced against an owner who has failed to comply with the payment terms of the [PCSPA]."[5] *Id.* at 194. In this matter, Betco commenced two (2) actions against an owner who failed to comply with the payment terms of the PCSPA—the mechanics' lien action and the action for breach of construction contract/PCSPA. This Court found no controlling legal basis for the conclusion that the fees incurred by Betco in the prosecution of its mechanics' lien case against Gatesman Properties are not recoverable in this action.

Since Betco is entitled to reasonable attorneys' fees and expenses in the prosecution of the mechanics' lien action and this action, the Court now turns its attention to what those amounts should be.

"In assessing the reasonableness of attorney's fees and costs it is necessary to look at the amount of work performed, the character of services rendered, the difficulty of the problems involved, and the professional skill and standing of the attorney in the profession." *Twp. of South Whitehall v. Karoly*, 891 A.2d 780, 784 (Pa.Commw. 2006). As the Pennsylvania Supreme Court further explained:

> The amount of fees to be allowed to counsel, always a subject of delicacy if not difficulty, is one peculiarly within the discretion of the court of first instance. Its opportunities of judging the exact amount of labor, skill and responsibility involved, as well as its knowledge of the rate of professional compensation usual at the time and place, are necessarily greater than ours, and its judgment should not be interfered with except for plain error."

In re Trust Estate of LaRocca, 431 Pa. 542, 548, 246 A.2d 337, 340 (1968). Moreover, "[a]s a general rule, the method of determining a fee for legal services provided on an hourly basis is to multiply the total number of hours reasonably expended by the reasonable hourly rate." *Signora v. Travel Liberty, Inc.*, 886 A.2d 284, 293 (Pa.Super. 2005).

In this case, both Mr. Michael and Mr. Robinson submitted Affidavits containing exhibits which set forth the details of work performed, the amount of time spent performing the work, the persons performing the work and the hourly rates charged for the work. The exhibits attached to Mr. Robinson's Affidavit also delineate the expenses incurred.

The Defendants make several arguments as to why the attorneys' fees being claimed are not reasonable. First, the Defendants argue that Betco should be precluded from recovering *any* fees billed by Mr. Michael as he "has not played an active role in the litigation." (Defendants' Memorandum of Law, p. 10.) Specifically, they argue that Mr. Michael never appeared in court on this case, never sought admission *pro hac vice*, did not attended the deposition conducted in this case, and has had no contact with defense counsel since Mr. Robinson became involved. Thus, the Defendants argue that Mr. Michaels's fees should be rejected in their entirety. Alternatively, they argue that Mr. Michael's fees should be reduced by ninety (90%) percent under the coordinate jurisdiction rule as Judge Friedman, in a separate action involving some of the same parties, reduced Mr. Michael's fees by that amount.[6] Both arguments fail.

First, the record before this Court clearly establishes that Mr. Michael did play a role in the litigation between Betco and the Defendants and, therefore, his fees should not be disregarded in their entirety. As set forth in Mr. Michael's Affidavit, he and his firm serve as Betco's nation-

al counsel. (Michael Affidavit, ¶2.) This Court is very familiar with the role of national counsel in litigation and understands the importance of having national counsel involved in cases even if another lawyer or law firm is handling the actual litigation. National counsel renders an important service to clients as it provides overview, insight, coordination, strategy and consistency. Just because Mr. Michael did not enter his appearance, appear in court or attend depositions does not mean that he did not provide valuable legal advice or services to his client. If one were to accept the Defendants' argument that lawyers who do not have direct day-to-day involvement in litigation cannot recover their fees, many lawyers (including senior partners and junior associates in law firms) would never have their fees awarded as they frequently work "behind the scenes" and do not play an "active role" in the litigation.

Furthermore, the coordinate jurisdiction rule does not apply to this analysis. The coordinate jurisdiction rule generally prohibits a judge from overruling an earlier decision of another judge of the same court *in the same case*. *Bednar v. Dana Corp.*, 926 A.2d 1232, 1236 (Pa.Super. 2008). In a separate action filed at G.D. No. 07-21514, Judge Friedman of the Court of Common Pleas of Allegheny County entered an Order with respect to the attorneys' fees request made by Betco. Judge Friedman's order was not entered in *this case*. Instead, Judge Friedman determined the amount of reasonable attorneys' fees to be awarded in a case before her that involved some of the same parties as are involved in this action. Judge Friedman did not make a ruling of law but was exercising her sound discretion in determining the reasonable amount of attorneys' fees to which Betco was entitled and she made that determination after considering the issues in that case, the work performed, the time spent and the hourly rates charged. Just as Judge Friedman exercised her discretion in making the fee determination on the record before her, this Court must look to the record before it and consider such things as the amount of work performed, the character of services rendered, the difficulty of the problems involved, and the professional skill and standing of the attorney in the profession.[7] *See Twp. of South Whitehall v. Karoly, supra.*

In accordance with its obligation, this Court looked carefully at the invoices submitted by Mr. Michael and Womble Carlyle. Based upon these invoices, it appears that Mr. Michael and his firm were solely representing Betco in the litigation involving the Defendants from March 14, 2007 until on or about April 30, 2007 when Mr. Robinson and Meyer Darragh were retained to assist in the representation of Betco. (Michael Affidavit, Exhibit B.) The total amount of time billed by Mr. Michael and his firm during this time period is 10 hours. (*Id.*) The work performed included conversations with the client and others, research, drafting of a demand letter, and selection of Pittsburgh counsel. After Mr. Robinson and his firm were retained, Mr. Michael and Womble Carlyle served exclusively as national counsel providing insight, oversight and strategic analysis to the client and Pittsburgh counsel. The total amount of time billed for the work performed by Mr. Michaels and his firm after Pittsburgh counsel was retained is 48 hours. (*Id.*) Some of that time was spent dealing with the *pro se* case filed by the Gatesmans and the Gatesmans' counterclaims. As noted by the Defendants, the fees incurred for time spent on these matters are not recoverable under either the construction contract or the PCSPA. Mr. Michael spent approximately 5 hours on these matters. These hours must be deducted from the remaining 48 hours spent by Mr. Michael and Womble Carlyle leaving 43 hours spent in providing oversight as national counsel. The Court believes that 43 hours is an unreasonable amount of time spent in overseeing this case. Although Mr. Michaels' services appear necessary, the Court does not believe that this case was so complex or raised unique issues that would require so many hours of oversight, coordination or strategizing. Accordingly, the Court has reduced these hours by fifty (50%) percent and has added the remaining oversight hours (21.5) to the 10 hours spent before Mr. Robinson and Meyer Darragh became involved to arrive at 31.5 hours which the Court believes is a reasonable amount of time expended by Mr. Michael and his firm on this matter.

The Court then looked at the hourly rate of $415 charged by Mr. Michael for the work performed in this case. Again, this Court is very familiar with rates charged in litigation, including rates charged by national counsel and believes that this rate is unreasonable under all of the facts and circumstances. Instead, the Court believes that $250 is a more reasonable hourly rate to be charged in this instance. Applying the hourly rate of $250 to 31.5 hours, Betco shall be awarded $7,875 for the services rendered by Mr. Michael and Womble Carlyle.

The Court now turns its attention to the attorneys' fees charged by Mr. Robinson and Meyer Darragh. As was the case with the invoices submitted by Mr. Michael and Womble Carlyle, the time spent by Mr. Robinson and Meyer Darragh on the Gatesmans' *pro se* case and the counterclaims is not recoverable. Additionally, the Court does not believe that the time spent by Mr. Robinson and Meyer Darragh discussing the case with Mr. Michael and others, preparing budgets, providing status reports, doing ministerial work such as disseminating pleadings, etc. was reasonable. Further, some of the time spent on the drafting of briefs appeared excessive. The Court carefully reviewed each time entry on the invoices submitted attached to Mr. Robinson's Affidavit and deducted that time spent on these tasks which the Court believed was not reasonable. The Court then multiplied the total number of hours (which was deemed reasonable) by the hourly rates charged by Mr. Robinson and Meyer Darragh[8] to arrive at final amount of $28,972 which shall be awarded to Betco for services rendered by Mr. Robinson and Meyer Darragh.

As for expenses, the invoices submitted by Mr. Robinson and Meyer Darragh set forth costs and expenses in the amount of $2,646.09. The expenses incurred and the amounts charged for these expenses appear reasonable; therefore, Betco shall be awarded $2,646.09 in expenses.

B. Interest

Section 5(d) of the PCSPA (73 P.S. §505(d)) provides:

> *Except as otherwise agreed by the parties,* if any progress or final payment to a contractor is not paid within seven days of the due date established in subsection (c), the owner shall pay the contractor, beginning on the eighth day, interest at the rate of 1% per month or fraction of a month on the balance that is at the time due and owing.

(Emphasis supplied.) In the contract at issue, the parties agreed that "in the event [owner] fails to make any payment pursuant to the payment terms, an additional 1 1/2% service fee per month is required to be paid until the due amount is paid in full…." (Exhibits to Defendants' Memorandum of Law, Exhibit A, ¶14.) As the parties agreed to a 1 1/2% per month interest rate to be applied to past due amounts, that rate must be used to determine the amount of interest due. Applying that rate to the amount of $29,007.74 (principal amount due) from November 2, 2006 through June 15, 2009,

the amount of interest due is $13,568.86. Said amount shall be awarded to Betco.[9]

C. Penalties

Section 512(a) of the PCSPA provides:

> **(a) Penalty for failure to comply with act.–** If arbitration or litigation is commenced to recover payment under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld. An amount shall not be deemed to have been wrongfully withheld to the extent it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment.

73 P.S. §512(a). Pursuant to this provision, a 1% per month penalty is assessed against the principal amount of $29,007.74 from November 2, 2006 through June 15, 2009 for an award to Betco in the amount of $9,044.29.

D. Stay of Execution

Gatesman Properties requests a stay of execution upon any amount awarded by this Court until the appeal of the mechanics' lien case is decided by the Pennsylvania Superior Court. This request was previously denied by the Court (Memorandum Opinion and Order of March 11, 2009) and the Court sees no reason to change its position. To the extent Gatesman Properties wishes to stay the execution on the amounts awarded, it may seek a stay under Rule 3121 of the Pennsylvania Rules of Civil Procedure.

An appropriate Order follows.

ORDER

AND NOW, to-wit this 16th day of June, 2009, upon consideration of the Plaintiff's Request for Fees, Interest and Penalties, the parties' briefs, affidavits and exhibits, and in accordance with the foregoing Memorandum Opinion, it is hereby ORDERED, ADJUDGED and DECREED that the judgment entered by this Court on January 20, 2009 is amended to provide that Defendant, Gatesman Properties, Inc. shall pay the following to Plaintiff, Betco, Inc.:

1. Attorneys' fees of Womble Carlyle Sandridge & Rice, P.L.L.C. in the amount of $7,875;

2. Attorneys' fees of Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. in the amount of $28,972;

3. Expenses of Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. in the amount of $2,646.09;

4. Interest in the amount of $13,568.86 (from November 2, 2006 through June 15, 2009), and accruing thereafter at the rate of $14.35 per day until paid in full; and,

5. Penalties in the amount of $9,044.29 (From November 2, 2006 through June 15, 2009), and accruing thereafter at the rate of $9.56 per day until paid in full.

Olson, J.
Court of Common Pleas
of Allegheny County, PA

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[1] Following entry of the January 20, 2009 Order of Court, the Defendants filed a Motion for Reconsideration and/or Application for Determination of Finality of Order ("Motion for Reconsideration"). On March 11, 2009, this Court issued a Memorandum Opinion and Order in which it denied the Defendants' Motion for Reconsideration.

[2] Although Gatesman Properties agreed to have this matter decided on court filings, it expressly objects to any award of fees, expenses, interest or penalties on the basis that summary judgment was improperly granted in this case. Thus, it responded to Plaintiff's request for fees, interest and penalties without waiving its objection. *See* Memorandum of Law in Opposition to Plaintiff's Request for Fees, Interest and Penalties, p. 2.

[3] Based upon Exhibit B to Mr. Michael's Affidavit, the amount of $25,076.50 being claimed is for attorneys' fees only. There are no expenses identified.

[4] The Defendants argue that Betco is not entitled to attorneys' fees, interest or penalties since the construction contract between the parties was negated by Judge Lutty in the mechanics' lien action and that the "new" contract found by Judge Lutty does not contain any provisions for the recovery of fees, costs, penalties or interest. This argument must fail for two (2) reasons. First, the change orders to which the Defendants make reference expressly state that "[a]ll other terms and conditions of this contract shall remain the same." (Defendants' Memorandum of Law, Exhibit A.) Thus, even under the "new" contract, Betco would be entitled to recover fees, costs and interest. Second, and more importantly, Betco is entitled to fees, costs, interest and penalties under the PCSPA as this Court stated in its previous Memorandum Opinion dated March 11, 2009.

[5] The payment terms of the PCSPA are governed by Section 5 (73 P.S. §505) which provides that an owner shall pay the contractor strictly in accordance with the terms of the construction contract, or, if there is no construction contract, then the contractor may submit a final invoice upon completion of the work and payment shall be made within thirty (30) days after delivery of the invoice.

[6] Judge Friedman issued a Memorandum in Support of Order and Order of Court in the case of *Gatesman Properties, Inc. and John and Kimberly Gatesman v. Betco, Inc., Terry L. Huber, Ken Lewis, Terry Campbell, Rhonda Hayes and Christine Kitts* filed at G.D. No. 07-21514.

[7] The Defendants argue that the attorneys' fees being sought should be deemed unreasonable merely because the amount being claimed exceeds the amount at issue in the litigation. First, it should be noted that the amount at issue in this case is not just the principal due under the contract of $29,007.74, but it also includes interest and penalties. Secondly, the mere fact that the fees being sought exceed the amount at issue is not determinative of reasonableness. Instead, the Court must look at the totality of the facts and circumstances in this case (i.e., the litigious nature of the disputes, the work that was required, the experience of the lawyers, etc.) in determining what was reasonable. In this case, the parties have fought vociferously and have engaged in extensive pleadings and motions practice, discovery, appeals, etc. The parties have chosen to fight their battle vigorously in court over a period of two years which is certainly their right to do. It does not seem fair, however, to have the Defendants engage in these ongoing legal battles (even knowing that there is the risk of having to pay attorneys' fees) and then complain that the fees incurred by the Plaintiff are higher than the amount at issue.

[8] The invoices attached to Mr. Robinson's Affidavit indicate that Mr. Robinson's hourly rate is $195, Jason Rosenberger's hourly rate is $145 and Matthew Ashby's hourly rate is $90. (Robinson Affidavit, Exhibits B and C.) The Court believes that these rates are reasonable. The invoices also indicate that James Miller's hourly rate was $90 and then increased at some time in September or October 2008 to $145. (*Id.*, Exhibit B.) No explanation was given for this $55/hour increase. The Court believes it is more reasonable to keep Mr. Miller's hourly rate to $90 for purposes of this attorneys' fee award.

[9] The Court noted in its Memorandum Opinion and Order of March 11, 2009 that Judge Lutty awarded interest and costs to Betco in the mechanics' lien action pursuant to his Order of Court dated August 21, 2008. (Memorandum Opinion and Order, pp. 11, n.6, 12, n.8.) Under the holding of the Pennsylvania Superior Court in *Artsmith, supra,* claims for damages other than the costs of labor and materials are more properly sought in a separate civil action for breach of contract or violation of the PCSPA though the contractor is limited to one ultimate satisfaction. Thus, Betco is entitled to only one award for interest and costs and cannot seek duplicative amounts awarded in the mechanics' lien action.

Christopher Belajac v. Allegheny County Housing Authority

Public Housing—Termination—HUD Regulation §982.553(a)(2)(ii)

The investigating officer's opinion that a sex offender should not be permitted to continue on Section 8 assistance, especially where the victim was five years old, was not valid reason for termination of assistance.

(Lynn E. MacBeth)

Michael E. Moser for Appellant.
Renee L. Mielnicki for Appellee.

No. SA 08-1403. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

AMENDED MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., June 23, 2009—The Decision of the hearing officer reveals she simply accepted the fact that Allegheny County Housing Authority ("ACHA") has the power to terminate the Appellant and then adopted the view of the Investigating Officer that was stricter than the applicable regulations.

> In ¶4 of her Decision the hearing officer states:
>
> 4. HUD Regulation §982.553(a)(2)(ii) provides that the housing authority may prohibit admission to the program if the housing authority determines that the member engaged in, or has engaged in during a reasonable time before the admission, criminal activity which may threaten the health, safety and right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity.

And then in ¶10 of the Decision the hearing officer states the Investigating Officer's opinion of what the law ought to be:

> 10. When the ACHA was asked at the hearing about its views as to whether a non-lifetime registrant should be terminated, the Investigating Officer expressed her view that a sex offender of any kind should not be permitted to continue on Section 8 assistance, especially in this case where the victim was 5 years old. Thus, both in general and based on the circumstances of this case, the ACHA has requested to terminate Tenant's participation in Section 8.

Lastly, in ¶11 of the Decision, the hearing officer stated, in effect, that the Investigating Officer's opinion of what the applicable rules should be, constituted "valid reasons" for ACHA's Decision to terminate Appellant's Section 8 assistance.

The ACHA offered no other reason for the termination of *this* person's Section 8 benefits except an opinion that its own rules should be different than they are.

The Findings of Fact made by the Hearing Officer reveal that Appellant's mental challenges are severe due to a brain injury, that his mother handled his Section 8 paperwork and unintentionally failed to report the criminal conviction that underlies this dispute. The Hearing Officer also credited the support of the Chief of Police and others "who attest to [Appellant's] character and do not wish to see him removed from the Section 8 program." See Letter Decision dated November 10, 2008, from the Hearing Officer to Appellant, page 2, "Decision," ¶1.

The appeal must be granted as there was no *evidence* to support the Decision to terminate Appellant's Section 8 benefits. See Order separately filed.

BY THE COURT:
/s/Friedman, J.

Dated: June 29, 2009

Steve Smith v. Housing Authority of the City of Pittsburgh

Denial of Public Housing Application—Criminal Record—Rehabilitation

The Court upheld denial of Appellant's public housing application based on his criminal convictions for murder and, after that, two misdemeanors.

(Lynn E. MacBeth)

Mary Ellen Droll for Appellant.
John Ciroli for Appellee.

No. SA 08-1210. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., June 24, 2009—This statutory appeal involves the *denial* of Mr. Smith's Low Income Public Housing Application based on the undisputed fact that he was convicted of third degree murder in 1981 and was sentenced to prison for a period of 9-20 years. He was released from prison at some point and was later convicted of two misdemeanors, one in 1994 and one in 1995. He has had no subsequent convictions.

He also is in poor health and is currently living in a nursing home where he is "a friendly and compliant resident."

We note first that a *denial* of public housing does not ordinarily constitute a violation of a *constitutional* right. The issue here is whether or not the Housing Authority of the City of Pittsburgh ("HACP") has abused its discretion in establishing regulations that seem to mandate permanent

("lifetime") exclusion from public housing of persons such as Mr. Smith. HUD regulations contain no such mandate.

The Record below includes a transcript of the Grievance Hearing held on August 29, 2008, and the Decision of the Hearing Officer dated September 15, 2008. The Hearing Officer indicated that, although counsel for both sides had briefed the issue of whether or not HACP "must take into account evidence of rehabilitation," her decision "rest[ed] on other grounds." Those grounds were that HACP had adopted a point system for applicants with a criminal history pursuant to HUD regulations. Under that system, Mr. Smith would be ineligible for public housing until November 2009, i.e. later this year.

The Hearing Officer then evaluated the grounds briefed by counsel, "evidence of rehabilitation." She stated that "were [she] to consider rehabilitation, [she] would not yet be convinced that rehabilitation exists." In essence, she felt that his "refraining from alcohol for certain periods of time was, given the date on the certificate [from] SCI-Pittsburgh, likely due to periods of incarceration, rather than voluntary abstinence." She also indicated that alcohol abuse and addiction was "the implied basis for [Mr. Smith's] prior life of crime."

In other words, although the Hearing Officer did not need to consider the issue of rehabilitation because of her use of the point system, she nevertheless found that here the evidence did not suggest that this applicant was "rehabilitated." The implication is that, even had the HACP *considered* "evidence of rehabilitation," such evidence was not sufficient at that point in time to warrant the conclusion that Mr. Smith is "rehabilitated."

On appeal, counsel for the parties again focused on the issue of rehabilitation, although the point system and the Hearing Officer's calculations are briefly discussed. We conclude that her calculations do not seem incorrect. We also conclude that there was substantial evidence to support the decision of the Hearing Officer.

The case raises questions of social policy, such as the housing needs of convicts who have been "freed" only to find themselves without the financial means to pay market rent, and the expenditure of tax monies for nursing home care rather than rental supplements. However, these questions are for the Legislature to address.

Unfortunately, Mr. Smith may, in fact, actually be rehabilitated, in the sense that he is unlikely given his current age and state of health, to commit any crimes. This is not the issue on appeal, however. The Hearing Officer is the person who evaluated Mr. Smith's credibility and the weight of the various items of circumstantial evidence. We have no basis to disagree with her conclusions.

The appeal must be denied, without prejudice to Mr. Smith's right to re-apply in November 2009, as permitted by the Hearing Officer's express ruling. At that point the issue of rehabilitation will be a central issue. Any comment by us on how that should play out would require an advisory opinion, which we are forbidden to issue.

See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: June 24, 2009

ORDER OF COURT

AND NOW, to-wit, this 24th day of June 2009, Appellant's appeal is hereby DENIED for the reasons set forth in the accompanying Memorandum in Support of Order.

BY THE COURT:
/s/Friedman, J.

Commonwealth of Pennsylvania v. Troy Joseph

Post-Conviction Relief Act Petition—Timeliness—After-Discovered Evidence

1. Defendant filed a PCRA Petition after limitation period of one year after his conviction.

2. Defendant sought the after-discovered evidence exception to the time limitation, alleging the existence of a new witness. The court found that Defendant failed to demonstrate in his petition that "the facts upon which the claim is predicated were unknown [to him] and could not have been ascertained by the exercise of due diligence," since the letter allegedly received by the witness was in response to a letter sent to the witness by counsel, indicating that someone knew of the witness's existence.

(Lynn E. MacBeth)

Ronald Wabby for the Commonwealth.
Defendant, *pro se*.
Nos. CC9707436, 9707909. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., September 17, 2009—The Defendant has appealed from this Court's Order of April 20, 2009, which dismissed his Third Amended PCRA Petition without a hearing. However, because a review of the record reveals that because the Defendant's Petition was untimely filed, this Court was without jurisdiction to address it. The Petition was, therefore, properly dismissed.

The Defendant was charged with Criminal Homicide[1] and a Violation of the Uniform Firearms Act: Firearms Not to be Carried Without a License.[2] Following a jury trial before this Court, the Defendant was convicted of First-Degree murder as well as the VUFA charge. The Defendant appeared before this Court on March 16, 1998 and was sentenced to a term of life imprisonment without the possibility of parole. The judgment of sentence was affirmed by the Superior Court on August 13, 1999. The Defendant did not seek Supreme Court review.

On July 14, 2000, the Defendant filed a pro se PCRA Petition. Counsel was appointed and an Amended Petition was subsequently filed. After giving the appropriate notice and reviewing both the Defendant's pro se response and counsel's (verbatim) response thereto, this Court denied the Amended PCRA Petition without a hearing on September 24, 2001. That Order was affirmed by the Superior Court on March 5, 2003. The Defendant's subsequent Petition for Allowance of Appeal was denied on September 16, 2003.

On November 4, 2004, the Defendant filed a second pro se PCRA Petition in which he alleged a claim of an after-discovered witness. This Court initially denied relief pursuant to the time-limitation provisions of the Act, but the Superior Court remanded the case for an evidentiary hearing on the Defendant's Prisoner Mailbox Rule claim. Following the proscribed evidentiary hearing, this Court again denied relief by its Order of October 17, 2007. The Superior Court affirmed the dismissal on February 18, 2009. The Defendant did not seek Supreme Court review.

While review of this Court's October 17, 2007 Order was pending, the Defendant filed a third pro se PCRA Petition on September 29, 2008, alleging a second after-discovered witness. An Amended Petition was filed by counsel on March 19, 2009. After giving the appropriate notice, this Court dismissed the Third Amended Petition on April 20, 2009. This appeal followed.[3]

The time limitation provisions of the Post-Conviction Relief Act are jurisdictional in nature and cannot be waived. Trial courts lack jurisdiction to address untimely petitions.

Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999). Ordinarily, petitions must be filed within one (1) year of the date the judgment of sentence becomes final. 42 Pa.C.S.A. §9545(b)(1). However, the Post-Conviction Relief Act does provide an exception for after-discovered evidence. It states:

> *§9545. Jurisdiction and proceedings*
>
> *(b) Time for Filing Petition -*
>
> *(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:*
>
> *..(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;..*
>
> *(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.*

42 Pa.C.S.A. §9545(b).

As our Superior Court acknowledged, the Defendant's judgment of sentence became final on September 12, 1999, and therefore, in order to be timely, any and all PCRA Petitions must have been filed by September 12, 2000. The instant Petition, filed on September 29, 2008, is obviously well outside of that limitation.

The Defendant, however, seeks the protection of the after-discovered evidence exception, with the claim of an allegedly new witness, Michael Harrison, an inmate at SCI-Huntingdon. In support of his claim, defense counsel attached a letter from Mr. Harrison dated September 9, 2008. If this Court did believe that September 9, 2008 was the actual date of discovery of this witness, then the Petition would be timely. However, a careful examination of the letter reveals that the letter was sent in response to Mr. Feeney's letter ***to him*** of August 20, 2008. Thus, it is clear that *someone* knew of Mr. Harrison's existence prior to August 20, 2008 and advised the Defendant (if it was not, in fact; the Defendant himself who contacted Mr. Harrison), who then passed the contact information along to Mr. Feeney. Neither the Defendant nor his counsel indicate **when** they learned of Mr. Harrison's existence and proposed testimony. Absent any such indications, the Defendant has not demonstrated that "the facts upon which the claim is predicated were unknown [to him] and could not have been ascertained by the exercise of due diligence" 42 Pa.C.S.A. §9545(b)(1)(ii), and this Court's dismissal was appropriate. *Commonwealth v. Yarris*, 731 A.2d 581, 590 (Pa. 1999). See also *Commonwealth v. Priovolos*, 746 A.2d 621, 626 (Pa.Super. 2000).

Accordingly, for the above reasons of fact and law, this Court's Order of April 20, 2009 must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

Dated: September 14, 2009

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[1] 18 Pa.C.S.A. §2501

[2] 18 Pa.C.S.A. §6106

[3] It bears mention that on May 12, 2009, the Defendant filed a **fourth** pro se PCRA Petition, with subsequent amendment by counsel on June 11, 2009, which again purports to raise an after-discovered evidence claim in the form of *another* after-discovered inmate-witness. Recognizing that it currently lacks jurisdiction to rule on the Petition, the case now being within the jurisdiction of the Superior Court, but in an attempt to mitigate the procedural confusion caused by the Defendant's continual - and extremely convenient - "discovery" of new witnesses and his resultant filing of numerous Petitions thereon, this Court issued an Order noting the filing date for future proceedings but staying any action on the Fourth Amended Petition until the instant appeal is decided and jurisdiction relinquished.

Commonwealth of Pennsylvania v. Bobby Ricks

Dual Representation—Conflict of Interest—Guilty Plea

A conflict of interest did not exist for counsel who represented co-defendants prior to trial, wherein both defendants entered guilty pleas, counseled by separate attorneys.

(Lynn E. MacBeth)

Michael Streily for the Commonwealth.
Christy Foreman for Defendant.

No. CC200716351. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Durkin, J., June 23, 2009—The Defendant was charged with one (1) count each of Possession with the Intent to Deliver a Controlled Substance,[1] Possession of a Controlled Substance Drugs, Device or Cosmetic,[2] Possession or Distribution of Small Amount,[3] Possession of Drug Paraphernalia,[4] and Criminal Conspiracy.[5] These charges arose from incidents occurring in March of 2007.

In March of 2007, the Defendant and Toni Koonce shared a residence from where they sold crack cocaine. Because of information known to law enforcement, a confidential informant was sent by police to the residence to make a controlled narcotics purchase. The confidential informant went to the house and bought cocaine from the Defendant. Though the Defendant was never charged with that delivery, based upon the controlled buy the police obtained a search warrant for the structure. When the warrant was executed, the police seized 72.50 grams of crack cocaine, and 11.85 grams of marijuana from inside the house. The Defendant was found to have 2.04 grams of crack cocaine on his person at the time of his arrest. The police as a result of the search in this matter also seized a total of $3,018.00 in United States currency. (P.T. 9-12)[6] Both the Defendant and Toni Koonce were subsequently charged.

On June 16, 2008, the Defendant, represented by Attorney Joseph Kanfoush, entered into a plea agreement to plead guilty to all charges filed at CC#200716351. After waiving his right to a pre-sentence report, the Defendant proceeded immediately to sentencing and received a mandatory 3 to 6 year term of imprisonment. Also on June 16, 2008, Toni Koonce, while represented by the Allegheny County Public Defender's Office, entered a guilty plea to the charges filed against her at CC#200716303. She likewise waived her right to a pre-sentence report and proceeded immediately to sentencing. Ms. Koonce was sentenced, pursuant to the plea agreement, to 15 months of probation. (P.T. 11) Neither defendant filed a direct appeal.

The Defendant filed a *pro-se* petition for post-conviction relief (PCRA). Counsel was appointed and on February 18, 2009 and filed an amended petition. Both the *pro-se* petition and the amended petition argue that Attorney Kanfoush was ineffective for representing both the Defendant and

Ms. Koonce. The amended petition states: "Petitioner's prior counsel was ineffective for proceeding to represent both the Petitioner and the Petitioner's fiancé, the co-defendant in this case, Ms. Toni Koonce, thus preventing the Petitioner from calling Ms. Koonce as a witness due to the conflict of interest." (Amended Post-Conviction relief Act Petition at p. 3)

The Commonwealth responded to counsel's amended petition on March 11, 2009. On March 26, 2009, this Court issued a notice of intention to dismiss, pursuant to Pa.R.Crim.P. 907. On May 6, 2009, the Defendant's post-conviction petition was dismissed without a hearing. The Defendant's counsel then filed a timely Notice of Appeal.

The standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. *Commonwealth v. Halley*, 870 A.2d 795, 799 n.2 (Pa. 2005) The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Carr,* 768 A.2d 1164, 1166 (Pa.Super. 2001)

In order to ensure a voluntary, knowing, and intelligent plea, a plea court is required, at a minimum, to ask the following questions:

> 1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?
>
> 2) Is there a factual basis for the plea?
>
> 3) Does the defendant understand that he or she has the right to a trial by jury?
>
> 4) Does the defendant understand that he or she is presumed innocent until found guilty?
>
> 5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
>
> 6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Pollard, 832 A.2d 517, 522-23 (Pa.Super. 2003); Pa.R.Crim.P. 590.

The analysis to determining whether a defendant's plea is knowing, voluntary, and intelligent requires an examination of the totality of the circumstances surrounding the plea. Even if there is an omission or defect in the guilty plea colloquy, the guilty plea will not be deemed invalid if the defendant fully understands the nature and consequences of his or her plea and then voluntarily and knowingly decides to plead guilty. *Commonwealth v. Blackwell*, 647 A.2d 915 (Pa.Super. 1994), alloc. denied, 655 A.2d 509 (1995)

In this matter, the Defendant testified during his plea that he was able to read, write, and understand the English language. The Defendant completed a 10 page, 68 question, *Guilty Plea Explanation of Rights* form while his attorney was available for consultation. The Defendant stated that he understood all the questions on the form, and had no questions for the Court. This Court made inquiry into all the relevant points of inquiry required by the *Pollard* decision. This Court finds that the Defendant fully understood the nature and consequences of his plea, and voluntarily and knowingly decided to plead guilty.

The Defendant claims, however, that plea counsel was ineffective because counsel had previously represented both the Defendant and Ms. Koonce in this case. An Attorney Certificate attached to the Commonwealth's Answer to Amended Post-Conviction Relief Act Petition indicates that Attorney Kanfoush had represented the Defendant and Ms. Koonce at their preliminary hearings in this case, and at bond forfeiture proceedings for both when they missed scheduled court appearances. Attorney Kanfoush, however, withdrew his appearance for Ms. Koonce and the public defender's office was appointed to represent Ms. Koonce for trial purposes. The Attorney Certificate further states that the Defendant never told defense counsel that he wanted Ms. Koonce to testify at a trial, and Ms. Koonce never indicated that she wanted to testify for the Defendant.

A defendant who argues that he has been denied the right to counsel due to dual representation of defendants in criminal proceeding must demonstrate that a conflict of interest actually existed at trial. Merely having dual representation alone does not amount to a conflict of interest. *Commonwealth v. Breaker,* 318 A.2d 354 (Pa. 1974) In this case, there was no dual representation at the time of trial. Separate and independent attorneys represented the Defendant and Ms. Koonce at the time set for trial. When Ms. Koonce entered her guilty plea, she was represented by the public defender's office. Private counsel represented the Defendant. If the Defendant wanted to proceed to trial, and subpoena Ms. Koonce to testify on his behalf, he could have easily done so. The Defendant has provided no indication, however, that Ms. Koonce was ready, willing, and able to provide testimony helpful to the Defendant. Therefore, based on the above, this Court cannot find that Attorney Kanfoush was ineffective in his representation of the Defendant.

For all of the above reasons, the Order of Court denying Defendant's post-conviction petition must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: June 23, 2009

[1] 35 P.S. §780-113(a)(30)

[2] 35 P.S. §780-113(a)(16)

[3] 35 P.S. §780-113(a)(31)

[4] 35 P.S. §780-113(a)(32)

[5] 18 Pa.C.S. §903(a)(1)

[6] "P.T." represents the plea and sentencing transcript dated June 16, 2008.