

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Winona Williams, Administratrix of the Estate of Earl Williams, Deceased v.
Sewickley Valley Hospital and Heritage Valley Health System**

Hospital Negligence—Error of Judgment Charge to Jury—Medical Malpractice—Pringle v. Rapaport, 2009, Pa.Super. 171, 980, A.2d 159 (2009)

1. Plaintiff's decedent fell while confined to the hospital after having been assessed as a fall risk and placed on safety and fall prevention measures.

2. Plaintiff alleged that decedent fell and died due to negligence by nurses in failing to monitor and observe him with sufficient frequency and failing to use proper fall prevention protocols.

3. The jury returned a verdict against the plaintiff and in favor of the defendants.

4. Plaintiff's motion for a new trial argued that the court erred in giving an "error of judgment" charge to the jury, which is now prohibited under *Pringle v. Rapaport*. An "error of judgment" charge provides generally that physicians are not responsible for "mere errors in judgment" or the use of "best judgment" unless the resulting error constitutes, or was the result of, negligence. The *Pringle* court ruled that giving an "error of judgment" charge was reversible error. The court granted the motion for a new trial.

(Lynn E. MacBeth)

Lawrence M. Kelly for the Plaintiff.

Deborah A. Kane for Defendant.

No. GD 08-7460. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., April 23, 2010—This matter comes before the Superior Court on the appeal of the Defendant, Sewickley Valley Hospital, from the Order of this Court granting Winona M. Williams' Motion for Post-Trial Relief.

I. BACKGROUND

On July 24, 2006, Earl Williams, the decedent, was admitted to Sewickley Valley Hospital (hereinafter "Defendant") for abdominal pain following a recent sigmoid resection. At said time, Mr. Williams walked independently with lower extremity weakness noted. He had no history of previous falls. Despite a lack of history, Mr. Williams was assessed as a fall risk and was placed on safety and fall prevention measures.

In the morning hours of July 26, 2006, Mr. Williams' roommate alerted hospital staff after hearing a noise in the bathroom. The staff discovered Mr. Williams on the floor, awake, unable to speak, with his right leg and arm flaccid. Mr. Williams died the following day.

Winona M. Williams (hereinafter "Plaintiff"), Administratrix of the Estate of Earl Williams, filed a cause of action alleging negligence on the part of the Defendant and Heritage Valley Health System. Specifically, the Plaintiff alleged that the nurses employed by the Defendant were negligent in failing to monitor and observe Mr. Williams with sufficient frequency as well as failing to use proper fall prevention protocols. (*See Complaint*).

II. PROCEDURAL HISTORY

This matter was initiated by complaint filed April 11, 2008. After limited pre-trial filings, the matter proceeded to trial by jury in October of 2009. On October 8, 2009, the Jury returned a verdict in favor of the Defendants and against the Plaintiff.

On October 14, 2009, the Defendants filed a Motion for Post-Trial Relief, requesting a new trial. On October 20, 2009, this Court filed an Order directing Plaintiff to provide a transcript within forty-five (45) days; Plaintiff to file a Brief in Support of Post-Trial Motion on or before December 22, 2009; Defendant to respond on or before January 7, 2010.

The Plaintiff maintains in its Motion for a new trial that the Court erred in its charge to the jury by giving an "error of judgment" charge, which is now prohibited under the ruling in *Pringle v. Rapaport*, 980 A. 2nd 159 (2009).

Following arguments on said Motion on January 20, 2010, this Court issued an Order granting Plaintiff's Motion for Post-Trial Relief. (Order dated February 1, 2010). On February 16, 2010, the Defendant filed a Notice of Appeal to Superior Court. By Order dated February 22, 2010, the Defendant was ordered to file a Concise Statement of Matters Complained of on Appeal no later than twenty-one (21) days after the entry of said Order pursuant to Pa.R.C.P. § 1925(b).

III. MATTERS COMPLAINED OF ON APPEAL

The Defendants raise only one claim of error:

1. The trial court erred in granting plaintiff's motion for new trial, where the complained of jury instruction was not an "error of judgment" instruction and was not as a whole inadequate or unclear, and did not have a tendency to mislead or confuse a material issue.

IV. DISCUSSION

This Court granted Plaintiff's request for Post-Trial Relief because it felt it had no other alternative based on the *Pringle* ruling. The Superior Court's standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. *Stewart v. Motts*, 654 A.2d 535, (Pa. 1995). It is only when "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue" that error in a charge will be found to be a sufficient basis for the award of a new trial. *Id.* at 540, see also, *Ferrer v. Trustees of University of Pennsylvania*, 825 A.2d 591 (Pa. 2002).

An "error of judgment" charge provides generally that physicians are not responsible for "mere errors in judgment" or the use of "best judgment" unless the resulting error constitutes, or was the result of, negligence. In *Pringle*, the Plaintiff argued that this instruction improperly advised the jury on, "the well-established applicable standards for medical malpractice and [was] also likely to mislead and confuse the jury in its deliberations." Accordingly, the *Pringle* court ruled that giving an "error of judgment" charge was reversible error.

Although this Court believes that the charge must be viewed as a whole to determine if either side was prejudiced, the *Pringle* decision seems to have narrowed that approach. Although this Court feels its charge was fair to all parties, it was compelled to

apply the *Pringle* decision to this case and grant Plaintiff a new trial. However, it is submitted that the *Pringle* decision should not be followed generally, but should be construed to apply to only the facts of the *Pringle* case.

V. CONCLUSION

This Court respectfully submits this Opinion to the Superior Court for such judgment as it deems appropriate.

BY THE COURT:
/s/Della Vecchia, J.

Date: April 23, 2010

East Allegheny School District v. Kash Snyder, Mark Snyder, Shanni Snyder, and Scott Snyder

Delinquent Real Estate Taxes—Default Judgment—Alleged Defects in Service of Process

1. Defendants were served with the complaint at their residence on which delinquent taxes were due. Service was accepted by a relative, George Snyder, pursuant to Pa. R.C.P. 402(a)(2)(i).

2. The defendants filed preliminary objections asserting that none of the defendants actually resided at the property.

3. Actual participation in legal proceedings waives irregularities in the notice and service procedures, even lack of formal notice. *Reid v. Clendenning*, 44 A. 500 (1899).

4. Defendants' preliminary objections were untimely filed and were stricken and were not an issue at trial.

5. The defendants were aware that they owned the property evidenced by their habitation, were aware that they owed property taxes, were aware they had not paid property taxes, were aware that the plaintiff was trying to collect property taxes, were aware that the patriarch of the family was served a complaint for delinquent taxes at the very property that is subject to the taxes. The issue they raise on appeal is form over substance and any defect in notice was harmless error.

(Lynn E. MacBeth)

Joseph W. Lazzaro for Plaintiff.

Kash Snyder, *pro se*.

Carson Snyder, *by her temporary guardian ad litem Kash Snyder, pro se*.

Shanni Snyder, *pro se*.

Matthew Snyder, *by his temporary guardian ad litem Shanni Snyder, pro se*.

Mark Snyder, *pro se*.

Scott Snyder, *pro se*.

No. AR 09-000544. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., March 16, 2010—This matter comes before the Commonwealth Court on the appeal of Kash Snyder, Mark Snyder, Shanni Snyder and Scott Snyder,¹ Defendants, from the non-jury verdict entered on behalf of East Allegheny School District against Defendants on May 29, 2009.

I. BACKGROUND

East Allegheny School District (hereinafter "Plaintiff") filed suit against Kash Snyder, Mark Snyder, Shanni Snyder, and Scott Snyder for delinquent real estate taxes. At the time of the Complaint, said delinquency totaled \$14,292.21. In addition to this amount, the Plaintiff also sought to collect an additional ten percent (10%) on any judgment recovered pursuant to the Local Tax Collection Law. In total, the Plaintiff was claiming damages of \$15,721.43.

II. PROCEDURAL HISTORY

The Complaint in this matter was filed on January 20, 2009. The Complaint alleges that the Snyders (hereinafter "Defendants") were the record owners of real property situated in the East Allegheny School District. A trial on this matter was scheduled for March 30, 2009, before a board of arbitrators. On February 20, 2009, after the Defendants failed to answer the above-referenced Complaint, the Plaintiff filed a Notice of Intention to Take Default Judgment. Defendant Kash Snyder filed Preliminary Objections on March 2, 2009. Said Preliminary Objections were scheduled for argument before the Honorable R. Stanton Wettick, Jr. on May 8, 2009. A Praecipe to Reinstate Complaint, as well as an Amended Complaint in Civil Action, were filed on March 27, 2009, thereby eliminating the need to have argument on the Preliminary Objections. The Amended Complaint listed a new trial date of May 28, 2009. At said time, the Defendants failed to appear. On May 11, 2009, an Order of Court was entered, holding that Defendant's (Kash Snyder's) Preliminary Objections to the original Complaint were moot.

On May 26, 2009, Defendant Shanni Snyder filed Preliminary Objections to the Amended Complaint, which were scheduled for argument on June 26, 2009. These Preliminary Objections were not timely filed.

On May 28, 2009, this Court entered a verdict in favor of Plaintiff and against Defendants in the amount of \$15,721.43, plus costs. On June 25, 2009, Judgment on the Verdict was entered against the Defendants in the above stated amount. On June 27, 2009, Judge R. Stanton Wettick, Jr. dismissed Shanni Snyder's Preliminary Objections as said Preliminary Objections were not timely filed and Defendants did not appear for argument.

On June 26, 2009, a Notice of Appeal was filed by the Defendants to the Superior Court of Pennsylvania. On July 13, 2009, an appeal was filed in the Commonwealth Court of Pennsylvania at the above-referenced docketing number. On July 24, 2009, this Court ordered the Defendants to file their matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).

On October 26, 2009, an Order was issued by the Commonwealth Court directing the Defendants to order and pay for transcripts, which at said time had not been done. The parties were given fourteen (14) days to comply with this directive. On

November 13, 2009, after the Defendants failed to adhere to the October 26, 2009 Order, the Commonwealth Court dismissed the present appeal. The following day the transcripts were filed and the Commonwealth Court reinstated the appeal.

III. MATTERS COMPLAINED OF ON APPEAL

The Defendants raise the following claims of error:

1. This Court erred in entering judgment against Kash Snyder, Scott Snyder, and Mark Snyder when they were not served with Amended Complaint in this case and, as a result, no jurisdiction existed for this Court to proceed without them at a hearing by judge.
2. This Court erred in proceeding to trial by judge against Shanni Snyder when no notice was provided to her indicating the time and date of the arbitration hearing as required by 231 Pa. Code 1303(a).
3. This Court erred in proceeding to trial by judge when all parties were not provided thirty days notice before the arbitration hearing as required by 231 Pa. Code 1303.
4. In the event that this Court somehow finds that proper notice was provided to Shanni Snyder, and that this Court can proceed at arbitration and trial without all defendants being served, she maintained a good excuse for not appearing at the arbitration because she was summoned to appear at a criminal trial in this Court of Common Pleas of Westmoreland County, Pennsylvania, on the same date and time in a case where she was named defendant.
5. This Court lacked jurisdiction over the Amended Complaint because it is a tax action and the plaintiff failed to name all property owners who were indispensable parties. The failure of the plaintiff to join the other property owners caused prejudice because a payment by one property owner offsets the debt by the others.
6. This Court lacked jurisdiction over the Amended Complaint because the plaintiff failed to prosecute the case against the indispensable parties named but did not serve the action.
7. This Court lacked jurisdiction as the East Allegheny School District failed to pass a proper Act 20 resolution and because no statute allows for the imposition of "collection fees" as alleged in the complaint.
8. This Court lacked jurisdiction because the plaintiff did not, as required by statute, provide the defendants with notice of imposition of free and costs, and the plaintiff failed to provide any ability to appeal the assessment in violation of 2 Pa. C.S. § 553.

IV. DISCUSSION

The Defendants' first four (4) assignments of error deal with alleged defects in service of documents or other procedural matters. The Defendants were originally served a copy of the original complaint on January 29, 2009, when a relative of the Defendants, George Snyder, was personally served within thirty (30) days of the filing of the Complaint by Allegheny County Deputy Sherriff Dan Macioce pursuant to Pa.R.C.P. 400(a). (See Sheriff Return, see also, Pa.R.C.P. 401(a)).

Service was accepted by George Snyder pursuant to Pa.R.C.P. 402(a)(2)(i). Said service is evidenced by the Defendants' filing of Preliminary Objections on March 2, 2009.

The Preliminary Objections assert that the service effectuated on January 29, 2009, upon George Snyder was defective based on the assertion that none of the named Defendants reside at the address of 98 Arlene Drive. (See Preliminary Objections, para 1-6, filed March 9, 2009).

The tax delinquent property is 98 Arlene Drive. It is the same place where service was effectuated, and the Complaint was served on Defendants' father and/or grandfather at the subject residence.

Actual participation in legal proceedings waives irregularities in the notice and service procedures, even lack of formal notice. *Reid v. Clendenning*, 44 A. 500 (Pa. 1899). Additionally, Pa.R.C.P. 2252 allows a Defendant to join as an additional Defendant any person who may be solely liable, liable over to the joining Defendant, or jointly or severally liable with the joining Defendant on the Plaintiff's cause of action, or who may be liable to the joining party on any cause of action arising out of the same transaction or occurrence or series of transactions or occurrences upon which the Plaintiff's cause of action is based. Pa.R.C.P. 2252(a).

The Defendants were free to join any minor in this litigation and the Court without question would have appointed guardians pursuant to Pa.R.C.P. 2031(b), which states:

[i]f a minor party to an action is not represented, the court shall appoint a guardian for the minor either upon its own motion or upon petition of (1) the minor party, (2) a guardian of the minor appointed by any court of competent jurisdiction, or by a will duly probated, (3) any relative of the minor, or (4) any other party to the action.

This Court would also like to address the Preliminary Objections to the Amended Complaint filed on May 26, 2009. On the day of trial, said Preliminary Objections were deemed untimely. The Amended Complaint was filed on March 27, 2009. Pa.R.C.P. § 1026, entitled Time for Filing, mandates, "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading..." At the time of trial, it was apparent that the Preliminary Objections that were yet to be ruled on were untimely filed, i.e. filed over one month past the appropriate filing deadline. There was no leave of Court granted or consent by the Plaintiff to excuse said delay. This Court held that said Preliminary Objections were hence stricken and no longer an issue prior to trial. In summary, the Defendants were aware that they owned the property evidenced by their habitation there, were aware that they owed property taxes, were aware they had not paid property taxes, were aware that the Plaintiff was trying to collect property taxes, were aware that the patriarch of the family was served a complaint for delinquent taxes at the very property that is subject to the taxes. This issue is form over substance, any defect in notice was harmless error. The other allegations of error are substantive and legal matters, which need not be dealt with herein, as the Defendants having failed to raise same at trial, the same are deemed waived.

V. CONCLUSION

This Court finds no merit to any of the Defendants' assertions of error. For the aforementioned reasons, this Court respectfully requests the Commonwealth Court of Pennsylvania to affirm the Judgment entered in favor of Plaintiff and against Defendants on

June 28, 2009.

BY THE COURT:
/s/Della Vecchia, J.

Date: March 16, 2010

¹ It is unclear to this Court at this time as to how many of the Defendants are appealing.

Alton D. Brown v. Jeffrey A. Beard, et al.

Prison Litigation Reform Act, 42 Pa. C.S. §§6601-6608—Pa. R.C.P. 240(j)

1. The Prison Litigation Reform Act allows a court to dismiss a prisoner's prison conditions complaint where the prisoner has had three or more prior such complaints dismissed because they were frivolous or malicious.

2. Plaintiff's three prior dismissals constitute "three strikes" pursuant to said Act and the court dismissed the complaint.

(Lynn E. MacBeth)

Alton D. Brown, *pro se*.

Suzanne Hueston for Department of Corrections.

No. GD 09-15663. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., March 16, 2010—On September 10, 2009, Plaintiff Alton Brown filed a Petition to Proceed *in forma pauperis* and a Complaint against Jeffrey A. Beard and numerous other employees of the Pennsylvania Department of Corrections for alleged civil rights violations. On January 22, 2010, I dismissed Plaintiff's complaint pursuant to Pennsylvania Rule of Civil Procedure 240(j). On February 3, 2010, Plaintiff appealed from that order.

In *Jae v. Good*, 946 A.2d 802 (Pa.Comm. 2008), the Commonwealth Court outlined in detail the application of the Prison Litigation Reform Act (PLRA), 42 Pa.C.S. §§ 6601-6608. Specifically, 42 Pa.C.S. 6602(f) allows a court to dismiss a prisoner's prison conditions complaint where the prisoner has had three or more prior such complaints dismissed because they were frivolous or malicious. The instant case qualifies under this act because Plaintiff's complaint relates to conditions of his confinement and this court has dismissed three of Plaintiff's previous cases.

"Prison conditions litigation" is defined as: "A civil proceeding arising in whole or in part under Federal or State law with respect to the conditions of confinement or the effects of actions by a government party on the life of an individual confined in prison. The term includes an appeal. The term does not include criminal proceedings or habeas corpus proceedings challenging the fact or duration of the confinement in prison."

In this complaint, Plaintiff makes the following allegations: Plaintiff was moved from a Restrictive Housing Unit to a Secure Special Needs Unit (Complaint (Facts) ¶3), Plaintiff was denied approximately ten meals, access to yard, law library and mail (*Id.* ¶¶ 7-8), Plaintiff was made to complete body cavity strip searches twice (*Id.* ¶11), Plaintiff was intentionally scratched with handcuffs and handcuffs were tight (*Id.* ¶13), Plaintiff was not given his "legal property" (*Id.* ¶20), Plaintiff's personal items went missing (*Id.* ¶22), Plaintiff was given a "bogus misconduct" (*Id.* ¶25). Furthermore, Plaintiff accuses Defendants of a "conspiracy to punish and retaliate against Plaintiff" (*Id.* ¶¶ 31-43). Plaintiff also alleges various physical and emotional impacts of his alleged treatment (*Id.* ¶¶ 44-54). All of these matters go directly to the terms of Plaintiff's confinement.

Plaintiff has also had three previous matters dismissed in this court. On March 7, 2002, Plaintiff filed a Petition to Proceed IFP and a Complaint against Phillip Johnson (Superintendent at SCI-Greene) at GD 02-4891. On April 1, 2002, the Honorable Joseph James dismissed that complaint as frivolous. The Commonwealth Court dismissed the appeal from that order (1725 CD 2002) and the Petition for Allowance of Appeal was denied (101 WAL 2003). On May 14, 2002, Plaintiff again filed a Petition to Proceed IFP and a Complaint against Phillip Johnson (Superintendent at SCI-Greene) and Jeffrey Beard (Secretary, Pennsylvania Department of Corrections) at GD 02-9575. On May 17, 2002, Judge James dismissed that complaint as frivolous. The Superior Court affirmed (1044 WDA 2002). Finally, on May 24, 2002, Plaintiff filed a Petition to Proceed IFP and a Complaint against the Pennsylvania Department of Corrections at GD 02-10332. On August 23, 2002, Judge James dismissed that complaint as frivolous. These three prior dismissals constitute "three strikes" pursuant to the PLRA.

Therefore, the Commonwealth Court should affirm this court's order dismissing Plaintiff's case.

Strassburger, J.

March 16, 2010

Judy Berkeybile v. Kate Barkman, et al.

Mandamus—Counsel Fees—Acceptance of Filings by Department of Court Records

1. Plaintiff filed a complaint in mandamus against various personnel in the Department of Court Records seeking the acceptance of documents offered for filing as well as counsel fees.

2. The court granted peremptory mandamus directing the filings to be accepted by the department but denied the request for counsel fees.

3. Plaintiff appealed. The court stated that Plaintiff cannot show the defendants acted in bad faith and that the actions of defen-

dants were not arbitrary, vexatious or in bad faith.

(Lynn E. MacBeth)

David M. Nernberg for Plaintiff.

Timothy E. Finnerty for Defendants.

No. GD 09-23070. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., April 7, 2010—On December 11, 2009, Plaintiff filed a complaint in mandamus against Kate Barkman, Director of the Allegheny County Department of Court Records, Martin Madigan, Manager of the Department of Court Records - Orphans' Court Division, Jean Lynch, a clerk in that department, and the Department of Court Records - Orphans' Court Division, alleging that Defendant Lynch refused to accept filings in a case. On December 23, 2009, Defendants filed an Answer to the Complaint, and on January 4, 2010, Plaintiff filed a Motion for Peremptory Judgment. On January 4, 2010, I entered an order scheduling argument in this matter before me on January 11, 2010. On January 8, 2010, Defendants filed a brief in opposition to Plaintiff's motion for peremptory judgment. After hearing argument from both sides, I issued the following order:

AND NOW, this 11th day of January 2010, it is ORDERED that peremptory mandamus is granted in part and denied in part as follows:

- 1) Defendants are ORDERED to accept the proffered documents for filing.
- 2) Defendants shall not certify the documents as part of the record an appeal at No. 02-1999-03110 (Orphans' Court Division) absent an order from Judge Lee Mazur or another judge of the Orphans' Court Division.
- 3) All parties' requests for counsel fees are denied.

/s/Strassburger, A.J.

On February 11, 2010, Plaintiff filed a Notice of Appeal, and on February 12, 2010, I ordered that Plaintiff file a concise statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On March 5, 2010, Plaintiff filed her concise statement alleging only that I should have awarded counsel fees to Plaintiff.

The standard of review of a trial court's decision to deny mandamus damages is abuse of discretion or legal error. *Barnes Land Dev. Co., LLC v. Bd. of Supervisors of Washington Twp.*, 852 A.2d 463, 466 (Pa.Cmwlth. 2004). A denial of counsel fees under Section 2503 of the Judicial Code, 42 Pa.C.S. § 2503, rests with the discretion of the trial court, and [the Commonwealth Court] reviews its denial for abuse of discretion. *Westmoreland County Indus. Dev. Auth. v. Allegheny County Bd. of Prop. Assessment*, 723 A.2d 1084, 1086 (Pa.Cmwlth. 1999).

This case is similar to *Maurice A. Nernberg & Assoc. v. Coyne*, 920 A.2d 967 (Pa.Cmwlth. 2007). In *Nernberg*, Plaintiff¹ appealed from an order denying money damages and counsel fees in connection with a successful mandamus action against the Allegheny County Prothonotary² and Motions Clerk of the Court of Common Pleas of Allegheny County. Nernberg challenged the practice within Allegheny County which permitted out-of-county attorneys to file preliminary objections by mail, yet mandating that Allegheny County attorneys appear in person to file preliminary objections. Nernberg claimed it was entitled to counsel fees because "Defendants engaged in arbitrary conduct when they refused to accept filings by mail." *Nernberg*, 920 A.2d at 972. The Superior Court held, however, that there was no evidence to show that Defendants acted in bad faith by following Local Rules.³

In this case, Plaintiff again cannot show Defendants acted in bad faith. At the hearing, I asked Attorney Nernberg what was supposed to happen when he attempted to file the exhibits with Defendants. Attorney Nernberg responded, "The exhibit would have been on the docket and would have been part of the record on appeal." (Hearing Transcript, 4). I found this contention to be in error. "I think that the Department of Court Records is supposed to accept the filings.... On the other hand, I think you're wrong in that these don't go up with the record to the Superior Court without an order from Judge Mazur saying that they constitute part of the record." *Id.*

Because Defendants actions were not arbitrary, vexatious, or in bad faith, the Superior Court should affirm the decision of this court denying counsel fees to Plaintiff.

Strassburger, A.J.

April 7, 2010

¹ It should be noted that in *Nernberg*, Plaintiff is attorney Maurice Nernberg representing himself in the mandamus action *pro se*. In the case before me. Attorney Nernberg's son, Attorney David Nernberg, is the attorney for Plaintiff Judy Berkeybile.

² On January 7, 2008, the Prothonotary was renamed the Department of Court Records.

³ It should also be noted that *Nernberg* also held that Section 2503(9) does not authorize an award of counsel fees to a *pro se* litigant and since Attorney Nernberg was representing his firm *pro se* in the litigation, he was not entitled to counsel fees.

Commonwealth of Pennsylvania v. Brian Stultz

DUI Checkpoint—Motion to Suppress—Mandamus—Counsel Fees—Acceptance of Filings by Department of Court Records

1. Defendant was found guilty of Driving Under the Influence of Alcohol or Controlled Substance and filed a Motion to Suppress which was heard and denied by the court.

2. Defendant contended that a "single lone observation" of odor of alcohol on his breath was insufficient to require him to submit to a field sobriety test.

3. The Defendant did not contest the legality of the original stop pursuant to the DUI checkpoint protocol, and the court found that the set-up and operation of the checkpoint comported with the requirements established by the Supreme Court in

Commonwealth v. Tarbert, 535 A.2d 1035, 1043 (1987).

(Lynn E. MacBeth)

Michael W. Streily for Commonwealth.

Michael P. O'Day Sr. for Defendant.

No. CC200814766. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., April 9, 2010—On August 7, 2008 Appellant was charged with one (1) count each of Driving Under the Influence of Alcohol or Controlled Substance (.08% to less than .10%), 75 Pa.C.S. § 3802(a)(2), and Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S. § 3802(a)(1). Appellant filed a Motion to Suppress which was heard and denied by this Court on April 27, 2009. On the same date, Appellant proceeded to a non-jury trial and this Court found Appellant guilty at both counts. Appellant was sentenced at the first count to a period of five (5) days incarceration, six (6) months probation, a fine of \$300.00, and the costs of prosecution. No further penalty was assessed at the second count.

On April 29, 2009 Appellant filed post-sentence motions. Appellant's post-sentence motions were denied on June 2, 2009. Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania on June 30, 2009. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Whether the trial court erred in failing to grant Appellant's pre-trial suppression motions challenging the arresting officer's single lone observation and/or indicia of intoxication (odor of alcohol on Defendant's breath) prior to arresting Defendant and requiring Defendant to submit to compulsory field sobriety tests.

FINDINGS OF FACT

On July 19, 2008, police officer Matthew Grubb, a fifteen year veteran of the Ross Township Police Department, was assigned to participate in a DUI checkpoint located in Allegheny County on Route 8 at the border of Etna Boro and Shaler Township. (Suppression Hearing Transcript, Apr. 27, 2009, at pages 4 and 28) (hereafter, "H.T.") That checkpoint was set up and operating under the auspices of the North Hills DUI Task Force. (H.T. 6.) Officer Grubb's assignment during that period of time was "line" or "contact" officer at one of the ten stations set up at the checkpoint on northbound Route 8. (H.T. 4-5, 9, 28.) As a contact officer, he was instructed to look for signs of intoxication, including the odor of alcohol, in the drivers who were stopped at the checkpoint. (H.T. 5, 13, 28.) The checkpoint protocol required that if any of those drivers exhibited a sign of intoxication, Officer Grubb was to remove them from their vehicles for further evaluation by other police officers. (H.T. 5, 13, 28.)

At approximately 1:00 a.m. Appellant was stopped at one of the ten stations in the DUI checkpoint and was approached by Officer Grubb. (H.T. 5-6, 21, 28.) While conversing with Appellant, Officer Grubb detected a strong odor of alcohol emanating from Appellant. (H.T. 6-7, 11, 28-29.) This was the only sign of intoxication observed by Officer Grubb at that time. (H.T. 6-7, 29.) Officer Grubb asked Appellant to step out of his vehicle, after which he turned Appellant over to a second contact officer for identification and registration purposes. (H.T. 7-8, 12, 17, 19, 29.) The second contact officer then turned Appellant over to Officer Timothy Rodman, a ten year veteran of the Etna Boro Police Department. (H.T. 7, 17, 19.) Officer Rodman was assigned to the field testing area of the checkpoint to perform field sobriety tests of individuals detained by contact officers such as Officer Grubbs. (H.T. 20.) Upon initial contact with Appellant, Officer Rodman noticed the odor of alcohol upon Appellant's breath, as well as bloodshot eyes. (H.T. 18, 29.) From his contact with and observations of Appellant, Officer Rodman formed the opinion that Appellant was intoxicated. (H.T. 18.) Consistent with the checkpoint protocol, Officer Rodman administered field sobriety tests, which Appellant failed. (H.T. 19-21, 29.) Appellant was subsequently arrested and charged as noted hereinabove.

DISCUSSION

Appellant alleges that the trial court erred in failing to grant his pre-trial suppression motions. This issue is without merit.

Recently, the Supreme Court of Pennsylvania reiterated the standard of review that an appeals court applies when reviewing the denial of a suppression motion as follows:

Our standard of review in addressing a challenge to the denial of suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous.

Commonwealth v. Curtis Jones, 2010 WL 522825, —A.2d— (Pa. Feb. 16, 2010).

Here, Appellant argues that his pre-trial suppression motions should have been granted by the Court because more than a single observation of the strong odor of alcohol is required to detain an individual for field sobriety testing, following a legal stop at a DUI checkpoint. Appellant did not contest the legality of the original stop pursuant to the DUI checkpoint protocol, and this Court found that the set-up and operation of the checkpoint comported with the requirements established by the Supreme Court of Pennsylvania in *Commonwealth v. Tarbert*, 535 A.2d 1035, 1043 (1987). (H.T. 3, 29-30.)

Here Appellant was lawfully stopped at a DUI checkpoint and only detained for further testing once Officer Grubb detected a strong odor of alcohol emanating from Appellant's person. Officer Grubb's actions were not only consistent with the protocol of a lawful DUI checkpoint, but also consistent with well established Pennsylvania law. See *Commonwealth v. McElroy*, 630 A.2d 35, 41 (Pa.Super. 1993) (following the legal stop of a vehicle, further investigation in the form of a field sobriety test clearly warranted where police officer detected the odor of alcohol on the defendant's breath). See also, *Commonwealth v. Yastrop*, 768 A.2d 318, 320 (Pa. 2001) (plurality opinion) (conviction for driving under the influence upheld where, following a stop at a legal DUI roadblock, only those drivers who smelled of alcohol were detained for field sobriety testing). Consequently, Appellant's claim is without merit.

CONCLUSION

For the aforementioned reasons, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: April 9, 2010

Commonwealth of Pennsylvania v. Connie Williams

Death Penalty—Mental Retardation

1. The court vacated the death sentence imposed as a result of Defendant's guilt in stabbing his wife during an argument due to Defendant's mental retardation despite jury's finding that the one aggravating circumstance (the Defendant had previously been convicted of murder) outweighed the two mitigating circumstances (he was under influence of extreme mental or emotional disturbance and his character and record).

2. Testimony from Defendant's witnesses suggested that he had a low IQ, was illiterate, was abused as a child by his father, and had prenatal and neonatal issues related to alcohol exposure from his mother.

(Lynn E. MacBeth)

Michael W. Streily for the Commonwealth.

Billy H. Nolas for Defendant.

No. CC 200001876, 200002869. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION AND ORDER OF COURT

Procedural History

O'Toole, J., April 15, 2010—On January 23, 2002, the Defendant, Connie Williams, was convicted by a jury of the following charges: Murder in the First Degree, 18 Pa.C.S.A. §2501 and Abuse of Corpse, 18 Pa.C.S.A. §510. As the Commonwealth had filed Notice of Intention to Seek the Death Penalty, the case then proceeded to the penalty phase. Finding that the one aggravating circumstance (the Defendant had previously been convicted of murder, 42 Pa.C.S.A. §9711(d)(11)) outweighed the two mitigating circumstances (the Defendant was under the influence of extreme mental or emotional disturbance and the Defendant's character and record, 42 Pa.C.S.A. §9711(e)(2) and (8)), the jury returned a sentence of death.

On March 25, 2002, the Court sentenced the Defendant to death, plus a consecutive term of incarceration of not less than one year nor more than two years. A post-sentencing Motion was denied on May 30, 2002.

The matter was appealed to the Pennsylvania Supreme Court, who affirmed the judgment of sentence in an Opinion dated July 22, 2004.

Appointed counsel filed a Petition under the Post-Conviction Relief Act. After numerous extensions, an Amended Petition was filed on July 2, 2008. The Commonwealth filed its Answer on June 24, 2009.

Factual History

On August 12, 1999, the Defendant was cooking steak and steak fries. He was using a knife to trim the fat from the steak. His wife, Frances Williams, entered the kitchen and began arguing with him about the fact that he had taken marijuana from her purse. The Defendant admitted to his wife that he had done so and he put the marijuana down the garbage disposal in her presence. Ms. Williams lunged toward the Defendant to stop him. The Defendant struck his wife in the chest with the knife that he had been using. She died of a single stab wound to the chest, which penetrated the sternum, the heart, and the aorta. (N.T. 01/22/02, pp. 132-133, 177-186, 197-199, 206-208)

After stabbing his wife, the Defendant cut off her hands, her feet, and her head. He then wrapped the remainder of her body in bedclothes and dumped the wrapped corpse in a ravine on the north side of the City of Pittsburgh. When the corpse was discovered, with the assistance of the Defendant, the Defendant revealed the location of the missing body parts. After initially denying that he had dismembered the body, the Defendant admitted that he had done so to prevent her from being identified. The Defendant then accompanied the police to the McKees Rocks section of Allegheny County where the missing body parts were located. (N.T. 01/22/02, pp. 128-157)

Summary of Testimony at the PCRA Hearing held on January 11-15, 2010

At the hearing on January 11-15, 2010, both the defense and the Commonwealth presented expert witnesses regarding the issue of whether or not the Defendant has mental retardation. All of the expert witnesses, who reviewed the Defendant's school records, his Department of Correction records, his previous IQ and adaptive functioning tests, his medical records, his childhood CYF records, witness affidavits, his criminal record, and the trial/sentencing transcripts, testified with a reasonable degree of psychological or psychiatric certainty.

The defense presented the following expert witnesses:

Daniel Martell, who is a forensic and neuropsychologist, interviewed the Defendant for a total of eight hours over two days. He testified that, in his opinion, the Defendant has mental retardation. In fact, he stated that the Defendant is a "textbook case." Dr. Martell explained that under the DSM-IV there is a three prong test to establish that a person has mental retardation. The first prong is an IQ of 70-75 or below. The second prong is concurrent impairments in adaptive functioning (i.e., the ability of the person to get along in the world independently without external structure and support). The DSM-IV sets forth 11 separate areas of adaptive functioning (e.g., work, leisure, self-care, health and safety, functional academic skills, etc.). There must be impairment in at least 2 of the 11 areas. The third prong requires that onset of the first two prongs be prior to age 18. Dr. Martell further explained that the criteria for mental retardation under the American Association on Mental Retardation/now, the American Association on Intellectual and Developmental Disabilities ("AAMR/AAIDD") are essentially the same. The AAMR/AAIDD requires a significantly subaverage IQ score (i.e., 75 or below), defined as two standard deviations below the mean on a visually administered IQ test. It also requires impairments in at least one of the three areas of adaptive functioning: social, conceptual, and

practical. Social is the ability to communicate and interact with other people in a normal fashion. Practical is the ability to take care of yourself—make food, ride the subway, handle money, be able to read and write. Conceptual is the ability to engage in abstract reasoning, forming concepts, and understanding how to apply functional academic skills to everyday problems. And finally, AAMR/AAIDD requires onset prior to age 18. (N.T. 01/12-15/10, pp. 13-17, 83, 89)

After explaining the criteria, Dr. Martell applied the criteria to the Defendant. First, he stated that the Defendant had a long history of IQ testing dating back to age 5 or 6. At age 8, he scored 68 on the Stanford-Binet test; 64 on the same test at age 12; and, 59 on the same test at age 15. He was placed in special education after the initial testing and he remained in special education until he dropped out of school in tenth grade. As an adult, the Defendant was administered the Wechsler Adult Intelligence Scale IV, on which he scored a 72, which is in the range of mental retardation. Dr. Martell went on to say that the Defendant was illiterate as a child and remains illiterate as an adult (i.e., he cannot read or write and he cannot do basic simple math). (N.T. 01/12-15/10, pp. 17-33, 47-48)

Second, Dr. Martell testified that the Defendant has significant deficits in adaptive functioning. Specifically, he has deficits in communication, self-care, and home living skills. Also, he has “profound” impairment in social/interpersonal skills (i.e., he has no friends and no social skills). Dr. Martell emphasized that in diagnosing these areas, the evaluator looks more at “weaknesses” than at “strengths” (i.e., what the person cannot do vs. what the person can do). (N.T. 01/12-15/10, pp. 51-70)

Third, Dr. Martell stated that the onset of the foregoing in the Defendant was prior to age 18. (N.T. 01/12-15/10, p. 60).

In addition, Dr. Martell diagnosed the Defendant with organic brain damage. Although he could not exactly pinpoint when the brain damage occurred, Dr. Martell stated that the Defendant was born with “some genetic predisposition to mental retardation” and he had closed head injuries as a child due to abuse. The brain damage, coupled with the additional risk factors evidencing that the Defendant was neglected and lacked appropriate nurturing in the home, are part of the assessment of mental retardation. (N.T. 01/12-15/10, pp. 75-83)

Barry Crown, who is a neuropsychologist, testified that the Defendant has brain damage and mental retardation. He interviewed the Defendant in November 2008 and administered the Wechsler Adult Intelligence Scale IV. The Defendant’s full scale IQ score on this test was 72. Dr. Crown’s clinical perception was that the Defendant was putting forth good effort. He further stated that the Defendant is illiterate and he has significant impairment in his verbal language based critical thinking. The Defendant compensates for these deficits through visual activity. As for the Defendant’s childhood education, Dr. Crown noted that he failed first grade, he never learned to read, and his grades and ability to achieve were very low, even though he was in special education. (N.T. 01/12-15/10, pp. 108-132, 151)

Dr. Crown also testified that the Defendant has significantly subaverage intellectual functioning within the mental retardation range in his reasoning ability, verbal ability, communication ability, and the ability to exercise judgment. With regard to the AAMR/AAIDD three areas of adaptive functioning, the Defendant has deficits in all three areas—he has an inability to self-assess or to assess other people, he has serious health problems for which he refuses treatment, and he always needed assistance to complete even rote tasks at his places of employment. Finally, Dr. Crown opined that there were several risk factors that contributed to the Defendant’s mental retardation including, in utero, prenatal and neonatal issues related to alcohol exposure from his mother, a genetic predisposition, poor nutrition, and physical abuse. (N.T. 01/12-15/10, pp. 137-160)

Jethro Toomer, a clinical and forensic psychologist, testified that the Defendant has mental retardation. He emphasized that in making an assessment of mental retardation it is very important to look at the totality of the data, not just individual pieces of data. He stated that the Defendant has subaverage intellectual functioning and deficits in all three areas of adaptive functioning. During his interview of the Defendant, he administered the Scales of Independent Behavior-Revised test. He gave the Defendant the short form of this test and gave the long form to his sister, brother, and sister-in-law. Based on the responses, Dr. Toomer determined that the Defendant has significant adaptive deficits in the following areas: communication, self-care, social and interpersonal skills, home living, community resources, etc. Dr. Toomer also stated that his test results were corroborated by the results of the tests administered by other professionals. (N.T. 01/12-15/10, pp. 224-255, 289)

William Musser, who is board certified in psychiatry and neurology, testified that the Defendant has mental retardation and brain damage. He found that the Defendant has the same significant deficits as determined by the other defense professionals (e.g., functional academics, home skills, communication, etc.). He also found that the onset of the Defendant’s mental retardation was prior to age 18. (N.T. 01/12-15/10, pp. 299-342)

Julie Kessel, who is a board certified psychiatrist, opined that the Defendant has mild mental retardation. When she interviewed the Defendant, she noted that he used very simple vocabulary and he had difficulty with abstract thinking. She called his life “a series of failures,” beginning in his childhood. Due to the Defendant’s severe memory problems, “[h]e has difficulty in putting all the pieces of different recollections together so he will remember pieces of something and then he’ll connect them to other pieces and that particular bridge connection I call confabulation.” Dr. Kessel stated that the Defendant is not deceitful; rather, he “fills in the blanks” in his memory through confabulation. Finally, Dr. Kessel testified and provided details about the Defendant’s significant adaptive deficits. (N.T. 01/12-15/10, pp. 369-415)

In addition to the expert witnesses, the defense presented the following lay witnesses: Richard Laird (a fellow inmate on death row), Lisa Middleman (defense counsel during the penalty phase of the trial), Lynn Williams (the Defendant’s brother), Monica Kolasa (a former employer), Beverly Esterman (the wife of a former employer), Charles Snyder (a former co-worker), Keisha Johnson (the long-time girlfriend of the Defendant’s brother), and Roy Williams (the Defendant’s son). In summary, these persons testified that the Defendant cannot read, he has difficulty communicating, he has difficulty understanding complex ideas, and following simple directions. In addition, the Defendant’s brother, Lynn Williams, testified that the Defendant was severely abused by their father during his childhood, he did not have any friends, and the other children called him “retard.” (N.T. 01/12-15/10, pp. 451-464)

The Commonwealth offered the testimony of the following two expert witnesses:

Daniel Marston, a psychologist, stated that he met with the Defendant in November 2008. He administered the Vineland Adaptive Behavior Scales test. This test assesses four areas of adaptive behavior: communication, daily living skills, socialization, and motor skills. The Defendant scored in the low range in communication, on the borderline between the average and moderately low ranges in daily living skills, and in the average range in motor skills. Dr. Marston was unable to score the socialization area because the Defendant responded “I don’t know” to too many of the questions. In Dr. Marston’s opinion, the Defendant is “borderline intellectual functioning,” which means that he is impaired, but he does not have mental retardation. (N.T. 01/12-15/10, pp. 512-546)

Bruce Wright, a board certified psychiatrist, testified that he interviewed the Defendant in 2001, which was prior to his homicide trial. At that time, he diagnosed the Defendant with an antisocial personality disorder, paranoid personality traits, borderline to low average intellectual function, and a presumed learning disability. Dr. Wright opined that while the Defendant is not average and he has some deficits, he does not have mental retardation. He believes that the responses from the Defendant and his family are unreliable, especially in light of the fact that the responses from his family differ greatly from their testimony during the penalty phase of the trial. He further stated that the age of onset of any mental retardation cannot be determined because the Stanford-Binet tests that were administered to the Defendant during his childhood are unreliable. (N.T. 01/12-15/10, pp. 651-673)

Summary of Applicable Case Law

In 2002, the United States Supreme Court, in *Atkins v. Virginia*, 536 U.S. 304 (2002), held that execution of a mentally retarded person is “cruel and unusual punishment,” prohibited by the Eighth Amendment to the United States Constitution.

On December 27, 2005, the Pennsylvania Supreme Court, with the late Chief Justice Ralph Cappy issuing the majority opinion, in *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005), held that a PCRA Petitioner must prove his or her mental retardation, as that term is defined by either the DSM-IV or the AAMR, by a preponderance of the evidence. Both of these definitions incorporate and require three concepts: limited intellectual functioning, significant adaptive limitations, and onset prior to age 18. For limited intellectual functioning, although declining to actually adopt a specific number, the Court discussed using an IQ score which is approximately two standard deviations (i.e., 30 points) below the mean (i.e., 100 points), taking into consideration the standard error of measurement of 3-5 points. “Thus, for example, a subaverage intellectual capability is commonly ascribed to those who test below 65-75 on the Wechsler scales.” *Id.*, at 630. Acknowledging that under either definition a low IQ score is not itself sufficient to classify a person as mentally retarded, the Supreme Court emphasized the necessity that the Defendant also have significant limitations in adaptive behavior, which the Court defined as “the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.” *Id.*

Discussion

After reviewing the very thorough testimony of both the defense and the Commonwealth expert witnesses, the Court is convinced, by a preponderance of the evidence, that the Defendant has mental retardation, as that term is defined by the three-prong tests set forth in the DSM-IV and by the AAMR/AAIDD. First, as found by the defense witnesses, the Defendant has an IQ of 70-75, which is in the range of mild mental retardation. Second, the Defendant has significant deficits in adaptive functioning. Although he has some strengths, his weaknesses far outweigh his strengths. Specifically, the Defendant is illiterate—he cannot read or write; the Defendant only held simple minimum-wage type jobs, with which he needed frequent assistance from co-workers; the Defendant was unable to handle money or manage his finances; the Defendant was unable to assist his son with his homework; the Defendant is unable to understand the serious nature of his medical conditions; and, the Defendant has no social skills and does not understand social queues. Third, based upon the Stanford-Binet tests, which was the best available test at the time, administered to the Defendant during his elementary and high school years, the Defendant’s mental retardation was present well before age 18.

Conclusion and Order of Court

In conclusion, these three criteria, coupled with the Defendant’s brain damage and the additional risk factors set forth by the experts (e.g., the Defendant’s severe childhood abuse, his genetic predisposition to mental retardation, his mother’s lack of prenatal care, and poor nutrition during his formative years) proves, by a preponderance of the evidence, that the Defendant has mental retardation. Accordingly, this 15th day of April, 2010, it is hereby ORDERED that the portion of the Defendant’s Amended Petition seeking to vacate the death penalty and impose a sentence of life imprisonment is granted.

BY THE COURT:
/s/O’Toole, A.J.

CAPSULE SUMMARY

Mark Flocker v. Tammy Flocker

Custody

1. The parties were married in 1993 and separated for the final time in 2006. They are the parents of two children, fifteen and eleven years of age at the time of the custody trial. Initially, custody was confirmed with the mother subject to partial custody with the father. The father filed for modification of custody which the court granted, awarding him primary custody of the children.

2. The trial court is not required to issue an opinion regarding its decision in a custody matter unless the court entered an order that declined to accept an arrangement to which the parents agreed.

3. The court did not determine that the children were thriving successfully in the prior custody arrangement for many reasons. First, the mother had changed schools often and was lax in helping the children with their school work. Second, the mother was not informing the father of the children's school and extracurricular activities, and the mother admitted she had stopped trying to communicate with the father. The court directed the parties to engage in co-parenting counseling. Third, the mother's paramour had thrown the younger child into a wall and there was considerable fighting and use of profanity between the mother and her paramour. The mother also admitted to speaking negatively about the father to the children.

4. The trial court considered the psychological evaluator's recommendation, but did not agree with the recommendation, particularly concerning the evaluator's assessment of the father being spiteful. The trial court determined that this was not consistent with the record developed at trial.

5. The children were clear in their preference of wishing to reside with the father and although this was but one factor, the trial court determined that this factor was worth its consideration.

6. The trial court realized that by changing custody, the children would no longer reside with their half-sibling, but would still be able to see such half-sibling when in the extensive partial custody of the mother.

7. The trial court believed that a move in the middle of the school year was warranted since the children were not thriving in their prior school arrangement.

8. The trial court concluded that the father provided a more stable and loving home, while the mother was less stable, less involved in the children's academics, and exposed the children to potential violence in her home. The distance between the parties rendered a shared custody arrangement to be unworkable.

(Christine Gale)

Eric J. Yandrich for Plaintiff/Husband.

John A. Adamczyk for Defendant/Wife.

No. FD06-2994-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, A.J., December 9, 2009.