PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,978

PLJ Editorial Staff

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United Union of Roofers Waterproofers and Allied Workers, Local Union No. 37 v. North Allegheny School District, Fox Chapel School District and Montour School District

School Code—Criminal Background Checks

School districts not permitted to bar roofers with criminal records from school sites because they would not have direct contact with children.

No. GD-15-014788. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 5, 2017.

OPINION

This Motion for Summary Judgment by the Plaintiff, United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 37, (UNION) re-visits the cases filed by the Union against 3 school districts, North Allegheny School District, Fox Chapel School District, Montour School District (DISTRICTS OR SCHOOL DISTRICTS) with respect to the School Districts implementing or following a practice of barring potential roofer employees from any school site if those employees had criminal records. The Defendants filed cross-motions in opposition and seeking Summary Judgment in their favor.

The critical issue was whether or not those barred employees would have *direct contact with children*. See School Code, 24 P.S. § 1-111 (a.1) and in particular the language that requires background checks on "teachers, substitutes, janitors, cafeteria workers, independent contractors and their employees, *except* those employees and independent contractors who have no direct contact with children". Based on the testimony I heard in several days of hearing, I granted an injunction against this practice by the School Districts.

The School Districts appealed to the Commonwealth Court, which on April 18, 2017, reversed finding that my grant of the injunction altered the *status quo* which all injunctions are to maintain. However, the Commonwealth Court obviously believed the *status quo* included the practice of barring roofers with criminal records even though they had no direct contact with children.

In my view, this decision by the Commonwealth Court failed to recognize the distinction between 1) requiring a background check and 2) barring roofers if they had a conviction regardless of contact with children. The Commonwealth Court, per Judge Leavitt, correctly articulated the standard for maintaining the *status quo*. Specifically at page 9, the Court said "The *status quo ante* is the "Last Actual, peaceable and *lawful* uncontested status which preceded the pending controversy citing Commonwealth v. Coward, 414 A.2d 91, 99. (Pa. 1980).

Here the prior conduct was *not* lawful and in fact barred roofers who have no direct contact with children under Section 24-111 (a)(1) cited above. The language of School Code is clear and there is *no* dispute that School Districts are barring roofers who had no contact with children

Secondly, the Motion for Summary Judgment Action by the Union is well taken and I here rule in favor of the Union. Stated another way, the status quo was unlawful and the Commonwealth Court at page 10 missed the point. The School District can conduct background checks and may bar those with convictions who have contact with children. But those who have no such contact cannot be barred even if the background check disclosed a conviction.

The *status quo* included the barring feature which was unlawful and that is what I enjoined. Under the Commonwealth Court ruling, apparently the School Districts can ask for a background check and also bar the worker even if there will be no direct contact with children. That is the *unlawful* part of the *status quo* which warranted the injunction.

Thus Motion for Summary Judgment on the issue of barring roofers from the job site who have no direct contact with children is GRANTED. The counter Motions of Defendants are DENIED.

BY THE COURT:
/s/O'Reilly, S.J.

Dated: December 5, 2017

Brian W. Jones, Assignee of ARP Associates LLC, Plaintiff v. John Skaro and Karen A. Skaro, Defendants Dorothy Donauer, Intervenor PNC Bank, N.A., Garnishee/Movant

Dissolution of Garnishment—Waiver

Order granting dissolution of garnishment proper where plaintiff failed to actually appeal the various prior orders mentioned in his Concise Statement of Errors Claimed of on Appeal and thus waived the issues related to those orders.

No. GD-09-007166. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—January 3, 2018.

OPINION

Plaintiff/Assignee, Brian Jones, has appealed from our order dated November 8, 2017 by which we granted the Motion of PNC Bank, Garnishee, for Dissolution of Garnishment Pursuant to Pa.R.C.P 3143 and directed the Department of Court Records, Civil Division (DCR) to mark the judgment in garnishment against PNC as satisfied and to mark the Attachment as dissolved upon receipt of $25,000 from PNC, with the direction that the sum be released to Dorothy Donauer. An earlier appeal by Mr. Jones was quashed by order of the Superior Court dated May 17, 2017. That appeal involved our order of February 8, 2017, opening the

judgment previously entered in this garnishment proceeding and allowing PNC, the Garnishee, to amend its answers to interrogatories. See 270 WDA 2017. No transcript of the record of the November 8, 2017 proceeding has been ordered although, in accordance with our preferred policy, a court reporter was present and made a record of the argument.

Because of our Central Calendar system, at least two other judges of our Court, sitting in our Motions Court, were involved with the instant garnishment proceedings before the matter came before the undersigned, also then sitting in Motions Court. In his Concise Statement of Errors Complained of on Appeal, Mr. Jones asserts that several prior orders of those other judges of this court were erroneous, but none of those orders are included in his instant Notice of Appeal even though they are no longer interlocutory. We should note that Mr. Jones, who is not a lawyer, is nevertheless fairly well-versed in what may be thought of as run-of-the-mill judgment collection proceedings, including garnishments. The procedural posture of this case, however, is not run-of-the-mill.

On July 28, 2016, the Honorable Paul F. Lutty, Jr. had ordered PNC to retain $25,000 in a bank account in the name of Defendant Karen Skaro and her mother, Dorothy Donauer pending a decision as to whether the monies in that account belonged to Mrs. Skaro, one of the judgment debtors, or to her mother. Judge Lutty also re-scheduled the hearing on the matter and the undersigned was assigned to Motions Court at the time set. Mrs. Donauer had been allowed to intervene by the Honorable John T. McVay, Jr. by order dated July 11, 2016, reconsideration denied July 21, 2016.

One of Plaintiff's complaints on appeal is that Judge McVay's order was improper because the intervention was allowed well beyond the applicable time limit. Plaintiff also complains on appeal that the undersigned should have disregarded that order rather than proceeding with the hearing on the issue of whose monies were in the account, Mrs. Skaro's or Mrs. Donauer's. However, Judge McVay's order has not been included in the instant Notice of Appeal even though it is now final. In the event Superior Court decides the objection to his order has nevertheless been preserved for appellate review, we note that we regarded the issue of timeliness to have been in Judge McVay's discretion and felt then (and feel now) that the propriety of his exercise of discretion was for the appellate courts, not the undersigned who has the same jurisdiction as Judge McVay.

Our eventual decision was that Mrs. Donauer was the true owner of the funds and that the account was in her daughter's name for convenience only. The only order now under appeal, dissolving the garnishment, is the natural consequence of that decision.

The basis for our decision that Mrs. Donauer was the true owner of the funds in the account was based on a decision to the same effect made in federal Bankruptcy Court. We correctly applied the principles of *res judicata* and concluded that Mr. Jones, who had been involved as a creditor during the Skaro bankruptcy, had a full and fair opportunity to argue that the funds belonged to Mrs. Skaro, and simply lost his case there. He may not re-litigate the same issue here in state court in an effort to get a different result.

CONCLUSION

By not appealing the various orders mentioned in his Statement, especially that of Judge McVay, along with his appeal of our order of November 8, 2017, Plaintiff has waived the issue of timeliness of the intervention or lack thereof. He also has waived his right to complain of our order of February 2, 2017. He also has not filed a timely appeal of the judgment that was entered against him on August 3, 2017, although he did file a Petition for Review in Superior Court which was denied without comment on October 23, 2017. See 93 WDM 2017.

Our order of November 8, 2017, which flows from our conclusion that Mrs. Donauer is the true owner of the account, was proper and should be affirmed.

BY THE COURT:
/s/Friedman, J.

Dated: January 3, 2018

Commonwealth of Pennsylvania v. Richard Friedman

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—DNA Refusal—DUI

Discussion of whether Burchfield should be applied retroactively to cases on collateral review.

No. CC 2015-2902. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—January 5, 2018.

MEMORANDUM ORDER OF COURT

AND NOW, this 5th day of January, 2018, upon meaningful consideration of the Defendant's Amended Petition under the Post-Conviction Relief Act ("PCRA"), filed on January 10, 2017, the Commonwealth's Motion to Lift Stay, filed on October 3, 2017, and the evidence and argument presented at the PCRA Hearing held on October 19, 2017,

IT IS HEREBY ORDERED that the Defendant's request for PCRA Relief is DENIED.

I. PROCEDURAL BACKGROUND

On November 24, 2015, the Defendant entered a negotiated plea to Counts One (1), Two (2), Four (4) and Five (5) of the information. Counts One (1) and Two (2) charged him with DUI – General Impairment/Incapable of Safe Driving (3rd Offense) under 75 Pa. C.S.A. 3802(a)(1). Count Four (4) charged Use/Possession of Drug Paraphernalia under 35 Pa. C.S.A. § 780-113(a)(32). Count Five (5) charged a Driving on Suspended License – DUI Related with a BAC of .02 or Higher, under 75 Pa. C.S.A. §1543(b)(1).(1)(iii).

On December 11, 2015, the Defendant was sentenced to 18 to 36 months of imprisonment at Count One (1), with a consecutive two (2) year term of probation to commence upon his release from imprisonment. No further penalty was imposed at Count Two (2). A one (1) year term of probation was imposed at Count Four, which was ordered to run consecutively to the term of probation imposed at Count One (1). A six (6) to twelve (12) month term of imprisonment was imposed at Count Five (5). The Defendant was awarded to 308 days of time credit, which was applied to Count 5. All other charges were withdrawn.

A post sentence motion was filed on December 16, 2015. The court scheduled a post sentence motion hearing for January 28, 2016. However, on the day of the hearing, counsel withdrew the motion. No direct appeal was filed. Accordingly, the Defendant's judgment of sentence became final on February 29, 2016, when the 30-day window for filing a direct appeal expired. *Commonwealth v. Miller*, 715 A.2d 1203, 1207 (Pa. Super. 1998). The Defendant, therefore, had until February 28, 2017, to file a timely PCRA petition. 42 Pa. C.S.A. §9545(b)(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 . . . .").

On October 19, 2016, the Defendant timely filed a pro se PCRA petition. On October 24, 2016, Attorney Chris Rand Eyster, Esq. was appointed to serve as PCRA Counsel. PCRA Counsel was directed to file an Amended Petition, if one was warranted, within 90 days of his appointment. On January 10, 2017, PCRA Counsel timely filed an Amended PCRA Petition, raising claims pursuant to *Birchfield v. North Dakota*, --- U.S. ----, 136 S.Ct. 2160 (2016). (Amended PCRA Petition, filed 1/10/17, pp. 1-5).

Relying on *Birchfield*, PCRA Counsel argued that trial counsel was ineffective for "failing to pursue a pre-trial motion that Petitioner's refusal to submit to a blood test was invalid under the Fourth Amendment of the U.S. Constitution and Article 1, §8 of the Pennsylvania Constitution because the police did not have a search warrant to obtain Petitioner's blood and Petitioner was not properly advised of his rights." (*Id.* at 3). PCRA Counsel claimed that plea counsel was ineffective for failing to raise a *Birchfield* claim through a post-sentence motion or appeal and for failing to challenge the "excessive/illegal sentence." (*Id.* at 3-4). PCRA Counsel also argued that plea counsel was ineffective during the plea bargaining process because he never attempted to negotiate a waiver of the RRRI eligibility requirements. (*Id.* at 4).

The Commonwealth was ordered to file its Answer to the Amended PCRA Petition. On January 30, 2017, the Commonwealth filed its original Answer, but then filed an Amended Answer on February 1, 2017. In its First Amended Answer, the Commonwealth noted that the Defendant would have been entitled to relief pursuant to *Birchfield* if "his case was procedurally postured like the defendant" in *Commonwealth v. Giron*, --- A.3d ---- (2017 WL 410267) (Pa. Super. 2017). (Commonwealth's Amended Answer to PCRA Petition, filed 2/1/17, p. 2). However, because the Defendant's conviction was final at the time that *Birchfield* was decided, the Commonwealth maintained that the Defendant would only be entitled to relief if *Birchfield* was found to apply retroactively pursuant to *Teague v. Lane*, 489 U.S. 288, 307 (1989). (*Id.* at 2-3). The Commonwealth took no position as to whether *Birchfield* had retroactive effect pursuant to *Teague*, and it deferred that determination to this court. (*Id.* at 3).

Accordingly, the court scheduled a PCRA Hearing in order to hear arguments as to whether *Birchfield* should apply retroactively to the Defendant's case. At the PCRA Hearing held on September 13, 2017, the court decided to stay its PCRA proceedings pending the resolution of *Commonwealth v. Bushaw*, 1083 WDA 2017. In *Bushaw*, the PCRA court determined that *Birchfield* applied retroactively to cases on collateral review, and the Commonwealth had filed a direct appeal challenging that ruling. (*See* Trial Court Opinion, filed on 9/26/17 by the Honorable Edward J. Borkowski). A status conference was scheduled for March 14, 2018.

On October 3, 2017, the Commonwealth filed a Second Amended Answer to the Amended PCRA Petition notifying the court that the Commonwealth had withdrawn its appeal in *Bushaw* following the issuance of the Trial Court's Opinion in that case. (Second Amended Answer, filed 10/3/17, p. 2). The Commonwealth requested that this court lift the stay and schedule a PCRA Hearing. The Commonwealth also took the position that the ruling in *Birchfield* is not retroactive pursuant to 42 Pa. C.S.A. §§9543 and 9545, or *Teague*. (*Id.* at 3-6).

At the PCRA Hearing held on October 19, 2017, the Commonwealth conceded that *Birchfield* created a new rule of constitutional law, but it maintained that *Birchfield* did not retroactively apply to cases on collateral review where the judgment of sentence is final. Because the Defendant's conviction was final at the time *Birchfield* was decided, the Commonwealth argued that *Birchfield* did not apply to the Defendant's case, especially in light of the fact that neither the U.S. Supreme Court nor the Pennsylvania Supreme Court had ruled that it should be applied retroactively. The Commonwealth further argued that *Birchfield* is not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288, 307 (1989) because it did not announce a new constitutional rule that is substantive in nature, and it did not create a "watershed rule of criminal procedure." The Defendant's position at the hearing was that *Birchfield* should be given retroactive effect pursuant to *Teague* because it announced a new constitutional rule that is substantive in nature.

The Defendant further argued that his counsel was ineffective at the time of sentencing on December 11, 2015 for not knowing that the United States Supreme Court had granted certiorari in *Birchfield* that very same day according to the SCOTUS blog, PCRA Hearing Exhibit C. He argued that post-sentence motions on the basis of *Birchfield* should have been filed after certiorari was granted. The Commonwealth disagreed, arguing that counsel is not ineffective for failing to predict a change in the law. The Commonwealth noted that trial counsel had filed appropriate motions on the case. The pre-trial motion was withdrawn upon the entry of the guilty plea, and the post-sentence motion was withdrawn by defense counsel with no testimony that the Defendant objected to that course of action. The Commonwealth further argued that the Defendant could not prove the prejudice element of the ineffectiveness claim given that *Birchfield* was not decided until after the Defendant's conviction was final.

After carefully considering the evidence and arguments presented at the PCRA Hearing, and after reviewing the relevant law surrounding the issue of retroactivity, this court finds that *Birchfield* does not retroactively apply to cases on collateral review and that trial counsel was not ineffective for failing to anticipate the United States Supreme Court's ruling in *Birchfield*.

II. ANALYSIS OF CLAIM

Pursuant to *Birchfield*, absent exigent circumstances, an officer may not obtain a warrantless blood draw pursuant to the search incident to arrest exception. *Birchfield*, 136 S.Ct. at 2185. *Birchfield* also invalidated the consent for a blood draw when such consent is obtained "on the pain of committing a criminal offense." *Id.* at 2186. As noted by the Commonwealth in its initial Answer to the Amended PCRA Petition, there is evidence in this case that the Defendant's refusal to submit to blood testing was prompted by his fear of needles, and that his refusal was not based on the warnings contained in the DL-26 Form. (*See* Affidavit of Probable Cause). However, pursuant to *Giron, supra*, that issue does not appear to be outcome determinative, and the parties do not dispute that the Defendant received enhanced criminal penalties based on his refusal.

Accordingly, the issue before this court, an issue which remains a matter of first impression following the withdrawal of the appeal in *Bushaw*, is whether *Birchfield* applies retroactively to cases on collateral review. As an initial matter, the court notes that, because the Defendant filed a timely PCRA petition, the retroactivity analysis is not dictated by the retroactivity rule set forth in §9545(b)(1)(iii) (setting forth the statutory time-bar exception for new constitutional rules of law which have been held to apply retroactively to cases on collateral appeal). Rather, the question of *Birchfield*'s retroactivity is governed by the analysis set forth

in the *Teague* and its progeny. Our Supreme Court recently had occasion to discuss the *Teague* framework in *Commonwealth v. Washington*, 142 A.3d 810, 813 (Pa. 2016). The Court explained *Teague*'s retroactivity analysis as follows:

> Under the *Teague* line of cases, a new rule of constitutional law is generally retrospectively applicable only to cases pending on direct appellate review. In other cases, retroactive effect is accorded only to rules deemed substantive in character, and to "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements" of the adjudicatory process."

Washington, supra, at 813 (citations omitted).

While this court agrees that *Birchfield* announced a new constitutional rule, this court finds that *Birchfield* fails to meet either of the two exceptions set forth in *Teague*. This court is aware that its esteemed colleague found *Birchfield* to be retroactive in *Bushaw, supra*. This court, however, respectfully disagrees that *Birchfield* announced a new constitutional rule of law which is substantive in nature. (*See Commonwealth v. Bushaw*, 1083 WDA 2017 Trial Court Opinion, p. 10).

With respect to the question of whether the ruling is substantive or procedural in nature, the court finds that *Birchfield* announced a procedural rather than substantive rule because, at its core, the effect of the *Birchfield* ruling only seeks to regulate the "manner of determining the defendant's culpability" and it does not alter the "range of criminal conduct" or seek to "prohibit punishment for an entire class of offenders." *Washington, supra*, at 813, 818. *Birchfield* did not decriminalize conduct so much as it "merely raise[d] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (explaining that "[n]ew rules of procedure . . . do not appl retroactively" because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise"). To be sure, after *Birchfield*, an individual who was convicted with the use of blood evidence that was unlawfully obtained either by way of a warrantless search incident to arrest or invalid consent might have been acquitted otherwise depending on what other evidence was lawfully obtained in the case.

Moreover, as noted by the Commonwealth, *Birchfield* "does not automatically invalidate all convictions where a defendant refused a blood draw, only those where a defendant was threatened with an enhanced criminal penalty." (Commonwealth's Second Amended Answer, 10/3/17, p. 5). Therefore, at its core, *Birchfield* is a new rule of criminal procedure because it simply altered the evidence-gathering process for law enforcement in DUI cases and modified the manner in which the exceptions to the warrant requirement could be applied to obtain blood evidence.

Though the *Birchfield* ruling is procedural in nature, the new rule is not one of the "watershed rules of criminal procedure" which would allow it to fall under the second *Teague* exception. The ruling does not "implicate the fundamental fairness and accuracy of the criminal proceeding." *Schriro, supra*, at 351-52 (citations omitted). As the United States Supreme Court recognized, the class of procedural rules which are given retroactive effect is "extremely narrow." *Id.* at 351-52. Unlike *Gideon v. Wainwright*, 372 U.S. 355 (1963), which conferred "the right to counsel upon indigent defendants with felonies" and fundamentally changed the procedural landscape for criminal proceedings, *Birchfield* does not qualify as one of the "watershed" cases that must be given retroactive effect. *Washington, supra*, at 813.

Accordingly, since the court finds that *Birchfield* does not apply retroactively to cases on collateral review, the Defendant's PCRA claims based on *Birchfield* are without merit. With respect to the Defendant's claim that plea counsel was ineffective during the plea-bargaining process for failing to negotiate a waiver of RRRI eligibility, PCRA Counsel abandoned this claim at the PCRA Hearing. This court further finds that trial counsel was not ineffective for failing to argue *Birchfield* at sentencing or request a stay of the sentencing based on certiorari having been granted in *Birchfiled*. To require that counsel be aware of every case for which the United States Supreme Court grants certiorari on the day that certiorari is granted, as well as understand the potential impact that such a case *might* have on a particular client's case, is simply too high a burden to impose on counsel as a requirement for effectiveness. This court likewise finds that counsel was not ineffective for failing to raise *Birchfield* in post-sentencing motions, as again acceptance of the Defendant's argument would require counsel to be cognizant of any and all cases on appeal anywhere which *might* affect his client's rights, an impossibly high burden.

Based on the foregoing, Defendant's PCRA Petition is DISMISSED.

The Defendant is hereby put on notice that he has the right to file, either *pro se* or through privately retained counsel, an appeal to the Pennsylvania Superior Court within thirty (30) days from the date of this Order.

BY THE COURT:
/s/Lazzara, J.

Date: January 5, 2018

Commonwealth of Pennsylvania v. Richard P. Friedman

ORDER OF COURT

AND NOW, this 28th day of February, 2018, it is HEREBY ORDERED that the Clerk of Courts shall transmit the record on this matter to the Superior Court of Pennsylvania forthwith. On February 20, 2018, the Defendant filed his Concise Statement of Matters Complained of on Appeal ("Concise Statement") pursuant to Pa. R.A.P. 1925(b). The Defendant raised two (2) issues for review. The issues raised on appeal have been addressed in this court's Order denying PCRA Relief, issued on January 8, 2018. A copy of this Order is attached hereto.

In its Order denying PCRA relief, this court explained its reasons for denying PCRA relief. This satisfies the requirements of Pa. R. AP 1925(a)(1)[1] that the court set forth its reasons for issuing the Order appealed from.

A copy of this Order has been served upon Counsel for the Defendant by regular mail, and upon the Office of the District Attorney/Appeals Division, by interoffice mail.

BY THE COURT:
/s/Lazzara, J.

[1] Pa. R.A.P. 1925(a)(1) provides in relevant part: "… upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, ***if the reasons for the order do not already appear of record***, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or ***shall specify in writing the place in the record where such reasons may be found***." (emphasis added).

Commonwealth of Pennsylvania v. Tyler Cooper McQuaid

Criminal Appeal—Suppression—Traffic Stop—"Welfare Check"

Police officer, responding to call re: unconscious man in car, who then stops that car on roadway is mere encounter as a welfare check on driver.

No. CC 2017-02539. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Zottola, J.—April 13, 2018.

OPINION OF COURT

Presently before this court is a Motion to Suppress on behalf of the Defendant, Tyler McQuaid. McQuaid is charged with Count 1-Driving Under the Influence of Alcohol or Controlled Substances. 75 Pa.C.S.A. § 3802 (D)(1)(i). A Suppression Hearing took place before this court on October 13, 2017. For the reasons set forth in this Opinion, the Motion to Suppress is denied.

The Defendant filed a Motion to Suppress on September 28, 2017 from which the following is taken verbatim:

> 1. Evidence obtained from the stop must be suppressed because the Officer lacked probable cause or reasonable suspicion to initiate a traffic stop.

Motion to Suppress

On October 13, 2017, a Suppression Hearing was held before this court. The Defendant contends that the evidence collected during a traffic stop, which resulted in the Defendant's arrest, must be suppressed because the police officer did not have probable cause or reasonable suspicion to initiate the traffic stop.

At the Suppression Hearing, the Commonwealth called Officer Joseph Daransky to the stand. Officer Daransky testified that on November 25, 2016 at approximately 3:00 P.M., he responded to a report of an unconscious man behind the steering wheel of a vehicle in a Wendy's parking lot at the Quaker Valley Village Shopping Center on Ohio River Boulevard. (S.H. pp 5-7)[1] Dispatch told Officer Daransky that the vehicle was a red Toyota Corolla and gave him the license plate number. (S.H. 6, 11) Officer Daransky arrived at the scene two minutes after he received the call, but he did not locate a vehicle matching that description in the Wendy's parking lot. (S.H. 10-11) As Officer Daransky attempted to locate the vehicle, he observed a red Toyota Corolla with the corresponding license plate number leaving a nearby GetGo Gas Station and making a right-hand turn onto Ohio River Boulevard. (S.H. 11-12) Officer Daransky engaged his emergency lights and initiated the traffic stop on the car at the intersection of Spencer Street and Station Way after receiving backup from Officer Smilek of the Edgeworth Police Department. (S.H. 13-14) Officer Daransky testified that he did not see any motor vehicle violations before he initiated the traffic stop. (S.H. 15) However, he testified that the nature of his stop was check on the driver's well-being. (S.H. 14) The information subsequent to the initiation of the traffic stop is beyond the scope for purposes of the Defendant's Motion to Suppress.

During a Motion to Suppress, the Commonwealth has the "burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the Defendant's rights." Pa.R.Crim.P. 581(H). Since "police officers have a duty to render aid and assistance to those they believe are in need of help," some traffic stops are considered "mere encounters" instead of investigatory stops. *Commonwealth v. Kendall*, 976 A.2d 503, 505 (Pa. Super. 2009). During a mere encounter, a police officer believes that the Defendant is in distress, either due to the condition of the Defendant's car or the Defendant's physical condition. *Id.* On the other hand, an investigatory stop "subjects a person to a stop and period of detention in order for the law enforcement officer to obtain more information." *Commonwealth v Rosas*, 875 A.2d 341, 347 (Pa. Super. 2005). Generally, "an investigatory stop of an automobile must be based on objective facts creating a reasonable suspicion that the motorist is presently involved in criminal activity." *Commonwealth v. Valenzuela*, 597 A.2d 93, 98 (Pa. Super. 1991). However, simply "triggering the emergency lights or initiating interaction with a driver does not necessarily shift the interaction between an officer and a driver from a mere encounter to an investigatory stop." *Kendall*, 967 A.2d at 505. See also *Commonwealth v. Johonoson*, 844 A.2d 556 (Pa. Super. 2004).

The interaction between Officer Daransky and the Defendant was a mere encounter, meaning that Officer Daransky did not need reasonable suspicion to initiate a traffic stop on the Defendant's vehicle. *Kendall*, 967 A.2d at 505. Officer Daransky observed a vehicle matching dispatch's description in an area close to the original scene only a few minutes after he received the call. Officer Daransky then testified that his motive behind initiating the traffic stop was to render aid to the driver since dispatch reported that the driver was recently unconscious. Therefore, this is a mere encounter and Officer Daransky did not need reasonable suspicion to initiate the traffic stop. *Id.* Although Officer Daransky initiated his emergency lights before stepping out of his car, this did not turn the mere encounter into an investigatory stop. *Johonoson*, 844 A.2d at 562. It is enough that Officer Daransky observed a car matching the description and license plate number of the car that was called in to dispatch and initiated a traffic stop to check on the driver's well-being. Therefore, the Commonwealth met its burden to overcome the Defendant's Motion to Suppress.

Based on the foregoing, the Defendant's Motion to Suppress is denied.

BY THE COURT:
/s/Zottola, J.

Date: April 13, 2018

[1] S.H. refers to transcript of Suppression Hearing dated October 13, 2017

Commonwealth of Pennsylvania v. Robert Blake

Criminal Appeal—PCRA—DNA TESTING—Actual Innocence

Post-conviction claim for DNA testing of evidence will not be granted if the evidence cannot support a claim of actual innocence.

No. CC 1987 08 910, 1987 09 390. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Williams, J.—April 26, 2018.

OPINION

In May 1987, Albert Falbo was killed. He was stabbed multiple times in the neck. The investigation began with an interview of Mr. Blake's brother. This led them to a plastic bag dumped near the Allegheny River. Inside was blood stained clothing belonging to Joseph Servich and personal items of the deceased. Servich was eventually tracked down in Florida. His statement to police implicated Mr. Blake.

Blake's homicide trial ended with a guilty verdict for second degree murder. The Superior Court affirmed his life sentence in August, 1991. *See*, 496 Pittsburgh 1990 and 497 Pittsburgh 1990.[1]

On January 20, 2016, a *pro se* request for post-conviction DNA testing was docketed. Counsel was appointed. Eventually, an item of evidence was discovered. The defense claims he is entitled to have that empty pack of Marlboro cigarettes tested for the presence of DNA. The government is opposed. Its position is based upon the requirements of the DNA testing statute - Section 9543.1 of Title 42. In particular, the government says the "petitioner has failed to meet his burden of showing that there is a reasonable probability that 'DNA testing of the specific evidence, assuming exculpatory results, would establish ... the applicant's actual innocence of the offense for which the applicant was convicted'." *Commonwealth's Second Answer to Motion for DNA Testing*, pg. 8 (March 6, 2018).

The government goes forward by focusing on two factors which this Court finds to be persuasive. The victim of this stabbing was found in his own apartment. He was not found in a car which is where the empty pack of smokes was found. Conspicuous by its absence is Mr. Blake's failure to explain this analytical gap. Furthermore, the Marlboro man's cigarette pack of choice was found in a car, in a different state and, some three months AFTER the killing. These "facts" lead to one question - when was the pack left there? Mr. Blake simply cannot answer that question. The inability of Mr. Blake to adequately address these factual holes in his claim prevents this Court from concluding that DNA results would establish his actual innocence.

An order will be issued denying his post-conviction claim for DNA testing. *See, Commonwealth v. Scarborough*, 64 A.3d 602,609 (Pa. 2013)("Consequently, because the only claim at issue in a motion for post-conviction DNA testing is a convicted individual's eligibility for such testing under the aforementioned provisions of Section 9543.1, when the trial court enters an order either granting or denying the testing, the litigation under this section is at an end: the sole claim between the parties -- the Commonwealth and the movant -- has been addressed by the trial court and finally disposed of. Thus, under the plain language of Rule 341(b), because a trial court order granting or denying the motion for DNA testing disposes of all claims raised by all parties to the litigation, it is, therefore, a final order.").

BY THE COURT:
/s/Williams, J.

[1] The murder case has a docket number ending in 910. The other docket number sets forth other charges like robbery, theft and conspiracy.