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OPINIONS

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PLJ

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Opinions

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Joseph Baran v.
George Weston Bakeries, Inc., and George Weston Bakeries Distribution, Inc.

Distribution Agreement—Injunction—Contract Breach—Failure to Cure

Exclusive distribution agreement terminated and earlier preliminary injunction preventing sale of distribution route dissolved where evidence at trial indicated plaintiff failed to cure at least four breaches.

No. GD 08-21117. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—May 10, 2018.

OPINION

In 1962, at the age of five, Plaintiff Joseph Baran began working in the bread industry by delivering bread door to door with his father. By 1985 Mr. Baran owned a delivery truck and was an independent contractor for Bestfoods Baking Distribution Company ("Bestfoods" hereinafter) delivering bread and other similar products to grocery stores in the West Mifflin area. In 1999 Bestfoods and Mr. Baran entered into a written agreement for Mr. Baran to distribute premium products, such as Thomas'® english muffins and Brownberry® breads. The agreement made Mr. Baran the exclusive distributor of those products in the West Mifflin and Homestead areas. In approximately 2004 Defendant George Weston Bakeries Distribution, Inc. ("Weston" hereinafter) acquired Bestfoods, including the rights and duties under the 1999 agreement with Mr. Baran.

Around this time, significant changes affecting Mr. Baran's distribution area were taking place. The large "Waterfront" shopping district along the Monongahela river opened in the Homestead area, and nationwide retailers located in the distribution area, including Walmart, Target and Sam's Club, increased their sales of foods. To accommodate these changes, Weston believed that Mr. Baran needed to change his delivery methods. Weston suggested that Mr. Baran have a family member or an employee assist him, or that he "split his route" by selling a portion of the distribution area to another independent operator. Mr. Baran, believing these suggestions would reduce his income, declined to implement them or any other change in his delivery methods.

In 2006, 2007 and 2008 Weston sent Mr. Baran eight letters that specified conduct by him that breached the 1999 agreement and allowed him three days to cure the breaches. In July of 2008, after a Walmart serviced by Mr. Baran removed Weston's shelf space in the deli section of the store and reallocated it to a competitor, Weston notified Mr. Baran the agreement was terminated. Weston instructed Mr. Baran to sell his distribution rights to a qualified purchaser within ninety days, with Weston operating Mr. Baran's business, for his account, pending the sale.

Mr. Baran commenced this proceeding in October of 2008 by filing a complaint in equity. In December of 2008 Mr. Baran filed a petition for preliminary injunction to prevent the sale of his distribution route and for restoration to his position as operator of the route. In February of 2009, following a hearing on the petition, the Honorable Judge Christine Ward granted the preliminary injunction preventing the sale of the route, but denied Mr. Baran's request to be restored as the route operator.[1] Judge Ward, in November of 2014, granted Weston's motion for partial summary judgment by ruling that the language of the 1999 agreement precludes Mr. Baran from claiming lost profits as damages arising from Weston's alleged breach of the agreement.

On November 1 and 2, 2017 I heard the nonjury trial of Mr. Baran's claim for a permanent injunction. During the nearly nine years that passed between the entry of the preliminary injunction and the trial, the 1999 agreement required Weston to operate the distribution route for Mr. Baran's benefit, by charging him the wages it paid relief route operators and remitting the net profits to him. After the trial, I received proposed findings of fact and conclusions of law from the parties. On December 11, 2017 I signed an order that dissolved the preliminary injunction and authorized Weston to sell Mr. Baran's route to a qualified purchaser. Mr. Baran timely filed a motion for post-trial relief, which I denied. Mr. Baran also filed a supplemental motion for post-trial relief that requested a stay of the sale of his route. I also denied this request for a stay. After judgment was entered in favor of Weston, Mr. Baran filed a timely appeal to the Superior Court of Pennsylvania from both Judge Ward's summary judgment ruling[2] and my denial of his motion for post-trial relief. On April 19, 2018 Judge Ward filed an opinion relative to her summary judgment ruling. Pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), this opinion addresses the alleged errors Mr. Baran identified in my ruling. The errors that I allegedly made are identified in paragraphs 1, 2 and 3 of Plaintiff's concise statement of matters complained of on appeal and in paragraph 1 of Plaintiff's amended concise statement of matters complained of on appeal.

Mr. Baran first contends there is not sufficient evidence for my ruling in favor of Weston, with my ruling being against the weight of the evidence. I disagree with Mr. Baran as there is abundant evidence supporting my ruling in favor of Weston. Termination of the 1999 agreement is permitted if Mr. Baran fails to cure a breach within three days after notice or if Mr. Baran repeatedly violates the agreement. *See* trial exhibit A, p. 13, §8.3. Mr. Baran failed to cure at least four different breaches. After notice, Mr. Baran admitted he did not deliver fresh baked products to Target three days a week and Sam's Club four days a week. *See* transcript of Nonjury Trial, November 1 and 2, 2017 ("T." hereinafter), pp. 85 and 118. There also was no dispute that, after notice, Mr. Baran was unable to get Walmart to replace either Weston's 4-sided sales display in the front of the store or its shelf in the deli section. T., pp. 238-245, 157-160 and 247-252. Under the 1999 agreement, each of these uncured breaches was a sufficient reason for termination. These four breaches, plus additional breaches involving a Giant Eagle and a Shop N Save that may have been cured, also are repeat violations under the 1999 agreement sufficient for termination. Therefore, there was sufficient evidence for my ruling in favor of Weston, and the ruling was not against the weight of the evidence.

Mr. Baran next contends he did not breach the 1999 agreement because a Weston representative testified that any breach was cured. However, I interpret the testimony differently. The testimony referred to by Mr. Baran was given at the trial by Ricky Saxon, a regional sales manager for Weston. I interpret the testimony to mean Mr. Saxon thought the breaches were cured but learned later they were not cured. The testimony from cross examination during the trial, set forth below, is consistent with my interpretation:

Q. Okay. So in your own words, what did you terminate him for?

A. I terminated Joe for repeated violations of the contract. As you had stated, these are curable breaches, but in my eyes I thought they were cured because there was no other complaint. He never changed his service patterns and went on and on repeatedly, even with some conversation with him, and it still occurred.

Q. Okay. So you thought they were all cured; is that correct?

A. Correct.

Q. And, in fact, you said in court they were all cured in front of Judge Ward?

…objection….

Q. But, nonetheless, he was terminated because of multiple curable breaches?

A. That were not cured.

Q. That were not cured, even though you originally said they were cured?

A. Correct.

T., pp. 36-38.

Q. Mr. Saxon, I understand that you went over these six violations again. But you and I can agree that this morning and six years ago at the preliminary inunction hearing, you testified under oath that all of these violations were cured; is that correct?

A. Correct, I did.

Q. Okay. Now, are you saying now they were not cured?

A. I'm saying now that I was mistaken when I thought he cured how many days a week he was giving fresh service.

Q. Okay. So, I mean, why didn't you bring it up then? I mean, why wait six—I mean, you have a violation. It says if you cure it within three days, no harm, no foul. You said you thought they were all cured. And now we keep going back over these same—out of 22 years, we got maybe three valid claims there. I know there's six. Maybe three are valid. Why bring it up again?

MR. GISLESON: Your Honor, object to the editorializing.

MR. TALARICO: Take out the editorializing.

THE COURT: All right. Go ahead. You can answer.

A. I see they're all viable. They're repeated incidences where he wouldn't make the change and give the customer what they requested.

Q. So the fact that you said they were cured—and you're the man that terminated him. If I can't rely on you to say they were cured, who can I rely on?

A. And, again, I took him at his word; and since I didn't hear anything from these customers at that time, that it was cured.

Q. So everything—

A. I did not go out and go to the store and say, "Let me see your tickets. Did you get seven-day-a-week service or five-day-a-week? My point was I certainly was not trying to—whatever you would say—throw Joe under the bus. I wanted him to succeed, so I wasn't going to go out there and pull everything to see, hey, was this totally taken care of? If I didn't hear from them, I took that it was.

T., pp. 380-382. I found Mr. Saxon credible when he indicated he first thought the breaches were cured but later found out he was mistaken as they were "not cured." Because Mr. Saxon credibly testified at the trial that the breaches of the 1999 agreement were not cured, I correctly determined that Mr. Baran breached the agreement.

Mr. Baran next contends there is no evidence of a substantial breach of contract by him. Pursuant to the 1999 agreement, the laws of the State of New York shall be applied when interpreting the agreement. A substantial or material breach occurs under New York law when the breach defeats the object of the parties in making the contract or goes to the root of the agreement. *See Metropolitan Nat Bank v. Adelphi Academy,* 886 N.Y.S. 2d 68, 23 Misc. 3d 1132 (A)(2009). Relative to Mr. Baran's obligations under the 1999 agreement, the object of the parties or root of the agreement is for Mr. Baran "to develop and maximize sales of products…by…promptly removing all stale or off code products; cooperating with [Weston]…in its marketing programs…and providing service on a basis consistent with good industry practice…." Trial exhibit A, p. 6, §4.1. There was extensive credible evidence of Mr. Baran breaching this provision. For example, even though Mr. Baran testified under oath to never being "thrown out of one store" (T., pp. 108-9), Weston's manager of retail accounts, John Gallaher, credibly testified that Mr. Baran, in fact, was "thrown out" or banned from a Target store because he refused to service it three days per week. *See* T., pp. 282-285. This is a breach of Mr. Baran's obligations to maximize sales of products, cooperate with Weston's marketing programs and provide service consistent with good industry practice. Mr. Gallaher also testified that the shelf in the deli section of Walmart was part of a Weston national program and losing it was "an embarrassment to us…." T., p. 252. This is a breach of Mr. Baran's obligations to maximize sales of products, cooperate with marketing programs and provide service consistent with good industry practice. Mr. Saxon testified to one day finding 400 off code products in multiple stores serviced by Mr. Baran, a problem Mr. Saxon never had with any other independent operator (*see* T., pp. 369-370), which patently breached Mr. Baran's obligation to remove off code products. Finally, Mr. Saxon testified he "never had an [independent operator] that had as many breaches or was unwilling to change" and he believed Mr. Baran was not maximizing sales or providing service consistent with good industry practice. T., pp. 353-354[3]. In summary, because there was extensive evidence of a substantial breach of contract by Mr. Baran, my decision in favor of Weston was correct.

Mr. Baran's final contention, set forth in the amended concise statement of matters complained of on appeal, is that I should have stayed my ruling that dissolved the preliminary injunction until it could be reviewed by the Superior Court. Mr. Baran, however, is not entitled to a stay pending appeal without making a substantial case on the merits, showing irreparable injury will be suffered without the stay, demonstrating a stay will not substantially harm other interested parties and will not adversely affect the public interest. *See Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 524 Pa. 415 at 420, 573 A.2d 1001 at 1003 (1990). Of these four requirements, Mr. Baran fails to make the necessary showing with at least three. As is set forth at length above, I find

all of Mr. Baran's arguments lack merit. Without the stay, Mr. Baran will not be irreparably harmed as he will receive the net proceeds from the sale of the route, estimated to be $138,167. Finally, a stay will substantially harm Weston because it will continue to incur the additional expenses and lost revenues that began over nine years ago when the preliminary injunction prohibited Weston from obtaining another independent operator. Mr. Baran being unable to make the showing needed for a stay pending appeal, my decision to deny his request was therefore correct.

BY THE COURT:
/s/Hertzberg, J.

[1] Weston appealed this decision to the Superior Court of Pennsylvania, which affirmed. *See* Superior Court docket number 426 WDA 2009.

[2] Mr. Baran filed an earlier appeal from Judge Ward's summary judgment ruling, which the Superior Court of Pennsylvania quashed since judgment had not yet been entered. *See* Superior Court docket no. 70 WDA 2018.

[3] Mr. Gallaher also testified that Mr. Baran was the worst distributor he had encountered (T. at p. 298) and that Mr. Baran was not maximizing sales (T. at p. 238).

Steve Mader v. Duquesne Light Company

Personal Injury—Electrocution—Jury Award

Masonry contractor was electrocuted when the top of his ladder contacted a 13,000 volt electrical transmission line owned by the defendant. Jury awarded plaintiff $500,000 in compensatory damages and no punitive damages. Court granted new trial on damages where Jury verdict slip contained an "irrational and inadequate" itemization of damages, where jury award of $0 for past of future lost earning was unjust and where jury award of $0 for non-economic damages "inadequate" in light of evidence of pain and suffering.

No. GD 13-6249. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—July 5, 2018.

OPINION

I. Background

Plaintiff Steven Mader, a fifty-four year old masonry contractor, worked on a two week project involving repairs to the chimney, fireplace and front stoop of an existing home in the North Hills of Pittsburgh. On September 21, 2012, after the project had been completed and Mr. Mader's crew was beginning to clean up, the customer asked Mr. Mader if he could check the gutters to see if any mortar from the chimney repair had been washed into them during a recent rainstorm. Mr. Mader used a sixteen foot aluminum extension ladder to check the gutters and then, carrying the ladder perpendicular to the ground, began walking from the home to place the ladder on his truck. Underground electrical service was provided to every home in the neighborhood, and Mr. Mader had not noticed that there were electrical power lines only eleven feet away from his customer's home.

With only air insulating this 13,000 volt electrical transmission line, the top of the ladder being carried by Mr. Mader made contact with it. The electricity ran down the ladder and through his body, causing him to immediately lose consciousness and fall to the ground. He regained consciousness and was taken to the hospital by ambulance with severe burn injuries to both of his arms (where he had been holding the ladder) and his feet (where the electricity exited his body). Mr. Mader received his last rights from a priest when he arrived at the hospital, but he ultimately survived what could have been a fatal electrocution.

The next day, surgery was performed on Mr. Mader's feet and right arm at the hospital. Both of his feet were burned from the toes to the mid-forefoot with the burn reaching the bone. Dead or dying tissue was excised and then cadaver grafts placed on Mr. Mader's feet. Tissue was excised from his right arm, which also was burned to the bone. To relieve the swelling of Mr. Mader's right arm, the hospital opened the subcutaneous layers of skin (which is known as a fasciotomy) and performed a cadaver graft. On September 29 he had another surgery at the hospital. The fasciotomy of Mr. Mader's right arm was closed and tissue was excised from his left hand and wrist. On October 1 both his feet were amputated in the middle of the arch, which is known as a transmetatarsal amputation. On October 3 Mr. Mader returned to the hospital operating room for irrigation of the amputation wounds. On October 10 he had an additional surgery to excise tissue and place a wound vac in his right forearm. Mr. Mader's final surgery at the hospital was on October 25. Tissue was debrided around his elbow and he also received an autograft, which consisted of removal of healthy skin from Mr. Mader's upper thighs that was used to replace skin he had lost. He then was moved out of the hospital to a skilled nursing facility, where he stayed for the next month and a half.

While in the hospital, Mr. Mader kept his masonry contracting business operating with his two employees able to do the jobs scheduled before September 21 without him on the sites. At the time of the year when Mr. Mader moved to the skilled nursing facility, his past practice was to shift the business primarily to chimney cleaning. Mr. Mader received calls on his cell phone for chimney cleaning, and his two employees came to the nursing facility daily to receive chimney cleaning assignments. While Mr. Mader was confined to a wheelchair when he left the nursing facility, he now is able to walk with his gait altered to accommodate the amputation of the balls of his feet. He did, however, close his business approximately two years after his injury because he could no longer participate in the physical process of bricklaying and his customers would not pay his prices without him doing the work.

In April of 2013, Mr. Mader sued Duquesne Light Company, the owner of the 13,000 volt electric power line he contacted with his ladder. Mr. Mader averred Duquesne Light's negligence, in maintaining the electric lines too close to the ground, caused his injuries. Mr. Mader also averred Duquesne Light acted with reckless indifference to his safety and therefore should pay punitive damages. The dispute was resolved in a jury trial, with me presiding. At the conclusion of the trial, the jury returned a verdict allocating Duquesne Light sixty percent negligent and Mr. Mader forty percent negligent for his injuries. The jury awarded Mr. Mader $500,000 in compensatory damages and found Duquesne Light's conduct did not warrant punitive damages.

Consistent with the Pennsylvania Suggested Jury Instructions Mr. Mader requested, I instructed the jury that he is entitled

to compensation for past medical expenses, past lost earnings, future lost earning capacity, past and future pain and suffering, embarrassment and humiliation, loss of ability to enjoy the pleasurers of life and disfigurement. *See* Exhibit 13 filed 3/20/2018, pp. 68-74. However, the written December 8, 2017 "Jury Verdict" provides this irrational and inadequate itemization of Mr. Mader's damages:

(a)	Past medical expenses	$_____444,525.56_____
(b)	Future medical expenses	$_____55,474.44_____
(c)	Past lost earnings	$_____
(d)	Future lost earning capacity	$_____
(e)	Past, present, and future pain and suffering, embarrassment and humiliation and loss of enjoyment of life	$_____
(f)	Disfigurement	$_____
	Total	$ 500,000.00

Mr. Mader timely filed a motion for post-trial relief that requested a new trial limited to the issue of damages. Duquesne Light's responsive brief acknowledges that Mr. Mader is entitled to a new trial on damages for past pain and suffering. But, it denies that Mr. Mader is entitled to a new trial on damages for future pain and suffering or for either past or future lost earnings. I granted Mr. Mader's request for a new trial as to all damages submitted to the jury (i.e., past medical expenses, future medical expenses, past lost earnings, future lost earning capacity, past, present and future pain and suffering, embarrassment and humiliation, loss of enjoyment of life and disfigurement).

Duquesne Light timely appealed from my order granting a new trial to the Superior Court of Pennsylvania. Duquesne Light also timely filed a concise statement of errors complained of on appeal, which, pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), I address in this opinion.

II. Past Medical Expenses

Duquesne Light contends my grant of a new trial on the issue of past medical expenses is erroneous because Mr. Mader did not request it. Duquesne Light is incorrect as Mr. Mader's motion for post-trial relief and his supporting memorandum request "a new trial limited to damages" or "a new trial on damages" without any request to exclude past medical expenses. Then, after Duquesne Light filed its brief denying Mr. Mader's entitlement to a new trial on past medical expenses (or anything other than past pain and suffering), Mr. Mader filed a reply that specifically requested "a new trial on all damages" because the jury "did not fairly adjudicate Mr. Mader's claims of damages and none of its damages' award should be permitted to stand."

Duquesne Light contends my grant of a new trial on the issue of past medical expenses also was erroneous because the $444,525.56 awarded was the stipulated amount of past medical expenses I instructed the jury to award if it found Duquesne Light liable. However, with Mr. Mader likely to incur additional medical expenses during the pendency of the new trial, past medical expenses will likely be greater than $444,525.56 at the new trial. Having a new trial on medical expenses also avoids the unnecessary confusion that is likely if the new jury hears extensive evidence of Mr. Mader's pain and suffering during tissue debridement, amputation and other medical procedures but is denied the ability to award past medical expenses.

Therefore, I was correct to order a new trial on the issue of past medical expenses.

III. Future Medical Expenses

Duquesne Light next contends my grant of a new trial on the issue of future medical expenses is erroneous. The first reason Duquesne Light provides is that Mr. Mader did not request a new trial on future medical expenses. Duquesne Light, however, is incorrect because Mr. Mader made this request in the same manner that he did for past medical expenses that is described above. Other reasons Duquesne Light provides are the award is between the amounts projected by the parties' life care planners, the award of $55,474.44 is close to the $42,636.65 to $50,483.67 projected by Duquesne Light's life care planner, Mr. Mader's life care planner exaggerated his future medical expenses, Mr. Mader did not follow all doctor's orders and there was evidence supporting the $55,474.44 future medical expense verdict. Even if this all were true, it is still impossible to known how the jury arrived at $55,474.44 for future medical expenses. It is most likely that the jury arrived at that amount because, when it is added to the stipulated past medical expenses, the total is a nice round number, $500,000. Duquesne Light mistakedly presumes a jury that irrationally determines Mr. Mader is not entitled to any compensation for his excruciating pain or disfiguring amputations and burns rationally calculated future medical expenses. Additionally, similar to the situation with past medical expenses, the life care plans at the new trial will have to project different amounts because medical expenses incurred during the pendency of the new trial no longer can be classified as future medical expenses.

Therefore, I was correct to order a new trial on the issue of future medical expenses.

IV. Lost Earnings

Duquesne Light next contends my grant of a new trial on the issue of past and future lost earnings is erroneous. The first five reasons provided by Duquesne Light are that Mr. Mader closed his business for reasons unrelated to his injuries, he was able to run his business from the nursing home, the business was making money when Mr. Mader voluntarily shut it down, Mr. Mader did not look for another job and Duquesne Light's vocational expert identified multiple jobs where he can work. Even if this all were true, Duquesne Light's expert physical medicine and rehabilitation doctor acknowledged Mr. Mader is physically unable to perform the duties of a bricklayer (*see* Exhibit 10 filed 3/20/2018, pp. 126-127), Duquesne Light's expert forensic accountant acknowledged the business earned less in 2012, 2013 and 2014 than its average in 2009, 2010 and 2011 (*see* Exhibit 7 filed 3/20/2018, pp. 116-117) and all the other jobs identified by Duquesne Light's vocational expert paid significantly less than Mr. Mader's business earned before his injuries (*see* Exhibit 11 filed 3/20/2018, pp. 31-36). Hence, Duquesne Light's expert forensic accountant, Karl Jarek, CPA, concluded Mr. Mader had past lost earnings of at least $56,910 and future lost earnings of at least $90,510 (*see* Exhibit 7 filed 3/20/2018, pp. 116-118). "A jury…may not withhold lost wages when the evidence in the case uncontradictedly establishes the loss of wages as the result of the negligence which they, the jury, have adjudicated against the responsible defendant." *Todd v. Bercini*, 371 Pa. 605, 92 A.2d 538, 539 (1952). Since the jury award to Mr. Mader of nothing for either past or future lost earnings is therefore unjust, I was correct to order a new trial on those issues.

Duquesne Light also contends the evidence generally supported the jury's conclusion that Mr. Mader was not entitled to any lost earnings. However, as described above, the evidence provided by Duquesne Light was that Mr. Mader was entitled to damages of at least $56,910 for past earnings and $90,510 for future earnings. Therefore, I correctly ordered a new trial on those issues.

V. Future Noneconomic Losses

Duquesne Light's final contention is that my grant of a new trial on the issue of future pain and suffering, embarrassment, humiliation and loss of enjoyment of life is erroneous. The first six reasons provided by Duquesne Light are that Mr. Made was able to walk independently within months of the accident, his wounds healed within a year, he is able to walk for extended periods of time, he works out regularly at a gym and took trips to Europe after the accident, he has not followed his doctor's orders and recent medical records show him doing well. In making these arguments, Duquesne Light ignores testimony from its expert life care planner that Mr. Mader will have future medical expenses for treatment by a physiatrist four times a year for management of his future pain. *See* Exhibit 11 filed 3/20/2018, p. 9. Also ignored by Duquesne Light is the "phantom" pain and other pain related to the amputation of Mr. Mader's feet that he will suffer in the future. *See* Exhibit 5 filed 3/20/2018, pp. 230-231 and Exhibit 14, pp. 4, 40-41 and 44. Finally, Duquesne Light ignores the embarrassment, humiliation and loss of enjoyment of life Mr. Mader undoubtedly will experience in the future from the difficulty of walking with half of his feet amputated.

Duquesne Light also contends the evidence generally supported the jury's conclusion that Mr. Mader was not entitled to the future noneconomic damages described above. However, because the jury ignored the undisputed evidence that Mr. Mader will have pain, embarrassment, humiliation and loss of enjoyment of life in the future, the jury verdict with no compensation for these future damages clearly is inadequate.

There simply was no reasonable basis for the jury to believe Mr. Mader would not experience pain and suffering in the future or that Mr. Mader's injury was not caused by the negligence of Duquesne Light. *See Davis v. Mullen*, 565 Pa. 386 at 397, 773 A.2d 764 at 770 (2001). Therefore, I was correct to order a new trial on the issues of future pain and suffering, embarrassment, humiliation and loss of enjoyment of life.

BY THE COURT:
/s/Hertzberg, J.

Marjorie Stein v.
Richard F. Grabowski and Sally L. Grabowski, husband and wife

Quiet Title—Doctrine of Consentable Lines

Pine trees and mailbox location established consentable line that the adjacent landowners recognized and acquiesced to for 50 plus years by maintaining their property up to that line.

No. GD-15-08110. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay, J.—September 2018.

OPINION

The Defendants, Richard F. Grabowski and Sally L. Grabowski ("Grabowskis"), appeals this court's March 19, 2018 order denying their motion for post-trial relief and affirming its January 17, 2018 Non-jury Verdict granting a judgement of quiet title in favor of Plaintiff, Marjorie Stein ("Stein").

SUMMARY OF FACTS

This case primarily concerns a disputed area of land located between two adjacent properties and the conduct of their predecessors in title with respect to that disputed land. Stein is the current owner of the property at 2521 Old Washington Road, Pittsburgh, Pennsylvania 15241 (the "Stein Property"). (T.T. at 49)[1]. The Grabowskis are the current owners of the property at 2511 Old Washington Road, Pittsburgh, Pennsylvania 15241 (the "Grabowski Property"). (T.T. at 201). These properties are adjacent to one another with the Grabowski Property situated north of the Stein Property. (P.E. 1.2)[2]

Stein's parents, Frank and Florence Dolanch, purchased the Stein Property and constructed a house on it in 1951. (T.T. at 50-51). Stein was raised on the Stein Property and left briefly when she was married in 1967. (P.C. at ¶7). Stein's mother conveyed the property to her in 1995. (T.T. at 50-52; P.C ¶ 8)[3]. In 2000, Stein's daughter occupied the Stein Property when Stein's mother went into a nursing home. (T.T at 103; P.C at ¶9). Stein's daughter lived in and maintained the property until 2003, at which time Stein moved back onto the property. (T.T. at 1-3; P.C. ¶10). Throughout the time that Stein did not occupy the Stein Property as her home, she lived within a few miles of the property (except for a four month period in 1967) and she stayed in contact with her parents and visited regularly. (T. T. at 112-114).

Prior to 2001, when the Grabowski's purchased the property, it was owned by William and Martha Stevenson, Stein's uncle and aunt. The Stevenson's had purchased the property in 1950 and subsequently build their house. (T.T. at 16-19). Mr. and Mrs. Stevensons are deceased but their son, Walter Stevenson, did testify regarding the recognized boundary lines prior to the Grabowski's ownership of the property. *Id.* Since their purchase of the property in 2001, the Grabowskis have never lived there. However, their son Scott Grabowski has resided on the property since 2001. (T.T. at 229-230). Because their interest only began in 2001, the Grabowskis have no knowledge or information about the use or possession of the area of the bank and driveway from 1951-2001. *Thus, the Stein's and their witnesses' testimony as to the use of the disputed area for 50 years is un-contradicted and uncontradictable.* (T.T. at 231). Stein's testimony about the use of the disputed area from the time the Grabowskis purchased the property in 2001 through the present was also not contradicted by the Grabowskis or any other evidence presented at trial.

On the Stein Property, there is a driveway leading to Stein's residence which has existed at that location since approximately 1951. (T.T. at 31, 52-53; P.E. 1.2). Immediately north and adjacent to the Stein's driveway is a slope or bank which rises northward and levels out approximately at the top of the ostensible front yard of the Grabowski Property. (P.E. 1.3, 1H (1), 1H (2)). The east-west trajectory of the top of the slope of this bank extends from the west at Old Washington Road, in the area of Stein's mailbox, to the east where there is a stand of evergreen trees planted on Stein's side-yard (hereinafter referred to as the "bank"). Stein claims this to be the observed boundary line, which is different from the survey or title. Stein asserts that an observed boundary line has been established by the doctrine of consentable lines, and is hereafter sometimes referred to as the "consentable" or "observed" boundary line. (P.E. 1.2, 1.3, and 4.B.1 (please refer to the "proposed property line"). The Grabowskis rely exclusively upon the deed description and surveys, but not on the conduct of the predecessors to the respective properties, and claim that a

triangular section of the bank and entire front part of Stein's driveway are their property (hereinafter referred to as the "Disputed Property"). (See P.E. 4.B.1).

During the trial the Court was presented evidence regarding the adjoining property owner's use, maintenance, and control of the disputed property over the past 64 years. The court heard testimony and reviewed numerous exhibits that demonstrated various examples of use and control by the adjoining property owners. These included standard yard and lawn maintenance (e.g. mowing, mulching, fertilizing, weeding and leaf removal); tree removal and planting; grading and installation and use of a driveway and mailbox.

Standard Lawn and Yard Maintenance

Stevenson testified that he began mowing the level portion of the lawn of the Grabowski Property around 1954, and that he did not mow the bank at any time. Thus, the bank was never mowed or maintained in any way by or on behalf of the Stevenson's for about 46 or 47 years. (T.T. at 26-29). Stevenson testified that the Dolanches, Stein's parents, mowed and maintained the bank from approximately 1953 onward. (T.T. at 29).

Stein testified that her brother and her father began mowing the bank in approximately 1953, and that they stopped mowing "where the bank came up and leveled off." (T.T. at 54-55). Stein testified that multiple other people either in her family or engaged by her family, mowed the bank since that time and up to the present day-for 64 years. (T.T. at 54-56, 67). There is no contradictory evidence that from 1953 through 2001 both sets of property owners consistently recognized and observed mowing the line at the top of the bank.

Scott Grabowski testified that when the Stein house was unoccupied they hired someone from Peters Township public works to come intermittently to cut the grass. During this time period Scott Grabowski mowed a portion of the bank south of the top of the slope in 2001, he did so because, in his opinion, the lawn was not being maintained (evidencing his presumption that it should be maintained by the Steins), and he mowed the bank because he "did not want to look at it." (T.T. at 186-187, 196-197), However, Stein resumed her occupancy of the residence in 2003 and her husband resumed mowing the bank before and has continued to do so ever since. *Scott has not mown the bank at any other time.* (T.T. at 189-190).

Stein testified that over the past 64 years, she and her family have used different lawn treatments on the bank throughout the years. (T.T. at 57-58). They also rake leaves on the bank, and when Scott blew the leaves off the Grabowski Property he specifically made sure to blow the leaves right up to the top of the slope of the bank, the observed boundary, in an acknowledgement of his understanding of the location of the boundary line. (T.T. at 57-58, 88; P.E. 1H (1), 1H (2)).

Stein testified that when her parents first purchased the property there were locusts trees that ran parallel along Old Washington Road the width of the Grabowski Property, then owned by the Stevenson's and along the front of the Stein's Property, then owned by her parents, the Dolanchs. (T.T. at 58-59). However, the locust trees were removed from the Stein Property at about the same time that the Stein Driveway was installed, approximately 1951. *Id.* As a result, the end of this stand of locust trees running along Old Washington Road at the front of the Grabowski Property and ending at the top of the slope of the bank and the Stein's mailbox, further delineated the observed boundary.

Walter Stevenson testified that there was a cluster of locust trees and shrubbery that existed on his parent's property that extended along Old Washington Road at the front portion of his parent's property and continued up "to the Dolanch property." (T.T. at 34-35; P.E. 1A). A photograph admitted from 1967 which shows the end of the cluster of locust trees and shrubbery in the same location as another photograph from 1997. (P.E. 1A, 1F). Another photograph which is approximately from 1960 or 1961 shows the same location of these trees and shrubs ending at the observed boundary line. (T.T. at 76; P.E. 1B).

Scott Grabowski testified that there were tree "stumps and brush" in 2001 when his parents purchased the property. (T.T. at 183-184, 194-195). Scott admitted that the stumps and brush on the Grabowski Property were in the same location as the photograph from 1997, and that the area was "more overgrown with weeds" in 2001, (T.T. at 195).

The Stein's mailbox has been in its present location, at the end of the trajectory of the top of the bank, marking the observed boundary line, for 55 or 56 years or since approximately 1961 or 1962. (T.T. at 69; P.E. 1.3, 1F, 2K). Richard Grabowski admitted that the mailbox was plainly visible when he purchased his property. (T.T. at 226).

There was an old line of evergreen trees and a new line of evergreen trees in the same location, at the east end of the top of the slope of the bank which has marked the east end of the consentable line and the trajectory of the consentable line along the top of the slope of the bank to the mailbox and locusts for 45 years. (T.T. at 62-63, 119-120; P.E. 1.2, 1.3, 1F, 2A, 2B, 2E, 2H, 2J). The original line of evergreen trees was planted in about 1972. (T.T. at 62; *see* P.E. 1F (Showing the original evergreen trees in the background of this 1997 Photograph; the trees are clearly mature as they are more than twice the height of the house)). The original evergreens were removed in approximately 2010 or 2011, a decade after the Grabowskis purchased the Grabowski property, because they looked spindly and thin." (T.T. at 62, 118-120, 190-191). Stein planted the new evergreens in the same general location as the old evergreens soon after the old trees were removed. (T.T. at 118-120, 190-191; P.E. 1.2, 1.3, 1F, 2A, 2B, 2E, 2F, 2H, 2J),

In approximately 2004, three years after the Grabowskis purchased the Grabowski Property, Stein had one pear tree and one blue spruce evergreen tree planted on the bank. (T.T. at 70, 126-127; P.E. 1.2, 1.3, 2E, 2G, 2H, 2I, 2J, 1H(1), 1H(2), 2K). Stein did so with the understanding that the trees were being planted on her property. (T.T. at 116)

As the occupant of the Grabowski property, Scott Grabowski maintained the lawn north of the consentable line. In approximately 2004 or 2005, he removed the locust trees and shrubs along Old Washington Road. (T.T. at 59-61, 184; P.E. 1A, 1B, 2A, 1F, 1.2). He also "leveled out", or reduced the slope along Old Washington Road, the area where he removed the locust trees on the Grabowski Property. (T.T. at 184). He did so to make his lawn easier to mow with his riding mower; however in doing so, he did not go beyond the top of the slope of the bank with his grading or in doing any lawn maintenance. (T.T. at 59-61, 184; P.E. 1A, 1B, 2A, 1F, 1.2).

Fifteen year after purchasing the property, non-resident Richard Grabowski informed Stein that he believed he owned the now disputed property. (T.T. at 66-67). Richard Grabowski admitted that he did not have a survey completed prior to his purchase of the property which may have resolved this dispute. (T.T. at 233)

DISCUSSION

Plaintiff Provided Sufficient Evidence to Establish a Consentable Line Which deviated From the Survey and Deed Descriptions

Stein asserts that from 1951to 2001, the Grabowski's predecessor in title , the Stevenson's , had acknowledged the Disputed Property including a portion of the driveway as the Dolanchs' and Steins 'land and both parties recognized it as their boundary line

through their course of conduct during that time. The doctrine of consentable lines as applied by Pennsylvania courts is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation *Corbin v Cowan*, 716 A2d 614,617 (Pa. Super. 1998), app. denied, 559 Pa 704, 740 A2d 233(1999).[4]

"Based upon a rule of repose sometimes known as the doctrine of consentable line, the existence of such a boundary may be proved either by dispute and compromise between the parties or recognition and acquiescence by one party of the right and title of the other" *Moore v. Moore*, 921 A.2d 1, 4 (2007) Since there is no evidence that there was a dispute between the Stevenson's and Stein or her parents (the Dolanchs) this court viewed this as a case of acquiescence.

"Acquiescence," in the context of a dispute over real property, "denotes passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user." *Zeglin*, 812 A.2d 558, 562 (2002). A determination of consentable line by acquiescence requires a finding 1) that each party has claimed the land on his side of the line as his own and 2) that he or she has occupied the land on his side of the line for a continuous period of 21 years. *Moore v. Moore*, 921 A.2d 1, 5 (2007). When a consentable line is established, the land behind such a line becomes the property of each neighbor regardless of what the deed specifies. In essence, each neighbor gains marketable title to that land behind the line, some of which may not have been theirs under their deeds." *Id.* (quoting *Soderberg v. Weisel*, 455 Pa.Super. 158, 687 A.2d 839, 843 (1997) (internal citation omitted).

If adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for the period of time prescribed by the statute of limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one. *Plauchak v. Boling*, 439 Pa. Super. 156, 165, 653 A.2d 671, 675 (1995) (quoting *Plott v Cole* 593 A2d 1216,1221(1988))

In such a situation, the parties need not have specifically consented to the location of the line. *Inn Le'Daerda, Inc. v. Davis*, 241 Pa.Super. 150, 163, 360 A.2d 209, 215 (1976). "It must nevertheless appear that for the requisite twenty-one years a line was recognized and acquiesced in as a boundary by adjoining landowners." *Id.* at 163, 360 A.2d at 215–16 (citing *Miles v. Pennsylvania Coal Co.*, 245 Pa. 94, 91 A. 211 (1914); *Reiter v. McJunkin*, 173 Pa. 82, 33 A. 1012 (1896)).

The evidence is clear that the prior owners of the two adjacent properties (the Stevensons and Dolanchs) had observed a consentable boundary that deviated from the their deed descriptions and surveys for approximately fifty (50) years prior to the Grabowski purchasing their property from the Stevensons.

Stein presented clear and convincing evidence that her parents the Dolanchs constructed a house and installed a driveway in 1951 which encroached the boundary line found in the deed descriptions and later surveys. The Court also found sufficient evidence that when the Dolanchs installed their driveway they also took control and maintained the strip of land that abutted their driveway which ran from Washington Road up the hill to a stand of pine trees that they planted. The court found significant uncontroverted evidence that when both properties where transferred in 1951, a stand of locust trees ran along Washington Road fronting both properties. When the Dolanchs installed their driveway they removed not only the locust trees fronting their deeded property but also trees on the Stevenson's adjacent property to install their driveway and provide a setback that abuts the entrance of driveway. This set back provided a clear view of Washington Road for vehicles exiting the Dolanch's driveway. Stein provided sufficient evidence that her parents continued to control and maintain the strip of property since approximately 1951 including the area at the entrance to the driveway which would have been necessary to ensure that vegetation did not grow back and obstruct the view of Washington Road for vehicles exiting the driveway. The court gave great weight to photographs (Exhibits 1A and 1B) from the 1960s clearly depicting the set back that the Dolanchs maintained from the Stevensons' locust trees at the entrance of their driveway.

The Court also found clear and convincing evidence that Stein's parents maintained the strip of property abutting their driveway which ran from Washington Road up the hill to a stand of pine trees that they had planted. The Dolanchs and Stein cut the grass, weeded, fertilized and planted trees on the strip of property for nearly 50 years before the Grabowskis purchased their property. The Court found credible the testimony of Walter Stevenson (the son of the prior owners of the Grabowski property) who testified that his family never maintained the disputed strip of property and that his aunt and uncle the Dolanchs and his cousin Stein always maintained and exercised control of the strip of property abutting the driveway. Stein and Stevenson testified that both families treated the crest of the bank that ran from Washington Road up the hill to the stand of pine trees as the line of demarcation for maintaining their respective properties. The Court found the placement of the Dolanchs' mailbox on the disputed strip of property in 1962 as further evidence of their control and the Stevensons acquiescence to the consentable boundary line.

The Court Did Not Abuse Its Discretion When It Disregarded The Property Descriptions In The 1995 Deed From Florence Dolanch To Stein.

Grabowski contends that this Court abused its discretion in finding that the evidence presented was sufficient to prove a consentable line when the deed from Steins mother Florence Dolanch dated September 4, 1995 and recorded June 29, 2001 did not include or mention the portion of the real estate claimed as the consentable line. The establishment of a consentable line is not a conveyance of land within the meaning of the Statute of Frauds because no estate is thereby created. *Hagey v. Detweiler*, 35 Pa. 409, 412 (1860). Therefore such a line may be initiated by oral agreement and proved by parol evidence. *Beals v. Allison*, 161 Pa.Super. 125, 128, 54 A.2d 84, 85 (1947) *Plauchak v. Boling*, 439 Pa. Super. 156, 165, 653 A.2d 671, 675 (1995). Pennsylvania law does not require that a consentable line be reduced to writing and again is a rule of repose.

The Court Considered the Two Surveys and Building Permits but Gave Them Limited Weight

First and foremost this court found that Grabowskis' predecessor in title (the Stevensons) had recognized andacquiesced to the consentable line for at least 50 years prior to their purchase of their property. In addition the Court found that the Grabowskis' had continued to acquiesce to the consentable line from 2001 to 2015. The Court found credible Stein's testimony that until 2003 she was not even aware of any discrepancy with the boundary lines and that she and her family had always believed the correct boundary was the consentable line which the adjoining property owners had always observed. (H.T, at pg. 116)[5] Stein also testified that she believed that the survey was incorrect and that they continued to plant trees and maintain the property within the boundary line that had been observed for the past 50 plus years (H.T. at pg. 125-26).This Court thus gave little weight to the surveys and building permits as they, like the deed description, are essentially irrelevant to an acquiescence and consentable line determination.

The Courts Admission of Hearsay Testimony of Stein Regarding Statements by her Deceased Mother With Regard to Her Understanding of the Location of the Property Lines Was Not an Error of Law.

In response to a question on cross examination regarding her understanding as to the location of the boundary line the Court admitted Stein's testimony that her understanding was derived from what her mother had always told her about the location of the boundary line over the objection of Grabowski. This Court ruled that it was not being offered for the truth of the matter asserted but in response to defense counsel's cross examination question about the survey and her understanding about the boundary line and why she believed the survey to be incorrect. This admission was not a deciding factor in the Court's finding of a consentable line in favor of Stein and was not considered for the truth of the matter asserted.

The Court Correctly Determined the Consentable Boundary Line, as a Matter of Law.

The court correctly concluded, as a matter of law, the pine trees at the top of the hill and the mailbox at the bottom established the consentable line that the adjacent landowner's recognized and acquiesced to for 50 plus years by maintaining their property up to that line. The court could not find any case law which states that regular maintenance of land is insufficient to establish recognition and acquiescence. But this Court did find two non-precedential Superior Court cases *Durdach v Revta* 2011 WL 7272290 and *Dennis v Palman* WL 347609 that had similar facts as the case sub judice regarding regular yard maintenance. . In the *Durdach* case, Revta installed a drive way that encroached the boundary line and maintained a strip of property abutting the driveway; the Superior Court found that yard maintenance along with the use of the driveway for more than 21 years was sufficient to prove the existence of a consentable line by recognition and acquiescence. In the *Dennis* case the boundary line was marked by two pine trees planted 193 feet away from each other in which the adjoining property owners maintained their respective yards up to that line for 37 years. The maintenance in *Dennis* was primarily mowing, weeding and mulching up to the property line which the Superior Court found to be sufficient to establish recognition and acquiescence. In this case, the Court has found that the maintenance of the disputed property by Stein to include mowing the grass, applying fertilizer, blowing leaves, weeding, planting trees, removing trees, mulching and grading the property. This evidence, along with other evidence such as the removal and planting of trees along the disputed property line and the location of the Steins mailbox and driveway, is sufficient to prove recognition and acquiescence by the parties. The court found clear and convincing evidence that the adjoining property owners had maintained their respective yards up to the consentable line for over 50 years which continued for another 14 years after Grabowski purchased their property and before they made a claim to the disputed property.

CONCLUSION

In conclusion, no reversible error occurred and this Court's findings should be affirmed and Grabowskis' appeal should be dismissed with prejudice.

BY THE COURT:
/McVay, J.

[1] "T.T." refers to the Trial Transcript

[2] "P.E." refers to the Plaintiff's Exhibits

[3] "P.C." refers to Plaintiffs Complaint

[4] See, *Consentable Lines in Pennsylvania*, 54 Dick. L. Rev. 96 (1949) for a historical review of this unique Pennsylvania common law doctrine.

[5] H.T. refers to the Hearing transcript

Commonwealth of Pennsylvania v. Edward McDonald

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Insanity Defense

PCRA petitioner claiming ineffectiveness for failing to raise an insanity defense must present some evidence to support the claim before a hearing is warranted.

No. CC 201513138. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—May 8, 2018.

OPINION

This is an appeal of the denial of the petition filed by Petitioner pursuant to the Post-Conviction Relief Act. On September 15, 2016, the defendant pled *nolo contendere* to two counts of Aggravated Arson, twelve counts of Arson and one count of Causing A Catastrophe. At the first Aggravated Arson count, he received a sentence of imprisonment of not less than 48 months nor more than 96 months followed by a term of probation of five years. He received a sentence of time served (20 months) relative to the second Aggravated Arson count. He received no further penalty at the remaining counts. He was also ordered to pay restitution in the amount of $115,000. Petitioner only raised one issue in his PCRA petition. He claims that his trial counsel "failed to mount an insanity defense" on behalf of the defendant.[1]

It is well established that counsel is presumed effective and the petitioner bears the burden of proving ineffectiveness. *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 664 (Pa. 2007). To obtain relief on a claim of ineffective assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As set forth in *Commonwealth v. Dennis*, 17 A.2d 297, 301 (Pa.Super. 2011),

> [i]n our Commonwealth, we have rearticulated the *Strickland* Court's performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001).

The standard remains the same for claims under Pennsylvania and federal law. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs. *Id.* at 221-222. Moreover, the credibility determinations of a trial court hearing a PCRA petition are binding on higher courts where the record supports such credibility assessments. *Commonwealth v. R. Johnson*, 600 Pa. 329, 356-57, 966 A.2d 523, 539 (2009).

The threshold inquiry in a claim of ineffective assistance of counsel is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Commonwealth v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (Pa.Super. 1991). Counsel cannot be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Tanner*, 600 A.2d 201 (Pa.Super. 1991).

The record does not establish that trial counsel rendered ineffective assistance of counsel. Petitioner's main claim is that trial counsel did not pursue an insanity defense in the trial court. Legal insanity is established if, "[a]t the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." 18 Pa.C.S § 314(c)(2). Petitioner's claim must fail because there has been absolutely no evidence provided to this Court that the petitioner was legally insane at the time he committed the crimes to which he pled *nolo contendere.* Trial counsel could not have rendered ineffective assistance of counsel for failing to raise an insanity defense for which no factual or legal support existed. PCRA counsel has similarly offered no factual or legal support for such a claim.[2] Accordingly, the PCRA petition was properly denied.

BY THE COURT:
/s/Mariani, J.

Date: May 8, 2018

[1] In his 1925(b) statement, Petitioner raised three issues: (1) Trial counsel was ineffective for never discussing a not guilty by reason of mental disease defense with defendant, and for failing to file notice of intent to plead not guilty on such grounds thereby shifting the burden of proof to the Commonwealth; (2) Trial counsel was ineffective for failing to introduce any mitigating evidence or testimony; and (3) Trial Counsel was ineffective for failing to object to the trial court's improper use, as an aggravating factor, of defendant's failure to obtain mental health treatment in sentencing. Moreover, defendant counsel should have used defendant's mental illness to support mitigation. Issues (2) and (3) were not raised in Petitioner's PCRA petition and are being raised for the first time on appeal. They are clearly waived. See Commonwealth v. Coleman, 19 A.3d 1111, 1118 (Pa.Super. 2011)(issues raised for the first time in a 1925(b) statement are waived). Issue (1), as stated in the 1925(b) statement, differs from the issue specifically raised in the PCRA petition. Because, however, issue (1) does purport to raise an issue related to an insanity defense, this Court will address the claim that was raised in the PCRA petition in this opinion.

[2] PCRA counsel states in the 1925(b) statement that this Court should have granted a hearing on the PCRA petition because the Commonwealth would have had the burden at the hearing to disprove the existence of an insanity defense. That statement is simply incorrect. A defendant pleading an insanity defense bears the burden of proving by a preponderance of the evidence that he did not know either the nature and quality of the act he committed, or that what he was doing was wrong. *Commonwealth v. Sohmer*, 546 A.2d 601, 604 (Pa. 1988). Petitioner has provided absolutely no evidence to support such a contention.

Commonwealth of Pennsylvania v. Treazure Toney

Criminal Appeal—Guilty Plea—Decertification—Robbery

Defendant who shows lack of respect for authority and is extremely uncooperative and defiant is not amenable to juvenile supervision.

No. CC 2017-00591. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—May 16, 2018.

OPINION

This is a direct appeal wherein the defendant, Treazure Toney, appeals from the judgment of sentence of February 16, 2018, after he pled guilty to one count of Robbery, in violation of 18 Pa.C.S.A. 3701(a)(1)(i). Pursuant to a negotiated guilty plea, the defendant was sentenced to a term of imprisonment of not less than ten months nor more than 20 months. This timely appeal followed. The defendant claims that this Court erred in denying the defendant's request to decertify his case to juvenile court.

The evidence admitted at the decertification hearing established that during the offense to which the defendant pled guilty, the defendant (who was then 16 years old) and another unidentified person committed an armed robbery on a 14 year-old male on January 9, 2017. The defendant contacted the vicitm to meet him via a Facebook message. While the victim was waiting for the defendant, the defendant and another person arrived. Both the defendant and his coconspirator were armed with handguns. The defendant stuck a handgun into the right side of the victim and then to the victim's head and went through his pockets and took his belongings. The defendant threatened the victim by telling him he would come back and shoot up his house if the victim notified the police. The defendant stole $180 and an iPhone. The defendant fled the scene after the robbery and police officers were able to track him by following his footprints in the snow. The defendant was found hiding on a roof of a shed. He was ordered to come down from the roof. The defendant refused to present his hands at the time of the arrest. The defendant was forcibly arrested. While back at the police station, in the presence of his mother, the defendant unzipped his pants and asked the arresting officer if he had "ever seen a black dick before?" The defendant then purposefully urinated on the police station floor.

The defendant was charged in adult court with using a firearm in connection with a robbery, a specific offense excluded from the definition of a "delinquent act". The law requires that this case proceed in adult court unless the defendant can demonstrate, by a preponderance of the evidence, that proceeding in juvenile court serves the public interest. See 42 Pa.C.S. §6322(a). As set forth in that statute "[i]n determining whether the child has so established that the transfer will serve the public interest, the court shall consider the factors contained in section 6355(a)(4)(iii)(relating to transfer to criminal proceedings)."

In determining whether the public interest can be served by transferring a case to juvenile court, section 6355(a)(4)(iii) of the Juvenile Act mandates courts to consider the following factors:

(A) the impact of the offense on the victim or victims;

(B) the impact of the offense on the community;

(C) the threat to the safety of the public or any individual posed by the child;

(D) the nature and circumstances of the offense allegedly committed by the child;

(E) the degree of the child's culpability;

(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

(II) mental capacity;

(III) maturity;

(IV) the degree of criminal sophistication exhibited by the child;

(V) previous records, if any;

(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;

(VIII) probation or institutional reports, if any;

(IX) any other relevant factors . . . .

42 Pa.C.S. § 6355(a)(4)(iii).

During the transfer hearing, the report and testimony of psychologist, Alice Applegate, was presented by defendant.[1] Dr. Applegate concluded that the defendant is amenable to treatment in the juvenile justice system. This Court considered all of the evidence offered at the transfer hearing, including the report and testimony of Dr. Applegate. This Court's decision not to transfer the defendant's case to juvenile court was based on the the serious impact of the armed robbery on the victim; the impact of the offense on the community; the serious threat to the safety of the public or any individual posed by the defendant; the nature and circumstances of the offense allegedly committed by the defendant and the degree of the defendant's culpability. While there was evidence presented that the defendant was amenable to treatment in the juvenile system, this Court believes that the factors cited above outweighed the evidence of amenability to treatment.

There is no question that the circumstances of the instant offense were serious. Its impact on the victim and the community cannot be overstated. In this Court's view, the defendant contacted the victim to meet him. As this Court noted during the hearing, the meeting was actually a set-up. The defendant pulled a gun, held it to the victim's head and forcibly robbed the victim of money and a cell phone. The defendant then threatened the victim and his family with physical harm if the victim contacted the police. This Court views this offense as gravely serious and the defendant played the central role in the robbery.

In addition to the circumstances of the offense of conviction, this Court also considered the defendant's history of being uncooperative, defiant and disrespectful to authorities in settings where other juveniles are present (at school). Although Dr. Applegate opined that the defendant is amenable to treatment in the juvenile justice system, Dr. Applegate's report contained 13 pages of notations concerning the defendant's defiant conduct toward authorities when he was in school. The defendant persistently engaged in fighting behavior with male and female students and he was constantly disruptive in class. The behavior continued between ages 5 and 16. On December 14, 2016, at age 16, the defendant was found in possession of marijuana at Carrick High School.

This Court also considered the defendant's absolute disregard for the authority of police officers. In addition to the incident at the police station in which the defendant urinated on the floor of the police station, the defendant also had prior interactions with the law that demonstrated his lack of respect for authority. On November 12, 2016, the defendant stole a vehicle and led police on a chase that resulted in the defendant's fleeing the police at a speed of approximately 75 miles per hour. The defendant lost control of the vehicle and wrecked the vehicle.

This Court also considered that, at the time of the decertification hearing, the defendant was four days shy of his 17th birthday.

Moreover, the threat to the safety of the individual who was robbed in this case, in particular, and the public in general, was not inconsequential. The robbery in this case was pre-planned and the defendant used social media to lure the victim to the location of the robbery, thereby demonstrating substantial criminal sophistication. Though the defendant does not have a lengthy criminal record, it appears as though his criminal conduct has escalated in the year surrounding the offense of conviction. The record demonstrates that the defendant is a threat to the community.

Considering all of the relevant factors, this Court believes that the public interest would not be served by transferring this case to juvenile court. Accordingly, the judgment of the Court should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: May 16, 2018

[1] The Commonwealth stipulated to Dr. Applegate's qualifications to testify as an expert witness in this case. This Court also recognized Dr. Applegate's expertise in this case as it has in numerous other cases.