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 5,656

PLJ Editorial Staff

Opinion Selection Policy

Opinions selected for publication are based upon precedential value or clarification of the law. Opinions are selected by the Opinion Editor and/or committees in a specific practice area. An opinion may also be published upon the specific request of a judge.

Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. All opinions submitted to the Pittsburgh Legal Journal (PLJ) are printed as they are received and will only be disqualified or altered by Order of Court, except it is the express policy of the Pittsburgh Legal Journal (PLJ) not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

County of Allegheny, Pennsylvania v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, AFL-CIO, CLC

Arbitration—Contract—Collective Bargaining Agreement

Denying a request to Modify or Vacate a Labor Arbitration Award where the award satisfied the essence test and was rationally derived from the Parties' collective bargaining agreement.

No. GD 17-011780. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay, Jr., J.—May 25, 2018.

OPINION

The Petitioner, the County of Allegheny, appeals this Court's March 13, 2018 order of court, denying the Petition to Amend, Modify or Vacate an Arbitration Award in favor of the Respondent, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Worker's International Union, AFL-CIO, CLC. This court confirmed the Arbitrator's award and found that it was rationally derived from the Collective Bargaining Agreement ("CBA").

PROCEDURAL HISTORY

The County of Allegheny commenced this action by filing a Petition to Amend, Modify or Vacate an Arbitration award on August 23, 2017. The Petitioner and Respondent had previously gone before an arbitrator pursuant to their negotiated CBA. The Arbitrator found in favor of the Respondent and issued an award directing that the Petitioner, "cease and desist from assigning duties through post order or otherwise to employees with a primary assignment that are outside their primary assignment except for 'emergent circumstances'." (Plaintiffs Ex. 6 pg. 7). On March 13, 2018, this Court confirmed the award by the Arbitrator in favor of the Respondent. The Petitioner filed their appeal on April 11, 2018 and their concise statement of errors on May 4, 2018.

FACTS

The Petitioner and Respondent negotiated a CBA in 2015. The Respondent was to provide medical services to the Petitioner at the Allegheny County Jail ("ACJ"). The Grievant, Charlotte Porter, is a member of the Union and an employee at the ACJ. Because of her seniority, Porter successfully bid upon one of the several primary assignments at the jail as defined by the CBA. (Plaintiffs Ex. 1 at 8-10 (Art. VIII)). The Grievant, in her primary assignment as a mental health nurse, performs mental health screenings for arriving inmates before they are assigned housing within the jail facility. Her primary assignment location required that she remain in the intake area of the ACJ. On September 27, 2016, Porter was assigned additional duties, some of which required that she temporarily leave her primary assignment area. (Plaintiffs Ex. 6 pg. 4-5).

Porter and the Union filed a grievance due to this assignment of additional duties. It was claimed that these additional duties were in violation of Article VIII (1) (C) (1) of the CBA, which outlines when the Petitioner was permitted to assign duties to the Grievant outside her primary assignment area. Complying with Article III (4) (C), the matter between the Petitioner and Respondent proceeded to arbitration. In making a ruling, the arbitrator noted that the "crux of the issue in the instance case centers on the differing interpretations of the scheduling provisions in Article VIII(1)(A) (B) and (C-1)". (Plaintiffs Ex. 6 pg. 5). The arbitrator noted that the "Management Rights clause" set forth in Article XVII of the CBA had to be reconciled with the "emergent" circumstance language of Article VIII (1) (C). *Id.* at 6. Ultimately, the Arbitrator issued a cease a desist letter to the Petitioner, ordering them to stop "assigning duties through post orders or otherwise to employees with a primary assignment that are outside their primary assignment except for emergent circumstances." *Id.* at 7(citing Art. VIII (1) (C) (1).

DISCUSSION

THE ARBITRATOR'S AWARD WAS RATIONALLY DERIVED FROM THE COLLECTIVE BARGAINING AGREEMENT.

In the judicial review of a labor arbitrator's award, the well-established essence test governs. The essence test provides,

> "First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement."

American Federation of State, County and Mun. Employees, Dis, Council 87 v. County of Lackawanna, 102 A.3d 1285, 1289 (Pa. Cmwlth. 2014). There is no contention in the record that the first prong of the "essence" test is not met. However, the Petitioners do claim that the Arbitrator's interpretation of the CBA is incorrect and thus his award is not rationally derived from the CBA.

An arbitrator's findings of fact are not reviewable by an appellate court, "and as long as he has arguably construed or applied the collective bargaining agreement, an appellate court may not second-guess his findings of fact or interpretation." *Coatesville Area Sch. Dist. v. Coatesville Area Teachers' Ass'n/Pennsylvania State Educ. Ass'n*, 978 A.2d at 415 n. 2. "[W]e must sustain the arbitrator's award if it is based on anything that can be gleaned as the 'essence' of the bargaining agreement." *Am. Fed'n of State, Cnty. & Mun. Emps., Dist. Council 84, AFL–CIO v. City of Beaver Falls,* 74 Pa. Cmwlth. 136, 459 A.2d 863, 865 (1983). We need not agree with the arbitrator's interpretation under the 'essence test but merely verify that the "interpretation and application of the agreement can be reconciled with the language of the agreement." *Dep't of Corr. v. Pa. State Corr. Officers Ass'n*, 38 A.3d 975, 980 (Pa. Cmwlth. 2011). The arbitrator's award can only be vacated if it "indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." *Coatesville*, 978 A.2d at 415 n. 2.

Here, this Court finds that the arbitrator's award and interpretation of the CBA can be reconciled with the language of the agreement, thus meeting the second prong of the "essence" test. In making his ruling, the arbitrator noted that the crux of the issue was the interpretation of the scheduling provision in Article VIII (1) (A), (B) and (C-1). (Plaintiffs Ex. 1 pg. 5). In ruling in favor of the Respondent, the Arbitrator noted that not every employee has a primary assignment. (Plaintiff's Ex. 6 pg. 5). The Petitioner argued that it had retained the right to assign regular duties by post order under Article VIII Section 1(A). (*Id*). The Arbitrator did not agree, saying that the right to assign regular duties via that provision only applied to those employees who had not bid for, and were awarded primary assignments. *Id*. The arbitrator ruled that Article VIII (1) (A) and (B) created "a general rule that the County can assign duties in a way that is reasonably necessary for patient care and efficient operations." and that Article VIII (1) (C) was a "clear exception to that general rule for employees who bid for and are awarded primary assignments." *Id.* at 6. The

arbitrator concluded that if he granted "unfettered discretion" to the Petitioner to assign employees other regular duties in any area of the jail, that would "nullify the 'emergent circumstances language" set forth in Article VIII (1)(C) of the CBA. To do so, would violate the constraints on the Arbitrator's authority as established by the CBA. (Plaintiffs Ex. 6 pg. 7). This Court agrees with the arbitrator's conclusion and therefore finds that no reversible error occurred in ruling the award was rationally derived from the CBA.

THE STATUTORILY ESTABLISHED MANAGERIAL PREROGATIVES WERE NOT INFRINGED BY THE ARBITRATOR.

The Petitioner argues that the Arbitrator had usurped the statutorily established managerial prerogatives of the ACJ when he ruled that the ACJ could not assign additional duties to the Grievant. In support of this, the Petitioner cited Pennsylvania Statute 43 P.S. §1101.702. This statutes states,

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

In the instant case, this court finds that this statute is inapplicable as the CBA had already been negotiated by the Petitioner and the Respondent. While they were not required to do so pursuant to §1101.702, the Petitioner did include the provision enumerated in Article VIII (4)(C). The Petitioner chose to limit its managerial prerogatives by limiting the circumstances it could move those with primary assignments to only "emergent" circumstances.

The Petitioner cites *City of Philadelphia v. Int'l Ass'n of Firefighters, Local 22*, 606 Pa. 447, 471, to support the notion that the ACJ retains managerial prerogatives over the Grievant. The court in *City of Philadelphia* noted that "matters of managerial decision-making that are fundamental to public policy or to the public enterprise's direction and functioning to fall within the scope of bargainable matters under Section 1." *Id.* at 465. The selection and direction of personnel was included in a list of managerial prerogatives enumerated by the court. *Id*. This Court finds the facts of the current case distinguishable from those in *City of Philadelphia*. The arbitration award in *City of Philadelphia* resulted from an interest arbitration proceeding. "Interest arbitration" is the arbitration that occurs when the employer and employees are unable to agree on the terms of a collective bargaining agreement. "Grievance arbitration" is the arbitration that occurs when the parties disagree as to the interpretation of an existing collective bargaining agreement. *Town of McCandless v. McCandless Police Officers Ass'n*, 587 Pa. 525, 901 A.2d 991, 992 (2006). The facts of City of Philadelphia are thus distinguishable from our present case. The arbitrator in City of Philadelphia was not interpreting a final, negotiated CBA, but was instead trying to establish the terms of a CBA as the two parties were unable to come to an agreement.

Here, the arbitrator was not dealing with interest arbitration but instead a grievance arbitration proceeding. In making his ruling, as this Court does now, the Arbitrator had a complete, negotiated CBA to interpret. This Court concludes that the Arbitrator was correct in interpreting the CBA a finding for the Rspondent. To rule in favor of the Petitioner here would allow them to change the terms of the negotiated agreement.

THE ARBITRATOR DID NOT EXCEED HIS AUTHORITY IN RULING IN FAVOR OF THE RESPONDENT.

The Collective Bargaining Agreement between the Petitioner and Respondent defines the role of the arbitrator in the grievance process. Article III (4) (C) of the CBA notes that the Respondent may appeal an "unsatisfactory level two decision to arbitration." (Plaintiffs Ex. 1 pg. 4). It further goes on to enumerate what the Arbitrator is authorized to do. Article III (4) (C) states,

> "The arbitrator is authorized only to clarify and interpret the express terms, provisions or clauses of this Agreement and does not have the authority to enlarge, alter, modify, delete or change the express terms, provisions or clauses of this agreement. (Plaintiffs Ex. 1 at pg. 5).

This court finds that the arbitrator, in finding for the Respondent, did not exceed his authority defined by the CBA because he did not go beyond the constraints established in Article III (4) (C).

In contending the Arbitrator exceeded his authority, the Petitioner noted that "his decision to disregard the contractual clause conferring upon the ACJ the right to reassign an employee 'notwithstanding any other provision' fails to apply the CBA as written". (Plaintiff's Brief at pg. 9). The Petitioner further argues that the arbitrator's "interpretation cannot be said to have drawn its essence from the CBA where the CBA specifically directs that the ACJ maintains the right to assign." *Id*. The Petitioner cites the distinguishable case of *Com., Dept. of Corrections, State Correctional Institution at Pittsburgh v. Pennsylvania State Corrections officers Ass'n.*, 56 A.3d 60 (Pa. Cmwlth. 2012) in support of this claim. In that case, the CBA required grievances be filed within 15 days of a suspension or discharge. The Arbitrator, despite this provision, concluded that the late grievances were timely filed because the suspensions constituted a continuing violation tolling the 15 day filing period as required by the CBA. The Commonwealth Court in that case noted "The Arbitrator's conclusion that the grievances were timely filed without foundation in, fails to logically flow from, and cannot be reconciled with the clear language of the CBA." *Id*.

Here, this Court found that the Arbitrator's award met the essence test as it was rationally derived from the CBA. The arbitrator noted in making his ruling that if he were to conclude that the County "has unfettered discretion to assign employees by post order to any area in the prison regardless of their primary assignment," he would be eliminating Article VIII (1)(C). To do so, the arbitrator would be in clear violation of Article III (4) (C). This award has a foundation in the CBA and logically flows from the language of Article VIII (1) (C). This court did not err in concluding that the arbitrator did not exceed his authority or jurisdiction as defined by the CBA.

CONCLUSION

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

BY THE COURT:
/s/McVay, J.

Date: May 25, 2018

Allegheny Intermediate Unit v. East Allegheny School District

Contract—Statute of Limitations

Doctrine of Nullum Tempus Occurrit Regi permitted political subdivision to defeat statute of limitations defense. Court enforced contractual interest rate.

No. GD 16-0003205. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay, Jr., J.—May 25, 2018.

OPINION

Defendant, East Allegheny School District (EA), appeals this Court's February 5, 2018 order entering judgement against (EA) in the amount of $3,023,067.00 and interest in the amount of $194,483.98 for a total judgement of $3,217,550.98 for breach of contract. The Court further assessed 12% annual interest, to accrue from the date of the order on the entire amount until final payment on the judgement.

PROCEDURAL HISTORY OF CASE

AIU commenced this action by writ of summons on 3/4/2016 and filed a complaint on 3/25/2016 alleging that EA breached its contract for nonpayment of special educational services provided to the district's students. Both parties filed motions for partial summary judgement with accompanying legal briefs. The Court granted AIU's partial summary judgement on September 12, 2017 finding that EA's statute of limitations defense to services rendered more than 4 years prior to AIU's law suit fails since the doctrine of *nullum tempus* applied and was not waived by the AIU.

The parties agreed to bifurcate the issues of damages and liability by Court Order dated September 22, 2017. Joint stipulated facts (JSF) were filed on October, 05, 2017 and both parties filed motions for partial summary judgement on the issue of liability only. After oral argument on October 10, 2017 the Court granted the AIU's motion for partial summary judgement by order dated October 23, 2017 finding that EA breached the contract by failing to pay all outstanding invoices for school years 2010-2011 through 2014-2015. The Court denied EA's request to certify its order granting AIU's summary judgement for interlocutory appeal because the non-jury trial on damages was scheduled for December 13, 2017. After a one day bench trial on December 13, 2017 the parties agreed to file findings of fact and legal briefs by January 12, 2018 and have closing arguments on January 19, 2018. Upon EA's motion to extend time to file findings of fact and legal briefs, the Court extended the filing dead line to January 26, 2018 and closing arguments to February 5, 2018. On February 5, 2018 the court entered its order which is the subject of this appeal. EA filed post-trial motions on February 15, 2018, which were denied on March 16, 2018. EA filed their appeal on March 27, 2018 and their concise statement of errors on April 19, 2018.

SUMMARY OF STIPULATED FACTS

The parties have stipulated to the following facts which are not in dispute. The plaintiff Allegheny Intermediate Unit (AIU) is a political body organized and existing under the laws of Pennsylvania and is part of Pennsylvania's public education system. AIU provides special education services to all 42 suburban school districts and five vocational / technical schools in Allegheny County, including defendant East Allegheny School District (EA). All programs of special education services offered by AIU have been developed and approved by the PA Department of Education. EA is comprised of the communities of North Versailles, East McKeesport, Wilmerding and Wall along with students from Duquesne City School District grades 7-12. There are approximately 1,630 students in grades K-12 in the district (JSF 1-9).

The parties agree that for each of the five (5) school years at issue, 2010-11 through 2014-15, AIU and EA had entered into a standard written "Educational Services Agreement" in which AIU would provide services to EA students requiring special education. During the school years at issue, EA requested and AIU provided both "District Based" and "Center Based" special education services. The service agreement contained a standard quarterly billing and payment arrangement between the parties which was complied with in the prior 2009-2010 school year. At the beginning of the 2010 -2011 school year, EA requested a modification of the standard quarterly billing due to financial difficulties of the school district. EA was having difficulty paying the whole amount owed on a quarterly basis. AIU agreed to accommodate EA's request and to provide that EA would be billed ten (10) monthly installments of $75,000.00 starting in September 2010. The modification further provided that there would be a reconciliation at the end of each school year and EA agreed and understood that it would receive a final bill after reconciliation was completed (JSF 11-20).

EA was the only district in Allegheny County to be provided this billing accommodation. Due to an oversight by AIU, it did not provide end of the year reconciliation statements for the 2010-2011 through 2013-2014 school years. On June 30, 2014, AIU provided EA with a reconciliation invoice for Center Based Services provided during the 2013-2014 school year which EA paid. Prior to the 2014-2015 school year EA's monthly payment had been increased to $85,000.00. In late spring 2015, AIU discovered that it had failed to perform and bill reconciliation invoices from 2010-2011 through 2014-2015 school years except for the Center Based Services for school year 2013-2014. On June 2, 2015 AIU sent EA a reconciliation invoice for all special education services for 2014-2015 school year. This was followed by another reconciliation invoice for 2010- 2011 through 2014-2015 school years on June 16, 2015. Both parties agree that EA has refused to pay any portion of any of the reconciliation invoices except the 2013-2014 Center Based Services. (JSF 21-29).

DISCUSSION

EA BREACHED A BINDING CONTRACT WITH AIU

First and foremost, the record is abundantly clear that AIU provided extensive special education services to EA in the school years at issue in compliance with the terms of their written contract. During the course of the trial EA did not provide any evidence that they did not receive the services in question or that the services were in any way unsatisfactory or subpar. EA's only defense was that when AIU did not timely provide the reconciliation billing at the end of each school year, then it was relieved from its contractual duty to pay for the special education services received by its students. The court fails to see EA's defense that a simple billing oversight resulting in a late final reconciliation relieves them of responsibility to pay for services rendered in a timely proficient manner. The court emphasizes that EA asked AIU to change its billing practice and should not use AIU's accommodation as an excuse not to pay. The parties agree that AIU modified its billing procedure in an effort to assist and aid a financially strapped school district which was experiencing cash flow issues. The court notes that EA choose not to pay the 2014-2015 reconciliation bill even though it was submitted at the end of the 2015 school year. The evidence is clear and convincing that EA received the services it contracted for and breached its contract in 2015 when it failed to pay the balance owed.

THE COURT PROPERLY APPLLIED THE DOCTRINE OF *NULLUM TEMPUS OCCURRIT REGI*.

It is the court's opinion that it followed *Duquesne Light Co. v Woodland Hills School District*, 700 A2d 1038 (Pa Cmwlth 1997) and *Township of Salem v. Miller Penn Development LLC,* 142 A3d 912 (Pa Cmwlth 2016) in ruling that the doctrine of *nullum tempus* applied and AIU had not waived its right to assert this doctrine to EA's defense of the statute of limitations to a portion of AIU's claim for breach of contract. *Nullum tempus occurrit regi* ("time does not run against the king") permits a political subdivision of the Commonwealth to circumvent the applicable statute of limitations *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1051 (Pa. Cmwlth. Ct. 1997).

For the *nullum tempus* doctrine to exempt a municipality from the statute of limitations, the municipality's claims must both 1) accrue to the municipality in its governmental capacity and 2) seek to enforce an obligation imposed by law, as distinguished from one arising out of a voluntary agreement. *Twp. of Salem v. Miller Penn Dev., LLC*, 142 A.3d 912, 918 (Pa. Cmwlth. Ct.), *appeal denied*, 639 Pa. 577, 161 A.3d 790 (2016).

The parties have stipulated that AIU is a political subdivision of the Commonwealth of Pennsylvania and part of the state educational system and therefore meets the first prong of the doctrine of *nullum tempus* which accrues only to a political subdivision of the Commonwealth acting in its governmental capacity. The second prong requires that the obligation which the political subdivision is seeking to enforce is an obligation imposed by law as distinguished from one arising out of a purely voluntary agreement. It is undisputed that AIU provides special education services pursuant to the School Code 24 P.S. s 906-A. In addition, Title 22 of the Pennsylvania Administrative Code §14.102 imposes a duty on all school districts, including EA to provide all of its students with disabilities with quality special education services. 22 PA Code s 14.102 provides as follow:

> **Children with disabilities have available to them a free appropriate public education which is designed to enable the student to participate fully and independently in the community, including preparation for employment or higher education.** (emphasis added)

The evidence in this case is clear that AIU had an obligation, required by law, to provide special education services to EA and that obligation was not one arising out of a voluntary agreement. The parties agree that all school districts, including EA, are required by law to provide special education to students meeting certain criteria. Therefore the obligation that AIU is attempting to enforce, i.e. the payment for EA's statutorily mandated special education services, clearly meets the second prong required to apply the doctrine of *nullum tempus*. This court's ruling that permitted AIU to invoke the doctrine of *nullum tempus* was not an error of law or an abuse of discretion and EA's defense of the statute of limitations cannot be raised to AIU's claim for breach of contract.

THE COURT DID NOT HAVE DISCRETION IN THE RATE OF INTEREST AWARDED.

This Court did not abuse its discretion or commit an error of law in awarding AIU pre and post judgement interest at the rate specified and agreed to in the parties' contract. Section 5 C. of the contract provides as follows:

> "Late Payment Charge: A late payment charge of 1% per month on any unpaid balance will be applied to any account that is over 60 days past due"

Pennsylvania law required this Court to apply the interest rate agreed to by the parties. The Pennsylvania Supreme Court in *TruServ Corp. v. Morgan's Tool & Supply Co.* held that, "[i]f the parties have agreed on the ***payment of interest***, it is payable not as damages but pursuant to a contract duty that is enforceable. Thus, we have no hesitation in concluding that, where the terms of a contract provide for the payment of interest, a court's award of such interest in favor of the prevailing party is not discretionary." 614 Pa. 549, 564, 39 A.3d 253, 261 (2012) (emphasis added).

This Court did not have discretion in the rate of interest it awarded. The record is clear that the interest rate ordered was the rate that the parties had agreed to. It should be noted that the Court did have the power to determine the date in which the interest started to accrue. In exercising its discretion, the Court decided that interest should start to accrue on June 17, 2017, which was 60 days from when AIU delivered the final reconciliation to EA's legal counsel, and more than two years from the date that the last special education service was provided by AIU. Therefore it is clear that this Court did not err or abuse its discretion by adhering to the ruling of the Pennsylvania Supreme Court in *TruServ Corp.* and awarded the interest agreed to by the parties. The interest awarded in this case cannot under any circumstance be deemed punitive in nature.

CONCLUSION

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

BY THE COURT:
/s/McVay, Jr., J.

Date: May 25, 2018

Commonwealth of Pennsylvania v. Craig Devon Murphy

Criminal Appeal—Expungement—Misdemeanor Offenses—Commonwealth Objection

Defendant fails to establish that he is entitled to have his criminal record expunged.

No. CC 200409419. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—September 12, 2018.

OPINION

Appellant, Craig Murphy (hereinafter referred to as "Murphy") appeals from this Court's Order dated May 15, 2018, in which the Court vacated a Full Expungement Order which was entered on November 8, 2017.

On September 8, 2017, Murphy filed a Petition for Expungement Pursuant to Pa.R.Crim.P. 790 (hereinafter referred to as "Petition"), seeking expungement of multiple misdemeanor charges that were filed against him in 2004. The offenses, to which

Murphy ultimately pled guilty in 2005, included theft by unlawful taking (18 Pa.C.S. § 3921(b)), tampering with records (18 Pa.C.S. § 4104(a)), false swearing (18 Pa.C.S. § 4903(a)(1)), unsworn falsification (18 Pa.C.S. § 4904(a)(1)), and securing execution of documents by deception (18 Pa.C.S. § 4114)).

On September 4, 2017, the Office of the District Attorney of Allegheny County acknowledged receipt of Murphy's Petition. After reviewing Murphy's Petition, the District Attorney's Office noted that Murphy was not entitled to the expungement he was seeking by law because misdemeanor convictions cannot be expunged. However, the District Attorney's opposition to Murphy's Petition was not forwarded to this Court, nor was this Court aware of the District Attorney's objection to Murphy's Petition. On November 8, 2017, an Expungement Order of Court was prepared by the Allegheny County Department of Court Records. On the same day this Court entered an Expungement Order of Court (hereinafter referred to as, "Expungement Order") pursuant to Murphy's Petition.

On November 17, 2017, the Allegheny County District Attorney's Office filed Notice of Commonwealth's Objection to Expungement Order, pursuant to 18 Pa.C.S. § 9122[1]. The Commonwealth's objections were based upon its contention that Murphy was not entitled to an expungement under the law because a misdemeanor conviction cannot be expunged. Upon belatedly learning of the District Attorney's objections to Murphy's Petition, and the reasons therefore, this Court entered an Order vacating the Expungement Order of Court it had previously entered on November 8, 2017. On June 11, 2018, Murphy filed a notice of appeal to the Pennsylvania Superior Court.

In his concise statement of matters complained of on appeal, Murphy raises multiple claimed errors. First, Murphy asserts that this Court, "erred by not vacating the final contested expungement order dated November 8, 2017[,] within thirty (30) days of issuance." Murphy's second claimed error is that this Court, "lacked subject matter jurisdiction to vacate the expungement order dated November 8, 2017[,] because the Defendant sought appellate review within the Commonwealth Court of Pennsylvania…" The third claim raised in Murphy's 1925(b) statement is that this Court, "erred by utilizing two separate docket numbers to identify the Defendants [sic] case as a result of recreated records." Murphy next asserts that this Court erred by determining that the Defendant was not entitled to expungement as a matter of statutory law and equity because 18 Pa.C.S.A. § 9122 does not expressly prohibit the expungement of a misdemeanor offense." Finally, Murphy asserts that this Court lacks the inherent authority to recreate court records after expungement."

Murphy's statement of matters complained of on appeal raises a litany of alleged errors with respect to this Court's denial of his Petition; however, Murphy fails to adduce a single cognizable argument which would entitle him to the relief he seeks. Not only are the claims set forth in Murphy's 1925(b) statement without merit, they contravene both procedural and statutory provisions relating to expunction of criminal convictions in Pennsylvania. In examining Murphy's 1925(b) statement, it is clear that he is attempting to obtain relief to which he is not entitled by engaging in a game of procedural "gotcha."

This Court will first address Murphy's assertion that he was entitled to expunction and that his Expungement Petition was improperly denied. The Pennsylvania Superior Court has made clear that, "[e]xcept for specific statutory authority to expunge a record of conviction, none exists other than the right to pardon granted to the Governor by the constitution." *Com. v. Wolfe*, 749 A.2d 507, 508–09 (Pa.Super. 2000). Absent this statutory authority, courts lack authority to expunge criminal records for individuals who have been arrested and convicted of crime. *Com. v. Magdon*, 310 Pa.Super. 84 (1983); *see also Com. v. Cremins*, 356 Pa.Super. 449 (1986); *Com. v. Homison*, 253 Pa.Super. 486 (1978) (Individual who has been validly convicted of a crime, whose conviction has not been reversed or vacated, is not entitled to have the record of such conviction expunged.).

The statute which authorizes the expunction of a criminal record is found at 18 Pa.C.S. §9122 . Section 9122(a) applies only to the expunction of non-conviction data contained in the criminal record, whereas section 9122(b) applies to the expunction of the entire criminal record regardless of the disposition of the case. In matters which have resulted in a conviction, expungement may occur only where: (1) the subject of the information reaches the age of seventy and has been free from arrest or prosecution for ten years; or (2) where the individual has been dead for three years. 18 Pa.C.S.A. § 9122(b). In the instant case, Murphy pleaded guilty to the charges against him, and thus any right to expunction must be found in section 9122(b)(1) or (b)(2). Section 9122(b)(1) permits expunction of the entire criminal record when the individual has reached the age of 70 years and has been free from arrest or prosecution, and § 9122(b)(2) allows expunction when the individual has been deceased for three years. As he is only 35 years of age, Murphy does not meet the statutory requirements for expunction under 18 Pa.C.S. §9122.

In sum, Murphy is not entitled to expunction of his criminal record because this Court is without authority to do so. The at-issue convictions were valid and have not been vacated, reversed, or pardoned, and Murphy has not met any of the statutory requirements for expunction under 18 Pa.C.S. §9122. He has presented no applicable statutory or precedential authority supporting his assertion that he is entitled to expunction of his criminal convictions. Accordingly, this court did not err in entering its May 15, 2018, Order, as the previously-entered Expungement Order was *void ab initio*.

Finally, this Court will address the procedural errors alleged in Murphy's 1925(b) statement. Murphy's first procedural claim is that this Court, "erred by not vacating the final contested expungement order dated November 8, 2017[,] within thirty (30) days of issuance. Relying on 42 Pa.C.S. § 5505, Murphy asserts that the Court's failure to vacate its Expungement Order within thirty days of issuance renders this Court's May 15, 2018, Order invalid. Murphy's assertions must fail for at least two reasons. First, this Court's Expungement Order was *void ab initio*, because Murphy was not entitled to expunction as a matter of law. Next, the entry of this Court's November 8, 2017, Expungement Order was the result of a clerical error, which this Court had inherent authority to correct. It is well settled that a trial court has the inherent, common-law authority to correct clear clerical errors in its orders and maintains that authority even after the expiration of the thirty-day statutory time limitation for the modification of orders. *Com. v. Borrin*, 2011 Pa.Super. 10 (2011), aff'd, 622 Pa. 422, (2013); *see also Com. v. Quinlan*, 433 Pa.Super. 111, 118 (1994) (Inherent in the court system is the court's power to amend records, to correct obvious and patent mistakes of court officers or counsel's inadvertencies, or to supply defects or omissions in the record.).

Murphy's next procedural claim is that this Court, "lacked subject matter jurisdiction to vacate the expungement order dated November 8, 2017, because the Defendant sought appellate review within the Commonwealth Court of Pennsylvania[2]." This claim must also fail because Murphy did not file his notice of appeal to the Superior Court until June 11, 2018 – nearly one month *after* this Court entered its May 15, 2018, Order. Moreover, even if Murphy had filed his notice of appeal before entry of this Court's May 15, 2018, Order, the filing of an appeal does not automatically divest the trial court of all jurisdiction in the underlying matter. Pennsylvania Rule of Appellate Procedure 1701, which addresses the effect of appeals, provides that, even after an appeal is taken, the trial court retains the authority to, *inter alia*, "[t]ake such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter…and take other action permitted or required by these rules or otherwise ancillary

to the appeal or petition for review proceeding." Pa.R.A.P. 1701(b)(1). In addition, the trial court retains the ability to grant reconsideration of the order which is the subject of the appeal or petition. Pa.R.A.P. 1701(b)(3).

The procedural errors alleged in Murphy's 1925(b) statement have no effect on the validity of this Court's May 15, 2018, Order vacating its Expungement Order. Murphy filed his Petition for Expungement on September 8, 2017, and the Allegheny County District Attorney's Office promptly noted that Murphy was not entitled to expunction as a matter of law on September 17, 2017. As the result of a breakdown in the administrative process, this Court did not receive notice of the District Attorney's objection until after it had entered its November 8, 2017, Expungement Order. The District Attorney's Office thereafter filed its formal objections to Murphy's Petition within nine (9) days of the issuance of this Court's Expungement Order. Accordingly, the Commonwealth's objections, which were filed within thirty days of the entry of this Court's November 8, 2018, Expungement Order were the functional equivalent to a motion for reconsideration of that Order.

For the foregoing reasons, the claims asserted in Murphy's 1925(b) statement are frivolous because Murphy is not entitled to expunction of his criminal convictions. The administrative delay in this Court receiving notice of the District Attorney's objections to Murphy's Expungement Petition resulted in the erroneous entry of this Court's November 8, 2017, Expungement Order. This Court's original Expungement Order was *void ab initio*, as Murphy was not entitled to expunction of his criminal records as a matter of law, and this Court acted within the bounds of its discretion to correct that clerical error. This Court's May 15, 2018, Order was a permissible exercise of judicial discretion and necessary to correct an obvious and patent error which would have otherwise resulted in an improper, impermissible expunction of Murphy's criminal convictions.

BY THE COURT:
/s/Cashman, A.J.

Dated: September 12, 2018

[1] There exist other statutory provisions authorizing expungement of criminal records; however, none of those provisions apply in the instant matter. For example, Rule 320 sets forth the procedures for expungement following the successful completion of an ARD program in a court case, Rule 490 addresses summary case expungement procedures, and 35 P.S. § 780-119 details expungement procedures under the Controlled Substance, Drug, Device, and Cosmetic Act.

[2] Murphy's appeal was filed in Superior Court.

Commonwealth of Pennsylvania v. James Cubbins

Criminal Appeal—Sex Offenses—Ineffective Assistance of Counsel—PCRA—Failure to Call Witnesses

Defendant alleges trial counsel's ineffectiveness for failing to raise an alibi defense and failing to call character witnesses at trial.

No. CP-02-CR-3993-2013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—September 21, 2018.

OPINION

On March 28, 2014, a jury convicted Appellant, James Cubbins, of one count each of Rape by Forcible Compulsion, Unlawful Contact with a Minor--Sexual Offenses, and Corruption of Minors.[1] This Court sentenced Appellant on June 24, 2014 to 20 to 40 years on the Rape count, three years of probation on the Unlawful Contact count, and no further penalty on the Corruption of Minors count. Following an unsuccessful direct appeal, Appellant filed a PCRA petition on October 6, 2016. This Court held a hearing on the PCRA on September 22, 2017 and determined that the first two issues were not supported by the record and dismissed those claims by Order of Court dated December 15, 2017. In the same Order, this Court conceded that the third issue in Appellant's PCRA, regarding a sentencing issue pursuant to *Alleyne v. Unites States,* 570 U.S. 99 (2013), required a resentencing hearing.

On January 10, 2018, Appellant filed a Notice of Appeal of the December 15, 2017 Order. This Court, on March 6, 2018, respectfully requested that the case be remanded from the Superior Court of Pennsylvania, for a resentencing, so that any issues arising from resentencing might be appealed and addressed simultaneous with the alleged errors presently on appeal. Appellant filed an Emergency Motion for Stay of the Proceedings for the same reason. On September 11, 2018, the Superior Court denied the Motion for Stay and directed that this Court file an Opinion in support of its December 15, 2017 Order.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges that this Court erred in denying PCRA relief on the basis of trial counsel's ineffective assistance as trial counsel failed to file a motion to present alibi witnesses and failed to call character witnesses on Appellant's behalf. (Statement of Errors to be Raised on Appeal, p. 5) Appellant further asserts that the Court erred in denying PCRA relief on the basis of cumulative errors arising from trial counsel's ineffective assistance. *Id.*

HISTORY OF THE CASE

At Appellant's jury trial, the victim, J.B., testified that she had known Appellant since July 2010, as he was a contractor who worked with her father. (TT 80) In 2012, while she was fifteen years old, due to family circumstances, J.B. was residing with her father and Appellant in an apartment. (TT 90) J.B. stated that one day in July, after she returned home from her summer job, she was watching TV in her room when Appellant entered the room. (TT 94) She stated that he was "drunk as usual," sat down on her bed, and asked her if she wanted to have sex. *Id.* She declined. *Id.* J.B. testified that Appellant got on top of her, forced her legs open, took off her pants and underwear and raped her. *Id.* She disclosed to her boyfriend, on February 13, 2013 at a point when Appellant was not residing in the apartment, and her boyfriend encouraged her to tell her father what had happened. (TT 217) She disclosed to her father the following day, and he promptly took her to the police and arranged alternate accommodation. (TT 292-296)

DISCUSSION

Appellant asserts trial counsel provided ineffective assistance of counsel. Counsel is presumed to be effective and "the burden of demonstrating ineffectiveness rests on [A]ppellant." *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To meet this burden, Appellant must, by a preponderance of evidence, plead and prove that:

> (1) His underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different.

Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003). Appellant's burden is made more difficult by the fact that trial counsel perished in 2013 and therefore could not testify as to his trial strategy. The unavailability of the allegedly ineffective attorney, however, does not relieve Appellant of his evidentiary burden. *Commonwealth v. Steele*, 961 A.2d 786, 820 (2008).

Appellant alleges that trial counsel was ineffective for failing to present alibi or character witnesses. At trial, counsel did not present a defense based on alibi but instead argued that the victim falsely accused Appellant in response to Appellant threatening to evict her and her father from Appellant's residence. It is clear that trial counsel investigated an alibi defense but chose not to pursue it. He obtained the victim's work schedule for the summer of 2012 and wrote notes on it indicating Appellant's location on various days. At the preliminary hearing, the victim testified that the incident probably occurred in summer 2012, and on cross-examination by Appellant's counsel at that time (Ronald Hayward)[2], the victim narrowed her testimony to July.[3] Based on the victim's Preliminary Hearing testimony that the incident occurred after she left work around 7:00 p.m., counsel was able to focus on five days in July when she left work around 7:00 p.m. He then consulted with his paralegal regarding alibi witnesses for those five days. (PT 64-66) One may reasonably conclude that as an experienced attorney he chose not to pursue an alibi defense, at least in part, due to the difficulty in obtaining competent and persuasive testimony regarding Appellant's location during the relevant time period nearly two years earlier.[4] If cross-examined at trial on her work schedule, a diligent and prepared attorney could reasonably anticipate that the victim might correct her testimony to indicate that the incident may have occurred in June or August instead, especially given her initial reluctance to state with specificity a month in the summer of 2012 when this incident occurred.

Furthermore, trial counsel may have considered the alibi witnesses and deemed them not to be credible. For example, witness Rhonda Rowland, Defendant's aunt, testified at the PCRA hearing that Appellant remodeled her bathroom for five days that July, yet Appellant testified at the PCRA hearing it was a three-day job. (PT 40, 140) Additionally, the victim's work timesheet did not correspond to any of the dates Appellant claimed to have been at Rowland's residence (the 5th, 13th or 16th of July 2012). (PT 75) In fact, the handwritten notes on the timesheet written at a time closer to the underlying incident indicates Appellant was at two different locations on July 13, 2012 and July 16, 2012, when he was supposedly working on Rowland's bathroom. *Id.* Likewise, witness Lisa Davis, Appellant's sister, testified at the PCRA hearing that she had a two-day business trip into Pittsburgh in July 2012, but the handwritten notes from alibi witnesses on the victim's timesheet indicate the trip was for four days. (PT 81, 116) Even with the benefit of hindsight, and the trial transcript, the alibi witness testimony proffered at the PCRA hearing was inconsistent and not supported by corroborating evidence and it did not cover each of the July dates when the victim worked until 7:00. Furthermore, the strength of alibi testimony provided by a sister and an aunt is another factor counsel would have considered in making his decision. "[T]he credibility of [a] witness would be seriously questioned by a jury due to the nature of the relationship between appellant and the witness." *Commonwealth v. Hoffman*, 589 A.2d 737, 746 (Pa. Super. 1991). The *Hoffman* court noted, "Defense counsel's decision not to call witnesses cannot be faulted when their testimony could be easily subverted." *Id.* Given the number of days for which Appellant would need to account, and the apparent differences between the trial attorney's handwritten notes of alibi testimony and the PCRA testimony, the decision not to call alibi witnesses was not an unreasonable one. It is clear that trial counsel did investigate, obtain timesheets and interview witnesses before deciding not to pursue an alibi defense.

Similarly, trial counsel's failure to call character witnesses was not error. Pa.R.E. 404 (a) (2) (A) states, "[A] defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." Pa.R.E. 404 (a) (2) (A). The official comments to the rule notes that:

> In a sexual abuse case, the defendant's reputation for chastity in the community is relevant and admissible. However, 'testimony to [defendant's] specific acts in behaving appropriately around children in their family is not proper character evidence as to his general reputation for chastity in the community,' *Commonwealth v. Johnson*, 27 A.3d 244, 249-250 (Pa. Super. 2011).

Pa.R.E. 404 (a) (2) (A), Comment.

Erin Melegari, trial counsel's paralegal, testified at the PCRA hearing that she worked with trial counsel for ten years on over one thousand cases, and in this case she provided him with all of the information regarding potential witnesses. She stated that she met with Appellant's sister Lisa Davis and spoke with her frequently about the case. Davis was the only witness[5] who testified at the PCRA hearing regarding Appellant's reputation in the community for chastity. Davis testified that she lives out of state and only visits occasionally, which would make it difficult for her to assess Appellant's reputation in the community of Pittsburgh. This Court found that Davis, Appellant's sister who resides out of state, would not be able to provide relevant character witness testimony, and as a result, trial counsel was not ineffective for failing to call her at trial. Davis' testimony would more properly be deemed opinion, and not character testimony. "Pennsylvania law generally limits proof of character evidence to a person's reputation, and opinion evidence cannot be used to prove character." *Commonwealth v. Reyes–Rodriguez*, 111 A.3d 775, 781 (Pa. Super. 2015) (*en banc*) (citing Pa.R.E. 405(a)), *appeal denied*, 123 A.3d 331 (Pa. 2015).

Finally, after the Commonwealth had rested, this Court at trial *voir dired* Appellant on his right to testify and call witnesses, including character witnesses. He indicated that, after consulting with trial counsel, he did not wish to testify or call character witnesses. This Court asked if Appellant was satisfied with trial counsel and Appellant indicated that he was. (TT 390-401) The record indicates that Appellant did discuss his case with trial counsel and was satisfied with his attorney's services. Assertions that one is satisfied with the services of one's attorney may not later be contradicted based on a guilty verdict. *See, e.g. Commonwealth v. Stork*, 737 A.2d 789, 791 (Pa. Super. 1999).

In Appellant's remaining allegation of error, Appellant asserts this Court erred in denying PCRA relief based on cumulative errors arising from ineffective assistance. Generally, claims that do not warrant PCRA relief cannot be stacked or accumulated to grant relief. *Commonwealth v. Sattazahn*, 952 AA.2d 640, 671 (Pa. 2008). However, if individual claims fail only due to lack of prejudice, the cumulative prejudice of the individual claims may be considered. *Commonwealth v. Koehler*, 36 A.3d 121, 161 (Pa. 2012). Thus, in order for individual prejudices from instances of ineffective assistance of counsel to accumulate, each instance must have no arguable merit and counsel must have no reasonable basis for the act or omission.

Appellant asserts that trial counsel objected too many times and requested a mistrial too many times. First, argument on objections and motions for mistrial are generally made at sidebar, outside of the jury's hearing. Further, Appellant has failed to establish that any objection or request for mistrial lacked arguable merit or a reasonable basis. Appellant's allegation of error in trial counsel's failure to seek a curative instruction following testimony that Appellant was in jail at one point could easily be defended as a reasonable trial strategy of not wanting to emphasize unfavorable testimony. Each of the allegations of error regarding trial counsel's difficulty hearing, or his related movements around the courtroom during testimony, do not have arguable merit. Ultimately, this Court observed no indication that counsel's purported difficulty hearing or his movements within the courtroom affected the trial or prejudiced Appellant at all. Therefore, this Court cannot consider the third prong of prejudice in these examples and similar instances of error alleged by Appellant. Appellant's claim of cumulative prejudice is without merit.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] 18 Pa.C.S. §§ 3121(a) (1), 6318(a) (1), and 6301(a) (1) (i), respectively.

[2] Appellant's counsel during the preliminary hearing was not trial counsel, and counsel at the preliminary hearing is not the subject of an ineffectiveness claim.

[3] Hayward asked the victim if she remembered telling the police that the incident happened in July and the witness stated that she did. She then stated again that the incident happened in July 2012. (PHT 13-14)

[4] The incident in question occurred in the summer of 2012 and the trial began on March 26, 2014.

[5] This Court notes that Raymond Gorby was asked to testify regarding Appellant's reputation in the community for chastity, but he was unable to testify in that regard.