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OPINIONS

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Commonwealth of Pennsylvania v. Carl Keating

Criminal Appeal—Sentencing—Substantial question for appellate review—Abuse of discretion—Consecutive sentences—Statutory sentencing factors—Evidence in mitigation

Trial court sentenced defendant for Homicide by Vehicle (DUI) and to consecutive sentences for its counts of Recklessly Endangering Another Person. Defendant appealed claiming that the trial court abused its discretion and failed to consider the defendant's rehabilitative needs and other statutory sentencing factors. The trial court opined that the defendant did not present a "substantial question" for appellate review. It then wrote that if the Superior Court did find that defendant presented a substantial question for review that the trial court acted within its discretion and properly considered the pre-sentence report, evidence presented in mitigation and all relevant sentencing factors.

No. CC 2020-5024. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—January 27, 2022.

OPINION

This is a direct appeal from the judgment of sentence entered on August 10, 2021, following a negotiated plea that was entered on May 12, 2021. In exchange for the Commonwealth's agreement to withdraw Count One (1) - Homicide by Vehicle While DUI, the Defendant pled guilty to the following charges: Homicide by Vehicle (Count 2); Involuntary Manslaughter (Count 3); Altered, Forged or Counterfeit Documents and Plates (Count 4); two(2) counts of Recklessly Endangering Another Person (Counts 5 & 6); DUI-Controlled Substance or Metabolite -1st Offense (Count 7); DUI--Controlled Substance- Impaired Ability (Count 8); Reckless Driving (Count 9); Driving at a Safe Speed (Count 10); Maximum Speed Limits (Count 11); Disregarding Traffic Lane (Count 12); Illegal Racing (Count 13); Violations of use of Certificate of Inspection (Count 14); and Display of Unauthorized Certificate of Inspection (Count 15). Sentencing was deferred to allow for the preparation of a Presentence Investigation Report ("PSR"),

On August 10, 2021, the court sentenced the Defendant to 45-90 months' imprisonment at the Homicide by Vehicle conviction at Count 2 of the information.¹ He was sentenced to 5 years of probation at Count 4 - Altered, Forged or Counterfeit Documents and Plates. The Defendant further was sentenced to a period of 12-24 months' imprisonment at each of his convictions for Recklessly Endangering Another Person (Counts 5 and 6). At Count 7 - DUI Controlled Substance - he was sentenced to 1 month and 15 days to 3 months' imprisonment to be followed by 6 months' probation. He was also ordered to pay \$1000 fine. The Defendant was given 90 days credit for time served and paroled forthwith on that charge.² The Defendant received various fines for the summary traffic offenses at Counts 9-15.

All periods of confinement were ordered to run consecutively to one another. The probationary periods were ordered to run concurrently to one another but consecutive to the periods of confinement. In total, the Defendant was sentenced to an aggregate sentence of 69-138 months' imprisonment and 5 years of probation.³

A timely post-sentence motion seeking a modification of the Defendant's sentence was filed on August 17, 2021. After consideration, the motion was denied on August 18, 2021.⁴ This timely appeal followed. The Defendant sought and received an extension of time to file his Concise Statement. On November 15, 2021, the Defendant timely filed his Concise Statement attacking the reasonableness and consecutive nature of his sentence. Specifically, the Defendant raised the following allegations of error on appeal:

I. The trial court abused its discretion by imposing unreasonable and excessive sentences on the counts of Homicide by Vehicle and Recklessly Endangering Another Person, as they were unduly harsh, given the nature of the offenses, the length of this imprisonment, and the trial court's failure to consider numerous mitigating factors, as well as Mr. Keating's character, personal history, and rehabilitative needs as required by 42 Pa. C.S.A. § 9721(b).

II. The trial court abused its discretion by imposing consecutive sentences on the Homicide by Vehicle and two counts of Recklessly Endangering Another Person, given the nature of the offenses, the length of this imprisonment, and the trial court's failure to consider numerous mitigating factors, as well as Mr. Keating's character, personal history, and rehabilitative needs as required by 42 Pa. C.S.A. § 9721(b).

(Concise Statement, pp. 4-5).

The Defendant's contentions are without merit. The court respectfully requests that the Defendant's sentence be upheld for the reasons that follow.

I. DISCUSSION

A. The Defendant's bald assertions of excessiveness and failure to consider relevant sentencing factors do not raise substantial questions for review.

The Defendant's sentencing arguments seek to challenge the discretionary aspects of sentencing. The court notes that "[t]he right to appeal a discretionary aspect of sentence is not absolute." *Commonwealth v. Martin*, 727 A.2d 1136, 1143 (Pa. Super. 1999). A defendant "challenging the discretionary aspects of [the] sentence must invoke [appellate] jurisdiction by satisfying a four-part test." *Commonwealth v. Moury*, 992 A.2d 162, 170 (Pa. Super. 2010). In applying the four-part test, the appellate court analyzes

(1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [708]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa. C. S. A. § 9781(b).

Id. at 170. "The determination of whether there is a substantial question is made on a case-by-case basis, and [the appellate court] will grant the appeal only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Haynes*, 125 A.3d 800, 807 (Pa. Super. 2015).

In his Concise Statement, the Defendant contends that this court abused its discretion in sentencing because it failed to consider certain statutory sentencing factors and did not impose a concurrent sentencing scheme. (Concise Statement, p. 4). As our appellate court has explained:

A court's exercise of discretion in imposing a sentence concurrently or consecutively does not ordinarily raise a substantial question. *Commonwealth v. Mastromarino*, 2 A.3d 581, 587 (Pa. Super.2010), appeal denied, 609 Pa. 685, 14 A.3d 825 (2011). Rather, the imposition of consecutive rather than concurrent sentences will present a substantial question in only "the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment." *Commonwealth v. Lamonda*, 52 A.3d 365, 372 (Pa. Super. 2012), appeal denied, 621 Pa. 677, 75 A.3d 1281 (2013),

Commonwealth v. Caldwell, 117 A.3d 763 (Pa. Super. 2015). Stated differently,

a defendant may raise a substantial question where he receives consecutive sentences within the guideline ranges if the case involves circumstances where the application of the guidelines would be clearly unreasonable, resulting in an excessive sentence; however, a bald claim of excessiveness due to the consecutive nature of a sentence will not raise a substantial question.

Commonwealth v. Dodge, 77 A.3d 1263, 1270 (Pa. Super. 2013), reargument denied (Nov. 21, 2013), appeal denied, 625 Pa. 648, 91 A.3d 161 (2014) (emphasis in original).

Our reviewing court has further noted that, "ordinarily, a claim that the sentencing court failed to consider or accord proper weight to a specific sentencing factor does not raise a substantial question." *Commonwealth v. Berry*, 785 A.2d 994, 996-97 (Pa. Super. 2001) (internal citation omitted) (emphasis in original). Additionally, our appellate court "has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." *Commonwealth v. Disalvo*, 70 A.3d 900, 903 (Pa. Super. 2013)

This court respectfully requests that the reviewing court find that the Defendant has failed to raise a substantial question for review of his sentence. The Defendant makes nothing more than a bald claim of excessiveness based on the consecutive sentencing scheme, and he sets forth a bareboned assertion that this court failed to consider the relevant sentencing factors in imposing sentence. The Defendant's aggregate sentence is not "unduly harsh, considering the nature of the crimes and the length of imprisonment." *Lamonda*, supra. The sentence was consistent with the sentencing provisions of the Sentencing Code, and it did not conflict with the fundamental norms that underlie the sentencing process.

However, should the reviewing court conclude that there exists a substantial question as to the appropriateness of the sentence, the Defendant's sentence was justified by the totality of the circumstances in this case.

B. This court did not abuse its discretion when it imposed a total aggregate sentence of 69-138 months' imprisonment because this court considered all of the statutory sentencing factors in fashioning an appropriate sentence, and a consecutive sentencing scheme was justified by the totality of circumstances.

The question raised in this appeal is whether this court abused its discretion when it sentenced the Defendant to a total period of 69-138 months' imprisonment for his conduct in driving while under the influence of marijuana and racing another vehicle, which caused a multi-vehicle collision that killed his girlfriend and endangered the lives of two (2) other people. See *Commonwealth v. Caldwell*, 117 A.3d 763, 770 (Pa Super. 2015) ("When reviewing a challenge to the discretionary aspects of sentencing, [the appellate court] determine[s] whether the trial court has abused its discretion.").

An abuse of discretion is more than an error in judgment; a sentencing court has not abused its discretion "unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). "In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003). This deferential standard of review acknowledges that the sentencing court is "in the best position to view the defendant's character, displays of remorse, defiance, indifference, and the overall effect and nature of the crime." *Commonwealth v. Allen*, 24 A.3d 1058, 1065 (Pa. Super. 2011) (internal citations omitted).

The aggregate sentence imposed in this case was neither excessive nor unreasonable given the totality of circumstances in this case. The crux of the Defendant's appeal is simply that this court did not afford as much weight to the mitigating factors as he would have liked. The Defendant's assertion that this court "fail[ed] to consider numerous mitigating factors, as well as Mr. Keating's character, personal history, and rehabilitative needs" ignores this court's history with the Defendant as well as the sentencing justification already set forth on the record. It further assumes that the mitigating factors, whether standing alone or taken together, should have outweighed the other, more serious concerns presented by the facts of this case and by the Defendant himself. (Concise Statement, pp. 4-5).

Initially, the court notes that, in fashioning its sentence, it had reviewed the PSR's that were prepared on July 21, 2011 and August 4, 2021. (Sentencing Transcript ("ST"), held 8/10/21, pp.5-6). Additionally, the court carefully considered the information set forth in the Defendant's memorandum in aid of sentencing, which contained letters of support for the Defendant. (ST, p. 6). The PSR's and sentencing memorandum extensively discussed the Defendant's background, personal characteristics and mental health struggles.

At the sentencing hearing, this court considered the victim impact statement from the victim's mother and father, which was read into the record by the Commonwealth. (ST, pp. 12-15). It also listened to the parties' sentencing arguments. (ST, pp. 6-12, 15-20). Defense counsel argued that the sentence should be focused not on punishment but rather rehabilitation, given the Defendant's background, personal characteristics, and mental health history. (ST, pp. 6-12).

The Commonwealth contended that the Defendant had already been provided with rehabilitative opportunities that he had failed to take advantage of and that the focus, therefore, should shift to punishment, given his serious criminal history, the reckless nature of the instant offense, and how his criminal conduct had now escalated to the point of taking a life. (ST, pp. 15-20). To be sure, the Defendant was considered a Repeat Felon at the time of sentencing, having already achieved the highest criminal history classification at the young age of 33. (ST, p. 16) (Plea Transcript ("PT"), held 5/12/21, P. 33).

Prior to imposing sentence, the court also listened to the Defendant's allocution. (ST, pp. 21-24). The Defendant expressed his remorse for his crimes and explained the trauma and guilt he was experiencing over killing his girlfriend, noting that he had even attempted suicide following the fatal accident. (ST, pp. 21-24).

This court paid careful attention to each one of defense counsel's mitigation arguments and, notwithstanding the Defendant's contentions to the contrary, those considerations were factored into this court's sentencing calculus. However, that was the extent

of this court's obligation. Ultimately, this court did not believe that the mitigating factors outlined by defense counsel in his sentencing memorandum and at sentencing warranted anything less than the sentence that was ultimately imposed.

Notably, this court was acutely aware of the Defendant's character, personal history, and rehabilitative needs prior to sentencing because the Defendant was a former Mental Health Court ("MHC") participant who successfully graduated from the program on September 30, 2015. (PT, p. 22); (ST, p. 24). During the Defendant's time in the program, this court's focus was solely on the Defendant's rehabilitation, and his previous sentences were tailored in such a way to allow him to meaningfully address his mental health treatment needs.

Indeed, the entire MHC team worked tirelessly to arm the Defendant with the information, support, and treatment resources that were necessary for him to gain control over his mental health problems. By the end of his time in the program, the Defendant had successfully demonstrated his knowledge and ability to comply with his medication and treatment needs. In this court's estimation, the Defendant's status as a former MHC graduate substantially weakened any argument that his mental health issues were mitigating to the point of warranting a dramatically lower sentence. If anything, his continued criminal conduct following his successful discharge from the program was a factor that weighed against him. As this court stated at the sentencing hearing:

Mr. Keating. I spent a lot of time yesterday reading through the memorandum in support of sentencing and presentence report and I listened to what everybody says here and there is no doubt that you have a mental health issue. There is no doubt that you have a mental health history.

What I see when I read through all of this is a neglected mental health history and it is incredibly disappointing to me because you know better, because you did have the ability to go through Mental Health Court, because we spent a lot of time talking about what was needed and what was necessary, and at the point that you graduated on September 30, 2015, when we were all so proud of you, you knew what you had to do moving forward - - to maintain the life that you had built for yourself. You had a child. You had a house. You had things going well. You were working. You were doing your treatment. You were taking your medication. You were doing everything that we asked which is why we graduated you.

And I read through this memorandum in support of sentencing and it made me sick, quite frankly, how quickly you stopped doing everything that you knew you needed to do to stay on track. How quickly that all went by the wayside when you weren't on probation anymore and didn't have a judge looking over your shoulder. How quickly you went from continuous significant treatment continuity to not taking your medication to hit or miss. To go to your PCP and asking for meds then not taking the meds. To go into a hospital to say you were in crisis to get meds and then not taking the meds. Being told to follow up and not following up.

. . . . You made those choices not to continue with your mental health treatment. You made those choices not to take your medication. And you made those choices knowing - - knowing that you needed to do so. You understood more than anybody here that you needed those medications and that treatment to stay out of this courtroom, to stay out of trouble. . . . And the choices that you made were the exact opposite.

Even after all this happens . . . you put yourself in the hospital for 302 and then you leave before they tell you you're ready and there is no good reason for it, none. You didn't get serious about your mental health until the public defender's office told you to get serious. That's what this says. That is what is in that memo. You only became serious when the public defender's office told you that you better get serious because you're going in front of a judge and that is when you got serious. And that is too late, way too late.

Against this backdrop, it is clear that this court did consider and weigh the Defendant's rehabilitative needs and other mitigating factors in crafting its sentence. However, as stated, this was not an individual who had unaddressed treatment needs and who had never had an opportunity to be rehabilitated. Rather, this was an individual who previously had enjoyed a team of people and a host of resources to address his mental health needs, but who had failed to take advantage of the numerous opportunities that he had been afforded and who had failed to follow through with treatment and medication that he knew he needed.

Other, much more compelling factors warranted the aggregate sentence imposed. The gravity of the offense and the fact that the Defendant's criminal conduct continued even after his arrest for the instant offense all weighed heavily in favor of a substantial sentence of imprisonment. After the Defendant had already killed his girlfriend in the instant DUI case, and while those charges were still pending, the Defendant was charged with driving under the influence and driving at a high rate of speed with faulty equipment, charges which were nearly identical to those for which he was already awaiting trial. (PT, pp. 16-17); (ST, pp. 18-19). This not only evinces a pattern of eerily similar criminal activity, but it also highlights the Defendant's utter disrespect for the law, his disregard for human life, his inability to lead a law-abiding life, and the substantial danger he poses to the public. (ST, p. 18); (PT, pp. 16-17). It also leaves hollow any expression of remorse, as a truly remorseful individual would not dare engage in exactly the same type of behavior that resulted in the loss of his loved one's life.

Accordingly, for all the reasons just stated, the Defendant cannot meet his burden of showing that his aggregate sentence was an abuse of discretion. As is reflected by the record, the aggregate sentence was a product of varied considerations and accounted for all of the relevant statutory factors. Given this court's familiarity with the Defendant, his history, background, and characteristics, this court was in the best position to view the Defendant and gauge his ability (or lack thereof) to become a productive, law-abiding member of society and to assess the danger he posed to the public. The court was aware of and considered the Defendant's mitigating factors and rehabilitative needs, but it found that the mitigating evidence was far outweighed by other, far more compelling factors that necessitated a serious period of imprisonment. A lengthy prison sentence was further necessary to promote respect for the law and to provide adequate deterrence, as the Defendant's prior, more lenient sentences clearly failed to dissuade him from committing serious crimes.

Moreover, this court acted within its discretion in imposing a consecutive sentencing scheme, as "extensive case law in this jurisdiction holds that defendants convicted of multiple offenses are not entitled to a 'volume discount' on their aggregate sentence." *Commonwealth v. Foust*, 180 A.3d 416, 434 (Pa. Super. 2018).

Finally, in imposing sentence, this court was aided by the PSR's and the Defendant's sentence for each conviction fell within the standard range of the guidelines. As our appellate court has repeatedly stated, "where the sentencing court imposed a standard-range sentence with the benefit of a pre-sentence report, we will not consider the sentence excessive. In those circumstances, we

can assume the sentencing court 'was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.'" Commonwealth v. Corley, 31 A.3d 293, 298 (Pa. Super. 2011) (quoting Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988)). For all the foregoing reasons, this court respectfully requests that its sentencing scheme be upheld.

II. CONCLUSION

The Defendant's allegations of error on appeal are without merit. Based on the foregoing discussion, the court considered all of the relevant mitigation evidence and statutory sentencing factors in imposing sentence. Accordingly, this court respectfully requests that its total aggregate sentence be upheld.

BY THE COURT:
/s/Lazzara, J.

Date: January 27, 2022

¹ The Involuntary Manslaughter conviction at Count 3 merged with Count 2.

² The DUI Controlled Substance Impaired Ability conviction at Count 8 merged with Count 7.

³ The court also imposed special conditions requiring the Defendant to: comply with DNA registration; continue Mental Health and Drug/Alcohol Treatment; have no contact with the families of the victims; attend safe driving classes; comply with the recommendation of the Drug and Alcohol Assessment; and pay the cost of the Drug and Alcohol Assessment directly to the Alternatives DUI Program.

⁴ Counsel did not request a hearing on the motion.

Charlene M. Campbell and Thomas D. Campbell v. Vuono & Gray, LLC, a Pennsylvania limited liability company; et al.

Motion to Disqualify Legal Counsel—Rules of Professional Conduct

Motion to disqualify legal counsel denied where motion was made early in the proceedings where there was no basis for the court to conclude that disqualification was necessary to ensure any party receives a fair trial. A request to disqualify legal counsel cannot be based on speculation.

Trial court's authority to disqualify counsel under the PA Rules of Professional Conduct are limited to situations where disqualification is needed to ensure the parties receive a fair trial.

No. GD 21-11596. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—February 9, 2022.

OPINION

I. Introduction

Charlene and Thomas Campbell, the plaintiffs, filed a motion to disqualify their Father's attorneys. From my denial of this motion, the Plaintiffs have timely appealed to the Superior Court of Pennsylvania. This opinion will explain the reasons I denied the motion to disqualify counsel.

II. Background

In 2014 defendant Charles T. Campbell, II, Plaintiffs' father ("Mr. Campbell" herein), terminated a trust he established in 1966. Mr. Campbell used the funds in it to satisfy a delinquent mortgage on the Fox Chapel Borough residence he occupied with his wife and the Plaintiffs, who are their two adult children. Mr. Campbell, his wife and the Plaintiffs also entered into a written agreement to sell the Fox Chapel residence and create a new trust at defendant Huntington National Bank funded by the sale proceeds. They agreed the principal amount of the new trust would be \$727,517 and the new trust would benefit Mr. Campbell for his lifetime and the Plaintiffs as remainder beneficiaries. However, the Fox Chapel residence has yet to be listed for sale and, therefore, the new trust has not been funded.

In 2016 Mr. Campbell's mother died in Florida leaving a will that left him one-third of the residue of her estate in a trust with defendant Joseph Scherle named the trustee. Mr. Scherle is authorized by the trust to distribute income and principal to Mr. Campbell during his lifetime with the Plaintiffs and their cousins as remainder beneficiaries.

Mr. Campbell's wife died in January of 2017, but three days before her death she alone signed a deed conveying the Fox Chapel residence she and Mr. Campbell owned to plaintiff Charlene Campbell and Mr. Campbell. In February of 2017 Mr. Campbell hired the defendant law firm of Vuono & Gray, LLC ("Vuono & Gray" herein consists of defendant attorneys Mark Vuono and Dennis Kusturiss) for help with, among other things, selling the Fox Chapel residence. Vuono & Gray discovered the January of 2017 deed that had been signed by Mr. Campbell's deceased wife, but not by him. Later in 2017 Charlene Campbell hired attorney Patrick Doheny. Vuono & Gray sought to have Charlene Campbell removed from the title to the Fox Chapel residence through amicable means, but they were unsuccessful. Charlene contends that her mother's single signature on the deed conveys title both from her mother and Mr. Campbell, because her mother was Mr. Campbell's attorney-in-fact under a 2001 power of attorney.

Mr. Campbell moved out of the Fox Chapel residence in 2017. The plaintiffs, however, continue to reside there with utilities, taxes and other expenses being paid from the trust established under Mr. Campbell's mother's will. In 2018 Mr. Campbell filed suit in the Civil Division of this court against Charlene Campbell to invalidate the January 2017 deed from Mr. Campbell's wife and quiet title to the Fox Chapel residence. See No. GD18-7173. In 2019 Charlene and Thomas Campbell sued Mr. Campbell in the Civil Division of this court for specific performance of the 2014 agreement to sell the Fox Chapel residence and create a new trust. See No. GD19-2486. The plaintiffs, Charlene and Thomas Campbell, thereafter also filed a petition in the Orphans' Court division for an accounting of the trust established under Mr. Campbell's mother's will. See No. 02-19-02074. The civil lawsuits were transferred

and consolidated into the Orphans' Court proceeding. Later in 2019, Mr. Campbell signed a trust agreement with Huntington National Bank for the \$727,517 to be realized upon the sale of the Fox Chapel residence. The 2019 trust agreement was prepared by Vuono & Gray and signed without the Plaintiffs' approval. The Plaintiffs challenge the validity of the 2019 trust, particularly provisions allowing Mr. Campbell to remove and replace the trustee and giving the trustee the ability to make distributions of principal for Mr. Campbell's benefit. In July of 2020 the Orphans' Court entered ten separate orders on the disputes, including an order appointing defendant Thomas Dempsey as Mr. Campbell's Guardian ad litem. While the Plaintiffs appealed from all ten orders, the Superior quashed the appeals for lack of jurisdiction. In January of 2021 the Plaintiffs were able to appeal the Orphans' Court Order for compensation of \$5,412 to Mr. Dempsey, and a decision on the appeal is pending. See Superior Court no. 33 WDA 2021.

The Plaintiffs initiated this proceeding in the Civil Division at docket number GD 21-11596 in September of 2021 by praecipe for writ of summons. After Vuono & Gray requested issuance of a rule upon the Plaintiffs to file a complaint, and after I denied Plaintiffs' motion to strike Vuono & Gray's request, Plaintiffs filed a complaint. Before any defendant filed a response to the complaint, on November 23, 2021 Plaintiffs filed a motion to disqualify Vuono & Gray as counsel for Mr. Campbell. No party requested an evidentiary hearing on the motion. I heard oral argument of the motion on December 17, 2021 and denied it by order dated December 20, 2021. The Plaintiffs filed a notice of appeal on December 21, 2021.

The Plaintiffs timely filed a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b) ("concise statement" herein) that is difficult for me to understand. I will do my best to restate my perception of the issues being appealed by the Plaintiffs and then analyze them.

III. Issues being Appealed and Analysis

Pursuant to Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 1.7(a)(2), the Plaintiffs contend "there is a significant risk that the representation of one or more clients will be materially limited...by a personal interest of the lawyer." Concise statement, ¶ 3. They contend that I erroneously "failed to apprehend that the Vuono Defendants will inevitably need to assert...that they acted...at the express direction of" Mr. Campbell, thus creating an adverse relationship. Concise statement, ¶ 4. In other words, Plaintiffs believe Vuono & Gray will defend against Plaintiffs' legal malpractice and tortious interference with contract claims by saying Mr. Campbell directed them to insert the trust provisions that give him the right to remove and replace the trustee and receive distributions of principal. With Vuono & Gray (as well as all other defendants) having not yet filed any answer, new matter or crossclaim, it is pure speculation for the Plaintiffs to identify what Vuono & Gray's defenses may be. In any event, Mr. Campbell's diminished mental capacity (see, e.g., amended complaint, ¶ 696) makes it unlikely that he directed Vuono & Gray to place specific provisions in the trust they prepared. A more likely defense is that Vuono & Gray's conduct does not constitute legal malpractice or tortious interference with a contract. Another defense may be that the contested trust provisions are in the best interest of their client, Mr. Campbell.

The Plaintiffs asked me to rule on their motion to disqualify at an early stage of this proceeding where there is no basis for me to conclude Vuono & Gray has a personal interest that violates Pa.R.P.C. 1.7(a)(2). In addition, a trial court's authority to disqualify counsel based on Rules of Professional Conduct is limited to situations "where disqualification is needed to ensure the parties receive the fair trial which due process requires." *Vertical Resources, Inc. v. Bramlett*, 2003 PA Super 462, 837 A.2d 1193, 1201 quoting *In re Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215, 221 (1984). I fail to see disqualification of Vuono & Gray being needed to ensure Mr. Campbell or another party receives a fair trial. A need to disqualify counsel cannot arise from speculation or imagination. Therefore, I correctly ruled against the Plaintiffs on their request to disqualify Vuono & Gray based on a personal interest.

Pursuant to Pa.R.P.C. 1.8(f), the Plaintiffs next contend that Vuono & Gray's independence of professional judgment is interfered with by their acceptance of "compensation for representing a client from other than the client...." See concise statement, ¶ 5. They contend that I erroneously overlooked the evidence of this interference created by defendant Scherle compensating Vuono & Gray for representing Mr. Campbell. *Id.* Rule 1.8(f), however, only applies when "a third person will compensate the lawyer..." (Pa. R.P.C. 1.8, comment 11), which is not what happens when Mr. Scherle pays for Mr. Campbell's attorney fees. Examples of who could be considered a "third person" under Rule 1.8(f) are a relative, friend, insurer or co-client. See Pa.R.P.C. 1.8, comment 11. In each example, it is not the client's own funds but the third party's funds being used to compensate the lawyer. Each of the checks used to compensate Vuono & Gray come from the trust established for Mr. Campbell by his deceased mother. See amended complaint, exhibit 10. These funds belong to Mr. Campbell, not Mr. Scherle. Therefore, I correctly determined that Rule 1.8(f) does not apply to the payments Mr. Scherle made from Mr. Campbell's trust.

Plaintiffs also argue a power of attorney from Mr. Campbell to Mr. Scherle that was prepared by Vuono & Gray is evidence of interference with Vuono & Gray's independent judgment. See concise statement, ¶ 5. According to Plaintiffs, this shows that Mr. Scherle, not Mr. Campbell, is Vuono & Gray's real client. *Id.* But the Plaintiffs failed to demonstrate Mr. Scherle not acting in Mr. Campbell's best interests, and after a year and half with a court-appointed guardian ad litem, Mr. Dempsey has not reported any improper behavior by Mr. Scherle. Hence, Plaintiffs' claim that Mr. Scherle is the real client is pure speculation.

Plaintiffs also argue that two emails during 2017 from Mr. Vuono to Mr. Scherle also show Mr. Scherle is the real client. See concise statement, ¶ 5. The first email is about the title to the Fox Chapel residence and the second email is about a conversation with Mr. Doheny, Plaintiffs' attorney, also concerning the Fox Chapel residence. I see nothing in these emails indicating Mr. Scherle is the real client. With the Plaintiffs claiming Mr. Campbell has a diminished mental capacity, they could not expect him to handle the sale of the Fox Chapel residence without assistance, and in the power of attorney Mr. Campbell authorized Mr. Scherle to sell his real property and to employ attorneys. Therefore, Plaintiffs' claim that Mr. Scherle is the real client is pure speculation.

Plaintiffs next contend I made an error by not disqualifying Vuono & Gray based on the expert report of J. Dustin Barr, Esquire. See concise statement, ¶ 6. Attorney Barr, who states that he has 25 years of estate planning and elder law practice, premises his opinions on the \$155,600 paid to Vuono & Gray between February of 2017 and October of 2020. See motion to disqualify, exhibit 39. However, Mr. Barr acknowledges that he did not review Vuono & Gray's invoices, which would describe the services rendered. It is likely that a large percentage of the services relate to the quiet title and specific performance lawsuits. Plaintiffs' counsel routinely files unnecessarily lengthy pleadings and motions that further increase the opponent's counsel fees. Therefore, if Vuono & Gray hire an expert to respond to attorney Barr's report, such expert probably will blame the Plaintiffs for a large percentage of Vuono & Gray's fees. Disqualification requests from opposing counsel must be viewed with caution due to the possibility of misuse as a technique for harassment. See *Weber v. Lancaster Newspapers, Inc.*, 2005 PA Super 192, 878 A.2d 63 at 80. To accept

attorney Barr's report as the reason to disqualify Vuono & Gray would be abandoning the caution mandated in Weber. Hence, I was correct to not base my ruling on attorney Barr's report.

Plaintiffs next contend that I made an error by not disqualifying Vuono & Gray for failure "to avoid the appearance of impropriety...." Concise statement, ¶ 7. However, any appearance of impropriety is not a proper basis to disqualify counsel unless disqualification is needed to ensure the parties receive a fair trial. See Vertical Resources, Inc. and In re Estate of Pedrick, supra. The Plaintiffs do not state how the alleged appearance of impropriety will deprive Mr. Campbell of a fair trial. Therefore, I correctly decided Vuono & Gray should not be disqualified based on an alleged appearance of impropriety.

Plaintiffs also contend that I made an error by not disqualifying Vuono & Gray because the Plaintiffs will be deprived of a fair trial. See concise statement, ¶ 7. Plaintiffs premise this argument by somehow considering themselves to be Vuono & Gray's clients. But, the Plaintiffs never hired Vuono & Gray to be their attorneys, and the Plaintiffs have been represented by their own attorney, Mr. Doheny. Because Vuono & Gray are not the Plaintiffs' attorneys, my disqualification ruling will not deprive them of a fair trial.

Plaintiffs next contend I made an error by giving any weight to the notion that Vuono & Gray are Mr. Campbell's "freely chosen counsel." See Concise statement, ¶ 8. They further contend there is "unrefuted" evidence that Mr. Campbell terminated Vuono & Gray. Id. It is untrue that the evidence that Mr. Campbell terminated Vuono & Gray is unrefuted. The alleged termination of Vuono & Gray is in this May 5, 2020 email to Mr. Vuono and Mr. Kusturiss:

Dear Mark and Dennis:

In the past few weeks since the Covid-19 lock down has occurred I have had time to read the paperwork from the work you have performed on my behalf in the past 3 + years.

After some thought and rereading the documents, and your bills, I no longer wish to continue having you as my attorneys. I am in the process of finding new attorneys.

I will have them contact you about my client files.

Sincerely,

Charles T. Campbell II

Amended complaint, exhibit 25. Mr. Vuono and Mr. Kusturiss represented to the Orphans' Court that this was the first email communication they had with Mr. Campbell and they understood he did not use email. Mr. Doheny, on two previous occasions, told Vuono & Gray Mr. Campbell terminated them. But, after consulting with Mr. Campbell, Vuono & Gray found he did not wish to terminate them. In response to the May 5, 2020 email from Mr. Campbell, Vuono & Gray therefore sent Mr. Campbell a letter by U.S. Mail asking for him to sign it to confirm that he had sent the email. Vuono & Gray represented to the Orphans' Court that Mr. Campbell did not respond to the letter or to two telephone calls or a follow up letter. However, Vuono & Gray provided this text message dated June 8, 2020 from Mr. Campbell:

Charles T Campbell has not terminated the services of Vuno & Gray. Let it be known again that Charles T Campbell still has the services of Mark Vuono & Dennis Kustruriss.

Preliminary objections raising issues of fact (filed 1/14/2022 as document 59), exhibit 41. Mr. Campbell was not present before me when the motion to disqualify was argued, and no evidentiary hearing has been held on the subject of the alleged termination of Vuono & Gray. Adding further doubt to the validity of the May 5, 2020 termination is the statement in it that Mr. Campbell was in the process of finding new attorneys who would contact Vuono & Gray, yet new attorneys for Mr. Campbell have failed to emerge over a nearly two year period. Rather than the evidence of Vuono & Gray's termination being "unrefuted," it instead is highly suspicious. Therefore, I was correct to consider that Vuono & Gray is Mr. Campbell's freely chosen counsel in ruling on the motion to disqualify.

Plaintiffs next contend that my ruling must be reversed or other attorneys will feel free to violate the Rules of Professional Conduct as there are no "consequences and/or remedies for doing so...." Concise statement, ¶ 9. This argument demonstrates Plaintiffs' misunderstanding of the operation of the Rules of Professional Conduct. Violation of a Rule is a basis for invoking the disciplinary process (see Pa. R.P.C., Preamble and Scope, ¶ 18), which could result in sanctions by the Disciplinary Board of the Supreme Court of Pennsylvania such as disbarment or license suspension. But, "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." Id., ¶ 19. As mentioned previously, disqualification is a remedy only where it is needed to ensure the parties receive a fair trial. See Vertical Resources, Inc. and In re Estate of Pedrick, supra. Since there is no basis to conclude that Mr. Campbell or another party will not receive a fair trial, disqualification of Vuono & Gray is not warranted.

Plaintiffs' final contention is that I made an error to the extent my ruling relies on the decisions of the Orphans' Court and the Superior Court that denied previous requests by Plaintiffs to disqualify Vuono & Gray. See Concise statement, ¶s 10, 11, 12 and 13. However, I did not consider these previous decisions in any way in ruling disqualification is unwarranted. Hence, reliance on these previous decisions cannot be an error that I made.

BY THE COURT:
/s/Hertzberg, J.

Date: February 9, 2022