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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
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Circulation 5,266

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OPINIONS

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NABIN SHARMA vs. ANJU SHARMA

Sole Legal Custody

As Mother had sole legal custody, she has the sole right to decide whether to obtain passports and whether to travel with the children to Nepal.

No. FD 12-001923-008. Sup. Ct. No: 220 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Bubash, J. April 17, 2023.

PROCEDURAL HISTORY

Appellant, Father, Nabin Sharma, (Hereinafter “Father”) appeals from my January 17, 2023, Order which allowed Mother to obtain passports for the two minor children, without Father’s consent, and to travel to Nepal with the children in March 2023.¹ Father’s Notice of Appeal, filed on February 16, 2023, did not contain a Concise Statement of Matters Complained of on Appeal, as required by Pa. R. App. P. 1925 (a) (2) (i). As this matter was designated a Fast Track Appeal, I issued an Order on February 16, 2023, directing Father to file his 1925 (B) statement “immediately.” The Superior Court by Per Curiam Order dated February 28, 2023, directed that Father file his 1925 (b) statement no later than March 9, 2023. Father then requested an extension of time, and the Superior Court extended his deadline to file until March 23, 2023. On March 23, 2023, I received through my motions email a copy of Father’s Concise Statement of Matters Complained of on Appeal. As of the date of this Opinion, the original has not been filed with the Department of Court Records.

In his Concise Statement, Father states:

“The within Petitioner, who is not represented by an attorney, is appearing before the court to request the following relief: Petitioner requests that family court grant petitioner for filing appeal to higher court for making passport of children without both biological parent consent.”

BACKGROUND

Since the issuance of the August 24, 2020 Temporary Protection From Abuse Order (TPFA), Mother has had primary physical and legal custody of the 2 minor Children, S.S. DOB 9/1/2009 and S.S. DOB 5/23/2012.² My December 1, 2020, Order modified the custody provisions of the TPFA and provided that after he completed a Batter’s Intervention Program and parenting classes, Father could have supervised visits with his children at Three Rivers Adoption Counsel (TRAC), with TRAC to determine the length and frequency of such visits. The custody provisions of the TPFA were further modified on August 22 2022 and allowed for both Parties to have full access to various records of the children.

The August 24, 2020, TPFA has been continued by Father for more than 2 ½ years because of pending criminal charges. Father has not been using TRAC’s services to visit with his children because he refuses to sign their service agreement.

OPINION

Initially, I would note that the issues raised in this appeal are now moot. I granted Mother permission to obtain a passport for the children and for her to take them to her native Nepal to visit relatives. The trip was to take place in March. As it is now April, either the trip took place pursuant to the Court Order allowing it or that Order is stale as the dates that travel was specifically permitted have passed. Either way, the issue of whether I erred in permitting international travel is now moot.

In *Cassani v. Karniak*,³ an unreported decision by the Superior Court found at 2022 WL 17098970 (2022), the Superior Court dismissed mother’s appeal of an Order permitting Father to travel to Italy with their children because the trip had already taken place. In that matter, Mother sought a stay of the lower Court order, which was granted provided, however, that if Father posted a bond the travel would be permitted. He posted the bond and Father and the children had gone to Italy and returned by the time the Superior Court addressed the matter.

The Superior Court noted:

As a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot. An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law.” In *Re D.A.*, 801 A.2d 614, 616 (Pa. Super. 2001). Importantly, “mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so.” *Bailer v. Bailer*, — A.3d —, 2022 WL 2255941, *2 (Pa. Super., June 23, 2022)1 (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)).

2020 WL 17098970. There is also nothing to remedy in this matter as the time provided for the travel has passed. Similarly, I believe that the challenge to my decision to allow Mother to obtain passports is moot. There is nothing in the record to suggest that Mother did not secure the passports as I allowed.

Even if these issues were not moot, this case is controlled by the Superior Court’s decision in *M.P. v. M.P.*, 54 A.3d 950 (Pa. Super. 2015), a case with remarkably similar facts. Mother in *M.P.* was granted primary custody of the minor child pursuant to a PFA Order and the child has been in her exclusive care since birth. Father was granted supervised visits but did not exercise his right to those visits and had not seen the child for months. The one difference between those facts and those in this matter is that Mother and Father in *M.P.* agreed that they would have shared legal custody. Here, there was no such agreement and Father does not have legal custody to any degree. In *M.P.*, however, the agreement as to shared legal custody also provided that that in the event of a disagreement between Mother and Father, Mother’s decision would prevail. The Superior Court noted that this arrangement gave Mother de facto sole legal custody. *Id.*, at 953.

In *M.P.* Mother presented a Petition seeking permission to travel with her child to her native Ecuador to visit with relatives. Father objected and the trial court barred the travel. The Superior Court reversed, observing that “legal custody” is defined as “[t]he right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions,” and “sole legal custody” is “[t]he right of one individual to exclusive legal custody of the child.” 23 Pa.C.S. § 5322(a). Because Mother had, in essence, the sole right to make all decisions regarding the child, she had legal custody. The Superior Court held that international travel and obtaining passports to allow it were “major decisions” that Mother had the authority to make based on her exercise of legal custody.

Consistent with *M.P.*, the PFA Orders in this matter granted Mother legal custody. Thus, she had the right and authority to make all decisions for the children, including major ones such as obtaining passports and travelling with the children internationally.

As the Superior Court in M.P. noted: “When one parent has sole legal custody, that parent has final authority to make decisions, regardless of whether the other parent agrees or disagrees.” M.P., Id. at 954.

This Court’s decision to allow Mother to travel with the children to her native Nepal in March 2023 should be upheld for two reasons. First, Father’s challenge is moot. The travel to which Father objects was to have occurred in March of 2023 which time has passed at the writing of this Opinion. Second, as Mother had sole legal custody, she has the sole right to decide whether to obtain passports and whether to travel with the children to Nepal.

For these reasons, my Order of January 17, 2023, should be affirmed.

BY THE COURT:

/s/The Hon. Cathleen Bubash

¹ Father presented a motion asking that I reconsider this order on January 27, 2023, and again on February 15, 2023. Both motions were denied.

² Father was also charged criminally at CP-02-CR-7196-2020 with one count each of Aggravated Assault, (18 Pa. C.S.A. section 2702 (a) (1)); Simple Assault (18 Pa. C.S.A. Section 2701 (A) (1)) and Strangulation, (18 Pa. C.S.A. section 2718 (A) (1). On January 12, 2023, pursuant to a plea agreement, the assault and strangulation charges were withdrawn, and he entered pleas of guilty to three counts of Disorderly Conduct as misdemeanors of the 3rd degree and was sentenced to an aggregate period of probation of nine months. He was also directed to have no contact with Mother, the victim in that matter.

³ I cite Cassani for its persuasive value pursuant to Pa. R. A. P. 126 (b), which authorizes a Court to cite to unpublished non-precedential memorandum decisions filed after May 1, 2019, for their persuasive value.

COMMONWEALTH OF PENNSYLVANIA vs. TYLER RALING

Motion for Parole

Defendant’s petition for parole was properly denied.

CP-02-CR-6296-2021. 1430 WDA 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Bigley, J.

OPINION

This is a timely appeal from the denial of the defendant’s motion for parole which was filed on September 30, 2022 and denied on November 2, 2022. The Defendant’s Rule 1925(b) Concise Statement of Errors Complained of on Appeal raises the following issues:

I. The trial Court erred by denying the defendant’s request for parole, as it had a mistaken belief that it was statutorily prohibited from entering an order of parole until the defendant had completed drug alcohol counseling at the Allegheny County Jail.

FACTUAL BACKGROUND

Defendant was arrested and charged with Driving Under the Influence of Alcohol or Controlled Substance (75 §3802 §§D1), Driving Under the Influence of Alcohol or Controlled Substance (75 §3802 §§D2), Driving While Operating Privileges were Suspended or Revoked (75 §1543§§A), Possession of a Controlled Substance (35 §780-113 §§A16) and Possession of Drug Paraphernalia (35 § 780-113 §§A32) on February 16, 2022.

Officers of the City of Pittsburgh Police Department were dispatched to the intersection of PJ McArdle Roadway at the Liberty Bridge at 5:30 p.m. for a report of a driver slumped over the wheel of his vehicle. When Officers arrived on scene, they observed the defendant stopped at the red light at the intersection slumped over the wheel. The defendant abruptly woke up after being initially unresponsive. It was determined that the defendant had an outstanding warrant from Westmoreland County for a parole violation and a search incident to arrest found the defendant to be in possession of twelve (12) stamp bags of heroin and a hypodermic syringe. Defendant was transported to UPMC Mercy hospital where standardized field sobriety tests were given and he later consented to a blood draw. The blood was turned over to the Allegheny County Crime Lab for testing and later yielded positive results for cocaine, fentanyl and cannabinoids.

Prior to this arrest, defendant had been charged in a separate case with two (2) counts of Driving Under the Influence of Alcohol or Controlled Substance along with various motor vehicle violations in Butler County.

Defendant had completed his “CRN” evaluation on January 25, 2022, and his drug and alcohol assessment through Mercy Behavioral Health on January 26, 2022, which deemed the defendant in need of “higher level of care”. When defendant appeared before this Court on August 18, 2022, he had plead guilty and was sentenced in Butler County on that Driving Under the Influence of Alcohol or Controlled Substance charge which resulted in the instant case becoming a third offense and graded as a Felony of the 3rd degree. Defendant plead guilty to Count One (1) Driving Under the Influence of Alcohol or Controlled Substance (75 §3802 §§D1) and was sentenced to a period of one (1) to seven (7) years of incarceration to be served in the Allegheny County Jail with permission for alternative housing and with this Court retaining parole jurisdiction. The defendant was further sentenced at Count Four (4) Possession of a Controlled Substance (35 §780-113 §§A16) to a period of eighteen (18) months probation to run concurrently to the sentence imposed at Count One.¹

Parole petitions were submitted by the Allegheny County Jail on August 29, 2022 and September 23, 2022, both of which were not recommending parole due to various infractions, the most serious this Court considered “being in possession of major contraband (an illegal drug-controlled substance or narcotic).” The defendant, through counsel, filed a Petition for Parole on

September 30, 2022, which was also denied by this Court on November 2, 2022. On October 13, 2022, defendant was transferred to alternative housing "Passages to Recovery" and a subsequent Parole Petition filed by the Allegheny County Jail indicated that the defendant had begun various treatment goals, had zero misconducts and parole was not being recommended as he had "not yet completed his treatment goals." Defendant's parole was again denied on November 16, 2022. On January 13, 2023, the defendant was returned to the Allegheny Jail from Passages to Recovery for admission to substance abuse and diverting medication.

This Court recognizing the limits available for sentencing purposes if the defendant were to violate the terms of his parole or to reoffend believes it to be in the defendant's best interest to complete treatment afforded to him while incarcerated and be recommended for parole. This court recognizes that a sentencing judge that has retained jurisdiction may grant parole under §3815 when an offender is eligible following the expiration of the offender's mandatory minimum term of imprisonment.

The defendant received the minimum sentence, was given credit for the same time credited to the case in Butler County and was upset when this court would not parole him forthwith at the time of sentencing. This court will not grant parole except upon written petition. 42 Pa. C.S. § 9776. Defendant is thirty (30) years old and at the time of the two (2) pending Driving Under the Influence charges (both in Allegheny and Butler Counties), had nineteen (19) prior convictions for various drug and drug related offenses and had numerous probation and parole violations in multiple counties. The defendant has not been able to meet his treatment goals, follow rules, or abstain from abusing drugs while in the Allegheny County Jail and in alternative housing. By reason of the foregoing the defendant's petition for parole was properly denied.

BY THE COURT:

/s/The Hon. Kelly E. Bigley

¹ Defendant was given credit for time served of a total of 394 days. The defendant's minimum sentence expired July 20, 2022.

COMMONWEALTH OF PENNSYLVANIA vs. ABDULLAH HANEEF IBN-SADIKA

Post-Conviction Relief Act Petition – Motion for DNA Testing

Petitioner's second request for DNA testing of cigarette butts recovered from murder scene denied. Even if DNA testing showed the presence of some other person's DNA it would not establish Petitioner's innocence. A PCRA Petitioner seeking the testing of DNA must make a prima facie showing that the evidence would demonstrate actual innocence, not merely that there were others present at some other time.

CC: 198410761. 198411275. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Howsie, J.

OPINION

This matter was before the court for disposition of Petitioner's Motion for DNA Testing. On December 14, 2021, the Court denied the motion. Thereafter, the Petitioner appealed the denial.

In the Petitioner's matters complained of on appeal he asserts that the Court abused the discretion by dismissing his motion.

A brief rendition of the facts are that at about 9:00 p.m. on March 16, 1983, Petitioner left the residence he was sharing with his girlfriend Ms. Sanders in Mount Oliver, Pennsylvania. The Petitioner and Ms. Sanders had been experiencing financial difficulties and Petitioner informed Sanders that he was going to get some money and that he might have to kill someone to do it. (Trial Transcript pg. 750-751). Petitioner returned home at approximately 2:00 a.m. with blood stains on one of his shoes and on a pair of black gloves. (Trial Transcript pg. 757). The Petitioner was carrying a gym bag which contained a jar, a small white pearl box containing a set of pearl handled steak knives, two checks each of which were the victim's personal checks made out to the Petitioner in which one of the checks the Petitioner's name was spelled incorrectly, various amounts of foreign currency and collector coins, various gold necklaces, stickpins, rings and earrings, a few of which were engraved with the victim's initials. (Trial Transcript pg. 752-753). Testimony given by Ms. Sanders at trial provided that Petitioner explained to her that the items in the gym bag were obtained from an elderly woman in the Homewood area of Pittsburgh. He informed Ms. Sanders that he forced the victim to write out a second check because she misspelled his name on the first. (Trial Transcript pg. 764). The Petitioner admitted to Sanders that he had stabbed the victim and left her to die in her bedroom because she could have identified him. (Trial Transcript pg. 765).

The Petitioner's request was based upon his belief that DNA testing of items (hair and cigarettes) would not identify him and may identify someone else as being present at the victim's residence. The Petitioner had made a similar request upon the Court in 2005, seeking DNA testing of cigarette butts from the victim's residence. In that instance, similar to the matter at this juncture, because the facts of this case do not require physical evidence to identify the Petitioner as the perpetrator, nonexistence of the Petitioner's DNA or someone else's DNA would be of no consequence. The Court being bound by that determination has pronounced in the Superior Court Opinion Commonwealth of Pennsylvania v. Abdullah H. Ibn-Sadiika, No. 844 Western District 2005, unpublished memorandum (Pa. Super. filed October 6, 2006). (Forensic testing of the cigarette butts), which held that this argument was based on pure speculation. The Superior Court relying on Commonwealth v. Smith, 889 A.2d 582, 585 (Pa. Super. 2005), that even if forensic testing of the cigarette butts produced a DNA profile that matched up with another individual in a state or national database, that would not establish Petitioner's innocence, let alone "reveal the identity of the likely killer."

In accordance with 42 Pa.C.S. § 9543.1, a petitioner requesting postconviction DNA testing must make prima facie showing that the identity of or participation in the crime by the perpetrator was at issue in the proceeding, and DNA testing of the specific evidence, assuming exculpatory evidence, would establish their actual innocence. 42 Pa.C.S. § 9543.1(c); Commonwealth v. Robinson, 2020 PA Super 217, 239 A.3d 154 (Pa. Super. 2020). A successful prima facie showing will vary with the circumstances of each case. Id. (citing In re Payne, 2015 PA Super 272, 129 A.3d 546, 559 (Pa. Super. 2015)). A court cannot order DNA testing if there is no reasonable possibility that favorable DNA test results would establish actual innocence.

Id.; see Payne, 129 A.3d at 563.

The absence of a petitioner's DNA at the crime scene alone is not sufficient to establish actual innocence. Commonwealth v. Tyler, 2020 PA Super 145, 234 A.3d 750, 754 (Pa Super. 2020). Particularly at the case at bar where physical identification evidence of the perpetrator was not required, given his admission coupled with the physical items belonging to the victim in his possession. The absence of DNA or certain identity would be of no consequence.

Based upon the foregoing reasons, the Petitioner's issues raised as matters complained of on appeal are deemed without merit.

BY THE COURT:
/s/The Hon. Elliot Howsie