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Opinions

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COMMONWEALTH OF PENNSYLVANIA vs. DARREL EUGENE HARDY, JR.

Right of Allocution

Case No.: CC201810887 and CC201810888. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Todd, J. March 22, 2023.

OPINION

This is an appeal by Defendant after he was found guilty at CC201810887 of Criminal Homicide, Murder in the First Degree, Firearm Not to be Carried Without a License, Tampering with and Fabricating Physical Evidence and at CC201810888 he was found guilty of 2 Counts of Arson and 1 Count of Criminal Mischief. Defendant was sentenced on June 30, 2022 to life imprisonment and consecutive sentences of 12 to 24 months for the firearm conviction and 36 to 72 months for the arson conviction. Defendant filed Post-Trial Motions which were denied on November 14, 2022. Defendant filed a Notice of Appeal to the Superior Court on November 17, 2022. Defendant filed a Concise Statement of Matters Complained of on Appeal on November 17, 2022, which set forth the following:

(1) the Court erred in denying suppression of Defendant's July 8, 2018 statement to police when Defendant was in the functional equivalent of custody and not advised of his constitutional rights prior to making the statement;

(2) the Court erred and/or abused its discretion in denying, solely on the basis of Defendant's representation by privately-retained counsel, the requests for public funds to retain an expert to analyze cell phone location data;

(3) the Court erred in allowing Defendant to waive his presence on the first day of jury selection (March 21, 2022) when the waiver colloquy failed to inform Defendant that his absence may limit or otherwise compromise issue (including ineffectiveness of counsel) related to jury selection; and,

(4) the Court erred and/or abused its discretion in curtailing and otherwise interfering with Defendant's right of allocution under 42 Pa.C.S. §9752(a)(2) and/or Pa.R.Cr.P. 704(C)(l) in not informing Defendant that statements in allocution should address the sentence to be imposed (including expression of remorse, acceptance of responsibility, plea for mercy/leniency, an other evidence in mitigation) before imposing sentence.

BACKGROUND

This matter arises out the murder of Zachary Moore in the early morning hours of July 8, 2018. At trial the Commonwealth established that at approximately 5:31 a.m. on July 8 police received a report of a man lying along the southbound side of East Pittsburgh McKeesport Boulevard in North Versailles. The responding officer found Moore's body with a with a gunshot wound to the head and the body was still warm. (T., p. 104)[1] Allegheny County Police homicide detectives also responded to the scene and based on their observation of fresh blood on the roadway and around the body, it was believed that Moore was shot at another location and then dumped from a vehicle on the side of the road. Further, finding that the back of Moore's shirt was also soaked in blood, it was believed that he may have been shot while in a seated position. (T., p. 133-134) Based on the evidence that Moore may have been seated in a vehicle when he was shot, it was believed that the vehicle could be "messy or contain lots of biological evidence" and that sometimes the perpetrators try to destroy the evidence. (T., p. 137) As a result, the Allegheny County 911 Center was contacted to determine if there were any reported car fires in Allegheny County that morning and a car fire was reported on the South Side slopes in the City of Pittsburgh at approximately 6:25 a.m. that morning. (T., p. 137) Further, review of the license plate reader system near the body showed a vehicle with a Maryland license plate, 7CK-9170, traveling north on East Pittsburgh McKeesport Blvd at 4:51 a.m. (T., p. 139) In addition, video from cameras at a nearby restaurant showed the vehicle making a U-tum and then proceeding southbound, the side of the road where the body was located. (T., 140) This license plate matched the license plate of the car that was reported on fire on the South Side of Pittsburgh. Detectives traced the license plate to Hertz Rental Car which identified the vehicle as a Chevy Malibu that was rented to Defendant. (T., 141-142)

Based on the information that Defendant had rented the vehicle, Allegheny Police detectives located an address for Defendant at 839 Sleepy Hollow Road in Castle Shannon and at approximately 2:00 p.m. on July 8 went to the location to speak to Defendant about his rental car. They were accompanied by two uniformed police officer so they could readily be identified as law enforcement and for their safety, as they had determined that Defendant was the registered owner of a firearm. (T., pp. 214-215)

During the interview, the detectives told Defendant they wanted to talk to him about his car. Defendant told them that he had recently rented the car because his car was wrecked. (Interview T., p. 5) He told them that he was a jitney driver and he picked Moore up in Homestead and they drove to the Homeville Trolley Stop, a bar in Homestead, as well as two clubs in the Strip District, Pritti's and the XO Club. Defendant also told the officers that they stayed at the Trolley Stop until about 12:00 a.m. They then went to Pritti's until about 2:30 a.m. and then to the XO Club, which closed at 4:00 a.m. Defendant stated that the clubs had video cameras and the officers would be able to see that they were at each of the clubs[2]. (Interview T., pp. 47-48) Defendant stated that when they left the XO Club, Moore drove him home because Defendant "was drunk as hell" and they were accompanied by a friend of Moore's, who described as being tall with dreads. (Interview T., p. 42)

He stated Moore dropped him off at his home at 4:30 a.m. and he let Moore take the car to drive home. {Interview T., pp. 10, 14, 42) Defendant stated that he never left his home after that and Defendant's girlfriend, Ashley Guinyard, who was present when Defendant was talking to the detectives, also stated that she was there when Defendant came home at 4:30 a.m. and they never left. (Interview T., p. 14, 23)

During their review of the videos from the clubs, the detectives identified the other person with Defendant and Moore as Christian Mahone. Mahone testified at trial that he was friends with Moore for about eight years and knew Defendant only as Moore's "driver," who he met about two months before the murder. (T., p. 179-180) Mahone testified that he saw Moore and Defendant at the Homeville Trolley Stop when he arrived between 10:00 to 11:00 p.m. (T., p. 184) He stated that during the night, Moore was flashing "a lot of money" and Moore told him that he had $7,000. (T., pp. 187-188) Mahone testified that Moore wanted to go to Pretti's Pit and Moore, Defendant and others went to Pretti's and he went to a different club in Homestead to eat. Video showed them leaving the Trolley Stop at 11:55 p.m. and they agreed to meet at the XO Club. (T., p. 191) At that time, Defendant was driving a red Malibu. Mahone testified that he then met Moore and Defendant at the XO Club at approximately 2:00 a.m. They then left the XO Club at approximately 3:30 a.m. because they wanted to go to a fourth club, Secrets, which was located in Homewood, and they wanted to arrive before 4:00 a.m. Mahone testified that Defendant and Moore rode him to his car and they

drove separately to Secrets. When Mahone arrived at Secrets, Moore was standing outside of the car urinating and Defendant was sitting in the driver's seat. (T., p. 200) It was approximately 4:00 a.m. and they were denied admission to Secrets and then Mahone talked with Moore briefly and then left. He testified that at that time Moore appeared inebriated and wasn't fit to drive but Defendant did not appear drunk. (T pp. 201-202)

During the investigation, the detectives also obtained various video surveillance which was presented at trial. This included video that showed Defendant driving his rental car at the intersection of Library Road and Grove Road in Castle Shannon at 5:54 a.m. on July 8; video from an autobody shop located at 2116 South 18th Street, in the vicinity of the car fire on the South Side of Pittsburgh at 6:25 a.m. on July 8 which showed Defendant walking on the street along the side of the autobody shop. (T., p. 149); video of Defendant on a Port Authority bus at approximately 6.28 a.m. traveling from South 18th Street toward Carson Street; and, video at the T Station entering a trolley at approximately 6:43 a.m. and exiting the trolley at the Castle Shannon stop at approximately 6:58 a.m. (T., pp. 458-468).

Evidence was also presented of dates, times and photos from the License Plate Reader system located in various parts of Allegheny County which included photos of Defendant's rental vehicle on 1-376 at the Squirrel Hill Tunnel at 5:03 a.m. on July 8.

The Commonwealth presented the testimony of John Orlando, a Special Agent for the FBI who testified that he did a review of Defendant's cell phone information using various T Mobile Towers including towers with coverage areas from a Hilton Garden Inn, Preeti's Pit, two License Plate reader locations, a residence in Castle Shannon, the crime scene and the Homeville Trolley Stop. Agent Orlando testified that his review of Defendant's cell phone data showed that on July 7, 2018 there were three phone calls and one text message between 8:52 p.m. and 9:38 p.m. (incoming at 9:14 p.m.; outgoing at 9:15 p.m.; and, incoming at 9:38 p.m.) from a cell phone tower in the Homestead area. (T., p. 404) He also testified that between 11:15 p.m. on July 7 and 12:31 a.m. on July 8 the data showed an incoming voice call at 11:59 p.m. and outgoing voice call at 12:00 a.m. and then text messages at 12:03 and 12:06 a.m. using a Braddock Hills and Rankin area tower. Special Agent Orlando also testified that there was no data regarding call activity between 12:30 a.m. and 5:03 a.m. on July 8, indicating the phone was either shut off or not in use. (T., p. 407) Agent Orlando then testified that the next activity was at 5:03 a.m. on July 8 was utilizing a cell phone tower within the area of a license plate reader heading west on 1-376. (T., pp. 408-409) The last activity was on July 8, 2018 at 6:23 a.m. which was an incoming call and it used the tower that would provide coverage to the Castle Shannon area, including the residence. (T., p. 409)

The Commonwealth also presented the testimony of several additional witnesses addressing forensic and scientific evidence, as well as testimony of other lay witnesses, whose testimony is not relevant to the issues raised on appeal. The Commonwealth argued that Defendant shot and killed Moore after leaving Secrets in Homewood and then dumped his body in North Versailles. It was argued that he then drove back to the apartment in Castle Shannon to change his clothes before driving to the South Side and setting the vehicle on fire and then returning to his apartment using the bus and trolley.

Defendant presented the testimony of an investigator, Keri Bozich, regarding the travel times between various locations identified during the testimony. Defendant argued these times were consistent with Moore or Mahone's driving the car after Moore dropped Defendant off at his apartment at 4:30 a.m. Defendant also presented the expert testimony of Dr. Robert Levine to address the issue of the types of firearms that could have been used to cause Moore's fatal head wound, arguing it was not necessarily of the caliber Defendant owned. Defendant argued that the detectives centered their investigation on him as he was the one that rented the car and they failed to investigate Mahone or others who were with Moore on the night he was killed. Defendant argued that although license plate readers identified his car in various locations during the early morning hours of July 8, it did not identify him as the driver. He also argued that video obtained from Secrets, did not show him, Moore or Mahone at Secrets, which called into question Mahone's credibility regarding the events that night.[3]

DISCUSSION

In his first issue, Defendant contends that it was error to deny his motion to suppress his statements made to detectives in his home on the afternoon of July 8, 2018 when he was not given Miranda warnings prior to making any statements. It is clear that Miranda warnings are only required when a person is subject to a custodial interrogation, which is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. In Commonwealth v. Cooley, 118 A.3d 370 (2015) the Supreme Court stated:

An individual is in custody if he is "physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation." Commonwealth v. Johnson, 556 Pa. 216, 727 A.2d 1089, 1100 (Pa. 1999) Regarding custody, the United States Supreme Court has further held the "ultimate inquiry is ... whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318,322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) The standard for determining whether an encounter is custodial is an objective one, focusing on the totality of the circumstances with due consideration given to the reasonable impression conveyed to the individual being questioned. Commonwealth v. Gwynn, 555 Pa. 86, 723 A.2d 143, 148 (Pa. 1998) (Opinion Announcing [***14] Judgment of the Court) (citation omitted). Commonwealth v. Cooley, 118 A.3d 370,376 (2015)

The factors utilized to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. Commonwealth v. Levanduski, 907 A.2d 3, 24 (Pa. Super. 2006)

At the suppression hearing on December 10, 2019 Detective Patrick Kinavey testified that he and his partner were called to assist in the investigation regarding the body found on the side of the road in North Versailles on the morning of July 8, 2018 and based on the blood evidence they believed the victim had been dumped there from a vehicle. (T., p. 6) Based on his experience, vehicles that are involved in a homicide are sometime set on fire to destroy evidence. (T., p. 7) Consequently a request was made to Allegheny County 911 for information regarding any recent car fires and a report was obtained of a vehicle fire on the South Side of Pittsburgh and the license plate number on that car matched the license plate number captured on a vehicle by a license plate reader in the area where the body was found that morning. (T., p. 10) After determining the car involved was rental car rented by Defendant, Kinavey and his partner went to Defendant's residence to speak to him about the vehicle and to find out if he knew where was and the status of the vehicle. (T., p. 14) The residence they went to located Castle Shannon, accompanied by two Castle Shannon police officers, was in an apartment rented by his girlfriend, who was the leaseholder. (T., p. 17) After knocking at the door Defendant's girlfriend, Ashley Guinyard, answered the door. They identified themselves and asked if Defendant was there. She responded by asking if they had a warrant and they told her they did not. They then asked if they could come in and talk to

Defendant and she invited them in. (T., p. 19) At the suppression hearing, Detective Kinavey credibly testified that they were there for informational gathering purposes as Defendant was the renter of the vehicle and they wanted to talk to him because often times a vehicle involved in a crime may have been lent to another person or the vehicle has been stolen. (T., pp. 19-20) Detective Kinavey testified that Defendant then emerged from a bedroom area and they spoke to him and the conversation was captured on a body camera. (T., p. 22) The video was offered into evidence and reviewed. Detective Kinavey testified that Defendant was never commanded or ordered Defendant to speak to them. They did not order him to stay in the residence and, in fact, Detective Kinavey asked Defendant at one point if they could talk in the hallway but Defendant indicated he would rather talk in the living room. (T., p. 25) At no point was force ever threatened or used and Defendant was never searched or restrained. (T., pp. 24 - 25) At one point Defendant walked back toward the bedroom and Detective K.inavey followed him to the bedroom door to see where he was going and Defendant indicated he did not want to be followed without a warrant. (T., p. 26) Detective Kinavey indicated that they wanted to follow him for their safety and then the conversation returned to the living room. (T., pp. 26-27) The conversation lasted about 32 minutes during which Defendant's movements were not restricted and neither Defendant nor his girlfriend ever asked them to leave. (T., p. 29) Detective Kinavey indicated that Defendant never indicated any unwillingness to talk and described the interaction as "very casual." (T., p. 29)

Defendant testified regarding his suppression motion on February 12, 2020 that he and his girlfriend were sleeping when the Detectives knocked on the door. He stated that he then heard his girlfriend talking to someone and she told him to come into the living room. (T. p. 5) He observed two men, one in a blue shirt and one in a white shirt with guns and two uniformed officers in the doorway. (T., pp. 5-6) He testified that he asked if they had warrants and they said no. (T., p. 7) Defendant then testified that he was surprised, shocked and frightened and that he was in "containment" because the officers blocked the only way out. (T., p. 8) Defendant acknowledged that at one point when he walked back to his bedroom one of the Detectives followed him and he told them not to follow him if they didn't have a warrant. (T., p. 9) He acknowledged that the officer told him that they didn't want him wandering around the house. (T., p. 10) He also acknowledged that he never asked them to leave. (T., p. 14) It was also clear that Defendant had no reservation in questioning the Detectives about the existence of a warrant and clearly he was not intimidated by their presence.

In this case, when considering the totality of the circumstances, the interaction or questioning of Defendant in his home did constitute Defendant being in custody or the functional equivalent of an arrest. The detectives responded when asked that they did not have a warrant and asked if they could enter the apartment and speak to Defendant and they were invited in. At no time did Defendant or his girlfriend ask the detectives to leave. As noted, when they asked Defendant to step into the hallway and talk, he declined and said he preferred to talk in the living room. Defendant was never restrained or transported against his will. In fact, Defendant moved about the apartment and Detective Kinavey only followed him to the bedroom door for his safety to assure that Defendant was not accessing a firearm or other weapon. The interaction was extended, in part, as a result of Defendant charging his phone to supply phone numbers to the detectives, but still only lasted approximately 32 minutes. The detectives never threatened or used force and the mere fact that they were carrying firearms did not constitute placing Defendant in custody or under arrest. It is also clear that there was a legitimate basis to question Defendant as he was renting a car that was burned and the detectives wanted to determine if he was safe or if he had any information about the circumstances surrounding the use of the vehicle. Further, even if a police investigation focuses on an individual that alone does not trigger custody requiring Miranda warnings. Commonwealth v. Levanduski, 907 A.2d 3, 24 (Pa. Super. 2006)

Defendant also referenced in his testimony the presence of the Castle Shannon police officers. However, Detective Kinavey credibly testified that, as they were in plain clothes, the officers not only were present to identify them as police but also for their safety as they were in and about the apartment building. One of the officers was present in the doorway to record the encounter on his body camera and the other was in the outside hallway. These officers did not restrain or restrict Defendant and there were no actions on their parts which constituted placing Defendant in custody. Based on the totality of the circumstances, the interaction between the detectives and Defendant did not constitute a custodial interrogation and, therefore, the Motion to Suppress was appropriately denied.

In his second issue, Defendant alleges that it was an abuse of discretion to deny his request for public funds to retain an expert to analyze cell phone data location solely on the basis of Defendant's representation by privately retained counsel. Prior to trial Defendant filed a motion seeking funds for a forensic expert and a private investigator. In his motion Defendant alleged that the Commonwealth provided counsel for defense with a witness list with 37 potential witnesses, including 8 people listed under "Lab." Defendant requested funds for a private investigator, Keri Bozich.[4]

Defendant's motion also indicated that a stipulation had been reached with the Commonwealth to admit the autopsy report of Dr. Luckasevic noting that his Autopsy report did not contain his opinion that the victim was in a seated position when he was shot. (¶ 8) The motion was denied by an order of September 21, 2021.

On February 17, 2022 Defendant filed a motion requesting reconsideration of his request for funds for a digital forensic expert. Defendant alleged that defense counsel received from the Commonwealth a draft report of FBI Special Agent John Orlando setting forth his findings regarding cell phone location analysis of Defendant's cellular phone. Orlando was part of the FBI's Cellular Analysis Survey Team (CAST) that is trained in the gathering of cell phone data and information.

Defendant alleged that counsel for Defendant had become aware of the FBI's internal guide for gathering data from cell phone providers for digital forensic evidence at trial and attached as Exhibit "A" a copy of an online magazine article describing general information regarding CAST. The article further stated, "CAST provides its own cell phone data visualization tool to law enforcement officials around the country called CASTViz for free." Defense counsel quoted a statement from the article: "The presentation adds that maps and analysis created by CASTViz should not be taken into court without being validated for accuracy, and that testimony should only be through a qualified expert." (¶ 5) However, in the motion Defendant did not set forth any areas of dispute with Agent Orlando's report or set forth an offer of what additional expert review of the cell phone information would address. The scope of work proposed by the expert requested included cellular location analysis of call detail records. However, as previously discussed, Defendant did not dispute that he and Moore were together starting on the night of July 7 through 4:30 a.m. on July 8, which is when Defendant told the detectives that Moore dropped him off at the apartment in Castle Shannon. In fact, Agent Orlando testified that his review of Defendant's cell phone data showed that on July 7, 2018 there were three phone calls and one text message between 8:52 p.m. and 9:38 p.m. (incoming at 9:14 p.m.; outgoing at 9:15 p.m.; and, incoming at 9:38 p.m.) from a cell phone tower consistent with Defendant being in the Homestead area or the Homeville Trolley Stop, which was consistent with Defendant's statement to detectives that he was jitneying in the Homestead area at that time.

Agent Orlando also testified that between 11:15 p.m. on July 7 and 12:31 a.m. on July 8 the data showed an incoming voice call at 11:59 p.m. and outgoing voice call at 12:00 a.m. and then text messages at 12:03 and 12:06 a.m. using a Braddock Hills and Rankin area tower, which was again consistent with Defendant's statement that he was in the Homestead area at that time. Special Agent Orlando also testified that there was no data regarding call activity between 12:30 a.m. and 5:03 a.m. on July 8, indicating the phone was either shut off or not in use. (T., p. 407) Agent Orlando then testified that the next activity at 5:03 a.m. on July 8 was utilizing a cell phone tower within the area of a license plate reader heading west on 1-376. (T., pp. 408-409)

In fact, Agent Orlando's testimony concerning phone activity from Defendant's phone on 1- 376 at 5:03 a.m. on July 8 is consistent with the testimony from Sergeant Timothy Cole regarding Defendant's vehicle's license plate being captured at the Squirrel Hill tunnel inbound on 1-376 5:01 a.m. in the morning of July 8, 2018. (T., p. 419) Sergeant Cole also testified to a license plate hit at 4:36:02 a.m. at the intersection of Oakwood Street and Tioga Street which is approximately 3 minutes from the Secrets nightclub. (T., pp. 419-420) As discussed above, there is also video evidence of Defendant walking on the street in the area of the car fire on the South Side and taking a bus and trolley from approximately 6:38 a.m. to 6:58 a.m., after he told detectives he was home at 4:30 a.m. and never left.

Defendant contends that it was an abuse of discretion to deny him funds for an expert witness solely on the basis of Defendant's representation by privately-retained counsel. The provision of public funds to hire experts to assist in the defense against criminal charges is a decision vested in the sound discretion of the court. Commonwealth v. Cannon, 954 A.2d 1222, 1226 (Pa. Super. 2008) As noted in Defendant's motions, Defendant had previously had the benefit of court appointed counsel and even alleged in the motion that previous counsel presented Defendant with "a written account of why he believed the evidence against [Defendant] was overwhelming and that he recommended a guilty plea." (Motion Requesting Funds For Forensic Expert and Private Investigator, ¶ 6) The motion attached as Exhibit "D" a review of the evidence apparently provided by counsel to Defendant. While Defendant was free to proceed with private counsel, it was not an abuse of discretion to deny providing public funds for expert fees under the circumstances in this case.

In his next issue, Defendant contends that there was error in allowing Defendant to waive his presence on the first day of jury selection, March 21, 2022, when the waiver colloquy failed to inform Defendant that his absence may limit or otherwise compromise issues on appeal, including issues of ineffectiveness of counsel, related to jury selection.

At the time set for the commencement of trial and jury selection on March 21, 2022 Defendant's counsel informed the Court that Defendant would not proceed with jury selection because he wanted to present a pro se habeas corpus petition, that counsel advised him was without a factual foundation. (T., pp. 4-5) Defendant stated:

"At no time did I request my attorney to do anything unethical or unlawful. If for any reason my lawyer feels this Petition has no merit, I would respectfully request she review my Petition and state for the record that no merit exists, that in this case she feels no merit exists." (T., p. 5)

Defendant requested the appointment of new counsel to argue the petition before trial, which request was denied and Defendant and counsel were instructed to proceed with jury selection. (T., p. 6) Defendant then stated that he was firing his counsel and refused to participate in jury selection. (T., pp. 6-7) Counsel returned when Defendant would not participate and stated that Defendant "wants to fire me because I haven't filed a habeas motion on his behalf' and began to discuss the strategy that counsel intended to employ at trial and stated "I would not argue on the habeas motion that he filed because it is not based on fact and is just a general statement of his - I cannot in good faith file the habeas motion." (T., p. 8) Defendant was then brought back to the courtroom and stated again that he wanted his pretrial motion heard. (T., p. 9) Defendant was advised that jury selection would proceed and was also informed that "If there is any arguments that she wants to make before we bring the jury in and swear them in, we will do it at that time." (T., p. 10) Defendant was then informed as follows:

Now, you can assist her in the jury selection process by being there, or you can sit down in the bullpen and she will do it without you there. That would deprive you of the right to have any input as to the various jurors that you would want to discuss with her, how you felt about them. And also your presence not being there, that can be a little prejudicial towards you. (T., p. 10)

Defendant stated that it was against his constitutional rights to "force me to go to trial." (T., p. 11) Defendant was also informed that "This is lawyer number four" and "today is the day of your jury trial." (T., p. 14) Defendant was again informed,

"What you could do is participate in the jury selection with your attorney, or you can sit in the bullpen and not be there and she will be forced to pick without you there. I think it would be better if you were with her so she can discuss with you whether you like a particular juror or not, but that's a decision up to you. You are not going to fire her today. This is the date of trial, and we are going to pick a jury and we are going to start." (T., pp. 14-15)

When specifically asked if he wished to participate or not, Defendant responded, "I'm not got to answer it" and also stated "I am not going to be there." (T., p. 15) Defendant was then told "I hope you understand you are waiving- -" Defendant interrupted by stating, "I didn't waive anything." (T., p. 16) At that point Defendant elected not to participate and jury selection proceeded without him. After the selection of eight jurors, Defendant elected to participate in the continuing jury selection process. (T., p. 17) Defendant was again advised that it was in his interest to participate in the jury selection process. (T., p. 19)

It is clear from the record in this case that Defendant's refusal to participate in the jury selection process was an attempt to delay the trial by asserting that he wanted to present a motion that his counsel indicated that she had discussed with him for months and had no factual basis.

Pa.R.Crim.P. 602 provides that:

(A) The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence.

While a person accused of a crime has a constitutional right pursuant to the Sixth Amendment of the United States Constitution and Article 1, § 9 of the Pennsylvania Constitution to be present at every stage of a criminal trial, a defendant may, by his actions, waive this right expressly or implicitly. Commonwealth v. Wilson, 712 A.2d 735. 737 (1978) Defendant herein was advised of his rights and that he was waiving his rights by failing to participate in the jury selection process. Repeated colloquies were conducted with Defendant regarding the importance of his participation in the jury selection process and it was apparent that Defendant was attempting to delay the commencement of the trial without cause and, therefore, there was no error in proceeding with the selection process without him being present.

In his next issue Defendant contends that it was error and an abuse of discretion to curtail or interfere with Defendant's right of allocution under 42 Pa.C.S. §9752(a)(2) and Pa.R.Crim.P. 704(C)(l) by not informing Defendant that statements in allocution

should address the sentence to be imposed, including expressions of remorse, acceptance of responsibility, a plea for leniency or other evidence in mitigation of sentence.

42 Pa.C.S. § 9752 provides as follows:

(a) General rule. – As soon as practicable after the determination of guilt and the examination of any presentence report, a proceeding shall be held at which the court shall:

(1) Entertain submissions by the parties on the facts relevant to the sentence, including any facts with respect to negotiated pleas, as to the nature of the sentence.

(2) Afford to the defendant the right to make a statement.

(3) Hear argument by the defense on the applicability of the various sentencing alternatives to the facts of the case, and may hear argument by the prosecution.

(b) Evidence. – Where the need for further evidence has not been eliminated by a presentence conference, evidence offered by the parties on the sentencing issue shall be presented in open court with the rights of confrontation, cross-examination, and representation by counsel. 42 Pa.C.S. § 9752

In addition, Pa.R.Crim.P. 704(C)(l) provides in part:

(C) Sentencing Proceeding.

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing. Pa. R. Crim. P. 704

In this case, a review of the sentencing transcript of June 30, 2022 indicates that Defendant knew of his right to make a statement, was afforded the opportunity to make a statement and exercised that right. Defendant was advised of his right to file post trial motions and right to file an appeal and his right to counsel on appeal. (T., p. 2-3) Defendant was advised new counsel would be appointed for his appeal. Defendant's counsel indicated that Defendant wanted to make a statement, however, counsel also indicated that "I don't know what he wants to say." (T., p. 4) This statement resulted in cautionary instructions to the Defendant that anything he said could affect his appellate rights. (T, p. 4) These instructions were not made to restrict Defendant in making a statement but to assure that he understood the potential implications of any statements he made.

Victim impact statements were given by the victim's sister, Yvonne Moore, (T., pp. 6-9); his mother, Tonia Copeland (T, pp. 9-15); his niece Honeste Moore, (T., pp. 15-16); and Defendant's mother, Donna Bryant (T., pp. 17 - 19) Counsel for defendant also addressed the Court and stated: "Yes, I have a few words, and then my client wants to speak." (T., p 20) Counsel then provided copies of job applications that Defendant had made before the murder and requested that, in light of the mandatory sentence for the murder conviction, that any other sentences for the arson and related cases be made concurrent sentences.

Defendant began his allocution statement by expressing sympathy and condolences to the family in the courtroom for their "loss" (T., p. 20) However, he also made clear that he did not accept responsibility for any of the crimes when he stated "Me going to jail for these crimes aren't giving you the justice you all deserve. I didn't kill Bud, and I also didn't put my car on fire. (T., p. 23) Defendant then continued with his statement that the Commonwealth's "story and evidence was all circumstantial evidence that showed that it had suspicion, conjecture, mere presence and opportunity which anyone else could have had as well. They didn't prove beyond a reasonable doubt that I actually killed Bud or that I set the car on fire." (T., p. 23) Defendant then began making an extended statement regarding the law concerning the standard of proof and the alleged failure of his counsel to "challenge the arson like she was supposed to do and was a defective lawyer, she was therefore ineffective." (T., p. 24 -25) Defendant then continued with an extended recitation of various sections of the Pennsylvania Rules of Professional Conduct, the Federal Rules of Criminal Procedure, the Pennsylvania Rules of Criminal Procedure, the United States Constitution, and the Pennsylvania Code of Judicial Conduct. (T. pp. 25 -31) While Defendant criticized his counsel, he also stated that "The attorney presented more than enough doubt." (T., p. 36) Defendant also began to cite cases raising claims of insufficiency of the evidence at which time Defendant was advised that he would have an attorney on appeal. (T., p. 37) Defendant repeatedly argued that he was being denied his right of allocution. These statements made it clear that he was fully aware of his right to make a statement and was claiming that he was being denied that right in order to raise an issue on appeal.

It is clear that Defendant was given his right of allocution. To the extent that he now argues that he was not advised that any statement that he made should address the sentence to be imposed as well as expressions of remorse, acceptance of responsibility, plea for leniency, or other evidence in mitigation of the sentence, it is clear that Defendant was not accepting responsibility or expressing remorse, He only expressed his condolences for the family's "loss" that he clearly stated he was not responsible for. In light of his refusal to speak to counsel about his allocution statement or even discuss with counsel the presentence report, Defendant was appropriately cautioned that statements that he made during his allocution statement might be used against him. Defendant was given great latitude in making his statement but when it became clear that the statement was nothing more than recitations of rules or law that he believed were violated during his trial, then it was appropriate to limit his statement and proceed with sentencing.

BY THE COURT:
/s/The Hon. Randal B. Todd

[1] Testimony from the Medical Examiner was that Moore died from a single intermediate range gunshot wound to the left side of the head. (T., p. 93) He also had post mortem abrasions on his right knee and foot, consistent with being moved after he died. (T., p., 92) His blood alcohol level was .241. (T., p. 93)

[2] Video evidence submitted at trial did show that Defendant and Moore were in the Homeville Trolley Stop, entering at 11:08 p.m. and leaving at 12:02 a.m. (T., p. 159); Pritti's Pit, entering at 12:52 a.m. and leaving at 1:42 a.m. (T., p. 160), and the XO Club, entering at 1:52 a.m. and leaving at 3:33 p.m. (T., pp. 163-164)

[3] Video obtained by investigators from Secrets did not include from 3:00 a.m. to 5:30 a.m., as requested, but was from approximately 5:57 a.m. and thereafter. (T., pp. 168, 550-560)

[4] As noted above, Bozich did in fact testify at trial on behalf of Defendant to the travel times between various locations, including Club XO to Secrets; Club XO to the license plate reader at the intersection of Tioga and Oakwood in Homewood; from Club XO to 839 Sleepy Hollow Road in Castle Shannon; from 839 Sleepy Hollow Road to Secrets; and, from 839 Sleepy Hollow Road to the intersection of Tioga and Oakwood in Homewood. (T. pp. 569 -579)

COMMONWEALTH OF PENNSYLVANIA vs. JESSIE CRAWLEY

PCRA Petition

No error in dismissing PCRA petition as no Brady claim exists.

Case No.: CP-02-CR-12842-2015. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Rangos, J. February 10, 2023.

OPINION

On February 16, 2017, a jury convicted Appellant, Jessie Crawley, of one count of Corrupt Organizations, one count of Conspiracy-Corrupt Organizations, one count of Possession With Intent to Deliver, three counts of Acquisition or Obtaining Possession of a Controlled Substance by Misrepresentation, one count of Conspiracy-Possession With Intent to Deliver, one count of Forgery, one count of Criminal Use of Communication Facility, one count of Identity Theft, and one count of Dealing in Proceeds of Unlawful Activity.[1] This Court sentenced Appellant on July 6, 2017 in the aggregate to twenty to forty years of incarceration. The Superior Court of Pennsylvania affirmed on September 6, 2018, and the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on February 26, 2019.

After the direct appeal concluded, Appellant filed a PCRA Petition. This Court dismissed the PCRA on March 13, 2020. Appellant filed a Notice of Appeal on April 8, 2020. On February 9, 2021, the Superior Court of Pennsylvania affirmed the dismissal of the PCRA Petition. Appellant filed a Petition for Allowance of Appeal, which the Pennsylvania Supreme Court denied on December 7, 2021.

Next, on January 4, 2022, Appellant filed a prose PCRA Petition, his second. Appellant alleged that the Commonwealth failed to provide potentially exculpatory evidence in violation of Bracfy v. Maryland, 373 U.S. 83 (1963). Counsel was appointed and this Court held an evidentiary hearing on the merits of the PCRA. Petition on August 10, 2022. Both sides filed post-hearing briefs and this Court ultimately dismissed the second PCRA Petition on October 12, 2022. Appellant filed a Notice of Appeal on November 11, 2022, and a Concise Statement on November 18, 2022.

MATTERS COMPLAINED OF ON APPEAL

Appellant, in his Concise Statement, raises three issues on appeal. Appellant asserts that this Court erred in violating Appellant's right to due process by permitting the Commonwealth to reference in its closing argument a sentence agreement for a material witness despite no such agreement having been made. Next, Appellant alleges that this Court erred in concluding that the Commonwealth had no duty to correct a false representation of a sentence agreement on the same material witness. Lastly, Appellant alleges this Court erred in determining that the prosecutor's statement during closing argument did not create substantial prejudice against Appellant. (Concise Statement of Errors to be Raised on Appeal, at 3-4.)

DISCUSSION

Appellant's allegations of error stem from this Court's dismissal of his PCRA Petition, which was based on a Bracfy claim. Appellant alleged that the Commonwealth failed to provide potentially exculpatory evidence in violation of Bracfy v. Maryland, 373 U.S. 83 (1963). Specifically, Appellant alleged that the Commonwealth failed to disclose the sentencing agreement between the Commonwealth and one of the witnesses, Raheem Hall. For a Bracfy violation, Appellant must establish:

(1) Evidence was suppressed by the Commonwealth, either willfully or inadvertently;

(2) The evidence was favorable to the defendant; and

(3) The evidence was material, in that its omission resulted in prejudice to the defendant.

Commonwealth v. Dennis, 17 A.3d 297, 308 (Pa. 2011).

After a hearing on PCRA Petition, and upon review of post-hearing briefs submitted by Petitioner and the Conunonwealth, and this Court's thotough review of the record, this Court found that Petitioner failed to establish a Bracfy claim. Petitioner failed to establish that the Commonwealth had finalized a specific plea agreement with Hall at the time of Petitioner's trial. Hall testified at the PCRA hearing that an offer of 10 to 20 years had been made to him. (Transcript of PCRA hearing, Aug. 10, 2022, hereinafter "PT" at 5). However, he further testified that the offer was unacceptable, and his lawyer would continue to negotiate. (PT 15).[2] Hall stated at the PCRA hearing that the offer of 10 to 20 years was first communicated to him while he was on the witness stand. (PT 16). In addition, David Gorman from the Office of the Attorney General testified that some discussion had occurred with Hall, but nothing specific had been offered to him. (PT 22-23). Since no plea agreement had been finalized, the Commonwealth cannot be faulted for failing to provide it. Commonwealth v. Ly, 980 A.2d 61, 83 (Pa. 2009).

Furthermore, given the substantial evidence in support of conviction, Petitioner failed to establish prejudice. For Appellant to prevail on a Bracfy claim, he must establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Commonwealth v. Wefrs, 986 A.2d 808 (Pa. 2009). Multiple witnesses testified at Appellant's three-day trial regarding several instances of Appellant engaging in fraudulent transactions regarding prescription drugs. Hall's testimony corroborates and duplicates testimony from other witnesses whose testimony Appellant does not challenge. In short, Hall's testimony is but a drop in the sea of evidence which led to Appellant's conviction. Therefore, this Court did not err in dismissing the PCRA Petition as no valid Bratfy claim exists.

CONCLUSION

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

BY THE COURT:
/s/The Hon. Jill E. Rangos

[1] 18 Pa.C.S. §§ 911 (b) (3), 911 (b) (4); 35 Pa.CS.§ 780-113 (a) (12); 18 Pa.C.S. §§ 903, 4101 (a) (3), 7512 (a), 4120 (a), and 5111(a) (1), respectively.

[2] Hall ultimately accepted a plea agreement with a sentence of 7 to 14 years, which itself was subsequently reduced to 4 to 14 years.

APPEAL OF NICHOLAS AND TERESA BENTIVEGNA OF REAL ESTATE TAX ASSESSMENT SET BY THE BOARD OF PROPERTY ASSESSMENT APPEALS AND REVIEW OF ALLEGHENY COUNTY

Property – Tax Assessment Appeals – Ability of Municipalities to Appeal Property Tax Assessments – Court Ability to Modify Prior Order

Mr. and Mrs. Bentivegna purchased property in Hampton Township in 2020. In 2021, the Hampton Township School District filed an appeal of the property tax assessment for the Bentivegna property, resulting in the property tax assessment being raised over $50,000. Mr. and Mrs. Bentivegna filed a Petition with the Board of Viewers appealing the new assessment, seeking to have the property tax assessment returned to its original value, and seeking a declaration that the legislation that permits municipalities to appeal property tax assessments violates both the Pennsylvania and United States Constitutions. It was agreed that the constitutional issues would be stayed until the Board of Viewers could hear the appeal. For over a year, the Board of Viewers failed to hold a hearing on the appeal. Therefore, Mr. and Mrs. Bentivegna filed a Motion to vacate the stay and proceed on the constitutional challenges, which was granted by the Court. The School District filed a Motion for Reconsideration of that Order, which was denied. The School District then appealed. The Court first held that the appeal should be quashed because the order from which the School District appeals is an interlocutory order. Turning to the substance, the School District argued that Court lacked the authority to alter the prior order staying the constitutional challenges absent fraud, accident or mistake, and relied on Universal Builders Supply, Inc. v. Shaler Highlands Corp., 175 A.2d 58 (Pa. 1961) to support its argument. The Court distinguished Universal Builders, as Universal Builders dealt with a consent decree that actually resolved a dispute between the parties, as opposed to the order at issue, which merely set forth the procedure to resolve the dispute between the Bentivegna's and the School District. The Court further held that there was an accident or mistake made in the order at issue, as the Bentivegna's mistakenly believed that the Board of Viewers appeal would occur expeditiously. However, due to the appeal of the Gioffre, et al. v. Fitzgerlad, et al. case, the Board of Viewers cannot hold the hearing, thus delaying the proceeding.

Case No.: GD22-016257. BV21-894. Nicholas and Teresa Bentivegna, Property Owners, Hampton Township, Municipality, Hampton Township School District, Block & Lot No. 1210-S-00133. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. March 24, 2023.

OPINION

In September of 2020 Nicholas Bentivegna and Teresa Bentivegna purchased a dwelling and land known as 2328 West Hardies Road in Hampton Township ("the property"). In February of 2021 the Hampton Township School District filed an appeal from the property's tax assessment. The Allegheny County Board of Property Assessment Appeals and Review issued a disposition of the appeal in June of 2021, raising the assessment from $109,200 to $161,900. Mr. and Mrs. Bentivegna filed a two count petition with this Court at docket no. BV21-894, appealing from this disposition. Count 1 requests that the property assessment be returned to $109,200. Count 2 requests a declaration by this Court that the legislation enabling municipalities to appeal from property tax assessments violates the Pennsylvania and United Sates Constitutions. The Hampton Township School District filed preliminary objections to Mr. and Mrs. Bentivegna's petition because the Board of Viewers that would hear the appeal under Allegheny County Local Rule 503 lacks subject matter jurisdiction over the constitutional challenges.

The Honorable Arnold Klein entered a ruling on the preliminary objections on October 4, 2021. The Order of Court states, among other things, that Mr. and Mrs. Bentivegna and the School District "agree that proceedings related to Count 2 of Taxpayers' Petition for Appeal shall be deferred until the conclusion of the Board of Viewers proceedings and rulings on any objections thereto…." Hence, the constitutional challenges were stayed while the Board of Viewers held two conciliations that Mr. and Mrs. Bentivegna attended on July 27, 2022 and November 9, 2022.

With the Board of Viewers having failed to hold or schedule a hearing, on December 14, 2022 Mr. and Mrs. Bentivegna filed a motion to vacate the stay of the constitutional challenges and to transfer the case to the general docket. See electronic docket document 12 at BV 21-8994. On December 29, 2022 I granted Mr. and Mrs. Bentivegna's motion and permitted the constitutional challenges to proceed on the general docket simultaneously with the Board of Viewers proceeding. The School District filed a petition for reconsideration of my December 29, 2022 order, which I denied on January 19, 2023. See electronic documents 3 and 4 at GD22-16257. On January 13, 2023 the Board of Viewers scheduled a hearing on the property's tax assessment for February 1, 2023, but on January 25, 2023 the School Board filed an appeal from my December 29, 2022 order to the Commonwealth Court of Pennsylvania.

I am filing this opinion as required by Pennsylvania Rule of Appellate Procedure 1925(a).

First, I believe the School District's appeal should be quashed because it is not from a final order. Instead, the School District's appeal is from an interlocutory, non-appealable order. The School District has appealed before there was a ruling on either the property's tax assessment or the constitutional challenges. Hence, the appeal should be quashed.

If the appeal is not quashed, I will next address the substance of the appeal, which is set forth in the School District's concise statement of errors complained of on appeal. The substance of the School District's appeal is that I erroneously modified the plain terms of a consent order, absent a showing of fraud, accident or mistake.

The School District references Universal Builders Supply, Inc. v. Shaler Highlands Corp. (405 Pa. 259, 175 A.2d 58 (1961)) in support of its argument. In that case, the Pennsylvania Supreme Court held that the trial court could not modify a consent decree "in the absence of fraud, accident or mistake." 405 Pa. 259, 265, 175 A.2d 58, 61. The consent decree specified that a mortgage foreclosure was resolved by the Defendant paying the Plaintiff $29,000 within sixty days. In this proceeding, the October 4, 2021 order, which is not signed by either party, differs from the consent decree in Universal Builders. The October 4, 2021 order sets forth the court procedure that will be used to resolve the dispute instead of the actual resolution of the dispute as was set forth in the Universal Builders consent decree. A change in circumstances (which I describe below), rather than fraud, accident or mistake, is all that I believe should be required for this Court to modify its October 4, 2021 order. Since circumstances changed as described below, my modification of the October 4, 2021 order was not erroneous.

In any event, there was an accident or a mistake made when Mr. and Mrs. Bentivegna agreed to the October 4, 2021 order. Mr. and Mrs. Bentivegna believed that the October 4, 2021 order would expeditiously and efficiently resolve the dispute (see ¶s

10-17, document 12, BV21-894), but they were mistaken. The reason that the Board of Viewers proceeding was delayed is Gioffre, et al v. Fitzgerald, et al, docket numbers GD21-7154 and 992 CD 2022. In Gioffre, on April 27, 2022 I signed a consent order for the reexamination of Allegheny County property sales from 2020, and on August 31, 2022 I entered a preliminary injunction that reduced the common level ratio from 2020 sales to 63.53 from the 81.1 ratio the State Tax Equalization Board set in June of 2021. The Board of Viewers was unable to determine the property's assessment until I set the common level ratio on August 31, 2022, and it continues to be unable to do so because of a pending appeal of Gioffre to the Commonwealth Court. Mr. and Mrs. Bentivegna were unaware that there would be a delay by the Board of Viewers due to Gioffre until I informed Mr. Bentivegna during the December 29, 2022 argument. Hence, it was an accident or a mistake for Mr. and Mrs. Bentivegna to believe the October 4, 2021 order would expeditiously and efficiently resolve the dispute. Since a consent decree can be modified on the basis of accident or mistake, I made no error in modifying the October 4, 2021 order.

BY THE COURT:
/s/The Hon. Alan Hertzberg

DELLAPOSTA PROPERTIES, LLC vs. PACKAGING CORPORATION OF AMERICA, and THREE CROSSINGS 2.0, L.P., and ROBERT C. BAIERL and CATHY J. BAIERL

Property – Prescriptive Easements – Tacking – Open and Notorious – Adverse – Width of Easement – Injunction

Plaintiff and Defendant own property adjacent to each other. Historically, vehicles had accessed the Plaintiff's property, in part, through a paved lot on the Defendant's property. Defendant never objected to this until a cease and desist letter was sent to Plaintiff in 2017. Because of this, Plaintiff alleged that it had acquired a prescriptive easement over this portion of the paved lot on Defendant's property. To obtain a prescriptive easement, a plaintiff must show that it and its predecessors used the portion of the property for a period of 21 years in a manner that was (1) continuous and uninterrupted, (2) open and notorious, and (3) adverse. Plaintiff had the burden of showing each of these elements by clear and convincing evidence. Defendant argued that Plaintiff could not show the 21 year period because, in order to do so, Plaintiff had to "tack" the prescriptive use of the prior owners of Plaintiff's property. Defendant argued that tacking required each successive owner to be in privity with one another. The Court disagreed and found that the requirements for adverse possession and a prescriptive easement differ, and declined to find a requirement of privity to invoke "tacking", relying on Predwitch v. Chroback, 142 A.3d 388 (Pa. Super. 1958) which stated that because easements are appurtenances of the dominant tenement, rights to a prescriptive easement pass to successive owners by conveyance of the dominant tenement. In order to be "open and notorious", the use must be visible and of such a nature and of such a frequency as to give reasonable notice to the servient land owned that the right or easement is claimed against him. As to adverse use, once the Plaintiff established sufficient evidence that the use of the land occurred for more than 21 years without evidence to explain how it began, the use is presumed to be adverse and the burden shifted to the Defendant to prove otherwise. Finally, the width of the prescriptive easement must be established by the extent of actual use during the prescriptive period. Having found Plaintiff met all of the requirements by clear and convincing evidence, the Court found that Plaintiff was entitled to a prescriptive easement, and that Defendant was enjoined from interfering with the easement rights.

Case No.: GD-17-005321. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. BACKGROUND

This case arises out of Plaintiff's, Dellaposta Properties, LLC ("Dellaposta"), claim that it has acquired the rights to a prescriptive easement over neighboring property owned by Defendant, Packaging Corporation of America ("PCA"). PCA has owned that property for the entire period in question, but is in the process of selling the property to Three Crossings 2.0, L.P. ("Three Crossings"), a party Defendant to this case. Three Crossings aims to develop and build on the property, including the section over which Dellaposta claims a prescriptive easement. PCA sent Dellaposta a letter in 2017 which requested that Dellaposta cease and desist from using PCA's property for ingress and egress. It is in the context of this sale and planned development that the instant action was commenced to protect Dellaposta's interests.

After this Court held a non-jury trial and heard post-trial arguments from counsel, on August 18, 2022 this Court issued a memorandum and non-jury verdict in favor of Dellaposta, finding that Dellaposta had acquired a prescriptive easement over PCA's property that was 12.5 feet in width. Thereafter, both parties filed motions for post-trial relief. While neither party took issue with this Court's finding that Dellaposta had acquired a prescriptive easement, Dellaposta sought reconsideration of this Court's finding on the width of the easement. Dellaposta argued that this Court's finding of only 12.5 feet was contrary to the evidence, and that the evidence supported a finding of up to 36 feet instead.

After reconsidering the evidence and the appropriate legal standard, on October 5, 2022, this Court, believing it had previously erred in finding only 12.5 feet, issued an Order granting Dellaposta's motion for post-trial relief and finding that the easement was 25 feet in width. Three Crossings and PCA took the instant appeal from that Order. Because this appeal only concerns the scope of the easement, a detailed factual recitation of the case is not necessary. For context, a brief background follows.

Dellaposta has owned the property located at 2735 Railroad Street, Pittsburgh, PA ("the Dellaposta Property") since 2013. From 2006 until 2013, the property was owned by Robert and Cathy Baierl ("the Baierls"); and from 1988 until 2006, a general partnership consisting of the Baierls and their son, Robert Baierl Jr., owned the property. Adjoining the Dellaposta property to the northeast is property located at 1 28th Street, Pittsburgh, PA ("the PCA Property") owned by PCA. The PCA Property borders the Dellaposta Property on both the Dellaposta Property's northeastern edge and its northern edge.

During the period in question, buildings sat on each property.[1] The building on the Dellaposta Property has a front loading dock, which faces Railroad Street, and two side loading docks toward the rear of the property, which face the PCA Property. In between the two buildings is a paved lot and/or driveway, most of which sits on the PCA property. The northeastern property line between the Dellaposta and PCA properties is demarcated on the paved lot by a metal guardrail that sits on the Dellaposta Property. The guardrail begins on the edge of the Dellaposta Property abutting Railroad Street and traverses the northeastern boundary of the two properties along the paved lot, but it does not extend the full length of the paved lot. The paved lot continues

around to the rear of the Dellaposta Property, along its northern boundary. As such, vehicles may access the rear of the Dellaposta Property by ingress and egress through the paved lot on the PCA Property.

Several telephone poles stand along Railroad Street where the paved lot abuts the street. The distance between the guardrail on the Dellaposta Property and the closest of these telephone poles to the guardrail is approximately thirty six (36) feet. This telephone pole, which will be referenced intermittently herein as "the telephone pole," is a useful landmark in describing the use and scope of the prescriptive easement.

Although the paved lot is owned by PCA, the successive owners and/or inhabitants of the Dellaposta property regularly used the portion of the paved lot between the guardrail and the telephone pole for ingress and egress. Delivery vehicles and other trucks would regularly access the Dellaposta property's rear loading docks by traversing over this section of the lot. It was because of this continuous and adverse use of the lot on PCA's property that this Court found an easement by prescription. Importantly for purposes of this appeal, however, no two trucks accessing the rear loading docks would have traversed identical paths. Thus, the question remains what portion of the lot between the guardrail and the telephone pole was actually used to access the rear loading docks.

II. ASSIGNMENTS OF ERROR

Three Crossings and PCA appealed this Court's Order of October 5, 2022 finding the easement to be 25 feet wide. Both Defendants make essentially the same two assignments of error, and so will be addressed simultaneously. Firstly, the Defendants assert that this Court erred by applying an incorrect legal standard for determining the scope of an easement. The appropriate standard, argue Defendants, is that the scope of an easement is based upon evidence of "actual use" of the easement. Secondly, as naturally follows from the first assignment of error, the Defendants assert that this Court abused its discretion in finding that the easement was 25 feet in width, as there was no evidence to support a finding that Dellaposta's "actual use" of the easement would have consisted of 25 feet in width. Thus, the Defendants challenge this Court's application of the law and the evidentiary basis for its finding of fact.

III. ANALYSIS

A. Whether this Court Applied an Incorrect Legal Standard

The Defendants are correct to point out that the legal standard in Pennsylvania for the scope of a prescriptive easement is the claimant's "actual use" of the easement throughout the prescriptive period. Hash v. Sofinowski, 487 A.2d 32, 36 (Pa. Super. Cr. 1985) ("The width of a prescriptive easement must be established by the extent of actual use during the prescriptive period."). While this standard is cast in simple language, the unavoidable vagueness of "actual use" becomes more apparent the more one attempts to apply it to the facts at hand. Disappointingly, Pennsylvania case law provides little guidance on what "actual use" actually requires.

For example, in Hash the Superior Court's guidance to the trial court on remand was to "ascertain the accurate dimensions of actual use" and to "pinpoint more precisely the exact bounds" of the original easement. Id. at 36. The Superior Court failed to specify how accurately, precisely, or exactly such bounds must be ascertained. Moreover, Hash dealt primarily with the issue of increased degree or altered nature of the usage of the easement beyond the degree or nature of the usage under which the prescriptive easement initially arose – an issue that is not present in this case. See id. The question left unanswered by Hash is how a court should determine the dimensions of actual use that initially arose during the period of prescriptive use.

Suppose a person acquires a prescriptive easement over a neighbor's yard by regularly crossing through the yard on foot. Surely, no two paths across the yard will be exactly the same. How precisely or consistently must the person travel within a path or area of the yard in order to acquire the easement? Will the person have to place their steps in the exact same spot upon each crossing, or is some deviation allowed? Assuming no two paths are exactly alike, the prescribed easement will likely include some portions of the servient estate where the claimant never stepped while excluding some portions where the claimant did step. Perhaps instead, to be more precise, the scope of the prescriptive easement should extend no further than the exact dimensions of the claimant's foot in each spot where they had placed their foot during the period of use. There could be no argument that this would constitute the "exact bounds" of the person's "actual use."

However, the law does not require such an absurd level of precision in defining the scope of actual use. The Restatement (First) of Property, for one, instructs in Section 477 that,

> … no use can ever be exactly duplicated. If any practically useful easement is ever to arise by prescription, the use permitted under it must vary in some degree from the use by which it was created. Hence, the use under which a prescriptive interest arises determines the general outlines rather than the minute details of the interest.[2]

In accord, the Restatement (Third) of Property states that easements "must be based on uses that are substantially confined to a regular route."[3] Although Pennsylvania case law does not speak to this issue directly, the Superior Court has relied on § 477 of the Restatement (First) at least twice,[4] and case law from other jurisdictions addressing nearly identical facts to the ones at hand comport with these general principles.

In Community Feed Store, Inc. v. Northeastern Culvert Corp., 559 A.2d 1068 (Vt. 1989), the Vermont Supreme Court dealt with a claim for a prescriptive easement, where the plaintiff had used part of a gravel lot on the neighboring servient estate for delivery trucks of various sizes to access and back into plaintiff's loading docks on the dominant estate. There, the trial court found, as Defendants urged this Court to find, that the width and length of the easement had not been proven with sufficient particularity. Id. at 1069. The Supreme Court disagreed with the trial court and held that "the extent of the user must be proved not with absolute precision, but only as to the general outlines consistent with the pattern of use throughout the prescriptive period." Id. at 1071. There, the burden was met through testamentary evidence and a diagram showing the typical route and boundaries of the path that trucks would take. Id.

The Supreme Court of Vermont is not alone in this regard. Other jurisdictions also follow the Restatement (First) of Property's notion that the scope of a prescriptive easement follows "general outlines." O'Brien v. Hamilton, 446 N.E.2d 730, 732 (Mass. App. 1983) ("… the extent of the easement … must be measured by 'the general pattern formed by the adverse use.") (emphasis in original) (citing Restatement (First) of Property § 477, cmt. b); Clinger v. Hartshorn, 89 P.3d 462, 467 (Colo. App. 2003) (same); SRB Inv. Co., Ltd v. Spencer, 463 P.3d 654, 663 n. 66 (Utah 2020) (same); Ventures v. Goodspeed Airport, LLC, 881 A.2d 937, 952 n. 23 (Conn. 2005) ("actual use" of the servient estate need only define the bounds of the easement with "reasonably certainty" to acquire the right).

Because the dimensions of an easement follow general outlines consistent with the pattern of use, "'[s]light deviations from the accustomed route will not defeat an easement, [only] substantial changes which break the continuity of the course of

travel....'" Community Feed Store, 559 A.2d at 1071 (quoting Warsaw v. Chicago Metallic Ceilings, Inc., 676 P.2d 584, 587 (Cal. 1984)); see also Concerned Citizens of Brunswick Cty Taxpayers Ass'n v. State, 404 S.E.2d 677, 683 (N.C. 1991) (evidence need not identify specific and definite routes, but reasonable deviation is permitted).

However, this does not mean that the scope of the easement will be synonymous with the extent of such deviations. For example, in Bedik Corp. v. Herrick Road Holdings LLC, 90 N.Y.S.3d 839, 843 (2018), a New York court held – again, on identical facts to this case – that "given the varying paths used by the trucks, equity dictates in these circumstances that the right-of-way be limited to the area necessary for the purpose of the easement." There, although the plaintiff submitted evidence of different routes of varying widths taken by different drivers, the New York court limited the width of the easement to that which was "least intrusive" while still allowing the necessary room for trucks to be able to swing around and back into the dominant estate's loading bays. Id. In so holding, the New York court emphasized that "[w]hile some variation of the trucks' actual use of the vacant lot is explainable and acceptable, the touchstone remains that the easement is limited to actual use." Id.

The Bedik court seems to be intimating that variations in a claimant's "actual use" of an easement will not necessarily be included within the scope of the easement, despite the fact that the claimant "actually used," on occasion, other portions of the servient estate that are not ultimately included in the easement's scope. Rather, equity will limit "actual use" to the scope necessary to maintain the purpose of the use. This makes sense in a situation where no two paths across the servient estate will be exactly the same, to ensure that the prescribed easement will neither be too underinclusive nor too overinclusive of the claimant's "actual use."

In summation, then, for any prescriptive easement to be "practically useful"[5] it must allow for some variations in the paths taken as long as those paths are "substantially confined to a regular route."[6] The dimensions of this regular route need not be proven with precision, but only "the general outlines consistent with the pattern of use throughout the prescriptive period." Community Feed Store, 559 A.2d at 1071. The fact that one path was not precisely confined to the dimensions of a prior path will not defeat an easement claim. Id. However, the scope of the easement will not include within its bounds every variant path that was taken over the course of the prescriptive period. Bedik, 90 N.Y.S.3d at 843. Rather, equity will limit the scope of the easement to that which is necessary to maintain the easement's purpose. Id.

Turning this analytical framework to the facts in this case, the trucks that crossed over the PCA property to access the rear loading docks on the Dellaposta property took varying routes throughout the course of the prescriptive period. However, these variations were substantially confined to a regular route. That is, although a truck may have entered the lot from a different angle, taken up more or less space, and traveled a different route, each truck was confined within the space between the guardrail and the telephone pole. Thus, the full variation in the routes taken by trucks during the prescriptive period would have encompassed the entire 36 feet of width between the guardrail and the telephone pole. Although no single route would have taken up the entire 36 feet of width – as Mr. Baierl testified – the various routes, collectively, encompass the area within that 36 feet of width. That 36 feet of width, then, would be the portion of the PCA property that Dellaposta and its predecessors "actually" used over the course of two decades.

However, we know that an easement scope of 36 feet is overinclusive because on any given occasion that a truck would have crossed over the PCA property it would not have needed all 36 feet along its route. On the other hand, defining the scope of the easement to be no more than the precise width of a truck would be underinclusive because it would allow for no variation and require each use of the easement to be precisely the same as the last. We know that trucks of varying widths traveled over the PCA property along different routes, such that the "actual use" of the PCA property extended beyond the mere width of a given truck on a given occasion. To measure the easement by the width of a given truck, as Defendants suggest, is much more restrictive than the cases cited above or the Restatement contemplate. Instead, equity attempts to balance under-inclusivity and over-inclusivity by prescribing something of an average of all the routes taken – that is, general outlines rather than minute details. As such, prescriptive easements are more concerned with preserving the purpose of the easement rather than the minutiae of its precise dimensions.

Thus, this Court limited the scope of the easement to be 25 feet in width because that is the amount of space necessary for maintaining the purpose of the easement. This allows Dellaposta to continue using the easement for the purpose that gave rise to the easement, which is for delivery trucks to be able to access the loading docks. Any smaller would have been unduly restrictive of truck drivers attempting to back into the loading docks. Any larger would have been more burdensome on PCA than is necessary to preserve the easement's purpose. As such, this Court can discern no error in its application of the correct legal standards.

B. Whether There Was Evidence to Support this Court's Finding

Assuming that this Court applied the correct legal standards, the Defendants argue that Dellaposta did not submit enough evidence to support this Court's finding that the easement is 25 feet in width. Testamentary evidence as to the width of the area that the claimant used is sufficient for a court to find that the scope of the easement is consistent with that testimony. See Thomas A. Robinson Family Ltd. Partnership v. Bioni, 178 A.3d 839, 848 (Pa. Super. Ct. 2017) ("The court was free to accept this testimony, and to reject any testimony to the contrary."); see also Community Feed Store, 559 A.2d at 1071 (testimony and diagram were sufficient to prove the general outlines of the claimant's pattern of use).

Here, this Court credited the testimony of Mr. Baierl, who owned and used the property for the vast majority of the prescriptive period. Mr. Baierl testified to trucks coming and going from the rear loading docks of the Dellaposta Property almost daily. His testimony was also accompanied by a diagram showing the typical route the trucks would take in between the guardrail and the telephone pole. It was not Dellaposta's burden to track the precise routes taken by each individual truck over the course of two decades, only to establish the general outlines of the pattern of use, which was substantially confined to a regular route. This Court, therefore, was free to credit Mr. Baierl's testimony, and find that Dellaposta and their predecessors actually used the area of the PCA property in between the guardrail and the telephone pole.

However, as already explained, this Court limited the width of the easement to that which was necessary for the easement's purpose, rather than the full 36 feet. While this was, in part, an equitable consideration to lessen the burden on the servient estate, see Bedik, 90 N.Y.S.3d at 843, it was also supported by the evidence. For one, Mr. Baierl himself testified that he never witnessed a truck use, on a single occasion, all 36 feet of width between the guardrail and the telephone pole. This is a plain admission that 36 feet is not necessary to preserve the easement's purpose. This Court relied on the testimony of Defendants' expert, Ms. Geraghty, to establish a more appropriate scope for the easement. This Court's initial ruling limited the scope of the easement to 12.5 feet, as that was consistent with Ms. Geraghty's opinion that a typical roadway lane of travel is 9 to 12.5 feet. Thus, a typical two-lane road would be, at most, 25 feet wide.

This Court's initial ruling prescribed a width of 12.5 feet, as that would have been enough to accommodate a truck travelling straight across the PCA property. However, after being urged to reconsider the width of the easement in Dellaposta's

Post-Trial Motion, this Court was reminded of the fact that larger trucks would also need room to swing out in order to reverse and back their trailers up to the loading docks or in order to turn around and exit the property. Not only was there testimony that trucks often did this, but also photographic evidence demonstrating how a truck would need to use an area of greater width in order to pull off these maneuvers.

Increasing the width of the easement was, therefore, necessary to preserve its purpose. However, increasing it to 25 feet was not arbitrary. This Court heard testimony that the Dellaposta Property's front loading dock, which abuts Railroad Street, could have been used by trucks making deliveries. However, Mr. Baierl noted that, in order for trucks to back into that loading dock, they would sometimes have to drive over the old railroad tracks – on the opposite side of the street – which some drivers were uncomfortable with doing. The important thing to be gleaned from this evidence is that truck drivers pulling off these maneuvers require at least a full two-lane road (25 feet) and not a single lane of travel (12.5 feet). This Court, thus, prescribed a width of 25 feet based on the testimony of Ms. Geraghty and the other evidence which tended to show that an easement width greater than a single lane of travel was not only necessary, but actually used, for turning around or backing into the loading docks. Moreover, as discussed in the previous section, defining the easement scope is not an exact science but rather aims only to prescribe a "general outline."[7] Therefore, there was more than enough evidence for this Court to find that the scope of the easement was 25 feet in width.[8]

VI. Conclusion

This Court did not err in applying the appropriate legal standard for defining the scope of a prescriptive easement. This Court correctly relied on the "actual use" standard as prescribed by Pennsylvania precedent and further relied on persuasive authority for greater clarity in applying that standard. There was also sufficient evidence in the record to support an easement width of 25 feet. This Court's verdict and Amended Order of October 5, 2022 should be affirmed.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] Currently, the building on the Dellaposta property remains but the building on the PCA property has since been torn down.

[2] Restatement (First) of Property, § 477, cmt. b (Am. L. Inst. 1944) (emphasis added). Note that the Hash court itself cited this section of the Restatement in its ruling. Hash, 487 A.2d at 34 (quoting Restatement § 477).

[3] Restatement (Third) of Property (Servitudes), § 2.17, cmt. h (Am. L. Inst. 2000) (emphasis added) (explaining that to meet the open-and-notorious requirement, the scope of the use of the easement should be reasonably definite).

[4] Hash, 487 A.2d at 34; McGavitt v. Guttman Realty Co., 909 A.2d 1, 4 (Pa. Super. Ct. 2006).

[5] Restatement (First) of Property, § 477, cmt. b.

[6] Restatement (Third) of Property (Servitudes), § 2.17, cmt. h.

[7] Restatement (First) of Property, § 477, cmt. b. In fact, this Court may have gone further than the law requires by defining the width of the easement in specific feet. C.f. Alvin v. Johnson, 71 N.W.2d 667, 668 n. 1 (Minn. 1955) (defining the scope of the easement to include "width for reasonable use thereof" did not render the judgment unenforceable for failure to describe the property subject to the judgment with a definite boundary).

[8] Defendant Three Crossings also argues that this Court erred in denying its Motion for Summary Judgment and thereby failing to find that there was no evidence to support an easement width greater than 16 feet. To the extent that this Court has explained the evidentiary basis for its ruling in the foregoing discussion, this Court also did not err in denying Three Crossin's Motion for Summary Judgment as to the width of the easement.

MARJORIE STEIN vs. RICHARD GRABOWSKI and SALLY L. GRABOWSKI, husband and wife

Property – Quiet Title – Consentable Lot Line – Weight of the Evidence in Non-Jury Trial

Plaintiff and Defendants own adjacent property. A dispute arose between the parties as to the boundary line between the properties. In January, 2018, a non-jury trial was held whereby a verdict was entered in favor of Plaintiff and specified the location of the new boundary line between the properties. This verdict was appealed to the Superior Court. The Superior Court remanded the case to re-establish the new exact boundary line between the properties. Upon the remand, new surveys and exhibits were ordered to be provided to the Court in an effort to correctly draw the new consent boundary line between the properties. After the materials were submitted, the Court again entered a non-jury verdict granting quiet title in favor of Plaintiff, and adopting the survey as prepared by Plaintiff's expert setting forth the new consent boundary line between the properties. Defendant again appealed to the Superior Court, arguing that the new consent line still does not conform to the mandate of the Superior Court as set forth in the original appeal. The Court noted that it compared the surveys submitted by both Plaintiff and Defendant, and found them to be nearly identical, with only a slight deviation. The Court found the Plaintiff's survey more credible, as the Plaintiff's expert performed an actual survey of the proposed consent boundary line, where as the Defendant's expert derived its proposed line using prior diagrams and did not physically go out to survey the proposed consent boundary line. Therefore, the line adopted by the Court accurately represents the consent boundary line between the properties, and the Court complied with the Superior Court's instructions on remand.

Case No.: GD-15-018110. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. April 6, 2023

OPINION

Procedural History

The Defendants, Richard F. Grabowski and Sally L. Grabowski, (Grabowski) filed an appeal to my 1/17/2018 Non-Jury Verdict that granted judgment to quiet title in favor of the Plaintiff, Margorie Stein (Stein). My Non-Jury Verdict held that Stein had established a new boundary by consensual line which divided the parties' properties and specified the location of the new boundary line.

The Superior Court of Pennsylvania rendered a Memorandum Opinion and Order dated 6/17/2019, which affirmed my Non-Jury Verdict in part, to the extent that I had found a consent line in favor of Stein and against Grabowski. The Superior Court vacated the part of my Non-Jury Verdict that adopted Stein's proposed boundary line. The Non-Jury Verdict boundary line was a straight line rather than the proven consent line at "the top of the bank" as the new boundary line. The Superior Court remanded this matter to me to enter a new Non-Jury Verdict which incorporated the established consent boundary line that follows the top of the bank.

The Superior Court's Memorandum Opinion gave me discretion as to whether an additional hearing was necessary to aid in the crafting of a new verdict. After Grabowski's Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on 12/9/2019, I scheduled a status conference with the parties on 3/18/2020, which was continued due to the Covid-19 pandemic.

Stein then filed a Motion Barring Grabowski from Disputing the Consent Line Established at the Top of the Slope and Proposed Non-Jury Verdict on Remand. By order dated 7/16/2020, I continued argument on Stein's Motion to Bar generally, and ordered the parties to obtain new surveys and exhibits for the new proposed boundary line that follows the top of the bank. After the parties submitted their new surveys and exhibits, I scheduled an argument for 10/05/2022.

After reviewing Stein's Second Motion Barring Grabowski from Disputing the Consent Line Established at the Top of the Slope and all parties' exhibits, I granted Steins' motion in part. I found the consensual line as to be determined by the Superior Court, was reflected in my Non-Jury Verdict Exhibits 4.B.1 and A. However, I directed Stein's surveyor to replot the property with the consensual line as shown on the exhibits to reflect an accurate closed property description for final adoption and to avoid future property disputes.

On 12/15/2022, I entered my Non-Jury Verdict on Remand pursuant to the Superior Courts Memorandum Opinion filed on 6/12/2019 at Superior Court No. 556 WDA 2019. My Non-Jury Verdict on Remand granted a judgement of Quiet Title in favor of Stein and adopted Stein's Plan as prepared by Laidis Engineering & Surveying, Inc., which plotted courses and distances that followed the top of the bank as directed by the Superior Court. I also directed that a copy of my Non-Jury Verdict on Remand be recorded with the Allegheny County Department of Real Estate, naming Grabowski as Grantor and Stein as the Grantee. Grabowski then filed an appeal to my Non-Jury Verdict on Remand on 1/24/2023.

Standard of Review

The Superior Court found my conclusion of law correct in finding that there was a consent line established, but the line that I adopted did not conform to the top of the bank established by the trial evidence. Therefore, the standard of review on remand is as follows:

the findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury. We consider the evidence in a light most favorable to the verdict winner. We will reverse the trial court only if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law.

Wyatt Inc. v. Citizens Bank of Pennsylvania, 976 A.2d 557, 564 (2009).

Discussion

Grabowski's Statement of Error is incorrect in averring that the new consent line adopted in my remand verdict does not conform and is not identical to the top of the bank as outlined on page 17 of the Superior Court's decision of 6/12/2019.

First, the Superior Court states in its memorandum opinion that my findings and conclusions were supported by the evidence, and legally correct but for the location of the consented-to-line. More importantly the Superior Court stated on page 17 that the insertion of the diagram was for the sole purpose of making it easier to explain their ruling and did not establish any property rights.

The Superior Court found that there was an inconsistency between the trial evidence that established the consent line to be the top of the bank and the one that I had adopted in my original Non-Jury Verdict. The line that I had adopted was created by Stein's surveyor that made a straight line that attempted to traverse the top of the bank and terminate at the Stein's mailbox on Washington Road.

There were several reasons why I had adopted this proposed line. First and foremost, Grabowski took the position at trial that there was no consent line except for the Stein's driveway, and he provided no contrary proposed consent line after the non-jury trial. Second, the Stein's proposed line that I had adopted attempted to follow the top of the bank as closely as possible, while utilizing a straight line to avoid a boundary line that would zig zag and possibly cause more confusion for future owners.

However, in order to follow the Superior Courts direction on remand, I reviewed and compared both parties' surveys and exhibits with their respective proposed top of the bank lines in relation to the diagram the Superior Court utilized in its Memorandum Opinion on page 17. I also took into consideration that the Superior Court, per footnote 5 of its opinion, relied on Stein's survey as the source of its top of the bank found on the page 17 diagram. Grabowski submitted two documents for consideration both from Gen3 Surveying, the first dated 3/5/2020 titled Plot of Exhibits and the other dated 9/20/2020 titled Plan of Proposed Line.

The Gen 3 documents provide proposed lines that purportedly follow the top of the bank. I then compared them to Stein's documents, the Liadis Engineering survey dated 12/15/2015, the Survey of the Top Slope, Exhibit A1 to the Non-jury Verdict on Remand, and the Superior Court's page 17 diagram. After reviewing them it was clear that Grabowski's Gen 3 Plot of Exhibits and Stein's Survey of the Top of Slope were almost identical except for a slight deviation from the mailbox to the top of the bank. I found the Stein survey more credible and gave it more weight since it entailed an actual survey of the top of the bank whereas Grabowski's Gen3 documents were derived from using prior diagrams and they did not go out and survey the top of the slope.

A close review of the Stein Slope survey reveals that the course of the top of the bank changes at least eight times before it merges with the original boundary line. The Gen3 Proposed Line changes course one time and amounts to a straight line which appears to be south of the top of the bank that appears in the prior Gen3 Plot of Exhibits and the Stein Slope Survey.

Conclusion

For the above reasons, I found that Stein's new proposed top of the bank boundary line accurately represents the consented line and follows the Superior Court's instructions on remand and no error occurred.

BY THE COURT:
/s/The Hon. John T. McVay Jr.