Carbon County Law Journal

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of the 56th Judicial District of
Pennsylvania

Roger N. Nanovic — President Judge
Steven R. Serfass — Judge
Joseph J. Matika — Judge
Richard W. Webb — Senior Judge

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vs. JOE LINCEN MESA, Defendant

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1. The defendant in a criminal proceeding is presumed to be competent to be tried and, if convicted, to be sentenced.

2. To rebut the presumption of competency in a criminal proceeding, defendant must prove by a preponderance of the credible evidence that he is either "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense."

3. Defense expert opinions as to a criminal defendant's competency to be sentenced are not conclusive on the trial court, even if no opposing opinions are presented by the Commonwealth. Medical opinions are only one of many factors to be considered by the court in making an incompetency determination.

4. To be competent to be sentenced, the defendant must have a rational as well as a factual understanding of the nature and object of sentencing, and be able to assist his counsel and participate at the time of sentencing with a reasonable degree of rational understanding.

5. In determining whether the defendant has rebutted the legal presumption of competency, the trial court is entitled and obligated to independently evaluate all of the evidence presented bearing on defendant's competency, including defendant's participation and its own observations of defendant at sentencing, and to reject, if justified, conclusory psychiatric testimony by those untrained and unfamiliar with legal proceedings.

NO. 706 CR 2009

MICHAEL S. GREEK, Esquire, Assistant District Attorney—Counsel for Commonwealth.

MATTHEW J. MOTTOLA, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 17, 2016

Joe Lincen Mesa, the Defendant in these criminal proceedings, raises one issue on direct appeal from his conviction of arson, that he was incompetent at the time of sentencing and, therefore, incapable of being sentenced. Because Defendant was examined by two defense experts, one of whom concluded Defendant was incompetent to be sentenced, and the Commonwealth chose not to have Defendant's competency evaluated, our decision to sentence Defendant requires careful review of the evidence presented on

this issue, including what Defendant had to say and the significance of the evidentiary presumption that a defendant is competent.

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2011, Defendant was convicted of two counts of arson[1] with respect to the incendiary destruction of his home and automobile on February 27, 2009. That Defendant had committed these offenses was evident from the evidence presented at trial by the Commonwealth: (1) the fire which destroyed Defendant's property had three separate points of origin—in the kitchen and a rear bedroom of the home, and in Defendant's automobile, which was parked outside in front of the home; (2) the cause of the fire at each location was consistent with the use of an inflammatory liquid—rubbing alcohol; (3) all reasonable accidental causes were eliminated; (4) Defendant was home at the time the fires began; (5) the home was recently posted and was scheduled for sheriff's sale on March 3, 2009; and (6) Defendant admitted setting the fires.

Defendant was originally scheduled for sentencing on October 17, 2011, and a presentence investigation report and mental health evaluation were ordered. Sentencing was continued several times until March 27, 2012, at which time Defendant presented Dr. Raja S. Abbas, a board-certified psychiatrist, who testified that Defendant appeared to have a cognitive disorder which rendered him incompetent to be sentenced, but that a detailed neuropsychological evaluation was necessary "to determine the extent or presence of any cognitive issues." (N.T. 3/27/12, pp. 9-10, 12, 19, 22, 27-29, 37, 43.)[2] In consequence, Defendant's sentencing date was continued multiple times, until July 29, 2014.

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[1] 18 Pa.C.S.A. §§ 3301(a)(1)(i) (arson endangering persons) and 3301(c)(3) (arson endangering property with intent to collect insurance).

[2] Such testing, according to Dr. Abbas, would involve detailed base testing of Defendant's memory and cognition to determine his ability to take in and process information and make logical decisions. (N.T. 3/27/12, pp. 24-25.) Dr. Abbas further testified that this testing would assist in assessing whether any medications Defendant was taking were affecting his thought process and whether Defendant's difficulties were genuine or exaggerated. (N.T. 3/27/12, pp. 25-26.) Dr. Abbas first met Defendant a few weeks prior to his testimony on March 27, 2012. (N.T. 3/27/12, p. 9.) Defendant had been admitted to the older adult unit at the Palmerton Hospital for depression and nightmares. (N.T. 3/27/12, p. 9.) Dr. Abbas was the medical director of this unit. (N.T. 3/27/12, pp. 4-5.) At the time of his testimony, Dr. Abbas explained that he had been a practicing psychiatrist for only four years and only once before had evaluated the legal competence of a

On March 24, 2014, David S. Glosser testified to the results of a neuropsychological assessment he performed on June 27, 2012.[3] Dr. Glosser is a clinical neuropsychologist; he is neither a medical doctor nor a psychiatrist. (N.T. 3/24/14, p. 9; N.T. 7/29/14, p. 21.) Dr. Glosser testified that Defendant exhibited significant signs of cognitive dysfunction and that as a result of this dysfunction and the medications he was taking, his judgment was compromised. (N.T. 3/24/14, pp. 16-17.) Dr. Glosser also testified that due to Defendant's poor mastery of the English language, Defendant's case was a difficult one to evaluate. (N.T. 3/24/14, p. 13.) Unfortunately, due to the delay between when Dr. Glosser's examination was performed and when his testimony was presented, at the time Dr. Glosser testified, he did not know the current status of Defendant's cognitive functions. (N.T. 3/24/14, pp. 21, 27-29.)

To update his assessment, Dr. Glosser re-examined Defendant on April 14, 2014. Following this re-examination, Dr. Glosser testified on July 29, 2014, that Defendant was able to understand the nature of the charges against him, that he had been convicted, that he needed to be sentenced and what sentencing is, and that he was at risk of being punished, which he dreaded. (N.T. 7/29/14, pp. 11, 16-17.) Dr. Glosser further noted that Defendant had the capacity and ability to participate in sentencing and to provide information to the court, but that he had a tendency to wander in his responses. (N.T. 7/29/14, pp. 17-18.)

With the results of the neuropsychological assessment which Dr. Abbas had earlier recommended now available, Dr. Abbas performed an updated psychiatric evaluation on July 18, 2015. (N.T. 9/18/15, p. 6.) On September 18, 2015, Dr. Abbas testified that Defendant was not competent to be sentenced. (N.T. 9/18/15, pp. 13-15.) In explaining this conclusion Dr. Abbas stated that Defendant was paranoid, that he believed the proceedings were a

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defendant to stand trial. (N.T. 3/27/12, pp. 5-6.) Given these circumstances, Dr. Abbas testified that his diagnosis of Defendant was tentative. (N.T. 3/27/12, p. 9.) As a tentative diagnosis, Dr. Abbas testified Defendant suffered from major depressive disorder with psychotic features, chronic pain disorder, and a possible cognitive disorder. (N.T. 3/27/12, pp. 9, 18-19, 27-28.)

[3] As explained by Dr. Glosser, because different areas or regions of the brain perform different and discrete functions, the tests he performed were designed to measure different cognitive functions in order to evaluate the functioning and relative intactness of the various areas of Defendant's brain. (N.T. 3/24/14, pp. 11-12.)

sham and everyone was an imposter, and that the facts upon which he was prosecuted were made up. (N.T. 9/18/15, pp. 13-16.) At this hearing, at the request of the court, Defendant testified for the first time, and the court had the opportunity to hear Defendant's responses to questions and to observe Defendant's demeanor. (N.T. 9/18/15, p. 41.) Defendant appeared to understand the questions asked and was responsive, however, at times, as predicted by Dr. Glosser, Defendant wandered in his responses. (N.T. 9/18/15, pp. 30, 46-47, 66.) By order dated December 29, 2015, we found Defendant to be competent to be sentenced.

Defendant was scheduled for sentencing on February 23, 2016. At that time, both Defendant and his counsel appeared in court, and Defendant was questioned and given an opportunity to present evidence to the court for sentencing purposes. The court also had available to it the presentence investigation report previously prepared by the Carbon County Adult Probation Office and dated March 22, 2012. Unfortunately, before Defendant's sentence was pronounced, Defendant collapsed and sentencing was deferred until March 15, 2016. (N.T. 2/23/16, p. 29.)[4] On March 15, 2016, Defendant was sentenced to a period of imprisonment of no less than eighteen months nor more than three years' in a state correctional institution, to be followed by two years' state probation, on Count 1, 18 Pa. C.S.A. §3301(a)(1)(i) (arson endangering persons), and a concurrent sentence of one to two years on Count 2, 18 Pa. C.S.A. §3301(c)(3) (arson endangering property).

On March 21, 2016, Defendant timely appealed from the judgment of sentence. In this appeal Defendant raises one issue, that we "erred in finding Joe Mesa competent to proceed in this matter when the undisputed testimony of two mental health professionals established that Mr. Mesa suffered from several mental health conditions that cause him to lack a rational understanding of these proceedings and to lack the ability to consult with his lawyer with a reasonable degree of rational understanding." **See** Defendant's Concise Statement of Errors Complained of on Appeal.

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[4] At his continued sentencing on March 15, 2016, Defendant explained that due to the stress of the proceeding, his blood pressure went "sky high" and he fainted. (N.T. 3/15/16, p. 3.)

DISCUSSION

A criminal defendant is presumed to be competent to stand trial and to be sentenced. **Commonwealth v. Smith,** 609 Pa. 605, 650, 17 A.3d 873, 899 (2011), **cert. denied sub nom., Smith v. Pennsylvania,** 133 S. Ct. 24 (U.S. 2012). To prove otherwise, the defendant must establish by a preponderance of the evidence that he is either "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. §7402(a); **Smith, supra** at 651, 17 A.3d at 899-900; **Medina v. California,** 505 U.S. 437, 448 (1992). Stated differently, the relevant question in a competency determination is "whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding, and to have a rational as well as a factual understanding of the proceedings." **Commonwealth v. Davido,** 630 Pa. 217, 264, 106 A.3d 611, 639 (2014) **(per curiam)** (citations omitted); **Dusky v. United States,** 362 U.S. 402 (1960) **(per curiam).**

Defendant claims on appeal that we erred because we did not accept the "undisputed testimony" of his mental health experts that Defendant lacked a "rational understanding of these proceedings" and the "ability to consult with his lawyer with a reasonable degree of rational understanding." In addressing this issue, it is important to first emphasize that the proceeding at issue is Defendant's sentencing. Defendant was tried before a jury and convicted on August 8, 2011. Defendant's competency to be tried has never been challenged.

The first time competency was raised as an issue was in March 2012, after Defendant's conviction. (N.T. 3/27/12, p. 41.) This was, coincidentally, at the same time when Defendant's presentence investigation report was completed. In that report, an aggregate period of imprisonment in a state correctional facility of not less than three years nor more than six years was recommended. In that report, substantial information pertinent to sentencing was obtained directly from Defendant and his wife, none of which was disputed at the time of sentencing on March 15, 2016.[5]

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[5] At sentencing, only three corrections or updates were requested by Defendant: that his change of address be noted; that at the time of sentencing, Defendant and his wife were no longer separated, they were again living together; and that Defendant was no longer diagnosed as having a tumor on his brain, but with white matter disease. (N.T. 2/23/16, pp. 3-5.)

Secondly, Defendant's characterization of Dr. Glosser's testimony as an expert determination that Defendant lacked a rational understanding of these proceedings or the ability to consult with his lawyer with a reasonable degree of rational understanding is not supported by the record. Dr. Glosser is neither a psychiatrist nor a medical doctor; he is a clinical neuropsychologist. There is no evidence that Dr. Glosser has any training or expertise in forensic psychiatry or in evaluating an individual's legal competency to be tried or sentenced; instead, Dr. Glosser freely admitted that he did not know the legal standard by which to judge legal competency. (N.T. 3/24/14, p. 26.) Further, while Dr. Glosser opined that Defendant was "cognitively and psychologically incapable of **fully** understanding what was going on" and "how to make decisions in his own best interest," the extent of this limitation was never delineated. (N.T. 7/29/14, p. 11.) This is significant given Dr. Glosser's acknowledgment that Defendant understood the nature of his criminal charges; knew he had been tried and convicted; knew that he needed to be sentenced and that this involved likely punishment which he dreaded—a natural response of anyone facing sentencing; and that Defendant possessed the capacity and ability to participate in sentencing and to provide relevant information to the court. (N.T. 7/29/14, pp. 11, 16-18.) Dr. Glosser never opined that Defendant was incompetent to be sentenced.

With respect to Dr. Abbas' testimony, in response to defense counsel's question, Dr. Abbas denied that Defendant was substantially unable to understand the nature and object of the criminal proceedings, but believed Defendant did not understand the exact nature of the proceedings. (N.T. 9/18/15, p. 13.) In explaining further, Dr. Abbas testified that Defendant believed the proceedings were manufactured as a means to deport him and that the court and the lawyers were imposters, that they were acting the role of real officials. (N.T. 9/18/15, pp. 13-14.) When questioned directly, Defendant admitted to knowing who the judge was, that defense counsel was his counsel representing him in this matter, and that the Assistant District Attorney who was present at the proceeding was the attorney prosecuting the case. (N.T. 9/18/15, pp. 54-55, 58-59.) When asked whether Defendant was substantially unable to participate in his defense and to assist defense counsel in defending

him, and after responding yes, Dr. Abbas explained that because of Defendant's paranoia and his irrational belief that everything had been made up against him, he, for this reason, was unable to defend himself. (N.T. 9/18/15, pp. 14-15, 27-28.)

At the hearing on September 18, 2015, Dr. Abbas testified that he had made two diagnoses of Defendant: (1) major depressive disorder with psychosis, and (2) dementia, not otherwise specified. (N.T. 9/18/15, p. 6.) While opining that Defendant experienced major depressive disorder with psychosis his entire life, Dr. Abbas acknowledged that this would not prevent him from maintaining employment, raising a family, and living a productive life. (N.T. 9/18/15, pp. 25, 36-39.) Dr. Abbas further acknowledged that the neuropsychological evaluations performed by Dr. Glosser did not confirm the extent of depression, psychosis, and cognitive issues he thought existed (N.T. 9/18/15, pp. 12-13), and that the tests performed by Dr. Glosser were a better measure of Defendant's cognition than those he had performed (N.T. 9/18/15, p. 19) and which evidenced only moderate dementia and no significant change in the level of Defendant's dementia between 2012 and 2015. (N.T. 9/18/15, pp. 9-10, 19.) Dr. Abbas also admitted that because Defendant was born in Colombia, South America, and did not immigrate to this country until he was twenty-three years old, there was a noticeable language barrier which complicated accurate testing of Defendant's cognition and understanding, and that because of Defendant's deep-seated paranoia, he was unable to determine whether many of the things Defendant told him in fact happened or were imagined. (N.T. 9/18/15, pp. 20, 39-40.) This, of course, begs the question: Did they, in fact, happen? No proof was presented to the contrary.

Underlying the issue Defendant intends to present on appeal is the implied premise that the testimony of Dr. Abbas and Dr. Glosser is conclusive, that in our role as fact-finder we are not permitted to weigh the strength of this evidence or its credibility, and that in ruling on Defendant's competence we cannot take into account our observations of Defendant, his demeanor, and his testimony. **But see, Commonwealth v. McGill,** 545 Pa. 180, 187, 680 A.2d 1131, 1135 (1996) (trial court's observations of defendant during collo-

quies and throughout trial supported the conclusion that defendant was competent to stand trial). In addition, Defendant's statement of the issue to be raised on appeal appears to ignore the difference between an undisputed fact on which no contrary evidence exists and an opinion, which by its very nature is an evaluation of factual information and which, in this case, seeks to evaluate objectively the subjective thought processes and understanding of the Defendant. Defendant's statement of the question on appeal further appears to ignore the significance of the presumption of competency and its role in evaluating whether Defendant is competent to be sentenced. **Commonwealth v. duPont,** 545 Pa. 564, 568, 681 A.2d 1328, 1330 (1996) (because a criminal defendant is presumed competent, the burden of proving otherwise is upon the defendant).

The threshold for competency is not high. Obviously, a criminal defendant need not have a law degree, be trained in the law, or have a detailed understanding of the law to be competent to be tried or sentenced. It is sufficient in this case if Defendant had the capacity to understand what sentencing is and to participate and assist his counsel at sentencing. **Cf. Commonwealth v. Banks,** 513 Pa. 318, 521 A.2d 1 (1987) (a defendant's ability to cooperate and not whether he actually cooperated is essential to the determination of his legal competency to stand trial). Because the presumption favors competency, it was incumbent upon Defendant to prove that he was substantially unable to do so. **See** 50 P.S. §7402(d) (providing that "a determination of incompetency shall be made by the court where incompetency is established by a preponderance of the evidence").

Following Defendant's conviction on August 8, 2011, Defendant appeared in court on seven separate occasions: March 27, 2012; March 24, 2014; July 29, 2014; September 18, 2015; February 23, 2016; March 15, 2016; and March 18, 2016. On each of these dates Defendant was polite, respectful and dressed for the occasion. (N.T. 2/23/16, p. 23; N.T. 9/18/15, p. 30.) On the last four dates, Defendant was asked questions and testified. During these times, Defendant listened attentively and answered appropriately. In order to avoid the effects of medication on his thought processes, Defendant avoided taking certain medications, such as morphine and fentanyl for pain, which might otherwise cloud his thinking

when he was in court. (N.T. 9/18/15, pp. 67-68; N.T. 2/23/16, pp. 23-24; N.T. 3/18/16, pp. 7-8.)

At times Defendant had difficulty expressing himself, but this appeared to be more because English is his second language than because of any difficulty in understanding or deficiency in thought. (N.T. 2/23/16, p. 19; N.T. 3/15/16, pp. 11-12.) At times Defendant rambled or strayed from a question, but this more often than not was when he wanted to make a point. Defendant questioned the thoroughness of the police investigation (N.T. 9/18/15, p. 52), claimed his trial counsel had not presented evidence he felt should be presented (N.T. 9/18/15, p. 56; N.T. 3/15/16, p. 11), and identified a third party, an insurance agent, who Defendant maintained was behind many of his problems because the agent had committed insurance fraud and Defendant threatened to expose him. (N.T. 9/18/15, pp. 50-51, 74-75; N.T. 2/23/16, pp. 19-20; N.T. 3/18/16, pp. 29, 53-54.) Defendant also at one point claimed that stomach cancer he had in the past may have returned, and he no longer wanted to go through chemotherapy again (N.T. 9/18/15, pp. 49, 69-71); and that his wife was ill and dependent on him for support. (N.T. 3/18/16, pp. 21-22, 46-47.)

None of this points to Defendant's incompetency. To the contrary, Defendant at all times maintained his innocence and denied his guilt. It was therefore natural and expected for Defendant to do this and also to present evidence which could be considered in mitigation of any sentence imposed. Such evidence also supports Defendant's awareness of the proceedings and their purpose.

When Defendant testified about events in the past he appeared to have no difficulty in recalling what had occurred. Dr. Abbas testified that Defendant's long-term memory about the fire was intact (N.T. 3/27/12, p. 34); and Defendant did not deny having rubbing alcohol in his home at the time of the fire, but testified that he always kept this in supply and used it frequently due to his health. (N.T. 9/18/15, pp. 85-86.) Defendant recalled when the jury returned with its verdict and questioned why the jury had not been polled, a question which revealed an insight which many laypersons do not possess concerning court proceedings. (N.T. 9/18/15, p. 84.)[6]

[6] In his testimony, Defendant did not use the term "polling," but described the process of polling. Moreover, Defendant's recollection in this regard was in fact correct, the jury was not polled. (N.T. 8/8/11, p. 116.)

Following the verdict, in 2012 Defendant and his wife separated for more than a year, and Defendant lived by himself and cared for himself. (N.T. 3/27/12, pp. 32, 35; N.T. 9/18/15, pp. 43-44; N.T. 3/18/16, p. 6.)[7] Since the jury's verdict, Defendant maintained his driver's license, frequently drove himself to court and to go shopping, and had been specially evaluated at the request of his family doctor to ensure his ability to drive safely, and passed that evaluation. (N.T. 9/18/15, p. 67; N.T. 3/18/16, pp. 39-40.)

Defendant testified at a bail hearing on March 18, 2016, that he was no longer seeing Dr. Abbas, that the last time he had seen Dr. Abbas was in March 2015, that he used to see Dr. Abbas every other month, and that when he did see Dr. Abbas, it was only for a short period, approximately five minutes each time. (N.T. 9/18/15, p. 69; N.T. 3/18/16, pp. 9, 25.) Defendant further indicated that part of the reason he had seen Dr. Abbas was at the suggestion of his attorney as a way of staying out of jail. (N.T. 3/15/16, p. 9.) Defense counsel never presented any evidence that any of the foregoing information provided by Defendant was inaccurate. Nor did defense counsel present any specific evidence to explain in what way Defendant was unable to assist his counsel or how his representation of Defendant for sentencing purposes was impaired.

It is not our intent to suggest or our belief that Defendant has no physical, mental or medical issues. Defendant has an extensive medical history as illustrated by his medical records. He has been treated for cancer in the past and has chronic pain syndrome attributable to a variety of physical conditions for which he is prescribed morphine and fentanyl. He is now sixty-eight years of age and been diagnosed with moderate dementia, which may or may not be common for someone of his age. He has been diagnosed with major depressive disorder with psychosis, and he likely is paranoid and misinterprets what people do and say in light of this paranoia. (N.T. 3/15/16, p. 13.) Nevertheless, other than conclusory statements by Dr. Abbas in response to defense counsel's questions reciting the statutory definition of incompetency in the Mental Health

[7] Notwithstanding Dr. Abbas' testimony that over the last year Defendant had not been taking care of himself and in recent visits was disheveled, dirty and had body odor, the same date Dr. Abbas testified, Defendant was in court dressed in a suit and tie, with no indication of being unclean. (N.T. 9/18/15, pp. 29-30.)

Procedures Act (**see** 50 P.S. §7402(a)), Defendant has failed to establish that he is substantially unable to understand the nature or object of sentencing or to participate and assist his counsel at the time of sentencing, particularly in light of the presentence investigation report prepared by the Carbon County Adult Probation office which contains extensive input from Defendant and his wife, none of which was disputed as being inaccurate when presented, the updated medical information defense counsel placed in the record at the time of sentencing, our observations of Defendant (N.T. 3/15/16, pp. 7-9, 11), and Defendant's actual participation at sentencing.[8] **See Commonwealth v. Smith,** 227 Pa. Super. 355, 367, 324 A.2d 483, 489 (1974) (holding that medical opinions about a defendant's condition should be only one of the factors relevant to an incompetency determination and admonishing courts not to surrender their careful, independent judgment of a defendant's competency in deference to conclusory psychiatric testimony by those untrained and unfamiliar with legal proceedings); **Commonwealth v. Jones,** 546 Pa. 161, 180, 683 A.2d 1181, 1190 (1996) ("The determination of competency to stand trial rests in the sound discretion of the trial court.").

CONCLUSION

Expert opinions are intended to assist in understanding the evidence or determining a fact in issue. Pa. R.E. 702(b). They are not to be followed blindly without examining the facts on which they are based, nor are the conclusions reached to be accepted notwithstanding what the credible evidence clearly proves to be true. This is particularly true when the subject matter of the opinion concerns matters which we indirectly deal with on a daily basis and in our interactions with others in evaluating the validity of what we are told, and in evaluating their understanding of what we say and do.

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[8] Dr. Abbas testified that Defendant dreaded sentencing. This is a natural reaction of any criminal defendant about to be sentenced and, if anything, evidences Defendant's understanding of the proceedings. (N.T. 3/27/12, p. 23.) Nor do we believe it unfair to note at this point that Defendant has been able to manipulate the system for more than four years to delay sentencing, or to state that in 2005 Defendant was convicted of forgery, a **crimen falsi** offense. (N.T. 2/23/16, p. 21; N.T. 3/15/16, p. 13.)

Defendant claims he was incompetent to be sentenced: that he did not have the capacity to understand what sentencing is, or to participate and assist his counsel at sentencing. This is contrary to our observations and evaluation of Defendant's testimony over numerous hearings and Defendant's actual participation at sentencing. This is contrary to specific testimony given by Dr. Glosser concerning Defendant's capacity to be sentenced. This is contrary to Defendant's acute awareness of the effect sentencing could have on him and his dread of that sentence. Simply stated, Defendant did not overcome the presumption of competency by a preponderance of the credible evidence.

FRANKLIN TOWNSHIP, Plaintiff

vs. NATIONAL GENERAL PROPERTIES, INC., Defendant

Pennsylvania Construction Code Act—Uniform Construction Code—Equitable Jurisdiction—Injunction—Unclean Hands

1. The Pennsylvania Construction Code Act (the "Act"), 35 P.S. §§7210.101-7210.1103, was enacted by the State Legislature with the goal of implementing statewide requirements for construction and construction materials consistent with nationally recognized standards for the protection, safety and welfare of the consumer, general public and the owners and occupants of buildings and structures.

2. Pursuant to the Act, the Department of Labor and Industry was directed to adopt and has adopted the 1999 BOCA National Building Code, 14th Edition, as Pennsylvania's Uniform Construction Code (the "UCC").

3. The Act authorized the Department of Labor and Industry to promulgate separate regulations with respect to Chapter 1 of the 1999 BOCA National Building Code, 14th Edition, relating to its administration. The Department has promulgated such regulations, which are codified at 34 Pa. Code §§401.1-405.42.

4. Under the Act, Pennsylvania municipalities can opt by a duly enacted ordinance to adopt the UCC as their municipal building code.

5. Under the UCC, any person who intends to construct, alter, demolish, occupy or change the occupancy of any building or structure is required to first apply to the local building code official and obtain a permit au-thorizing such construction, alteration, demolition, occupancy or change of occupancy.

6. Under the UCC, before any occupancy or change in occupancy of a building or structure can occur, the building or structure must first be inspected by the local building code official to ensure that the building or structure meets the standards for occupancy as set by the UCC.

7. Before an injunction will issue to close a building and evict its tenants, the plaintiff "must establish that [its] right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested."

8. In denying Plaintiff's request for the immediate closure of a business building subject to the UCC, and eviction of its tenants who operate commercial businesses therein, where the owner failed to comply with the Code by not requesting an inspection of the building following its construction and allowed tenants to occupy the building before a certificate of occupancy had issued, the court, in balancing the equities, took into account the effect on the tenants, the lack of evidence as to whether a danger or hazard in fact existed, and Plaintiff's delays in enforcing the Code notwithstanding its awareness of the owner's renovations to the building and occupancy of the building by innocent tenants whose livelihood was at stake.

9. Rather than ordering the immediate closure of a building used for business purposes until such time as the owner obtained an occupancy permit as requested by Plaintiff, the court, instead, directed the owner to make the building available for inspection by the local building code official within thirty days of the entry of its order, and further ordered that if the owner failed to permit the inspection of the building within such thirty-day period or failed to rectify any violations of the UCC discovered upon inspection within such reasonable time as set by the building code official, the Plaintiff could proceed with all enforcement remedies provided by law, including the immediate closing of the building and eviction of its tenants, as appropriate.

NO. 14-0879

ERIC JAMES FILER, Esquire—Counsel for Plaintiff.

NATIONAL GENERAL PROPERTIES, INC.—Pro Se.

NANOVIC, P.J.—June 3, 2016

DECISION

AND NOW, this 3rd day of June, 2016, after a trial without a jury held on January 28, 2016, at which Defendant was not represented and no one appeared on its behalf,[1] the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff, Franklin Township ("Township"), is a Pennsylvania township of the second class located in Carbon County, Pennsylvania.

2. The Defendant, National General Properties, Inc., is a Pennsylvania corporation, with its principal place of business located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania.

[1] Defendant's attorneys were granted leave to withdraw on December 11, 2015. No new counsel has since entered an appearance on Defendant's behalf. As a corporation, Defendant "may appear in court only through an attorney at law admitted to practice before the court." **Walacavage v. Excell 2000, Inc.,** 331 Pa. Super. 137, 142, 480 A.2d 281, 284 (1984). This rule applies even to those corporations which have a single shareholder. **Id.**

3. Defendant is the owner in fee simple of real property located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania. A commercial building (the "Building") renovated by Defendant to accommodate four tenants is located on this property. Three of the rental units within the Building Defendant leases to various tenants who operate commercial businesses therein.

4. Pamela Fludgate is a principal and the President of the Defendant corporation.

5. Carl E. Faust serves as the Building Code Official for Franklin Township. His duties include administering and enforcing the provisions of the Uniform Construction Code, 34 Pa. Code §§401.1-405.42, within the Township.

6. On February 6, 2012, Mr. Faust sent a letter to Ms. Fludgate, informing her that Defendant had not obtained a building permit for the renovations Defendant made to the Building creating the separate tenant spaces and that the Building was being occupied without an "occupancy permit" (**i.e.,** a certificate of occupancy), as required under UCC §403.46. (Plaintiff's Exhibit "A".) Mr. Faust informed Ms. Fludgate that appropriate plans, a building permit application, and a letter from the Sewage Enforcement Officer dealing with the added loads to the existing septic system needed to be submitted in order to obtain a building permit, and if Defendant did not provide him with those materials by February 24, 2012, he would initiate proceedings to have the Building vacated under UCC §403.83. **Id.**

7. Mr. Faust sent additional correspondence to F. Peter Lehr, Esquire, Defendant's counsel at that time, informing him that the Building had been altered and was being occupied by tenants in violation of the Uniform Construction Code and that he had given Defendant until February 24, 2012 to submit the requested information for building permits to be issued. (Plaintiff's Exhibits "B" and "C".)

8. Defendant failed to provide the information requested by the February 24, 2012 deadline, and on February 25, 2012, Mr. Faust sent Ms. Fludgate a letter-order informing her that he was initiating an action to have the Building vacated and that Defendant

could appeal his order to vacate by submitting a written answer within 30 days. (Plaintiff's Exhibit "D".)

9. Defendant timely appealed Mr. Faust's letter-order to the Joint UCC Appeals Board ("Appeals Board") on or about March 23, 2012. A hearing before the Appeals Board was originally scheduled for May 9, 2012, but was continued to June 20, 2012, at Defendant's request.

10. On May 2, 2012, Defendant filed a complaint in mandamus with this court seeking a preliminary injunction compelling the Township to issue a certificate of occupancy for the Building. That mandamus action was docketed to 12-0948. By order dated December 31, 2012, the undersigned denied Defendant's request for a preliminary injunction on the grounds that it had not exhausted its administrative remedies (**i.e.,** a hearing before the Appeals Board) and had failed to show that such remedies were inadequate.

11. A hearing on Defendant's appeal was held before the Appeals Board on May 7, 2013. On May 14, 2013, the Appeals Board decided, **inter alia,** that Defendant was not entitled to a certificate of occupancy, and that within sixty days of the Board's decision Defendant must submit one or more applications for construction permits and a highway occupancy permit to the relevant agencies. (Plaintiff's Exhibit "E".) The Board further held that "inspections shall be conducted in accordance with 34 Pa. Code §403.45 and Certificate(s) of Occupancy shall be issued within 5 business days after receipt of a final inspection report that indicates compliance with the Uniform Construction Code." **Id.** Lastly the Appeals Board held that "[i]n the event that [Defendant] fails to submit application(s) ... within sixty (60) days of the date of [its] Decision, then the Township may proceed with all enforcement remedies as provided by law." **Id.**

12. Defendant did not appeal the decision of the Appeals Board to the Court of Common Pleas.

13. Defendant did not submit the documents required under the Code for Mr. Faust to issue a construction permit within the required sixty days from the date of the Appeals Board's decision.

14. Notwithstanding Defendant's failure to timely comply with the Appeals Board's decision, Mr. Faust did not proceed with an-

other enforcement action against Defendant. Instead he continued to work with Defendant and Defendant's architect to obtain the necessary documents and estimates of the construction costs in order for him to calculate the permit fee. Once that information was finally submitted and the permit fee paid, Mr. Faust issued a construction permit for the Building on June 29, 2014.

15. On May 5, 2014, before the construction permit was issued on June 29, 2014, Plaintiff filed its Complaint for Injunction in the instant action seeking an order compelling Defendant to vacate the Building until it complies with the terms of the Appeals Board's decision and requesting, **inter alia,** any other equitable relief that the court deems to be reasonable, necessary and just under the circumstances.

16. Defendant filed an Answer, New Matter and Counterclaim on June 12, 2014. Therein, Defendant requested, **inter alia,** that this court order Plaintiff to calculate the construction permit fee to be paid by Defendant for the issuance of a construction permit and further order Plaintiff to issue a Certificate of Occupancy for the Building in accordance with the Appeals Board's decision.

17. Between June 29, 2014, the date the construction permit for Defendant's Building was issued, and January 28, 2016, the date of trial, Defendant had not contacted Mr. Faust to inform him that construction was completed and ready for inspection.

18. Further, at the January 28, 2016 trial, Mr. Faust testified that as of June 19, 2014 not all construction for two of the tenant spaces had been completed, without giving any detail as to what was incomplete.

19. As of January 28, 2016, Mr. Faust had not completed an inspection of Defendant's Building and no certificates of occupancy for the Building had been issued.

20. The Building has been occupied, without a certificate of occupancy, up to the present time.

CONCLUSIONS OF LAW

1. In order to receive an injunction, Plaintiff "must establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the

relief requested." **Kuznik v. Westmoreland County Board of Commissioners,** 588 Pa. 95, 117, 902 A.2d 476, 489 (2006) (citation omitted).

2. The General Assembly enacted the Pennsylvania Construction Code Act ("the Act") in order to, **inter alia,** "provide standards for the protection of life, health, property and environment and for the safety and welfare of the consumer, general public and the owners and occupants of buildings and structures" and "encourage standardization and economy in construction by providing requirements for construction and construction materials consistent with nationally recognized standards." 35 P.S. §7210.102(b)(1), (2).

3. The Act required the Department of Labor and Industry to adopt the 1999 BOCA National Building Code, Fourteenth Edition, as Pennsylvania's Uniform Construction Code, but allowed the Department to promulgate separate regulations with respect to Chapter 1 of the Code relating to its administration. 35 P.S. §7210.301(a). The Department has promulgated such regulations, which are codified at 34 Pa. Code §§401.1-405.42 and govern the administration of the Code.

4. The Act allows municipalities to enact ordinances in order to adopt the Uniform Construction Code as their municipal building codes as well as several options for municipalities to enforce the Code. 35 P.S. §7210. 501(a)(1). Franklin Township enacted such an ordinance, Number 2004-01, on June 15, 2004. (Plaintiff's Exhibit F.)[2] Therefore, at all times relevant to the determination of this action, the Code was in effect in Franklin Township.

5. Defendant's Building is subject to the Act and the Code's provisions. **See** 34 Pa. Code §403.1(a)(1) ("The Uniform Construction Code applies to the construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every building or structure which occurs on or after April 9, 2004, and all existing structures that are not legally occupied") **and** 35 P.S. §7210.104(a) (The Act "shall apply to the construction, alteration, repair and occupancy of all buildings in this Commonwealth.").

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[2] Additionally, 42 Pa. C.S.A. §6107(a) states that "[t]he ordinances of municipal corporations of this Commonwealth shall be judicially noticed."

6. Under the Code, any owner who "intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a commercial building, structure and facility ... regulated by the Uniform Construction Code shall first apply to the building code official and obtain the required permit under §403.42a. ..." 34 Pa. Code §403.42(a).

7. The Code requires that applications for a construction permit include, **inter alia,** construction documents such as plans and specifications as well as any other data the building code official requires to be submitted with the application. 34 Pa. Code §403.42a(b). Furthermore, an issued permit is not valid until the required fees have been collected. 34 Pa. Code §403.43(m).

8. The permit holder, or an authorized agent thereof, is required to notify the building code official when work is ready for inspection and provide access for the inspection. 34 Pa. Code §403.45(c). As of the date of trial, Defendant had not notified Mr. Faust, or any other individual designated by the Township to conduct building inspections, that the work performed on the Building was ready for inspection.

9. Once the inspection has been completed, if the inspector finds that the construction complies with the Code, the inspector is required to file a final inspection report with his/her findings. 34 Pa. Code §403.45(e). Within five business days after receipt of such report, the Building Code Official must issue a certificate of occupancy. 34 Pa. Code §403.46(b). Without a final inspection report, the Building Code Official is unable to determine whether or not the subject building or structure is in compliance with the Code and therefore unable to issue a certificate of occupancy.

10. The Code mandates that "[a] building, structure or facility may not be used or occupied without a certificate of occupancy issued by a building code official." 34 Pa. Code §403.46(a).

11. Defendant has failed to comply with the Code by not requesting an inspection of its Building following construction pursuant to a duly issued construction permit and by allowing tenants to continue occupying its Building even though the Building lacks a certificate of occupancy. **See** 34 Pa. Code §§403.45(c), 403.46(a).

12. Under the Code, a building code official has the authority to initiate action to vacate or close a building or structure for a

violation(s) of the Code. 34 Pa. Code §403.83(a). Such an action was initiated with respect to Defendant's Building on February 25, 2012. Following the decision of the Joint UCC Appeals Board, Defendant has still not brought its building fully into compliance with the Code.

13. The Township has requested an injunction ordering that the Building be vacated until such time as Defendant brings the Building into compliance with the Code. At trial, Mr. Faust alternatively suggested that we order Defendant to allow inspection of the Building within thirty days of our decision.

14. The Township has established that its right to relief is clear: Defendant's Building is subject to both the requirements of the Pennsylvania Construction Code Act and the Uniform Construction Code, and Defendant has allowed the Building to be occupied despite being on notice since February 6, 2012 that doing so violated the Code.

15. The Township's injury, Defendant's ongoing violation of the Code, cannot be adequately compensated by damages.

16. As to the last element necessary for the grant of a permanent injunction: whether a greater injury will result from refusing rather than granting the relief requested, we must carefully weigh the equities of the situation. "It is axiomatic that an equity court is primarily interested in effecting fairness between the parties." **Bold v. Bold,** 404 Pa. 487, 494, 574 A.2d 552, 555 (1990). Furthermore, "[e]quity [will not] lend its aid to further an improper objective which will likely cause great detriment or irreparable harm to the other party." **Hagy v. Premier Manufactoring Corporation,** 404 Pa. 330, 335, 172 A.2d 283, 286 (1961). "It is equally plain that in order to do this, the court will consider, of necessity, all of the circumstances of the case." **Bold, supra.** The tenants who occupy the Building are not parties to this action; however, any order to close and/or vacate Defendant's Building for violations of the Code will adversely affect those tenants: their businesses will be forced to close until such time as Defendant, their landlord, brings the Building into compliance with the Code. Conversely, Defendant's failure to bring its Building into compliance with the Code creates a heightened risk to consumers who enter the Building, the owners and occupants of the Building, and the general public, as the Code

mandates various safety features, including fire protection, and it cannot be ascertained whether the Building complies with these provisions without an inspection. **See e.g.,** 34 Pa. Code §403.46(e). No evidence has been introduced indicating whether the tenants occupying the Building are aware of Defendant's violations of the Code or that the occupation of the Building is prohibited in the absence of a certificate of occupancy. At the same time, any further delay in the inspections is harmful to both the Township's interest in ensuring all subject buildings and structures within its boundaries are in compliance with the Code as well as the general public's interest that places of business open to the public comply with the Code's uniform standards for health and safety. Nevertheless, the primary relief Plaintiff seeks, the immediate closure of the Building until such time as Defendant complies with the Code, would result in a greater injury than if we refused Plaintiff that relief. The alternate relief that Mr. Faust suggested at trial, ordering Defendant to allow inspections within a set period of time from the date of our decision before ordering the Building to be closed, will not result in a greater injury than if we denied Plaintiff this alternative injunctive relief.

17. The Township's reliance on Section 403.84 to evict the tenants and close the Building is misplaced. Section 403.84(b) requires the Building Code Official to order the vacating of a building or structure if the official determines the existence of an unsafe condition, and Section 403.84(a) allows the Building Code Official to determine that a building or structure is unsafe because of "illegal or improper occupancy." Such determination is discretionary, not mandatory. To order immediate eviction of the tenants in this case without proof that the Building is in fact a danger or hazard disregards the interests of the tenants and the public generally and ignores the Township's admitted failures in adhering to the Code notwithstanding its awareness of the renovations of the Building undertaken by the Defendant and occupancy by innocent tenants whose livelihood is at stake. These circumstances, we believe, justify that before the Building is closed and the tenants evicted, an inspection of the Building first be conducted by the Building Code Official. If this inspection uncovers real dangers, or if the Defendant refuses to permit the inspection in accordance with

this Decision, immediate closing of the Building and eviction of the tenants is appropriate.

18. In Defendant's Answer, New Matter and Counterclaim,[3] Defendant requested that the Township be ordered to calculate the appropriate fee that Defendant would have to pay in order to obtain a construction permit. Defendant was issued a construction permit for its Building on June 29, 2014, therefore this request is moot.

19. With respect to Defendant's request that the Township be ordered to issue a certificate of occupancy for Defendant's Building, as pled in Defendant's Answer, New Matter and Counterclaim, that request is denied for the reasons stated above.

ORDER

In accordance with the foregoing, it is hereby ORDERED and DECREED that:

1. Defendant shall, within thirty days of the entry of this order, make arrangements for Carl E. Faust, Building Code Official for Franklin Township, and/or an inspector that either he or the Township designates to act in his stead, to conduct and complete an inspection of the Building located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania. The inspection shall be conducted in accordance with 34 Pa.Code §§ 403.45, 403.86. The Building Code Official and/or his designee shall inform Defendant, its principal or its agent, in writing, if the construction complies with or fails to comply with the Uniform Construction Code. **See** 34 Pa.Code §§ 403.45(d), 403.82.

2. Within fourteen days of the inspection, regardless of whether the construction is found to be in compliance with or not in compliance with the Uniform Construction Code, Defendant shall pay any and all outstanding fees relating to its Building, assessed pursuant to the Uniform Construction Code and/or applicable municipal ordinances, to the Township.

3. If Defendant fails to either permit the inspection of the Building within the time limits set forth in this order, fails to rectify

[3] Defendant did not set forth separate averments and a cause of action under the heading "Counterclaim," as required by Pa. R.C.P. 1031(a). Rather Defendant requested relief in two separate "wherefore" clauses, one located at the end of its Answer and the other at the end of its New Matter.

any violations of the Uniform Construction Code assessed by the Building Code Official and/or his designee within a reasonable time set by the Building Code Official and/or his designee, and/or fails to pay any outstanding fees within the time limits set forth herein, the Township may proceed with all enforcement remedies as provided by law. Nothing in this order shall be construed as preventing the Building Code Official from issuing a certificate of occupancy for a portion of the Building if that portion independently meets the Uniform Construction Code pursuant to 34 Pa.Code §§ 403.46(c).

Pursuant to Pa.R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on this Decision and mark the order as final if no motion for post-trial relief has been filed under Pa.R.C.P. No. 227.1 within ten days after notice of the filing of this Decision and order.

COMMONWEALTH of PENNSYLVANIA
vs. NATHAN ALAN KLINGEL, Defendant

Criminal Law—Investigatory Stop of Jointly-Owned Vehicle—Driving Privileges of One of the Owners Known to Have Expired—Identity of Driver Unknown Before Stop—Absence of Statutory Presumption That Vehicle Ownership Is Driver—Legality of Stop—Reasonable Suspicion/Probable Cause—Motion to Suppress

1. A vehicle stop must be supported by either reasonable suspicion or probable cause, depending upon the reason for the stop. If nothing can be gained by investigation after the stop, the stop must be supported by probable cause. If the stop involves a suspected violation of the Vehicle Code with respect to which further investigation is likely to shed light on confirming or negating the violation, the stop need only be supported by reasonable suspicion.

2. A traffic stop of a motor vehicle jointly owned by two males, one of whose driving privileges had expired, in order to determine whether the driver of the vehicle, a male, was the owner of the vehicle whose driving privileges had expired, constituted an investigatory stop which, to be valid, needed to be supported by reasonable suspicion.

3. Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Both the information possessed by the police and its degree of reliability is evaluated under the totality of the circumstances in determining whether reasonable suspicion existed at the time of a vehicle stop.

4. To establish reasonable suspicion, "specific and articulable facts" must be set forth leading a police officer to suspect that criminality was afoot. The officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch."

5. A police officer's stop of a motor vehicle known to be owned by two men, one of whose driving privileges had expired, coupled with the officer's observation that the driver was a male, is not sufficiently restricted to support a reasonable suspicion to justify the stop as a valid means to further investigate whether the driver was operating the vehicle under an expired license. Such facts, standing alone, support at most a possibility that the operating privileges of the driver were expired.

6. No statutory presumption exists in criminal proceedings that the driver of a vehicle is its owner.

7. Where a traffic stop is unlawful, all incriminating information gained from the stop must be suppressed.

NO. 1381 CR 2015

SETH E. MILLER, Esquire, Assistant District Attorney—Counsel for Commonwealth.

BRIAN C. JORDAN, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 23, 2016

Is an investigatory stop of a motor vehicle to determine the identity of its driver constitutionally permitted when, at the time of the stop, the investigating officer reasonably believes the vehicle has two owners—both men, the driving privileges of one of the two owners have expired, and the officer visually observes the driver to be a man? This is the primary issue raised in Defendant's Omnibus Pretrial Motion to Suppress which we now decide.

PROCEDURAL AND FACTUAL BACKGROUND

On August 10, 2015, while driving behind a black Honda Accord traveling north on State Route 209 in Franklin Township, Carbon County, Pennsylvania, Trooper Jonathan Lazarchick of the Pennsylvania State Police ran a routine computer check of the vehicle's registration through NCIC. This search disclosed that the vehicle was jointly owned by the Defendant, Nathan Alan Klingel, and William Leader, and that the driving privileges of the Defendant had expired on May 1, 2015. (N.T. Suppression Hearing, 3/18/16, pp. 7-8, 27-30, 35-36; Defendant Exhibit Nos. 1 and 2.)[1] Based on this information and Trooper Lazarchick's observa-

[1] At the time of the stop, the computer in Trooper Lazarchick's cruiser did not allow the photograph of Defendant depicted on Exhibit 2 to be transmitted. Therefore, Trooper Lazarchick did not have this photograph available at the time of the stop to compare with his visual observations of the driver of the vehicle. (N.T. 3/18/16, pp. 36-37.)

tion that the driver of the vehicle was a male, Trooper Lazarchick initiated a traffic stop to investigate further. (N.T. 3/18/16, p. 26.)

Trooper Lazarchick requested the driver to provide his driver's license, the vehicle's registration and proof of insurance. (N.T. 3/18/16, p. 9.) At this time, Trooper Lazarchick learned for the first time that Defendant was the driver of the vehicle, that the vehicle's inspection sticker had expired, and that the vehicle was not currently insured. (N.T. 3/18/16, p. 9.) With the driver's identity now known to him, Trooper Lazarchick knew as well that the driver was the owner of the vehicle whose driving privileges had expired, a fact confirmed when Trooper Lazarchick examined Defendant's driver's license. (N.T. 3/18/16, p. 42.)

During this stop, Trooper Lazarchick detected an odor of marijuana coming from the vehicle of which Defendant was the sole occupant and observed that Defendant's eyes were bloodshot and glassy. (N.T. 3/18/16, pp. 9-10.) In response to questions asked by Trooper Lazarchick, Defendant admitted to having marijuana in the car and smoking marijuana approximately two to three hours earlier. (N.T. 3/18/16, pp. 13, 15-16.) A consensual search of Defendant's vehicle also yielded a small plastic bag containing marijuana, a cigarette box containing several burnt marijuana cigarettes, and a multicolored bowl. (N.T. 3/18/16, pp. 14-17.)

Defendant was placed under arrest and transported to the Pennsylvania State Police Barracks in Lehighton where standard field sobriety tests were conducted, which Defendant failed, and where a drug recognition expert examined Defendant. (N.T. 3/18/16, pp. 17-20.) Defendant was next transported to the Palmerton Hospital where Defendant's blood was drawn and sent for testing which results, made available on August 25, 2015, indicated the presence of marijuana in Defendant's system. (N.T. 3/18/16, p. 22.)

A criminal complaint charging Defendant with Possession of a Controlled Substance,[2] Possession of Drug Paraphernalia,[3] Driving Under the Influence of a Controlled Substance—Presence in the Driver's Blood of Any Amount of a Schedule I Controlled

[2] 35 P.S. §780-113(a)(16).

[3] 35 P.S. §780-113(a)(32).

Substance,[4] Driving Under the Influence of a Controlled Substance—Impairment,[5] Driving Without a License,[6] Operating a Motor Vehicle Without Required Financial Responsibility,[7] and Operating a Motor Vehicle Without Official Certificate of Inspection[8] was filed on September 3, 2015. The case was waived into court and, on January 25, 2016, Defendant filed his instant Omnibus Pretrial Motion to Suppress any and all evidence obtained as a result of the traffic stop conducted by Trooper Lazarchick contending, **inter alia,** that Trooper Lazarchick possessed neither probable cause nor reasonable suspicion to make the stop.

A hearing on Defendant's Motion was held on March 18, 2016, the issues have been briefed by the parties, and the Motion is ripe for disposition.

DISCUSSION

Defendant claims Trooper Lazarchick's traffic stop was unlawful because Trooper Lazarchick possessed neither probable cause nor reasonable suspicion at the time of the stop to believe that the Motor Vehicle Code or any criminal statute had been violated by Defendant or was being violated by Defendant. Section 6308(b) of the Motor Vehicle Code sets forth a statutory standard for vehicle stops for suspected Vehicle Code violations equivalent to the constitutional standard set forth in **Terry v. Ohio,** 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), allowing an investigatory stop based on reasonable articulable suspicion. **Commonwealth v. Chase,** 599 Pa. 80, 87, 960 A.2d 108, 112 (2008). Specifically, Section 6308(b) states:

> **Authority of Police Officer.**—Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number

[4] 75 Pa. C.S.A. §3802(d)(1)(i).

[5] 75 Pa. C.S.A. §3802(d)(2).

[6] 75 Pa. C.S.A. §1501(a).

[7] 75 Pa. C.S.A. §1786(f).

[8] 75 Pa. C.S.A. §4703(a).

> or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa. C.S.A. §6308(b).[9]

As to what constitutes "reasonable suspicion," the Pennsylvania Supreme Court in **Commonwealth v. Holmes,** 609 Pa. 1, 14 A.3d 89 (2010), stated:

> Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the seizure, **a police officer must be able to point to 'specific and articulable facts' leading him to suspect [criminality] is afoot.** ... In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention. ...

Id. at 12, 14 A.3d at 95 (emphasis in original) (internal citations omitted) (**quoting Commonwealth v. Brown,** 606 Pa. 198, 996 A.2d 473, 477 (2010)). To establish reasonable suspicion, an officer

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[9] As interpreted by our Supreme Court, this section sometimes requires a police officer to possess probable cause and not merely reasonable suspicion to initiate a traffic stop. If nothing can be gained by investigation after the stop (**i.e.**, if the claimed violation of the Vehicle Code which prompted the stop is "not investigatable"; **e.g.**, violations such as running a red light, driving the wrong way on a one-way street, or driving at an unsafe speed), the stop must be supported by probable cause. **Commonwealth v. Chase,** 599 Pa. 80, 91-94, 960 A.2d 108, 114-16 (2008). However, if the stop involves a suspected violation of the Vehicle Code with respect to which further investigation is likely to shed light on confirming or negating the violation (**e.g.**, driving under the influence, where further investigation almost inevitably leads to the most incriminating type of evidence, such as a strong odor of alcohol, slurred speech, and bloodshot eyes), the stop need only be supported by reasonable suspicion. **Id. See also, Commonwealth v. Feczko,** 10 A.3d 1285, 1290-91 (Pa. Super. 2010) **(en banc).** Here, further investigation was necessary to determine whether a Vehicle Code violation was occurring—who the operator was and whether the operator was driving with an expired license. Therefore, under the facts of this case, the issue is one of reasonable suspicion, not probable cause.

"must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." **Commonwealth v. Mason,** 130 A.3d 148, 152 (Pa. Super. 2015) (**quoting United States v. Sokolow,** 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)), **appeal denied,** 138 A.3d 3 (Pa. 2016).

Distinguishing further the differences between reasonable suspicion and probable cause, the Pennsylvania Superior Court in **Commonwealth v. Fell,** 901 A.2d 542 (Pa. Super. 2006), stated:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. ... Reasonable suspicion, like probable cause, is dependent on both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture,' ... that must be taken into account when evaluating whether there is reasonable suspicion.

Id. at 545 (**quoting Alabama v. White,** 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)). **See also, Navarette v. California,** ___ U.S. ___, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014) (stating that reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause") (citation and quotation marks omitted).

"It is the duty of the suppression court to independently evaluate whether, under the particular facts of the case, an objectively reasonable police officer would have reasonably suspected criminal activity was afoot." **Holmes, supra** at 13, 14 A.3d at 96.

> And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this

> Court has consistently refused to sanction. And simple '"good faith on the part of the arresting officer is not enough." *** If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police.[']

Id. (**quoting Terry v. Ohio,** 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

It is well established that the Commonwealth bears the burden "of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights." Pa. R.Crim.P. 581(H); **accord Commonwealth v. Wallace,** 615 Pa. 395, 407, 42 A.3d 1040, 1047-48 (2012). In this case, for Trooper Lazarchick's stop to be supported by reasonable suspicion the Trooper must be able to "articulate specific facts which, in conjunction with the reasonable inferences derived from those facts, led him reasonably to conclude, in light of his experience, that criminal activity was afoot"—as applicable here, that a violation of Section 1501(a) of the Motor Vehicle Code had occurred or was occurring and that this violation required additional investigation. **Commonwealth v. Beasley,** 761 A.2d 621, 626 (Pa. Super. 2000); **Chase, supra; Commonwealth v. Feczko,** 10 A.3d 1285, 1290-91 (Pa. Super. 2010) **(en banc).** Section 1501(a) generally prohibits a motor vehicle from being driven on a highway of this Commonwealth by a person who does not possess a valid driver's license. 75 Pa. C.S.A. §1501(a).

At the time Defendant was stopped, Trooper Lazarchick knew, based on what he had learned from NCIC, that the car Defendant was driving was owned by two males, one of whose license had expired. He also knew that the driver of the vehicle he was following was a male. However, Trooper Lazarchick did not know who the driver was, whether the driver was one of the two owners, or whether the driver resembled either of the two owners. The information then available to Trooper Lazarchick was insufficient to reliably make any of these determinations. Accordingly, at the time of the stop, the driver of the vehicle could just as easily have been the other owner, or a friend or relative of either owner, rather than Defendant. In effect, Trooper Lazarchick assumed that the driver

of the vehicle might be the owner whose license had expired and decided to investigate.[10]

This margin of error is too large to support the level of reliability necessary to establish reasonable suspicion. **See Commonwealth v. Bailey,** 947 A.2d 808, 812 (Pa. Super. 2008) ("[I]t is well-settled that a mere assumption is not synonymous with reasonable suspicion."), **appeal denied,** 598 Pa. 785, 959 A.2d 927 (2008); **see also, Commonwealth v. Andersen,** 753 A.2d 1289, 1294 (Pa. Super. 2000) (concluding in a case where "articulable and reasonable grounds" was equated with probable cause that "the knowledge a vehicle is owned by an individual whose driving privileges are suspended coupled with the **mere assumption** that the owner is driving the vehicle, does not give rise to articulable and reasonable grounds to suspect that a violation of the Vehicle Code is occurring every time this vehicle is operated during the owner's suspension") (emphasis in original). By contrast, in **Commonwealth v. Hilliar,** 943 A.2d 984 (Pa. Super. 2008), **appeal denied,** 598 Pa. 763, 956 A.2d 432 (2008), the court determined that a traffic stop of a vehicle whose owner had a suspended license and whose driver physically matched the age and gender of the owner of the vehicle was a reasonable one. "Based on the officer's conclusion that it was likely that the person operating the vehicle was the owner because he was a male of the same age as the owner and had possession of the owner's vehicle," the court in **Hilliar** found the officer had reasonable suspicion to believe the vehicle was being driven by a driver with a suspended license and the stop was held to be legal. **Id.** at 987-88, 990.

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[10] Previously, Section 1212 of the Vehicle Code of 1959, 75 P.S. §1212, contained a statutory presumption that the driver of a vehicle was its owner. This presumption in criminal proceedings was held unconstitutional by the Pennsylvania Supreme Court as it violated a defendant's presumption of innocence, right not to be compelled to testify against himself, and the requirement that the Commonwealth prove all elements of the offense beyond a reasonable doubt. **Commonwealth v. Slaybaugh,** 468 Pa. 618, 623, 364 A.2d 687, 689-90 (1976). No comparable presumption exists under the current Vehicle Code, however, in the Judicial Code a statutory inference exists with respect to the recovery of civil penalties only, that "the person to whom the registration number was officially assigned is the owner of the conveyance and was then operating the conveyance." 42 Pa. C.S.A. §6143(a).

Here, Trooper Lazarchick testified that his decision to stop and investigate was based on the following facts: that the vehicle was owned by two men, one of whose driving privileges had expired, which information he had obtained from the NCIC report[11] and his own observation that the driver was a man. From these facts alone, Trooper Lazarchick concluded that Defendant was the driver, even though it was equally if not more likely from this general information that William Leader, the other owner, or some other man, was the driver. Stated differently, a police officer's reasonable belief that a vehicle being followed by him and driven by a male is owned by two men, one of whose driving privileges has expired, is not sufficiently restricted on these limited facts to raise a reasonable suspicion that a violation of the Motor Vehicle Code is occurring every time the vehicle is driven by a male.[12] **Cf. Navarette v. California, supra** ("The Fourth Amendment permits brief investigative stops ... when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity.") (quotation marks omitted).

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[11] Trooper Lazarchick testified to no other identifying information in the NCIC report which he reviewed and relied upon before making the stop.

[12] Defendant cites **Commonwealth v. McGraw,** 2015 WL 6394791 (Pa. Super. 2015), in support of his Motion. Citing **Commonwealth v. Hilliar,** 943 A.2d 984, 990 (Pa. Super 2008), the court in **McGraw** stated that "information that an owner of a vehicle had her license suspended alone cannot justify the stop of the vehicle," but that "to justify a stop to investigate whether an owner under suspension is operating the vehicle, the Commonwealth must adduce additional evidence to justify the belief that the driver is the owner whose license was suspended." **Id.** at *7. **McGraw** does not stand, as Defendant contends, for the proposition that a police officer's observation of a vehicle which is owned by a person with a suspended license and which is being driven by an individual of the same gender as the owner is too speculative to support a finding of reasonable suspicion. After noting the precedent set in **Hilliar**—that where an officer has reliable information that a vehicle being followed by him is owned by an individual whose operating privileges are suspended, together with the officer's observation that the driver of the vehicle matches the owner's description as "a middle-aged man," the officer's decision to conduct a traffic stop is supported by reasonable suspicion—the court declined to address whether a police officer's receipt of a CLEAN (Commonwealth Law Enforcement Assistance Network) report indicating the owner of a vehicle he was following was a female whose operating privilege was suspended for driving under the influence, coupled with the officer's observation that the driver was a female, with no further identifying information connecting the driver with the owner, was adequate to establish reasonable suspicion, the Commonwealth having failed to assert that this similarity

CONCLUSION

Reasonable suspicion—sufficient to support the traffic stop of a moving vehicle to investigate whether the driver has a valid driver's license—must be predicated on objective, articulable facts known to the detaining officer at the time of the stop and must be such that the officer can reasonably conclude that the subject of the stop is in violation of the Motor Vehicle Code. This standard is not met in this case where the only facts known by the officer at the time of the stop—that the vehicle stopped was owned by two men, one of whose driving privileges had expired, and the driver was a male—created little more than a possibility that the driver's operating privileges had expired. Under these circumstances, we find that Trooper Lazarchick's belief that the driver was the owner of the vehicle who had an expired license was not reasonable. We hold, therefore, that Trooper Lazarchick did not have reasonable suspicion to believe Section 1501(a) of the Vehicle Code was being violated at the time of the stop, that the stop was unlawful, and that all incriminating information gained from the stop must be suppressed.

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alone was sufficient to justify the stop. In contrast, the Commonwealth cites to **Commonwealth v. Schrock,** 2016 WL 1623420 (Pa. Super. 2016), which held that an officer's information at the time of the stop, based on an NCIC report, that the owner of a vehicle was a female with a DUI-suspended license, together with the officer's observation that the driver was female, was sufficient to justify the stop as a valid means to further investigate whether the driver was operating the vehicle under a suspended license.

While the opinions in **McGraw** and **Schrock** are instructive, both are unpublished memorandum decisions of the Pennsylvania Superior Court which are non-precedential and may not be relied upon or cited by us in support of our decision. **Treasure Lake Property Owners Association, Inc. v. Meyer,** 832 A.2d 477, 479-80 n.3 (Pa. Super. 2003) (citing Superior Court Internal Operating Procedure Section 65.37, 210 Pa. Code §65.37). Moreover, both **McGraw** and **Schrock** are readily distinguishable in material part from the present facts since in both cases the vehicle involved had a single owner of record whose driver's license was suspended, whereas in the instant matter the vehicle involved is owned by two individuals only one of whose driving privileges had expired.

In Re: OBJECTIONS to TAX CLAIM BUREAU'S SALES of REAL ESTATE for UNPAID TAXES LEVIED for the YEAR 2013 ROBERT J. SHUBECK, Petitioner vs. CARBON COUNTY TAX CLAIM BUREAU, Respondent

Civil Law—Real Estate Tax Sale Law—Notice Provisions—Compliance With Due Process—Objections to Tax Upset Sale—Defective Notice—Conspicuous Posting of Property Required—Additional Notification Efforts Required When Certified Mail Notice of Sale Returned Unclaimed—Research of Public Records

1. Prior to the sale of real estate for delinquent real estate taxes, the Real Estate Tax Sale Law ("Act"), 72 P.S. §§5860.101-5860.803, requires that reasonable efforts be undertaken by the tax claim bureau to provide actual notice of the pending sale to a property owner including, at a minimum, that notice be given (1) by certified mail, and, if unclaimed, by first-class mail following further investigation of the owner's last known address; (2) by publication; and (3) by posting of the property.

2. The notice provisions of the Act are designed to guard against the deprivation of property without due process. Accordingly, absent strict compliance with the Act's notice requirements, a tax sale of the property is invalid and any purported transfer of title by the tax claim bureau will be set aside.

3. Once objections to a tax sale are filed, the burden shifts to the tax claim bureau to prove that it complied with all statutory notice provisions and applied common-sense business practices in ascertaining proper addresses to which to send notice of the tax sale before the notice of tax sale is mailed to a property's owner.

4. Notice by posting requires that conspicuous posting of the impending sale of the property for delinquent real estate taxes be made at least ten days prior to the sale. The type and manner of posting must be such as to be reasonably likely to inform the taxpayer and public of the intended sale, and be securely attached to the property.

5. Posting the property for tax sale serves two purposes: (1) to provide notice to the owner and others who are likely to notify the owner of the sale; and (2) to provide notice to the public generally so as to encourage competitive bidding at the tax sale in order to obtain the best price at the time of the sale.

6. Because of the dual purpose of posting, defective posting of the property, even if the owner has actual notice of the sale, will often invalidate a tax sale.

7. The tax claim bureau's posting of the property which consisted of vacant land covered with weeds and bushes by making a tear in the paper notice of sale and slipping this onto a weed was neither likely to inform the owner or the public at large of the intended tax sale, or securely attached to the property, and, therefore, was defective under the Act.

8. Notice of a tax sale by mail requires that written notice of the scheduled tax sale of the property be given to the owner at least thirty days before the date of sale by certified mail, restricted delivery, return receipt requested, addressed to the owner's last known address. In the event this notice is returned to the tax claim bureau unclaimed, or under circumstances indicating it has not been received by the owner, then, at least ten days before the date of sale, Section 602 of the Act requires a second mailing of the notice of sale to the owner by United States first-class mail to the owner's

last known address after first reviewing and examining the records and information possessed and maintained by the tax claim bureau, by the tax collector for the taxing district making the return of unpaid taxes, and by the county office responsible for assessments and revisions of taxes.

9. In the case of an unclaimed notice of sale sent by certified mail, in addition to the review and examination of information in those offices required by Section 602, the tax claim bureau is required by Section 607.1(a) to exercise reasonable efforts to discover the whereabouts of the owner. Such efforts must include, but are not necessarily restricted to, a search of current telephone directories for the county, and of the dockets and indices of the county tax assessment office, recorder of deeds office and prothonotary's office. The making and the results of these additional notification efforts are required to be documented and maintained by the tax claim bureau in the property file.

10. The requirements of due process require the tax claim bureau to conduct a reasonable investigation to ascertain the identity and whereabouts of the record owner of the property subject to an upset sale for purposes of providing notice to that owner. Consequently, not only must the offices and sources of information required to be searched be reasonably searched, but such search is not necessarily limited to those offices and those sources of information specifically identified in the Act since due process requires that a "reasonable search" be conducted, and the Act sets forth only certain minimum efforts to be undertaken.

11. In this case, the tax claim bureau failed to meet its burden that it complied with the additional notification efforts required by Section 607.1(a) to locate and provide actual notice to the owner of the impending tax sale where it did not document the nature or results of its search of the recorder of deeds records; its search of the prothonotary's records failed to ascertain that the address to which the bureau mailed notice of the tax sale, and where the owner had formerly resided, was in foreclosure and that service of the complaint in foreclosure had been made on the owner at his place of employment; and failed to contact the owner's father whose first and last name was the same as the owner's, and whose name was listed in the local telephone directories, because the father's middle initial either was not provided in the directory or was different from that of the owner's.

NO. 15-2738

MICHAEL S. GREEK, Esquire—Counsel for Petitioner.

ROBERT S. FRYCKLUND, Esquire—Counsel for Respondent.

MEMORANDUM OPINION

NANOVIC, P.J.—August 17, 2016

By order dated May 31, 2016, we concluded the Carbon County Tax Claim Bureau (the "Bureau") had failed to comply with the notice provisions of the Real Estate Tax Sale Law and set aside the tax sale of property ("Property") which had been owned by Robert J. Shubeck ("Shubeck"), the record owner at the time of sale. The Bureau appeals from this order.

PROCEDURAL AND FACTUAL BACKGROUND

On September 25, 2015, the Bureau sold Shubeck's property at a tax upset sale for nonpayment of unpaid 2013 borough and county taxes. (N.T., p. 8.) The Property is a vacant lot—approximately 30 to 50 feet wide and 100 feet deep—with no improvements. (N.T., pp. 35, 47.) The Property is located at 42 West Mill Street, Nesquehoning, Carbon County, Pennsylvania, and bears a property record card number of 105-B1-42-Q15.02.

On April 1, 2014, the Bureau sent Shubeck notice of the return and claim for the 2013 unpaid real estate taxes owed on the Property by certified mail, return receipt requested. (County Exhibit No. 1, Notice of Return and Claim.) Notice of the scheduled tax sale of the Property for the unpaid 2013 taxes was given by the Bureau to Shubeck on June 3, 2015, by certified mail, restricted delivery, return receipt requested. (County Exhibit No. 3, Notice of Sale.) Both mailings were returned to the Bureau as unclaimed after delivery was attempted by the United States Postal Service. (N.T., pp. 9, 11.)

In addition to the certified mailings, the Bureau sent Shubeck two separate reminder letters of the delinquency by first-class mail, postage prepaid, on November 5, 2014, and February 2, 2015. (Court Exhibit Nos. 1 and 2.) Each of these courtesy notices advised Shubeck that the 2013 taxes must be paid by June 30, 2015, to avoid upset tax sale costs and advertisement and warned that if the taxes were not paid, the Property would be sold to collect the amount owed. Neither of these courtesy letters contained a date for the tax sale.

A third notice was also sent by the Bureau to Shubeck by first-class mail, postage prepaid, on August 27, 2015. (N.T., pp. 12-13; County Exhibit No. 4, Ten-Day Sale Notice.) This notice of public tax sale advised Shubeck of the date of the sale, September 25, 2015, and notified Shubeck that the Property would not be sold if the estimated upset price disclosed in the notice, $306.28, was paid prior to the day of sale.

All of the mailed notices identified in the preceding paragraphs were addressed to Shubeck at 108 West Mill Street, Nesquehoning, Pennsylvania. With the exception of the reminder letter dated February 2, 2015, Shubeck denied receiving any of this mail. (N.T.,

pp. 53-55.) As to the February 2, 2015 notice, Shubeck testified that after receiving this letter he telephoned the Bureau's office and spoke with a representative in the office, that he explained his intent to make payment and was assured he had time to do so, and that he left his cell phone number with the person he spoke to in the event they needed to contact him and was told it would be kept on file. (N.T., pp. 41-43.)

In explaining further why he had not received any of the other notices sent to the 108 West Mill Street address, Shubeck testified he had been involved in a bitter divorce and for about a year had not been living at this location. (N.T., p. 39.) Instead, he had been living with his parents at a separate address in Nesquehoning, but occasionally visited his former home to check the mail, which was also checked by his wife who did not communicate with him. (N.T., pp. 38-43.) Shubeck further testified that the residence at 108 West Mill Street was in foreclosure, that he had been served with the complaint in the foreclosure proceedings by the Carbon County Sheriff's Office at his place of employment, and that what mail he did pick up at 108 West Mill Street was mostly related to the foreclosure proceedings. (N.T., pp. 39-40, 43.)

Renee Roberts, the Director for the Bureau, testified that upon return of the unclaimed notice of public sale sent to Shubeck by certified mail on June 3, 2015, the Bureau undertook additional efforts to determine Shubeck's current address for notification purposes. (N.T., pp. 11-12.) According to the Director, in addition to examining the records it maintained, the records in the Carbon County Tax Assessment and Prothonotary's Offices were checked, the local and county telephone directories were examined, and the tax collector was contacted. (N.T., p. 12.) In providing this testimony, the Director referred to and relied upon the second page of County Exhibit No. 3, a document entitled "ADDITIONAL NOTIFICATION EFFORTS—Upset Sale: September 25, 2015." No other address for Shubeck was discovered from this search.

The Director also testified that notice of the tax sale was advertised in **The Times News,** a newspaper of general circulation in Carbon County, and in the **Carbon County Law Journal.** (N.T., pp. 15-16.) Copies of both of these advertisements were admitted into evidence. (County Exhibits Nos. 8 and 9.) Finally,

the Director testified that upon return of the unclaimed Notice of Return and Claim mailed to Shubeck on April 1, 2014, this notice was posted on the Property on July 25, 2014 (N.T., p. 10); also that the Property was posted with the Notice of Sale on July 17, 2015. (N.T., pp. 13-14.) Both postings were made by Michael Zavagansky, a maintenance supervisor for Carbon County who also serves as a deputy sheriff in the Carbon County Sheriff's Office, by posting a bush or weed on the Property. (N.T., p. 32; County Exhibit Nos. 2 and 5.)[1]

Shubeck first learned that the Property had been sold when he appeared at the Bureau's Office in October 2015 to pay the taxes due. (N.T., p. 46.) Upon learning of the sale, he filed objections to the tax sale on October 23, 2015, and amended exceptions and/or objections to the sale on November 9, 2015 (the "Objections"). In these objections, Shubeck claimed, **inter alia,** that the Bureau did not properly post notice of the upset sale on the Property and failed to make reasonable efforts to determine his correct mailing address and to notify him of the upset sale.

A hearing was held on Shubeck's objections on February 29, 2016. By order dated May 31, 2016, we granted the objections and invalidated the September 25, 2015 upset tax sale. The Bureau appealed our decision on June 23, 2016, and filed a timely Concise Statement of the Matters Complained of on Appeal in response to our Rule 1925(b) order dated June 28, 2016.

DISCUSSION

The Real Estate Tax Sale Law ("Act"), Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §§5860.101-5860.803, requires in Section 602 three forms of notice be provided before a delinquent taxpayer's real estate can be sold for unpaid taxes: by publication, posting and certified mail. 72 P.S. §5860.602. The notice provisions of the Act are strictly construed and strict compliance with each is required to guard against deprivation of property without due process of law.

"A fundamental requirement of due process is that notice be 'reasonably calculated, under all the circumstances, to apprise in-

[1]Mr. Zavagansky used the terms "bushes" and "weeds" interchangeably, explaining there is no difference because "they're weeds and they're bushes." (N.T., p. 37.)

terested parties of the pendency of the action and afford them an opportunity to present their objections.' " **Famageltto v. County of Erie Tax Claim Bureau,** 133 A.3d 337, 345 (Pa. Commw. 2016) **(en banc)** (quoting **Mullane v. Central Hanover Bank & Trust Co.,** 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). In the context of tax sales, this requires, at a minimum, that "an owner of land be actually notified by [the tax claim bureau], if reasonably possible, before [the] land is forfeited by the state." **Tracy v. County of Chester, Tax Claim Bureau,** 507 Pa. 288, 297, 489 A.2d 1334, 1339 (1985). This standard requires tax claim bureaus "to conduct reasonable investigations to ascertain the identity and whereabouts of the latest owners of record of property subject to an upset sale for purposes of providing notice to that party." **Farro v. Tax Claim Bureau of Monroe County,** 704 A.2d 1137, 1142 (Pa. Commw. 1997). From an evidentiary perspective, once objections to a tax sale are filed averring the statutory notice provisions of the Act were not complied with, the burden shifts to the Bureau to prove that "it complied with all statutory notice provisions and applied common sense [sic] business practices in ascertaining proper addresses" where notice of the tax sale may be given. **Id.** at 1142; **Rinier v. Tax Claim Bureau of Delaware County,** 146 Pa. Commw. 568, 581, 606 A.2d 635, 641-42 (1992).[2]

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[2]The Act "impose[s] duties, not on owners, but on the agencies responsible for sales; and such of those duties as relate to the giving of notice to owners of [the] impending sales of their properties must be strictly complied with." **In re Return of Tax Sale by Indiana County, Tax Claim Bureau v. Clawson,** 39 Pa. Commw. 492, 498, 395 A.2d 703, 706 (1979). In **In re Consolidated Reports and Return by the Tax Claim Bureau of Northumberland County of Properties,** the Commonwealth Court stated:

> The notice provisions of the [Act] are designed to 'guard against deprivation of property without due process.' **Donofrio v. Northampton County Tax Claim Bureau,** 811 A.2d 1120, 1122 (Pa. Cmwlth.2002). Because the government actor attempting to take property bears the constitutional duty to provide notice prior to a tax sale, our inquiry into whether adequate notice was provided must focus 'not on the alleged neglect of the owner, which is often present in some degree, but on whether the activities of the Bureau comply with the requirements of the [Act].' **Smith v. Tax Claim Bureau of Pike County,** 834 A.2d 1247, 1251 (Pa. Cmwlth.2003).

132 A.3d 637, 644 (Pa. Cmwlth. 2016) **(en banc).** In addition, the appellate courts of this Commonwealth have often noted that the primary purpose of the

A. Adequacy of Posting

Section 602(e)(3) of the Act provides: "Each property scheduled for sale shall be posted at least ten (10) days prior to the sale." 72 P.S. §5860.602(e)(3). The Act does not specify the location, size or manner of posting, however, each should be viewed in light of the purpose of the posting: to notify the general public, as well as the owner, of the tax sale. **In re: Somerset County Tax Sale of Real Estate Assessed in the Name of Tub Mill Farms, Inc.,** 14 A.3d 180, 183 (Pa. Commw. 2010) (quoting **O'Brien v. Lackawanna Co. Tax Claim Bureau,** 889 A.2d 127, 128 (Pa. Commw. 2005)), **appeal denied,** 611 Pa. 657, 26 A.3d 484 (2011).[3] Accordingly, "the method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of [the] intended real property sale." **Id.** at 184 (quoting **Wiles v. Washington County Tax Claim Bureau,** 972 A.2d 24, 28 (Pa. Commw. 2009)). Further, "in order to constitute posting that [is] reasonable and likely to ensure notice ... the posting must be conspicuous, attract attention, and be placed there for all to observe." **Id.** (quoting **Ban v. Tax Claim Bureau of Washington County,** 698 A.2d 1386, 1389 (Pa. Commw. 1997)). In addition, the posted notice must be securely attached. **Wiles v. Washington County Tax Claim Bureau,** 972 A.2d 24, 28 (Pa. Commw. 2009).

Here, Mr. Zavagansky testified that the Property was covered with tall weeds and that he posted the Property by making a tear in the paper Notice of Sale and then slipped this notice onto one

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tax sale laws is to ensure the collection of taxes, not to strip away citizens' property rights, **Rivera v. Carbon County Tax Claim Bureau,** 857 A.2d 208, 214 (Pa. Commw. 2004), **appeal denied,** 583 Pa. 692, 878 A.2d 866 (2005), and that "[t]he strict provisions of [the Act] were never meant to punish taxpayers who omitted through oversight or error ... to pay their taxes." **In re Return of Sale of Tax Claim Bureau,** 366 Pa. 100, 107, 76 A.2d 749, 753 (1950).

[3]Because of this dual purpose, while actual notice of a pending tax sale is often said to waive strict compliance with the notice requirements of the Act, this is not generally true where the defect is one of posting the property. In **In re: Somerset County Tax Sale of Real Estate Assessed in the Name of Tub Mill Farms, Inc.,** the court stated:

> [E]ven when a property owner receives actual notice of a tax sale, a defect in the posting may nevertheless require a court to overturn a tax sale. The reason for such a result is that the posting notice serves the function of notifying the general public, as well as the owner, of a tax sale.

14 A.3d 180, 183 (Pa. Commw. 2010) (quoting **O'Brien v. Lackawanna County Tax Claim Bureau,** 889 A.2d 127, 128 (Pa. Commw. 2005)).

of the weeds near the front of the Property by the sidewalk. (N.T., pp. 33-34, 47-48.) Mr. Zavagansky did not testify as to the type or size of the weed or how secure the posting was. He did not testify as to how sturdy the weed was, the dimensions of the notice, the size print on the notice, the height at which the notice was posted, how visible or legible the posting was from the front of the property, or whether the weed obstructed in any way the visibility of the notice. Absent such evidence, particularly given the inevitable questions raised by posting notice on a weed, the Bureau failed to meet its burden of establishing that the notice was conspicuous, **i.e.,** reasonably likely to inform the taxpayer and public of the sale. **Cf. O'Brien v. Lackawanna County Tax Claim Bureau,** 889 A.2d 127 (Pa. Commw. 2005) (holding that a notice that was printed on standard letter-size paper, but which was folded into thirds and wrapped around a small branch on a tree next to a road that was not passable, did not satisfy the reasonable notice standard).[4]

B. Additional Notification Efforts

Section 5860.602(e)(1) and (2) of the Act requires that at least thirty days before the date of sale, the Bureau provide notice of the sale to the owner "by United States Certified Mail, restricted delivery, return receipt requested, postage prepaid," and that if the return receipt is not received from the owner, then, at least ten days before the date of sale, notice of the sale be given to the owner by "United States first class mail, proof of mailing, at his last known post office address by virtue of the knowledge and information possessed by the bureau, by the tax collector for the taxing

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[4]Effective June 17, 2016, the Act was amended to include definitions for the words "posted" and "posting." **See** Act of December 20, 2015, P.L. 487. As defined in this amendment, for unimproved property the amendment provides:

> ...
>
> (2) In the case of property containing no assessed improvements, affixing notices as required by this act:
>
> (i) To a stake secured on or adjacent to the property, within approximately twenty-five (25) feet of any entrance to the property in a manner situated to be reasonably conspicuous to both the owner and the general public.
>
> (ii) Adjacent to the property line, on a stake secured on or adjacent to the property in a manner reasonably conspicuous to the owner and the general public in cases in which subclause (i) does not apply.

72 P.S. §5860.102 (Definitions).

district making the return and by the county office responsible for assessments and revision of taxes." 72 P.S. §860.602(e)(1), (2). Further, in the case of an unclaimed notice of sale sent by certified mail, "the bureau must exercise reasonable efforts to discover the whereabouts of such person or entity and notify him." 72 P.S. §5860.607a(a). The additional efforts required to be made by the Bureau under Section 607.1(a) are in addition to the mailing, posting and publication notices required under Section 602. **In re Tax Sale of Real Property Situated in Jefferson Township, Somerset County,** 828 A.2d 475, 477 n.5 (Pa. Commw. 2003) (quoting 72 P.S. §5860.607a(b)).

Section 607.1(a) (Additional Notification Efforts) of the Act provides:

> **When any notification of a pending tax sale** or a tax sale subject to court confirmation is required to be mailed to any owner, mortgagee, lienholder or other person or entity whose property interests are likely to be significantly affected by such tax sale, and such mailed notification **is** either **returned without the required receipted personal signature of the addressee** or under other circumstances raising a significant doubt as to the actual receipt of such notification by the named addressee or is not returned or acknowledged at all, then, before the tax sale can be conducted or confirmed, **the bureau must exercise reasonable efforts to discover the whereabouts of such person or entity and notify him. The bureau's efforts shall include, but not necessarily be restricted to,** a search of current telephone directories for the county and **of the dockets and indices** of the county tax assessment offices, recorder of deeds office and prothonotary's office, as well as contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property. **When such reasonable efforts have been exhausted,** regardless of whether or not the notification efforts have been successful, **a notation shall be placed in the property file describing the efforts made and the results thereof,** and the property may be rescheduled for sale or the sale may be confirmed as provided in this act.

72 P.S. §5860.607a(a) (emphasis added).

As previously stated, the notice of sale sent to Shubeck by the Bureau on July 1, 2015, by certified mail addressed to 108 West Mill Street in Nesquehoning was returned unclaimed. Consequently, upon the return of this notice, the Bureau was required under Section 607.1(a) to conduct, at a minimum, a search of those sources of information enumerated therein, understanding that the statutory standard is a "reasonable search," one not necessarily limited to those sources itemized in the statute. 72 P.S. §5860.607a(b); **Famageltto, supra** at 344; **Maya v. County of Erie Tax Claim Bureau,** 59 A.3d 50, 55 (Pa. Commw. 2013).

Thus, "even technical compliance with the statute may not always satisfy the demands of due process since the [Act] states the **minimum effort** to be done by a tax claim bureau." **In re Consolidated Reports and Return by the Tax Claim Bureau of Northumberland County of Properties,** 132 A.3d 637, 644 (Pa. Commw. 2016) **(en banc)** (citation and quotation marks omitted) (emphasis in original). **See also, Geier v. Tax Claim Bureau of Schuylkill County,** 527 Pa. 41, 47, 588 A.2d 480, 483 (1991) (holding that "even though the Bureau technically complied with the notice requirements of the tax sale statute, the Bureau failed to satisfy the demands of due process in conducting the sale"); **Krawec v. Carbon County Tax Claim Bureau,** 842 A.2d 520, 523-25 (Pa. Commw. 2004) (holding that a tax claim bureau failed to exercise reasonable efforts notwithstanding its search of the records required by Section 607.1(a) to be examined within the county where the property was located and declaring the tax sale of property in Carbon County void when the Bureau failed to make inquiry of the Register of Wills of Philadelphia County to determine whether a will had been probated for a deceased owner whose last known address was in Philadelphia and who the Bureau knew had died).

The search required by Section 607.1(a) must be conducted "regardless of the correctness of the address to which the Bureau sent the notices." **Maya, supra** at 57 (quoting **Grove v. Franklin County Tax Claim Bureau,** 705 A.2d 162, 164 (Pa. Commw. 1997)). Nor is the Bureau's obligation to conduct this search excused even though such efforts would have been futile "because it is the reasonableness of the effort that is important, not whether

it would have led to the discovery of [another] address." **Id.** at 57 (citing **Steinbacher v. Northumberland County Tax Claim Bureau,** 996 A.2d 1095, 1099 (Pa. Commw. 2010) and quoting **Rice v. Compro Distributing, Inc.,** 901 A.2d 570, 577 (Pa. Commw. 2006)); **see also, Jones v. Flowers,** 547 U.S. 220, 231, 126 S. Ct. 1708, 1717, 164 L. Ed. 2d 415 (reasoning that "the constitutionality of a particular procedure for notice is assessed **ex ante** rather than **post hoc.**").

To establish what efforts were made to locate Shubeck after the certified mailing of the notice of sale was returned unclaimed, the Bureau placed in evidence a one-page document entitled "ADDITIONAL NOTIFICATION EFFORTS—Upset Sale: September 25, 2015." (County Exhibit No. 3, p. 2.) This document is divided into separate sections, one for each source of information listed in Section 607.1(a) to be searched, and with the exception of the Recorder of Deeds Office, each section provides a space to insert the date when the source was searched, a space for the initials of the person conducting the search, and a space for one of two results to be checked, selecting whether the source had the same address as that used by the Bureau in its certified mailing or had no listing. The form also contains space for the Bureau to document other sources it may have checked and to similarly disclose the results of each such search as is done for the sources listed in Section 607.1(a), as well as a final line which states simply: "**Rec. of Deeds:** researched on a monthly basis."

As completed, the results of the Bureau's search which appear on Exhibit 3 reflect that the same address for Shubeck was found by the Bureau in its search of the Assessment Office, Prothonotary's Office, review of its own records, and contact with the tax collector as that used in the Bureau's certified mailing. The form also indicates that no listing for Shubeck existed in either the county or local telephone directory[5] and that there were no notes in the Tax Claim Office to be checked. As pertains to the Recorder of

[5] Contrary to Exibit 3, the Bureau's Director testified that review of the county and local telephone directories contained listings for Shubeck and showed his address to be the same one used by the Bureau in its mailings. (N.T., p. 12.) On this point we believe the Director was clearly in error: Shubeck used a cell phone only and did not maintain a listing in any telephone directory. (N.T., p. 40.) Later, the Director corrected her testimony on this issue. (N.T., p. 22.)

Deeds Office, Exhibit 3 is silent as to who, if anyone, searched these records, when, and what the results were.

The Additional Notification Efforts checklist was introduced into evidence during the testimony of the Bureau's Director. Because the Director did not personally conduct any of the searches, she was unable to explain what dockets and indices were reviewed in the various recording offices; what, if anything, those records revealed; or whether any entries were actually located in either the county or local phone directories which may have assisted in locating Shubeck. (N.T., pp. 18-20, 23-24.) Specifically, the Director could not explain whether the search results of the Prothonotary's Office revealed that Shubeck's home was then being foreclosed upon and that service by the Sheriff had been made at Shubeck's place of employment, J&R Slaw.

With respect to the telephone directory, Shubeck testified that he did not have a listing since he used a cell phone, but that his father, with whom he resided in Nesquehoning, was listed under the name of either Robert Shubeck or Robert L. Shubeck. (N.T., pp. 38, 40, 45.) The Director testified that under either listing, no call would have been placed to check on Shubeck's address since neither listing contains Shubeck's middle initial "J" and the Act does not require that a call be made, only that the telephone directory be checked for an address. (N.T., pp. 17, 19, 24.) The Director also testified that if Shubeck's cell phone number had been written down and retained as Shubeck testified he was told would happen, this would be noted in the Bureau's file for the Property, yet not only was no telephone number written in the file, no notes whatsoever were discovered. (N.T., pp. 17, 19-20.)

In granting Shubeck's objections to the tax sale, we determined the Bureau had failed to exercise reasonable efforts to locate Shubeck after the certified mailing of the notice of sale was returned unclaimed. Section 607.1(a) requires that the dockets and indices of both the Recorder of Deeds and Prothonotary's Offices be examined and that a notation be placed in the property file describing the efforts made and the results thereof. As to the records in the Recorder of Deeds Office, the Bureau's records as evidenced by Exhibit 3, p. 2, indicate, at most, that the Recorder of Deeds' records are to be researched on a monthly basis, however, they

do not evidence that this was in fact done for Shubeck's property, when the most recent search was made after the certified mail was returned unclaimed, or what the results of that search were.[6] As to the Prothonotary's Office, what records were examined and what was found is not disclosed. (N.T., pp. 18-19.) Yet it is clear that had a reasonable search been done, the fact that Shubeck's former residence, **i.e.** 108 West Mill Street, was in foreclosure should have been discovered and the fact that the complaint in this suit was served on Shubeck at his place of employment would appear there and could have been investigated to track down Shubeck. **Cf. Parkton Enterprises, Inc. v. Krulac,** 865 A.2d 295 (Pa. Commw. 2005) (affirming the trial court and holding that a reasonable investigation to find the current owner required the tax claim bureau to inquire into the identity of the purchaser of that property at a sheriff's sale conducted less than one month before the scheduled tax sale); **In re Tax Claim Bureau of Beaver County Tax Sale September 10, 1990,** 143 Pa. Commw. 659, 667, 600 A.2d 650, 654 (1991) (reversing the trial court and finding "reasonable efforts" to locate wife who continued to hold an interest with her ex-husband in the marital residence which was the subject of the upset tax sale and where her ex-husband still resided had not been made by the tax claim bureau, in part, because the bureau failed to find wife's current mailing address in Florida in its Section 607.1(a) search of the records of the owners' divorce proceedings filed in the Prothonotary's Office). With respect to the telephone directories, whether the listing was for "Robert Shubeck" or "Robert L. Shubeck," common sense dictates that a reasonable investigation intent on ascertaining the accuracy of the address the Bureau maintained in its records for where Shubeck currently resided would have followed up on this lead.

The reasonableness of the Bureau's investigation is further called into question by the fact that the posting of the Property was done by Michael Zavagansky, a deputy sheriff in the same office that served Shubeck with the complaint in the mortgage foreclo-

[6]Moreover, while testifying to the efforts it undertook to find Shubeck's current address, the Bureau's Director never testified that the records in the Recorder of Deeds Office were checked. (N.T., p. 12.)

sure proceedings, and that Shubeck was then under supervision by the Carbon County Adult Probation Office for a crime committed in Carbon County, yet no check was made of any of these offices (**i.e.,** Sheriff, Adult Probation or Clerk of Courts), all of which, like the Prothonotary's Office, are located in the Carbon County Courthouse. (N.T., pp. 20-21, 43-44.) Further questioning the reasonableness and accuracy of the Bureau's search, is Shubeck's testimony, which we accepted as credible, that upon receiving the Bureau's reminder notice dated February 2, 2015, advising that unless the 2013 taxes were paid the Property would be sold, Shubeck telephoned the Bureau's office, spoke with a representative therein, provided his cell phone number, and was assured his number would be retained, yet according to Exhibit 3, when the Bureau examined its own records, not only was no telephone number found, no notes of any nature existed. (County Exhibit No. 3.)

Because the reasonableness of the Bureau's additional efforts search was clearly suspect, we did not err in determining that reasonable efforts were not made and that the Bureau did not meet its burden of exercising common-sense business practices in ascertaining a valid address at which to notify Shubeck of the pending tax sale. **Cf. Maya, supra** at 56 (holding that the trial court properly exercised its discretion in rejecting the bureau's "Additional Notification Efforts" which was found to be unreliable and lacking in trustworthiness).[7]

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[7] The Bureau's claim that Shubeck had actual notice of the tax upset sale by virtue of the reminder letter dated February 2, 2015, which Shubeck admitted he received and, therefore, strict compliance with the notification provisions of the Act was unnecessary, is without merit. This reminder letter did not state the time, date, location, or terms of the sale as required by Section 602(a) of the Act, 72 P.S. §5860.602(a). The letter merely stated that the 2013 taxes were overdue and that if Shubeck failed to make payment by June 30, 2015, the Property would be scheduled for sale. Thus, Shubeck's receipt of this delinquency notice did not establish actual notice of the tax sale. **In re: York County Tax Claim Bureau,** 3 A.3d 765, 768 (Pa. Commw. 2010) (citing **Jones v. Flowers,** 547 U.S. 220, 232-33, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) for the principle that "a property owner's actual notice of a tax **delinquency** is [insufficient] to establish actual notice of a tax **sale**"), **disapproved of on other grounds by Horton v. Washington County Tax Claim Bureau,** 623 Pa. 113, 127, 81 A.3d 883, 892 (2013) (emphasis in original).

CONCLUSION

Because the sale of property at tax sale transfers title to property, often at only a fraction of its value, due process requires that an owner be provided due notice of the pending sale and an opportunity to cure the delinquency before his ownership interest in the property can be terminated. It is with this goal in mind that the notice provisions of the Act are strictly enforced. In the upset tax sale of Shubeck's property, because the Bureau did not comply with the posting requirements of Section 602(e)(3) of the Act, 72 P.S. §5860.602(e)(3), or make reasonable efforts to ascertain if there was another address at which Shubeck would be more likely to receive actual notice of the pending tax sale as required by Section 607.1(a) of the Act, 72 P.S. §5860.607a(a), and due process, our decision to set aside this sale was not only an appropriate exercise of discretion, but one required by law.[8]

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[8]As a final matter, the Bureau claims we erred in granting Shubeck's objections because Shubeck failed to submit a post-hearing memorandum as directed by the Court. This claim is based on a false predicate and misstates what occurred at the hearing. After all evidence had been presented, the Court questioned counsel about what the evidence established. During the course of this discussion, the Court expressed its belief that the Bureau's Additional Notification Efforts checklist, Exhibit 3, did not evidence that the Recorder of Deeds Office had been contacted after the certified mailing of the Notice of Sale to Shubeck was returned unclaimed and that the only testimony presented about what additional efforts were made by the Bureau to locate Shubeck was that of the Bureau's Director who made no mention of any search of the Recorder of Deeds Office. (N.T., pp. 65, 69.) While not conceding this deficiency, the Bureau's counsel argued that even if this were the case, Shubeck's admission to having received the Bureau's reminder letter of February 2, 2015 (Court Exhibit No. 1) evidenced actual notice such that strict compliance with the notification requirements of the Act was not required, even though this letter did not state when the tax sale would occur. (N.T., p. 70.) After the Court stated its intention to find that the evidence failed to support that a reasonable search of the Recorder of Deeds Office had been conducted as required by Section 607.1(a) of the Act and that Court Exhibit No. 1 did not establish actual notice because it failed to provide notice of the date of the tax sale, the Bureau's counsel requested an opportunity to research whether Court Exhibit No. 1 was sufficient to import actual notice of the tax sale to Shubeck. In granting this request, we also allowed Shubeck's counsel fifteen days to respond. A memoranda of law was submitted by the Bureau on March 9, 2016, however, no response was filed by Shubeck. The Bureau has pointed to no rule, statute or case holding that when an objector to a tax sale fails to submit post-hearing legal authority in response to an issue raised by the Court which the Bureau requested an opportunity to brief after being advised of the Court's intention to rule against the Bureau, the objector somehow forfeits a ruling in his favor. The issue, we believe, when properly stated, answers itself and has no merit.

COMMONWEALTH of PENNSYLVANIA
vs. JAMES V. KUTCHERA, JR., Defendant

Criminal Law—Sentencing—Sentencing Code, Section 9760(1)—Entitlement to Credit for "Time Spent in Custody" Before Sentencing—Meaning of the Term "Custody"—Functional Equivalent of Incarceration—Mandatory Credit for Court-Ordered Institutionalized Rehabilitation and Treatment Programs—Discretionary Credit for Voluntary Inpatient Treatment in a Drug or Alcohol Facility

1. A criminal defendant who is placed in custody on charges for which he is later sentenced is entitled to credit for all time spent in custody against any prison sentence imposed on such charges.

2. Section 9760(1) of the Sentencing Code provides that a defendant be given credit for "all time spent in custody as a result of the criminal charge for which a prison sentence is imposed." At a minimum, Section 9760(1) requires that a defendant is entitled to credit for all time spent in prison prior to sentencing on the offense for which he was placed in custody.

3. The meaning of the word "custody" in Section 9760(1) of the Sentencing Code extends beyond imprisonment alone, with imprisonment being but one form of custody.

4. Presentencing constraints on a defendant's freedom imposed by a court which are the functional equivalent of those existing in a prison, if unilaterally and independently imposed by the court, constitute "custody" as that term is used in Section 9760(1) of the Sentencing Code and entitle the defendant to credit against a prison sentence. Consequently, a defendant who is court-ordered to confinement in an institutional rehabilitation or treatment facility before being sentenced, which facility strictly supervises its residents and confines them to the grounds of the facility, is entitled to credit for such time spent in rehabilitation or treatment.

5. A defendant who voluntarily admits himself into a long-term inpatient treatment program prior to sentencing is not automatically entitled to credit, as a matter of right, for the time spent in inpatient treatment; however, if the treatment was provided in an "institutional setting" with restrictions placed on the defendant tantamount to those which exist in prison, it is within the trial court's discretion to grant credit for the time spent in inpatient treatment.

6. Whether a defendant is entitled to credit, as a matter of right, for time spent in an inpatient drug or alcohol treatment and rehabilitation facility which occurs in an "institutional setting" with restrictions which are the functional equivalent of imprisonment is determined by whether the defendant was court-ordered into inpatient treatment or voluntarily admitted himself for treatment.

7. Bail conditions which coerce a defendant into an inpatient treatment program only to avoid pretrial imprisonment is the equivalent of court-ordered treatment such that the defendant is entitled to credit for this time against a prison sentence. In contrast, where the defendant requests a change in bail conditions to allow the defendant's admission into an inpatient treatment facility and the court accommodates the defendant's

request by reducing the monetary amount of bail to a nominal figure, but conditions defendant's release from jail on admission into an inpatient treatment program, because the impetus for treatment and the request to be placed in an inpatient facility originates with the defendant, whether the defendant is granted credit for any time spent in inpatient treatment rests in the sound discretion of the trial court.

NOS. 1207 CR 13, 225 CR 14, 330 CR 14,
414 CR 14, 419 CR 14, 538 CR 14

SETH E. MILLER, Esquire, Assistant District Attorney—Counsel for Commonwealth.

ADAM R. WEAVER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P. J.—October 31, 2016

Is a criminal defendant entitled to receive credit against his sentence for time spent in treatment in a privately-run drug or alcohol facility? Or is the decision within the sentencing court's discretion? Does the answer depend on whether the defendant voluntarily enters the facility on his own or is court-ordered to do so? And does the nature or extent of the restrictions placed on a resident make a difference?

These questions are at the heart of Defendant's appeal in this case.

FACTUAL AND PROCEDURAL BACKGROUND

On May 26, 2016, the Defendant, James V. Kutchera, Jr., pled guilty to four counts of driving under the influence (drug-related),[1] one count of possession with intent to deliver[2] and one count of theft,[3] as detailed below:

Case No.	Date of Offense	Plea	Grade of Offense	Sentence Imposed
1207 CR 2013	7/6/13	DUI	M-1	6 months to 5 years, SCI
538 CR 2014	11/14/13	DUI	M-1	1 to 5 years, SCI

[1] 75 Pa. C.S.A. §3802(d)(1).

[2] 35 P.S. §780-113(a)(30).

[3] 18 Pa. C.S.A. §3921(a).

330 CR 2014	11/21/13	DUI	M-1	1 to 5 years, SCI
225 CR 2014	11/22/13	Theft	M-1	6 months to 2 years less 1 day, SCI
419 CR 2014	1/11/14	DUI	M-1	1 to 5 years, SCI
414 CR 2014	1/30/2014 to 1/31/2014	PWID	F	1 year less 1 day to 2 years less 1 day, SCI

Defendant was sentenced on August 8, 2016, to an aggregate term of imprisonment of 2 years to 12 years less one day in a state correctional institute, against which he was granted 318 days' credit, consisting of 27 days spent at White Deer Run for inpatient treatment and detoxification (N.T., 8/8/16, p. 41) and 291 days' in the Salvation Army's Four Step Program.[4] Defendant's motion to modify this sentence to include additional credit for his participation in extended optional rehabilitation was denied by order dated August 29, 2016, followed by Defendant's appeal taken on September 6, 2016. In this appeal, Defendant claims we erred in denying his request for an additional 373 days' credit: 310 days for time spent in the Salvation Army's Extended Alumni Program between February 28, 2015 and January 4, 2016, and 63 days spent in the Joy of Living Recovery Program from January 20, 2016 to March 23, 2016. (**See** Defendant's Concise Statement of Matters Complained of on Appeal Pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure.)

DISCUSSION

Defendant is twenty-nine years old. The offenses to which he pled guilty occurred during a period of slightly less than seven months and were all drug-related. To Defendant's credit, he recognized his addiction and before being sentenced or spending time in prison for any of these charges voluntarily entered an inpatient detoxification program at White Deer Run in Allenwood, Penn-

[4] In addition, in the case docketed to No. 414 CR 2014, Defendant was allowed 42 additional days' credit for time spent in jail between the date of his arrest on March 18, 2014, and his release on bail on April 28, 2014.

sylvania, where he received treatment from February 12, 2014 to March 10, 2014. After he was arrested on March 18, 2014, in the case docketed to No. 414 CR 2014 for possession with intent to deliver and before he was released on bail on April 28, 2014, Defendant requested permission from the Court to participate in a long-term treatment program at the Salvation Army. (**See** Defendant's Petition filed on April 7, 2014, requesting permission for Defendant to enter a long-term treatment program of six months or more, Paragraph 5.)[5] The bail conditions subsequently imposed by the Court accommodated this request and allowed Defendant to enter the Salvation Army's basic rehabilitation program on May 13, 2014, which he successfully completed on February 27, 2015. The treatment Defendant later received in the Salvation Army's Extended Alumni Program and the Joy of Living Recovery Program was voluntarily undertaken by Defendant and was not court-ordered.

As a general rule, a defendant is entitled to credit for all time spent in jail prior to sentencing attributable to the offense for which he is sentenced. Specifically, Section 9760(1) of the Sentencing Code provides as follows:

> §9760. Credit for time served
>
> ...
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa. C.S.A. §9760(1). Under this section, if before being sentenced to a period of imprisonment, the defendant has been held in prison on the same charge for which he is sentenced, he has an

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[5] This **pro se** petition was filed in the cases then pending before the Court, those docketed to Nos. 1207 CR 2013, 225 CR 2014 and 330 CR 2014 (MJ-56302-CR-0000370-2013), and case numbers 414 CR 2014 (MJ-56303-CR-0000054-2014) and 419 CR 2014 (MJ-56301-CR-0000088-2014), then pending before the magisterial district courts.

unquestioned right to receive sentencing credit for the time spent in prison. **Commonwealth v. Kyle,** 582 Pa. 624, 632, 874 A.2d 12, 17 (2005).

Nevertheless, because the meaning of the word "custody" in Section 9760(1) extends beyond imprisonment alone, with imprisonment being but one type of custody, **id.** at 636, 874 A.2d at 19 (**citing Commonwealth v. Chiappini,** 782 A.2d 490 (Pa. 2001)), the more difficult question is, excepting imprisonment, what restrictions, if any, on a defendant's freedom of movement are tantamount to presentence custody for which credit is due. Nonmonetary conditions of release on bail pending trial or sentencing which require reporting or impose travel restrictions, or which otherwise subject a defendant to supervision while the defendant remains free on bail, including home confinement, with or without electronic monitoring, do not count. **Id.** at 639-40, 874 A.2d at 21-22. As expounded by **Kyle,** such constraints are not the functional equivalent of those existing in an institutional setting and, therefore, do not meet the statutory requirement of "custody" under Section 9760. **Id.** at 634, 874 A.2d at 18 (**citing Commonwealth v. Shartle,** 438 Pa. Super. 403, 652 A.2d 874, 877 (1995), **appeal denied,** 541 Pa. 637, 663 A.2d 690 (1995)). In contrast, time spent in institutionalized rehabilitation and treatment programs which strictly supervise patients, monitor progress, and confine patients to the treatment facility is "time spent in custody" for purposes of Section 9760. **Commonwealth v. Conahan,** 527 Pa. 199, 202, 589 A.2d 1107, 1109 (1991); **Kyle, supra** ("Courts have interpreted the word 'custody,' as used in Section 9760, to mean time spent in an institutional setting such as, at a minimum, an inpatient alcohol treatment facility."). Therefore, if a defendant is court-ordered to confinement in an institutional treatment facility before being sentenced, he is entitled to credit for the time spent in treatment. **Commonwealth v. Conahan, supra.**

But suppose a drug-addicted defendant facing a long prison sentence finally comes to grips with the reality of his addiction, realizes that if he doesn't change course he will likely die, and, with the support of his family, voluntarily enters a long-term inpatient treatment program to save his life. He does well in the program,

successfully completes the program, and, at sentencing, seeks credit for the time he was in inpatient treatment. As a matter of law is he automatically entitled to credit for the time he voluntarily spent in inpatient treatment? No. **See Commonwealth v. Conahan, id.** at 204, 589 A.2d at 1110. May the sentencing court within its discretion grant credit for this time voluntarily spent at an institutionalized rehabilitation facility? Yes. **Id.; see also, Commonwealth v. Mincone,** 405 Pa. Super. 599, 592 A.2d 1375 (1991) **(en banc)** (discussing **Conahan**).

In **Conahan,** the defendant was convicted for the second time of driving under the influence and under the laws as they then existed was required to be sentenced to a mandatory minimum term of imprisonment of not less than 30 days. Before pleading guilty to this offense, the defendant voluntarily entered and successfully completed inpatient treatment for alcoholism in three hospitals over a period of 95 consecutive days. The trial court sentenced the defendant to imprisonment for a minimum of 30 days and a maximum of one year but, pursuant to 42 Pa. C.S.A. §9760, credited the defendant for 95 days of "custodial treatment" and granted immediate parole.

On appeal by the Commonwealth, the Superior Court reversed, finding that because defendant's confinement was not involuntary and because inpatient alcohol treatment was not the same as imprisonment, the defendant was not entitled to credit for this treatment. On review by our Supreme Court, the Supreme Court reversed and held that while the defendant was not entitled **as a matter of right** to credit for the time spent in inpatient treatment, because the treatment he received took place in an "institutional setting" and the restrictions placed on his liberties were sufficient to constitute "imprisonment," it was within the trial court's **sound discretion** to grant the defendant credit for the inpatient institutional rehabilitation he received. **Conahan, supra** at 202, 589 A.2d at 1109.[6]

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[6]In **Commonwealth v. Conahan,** 527 Pa. 199, 589 A.2d 1107 (1991), defendant's conviction of driving under the influence required that he be imprisoned for a minimum of 30 days. At the time the defendant in **Conahan** was sentenced, intermediate punishment as an alternative to imprisonment did not exist and,

In **Commonwealth v. Cozzone,** 406 Pa. Super. 42, 593 A.2d 860 (1991), as a condition of defendant's release on bail for his second driving under the influence offense, he entered an inpatient alcohol treatment center where he remained for 32 days. Defendant pled guilty to the offense, was sentenced to a term of imprisonment of not less than 30 days nor more than 23 months, and was given no credit for the time spent in inpatient treatment prior to his guilty plea.

In **Cozzone,** the circumstances preceding defendant's bail were that he failed to appear for a preliminary hearing, a warrant for his arrest was issued, and an explicit condition of his release on bail in lieu of being committed to the county prison was that he admit himself to an alcohol treatment facility. Given this background, the **Cozzone** court found the defendant did not voluntarily admit him-

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therefore, for the defendant to be given credit for his time in treatment the court needed to determine whether defendant's inpatient rehabilitation qualified as imprisonment. In answering this question, the court first found that Section 9760 "time spent in custody" includes time spent in institutionalized rehabilitation and treatment programs, **id.** at 202, 589 A.2d at 1109, and further that " 'institutionalized' rehabilitation is sufficient 'custody' for purposes of crediting 'time served' because it falls within the definition of 'imprisonment.' " **Id.** at 200, 589 A.2d 1108. This interpretation was premised on the statutory framework as it then existed when the defendant in **Conahan** was sentenced and the court's construction of the statutory term "imprisonment" to encompass not only punishment but the treatment of addiction.

Since **Conahan** was decided, the Sentencing Code was amended to permit a sentencing court to impose a sentence of intermediate punishment in lieu of a mandatory prison sentence for defendants convicted of driving under the influence. **See** 42 Pa. C.S.A. §9721(a)(6) (sentencing generally) and 9763(c) (stating that a defendant convicted of DUI may be sentenced to county intermediate punishment in a residential inpatient program or residential rehabilitation center, or to house arrest with electronic surveillance combined with drug and alcohol treatment). With the enactment of Section 9763(c), the Legislature has evidenced its intent that imprisonment and intermediate punishment are mutually exclusive sentencing options available to the court in driving under the influence cases and are to be treated differently. **Commonwealth v. Koskey,** 571 Pa. 241, 247, 812 A.2d 509, 514 (2002). With this development, whether **Conahan** would be decided the same today where a convicted driving under the influence offender facing a mandatory minimum prison sentence is sentenced to neither actual confinement in a prison or intermediate punishment is an open question. **See also, Commonwealth v. Mendez,** 749 A.2d 511, 512 (Pa. Super. 2000) (equating inpatient rehabilitation as a form of intermediate punishment, citing 42 Pa. C.S.A. §9763(b)(7)).

self for treatment but did so only to avoid pretrial imprisonment, thus making the case distinguishable from **Conahan,** where the defendant voluntarily admitted himself into a treatment facility. Finding the time the defendant spent in inpatient treatment was "time spent in custody" within the contemplation of 42 Pa. C.S.A. §9760(1), the Superior Court held the defendant was entitled to credit for this time against his prison sentence.

In **Commonwealth v. Toland,** in reviewing and analyzing the decisions in **Cozzone** and **Conahan,** the court stated:

> Looking at these cases together, therefore, it seems that whether a defendant is entitled to credit for time spent in an inpatient drug or alcohol rehabilitation facility turns on the question of voluntariness. If a defendant is ordered into inpatient treatment by the court, **e.g.,** as an express condition of pre-trial bail, then he is entitled to credit for that time against his sentence. **Cozzone.** By contrast, if a defendant chooses to voluntarily commit himself to inpatient rehabilitation, then whether to approve credit for such commitment is a matter within the sound discretion of the court. **Conahan. See also Commonwealth v. Mincone,** 405 Pa.Super. 599, 592 A.2d 1375 (1991) **(en banc)** (trial court may exercise its discretion in determining whether to grant defendant credit towards his mandatory minimum sentence of imprisonment for time voluntarily spent at Gateway Rehabilitation Center, an institutionalized rehabilitation facility) (discussing **Conahan, supra**).

Commonwealth v. Toland, 995 A.2d 1242, 1250-51 (Pa. Super. 2010), **appeal denied,** 612 Pa. 691, 29 A.3d 797 (2011).

In **Toland,** the magisterial district court imposed as a bail condition that defendant "shall enter and complete [a] comprehensive in-patient alcohol/drug treatment program." **Id.** at 1247. Despite this language in the bail bond, the trial court determined that defendant had voluntarily checked himself into inpatient treatment and was not entitled to credit. In affirming the trial court, the Superior Court found that the trial court's conclusion that defendant had voluntarily committed himself to residential

rehabilitative treatment was supported by the record—upon release from prison, defendant did not immediately admit himself for treatment until one month after his release on bail, defendant continued his preliminary hearing numerous times to remain in treatment, and before defendant was found guilty he acknowledged that his entry into the inpatient treatment facility was not to avoid going to jail but to "save his life," claiming for the first time that he began treatment as a condition of bail only after the trial court denied him credit—and that the programs defendant entered were not custodial and did not rise to the level of "imprisonment." **Id.** at 1251; **see also, Commonwealth v. Shull,** 148 A.3d 820 (Pa.Super. 2016) (denying defendant's request for credit for pretrial time spent in inpatient treatment, notwithstanding that defendant's bail bond was modified to include as an additional condition of his release from jail that he remain in treatment at the facility where he voluntarily began treatment one week earlier and not leave unless accompanied by a facility employee or for the purpose of attending a court hearing; finding, as in **Toland,** that defendant had voluntarily admitted himself into a treatment facility "not to avoid pretrial detention but, instead, to acquire for himself the best treatment available for his addiction and medical difficulties.").

In Defendant's **pro se** Petition filed on April 7, 2014, Defendant admitted having voluntarily admitted himself for inpatient treatment at White Deer Run for twenty-seven days which ended on March 10, 2014, and that at the conclusion of this stay he was advised to enter a long-term treatment program, the basis for his request seeking court approval for admission into a long-term treatment facility for six months or more. In this Petition, Defendant expressly identifies the Salvation Army as the facility for which he was "waiting on a bed date" and also states that his father, mother and future wife supported his request. Implied, if not specifically stated in the Petition, is that his life and future depended on his getting long-term treatment.

On April 23, 2014, in response to Defendant's request, the magisterial district justice in the case docketed to No. 419 CR

2014 set bail at $1,000.00, 10%, and imposed as a condition of Defendant being released on bail that "Defendant must report to a Rehab within 30 days from today or bail will be revoked." Additionally, new charges in the cases docketed to Nos. 419 CR 2014 and 414 CR 2014, formed the basis for a petition to revoke Defendant's bail filed by the Carbon County Adult Probation Office on April 24, 2014, in the case docketed to No. 1207 CR 2013. By amended order dated April 28, 2014,[7] the Honorable Joseph J. Matika of this Court revoked Defendant's bail previously set at $5,000.00 unsecured; reset bail at $1,000.00, 10%; and noted that if bail was posted, Defendant would have "30 days from April 23, 2014,[8] to enter the Salvation Army Rehabilitation Center and successfully complete the program." On April 28, 2014, Defendant, through his mother, posted the $100.00 bail amount required for his release in each of the three cases for which a monetary bail condition had been imposed,[9] and was admitted into the Salvation Army's Four Step Program on May 13, 2014.

It is apparent from the sequence and timing of Defendant's Petition for admission into a long-term treatment facility filed on April 7, 2014, the nominal amount of bail set, the bail conditions set by the magisterial district judge on April 23, 2014, Judge Matika's order dated April 28, 2014, and the posting of Defendant's bail on April 28, 2014 by his mother, all of which allowed Defendant to enter into the Salvation Army's long-term program, that the courts were responding to Defendant's decision and request to be admitted into the Salvation Army's rehabilitation program. (N.T., 8/8/16, pp. 41-42.) Similar to the numerous continuances noted by the court in **Toland,** after Defendant entered the Salvation Army Program, he repeatedly applied to continue his plea date, which was unopposed by the District Attorney's office, to allow him to complete the Salvation Army's Four Step Program, and later to

[7]This order is identical to the original order filed on April 28, 2014, the only difference being to correct the date of the order.

[8]This is the same date and time period set by the magisterial district justice in the case docketed to No. 419 CR 2014.

[9]The three cases are those docketed to Nos. 1207 CR 2013, 414 CR 2014 and 419 CR 2014.

participate in and complete both the Extended Alumni Program and the Joy of Living Recovery Program. Though Defendant's treatment in both the Salvation Army's basic and extended rehabilitation programs was continuous, a sixteen-day break occurred between his completion of this treatment and his entry into the Joy of Living Recovery Program, a break which the **Toland** court construed as supporting the sentencing court's conclusion that notwithstanding the literal wording of the bail bond, defendant's receipt of inpatient treatment was voluntary.

With these considerations in mind, and in accordance with the cases cited above, we believe the instant case is more closely aligned with **Toland** and **Shull,** then with **Cozzone,** and that the decision to grant Defendant any credit for the treatment he received was one within our discretion, and not as of right. It was Defendant who initiated and requested he be allowed to participate in the Salvation Army Rehabilitation Program before the terms of his release on bail were changed to include rehabilitation, and it was Defendant who arranged to be admitted and thereafter voluntarily chose to remain in the program to better his life. Fairly stated, Defendant was not coerced into any treatment program by the bail conditions set by the Court; rather, the bail conditions were changed to accommodate Defendant's request to enroll in and attend a treatment program outside of the prison setting.

This notwithstanding, in exercising our discretion we in fact gave Defendant full credit for the 291 days he spent in the Salvation Army's Four Step Program between May 13, 2014 and February 27, 2015, and also full credit for the 27 days he spent in the inpatient detoxification program at White Deer Run from February 12, 2014 to March 10, 2014, before any bail conditions were set in relation to Defendant receiving treatment for his addiction. Moreover, this credit was granted not only in the case docketed to No. 419 CR 2014, but also in the cases docketed to Nos. 330 CR 2014, 414 CR 2014 and 538 CR 2014. In doing so, we accepted that Defendant was committed to addressing his addiction; that he had devoted a significant amount of time in rehabilitation which he had successfully completed and where

his life had been structured and his liberties restricted; and that Defendant appeared to have turned his life around and should be rewarded for his efforts.[10, 11]

In contrast to Defendant's completion of the Salvation Army's Four Step Program, not only was Defendant's participation in the Salvation Army's Extended Alumni Program and the Joy of Living Recovery Program also completely voluntary, his participation in these two programs was entirely optional on his

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[10] With respect to the restrictions placed on Defendant in the Four Step Program, it is important to note first that the Salvation Army is neither an inpatient facility nor is it a licensed treatment center. (N.T., 8/8/16, pp. 8, 10.) It is more accurately described as an adult rehabilitation center, with participants referred to as "beneficiaries," not patients. Participants are required to attend in-house individual and group counseling five to six days a week for an hour or two a day and to work for the Salvation Army forty hours a week as part of a work therapy program. (N.T., 8/8/16, pp. 9-10, 21.) The participants in the Salvation Army program are not paid for this work, but in exchange receive food, shelter, clothing and counseling. (N.T., 8/8/16, p. 9.) In Defendant's case, he worked on trucks and in the kitchen and was also allowed to leave the property and make house calls to collect donations for the Salvation Army. (N.T., 8/8/16, pp. 45-46.)

The four-step basic program at the Salvation Army takes approximately thirty weeks to complete. (N.T., 8/8/16, p. 19.) During the first phase, which is known as orientation and which lasts between twenty-eight (28) and thirty-five (35) days, the participant is unable to leave the property or to use a telephone. (N.T., 8/8/16, pp. 10-11.) During the next three steps, the participants are allowed to leave the property unescorted for pre-approved meetings or events and must return by set curfews: 10:00 p.m. for steps two and three, and 10:30 p.m. for step four. (N.T., 8/8/16, p. 11.) During their time away from the property, the participants are required to attend community-based self-help programs and outside fellowships (**e.g.,** Twelve Step Fellowships, Bible Studies, AA and NA Meetings) and are also allowed to visit and meet with family and to shop. (N.T., 8/8/16, pp. 11, 15, 46-47, 55.) Upon their return to the property, the participants are required to submit to a breathalyzer test. These steps are the same for all participants enrolled in the program, whether or not they have been charged with a crime. (N.T., 8/8/16, pp. 17-18.)

[11] In each of the six cases involved in this appeal, the Commonwealth and Defendant executed stipulations which provided that Defendant would be granted credit against his sentence for successful inpatient treatment. Although multiple stipulations with different dates appear in each case, the original of these stipulations bear dates of either June 17, 2014 or July 31, 2014 (**i.e.,** shortly after Defendant first entered the Salvation Army Program on May 13, 2014) and the most recent stipulations in each case are dated February 25, 2015 (**i.e.,** shortly before Defendant completed the Salvation Army's Four Step Program). Although we believe it significant that Defendant entered the Salvation Army Program before the first of the stipulations was agreed to, we believe these stipulations also

part and was not a requirement of successful completion of the basic program. Moreover, the restrictions placed on Defendant in these two programs were less onerous than those in the Four Step Program and were not so coercive as to constitute custody. (N.T., 8/8/16, pp. 12, 15-16.) In both of these programs, the Defendant was not locked in or confined to the facility; he was permitted to leave unescorted for appointments, work and leisure activities; if he chose to leave the program, he could do so without being physically restrained—albeit he would be terminated from the program; and if he left and did not return he would not be charged with escape. (N.T., 8/8/16, pp. 11-13, 15-24, 43-47, 55.)[12] **Cf. Commonwealth v. Fowler,** 930 A.2d 586 (Pa. Super. 2007) (affirming denial of credit time for time voluntarily spent

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provide an additional basis for the exercise of our discretion in awarding the Defendant credit for his successful completion of the Salvation Army's Basic Four Step Program. **Cf. Commonwealth v. Kriston,** 527 Pa. 90, 588 A.2d 898 (1991) (holding that while generally credit is not due against a prison sentence for time spent on home electronic monitoring, where a defendant has been assured by prison authorities that such time would be counted towards his minimum sentence, equitable considerations required that credit be awarded).

At the same time, we do not believe it was the intent of these stipulations that Defendant be granted credit for multiple and sequential treatment programs regardless of their duration. To find otherwise, would allow Defendant to game the system and control how much time he would spend in jail simply by continuing in treatment outside of a prison facility. It appears unlikely that such a result was reasonably contemplated by the parties at the time the stipulations were entered (N.T., 8/8/16, p. 52) and was certainly not what we understood the stipulations to mean or what we felt bound to follow at the time Defendant's pleas were taken. To the contrary, we believe our reading of the stipulations was reasonable and the 318 days of credit which we awarded for Defendant's long-term treatment in the Salvation Army's Four Step Program, combined with his treatment at White Deer Run, was both fair and just.

[12] In the Alumni Program, which provides participants with safe housing and is purely optional—most graduates of the Four Step Program do not continue with this extended time—participants often no longer work for the Salvation Army, but work off-site while living at the Salvation Army Center. (N.T., 8/8/16, pp. 19-23.) In this case, Defendant worked in an outside restaurant since February 2015. (N.T., 8/8/16, p. 21; Pre-Sentence Investigation Report dated June 13, 2016, p. 9.)

Similarly, as a resident in the Joy of Living Recovery Program, Defendant continued his employment with the same restaurant at which he was working in the Salvation Army's Alumni Program and had outside counseling available to him. This program, basically a recovery house, provided Defendant with a structured living environment, with an emphasis on rehabilitation through community service, and required sign in/out rosters and curfews.

in a drug treatment court program from which defendant was revoked, which he was permitted to opt out of at any time, and where defendant's stay was not so restrictive as to constitute custody; **e.g.,** defendant was not physically prevented from leaving the facility, at no time was defendant locked down, there were no bars in the windows, perimeter fencing of the premises was for privacy and not for security purposes, and individuals there as part of the county drug court program were treated no differently than other residents), **appeal denied,** 596 Pa. 715, 944 A.2d 756 (2008). By comparison, both these programs appear to more closely resemble home confinement restrictions for which credit is not allowed. **Kyle, supra** at 639, 874 A.2d at 21-22.

CONCLUSION

A criminal defendant is entitled to credit for time spent in custody before being sentenced. But, what constitutes custody? In jail? Of course. In inpatient treatment? If court-ordered, yes. If voluntarily entered by the defendant, the decision to grant or deny credit is within the discretion of the sentencing court.[13]

Bail restrictions which on their face condition release from prison on admission to an inpatient facility are more complicated. If the restrictions were imposed **sua sponte** by the court with the effect of coercing the defendant into treatment he would not otherwise have sought, the defendant is entitled to credit for the time spent in treatment. If instead the impetus for treatment originates with the defendant—oftentimes the defendant acknowledges his addiction and asks to be released into an inpatient facility for treatment—and the court in response to defendant's request imposes or modifies bail conditions to allow defendant to receive this treatment, defendant's entry into inpatient care may fairly be deemed

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[13] With respect to the exercise of this discretion by the sentencing court, the standard of review on appeal is well-settled:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision

Commonwealth v. Toland, 995 A.2d 1242, 1248 (Pa. Super. 2010) (citations omitted).

to be voluntary, with the nature of the restrictions placed on the defendant while in the treatment program, his commitment to the program, and whether he successfully completes the program being factors for the court to consider in exercising its discretion as to whether the defendant should be given credit against a prison sentence for his time spent in treatment.

Here, Defendant sought to be admitted to the Salvation Army's long-term treatment program for a period of six months or more. Defendant's bail conditions were set to accommodate this request and we considered all of Defendant's time spent in treatment to be voluntary. Our decision to grant Defendant credit for the 291 days he spent in the Salvation Army's Four Step Program—almost four months more than the six-month minimum he originally requested —as well as the 27 days he voluntarily spent at White Deer Run before any monetary conditions of bail were imposed, was well within our discretion. Further, the limited restrictions and supervision Defendant faced while at the Salvation Army's Extended Alumni Program and the Joy of Living Recovery Program, as well as the duration of these stays in the context of the credit already given, justified our denial of this additional credit.

COMMONWEALTH of PENNSYLVANIA
vs. KENNETH ALLEN WANAMAKER, JR., Defendant

Criminal Law—Enforcement of a Plea Agreement—Enforcement As a Matter of Right—Court Approval As a Condition Precedent to Enforcement—Specific Performance—Pa. R.Crim.P. 590—Enforcement As a Matter of Judicial Discretion—Fundamental Fairness

1. Pursuant to Pa. R.Crim.P. 590(A)(3), a trial court shall not accept a plea of guilty or **nolo contendere** unless the court first determines after inquiry of the defendant that the plea is voluntarily and understandably tendered.

2. The terms of a plea agreement are not binding upon the court, and unless and until the court approves the agreement, it is not specifically enforceable by either party.

3. Because a plea agreement is subject to the court's approval before it is enforceable, no right to specific performance of a plea agreement exists before this condition precedent has been met.

4. A plea agreement which has neither been entered of record nor accepted by the court is at most an executory agreement; it is not specifically enforceable by either party.

5. Inherent in the powers of a district attorney is the right to exercise prosecutorial discretion in a manner believed to be in the public's best interests, absent invidiously discriminatory factors unrelated to the protection of society such as race, religion, or national origin.

6. Before a plea agreement is presented to and approved by the court, the district attorney may decide, as a function of prosecutorial discretion, that the agreement is not in the best interests and/or for the general welfare of the citizens of this Commonwealth.

7. Notwithstanding that neither party has a "right" to specific performance of a plea agreement which has not been presented to and approved by the court, enforcement of the agreement may nevertheless be warranted in the interest of justice, as a matter of judicial discretion, and not as a matter of right to specific performance.

8. Defendant was not entitled to discretionary enforcement of a plea agreement whose existence was not disputed and which had not been presented to or accepted by the trial court where the district attorney's decision to withdraw a plea offer previously made to and accepted by the Defendant was a permissible exercise of prosecutorial discretion and where the Defendant had not detrimentally relied upon the agreement to his prejudice.

NO. 227 CR 2014

SETH E. MILLER, Esquire, Assistant District Attorney—Counsel for Commonwealth.

MATTHEW J. RAPA, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 21, 2016

This case distinguishes between a criminal defendant's legal right to specifically enforce an executory plea agreement and enforcement of a plea agreement, not as a matter of right, but as a matter of judicial discretion in the interest of justice.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant in these proceedings, Kenneth Allen Wanamaker, Jr., claims and the Commonwealth admits that shortly before the call of the criminal trial list held on March 29, 2016, the parties negotiated and reached a plea agreement. A written stipulation documenting the terms of this agreement was signed by the Assistant District Attorney assigned to the case, which was in turn signed by the Defendant and his counsel and returned to the District Attorney's Office for filing and the scheduling of a plea hearing. (Defendant Exhibit No. 1.) Pursuant to the terms of this stipulation, Defendant agreed to plead guilty to one count of Pos-

session of Drug Paraphernalia, 35 P.S. §780-113(a)(32), Count 2 of the criminal information, and one count of Driving Under the Influence of Alcohol, 75 Pa. C.S.A. §3802(a)(1) (Driving Under the Influence—General Impairment), Count 10 of the criminal information. Count 10 was specially added to the criminal information pursuant to a separate stipulation of the parties filed on February 9, 2016, and approved by court order of the same date.

At the call of the trial list on March 29, 2016, Defendant's counsel advised the court that he had just learned that the Commonwealth was withdrawing its offer, that no satisfactory explanation was given for this withdrawal, and that a continuance of the trial scheduled for April 4, 2016, was therefore requested. Defense counsel further indicated that he intended to review the possibility of enforcing the parties' stipulation. Given these developments, Defendant's continuance request was granted. On May 24, 2016, Defendant filed his Motion to Compel Specific Performance of the Plea Agreement.

In this Motion, Defendant recites the procedural and factual background leading to the entry of the plea agreement[1] and alleges that unexpectedly and shortly before the call of the trial list on March 29, 2016, the Commonwealth suddenly withdrew its offer. In support of his Motion to Compel Enforcement of the Plea Agreement, Defendant cites the Superior Court's decision in **Commonwealth v. Mebane,** 58 A.3d 1243 (Pa. Super. 2012). In its answer to Defendant's Motion, the Commonwealth admits the existence and signing of the stipulation but notes that it was never filed with the court; contends that "no plea agreement exists unless and until it is presented to the court," **citing** and **quoting Commonwealth v. McElroy,** 445 Pa. Super. 336, 342, 665 A.2d 813, 816 (1995); and argues that no right to specific performance of a plea agreement exists before it is presented to the court for approval, **citing Commonwealth v. Spence,** 534 Pa. 233, 248, 627 A.2d 1176, 1184 (1993). The Commonwealth further states

[1] As evidenced by this history, Defendant is not without unclean hands. Previously, Defendant entered a plea agreement in July 2015 to plead guilty to possession of drug paraphernalia, 35 P.S. §780-113(a)(32), Count 2 of the criminal information, and driving under the influence, 75 Pa. C.S.A. §3802(d)(1)(ii) (driving when there was present in his blood any amount of a schedule II or schedule III

in its answer that the practice and procedure for presenting and accepting plea agreements is governed by Pa. R.Crim.P. 590.[2]

At a hearing on Defendant's Motion held on July 22, 2016, the Assistant District Attorney represented to the court that he had entered the stipulation in good faith, but that afterwards the District Attorney overruled his decision in this regard and that for this reason the Commonwealth's offer was withdrawn. In further explanation, the Assistant District Attorney represented that the District Attorney had recently implemented a new policy—he was uncertain whether this was implemented before or after the date of the stipulation, but in either event, he was unaware of the change at the time of the stipulation—pursuant to which a plea to an alcohol only driving under the influence charge would not be accepted where a defendant was charged with being under the influence of both alcohol and some other controlled substance.

DISCUSSION

Defendant asks us to enforce the terms of an executory plea agreement never filed of record and neither presented to nor approved by the court. As a matter of law, "a defendant has no con-

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controlled substance which had not been medically prescribed, here methamphetamine), Count 3 of the information. Defendant pled guilty to these charges on August 13, 2015. On December 7, 2015, Defendant filed a motion to withdraw his guilty pleas, which motion, not being opposed by the Commonwealth, was granted by the court by order dated January 19, 2016.

A criminal defendant's pre-sentence motion to withdraw a guilty plea should be granted if supported by a fair and just reason and substantial prejudice will not inure to the Commonwealth. **Commonwealth v. Forbes,** 450 Pa. 185, 191, 299 A.2d 268, 271 (1973). In this respect, "a defendant's innocence claim must be at least plausible to demonstrate, in and of itself, a fair and just reason for pre-sentence withdrawal of a plea." **Commonwealth v. Carrasquillo,** 631 Pa. 692, 705-706, 115 A.3d 1284, 1292 (2015). In his motion to withdraw his guilty pleas, Defendant alleged simply that he wished to pursue pretrial motions concerning the stop of his vehicle and he believed he was innocent of driving under the influence of a controlled substance.

[2] Pennsylvania Rule of Criminal Procedure 590 states in relevant part:

Rule 590. Pleas and Plea Agreements

(A) Generally

(1) Pleas shall be taken in open court.

(2) A defendant may plead not guilty, guilty, or, with the consent of the judge, **nolo contendere.** If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.

stitutional right to have an executory plea agreement specifically enforced ... ." **Commonwealth v. Anderson,** 995 A.2d 1184, 1191 (Pa. Super. 2010) (**quoting Commonwealth v. Fruehan,** 384 Pa. Super. 156, 557 A.2d 1093, 1094-95 (1989)). For one thing, "the terms of a plea agreement are not binding upon the court," and unless and until the court approves the agreement, it is not specifically enforceable by either party. **Commonwealth v. White,** 787 A.2d 1088, 1091 (Pa. Super. 2001); **Commonwealth v. Spence, supra** at 249, 627 A.2d at 1184. In contractual terms, the plea agreement is subject to a condition precedent, namely the court's approval, before it is enforceable. **Anderson, supra** (noting that while a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract law standards) (**citing** and **quoting Commonwealth v. Kroh,** 440 Pa. Super. 1, 654 A.2d 1168, 1172 (1995)). Hence, it is imprecise and technically inaccurate to assert, as was stated in **Commonwealth v. McElroy,** that "no plea agreement exists unless and until it is presented to the court." **Supra; Mebane, supra** at 1248.

Here, as the Commonwealth correctly argues, because the parties' plea agreement was never filed of record nor presented to or approved by the court, defendant does not have a right to specific enforcement of that agreement. Nevertheless, enforcement of a plea agreement may be "warranted in the interest of justice, as a matter of judicial discretion, and not as a matter of **right** to specific performance ... ." **Id.**

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(3) The judge may refuse to accept a plea of guilty or **nolo contendere,** and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

(B) Plea Agreements

(1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record **in camera** and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of **nolo contendere** is based.

Pa. R.Crim.P. 590(A)-(B).

In **Mebane,** several months in advance of the scheduled trial date, the parties reached a plea agreement of which court staff was timely apprised, but which was not scheduled for a separate hearing in advance of the trial date and, therefore, had not yet been reviewed or approved by the court prior to trial. When the parties appeared in court on the trial date, the Commonwealth for the first time advised the defendant that it would no longer honor the plea agreement. Sometime between when the plea agreement had been reached and the trial date, the Commonwealth learned of a favorable ruling it had received on an outstanding defense suppression motion the results of which neither party had been notified of officially and which the defense was not aware of prior to the date of trial. Under these circumstances, the trial court first determined that "fundamental fairness entitled [the defendant] to the benefit of the bargain, finding that although 'the prosecutor may have inadvertently obtained' ... the Ruling, he 'nonetheless vulpinely used ... information regarding the Trial Court's ruling prior to its disclosure to defense counsel.'" **Id.** at 1244 (citation omitted). The court in **Mebane** then accepted the defendant's plea and sentenced him in accordance with the plea agreement.

On appeal, the Commonwealth argued that the trial court had erred in specifically enforcing the plea agreement because the Commonwealth's offer was withdrawn prior to presentation of the plea agreement to the court. In affirming the trial court's decision to enforce the plea agreement, the Superior Court concluded that the trial court's factual findings that the prosecutor "'vulpinely used ... information regarding the Trial Court's ruling prior to its disclosure to defense counsel[,]' leading the defendant to proceed for a considerable period of time under the impression that he would be pleading guilty on the scheduled trial date under the agreed-upon terms," was adequately supported by the record; that "the trial court acted in conformity with the general policy of maintaining the integrity of the plea bargain process when it determined that enforcement of the plea agreement was warranted in the unique circumstances" of the case; and that the trial court had not abused its discretion nor committed an error of law. **Id.** at 1249 (citation omitted).

The question then before us becomes whether as an exercise of our discretion in the interest of justice, the plea agreement reached between the parties in this case should be specifically enforced in order to maintain the integrity of the plea bargain process. As a matter of fact, we find and accept that the Assistant District Attorney handling this matter acted in good faith in entering the plea agreement but unfortunately, for reasons which are unclear, was unaware of the District Attorney's change in policy. That this occurred is unexcusable and if it occurred routinely, would clearly undermine the integrity of the plea bargaining process. If it were as the Defendant suggests that a plea agreement negotiated by an assistant attorney can be overridden at any time in the absolute discretion of the District Attorney, even on the eve of trial, a defendant's belief that an agreement exists would be illusory and the effects on plea negotiations devastating.[3] This, however, is not what occurred. A lapse in communication occurred between the District Attorney and Assistant District Attorney. Whether the Defendant should be able to take advantage of this lapse or the District Attorney be able to correct the error made is the real question.

In **McElroy,** the District Attorney of Warren County offered a proposed plea agreement to the defendant which was accepted. The case involved a high-speed chase of the defendant in which a vehicle driven by a pursuing state trooper crossed into the opposing lane of traffic resulting in the death of an innocent victim. Under the plea agreement, the defendant was to plead **nolo contendere** to a charge of reckless endangerment of the trooper, with the charge of reckless endangerment of the victim

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[3] The entry of guilty pleas and plea agreements are crucial to the administration of criminal justice.

> It is well recognized that the guilty plea and the frequently concomitant plea bargain are valuable implements in our criminal justice system. The disposition of criminal charges by agreement between the prosecutor and the accused, ... is an essential component of the administration of justice. Properly administered, it is to be encouraged. In this Commonwealth, the practice of plea bargaining is generally regarded favorably, and is legitimized and governed by court rule.

Commonwealth v. Mebane, 58 A.3d 1243, 1245 (Pa. Super. 2012) (citation omitted).

to be **nolle prossed.** The victim's family, which had previously commenced a wrongful death action against the defendant, the defendant's trucking company (whose vehicle the defendant was operating at the time of the accident), and the trooper, was outraged by the plea agreement because it permitted the defendant to escape direct liability for the victim's death. In response, the district attorney withdrew the plea offer and the defendant sought to enforce the plea agreement.

The trial court's order granting the defendant's motion to enforce the agreement was reversed on appeal by the Superior Court. In explaining its decision, the Superior Court, quoting from the Supreme Court's decision in **Spence,** stated that "prior to the **entry** of a guilty plea, the defendant has no right to specific performance of an 'executory' agreement," and that because the "plea agreement had neither been entered of record nor accepted by the trial court [it] was, therefore, not enforceable," "[i]t was, at most, executory." **McElroy, supra** at 343, 665 A.2d at 816 (**quoting Commonwealth v. Spence,** 534 Pa. 233, 249, 627 A.2d 1176, 1184 (1993)). With respect to the District Attorney's power to renege on the plea agreement, the court stated: "A district attorney may decide, as a function of her/his prosecutorial discretion, that a plea bargain agreement not yet entered of record and approved by the court is not in the best interests and/or for the general welfare of the citizens of this Commonwealth." **Id.** at 344, 665 A.2d at 817.

Admittedly, the issue in **McElroy** did not involve the discretionary enforcement of a plea agreement by the trial court. It did, however, involve the enforcement of a plea agreement whose existence was not disputed and which had not been presented to or accepted by the trial court. Importantly, the Superior Court's opinion reversing the trial court strongly affirmed the inherent powers of a district attorney to exercise prosecutorial discretion in a manner believed to be in the public's best interests, absent invidiously discriminatory factors unrelated to the protection of society. In this case, no claim has been made or proof presented that the District Attorney's decision to withdraw the plea offer was "based upon an invidious classification such as race, religion or national origin ... or upon other factors unrelated to the protection of society." **Id.** (citations and quotation marks omitted). Nor

do we find that the public interests the District Attorney seeks to promote by her policy change are necessarily outweighed by the Defendant's interest in enforcement of an agreement which Defendant has not detrimentally relied upon.

CONCLUSION

Because we are not convinced that what occurred here was an intentional or deliberate attempt by the District Attorney's Office to sabotage the Defendant shortly before trial, because the plea agreement was not presented to or accepted by the court, because this appears to be an isolated instance, and because the Defendant has failed to point to any prejudice he has sustained, other than being unable to enforce the plea agreement, we do not find that the interests of justice requires enforcement of the plea agreement. Accordingly, Defendant's Motion will be denied.

ORDER OF COURT

AND NOW, this 21st day of December, 2016, upon consideration of Defendant's Motion to Compel Specific Performance of Plea Agreement, the Commonwealth's answer thereto, after hearing thereon, and in accordance with our Memorandum Opinion of this same date, is it is hereby

ORDERED and DECREED that Defendant's Motion is denied.

JOYCE MIKOLAWSKI and DENNIS MIKOLAWSKI, Plaintiffs vs. CURTIS ANTHONY YOUNG, JAROD BROWN, WELLINGTON MAYO and YOUTH SERVICES AGENCY OF PENNSYLVANIA, Defendants

Civil Law—Negligence—General Duty of Care—Foreseeable Risks of Injury—Liability for the Criminal Conduct of a Third Party—Negligent Infliction of Emotional Distress—"Zone of Danger"—Requisite Nexus With Defendant's Tortious Conduct

1. The elements of a negligence based cause of action are a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss.

2. Absent the existence of a special relationship between the plaintiff and the defendant, the only duty owed by a defendant to a plaintiff is the general duty imposed on all persons not to place others at risk of harm through their actions. The scope of this duty is limited to those risks which are **reasonably foreseeable** by the defendant in the circumstances of the case.

3. In general, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a preexisting duty owed to the party harmed.

4. For a private landowner to be held civilly liable under a negligence theory for the foreseeable criminal conduct of others, the owner must have known or reasonably should have known of the dangerous propensities of such third parties and that its negligence would afford such third parties an opportunity to engage in intentionally tortious or criminal conduct or increase the risk that harm of the type which did occur, would occur.

5. The "zone of danger" exception to the "impact rule" for negligent infliction of emotional distress affords a cause of action for emotional distress in the absence of physical injury or impact where the plaintiff was in personal danger of physical impact and where the plaintiff was in actual fear of physical impact.

6. Claims for negligent infliction of emotional distress are restricted to breaches of duty which directly result in emotional harm and where the defendant's conduct involves an unreasonable risk to cause such harm. A claim for negligent infliction of emotional distress does not exist where the defendant's conduct was only negligent and the foreseeability of causing emotional distress only to a third party was remote from the "wrongful" act forming the basis of the defendant's negligence.

7. Where the record is barren as to what criminal acts juvenile offenders committed prior to their placement at a residential facility owned, operated and maintained by the Defendant, their propensity for violence, or whether, if they escaped, there was a foreseeable likelihood of resulting physical or violent behavior from which severe fright or other emotional disturbance to others might be anticipated, Defendant breached no duty to Plaintiff homeowners for negligent infliction of emotional distress alleged to have occurred when the juvenile offenders escaped from Defendant's youth services camp, broke into the homeowners' home, and, brandishing a piece of firewood, threatened the homeowners with physical injury if the homeowners did not submit to the juveniles' demands.

NO. 12-2311

MARVIN O. SCHWARTZ, Esquire—Counsel for Plaintiffs.

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MEMORANDUM OPINION

NANOVIC, P.J.—December 30, 2016

As a matter of law, can a defendant be held legally responsible for negligent infliction of emotional distress where the emotional harm claimed was directly caused by the intentional or criminal conduct of third parties. That is the issue underlying the pending Motion for Summary Judgment filed by Defendant Youth Services Agency of Pennsylvania.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2010, the above-named individual defendants, all minors at the time (hereinafter "Juvenile Offenders"), escaped from Camp Adams located in Penn Forest Township, Carbon

County, Pennsylvania, where they had been committed pursuant to court order in juvenile proceedings under the Juvenile Act, 42 Pa. C.S.A. §§6301-6375.[1] This Camp was owned, operated and controlled by the Defendant, Youth Services Agency of Pennsylvania (hereinafter "YSA"). In accordance with the orders of commitment, the Juvenile Offenders were under the care, custody and control of Defendant YSA and restricted from leaving its facility without authorization.

Shortly after their escape, the Juvenile Offenders broke into the home of Joyce and Dennis Mikolawski (hereinafter "Plaintiffs") during the early morning hours of October 30, 2010, and threatened the Plaintiffs with physical bodily harm before taking their money and stealing their car. Plaintiffs, who are married to one another, live across the street from Camp Adams. (Dennis Mikolawski Deposition, 4/22/14, pp. 39-40.) None of the Juvenile Offenders struck or had physical contact with either Plaintiff, and the Plaintiffs were not physically injured as a result of this incident. However, both Plaintiffs claim to have sustained severe mental anguish and emotional distress caused when one of the Juvenile Offenders brandished a piece of firewood over his head and threatened the Plaintiffs with physical injury if they did not submit to the Juvenile Offenders' demands.

In their complaint filed on October 25, 2013, Plaintiffs assert claims of intentional infliction of emotional distress, assault, false imprisonment, trespass and civil conspiracy against each of the individual defendants. Plaintiffs also allege that YSA was negligent for allowing the Juvenile Offenders to escape and should be held accountable for Plaintiffs' injuries since it knew or should have known that the Juvenile Offenders possessed dangerous and violent propensities and would likely cause harm to others if they escaped.

On March 31, 2016, YSA filed a Motion for Summary Judgment alleging Plaintiffs failed to produce sufficient evidence to support their negligence claim. Plaintiffs argue their complaint sets forth a cause of action for negligent infliction of emotional

[1] Camp Adams is an ACT (Adventure Challenge Treatment) Boys Camp, a form of residential placement; it is not a juvenile detention center.

distress against YSA and that the evidence is sufficient to support this cause of action.[2]

DISCUSSION

To maintain a claim for negligent infliction of emotional distress, a plaintiff must demonstrate one of four factual scenarios: (1) where the defendant owed a contractual or fiduciary duty to the plaintiff; (2) where the plaintiff suffered a physical injury that caused the emotional distress; (3) where the plaintiff was in the "zone of danger" of the defendant's tortious conduct and at risk of immediate physical injury; or (4) where the plaintiff witnessed a serious injury to a close family member. **Doe v. Philadelphia Community Health Alternatives AIDS Task Force,** 745 A.2d 25, 27 (Pa. Super. 2000), **aff'd,** 564 Pa. 264, 767 A.2d 548 (2001). Of these scenarios, only the third is applicable and it is this scenario upon which Plaintiffs rely. Specifically, Plaintiffs argue that once the piece of firewood was brandished as a weapon and Plaintiffs threatened with battery if they did not comply with the Juvenile Offenders' demands, Plaintiffs were placed in personal danger of physical impact.

For purposes of its Motion for Summary Judgment, YSA concedes the sufficiency of the evidence to support a finding of negligence on its part which allowed the Juvenile Offenders to escape from Camp Adams, but argues that for liability to exist, the defendant's negligence must have been the immediate and direct cause of placing the plaintiff in the "zone of danger," rather than a remote, indirect and unforeseen cause as occurred here. For example, in **Niederman v. Brodsky,** 436 Pa. 401, 261 A.2d 84 (1970), which recognized the "zone of danger" exception to the "impact rule," it was defendant's reckless and negligent operation of a motor vehicle which caused the vehicle driven by him to skid and nearly strike the plaintiff which gave rise to plaintiff's "right

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[2] A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. **See Fine v. Checcio,** 582 Pa. 253, 870 A.2d 850 (2005); Pa. R.C.P. 1035.2. To meet this standard, "a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense." **Petrina v. Allied Glove Corporation,** 46 A.3d 795, 798 (Pa. Super. 2012) (**quoting Chenot v. A.P. Green Services Inc.,** 895 A.2d 55, 61 (Pa. Super. 2006)).

to recover damages for his physical injury (the heart attack), even though he was not 'impacted' by the defendant's vehicle, since this injury resulted from the plaintiff's fear of impact (mental anguish)." **Schmidt v. Boardman Company,** 608 Pa. 327, 367, 11 A.3d 924, 948 (2011) (recognizing **Niederman**'s adoption of the "zone of danger" rule, which affords a cause of action for negligent infliction of emotional distress "where the plaintiff was in personal danger of impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact").

In contrast, as argued by YSA in the instant case, YSA's alleged negligence was not having in place sufficient safeguards at the Camp to prevent the escape of the Juvenile Offenders, whereas the direct source of the "danger" giving rise to Plaintiffs' claim for negligent infliction of emotional distress was the intentional and immediate threatening of physical force upon the Plaintiffs by the Juvenile Offenders. In essence, YSA contends that any assumed negligence by it which resulted in the escape of the Juvenile Offenders from its facility cannot be the basis of liability for Plaintiffs' claim of damages for emotional distress which was caused directly by the unexpected and intervening conduct of the Juvenile Offenders. YSA's Motion, in effect, questions whether under such circumstances, YSA owed and/or breached a duty to Plaintiffs not to engage in conduct which created an unreasonable and foreseeable risk of injury to Plaintiffs' emotional well-being.

In **Minnich v. Yost,** 817 A.2d 538 (Pa. Super. 2003), **appeal denied,** 573 Pa. 710, 827 A.2d 1202 (2003), the court stated:

> It is axiomatic that the elements of a negligence-based cause of action are a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss. ... When considering the question of duty, it is necessary to determine whether a defendant is under any obligation for the benefit of the particular plaintiff ... and, unless there is a duty upon the defendant in favor of the plaintiff which has been breached, there can be no cause of action based upon negligence.

Id. at 541 (citations and quotation marks omitted).

Unless a special relationship exists between the plaintiff and the defendant, the only duty owed by the defendant to the plaintiff is the general duty imposed on all persons not to expose others to

reasonably foreseeable risks of injury. **Schmoyer by Schmoyer v. Mexico Forge, Incorporated,** 437 Pa. Super. 159, 164-65, 649 A.2d 705, 708 (1994).

> Duty, in any given situation, is predicated upon the relationship existing between the parties at the relevant time. **Zanine v. Gallagher,** 345 Pa.Super. 119, 497 A.2d 1332, 1334 (1985). Where the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions. **Id.** The scope of this duty is limited, however, to those risks which are **reasonably foreseeable** by the actor in the circumstances of the case. **Id.**

J.E.J. v. Tri-County Big Brothers/Big Sisters, Inc., 692 A.2d 582, 584 (Pa. Super. 1997) (citations and quotation marks omitted) (emphasis added). In general, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a preexisting duty. **Feld v. Merriam,** 506 Pa. 383, 391-92, 485 A.2d 742, 746 (1984); **Mascaro v. Youth Study Center,** 514 Pa. 351, 362, 523 A.2d 1118, 1124 (1987); Restatement (Second) Torts, Sections 315 and 448.

"Under our case law and the Restatement of Torts, Second, [the Pennsylvania Supreme Court has] held landowners liable for failing to take precautions against **unreasonable** risks that stem directly and indirectly from the property including the contemplated acts of third parties, whose crimes are facilitated by the condition of the property." **Mascaro, supra** at 360, 523 A.2d at 1122 (emphasis added); **see also,** Restatement (Second) Torts, Sections 315, 365 and 448.[3]

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[3] Section 315 of the Restatement (Second) Torts provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
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> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Section 365 provides, in pertinent part:

> A possessor of land is subject to liability to others outside of the land for physical harm caused by the disrepair of a structure. ... if the exercise of reasonable care ... would have made it reasonably safe by repair or otherwise.

In **Mascaro,** the court held that plaintiffs had stated a cause of action in negligence at common law against a juvenile detention center whose alleged negligent maintenance of its facility allowed a juvenile to escape. Once at large, the juvenile and an accomplice burglarized plaintiffs' home and, while inside the home, raped and beat a mother and her daughter. The detention center knew or should have known of the juvenile's dangerous propensities since the juvenile had "at least fourteen arrests and five convictions, including three other rapes, four burglaries and three robberies, and that he had escaped from detention centers three other times." **Id.** at 359, 523 A.2d at 1122. Given these known propensities to commit crime, the center knew, or should have known, that the juvenile would take advantage of the security defects at its facility and upon escaping would likely commit additional burglaries and rapes, including those at issue in **Mascaro. See also, Anderson v. Bushong Pontiac Company Inc.,** 404 Pa. 382, 171 A.2d 771 (1961) (imposing liability on the owner of a used car lot for damages which were caused when a car which was stolen and negligently driven by minors hit the plaintiff, a pedestrian; the court found that it was reasonable for the lot owner to foresee not only that the car, which was not secured or otherwise protected after its keys had been stolen two days earlier, would be stolen, but also that it was likely to be stolen and operated by minors who frequented the area and, because of their youth and immaturity, driven by them in a careless and unsafe manner).

For a private landowner to be held civilly liable under a negligence theory for the foreseeable criminal conduct of others, the owner must have known or reasonably should have known of the dangerous propensities of such third parties and that its negligence would afford such third parties an opportunity to engage in intentionally tortious or criminal conduct or increase the risk that harm

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Section 448 provides:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct should have realized the likelihood that such a situation might be created thereby and that a third person might avail himself of the opportunity to commit such a tort or crime.

of the type which did occur, would occur. Here, the record is barren of what criminal acts the Juvenile Offenders committed prior to their placement at Camp Adams, their propensity for violence, or whether, if they escaped, there was a foreseeable likelihood of threatened or violent behavior by them from which severe fright or other emotional disturbance to others might be anticipated. **Cf., Moore v. Commonwealth, Department of Justice,** 114 Pa. Commw. 56, 62, 538 A.2d 111, 114 (1988) (holding that a state prison could not be held liable for its release of an inmate convicted of armed robbery, and who following his release shot plaintiff five times, for failing to properly diagnose, treat or recognize the inmate's psychiatric condition before he was released on a two-day home furlough since the prison did not have the expertise to enable it to foresee that the inmate's psychiatric deficiencies would cause him to harm and injure others).

In **Ford v. Jeffries,** 474 Pa. 588, 379 A.2d 111 (1977), the owner of a dilapidated dwelling house with holes in the outside walls and foundation through which access to the interior could be gained, which was located five to six feet from plaintiff's home and which was a continuing fire hazard—a fire having occurred in this structure two months earlier—was held responsible for the destruction of plaintiff's home when a fire in the dilapidated structure, possibly caused by an arsonist, spread to plaintiff's nearby home. In noting that "even if the superseding force of an arsonist was the cause of the fire, it would not insulate the [defendant] from liability," the Pennsylvania Supreme Court stated:

> If one engages in negligent conduct toward another, such as unreasonably increasing the risk that that person will suffer a **particular kind of harm,** it cannot be said, as a matter of law, that the actor is not liable simply because the foreseeable plaintiff suffered the **foreseeable harm** in a manner which was not foreseeable. [The owner's] conduct in this case could have increased the risk that [the plaintiff's] house would be damaged by fire. Such harm in fact occurred. Given these circumstances, it was for the jury to determine whether the [owner's] conduct, if it was negligent, was superseded by the intervening force.

Id. at 596, 379 A.2d at 115 (emphasis added).

In this case, due to YSA's negligence in its maintenance of Camp Adams and supervision of the Juvenile Offenders, the foreseeability of the Juvenile Offenders' escape from Camp Adams is apparent. This notwithstanding, the record fails to reflect any prior knowledge or notice to YSA from which it could foresee that if the Juvenile Offenders escaped, there was a realistic probability of a criminal break-in or assault. That this was a possible consequence does not mean it was a probable or legally foreseeable consequence. **Jamison v. City of Philadelphia,** 355 Pa. Super. 376, 380, 513 A.2d 479, 481 (1986), **appeal denied,** 515 Pa. 581, 527 A.2d 541 (1987). **See also, Liney v. Chestnut Motors, Inc.,** 421 Pa. 26, 218 A.2d 336 (1966) (finding that even if an automobile repair garage which allowed a car delivered to the garage for repairs to remain parked outside on the street in an area with a high rate of car thefts with the keys in the ignition should have foreseen the likelihood of theft of the vehicle, it had no notice or reason to believe that the thief would be an unsafe driver and, therefore, it could not be held liable when the vehicle was driven carelessly, striking the plaintiff-pedestrian on a sidewalk); **Roche v. Ugly Duckling Car Sales, Inc.,** 879 A.2d 785 (Pa. Super. 2005) (affirming the trial court's grant of summary judgment to defendants, finding that because the evidence was insufficient to support a finding that defendants knew or should have known vehicles would be stolen by juvenile offenders from defendant's unfenced parking lot which had a history of car thefts, or that the vehicles would be driven in a negligent or reckless manner, there was, therefore, no duty of care owed to plaintiff since, while the theft may have been foreseeable, that the vehicles would be stolen by juveniles who would drive incompetently or carelessly was not), **appeal denied,** 587 Pa. 732, 901 A.2d 499 (2006).

One reason for judicial caution and doctrinal limitations on recovery for emotional distress is the "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act." **Toney v. Chester County Hospital,** 614 Pa. 98, 121, 36 A.3d 83, 97-98 (2011) (Baer, J., Opinion in Support of Affirmance) (**quoting Prosser and Keeton on the Law of Torts,** §54 at 360-61). Consistent with

this concern, claims for negligent infliction of emotional distress appear to be restricted to breaches of duty which directly result in emotional harm and where the defendant's conduct involves an unreasonable risk to cause such harm. **See** Restatement (Second) Torts, Section 436 (comment).

While a wrongdoer should clearly be held accountable for the natural and proximate consequences of his misconduct, the record before us fails to support a finding that a breach of YSA's duty to confine the Juvenile Offenders to its facility created an obvious and objectively articulable increased risk of violence or physical harm to innocent parties if the Juvenile Offenders escaped the confines of Camp Adams. Even if YSA was negligent in allowing the Juvenile Offenders to escape, it cannot be said to have been negligent **vis-à-vis** Plaintiffs whose injuries were not a foreseeable consequence of the Juvenile Offenders' escape.

CONCLUSION

Having concluded that YSA could not foresee the harm claimed by Plaintiffs in the event the Juvenile Offenders escaped from Camp Adams, YSA breached no duty to protect Plaintiffs against negligent infliction of emotional distress caused by the alleged criminal and intentionally tortious conduct of the Juvenile Offenders. As no duty has been established, no recovery is possible under a negligence theory. Accordingly, YSA's Motion for Summary Judgment will be granted.

COMMONWEALTH of PENNSYLVANIA
vs. SCOTT TIMOTHY WATKINS, Defendant

Criminal Law—Challenging the Finding of a Magisterial District Judge That Evidence Is Sufficient to Establish a ***Prima Facie*** *Case of an Attempt to Commit Aggravated and Simple Assault—Writ of* ***Habeas Corpus****—Specific Intent to Cause Bodily Injury As a Necessary Element—Distinguishing Between Evidence Which Establishes an Intent to Frighten and That Required to Establish an Intent to Cause Bodily Injury—Recklessly Endangering Another Person—Actual Present Ability to Inflict Harm As a Necessary Element—Pointing of an Unloaded Gun Insufficient—Custodial Interrogation—Necessity of* ***Miranda*** *Warnings Before Police Questioning—Public Safety Exception*

1. A writ of habeas corpus is the proper means for testing a pretrial finding that the Commonwealth has sufficient evidence to establish a **prima facie** case. Whether the evidence is sufficient to establish a **prima facie** case is a question of law in which the trial court is afforded no discretion.

2. A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

3. When a defendant is charged with either aggravated assault or simple assault arising out of an attempt to cause bodily injury, a necessary element of the Commonwealth's case in chief is proof that the defendant's actions were undertaken with the specific intent to cause bodily injury.

4. The intent to threaten another with bodily harm is different from the intent to cause bodily injury. Conduct which evidences only an intent to threaten or intimidate another with bodily injury is insufficient to prove a specific intent to cause bodily injury: something more must be shown.

5. The isolated act of pointing a gun at another person is insufficient to support a conviction for either attempted aggravated or simple assault, both of which require as a necessary element of the offense proof of a specific intent to cause bodily injury. To establish a specific intent to cause bodily injury something more than simply menacing another with a gun is required.

6. Where a defendant in addition to pointing a gun at another person verbally expresses his intent to shoot the other, unsuccessfully attempts to fire the gun, is prevented by the intended victim or a third person from firing the gun, or is prevented by the victim's escape from acting on his threat of shooting the victim, such other indicia manifesting an actual intent to harm is sufficient to establish the requisite specific intent to cause bodily injury to convict for the offenses of attempted aggravated or simple assault.

7. To sustain a conviction of recklessly endangering another person, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. Consequently, as a general matter, the mere pointing of an unloaded gun, without more, will not support a conviction for recklessly endangering another person.

8. As a general rule, a defendant in police custody cannot be questioned by the police without **Miranda** warnings first having been given before any statement made by the defendant will be deemed admissible against him.

9. No violation of **Miranda** exists where a suspect in custody without prompting spontaneously "blurts out" an incriminating statement before **Miranda** warnings have been given.

10. The public safety exception to **Miranda** allows police questioning of a suspect in custody before **Miranda** warnings have been given where the circumstances and purpose of the questioning is to ensure the public safety and not to elicit incriminating responses. Under such circumstances, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."

NO. 798 CR 2016

CYNTHIA DYRDA-HATTON, Esquire, Assistant District Attorney—Counsel for Commonwealth.

BRIAN J. COLLINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—February 6, 2017

When a defendant, without justification, points a gun at another, presses the barrel against the other's cheekbone, and fires, killing a defenseless person, those facts, standing alone, will support a conviction for murder—the unlawful, intentional killing of another, since "the use of a deadly weapon on a vital part of the body is sufficient to establish the specific intent to kill." **Commonwealth v. Sepulveda,** 579 Pa. 217, 223, 855 A.2d 783, 786 (2004). But suppose, instead of pulling the trigger, the defendant, after holding the barrel of the loaded gun against the other's cheekbone, lowers the weapon, turns around, and walks away, saying nothing. Will these facts support a conviction for attempted murder—more specifically, are they sufficient to establish the specific intent to cause death or serious bodily injury—or is something more required?

Suppose further, after the police respond a short time later to investigate the reported incident and have been apprised of what happened, they find the defendant, who is visibly intoxicated, standing at the scene of the occurrence with his hands in the air; he's ordered to keep his hands raised; and not knowing where the gun is, the police ask, and the defendant tells them. Must this response and the gun which is recovered based on that response be suppressed under **Miranda**?

These two questions encapsulate the issues discussed below.

PROCEDURAL AND FACTUAL BACKGROUND

On May 14, 2016, at approximately 10:30 P.M., Scott Timothy Watkins ("Defendant") exited his camper at the Sunny Rest Resort in Lower Towamensing Township, Carbon County, Pennsylvania, and drawing a handgun from his rear waistband, pointed the gun at one of two security guards who were standing in front of his camper. As Defendant exited the camper, a fully loaded magazine clip dropped to the ground.[1] Defendant then stepped forward and pressed the barrel of his pistol into the face of the security guard just below his left eye. For several moments Defendant

[1] It is unknown whether this clip was intentionally ejected from the gun as Defendant swung the gun in the guard's direction or was a spare clip which fell to the ground as Defendant reached for his gun and was pulling it from his waistband.

said nothing, then returned the weapon to where it was drawn, told the security guard to "get the 'F' out of there," turned, and walked back to his camper.

Earlier in the evening, the two security guards had been making their rounds at the Sunny Rest Resort, a private campground,[2] when they came upon Defendant and his wife, Lisa Watkins, partying at another camp site. Both were drinking alcoholic beverages. Mrs. Watkins asked if the guards could help take her back to her camper since she needed to use the bathroom. The guards agreed to assist and drove Mrs. Watkins on their golf cart approximately one hundred yards to her camper where she invited them inside and offered them some candy. The guards were inside the camper for less than five minutes and were already outside the camper by the time Defendant drove up in a separate vehicle. For some reason Defendant was angry, and as he stormed past the guards and entered the camper, he mumbled something the guards were unable to hear clearly. He was also intoxicated.

From where the guards were located, they heard Defendant screaming at his wife. One of the guards also saw Defendant strike his wife three times in the face. When he told this to the second guard, the second guard walked up to the camper and knocked on the camper door. Defendant screamed, "Are you serious?" It was at this point that Defendant opened the camper door and walked toward the first guard with his gun drawn and pointed at the guard.

The incident was immediately reported to the Pennsylvania State Police barracks which, at 10:35 P.M., dispatched two troopers who arrived at the Sunny Rest Resort within approximately ten minutes. Upon their arrival, the police first briefly interviewed the two guards in an office building near the gated front entrance and then, accompanied by security personnel, drove to Defendant's campsite. When the police reached Defendant's camper, they observed Defendant standing in front of his camper with his hands in the air. The officers directed Defendant to keep his hands in the air.

As Defendant was being taken into custody, he was either asked where the gun was or he volunteered this information spontaneously: the arresting officer's testimony on this point supports

[2] Sunny Rest Resort is a clothing optional campground. There is no evidence in the record that anyone was other than fully clothed on the date of this incident.

either version. (N.T. 6/8/16 (Preliminary Hearing), pp. 84, 92.) In accordance with what Defendant told the police, the police found the gun which Defendant had pointed at the security guard lying on a picnic table directly in front of Defendant's camper. It was a black and silver FNH .40 caliber pistol. There was no magazine in this gun, however, the gun was loaded and had one round in the chamber.

Defendant was taken into custody and transported to the Pennsylvania State Police barracks in Lehighton. After being advised of his **Miranda** rights, Defendant admitted to exiting his camper with a pistol and pointing it at the security guard. He also admitted that the pistol he used was the one the police retrieved from the outside table. Defendant justified his actions by stating he felt threatened by the security guards, however, he was unable to explain what the security guards had done which caused his concern.

Defendant and his wife had been drinking the night of the incident and both were highly intoxicated. Both exhibited slurred speech and were off balance while walking. It is unclear why Defendant was angry with his wife the evening of the incident or why he was carrying a gun. The magazine clip which dropped to the ground as Defendant exited the camper was picked up by Defendant's wife when she left the camper after Defendant pointed the gun at the security guard. Mrs. Watkins handed this clip to the first security guard who found her walking along the road away from the camper after the incident was over. This ammunition clip was provided to the Pennsylvania State Police when they first arrived at the Sunny Rest Resort that evening.

As a result of this incident, Defendant has been charged with one count of Aggravated Assault,[3] two counts of Simple Assault,[4] one count of Recklessly Endangering Another Person,[5] and one count of Harassment.[6] At a preliminary hearing held on June 8, 2016, all charges were bound into court.

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[3] 18 Pa. C.S.A. §2702(a)(4) (attempt to cause bodily injury to another with a deadly weapon).

[4] 18 Pa. C.S.A. §§2701(a)(1) (attempt to cause bodily injury) and 2701(a)(3) (attempt by physical menace to place another in fear of imminent serious bodily injury).

[5] 18 Pa. C.S.A. §2705.

[6] 18 Pa. C.S.A. §2709(a)(1).

On August 17, 2016, Defendant filed an Omnibus Pretrial Motion in which Defendant challenges by way of a Petition for Writ of **Habeas Corpus** the sufficiency of the evidence to establish a **prima facie** case of either aggravated or simple assault by attempting to cause physical injury and of recklessly endangering another person.[7] In his Omnibus Motion, Defendant also seeks to suppress his statement to the police describing where the gun was located as being an inculpatory statement made while he was in police custody in response to police questioning and before he was informed of his **Miranda** rights. A hearing on this Motion was held on September 30, 2016.

DISCUSSION

Sufficiency of the Evidence

A defendant may be convicted of aggravated assault graded as a felony of the first degree if he "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa. C.S.A. §2702(a)(4). Similarly, he may be convicted of simple assault as a misdemeanor of the second degree if he "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa. C.S.A. §2701(a)(1). For each of these offenses with which Defendant has been charged, since no physical injury was caused to the security guard, Defendant correctly states that to withstand dismissal, the Commonwealth's evidence must be sufficient to prove a **prima facie** case of attempted aggravated and simple assault. **Cf. Commonwealth v. Martuscelli,** 54 A.3d 940, 948 (Pa. Super. 2012) ("Where the victim does not suffer serious bodily injury, the charge of aggravated assault can be supported only if the evidence supports a finding of an intent to cause such injury."). "A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa. C.S.A. §901(a). When a defendant is charged with either aggravated assault or simple assault because of an attempt to cause bodily injury, the

[7] A petition for a writ of habeas corpus is the proper means for testing a pretrial finding that the Commonwealth has sufficient evidence to establish a **prima facie** case. **Commonwealth v. Dantzler,** 135 A.3d 1109, 1112 (Pa. Super. 2016) **(en banc).** Whether the Commonwealth, at this stage of the proceedings, has met its burden of presenting a **prima facie** case showing that a crime has been committed and that the accused is the one who committed it is a question of law on which the trial court is afforded no discretion. **Id.**

Commonwealth must prove the defendant's actions were undertaken with the specific intent to cause such injury. **Commonwealth v. Sanders,** 426 Pa. Super. 362, 368, 627 A.2d 183, 186 (1993), **appeal denied,** 535 Pa. 657, 634 A.2d 220 (1993). "A person acts intentionally with respect to a material element of an offense when ... it is his conscious object to engage in conduct of that nature or to cause such result ... ." 18 Pa. C.S.A. §302(b)(1)(i). "Criminal intent may be proved by direct or circumstantial evidence." **Commonwealth v. Alexander,** 477 Pa. 190, 194, 383 A.2d 887, 889 (1978).

Defendant argues the most the Commonwealth has proven is his intent to threaten and intimidate the security guard by pointing a loaded weapon in his direction and pressing it against his left cheek, but that by itself this is not enough to evidence the requisite specific intent to actually cause physical injury. As argued by Defendant, the intent to threaten someone with physical injury is different from the intent to cause physical injury. Consequently, proof which evidences a threat only is insufficient to prove a further intent to carry out that threat: something more must be shown.[8]

In **Alexander,** the Pennsylvania Supreme Court held that whether the necessary specific intent to cause bodily injury has been proven for a charge of aggravated assault must be determined on a case-by-case basis under the totality of the circumstances.[9] **Id.** Such circumstances include but are not limited to evidence of

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[8] Nevertheless, a threat to cause serious bodily injury by pointing a gun at another can itself constitute simple assault as an "attempt[] by physical menace to put another in fear of imminent serious bodily injury." 18 Pa. C.S.A. §2701(a)(3); **Commonwealth v. Repko,** 817 A.2d 549, 554 (Pa. Super. 2003). Defendant has in fact been charged with simple assault on this basis as well.

[9] At the time of the Supreme Court's decision in **Alexander,** the Crimes Code defined aggravated assault as follows:

> A person is guilty of aggravated assault if he:
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> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
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> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest;
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> (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest; or
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

18 Pa. C.S.A. §2702(a) (1973).

a significant difference in size or strength between the defendant and the victim, any restraint on the defendant preventing him from escalating the attack, the defendant's use of a weapon or other implement to aid his attack, and statements made by the defendant before, during, or after the attack which might indicate his intent to inflict injury. **Id.** The fact that a defendant had ample opportunity to inflict bodily injury, but did not do so, is also a factor but, like the other factors, is not alone determinative of an intent to inflict bodily injury. **Commonwealth v. Matthew,** 589 Pa. 487, 493, 909 A.2d 1254, 1258 (2006).

In **Commonwealth v. Gruff,** 822 A.2d 773 (Pa. Super. 2003), **appeal denied,** 581 Pa. 672, 863 A.2d 1143 (2004), the Superior Court found the evidence sufficient to uphold the defendant's conviction for aggravated assault where the defendant grabbed the victim from behind, placed a bayonet blade against his throat, and verbally threatened to kill him, at which point the victim pulled loose and ran into the woods. The defendant made no attempt to hold on to the victim or to chase him when he escaped.

In **Matthew,** the Pennsylvania Supreme Court affirmed the defendant's conviction of aggravated assault where the defendant placed a loaded gun against the victim's throat, pointed the gun at the victim as he frantically searched through a burning car, and verbally threatened to kill the victim immediately before fleeing when a passerby appeared at the scene. **See also, Sanders, supra** (finding evidence sufficient to sustain conviction of aggravated assault under Section 2702(a)(4) where the defendant pulled out a loaded gun, pointed the gun at the victim's chest, walked up to the victim, placed the gun against his head, and verbally threatened to blow his head off, whereupon the victim attempted to wrestle the gun away from the defendant which ultimately was taken from defendant's hand by a third party); **Commonwealth v. Chance,** 312 Pa. Super. 435, 458 A.2d 1371 (1983) (upholding conviction of aggravated assault under Section 2702(a)(4) where the defendant pointed a gun at the victim and the victim heard the gun click several times while he was struggling with the defendant).

Conversely, in **Commonwealth v. Mayo,** 272 Pa. Super. 115, 414 A.2d 696 (1979), the Superior Court reversed the defendant's conviction of aggravated assault under Section 2702(a)(4) where the defendant entered the victim's apartment in the early morning hours,

placed a knife to the victim's throat, stated he kills people who falsely accuse him of things he hasn't done (this occurring immediately after the victim had accused him of taking her wallet), and then used the knife to make faint scratches on the victim's chest before removing the victim's clothes and raping her. Critical to the court's decision was its finding that notwithstanding defendant's obvious opportunity and ability to inflict serious injury on the victim, he did not do so, and that defendant's actions "all point[ed] decisively to an intent not to inflict bodily injury, but to frighten and/or humiliate ... ." **Id.** at 128, 272 Pa. Super. at 703. The rationale of **Mayo** was expressly reviewed and approved by the Supreme Court in **Matthew** as adhering to the totality of the circumstances test set forth in **Alexander. Matthew, supra** at 493-94, 909 A.2d at 1258.

Merely menacing another with a gun, without discharging the weapon or without some other indicia manifesting intent, is insufficient to demonstrate an intent to inflict bodily injury. In **Commonwealth v. Alford,** 880 A.2d 666 (Pa. Super. 2005), **appeal denied,** 586 Pa. 720, 890 A.2d 1055 (2005), defendant's conviction for aggravated assault under 18 Pa. C.S.A. §§2702(a)(1) and 2702(a)(4) was reversed where the defendant, an escaped prisoner, pointed a handgun at the victim through a front door window and demanded to be let into her home, at which point the victim ran out the kitchen door to a neighbor's house. No explicit threats of bodily injury were made and the handgun was never placed directly against the victim's face or throat.

In **Alford,** the Superior Court equated defendant's words and actions to an implied conditional threat, "**i.e., either** let me into the house **or** I may shoot you." **Id.** at 672 (emphasis in original). According to the court, "[s]uch a threat, conditioned on the victim's performance of some act, is insufficient to prove aggravated assault." **Id.** The court further noted that defendant's "[r]unning to [the victim's] house after escaping [from police] custody, pounding on her front door, and pointing a gun at her through the front door window after being denied entry was simply not enough to support the inference that aggravated assault was the **true** intention of [defendant]." **Id.** (emphasis added). **But see, Commonwealth v. Fortune,** 68 A.3d 980 (Pa. Super. 2013) (6-3 decision) (affirming defendant's conviction for aggravated assault under Section 2702(a)(1) where the defendant pointed a gun at the middle of the

victim's forehead and verbally threatened to kill her if she didn't turn over the keys to her car, whereupon the victim handed over the keys and ran away; defendant argued that the threat was a conditional one intended only to scare the victim into giving him the keys to her vehicle, that his actual intent was to steal the car and not to physically harm the victim), **appeal denied,** 621 Pa. 701, 78 A.3d 1089 (2013).

In the instant case, under the line of cases which require something more than the mere act of pointing a loaded gun at another person to establish the specific intent to cause injury, that something more is not present. That Defendant was intoxicated, arguing with his wife, hitting her, and making bad decisions is not in question. That Defendant was upset and felt the security guards were meddling in a dispute between him and his wife which did not concern them when they knocked on the camper door and he replied in disbelief "Are you serious?" is equally clear. That he had the means to inflict bodily injury on the security guard and threatened to do so, albeit nonverbally, by pointing a loaded weapon at the security guard, cannot be disputed. Yet there is no evidence that he expressed verbally his intent to shoot the guard, that he attempted to fire his weapon, that the security guard or anyone else prevented him from doing so, or that the security guard escaped before Defendant lowered his weapon. Defendant of his own accord withdrew from his confrontation with the security guard, warned the guard to "get the 'F' out of there," and voluntarily retreated to the interior of his camper. This notwithstanding that Defendant had the clear opportunity to shoot and seriously maim or kill the guard. Instead, Defendant's actions all point decisively, as in **Mayo,** "to an intent not to inflict bodily injury," but rather to an intent to frighten and scare the guard so as to be left alone.

There is no evidence that Defendant's intent was anything other than to scare and intimidate the security guard.

Suppression

When the Pennsylvania State Police first encountered Defendant on May 14, 2016, he was standing in front of his camper with his hands in the air. The police instructed Defendant to keep his hands where they could see them. As this was happening, Defendant told the police where the gun was, and this is where the police found it. Because, according to Defendant, he was in police

custody[10] and was responding to a question asked by the police when he told the police where to find the gun, and because Defendant was not first advised of his **Miranda** rights before this question was asked, Defendant argues his statement and the evidence the police discovered which derived from this statement must be suppressed.[11] **See e.g., Sepulveda, supra** at 229, 855 A.2d at 790 ("Once in custody, and prior to interrogation, a person must be

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[10] We have accepted for purposes of Defendant's argument that Defendant was in custody when he advised the police where the gun was, although this is by no means clear.

> An encounter becomes an arrest when, under the totality of the circumstances, a police detention becomes so coercive that it functions as an arrest. **Commonwealth v. Revere,** 814 A.2d 197, 200 (Pa.Super.2002), **aff'd on other grounds,** 585 Pa. 262, 888 A.2d 694 (2005). The numerous factors used to determine whether a detention has become an arrest are the cause for the detention, the detention's length, the detention's location, whether the suspect was transported against his or her will, whether physical restraints were used, whether the police used or threatened force, and the character of the investigative methods used to confirm or dispel suspicions. **Id.**

Commonwealth v. Stevenson, 894 A.2d 759, 770 (Pa. Super. 2006) (finding police officer's request to defendant, who was exiting a convenience store, to raise his hands or place them on his head where police suspected defendant was carrying a handgun and wanted to ascertain whether he had a permit to carry a concealed weapon constituted an investigatory stop, not an arrest), **appeal denied,** 591 Pa. 691, 917 A.2d 846 (2007). **See also, Commonwealth v. Gwynn,** 555 Pa. 86, 99-100, 723 A.2d 143, 149 (1998) (concluding that a police officer's placement of the defendant in a patrol car, and subsequent handcuffing of the defendant, did not rise to the level of an arrest under the circumstances presented in the case).

[11] As argued by Defendant, the only evidence the police have to prove that the gun was loaded at the time it was pointed at the security guard is the round the police discovered in the gun's chamber when they first examined this weapon. As previously indicated, the gun examined by the police did not contain a magazine clip. Instead, a magazine clip for this weapon had earlier been picked up by Defendant's wife where she found it lying on the ground in front of the camper after the Defendant had pointed the gun at the security guard. Accordingly, if the evidence of the round in the handgun's chamber is suppressed, and absent any other evidence to prove that the gun was loaded at the time it was pointed at the security guard, the charge of recklessly endangering another person must also be dismissed because, to convict the Defendant of reckless endangerment, it must be proven that at the time the gun was pointed at the security guard, Defendant in fact was placing the guard in danger of death or serious bodily injury. To sustain a conviction of recklessly endangering another person, "the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so." **Commonwealth v. Hopkins,** 747 A.2d 910, 915 (Pa. Super. 2000); **see also, Commonwealth v. Reynolds,** 835 A.2d 720, 728 (Pa. Super. 2003) ("[A]s a general matter, the mere pointing of an unloaded gun, without more, does not constitute [recklessly endangering another person].").

provided with **Miranda** warnings before any statement he makes will be deemed admissible.").

In evaluating Defendant's Motion, it is unclear, first, whether Defendant was questioned at all before he told the police where to find the gun. The police had just arrived at Sunny Rest Resort when they were advised by the first security guard what Defendant had done and were accompanied by this guard to Defendant's camper. When they found Defendant standing in front of his camper with his hands in the air, that the person they saw was the person they were looking for could not have been in question. According to one version of what happened next, the police directed Defendant to keep his hands in the air, which Defendant did, and Defendant immediately volunteered that he didn't have a gun, that it was on the outside table by his camper. Under this scenario, there is no **Miranda** violation. **Commonwealth v. Baez,** 554 Pa. 66, 86, 720 A.2d 711, 720-21 (1998) (finding no violation of **Miranda** where a suspect in custody spontaneously "blurts out" an incriminating statement).

Even if we were to accept that in addition to Defendant being directed to keep his hands in the air, the police asked Defendant where the gun was and it was in response to this question that Defendant told them, Defendant's answer is admissible under the United States Supreme Court's decision in **New York v. Quarles,** 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), wherein the court created a public safety exception to the requirements of **Miranda.** As stated in **Commonwealth v. Bowers,** 400 Pa. Super. 377, 583 A.2d 1165 (1990), **appeal denied,** 528 Pa. 627, 598 A.2d 281 (1991):

> Normally the fact that a suspect is in custody will require that **Miranda** warnings be given to the suspect prior to any police questioning. However, in **New York v. Quarles, supra,** the United States Supreme Court held that in certain situations the requirements of **Miranda** will be excused where police ask[ed] questions to ensure the public safety and not to elicit incriminating responses.

Id. at 386, 583 A.2d at 1170.

In **Bowers,** the police responded to a report of a shooting in front of defendant's residence. When the police arrived at the scene they learned that defendant had shot a person walking past his home

with a shotgun. The defendant was found hiding in an abandoned house located next to his home, but the police did not know where the gun was. Defendant was arrested and placed in handcuffs and asked several times where the gun was. At first, defendant refused to provide this information. After the police told defendant they wanted to know where the gun was so it wouldn't be found by a child or another person and someone was hurt, defendant informed the police where to look. These statements, which were made after defendant was in handcuffs and obviously in custody, and which were not preceded by **Miranda** warnings, were found admissible under the public safety exception to the **Miranda** Rule.

Here, any police inquiry as to the location of the gun was clearly prompted by a concern for the officers' own safety and that of the surrounding campers. The police knew that Defendant was intoxicated, that he had recently been physically abusive of his wife, that Defendant had access to a gun and had recently pointed it at a security guard and pressed it against his face, that Defendant was not thinking clearly, and that the situation they were then confronting was potentially highly volatile. It was extremely important to know where the gun was and whether Defendant still had it in his possession.

Under these circumstances, the police asked Defendant only one question, where the gun was, and did not seek to elicit any other information for the purpose of incriminating Defendant. Because we conclude that overriding considerations of public safety justified this single, focused question to determine whether Defendant was armed so as to ensure the safety of the officers and the public before **Miranda** warnings were given, and that the question was not motivated for the purpose of having Defendant incriminate himself, this scenario is one where "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." **Quarles, supra** at 657.

CONCLUSION

Because intent is a subjective state of mind, it is of necessity difficult of direct proof and must often, as here, be demonstrated by circumstantial evidence. This is especially difficult in a case of

this nature where a gun is pointed but no shots are fired, making the line between threatening bodily injury and attempting to cause bodily injury with a deadly weapon oftentimes difficult to discern and extremely fact-dependent. The distinction, however, is a critical one in determining Defendant's true intent, as it separates two different states of mind: the intent to threaten bodily injury and the intent to cause bodily injury.

"[T]he mere act of pointing a gun at another person is not sufficient to support a conviction for aggravated assault. Something more is required in order to establish a specific intent to cause injury to the person at whom the gun is being pointed." **Sanders, supra** at 371, 627 A.2d at 187. Absent this something more, such conduct evidences at most a threat to cause bodily injury—an intent, perhaps, to frighten—but not the requisite intent to actually cause bodily injury. Without further indicia of the specific intent to harm, concluding otherwise would rest solely on impermissible suspicion or surmise. For this reason, Defendant's Omnibus Pretrial Motion requesting dismissal of count one of the criminal information, aggravated assault as an attempt to cause bodily injury to another with a deadly weapon, and count two, simple assault as an attempt to cause bodily injury, will be granted.

With respect to Defendant's Motion seeking to suppress his statement regarding the location of the gun because he was not given his **Miranda** warnings before being asked where the gun was, the immediately preceding attendant circumstances and the immediate necessity of ascertaining the whereabouts of the gun for the safety of the police and the public justified such inquiry under the public safety exception to the requirement that **Miranda** warnings be given before questioning by officers. Accordingly, the Defendant's response, as well as the information derived from this response, is not subject to suppression.

COMMONWEALTH of PENNSYLVANIA
vs. APRIL MAE BANAVAGE, Defendant

*Criminal Law—Driving Under the Influence—Warrantless Blood Draw—Implied/Actual Consent—Effect of Refusal—**Birchfield**—Totality of the Circumstances*

1. The warrantless taking of a blood draw from a driver arrested for driving under the influence constitutes a search subject to the protections of the Fourth Amendment of the United States Constitution, as well as Article I, Section 8 of the Pennsylvania Constitution, against unreasonable searches and seizures.

2. In general, a search or a seizure is unreasonable unless conducted pursuant to a valid search warrant upon a showing of probable cause, or unless an established exception to the warrant requirement applies.

3. Under Pennsylvania's Implied Consent Law, if a driver who has been lawfully arrested for driving under the influence refuses to submit to chemical testing of his breath or blood upon request of the arresting officer, he is subject to enhanced criminal penalties if he is later convicted of violating Section 3802(a)(1) of the Vehicle Code relating to general impairment due to alcohol consumption.

4. In **Birchfield,** the United States Supreme Court held that implied consent laws that impose criminal penalties on drivers who refuse to submit to a blood test violate the Fourth Amendment of the United States Constitution and that implied consent to a blood test cannot lawfully be based on the threat of enhanced criminal penalties if a requested blood test is refused.

5. In **Birchfield,** the United States Supreme Court held that consent to a blood draw after a driver is inaccurately advised that a refusal may result in criminal penalties is not **per se** invalid, but is a factor to be considered in evaluating whether the driver's consent was voluntary under the "totality of all the circumstances."

6. For a consent to a search to be valid, it must be unequivocal, specific and voluntary. Voluntariness requires a showing by the Commonwealth that the consent was the product of an essentially free and unrestrained choice—not the result of duress or coercion, express or implied.

7. After being advised that her refusal to submit to chemical testing of her blood would subject her to increased criminal penalties if she were convicted of driving under the influence, general impairment, alcohol-related, Defendant consented to the test. Defendant's consent was held to be voluntary under the totality of the circumstances: no odor of alcohol was detected on Defendant's breath; Defendant's admission to the arresting officer that she was taking prescription medication and had a neurological condition; an evaluation by a drug recognition expert who opined that Defendant was under the influence of a controlled substance and that a blood draw should be obtained; Defendant's statement to the arresting officer before being advised of the consequences of a refusal that she was agreeable to a blood test and wanted to cooperate; and the absence of evidence that Defendant's consent to a blood test was improperly affected or influenced in any manner by the criminal consequences of which she was advised—as opposed to the civil and evidentiary consequences—of her refusal.

NO. 509 CR 2014

BRIAN B. GAZO, Esquire, Assistant District Attorney—Counsel for Commonwealth.

KATHERINE E. McSHANE, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 16, 2017

In Pennsylvania the right to drive is subject to "implied consent": the statutory requirement that a driver who is arrested for driving under the influence must, upon request, submit to chemical testing of his breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance, failing which various civil, criminal, and evidentiary sanctions may be imposed. 75 Pa. C.S.A. §1547(a)(1), (b)(1), (b)(2)(i-ii). This condition on the right to drive was severely curtailed in **Birchfield v. North Dakota,** ___ U.S. ___, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), where the United States Supreme Court held, **inter alia,** that implied consent laws which impose criminal penalties on the refusal to submit to a warrantless blood test requested in accordance with such laws violate, as a matter of law, the Fourth Amendment's prohibition against unreasonable searches by impermissibly infringing upon the individual's right to refuse a warrantless search of his blood. **Id.** at 2186. At the same time, the Supreme Court held, albeit implicitly, that a driver's actual or express consent to a blood draw was not **per se** invalid, notwithstanding the threat of criminal consequences for a refusal, and that the voluntariness of such consent needed to be "determined from the totality of all the circumstances." **Id.** This question of fact is the issue now before us.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2016, at approximately 8:40 A.M., April M. Banavage ("Defendant") was driving north on State Route 209 in Carbon County when she was stopped by Pennsylvania State Trooper Mark Bower for erratic driving. The legality of this stop is not in question.

Trooper Bower approached the driver's side of Defendant's vehicle and requested to see Defendant's driver's license, vehicle registration, and proof of insurance. In responding to this request, Defendant moved slowly and appeared to Trooper Bower to be

extremely tired and out of it. Upon exiting her vehicle, Defendant was unsteady and had difficulty maintaining her balance. No odor of alcohol was detected on Defendant's breath.

Various field sobriety tests were administered to Defendant, the results of which led Trooper Bower to suspect Defendant was under the influence of a controlled substance. Contributing to this belief was Defendant's statement to Trooper Bower that she was taking prescription medication and had a neurological disorder. Thereupon, Trooper Bower contacted Sergeant Shawn Noonan of the Pennsylvania State Police and was advised to transport Defendant to the Lehighton barracks for evaluation by a drug recognition expert. After this evaluation was completed, Trooper Bower was further advised to take Defendant to the Lehighton Hospital for a blood draw.

While en route to the hospital, Trooper Bower explained to Defendant where they were going and why: to have Defendant's blood chemically tested subject to her agreement to a blood draw. Defendant agreed to submit to the test and stated she would cooperate.

At the hospital, Trooper Bower read the following language from Form DL-26 (3-12) to Defendant verbatim:

> It is my duty as a police officer to inform you of the following:
>
> 1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code.
>
> 2. I am requesting that you submit to a chemical test of **blood** (blood, breath or urine. Officer chooses the chemical test).
>
> 3. If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. In addition, if you refuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. These are the same penalties that would be imposed if

you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of $1,000.00, up to a maximum of five years in jail and a maximum fine of $10,000.

4. You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to speak with an attorney or anyone else after being provided these warnings or you remain silent when asked to submit to chemical testing, you will have refused the test.

(Suppression Hearing, Commonwealth Exhibit No. 1.)

Trooper Bower testified that as he read the above warnings to the Defendant, she appeared to understand what was read and had no questions. Defendant then signed the form where indicated and agreed to the blood draw. No warrant was obtained prior to taking Defendant's blood. The results of this test were positive and, on February 16, 2016, Defendant was criminally charged with driving under the influence—presence of a metabolite of a controlled substance (75 Pa. C.S.A. §3802(d)(1)(iii)) and driving under the influence of a controlled substance—general impairment (75 Pa. C.S.A. §3802(d)(2)), together with various summary moving violations.

On July 11, 2016, Defendant filed an Omnibus Pretrial Motion seeking to suppress the blood results as being obtained in violation of her Fourth Amendment rights and without valid consent, relying principally on the **Birchfield** decision. A hearing on this motion was held on January 24, 2017. At this hearing, Defendant did not testify. The only testimony presented was that of Trooper Bower called by the Commonwealth.

DISCUSSION

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. The taking of blood constitutes a search subject to the protections of the Fourth Amendment, as well as Article I, Section 8 of the Pennsylvania Constitution. **Commonwealth v. Smith,** 621 Pa. 218, 225, 77 A.3d 562, 566 (2013); **Birchfield, supra** at 2173.[1]

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[1] **See also, Commonwealth v. Funk,** 254 Pa. Super. 233, 242, 385 A.2d 995, 1000 (1978) (noting that "blood samples are not testimonial evidence and come under the protection of the [F]ourth, not the [F]ifth, [A]mendment ... and therefore do not get **Miranda** protection.").

"Generally, a search or a seizure is unreasonable unless conducted pursuant to a valid search warrant upon a showing of probable cause." **Commonwealth v. March,** 154 A.3d 803, 808 (Pa. Super. 2017) (citation and quotation marks omitted). "Since the blood test in the case at bar was performed without a warrant, the search is presumptively unreasonable and therefore constitutionally impermissible, unless an established exception applies." **Commonwealth v. Evans,** 153 A.3d 323, 328 (Pa. Super. 2016) (quotation marks and citation omitted). "One of the standard exceptions to the warrant requirement is consent, either actual or implied." **March, supra** (citation omitted).

The sole issue presented in this case is whether Defendant voluntarily consented to the blood draw requested by Trooper Bower or whether her consent was coerced and involuntary. In the context of a suppression motion, the Commonwealth bears both the burden of production and burden of persuasion by a preponderance of the evidence that the challenged evidence was lawfully obtained and is admissible. **Commonwealth v. Enimpah,** 62 A.3d 1028, 1031 (Pa. Super. 2013), **affirmed,** 630 Pa. 357, 368, 106 A.3d 695, 701 (2014); **Evans, supra** at 327; Pa. R.Crim.P. 581(H). It is the state's burden to prove consent.

In order for a consent to search to be valid, it must be unequivocal, specific, and voluntary. **Commonwealth v. Acosta,** 815 A.2d 1078, 1083 (Pa. Super. 2003) **(en banc), appeal denied,** 576 Pa. 710, 839 A.2d 350 (2003).

> In connection with the inquiry into the voluntariness of a consent given pursuant to a lawful encounter, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances. While knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Additionally, although the inquiry is an objective one, the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will), are to be taken into account.

> Since both the tests for voluntariness and for a seizure centrally entail an examination of the objective circumstances surrounding the police/citizen encounter to determine whether there was a show of authority that would impact upon a reasonable citizen-subject's perspective, there is a substantial, necessary overlap in the analyses.
>
> ***
>
> [Thus, we] conclude that the following factors ... are pertinent to a determination of whether consent to search is voluntar[ily] given: 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including the degree of coerciveness; 8) whether the person has been told that he is free to leave; and 9) whether the citizen has been informed that he is not required to consent to the search.

Commonwealth v. Powell, 994 A.2d 1096, 1101-1102 (Pa. Super. 2010) (**quoting Commonwealth v. Kemp,** 961 A.2d 1247, 1261 (Pa. Super. 2008) **(en banc)**), **appeal denied,** 608 Pa. 665, 13 A.3d 477 (2010).

"The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent." **Smith, supra** at 236, 77 A.3d at 573 (**quoting Commonwealth v. Reid,** 571 Pa. 1, 811 A.2d 530, 549 (2002)). "Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation." **Id.**

The key concern is whether the consent was voluntarily given and not the product of coercion or duress. **Commonwealth v. Cleckley,** 558 Pa. 517, 522, 738 A.2d 427, 430 (1999). This is a question of fact to be determined by the totality of the circum-

stances. **Id.** Under this standard, "no one fact, circumstance, or element of the examination of a person's consent has talismanic significance." **Smith, supra** at 229, 77 A.3d at 569. "[W]hile knowledge of the right to refuse consent is a factor to consider in determining whether consent to search was voluntarily and knowingly given, it is not dispositive." **Cleckley, supra** ("One's knowledge of his or her right to refuse consent remains a factor in determining the validity of consent ... " **id.** at 527, 738 A.2d at 433 and whether the consent was the "result of duress or coercion."); **see also, Schneckloth v. Bustamonte,** 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973) (same).

Here, Defendant was correctly advised that she was under arrest for driving under the influence of alcohol or a controlled substance; that if she refused the requested chemical test of her blood, her license would be suspended; and that she had no right to consult with an attorney before deciding whether to submit to testing. She was also advised—in hindsight, incorrectly, based on the June 23, 2016 **Birchfield** decision—that if she refused a chemical test of her blood and was subsequently convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, she would be subject to the enhanced criminal penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code, the same penalties which apply to motorists convicted of driving with the highest rate of alcohol. Significantly, Pennsylvania's enhanced criminal penalties for persons who refuse a requested blood test and are then convicted of violating Section 3802(a)(1) apply only to motorists convicted of driving under the influence of alcohol, general impairment: they are inapplicable to individuals such as the Defendant whose violation consists of having any amount of a metabolite of a prohibited controlled substance in their blood or whose impairment is caused by any drug or combination of drugs, and who, by virtue of such violation, are automatically subject to the penalties described in Section 3804(c).[2] The question then becomes

[2] Specifically, Section 3802(a)(1) under the subtitle of "general impairment" prohibits an individual from driving a vehicle "after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving ... the vehicle." 75 Pa. C.S.A. §3802(a)(1).

whether Defendant was misled by this later warning.[3] **See Commonwealth v. Wright,** 411 Pa. 81, 85, 190 A.2d 709, 711 (1963) (Consent for a search "may not be gained through stealth, deceit or misrepresentation, and that if such exists this is tantamount to implied coercion ... ").

Under the evidence presented at the suppression hearing, before Trooper Bower requested a blood test it appeared likely that Defendant's impairment was caused by one or more controlled substances, not alcohol. At the time of Defendant's traffic stop, notwithstanding Defendant's erratic driving, Trooper Bower's observations of Defendant's sluggishness and unsteadiness while standing, and the results of the field sobriety tests, Trooper Bower detected no odor of alcohol. (Suppression Hearing, Commonwealth Exhibit No. 2—Intoxication Worksheet.) To this must be added that at the scene, Defendant advised Trooper Bower she had a neurological disorder and was taking prescription medication. Finally, while still at the scene, Trooper Bower was in contact with a drug recognition expert, Sergeant Noonan, who advised Trooper Bower to have a drug recognition evaluation performed. Only after this occurred was Trooper Bower advised to take Defendant to the hospital for a blood draw.

It was in the face of this information that Trooper Bower transported Defendant to the Lehighton Hospital for a blood test. The results of that test disclosed the presence of approximately five depressants and ecstasy in Defendant's system. No alcohol was discovered, a fact Defendant must have anticipated when the DL-26 Form was read to her and she agreed to the blood draw.

Under these circumstances, it is likely the partial defect in the DL-26 Form was inconsequential to Defendant's decision to consent to the blood draw and did not influence that decision. Supporting this conclusion is the restrained and respectful manner with which Trooper Bower treated Defendant, explaining to her

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[3] In this respect no evidence was presented as to Defendant's knowledge or experience relative to Pennsylvania's driving under the influence laws, and Defendant never testified that she was deceived or misled by the reference in the DL-26 Form to a conviction under Section 3802(a)(1) of the Vehicle Code as the trigger for imposing enhanced criminal penalties if she refused to submit to a blood test.

what was going on and why he was taking her to the hospital, and Defendant agreeing to the draw before she arrived at the hospital and the DL-26 Form was read to her.

That Defendant's consent was freely given and uncoerced is supported not only by Trooper Bower's manner of interacting with Defendant, but also by Defendant's willingness to cooperate. There is no evidence of a show of force, unusual commands, aggressive behavior, or any use of language or tone by Trooper Bower that was not commensurate with the circumstances. Nor is there any evidence to suggest that Trooper Bower's request for Defendant to submit to a blood test was a command or a directive.

And while it is true that Defendant was in custody at the time her consent was given, a factor which must be taken into account, this factor is not controlling and is outweighed here by Defendant knowing the test was being requested for criminal or prosecutorial purposes and having been advised via Officer Bower's reading of the DL-26 Form that she had a right to refuse testing. **See Commonwealth v. Rosas,** 875 A.2d 341, 350 (Pa. Super. 2005) (collecting cases finding consent voluntary notwithstanding that defendant was under arrest and handcuffed at the time), **appeal denied,** 587 Pa. 691, 897 A.2d 455 (2006); **Smith, supra** at 239, 244, 77 A.3d at 574-75, 578 (analyzing whether a consent must be both knowing and voluntary, the majority apparently concluding that "a defendant's knowledge of the possible use of blood test results in a subsequent criminal prosecution against him is a required, rather than merely a relevant, factor in an assessment of voluntary consent" and the dissent concluding that a defendant's "knowledge (whether actual or 'objective') of the criminal investigative purposes of a search may certainly be a relevant factor in determining the voluntariness of consent, but is not a necessary one"). That Defendant possessed the requisite knowledge to understand the criminal implications of her consent is objectively readily apparent from the evidence: she was coherent throughout her interactions with Trooper Bower, she was uninjured (eliminating the possibility that the blood draw was for medical purposes), there was no vehicle accident (eliminating the possibility that the blood draw was part of a routine accident investigation), and she was under arrest. Given these factors, Defendant knew or should have known the purpose of the chemical

test of her blood was to determine if she was under the influence for prosecutorial purposes. Overall, we find that Defendant's consent was voluntarily given as it was "the product of an essentially free and unconstrained choice." **Commonwealth v. Strickler,** 563 Pa. 47, 79, 757 A.2d 884, 901 (2000).

CONCLUSION

Notwithstanding the partial inaccuracy of the DL-26 warning given to Defendant, the error was harmless in the sense it was factually inapplicable to Defendant's circumstances and, under the totality of the circumstances, was not evidenced to have influenced Defendant's decision to submit to a warrantless blood test. Accordingly, Defendant's Motion to Suppress the blood that was taken from her at the hospital and the results of the blood alcohol test will be denied.

COMMONWEALTH of PENNSYLVANIA
vs. ERNEST T. FREEBY, Defendant

Criminal Law—PCRA—Ineffectiveness of Trial Counsel—Requirement of Actual Prejudice—Comparing the Standards and Burdens Which Apply to a Collateral Challenge Premised on Counsel's Ineffectiveness With Those Applicable to a Claim of Trial Court Error on Direct Appeal—Distinguishing a Claim of Counsel's Ineffectiveness From a Waived Claim of Trial Court Error From Which It Derives As Presenting Separate But Related Issues for Review

1. Under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§5941-5946, a claim of ineffectiveness of trial counsel requires the petitioner to prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. Under this standard, the petitioner must prove that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

2. Where the claim of counsel's ineffectiveness is premised on matters of strategy and tactics, a finding that the strategy chosen by trial counsel lacked a reasonable basis is not warranted unless, in light of all the alternatives available to counsel, the strategy chosen was so unreasonable that no competent lawyer would have chosen it. In the absence of such proof, counsel is presumed to be effective.

3. To meet the PCRA standard for prejudice, the petitioner must prove actual prejudice; prejudice is not presumed. This requires the petitioner to prove that but for counsel's unprofessional errors, there is a reasonable probability the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

4. In certain limited circumstances the prejudicial effect of counsel's ineffectiveness is presumed and is not required to be proven. **Per se** ineffectiveness has been found to exist in the following three scenarios: (1) where there was an actual or constructive denial of counsel; (2) where the state interfered with counsel's assistance; or (3) where counsel had an actual conflict of interest.

5. Whereas, when a collateral attack on trial counsel's performance is made under the PCRA, counsel is presumed to be effective and defendant has the burden of proving that counsel's conduct had an actual adverse effect on the outcome of the proceedings, the standard for evaluating the effect of trial court error on direct appeal is an easier standard for a defendant to meet. Under the "harmless error" standard applicable to direct appeals of trial court error, "whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless." To refute such a finding, the burden is on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt.

6. A juror who acknowledges during voir dire a natural preference for wanting the defendant to take the stand and testify over a defendant who does not testify, but is not questioned as to whether she would be able to set aside this preference and follow the court's instruction that the defendant in a criminal case is not required to testify and that if he chooses not to testify this cannot be held against him, is not automatically disqualified as a juror. Consequently, where defense counsel fails to make a challenge for cause or to exercise a preemptory challenge to strike a juror who expresses such personal preference, and where no further examination occurs of whether such preference is fixed or whether the juror will accept and apply the law given by the court, this failure by itself, combined with the court's express instruction to the jury that defendant's decision not to testify cannot be held against him as well as the legal presumption that a jury follows the court's instructions, does not prove by a reasonable probability that defendant has in fact been prejudiced by the juror's selection as a member of the jury.

7. No error occurred when the trial court granted the Commonwealth's challenge for cause of those jurors who indicated during jury selection that their ability to be fair and impartial would be affected—in a case where the defendant was charged with homicide—if the Commonwealth failed to produce the victim's body, and that they would be unable to convict under such circumstances. Moreover, the PCRA standard of prejudice is not met where trial counsel failed to raise this issue on direct appeal and fails to show that those jurors who were selected in place of those jurors who were stricken for cause were somehow not fair and impartial.

8. Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that has some reasonable basis designed to effectuate his client's interests. Here, trial counsel's decision not to call a defense expert—once the opinion of the Commonwealth's expert which the defense expert had been employed to rebut was precluded and stricken by the court—for fear that the defense expert's testimony might open the door to the Commonwealth recalling its expert was not so unreasonable that no competent lawyer would have chosen it.

9. Derivative claims of ineffective assistance of counsel are analytically distinct from defaulted direct review claims that were or could have been raised on direct appeal. Because Sixth Amendment claims challenging counsel's conduct at trial are analytically distinct from foregone claims of trial court error from which they frequently derive, and must be analyzed as such, Sixth Amendment claims of trial counsel's ineffectiveness constitute a separate is-

sue for review under the PCRA and are not foreclosed by a denial on direct review of alleged trial court error.

10. Defense counsel's failure to request a mistrial was not ineffective where defense counsel had a reasonable basis to believe the trial was going well for Defendant and that reasonable doubt had been created, and where the record of the evidence presented at trial does not establish that Defendant was deprived of a fair and impartial trial.

NO. 539 CR 2009

GARY F. DOBIAS, Esquire, District Attorney—Counsel for Commonwealth.

BRIAN J. COLLINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 23, 2017

On January 30, 2012, the Defendant, Ernest T. Freeby, was convicted of first-degree murder[1] in the death of his wife, Edwina Onyango, and tampering with physical evidence[2] as part of a cover-up to conceal and remove evidence of his wife's death and his involvement. These convictions were upheld on direct appeal. Defendant now seeks to overturn his convictions through a collateral challenge pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§5941-5946, in which Defendant claims his trial counsel was ineffective.

PROCEDURAL AND FACTUAL BACKGROUND

Edwina's body was never discovered and there were no eyewitnesses to the crime. In consequence, the evidence used to convict Defendant was entirely circumstantial.

The marriage between Defendant and Edwina on March 20, 2001, was a marriage of convenience: Defendant wanted a wife to increase his chance of gaining custody of his two children from a previous relationship, and Edwina, a native of Kenya whose legal status in this country was in question, hoped to increase her chance of becoming a United States citizen by marrying Defendant. From this shaky beginning, it was perhaps not unexpected that the two separated sometime in 2003. Edwina remained in the Allentown area where she and Defendant first lived after their marriage, and

[1] 18 Pa. C.S.A. §2501(a).

[2] 18 Pa. C.S.A. §4910(1).

Defendant moved to Carbon County and set up residence at 207 West Bertsch Street, Lansford, Pennsylvania.

After Defendant and Edwina separated, Defendant began a romantic relationship with Julianne Sneary with whom he fathered three children. Although Defendant claimed this was an open relationship of which Edwina was aware, the Commonwealth's evidence was that Edwina only became aware of the relationship and the fact that Defendant and Julianne Sneary had children together shortly before her disappearance in December of 2007. Before then, Defendant attempted to keep Ms. Sneary's presence hidden from Edwina—Ms. Sneary would leave Defendant's home on Sundays before Edwina arrived to routinely visit Defendant—and Defendant had others tell Edwina the children Defendant had with Ms. Sneary were Defendant's sister's children.

In contrast to Edwina, Ms. Sneary knew of Edwina's existence and that Defendant and Edwina were married; in fact, this was the reason Defendant gave Ms. Sneary for why he was unable to marry her. Defendant disclosed to Ms. Sneary the nature of his marriage to Edwina, told Ms. Sneary that he could not get divorced because he had made a promise to Edwina to stay married until she obtained United States citizenship, discussed with Ms. Sneary the status of deportation proceedings that had been brought against Edwina and the parallel proceedings for Edwina to gain United States citizenship, and repeatedly promised Ms. Sneary that the end was in sight and that as soon as Edwina became a United States citizen, he would obtain a divorce and could marry Ms. Sneary.

As this situation dragged on, Ms. Sneary's parents increasingly disapproved of their daughter's relationship with Defendant, of her having children with a married man, and urged Ms. Sneary to leave Defendant. At one point when Defendant and Ms. Sneary were discussing their wedding plans, and the impossibility of this occurring as long as Defendant was married to Edwina, and the pressure Ms. Sneary's parents were placing on her to leave Defendant, Defendant told Ms. Sneary that the only way he could rid himself of Edwina was to kill her. This conversation occurred approximately one year prior to Edwina's disappearance.

Edwina was last seen or heard from by her blood relatives on Sunday morning, December 9, 2007, at approximately 11:00 A.M. Edwina told her sister, Phoebe Onyango, and a family friend, Ester

Ouma, that she was going to visit Defendant at his home in Lansford and would be returning home later in the day. This never happened.

Prior to her December 9, 2007 disappearance, Edwina had maintained regular, almost daily contact, either in person or by telephone, with family and friends. When this ceased, Edwina's family reported her missing to the police. As part of a police investigation into Edwina's whereabouts, Defendant told the police that Edwina had been to his home with a friend on December 9, 2007, at around noon, and stayed approximately two to two and a half hours. Defendant told the police that Edwina no longer wanted her 2000 Dodge Neon and had given it to him to keep, that Edwina left his home in her friend's vehicle. In Edwina's car were numerous personal items which would normally be removed by the owner before transferring ownership of a car. Defendant also denied that he had ever used Edwina's credit card, yet the police later learned that Edwina's credit card had been used eight times after her disappearance, all eight times by Defendant.

While executing a search warrant at Defendant's residence on January 17, 2008, the police discovered human blood on steps leading to the basement, on the basement floor, on the door leading to the coal bin, and on several areas inside the coal bin. A large area of blood was discovered on the dirt floor of the coal bin and hair was found nearby embedded in blood on the concrete wall. Subsequent DNA testing disclosed that the blood found in three areas of the basement was Edwina's and that the hair matched Edwina's maternal bloodline.

During their investigation of Defendant's home on January 17, 2008, the police noticed that the steps leading to the basement had recently been painted. When this paint was stripped, the police found additional blood underneath the paint. Defendant admitted to painting the steps. Additionally, after the police discovered blood on the dirt floor of the coal bin, Defendant removed the dirt to a depth of approximately eight to ten inches and also removed a 2 x 4 wooden support beam that had previously been found to contain blood.

At trial, the Commonwealth's experts testified that the blood pattern on the floor of the coal bin was created by a large quantity or pooling of blood and that this was consistent with a substantial or significant wound. The Commonwealth's experts further opined

that the blood pattern in the coal bin floor was consistent with a stationary body bleeding while at that location, and that the hair embedded in blood on the concrete wall was consistent with the head of this body resting against the wall. The Commonwealth's experts further testified that the scene in Defendant's basement was indicative of injury resulting from trauma or violence, rather than accidental means. (N.T. 1/23/12 (Trial), pp.148-50; N.T. 1/24/12 (Trial), pp. 140-43.)

At the conclusion of the evidence, and following jury instructions, Defendant was convicted of murder in the first degree and tampering with physical evidence. He was sentenced to life imprisonment on the charge of murder and a consecutive term of two years' probation on the charge of tampering with physical evidence. Post-trial motions were filed by the Defendant on May 24, 2012, and denied by the court on October 22, 2012.

On direct appeal to the Pennsylvania Superior Court, Defendant's judgment of sentence was affirmed by that court on December 4, 2013. Reargument was denied on February 6, 2014. On July 9, 2014, the Pennsylvania Supreme Court denied Defendant's Petition for Allowance of Appeal.

On April 2, 2015, Defendant filed a **pro se** Post Conviction Collateral Relief Act ("PCRA") Petition. As this was Defendant's first PCRA petition, counsel was appointed to represent Defendant and an amended counseled Petition was filed on September 25, 2015. A hearing on the Amended Petition was held on June 23, 2016. Defendant's brief in support of the Petition was filed on November 28, 2016, and the Commonwealth's brief in opposition was filed on January 6, 2017. Defendant raises four issues, all involving claims of ineffectiveness of trial counsel, which we discuss below. At trial, Defendant was represented by attorneys George T. Dydynsky, Esquire and Paul J. Levy, Esquire.

DISCUSSION

Prefatory to examining Defendant's claims of counsels' ineffectiveness, it's important that we review the constitutional standard for evaluating on collateral review whether counsel has been ineffective and to contrast this with the harmless error standard applied in evaluating trial court error on direct appeal. Under the

PCRA, to establish trial counsel's ineffectiveness, a petitioner must demonstrate:

> (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).

Commonwealth v. Spotz, 624 Pa. 4, 18 n.3, 84 A.3d 294, 302 n.3 (2014). Furthermore,

> a PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

Id. at 33, 84 A.3d at 311 (internal quotation marks and other punctuation omitted). To this must be added that

> [g]enerally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. ... Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. ... To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. ... A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

Id. at 33-34, 84 A.3d at 311-12 (internal citations, quotation marks and other punctuation ommitted); **Commonwealth v. Dunbar,**

503 Pa. 590, 596, 470 A.2d 74, 77 (1983) ("Before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it.").[3] "Counsel's assistance is **deemed constitutionally effective** [if the] Court determines that the defendant has not established any one of the prongs of the ineffectiveness test." **Commonwealth v. Rolan,** 964 A.2d 398, 406 (Pa. Super. 2008) (citations and internal quotation marks omitted) (emphasis in original).

In contrasting the standard for evaluating counsel's ineffectiveness in the context of a post-conviction collateral proceeding with a preserved claim of trial court error on direct appeal, the Pennsylvania Supreme Court in **Spotz** stated:

> As a general and practical matter, it is more difficult for a defendant to prevail on a claim litigated through the lens of counsel ineffectiveness, rather than as a preserved claim of trial court error. **Commonwealth v. Gribble,** 580 Pa. 647, 863 A.2d 455, 472 (2004). This Court has addressed the difference as follows:
>
> [A] defendant [raising a claim of ineffective assistance of counsel] is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could

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[3] Under the Strickland/Pierce test for ineffectiveness, actual prejudice must be demonstrated by the petitioner; it is not presumed. To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), decided the same day as Strickland, the United States Supreme Court held that there are certain circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," prejudice is presumed and is not required to be proven. Id. at 658, 104 S. Ct. at 2046. In the context of ineffective assistance of counsel, per se ineffectiveness has been found to exist, thus removing the Defendant's burden to prove actual prejudice, where there was an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest. Smith v. Robbins, 528 U.S. 259, 287, 120 S. Ct. 746, 765, 145 L. Ed. 2d 756 (2000); see also, Commonwealth v. Reaves, 592 Pa. 134, 148, 923 A.2d 1119, 1128 (2007). Because Defendant's claim of ineffectiveness does not fall into one of these three categories, Defendant is required to prove actual prejudice to prevail.

have reasonably had an adverse effect on the outcome of the proceedings.' **Pierce,** 515 Pa. at 162, 527 A.2d at 977. This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in **Commonwealth v. Story,** 476 Pa. [391], 409, 383 A.2d [155], 164 [(1978)] (citations omitted), states that '[w]henever there is a "reasonable possibility" that an error "might have contributed to the conviction," the error is not harmless.' This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the **Pierce** prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. **Pierce, supra.**

Spotz, supra at 39, 84 A.3d at 315.

Earlier, in **Commonwealth v. Howard,** 538 Pa. 86, 645 A.2d 1300 (1994), the Pennsylvania Supreme Court stated the following with regard to the different standards and burdens in a collateral challenge premised on counsel's ineffectiveness versus a "harmless error" analysis on direct appeal:

> As noted above, this Court has held under **Pierce** and its progeny that a defendant is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' **Pierce,** 515 Pa. at 162, 527 A.2d at 977. This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in **Commonwealth v. Story,** 476 Pa. at 409, 383 A.2d at 164 (citations omitted), states that '[w]henever there is a "**reasonable** possibility" that

an error "might have contributed to the conviction," the error is not harmless.' This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the **Pierce** prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. **Pierce, supra.**

Id. at 1307. We now address Defendant's first claim of ineffectiveness of counsel.

(1) The Selection of Alice Nyer As a Juror

During **voir dire** the following exchange took place between Defendant's trial counsel, George T. Dydynsky, Esquire, and the jury:

MR. DYDYNSKY: The law, our Constitution, our Bill of Rights do not require him to take the stand in his defense. ... Now, that being said, should Mr. Freeby not take the stand, would any of you hold that against him? Or would you still give him the presumption of innocence and still look at the evidence as we present it and as the Commonwealth presents it and make your decision on the evidence that is before you and still believe in that presumption of innocence of Mr. Freeby?

Now, that being said, does anyone here have a problem with a defendant not testifying on his own defense? Anyone have a problem with the defendant not testifying on his own behalf?

JUROR 17: Pat Fauzio, number 17.

MR. DYDYNSKY: Now, if the Judge instructed you, just as I did—well, I didn't instruct you. I told you. I told you the background information. The defendant is presumed innocent. If the Judge instructs you that he does not need to get up and take an oath and testify, would you still feel that you prefer he testify?

JUROR 5: Alicia Nyer, five.

(N.T. 1/9/12 (Trial), pp. 55-57.)

Based on this exchange, Defendant claims trial counsel was ineffective for failing to challenge for cause Ms. Nyer's ability to be a fair, impartial and unprejudiced juror or, in the alternative, for failing to exercise a peremptory challenge to have Ms. Nyer stricken as a member of the jury. Ultimately, Ms. Nyer was selected and sat as one of the twelve principal jurors at Defendant's trial. The Defendant did not take the stand in his own defense at trial.

In **Commonwealth v. England,** 474 Pa. 1, 375 A.2d 1292 (1977), the Pennsylvania Supreme Court stated:

> A prospective juror's personal views are of no moment absent a showing that these opinions are so deeply embedded as to render that person incapable of accepting and applying the law as given by the court. So long as the juror is able to, intends to, and eventually does, adhere to the instructions on the law as propounded by the trial court, he or she is capable of performing the juror's function. In this regard, it may safely be inferred that a juror will not violate his or her oath in the absence of any expression or other indications to the contrary.

Id. at 8, 375 A.2d at 1296. Contrary to Defendant's contention, Ms. Nyer did not express a fixed opinion of being unable to follow the court's instructions or that she would hold it against Defendant if he did not testify on his own behalf.

On its face, it is unclear what Ms. Nyer believed. During **voir dire,** the Jury was instructed that if a question was asked by counsel which identified an issue which required a response, they should raise their hand, state their name, and identify their jury number. (N.T. 1/9/12 (Trial), p. 2.) This was done by Ms. Nyer, however, no follow-up was conducted by counsel and consequently, it is speculative at best to know exactly what Ms. Nyer intended to say if counsel had followed up. At most, Ms. Nyer's responding to the question actually asked indicates only the personal view of what most people asked this question would likely and honestly say, that they would "prefer" to hear from the Defendant. **See Commonwealth v. England, supra** ("A prospective juror's personal views are of no moment ... ."). Ms. Nyer was not asked and she did not state that if she were expressly instructed by the court, as she was, that Defendant was not required to testify and that if he chose not

to testify this could not be held against him, that she would not follow the court's instructions. (N.T. 1/30/12 (Trial), pp. 178-79).[4]

Significantly, Defendant has failed to establish by a reasonable probability that, but for trial counsel's alleged failure to challenge for cause or to exercise a peremptory challenge and having Ms. Nyer stricken from the jury, that the result of the proceedings would have been different. The jury is presumed to follow the court's instructions and there is no reason to believe Ms. Nyer, as well as any of the other jurors, did not do so in this case. **Commonwealth v. Johnson,** 542 Pa. 384, 401, 668 A.2d 97, 105 (1995).

(2) Trial Counsel's Failure to Appeal the Court's Grant of the Commonwealth's Challenge for Cause of Those Jurors Who Stated That Their Ability to Be Fair and Impartial Would Be "Affected" by the Commonwealth's Inability to Produce a Body

During **voir dire,** the District Attorney asked the prospective jurors the following question:

> Members of the jury, I believe his Honor will later on instruct you that it is not necessary for the Commonwealth to produce the victim's body in order to convict someone of homicide. Are there any of you who do not agree with that or have a problem with that concept?

(N.T. 1/9/12 (Trial), p. 29.)[5] With respect to those jurors who responded in the affirmative, the District Attorney asked whether the failure of the Commonwealth to produce the victim's body would affect their ability to be fair and impartial and whether they would

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[4] On this point, the jury was instructed as follows:

> In this case, the Defendant, Ernest Troy Freeby, did not take the stand to testify. It is entirely up to the defendant in a criminal trial to choose whether or not to testify. A criminal defendant has an absolute right, founded on the Constitution, to remain silent. His plea of not guilty is a denial of the charges against him. You must not draw any inference of guilt from the fact that the Defendant did not testify. The Commonwealth has to prove the Defendant's guilt beyond a reasonable doubt without any aid from the fact that the Defendant did not testify. This is not an arbitrary rule, but it is one that is well founded in logic and in our experience in the administration of justice.

(N.T. 1/30/12 (Trial), pp. 178-79.)

[5] In fact, that instruction was given. (N.T. 1/30/12 (Trial), p. 189.)

be able to convict the Defendant if the Commonwealth could not produce the victim's body. (N.T. 1/9/12 (Trial), pp. 29-30.) As to those jurors who indicated their ability to be fair and impartial would be affected by the Commonwealth's failure to produce the victim's body and that they would be unable to convict under such circumstances, the court granted the Commonwealth's request to strike for cause. (N.T. 1/9/12 (Trial), pp. 65-71.)[6]

As a matter of law, the Commonwealth is not required to produce a body to sustain a conviction in a homicide case. **Commonwealth v. Rivera,** 828 A.2d 1094, 1104 (Pa. Super. 2003), **appeal denied,** 577 Pa. 672, 842 A.2d 406 (2004). Consequently, as to those jurors who stated their ability to be fair and impartial would be affected if the Commonwealth was unable to produce a body, the court acted appropriately in granting the Commonwealth's challenge for cause. **See Commonwealth v. Sushinskie,** 242 Pa. 406, 413, 89 A. 564, 565 (1913) (holding that when faced with a challenge of a juror for cause, the trial judge has "wide discretion" and his judgment in passing upon such challenge is to be given "much weight").

Further, Defendant has failed to show that by granting the Commonwealth's challenge for cause, the Defendant was somehow denied a fair and impartial jury. Stated differently, Defendant has failed to show that those jurors who were selected in place of those jurors who were stricken for cause were somehow not fair and impartial. In sum, Defendant has failed to establish that he was prejudiced by the jurors who were selected in place of those who were stricken, the third prong of the **Pierce** test.

(3) Trial Counsel's Failure to Call Dr. Cyril Wecht As an Expert Witness

As part of its case-in-chief, the Commonwealth presented the testimony of Dr. Isidore Mihalakis, an expert in the field of forensic pathology. Dr. Mihalakis testified that the amount of Edwina's blood found in Defendant's basement was consistent with a significant

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[6] In Defendant's counseled Motion for Post Conviction Collateral Relief the jurors complained of were juror numbers 10, 17, 41, 57, 62 and 78. At the PCRA hearing, counsel for the Defendant conceded that of those jurors identified in Defendant's PCRA Motion, several would have been stricken for cause for other reasons. (N.T. 6/23/16 (PCRA Hearing), pp. 125-29.)

injury, one requiring medical attention, and that the amount and location of this blood was indicative of trauma or violence. Defendant's objection to Dr. Mihalakis testifying that the crime scene was consistent with a homicide was sustained, and when Dr. Mihalakis nevertheless sought to interject such testimony in his response to another question, the testimony was stricken and the jury later instructed to disregard Dr. Mihalakis's testimony on this point. (N.T. 1/23/12 (Trial), pp. 152-53.)

To counter Dr. Mihalakis's testimony, the defense had arranged for its own forensic pathologist, Dr. Cyril Wecht, to be called as a defense witness. After Dr. Mihalakis was precluded from opining that the crime scene was consistent with a homicide, as a tactical matter, defense counsel elected not to call Dr. Wecht. As Attorney Dydynsky testified at the post-conviction hearing, the defense believed they had been successful in keeping a critical piece of evidence from being considered by the jury and were concerned that if Dr. Wecht were called as a defense witness, this might open the door to Dr. Mihalakis being recalled on rebuttal and risk having his opinions which were previously excluded admitted. (N.T. 6/23/16 (PCRA Hearing), pp. 117-18, 186-87, 207.)

Defendant's claim that his trial counsel was ineffective in failing to call Dr. Wecht in his defense directly questions the wisdom of strategic or tactical decisions made by his trial counsel. "Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." **Commonwealth v. Miller,** 572 Pa. 623, 646, 819 A.2d 504, 517 (2002) (internal quotation marks omitted). With respect to the calling of expert witnesses in a criminal matter, the Pennsylvania Supreme Court in **Commonwealth v. Chmiel,** 612 Pa. 333, 30 A.3d 1111 (2011) stated:

> The mere failure to obtain an expert rebuttal witness is not ineffectiveness. Appellant must demonstrate that an expert witness was available who would have offered testimony designed to advance appellant's cause. ... Trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic, or

> scientific expert merely to critically evaluate expert testimony [that] was presented by the prosecution.

Id. at 388, 30 A.3d at 1143 (internal quotations and citations omitted). Here, in addition to successfully challenging Dr. Mihalakis's opinion that the crime scene in Defendant's basement was consistent with a homicide, defense counsel raised questions regarding the quantity of blood upon which Dr. Mihalakis premised his opinion that the amount of blood found was consistent with a significant injury having occurred.

When asked to estimate the amount of blood upon which he based his opinion, Dr. Mihalakis conceded he couldn't. Trooper Phillip Barletto, who testified on the Commonwealth's behalf before Dr. Mihalakis, also acknowledged on cross-examination that it was not possible to quantify the amount of blood spilled given the number of variables, including temperature, soil composition and the clothing worn by the victim. (N.T. 1/16/12 (Trial), p. 177.) When Dr. Mihalakis was asked whether his inability to quantify the actual amount of blood involved changed his opinion, he said it didn't, explaining the blood was distributed over an area of a foot and a half in length and six to eight inches wide. (N.T. 1/23/12 (Trial), pp. 154-55.) In closing argument, defense counsel demonstrated that even a small quantity of fluid could be dispersed over a similar area. (N.T. 1/30/12 (Trial), pp. 66-67.)

Dr. Wecht was retained by the defense in this case to refute the unexpressed but implied conclusion and opinion contained in Dr. Mihalakis's expert report of February 18, 2008, that the crime scene was consistent with a homicide. (N.T. 6/23/16 (PCRA Hearing), pp. 114, 204-205.)[7] Once Dr. Mihalakis was barred from rendering

[7] To the extent Dr. Wecht was critical of the legitimacy of Dr. Mihalakis's conclusions and their reliance on what Dr. Wecht termed "interpersonal factors," this aspect of Dr. Wecht's report was a critical evaluation of an expert's opinion of the type found wanting in **Commonwealth v. Chmiel,** 612 Pa. 333, 338, 30 A.3d 1111, 1143 (2011), and was of a type readily understandable by a layperson and able to be argued directly by counsel before the jury. Moreover, as noted in our Memorandum Opinion of November 20, 2012, because the "interpersonal factors" to which Dr. Mihalakis referred in his report of February 18, 2008, in opining that Edwina was dead—factors such as her unexplained disappearance, failure to contact friends and family, and failure to return to work—were all factors which the jury could interpret on its own, without the need for expert testimony, we declined to allow Dr. Mihalakis to make this conclusion for the jury.

this opinion, the primary reason defense counsel had employed Dr. Wecht as a witness no longer existed and the threat of rebuttal testimony from Dr. Mihalakis undermining this victory if Dr. Wecht testified was a strategic and tactical consideration trial counsel was right to consider. **See Commonwealth v. Begley,** 566 Pa. 239, 290, 780 A.2d 605, 635 (2001) (finding that trial counsel may legitimately make tactical decisions not to question witnesses about alleged inconsistencies so as not to enable the witnesses to clarify their testimony and develop plausible explanations). Following Dr. Mihalakis's testimony, defense counsel believed they had dodged a bullet and had created reasonable doubt about Defendant's guilt by highlighting a major weakness in the Commonwealth's case—over how much blood was in fact lost and whether this loss was sufficient to be life threatening—which would be jeopardized if Dr. Wecht were called to testify. (N.T. 6/23/16 (PCRA Hearing), p. 218.)

In evaluating defense counsel's strategy, it is also important to understand that during the trial, defense counsel was in contact with Dr. Wecht and reviewed with him the evidence presented and trial strategy. (N.T. 6/23/16 (PCRA Hearing), pp. 104-105.) In particular, defense counsel advised Dr. Wecht that the court had precluded Dr. Mihalakis from testifying that the crime scene was consistent with a homicide. (N.T. 6/23/16 (PCRA Hearing), pp. 116, 183-84.) Both defense counsel and Dr. Wecht, who has a law degree and is admitted to the Pennsylvania bar, agreed that after the court ruling and the limitations of Dr. Mihalakis's testimony, it would not be necessary for Dr. Wecht to testify. (N.T. 6/23/16 (PCRA Hearing), pp. 116, 207.)

The reasonableness of counsel's representation must be viewed from counsel's perspective at the time of trial and evaluated in the context of the entire record and counsel's overall strategy to determine whether counsel lacked a reasonable basis for his or her actions or inactions; second guessing counsel in hindsight and comparing what counsel did with what he or she might have been done is not the standard. **Commonwealth v. Puksar,** 597 Pa. 240, 256-57, 951 A.2d 267, 277 (2008); **Commonwealth v. Saxton,** 516 Pa. 196, 532 A.2d 352 (1987). Given the reasons defense counsel provided at the PCRA hearing and the evidence which supported this rationale, we do not find counsel's decision not to call Dr.

Wecht to be "so unreasonable that no competent lawyer would have chosen it." **Commonwealth v. Dunbar, supra.**

(4) Failure to Request a Mistrial Following Dr. Mihalakis's Testimony That the Crime Scene Was Consistent With a Homicide

At trial, Dr. Mihalakis was asked on direct examination whether the scene in Defendant's basement was "consistent with or indicative of serious bodily injury or homicide." (N.T. 1/23/12 (Trial), p. 150.) The court sustained Defendant's objection to this question on the basis that any opinion about whether or not the crime scene was consistent with the occurrence of a homicide was beyond the scope of Dr. Mihalakis's report. (N.T. 1/23/12 (Trial), p. 151-52.) In response to the Commonwealth's next question, whether the scene was indicative of serious bodily injury, Dr. Mihalakis responded: "Yes, I believe it is indicative of significant bodily injury or homicide." (N.T. 1/23/12 (Trial), pp. 152-53.) Defendant's objection to this response was sustained, the answer was stricken, and the jury was instructed to disregard the testimony. (N.T. 1/23/12 (Trial), pp. 152-53.) Defendant did not request a mistrial.

On direct appeal Defendant claimed the court erred in not declaring a mistrial **sua sponte** as a matter of "manifest necessity." The Superior Court affirmed noting that the utterance of the remark did not deprive Defendant of a fair and impartial trial where the record demonstrated overwhelming evidence of a homicide. **Commonwealth v. Freeby,** 3294 EDA 2012, Memorandum Opinion 12/4/13 at p. 6. Defendant now claims that his counsel was ineffective in failing to move for a mistrial.

"Derivative claims of ineffective assistance of counsel are analytically distinct from the defaulted direct review claims that were (or could have been) raised on direct appeal." **Commonwealth v. Reaves,** 592 Pa. 134, 151, 923 A.2d 1119, 1130 (2007) (**citing Commonwealth v. Collins,** 585 Pa. 45, 888 A.2d 564, 572-73 (2005)). Such claims

> deriving from an underlying claim of error that was litigated on direct appeal cannot automatically be dismissed as 'previously litigated.' Rather, Sixth Amendment claims challenging counsel's conduct at trial are analytically distinct from the foregone claim of trial court error from which they often derive, and

> must be analyzed as such. **Commonwealth v. Carson,** 590 Pa. 501, 913 A.2d 220, 234 (2006) ('This Court recognized in **Collins** that while an ineffectiveness claim may fail for the same reasons that the underlying claim faltered on direct review, the Sixth Amendment basis for ineffectiveness claims technically creates a separate issue for review under the PCRA.').

Commonwealth v. Puksar, supra at 251-52, 951 A.2d at 274. Therefore, although Defendant is now seeking collateral review of what in effect is essentially the same grounds raised and rejected on direct appeal, he is not foreclosed from doing so under the guise of ineffective assistance of counsel. To succeed, however, under the standard set forth in **Strickland** and **Pierce,** Defendant must plead and prove that his "counsel's performance was deficient" and that this "deficient performance prejudiced the defense." **Strickland, supra** at 687, 104 S. Ct. at 2064; **see also, Pierce, supra** at 158, 527 A.2d at 975.

As to the reasonableness of counsel's performance, a significant portion of the Commonwealth's case had been concluded by the time Dr. Mihalakis testified. Trial counsel believed that the case was going well for them and that issues raised during their cross-examination of Dr. Mihalakis created a reasonable doubt in the mind of the jury. (N.T. 6/23/16 (PCRA Hearing), pp. 177-78, 218.) These reasons were not unfounded as discussed in our review of counsels' decision not to call Dr. Wecht as a witness at trial.

As to whether Defendant was prejudiced by trial counsels' failure to move for a mistrial, the issue must be decided in light of what actually occurred at trial, not in light of what might have occurred had Dr. Wecht testified. The standard governing a trial court's refusal to grant a request for a mistrial was summarized by the Pennsylvania Superior Court in **Commonwealth v. Bracey,** 831 A.2d 678 (Pa. Super. 2003), **appeal denied,** 577 Pa. 685, 844 A.2d 551 (2004), as follows:

> The decision to declare a mistrial is within the sound discretion of the court and will not be reversed absent a 'flagrant abuse of discretion.' **Commonwealth v. Cottam,** 420 Pa.Super. 311, 616 A.2d 988, 997 (1992); **Commonwealth v. Gonzales,** 415 Pa.Super. 564, 570, 609 A.2d 1368, 1370-71 (1992). A mistrial is an 'extreme remedy ... [that] ... must

> be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial.' **Commonwealth v. Vazquez,** 421 Pa.Super. 184, 617 A.2d 786, 787-88 (1992) (**citing Commonwealth v. Chestnut,** 511 Pa. 169, 512 A.2d 603 (1986), and **Commonwealth v. Brinkley,** 505 Pa. 442, 480 A.2d 980 (1984)). A trial court may remove taint caused by improper testimony through curative instructions. **Commonwealth v. Savage,** 529 Pa. 108, 602 A.2d 309, 312-13; **Commonwealth v. Richardson,** 496 Pa. 521, 437 A.2d 1162 (1981). Courts must consider all surrounding circumstances before finding that curative instructions were insufficient and the extreme remedy of a mistrial is required. **Richardson,** 496 Pa. at 526-527, 437 A.2d at 1165. The circumstances which the court must consider include whether the improper remark was intentionally elicited by the Commonwealth, whether the answer was responsive to the question posed, whether the Commonwealth exploited the reference, and whether the curative instruction was appropriate.

Id. at 682-83 (**citing Commonwealth v. Stilley,** 455 Pa. Super. 543, 689 A.2d 242, 250 (1997)), **appeal denied,** 577 Pa. 685, 844 A.2d 551 (2004). As a practical matter, whether a court errs in refusing to grant a mistrial is similar to whether defense counsel errs in failing to request a mistrial. The question to be asked in each instance is whether it can reasonably be said that the error deprived the defendant of a fair and impartial trial.

Here, Dr. Mihalakis's remark was not ignored or passed over by the court or the parties. Immediately when it occurred, defense counsel objected and the testimony was stricken from the record. Further, both in preliminary instructions before any evidence or testimony was presented and in closing instructions, the jury was instructed to disregard any testimony that was stricken from the record and that it should be treated as though they had never heard it and that they could not base any of their findings upon it. (N.T. 1/10/12 (Trial), p. 6; N.T. 1/30/12 (Trial), p. 163.)

Moreover, as noted by the Superior Court on direct appeal and discussed by this court in its Memorandum Opinion of November 20, 2012, denying Defendant's Post-Sentence Motion, in which we more fully detailed all of the evidence supporting Defendant's

convictions, the evidence against Defendant that a homicide had occurred was overwhelming and Defendant was not deprived of a fair and impartial trial.

CONCLUSION

For the reasons discussed, Defendant has failed to overcome the presumption of counsel's effectiveness and Defendant has failed to prove, by a preponderance of the evidence, that his convictions resulted from the ineffective assistance of his trial counsel which, in the circumstances of this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Having so concluded, Defendant's Petition for Post-Conviction Collateral Relief, as amended, will be denied.

ORDER OF COURT

AND NOW, this 23rd day of June, 2017, upon consideration of Defendant's, Ernest T. Freeby's, Petition for Post-Conviction Collateral Relief, as amended, filed on September 25, 2015 and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Petition is hereby denied.

WILLIAM McABIER, KENNETH G. GILMORE and RUTH GILMORE, Husband and Wife, Plaintiffs vs. PLEASANT VALLEY WEST CLUB, Defendant

Civil Law—Applicability of Uniform Planned Community Act—Duty of a Property Owners' Association to Build and Maintain Subdivision Roads to Specifications and Standards Set Forth in an Approved Subdivision Plan—Significance of Property Owners' Association's Incorporation As a Nonprofit Corporation—Standing—Applicability of Pa. R.J.A. 2156(1)'s Requirement That Litigation Involving a Nonprofit Corporation Be Heard by the Orphans' Court Division of the Court—Challenge to Subject Matter Jurisdiction

1. Whether the property owners' association for a private residential development to which ownership of the development roads has been conveyed can be held responsible to its members for building, constructing, and maintaining the roads to the standards and specifications set forth in the approved and recorded subdivision plan for the development requires the existence of a legally recognizable duty owed by the association to its members, whether arising under the Uniform Planned Community Act, the Municipalities

Planning Code, by virtue of the members' ownership interest in real estate within the development, or from some other source.

2. The purchaser of an approved land development from the original developer for purposes of continuing the development assumes the rights and obligations of the original developer under the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101-11202.

3. The transfer of ownership of the roads in a private residential development from the developer to a property owners' association consisting of all lot owners in the development, unlike a transfer of all properties in an approved development from the original developer to a third-party developer, does not by itself obligate the association to build and improve the development roads to the standards and specifications set forth in the approved subdivision plan for the development.

4. Under the Uniform Planned Community Act, 68 Pa. C.S. §§5104-5414, a subdivision of land into separate, individual building lots and designated roads to be used as the means of ingress and egress to the lots from surrounding public roads, with ownership of the roads to be held by a nonprofit property owners' association whose membership is restricted to and consists only of all of the lot owners in the subdivision, and with the cost of maintenance, repair and improvement of the roads to be assessed against and borne only by the lot owners by virtue of their ownership interest in the lots within the subdivision, is a planned community.

5. The Uniform Planned Community Act, 68 Pa. C.S. §§ 5101-5414, governs the formation and organization of planned communities in Pennsylvania created after its effective date, February 2, 1997, as well as the rights and obligations by and between the community's developer (declarant), property owners within the community, and the unit owners' association for the community.

6. Pursuant to Section 5102 of the Uniform Planned Community Act, various enumerated provisions are intended to apply retroactively to planned communities created prior to the effective date of the Act, subject, however, to the qualification applicable to all retroactive provisions of the Act, that they "apply only with respect to events and circumstances occurring after the effective date of [the Act] and do not invalidate specific provisions contained in existing provisions of the declaration, bylaws, or plots and plans of those planned communities."

7. For planned communities created after February 2, 1997, Section 5414(a) of the Uniform Planned Community Act places the obligation to complete roads and improvements depicted on a subdivision plan and designated as "MUST BE BUILT" on the declarant developer, not the property owners' association. Similarly, under Sections 10509 and 10511 of the Pennsylvania Municipalities Planning Code, the obligation to build and construct subdivision roads in accordance with an approved and recorded subdivision plan is upon the developer, or its successor, not upon the property owners' association. Absent a preexisting duty imposed on a property owners' association to build or improve development roads to specifications set by the developer, the enactment of the Uniform Planned Community Act cannot be applied retroactively to create such a duty where none previously existed.

8. The power and right of a property owners' association to assess its members under the common law, the Uniform Planned Community Act, and applicable covenants binding the owners of real estate within the development, the

reasonable costs of maintaining and repairing development roads titled in the association's name does not create a secondary duty in the association to build and improve such roads to the standards and specifications provided for in the approved subdivision plans prepared and submitted by the developer.

9. For all planned communities, whether created before or after February 2, 1997, the Uniform Planned Community Act requires that the propriety of the actions of the property owners' association for the community in deciding what development roads to build and maintain, and in what manner and to what extent, be determined by whether the association's board acted "in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances." Whether this standard has been met is a question of fact to be determined by the finder of fact, after hearing, rather than as a question of law.

10. The incorporation of a property owners' association as a nonprofit corporation can in certain instances be a significant factor in determining whether the property owners' association by its conduct has breached a duty owed by the property owners' association to its members in the event the private residential community managed by the property owners' association is found not to be a planned community within the meaning of the Uniform Planned Community Act. In such a case, the standard of care imposed on the directors of a domestic nonprofit corporation pursuant to Section 5712(a) of the Nonprofit Corporation Law is substantially the same as that imposed on the executive board of a planned community under the Uniform Planned Community Act. In the case of nonprofit corporations, this deferential standard is enhanced by the business judgment rule which insulates corporate directors from "second-guessing liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance."

11. Pa. R.J.A. 2156(1) provides, **inter alia,** that the Orphans' Court Division of the Court of Common Pleas hear and determine disputes concerning the administration and proper application of property committed to charitable purposes held or controlled by a nonprofit corporation, as well as all matters arising under Title 15 of the Pennsylvania Consolidated Statutes or otherwise where is drawn in question the application, interpretation or enforcement of any law regulating the affairs of a nonprofit corporation holding or controlling any property committed to charitable purposes.

12. A challenge to the subject matter jurisdiction of the court to adjudicate the matter before it relates to the competency of a court to hear and decide the type of controversy presented. Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect.

13. Those properties within a private residential community which have been identified in the approved subdivision plan for the community for use as roads and rights-of-way, title to which has been conveyed to the property owners' association for the community, a nonprofit corporation, is not property committed to charitable purposes such that litigation commenced against the association by property owners within the community questioning the existence and extent of the association's duty to construct and maintain the roads to the standards and specifications set forth in the approved subdivision plan for the community is required to be heard and decided by the Orphans' Court Division of the Court of Common Pleas pursuant to Pa. R.J.A. 2156(1).

14. Absent a statutory grant of standing, for a plaintiff to have standing to commence suit, the plaintiff must have a substantial, direct and immediate interest in the controversy.

15. Section 5793 of the Nonprofit Corporation Law grants standing to any person aggrieved by the corporate action of a nonprofit corporation to question the validity of such action.

16. Where the claims made by property owners within a planned community against the property owners' association for that community are not premised on the decisions of a property owners' association which has been organized as a domestic nonprofit corporation, but upon rights and duties arising under principles of real estate law for events which occurred before the association came into existence, and are independent of the property owners' membership therein, Section 5793 of the Nonprofit Corporation Law does not apply and does not prohibit the exercise of equitable jurisdiction by the court for those claims seeking equitable relief.

NO. 16-1724

JAMES P. WALLBILLICH, Esquire—Counsel for Plaintiffs.

MICHAEL A. GAUL, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 26, 2017

Is a property owners' association which owns the roads and common areas in a private residential subdivision under a duty to build and construct these privately owned roads to the standards and specifications set forth in the approved subdivision plans if the roads do not meet such standards and specifications and did not at the time title to these properties was conveyed to the association by the developer. This, essentially, is the question at issue in this litigation in which the Plaintiffs, whose homes are located within the subdivision, claim that two roads depicted on the approved subdivision plans as providing access to their properties have in one instance not been built and in the other not built to the standards and dimensions called for in the recorded subdivision plans. Title to the land on which these roads were to be built is now owned by the property owners' association for the subdivision, the Defendant Pleasant Valley West Club (the "Association")—a nonprofit corporation whose members all own lots in the subdivision—under and subject to the right of all lot owners in the subdivision to use this property as a means of ingress and egress to their properties.

FACTUAL AND PROCEDURAL BACKGROUND

Pleasant Valley West is a 727.42-acre private residential subdivision (the "Development") located in Penn Forest Township,

Carbon County, Pennsylvania. It was originally laid out in 1973 by Sellamerica, Ltd. ("Sellamerica"), the original developer, with approved subdivision plans recorded in the Carbon County Recorder of Deeds Office on January 18, March 6 and June 5, 1973, and a set of eighteen numbered protective covenants encumbering the Development properties filed on February 20, 1973. (Amended Complaint, ¶¶9-10, 12; Amended Complaint, Exhibit No(s). A and B.)[1]

The Development consists of approximately 589 lots spread over six sections, namely Sections A through F inclusive, with lots ranging in size from one acre to five acres. (Amended Complaint, Exhibit No. A (Pocono Forest Lake Master Plan) and Exhibit No. G, p. 1.) The lots in Section D are all five acres in size. (Amended Complaint, Exhibit No. G, p. 2.) Within the Development, as depicted on the recorded subdivision plans, is a private road system totaling 45,800 feet in distance, with 50-foot-wide rights-of-way and 24-foot-wide cartways, a 16-acre lake known as Pocono Forest Lake, and a community lodge. (Amended Complaint, Exhibit No. G, pp.6,8.) In addition, Drakes Creek, a small stream varying between eight and ten feet in width, flows through the Development.

On January 5, 1976, the Defendant Association, Pleasant Valley West Club, was incorporated as a Pennsylvania nonprofit corporation. (Amended Complaint, ¶15; Amended Complaint, Exhibit No. D (Articles of Incorporation).) By deed dated April 5, 1976, and recorded on April 7, 1976, in Carbon County Deed Book Volume 366, at page 341, Pocono Pleasant Valley Lake Estates, Inc. ("Pocono

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[1] Protective Covenant Nos. 12 and 14 provide as follows:

> (12) Until dedicated to public use, title to the portion of lands of the Seller laid down on the maps as streets shall remain in the Seller subject to the right of the Buyer and others and those claiming under them to use the same for ingress and egress to and from the public roads, and subject to the right of the Seller to maintain or grant the right to maintain water mains, sewer pipes, street drains, gas mains, fixtures for street lighting, telephones and electric poles, within the lines of such roadways.
>
> ...
>
> (14) The Buyer agrees to pay unto the seller such annual fees as the seller may charge for each lot for the repair, maintenance and snow removal of the streets and roads, and/or control, maintenance and administration of any beach, lakes, trout streams, parks and other recreational facilities until or when dedicated.

(Amended Complaint, Exhibit No. B (Protective Covenants).)

Pleasant Valley"), which purchased the Development in November 1973, conveyed title to all of the roads and common areas within the Development to the Association. (Amended Complaint, ¶17; Amended Complaint, Exhibit No. E (Deed of Conveyance).)[2] On September 14, 1981, the Association filed a second set of "restrictive covenants" applicable to the Development. (Amended Complaint, ¶18; Amended Complaint, Exhibit No. F.)[3]

By deed dated August 27, 1996, the Plaintiff, William McAbier, became the owner of Lot 6, Section D a/k/a 259 Forest Lake Drive, on which he resides within the Development. By deed

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[2] The Development when first created by Sellamerica was known as Pocono Forest Lake. This name was changed in 1974 to Pleasant Valley West by Pocono Pleasant Valley, which purchased the subdivision and is a successor to Sellamerica. (Amended Complaint, ¶¶13-14; Amended Complaint, Exhibit No(s). A, C and G, p. 1.) Upon its purchase of the subdivision, Pocono Pleasant Valley assumed all of the obligations and duties of Sellamerica with respect to the Development. (Amended Complaint, Exhibit No. G, p. 1.)

[3] These covenants are identical to those filed by Sellamerica on February 20, 1973 with one exception, an additional covenant identified by the number 19 was added. (Amended Complaint, ¶18; Amended Complaint, Exhibit No. F (Restrictive Covenants).) This additional covenant provides that the "Restrictive Covenants shall run with the land and shall bind all present owners, their heirs, successors and assigns." **Id.**

The effect of this new covenant is unclear since at the time these restrictive covenants were filed, the Association did not own the lots within the Development, only the roads and common areas, and as a general rule, covenants filed in conjunction with a general scheme of development as shown, for example, by the filing of a map laying out a certain tract or parcel of land in building lots and manifestly reflecting an intent to apply to all lots laid out in the plan, run with the land. **Clancy v. Recker,** 455 Pa. 452, 457-58, 316 A.2d 898, 901-902 (1974); **Birchwood Lakes Community Association, Inc. v. Comis,** 296 Pa. Super. 77, 84, 442 A.2d 304, 307 (1982) ("The test for determining whether a covenant runs with the land is whether it was so intended by its creators."); **Price v. Anderson,** 358 Pa. 209, 215-16, 56 A.2d 215, 219 (1948) (discussing the doctrine of reciprocal covenants). Absent the applicability of this principle, the legal authority to bind existing lot owners to a restriction which did not exist at the time they purchased their property is not apparent. Moreover, since a span of more than eight years lapsed between the filing of the protective covenants by Sellamerica and the restrictive covenants filed by the Association, it appears likely that lots were sold prior to the filing of the Association's restrictive covenants. The Association's characterization of these covenants as "restrictive covenants," especially covenant numbers 12 and 14 which are quoted in footnote 1, is also problematic. A restrictive covenant may be defined as:

> A covenant restricting or regulating the use of real property or the kind, character, and location of buildings or other structures that may be erected thereon, usually created by a condition, covenant, reservation, or exception

dated November 20, 2004, the Plaintiffs, Kenneth G. Gilmore and Ruth Gilmore, became the owners of Lot 9, Section D a/k/a 207 Forest Lake Drive, on which they reside within the Development. Plaintiffs' properties front on Forest Lake Drive, one of the private Development roads now owned by the Association.

Forest Lake Drive is approximately 1700 feet in length. (Amended Complaint, ¶39.) Its cartway averages 14 feet in width, rather than the 24 feet depicted in the subdivision plans, and its surface, at least in the vicinity of Plaintiffs' homes, is unpaved, in contrast to the majority of the subdivision roads in the Development. (Amended Complaint, ¶¶40, 41 and 49.) Additionally, poor drainage on the road is a source of continuing washouts. (Amended Complaint, ¶42.)

In consequence, Forest Lake Drive is too narrow for two vehicles to pass one another safely, emergency vehicles are unable to turn around on the road, and continuing potholes and surface water run-off due to the drainage issues make the road difficult and, at times, unsafe to use. (Amended Complaint, ¶¶43, 46, 48, 59 and 87.) This is especially true for Plaintiffs who live at or near the end of Forest Lake Drive and have no other means of accessing their properties. (Amended Complaint, ¶¶38, 113.) Mohawk Drive, which is depicted on the subdivision plans as intersecting

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in a deed, but susceptible of creation by contract not involving transfer of title to land and by implication. 20 Am J2d Cov ss 165 **et seq.**

Birchwood Lakes Community Ass'n, Inc., supra at 83, 442 A.2d at 307 (**quoting Ballentine's Law Dictionary,** 3rd Ed.). In construing the effect of covenant it is important to distinguish between a restrictive covenant and a non-restrictive covenant: whereas a restrictive covenant is strictly construed against the grantor, a non-restrictive covenant is more liberally construed to "give effect to the intention of the parties as expressed at the time." **Id.**

Both the covenants filed by Sellamerica and those filed by the Association make no reference to the formation or creation of a property owners' association to which all lot owners within the subdivision would automatically become members and be subject to the association's rules and regulations. The Association's covenants also retain the same terminology as those filed by Sellamerica, including the use of the term "Seller," as the person or party in which title to the Development roads is held, and the "Seller" as being the person or party entitled to collect fees or assessments for the repair and maintenance of the Development roads and recreational facilities, notwithstanding that these roads were transferred to the Association more than five years earlier.

with Forest Lake Drive and which, according to Plaintiffs, would otherwise have provided a second means of ingress and egress to Plaintiffs' properties, has never been built, opened or maintained. (Amended Complaint, ¶¶60-62.) Plaintiffs estimate the cost of paving Forest Lake Drive, addressing the drainage issues, and widening the road to conform with the recorded subdivision plans to be $155,000.00. (Amended Complaint, ¶50.)

Plaintiffs instituted this suit by the filing of a complaint on August 1, 2016. In response to the Association's preliminary objections, Plaintiffs filed an Amended Complaint on September 29, 2016. The Association's preliminary objections to Plaintiffs' Amended Complaint are the subject of this opinion.

In the Amended Complaint, Plaintiffs claim the Association has a duty to build, widen and pave—and to repair and maintain —Forest Lake Drive and Mohawk Drive in accordance with the specifications depicted on the recorded final subdivision plans, as well as with an Offering Statement and Property Report (the "Offering Statement") dated November 21, 1974, and filed by Pocono Pleasant Valley for the interstate marketing of properties in the Development.[4] The Amended Complaint alleges that the Association has breached this duty and requests that the Association be court-ordered to build and construct Forest Lake Drive and Mohawk Drive to the dimensions and specifications described in the approved subdivision plans.

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[4] Although the name of the subdivision is identified in this Offering Statement as Pocono Pleasant Valley West, this appears to be the same subdivision as Pleasant Valley West and we have so interpreted it for purposes of the Association's objections. As to the dimensions and surface covering of the Development roads, the Offering Statement on page 6 states: "At present, the roads in the subdivision have been cut, leveled and graded, and are of two lanes with a right-of-way of 50 feet and a cartway of 24 feet with necessary shoulders and drainage and will be covered with 6 to 9 inches of natural shale." This Statement, according to its terms, has been filed with the Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development. (Amended Complaint, Exhibit No. G.) In this regard, the Association notes that the plans attached to the Amended Complaint do not contain any representation that Forest Lake Drive would be a paved road. **See also,** Section 10509(a) of the Pennsylvania Municipalities Planning Code which provides that "[n]o plat shall be finally approved unless the streets shown on such plat have been improved to a mud-free or otherwise permanently passable condition, or improved as may be required by the subdivision and land development ordinance. ..." 53 P.S. §10509(a).

The Amended Complaint contains five counts, each purporting to set forth a different cause of action with respect to the source of the Association's duty to build and maintain Forest Lake Drive and Mohawk Drive in accordance with the specifications depicted on the recorded subdivision plans and contained in the Offering Statement filed by Pocono Pleasant Valley. Count I claims that the Association is the successor in interest to the original developer, Sell-america, and has assumed its obligations;[5] Count II claims the duty is a fiduciary one imposed on the Association under the Uniform Planned Community Act, 68 Pa. C.S. §5101-5414 (also referred to as the UPCA or the Act); Count III claims the Association also has a duty under the Act to properly budget for and fund a reserve for capital improvements to build and construct the subdivision roads according to the subdivision plans; Count IV claims the Association's duty to build and maintain the subdivision roads stems from the restrictive covenants it filed in the Carbon County Recorder of Deed's Office on September 14, 1981; and Count V claims the Association's duty to maintain and build the subdivision roads arises under its bylaws.

DISCUSSION

Preliminary Objections in the Nature of a Demurrer

The Association has demurred to each count of the Amended Complaint as being legally insufficient under Pa. R.C.P. 1028(a)(4) to sustain a cause of action.[6] Specifically, the Association contends

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[5] Count I may also be intended to assert a claim for detrimental reliance premised on the Offering Statement filed by Pocono Pleasant Valley. (Amended Complaint, ¶¶19-21, 76-77; Amended Complaint, Exhibit No. G.) The elements of a **prima facia** claim of promissory estoppel are (1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on this promise; and (3) injustice can be avoided only by enforcing the promise. **Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.,** 535 Pa. 469, 477-78, 636 A.2d 156, 160 (1994). In this respect, Plaintiffs fail to explain how the statements made by Pocono Pleasant Valley in its Offering Statement can be attributed to the Association and also fail to clearly state that Plaintiffs actually relied upon this Offering Statement to their detriment. (**See** Amended Complaint, paragraph 77, which alleges: "Based on these representations, buyers, including Plaintiffs, made financial decisions to acquire properties in the community, in some cases, to their ongoing detriment.")

[6] Preliminary objections in the nature of a demurrer require the court to resolve issues solely on the basis of the pleading at issue with no other evidence being considered. **See In re: Adoption of S.P.T.,** 783 A.2d 779, 782 (Pa. Super. 2001) (**citing Mellon Bank, N.A. v. Fabinyi,** 437 Pa. Super. 559, 650 A.2d 895, 899 (1994)). As such, the decision to grant or deny a demurrer is a question of law.

Plaintiffs have failed to aver material facts sufficient to establish any duty owed by the Association to ensure the building or improvement of either Forest Lake Drive or Mohawk Drive in accordance with the specifications identified in the original plans.[7] Given this basis of the Association's Preliminary Objections, in ruling on the Preliminary Objections we focus our attention on the source of the duty attributed to the Association in each count of the Amended Complaint.

> Preliminary objections in the nature of demurrers are proper when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. Moreover, when considering a motion for a demurrer, the trial court must accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.

Little Mountain Community Association, Inc. v. The Southern Columbia Corp., 92 A.3d 1191, 1195 (Pa. Super. 2014) (**quoting Yocca v. Pittsburgh Steelers Sports, Inc.,** 578 Pa. 479, 854 A.2d 425, 436 (2004)). If an inconsistency exists between a pleading and a written instrument, the latter will prevail. **Eberhart v. Nationwide Mutual Insurance Company,** 238 Pa. Super. 558, 564 n.6, 362 A.2d 1094, 1097 n.6 (1976).

"Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." **Joyce v. Erie Insurance Exchange,** 74 A.3d 157, 162 (Pa. Super. 2013). The test is whether the complaint sets forth a cause of action upon which relief can be granted under any theory of law. **Regal Industrial Corporation v. Crum and Forster, Inc.,** 890 A.2d 395, 398 (Pa. Super. 2005). Further, the plaintiff need not divulge the legal theory underlying the complaint. **DelConte v. Stefonick,** 268 Pa. Super. 572, 577, 408 A.2d 1151, 1153 (1979). If there is any doubt, it should be resolved by overruling the demurrer. **Bailey v. Storlazzi,** 729 A.2d 1206, 1211 (Pa. Super. 1999); **McMahon v. Shea,** 547 Pa. 124, 129, 688 A.2d 1179, 1181 (1997).

[7] In addition, the Association argues that Plaintiffs do not have standing to complain about any failure to construct road improvements as they purchased their properties many years after the Development was opened and after any alleged failure to construct improvements would have occurred. Standing is a doctrine of judicial restraint exercised where it is not clear the party who sues is truly interested, with a concrete stake in the action, sufficient to permit them to proceed. **Robinson Township v. Commonwealth,** 52 A.3d 463, 471 (Pa. Commw. 2012) (en banc), **aff'd in part, reversed in part on other grounds** by 623 Pa. 564, 83 A.3d 901 (2013). At its most basic level, standing is concerned with the question of who is entitled to make a legal challenge. As a preliminary matter to judicial resolution of a controversy, a plaintiff must establish that he or she has standing to maintain the action. **Johnson v. American Standard,** 607 Pa. 492, 510, 8 A.3d 318, 329 (2010). In order to have standing, the individual must have a substantial, direct and immediate interest in the controversy. **Id.** at 517, 8 A.3d at 334. With respect to decisions involving the internal operations of a nonprofit corporation, whether a party has standing to sue is governed by the

(1) Duty: As a Successor Declarant

In Count I, Plaintiffs allege the Association has an "affirmative duty to build the roads within the community as depicted on the plans." (Amended Complaint, ¶78.) The basis of this duty as claimed by Plaintiffs is that the Association is the successor declarant[8] for the Development and has assumed whatever duties, obligations, or liabilities Sellamerica and Pocono Pleasant Valley had to make these improvements. (Amended Complaint, ¶¶22, 69, 72, 80.) This, of course, is a legal conclusion.

While courts when ruling upon a demurrer must accept as true all of the material facts set forth in the complaint and all of the reasonable inferences that may be drawn therefrom, courts "need not accept a party's allegations as true to the extent that they con-

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Pennsylvania Nonprofit Corporation Law, 15 Pa. C.S.A. §§5101-6162. **Petty v. Hosp. Service Association of Northeastern Pennsylvania,** 967 A.2d 439, 444-45 (Pa. Commw. 2009), **aff'd,** 611 Pa. 119, 23 A.3d 1004 (2011). As amended in 2013, Section 5793(a) of the Nonprofit Corporation Law confers standing on any person aggrieved by any corporate action. 15 Pa. C.S.A. §5793(a).

As alleged by Plaintiffs, neither Forest Lake Drive nor Mohawk Drive have been built or maintained as required by the recorded final subdivision plan and the Development documents. Plaintiffs claim Forest Lake Drive is a single, narrow, unpaved cartway, inadequate and unsafe as a means of access to their homes, but which, by necessity, they travel daily, and that the failure to construct Mohawk Drive has deprived them of a second means of ingress and egress to their homes. As property owners with a legal right to use all of the Development roads and as homeowners who live within the Development and whose sole means of access to their home is by way of Forest Lake Drive whose alleged deteriorated and unsafe condition directly affects Plaintiffs each and every day, Plaintiffs claim to have a direct interest in the subject matter of this case which is "substantial and immediate." We agree. **See also, Doylestown Township v. Teeling,** 160 Pa. Commw. 397, 635 A.2d 657 (1993) (recognizing that the buyer of a lot in a subdivision has standing to bring an action to enforce the notes on the final subdivision plan as a covenant running with the land); 68 Pa. C.S.A. §5412 (providing that "[i]f a declarant or any other person subject to [the Uniform Planned Community Act] violates any provision of [the Act], or any provisions of the declaration or bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief").

[8] Under the UPCA, the term "declaration" is defined as "[a]ny instrument, however denominated, that creates a planned community and any amendment to that instrument." 68 Pa. C.S.A. §5103. The Amended Complaint refers repeatedly to the original developer, Sellamerica, as the declarant and the protective covenants filed by Sellamerica, as a declaration. (**See e.g.,** Amended Complaint, ¶¶10, 12.) While perhaps it might be more accurate to describe the combination of the recorded subdivision plan and the related filed protective covenants as a declaration (**see** 68 Pa. C.S.A. §5210(a)), the adaptation of the UPCA's terminology to describe conduct which predates the enactment of the UPCA is needlessly

stitute conclusions of law." **Walter v. Magee Womens Hospital of UPMC Health System,** 876 A.2d 400, 404 (Pa. Super. 2005) (**quoting Fay v. Erie Ins. Group,** 723 A.2d 712, 714 (Pa. Super. 1999)). No written assignment of rights and co-relative duties from Sellamerica or Pocono Pleasant Valley to the Association is attached to the Amended Complaint, nor any facts alleged identifying an assignment.

Nevertheless, to support their assertion that the Association is a successor of Sellamerica and is obligated as such to build and construct the subdivision roads to the standards and specifications set forth in the approved subdivision plans, Plaintiffs point to the recital contained in the restrictive covenants recorded by the Association on September 14, 1981, wherein Sellamerica is expressly identified as the Association's "predecessor in interest." Whether this characterization denotes that the Association has stepped into the shoes of Sellamerica and acquired its rights as well as its duties, or is simply descriptive of a chronological sequence of one coming before another, is a distinction that cannot be made in the face of a demurrer. Viewing the allegation as we must in the light most favorable to the Plaintiffs, as an evidentiary admission, we find this is sufficient to withstand the Association's demurrer to Count I of the Amended Complaint.

As to Pocono Pleasant Valley, under the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101-11202, both Sellamerica, as the original developer of Pleasant Valley West, and Pocono Pleasant Valley, which purchased the entirety of the Development from Sellamerica, were obligated to build and construct the subdivision roads in accordance with the approved and recorded subdivision plans. **See** 53 P.S. §§10509, 10511; **Stivala Investments, Inc. v. South Abington Township Board of Supervisors,** 815 A.2d

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confusing and fraught with legal connotations immaterial to the instant issue. For this reason, we believe it more accurate to refer to Sellamerica as the original developer of what is now known as the Pleasant Valley West Development. Finally, as it affects whether the Development is a planned community under the UPCA, since the UPCA does not make the mandatory filing of a declaration retroactive, "a planned community that predates the UPCA may meet the statutory definition regardless of whether it filed a declaration." **Pinecrest Lake Community Trust v. Monroe County Board of Assessment Appeals,** 64 A.3d 71, 75 n.8 (Pa. Commw. 2013).

1, 6-7 (Pa. Commw. 2002) (holding that the purchaser of an approved land development from the original developer for purposes of continuing the development assumes the rights and obligations of the original developer), **appeal denied,** 575 Pa. 690, 834 A.2d 1145 (2003). That Pocono Pleasant Valley assumed this obligation is also confirmed in the following language contained in the Offering Statement it filed with the United States Department of Housing and Urban Development:

> [I]t is hereby warranted and represented to all persons who have already purchased lots or who may purchase lots in the future that it assumes all of the obligations and duties of the previous owner in connection with this subdivision and that it will perform and adhere to all of the warranties or representations made by the previous owner regardless of the change in name.

(Amended Complaint, Exhibit No. G, p. 1.)[9] This notwithstanding, no material facts are alleged or exhibits attached or documentation identified in the Amended Complaint to explain how whatever duties Pocono Pleasant Valley had to build and improve the Development roads were delegated to and assumed by the Association.[10]

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[9] Assuming for purposes of the Association's objections that Pocono Pleasant Valley assumed Sellamerica's obligations and duties for the Development as acknowledged in the Offering Statement—the manner, terms and documentation supporting this conclusion not having been disclosed—delegation of Sellamerica's duties to Pocono Pleasant Valley would not relieve Sellamerica of its obligations as the original developer in the absence of an agreement that the original obligation be extinguished and a new one substituted. **Parish Mfg. Corporation v. MartinParry Corporation,** 285 Pa. 131, 136, 131 A. 710, 712 (1926).

[10] The Pennsylvania Rules of Civil Procedure require that a plaintiff state the material facts on which a cause of action is based in a concise and summary form. Pa. R.C.P. 1019(a). To meet this standard, the complaint must not only give the defendant fair notice of what the plaintiff's claims are and the grounds upon which they rest, but must also "enable the defendant to know the nature of his alleged wrongdoing so that he may prepare a defense." **General State Authority v. Lawrie & Green,** 24 Pa. Commw. 407, 415, 356 A.2d 851, 856 (1976). Accordingly, if Plaintiffs intend to pursue this claim on the basis of the Association having assumed the obligations of Pocono Pleasant Valley to build and construct the Development roads in accordance with the recorded subdivision plans or other Development documents, Plaintiffs need to aver and identify the material facts establishing the Association's assumption of such obligation, or allege that they are unable to do so but believe in good faith that this has occurred.

(2) Duty: Founded Upon the UPCA

With respect to Counts II and III of the Amended Complaint, we believe Plaintiffs' reliance on the Uniform Planned Community Act as the basis for duties imposed on the Association is misplaced. The Uniform Planned Community Act was enacted on December 19, 1996, and became effective February 2, 1997: after the Development was formed in 1973; after Section A of the Development was sold out as reported in Pocono Pleasant Valley's November 21, 1974 Offering Statement (Amended Complaint, Exhibit No. G, p. 2); and after the Association was incorporated in 1976 and took title to the Development roads and common areas. As evidenced by these facts, the Association is not a unit owners' association organized under Section 5301 of the Act. 68 Pa. C.S.A. §5301 (Organization of Unit Owners' Association).[11]

Nor does the Uniform Planned Community Act seek to retroactively treat the Association as if it were a unit property owners' association created under the Act. Under the Statutory Construction Act of 1972, "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa. C.S.A. §1926. This intent appears in Section 5102 of the Act which sets forth an extensive list of provisions which are expressly made retroactive. Section 5301 is not included within these provisions. **See Little Mountain Community Association, Inc. v. The Southern Columbia Corp.,** 92 A.3d 1191 (Pa. Super. 2014) (holding that a property owners' association which first came into existence after the UPCA was enacted on December 19, 1996, with respect to a private residential subdivision that was formed before the effective date of the Act and from which subdivision lots had previously been conveyed, was not a unit property owners' association pursuant to Section 5301 of the Act and could not be deemed one retroactively).

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[11] Section 5301 provides:

> A unit owners' association shall be organized no later than the date the first unit in the planned community is conveyed to a person other than a successor declarant. The membership of the association at all times shall consist exclusively of all the unit owners ... . The association shall be organized as a profit or a nonprofit corporation or as an unincorporated association.

68 Pa. C.S.A. §5301.

Instead, the Association in this case, as in **Little Mountain Community Ass'n,** appears to be a self-proclaimed community association created after the Development began. Neither the protective covenants filed by Sellamerica, nor the restrictive covenants later filed by Pocono Pleasant Valley, refer to or make mention of any existing property owners' association or one to be formed in the future, of any plan to transfer title to the Development roads and common areas to an association, for an association to maintain or manage the Development, or that membership in any such association would be restricted to property owners who, by virtue of their ownership of lots within the Development, would automatically become members.[12]

At the same time, Section 5303(a) of the Act, which sets forth the standard by which decisions of the executive board of a property owners' association are to be viewed, applies retroactively to planned communities created prior to the effective date of the Act, subject, however, to the qualification applicable to all retroactive provisions of the Act, that they "apply only with respect to events and circumstances occurring after the effective date of [the Act] and do not invalidate specific provisions contained in existing provisions of the declaration, bylaws, or plots and plans of those planned communities." 68 Pa. C.S.A. §5102(b), (b.1).[13] To allow otherwise "could violate the constitutional prohibition against impairment of contracts," and the related principle that "provisions affecting property or contractual rights cannot be repealed or altered without the

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[12] The first mention of a property owners' association for the Development appears in the 1974 Offering Statement filed by Pocono Pleasant Valley, which provided that "[a]ll roads and cul-de-sacs in the subdivision will be maintained by the developer until such time as they are either offered to a lot owners association or unless dedicated to and accepted by local authorities" and that the assessment on lot owners for the cost of maintenance then being paid to the subdivider will be paid to the association once an association was incorporated. (Amended Complaint, Exhibit No. G (Offering Statement, "Improvements and Maintenance," p. 6).)

[13] Nevertheless, "[i]n accordance with Section 5102(b) of the Act, Section 5103 of the Act, 68 Pa. C.S. §5103 [the definitional section of the Act], applies retroactively to planned communities created before the effective date of the Act, to the extent necessary to construe the other applicable retroactive provisions." **Rybarchyk v. Pocono Summit Lake Property Owners Association, Inc.,** 49 A.3d 31, 35, 36 n.4 (Pa. Commw. 2012), **appeal denied,** 620 Pa. 712, 68 A.3d 910 (2013).

consent of the parties whose interests are thereby impaired." **Little Mountain Community Ass'n, Inc., supra** at 1199 (**quoting** from **Pinecrest Lake Community Trust ex rel. Carroll v. Monroe County Bd. of Assessment Appeals,** 64 A.3d 71, 80 (Pa. Commw. 2013) and **Schaad v. Hotel Easton Co.,** 369 Pa. 486, 87 A.2d 227, 230 (1952), respectively). Consequently, if the Association had no duty to build or improve the Development roads to specifications set by the Developer before the Uniform Planned Community Act was enacted, the enactment of the UPCA cannot be applied retroactively to create such a duty where none previously existed.[14]

Section 5303(a) of the Act, in pertinent part, provides:

§ 5303. Executive board members and officers

(a) Powers and fiduciary status.—Except as provided in the declaration, in the bylaws, in subsection (b) or in other provisions of this subpart, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall stand in a

[14] Under the UPCA, the obligation to complete roads and improvements depicted on a subdivision plan and designated as "MUST BE BUILT" is that of the declarant developer, not the "unit owners association." 68 Pa. C.S.A. §5414(a). While the Association once having taken title to the Development roads and common areas clearly has the authority to make capital improvements of the type requested by Plaintiffs, ultimately, what Plaintiffs seek is to circumvent the discretion which resides with the unit owners as voting members of the Association to decide whether to exercise that authority, and, instead, to force the unit owners to assume the financial burden of construction which properly lies with the developer. **See Fogarty v. Hemlock Farms Community Association, Inc.,** 685 A.2d 241, 244 (Pa. Commw. 1996) (holding that absent language in the deed covenant prohibiting a pre-UPCA association from levying special assessments for capital improvements, the homeowners may be assessed their proportionate costs to construct the new improvements); 68 Pa. C.S.A. §5302(a)(7).

In referring to Section 5414, it's also important to note that this section is not retroactive to a planned community created before 1997. 68 Pa. C.S.A. §5102(b), (b.1). Therefore, to the extent Plaintiffs rely on the provisions of the UPCA as creating a duty imposed on Sellamerica to build and complete the Development's roads as depicted on the subdivision plans, which duty has been assumed by the Association as the successor to Sellamerica, Section 5414 of the UPCA cannot serve as the source of this duty. At most, on the issues raised by Plaintiffs in their Amended Complaint, the UPCA imposes on the Association only the responsibility for the maintenance, repair and replacement of the roads in issue. **See** 68 Pa. C.S.A. §5307 (Upkeep of Planned Community, General Rule). Further, all of this assumes that the Development is a "planned community" under the Act which, as discussed in footnote 15 below, is in question.

> fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.

68 Pa. C.S.A. §5303; **see also, Burgoyne v. Pinecrest Community Association,** 924 A.2d 675, 683 (Pa. Super. 2007) (finding Section 5303 governs the standard by which to review decisions made by the board of directors of a nonprofit corporation serving as the governing body of the owners of a planned community created before the effective date of the Act); **Logans' Reserve Homeowners' Association v. McCabe,** 152 A.3d 1094, 1097-98 n.6 (Pa. Commw. 2017) (holding that Section 5303 of the Act, not the corporate business judgment rule, governs the standard for reviewing decisions made by an association's executive board). Therefore, the propriety of the actions of the Association's Executive Board in deciding what Development roads to build and maintain, and in what manner and to what extent, and the budgeting, funding and use of reserves for capital improvements—assuming the Development is a planned community[15]—are to be determined by whether the Board acted

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[15] Whether the Development is a "planned community" within the definition of the Act is at this time an open question. The Act defines a "planned community" as:

> Real estate with respect to which a person, by virtue of ownership of an interest in any portion of the real estate, is or may become obligated by covenant, easement or agreement imposed on the owner's interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management, administration or regulation of any part of the real estate other than the portion or interest owned solely by the person. ...

68 Pa. C.S. §5103.

As restated by the Pennsylvania Supreme Court:

> In simpler terms, a planned community is an area of land consisting of homes that are individually owned as well as common areas that are owned or leased by an association consisting of all of the homeowners in the community. [] **See id.** §§5103, 5205, 5301; Uniform Planned Community Act, prefatory note, 7B U.L.A. (1980); [Norman Geis, **Codifying the Law of Homeowner Associations: The Uniform Planned Community Act,** 15 Real Prop., Prob. and Tr. J. at 854, 856 (1980)]. Significantly, however, the planned community homeowners are responsible for paying dues or fees to the homeowners' association for the common facilities. **See** 68 Pa. C.S. §5103 (defining 'common expense liability' as the 'liability for common expenses

"in good faith; in a manner they reasonably believed to be in the best interests of the Association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would

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to each [home]'); **id.** §5208 (explaining how the common expenses of the homeowners' association are allocated among the homeowners in a planned community).

Saw Creek Community Association, Inc. v. County of Pike, 581 Pa. 436, 442, 866 A.2d 260, 263 (2005) (footnote omitted).

First, while the protective covenants filed by Sellamerica, the original developer of what is now Pleasant Valley West, obligate property owners in the Development to pay assessments for the maintenance and repair of the Development roads and recreational facilities, which rights appear to have passed to Pocono Pleasant Valley as the successor to Sellamerica's ownership and interest in the Development, whether the Association has succeeded to these rights as the owner of the roads and common areas and, therefore, has the authority under Section 5302 of the Act to impose and collect assessments against all property owners in the Development to build and maintain the Development roads, is unclear. Under the protective covenants filed by Sellamerica, title to the subdivision roads and recreational areas was reserved to Sellamerica, with the right of dedication to public use. (**See** Amended Complaint, Exhibit No. B, (Protective Covenants, Nos. 12 and 14).) Whether this "restraint on alienation" was violated when title to these properties was conveyed to the Association (**see** Amended Complaint, Exhibit No. E), and if so, whether such limitation on transferring title is enforceable and to what effect is too early to tell. **See Ralston v. Ralston,** 55 A.3d 736, 740 (Pa. Super. 2012) (holding that absolute restraints are against public policy and are void, but that limited and reasonable restraints are enforceable). Second, while the Association's bylaws require that its members be registered, titled owners of a lot in the Development, it is unclear whether membership in the Association is voluntary or mandatory, or whether all lot owners in the Development are automatically entitled to be members of the Association. (Amended Complaint, Exhibit No. H (Bylaws, Article III (Members, Section 1(A))).) Third, both the Development and the Association were created more than two decades before the enactment of the UPCA with no provision having been made in either the recorded subdivision plan or the protective covenants for ownership of the Development roads to be transferred to a property owners' association.

Based on similar factors, admittedly distinguishable, the Commonwealth Court in **Rybarchyk v. Pocono Summit Lake Property Owners Association, Inc.,** 49 A.3d 31 (Pa. Commw. 2012), concluded the subdivision at issue was not a "planned community" as defined in the Act. **Id.** at 35-37. **But see, Pinecrest Lake Community Trust v. Monroe County Board of Assessment Appeals,** 64 A.3d 71 (Pa. Commw. 2013), in which the trial court determined a development qualified as a planned community under the UPCA, a conclusion not disputed by the parties on appeal, where the lots within a planned residential development which pre-dated enactment of the UPCA were encumbered by restrictions obligating the owners thereof to pay their **pro rata** share of the expense to maintain and manage the common areas, which common areas were owned by a trust of which the lot owners were the beneficiaries.

use under similar circumstances." 68 Pa. C.S.A. §5303.[16] Whether the Association met this standard is a question of fact, not to be determined in preliminary objections. **Wilson v. PECO Energy Company,** 61 A.3d 229, 233 (Pa. Super. 2012) (holding that the question of the scope of the defendant's duty, and whether the defendant exercised reasonable care in the performance of that duty, is a question of fact for the jury).

(3) Duty: Arising Out of the Protective Covenants

Count IV of the Amended Complaint ostensibly claims the Association has breached the protective covenants filed by Sellamerica on February 20, 1973, and the restrictive covenants filed by the Association on September 14, 1981. No specific covenant allegedly breached is identified, however, in paragraph 75 of the Amended Complaint, Plaintiffs aver that "[t]he 1973 and 1981 covenants confirm a right of ingress and egress, which require a commensurate obligation of construction and maintenance of the road by the Association."[17] (**See also,** Amended Complaint, ¶¶63, 94, 101.)

Paragraph 133 avers "the Association has a duty to obey the mandates identified in the Covenants." In conclusory language,

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[16] Whether the Development is a planned community and its executive board subject to the standard of care set forth in Section 5303(a) appears, in any event, to be of little significance on this issue since the standard of care applicable to the directors of a domestic nonprofit corporation, to which organizational form the Association belongs, is substantially the same. As to this standard, Section 5712(a) of the Pennsylvania Nonprofit Corporation Law provides, in pertinent part, as follows:

> Section 5712. Standard of Care and Justifiable Reliance
>
> **(a) Directors.—**A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interest of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. ...

15 Pa. C.S.A. §5712(a).

[17] In the context of the averments of the Amended Complaint, the "road" referred to in paragraph 75 appears to be in reference to Forest Lake Drive, however, this is unclear, and the singular road may be a typo and may have been intended to refer to all of the roads in the Development.

Plaintiffs then aver in Paragraph 138 that the Association's "failure to abide by its covenants is the actual and proximate cause of Plaintiffs' damages."

We have read and re-read the covenants and find no basis therein for Plaintiffs' claim of a duty impressed on the Association to build or widen the Development roads (**e.g.,** Mohawk Drive and Forest Lake Drive, respectively) to the standards set forth in the recorded subdivision plan. Such a duty, as already discussed, may have existed with Sellamerica or Pocono Pleasant Valley, but nowhere does any language in the covenants suggest that such duty has been assumed or accepted by the Association. Moreover, the covenants contain no reference to the Association specifically by name, or even to an unnamed association of property owners to be formed at some time in the future.

On the issue of repair and maintenance, the covenants provide for ownership of the roads to remain with the seller (**i.e,** the Developer) until dedicated to public use, subject to the buyers' right to use the roads for access to their property, and allow the seller to charge the buyers an annual fee "for the repair, maintenance and snow removal of the streets and roads. ... " (Amended Complaint, Exhibit No. B (Protective Covenants, Nos. 12 and 14).) With the transfer of title to the roads to the Association, both at common law and under the Uniform Planned Community Act the Association has the right to assess the property owners for the reasonable costs of repairing and maintaining the roads. **Hess v. Barton Glen Club, Inc.,** 718 A.2d 908, 912-13 (Pa. Commw. 1998), **appeal denied,** 558 Pa. 623, 737 A.2d 745 (1999); **Spinnler Point Colony Association, Inc. v. Nash,** 689 A.2d 1026, 1029 (Pa. Commw. 1997) (holding that "a property owner who purchases property in a private residential development who has the right to travel the development roads and to access the waters of a lake is obligated to pay a proportionate share for repair, upkeep and maintenance of the development's roads, facilities and amenities"); **cf.,** 68 Pa. C.S.A. §§5302(a)(6), (10) (Power of a Unit Owners' Association), 5314 (Assessments for Common Expenses). To the extent the Association by taking title may also have assumed the duty to repair and maintain the

roads—here, it is important to distinguish a landowner's settled right to maintain a road it owns and to be compensated on a proportionate basis from those who have a right to use the road for the cost of maintenance and repair from an affirmative duty to maintain the road imposed on a landowner either at common law or by statute (**see e.g.,** 68 Pa. C.S.A. §5307(a) (placing on the unit owners' association responsibility to repair, maintain and replace the common elements))—Plaintiffs have provided us with no legal authority that this duty extends to the construction of roads on paper streets or the widening of existing roads to conform with a subdivision plan.

Finally, when reviewing the good faith and reasonableness of corporate decisions, such as the Association's decisions here of what roads to repair, when, and how, the business judgment rule "embodies the 'policy of judicial noninterference with business decisions of corporate managers,' and insulates corporate directors from 'second-guessing or liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance.'" **Zampogna v. Law Enforcement Health Benefits, Inc.,** 151 A.3d 1003, 1012 (Pa. 2016) (**quoting Cuker v. Mikalauskas,** 547 Pa. 600, 692 A.2d 1042, 1046 (1997)).[18]

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[18] In **Zampogna v. Law Enforcement Health Benefits, Inc.,** 151 A.3d 1003 (Pa. 2016), the Pennsylvania Supreme Court conducted a brief review of the history of corporate law in Pennsylvania noting that early on "corporations were required to be incorporated for a specific purpose and were limited to take only those actions that furthered the corporation's purpose"; "if a corporation's action was not 'fairly considered incidental or auxiliary to' its corporate purpose, a court could deem the action unauthorized as beyond the scope of the corporation's authority **(i.e., ultra vires)**." **Id.** at 1011. In contrast, the Business Corporation Law today grants a business corporation broad corporate powers "[s]ubject to the limitations and restrictions imposed by statute or contained in its articles" and removes "the requirement that for-profit corporations be incorporated for a specific, limited purpose." **Id.** at 1011-12. As a result, "[b]ecause for-profit corporations are no longer limited to taking actions related to their corporate purposes, the **ultra vires** doctrine is, in effect, no longer viable to challenge a for-profit corporate action"; "[r]ather, a challenge to a corporate action proceeds in modern jurisprudence under what is known as the business judgment rule." **Id.** at 1012.

The court further noted that the same developments have been extended to nonprofit corporations generally, and that although "nonprofit corporations are required by the [Nonprofit Corporation Law] and its regulations to be incorporated for a specified purpose, as opposed to for-profit corporations, which may be incorporated for 'any lawful purpose,'" this "does not necessarily mean that we must construe this requirement narrowly." **Id.** at 1013 (citations omitted).

"[C]ourts should not act as super-boards second guessing decisions of corporate directors, as courts are 'ill-equipped' to become 'enmeshed in complex corporate decision-making.' " **Id.** at 1014 (**citing** and **quoting Cuker, supra** 692 A.2d at 1046).[19]

(4) Duty: Arising Under Defendant's Bylaws

Count V of the Amended Complaint alleges a failure of the Association to comply with its Bylaws. In this Count, Plaintiffs allege Article III, Section 6, of the Bylaws obligates the Association to maintain the common areas (Amended Complaint, ¶¶25, 43); the proper level of maintenance is that defined in the declaration and plans (Amended Complaint, ¶146); although the Association has previously represented that membership approval is required before monies are used for road maintenance, including the maintenance of Forest Lake Drive, the Bylaws provide to the contrary (Amended Complaint, ¶¶26, 55, 144, 145, 148); as a result of the Association's failure to maintain Forest Lake Drive, the Plaintiffs have been forced to use a poorly maintained and unsafe road. (Amended Complaint, ¶¶59, 87, 156.)

The Association's bylaws have been attached to the Amended Complaint as Exhibit H. (Amended Complaint, ¶24.) Article III, Section 6, of these bylaws acknowledges the Association's responsibility to maintain the roads[20] and Article III, Section 7 excludes

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Summarizing its holding, the court stated: "Thus, we find that a nonprofit corporation's action is authorized when: 1) the action is not prohibited by the [Nonprofit Corporation Law] or the action is not clearly unrelated to the corporation's stated purpose." **Id.** at 1013.

[19] As previously noted, the standard of care set forth in Section 5712(a) of the Nonprofit Corporation Law, 15 Pa. C.S.A. §5712(a), is virtually identical to that described in Section 5303 of the Uniform Planned Community Act, 68 Pa. C.S.A. §5303(a). **See** footnote 16 **supra.**

[20] As relevant to the Association's Objections, Article III, Section 6, of the Association's bylaws provides:

> Since the Corporation is responsible to maintain all roads and recreational facilities and its only source of income is the annual dues, all lot owners should be assessed as described in the Offering Statement of the Pocono Pleasant Valley West Subdivision dated 11/21/70.

(Amended Complaint, Exhibit "H" (Pleasant Valley West Club Bylaws, Article III, Section 6).) **See also,** 68 Pa. C.S.A. §5307(a) (Upkeep of Planned Community, General Rule).

the need to submit expenditures for the maintenance of roads for prior approval to the membership.[21] Nevertheless, the Bylaws, on their face, do not define any level of maintenance by reference to the recorded subdivision plans, any Development documents, or otherwise. Accordingly, what maintenance is to be provided is left to the discretion of the Association, subject to the dictates of Section 5303(a) of the Act and/or the business judgment rule. **See** 68 Pa. C.S.A. §5303(a) (Powers and Fiduciary Status); 15 Pa. C.S.A. §5712 (Standard of Care and Justifiable Reliance), respectively.

Preliminary Objections Challenging the Court's Subject Matter Jurisdiction

Pursuant to Pa. R.C.P. 1028(a)(1) and 1028(a)(7), the Association next argues that this Court lacks subject matter jurisdiction over Plaintiffs' action because Plaintiffs have not abided by Pa. R.J.A. 2156(1) and that equity is without jurisdiction to hear or grant relief because Plaintiffs have failed to exercise or exhaust a statutory remedy, namely that provided under 15 Pa. C.S.A. §5793 to "select individuals vested with power and influence over [the nonprofit corporation]." **Petty v. Hospital Service Association of Northeastern Pennsylvania,** 967 A.2d 439 (Pa. Commw. 2009), **aff'd,** 611 Pa. 119, 133, 23 A.3d 1004, 1012 (2011). Included within this select group having standing to challenge the validity of corporate action are members of the nonprofit corporation, such as Plaintiffs.

(1) Pa. R.J.A. 2156(1)

"Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented." **Silver v. Pinskey,** 981 A.2d 284, 292 (Pa. Super. 2009) (en banc) (**quoting Commonwealth v. Bethea,** 574 Pa. 100, 113, 828 A.2d 1066, 1074 (2003).)

> Jurisdiction is the capacity to pronounce a judgment of the law on an issue brought before the court through due process of

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[21] As relevant to the Association's Objections, Article III, Section 7, of the Association's bylaws provides:

> Excluding the maintenance of all roads ... expenditures over Two Thousand Dollars ($2,000.00) must be submitted in writing stating the purpose, total cost, and where the money would come from to all members in good standing. Members must then approve the expenditure by a simple majority vote.

(Amended Complaint, Exhibit "H" (Pleasant Valley West Club Bylaws, Article III, Section 7).)

> law. It is the right to adjudicate concerning the subject matter in a given case. ... Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect. The trial court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved **sub judice.** Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case.

Estate of Gentry v. Diamond Rock Hill Realty, LLC, 111 A.3d 194, 198 (Pa. Super. 2015) (**quoting Aronson v. Sprint Spectrum, L.P.,** 767 A.2d 564, 568 (Pa. Super. 2001)). "Jurisdiction is a matter of substantive law. 42 Pa. C.S. §931(a) (defining the unlimited original jurisdiction of the courts of common pleas)." **Silver, supra** at 292 (citation and quotation marks omitted).

The Association argues mandatory and exclusive jurisdiction over Plaintiffs' claims is in the Orphans' Court Division of this Court, **citing Bannister v. Eagle Lake Community Association, Inc.,** 17 D. & C.4th 582 (Lack. Co. 1992). In **Bannister,** plaintiff averred two or more **ultra vires** overreaching and unconscionable agreements entered into by the directors of a nonprofit corporation; claimed that the **ultra vires** acts of the directors and officers of the nonprofit corporation were illegal, oppressive or fraudulent; asserted the corporate assets were being misapplied and wasted; and requested the corporation be wound up and dissolved. Relying on Pa. R.J.A. Rule 2156(1), the court concluded that for the type of challenges there made, the case should be transferred to the Orphans' Court Division.

Pa. R.J.A. Rule 2156(1), in pertinent part, provides:

> In addition to other matters which by law are to be heard and determined by **the orphans' court division of a court of common pleas,** the division **shall hear and determine the following matters:**
>
> **(1) Nonprofit corporations.** The administration and proper application of property committed to charitable purposes held or controlled by any domestic or foreign nonprofit corporation and **all matters** arising under Title 15 of the Pennsylvania Consolidated Statutes (relating to corporations and unincorporated associations) or otherwise **where is drawn in question** the application, interpretation or enforcement of **any law regulating the affairs of nonprofit corporations hold-**

> **ing or controlling any property committed to charitable purposes, or of the** members, security holders, **directors,** officers, employees or agents **thereof,** as such.

(Emphasis added.)

At issue in this case is the duty, if any, of a property owners' association in a private residential subdivision to build, construct, widen and improve—as well as to repair and maintain—development roads allegedly neither built or constructed by the developer in accordance with approved and recorded final subdivision plans. The roads in this case and, as applicable, the lands upon which they were to be built are privately owned by the defendant Association and are under and subject to the right of the private property owners in the Development and those claiming under them to use the same for ingress and egress to and from public roads as a means of access to their properties. Such roads and the property on which they were to be built are not committed to charitable purposes.

" 'Property committed to charitable purposes' means all property committed to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community, ..." **Id.** The Amended Complaint makes no claim regarding "the administration and proper application of property committed to charitable purposes" nor does it "[draw] in question the application, interpretation or enforcement of any law regulating the affairs of nonprofit corporations holding or controlling any property committed to charitable purposes."[22]

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[22] Nor does Section 711 of the Fiduciaries Act entitled "Mandatory Exercise of Jurisdiction through Orphans' Court Division in General" support the Association's position. As it relates to nonprofit corporations, Section 711 provides that jurisdiction of the Court of Common Pleas shall be exercised through its Orphans' Court Division for the following:

> (21)**Nonprofit corporations—**The administration and proper application of funds awarded by an orphans' court or an orphans' court division to a nonprofit corporation heretofore or hereafter organized under the laws of the Commonwealth of Pennsylvania for a charitable purpose at the direction of the orphans' court or orphans' court division or at the direction of a settlor or testator of a trust or estate, jurisdiction of which is exercised through the orphans' court division except as the administrative, presiding or president judge of such division disclaims the exercise of future jurisdiction thereof.

20 Pa. C.S.A. §711(21).

(2) 15 Pa. C.S.A. §5793

The Association's claim of a statutory remedy is premised upon Sections 5791 through 5793 of the Nonprofit Corporation Law of 1988, 15 Pa. C.S.A. §§5791-5793. Section 5793 provides, in relevant part, as follows:

> §5793. Review of contested corporate action
>
> **(a) General rule.—**Upon application of any person aggrieved by any corporate action, the court may hear and determine the validity of the corporate action.

15 Pa. C.S.A. §5793(a). The words "corporate action" include "[t]he taking of any action on any matter that is required under [the Nonprofit Corporation Law] or under any other provision of law to be, or that under the bylaws may be, submitted for action to the members, directors, members of an other body or officers of a nonprofit corporation." 15 Pa. C.S.A. §5791(a)(2). The term "action" also includes a "failure to act" when there was a duty to act. **See** 15 Pa. C.S.A. §5103 (Definitions); **Ciamaichelo v. Independence Blue Cross,** 928 A.2d 407, 410-11, 413 n.3 (Pa. Commw. 2007).

Section 5793 of the Nonprofit Corporation Law grants standing to any person aggrieved by any corporate action of a nonprofit corporation to sue the corporation. In **Ciamaichelo,** the court examined three factors in determining whether the subscribers to health insurance provided by the defendant insurer had standing under Section 5793(a) to bring suit against the defendant: (1) whether the challenged action constituted corporate action as defined in Section 5793(a); (2) whether the subscribers were included within the class of persons authorized by Section 5793(a) to question and commence suit over the corporate decisions at issue; and (3) whether the corporate action affected the subscribers' status, rights or duties. **Id.** at 410-11.[23]

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[23] At the time the conduct at issue in **Ciamaichelo** occurred, Section 5793(a) of the Nonprofit Corporation Law provided:

> **(a) General rule.—**Upon petition of any person whose status as, or whose rights or duties as, a member, director, member of an other body, officer or otherwise of a nonprofit corporation are or may be affected by any corporate action, the court may hear and determine the validity of such corporate action.

15 Pa. C.S.A. §5793(a). This Section was amended to its current version effective September 7, 2013.

Here, Plaintiffs have identified no provision of the Nonprofit Corporation Law that has allegedly been violated by the Association. Nor have Plaintiffs identified any rights or duties Plaintiffs possess as members of a nonprofit corporation which have been violated by the Association or which have been affected by any corporate action or inaction. Instead, the rights and duties Plaintiffs seek to enforce in this case arise as an incident of their ownership of property in an approved final subdivision under the law applicable to real estate conveyancing. The rights and duties appurtenant to these properties were created with the approval and filing of the final subdivision plan for the Development and the filing of the protective covenants by Sellamerica on February 20, 1973, before the Association even existed.[24] Accordingly, we conclude Plaintiffs are not required to file a petition pursuant to Section 5793 of the Nonprofit Corporation Law to obtain the relief they seek.

CONCLUSION

Absent special circumstances, an association which takes title to development roads from the original developer of a private residential community, which roads do not conform to the dimensions and standards set forth in the approved and recorded subdivision plans for the development, has no independent affirmative duty to build and construct the roads to comply with such standards. Plaintiffs' Amended Complaint raises at least four legal theories which Plaintiffs contend obligates the Defendant Association to improve and build the Development roads as laid out in the Development's formative documents: (1) the Association's assumption

[24] Moreover, to the extent Plaintiffs claim the Development is a "planned community" within the meaning of the Uniform Planned Community Act and subject to the provisions of that Act, we have found no case raising issues related to the improvement or maintenance of common areas titled in the name of a community association which was organized as a nonprofit corporation which require that an action against the association be commenced by the filing of a petition pursuant to 15 Pa. C.S.A. §5793(a). **Cf. Logans' Reserve Homeowners' Association v. McCabe,** 152 A.3d 1094 (Pa. Commw. 2017) (reviewing property owners' claim alleging association's breach of development declaration in failing to maintain common area behind owners' property asserted as a counterclaim in the court of common pleas in response to association's complaint seeking payment of unpaid assessments; reference to bylaws of the association and reliance by the association on the business judgment rule as a defense suggest the association was incorporated, but this is not stated definitively in the case).

of the Developer's obligation to do so; (2) a fiduciary duty owed by the Association to unit property owners under the Uniform Planned Community Act; (3) obligations flowing by and between the Association and the unit owners which arise from certain "restrictive" covenants and which bind the Association to make the improvements requested; and (4) enforcement of the Association's bylaws. While hypothetically viable, the material facts set forth in the Amended Complaint to support these causes of action, either do not support the theory or are insufficient to sustain the cause of action with two exceptions: Plaintiffs' claim that the Association has succeeded to the liability of the original developer, Sellamerica, and Plaintiffs' claim that the Association refuses to maintain the existing Development roads in a safe condition for vehicular travel and access to Plaintiffs' properties. Accordingly, while the remainder of Plaintiffs' claims will be dismissed, because Plaintiffs may be able to address the concerns identified in this opinion, and we believe Plaintiffs should be given the opportunity to do so, the order we enter will allow Plaintiffs to file a further Amended Complaint to set forth those material facts legally necessary to establish a right to relief under these alternate theories.

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