

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : Nos. 774 CR 2011  
 : 823 CR 2011  
 KEVIN BRANDWEIN, : 724 CR 2013  
 Defendant :

Gary F. Dobias, Esquire Counsel for the Commonwealth  
Assistant District Attorney  
Paul J. Levy, Esquire Counsel for the Defendant  
First Assistant Public Defender

**MEMORANDUM OPINION**

Serfass, J. - September 30, 2016

Defendant, Kevin Brandwein (hereinafter "Defendant"), has taken this appeal from our August 1, 2016 orders denying his "Motion to Dismiss for Lack of Subject Matter Jurisdiction, Nunc Pro Tunc" and "Motion Pursuant to 'Pa.R.A.P. 2115(b) - Failure to Act.'" We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and respectfully recommend that the aforementioned orders be affirmed for the reasons set forth hereinafter.

**FACTUAL AND PROCEDURAL HISTORY**

Defendant's appeal relates to three (3) separate cases. With respect to the case indexed to docket number CR 774-2011, Defendant was charged with Harassment<sup>1</sup> and Simple Assault.<sup>2</sup> On

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<sup>1</sup> 18 Pa.C.S.A. §2709(a)(1).

<sup>2</sup> 18 Pa.C.S.A. §2701(a)(1).

August 2, 2013, Defendant, with the assistance of Paul J. Levy, Esquire, of the Carbon County Public Defender's Office, entered a guilty plea to Simple Assault with the remaining charge being dismissed. On that same date, this Court sentenced Defendant to a period of incarceration in a state correctional facility of not less than nine (9) months nor more than eighteen (18) months. He was credited with five (5) days for time served. The sentence was to run consecutive to the sentence imposed in the case indexed to docket number 823-CR-2011, and the minimum sentence to be served for all offenses was one hundred twenty-six (126) months.

In the case indexed to docket number CR 823-2011, Defendant was charged with Aggravated Assault,<sup>3</sup> Criminal Attempt-Homicide,<sup>4</sup> two (2) counts of Criminal Conspiracy-Homicide,<sup>5</sup> and two (2) counts of Criminal Conspiracy-Aggravated Assault.<sup>6</sup> On August 2, 2013, Defendant, again with the assistance of Attorney Levy, entered a guilty plea to Count #1 - Aggravated Assault and Count #4 - Criminal Conspiracy-Aggravated Assault, with the remaining charges being dismissed. On that same date, this Court sentenced Defendant on Count #1 to a period of incarceration in a state correctional facility of not less than one hundred seventeen

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<sup>3</sup> 18 Pa.C.S.A. §2702(a)(1).

<sup>4</sup> 18 Pa.C.S.A. §2501.

<sup>5</sup> 18 Pa.C.S.A. §903(a)(1) and 18 Pa.C.S.A. §903(a)(2).

<sup>6</sup> 18 Pa.C.S.A. §903(a)(1) and 18 Pa.C.S.A. §903(a)(2).

(117) months nor more than two hundred thirty-four (234) months. Defendant received six hundred fifty-two (652) days credit for time served. On that same date, this Court sentenced Defendant on Count #4 to a period of incarceration at a state correctional facility of not less than ninety (90) months nor more than one hundred eighty (180) months. That sentence was to run concurrently with the sentence imposed in Count #1, with the minimum sentence to be served being one hundred seventeen (117) months.

Lastly, with respect to the case indexed to docket number CR 724-2013, Defendant was charged with two (2) counts of Aggravated Harassment by Prisoner.<sup>7</sup> On August 2, 2013, Defendant, again with the assistance of Attorney Levy, entered a guilty plea to one (1) count of Aggravated Harassment by Prisoner with the remaining charge being dismissed. On that same date, this Court sentenced Defendant to a period of incarceration in a state correctional facility of not less than twenty-seven (27) months nor more than fifty-four (54) months. Defendant received time served credit of ninety-two (92) days. The sentence was to run concurrently with Count #1 of the case indexed to docket number 823-CR-2011, with the minimum sentence to be served on all offense to be one hundred seventeen (117) months.

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<sup>7</sup> 18 Pa.C.S.A. §2703.1.

On April 11, 2016, Defendant filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction, Nunc Pro Tunc." On July 11, 2016, Defendant also filed a "Motion Pursuant to 'Pa.R.A.P. 2115(b) - Failure to Act.'" On August 1, 2016, this Court entered orders denying both motions.

On August 18, 2016, Defendant filed a Notice of Appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), this Court issued an order on August 23, 2016, directing Defendant to file of record and serve upon the undersigned, a concise statement of the matters complained of on appeal. On September 12, 2016, Defendant filed his concise statement in compliance with our order.

### **DISCUSSION**

In his concise statement, Defendant raised nineteen (19) matters, which can be summarized into the following three (3) issues:

1. Whether this Court has subject matter jurisdiction over these cases;
2. Whether the statutes under which Defendant was prosecuted were valid; and
3. Whether Defendant's counsel was ineffective.

#### **I. LACK OF SUBJECT MATTER JURISDICTION**

Initially, Defendant argues that this Court lacks subject

matter jurisdiction over the above-captioned cases. "Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented." Commonwealth v. Bethea, 828 A.2d 1066, 1074 (Pa. 2003)(citation omitted). Controversies arising out of violations of the Pennsylvania Crimes Code, 18 Pa.C.S.A. §§ 101 et seq, are entrusted to the original jurisdiction of the courts of common pleas for resolution. Id. (citing 18 Pa.C.S. § 102). We also recognize that, generally, a person may be convicted under the laws of this Commonwealth if his "conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth." Commonwealth v. John, 854 A.2d 591, 594 (Pa. Super. 2004)(quoting 18 Pa.C.S.A. § 102(a)(1)).

In the instant matter, Defendant was charged with, and subsequently pleaded guilty to, numerous offenses under the Crimes Code, all of which occurred within this Commonwealth. In the case indexed to docket number 774-CR-2011, Defendant's criminal conduct occurred in Lansford Borough, which is located in Carbon County, Pennsylvania. In the case indexed to docket number 823-CR-2011, Defendant likewise committed all of the criminal offenses with which he was charged in Lansford Borough, Carbon County, Pennsylvania. Lastly, in the case indexed to docket number 724-CR-2013, Defendant's criminal conduct occurred

while he was an inmate at the Carbon County Correctional Facility, which is situated in the Borough of Nesquehoning, Carbon County, Pennsylvania. Accordingly, it is indisputable that this Court has subject matter jurisdiction over the above-captioned cases.

## **II. VALIDITY OF RELEVANT STATUTES**

Defendant next argues that he was prosecuted under criminal laws that are invalid and/or unconstitutional. First, he argues that none of the criminal statutes at issue contain enacting clauses. Moreover, Defendant avers that the subject laws are "unnamed." Finally, he contends that no law shall embrace more than one subject, which is to be expressed in the title thereof.

Pursuant to 1 Pa.C.S.A. § 1101(a), all Pennsylvania statutes are required to begin in the following style: "The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:" The enacting clause is required to be placed "...immediately after the preamble or the table of contents of the statute, or if there be neither preamble nor table of contents, then immediately after the title." 1 Pa.C.S. § 1101(a). In Commonwealth v. Stultz, the appellant asserted that the Pennsylvania Crimes Code does not contain the required enacting clause. 114 A.3d 865, 879 (Pa. Super. 2015), appeal denied, 125 A.3d 1201 (Pa. 2015). There, the Pennsylvania Superior Court

found that, although West Publishing Company omitted the enacting clause from its annotated edition of the Crimes Code, its review of the official codification of the Pennsylvania Crimes Code, enacted by the General Assembly in 1972, reveals that the enacting clause was included immediately before the table of contents for Title 18. Id. (citing Act of December 6, 1972, P.L. 1482 No. 334). Thus, the Superior Court concluded that the appellant's contention was meritless. Id. at 879-80.

Here, Defendant makes the same assertion as the appellant in Stultz with regard to being prosecuted under criminal statutes that lack an enacting clause. As such, Defendant's argument with respect to the enacting clause must likewise be rejected. Moreover, Defendant fails to articulate, with any degree of specificity, how the title and/or single-subject rule are implicated in the above-captioned cases. In his concise statement, Defendant simply poses the following questions: "Were the laws used against the defendant unnamed?" and "Is it true no laws shall embrace more than one subject, which shall be expressed in it's title?" Based upon these questions, which Defendant answers in the affirmative, this Court is left guessing as to what issues Defendant is attempting to preserve for appellate review. See Madrid v. Alpine Mountain Corp., 24 A.3d 380, 382 (Pa. Super. 2011) (citation omitted) (recognizing

that "[w]hen a court has to guess what issues an appellant is appealing, that is not enough for meaningful review").

Therefore, we find Defendant's blanket assertions that he was prosecuted under laws that are invalid and/or unconstitutional to be without merit.

### **III. INEFFECTIVE ASSISTANCE OF COUNSEL**

Defendant contends that his attorney was ineffective because he failed to properly argue that Defendant was sentenced under unconstitutional statutes. Initially, we note that counsel is presumed to be effective and the burden rests on the defendant to prove otherwise. Commonwealth v. Bath, 907 A.2d 619, 622 (Pa. Super. 2006) (citation omitted). In order to succeed on an ineffective assistance of counsel claim, Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceeding would have been different. Commonwealth v. Bryant, 855 A.2d 726, 736 (Pa. 2004) (citations omitted). Where Petitioner fails to satisfy one prong of the test for ineffectiveness, his claim for ineffectiveness of counsel will fail. Commonwealth v. Taylor, 933 A.2d 1035, 1041 (Pa. Super. 2007) (citing Commonwealth v. Rush, 838 A.2d 651 (Pa.



2003)). Further, counsel will not be found ineffective "for failing to pursue a baseless or meritless claim." Id. at 1042 (citation omitted).

In the instant matter, Defendant is unable to demonstrate that the underlying claim is of arguable merit. As discussed in greater detail hereinabove, Defendant's claims that the statutes at issue are invalid and/or unconstitutional and that this Court lacks subject matter jurisdiction over the above-captioned cases are completely devoid of merit. See Taylor, 933 A.2d at 1042 (noting that counsel will not be found ineffective "for failing to pursue a baseless or meritless claim.") Based upon Defendant's failure to satisfy the first prong of the ineffectiveness of counsel analysis, we need not address the remaining prongs. Id. at 1041. Accordingly, we hold that Defendant has not met his burden in establishing that his attorney rendered ineffective assistance of counsel.

#### **CONCLUSION**

For the foregoing reasons, we submit that Defendant's appeal is without merit and respectfully recommend that our orders dated August 1, 2016 be affirmed accordingly.

**BY THE COURT:**

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**Steven R. Serfass, J.**