NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. FREDERICK PERRY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1331 MDA 2013

Appeal from the PCRA Order July 10, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0001181-2005

BEFORE: GANTMAN, P.J., OTT, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.: **FILED JULY 23, 2014**

Frederick Perry appeals the order entered July 10, 2013, in the Lackawanna County Court of Common Pleas, denying his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq*. Perry seeks relief from the judgment of sentence of an aggregate 11 years, 11 months to 57 years' imprisonment imposed on January 26, 2006, after a jury found him guilty of three counts of arson, two counts of recklessly endangering another person, and one count of criminal mischief.[1] On appeal, Perry asserts the ineffective assistance of trial counsel for (1) failing to file a motion to suppress the Commonwealth's evidence regarding dog tracking of human footprints found at the scene, and (2) failing to conduct a

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[1] 18 Pa.C.S. §§ 3301(a) and (c), 2705, and 3304(a)(1), respectively.

more thorough investigation of those footprints, in particular, failing to compare a photo of the footprints to the sole of a sneaker recovered from Perry's residence. For the reasons set forth below, we affirm.

The facts underlying Perry's arrest and conviction were summarized by a panel of this Court in an unpublished memorandum decision affirming Perry's conviction on direct appeal:

> The charges in the instant case stem from the occurrence of a fire at a duplex located at 631-633 Hemlock Street, Scranton, Pennsylvania, late in the evening of January 19, 2005. At approximately 11:52 p.m., the owner of the property, Ms. Marcella Murphy, discovered smoke billowing up from her basement. Ms. [Murphy] promptly called the police and reported the fire. When firefighters arrived, the back of 631 Hemlock was ablaze. Officer Jason Gula of the Scranton Police Department arrived shortly after receiving the call and found Ms. Murphy in the doorway of 633 Hemlock Street, the side of the duplex which she occupied. He escorted her to a neighbor's house. After the fire had been extinguished, an investigation was undertaken to determine the origin of the fire. During the investigation, footprints were discovered behind the house, which were made in freshly fallen snow. In short order, Fire Inspector John Joyce concluded that the fire was the result of arson.
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> The investigation very quickly centered on [Perry], who had had a stormy relationship with Megan McGoff, who lived at 631 Hemlock Street. Within hours of extinguishing the fire, police officers from the Scranton Police Department went to [Perry's] residence at 312 Prospect Avenue and attempted to talk with [Perry], knocking on his door several times. When they received no response, they spoke with [Perry's] neighbor, Mary Reid, who had been awoken by the commotion. Over the next hour or two, the police officers made several trips to [Perry's] apartment building to either see if [Perry] was home or to talk with neighbors, including Ms. Reid. During one of these trips, two officers heard voices coming from [Perry's] apartment. The officers moved closer and were able to hear a voice say "you did it. You burned the mother fucking house down." Some time later, the police placed [Perry's] apartment building under

> surveillance as they felt that they would not be able to get [Perry] to open the door. During this surveillance, three gas cans were observed alongside the building in the back. Two of the three cans were snow covered. However, the handle of one of the cans was clean. There were also fresh footprints leading up to the gas cans.
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> The next morning, [Perry] was able to get out of the apartment without being apprehended and was taken by a friend to the bus station where he purchased a ticket to Philadelphia, the city where [he] had been born and spent many years. [Perry] was apprehended some time later and returned to Scranton[.]

Commonwealth v. Perry, 915 A.2d 148 (Pa. Super. 2006) (unpublished memorandum at 2-3) (record citation omitted).

Relevant to the issues raised in this appeal are the following additional facts, as summarized by the PCRA court:

> The [footprints detected behind McGoff's residence] led from the [rear yard] of 631 Hemlock to garbage cans in the alley. Inside the garbage can, a plastic cup was found which smelled like gasoline. Inspector John Joyce … determine[d] the origin of the fire, which he placed as beginning in the rear left corner of the kitchen.
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> The next morning, [Officer Scott Stelmak] arrived with his K-9 sniffing dog, Blitz, to track the footprints in the snow. Blitz followed a scent in the snow, which never led directly to [] Perry's apartment, but did lead nearby.[2]

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[2] McGoff's father testified that after he received a call that his daughter's house was on fire, he immediately left his home a few blocks away. N.T., 10/12/2005, at 149. He encountered Perry in an alley on nearby Hertz Court and confronted him about the fire. ***Id.*** at 151. Perry denied his involvement, stating, "You can't prove it. I have witnesses. I'm not an arsonist." ***Id.*** As Perry started to walk away, McGoff's father heard him say something like, "that PFA, that doesn't mean anything to me." ***Id.*** at 153. *(Footnote Continued Next Page)*

> As part of the investigation, officers discovered that the rear kitchen window had been broken and a brick was found nearby. The brick seemed out of place since it had come from another part of the yard. At trial, the Commonwealth advanced a theory that [] Perry had broken the kitchen window and introduced an accelerant into the kitchen which he then ignited. He then ran from the house and was back inside his apartment and on the phone with a friend within four or five minutes of starting the fire.[3]
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> When police later obtained a search warrant for [] Perry's apartment they found a sneaker they believed matched the footprints in the snow, lighters, and a folded up Protection From Abuse Order which was received by [him] that same day, issued against him by his ex-girlfriend, the victim[.[4]]
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> It was revealed at trial that [the victim initially] obtained a PFA order against [] Perry after he set her car on fire and was arrested for the crime. He was later convicted of that crime.

PCRA Court Opinion, 7/10/2013, at 1-2 (record citations omitted).

(Footnote Continued) ———————————

This alley, a few blocks from Perry's house, was where Blitz lost track of the scent.

[3] The evidence at trial established that the fire was called in to the police at 11:52 p.m. N.T., 10/12/2005, at 231. Further, the evidence established that Perry was in his apartment, on the phone with a friend, Scott Duplessis, at 11:54 p.m. N.T.,10/13/2005, at 254. That call lasted four minutes, during which time Duplessis could hear the fire engine sirens. ***Id.*** at 255-256. Duplessis testified that Perry ended the call to "see what was going on." ***Id.*** at 256. Perry called Duplessis back at approximately 12:24 a.m. and told him McGoff's house was on fire, and that he had an encounter with her father in a nearby alley. ***Id.*** at 256-257.

[4] The police also followed the scent of gasoline in Perry's kitchen, and discovered a pair of black gloves and an unwashed white t-shirt in Perry's washing machine. N.T., 10/13/2005, at 104-105. Both items smelled of gasoline, and subsequent laboratory testing on the items indicated the presence of gasoline. N.T., 10/13/2005, at 199-200.

After the victim obtained the initial PFA order, she saw Perry lingering near her house and the tires on her car were slashed twice within a one week period. She then obtained a modification of the PFA to include a distance restriction, so that Perry was not permitted within 500 feet of her. It was the modification to the first order that Perry received on the day of the fire.

Perry was subsequently charged with three counts of arson, two counts of REAP and one count of criminal mischief. His case proceeded to a jury trial, and, on October 14, 2005, the jury returned a verdict of guilty on all charges. On January 26, 2006, the trial court imposed an aggregate sentence of 11 years, 11 months to 57 years' imprisonment.[5] He filed a motion for reconsideration of sentence, which was promptly denied by the trial court. On November 27, 2006, this Court affirmed Perry's judgment of sentence on direct appeal, and, thereafter, the Pennsylvania Supreme Court denied his petition for allocator review. ***Commonwealth v. Perry***, 915 A.2d 148 (Pa. Super. 2006), *appeal denied*, 926 A.2d 441 (Pa. 2007).

On November 1, 2008, Perry filed a timely, *pro se* PCRA petition. After several counsel changes, present counsel was appointed. On October 4,

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[5] Specifically, the trial court sentenced Perry to two consecutive terms of 54 months to 20 years' imprisonment for arson-endangering persons, a consecutive term of 20 months to 10 years' imprisonment for arson–endangering property, and a consecutive term of 15 months to seven years' imprisonment for criminal mischief. The remaining two convictions of REAP merged for sentencing purposes.

2012, present counsel filed a supplemental petition asserting the ineffective assistance of trial counsel. The PCRA court conducted an evidentiary hearing on January 16, 2013, during which trial counsel was the only witness presented by either party. Following the hearing, on January 25, 2013, Perry filed a motion seeking to retain an expert to compare the sole of the sneaker obtained from Perry's home with a photograph of the footprints found near the crime scene. On January 29, 2013, the PCRA court denied the motion. Thereafter, on July 10, 2013, the court denied Perry's PCRA petition. This timely appeal followed.[6]

While Perry purports to raise four issues in his statement of questions involved, he consolidates these issues into two distinct claims in his brief. ***See*** Perry's Brief at 4. First, he argues trial counsel was ineffective in failing to file a motion to suppress the Commonwealth's dog tracking evidence. Second, he contends trial counsel was ineffective for failing to conduct a more thorough investigation of the footprints found near the crime scene, including a comparison of the markings on the footprints to those on the sole of the sneakers obtained from Perry's residence.

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[6] On September 9, 2013, the trial court ordered Perry to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Perry complied with this directive and filed a concise statement on September 20, 2013.

When reviewing an order dismissing a PCRA petition, we must determine whether the ruling of the PCRA court is supported by record evidence and is free of legal error. ***Commonwealth v. Davis***, 86 A.3d 883, 887 (Pa. Super. 2014). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id.*** (citation omitted)

Where, as here, both of the petitioner's claims challenge the ineffectiveness of counsel, our review is well-settled:

> We begin our analysis of ineffectiveness claims with the presumption that counsel is effective. To prevail on his ineffectiveness claims, Appellant must plead and prove, by a preponderance of the evidence, three elements: (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) Appellant suffered prejudice because of counsel's action or inaction. With regard to the second, *i.e.*, the "reasonable basis" prong, we will conclude that counsel's chosen strategy lacked a reasonable basis only if Appellant proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." To establish the third, *i.e.*, the prejudice prong, Appellant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction.

Commonwealth v. Spotz, 18 A.3d 244, 259-260 (Pa. 2011) (internal citations omitted). "Failure to establish any prong of the test will defeat an ineffectiveness claim." ***Commonwealth v. Keaton***, 45 A.3d 1050, 1061 (Pa. 2012) (citations omitted).

First, Perry argues trial counsel should have filed a motion to preclude the dog tracking evidence because the Commonwealth failed to establish a

proper foundation for this testimony.[7] Specifically, Perry contends (1) neither the dog, Blitz, nor his handler, Officer Scott Stelmak, was qualified to track humans, (2) Blitz was not started on a track where Perry was known to have been, and (3) the trail Blitz followed had been contaminated since it had been "plowed, rock salted, shoveled, had other footprints, and had vehicles traveling through the track." Perry's Brief at 14. Because there was no foundation for the testimony, Perry argues trial counsel should have sought to preclude it, rather than simply challenge the testimony during cross-examination. Further, Perry contends trial counsel had no reasonable basis for failing to move to preclude the evidence, and that he was prejudiced by its admission because there was no other evidence linking him to the scene of the crime.

With regard to dog tracking evidence, this Court has held:

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[7] Although Perry raises this claim in the context of trial counsel's failure to file a motion to suppress the evidence, we find that he should have challenged counsel's failure to file a motion in *limine*.

> A motion in *limine* differs from a suppression motion in that a suppression motion is designed to preclude evidence that was obtained in violation of a defendant's constitutional rights, while a motion in *limine* "precludes evidence that was constitutionally obtained but which is prejudicial to the moving party."

Commonwealth v. King, 689 A.2d 918, 921 (Pa. Super. 1997) (citation omitted). Because Perry does not contend that the dog tracking evidence was obtained in violation of his constitutional rights, a motion in *limine* would have been the proper vehicle for his claim.

> [W]here a proper foundation has been laid, "testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime with which he is accused."
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> [The courts] are [in agreement] that before evidence of dog trailing may be received, however, the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the trailing by the dog must be shown. While the specific requirements differ in some respects from state to state, most courts are in substantial agreement that the proponent of the evidence must show that (1) the handler was qualified, both by training and experience, to use the dog; (2) the dog was adequately trained to track humans; (3) the dog, by virtue of experience, was reliable in tracking humans; (4) the dog was placed on track at a place where circumstances showed the guilty party to have been; and (5) the trail had not become so stale or contaminated that it was beyond the dog's ability to follow.

Commonwealth v. Michaux, 520 A.2d 1177, 1179 (Pa. Super. 1987) (citations omitted), *appeal denied*, 536 A.2d 1329 (Pa. 1987).

Perry first contends that neither Blitz, nor Officer Stelmak, were qualified to track humans. His argument, however, is belied by the record. Officer Stelmak testified that he had been working with Blitz since February of 2003, and they had participated in numerous training classes, including ongoing training consisting of one eight-hour session each month. N.T., 10/13/2005, at 7-8, 9-10, 14. He testified that many of these sessions included training for tracking humans. ***Id.*** at 10-11, 13-14. In fact, Blitz's certification as a street-ready patrol dog includes the ability to track humans. ***Id.*** at 15-16. Officer Stelmak also testified that he could "accredit Blitz to seven captures in tracking[,]" which included apprehensions of individuals or recovered evidence. ***Id.*** at 18-19. Although prior to the arson

case, he had never used Blitz to track in snow in a "real-life situation[,]" Officer Stelmak testified that Blitz had been trained to track in snow. ***Id.*** at 20. Furthermore, Officer Stelmak described in detail how Blitz was trained to follow a human scent, particularly how the officer allows the dog to take the lead, and does not direct him where to go. ***See id.*** at 11-12. Therefore, we conclude that the testimony demonstrated that Blitz was adequately qualified by both training and experience to track humans.

Perry also contends that Blitz was not placed in an area where Perry was known to have been because, although Blitz began tracking the footprints leaving the rear of 631 Hemlock Street, Perry "himself was not known to have been in this area at the time." Perry's Brief at 13. However, evidence of **the defendant's** presence where the dog begins tracking is not required. Rather, the dog must be placed "on track where circumstances showed the **guilty party**" had been. ***Michaux***, ***supra***, 520 A.2d at 1179 (emphasis supplied). In the present case, Officer Stelmak placed Blitz on the trail of fresh footprints in the snow leaving the scene of the arson. The fact that the trail led to an area where Perry had been seen, *i.e.*, the alley, simply lends credence to the fact that Blitz was following Perry's scent.

Lastly, Perry argues the Commonwealth failed to establish that the trail was not contaminated. He asserts that "[a]ccording to the testimony submitted at trial, the area Blitz tracked was plowed, rock salted, shoveled, had other footprints, and had vehicles traveling through the track." Perry's Brief at 14. Moreover, he argues that at one point Blitz lost the scent, and

did not regain it until he was redirected by the lead investigatior, Inspector Monahan, who was following Officer Stelmak and Blitz. ***Id.*** Again, we conclude the evidence does not support Perry's argument.

Rather, the testimony presented at trial supports the Commonwealth's assertion that the trail followed by Blitz had not been contaminated. Although Officer Stelmak testified that he stopped Blitz at one point to remove rock salt from the dog's paw, Blitz was easily able to continue tracking the scent. N.T., 10/13/2005, at 27, 31. Moreover, there was one more break in the track, close to the end of the trail, when Blitz lost the scent. At that point, Inspector Monahan mentioned that they were "very close to the ending point." ***Id.*** at 29. He suggested they cross the street, but did not direct Officer Stelmak specifically to Hertz Court, where Perry was seen by McGoff's father. Officer Stelmak testified that "[a]s soon as we crossed the street Blitz put his nose down and took off down the court." ***Id.*** at 29. The officer explained this indicated to him that Blitz "was tracking and he had picked up the scent that we were following." ***Id.*** at 30.

Accordingly, we conclude the Commonwealth provided a proper foundation for the admission of the dog tracking evidence, and trial counsel was not ineffective for failing to move to preclude it. Furthermore, even if we were to conclude that the evidence should not have been admitted, Perry has failed to establish prejudice. First, the trail Blitz followed did **not** lead to Perry's apartment, where the evidence established he was present only a few minutes after the fire was reported. Second, as the PCRA court noted in

its opinion, the "officers already had probable cause to obtain a search warrant for [Perry's] house regardless of the tracking in the snow, based on the prior incident with [Perry] setting the victim's car on fire." PCRA Court Opinion, 7/10/2013, at 17. While Perry calls this conclusion "pure conjecture,"[8] he fails to acknowledge that the dog tracking evidence is not mentioned in the probable cause affidavits for **either** search warrant. ***See*** Application for Search Warrant and Authorization, January 20, 2005, Affidavit of Probable Cause; Application for Search Warrant and Authorization, January 25, 2005, Affidavit of Probable Cause. Therefore, the significance of the dog tracking evidence, in light of Perry's history with the victim and the discovery of gasoline soaked gloves and clothing in Perry's washing machine, is minimal. Accordingly, because Perry cannot demonstrate that but for counsel's failure to seek preclusion of the dog

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[8] Perry's Brief, at 19. Perry also implies that the probable cause affidavits supporting the search warrants do not include any reference to either the original PFA or modification, McGoff obtained against Perry. ***Id.*** However, this implication is simply false. In the probable cause affidavit supporting the January 20, 2005, search warrant, Inspector Monahan noted that Perry had been arrested and convicted of setting fire to McGoff's car in October of 2004, and that McGoff had a "protection from abuse order because Mr. Perry would circle the block around her house and stare at her windows." Application for Search Warrant and Authorization, January 20, 2005, Affidavit of Probable Cause, at 1. The affidavit supporting the January 25, 2005, warrant repeated this information, as well as noted that a copy of a petition to modify the PFA was recovered during the first search. Application for Search Warrant and Authorization, January 25, 2005, Affidavit of Probable Cause, at 2.

tracking evidence, there is a reasonable probability that he would have been acquitted, he is entitled to no relief on his first claim. ***See Spotz***, ***supra***.

Next, Perry argues trial counsel was ineffective for failing to conduct a more thorough investigation of the footprints discovered at the scene, and in particular, failing to compare a photo of the footprints to the sole of a sneaker recovered from Perry's residence. He claims the imprints on the footprint and the sneaker "are not the same design," and that counsel had no reasonable basis for failing to discredit the Commonwealth's evidence. Perry's Brief at 29. Moreover, Perry contends that had trial counsel challenged the footprint evidence, the outcome of the trial would have been different because the footprints were the only evidence indicating Perry was present at the scene of the fire.

Again, we find that Perry has misrepresented the evidence presented at trial. Both a photo of the footprint recovered from the scene, and the sneakers recovered from Perry's apartment were presented as exhibits at trial. Using the photo of the footprints as an exhibit, Inspector Monahan testified, "If you look at the bottom here (indicating) you can see, like, an upside down V there. Can you see that right there (indicating)? And you see these lines (indicating). This is what I was following in the footsteps in the snow." N.T., 10/13/2005, at 63. Later, Inspector Monahan identified the sneakers recovered from Perry's home. The prosecutor asked Inspector Monahan if he "noticed anything particular about those sneakers when you saw them?" ***Id.*** at 99. After the inspector answered, "Sure[,]" defense

counsel requested to approach the bench. ***Id.*** at 99-100. Counsel expressed his concern that the Commonwealth may ask the officer to make a comparison of the two prints. The court agreed that such testimony would not be proper:

> You may put up a copy of the shoe print and he's not a person that can analyze – he has no background in regards to it. So you can simply say this is it and they [the jury] can pass it and see the bottom. Absent an expert, they can do that. You really can't draw any comparison.

Id. at 101. Therefore, the Commonwealth presented no testimony at trial comparing the photo of the footprints left at the scene to the sole of the sneakers recovered from Perry's house.

During the evidentiary hearing, however, PCRA counsel showed trial counsel a photo of the sneakers taken from Perry's home. He asked trial counsel to describe the marking on the sole of the sneakers. While counsel described an "upside-down V" on the center of the sneaker by the arch, he agreed with PCRA counsel that there was a "right-side up V" on the heel of the sneaker. N.T., 1/16/2013, at 28. Based upon this testimony, Perry contends that "[i]t was established at the evidentiary hearing that but for trial counsel's failure to compare the sole of the sneaker with the imprint in the snow there is a reasonable probability that the outcome of the proceedings would have been different." Perry's Brief at 25. We disagree.

Preliminarily, we note that neither a photo of the footprint, nor a photo of the sneakers, was included in the certified record presented to this Court. Therefore, we are precluded from drawing any conclusion on our own as to

the likelihood that the imprints matched. "It is Appellant's responsibility to ensure that this Court is provided a complete certified record to ensure proper appellate review; a failure to ensure a complete certified record may render the issue waived." ***Commonwealth v. Whitaker***, 878 A.2d 914, 922 (Pa. Super. 2005), *appeal denied*, 891 A.2d 732 (Pa. 2005). Moreover, PCRA counsel, in arguing that the markings on the sneakers were distinct from those on the footprint, was relying on Inspector Monahan's trial testimony that the footprints displayed an "upside down V." N.T., 10/13/2005, at 63. However, as the PCRA court noted, "[i]nverted is a matter of perspective." N.T., 1/16/2013, at 58. Indeed, the court found that if the photo were held upside down, the V would appear right side up.[9] ***Id.*** Therefore, because Perry is unable to demonstrate that had counsel more thoroughly investigated the markings on the footprints with those on the sneakers, the outcome of his trial would have been different, he is again entitled to no relief.[10]

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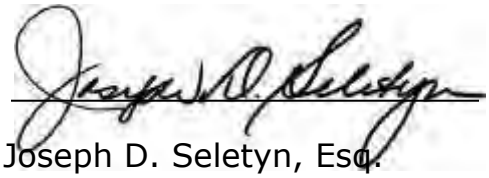
[9] Indeed, it is unclear from Inspector Monahan's testimony how he was viewing the photo when he described the markings.

[10] We note that Perry did not present expert testimony comparing the markings on the footprints to those on the sneaker soles. Although he did file a motion before the PCRA court seeking to retain an expert, he did so only **after** the conclusion of the evidentiary hearing. Therefore, we find no abuse of discretion on the part of the PCRA court in denying that belated motion. Indeed, it is the petitioner's burden to plead and prove his eligibility for PCRA relief. 42 Pa.C.S. § 9543(a)(2).

Accordingly, because we conclude that both of Perry's claims asserting the ineffectiveness of trial counsel fail, we affirm the order of the PCRA court dismissing Perry's PCRA petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014