No PA Supreme Court Cases
Com. v. Perry **(Note: This case was published in December 2015)**
Superior Court of Pennsylvania
2014 WL 10915488 – 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). 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.

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 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 morning after the arson, 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.
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. 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."

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:
Where 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."
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.**
6 See Commonwealth v. Michaux.

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. He testified that many of these sessions included training for tracking humans. In fact, Blitz's certification as a street-ready patrol dog includes the ability to track humans. Officer Stelmak also testified that he could "accredit Blitz to seven captures in tracking," which included apprehensions of individuals or recovered evidence. 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. 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.

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."

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. See Michaux.
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 "according 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." Moreover, he argues that at one point Blitz lost the scent, and did not regain it until he was redirected by the lead investigation, Inspector Monahan, who was following Officer Stelmak and Blitz. **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. 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." 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 "as soon as we crossed the street Blitz put his nose down and took off down the court." The officer explained this indicated to him that Blitz "was tracking and he had picked up the scent that we were following."

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." While Perry calls this conclusion "pure conjecture," he fails to acknowledge that the dog tracking evidence is not mentioned in the probable cause affidavits for either search warrant.
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 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.

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.

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