

Lebanon County Legal Journal

The official legal periodical for Lebanon County
containing the decisions rendered in the 52nd Judicial District

Vol. 51

Lebanon, Pennsylvania, March 5, 2014

No. 23

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Published every Wednesday. Advertisements must be at Room 305,
Municipal Building, 400 South Eighth Street, Lebanon PA, 17042
by 11 a.m. of preceding Monday.

Lebanon County Legal Journal, per bound volume.....\$95.00
Advance Sheets, per year.....\$97.75
Single copy, advance sheets.....\$4.00

717-228-4411; www.lebanoncountylegaljournal.org

**Owned and published by the Lebanon County Bar Association
Paul W. Kilgore, Esq., Chairman
C. Walter Whitmoyer, Jr., Esq., Editor
Stephanie Axarlis, Esq., Editor**

DECEDENTS' ESTATES

NOTICE IS HEREBY GIVEN that Letters Testamentary or of Administration have been granted in the following estates. All persons indebted to the said estate are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

FIRST PUBLICATION

ESTATE OF JANE B. HARRIS, late of Cornwall Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

David P. Harris, Executor
c/o Russell, Krafft & Gruber, LLP
Hempfield Center, Suite 300
930 Red Rose Court
Lancaster PA 17601

Jon M. Gruber, Esquire, Attorney

ESTATE OF RITA M. KASPER, late of North Cornwall Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Carole K. Good, Executrix
275 Reist Road
Lebanon PA 17042

Paul W. Kilgore, Esquire
Spitler, Kilgore & Enck, Attorneys

ESTATE OF WILLIAM Z. MARTIN, JR., late of Middle Creek Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executors.

J. Michael Hurst, Executor
2013 Robindale Ave.
Lancaster PA 17601

Leonard Z. Martin, Executor
524 West Broad Street
New Holland PA 17557

William Z. Martin, III, Executor
992 West Main Street
New Holland PA 17557

Good & Harris, LLP
Attorney

ESTATE OF V. LOUISE MATTINGLY, late of Cornwall Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Stephen J. Mattingly, Executor
c/o Kevin M. Richards, Esquire
P.O. Box 1140
Lebanon PA 17042

ESTATE OF MARTHA A. TEETS, late of North Londonderry Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Co-Executors.

Glen W. Teets, Co-Executor
Wanda Kissinger, Co-Executor
483 Old Farm Road
Palmyra PA 17078

Gerald J. Brinser, Esquire
Attorney

ESTATE OF MARYETTA A. WHITMAN, late of Lebanon County, PA, deceased. Letters of Administration have been granted to the undersigned Administrators.

Penny S. Arnold, Administrator

c/o Anthony J. Fitzgibbons, Esquire
270 North Zinn's Mill Road
Lebanon PA 17042

SECOND PUBLICATION

ESTATE OF JENNIFER L. ESHLEMAN-SARIANO, late of Swatara Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Anthony R. Sariano, Executor
c/o Loren A. Schrum, Esquire
Reilly, Wolfson, Sheffey, Schrum and
Lundberg LLP
1601 Cornwall Road
Lebanon PA 17042

ESTATE OF SHIRLEY A. KAHL, late of Millcreek Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executors.

Timothy Frederick, Executor
138 Michters Road
Newmanstown PA 17073

Brian Althouse, Executor
435 Berne Road
Hamburg PA 19526

ESTATE OF MICHAEL J. MCGINTY, SR., late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executrices.

Kathleen A. Sahasaylo, Executrix
1228 Orchid Court
Naples FL 34110

Michele P. Boyer, Executrix
2785 Horseshoe Pike
Box 234
Campbelltown PA 17010

Paul W. Kilgore, Esquire
Spitler, Kilgore & Enck, PC, Attorneys

ESTATE OF MIRIAM M. RUHL, late of North Cornwall Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Patricia D. Blouch, Executor
c/o Patrick M. Reb, Esquire
547 South Tenth Street
Lebanon PA 17042

ESTATE OF JOANNE M. WALKINSHAW, late of Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

George E. Christianson, Executor

George E. Christianson, Esquire
Attorney

THIRD PUBLICATION

ESTATE OF EILEEN E. DELANY, late of Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Stephen J. Tolkach, Executor
14 Eagleton Farm Road
Newton PA 18940

Daryl J. Gerber, Esquire
Law Office of Daryl J. Gerber
46 East Main Street
Palmyra PA 17078

ESTATE OF B. VALERIA HEISEY a/k/a Valeria Heisey, late of Penn Township, Lancaster County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Rodney F. Heisey, Executor
c/o George J. Morgan, Esquire
Morgan, Hallgren, Crosswell & Kane P.C.
700 N. Duke Street
P.O. Box 4686
Lancaster PA 17604-4686

ESTATE OF DELORES M. HOSSLER, late of Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Co-Executors.

Robert H. Hossler, Co-Executor
280 Syner Road
Annville PA 17003

Cathy S. Ketterer, Co-Executor
18 Sandy Drive
Annville PA 17003

Daryl J. Gerber, Esquire
The Law Office of Gerber & Associates
46 East Main Street
Palmyra PA 17078

ESTATE OF LAYCENE A. KREIDER, late of North Lebanon Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Brenda L. Long, Executrix

Horace M. Ehrgood, Esquire
Attorney for Estate

ESTATE OF EMMA A. LENGLE, late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Sandra L. Bender, Executrix

Horace M. Ehrgood, Esquire
Attorney for Estate

ESTATE OF EVELYN M. NYE, late of North Cornwall Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Noah T. Redcay, Executor

Horace M. Ehrgood, Esquire
Attorney for Estate

ESTATE OF ZOE V. PETKOVICH, late of Union Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executors.

Diane Frie, Executrix
297 Dallas Drive
Grantville PA 17028

Mildred Yezdimir, Executrix
2301 Gulf of Mexico Drive, Unit 54
Longboat Key, FL 34228

Siegrist, Koller, Brightbill, Long & Feeman
315 South Eighth Street
Lebanon PA 17042

ESTATE OF NANCY L. SIEBER, late of North Lebanon Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Horace M. Ehrgood, Executor

Horace M. Ehrgood, Esquire
Attorney for Estate

ESTATE OF PAUL W. STAUNING, late of Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Timothy C. Stauning, Executor
P.O. Box 205
Princeton NJ 08542

Daryl J. Gerber, Esquire
Law Office of Daryl J. Gerber
46 East Main Street
Palmyra PA 17078

ESTATE OF BARBARA A. WHITE, late of North Cornwall Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

James Ratliff, Jr., Executor

Horace M. Ehrgood, Esquire
Attorney for Estate

ESTATE OF VIVIAN M. WHITMOYER, late of North Lebanon Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Christine M. Drupp, Executrix
c/o Frederick S. Wolfson, Esquire
Reilly, Wolfson, Sheffey, Schrum and
Lundberg, LLP
1601 Cornwall Road
Lebanon PA 17042

ESTATE OF TIMOTHY P. ZIEGLER, late of Jackson Township, Lebanon County, PA, deceased. Letters of Administration have been granted to the undersigned Administratrix.

Loretta M. Ziegler, Administratrix
18 Maple Lane
Myerstown PA 17067

C. Walter Whitmoyer, Jr., Esquire
815 Cumberland Street
Lebanon PA 17042

ARTICLES OF INCORPORATION

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State at Harrisburg Pennsylvania, on February 11, 2014, incorporating **Randall Blessing, Inc.** as a business corporation under the provisions of the Business Corporation Law of 1988.

Paul A. Lundberg, Esquire
Reilly, Wolfson, Sheffey, Schrum and
Lundberg LLP
1601 Cornwall Road
Lebanon PA 17042

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, PA, on March 1, 2014, for the purpose of incorporating **EUC Soccer Club** as a nonprofit corporation under the Pennsylvania Nonprofit Corporation Law of 1988 (P.L. 1444, No. 177). The nonprofit corporation has been formed and incorporated for the following purposes: To promote and develop youth soccer within Lebanon County.

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed on February 20, 2014, with the Commonwealth of Pennsylvania, Department of State, at Harrisburg, PA, for the purpose of obtaining a Certificate of Incorporation. The name of the corporation organized under the Pennsylvania Nonprofit Corporation Law of 1988, Act of December 21, 1988, P.L. 1444, No. 177, as amended and supplemented, is **SCLC, Inc.** The purpose for which the corporation was organized and shall be at all time operated exclusively for charitable, religious, educational, and scientific purposes, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. Such purposes of the corporation shall specifically include but not be limited to operate one or more Circles initiative programs in the area of Palmyra, Pennsylvania.

Rhoads & Sinon LLP
Paul F. Wessell, Esquire
One South Market Square, 12th floor
P.O. Box 1146
Harrisburg PA 17108-1146

NOTICE OF SHERIFF'S SALE OF REAL PROPERTY

In the Court of Common Pleas of Lebanon County, Pennsylvania No. 2013-00263

JPMorgan Chase Bank, National Association vs. Lois Shaub, in her capacity as heir and devisee of the estate of Cindy S. Brubaker; **Jacquelyn Keeney**, in her capacity as heir and devisee of the estate of Cindy S. Brubaker; unknown heirs, successors, assigns, and all persons, firms, or associations claiming right, title or interest from or under **Cindy S. Brubaker**, deceased

Notice to: Unknown heirs, successors, assigns, and all persons, firms, or associations claiming right, title or interest from or under Cindy S. Brubaker, deceased

Being premises: **301 Spring Hill Lane, Lebanon, PA 17042-9058**

Being in Cornwall Borough, County of Lebanon, Commonwealth of Pennsylvania
Tax parcel number: 12-2339674-336768-0000. Improvements consist of residential property.

Sold as the property of Lois Shaub, in her capacity as heir and devisee of the estate of Cindy S. Brubaker; Jacquelyn Keeney, in her capacity as heir and devisee of the estate of Cindy S. Brubaker; unknown heirs, successors, assigns, and all persons, firms, or associations claiming right, title or interest from or under Cindy S. Brubaker, deceased.

Your house (real estate) at 301 Spring Hill Lane, Lebanon, PA 17042-9058 is scheduled to be sold at the Sheriff's Sale on 04/08/2014 at 10:00 a.m., at the Lebanon County Courthouse, 400 South 8th Street, Lebanon PA 17042, to enforce the court judgment of \$330,339.00 obtained by, JPMorgan Chase Bank, National Association (the mortgagee), against the above premises.

Phelan Hallinan, LLP
Attorney for plaintiff

NOTICE OF FORECLOSURE

**In The Court of Common Pleas of
Lebanon County, Pennsylvania; Civil
Action-Mortgage Foreclosure Civil
Division No. 2013-02265**

Affinity Bank, a division of First Priority
Bank, Successor to Affinity Bank of
Pennsylvania, Plaintiff

vs.

Paul Curran and Mary C. Curran, as
Mortgagors, and Ata Zandieh, as Real
Owner, Defendants

To: Ata Zandieh

You are hereby notified that on November 15, 2013, Plaintiff filed a Complaint endorsed with a Notice to Defend against you in the Court of Common Pleas of Lebanon County, Pennsylvania to Docket No. 2013-02265. You are hereby notified to plead to the above-referenced Complaint on or before twenty (20) days of the date of this publication or a judgment will be entered against you.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the Court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the Plaintiff. You may lose money or property or other rights important to you.

You should take this notice to a lawyer at once. If you do not have a lawyer, go to or

telephone the office set forth below. This office can provide you with information about hiring a lawyer.

If you cannot afford to hire a lawyer, this office may be able to provide you with information about agencies that may offer legal services to eligible persons at a reduced fee or no fee.

Mid-Penn Legal Services
513 Chestnut Street
Lebanon, PA 17042
Telephone: 717-274-2834

**Court of Common Pleas Civil Division
of Lebanon County No. 2013-02002**

Wells Fargo Bank, N.A., Plaintiff

vs.

Laurie Diaz, in her capacity as heir of
Patricia Ann Moritz, deceased

Eric Livering, in his capacity as heir of
Patricia Ann Moritz, deceased

Sally Shay, in her capacity as heir of
Patricia Ann Moritz, deceased

Susan Kleinfelter, in her capacity as heir
of Patricia Ann Moritz, deceased

Mary Shay, in her capacity as heir of
Patricia Ann Moritz, deceased

Bruce Weand, in his capacity as heir of
Patricia Ann Moritz, deceased

Sherri Wilson, in her capacity as heir of
Patricia Ann Moritz, deceased

Unknown heirs, successors, assigns, and
all persons, firms, or associations claiming
right, title or interest from or under Patricia
Ann Moritz, deceased, Defendants

**TO: Unknown heirs, successors, assigns,
and all persons, firms, or associations
claiming right, title or interest from or
under Patricia Ann Moritz, deceased**

You are hereby notified that on October
15, 2013, Plaintiff, Wells Fargo Bank, N.A.,
filed a Mortgage Foreclosure Complaint
endorsed with a Notice to Defend, against
you in the Court of Common Pleas of
Lebanon County Pennsylvania, docketed
to No. 2013-02002. Wherein Plaintiff seeks
to foreclose on the mortgage secured on

your property located at **535 West Locust
Street, Cleona, PA 17042-3147** whereupon
your property would be sold by the Sheriff
of Lebanon County.

You are hereby notified to plead to the
above referenced Complaint on or before
20 days from the date of this publication or
a Judgment will be entered against you.

If you wish to defend, you must enter
a written appearance personally or
by attorney and file your defenses or
objections in writing with the court. You
are warned that if you fail to do so the case
may proceed without you and a judgment
may be entered against you without further
notice for the relief requested by the
plaintiff. You may lose money or property
or other rights important to you.

You should take this notice to your lawyer
at once. If you do not have a lawyer, go to
or telephone the office set forth below. This
office can provide you with information
about hiring a lawyer. If you cannot afford
to hire a lawyer, this office may be able
to provide you with information about
agencies that may offer legal services to
eligible persons at a reduced fee or no fee.

Mid-Penn Legal Services
513 Chestnut Street
Lebanon, PA 17042
(717) 274-2834

**Court of Common Pleas Civil Division
of Lebanon County No. 2013-02354**

PHH Mortgage Corporation, Plaintiff
Vs.

Unknown heirs, successors, assigns, and all persons, firms, or associations claiming right, title or interest from or under William C. Vorek, deceased.

TO: Unknown heirs, successors, assigns, and all persons, firms, or associations claiming right, title or interest from or under William C. Vorek, deceased.

You are hereby notified that on November 27, 2013, Plaintiff, PHH Mortgage Corporation, filed a Mortgage Foreclosure Complaint endorsed with a Notice to Defend, against you in the Court of Common Pleas of Lebanon County, PA, docketed to No. 2013-02354. Wherein Plaintiff seeks to foreclose on the mortgage secured on your property located at **22 Village Drive, Fredericksburg PA 17026-9127** whereupon your property would be sold by the Sheriff of Lebanon County.

You are hereby notified to plead to the above referenced Complaint on or before 20 days from the date of this publication or a Judgment will be entered against you.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this notice to your lawyer at once. If you do not have a lawyer, go to or telephone the office set forth below. This office can provide you with information about hiring a lawyer. If you cannot afford to hire a lawyer, this office may be able to provide you with information about agencies that may offer legal services to eligible persons at a reduced fee or no fee.

Mid-Penn Legal Services
513 Chestnut Street
Lebanon, PA 17042
(717) 274-2834

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010

Crimes – PCRA – After Acquired Evidence – Ineffective Assistance of Counsel – Arrest – Warrantless Search – Probable Cause – Exterior Pat Down – Officer Safety.

1. The Post-Conviction Relief Act (PCRA) provides a process by which persons convicted of crimes they did not commit and persons serving illegal sentences can obtain relief. The PCRA is the exclusive method by which collateral relief may be obtained in Pennsylvania.
2. To be eligible for relief, a PCRA defendant must prove the following elements by a preponderance of evidence: (1) that he has been convicted of a crime under the laws of this Commonwealth and that he is serving a sentence for that crime; (2) that the conviction resulted from one of the enumerated errors listed in §9543(a)(2) of the PCRA; (3) that the allegation of error has not previously been litigated or waived; and (4) that any failure to litigate the issue previously was not the result of a rational, strategic or tactical decision by the Defendant or his counsel.
3. A Petitioner seeking post-conviction relief based on boilerplate allegations of constitutional error and ineffective assistance of counsel must offer proof that, in the circumstances of the case, no reliable adjudication of guilt or innocence could have taken place.
4. When a claim of after-acquired evidence is raised, additional principles apply. To succeed on claim of newly discovered exculpatory evidence, the petitioner must establish that: (1) the evidence has been discovered after the trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) such evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) such evidence would likely compel a different verdict.
5. When a claim of ineffective assistance of counsel is raised, trial counsel is presumed to be effective, and the Defendant bears the burden of proving otherwise.
6. In order for a petitioner to establish a claim of ineffectiveness of counsel, he must satisfy a three prong test set forth by the Pennsylvania Supreme Court. The Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's particular course of conduct did not have some reasonable basis designed to effectuate the petitioner's interests; and (3) but for counsel's ineffectiveness, a reasonable probability exists that the outcome of the proceeding would have been different.
7. If the claim is without arguable merit, the Court's inquiry ends, because counsel cannot be deemed ineffective for failure to pursue a meritless issue.

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8. The Court concluded that the identity of the searching officer likely would not have had an impact on the outcome of the case. Accordingly, the Court rejected Defendant's PCRA claim based upon Officer Minnick's inconsistent testimony.

9. A warrantless search incident to a lawful arrest is reasonable and no additional justification is required for a search of the defendant. This concept involves all arrests, including summary offenses.

10. An arrest may be accomplished by any act that indicates an intention to take a person into custody and subjects him to the actual control and will of the person making the arrest.

11. A search incident to an arrest may not occur prior to an arrest, and if the Defendant is not under arrest at the time of the search, the search may not later be supported as being incident to arrest.

12. It has long been established that the mere existence of probable cause furnishes no justification for a warrantless search or seizure.

13. A search incident to an arrest is justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.

14. When an officer has probable cause and places an accused under arrest, he can and should conduct a warrantless search. When an officer merely has a reasonable suspicion that criminal activity is afoot, the standard is different. Police officers are only permitted to perform an exterior pat-down of the accused's person when they feel that the accused is armed and dangerous, as their need for protection and preservation of evidence is not as high as during a formal arrest. Therefore, the law only permits a lower level of intrusion.

15. Precedent makes it clear that there is a bright line between these two standards, and the argument, "we could have arrested him, but didn't" does not justify crossing the line between a pat-down for weapons and an actual search of a pocket.

16. The Court found that the evidence obtained from Defendant was taken prior to his arrest and, therefore, the search of Defendant cannot be considered as incident to arrest.

17. If, during the course of a valid investigatory stop, an officer observes unusual and suspicious conduct on the part of the individual which leads him to reasonably believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer garments for weapons in order to preserve officer safety.

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010

18. Nothing in Terry (the U.S. Supreme Court case that justified officer safety searches) can be understood to allow any search whatsoever for anything but weapons.

19. Based upon the record before the Court, it found that officer safety was not an argument that would likely succeed at a suppression motion. By definition, this caused the Court to conclude that a suppression motion would have arguable merit, thereby satisfying the first element of Defendant's ineffectiveness claim.

20. Because the Court found that Defendant's attorney did not proffer any other reasons for not filing the Motion than because she did not think it had any merit, it found that Defendant had satisfied this second element of his ineffectiveness claim.

21. A mere showing of error by counsel or ineffectiveness of counsel is insufficient to demonstrate a right to relief; the petitioner must show that he or she was thereby prejudiced. Because a reasonable probability existed that, but for counsel's ineffectiveness in not filing the Suppression Motion, the jury would not have been able to convict Defendant, the Court found that Defendant had satisfied the third element of his ineffectiveness claim.

22. Since Defendant established a claim for ineffective assistance of counsel under the PCRA, the Court granted Defendant's PCRA Petition.

Defendant's Petition for Post-Conviction Relief. C.P. of Lebanon County, Criminal Division, CP-38-CR-1507-2010.

David Arnold, Esquire, for Commonwealth

Eric Winter, Esquire, for Defendant

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010

**IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA
CRIMINAL DIVISION No. CP-38-CR-1507-2010**

COMMONWEALTH OF PENNSYLVANIA

v.

ADALBERTO BENIQUEZ-RODRIGUEZ

ORDER

AND NOW, this 5th day of December, 2013, upon consideration of the Defendant's Petition for Post Conviction Relief and in consideration of the testimony adduced, the Defendant's Petition is hereby GRANTED. The Commonwealth is directed to present this case for further proceedings as provided by law.

APPEARANCES

**David Arnold, Esquire
District Attorney's Office**

For Commonwealth of Pennsylvania

Eric Winter, Esquire

For Adalberto Beniquez-Rodriguez

OPINION BY CHARLES, J., December 5, 2013

As Justice Day eloquently explained in his *Weeks v. United States* Opinion, "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established [by] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."¹ It is the responsibility of this Commonwealth's judges to protect the balance between the rights of the individual and the needs of the State.

Today, we are faced with a Defendant's Petition for Post-Conviction Relief challenging the validity of a search that uncovered evidence sufficient to convict him and deprive him of his liberty. Providing us with nothing more than, "I don't think I should have to file a frivolous motion if there's no legal basis for it," (N.T. 11/19/2012 pp. 38-39)², the

¹ *Weeks v. United States*, 232 U.S. 383, 393, 34 S. Ct. 341, 344, 58 L. Ed. 652 (1914) overruled by *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)

² N.T. refers to Notes of Testimony from DEFENDANT's jury trial and PCRA hearings.

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010

Defendant's trial counsel chose not to file a Motion to Suppress this evidence. After careful analysis, however, we conclude that a valid legal basis existed for a suppression motion and that the Defendant's counsel should have filed one. Accordingly, we find that Defendant's Trial Counsel was ineffective for failing to file a Suppression Motion.

I. FACTS AND PROCEDURAL HISTORY

On September 3, 2010 at approximately 4:41 p.m., Officer Minnick of the Lebanon City Police Department was on duty traveling on Church Street in the City of Lebanon (N.T. 4/8/2011 p.8). Officer Minnick observed DEFENDANT on a bicycle. DEFENDANT turned east on Church Street from Seventh Street. Officer Minnick observed DEFENDANT drinking from what appeared to be a Heineken beer bottle (N.T. 4/8/2011 pp. 8-9). Officer Minnick called to DEFENDANT to come back to him. When DEFENDANT came back to Officer Minnick, Officer Minnick observed that DEFENDANT was holding two cellular telephones in his hand and had a third cellular telephone attached to his waistband (N.T. 4/8/2011 p.10).

During the course of Officer Minnick's conversation with DEFENDANT, he noticed DEFENDANT was visibly shaking almost to the point where he was unable to control his shaking (N.T. 4/8/2011 p.14). Because Officer Minnick was starting to be concerned that something was not right, he advised DEFENDANT that he was going to pat him down for weapons (N.T. 4/8/2011 p.14). Officer Minnick asked DEFENDANT to get off of his bike and DEFENDANT refused (N.T. 4/8/2011 p.15). Because Officer Minnick had no way of knowing whether DEFENDANT was armed or not, he requested another police officer to respond to his location (N.T. 4/8/2011 p.15). Officer David Zinda arrived. Officer Minnick again informed DEFENDANT that he was going to perform a pat-down of his person. Officer Minnick grabbed DEFENDANT's arm in an effort to assist him off of his bicycle at which time DEFENDANT struggled with him. Because of DEFENDANT's resistance, Officer Minnick handcuffed him (N.T. 4/8/2011 p.16).

After DEFENDANT was handcuffed, Officer Zinda conducted a pat-down search. He felt something inside DEFENDANT's pants pocket. Officer Zinda reached inside the pocket and found a folded up one dollar bill in his right front pants pocket. After unfolding that one dollar bill, Officer Zinda saw a white powdery substance that appeared to be powder cocaine (N.T. 4/8/2011 p.17). Officer Zinda also located a clear plastic knotted off bag. The bag contained eight Xanax tablets (N.T. 4/8/2011 p.19). Officer Zinda also searched DEFENDANT's left pocket and found a cigarette pack. Upon further inspection of the cigarette pack, Officer Zinda found a clear plastic knotted off sandwich bag that contained cocaine. (N.T. 4/8/2011 p.20-21; Exh. 6).

On April 8, 2011, a jury convicted DEFENDANT of six counts of Violation of the

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010

Controlled Substance, Drug, Device and Cosmetic Act³. On May 25, 2011, this Court sentenced Defendant to serve 2 to 4 years in a state correctional facility. On September 26, 2011, this Court denied DEFENDANT's Post-Sentence Motions. On October 5, 2011, DEFENDANT filed a timely appeal to the Superior Court of Pennsylvania. On April 5, 2012, the Superior Court affirmed DEFENDANT's conviction and sentence.

On July 13, 2012, DEFENDANT filed a timely PCRA petition. A hearing was held on November 19, 2013 at which Officer Minnick testified that it was actually Officer Zinda who recovered the items from DEFENDANT's pockets during the September 3, 2010 encounter⁴. Based on this revelation, the PCRA hearing was continued to allow Officer Zinda to testify. A new Hearing was scheduled for March 1, 2013, and was continued until August 16, 2013.⁵ On August 16, a hearing was held at which Officer Zinda testified and admitted that he conducted the pat-down while Officer Minnick attempted to control DEFENDANT. (N.T. 8/16/2013 p.7)

At the PCRA Hearings, DEFENDANT raised two issues:

- (1) Whether inaccurate information presented to the jury rendered DEFENDANT's trial unfair; and
- (2) Whether Attorney Judd was ineffective for failing to request a suppression hearing for the drugs recovered from DEFENDANT by police.

These issues are now ripe for our review and will be addressed seriatim.

II. POST-CONVICTION RELIEF ACT

The Post-Conviction Relief Act (PCRA) provides a process by which persons convicted of crimes they did not commit and persons serving illegal sentences can obtain relief. 42 Pa.C.S.A. § 9542. The PCRA is the exclusive method by which collateral relief may be obtained in Pennsylvania. *Commonwealth v. Chester*, 733 A.2d 1242, 1250 (Pa. 1999). To be eligible for relief, a PCRA defendant must prove the following elements by a preponderance of evidence:

³ Possession with Intent to Deliver Cocaine - 35 P.S. § 113(a)(30)

Possession with Intent to Deliver Xanax - 35 P.S. § 113(a)(30)

Possession of Cocaine - 35 P.S. § 113(a)(16)

Possession of Xanax - 35 P.S. § 113(a)(16)

Possession of Drug Paraphernalia for Cocaine - 35 P.S. § 113(a)(32)

Possession of Drug Paraphernalia for Xanax - 35 P.S. § 113(a)(32)

⁴ At trial, Officer Minnick's testimony suggested that he conducted the entire pat-down. It was not until the March 1, 2013 PCRA hearing that it became clear that Officer Zinda conducted the pat-down while Officer Minnick attempted to control DEFENDANT.

⁵ Officer Zinda was not available until August due to a reserve military deployment.

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- (1) That he has been convicted of a crime under the laws of this Commonwealth and that he is serving a sentence for that crime;
- (2) That the conviction resulted from one of the enumerated errors listed in § 9543(a)(2) of the PCRA⁶;
- (3) That the allegation of error has not previously been litigated or waived; and
- (4) That any failure to litigate the issue previously was not the result of a rational, strategic or tactical decision by the Defendant or his counsel.

See 42 Pa.C.S.A. § 9543. A Petitioner seeking post-conviction relief based on boilerplate allegations of constitutional error and ineffective assistance of counsel must offer proof that, in the circumstances of the case, no reliable adjudication of guilt or innocence could have taken place. *Commonwealth v. Rivers*, 567 Pa. 239, 246-247, 786 A.2d 923, 927-928 (2001).

When a claim of after-acquired evidence is raised, additional principles apply. To succeed on claim of newly discovered exculpatory evidence, the petitioner must establish that: (1) the evidence has been discovered after the trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) such evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) such evidence would likely compel a different verdict. *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 517, 720 A.2d 79, 94 (1998), citing *Commonwealth v. Williams*, 537 Pa. 1, 24-26, 640 A.2d 1251, 1263 (1994).

When a claim of ineffective assistance of counsel is raised, trial counsel is presumed to be effective, and the Defendant bears the burden of proving otherwise. *Commonwealth v. Lewis*, 708 A.2d 497 (Pa.Super. 1998); *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990). In order for a petitioner to establish a claim of ineffectiveness of counsel, he must satisfy a three prong test set forth by the Pennsylvania Supreme Court in *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). The Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's particular course of conduct did not have some reasonable basis designed to effectuate the petitioner's interests; and (3) but for counsel's ineffectiveness, a reasonable probability exists that the outcome of the proceeding would have been different. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). If the claim is without arguable merit, the Court's inquiry ends, because counsel cannot be deemed ineffective for failing to pursue a meritless issue. *Commonwealth v. DiNicola*, 751 A.2d 197, 198 (Pa.Super. 2000).

⁶ § 9543(a)(2) lists seven errors that a defendant can allege, three of which are relevant here: (i) A violation of the Constitution which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, (ii) Ineffective assistance of counsel, and (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010**III. DISCUSSION**

DEFENDANT raised two issues at his PCRA hearings. DEFENDANT first argued that Officer Minnick's trial testimony inaccurately suggested that he had conducted the search that revealed the presence of contraband, when in fact the search was actually conducted by Officer Zinda. DEFENDANT argues that this inconsistency warrants a new trial and that his argument is timely based upon the following provisions of the PCRA:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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; or

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

DEFENDANT also argued that Attorney Judd should have filed a Motion to Suppress the drugs found on DEFENDANT's person because they were the fruit of an illegal search. Because Attorney Judd failed to do so, DEFENDANT argued that he received ineffective assistance of counsel under subsection (ii) of the PCRA.

The first argument outlined above does not justify granting relief to DEFENDANT. However, DEFENDANT's second argument requires us to grant his request for PCRA relief. Our reasons for these decisions follow:

A. INACCURATE INFORMATION TO JURY

DEFENDANT argues that the Commonwealth presented factually inaccurate information to the jury regarding the search of DEFENDANT during the September 3, 2010 encounter. He explains that during Trial, the testimony of Officer Minnick showed that Officer Minnick conducted the search and uncovered the drugs for which DEFENDANT was charged⁷. However, at the November 19, 2012 PCRA Hearing, Officer Minnick's

7 Q. To make sure it's clear, when you found this dollar bill, it was folded up into basically a square and contained that white powdery substance inside of the folded up bill; is that correct?

A. Correct. It was folded length-wise and then they only, you know, just fold it up, like, into a packet. (N.T. 4/8/2011 p. 18).

Q. Okay. Did you also find another item in the – the Defendant's right pocket?

A. Yes, I did. (N.T. 4/8/2011 p. 19).

This is the cigarette pack that was – I located in his left front pants pocket when we searched the left pocket of his pants. And once we further inspected the cigarette pack, we found – well, you can see it in here. It's a clear plastic, again, knotted off sandwich bag corner that contained the white powdery substance at the bottom of this State police packaging bag. (N.T. 4/8/2011 p. 21).

Q. Officer Minnick, did you ultimately complete a full search of the Defendant?

A. Yes, I did. (N.T. 4/8/2011 p. 22).

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testimony showed that it was actually Officer Zinda who uncovered the drugs.⁸ Moreover, Officer Minnick's PCRA testimony was consistent with his written report.⁹

We have a difficult time reconciling Officer Minnick's testimony at trial with his testimony at the PCRA Hearing. However, we find that the inaccurate information submitted to the jury at Trial falls short of the requirements set forth in subsections (i) and (vi) of the PCRA. Subsection (i) requires that the Constitutional violation must be so severe that "no reliable adjudication of guilt or innocence could have taken place" at DEFENDANT's trial. 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i) (West). Subsection (vi) requires that submission of the after-acquired evidence "would have changed the outcome of the trial if it would have been introduced." 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(vi) (West). While it is true that the jury was under the impression that Officer Minnick conducted the pat-down when, in fact, it was Officer Zinda that conducted the pat-down, we do not see how this fact could have changed the outcome of the case.

We find it difficult to characterize Officer Zinda's testimony as "after-acquired evidence." DEFENDANT was present both at the time of the search and during Officer Minnick's testimony at Trial.¹⁰ Even if we did find that this discrepancy in testimony was misleading, we find it odd that DEFENDANT only raises the issue now.

In addition, and more important, the contraband discovered by police was possessed by DEFENDANT. Regardless of which officer actually found the drugs, the critical fact was that the drugs were seized from DEFENDANT. After a careful review of the transcript from Trial and the two transcripts from the PCRA hearings, it is clear that Officer Minnick's inconsistent testimony was not critical to the jury's decision that DEFENDANT possessed drugs. Both police officers testified that cocaine was found in DEFENDANT's pockets. The only inconsistency involves the identity of the searching officer.

We conclude that the identity of the searching officer likely would not have had an impact on the outcome of the case. Moreover, it should not have been a surprise to DEFENDANT and his trial counsel that it was actually Officer Zinda that conducted the pat-down. Accordingly, we reject DEFENDANT's PCRA claim based upon Officer Minnick's inconsistent testimony.

8 Q. Who went into my client's pockets?

A. I don't recall. I remember controlling his body, so to the best of my knowledge, it would have been the other officer. (N.T. 11/19/2012 p. 12).

9 The Police Report written by Officer Minnick following the pat-down states that Officer Minnick "held Beniquez-Rodriguez's arms while Ofc. Zinda conducted a search of his person" (See Exhibit A to Commonwealth's Brief).

10 In addition, Officer Minnick's report clearly identifies Officer Zinda as the one who actually performed the search of DEFENDANT's pockets.

COMMONWEALTH VS. BENIQUEZ-RODRIGUEZ No. CP-38-CR-1507-2010**B. SUPPRESSION HEARING**

DEFENDANT next argues that he received ineffective assistance of counsel under subsection (ii) of the PCRA because Attorney Judd failed to file a Motion to Suppress the drugs found during DEFENDANT's pat-down. Because we find that a reasonable probability exists that the outcome of the proceeding would have been different had Attorney Judd filed the Motion, we find that DEFENDANT received ineffective assistance of counsel and is entitled to relief under the PCRA.

1. The Underlying Claim is of Arguable Merit

The first element of an ineffective assistance of counsel claim is whether the petitioner's underlying claim is of arguable merit. If the claim is without arguable merit, the Court's inquiry ends, because counsel cannot be deemed ineffective for failing to pursue a meritless issue. *Commonwealth v. DiNicola*, 751 A.2d 197, 198 (Pa.Super. 2000). Therefore, we must analyze the suppression issue in light of all the circumstances to determine if there is merit to DEFENDANT's argument. In doing so, we will address each of the Commonwealth's proffered justifications for Officer Zinda's search.

a. Search Incident to Arrest

The prosecution posits that Officer Zinda's search was incident to arrest, rendering the contraband in DEFENDANT's pockets inevitably discovered. DEFENDANT, on the other hand, argues that he was not charged for his summary offense, nor was there any indication that he was under arrest before the pat-down was conducted.¹¹ The Commonwealth argues that because Officer Zinda could have arrested DEFENDANT, the search should be upheld. DEFENDANT responds that "could have arrested" is not the standard used to trigger a warrantless search.

We begin by stating that a warrantless search incident to a lawful arrest is reasonable and no additional justification is required for a search of the defendant. *Commonwealth v. Long*, 414 A.2d 113 (Pa. 1980). This concept involves all arrests, including summary offenses. *United States v. Robinson*, 38 L.Ed.2d.427 (1973). An arrest may be accomplished by "any act that indicates an intention to take (a person) into custody and subjects him to the actual control and will of the person making the arrest." *Commonwealth v. Bosurgi*, 411 Pa. 56, 68, 190 A.2d 304, 311 (1963), Cert. denied, 375 U.S. 910, 84 S.Ct. 204, 11 L.Ed.2d 149 (1963). A search "incident to" an arrest may not occur prior to an arrest, and if the DEFENDANT is not under arrest at the time of the search, the search may not later

¹¹ Officer Zinda even admitted that he did not consider DEFENDANT to be under arrest at the time of the search (N.T. 8/16/2013 p.17).

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be supported as being incident to arrest. *Commonwealth v. Silo*, 480 Pa. 15, 389 A.2d 62 (1978), *Commonwealth v. Hlavsa*, 266 Pa.Super. 602, 405 A.2d 1270 (1979).

The Summary Offense in this this case reads as follows: “An individual who is an operator or an occupant in a motor vehicle may not be in possession of an open alcoholic beverage container or consume a controlled substance.” 75 Pa.C.S.A. § 3809(a). “An individual who violates this section commits a summary offense.” 75 Pa.C.S.A. § 3809(c). Further, “when an arrest without a warrant in a summary case is authorized by law, a police officer who exhibits some sign of authority may institute proceedings by such an arrest.” Pa.R.Crim.P. Rule 440. Under the comments to Rule 440, the legislature explains that “it is intended that these proceedings will be instituted by arrest only in exceptional circumstances such as those involving violence, or the imminent threat of violence, or those involving a danger that the defendant will flee.” *Id.*

The Commonwealth cites *Commonwealth v. Williams*, 390 Pa.Super. 493, 568 A.2d 1281 (1990). In *Williams*, a borough police officer cited a defendant for the summary offense of disorderly conduct. The defendant was unable to provide identification, so the officer advised the defendant he would need to go back to the police station for identification purposes. Before placing the defendant in the police car, the officer searched the defendant and found cocaine in his jacket. The Court held that the cocaine was admissible because it was discovered pursuant to a search incident to arrest.

The Commonwealth argues that the present case is very similar to the *Williams* case. In the present case, DEFENDANT committed a Summary Offense by drinking beer while riding a bicycle. His behavior led the officers to believe that he was a flight risk. According to the Commonwealth, the officers had the authority to institute proceedings by arrest without a warrant; the fact that Officer Minnick ultimately did not file the summary citation is of no import.

We disagree with the Commonwealth’s comparison of the present case to *Williams*. In *Williams*, the Defendant was cited, arrested, placed in a police car, and taken to the police station. In the present case, DEFENDANT was not cited, arrested, placed into a police car, nor was he taken to the police station. Contrary to the Commonwealth’s assertion, case law suggests that without an actual arrest, a search incident to arrest cannot occur.

We find that the case of *Commonwealth v. Silo*, 480 Pa. 15, 389 A.2d 62 (1978) is more instructive. In *Silo*, the Court held that the arrival and presence of police at a hospital ward in which Silo was a patient did not constitute an arrest where the police did not communicate to Silo any intention of taking him into custody and did not read Miranda warnings to him until almost an hour after they had seized his clothing. After Silo admitted himself to a hospital, police responded to a call from two neighbors and found the dead

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body of Silo's mother. Two of the detectives went to the hospital to attempt to interview Silo concerning his mother's death. While waiting, they asked the nurse to give them Silo's personal belongings that he had when he was admitted to the hospital. The officers saw bloodstains on Silo's trousers, which matched the victim's blood and later constituted key circumstantial evidence upon which the prosecution based its case. Officers then interviewed Silo and read him his Miranda warnings before arresting him.

The key issue in *Silo* was whether the defendant had been arrested before his clothing was seized. The Court explained as follows:

In this case, the only pre-seizure actions by the police officers were their arrival at the intensive care ward and their presence there before requesting appellant's clothing from the nurse. The officers did not communicate to appellant any intention of taking him into custody. The reading of the Miranda warnings to appellant did not occur until almost an hour after the police had seized appellant's clothing. The arrival and presence of the police at the hospital ward cannot constitute an arrest under the test articulated in *Bosurgi*. Therefore, we cannot accept the Commonwealth's argument that appellant's clothing was seized incident to an arrest.

Silo, 480 Pa. at 22, 389 A.2d at 65-66.

The following footnote to the case clarifies that, even if officers do have probable cause to arrest, this is not justification for a warrantless search:

The Commonwealth also argues that since the police had probable cause to arrest appellant, they were entitled to his clothing. Assuming arguendo that probable cause to arrest did exist, there is no legal authority to support this argument. On the contrary, it has long been established that the mere existence of probable cause furnishes no justification for a warrantless search or seizure. *Chapman v. United States*, 365 U.S. 610, 613, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

Id. at 66.

Silo is clear. It is also consistent with the purpose behind the search incident to arrest exception. A search incident to an arrest is justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime – things which might easily happen when the weapon or evidence is on the accused's person or under his immediate control." *Preston v. United States*, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777, 780, (1964); *Commonwealth v. Brown*, 329 Pa.Super. 85, 477 A.2d 1364 (1984).

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When an officer has probable cause and places an accused under arrest, he can and should conduct a warrantless search. When an officer merely has a reasonable suspicion that criminal activity is afoot, the standard is different. Police officers are only permitted to perform an exterior pat-down of the accused's person when they feel that the accused is armed and dangerous, as their need for protection and preservation of evidence is not as high as during a formal arrest. Therefore, the law only permits a lower level of intrusion. Precedent makes it clear that there is a bright line between these two standards, and the argument "we could have arrested him, but didn't" does not justify crossing the line between a pat-down for weapons and an actual search of a pocket.

The case at bar is very similar to *Silo*. Here, Officer Minnick and Officer Zinda had probable cause to arrest DEFENDANT for the Summary Offense of operating a motor vehicle while in possession of an open container of alcohol. Rather than arresting DEFENDANT or indicating to him in any way that they intended to take him into custody, they instead conducted a warrantless search of DEFENDANT's pockets. We find that the evidence obtained from DEFENDANT was taken prior to his arrest and, therefore, the search of DEFENDANT cannot be considered as incident to arrest.

b. Reasonable Suspicion and Officer Safety

Of course, searches can be conducted independent of an arrest if the search is necessary to preserve officer safety: "If, during the course of a valid investigatory stop, an officer observes unusual and suspicious conduct on the part of the individual which leads him to reasonably believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer garments for weapons." *Commonwealth v. E.M./Hall*, 558 Pa. 16, 735 A.2d 654, 659 (Pa. 1999). "Nothing in Terry [the U.S. Supreme Court case that justified officer safety searches] can be understood to allow...any search [whatsoever] for anything but weapons." *Commonwealth v. Canning*, 402 Pa. Super. 438, 439, 587 A.2d 330, 331 (1991). As we understand it, "the purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence..." *Commonwealth v. Johnson*, 429 Pa. Super. 158, 164, 631 A.2d 1335, 1338-39 (1993), citing *Adams v. Williams*, 407 U.S. 143, 145, 92 S. Ct. 1921, 1922, 32 L. Ed. 2d 612 (1972).

Simply put, we fail to see how DEFENDANT could have been perceived as dangerous after he was handcuffed. According to the officers, DEFENDANT was visibly shaking and was "combative in [their] efforts to try to conduct the pat-down" (N.T. 11/19/2012 p. 10). It is for this reason that Officer Minnick handcuffed DEFENDANT. After this point, however, there is no testimony in the record suggesting that DEFENDANT was dangerous

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in any way. For this reason alone, we cannot at this point declare Officer Zinda's search to be necessary to preserve officer safety.¹²

We do not have to decide today whether a Motion to Suppress would absolutely have been granted. All we must decide at this point is whether such a motion would be "arguable merit." Based upon the record before us, we find that "officer safety" is not an argument that would likely succeed at a suppression motion. By definition, this causes us to conclude that DEFENDANT's suppression motion would have "arguable merit."

2. No Reasonable Basis to Effectuate Petitioner's Interests

Next, we must determine whether Attorney Judd's particular course of conduct had a reasonable basis to effectuate DEFENDANT's interests. DEFENDANT argues that Attorney Judd never discussed the option of a Motion to Suppress with him. As such DEFENDANT never knew of this option. He asserts that he would have opted to pursue suppression had he been given a choice.

After reviewing Attorney Judd's testimony, we find that she did not articulate a reasonable basis to justify her course of conduct. At the November 19, 2012 PCRA Hearing, Attorney Judd testified that she did not think the Pretrial Motion would have been legally appropriate and, in her opinion, she should not have to file a frivolous Motion¹³. Nowhere in her testimony does she mention that it was part of a legitimate trial strategy or a means to effectuate DEFENDANT's interests in any way. Essentially, Attorney Judd did not file the Pretrial Motion because she did not think it had any merit. Because we find that

¹² Even if DEFENDANT had not been handcuffed at the time of the pat-down, it was also likely that the officers exceeded the scope of a normal pat-down. Under the plain feel exception, "a police officer may seize non-threatening contraband detected through the officer's sense of touch during a Terry frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object." *Commonwealth v. Stevenson*, 560 Pa. 345, 744 A.2d 1261, 1265 (Pa. 2000). A police officer may not use the pretext of believing he/she felt a weapon to legitimize the retrieval of any and all objects found on a suspect's person when that belief is not reasonable, i.e., not supported by articulable facts or the physical characteristics of the evidence seized. *Commonwealth v. Stevenson*, 560 Pa. 345, 744 A.2d 1261, 1265 (Pa. 2000). There is no evidence in the record suggesting that Officers Minnick and Zinda thought that the cigarette pack and folded up piece of paper were weapons.

¹³ Q. Did you discuss filing a pretrial with Mr. Beniquez?

A. No, we did not.

Q. Why not?

A. I guess because I never saw it as a pretrial issue. We did, however, discuss all of the facts of the case on at least four different occasions. (N.T. 11/19/2012 pp. 37-38).

Q. Let me put it this way, is there a disadvantage to filing a Motion to Suppress?

A. Well, I don't think I should have to file a frivolous motion if there's no legal basis for it. If I think an issue is gray then maybe I tend to file it. (N.T. 11/19/2012 pp. 38-39).

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the Suppression Motion is a meritorious issue, and because Attorney Judd did not proffer any other reasons for not filing the Motion, we find that DEFENDANT has satisfied this element of his ineffectiveness claim.

3. Reasonable Probability of a Different Outcome

Finally, we must determine whether a reasonable probability exists that, but for counsel's ineffectiveness, the outcome of the proceeding would have been different. A mere showing of error by counsel or ineffectiveness of counsel is insufficient to demonstrate a right to such relief; the petitioner must show that he or she was thereby prejudiced. *Commonwealth v. O'Searo*, 483 Pa. 286, 396 A.2d 1173 (1978). In analyzing the prejudice prong of the test for ineffective assistance of counsel during the trial, the postconviction court must examine the trial with the focus not on the outcome, but on whether the error so affected the adversarial balance that the trial was rendered unfair and the verdict rendered suspect. *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523 (2009).

We note that DEFENDANT was convicted of six counts of possession, all of which were based on the drugs and paraphernalia found as a result of the September 3, 2010 confrontation. In our September 26, 2011 Opinion, we listed the following pieces of evidence that the Jury used to convict DEFENDANT:

1. The Defendant possessed several types of controlled substances.
2. The Defendant possessed three cellular telephones.
3. The drugs possessed by the Defendant were packaged for delivery.
4. No drug paraphernalia of the type used to ingest drugs was found in the Defendant's possession.
5. The Defendant possessed an unusually large amount of cocaine that exceeded the amount that is normally found in the possession of a mere user.
6. Officer Minnick was qualified as an expert witness. He testified based upon all of the facts and circumstances presented that he believed the Defendant possessed drugs with the intent to deliver them.

Without the fruits of the September 3, 2010 illegal search, the only evidence the Commonwealth would have had against DEFENDANT was the three cell phones. Indeed, we stated in our Opinion that "[i]t may be true that any one of the above factors, by itself, would not justify the Jury's verdict" (p. 9). We do not see how, if the Suppression Motion would have succeeded, a jury would have been able to convict him of the crimes for which he was charged.

Because a reasonable probability exists that, but for counsel's ineffectiveness, the jury would not have been able to convict DEFENDANT, we find that DEFENDANT has satisfied the third element of his ineffectiveness claim.

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IV. Conclusion

Since DEFENDANT has established a claim for ineffective assistance of counsel under the PCRA, we will be granting DEFENDANT's PCRA Petition. Via an Order entered simultaneous with this Opinion, we will be returning the Defendant and the Commonwealth to the position they enjoyed at Arraignment. As such, DEFENDANT will be afforded another opportunity to file and pursue a Pre-Trial Suppression Motion.

In the event that the Commonwealth does not appeal this decision, our intent will be to conduct a status conference with both counsel during March of 2014. At the status conference, we will establish a schedule leading forward to trial.