

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 97-11,193  
 :  
 TYRONE BUTLER, :  
 :  
 Defendant/Petitioner : 1925(a) OPINION

*Date: December 13, 2002*

**OPINION IN SUPPORT OF THE ORDER OF JULY 22, 2002 IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Petitioner has been permitted to appeal *nunc pro tunc* this Court's Order of July 22, 2002, which denied Petitioner relief in the form of modification of sentence removal from the State Correctional Institution at Graterford for appropriate treatment of a serious illness. Petitioner had sought such relief under the provisions of Act of May 31, 1999, as amended by the Act of January 26, 1966, 61 P.S. §81.

Procedurally, Petitioner had filed a petition on May 13, 2002 through Court-appointed counsel, Kyle W. Rude, Esquire, under 61 P.S. §81 and evidence was received by the Court on May 24, 2002. Subsequently, legal argument and other evidence were considered on July 22, 2002. At the conclusion of the proceeding on July 22, 2002, this Court denied Petitioner's relief, which essentially sought that he either be transferred or removed from the prison in order to have a urethroscopy along with KTP laser treatment performed to remove a stricture that was causing him excessive pain.

By an Order of September 15, 2002, Petitioner was granted permission to appeal *nunc pro tunc*, without objection by the Commonwealth.

Petitioner has filed two Statements of Matters Complained of on Appeal pursuant to Pa. RAP 1925(b), the first on or about October 15, 2002 and the second on or about November 18, 2002. In the Statements of Matters Complained of on Appeal, Petitioner essentially asserts that the Court erred in failing to appropriately address a diagnosis that asserted Petitioner had a urethral stricture, which needed to be treated through urethroscopy. Petitioner also asserts that the Court erred in denying the requested relief by reaching the conclusion that the State Correctional Institution at Graterford did not have the resources necessary to do the procedure recommended by Dr. Malloy without expert opinion or testimony from the physician healthcare administrator.

Petitioner's additional assertions complain about the ineffectiveness of counsel representing him in this Petition. First, Petitioner alleges counsel failed to present to the Court an additional medical report from Dr. Rockoff that substantiated Dr. Malloy's findings. Secondly, Petitioner alleges counsel failed to present evidence that the action of the prison and its healthcare providers, the Prison Health Services Corporation, were maliciously motivated. Finally, Petitioner asserts that counsel was ineffective in conceding to the Commonwealth's argument made on July 22, 2002 that the case of *Commonwealth v. Devers*, 779 A.2d 578 (Pa. Super. 2001) requires a two-prong finding that 61 P.S. §81 would require the prisoner to become seriously ill and that for the benefit of the prisoner as well as the rest of the prison population, the prisoner should be transferred to a more suitable institution for the appropriate medical treatment. See Petitioner's Amended Statement of Matters Complained of on Appeal, Unnumbered paragraph, page 2. Upon review of the applicable case law, particularly, *Commonwealth v. Devers* and the determination of the Pennsylvania Superior Court in the case of *Commonwealth*

*v. Lightcap*, 806 A.2d 449 (Pa. Super. 2002), this Court believes that Petitioner is correct that the Court has erred in its ruling below and that this Court's Order of July 22, 2002 should be vacated. The case should be remanded with provisions for an order to be made that Petitioner should be afforded the urethroscopy and KTP laser treatment.

At the argument on July 22, 2002, this Court adopted the proposition that not only must Petitioner show he was seriously ill and in need of treatment, which could be given, the medical condition of Petitioner had to threaten the overall health of the other inmates at the prison. *See*, for example, the Court's comment, N.T. p. 7 and holding at N.T., p. 14, Transcript of July 22, 2002. That position was advanced by the District Attorney at that proceeding and accepted by Petitioner's counsel. *See*, for example, N.T. pp. 8-10, July 22, 2002.

This is an incorrect interpretation of *Devers*.

The incorrect interpretation of *Devers* was based upon this Court's reliance on the language set forth at p. 581 where the Court stated that for the statutory provisions of 61 P.S. §81 to apply the prisoner would need to be seriously ill while in prison . . . "and for the benefit of the ill prisoner **as well as the rest of the prison population**, should be transferred temporarily to a more suitable institution where he or she can be administered." (emphasis added) 779 A.2d 578 at 581. While this language seemingly makes the connection between the serious illness of the prisoner conjunctive with a requirement that the illness threatened the health of the rest of the prison, this Court does not believe that to be an appropriate interpretation of §81. In fact, the *Devers* court in its holding recognizes that as its stated:

That section (61 P.S. §81) only provides for transfer or sentence modification where the institution lacks the resources to properly care for an inmate **or** where the inmate's removal is in the best interest of the institution as a whole. (emphasis supplied).

779 A.2d at 582.

This view of *Devers* and the correct interpretation to be applied to 61 P.S. §81 in such situations is also recognized in *Commonwealth v. Lightcap*, 806 A.2d 449 (Pa. Super. 2002). The Court recognized that the statute covers only those prisoners who become seriously ill while in prison, and that, in order to obtain relief, the petitioner must make a *prima facie* claim for modification. To do so:

A petition must allege that his current facility lacks the resources to treat him or that his illness compromises the collective health of the institution holding him.

*Citing Devers, Id.* At 451, 452. *See also Commonwealth v. Tuddles*, 782 A.2d 560 (Pa. Super. 2001). The Court had no doubt from Petitioner's own testimony, as well as the medical reports submitted on his behalf from Dr. Malloy and Dr. Rockoff, that he did have substantial pain and that there were medically-necessary reasons for him to undergo urethroscopy to determine if this was due to a urethral stricture and if so to have the stricture removed by appropriate laser treatment during the urethroscopy. The evidence supplied from the Institution in the form of a registered nurse's opinion made it clear that the Institution was not in a position to have this procedure performed by its healthcare providers. Petitioner also alleged there were malicious motives on the part of the Institution and its physicians because Petitioner had instituted a civil malpractice suit against them for his other medical treatment while in prison. Petitioner also asserted that there were budgetary reasons motivating the prison to deny the urethroscopy and later treatment due to its expense. However, this Court did not need to determine those issues. Just because the Court was satisfied as indicated by its findings entered on the record on July 22, 2002, that Petitioner had become seriously ill while in prison, that he did have the need for the

medical procedure of urethroscopy under local anesthesia with treatment by laser (assuming a stricture would be found) *See* N.T. 12, 13, 722, 2002. The Court also found that Petitioner did not need an inflatable penal prosthesis. The Court went on to find that given the Department of Corrections acknowledgement that the procedure would be complicated coupled with the Institution's refusal to proceed with the urethroscopy, despite having received the recommendation from Dr. Malloy, that Petitioner had met a burden of proof by preponderance of this evidence that the facility does not have the resources necessary to perform the recommended urethroscopy procedure. *See Id.* At 13. Accordingly, under the holding of *Devers* and *Lightcap*, *supra* this Court believes that Petitioner is entitled to the relief of having the urethroscopy performed, as recommended by Dr. Malloy and buttressed by the recommendations of Dr. Rockoff. This Court suggests to the Pennsylvania Superior Court that due to the clinical condition of Petitioner the Superior Court enter an order appropriately directing the Department of Corrections to see that such procedure is provided without delay to Petitioner at an appropriate state correctional institution or that he be granted an appropriately restrained and supervised medical furlough for the minimum time necessary for the procedure to be performed at an appropriate hospital with the available security to keep Petitioner under restraint. This Court notes that testimony and medical reports received indicates that the procedure is a same-day surgery, essentially an in and out operation.

BY THE COURT,

William S. Kieser, Judge

cc: Kyle W. Rude, Esquire  
Henry W. Mitchell, Esquire, ADA  
Christian Kalas, Esquire

Judges  
Gary L. Weber, Esquire (Lyc. Reporter)