

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1875-1999 (99-11,875)
:
vs. : CRIMINAL DIVISION
:
:
JOHN FREDERICK, :
Defendant : 1925(a) Opinion

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

This opinion is written in support of this Court's Order entered July 20, 2006, which denied Appellant's petition for DNA testing. The relevant facts follow:

On April 6, 1997, Samuel Myers Jr. (decedent) was killed in an automobile accident while acting in the scope of his employment. Appellant, the decedent's employer, did not have workers compensation insurance. As a result, Appellant was criminally charged with violations of 77 P.S. §501.

On May 23, 2000, Appellant pleaded guilty in exchange for a probationary sentence and the payment of restitution. On September 6, 2000, the Court sentenced Appellant in accordance with the plea agreement.

Appellant also was involved in workers compensation proceedings. During these proceedings, the parties entered into a joint stipulation of facts on or about May 25, 1999. One of the facts to which Appellant stipulated was that decedent was survived by the following children: Thomas Lee Myers, date of birth 10/08/1994; and Marcus Allen Myers, date of birth 10/04/1996. Respondent's Exhibit 1, para. 6. On June 15, 1999, Appellant's

attorney wrote a letter to the workers compensation judge which stated: “It has now been brought to my attention that the youngest of the two surviving children may not be the child of Decedent, Samuel N. Myers, Jr.” Respondent’s Exhibit 2. Despite believing that one of the children may not be the child of the decedent, Appellant did not present any evidence in support of this claim before the workers compensation judge. Respondent’s Exhibit 3.

On June 5, 2006, Appellant filed a petition for DNA testing. The requested DNA testing would not affect Appellant’s guilt or innocence of the crimes to which he pleaded guilty. Instead, Appellant requested DNA testing to relieve him of his obligation to make restitution to Thomas Lee Myers and Marcus Allen Myers, because Appellant did not believe they were decedent’s children. The Court denied the petition, finding that Appellant’s claims were either untimely, waived, or barred by the doctrines of collateral estoppel or res judicata. N.T., July 13, 2006, at 32-34. Appellant filed a timely appeal.

Appellant contends the court erred in denying the request for DNA testing and denying Appellant’s counsel the right to call the mother of the children as on cross-examination to determine paternity. The Court cannot agree. First, the Court believes the request is untimely or waived. Appellant had reason to question paternity over a year before his sentencing hearing. See Respondent’s Exhibit 2, a letter dated June 15, 1999 from Appellant’s counsel to the workers compensation judge. Appellant was sentenced on September 6, 2000. Part of the plea agreement and sentence was that Appellant pay restitution. Appellant understood that as part of the plea agreement he would have to pay restitution in the amount of workers compensation benefits as found by the workers compensation judge. N.T., July 13, 2006, at 24-25. Appellant did not file a motion to modify the restitution or file an appeal. In fact, Appellant did not raise any issue regarding

paternity and/or DNA testing until he filed his petition for DNA testing on June 5, 2006. Therefore, the request is untimely and Appellant waived this issue by failing to raise it in a timely manner. See Commonwealth v. Lauer, 265 Pa.Super. 542, 543-44, 402 A.2d 678, 679 (Pa.Super. 1979)(appellant's claim that a person to whom he was ordered to pay restitution was not a "victim" entitled to restitution was waived by appellant's failure to take a direct appeal.).

Appellant's counsel argued that Appellant should be permitted to have DNA testing to clear his name like any other convicted felon. The DNA testing requested in this case has no bearing on Appellant's guilt or innocence. Whether or not the children were the biological children of decedent in no way changes the fact that Appellant failed to procure workers compensation insurance in violation of 77 P.S. §501. The Court also notes there is a statutory provision for post conviction DNA testing, but Appellant cannot meet its requirements because he is not incarcerated or awaiting execution and the DNA testing would not prove his innocence. 42 Pa.C.S.A. §9543.1.

Even if DNA testing would show that one or both of the children were not the biological children of decedent, that doesn't necessarily mean Appellant would not have to pay restitution to the children. If the children were members of decedent's household at the time of decedent's death, the term "child" or "children" under the Workers Compensation Act also includes step-children, adopted children and children to whom decedent stood in loco parentis. 77 P.S. §562; see also Johns v. Workers' Compensation Appeal Board (Balmer Brothers Concrete Works), 877 A.2d 525 (Pa.Comm. 2005), appeal denied 586 Pa. 731, 890 A.2d 1061 (Pa. 2005); Celotex Corp. v. Workmen's Compensation Appeal Board, 41 Pa.Comm. 416, 399 A.2d 171 (Pa.Comm. 1979).

In summary, the Court denied Appellant's request for DNA testing because the request was untimely and/or the issue was waived.¹ Appellant cannot rely on the post conviction DNA statute, 42 Pa.C.S. §9343.1 to avoid the timeliness issue because he is not incarcerated or awaiting execution and the DNA testing would not prove his innocence of the criminal charges. It would be patently unjust to subject these children to DNA testing and potentially have them lose their father a second time and possibly suffer psychological harm when Appellant understood and accepted that he would have to pay them restitution in the amounts found by the workers' compensation judge as part of his plea agreement. Furthermore, even if DNA testing showed decedent was not the biological father of one or both of the children, they still might be entitled to workers' compensation benefits if they were members of decedent's household and decedent stood in loco parentis to them. Therefore, the Court would respectfully request that if the Appellate Courts disagree with our ruling that the issue was untimely or waived they would remand the case to determine whether Appellant would have to pay restitution under the in loco parentis concept before ordering DNA testing so that these children do not unnecessarily undergo the potential psychological harm of questioning whether decedent was their father or finding out that he wasn't.

DATE: _____

By The Court,

¹ The Court did not rely on the doctrine of collateral estoppel in this opinion because, after the hearing in this case, the Court found case law and other material which indicated the doctrine did not apply when the issue was subject to a stipulation in the prior proceeding. See Logan v. Marks, 75 Pa.Comm. 574, 579 (1983) ("Of more importance, however, is the requisite for collateral estoppel that the issue before us now must have been actually decided in the prior case and a final judgment entered on the merits....An issue is not actually litigated if it is the subject of a stipulation between the parties."); Restatement 2d of Judgments §2, comment e ("A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action....An issue is not actually litigated... if it is the subject of a stipulation between the parties.").

Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Anthony Miele, Esquire
Mark Givler, Esquire (Counsel for Vicki Green Longo)
121 W Church St, PO Box 466, Lock Haven PA 17745
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work file