5, 6, 7 and 8 of appellant's Zoning Appeal Notice, their sole remedy is by an action of mandanus and is not permitted under Section 1006 of the Pa. M.P.C.

The decision of the Commonwealth Court in Rosanelle, supra., and the language of Section 1006 (3) (a) of the Pa. M.P.C., supra., leads us to conclude the procedure followed by appellant was proper; this Court does have jurisdiction in the case at bar; and intervenors' motion must be dismissed.

ORDER OF COURT

NOW, this 25th day of January, 1980, the Motion to Quash is dismissed.

Exceptions are granted the intervenors.

COMMONWEALTH v. ROACH, C.P. Cr.D. Franklin County Branch, No. 405 of 1978

Sentencing - Double Jeopardy, State Correctional Institution Suspended Sentence - 3 Judge Superior Court Panel - Precedent Appeal to Supreme Court

1. The Court's practice of imposing a sentence of imprisonment at a state correctional institution, suspending that sentence and as a condition of probation ordering a flat term in the county prison does not constitute double jeopardy under the Fifth Amendment of the U.S. Constitution in that if the defendant's probation is revoked, credit is given the defendant for time spent in the county prison.

2. *Commonwealth v. Johnson*, decided August 30, 1979 (Superior Ct. No. 525 March Term, 1977) by a three judge panel of the Superior Court containing only one active Superior Court judge held the Court's SCI Suspended Sentence practice as placing a defendant in double jeopardy.

3. The decision of a three judge panel of the Superior Court with only one judge on the panel an active judge of that Court, does not constitute precedent for a lower court in that the Superior Court is a constitutionally mandated seven member court.

4. In that the District Attorney has petitioned the Supreme Court for allowance of appeal to the Superior Court's decision in *Commonwealth v. Johnson*, the constitutional question remains open until the appeal is decided.

John F. Nelson, Esq., Assistant District Attorney for the Commonwealth

Timothy W. Misner, Esq., Counsel for the Petitioner

OPINION AND ORDER

KELLER, J., October 25, 1979:

Roy Robert Roach was serving a sentence in the Franklin County Prison in September and October 1978, and had been granted work release privileges while so incarcerated. Without any permission or authorization from the Court or prison authorities, he did in September 1978 leave the Clever Machine Shop in Mercersburg, Pennsylvania, his work release employer, and go to Hagerstown, Maryland to be married. Presumably, he returned to the county prison on time and no action was taken for this violation of work release rules. On October 19, 1978 he left the Franklin County Prison to go to his place of employment in Mercersburg. He surrendered himself to either the Pennsylvania State Police or the local police department in McConnellsburg, Fulton County, Pennsylvania on October 28, 1978, and was returned to the Franklin County Prison. According to the petitioner he woke up at 6:00 A.M. on October 20, 1978 in Danville, North Carolina and he recalled driving his own car and cashing his paycheck on the way to finance his trip. (It is the recollection of this Court that the Assistant District Attorney advised the Court at the time Mr. Roach entered his plea of guilty that he was on his honeymoon during this period.)

Mr. Roach was charged with escape, a felony of the third degree. On November 8, 1978, he waived arraignment and entered a plea of guilty to the escape charge after a full and complete guilty plea colloquy was conducted.

On December 20, 1978 Mr. Roach appeared before the Court for sentencing and was represented by Assistant Public Defender Douglas W. Herman. The Pre-Sentence Report filed in the case indicated the petitioner had a long-standing alcohol abuse problem which was reflected in a substantial number of criminal charges involving driving under the influence. The report also indicated that he had some rather substantial skills as a machinist, but an extremely poor work record which undoubtedly contributed to his involvement with the Court on non-support charges, and accumulated arrearages. The defense counsel made an impassioned plea to the Court not to impose a State Correctional Institution sentence upon the defendant, and inter alia argued that the

interests of the defendant and society would best be served if he were given one more chance to participate in the Work Release Program at the county prison so he could participate in alcohol programs directed by the local Probation authority, while contributing to the support of his family and eliminating various fines and costs due and owing. Defense counsel advised the Court that Mr. Roach did have a job available so he would be able to participate again in the Work Release Program upon securing the approval of the Work Release Coordinator.

Notwithstanding the impassioned plea of defense counsel, the Court was persuaded by the arguments of the Assistant District Attorney and the facts set forth in the Pre-Sentence Investigation Report, that the petitioner should be sentenced to a State Correctional Institution for a period of not less than 1½ years nor more that 3½ years, and had, in fact, completed that sentence on the sentence form sheet used in this Judicial District. However, out of an abundance of caution the Court requested the Probation Officer present in the courtroom to confirm whether in fact there was employment available for Mr. Roach, and deferred completion of sentence until that information was secured. The Probation Officer made the inquiry and promptly reported to the Court that in fact the job was available. With this information confirmed and being mindful of the legislative mandate favoring the minimum amount of confinement consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant, the Court then suspended the sentence of imprisonment; placed the defendant on probation for a period of 3½ years upon various conditions, including that he serve 23 months 20 days in the Franklin County Prison; be under the supervision of the State Board of Probation and Parole; participate in alcohol programs directed by the Probation authorities; and not consume alcoholic beverages.

After the imposition of sentence the Court advised Mr. Roach just how close he had come to having only the State Correctional Institution sentence, and explained to him that he would serve the 23 months 20 days or such term as the Court with the advice and guidance of the Probation Department and prison staff determined to be appropriate, and if he violated his probation and was found to be in violation, then the suspended sentence would be vacated and that would immediately trigger the SCI sentence. Mr. Roach indicated he fully understood how the State Correctional Institution sentence suspended would operate. The Court then fully informed him of his right to petition for withdrawal of his guilty plea or to modify his sentence within ten (10) days of

December 20, 1978; his right of appeal; and of his court-appointed counsel's willingness to proceed with the preparation of such petition and to represent him on appeal without charge to him. This, too, the petitioner indicated he understood.

On February 22, 1979 Mr. Roach commenced his employment with Benju Corporation, Waynesboro, Pennsylvania and continued with that corporation until removed on May 18, 1979 for violation of work release rules.

On May 4, 1979 Mr. Roach's petition under the Post Conviction Hearing Act was presented to the Court and an order was signed the same date returning his petition to him "to allege facts in support of the allegation that petitioner is eligible for relief by reason of 'a plea of guilty unlawfully induced'.". On the same date the Court wrote a letter to Mr. Roach explaining the return of the petition and urging him to reconsider his decision not to have an attorney represent him. On or before May 17, 1979 an amendment to his petition was presented to the Court and on May 17, 1979 an order was entered noting his contention that his plea of guilty was unlawfully induced by a member of the Public Defender's staff, and inter alia appointing Timothy W. Misner, Esq., counsel to represent him and granting a rule upon the Commonwealth to show cause why a hearing should not be granted; returnable on or before June 6, 1979. An answer to the petition was filed by the Commonwealth on May 25, 1979. On motion of petitioner's new counsel an order was signed on June 20, 1979 granting a rule upon the Commonwealth to show cause why a hearing should not be granted, and making the rule returnable on or before July 10, 1979. An answer was filed by the Commonwealth on June 26, 1979. On July 2, 1979 an order was signed setting August 20, 1979 at 9:30 o'clock A.M. as the date and time for hearing on the Post Conviction Hearing Petition.

On June 20, 1979 the petitioner was served with a notification of hearing for violation of probation by Ronald T. Sugden, Chief Probation Officer, with the hearing scheduled for July 2, 1979 at 1:30 P.M. The reasons given for the hearing were that the defendant failed to abide by the court order that he not consume alcoholic beverages in that he did so on May 18, 1979, and that he failed to maintain employment by reason of his discharge from his employment at Benju Corporation on May 18, 1979. On July 2, 1979, after hearing, the Court entered the following order:

"NOW, July 2, 1979, a hearing having been held this date

and the Court being of the opinion that Robert Roy Roach violated the terms of his agreement for participation in the work/education program of the Franklin County Prison in that he (1) cashed his paycheck of May 18, 1979, and diverted $83.00 to Wendy Carnes (2) he had incurred indebtedness to Miss Carnes without the consent of the Work Release Director, (3) he received and possessed a quantity of vodka at his place of employment, and (4) he consumed a sufficient quantity of alcohol while on work release so that he tested .10 on the Sober Meter test administered at the Franklin County Prison at 5:24 P.M. on May 18, 1979; all of which led to his removal from the Work Release Program.

In addition the defendant violated condition No. 6 of his special probation by reason of his voluntary conduct leading to his failure to maintain employment and the special court imposed condition against the consumption of alcohol.

IT IS ORDERED THAT the suspended sentence imposed December 20, 1978 be vacated. The Defendant shall be given credit for all time served in the Franklin County Prison against the 1½ year to 3½ year sentence imposed December 20, 1978."

On August 6, 1979 an order was entered specifically giving the defendant 6 months 16 days credit to be applied to the 1½ to 3½ years State Correctional Institution sentence imposed December 20, 1978.

On August 10, 1979 an order was entered directing the Sheriff of Franklin County to transport the petitioner from the State Correctional Institution to the Franklin County Jail for the purpose of participating in the Post Conviction Hearing Act Hearing, and thereafter return him to said institution.

The hearing was held as scheduled. Briefs were submitted by counsel on or before September 10, 1979, and the matter is ripe for disposition.

At hearing, the petitioner and his counsel agreed that the issues raised by the petition and its amendment were:

1. Whether the petitioner had been unlawfully induced to enter a plea of guilty.

2. Whether Attorney Herman was guilty of ineffective representation by reason of his failure to file post sentence petition and/or appeal the judgment of sentence.

3. Whether the sentence imposed twice placed the petitioner in jeopardy.

FINDINGS OF FACT

1. The petitioner does not want to withdraw his plea of guilty to the escape charge.

2. Within a few days after sentence was imposed (December 20, 1978) the petitioner conferred with Attorney Herman at the Franklin County Prison. They primarily discussed petitioner's potential problems with work release, when petitioner could meet with Mr. Martin, the Work Release Coordinator, how petitioner could pay monies due the county, and the possibilities of parole.

3. Although the defendant appeared satisfied with the sentence imposed and optimistic about his future, he inquired whether the SCI suspended sentence with the condition of probation that he serve up to 23 months 20 days in the Franklin County Prison was illegal or constituted double jeopardy. Counsel expressed doubt as to the lawfulness of the sentence.

4. Despite the Court's specific advice to the defendant on December 20, 1978 concerning his right to file post sentence motions for modification of sentence and to withdraw his guilty plea within ten days, and the availability of his court-appointed counsel to represent him in such proceedings without charge to him, the defendant never discussed seeking such relief and never instructed counsel to prepare such a petition or petitions.

5. Whether the petitioner and his counsel ever had any discussion concerning an appeal from the judgment of sentence as petitioner claims and counsel denies, petitioner concedes he never requested or directed his counsel to take any action toward perfecting an appeal. The petitioner also testified that his counsel told him he would appeal if petitioner wanted him to.

6. On January 8, 1979, the petitioner wrote a letter to the Honorable George C. Eppinger, P. J. with a copy to Attorney Herman concerning his desire to be readmitted to the work release program so he could pay his fines and provide for his family. Other than referring to the time to be served under the sentence, his only reference to the sentencing hearing is:

"Judge Keller gave me a chance to prove to myself and the county, to show that I can be a man enough to handle by problems, in which he, Judge Keller recommend to be return to work so that I may keep my job. For at my hearing it was known that I still had my job.

DISCUSSION

The petitioner testified at the August 20, 1979 hearing that he did not desire to withdraw his guilty plea. We consider this as an abandonment of his contention that he was unlawfully induced to enter that plea and will give it no further consideration.

Section 3 (d) of the Post Conviction Hearing Act of 1966, Jan. 25, P. L. 1580, 19 P.S. 1180-3(d) (Supp. 1979-1980), provides inter alia:

"To be eligible for relief under this Act, a person must initiate a proceeding by filing a petition under section 5 and must prove the following: (d) that the error resulting in his conviction and sentence has not been finally litigated or waived."

Section 4(b) of the PCHA, supra, 19 P. S. 1180-4(b) provides inter alia:

"(b) For the purposes of this Act, an issue is waived if:

"(1) the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this Act; and (2) the petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue."

Section 4(c) of the same Act provides:

"There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure."

In the case at bar, the petitioner was advised of his right to petition for modification of sentence or leave to withdraw his guilty plea, and of his right to appeal an adverse decision on either or both such petitions; and he failed to avail himself of that procedure. Therefore, in this Post Conviction Hearing Act proceeding, he must either rebut the presumption that his

failure to raise the issue on direct appeal was knowing and understanding or he must allege and prove the existence of extraordinary circumstances justifying the failure to raise the issue. *Commonwealth v. LaSane*, 479 Pa. 629, 389 A. 2d 48 (1978). "Ineffective counsel constitutes such 'extraordinary circumstances' ". *Commonwealth v. Wideman*, 453 Pa. 119, 123, 306 A. 2d 894 (1973).

In *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 605, 235 A. 2d 349 (1967), the Supreme Court held:

"We cannot emphasize strongly enough, however, that our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decisions had any reasonable basis."

"It is only when the claim which was foregone was of arguable merit that we must make an inquiry into the basis for the post trial counsel's decision not to pursue the matter." *Commonwealth vs Hubbard*, 472 Pa. 259, 278, 372 A. 2d 687 (1977).

In the instant case defense counsel persuaded the sentencing Court to suspend the State Correctional Institution sentences the Court was prepared to impose. Petitioner was made aware of his counsel's significant success in securing another chance for him. Petitioner was fully advised of his right to file post sentence motions, appeal rights, and of the availability and willingness of his counsel to represent him in these proceeding without charge to him. Within days of the imposition of sentence, petitioner conferred with his counsel, was told by counsel he would appeal if he wanted him to; and petitioner neither requested nor directed counsel to take any post sentence action on his behalf.

Applying the foregoing facts to the statutory and decisional law above set forth, we conclude:

1. Petitioner failed to establish by a preponderance of the evidence constitutional ineffectiveness of counsel.

2. The course of conduct followed by counsel was

thoroughly professional and effective.

We, therefore, conclude as a matter of law that the petitioner did waive the double jeopardy issue, and the petition must be dismissed.

While the double jeopardy issue has in our judgment been waived, we feel it would not be inappropriate to consider this contention as an integral part of this Opinion.

Several years ago this Court concluded there was a need to tailor a sentence which would have the effect of initially imposing a "hard" sentence with the "hardness" then alleviated by a superimposed sentence but with the assurance of the original sentence remaining. Out of these deliberations we developed what became known in this Judicial District as the "SCI suspended sentence". This effort at innovative sentencing operated on the principles of first imposing a sentence of imprisonment for whatever minimum and maximum terms were deemed appropriate in the light of the crime or crimes committed, and all other relevant circumstances; and then due to special circumstances justifying relief from the initial sentence, it was suspended and the defendant placed on probation usually for the maximum term of the original sentence. Where the nature of the crime, the prior criminal record and/or other circumstances dictated some period of incarceration; one of the conditions of probation imposed would be a flat term in the county prison, which permitted release on court order at any time deemed appropriate.

Experience led this Court to conclude that the "SCI suspended sentence" was an extremely effective sentencing tool. From the extremely limited number of probation violations brought to our attention, we concluded that the vast majority of defendants who received that sentence were persuaded that it was in their best interest to successfully complete their probation rather than risk having the suspended sentence vacated and the original SCI sentence come into effect.

The petitioner contends that the constitutional prohibition against double jeopardy (5th Amendment U. S. Constitution and Art. I, Section 10 Constitution of Pennsylvania) proscribes the imposition of the "SCI suspended sentence" because that sentence constitutes multiple punishment for the same offense. *Commonwealth v. Henderson*, Pa. , 393 A. 2d 1146 (1978). Probation is punishment for double jeopardy purposes. *Appeal of Moore*, 217 Pa. Super.

206 (1970). The constitutional prohibitions relate to the potential for double jeopardy. *Commonwealth v. Dooley*, 225 Pa. Super. 454, 310 A. 2d 690 (1973).

From these well-recognized legal principles the petitioner springs to the ultimate conclusion that he was potentially placed twice in jeopardy; for if he served the entire 23 months 20 days condition of probation in the Franklin County Prison and then violated his probation, he could then be sentenced to 1½ to 3½ years in a state correctional institution. This, he urges, would constitute double punishment.

If the petitioner were correct in his assumption that he would receive no credit for time served in the Franklin County Prison as a condition of his probation, then he would indeed be faced with the potential for double punishment. However, his assumption is in error and consequently his conclusion is erroneous and must fall. As a matter of law, petitioner must be given credit for any incarceration time served for a specific offense regardless of the name or location of the penal institution. As a matter of fact the order of July 2, 1979 finding him in violation of his probation and vacating the suspended sentence directed that credit be given for all time served, and the order of August 6, 1979 specifically gave him credit for 6 months 16 days to be applied to the SCI sentence.

The petitioner correctly cites *Commonwealth v. William R. Johnson*, Pa. Super. , A. 2d , filed August 30, 1979 (Superior Court No. 525 March Term 1977) in support of his double jeopardy argument. William R. Johnson was sentenced by this Court to 2 years to 4 years in a State Correctional Institution; the sentence was suspended, Johnson was placed on probation for 4 years and as one of the conditions of probation he was ordered to serve 10 months in the Franklin County Prison. Subsequently, Johnson was found in violation of his probation, the suspended sentence was vacated, the SCI sentence put in effect, and the appeal followed alleging double jeopardy.

The Johnson appeal was heard by a three judge panel of the Superior Court consisting of Judges Van Der Voort, Watkins and Lipez. In an opinion written by Judge Van Der Voort and concurred in by Judge Lipez, the panel vacated the 2 to 4 year sentence of imprisonment concluding this Court's sentence constituted double jeopardy. In the Superior Court panel's opinion after noting, "...The lower court reimposed the 2 to 4 year sentence," it was stated:

"Appellant now argues that the reimposition of the 2 to 4 year sentence, the imposition of which had been suspended, is double jeopardy in light of the lesser sentence of the 10 months imprisonment which had been imposed upon him and which he served. We agree. It is a law of ancient derivation and constitutional dimensions that once the sentence has been imposed upon a criminal, he cannot again be sentenced to another and different punishment for the same offense. *Ex parte Lange*, 85 U.S. (18 Wall.), 21 L. Ed. 872 (1874). To modify a sentence and thereby increase punishment is double jeopardy and is Constitutionally impermissible. *Commonwealth v. Silverman*, 442 Pa. 211, 275 A. 2d 308 (1971). In the instant case, a sentence of 2 to 4 years' imprisonment was imposed. This was then suspended and replaced by a lesser sentence of 10 months' imprisonment, together with certain other conditions of probation. The reimposition of the 2 to 4 year sentence is a second punishment for same offense and constitutes double jeopardy."

This Court recognizes and readily acknowledges its responsibility and duty to accept and be bound by the precedential decisions of the appellate courts of the Commonwealth. This Court is well acquainted with and acknowledges its complete respect for the legal expertise and scholarship of Judges Van Der Voort, Watkins and Lipez. However, this Court is totally at loss as to the precedential weight to be given the Johnson panel decision, for only Judge Van Der Voort was an active member of the Superior Court of Pennsylvania on the date of presentation of briefs in the case. Judge Watkins was retired from the bench of the Superior Court and assigned as a senior judge by the Order of the Supreme Court of Pennsylvania to the Superior Court. Judge Lipez was retired from the bench of the Court of Common Pleas of the 25th Judicial District (Clinton County), and assigned as a senior judge by Order of the Supreme Court of Pennsylvania to the Superior Court. Presumably Judge Watkins concurred without comment. Thus, it would appear that the decision of the Superior court in Johnson was reached by three judges for an Appellate Court constitutionally mandated to consist of seven judges. (Art. V, Section 3 Constitution of Pennsylvania); and two of the panel were not active sitting judges of that Court.

This Court is without knowledge as to what facts in Johnson were presented to the Superior Court panel. However, the language of the Opinion above quoted leads us to the conclusion that the actual facts of the case were obfuscated or the panel misapprehended them, for at no time did this Court "reimpose" the 2 to 4 year sentence on Mr. Johnson.

The only action taken by this Court was to vacate the superimposed restriction against the initial sentence becoming effective.

In the Johnson Opinion, the Superior Court panel observed in a footnote, "Neither the 'Sentencing Code', supra, nor the specific section (1354) thereof which states the content and conditions allowable for an order of probation, permits a term of incarceration to be a condition of probation." Section 1354 of the sentencing Code, Act of 1972, P. L. 1482, No. 334, Sect. 1354, as amended, 18 Pa. C.S.A. 1354 (Supp.) controls orders of probation. The section neither specifically authorizes or prohibits a term of incarceration as a condition of probation. However, Section 1321 of the Sentencing Code, supra., provides inter alia:

(a) General rule. - In determining the sentence to be imposed the court shall, except where a mandatory minimum sentence is otherwise provided by law, consider and select *one or more of the following alternatives, and may impose them consecutively or concurrently:* (Emphasis ours)

(1) An order or probation.
(2) A determination of guilt without further penalty.
(3) Partial confinement.
(4) Total confinement.
(5) A fine.

(b) General standards. - In selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant...In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed."

In *Commonwealth v, Nickens,* Pa. Super. , 393 A. 2d 759 (1978), the trial court sentenced the appellant to 6 months to 23½ months in the county prison to be followed by probation for three years. The five Judges of the Superior Court who participated in the case, unanimously affirmed the sentence. Judge Van Der Voort writing for the Court held:

"The Code makes clear that the five possible modes of punishment are alternatives, of which one or more could be

PLEASE NOTE:

This week's issue completes Volume 3 of the advance sheets. The Journal staff has already begun work towards early preparation of Bound Volume 3. If any of you who read the Journal have found typographical errors in any of the advance sheet issues but have not yet reported them to the editor, will you please do so now. We have made every effort to locate mistakes and make corrections, but every now and then one slips by us, despite two proof readings before printing and one afterwards. The procedure for preparing the bound volume requires a complete reprinting of all the Opinion pages, so mistakes appearing in the advance sheets can easily be corrected during our earlier stages of preparing the bound volume for printing.

> **selected. This language is unambiguous and provides authority to sentence in a manner contrary to appellant's position. A sentence may be comprised of one or more of the alternatives, as the sentencing court may select, based upon the stated criteria. A sentence which includes more than one of the five possible alternatives will be considered as one term of punishment comprised of certain parts—not, as appellant argues, as double punishment for the same offense contrary to the double jeopardy prohibition. In imposing one sentence comprised of two alternatives—total confinement to be followed by probation—where the total period of sentence did not exceed the statutory limit and is not obviously too severe, as is the situation here, the lower court did not err."**

By way of comment, Section 1322 of the Sentencing Code, supra., establishes twelve "grounds" which would mitigate in favor of an order of probation. We do not perceive that petitioner's criminal conduct or his prior record squarely brings him within any of these "grounds". (While no serious physical harm was threatened by the escape, we consider escape while participating in the Work Release Program constitutes a serious threat to continued public acceptance of that program, which would in turn do serious harm to other residents of the county prison.) Section 1325 establishes the criteria to be considered for "total confinement." This Court concluded the nature and circumstances and the history, character and condition of the petitioner met each of these tests.

We are advised the District Attorney of Franklin County on or about September 26, 1979 petitioned the Supreme Court of Pennsylvania for allowance of appeal from the decision of the Superior Court panel in *Commonwealth v. Johnson*, supra. Since this petition has not been acted upon, the constitutionality of this Court's "SCI suspended sentences" remains an open question.

For all of the foregoing reasons, we respectfully decline to conclude the sentence imposed upon Robert Roy Roach on December 20, 1978, placed him in double jeopardy in violation of his rights under the Constitutions of the United States and the Commonwealth of Pennsylvania. We remain persuaded that the protection of the community and the best interests of the petitioner and the community required a sentence which would provide for probation with intensive supervision following a modest term of incarceration in the county facility while he participated in locally available alcohol abuse programs and the Work Release Program and at the same time held out the powerful incentive of serving a

much longer term of incarceration in a State Correctional Institution for violation of his probation.

ORDER OF COURT

NOW, this 25th day of October, 1979, the petition of Roy Robert Roach under the Post Conviction Hearing Act, is dismissed for the reasons set forth in Opinion.

Exceptions are granted the petitioner.

CURFMAN v. R & H RESTAURANTS, INC., Franklin County Branch, A.D. 1979 - 323

Trespass - Measure of Damages - Destruction of Trees

1. Where shade or ornamental trees are destroyed the measure of damages is based on the diminution in the value of the real estate.

2. Where trees grown as a crop are destroyed, the measure of damages is the value of the trees themselves.

William H. Kaye, Esq., Counsel for Plaintiffs

Dennis A. Zeger, Esq., Counsel for R & H Restaurants, Inc., Defendant

OPINION AND ORDER

KELLER, J., March 26, 1980:

This action in trespass was commenced by the filing of a complaint on December 11, 1979, and service of the same upon the defendants by a Deputy Sheriff of Franklin County, Penna. on December 11, 1979. The plaintiffs allege an agreement by R & H Restaurants, Inc. with defendant-Barrick for defendant-Barrick to cut and remove trees designated by defendant, R & H Restaurants, Inc., and the cutting and removal of four oak trees located on the lands of plaintiff which provided a screen, shade and noise baffle for plaintiff's property. The plaintiffs seek compensatory damages based on a diminution in value of their real estate, plus punitive damages. The defendant, R & H Restaurants, Inc., filed preliminary objections in the nature of a motion to strike plaintiffs' paragraphs 12, 13 and 14, which allege their claim for compensatory damages based on diminution of the value of their real estate.

Arguments were heard on the preliminary objections on February 7, 1980, and the matter is now ripe for disposition.

The defendant contends that the claim for diminution in the value of plaintiffs' real estate asserts an improper measure of damages, for they are at best entitled to the value of the trees that were cut on the stump. In support of this position, they cite 22 Am. Jur. 2d, Damages Sec. 137, pages 199-200:

> "In cases of injury to property attached to, or forming part of, real estate, the courts recognize two elements of damages - the value after separation from the freehold, if any, of the thing taken, injured, or destroyed, and the damage to the realty, if any, occasioned by the severance. The measure of damages in such cases depends to some extent on the character of the property taken or destroyed. A distinction is often made between (1) property the chief value of which consists in its connection with the soil and its incidental enhancement of the value of the land, and (2) those improvements which may be replaced at will and whose value may readily be determined apart from the ground on which they rest. Thus, if the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate from, and independant of, the real estate, the measure of damages is the difference in value between the real estate before the injury and after it. But if the thing destroyed or injured has a value which can be accurately measured without reference to the value of the soil on which it stands or out of which it grows, the measure of damages is the value of the property injured, not exceeding the value of the land with the improvements upon it, or the cost of restoring or replacing it, where this can be done at a reasonable cost, or at a cost not disproportionate to the real injury."

To the contrary the plaintiffs contend that the measure of damages when the trees cut by a trespasser are ornamental or fruit trees, is the difference in the value of the realty before and after the trespass. In addition to the cases cited plaintiffs cite 22 Am. Jur. 2d, Damages Sec. 143:

> "There is no fixed rule of damages for injury to or destruction of shade and ornamental trees. This is undoubtedly because these trees are not grown for economic gain; thus, their loss is the hardest to translate into dollars. In each case, the court attempts to compensate the owner for the losses suffered. Generally, courts have measured damages by use of the 'before-and-after' rule - that is, the difference between the market value of the land immediately before