

## ***Therapy by Dog***

Not too long ago, I was at an Inns of Court session where therapy dogs were discussed. I was surprised because I always thought that therapy dogs were great, but then again, I am biased. We had a dog, Sampson, who my son trained as a therapy dog. My son was the youngest person ever to have trained a therapy dog in the group, and one of the people in the group was a woman who was the oldest to have ever trained a therapy do.

Sampson fulfilled his role well throughout his life. I remember taking him in to see my mother and other elderly people when my mother broke her femur. It was amazing to me that Sampson, the big midwestern lab that he was, did not touch any of the food. I also will never forget Sampson's "final exam" where he was put in a room by himself and we watched through a one-way mirror. Elderly people walked around with walkers and canes dropping them all over the place, including one on the dog's head, and he never moved from the spot where he was. I think he was about 18 months old at the time. Truly, I thought that he was better behaved than my kids.

So, okay, I love therapy dogs. Apparently, I am not alone in my view. See *Commonwealth vs. Purnell*, 2021 Pa. LEXIS 3610, 2021 WL 4303633 (S. Ct. September 22, 2021) (Baer, J.). Addressing an issue of first impression under Pennsylvania law, the Supreme Court of Pennsylvania considered the appropriate test to apply to a trial court's determination concerning whether a witness in a criminal case may utilize a "comfort dog" for support during his or her trial testimony. It appears that the term "comfort dog" is the new designation for what I used to call therapy dogs. For reasons explained in the opinion, the Supreme Court concluded that trial courts have the discretion to permit a witness to testify with the assistance of a comfort dog.

The decision rested upon the "indisputable" authority of trial courts to exercise "broad discretion in controlling trial conduct." *Id.* at \*22-\*23. The Superior Court relied upon Pennsylvania Rule of Evidence 611(a), which provides as follows:

- The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- (1) make those procedures effective for determining the truth;
  - (2) avoid wasting time; and
  - (3) protect witnesses from harassment or undue embarrassment.

Pa.R.E. 611(a).

The Supreme Court agreed that "this language is sufficiently comprehensive to allow a trial court to consider whether a comfort dog may assist a witness in testifying in a truthful manner during a trial." *Purnell, supra*, 2021 PA. LEXIS 3610, at \*23. In the exercise of that discretion, the courts should balance the degree to which the accommodation will assist the witness in testifying in a truthful manner against any possible prejudice to the defendant's right to a fair trial and employ means to mitigate any such prejudice. *Id.* at \*28. The court further noted that than an abuse of discretion

occurs when a court “has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Id.*, quoting *Commonwealth vs. Gill*, 206 A.3d 459, 466-67 (2019).

Here, the Court discerned no abuse of discretion on the part of the trial court. Indeed, in spite of the fact that no specific standard existed in Pennsylvania law at the time, the trial court considered the circumstances advanced by the Commonwealth demonstrating that A.H. would be more likely to testify in a truthful manner with the support of a comfort dog. In addition, the court balanced that consideration against any potential prejudice the presence of the dog may cause Appellant. Lastly, the court mitigated any potential prejudice by employing multiple appropriate measures, including referring to the animal as a "service dog" to lessen the likelihood of evoking sympathy; requiring that the dog enter and exit the courtroom outside of the jury's presence and remain hidden under the witness stand throughout A.H.'s testimony; and twice instructing the jury not to consider the presence of the dog for any purpose, not to attribute any sympathy to A.H., and not to judge the witness's credibility any differently. *Purnell, supra*, at \*27. The Supreme Court found the use of such measures to be “particularly persuasive,” *id.* at \*26, in the determination that no abuse of discretion occurred. Accordingly, the Supreme Court affirmed the Superior Court's decision, which affirmed Appellant's judgment of sentence.

The bullet point takeaways are as follows:

- In permitting comfort dogs, court should balance degree to which accommodation will assist the witness in testifying in a truthful manner against possible prejudice to the defendant's right to a fair trial.
- The availability of measures to mitigate any prejudice, such as limiting instructions and procedures to limit the jury's view of the dog should be a part of the analysis.
- Permitted in criminal case.
- Will the same logic apply in civil cases?
- Court sustained the trial court's approach in permitting the comfort dog.

Sampson's memory will live on, through the good work of other “comfort dogs” now approved by our state's highest court.

## **CAR/srb**

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