J-A02036-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DARRYLL LELAND BRISTON, JR.,	:	
	:	
Appellant	:	No. 219 WDA 2012

Appeal from the Judgment of Sentence January 10, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0013062-2010

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED NOVEMBER 22, 2013**

Darryll Leland Briston, Jr. ("Briston") appeals from the January 10, 2012 judgment of sentence entered by the Court of Common Pleas of Allegheny County. After careful review, we vacate the judgment of sentence and remand for further proceedings.

On July 23, 2010, Pittsburgh Police Officer Daniel Pagan was on patrol with Officer Phil Lurza in the East Liberty section of Pittsburgh. The uniformed officers were patrolling that area specifically because of an increase in homicides in the vicinity in the preceding weeks. N.T., 11/2/11, at 4. Around 6:00 p.m., Officer Pagan observed a car pull into a parking lot. During 10 to 15 minutes of patrolling in their marked police cruiser, the officers passed the parking lot two or three times and noticed that that car remained in the same spot with the driver (later identified as Briston) still

inside the vehicle. As Officer Pagan was driving past the lot, he observed that Briston was looking down and making "a motion consistent with rolling a marijuana blunt." ***Id.*** at 6. Officer Pagan observed Briston "looking down at his lap […] and […] making the arm motions with the twisting and rolling." ***Id.*** at 8. Officer Pagan admitted that these were "slight shoulder movements" and that he could only see from mid-arm and above. ***Id.*** at 16-17. He further admitted that the movements observed were also consistent with lawful activities, such as texting or checking email. ***Id.*** at 17.

"[W]ith it being a high crime area and the drug activity in the area at that time," Officer Pagan pulled his police vehicle in behind Briston's vehicle at a 45-degree angle and activated his emergency lights. ***Id.*** at 6. Officer Pagan approached Briston's car and observed what he believed to be two bullet holes in the rear passenger door. ***Id.*** at 8-9. Officer Lurza approached from the passenger side of the car. ***Id.*** at 17. Briston appeared to be sweating, nervous, and "his breathing was labored." ***Id.*** at 8, 11. Officer Pagan spoke with Briston, at which time the officer detected an odor of "burnt marijuana." ***Id.*** at 9. When asked for a driver's license, Briston "dipped his right shoulder down toward the center console to the waistline area," which Officer Pagan believed suggested that Briston had a gun. ***Id.*** at 10.

At that point, the officers ordered Briston from the car. They discovered a loaded firearm in the vehicle. The officers also recovered a small amount of marijuana. ***Id.*** at 23.

Briston was charged with firearms not to be carried without a license and possession of marijuana.[1] On October 6, 2011, Briston filed a motion to suppress the gun and drugs, arguing that the officers did not have reasonable suspicion at the outset to justify the investigative detention. On November 2, 2011, the Honorable Donna Jo McDaniel conducted a hearing on the suppression motion. After the hearing, the court denied the motion.

Immediately following the denial of the motion, the case proceeded to a bench trial. Counsel for Briston stipulated to the other evidence that the Commonwealth had – a crime lab report. ***Id.*** at 21. The trial court then colloquied Briston to ensure he was knowingly, voluntarily and intelligently waiving his right to a jury trial. ***Id.*** Thereafter, the Commonwealth incorporated the testimony from the suppression hearing and offered the crime lab report, which showed that the firearm recovered was in working condition and the weight of the marijuana seized. ***Id.*** at 23. The Commonwealth did not present any evidence that Briston was not licensed to carry a firearm. Briston did not testify at the suppression hearing or the trial.

[1] 18 Pa.C.S.A. § 6106(a)(1); 35 P.S. § 780-113(a)(31).

After the close of evidence, and after Briston's counsel gave his closing argument,[2] but before rendering a verdict, the trial court proceeded to question Briston on its own initiative. The following exchange took place:

> THE COURT: Do we know anything about this prior drug conviction, either of you?
>
> [BRISTON'S COUNSEL]: It would have been when he was a juvenile, Your Honor.
>
> THE COURT: How old are you now, [] Briston?
>
> [BRISTON]: I'm 20 years old.
>
> THE COURT: What kind of drugs did you have? Don't lie to me. I will look it up.
>
> [BRISTON]: It was heroin.
>
> THE COURT: How much did you have?
>
> [BRISTON'S COUNSEL]: This is a juvenile conviction. He has a pending case in front of Judge Williams. I would ask that that be stricken.
>
> THE COURT: Tell me about the case when you were a juvenile.
>
> [BRISTON]: It was heroin.
>
> THE COURT: How much did you have, [] Briston?
>
> [BRISTON]: I had 1,100 stamped bags.
>
> THE COURT: Did you say 1,100?
>
> [BRISTON]: Yes.

[2] The Commonwealth elected to waive its closing argument. Briston did not present any argument regarding the firearm charge.

Id. at 24-25. After interrogating Briston, the trial court found Briston guilty of the firearm offense and not guilty of the marijuana offense. ***Id.*** at 25. It sentenced Briston to one to three years of incarceration, with a recommendation for boot camp.

Briston filed a timely notice of appeal, followed by a timely court-ordered concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court issued a responsive opinion pursuant to Pa.R.A.P. 1925(a). On appeal, Briston raises two issues for our review:

> I. Whether Judge McDaniel erred in failing to grant [] Briston's [m]otion to [s]uppress when, based on the totality of the circumstances, the police immediately subjected [] Briston to an investigative detention without reasonable suspicion of criminal activity?
>
> II. Whether [] Briston's conviction for the crime of [f]irearms [n]ot to be [c]arried [w]ithout a [l]icense must be reversed, and his [j]udgment of [s]entence vacated, when the Commonwealth produced no evidence whatsoever of non-licensure, a necessary and critical element?

Briston's Brief at 4.

We begin by addressing Briston's second issue – his sufficiency claim – first, as "[t]he Double Jeopardy Clause bars retrial after a defendant's conviction has been overturned because of insufficient evidence." ***Commonwealth v. Mullins***, 591 Pa. 341, 346, 918 A.2d 82, 85 (2007) (citations omitted). We review a challenge to the sufficiency of the evidence according to the following standard:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Baker, 72 A.3d 652, 657-58 (Pa. Super. 2013) (citation omitted).

The crime of carrying a firearm without a license is defined by statute, in relevant part, as follows:

> [A]ny person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S.A. § 6106(a)(1). Here, there is no question that Briston was carrying a gun in his vehicle and that it was a functioning firearm. Rather,

Briston contends that there was insufficient evidence to prove that he was not licensed to carry the firearm. Briston's Brief at 38-48. Non-licensure is an essential element of the crime, for which the Commonwealth bears the burden of proof. ***Commonwealth v. Woods***, 638 A.2d 1013, 1016 (Pa. Super. 1994).

The record reflects that Commonwealth presented absolutely no evidence, circumstantial or otherwise, of non-licensure. The trial court presents two rationales to support its conclusion that the evidence was nonetheless sufficient to sustain the conviction. First, the trial court points to Briston's stipulation "to the other evidence that the Commonwealth has…[.]" Trial Court Opinion, 6/28/12, at 7. The trial court states that it "presumed that the Commonwealth had evidence of [Briston's] non-licensure," and thus included this "evidence" in the stipulation. ***Id.*** Our review of the record reveals no support for this presumption. To the contrary, the record is clear that the stipulation did not include evidence of non-licensure. After the trial court ruled on the suppression motion, Briston's counsel stated: "We would stipulate to the other evidence that the Commonwealth has, Your Honor, which I believe is a Crime Lab." N.T., 11/2/11, at 21. The Commonwealth summarized its evidence, including the discovery of the gun and the crime lab report that established that the gun was in operating condition and the weight of the marijuana recovered. ***Id.*** at 23. After Briston's counsel indicated he had nothing to add, the court

accepted the stipulation. ***Id.*** at 23-24. The record shows that the stipulation was only to the crime lab report, as that is the only evidence discussed by either Briston or the Commonwealth.

Second, the trial court offers Briston's testimony in response to its own questioning as providing sufficient circumstantial evidence to make the Commonwealth's case that Briston was unable to possess a license to carry a firearm. Trial Court Opinion, 6/28/12, at 7-8. As stated above, the record reflects that after the close of evidence and after Briston's closing argument on the possession charge, but before the trial court announced its verdict, the trial court *sua sponte* questioned Briston regarding his age (20 years old) and a prior delinquency adjudication for a drug offense.[3] The trial court did so without prompting by either party; without a request to reopen the evidentiary record;[4] and without consideration for Briston's constitutional rights. ***See*** U.S. CONST. amend. V ("No person shall be […] compelled in any criminal case to be a witness against himself[.]"); PA. CONST. art. 1 § 9 ("In all criminal prosecutions the accused […] cannot be compelled to give

[3] Either of these facts would preclude Briston from possessing a valid license to carry a firearm. ***See*** 18 Pa.C.S.A § 6109(e)(1)(ii) (prohibiting the issuance of a firearm license to a person with a drug-related conviction); 18 Pa.C.S.A. § 6109(b) (requiring an applicant for a firearm license to be at least 21 years old).

[4] A trial court may grant a party's request to reopen the record to present additional evidence where it is necessary "to prevent a failure or miscarriage of justice[.]" ***Commonwealth v. Chambers***, 546 Pa. 370, 396, 685 A.2d 96, 109 (1996) (citations omitted).

evidence against himself."); ***Commonwealth v. O'Bidos***, 849 A.2d 243, 250 (Pa. Super. 2004) ("[T]he decision to testify on one's own behalf is ultimately to be made by the accused after full consultation with counsel."), *appeal denied*, 580 Pa. 696, 860 A.2d 123 (2004).[5]

While a trial judge has the authority to ask questions of a witness, Pa.R.E. 614(b), the defendant was not a witness before the trial court initiated its questioning. Making the defendant a witness and questioning him in this manner impermissibly placed the trial court in the role of advocate, a practice our Supreme Court has "emphatically disapproved" for nearly a century. ***Commonwealth v. Myma***, 278 Pa. 505, 508, 123 A. 486, 487 (1924); ***see also Commonwealth v. Seabrook***, 475 Pa. 38, 43, 379 A.2d 564, 566 (1977). The Commonwealth offered no evidence to support a critical element of the charged crime – non-licensure. ***See Woods***, 638 A.2d at 1016. The trial court's crossover from neutral arbiter to advocate for the prosecution is unsupportable under any analysis based upon the conduct of a fair and impartial trial where, as in our system, the Commonwealth bears the burden of proving all elements of the crime charged. This supplementation of the Commonwealth's case by the trial judge must be ignored and thus, in a vacuum, the firearm charge against

[5] Briston did not challenge the constitutionality of the trial court's interrogation either in the trial court or on appeal.

Briston would be dismissed because the Commonwealth failed to adduce any evidence that Briston was not licensed to possess the firearm.[6]

However, the trial court error here did not occur in a vacuum. Following the suppression hearing, counsel for Briston indicated his desire to proceed to a bench trial, and stipulated to the Commonwealth's remaining evidence: a crime lab report. N.T., 11/2/11, at 21. Following Briston's stipulation, the trial court conducted a colloquy to ensure that Briston's waiver of his right to a jury trial was knowing, voluntary and intelligent. ***Id.*** at 21-22. In response to one of the first questions in the colloquy, Briston stated that he was 20 years old. ***Id.*** at 21. Because, as noted hereinabove, Section 6109(b) requires an applicant to be 21 years old to obtain a firearm license, Briston's age precluded him from obtaining a license to carry a firearm. ***See*** 18 Pa.C.S.A. § 6109(b). Thus, there was circumstantial

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[6] A sufficiency of the evidence claim does not need to be specifically preserved in the court below in order for this Court to address it on appeal. ***See*** Pa.R.Crim.P. 606(A). Therefore, the failure by counsel for Briston to object to the timing and manner of the trial court's questioning of Briston was not necessary to raise a sufficiency challenge.

We acknowledge that a sufficiency review requires that we consider all evidence actually presented at trial, regardless of its admissibility. ***Commonwealth v. Sanford***, 580 Pa. 604, 609, 863 A.2d 428, 431-32 (2004). The evidence adduced by the trial court during its questioning of Briston, however, was not presented **at trial**. By the time the trial court engaged in its barrage of questioning, the evidence was closed and the trial court was at the point of issuing its verdict. The trial had ended. There was no motion before the trial court to reopen the evidentiary record and no request to call additional witnesses by either party. Therefore, for purposes of our sufficiency review, we do not consider these answers as evidence.

evidence of record to support the non-licensure element without the trial court's impermissible questioning of Briston.[7] Because we can affirm the trial court on any ground, ***Commonwealth v. Lewis***, 39 A.3d 341, 345 (Pa. Super. 2012), we are constrained to affirm on this basis.[8]

We now turn to Briston's challenge to the trial court's denial of his motion to suppress. Our standard for reviewing a challenge to the suppression court's determination is well settled:

> Our review is limited to determining whether the record supports the findings of fact of the suppression court and whether the legal conclusions drawn from those findings are correct[]. We are bound by the factual findings of the suppression court, which are supported by the record, but we are not bound by the suppression court's legal rulings, which we review *de novo.*

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[7] The waiver colloquy took place in the midst of the bench trial as it occurred **after** defense counsel stipulated to the Commonwealth's evidence but **before** the close of the evidentiary record. ***See*** N.T., 11/2/11, at 21-23 (Defense counsel stipulated to certain evidence the Commonwealth had in its possession, the trial court conducted the waiver colloquy, and then the Commonwealth offered the crime lab report and incorporated the testimony from the suppression hearing.). Therefore, the information adduced during the waiver colloquy is properly considered during our sufficiency review in contrast to the testimony elicited by the trial court after the close of the evidence and closing arguments.

[8] Although we conclude that there was sufficient evidence to convict Briston of the firearm charge, we note for the trial court's benefit that its invitation for us to "remand for the specific introduction of [] evidence [of non-licensure]," (Trial Court Opinion, 6/28/12, at 8) ignores the double jeopardy consideration attendant to a successful sufficiency challenge. ***See Mullins***, 591 Pa. at 346, 918 A.2d at 85.

Commonwealth v. James, __ Pa. __, 69 A.3d 180, 186 (2013) (citation omitted).

Pursuant to Fourth Amendment jurisprudence, there are three categories of interactions between police and a citizen:

> The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an 'investigative detention' must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or 'custodial detention' must be supported by probable cause.

Commonwealth v. Downey, 39 A.3d 401, 405 (Pa. Super. 2012) (citation omitted). The difference between finding an investigative detention occurred rather than a mere encounter depends on whether the individual was "seized" by police. ***Commonwealth v. Au***, 615 Pa. 330, 333, 42 A.3d 1002, 1004 (2012).

> To guide the crucial inquiry as to whether or not a seizure has been effected, the United States Supreme Court has devised an objective test entailing a determination of whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave. In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained. In making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor

> dictating the ultimate conclusion as to whether a seizure has occurred.

Downey, 39 A.3d at 405 (citation omitted).

Briston asserts that his interaction with Officers Pagan and Lurza was an investigative detention from its inception that was not accompanied by the requisite reasonable suspicion. Briston's Brief at 13-37. Likening this case to ***Commonwealth v. Guzman***, 44 A.3d 688 (Pa. Super. 2012), the trial court found that the interaction was a mere encounter at its inception, which later ripened into an investigative detention, for which the officers had reasonable suspicion, once they observed the bullet holes in the car, observed Briston's demeanor, and smelled marijuana. Trial Court Opinion, 6/28/12, at 5-6.

In ***Guzman***, police observed a vehicle park with its headlights on in a private driveway while the officer was patrolling a high crime neighborhood. ***Guzman***, 44 A.3d at 693. The officer observed a person walk into an apartment building from the area of the parked car. ***Id.*** The officer pulled into a parking spot behind the car and turned on his spotlight, allowing him to see a person in the passenger seat. ***Id.*** The officer exited his cruiser and approached the vehicle, at which the passenger (Guzman) "spontaneously jumped out of the vehicle, setting off the car alarm and leaving the passenger door open." ***Id.*** Guzman reached into his pockets for the keys, at which the officer ordered him to keep his hands out of his pockets. ***Id.*** at

691. Guzman responded by yelling, "I'm not going down for this," and "[i]t's not mine." ***Id.*** Upon looking into the car through the open door, the officer observed heroin and bags of marijuana sticking out from underneath the front passenger seat. ***Id.***

The trial court granted Guzman's motion to suppress, finding the encounter to have been an investigative detention from its inception made without reasonable suspicion. The Commonwealth appealed and this Court reversed, finding that the interaction began as a mere encounter:

> In simply parking behind a vehicle that was already stopped and approaching it, Officer Wetzel did not display the type of physical force or show of authority necessary to rise to the level of an investigative detention. A reasonable person in [Guzman's] situation would not necessarily feel restrained by police or unable to leave, especially in light of the fact that Officer Wetzel had yet to speak to Appellee or give him any commands. [Guzman] spontaneously jumped out of the SUV. Officer Wetzel had shown no force or issued any command to support the court's conclusion that a seizure had instantly occurred.
>
> Instead, the officer's actions thus far carried all the hallmarks of a mere encounter. Officer Wetzel needed no justification to park behind the SUV and approach it; as a police officer, he is entitled to approach ordinary citizens on the street and ask a few questions. Had Officer Wetzel demonstrated a greater show of force or authority in approaching the SUV, our analysis might be different, but the facts presented at the suppression hearing do not support a finding of force or official police detention. Given there was no compulsion from Officer Wetzel when [Guzman] jumped from the SUV, Officer Wetzel's

> actions constituted a mere encounter that required no justification.

Id. at 693-94 (footnote and internal citations omitted).

We find ***Guzman*** to be distinguishable from the case at bar. Unlike in ***Guzman***, where the officer parked **in a parking spot** behind the defendant's vehicle, the police in the case before us pulled directly behind Briston's vehicle, blocking (at least partially) his only means of egress, and activated the cruiser's overhead lights. N.T., 11/2/11, at 6-7. Moreover, the two police officers present here (as opposed to one officer in ***Guzman***) positioned themselves at both the driver and passenger doors of Briston's vehicle, essentially surrounding the car. ***Id.*** at 17. These discrepancies and additional facts require the "different" analysis contemplated by the ***Guzman*** majority. The facts and circumstances presented at the suppression hearing in this case unquestionably support a finding that the interaction between Briston and the police was an investigative detention from its inception. Police pulling behind Briston's car, activating the cruiser's overhead lights, and approaching from both sides of the vehicle constituted a show of force that restrained Briston's movement; no reasonable person in Briston's position would feel free to leave. ***See, e.g., Commonwealth v. Hill***, 874 A.2d 1214, 1219 (Pa. Super. 2005) (police act of pulling behind the appellant's vehicle and activating the police vehicle's overhead lights, after appellant lawfully pulled over, had not committed any Motor Vehicle Code

violation, and did not give police any reason to suspect he needed assistance, constituted an investigatory detention, as a reasonable person would not believe he was free to leave under the circumstances).

We likewise find unquestionable the conclusion that the police lacked reasonable suspicion to conduct the investigatory detention in question. "Reasonable suspicion" required to justify an investigative detention has been defined as "specific and articulable facts" to suspect "criminal activity is afoot." ***Guzman***, 44 A.3d at 692-93. "The test for reasonable suspicion is an objective one: […] whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." ***Id.*** (citation omitted). "The assessment of reasonable suspicion, like that applicable to the determination of probable cause, requires an evaluation of the totality of the circumstances, with a lesser showing needed to demonstrate reasonable suspicion in terms of both quantity or content and reliability." ***Id.*** at 693.

Officer Pagan only observed Briston "looking downward in a motion consistent with rolling a marijuana blunt," admitting that the movements he saw were consistent with various forms of lawful activity. N.T., 11/2/11, at 6, 16-17. These movements, combined with Briston's presence in "a high crime area," were the sole bases for the police to approach Briston's vehicle. ***Id.*** at 6. The law is clear that this is insufficient to support a finding of

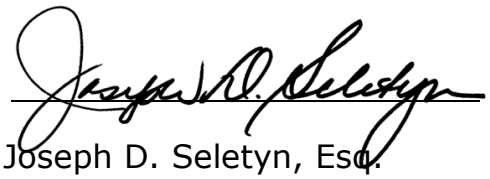
reasonable suspicion. ***Commonwealth v. DeWitt***, 530 Pa. 299, 307, 608 A.2d 1030, 1034 (1992); ***Commonwealth v. McClease***, 750 A.2d 320, 326 (Pa. Super. 2000).[9] Simply stated, it is not unlawful for a citizen to sit, looking downward, in a legally parked vehicle in broad daylight. The outcome does not change because this innocent behavior takes place in a "high crime area."

We therefore vacate the judgment of sentence and remand the case to the trial court for a new trial without the evidence obtained from the illegal investigative detention.

Judgment of sentence vacated. Case remanded with instructions. Jurisdiction relinquished.

Wecht, J. files a Concurring Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/22/2013

[9] In fact, the Commonwealth concedes in its appellee's brief that police lacked reasonable suspicion to initiate an investigative detention. Commonwealth's Brief at 22.