

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CARMELO ANTONIO PACHECO-CORREA,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1113 MDA 2012

Appeal from the Judgment of Sentence Entered May 21, 2012  
In the Court of Common Pleas of Lancaster County  
Criminal Division at No(s): CP-36-CR-0002396-2011

BEFORE: BENDER, J., SHOGAN, J., and FITZGERALD, J.\*

MEMORANDUM BY BENDER, J.:

**FILED MAY 07, 2013**

Appellant, Carmelo Antonio Pacheco-Correa, appeals from the judgment of sentence of five to ten years' incarceration imposed after he was convicted following a non-jury trial of possession with intent to deliver narcotics (PWID), possession of narcotics, and possession of drug paraphernalia. Appellant challenges the trial court's denial of his pretrial motion to suppress. We affirm.

In April of 2009, Appellant was placed under the supervision of the Pennsylvania Board of Probation and Parole in an unrelated case. Agent Damien Mscisz was assigned as Appellant's parole officer. Approximately two years later, Agent Mscisz became suspicious that Appellant was

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\* Former Justice specially assigned to the Superior Court.

engaging in the illegal sale of narcotics based on the agent's perception that Appellant's lifestyle did not correlate with his employment income. On April 27, 2011, Agent Mscisz detained Appellant and conducted a search of his person and vehicle, discovering approximately \$300 in cash in Appellant's car, and a key to a hotel room in his wallet. A subsequent search of the hotel room revealed narcotics and paraphernalia used to package drugs for sale. Accordingly, Appellant was arrested and charged with the above-stated offenses.

Prior to his trial, Appellant filed a motion to suppress the evidence, arguing that Agent Mscisz lacked reasonable suspicion to validate the search of Appellant's person, vehicle, and hotel room. On January 17, 2012, the trial court conducted a suppression hearing at which Agent Mscisz testified. On May 3, 2012, the court issued an order denying Appellant's motion to suppress. Following a non-jury trial on May 21, 2012, the court found Appellant guilty of the above-stated offenses and sentenced him as indicated *supra*. Appellant filed a timely notice of appeal and presents two issues for our review:

- I. Were the Trial Court's Findings of Fact in support of the denial of Appellant's Motion to Suppress supported by the record?
- II. Did reasonable suspicion exist to justify the search of Appellant's person, vehicle and hotel room?

Appellant's Brief at 4.

Before addressing the merits of Appellant's arguments, we note our well-settled standard of review of the denial of a motion to suppress:

In reviewing an order from a suppression court, we consider the Commonwealth's evidence, and only so much of the defendant's evidence as remains uncontradicted. We accept the suppression court's factual findings which are supported by the evidence and reverse only when the court draws erroneous conclusions from those facts.

***Commonwealth v. Hoopes***, 722 A.2d 172, 174-75 (Pa. Super. 1998).

Appellant first avers that the trial court made factual findings that were not supported by the record. Appellant's argument hinges on his assertion that Agent Mscisz made "erroneous assumptions" regarding Appellant's employment and income. Appellant's Brief at 11. For instance, Appellant claims the agent incorrectly assumed that he worked for nine months in 2010, that he was working 100 to 120 hours per week, and that Appellant was consistently making \$13 per hour for the entire nine months of his employment. From these incorrect inferences, the agent concluded that Appellant's lifestyle was beyond the means of his income, and surmised that Appellant was supporting his lifestyle by engaging in illegal activities. Appellant maintains that the trial court improperly accepted Agent Mscisz's assumptions and unsupported conclusions as facts, and erroneously determined that the agent had the requisite quantum of suspicion to legitimize the search.

To fully understand Appellant's contentions, it is necessary to discuss the testimony provided by Agent Mscisz at the suppression hearing. There,

Agent Mscisz stated that Appellant called him on July 6, 2010, and informed the agent that he had "secured a new residence with his girlfriend" in Ephrata, Pennsylvania. N.T. Suppression Hearing, 1/27/12, at 15. Appellant also told the agent that he had gotten "a heavy-labor job" at High Tech Concrete (HTC). *Id.* at 16. On October 24, 2010, Agent Mscisz conducted a home visit at Appellant's new residence. *Id.* at 15. The agent took note of the fact that Appellant's new house was "a very nice townhome, [with] very nice things in it," including "nice furniture, couches, [] [television] entertainment center, [and] beautiful beds in the bedrooms." *Id.* at 13-14. Agent Mscisz testified that Appellant's Ephrata home was "above average" in comparison with his prior residence, which was a "type of studio apartment in a very high-crime area, high-drug area." *Id.* at 14. Additionally, at a subsequent home visit conducted on April 18, 2011, the agent observed that Appellant had purchased a new vehicle, which Appellant told him cost \$450 per month. *Id.* at 20.

Because Agent Mscisz suspected that Appellant's lifestyle did not correlate with the income he was making at HTC, the agent asked Appellant for details about his employment. *Id.* at 14. Appellant told the agent that he was working at HTC "between 100 and 120 hours per week." *Id.* This raised "red flags" for Agent Mscisz, who testified:

[Agent Mscisz]: Just doing the math, it would mean he was working approximately 120 hours, depending on his schedule, maybe he would sleep four hours a day, plus his job was nearly 45 minutes away. It just seemed unimaginable that one can

work this kind of schedule and still be standing and talking to me about it.

**Id.** at 18. Also, the agent noted that Appellant's clean appearance and "smooth" hands did not correlate with working long hours doing heavy labor with concrete. **Id.** at 18-19.

Based on his suspicions, Agent Mscisz asked Appellant for paystubs, bank statements, or W2 tax documents to prove what he was earning at HTC. **Id.** at at 16-17. The agent testified that Appellant told him that all of those documents "were at his accountant for tax preparation." **Id.** at 16-17. Agent Mscisz also testified that on a "few" occasions, he called Appellant's home and was told by his girlfriend that Appellant was at work. **Id.** at 17. However, when the agent then called Appellant's cell phone, Appellant "said he was in the city or with his brother, something like that," which raised further concerns with the agent. **Id.** at 17-18.

On April 27, 2011, Agent Mscisz asked Appellant to meet with him at the parole office and to "bring documentation of his job." **Id.** at 20. Appellant arrived at the meeting with W2 forms from two different employers, HTC and "a temp agency." **Id.** at 21. Those forms indicated that Appellant had earned a total of approximately \$25,000 in 2010. **Id.** Appellant also admitted at the meeting that he had been laid off from HTC on March 18, 2011, and gave the agent documentation that he was receiving \$500 per week in unemployment benefits. **Id.** at 22, 37. The fact that Appellant did not report the change in his employment status within 72

hours of being terminated from HTC constituted a technical violation of the terms of his parole. **Id.** at 7.

After reviewing the W2 forms provided by Appellant, Agent Mscisz believed that the income Appellant made in 2010 "did [not] meet the threshold in terms of what lifestyle [Appellant] was living." **Id.** at 22. Thus, he brought Appellant into an interview room to question him further about his employment. **Id.** at 22-23. Agent Mscisz testified that "[i]n the interview room, [Appellant] was very nervous the second we started questioning him." **Id.** at 26. The agent further stated that Appellant "started sweating, started shaking his head kind of back and forth. [Appellant] seemed very agitated, kind of jumpy." **Id.** Agent Mscisz then described the conversation he had with Appellant as follows:

[Agent Mscisz]: First [I] brought [Appellant] back in the interview room, sat down and talked to him about all the paperwork he provided.

The first thing I drew to his attention, because I had to make sure there was no other reasonable explanation to the disparity in income – sometimes we have offenders who work under the table jobs and they are afraid to tell us about them, they will have to pay taxes or something like that. They think they will be in trouble. We don't approve of that, generally, but we won't arrest somebody.

I talked to him, explained to him that the numbers didn't match, did he work any other jobs or [have] any other explanation for his income. I believe I even did the math for him at the time about how much he should have made because he insisted he worked about nine months of 2010 for High Tech Concrete at about \$13 an hour.

He kept saying – he did insist he worked that time. So that was his rate, that he worked between 100 and 120 [hours] a week.

So at that point, absent any other explanation, we did detain him, put him in a holding cell.

**Id.** at 23.

After detaining Appellant, Agent Mscisz searched his person and vehicle. In the center console of Appellant's car, the agent found \$305 in cash.<sup>1</sup> **Id.** at 25. Additionally, Agent Mscisz discovered a key to a hotel room in Appellant's wallet. **Id.** at 24. Appellant told the agent that he had stayed at the hotel the night before. **Id.** at 24-25. When that hotel room was subsequently searched, Agent Mscisz discovered "several thousand[...]small wax baggies that you use to package heroin," other drug paraphernalia, and "two baggies that contained a brown powdery substance" determined to be heroin. **Id.** at 28-29.

Based on Agent Mscisz's testimony, the trial court denied Appellant's motion to suppress, reasoning:

Considering the totality of the circumstances, Agent Mscisz had sufficient reasonable suspicion to search [Appellant's] person, wallet, vehicle and the hotel room under [Appellant's] control. [The agent's] observations of [Appellant's] lifestyle, and demeanor are proper considerations, as were the inconsistencies in [Appellant's] explanations of his sources and amounts of income. ... Agent Mscisz testified that he knew to look at someone's lifestyle versus their income level to determine if he/she is selling drugs again, and the court is permitted to

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<sup>1</sup> Appellant also brought \$280 in cash with him to the meeting to pay the required parole supervision fees. **Id.** at 25.

consider the experience of agents in similar circumstances. Taken in their totality, Agent Mscisz'[s] observations were sufficient to create a reasonable suspicion that [Appellant] was violating his probation, thus justifying his detention, search and arrest.

Trial Court Opinion and Order (T.C.O.O.), 5/3/12, at 3.<sup>2</sup>

Appellant challenges the trial court's above-stated "factual findings" that Appellant's "'lifestyle' and 'demeanor' along with 'inconsistencies in [Appellant's] explanation of his sources and amount of income' supported a finding of reasonable suspicion." Appellant's Brief at 11 (quoting T.C.O.O. at 3). While Appellant claims that these factual findings were not supported by the record, after careful review, we are compelled to disagree. Agent Mscisz described the changes in Appellant's residence and lifestyle that he observed during home visits, and which piqued his suspicions that Appellant was living above his means. Namely, the agent noted that Appellant's Ephrata home was nicely furnished and contained electronics, and that Appellant was driving a new car. Furthermore, when Agent Mscisz initially asked Appellant

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<sup>2</sup> The trial court also reasoned that "[t]he hotel room key found in [Appellant's] wallet provides further support: The hotel room was not an approved residence for [Appellant], so his overnight stay there the previous evening was itself a violation of [Appellant's] probation (albeit, perhaps, a fairly small and technical one, but a violation none the less, and an additional objective circumstance to support Agent Mscisz's suspicions)." T.C.O.O. at 3. However, because the hotel room key was not discovered until after the search was underway, we do not consider Appellant's act of staying in a hotel room overnight in assessing the totality of the circumstances to support Agent Mscisz's reasonable suspicion.



for documentation of his income, Appellant evasively responded that all of his paperwork was in the possession of his accountant.

Then, when being questioned further about his employment at the April 27, 2011 meeting, Appellant appeared nervous and agitated, and he was sweating and jumpy. Agent Mscisz testified that Appellant “*insisted* that he worked about nine months of 2010 for [HTC] at about \$13 an hour” for “between 100 and 120” hours per week, which did not correspond with the income set forth on his W2 forms.<sup>3</sup> N.T. Suppression Hearing, 1/17/12, at 23 (emphasis added). Moreover, the agent also testified that Appellant’s physical appearance did not indicate he was working as a manual laborer. For instance, the agent testified that Appellant’s hands were “very smooth.” ***Id.*** at 19.

While Appellant now claims that there was no evidence that he worked 100 to 120 hours *every week*, that he made \$13 per hour from the start of his employment with HTC, or that he worked for nine months in 2010, Agent Mscisz testified that Appellant *himself* told the agent this information. Appellant’s claims did not correlate with the income indicated on his W2 tax documents, and also did not correspond with Agent Mscisz’s observations of

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<sup>3</sup> As stated *supra*, Appellant’s W2 forms indicated he made approximately \$25,000 in 2010. However, if he worked 100 hours per week, at \$13 per hour, for nine months – as Appellant himself claimed – he would have made approximately \$46,800. Even if Appellant only worked for six months in 2010, as he now argues on appeal, his earnings would have totaled \$31,200, which also does not correlate with the income stated on his W2 tax form.

Appellant's physical appearance. Agent Mscisz also clearly described the aspects of Appellant's lifestyle and demeanor which raised "red flags" for the agent. Thus, the trial court's determinations regarding Appellant's lifestyle, demeanor, and the "inconsistencies in [Appellant's] explanation of his sources and amount of income" were supported by the record, namely Agent Mscisz's testimony.

Next, Appellant argues that the trial court erred in concluding that Agent Mscisz had reasonable suspicion to detain and search his person and property. In regard to searches of parolees, 61 Pa.C.S. § 6153 provides, in relevant part:

**(b) Searches and seizures authorized.-**

(1) Agents may search the person and property of offenders in accordance with the provisions of this section.

(2) Nothing in this section shall be construed to permit searches or seizures in violation of the Constitution of the United States or Section 8 of Article I of the Constitution of Pennsylvania.

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**(d) Grounds for personal search of offender.-**

(1) A personal search of an offender may be conducted by an agent;

(i) if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision;

(ii) when an offender is transported or taken into custody; or

(iii) upon an offender entering or leaving the securing enclosure of a correctional institution, jail or detention facility.

(2) A property search may be conducted by an agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.

61 Pa.C.S. § 6153(b), (d).

Furthermore, section 6153 delineates factors that “may be taken into account” when assessing the existence of reasonable suspicion to search a parolee’s person or property. Those factors include: (1) the observations of parole agent; (2) information provided by others; (3) the activities of the offender; (4) information provided by the offender; (5) the experience of the parole agent with the offender; (6) the experience of the parole agent in similar circumstances; (7) the prior criminal and supervisory history of the offender; and (8) the need to verify compliance with the conditions of supervision. 61 Pa.C.S. § 6153(d)(6)(i)-(viii). While considering these factors, we ultimately determine whether a parole agent had reasonable suspicion to search a parolee by evaluating the totality of the circumstances. ***Commonwealth v. Colon***, 31 A.3d 309, 315 (Pa. Super. 2011) (citation omitted) (“The determination of whether reasonable suspicion exists is to be considered in light of the totality of the circumstances.”).

Instantly, Appellant first challenges Agent Mscisz’s reasonable suspicion because the agent “never ascertained who was responsible for the rent or bills in [the Ephrata] townhouse” that Appellant shared with Amber

Pacozzi. Appellant's Brief at 22. Appellant alleges that Pacozzi may have been the owner of the expensive furniture and electronics in their home and, thus, it was improper for Agent Mscisz to consider these items in assessing whether Appellant's lifestyle correlated with his income.

Initially, we agree with Appellant that Agent Mscisz could have questioned him about Pacozzi's financial contributions to their home. However, at the same time, it is curious that Appellant did not offer this information when being interviewed about his lifestyle and income. Indeed, Appellant's silence on this issue prompts us to disagree with his claim that the "objective reasonable inference ... is that the furniture and furnishings of the townhouse in Ephrata belonged to Amber Pacozzi." *Id.* Therefore, his argument in this regard is unconvincing.

Appellant also asserts that Agent Mscisz lacked reasonable suspicion to search his person and property because the agent "had no extrinsic information that Appellant was involved in illegal activity." Appellant's Brief at 21. Appellant claims that "[t]here is no Pennsylvania case ... which sustained a search absent some evidence extrinsic to the parole agent's personal observations and assessment of the relation between a parolee's visible means and his possessions." *Id.* at 17. He further states that "[c]ase law in Pennsylvania has supported parole searches in circumstances only where there have been independent, corroborative reports of illegal activity, combined with a parole officer's observations of lifestyles they

judged to be more lavish than the apparent means of the parolee.” ***Id.*** at 16-17 (emphasis omitted).

However, Appellant’s argument ignores the fact that 61 Pa.C.S. § 6153, explicitly states that “[i]nformation provided by others” is a factor that *may* be taken into account in assessing whether reasonable suspicion to conduct a search is present. 61 Pa.C.S. § 6153(d)(6)(ii). While admittedly, in this case there was no extrinsic information provided to Agent Mscisz that Appellant was selling drugs, there was “information provided by others” to the extent that Appellant’s employers verified his income on the W2 tax forms. Furthermore, several of the other considerations set forth in section 6153(d)(6)(i)-(viii) were present. Notably, as discussed *supra*, Agent Mscisz personally observed a significant upgrade in Appellant’s lifestyle, and Appellant exhibited evasive behavior when initially asked to provide documentation of his income. Appellant’s nervousness and agitation when being questioned about his employment, and the inconsistencies between the employment information he told the agent and the salary indicated on his W2 tax forms, further supported the agent’s reasonable suspicion. In addition, Agent Mscisz described deceptive behavior by Appellant and his girlfriend, Pacozzi, which raised concerns in the agent’s mind. For instance, Agent Mscisz testified that on several occasions, Pacozzi told him that Appellant was working, but when the agent then called Appellant, he was informed that Appellant “was in the city or with his brother, something like that.” N.T. Suppression Hearing, 1/17/12, at 17.

Also significant is the fact that Appellant committed a technical violation of the terms of his parole by not reporting to Agent Mscisz that he had been terminated from HTC within 72 hours of that decision. **See** N.T. Suppression Hearing, 1/17/12, at 7 (stating condition of Appellant's parole was to report any changes in employment within 72 hours). Agent Mscisz testified that when he visited Appellant's home on April 18, 2011, Appellant led the agent to believe that he was still employed with HTC when, in fact, Appellant had been laid off in March of 2011. **Id.** at 21-22. It was not until the April 27, 2011 meeting that Appellant admitted that he had deceived the agent and was no longer working at HTC. **Id.** at 22.

Finally, Agent Mscisz's experience in similar circumstances also weighs in favor of concluding that he had reasonable suspicion to search Appellant. The agent testified that he had investigated approximately ten to fifteen cases in which the probationer/parolee was discovered to be in violation of the terms of his/her probation or parole. **Id.** at 10. He indicated that based on his experience, he had "become familiar with certain patterns which set off triggers for [him] that somebody may be in violation of their [parole or] probation." **Id.** When asked to specify what he looked for as indicators that a probationer/parolee may be "involved in the sale of controlled substances," the agent testified:

[Agent Mscisz]: First I would look at disparity of income. First is their lifestyle. If they are living a certain life that looks like it's beyond their means, their income level, that would be the first tip-off they might be involved in illegal activity, such as drug sales. Lying, just general deceptive behaviors, that comes up

probably most often in our interviews with people on parole. If we determine that the things they are telling us do not match up to what is usually going on or they are leading us to believe a lifestyle that they are not [leading].

**Id.** at 10-11. Here, Agent Mscisz testified regarding his perception of the disparities in Appellant's lifestyle and his income. Additionally, the agent described deceptive behaviors by Appellant, and ways in which Appellant's claims were not correlating with the agent's observations.

In sum, Agent Mscisz stated specific and articulable facts demonstrating his reasonable belief that Appellant was in possession of contraband or other evidence of violations of his parole.<sup>4</sup> **See** 61 Pa.C.S. § 6153(d)(2) ("A property search may be conducted by an agent if there is reasonable suspicion to believe that the real or other property in the

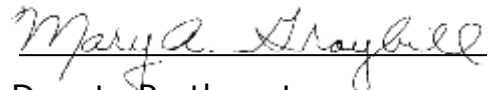
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<sup>4</sup> We note that at the end of his argument, Appellant distinguishes the searches of his car and hotel room, and briefly contends that Agent Mscisz did not specify sufficient facts to legitimize those two searches. We disagree. Agent Mscisz testified that after he discovered the hotel room key on Appellant's person, Appellant admitted that he had stayed in the room the night before. Agent Mscisz stated that Appellant "never contacted [the parole department] to ask if he could stay at some place other than his residence." N.T. Suppression Hearing, 1/17/12, at 24. Moreover, Appellant responded vaguely when questioned about the hotel room, stating "that he was checking out," but that he "still had access to the room" because "[h]e had[ not] completed his checkout yet." **Id.** at 29. After this conversation, Agent Mscisz searched Appellant's vehicle, discovering a large amount of cash in the console. These facts, taken with the totality of the other circumstances, were sufficiently specific to support the court's conclusion that Agent Mscisz had reasonable suspicion to search Appellant's person, vehicle, and hotel room.

possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.”). Accordingly, the trial court did not err in concluding that Agent Mscisz had reasonable suspicion and in denying Appellant’s motion to suppress on that basis.

Judgment of sentence affirmed.

Judgment Entered.

  
Deputy Prothonotary

Date: 5/7/2013