

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
DERIK CHILDS,	:	
	:	
Appellee	:	No. 1129 EDA 2013

Appeal from the Order Entered March 14, 2013 in
the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0015220-2010

BEFORE: BENDER, P.J., OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED DECEMBER 11, 2013**

The Commonwealth of Pennsylvania appeals the order entered March 14, 2013, which granted in part and denied in part the motion to suppress of Derik Childs (Childs). We reverse the portion of the order that granted Childs’s motion to suppress and remand for further proceedings consistent with this memorandum.

In June of 2010, Officer Stan Davis of the Philadelphia Police Department received a report of possible drug sales occurring in the 4200 block of Griscom Street in Philadelphia, Pennsylvania. Officer Davis later received descriptions of two possible suspects. The first, nicknamed “Ish,” was described as a skinny, 20-to-30-year-old black male with a dark complexion. The second, nicknamed “D,” was described as a tall and skinny, 20-to-30-year-old black male. Officer Davis was informed that a cell phone

*Retired Senior Judge assigned to the Superior Court.

with the number (215) 494-8963 was being used to conduct drug sales, and that the suspects were operating out of the first floor of 4226 Griscom Street.

Based on this information, Officer Davis began an investigation of the alleged drug activity. On July 14, 2010, Officer Davis parked his car approximately 50 to 100 feet from the corner of Griscom and Womrath Streets. From there, Officer Davis observed several individuals, including two later identified as Childs and Shelton Speaks (Speaks). Officer Davis contacted two additional police officers and requested that they bring a confidential informant (CI) to the area in order to attempt a controlled buy of narcotics. The officers complied. Officer Davis watched as the CI handed money to Childs. Speaks then went inside 4226 Griscom Street. When he returned, Speaks handed the CI an object or objects. The CI then returned to the additional police officers. The CI turned over two plastic bags containing a substance that tested positive for cocaine. The CI also indicated that he or she was given the phone number (215) 494-8963 for future narcotic purchases.

Officer Davis then secured a warrant for 4226 Griscom Street. On July 17, 2010, Officer Davis returned to this area, where he again observed Childs and Speaks. Officer Davis requested that the CI call the aforementioned cell phone number. When the number was called, Childs retrieved a cell phone and appeared to answer the call. Speaks then used a

key to enter a nearby Cadillac. After Speaks exited the Cadillac, Officer Davis ordered additional police officers to converge on the location and arrest Childs and Speaks. From Childs, the police recovered \$409, a cell phone, and identification cards. From Speaks, police recovered \$925 and a key to the Cadillac that Speaks had entered. Sergeant Robert Friel entered the Cadillac and attempted to start it so that the vehicle could be confiscated. However, the Cadillac would not start, and Sergeant Friel decided to simply search the car instead. Prior to entering the vehicle, Sergeant Friel observed a digital scale on the back seat, which he later retrieved. Sergeant Friel also recovered a bag of marijuana from the floor of the Cadillac. The officers conducted a search of the first floor of 4226 Griscom Street as well. No drugs or other evidence was recovered from this search.

As a result of these events, Childs was charged with possession of a controlled substance, possession with intent to deliver, possession of drug paraphernalia, criminal use of a communication facility and conspiracy.¹ Both Childs and Speaks filed motions to suppress, and a joint suppression hearing was held. The trial court granted the suppression motions of both defendants in part. Specifically, the trial court suppressed the drugs and scale recovered from the Cadillac, but declined to suppress the cell phone, money, and identification cards.

¹ 35 P.S. §§ 780-113(a)(16),(30), and (32); 18 Pa.C.S. §§ 7512 and 903, respectively.

On November 22, 2011, the Commonwealth timely filed a notice of appeal along with a concise statement of errors complained of on appeal. On October 5, 2012, Childs filed in this Court a Petition to Remand for Resolution, in which he requested that the case be remanded back to the trial court because his "counsel and the Commonwealth have engaged in discussions that have resulted in the parties reaching a plea agreement in the instant matter." Thus, on October 24, 2012, this Court entered an order vacating the trial court's suppression order and remanding the case. This Court instructed that "[i]n the event the parties do not enter into their proposed agreement, the trial court shall re-enter the suppression order."

On March 14, 2013, a hearing was held at which counsel for Childs informed the trial court that Childs was unable to consolidate the present case with "another open matter" as planned, and requested that the court reinstate its order granting suppression of the marijuana and digital scale. N.T., 3/14/2013, at 4. Thus, the trial court reinstated its prior order, and the Commonwealth again timely filed a notice of appeal² along with a new concise statement of errors complained of on appeal.

The Commonwealth now raises the following issues on appeal.

1. Does a codefendant's possession of a car key confer upon defendant a "property right" in a vehicle and relieve him of his burden of establishing a constitutionally protectable privacy interest?

² Pursuant to Pa.R.A.P. 311(d), the Commonwealth certified on both notices of appeal that the relevant order terminated or substantially handicapped the prosecution.

2. Where a police officer observes contraband in an automobile in plain view from a lawful vantage point and with lawful right of access to the vehicle, can the officer seize the contraband without a warrant?

Commonwealth's Brief at 3 (trial court answers omitted).

Our well-settled standard of review is as follows.

When the Commonwealth appeals from a suppression order, we ... consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of facts bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Cruttenden, 976 A.2d 1176, 1179 (Pa. Super. 2009) (quoting ***Commonwealth v. Deck***, 954 A.2d 603, 606 (Pa. Super. 2008)).

At Childs's suppression hearing, the trial court provided the following explanation for its decision to suppress the marijuana and digital scale recovered from the Cadillac.

[I]n this case ... the police would've needed to go through the rigmarole to do what they needed to do to get a search warrant for the vehicle. Because I will find that they find keys on you, and they're going to allegedly accuse you of having contraband which is in the vehicle, I'll find that that is a property right. It might not be your car, but you were in possession of it one way or the other. So I'll find in that sense that the items in the vehicle are to be suppressed.

N.T., 10/27/2011, at 102; ***see also*** Trial Court Opinion, 5/16/2013, at 8 ("[T]he Commonwealth has not proven that there were exigent

circumstances which would have prevented the Commonwealth from securing a search warrant for the [car] before invading [Childs's] rights[.]”).

In response, the Commonwealth argues that Childs failed to establish at the suppression hearing that he had a reasonable expectation of privacy in the Cadillac.^{3,4} We agree.

“[G]enerally under Pennsylvania law, a defendant charged with a possessory offense has automatic standing to challenge a search. However, in order to prevail, the defendant, as a preliminary matter, must show that he had a privacy interest in the area searched.” ***Commonwealth v. Jones***, 874 A.2d 108, 117-18 (Pa. Super. 2005) (citations and quotation marks omitted); ***see also Commonwealth v. Enimpah***, 62 A.3d 1028, 1032 (Pa. Super. 2013), *appeal granted*, 335 MAL 2013, 2013 WL 5733740 (Pa. Oct. 22, 2013) (“[D]efendants must convince the trial court that the Commonwealth violated his or her reasonable expectation of privacy in order for suppression to be proper.”). “The burden is on the defendant seeking suppression to establish a legitimate expectation of privacy as an essential

³ In the alternative, the Commonwealth argues that the seizure of the digital scale and marijuana was justified under the plain view doctrine. Given our disposition of the Commonwealth’s first issue, however, we need not reach of the question of whether the plain view doctrine would apply under the present circumstances.

⁴ In its brief, the Commonwealth cites to and quotes from the unpublished memorandum which disposed of the appeal of Speaks. We note that unpublished memoranda may only be cited under very limited circumstances, not applicable here, pursuant to Superior Court I.O.P. 65.37.

element of his case.” ***Commonwealth v. Perea***, 791 A.2d 429 (Pa. Super. 2002) (citing ***Commonwealth v. Hawkins***, 718 A.2d 265 (Pa. 1998)).

Our Courts have held that mere possession of, or access to, a vehicle is insufficient to establish a reasonable expectation of privacy. ***See, e.g., Commonwealth v. Cruz***, 21 A.3d 1247, 1251-52 (Pa. Super. 2011) (“Appellant presented no evidence that he owned the vehicle, that it was registered in his name, or that he was using it with the permission of the registered owner. Thus, appellant had no cognizable expectation of privacy and may not challenge the search.”); ***Commonwealth v. Burton***, 973 A.2d 428, 436 (Pa. Super. 2009) (*en banc*) (“[Burton] failed to demonstrate that he had a reasonably cognizable expectation of privacy in a vehicle that he did not own, that was not registered to him, and for which he has not shown authority to operate.”).

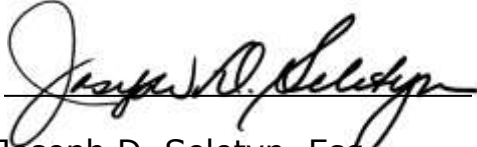
Here, Childs made no effort to establish at his suppression hearing that he owned the relevant vehicle or otherwise had a reasonable expectation of privacy therein. It was never made clear who the registered owner of this car was, or if that owner gave permission to either Speaks or Childs to use the car. Therefore we conclude that the trial court erred by suppressing the digital scale and the marijuana found inside. Accordingly, we reverse the portion of the order granting Childs’s motion to suppress and remand for further proceedings.

Order reversed in part. Case remanded. Jurisdiction relinquished.

J-S68042-13

President Judge Bender Concurs in Result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/11/2013