

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOHN FINN

Appellant

No. 1170 EDA 2013

Appeal from the Judgment of Sentence April 15, 2013
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000109-2012

BEFORE: GANTMAN, J., DONOHUE, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.:

FILED DECEMBER 04, 2013

Appellant, John Finn, appeals from the judgment of sentence entered in the Carbon County Court of Common Pleas, following his jury trial convictions for two (2) counts of driving under influence of alcohol or controlled substance ("DUI") and his bench trial convictions for the summary traffic offenses of duty of driver in emergency response areas, maximum speed limits, and restrictions on alcoholic beverages.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows.

[On October 8, 2011 at 2:05 a.m.,] Trooper Splendido was completing a traffic stop at mile post 73.2 northbound on Interstate 476 with his emergency lights activated when a

¹ 75 Pa.C.S.A. §§ 3802(a)(1), (b), 3327, 3362, 3809, respectively.

[SUV] drove past at a high rate of speed in the right lane, without yielding to the left lane.^[2]

* * *

Trooper Splendido testified that while he was completing the paperwork for the initial traffic stop, he was passed by a tractor-trailer and a passenger vehicle, traveling approximately twenty (20) seconds apart. These vehicles were followed by [the] SUV traveling at a high rate of speed. A window mounted [radar unit] was used to obtain the SUV's speed of ninety-nine (99) miles per hour. The [radar] unit in the trooper's patrol vehicle alerted him of an approaching speeding vehicle with an audible signal. The trooper saw the approaching SUV in his rearview mirror but he was unable to determine the make or model of the vehicle due to the high rate of speed that it was traveling. He was able to determine that it was a light colored SUV.

Trooper Splendido returned the driver's information and began his pursuit of the SUV. He passed the tractor-trailer and the passenger car, still approximately twenty (20) seconds apart, before catching up to the speeding SUV. There were no on-ramps located on the three (3) mile section of highway that the trooper traveled to catch up to the SUV. The trooper initiated the traffic stop and made contact with the driver of the SUV, who was identified as [Appellant].

* * *

The trooper testified that he had conducted traffic stops like this one in the past where he had lost sight of the vehicle for a short period of time when accelerating from a parked position. He maintained that he had accounted for both vehicles which passed him previously and had to travel at an average rate of approximately one hundred (100) miles per hour to catch up to the SUV.

² The left lane had no traffic. (**See** Affidavit of Probable Cause, dated 11/1/11, at 1.)

(Trial Court Opinion, filed June 14, 2013, at 2-5) (internal citations to the record omitted).

During the traffic stop, Trooper Splendido noticed a strong odor of alcohol emanating from Appellant's vehicle. Further, Appellant's eyes were bloodshot and glassy. Trooper Splendido asked Appellant whether he had consumed any alcoholic beverages, and Appellant admitted drinking a few beers at a baseball game. After administering field sobriety tests, Trooper Splendido arrested Appellant for DUI. Subsequent testing revealed Appellant's blood alcohol content was 0.15%.

On February 24, 2012, the Commonwealth filed a criminal information charging Appellant with two counts of DUI and various Motor Vehicle Code offenses. On March 30, 2012, Appellant filed a motion to suppress all evidence obtained as a result of the traffic stop. In it, Appellant asserted his arrest "occurred without a valid warrant, without probable cause and without reasonable grounds to conclude that [Appellant's] vehicle was the one that passed Trooper Splendido at an allegedly high speed." (Suppression Motion, filed 3/30/12, at 2). The court conducted a suppression hearing on May 14, 2012. On June 18, 2012, the court denied Appellant's suppression motion.

Following trial, a jury convicted Appellant of 2 counts of DUI. The court also convicted Appellant of the summary traffic offenses of duty of driver in emergency response areas, maximum speed limits, and restrictions on alcoholic beverages. On April 15, 2013, the court sentenced Appellant to

thirty (30) days to six (6) months' imprisonment, plus fines, costs and suspension of Appellant's driver's license for one (1) year.

Appellant timely filed a notice of appeal on April 19, 2013. On April 24, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on May 1, 2013.

Appellant raises one issue for our review:

WHETHER THE FINDER OF FACT ERRED IN FINDING THAT THE REQUISITE REASONABLE SUSPICION EXISTED TO CONCLUDE THAT APPELLANT HAD COMMITTED A CRIME OR WAS OTHERWISE ENGAGED IN UNLAWFUL ACTIVITY?

(Appellant's Brief at 4).

On appeal, Appellant emphasizes Trooper Splendido's testimony that he lost sight of the speeding vehicle for a "considerable amount of time" prior to stopping Appellant. (Appellant's Brief at 9) (citing N.T. Suppression, 5/14/12, at 16; R.R. at 16a). Appellant contends Trooper Splendido did not make any observations of the speeding vehicle that could enable him to identify it further down the highway. Appellant maintains the trooper did not observe the license plate number, make or model of the vehicle, number of passengers, or sex of the driver. Under the totality of these circumstances, Appellant argues Trooper Splendido could not have known that Appellant's vehicle was the same SUV that passed the emergency response area minutes earlier. Appellant concludes the court should have granted his suppression motion. We disagree.

We examine this issue subject to the following principles:

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.

[W]e may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Williams, 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted). Further, "It is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony." ***Commonwealth v. Clemens***, 66 A.3d 373, 378 (Pa.Super. 2013) (quoting ***Commonwealth v. Gallagher***, 896 A.2d 583, 585 (Pa.Super. 2006)).

Section 6308 of the Motor Vehicle Code provides:

§ 6308. Investigation by police officers

* * *

(b) Authority of police officer.—Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has **reasonable suspicion** that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other

information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b) (emphasis added). “Traffic stops based on a reasonable suspicion[,] either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose. In effect, the language of Section 6308(b)—“to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title”—is conceptually equivalent with the underlying purpose of a **Terry** stop. ... Mere reasonable suspicion will not justify a vehicle stop when the driver’s detention cannot serve an investigatory purpose relevant to the suspected violation.” **Commonwealth v. Feczko**, 10 A.3d 1285, 1291 (Pa.Super. 2010), *appeal denied*, 611 Pa. 650, 25 A.3d 327 (2011) (internal citations omitted). “In such an instance, it is [incumbent] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, **which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.**” **Id.** (emphasis in original) (quoting **Commonwealth v. Gleason**, 567 Pa. 111, 122, 785 A.2d 983, 989 (2001)).³

³ Throughout his brief, Appellant erroneously refers to the reasonable suspicion standard. Nevertheless, this Court must examine whether Trooper Splendido possessed probable cause to believe that Appellant had committed
(Footnote Continued Next Page)

“Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a [person] of reasonable caution in the belief that the suspect has committed or is committing a crime.” ***Commonwealth v. Thompson***, 604 Pa. 198, 203, 985 A.2d 928, 931 (2009) (internal quotation marks omitted).

The question we ask is not whether the officer’s belief was correct or more likely true than false. Rather, we require **only a probability**, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Id. (emphasis in original) (internal citations and quotation marks omitted). Pennsylvania law makes clear, however, that a police officer has probable cause to stop a motor vehicle if the officer observed a traffic code violation, even if it is a minor offense. ***Commonwealth v. Chase***, 599 Pa. 80, 89, 960 A.2d 108, 113 (2008).

The Motor Vehicle Code defines the offense of duty of driver in emergency response areas as follows:

§ 3327. Duty of driver in emergency response areas

(a) General rule.—When approaching or passing an emergency response area, a person, unless otherwise directed by an emergency service responder, shall:

(Footnote Continued) _____

the offenses of duty of driver in emergency response areas and maximum speed limits.

(1) pass in a lane not adjacent to that of the emergency response area, if possible; or

(2) if passing in a nonadjacent lane is impossible, illegal or unsafe, pass the emergency response area at a careful and prudent reduced speed reasonable for safely passing the emergency response area.

75 Pa.C.S.A. § 3327(a). “[T]he term ‘emergency response area’ means the area in which emergency service responders render emergency assistance to individuals on or near a roadway or a police officer is conducting a traffic stop...as long as the emergency vehicle is making use of visual signals....”

75 Pa.C.S.A. § 3327(f).

The Motor Vehicle Code also defines the offense of maximum speed limits as follows:

§ 3362. Maximum speed limits

(a) General rule.—Except when a special hazard exists that requires lower speed for compliance with section 3361 (relating to driving vehicle at safe speed), the limits specified in this section or established under this subchapter shall be maximum lawful speeds and no person shall drive a vehicle at a speed in excess of the following maximum limits:

* * *

(1.1) 65 miles per hour for all vehicles on freeways where the department has posted a 65-miles-per-hour speed limit.

75 Pa.C.S.A. § 3362(a)(1.1).

Instantly, the Commonwealth established that Trooper Splendido observed Appellant commit a Motor Vehicle Code violation, as the code

requires motorists to pass an emergency response area in a non-adjacent lane when possible. **See** 75 Pa.C.S.A. § 3327(a). Although possible, Appellant passed the emergency response area without moving into an open lane of traffic to his left. Further, Trooper Splendido's radar unit confirmed that Appellant's vehicle was traveling ninety-nine (99) miles per hour, in violation of the posted speed limit. **See** 75 Pa.C.S.A. § 3362(a)(1.1). On these bases, the traffic stop was justified.

To the extent Appellant complains that Trooper Splendido could not know whether Appellant's SUV was the same vehicle that sped past the emergency response area, the court noted:

In the instant matter, Trooper Splendido observed a tractor-trailer and passenger vehicle pass him, approximately twenty (20) seconds apart, followed by a silver SUV traveling at ninety-nine (99) miles per hour. The trooper had five (5) years of experience as a Pennsylvania State Trooper at the time of the traffic stop and testified that there were multiple times in the past during which he had lost sight of a speeding vehicle after it had passed him before he began his pursuit from a parked position. Trooper Splendido had passed both the tractor-trailer and passenger vehicle in his pursuit of the SUV. There were no on-ramps for additional vehicles to enter the highway during the three (3) mile pursuit. The trooper had to maintain an average speed of approximately one hundred (100) miles per hour to catch up to the SUV.

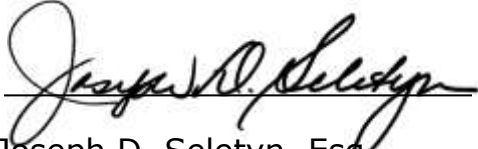
(**See** Trial Court Opinion at 7-8.) Here, the court was free to weigh and credit the trooper's testimony regarding the pursuit. The record supports the court's determination that Appellant's SUV was the same vehicle which sped through the emergency response area. **See Clemens, supra**. Thus,

J-S64036-13

the court properly denied Appellant's suppression motion. **See Williams, supra.** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

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: 12/4/2013