

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| JONATHAN THOMAS, | : | |
| | : | |
| Appellant | : | No. 1196 WDA 2012 |

Appeal from the Judgment of Sentence entered on July 19, 2012
in the Court of Common Pleas of Fayette County,
Criminal Division, No. CP-26-CR-0000673-2011

BEFORE: BENDER, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: April 29, 2013

Jonathan Thomas (“Thomas”) appeals from the judgment of sentence imposed after he was convicted of robbery, possessing an instrument of crime, theft by unlawful taking, recklessly endangering another person, and simple assault.¹ We affirm.

The trial court set forth the pertinent facts of this case in its “Statement in Lieu of Opinion,” which we adopt for the purpose of this appeal. **See** Statement in Lieu of Opinion, 9/5/12, at 1-5. The trial court sentenced Thomas to a prison term of seven to fourteen years for his conviction of robbery. The trial court imposed no further penalty on the remaining convictions.

¹ 18 Pa.C.S.A. §§ 3701, 907, 3921, 2705, 2701.

Thomas raises the following issues on appeal:

1. Should the evidence obtained from the search warrant have been excluded since said evidence was acquired from 9 Furlong Court and not 9 MacArthur Terrace as listed in the affidavit of the search warrant?
2. Should the recorded statement of [Thomas] have been suppressed since it was not voluntarily, knowingly and/or intelligently given since [Thomas] was under the influence of various controlled substances?

Brief for Appellant at 7.

Thomas first contends that the evidence obtained upon execution of the search warrant should have been suppressed. Brief for Appellant at 10-11. Thomas asserts that the police lacked probable cause to search the residence at issue because the address of the residence searched was not listed in the application for search warrant. *Id.* at 10. Specifically, Thomas contends that the police searched the residence at "9 Furlong Court," not "9 MacArthur Terrace," as indicated in the affidavit of probable cause. *Id.* Therefore, Thomas contends that the search warrant requirement of particularity was violated. *Id.* *See* Pa.R.Crim.P. 206 (providing that an application for a search warrant shall be supported by a written affidavit, which shall "name or describe with particularity the person or place to be searched ...").

An appellate court's 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. Since the prosecution prevailed in the suppression court, we 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 factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Stevenson, 894 A.2d 759, 769 (Pa. Super. 2006) (citation omitted). “[I]n reviewing [a] suppression claim, we are bound by the record as created at the suppression hearing.” **Commonwealth v. Ventura**, 975 A.2d 1128, 1136 (Pa. Super. 2009).

Search warrants should be read “in a common sense fashion and should not be invalidated by hypertechnical interpretations.” **Commonwealth v. Belenky**, 777 A.2d 483, 486 (Pa. Super. 2001). “[A] practical, common-sense approach should be taken in determining whether the place to be searched is specified with sufficient particularity.” **Id.**

[A] warrant must describe the place to be searched and the items to be seized with specificity, and the warrant must be supported by probable cause. The place to be searched must be described “precise[ly] enough to enable the executing officer to ascertain and identify, with reasonable effort, the place intended, and where probable cause exists to support the search of the area so designated, a warrant will not fail for lack of particularity.”

Id. (citation omitted).

In the instant case, the search warrant application listed the place to be searched as “# 9 Macarthur Terrace, Uniontown, PA ..., a brown brick multi-unit apartment.” Application for Search Warrant, 1/25/11. In the Affidavit of Probable Cause, Trooper Yarosh averred that he spoke with

Thomas's girlfriend, Tara Lewis ("Lewis"), at "9 MacArthur Terrace, Uniontown" *Id.*

At the suppression hearing, State Trooper Kiprian Yarosh testified that, on January 24, 2011, he responded to the scene, where he interviewed Martha Newhouse, the Dairy Mart store clerk. *Id.* at 19. Trooper Yarosh also viewed a surveillance video of the incident. *Id.* at 20. Trooper Yarosh testified that other officers, after detaining Thomas, had indicated that Thomas stated that he lived at 9 MacArthur Terrace with his girlfriend, Lewis. *Id.* at 24, 26. Trooper Yarosh testified that he obtained a search warrant for, and searched the residence at 9 MacArthur Terrace, where he found incriminating evidence. *Id.* at 26-27.

Trooper Yarosh testified as follows as to the address at which the search warrant was executed:

Q. [The Commonwealth]: Did [Thomas] ever make a statement that his girlfriend lives at 9 Furlong Court and not 9 MacArthur Terrace?

A. [Trooper Yarosh]: Well, ... yeah, he did say, ... that she lived at ... 9 Furlong but he said it was over in Bier[er]wood, [sic] went over there and 9 is on MacArthur Terrace.

Q. So there is no nine?

A. And then I don't exactly know if it was me that asked him: Are you sure it was 9 Furlong or 9 MacArthur or what?

Q. Well, let me ask you this: Was the search warrant correctly served on 9 MacArthur Terrace or was it served somewhere else?

A. [W]hen he informed me that his girlfriend was Tara, I asked him the last name and he said Tara Lewis. We ... found out that the actual address on her driver's license is 22 Farragut Street. We asked ... him again where she lived and he said it was over at 9 Furlong and then he said MacArthur. At 9 MacArthur is where Tara Lewis, his girlfriend, lived.

Q. But the search warrant says: 9 MacArthur Terrace. What I'm asking is: Is that where you served the search warrant and obtained these items from?

A. Yes.

Q. You didn't have a search warrant for 9 MacArthur Terrace and search 60 Main Street or something like that?

A. No, sir.

Q. And there is a number 9 MacArthur Terrace?

A. That's correct.

Id. at 38-39.

We conclude that the evidence supported the trial court's decision to deny the Motion to suppress. The evidence demonstrated that the location searched was the location that the police officers intended to search, *i.e.*, the residence where Lewis resided. Thus, the error in the address listed did not invalidate the search warrant. ***See Belenky***, 777 A.2d at 487 (holding that an incorrect address did not invalidate the search warrant where the police did not go to the "wrong" location, but simply did not properly describe the "right" location, and only the appropriate premises were searched); ***accord Commonwealth v. Washington***, 858 A.2d 1255, 1258 (Pa. Super. 2004) (holding that error in address to be searched did not

invalidate the search warrant where the evidence showed that there was no ambiguity about the location of the residence to be searched).

Thomas next contends that the trial court erred by failing to suppress his recorded statement because Thomas was under the influence of various controlled substances at the time he gave this statement. Brief for Appellant at 12. Thomas asserts that his recorded statement therefore was not given knowingly, voluntarily and intelligently. *Id.*

“A confession obtained during a custodial interrogation is admissible where the accused’s right to remain silent and right to counsel have been explained and the accused has knowingly and voluntarily waived those rights.” *Commonwealth v. Parker*, 847 A.2d 745, 748-49 (Pa. Super. 2004). “The test for determining the voluntariness of a confession and whether an accused knowingly waived his or her rights looks to the totality of the circumstances surrounding the giving of the confession.” *Id.* “The Commonwealth bears the burden of establishing whether a defendant knowingly and voluntarily waived his *Miranda*^[2] rights.” *Id.*

[T]he law in Pennsylvania pertaining to the waiver of *Miranda* warnings while intoxicated is well-settled:

The fact that an accused has been drinking does not automatically invalidate his subsequent incriminating statements. The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it....

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

“[W]hen evidence of impairment is present, it is for the suppression court to decide whether the Commonwealth has established by a preponderance of the evidence that the suspect nonetheless had sufficient cognitive awareness to understand the *Miranda* warnings and to choose to waive his rights.”

Ventura, 975 A.2d at 1137-38 (citations and footnote omitted).

In the instant case, at the suppression hearing, Trooper Yarosh testified that he spoke to Thomas sometime after 1:19 a.m., while Thomas was in the back of the patrol vehicle.³ N.T., 9/12/11, at 23. Trooper Yarosh asked Thomas if he was “doing alright, [and] if he needed anything.” *Id.* Trooper Yarosh told Thomas that he was not under arrest, but that he was being detained. *Id.* Trooper Yarosh observed that Thomas had a strong odor of alcohol on his person. *Id.*

Trooper Yarosh testified that he spoke to Thomas again at 2:05 a.m. while Thomas was still seated in the back of the patrol car. *Id.* at 25. Trooper Yarosh read Thomas his constitutional rights and *Miranda* warnings. *Id.* Trooper Yarosh testified that Thomas was not under the influence of alcohol to the extent that it rendered him incapable of talking to him or understanding what Trooper Yarosh was saying. *Id.* Trooper Yarosh indicated that Thomas “understood exactly what was going on ... [and h]e seemed very lucid.” *Id.*

³ Officer Michael Bittner had detained Thomas about a quarter of a mile from the Dairy Mart, and had handcuffed Thomas and placed him in the rear of a patrol car. N.T., 9/12/11, at 4.

Trooper Yarosh spoke to Thomas again at the police barracks as Trooper Yarosh was typing the application for a search warrant. *Id.* at 28. Thomas indicated that he did not wish to say anything at that time. *Id.* After the search warrant was executed and incriminating evidence was recovered, while Trooper Yarosh was typing the criminal arrest warrant, another trooper indicated that Thomas wanted to talk to Trooper Yarosh. *Id.* at 29. Trooper Yarosh had Thomas sit next to him. *Id.* Trooper Yarosh advised Thomas of his *Miranda* rights at 11:22 a.m. on January 25, 2011, and Thomas signed a waiver of rights form. *Id.* Thomas then spoke to Trooper Yarosh and another trooper and gave a verbal taped statement admitting the crime. *Id.*

Trooper Yarosh testified that he did not offer Thomas any promises or make any threats to get Thomas to make an incriminating statement. *Id.* at 32. The trooper stated that, before Thomas made his statement, Trooper Yarosh told him that he didn't have to make it, but that he still would be arrested. *Id.* Trooper Yarosh told Thomas that, if he was honest, Trooper Yarosh would tell the district magistrate that Thomas had been very cooperative. *Id.* at 40.

At the suppression hearing, Thomas testified that, in the late hours of January 24, 2011, he consumed 40 ounces of malt liquor and 10 to 15 Xanax pills over an undetermined period of time prior to the crime. *Id.* at 53. Thomas stated that he remembered talking to Trooper Yarosh while he was seated in the back of the police car. *Id.* at 55. He remembered that

Trooper Yarosh told him that he was not being arrested, just detained. *Id.* He stated that he was “somewhat” able to understand the trooper. *Id.* at 56. Thomas stated that he felt “weird” after consuming the alcohol and drugs. *Id.* Thomas testified that he did not remember having a conversation with Trooper Yarosh at the police barracks. *Id.* Thomas admitted that the “weird” feeling he had after consuming the alcohol and drugs was not present at 11:00 a.m. the next morning, at the time he gave his statement. *Id.* at 61.

The testimony of Trooper Yarosh at the suppression hearing established that Thomas had “sufficient cognitive awareness to understand the *Miranda* warnings and to choose to waive his rights.” *See Ventura*, 975 A.2d at 1137-38. Trooper Yarosh testified that, although Thomas smelled of alcohol, Thomas was not under the influence to the extent that it rendered him incapable of talking or understanding Trooper Yarosh. N.T., 9/12/11, at 25. Trooper Yarosh further testified that Thomas seemed “very lucid.” *Id.* The suppression court found Trooper Yarosh’s testimony to be credible and we will not disturb the credibility determination of the suppression court. *See Ventura*, 975 A.2d at 1138-39. Thus, based on our standard of review, we conclude that the trial court did not err in denying Thomas’s Motion to suppress his recorded statement.

Judgment of sentence affirmed.

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9/7/12

J- 503039-13

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

CRIMINAL DIVISION

v.

JONATHAN THOMAS,

No. 673 of 2011

Appellant.

STATEMENT IN LIEU OF OPINION

LESKINEN, J.,

AND NOW, this 5th day of September, 2012, this Court writes in response to Defendant Jonathan Thomas' [hereinafter "Thomas" or "Defendant"] "Concise Issue[s]" of appeal, filed on August 6, 2012. A jury convicted the Defendant on July 10, 2012, before the undersigned, of robbery; possessing instrument of crime; theft by unlawful taking (more than \$50); recklessly endangering another person; and simple assault.

The two issues raised on appeal are:

1. "Should the evidence obtained from the search warrant have been excluded since said evidence was acquired from 9 Furlong Court and not 9 MacArthur Terrace as listed in the affidavit of the search warrant?"
2. Should the recorded statement of the Defendant have been suppressed since it was not voluntarily, knowingly and/or intelligently given since the Defendant was under the influence of various controlled sub[s]tances?"

The relevant facts are as follows: Martha Jean Newhouse, a former Dairy Mart employee, testified that on January 24, 2011, Mr. Thomas entered the Dairy Mart store

on Dixon Boulevard at approximately 11:45 p.m. (See Notes of Transcript (N.T.), pp. 13-16.) Mr. Thomas "grabbed Todd [Robinson] and put a knife to his throat." *Id.* at 16. At that point, Mr. Thomas directed, "No sudden moves," and demanded all of the money in the store, including that in the safe. *Id.*

Ms. Newhouse gave Mr. Thomas the money from the cash register, which totaled one-hundred and twenty-six dollars in tens, fives, and ones, but was unable to access the safe. *Id.* at 17. Mr. Thomas then demanded Newport cigarettes. *Id.* at 18. Ms. Newhouse complied, and to her knowledge, Mr. Thomas left the store with three individual packs and two cartons, one of kings and one of 100s, all of which were marked with a specific tax stamp. *Id.* at 19-20.

Ms. Newhouse also testified that the person who came into the store and took the money and cigarettes was wearing blue jeans, boots, a white hoodie, an Ace bandage around his face, and glasses. *Id.* at 20-21. Horatio James Gaskill, also present in the Dairy Mart when these events took place, corroborated Ms. Newhouse's testimony regarding the events. *Id.* at 34-35. Mr. Gaskill was also able to corroborate that the Defendant was wearing a hoodie, an Ace bandage, sunglasses, jeans, and boots. *Id.* at 35-36.

Jeremy Brady, another patron of Dairy Mart during the relevant time, testified that a man entered the store wearing a white hoodie, an Ace bandage, sunglasses, boots, and jeans. *Id.* at 44, 45. He further testified that the Defendant held Mr. Robinson at knifepoint and demanded cash and Newport cigarettes. *Id.* Todd Robinson, who was held at knifepoint, testified similarly about how the events transpired and what the Defendant was wearing. *Id.* at 51-52. Mr. Robinson also testified that the person who

held him at knifepoint was only slightly bigger than his own 5'7", 160-pound stature. *Id.* at 53.¹

Uniontown City Patrolman Michael Bittner [hereinafter "Bittner"] became involved with this investigation a short while after the events occurred. *Id.* at 65. Based on the 9-1-1 dispatch description and the time of night, Patrolman Bittner was able to locate and make contact with Mr. Thomas approximately one hour after the events occurred at the Dairy Mart. *Id.* at 66-68. Mr. Thomas was walking along a road, within a few blocks of the Dairy Mart and his believed residence. *Id.* Mr. Thomas was wearing a white hooded sweatshirt and appeared to have white or light-colored skin, so Patrolman Bittner decided to verify the man's identity. *Id.* at 68.

Mr. Thomas had in his possession Newport cigarettes and one-hundred and twenty-one dollars in small bills. *Id.* at 69. Mr. Thomas also gave his address to Patrolman Bittner as 9 MacArthur Terrace, Uniontown, and stated that he lived there with Tara Lewis. *Id.* at 71.

State Trooper Kiprian Yarosh [hereinafter "Yarosh"] first encountered Defendant at approximately 2:05 a.m. when Defendant was sitting in the back of a police patrol car at the Dairy Mart. *Id.* at 102. He read Mr. Thomas his Miranda rights because Mr. Thomas was being detained. *Id.* at 103. Trooper Yarosh also observed that Mr. Thomas smelled of alcohol—indicating that either Mr. Thomas consumed a large amount of alcohol or that he had recently consumed any amount of alcohol. *Id.* at 126-27.

¹ State Trooper Kiprian Yarosh testified that Defendant Thomas' "height is estimated at 5 foot 9; weight is approximately 175, 180 pounds." N.T. at 96.

When a search warrant was obtained, the warrant listed the place to be searched as 9 MacArthur Terrace and stated that it was a brown brick multi-unit apartment. *Id.* at 87-88. There was confusion about this exact address and whether it should have been stated as 9 Furlong Court instead. Ms. Lewis testified that her address, at that time, was 9 Furlong Court, and that there was no 9 MacArthur Terrace. *Id.* at 88. Patrolman Bittner testified, however, that “[e]verybody referred to it that night as 9 MacArthur.” *Id.* at 76. Trooper Yarosh testified that Mr. Thomas relayed his address as 9 MacArthur Terrace, in the Biererwood Acres housing project. *Id.* at 91.

Despite any confusion, Trooper Yarosh testified that he intended to search Mr. Thomas’ residence; that he believed the residence he went to, for the purpose of searching, was 9 MacArthur Terrace; and that based on the information he received, the place that he went to was the one he intended to search. *Id.* at 91-93. This is all further substantiated by the fact that when the police arrived at what was believed to be 9 MacArthur Terrace, Ms. Lewis was at that residence.² *Id.* at 93-94.

The prepared warrant listed Newport cigarettes, an Ace bandage, a white hooded sweatshirt, blue jeans, brown boots, sunglasses, and a knit hat or something similar in nature. *Id.* at 109. These items were located within the residence, in the kitchen and living room.³ *Id.* at 111-16.

After the search, Trooper Yarosh returned to the state police station, where he met with Mr. Thomas. *Id.* at 118. Trooper Yarosh reread Miranda warnings to Mr.

² It seems that there are two buildings in close proximity, one labeled with a sign that says Furlong Court and one labeled with a sign that says MacArthur Terrace. Furlong Court is comprised of odd-numbered units, and MacArthur Terrace is comprised of even-numbered units. N.T. at 147. The residence that was searched was marked with a 9, but was apparently in the block of units labeled as Furlong Court.

³ The cigarettes that were located in the residence were the described Newports, including one carton of kings and one carton of 100s. The boxes were marked with the same tax stamps that were testified to by Ms. Newhouse. N.T. at 59-60.

Thomas, wherein Mr. Thomas signed the paper containing the Miranda warnings. *Id.* at 118-19. Directly after, at approximately 11:20 a.m. on January 25, 2011, Mr. Thomas gave a voluntary statement, which was recorded. *Id.* at 119, 128. The statement was played for the jury, and in it, Trooper Scott Krofcheck first identifies Jonathan Thomas, where he says,

Q "All right. My name is Trooper Scott Krofcheck of the Pennsylvania State Police. I'm in the presence of Jonathan Anthony Thomas. Mr. Thomas has agreed to give a statement in regards to an incident that occurred at the Dairy Mart in South Union Township. This occurred on January 24th at approximately 11:45 p.m. Mr. Thomas is in my presence. Mr. Thomas (inaudible) and has agreed to make a statement. Is that correct, Mr. Thomas?"

A "Yes."

Id. at 134. Within his statement, Mr. Thomas says that he used a knife to take cigarettes and cash from the Dairy Mart in South Union Township. *Id.* at 135, 136. Mr. Thomas says that he was wearing blue jeans, a red shirt, a white hoodie, and an Ace bandage. *Id.* at 135. Mr. Thomas also says that he put the cigarettes at Tara [Lewis]'s house, and that he is sorry. *Id.* at 136, 137.

In consideration of the evidence presented to the jury, all of which they were free to believe or disbelieve, and the jury's conclusion and decision to convict, this Court finds that Defendant Thomas' conviction was proper.