

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JOSEPH WESLEY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1259 EDA 2012

Appeal from the Judgment of Sentence March 23, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0000812-2010

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

Filed: February 5, 2013

Joseph Wesley appeals from his judgment of sentence, entered in the Court of Common Pleas of Delaware County, after being found guilty, by a jury, of possession of a controlled substance with the intent to deliver.¹ On appeal, Wesley contends that the trial court should have suppressed the drugs recovered from his vehicle where the police seized his car without a warrant or probable cause and there was no reasonable suspicion to support the canine search that led to car's impoundment and subsequent interior search.² After careful review, we affirm.

* Retired Senior Judge assigned to the Superior Court.

¹ 35 P.S. § 780-113(a)(30).

² Although Wesley's Pa.R.A.P. 1925(b) Statement raises an issue regarding whether application of the mandatory minimum sentence under 18 Pa.C.S.A. (Footnote Continued Next Page)

At Wesley's suppression hearing, Upper Darby Township Police Officer Anthony Capodanno testified that while on patrol in a high crime, high drug area at 2:20 in the morning, he observed a group of men and women "hanging around" in a 7-11 convenience store parking lot. When the officer drove past the lot ten minutes later, he heard a female screaming and two individuals walking away from the area. Officer Capodanno investigated the situation, pulling up next to two women in the lot. The officer noticed a wig on the ground in the middle of the lot and one of the women, who was crying, informed the officer that she had just been assaulted. The woman then told the officer that her attacker was a friend of one of the individuals walking away from the parking lot, one of whom was Wesley. The women told the officer that the individuals walking away possessed guns and "dope and coke" and that drugs were hidden in compartments in Wesley's vehicle. N.T. Suppression Hearing, 12/22/2010, at 29, 30. Officer Capodanno broadcast this information over his police radio.

Based upon the information the women relayed to Officer Capodanno, the officer drove 20 yards to the area where the male individuals were leaving the lot. The officer asked the men for identification and then patted them down for weapons; no weapons were recovered. The defendant,

(Footnote Continued) _____

§ 6317 (Drug-free school zones) was proper, he has not briefed this issue on appeal. Thus, it is waived. **See** Pa.R.A.P. 2116(a).

whom the officer recognized from a prior shooting incident in the same neighborhood about a year earlier, told the officer that his car was parked on Copley Road. *Id.* at 26. The officer located the car, ran the tag and verified that it belonged to Wesley. *Id.* at 27. Wesley told the officer that he had been to a party at a Holiday Inn in West Chester where he met the woman allegedly assaulted; he told the officer that he drove the women from the party back to Upper Darby. *Id.* at 28. When Wesley indicated that he had been drinking that evening, Officer Capodanno administered Wesley a breathalyzer test; although the test yielded he had a BAC within the legal limit, the officer suggested that Wesley not drive home.³ *Id.* at 37. Wesley left the parking lot on foot. *Id.*

After Officer Capodanno radioed the information over the police radio, a fellow officer, Officer Sprowell,⁴ arrived on the scene with his canine, a certified narcotics detection dog, Masai. Approximately two to three minutes after the women made the statements regarding the drugs in Wesley's car to the police, Masai walked around the exterior of Wesley's car two times and indicated twice to the officer that a controlled substance was

³ Although an officer asked Wesley if he would agree to a consensual search of his vehicle, he never gave the officer a clear answer. N.T. Suppression Hearing, 12/22/2010, at 33. Therefore, no interior search of the car was performed at the scene. Affidavit of Probable Cause, 10/8/2009, at 2.

⁴ Officer Sprowell is a trained and certified narcotics dog handler. N.T. Suppression Hearing, 12/22/2010, at 47.

present in the vehicle near the rear passenger door. *Id.* at 41. At that point, Wesley's car was seized and towed back to the Upper Darby Township Police Department, pending the issuance of a search warrant. Later that day, a district judge issued a search warrant for Wesley's car; the search uncovered two containers with false bottoms in the center console, along with a box of sandwich baggies. Additionally, a digital scale, a bag containing different sized and colored plastic bags, and a large bag of narcotics were found behind a void in the center console. Laboratory tests determined that a total of 33.1 grams of cocaine, .1 grams of Ecstasy and 5.2 grams of Percocet were recovered from Wesley's vehicle.

When reviewing an order denying a motion to suppress evidence, we must determine whether the trial court's factual findings are supported by the evidence of record. If the evidence supports the trial court's findings, we are bound by them and may reverse only if the legal conclusions drawn therefrom are erroneous. *Commonwealth v. Blair*, 860 A.2d 567, 571 (Pa. Super. 2004).

In *Commonwealth v. Rogers*, 849 A.2d 1185 (Pa. 2004), our Supreme Court made the following observation regarding the level of suspicion needed prior to conducting canine sniff searches:

Pursuant to the Constitution of the Commonwealth of Pennsylvania, a canine sniff is a search. Yet, this type of search is not treated like other searches as it is inherently less intrusive upon an individual's privacy than other searches. This particular surveillance technique amounts to a relatively minor intrusion upon privacy, much less than is involved, say, in the physical entry and ransacking of a house in an effort to find a quantity of

narcotics. Thus, there need not be probable cause to conduct a canine search of a place; rather, the police need merely have reasonable suspicion for believing that narcotics would be found in a place subject to a canine sniff.

Id. at 1190. A narcotics detection dog may test for the presence of narcotics where “[(1)] the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and [(2)] the police are lawfully present in the place where the canine sniff is conducted.” ***Commonwealth v. Johnston***, 530 A.2d 74, 79 (Pa. 1987).

Here, Wesley contends that the investigating officers conducted the canine exterior search of his vehicle based upon a mere presumption, not the requisite reasonable suspicion, and that the canine sniff then led to the resultant search warrant authorizing the interior search of his car and discovery of contraband. We disagree.

Based upon a totality of the circumstances, we find that it was reasonable for the officers to suspect that Wesley may have been or was engaging in criminal conduct – more specifically, possessing drugs in his car. Officer Capodanno, an experienced police officer heard a woman screaming in the 7-11 parking lot. That woman told the officer that she had been with Wesley earlier that night at a party, that he had driven her to Upper Darby in his car and that Wesley’s car contained drugs. Officer Sproull responded to his fellow police officer’s call and arrived on the scene, a high drug/crime area, only minutes after the information about the presence of drugs in the car had been relayed to Officer Capodanno and disseminated over the police radio. Prior to the dog sniff, the officers had confirmed that the car was

Wesley's. In addition, Wesley's story about meeting the women at a West Chester party that evening was corroborated by the woman's story she gave to Officer Capodanno. ***Commonwealth v. Cook***, 735 A.2d 673 (Pa. 1999) (reasonable suspicion does not require that activity in question be unquestionably criminal before officer may investigate further; test is that it requires suspicion of criminal conduct that is reasonable based upon facts in light of officer's experience).

Here, the officers articulated reasonable grounds for believing that drugs may have been located in Wesley's vehicle and the officers were lawfully present at the scene, a public parking lot of a 7-11 convenience store. ***Johnston, supra***. Moreover, once the police detection dog positively indicated the presence of drugs in the car, probable cause existed for a search warrant to issue for the interior of the car. Because the trial court's findings are supported by the evidence of record, we are bound by them and must affirm. ***Blair, supra***.

Judgment of sentence affirmed.