NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANTHONY C. HIRSCHBUHL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1276 EDA 2013

Appeal from the Judgment of Sentence April 4, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0007378-2012

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

MEMORANDUM BY GANTMAN, J.: **FILED NOVEMBER 25, 2013**

Appellant, Anthony C. Hirschbuhl, appeals from the judgment of sentence entered in the Delaware County Court of Common Pleas, following his bench trial convictions for possession of a small amount of marijuana and driving while operating privilege is suspended or revoked.[1] For the following reasons, we vacate the judgment of sentence.

The relevant facts and procedural history of this appeal are as follows. On October 17, 2012, Haverford Township Police Officer Matthew Murray was on patrol at approximately 3:15 a.m. when he observed a Cadillac sedan traveling northbound on Darby Road. Officer Murray followed the Cadillac and watched it drift out of the right lane on two occasions, once to

---

[1] 35 P.S. § 780-113(a)(31), 75 Pa.C.S.A. § 1543, respectively.

the left and once to the right. After drifting, the Cadillac made a right turn onto Brookline Boulevard. Officer Murray concluded the Cadillac had committed a Motor Vehicle Code violation under 75 Pa.C.S.A. § 3309(1), driving on roadways laned for traffic, and he conducted a traffic stop on that basis.

Officer Murray exited the police cruiser and approached the driver's side of the Cadillac. Appellant occupied the driver's seat, and there was a female passenger in the vehicle. Officer Murray asked Appellant for his license and documentation for the vehicle. Appellant, however, could not produce a license, and he informed the officer that he had a learner's permit. Officer Murray conducted a computer check of Appellant's name and date of birth, which revealed an outstanding arrest warrant. Further, Appellant's driver's license was suspended. Consequently, Officer Murray removed Appellant from the vehicle, arrested him, and placed him in the rear of the police cruiser.

Officer Murray also spoke with the passenger, removed her from the vehicle, and discovered that the vehicle belonged to a third party. Officer Murray decided to have the car towed away from the scene. Officer Murray contacted a towing company and performed an inventory search. While looking at the interior of the vehicle, Officer Murray noticed a green, leafy substance in the center console area. Subsequent analysis confirmed that the substance was marijuana.

On November 21, 2012, the Commonwealth filed a criminal information charging Appellant with possession of a small amount of marijuana and driving with a suspended license.[2] On April 4, 2013, Appellant filed a suppression motion. In it, Appellant argued the police stopped the Cadillac "without probable cause to believe that a crime [had] been or was being committed." (Suppression Motion, dated 4/4/13, at 1). Appellant further argued the police conducted a vehicle search that violated his rights under the state and federal constitutions. Appellant concluded the "items seized [should] be prohibited from use at trial." (***Id.***) Also on April 4, 2013, the court conducted a hearing and denied the suppression motion.

That same day, Appellant proceeded to a bench trial, and the court found him guilty of possession of a small amount of marijuana and driving with a suspended license. Immediately following trial, the court sentenced Appellant to fifteen (15) to thirty (30) days' imprisonment, with credit for time served. The court also granted immediate parole. Appellant did not file post-sentence motions.

Appellant timely filed a notice of appeal on May 2, 2013. On May 3, 2013, the court ordered Appellant to file a concise statement of errors

---

[2] On October 17, 2012, Officer Murray prepared a criminal complaint, which included one count of the summary traffic offense of driving on roadways laned for traffic. The Commonwealth, however, did not include this charge in the subsequent criminal information.

complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on May 22, 2013.

Appellant now raises two issues for our review:

> WHETHER THE COURT ERRED WHEN IT REFUSED TO SUPPRESS THE FRUITS OF THE AUTOMOBILE STOP AND SEARCH HEREIN, WHICH WERE CONDUCTED WITHOUT LEGAL JUSTIFICATION AND IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION?
>
> WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR POSSESSION OF A SMALL AMOUNT OF MARIJUANA FOR PERSONAL USE, WHERE THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT [APPELLANT] ACTUALLY OR CONSTRUCTIVELY POSSESSED THE MARIJUANA IN QUESTION?

(Appellant's Brief at 5).

In his first issue, Appellant contends he did not violate the Motor Vehicle Code prior to the traffic stop. Appellant maintains he swerved on two occasions to avoid automobiles parked on the right side of the road. Appellant also emphasizes that the Commonwealth did not prosecute him for any Motor Vehicle Code violations committed prior to the traffic stop. Under these circumstances, Appellant insists Officer Murray did not articulate specific facts demonstrating probable cause of a Motor Vehicle Code violation, and the traffic stop was illegal.

Additionally, Appellant complains that the officer conducted an illegal, warrantless vehicle search. Appellant argues the search did not qualify as

an exception to the warrant requirement, because Officer Murray did not possess probable cause of criminal activity or exigent circumstances. Appellant further argues that the officer did not conduct an inventory search, because the search "was conducted as part of a criminal investigation" and it was "unclear if [the police] actually checked for valuables and made an inventory list." (Appellant's Brief at 19). Appellant concludes the court should have granted his suppression motion. We agree.

We review the denial of a suppression motion as follows:

> 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).

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). "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). "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)).

"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 driving on roadways laned for traffic as follows:

> **§ 3309. Driving on roadways laned for traffic**
>
> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:
>
> > **(1) Driving within single lane.—**A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.
>
> * * *

75 Pa.C.S.A. § 3309(1). "Whether an officer possesses probable cause to stop a vehicle for a violation of this section depends largely upon on whether a driver's movement from his lane is done safely." ***Commonwealth v. Cook***, 865 A.2d 869, 874 (Pa.Super. 2004), *appeal denied*, 584 Pa. 672, 880 A.2d 1236 (2005) (citing ***Gleason, supra***).

In ***Gleason***, the arresting officer followed the defendant on a four-lane divided highway for a distance of approximately one-quarter mile in the early morning hours. The officer observed the defendant cross the solid fog line on the right side of the road on two or three occasions. Even though there were no other vehicles on the road and the defendant's driving did not constitute a safety hazard, the officer executed a stop. The trial court initially granted the defendant's motion to suppress evidence, based on an illegal traffic stop; this Court reversed. Our Supreme Court ultimately reinstated the trial court's decision:

> [T]he Superior Court erred in holding that [the officer] was justified in stopping [the defendant's] vehicle under the facts of this case. As noted previously, the [Superior Court] conceded that "the lack of any evidence at the suppression hearing that [the defendant's] driving created a safety hazard leads us to agree with the trial court that there was insufficient evidence to support a Section 3309(1) violation." In finding the stop of [the defendant] to be justified nevertheless, the [Superior Court] lowered the standard necessary for a proper vehicle stop….

Id. at 121, 785 A.2d at 989 (internal citation omitted).

Instantly, Officer Murray testified regarding Appellant's driving as follows:

> [OFFICER]: I was traveling north on Darby Road when I observed a blue in color Cadillac sedan traveling in the same direction. I observed that vehicle drift over the lane lines on two occasions, as it proceeded north on Darby Road.
>
> [COMMONWEALTH]: And is this a—when you say drifted over the lane, is that the center lane or the side lane?

> [OFFICER]: Both. Well, he traveled—drifted once over to the left, and once over to the right.
>
> * * *
>
> [COMMONWEALTH]: Okay. And you said you saw the car travel over the lanes on two occasions.
>
> [OFFICER]: Yes.
>
> [COMMONWEALTH]: And so then what did you do?
>
> [OFFICER]: At that time the vehicle had made the right turn onto Brookline Boulevard. I then activated my emergency lights and stopped the vehicle on Brookline Boulevard.

(***See*** N.T. Suppression, 4/4/13, at 6-7.) Officer Murray also confirmed that he prepared the criminal complaint against Appellant, charging him with a violation of Section 3309. (***Id.*** at 10).

On cross-examination, defense counsel questioned the officer about other vehicles parked on the side of the road:

> [COUNSEL]: What lane was my client's vehicle traveling in, the right lane or left lane?
>
> [OFFICER]: I believe…he was originally in the right lane.
>
> [COUNSEL]: As I'm going north on Darby, are various cars parked to the right of the right lane on the shoulder?
>
> [OFFICER]: In areas, yes. And in other areas, no.
>
> [COUNSEL]: At times you will see cars veer a little bit toward the center or the left lane because of those cars parked in the right. Is that accurate?

> [OFFICER]: I would say no. There are, at times, vehicles parked on the side, but there's sufficient area to the side of the road to keep those vehicles out of the lane and not be in the way.

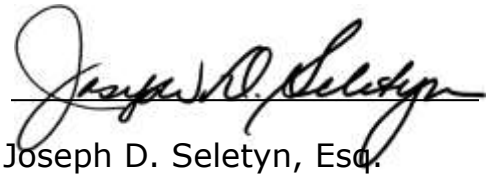
(***Id.*** at 12-13). Nevertheless, the officer's testimony did not establish whether vehicles were parked on the portion of Darby Road where Appellant drifted out of his lane.

Here, Officer Murray did not explain how much of Appellant's vehicle drifted out of the lane. The officer did not state how long Appellant remained outside the lane before correcting his course. The officer failed to indicate whether other vehicles or pedestrians were present on the road and whether Appellant's actions constituted a safety hazard. The officer also neglected to mention how long he followed Appellant before conducting the traffic stop. Absent more, Officer Murray's observations did not establish probable cause to believe that Appellant had violated Section 3309(1). ***See Gleason, supra***. ***Compare Cook, supra*** at 874 (holding officer had probable cause to believe defendant violated Section 3309(1) where officer received call from radio dispatch stating off-duty trooper had observed vehicle being driven in erratic manner, officer watched defendant drive over right fog line three times by half of vehicle's width, defendant returned to lane of travel "in an overly anxious and unsafe manner by jerking his car" back into lane, and officer observed defendant for distance of one mile). Here, the evidence obtained as a result of an illegal traffic stop should have been suppressed. ***See Williams, supra***. Based upon the foregoing, we

reverse the suppression order and Appellant's convictions, vacate the judgment of sentence, and dismiss the charges against Appellant.[3]

Judgment of sentence vacated; Appellant is discharged. Jurisdiction is relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013

[3] Due to our disposition, we do not address Appellant's second claim on appeal.