NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
EDWIN ALBERT PRECHTL,	:	
Appellant	:	No. 1326 MDA 2012

Appeal from the Judgment of Sentence June 28, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division No(s).: CP-41-CR-0000612-2011

BEFORE: BENDER, SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 24, 2013**

Appellant, Edwin Albert Prechtl, appeals from the judgment of sentence entered in the Lycoming County Court of Common pleas following a non-jury trial, in which he was found guilty of driving under the influence of alcohol, an ungraded misdemeanor.[1] Appellant challenges the trial court's denial of his motion to suppress evidence and the sufficiency of the evidence.[2] We affirm.

The trial court summarized the relevant factual and procedural history:

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* Former Justice specially assigned to the Superior Court.

[1] 75 Pa.C.S. § 3802(b).

[2] The Commonwealth indicated by letter to this Court that it would not file an appellee's brief.

> On April 20, 2011 at approximately 2:30 a.m., Trooper Paul McGee [ ] of the Pennsylvania State Police observed a vehicle with its headlights on and its engine running parked in a shopping plaza. McGee was concerned that someone was in need of assistance or that criminal activity was being directed towards one of the stores nearby. McGee then drove his marked police vehicle behind the vehicle and approached. McGee first observed [Appellant] in a reclined position in the driver's seat and knocked on the window. [Appellant] rolled down the window after a few moments of confusion and McGee proceeded to talk to [Appellant]. During the conversation McGee noticed that [Appellant] had red eyes, slurred speech, and a strong odor of alcohol emanating from his person. McGee asked [Appellant] to perform field sobriety tests. [Appellant] initially agreed but then eventually declined. [Appellant] was then arrested and transported to the DUI Center at the Williamsport Hospital and Medical Center [where] a blood sample was collected and revealed that [Appellant] had a blood alcohol content (BAC) of 0.126%. [Appellant] was charged with Driving Under the Influence of Alcohol or Controlled Substance (1st) and Driving Under the Influence With Highest Rate of Alcohol (1st). On March 27, 2012, the Information was amended for Count 2 to be Driving Under the Influence of Alcohol, 75 Pa.C.S.A. § 3802.
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> On [June 28, 2011], [Appellant] filed a Motion to Suppress. [Appellant] alleged that McGee did not have reasonable suspicion to initiate a vehicle stop. [The court held a hearing on September 1, 2011 and Appellant filed his brief in support on September 8, 2011.] On September 23, 2011, the [trial court] denied [Appellant's] Motion to Suppress finding that the interaction was a mere encounter.

Trial Ct. Op., 11/3/12, at 1-2.

The non-jury was held on March 27, 2012. The trial court summarized the evidence presented at trial:

> [Appellant] argued that he drove to the Loyal Plaza mall and parked his vehicle, crossed a four lane road, and met

> friends at the Harley Davidson store. The friends then drove [Appellant] to a bar where he proceeded to drink. His friends then drove him back to his vehicle at the Loyal Plaza mall where he slept in his vehicle with the engine and lights on, using a keyless remote. [Appellant had an auto mechanic who installs remote vehicle starters testify at trial as an expert witness.] The [trial court] found [Appellant's] testimony not to be credible and found him guilty based upon the location of his vehicle and the statements of the trooper in combination with [Appellant's] own inconsistent statements, in which the [trial court] found likely and credible. The [trial court] found beyond [a] reasonable doubt that [Appellant] was operating his vehicle under the influence of alcohol to a degree which would have rendered him incapable of safe driving. [Appellant] was sentenced to thirty [ ] days to six [ ] months incarceration. Only July 6, 2012, [Appellant] filed a Petition for Reconsideration/Modification of Sentence, which was denied by the [trial court] on the same day.

Id. at 2.

The trial court found Appellant guilty of both counts of driving under the influence of alcohol. ***Id.***

> On July 18, 2012, [Appellant] filed a Notice of Appeal in regards to the Sentencing Order dated June 28, 2012. On July 24, 2012, [the trial court] requested a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). [Appellant complied.]

Id.

Appellant presents two issues for our review.[3] Appellant's Brief at 15. First, Appellant contends that the trial court erred when it "[f]ailed to grant

[3] Although Appellant's "questions presented" section in his brief sets forth three claims, his arguments in support of the second and third are the same. ***See*** Appellant's Brief at 15, 26-30. Furthermore, the third claim in his statement of questions states in part that "the evidence presented was

the omnibus pre trial suppression motion where the arresting state trooper lacked reasonable and [articulable] grounds or probable cause to initiate a warrantless traffic stop[.]" ***Id.*** Appellant contends that "[he] was lawfully parked in a parking lot with his automobile lights illuminated." ***Id***. at 26. Appellant analogizes his case to ***Commonwealth v. Dewitt***, 608 A.2d 1030 (Pa. Super. 1992). ***Id.*** at 25-26. Appellant argues that the state trooper "lack[ed] probable cause and reasonable and [articulable] grounds to initiate a warrantless traffic stop as there was nothing 'suspicious' about [his] vehicle, its location, and a complete lack of criminal activity afoot." ***Id.*** at 26. We find no relief is due.

"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." ***Commonwealth v. Williams***, 941 A.2d 14, 26 (Pa. Super. 2008) (citations omitted).

> Our Supreme Court has defined three forms of police-citizen interaction: a mere encounter, an investigative detention, and a custodial detention. A mere encounter between police and citizen need not be supported by any level of suspicion and carries no official compulsion on the part of the citizen to stop or respond. An investigatory

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grossly manipulated and inexplicably incomplete." ***Id.*** at 15. We find this claim is waived for failure to mention or develop it in the argument section. ***See Commonwealth v. Einhorn***, 911 A.2d 960, 970 (Pa. Super. 2006) ("This Court will not become the counsel of an appellant and will not, therefore, consider issues which are not fully developed in the brief. . . . An issue that is not properly briefed in this manner is considered waived . . . .").

> stop, which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. A custodial detention is an arrest and must be supported by probable case.

Commonwealth v. Fuller, 940 A.2d 476, 478-79 (Pa. Super. 2007) (citations and quotation marks omitted). Generally, reasonable suspicion is required when a police officer stops a vehicle for a suspected Vehicle Code violation. 75 Pa.C.S. 6308(b).

We note that in the instant case, Appellant's attorney on appeal, Jarrett R. Smith, Esq., was also his suppression and trial counsel. Appellant argues on appeal that the interaction with Trooper McGee was a warrantless traffic stop, requiring reasonable suspicion. Appellant's Brief at 24. However, at the suppression hearing, Attorney Smith conceded that the interaction between Appellant and the trooper was a mere encounter, but argued that a mere encounter required a level of suspicion:

> The Court: . . . We're here on the motion to suppress omnibus pretrial motion that was filed on June 28th. [Appellant's counsel], if I understand the motion correctly, you're alleging—I was trying to figure out, are you alleging that the interrogation constituted a custodial interrogation?
>
> [Attorney Smith]: No, Your Honor.
>
> The Court: You're alleging that it was a mere encounter?
>
> [Attorney Smith]: **It is a mere encounter**, Your Honor, but there was absolutely no reason for the officer to even have contact for any reason whatsoever, which resulted then in the finding of the evidence. There was no criminal activity afoot, totality of the circumstances, etc., that would give rise, and that anything then recovered is fruits

> of the poison—
>
> The Court: Isn't it true that if you concede that it's a mere encounter that the officer need not—that the interaction need not be supported by any level of suspicion?
>
> [Attorney Smith]: I would disagree, Your Honor. There has to be at least some suspicion of activity—
>
> The Court: For a mere encounter?
>
> [Attorney Smith]: Absolutely, Your Honor. I brought case law to that effect.

N.T. Suppression Hr'g, 9/1/11, at 3-4 (emphasis added). During cross-examination of Trooper McGee at the suppression hearing, Appellant's attorney argued that the officer needed "probable cause." ***Id.*** at 22.

After the suppression hearing, Appellant filed a brief in support of his motion to suppress, contending that the interaction was an illegal traffic stop and warrantless search. Appellant's Omnibus Pretrial Mot. to Suppress Br., 9/8/11, at 1-3. Appellant first argued that an officer "must have **probable cause** to believe that a violation of the vehicle code or regulation has taken place," but then later stated that the requirement is "**reasonable suspicion**." ***Id.*** at 2 (emphasis added). He argued that the Trooper never articulated at the hearing why he had reasonable suspicion to approach Appellant's vehicle. ***Id.*** Appellant urged the trial court to "concur with the [***Commonwealth v. Anthony***, 1 A.3d 914 (Pa. Super 2010),] Court and suppress the evidence illegally obtained as a result of [this] illegal encounter . . . ." ***Id.*** at 3.

In the trial court's order denying the suppression motion, it stated, "As conceded by defense counsel, the interaction in the case sub judice [ ] was a mere encounter." Trial Ct. Op. & Order, 9/26/11, at 4. The court noted, "[Appellant's] counsel's arguments are blatant misrepresentations of the ***Anthony*** case and the law with respect to mere encounters."[4] ***Id.*** at 2. The court held that no level of suspicion was required because, "during the hearing and argument in this case, defense counsel conceded that the interaction was a mere encounter." ***Id.*** at 4-5. It held that this mere encounter only rose to the level of investigative detention once the Trooper noticed signs of intoxication on Appellant.[5] ***Id.*** at 4.

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[4] The court further stated that it "seriously question[ed] if defense counsel even read ***Anthony*** let alone understood it." Trial Ct. Op. & Order, 9/26/11, at 7. The court also distinguished the ***Anthony*** decision because it

> arose out of a traffic stop of a moving vehicle because objects were hanging from the rearview mirror. The officer did not describe how the objects materially impaired or obstructed the driver's vision; rather, he was of the opinion that it was a violation for any object to hang from the rearview mirror of a vehicle. The Superior Court reversed the trial court because it is not a violation of the vehicle code or the regulations in the administrative code to have any objects hanging from one's rearview mirror; it is only a violation if the objects materially impair or obstruct the driver's vision.

Id. at 2-3.

[5] The court also noted, "Defense counsel's personal attacks on Trooper McGee both during the hearing and in his brief defy understanding." ***Id.*** at 10.

We agree with the trial court that Attorney Smith conceded at the suppression hearing that the initial interaction between the trooper and Appellant was a mere encounter. ***See*** Trial Ct. Op. & Order at 4; N.T. Suppression Hr'g at 3-4. We further agree that a mere encounter need not be supported by any level of suspicion. ***See Fuller***, 940 A.2d at 478-79.

To the extent that Appellant preserved, in his post-suppression hearing brief a claim that the interaction was a traffic stop, we disagree. Appellant, after citing case law establishing that a traffic stop generally requires reasonable suspicion, analogizes his case to ***Dewitt***. Appellant's Brief at 24-26. We disagree that ***Dewitt*** applies in this case, as the facts of ***Dewitt*** differ from the instant case for reasons ignored in Appellant's brief. In ***Dewitt***, although the defendant's car was initially parked in a parking lot, once the officer stopped alongside it, **it drove away**. ***Dewitt***, 608 A.2d at 1032. It was only after the vehicle began to drive away that the officer initiated a traffic stop. ***Id***. The Superior Court found the stop was illegal because the officer did not have probable cause for any illegal activity or reasonable suspicion of a Vehicle Code violation. ***Id***. at 1032-34. In the instant matter, there was no evidence that Appellant's car was moving when Trooper McGee approached. Indeed, the factual premise of his second issue on appeal is that his car was parked. Therefore, we find that there was no traffic stop, but rather the interaction was a mere encounter.

In his second issue, Appellant argues that the trial court erred in

"fail[ing] to acquit" him of DUI when it found he "was in actual physical control over the movement of a motor vehicle when the evidence showed [he] was sleeping in the driver's side seat with the lights on and the engine running when the vehicle was not in gear and the keys were not in the ignition[.]" Appellant's Brief at 15, 26. Appellant concedes that he was found with the "classic indicia of intoxication" while lawfully parked in the shopping center parking lot with the lights illuminated and engine running at 2:30 a.m. ***Id.*** at 28. However, Appellant argues that his "vehicle did not show any evidence [that it] had been moved recently nor were there any reports or any proof [he] attempted to move the vehicle." ***Id.*** Appellant also contends that "the evidence failed to show the keys were in the ignition even though the engine was running." ***Id.*** Appellant argues that his "vehicle was running as a result of his remote starter which expert testimony showed the keys were not required to be in the ignition but would explain why the ignition was running." ***Id.*** at 29. Appellant also asserts that the trooper "could not affirmatively state the vehicle keys were in the ignition . . . ." ***Id.*** Appellant argues "mere presence in the driver seat is insufficient to establish actual physical control of a motor vehicle. . . ." ***Id.*** at 28.

Initially, we note:

> A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be

> deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Williams, 871 A.2d 254, 259 (Pa. Super. 2005) (citations and quotation marks omitted).

The relevant section of Pennsylvania's Motor Vehicle Code for driving under the influence states:

> § 3802. Driving under influence of alcohol or controlled substance
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> * * *
>
> (b) High rate of alcohol.—An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(b).

> The term "operate" requires evidence of actual physical control of either the machinery of the motor vehicle or the management of the vehicle's movement, but not evidence that the vehicle was in motion. Our precedent indicates that a combination of the following factors is required in determining whether a person had 'actual physical control of an automobile: the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle. A determination of actual physical control of a vehicle is based upon the

> totality of the circumstances. The Commonwealth can establish through wholly circumstantial evidence that a defendant was driving, operating or in actual physical control of a motor vehicle.

Commonwealth v. Toland, 995 A.2d 1242, 1246 (Pa. Super. 2010) (citations and quotation marks omitted).

In the instant case, we note that although Appellant raises this issue as a sufficiency of evidence claim, he ignores evidence unfavorable to him and the court's credibility findings. Appellant argues, "[T]he evidence failed to show the keys were in the ignition even though the engine was running. . . . The evidence is completely devoid of establishing [Appellant] was ever in actual physical control [of] his motor vehicle." Appellant's Brief at 28. Appellant also argues that

> the arresting trooper testified he could not affirmatively state the vehicle keys were in the ignition and the evidence shows the trooper asking [Appellant] to place the keys in the ignition to roll up the windows and shut the vehicle off since it was started with the factory installed remote starter device.

Id. at 29.

However, our review of the trial transcript reveals that Appellant ignores Trooper McGee's testimony during cross-examination:

> [Attorney Smith]: But can you say with certainty today whether the key was in the ignition, sir? Do you have specific recollection of that?
>
> [Trooper McGee]: **Yes.** I had him remove it as soon as I determined he was under the influence or there was alcohol involved.

* * *

> [At this point, a video of the interaction between Officer McGee and Appellant was shown.]
>
> [Q]: . . . And Trooper, throughout this entire ordeal this is your voice making instructions to put the key back in the ignition and things of this nature. . . . If the key was in the ignition why would you ask—would you need explanation of how to turn it?
>
> [A]: I told him to put it back in the ignition.
>
> [Q]: So it was out of the—so it was out of it?
>
> [A]: Yeah. We wanted him to roll up his windows and secure his vehicle.
>
> [Q]: Is it at all possible that in fact the key was not in the ignition when you approached?
>
> [A]: **No, it was.**

N.T. Non-jury Trial, 3/27/12, at 29, 31-32 (emphasis added).

Additionally, the trial court stated its reasons for not finding Appellant was a credible witness:

> [Appellant's] account of the events severely changed while he was testifying. [Appellant] stated he was in his vehicle [for] four and a half . . . hours to five . . . hours and then changed it to seven . . . to seven and a half . . . hours. [Appellant] also said once that he was dropped off at his vehicle at 5:30 PM and then changed it to 7 PM. Further, [Appellant] once stated that he parked his car at Loyal Plaza Mall and then met his friends at a Harley Davidson store across the street and then later said he met his friends at the Loyal Plaza Mall. Finally, [Appellant] contradicted most of his testimony by stating once that he drove directly to the Harley Davidson Store.

Trial Ct. Op., 11/3/12, at 4.

The trial court also found Appellant not credible because "it appeared that [he] changed his version of events due to a conversation he had with another person or his attorney" during a ten minute court recess. ***Id.***; ***see also*** N.T. Non-jury Trial at 53. Appellant also "looked at his attorney before answering many questions." ***Id.*** at 5. Finally, the court found Appellant's assertion that the car was only started with the remote starter not credible because "the vehicle automatically shut off after at most twenty [ ] minutes and [Appellant] testified that he was in the vehicle for seven [ ] to seven and a half [ ] hours and only hit the button twice." ***Id.***

In light of this evidence—ignored by Appellant on appeal—we find that his arguments implicitly require us to overlook the trial court's credibility findings and findings of fact. This we cannot do. ***See Williams***, 871 A.2d at 259.

Finally, we note that Appellant relies upon two previous decisions of this Court. First, he states, "[T]his court should concur with the [***Commonwealth v. Price***, 610 A.2d 488 (Pa. Super. 1992),] court and dismiss [Appellant's] conviction for DWI. . . . since mere presence in the driver seat is insufficient to establish actual physical control of a motor vehicle to support this conviction." Appellant's Brief at 28. However, in that case, the Superior Court stated:

> Merely because [the defendant] sat in the driver's seat of the car, **which was not running**, and held the keys to the trunk in his hand does not rise to the level of actual physical control necessary to support a conviction for

> driving under the influence. A brief review of the cases which considered the concepts of actual physical control reveals that, at a very minimum, a parked car should be started and running before a finding of actual physical control can be made. . . . In this case, however, the police found [the defendant] in the driver's seat, with the **engine and lights off** and the keys out of the ignition.

Id. at 490 (emphasis added). In the instant matter, the vehicle's engine was running and the headlights were on. Trial Ct. Op. at 6.

Appellant also relies on ***Commonwealth v. Saunders***, 691 A.2d 946 (Pa. Super. 1997). In ***Saunders***, the defendant was asleep in the driver's seat of his car, parked in a convenience store parking lot at 2:30 a.m. with the vehicle's engine running and emergency brake on. ***Saunders***, 691 A.2d at 947. The trial court granted the defendant's motion for *habeas* relief and found that the Commonwealth could not establish actual physical control of the vehicle. ***Id***. The Commonwealth appealed. ***Id.***

Appellant contends that in ***Saunders***, "the Superior Court reversed the trial court indicating that a prima [facie] case was established but not enough evidence to establish a conviction." Appellant's Brief at 29. This misstates the holding of ***Saunders***, in which the Superior Court found:

> [T]he Commonwealth did present, at the habeas corpus hearing, evidence to support an inference of appellee's actual physical control of his automobile. Accordingly, the trial court erred in granting appellee's habeas corpus motion and dismiss the DUI charges . . . against appellee. Hence, we reverse the . . . trial court order and remand for trial on the DUI charges against appellee.

Id. at 950-51.

Instantly, the trial court found that the Commonwealth established actual physical control based on a combination of factors. Trial Ct. Op., 11/3/12, at 5. The court noted that there was no location near Appellant's car where he could have purchased alcohol, and all of the stores in the shopping center were closed at 2:30 a.m. ***Id.*** at 6. Additionally, "the vehicle's engine was running and its lights were on." ***Id.*** Although Appellant argued that he started his car with a remote starter, "[t]he [c]ourt did not find this credible as [Trooper] McGee stated that he saw the keys in the ignition when he told [Appellant] to turn the vehicle off." ***Id***. at 5. The court also noted that based on information from Appellant's auto mechanic expert, the vehicle would automatically shut off from the remote start feature "after at most twenty [ ] minutes and [Appellant] testified that he was in the vehicle for seven [ ] to seven and a half [ ] hours and only hit the button twice." ***Id.*** Finally, the court noted that "because [Appellant] constantly changed his story and at one point admitted to driving directly to the Harley Davidson store, the [trial court] believe[d Appellant] did in fact drive his car . . . ." ***Id.*** at 6.

Accordingly, we do not disturb the trial court's finding that Appellant was in actual physical control of the vehicle. ***See Williams***, 871 A.2d at 259; ***see also Toland***, 995 A.2d at 1246.

Judgment of sentence affirmed.

Judgment Entered.

Mary A. Troyer

Deputy Prothonotary

Date: 5/24/2013