

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KORY DARNELL GAYNOR,	:	
	:	
Appellant	:	No. 1766 EDA 2012

Appeal from the Judgment of Sentence Entered June 5, 2012,  
In the Court of Common Pleas of Bucks County,  
Criminal Division, at No. CP-09-CR-0000797-2012.

BEFORE: GANTMAN, SHOGAN and MUSMANNNO, JJ.

MEMORANDUM BY SHOGAN, J.:

**FILED AUGUST 16, 2013**

Appellant, Kory Darnell Gaynor, appeals from the judgment of sentence entered June 5, 2012, following his conviction at a bench trial of driving under the influence of alcohol. We affirm.

At the conclusion of the suppression hearing, the trial court made the following factual findings:

On or about November 25, 2011, at 12:40 a.m., [Yardley Borough Police] Officer Dominic Belisari was stationed at the Yardley Daycare Academy on South Main Street in the Borough of Yardley, Bucks County, Pennsylvania.

The daycare center stands next to the Wells Fargo Bank, a business establishment which was closed at the time. Apparently, closed at the time because of the hour of the day, not because the business had ceased to operate.

Officer Belisari was at the location, approximately, 10 to 15 minutes and, during that time, observed a vehicle in the driveway of the Wells Fargo Bank. He did not observe any

conduct that raised a suspicion of any sort that criminal activity was afoot, although he was aware that there had been a number of burglaries or thefts in the apartment complex across the street within a two-to three-month period immediately prior to the incident on November 25, 2011.

Officer Belisari moved his vehicle to the rear of the vehicle in question, observed two occupants inside, and ran the license plate as soon as he was able to see it.

The registration of the vehicle returned what to Officer Belisari seemed to be an out of the area address; to wit, a Levittown, Pennsylvania address, being a municipality in the lower part of Bucks County, Pennsylvania, the same as Yardley Borough, Bucks County, Pennsylvania.

N.T., 6/5/12, at 35–36; Trial Court Opinion, 10/11/12, at unnumbered 1–2.

Officer Belisari approached the driver of the vehicle, Appellant, and requested identification. N.T., 6/5/12, at 15. Upon speaking with Appellant, the officer detected an odor of alcohol. ***Id.*** Appellant failed subsequent field-sobriety tests; a portable breath test yielded a result of 0.161. Affidavit of Probable Cause, 11/30/11. Thereafter, Appellant was transported to the hospital for blood analysis.<sup>1</sup>

On February 28, 2012, Appellant filed an omnibus pretrial motion to suppress evidence as a result of the stop. Following a hearing on June 5, 2012, the court denied the suppression motion, and Appellant proceeded to the bench trial. Following his conviction of driving under the influence of alcohol, second offense, the court sentenced Appellant to ninety days to six

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<sup>1</sup> At trial, the Commonwealth and Appellant stipulated to the admission of Officer Belisari's reports without objection. N.T., 6/5/12, at 38.

months of imprisonment and ordered service of the term of incarceration under house arrest. This timely appeal followed. Both the trial court and Appellant complied with Pa.R.A.P. 1925.

Appellant raises one issue for our review:

1. Whether the trial court erred by denying the Appellant's motion to suppress evidence from his vehicle stop where the arresting officer lacked reasonable suspicion to stop, seize, detain, and arrest the Appellant?

Appellant's Brief at 4.

The trial court determined that there were no discernible differences between the instant case and the recent pronouncement of our Supreme Court in ***Commonwealth v. Au***, 42 A.3d 1002 (Pa. 2012). Thus, it denied suppression, ruling that the interaction between Officer Belisari and Appellant was a mere encounter. We agree.

Our standard of review of an order denying a motion to suppress is settled:

We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

***Commonwealth v. Rowe***, 984 A.2d 524, 525 (Pa. Super. 2009) (citations omitted). Since the only evidence presented at the suppression hearing was

the testimony of Officer Belisari, who testified for the Commonwealth, such testimony was uncontested and uncontradicted. "Thus, no relevant facts are in dispute, and the question presented for this Court is purely one of law."

***Commonwealth v. Worthy***, 957 A.2d 720, 724 (Pa. 2008).

Appellant contends that the trial court erred in denying his suppression motion, where Officer Belisari illegally detained him by requesting his identification without reasonable suspicion of criminal activity. Appellant posits this case is not controlled by ***Au***, as the trial court found, primarily because Officer Belisari activated the overhead lights on his cruiser, and the officer in ***Au*** did not do so. In light of the totality of the circumstances, we do not believe this difference requires the suppression of evidence in the instant case.

In ***Au***, similarly to here, a car was parked in the lot of a local business in the early morning hours after midnight. The officer therein pulled his cruiser behind the vehicle and shone his headlamps into the automobile. The business had closed several hours earlier, just as the bank in the case *sub judice*. When the officer in ***Au*** approached the vehicle with a flashlight, he asked the passenger what was "going on." The officer requested identification, and as passenger Au opened the glove box to retrieve his wallet, the officer observed two baggies of marijuana. Au subsequently was

charged with possession of marijuana. The trial court granted Au's suppression motion.

A three-judge panel of this Court affirmed. Upon the grant of a petition for reargument, this Court, *en banc*, was sharply divided. The majority affirmed the trial court's decision to suppress the evidence from the encounter, which it deemed an investigatory detention. This author, joined by three others, dissented, concluding under the totality of the circumstances that the police officer's approach and request for identification was a mere encounter requiring no level of suspicion.

Our Supreme Court adopted the reasoning of the dissent. Guided by the decision of the United States Supreme Court in ***Hiibel v. Sixth Judicial District Court of Nevada***, 542 U.S. 177 (2004), the **Au** Court determined that "a request for identification is not to be regarded as escalatory in terms of the coercive aspects of a police-citizen encounter." **Au**, 24 A.3d at 1007.

We do not find that Officer Belisari's interaction with Appellant herein escalated beyond a mere encounter solely because he activated his overhead lights. As we stated in ***Commonwealth v. Johonoson***, 844 A.2d 556, 562 (Pa. Super. 2004), "[B]y activating the overhead lights, the officer signals to the motorist that it is actually a police officer (rather than a potentially dangerous stranger) who is approaching." **Accord** ***Commonwealth v. Kendall***, 976 A.2d 503, 508 (Pa. Super. 2009) ("If the

investigation occurs at night, it is reasonable for an officer to activate overhead lights to ensure his or her own safety as well as the safety of the driver . . . .”).

Herein, Officer Belisari observed Appellant and an occupant in a vehicle with the motor running, sitting in the parking lot of the Wells Fargo Bank at 12:40 in the morning. N.T., 6/5/12, at 7. The officer observed the automobile for approximately ten minutes. **Id.** at 8. When he ran the license plate of the vehicle, the officer learned that the car was registered to an address in another town. **Id.** at 14. The adjacent apartment complex had recently been plagued by multiple thefts in the prior month. **Id.** at 20.

Considering all of the factors, we conclude the interaction between Officer Belisari and Appellant was a mere encounter based upon the circumstances at the time. **Au**, 42 A.3d 1002 (officer’s request for identification did not transform encounter with Au into an investigatory detention); **Commonwealth v. McAdoo**, 46 A.3d 781 (Pa. Super. 2012), *appeal denied*, **Commonwealth v. McAdoo**, 65 A.3d 413 (Pa. 2013) (officer’s request for defendant’s name did not rise above mere encounter).

Accordingly, the trial court did not err in denying the motion to suppress.

Judgment of sentence affirmed.

J-S32016-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambitt", written over a horizontal line.

Prothonotary

Date: 8/16/2013