

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DEARIAN LEWIS DAVENPORT,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1901 WDA 2011

Appeal from the Judgment of Sentence November 2, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0016556-2010

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: February 22, 2013

Appellant, Dearian Davenport, challenges a judgment of sentence entered in the Court of Common Pleas of Allegheny County, following his conviction for possessing a firearm with an altered manufacturer number,¹ carrying a firearm without a license,² obstructing highways,³ and signaling improperly.⁴ We affirm in part and vacate in part.

On June 5, 2010, Detective Daniel Sullivan, a twelve year veteran of the Pittsburgh police force, and his partner, Officer Duratovic, were on an 11 pm to 4 am patrol of the city's Strip District. N.T. 7/26/11 at 4.

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 6100.2(A).

² 18 Pa.C.S. § 6106(A)(1).

³ 18 Pa.C.S. § 5507(A).

⁴ 75 Pa.C.S. § 3334(B).

“Numerous” citizen and business complaints of criminal activity in that area had resulted in their assignment to a “crime suppression, zero tolerance” watch of the neighborhood. *Id.* A Jeep Cherokee with heavily tinted windows was observed making two turns without signaling properly, but before the police were able to conduct a traffic stop, the driver of the Jeep slammed on the brakes and stopped the vehicle in the middle of the street. *Id.* at 5, 7.

At that point, Detective Sullivan initiated the traffic stop, and approached the driver’s half open window. *Id.* at 7. Standing next to the driver’s window, Detective Sullivan observed that the driver’s right hand was concealed, up to the wrist, in the vehicle’s center console. *Id.* at 7, 13-14. Detective Sullivan ordered the driver to show his hands, but the man failed to obey until ordered to do so a second time. *Id.* at 7-8. He could not produce a driver’s license, but identified himself as Dearian Davenport, and gave his address. *Id.* at 8. During this time, Detective Sullivan’s flashlight was illuminating the interior of the vehicle and he observed that in the area where Appellant had concealed then withdrawn his hand, the center console shelf was not properly affixed. *Id.* at 8, 15-16, 18-19. Detective Sullivan knew from previous experience with this model Jeep that there was a void under the shelf in which weapons or drugs could be concealed. *Id.* at 8-10. With regard to Appellant’s motion, Detective Sullivan testified: “[t]here was no reason for him to even reach in that area. He didn’t have his driver’s

license. I didn't ask for registration or insurance. There was no reasonable explanation why his hand would be even in that area." *Id.* at 19.

Concluding, based on these observations, that a weapon may be concealed in the void, Detective Sullivan ordered Appellant out of the vehicle, lifted the loose shelf, and observed a handgun. *Id.* at 10. Appellant was then handcuffed, and the gun recovered from the vehicle. *Id.* at 11.

Following the filing of charges, Appellant filed an omnibus pretrial motion seeking the suppression of all evidence on the grounds that it was obtained in violation of Appellant's rights under the Fourth Amendment of the U.S. Constitution and the Fourteen Amendment of the Constitution of Pennsylvania. Specifically, Appellant asserted that he was removed from the vehicle without reasonable suspicion, the vehicle was searched without a warrant or sufficient probable cause, the scope of the search exceeded authority for a warrantless search, the handgun found was not in plain view, and the search did not comply with the motor vehicle exception to the warrant requirement. Motion filed 7/5/11. A suppression hearing before the Honorable John A. Zottola was held on July 26, 2011, during which Detective Sullivan testified on behalf of the Commonwealth. N.T. 7/26/11 at 3-19. No testimony was presented for Appellant. The parties then briefed their

respective positions, and the motion was denied by Judge Zottola on October 24, 2011.⁵

Following a bench trial before the Honorable David R. Cashman on November 2, 2011, Appellant was convicted of the above charges. For possessing a firearm with an altered manufacturer's number, a second degree felony with a standard range sentence of 6 to 14 months' imprisonment, Appellant received a mitigated sentence of one year's probation.⁶

Appellant filed the instant timely appeal on December 2, 2011, and has complied with the court's order to file a concise statement of the errors complained of on appeal pursuant to Rule 1925(b). Therein, he sets forth a challenge to Judge Zottola's suppression ruling, and a challenge to the sufficiency of the evidence to support his conviction for obstructing highways and other public passages. Rule 1925(b) Statement filed 3/5/12. The record contains a responsive Rule 1925(a) Opinion from Judge Cashman, addressing both issues raised by Appellant.

⁵ Pennsylvania Rule of Criminal Procedure 581(I) mandates that at the conclusion of a suppression hearing, "the judge shall enter on the record a statement of findings of fact and conclusions of law" Pa.R.Crim.P. 581(I). Here, neither the transcript of the suppression hearing nor the October 24, 2011 order contain a statement of Judge Zottola's findings of fact and conclusions of law, as contemplated by Pa.R.Crim.P. 581(I).

⁶ A determination of guilt without further penalty was made with regard to the remaining convictions. Appellant, an Ohio State University student, was permitted supervision of his probation in Franklin County, Ohio.

Appellant first asks us to determine “[w]hether Judge Zottola erred in not granting Mr. Davenport's Omnibus Pre-Trial Motion seeking to suppress the gun when Officer Sullivan's testimony failed to establish specific and articulable facts reasonably suggesting that Mr. Davenport may have been armed and dangerous, or a gun may have been inside his car?” Appellant's brief at 4.

Appellant acknowledges that Detective Sullivan lawfully stopped Appellant's vehicle for twice failing to signal before turning. Appellant's brief at 10. In challenging Judge Zottola's refusal to suppress the firearm, however, Appellant insists that Detective Sullivan's testimony “failed to establish specific and articulable facts reasonably suggesting that [Appellant] may have been armed and dangerous, or a gun may have been inside the car.” Appellant's brief at 10. Appellant further suggests that the evidence shows that Officer Sullivan did not fear for his safety, but instead conducted an “impermissible exploratory search” for evidence of criminal activity. *Id.* at 11. Additionally, according to Appellant, Officer Sullivan's belief that Appellant had hidden a weapon under the console was based on nothing more than an “unparticularized suspicion or hunch,” insufficient to justify a warrantless search of the vehicle. *Id.* at 11-12.

Generally, our standard of review when addressing a challenge to a trial court's denial of suppression is “whether the factual findings are supported by the record and whether the legal conclusions drawn from these facts are correct.” *Commonwealth v. Tiffany*, 926 A.2d 503, 506 (Pa. Super.

2007) (citations omitted), *appeal denied*, 597 Pa. 706, 948 A.2d 804 (2008).

When reviewing the rulings of a suppression court, we must 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 legal conclusions drawn therefrom are in error.

Id. (citations and internal quotation marks omitted).

Commonwealth v. Hawkins, 45 A.3d 1123, 1126 (Pa. Super. 2012) *appeal denied*, 53 A.3d 756 (Pa. 2012).

When the suppression court's specific factual findings are unannounced, or there is a gap in the findings, the appellate court should consider only the evidence of the prevailing suppression party ... and the evidence of the other party ... that, when read in the context of the entire record, remains uncontradicted.

Commonwealth v. Millner, 585 Pa. 237, 246, 888 A.2d 680, 685 (2005) (citations omitted). *Accord* ***Commonwealth v. Wood***, 833 A.2d 740, 743 (Pa. Super. 2003) *aff'd*, 862 A.2d 589 (Pa. 2004) (*citing* ***Commonwealth v. Haynes***, 577 A.2d 564, 570 (Pa. Super. 1990)).

In ***Michigan v. Long***, 463 U.S. 1032 (1983), the United States Supreme Court applied the principles announced in ***Terry v. Ohio***, 392 U.S. 1 (1968), to a search of the passenger compartment of a vehicle for weapons, explaining as follows:

Our past cases indicate [...] that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible

presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. See *Terry*, 392 U.S.[] at 21[...]. '[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' *Id.* at 27[...].

Long, 463 U.S. at 1049–50 (footnote omitted).⁷ "The sole justification of the search is the protection of police officers and others nearby." *Id.* (citation and quotation omitted). An officer must therefore have reasonable suspicion that the person subject to the stop has a weapon in order to conduct a lawful search of the passenger compartment of a vehicle at the time of the stop. *Id.*

In the instant matter, the record shows that Detective Sullivan, a twelve year police veteran, while conducting a night patrol specifically required because of the high crime nature of the neighborhood, encountered Appellant, who was unable to produce identification and whose actions created in Detective Sullivan the fear that a weapon was located in the area where Appellant had concealed his hand, and from which Appellant initially

⁷ In *Commonwealth v. Morris*, 537 Pa. 417, 422 n.3, 644 A.2d 721, 724 n.3 (1994), the Pennsylvania Supreme Court applied the standard announced in *Long, supra*, to validate a vehicle search conducted during a traffic stop, finding the reasoning set forth in *Long* to be applicable to Article I, Section 8 of the Pennsylvania Constitution.

refused to remove that hand. Further, there is no indication from the record that Detective Sullivan would have arrested Appellant for traffic violations, thus, Appellant would have been able to return to the vehicle and access any weapon secreted in the center console void, an area Detective Sullivan knew was large enough to conceal such a weapon. Under these circumstances, we find that Detective Sullivan's protective search of the area under the center console of the vehicle was constitutionally valid. ***Commonwealth v. Boyd***, 17 A.3d 1274, 1279-1280 (Pa. Super. 2011), *appeal denied*, 29 A.3d 370 (Pa. 2011); ***In re O.J.***, 958 A.2d 561, 566 (Pa. Super. 2008); ***Commonwealth v. Murray***, 936 A.2d 76, 80 (Pa. Super. 2007).

Appellant's second issue on appeal asks us to determine:

Whether Mr. Davenport's conviction for the crime of Obstructing Highways and Other Public Passages must be reversed, and his Judgment of Sentence in this regard must be vacated, when the Commonwealth failed to prove, beyond a reasonable doubt, that his mere act of suddenly stopping his car "obstruct[ed]" 19th Street, or rendered the roadway "impassable without unreasonable inconvenience or hazard"?

Appellant's brief at 4.

When addressing a challenge to the sufficiency of the evidence, "our task is to determine whether the evidence and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the factfinder to find every element of the crime charged beyond a reasonable doubt." ***Commonwealth v. Battaglia***, 725 A.2d 192,

193 (Pa. Super. 1999) (citing *Commonwealth v. Zambelli*, 695 A.2d 848, 851 (Pa. Super. 1997)).

The elements of the crime of obstructing highways and other public passages are contained in Section 5507 of the Crimes Code, which defines the offense, in pertinent part, as follows:

(a) Obstructing.-A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or in case he persists after warning by a law officer, a misdemeanor of the third degree.

(c) Definition.--As used in this section the word "obstructs" means renders impassable without unreasonable inconvenience or hazard.

18 Pa.C.S.A. § 5507.

Here, even viewing the evidence in the light most favorable to the Commonwealth, we are constrained to find that it does not support Appellant's conviction. At Appellant's bench trial before Judge Cashman, the parties agreed to incorporate the testimony and evidence presented at the suppression hearing. N.T. 11/2/11 at 4. No other testimony or evidence was presented. *Id.* at 5. As such, the sum of the testimony and evidence presented regarding Appellant's obstructing the roadway is Detective Sullivan's suppression hearing testimony that Appellant's vehicle "slammed on its brakes and stopped in the middle of the street." N.T. 7/26/11 at 7. There was no evidence or testimony presented that the actual location of Appellant's vehicle rendered the street "impassable without unreasonable

inconvenience or hazard," as is contemplated by Section 5507(c). Because there was insufficient evidence presented to establish every element of this offense, we must vacate Appellant's conviction for violating Section 5507. ***Battaglia***, 725 A.2d at 194. Since Appellant was adjudged guilty without further penalty with regard to it, however, remand is unnecessary. We affirm in all other respects.

Affirmed in part; Vacated in part, consistent with this memorandum;
Jurisdiction relinquished.