

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SHYNNELL ISSAC WALKER

Appellant

No. 1019 MDA 2013

Appeal from the Judgment of Sentence May 30, 2013
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001462-2012

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY PANELLA, J.:

FILED MAY 29, 2014

Appellant, Shynnell Issac Walker, appeals from the judgment of sentence entered May 30, 2013, by the Honorable Marc F. Lovecchio, Court of Common Pleas of Lycoming County. We affirm.

The trial court set forth the pertinent facts as follows:

At approximately 4:45 p.m. on August 14, 2012, Officer Thomas Bortz and Officer Brian Chilson were on an "interdiction" detail in the 500 block of Memorial Avenue near Flanagan Park in Williamsport. The officers observed a dark blue or black Volvo parked at the entrance of 565 Memorial Avenue. The vehicle raised Officer Bortz'[s] suspicions because there is no residence on that side of the street, it is a predominantly minority neighborhood, and the vehicle was occupied by two Caucasian males. The Volvo also had a sticker on the back of it, indicating it had been purchased from a dealer in Berwick or Danville. The drive was laid back in this seat and the passenger was on a cell phone and his "head was on a swivel" – turning as if he was looking for someone. As the officers drove past in their marked vehicle, the driver sat up, backed the Volvo out of its parking spot, and drove west on Memorial Avenue.

The officers turned around to follow the Volvo. Just before the Volvo reached Walnut Street, the driver pulled the vehicle over to the curb and Appellant got into the rear passenger seat. The Volvo then turned onto Walnut Street. When the vehicle reached the intersection of Walnut and Fourth Streets, it stopped at the red light and the officers were right behind it. The light changed green and the vehicle proceeded into the intersection a few feet as if it was going to [continue] south on Walnut Street. There was another vehicle traveling north with its left turn signal on. The vehicle in which Appellant was a passenger stopped and the driver waived to signal the driver of the oncoming vehicle to turn left in front of him. After that vehicle turned left, the driver of the Volvo quickly turned on his right turn signal and turned right onto Fourth Street. The police stopped the Volvo, because ... the driver failed to activate his turn signal at least 100 feet before the intersection [in violation of 75 Pa.C.S. § 3334].

When the officers walked up to the Volvo to speak to the occupants, they immediately noticed an odor of marijuana. After they got the driver and the front seat passenger out of the vehicle to speak to them separately, the officers could still smell the odor of marijuana inside the vehicle. The front seat passenger and the driver told the police that they drove to Williamsport so that the front seat passenger could buy heroin from Appellant. The front seat passenger was going to pay the driver for the ride to Williamsport by giving him some of the heroin. The police took Appellant into custody and searched him. They found ten bags of heroin, four bags of marijuana, some money and a cell phone on Appellant's person.

Appellant was charged with possession with intent to deliver a controlled substance (heroin), possession of a small amount of marijuana, possession of drug paraphernalia, and possession of a controlled substance (heroin).

Appellant filed a motion to suppress evidence on the basis that the police unlawfully stopped the Volvo. The court held a hearing and argument on Appellant's suppression motion on December 14, 2012, and it denied the motion in an Opinion and Order entered December 18, 2012.

Appellant waived his right to a jury trial. A bench trial was held on March 8, 2013, and the court found Appellant guilty of all the charges.

On May 30, 2013, the court sentenced Appellant to 30 to 60 months of incarceration in a state correctional institution. Appellant filed a timely notice of appeal.

Trial Court Opinion, 11/13/13 at 1-3.

Appellant raises the following issues for our review:

- I. Whether the [t]rial [c]ourt erred by denying [Appellant's] motion to suppress when police had no reasonable suspicion or probable cause to stop the Volvo after it made a proper turn.
- II. Whether the trial court erred by permitting Officer Bortz to testify as both an expert and fact witness concerning possession with intent to deliver, as the evidence was cumulative based [sic] since two other individuals in the Vovlo testified they picked up [Appellant] and intended to purchase controlled substances from him?

Appellant's Brief at 7.

Our standard when reviewing a trial court's denial of a motion to suppress evidence is as follows:

[W]e are limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We may consider the evidence of the witnesses offered by the prosecution, as verdict winner, and only so much of the defense evidence that remains uncontradicted when read in the context of the record as a whole.

Commonwealth v. McAliley, 919 A.2d 272, 275-276 (Pa. Super. 2007) (citation omitted). "Moreover, if the evidence supports the factual findings of the suppression court, this Court will reverse only if there is an error in the legal conclusions drawn from those findings." **Commonwealth v. Powell**, 994 A.2d 1096, 1101 (Pa. Super. 2010).

The quantum of proof necessary to effectuate a vehicle stop on suspicion of a violation of the motor vehicle code is governed by 75 PA.CON.S.TAT.ANN. § 6308(b), which states:

(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.CON.S.TAT.ANN. § 6308(b). Traffic stops based upon suspicion of a violation of the motor vehicle code under section 6308(b) “must serve a stated investigatory purpose.” *Commonwealth v. Feczko*, 10 A.3d 1285, 1291 (Pa. Super. 2010) (en banc). “Mere reasonable suspicion will not justify a vehicle stop when the driver’s detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, ‘it is encumbent [sic] 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.*, at 1291 (emphasis omitted) (citation omitted).

Appellant argues that Officer Bortz lacked probable cause to believe that the driver of the vehicle improperly engaged his turn signal in violation

of 75 Pa.C.S.A. § 3334, **Turning movements and required signals.**

Appellant's Brief at 11. Section 3334 states that:

(a) General rule.--Upon a roadway no person shall turn a vehicle or move from one traffic lane to another or enter the traffic stream from a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.

(b) Signals on turning and starting.--At speeds of less than 35 miles per hour, an appropriate signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. The signal shall be given during not less than the last 300 feet at speeds in excess of 35 miles per hour. The signal shall also be given prior to entry of the vehicle into the traffic stream from a parked position.

75 Pa.C.S.A. § 3334.

Appellant is correct that a vehicle stop based solely upon suspicion of violation of section 3334 requires probable cause:

[A] vehicle stop based solely on offenses not 'investigatable' cannot be justified by a mere reasonable suspicion, because the purposes of a **Terry** [*v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] stop do not exist—maintaining the status quo while investigating is inapplicable where there is nothing further to investigate. An officer must have probable cause to make a constitutional vehicle stop for such offenses.

Commonwealth v. Busser, 56 A.3d 419, 423 (Pa. Super. 2012) (footnote and citation omitted).

It is undisputed that the driver of the vehicle did not activate his turn signal until *after* he had entered the intersection of Walnut and West Fourth Streets, and therefore failed to continuously use his turn signal at least 100

feet before making the turn. Appellant argues, however, that pursuant to the last sentence of paragraph (b) the driver of the Volvo was only required to activate his turn signal immediately prior to executing the turn because he was entering the stream of traffic from a "parked position." Appellant's Brief at 13. The trial court flatly rejected this interpretation:

[Appellant's] interpretation of the statute given its clear language is untenable. Section 3334 (a) clearly dictates that no person shall turn a vehicle without giving an appropriate signal. Section 3334(b) clarifies it further by noting that if the vehicle is traveling less than 35 mph, the signal of an intention to turn must be given continuously during not less than the last 100 feet driven by the vehicle before turning.

In this particular case, the evidence is undisputed that the driver of the Volvo turned his vehicle from South on Walnut Street to west on West Fourth Street. He was obviously traveling less than 35 mph but did not continuously give a signal of intention to turn right during the last 100 feet traveled by it.

Moreover, [Appellant's] argument that the last sentence of subsection (b) permits [the driver's] conduct is without merit. That sentence requires that a signal be given prior to the entry of the vehicle into the traffic stream from a parked position. To suggest that a vehicle which stops in an intersection intending to turn right or left is either entering into the traffic stream or from a parked position not only begs logic but is contrary to the clear intent and words of the statute. Indeed, the vehicle was stopped and not parked. See 75 Pa.C.S.A. § 102 (relating to definitions). Moreover, the vehicle's turn signal was not activated while it was stopped at the traffic signal. Instead, the vehicle proceeded into the intersection ten to fifteen feet where it paused to permit another vehicle to turn left before the driver activated the turn signal and turned right onto West Fourth Street. Therefore, even if the provision regarding parked vehicles were applicable, it was violated because the driver did not activate the turn signal before the vehicle entered the intersection.

Trial Court Opinion, 12/18/12 at 4-5.

We concur with the trial court's analysis. Based on the foregoing, we agree that Officer Bortz had probable cause to believe the driver of the Volvo violated section 3334 of the Motor Vehicle Code. Therefore, Appellant's challenge to the court's denial of his suppression motion is without merit.

Lastly, Appellant argues that the trial court abused its discretion when it permitted Officer Bortz to testify as both a fact and expert witness regarding Appellant's intent to deliver the heroin. Appellant contends that the testimony was highly prejudicial and cumulative as both the driver of the Volvo and the other passenger testified that they picked up Appellant in order to purchase drugs from him. Appellant's Brief at 14-18 (citing ***Commonwealth v. Watson***, 945 A.2d 174, 177 (Pa. Super. 2008); ***Commonwealth v. Montavo***, 653 A.2d 700, 705-706 (Pa. Super. 1995); ***Commonwealth v. Carter***, 589 A.2d 1133, 1135 (Pa. Super. 1991)).

We review the admission of evidence as follows:

[T]he admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. Evidence, even if relevant, may be excluded if its probative value is outweighed by the potential prejudice.

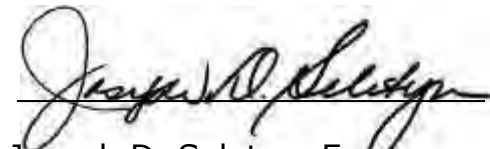
Commonwealth v. Fransen, 42 A.3d 1100, 1106 (Pa. Super. 2012)
(internal citations omitted).

We find no error in the trial court's decision to permit Officer Bortz to testify as both a fact and expert witness. Unlike the cases cited by

Appellant, the instant proceeding was a non-jury trial. "We must presume that the trial judge, sitting as factfinder, would ignore any potentially prejudicial information and remain objective in weighing the evidence in order to render a true verdict." ***Commonwealth v. Wattley***, 880 A.2d 682, 685 (Pa. Super. 2005) (citation omitted). As such, even if the admitted testimony was unfairly prejudicial,¹ the trial court is presumed to have ignored it.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/2014

¹ Due to our disposition of this issue, we do not reach a decision as to whether the admitted testimony was cumulative or unfairly prejudicial.