J-S16017-14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WAYNE MICHAEL EIDSON,	:	
	:	
Appellant	:	No. 1293 MDA 2013

Appeal from the Judgment of Sentence June 17, 2013,
Court of Common Pleas, Lancaster County,
Criminal Division at No. CP-36-CR-0004714-2009

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED APRIL 28, 2014**

Appellant, Wayne Michael Eidson ("Eidson"), appeals from the judgment of sentence entered on June 17, 2013, following his convictions of five counts of Sexual Abuse of Children. For the reasons that follow, we affirm the judgment of sentence but remand to the trial court for proper imposition of sexual offender registration requirements.

The trial court summarized the facts of this case as follows:

> On March 12, 2009 Manheim Township Police Department was notified regarding a laptop computer belonging to [Eidson] which contained suspected child pornography. (See N.T. Suppression, 3/11/13, at 7). Corey Amidon [("Amidon")], an employee of Laser Plus, reported that [Eidson] brought his laptop computer into Laser Plus for repairs due to the computer running slowly. (See id, at 6). Gary Loughman [("Loughman")], another Laser Plus employee, testified at the suppression hearing that when a computer is brought in for repair, the employee will initially ask the customer to

*Retired Senior Judge assigned to the Superior Court.

> describe the problem. (See id., at 17). [] Loughman explained that when a customer complains of slowness, it usually indicates virus on the computer. (See id, at 18). He further explained that in searching for the virus, the employee will back up the customer's files onto an external hard drive to preserve the files in case the customer's computer became corrupted. (See id., at 18-19). In the process of backing up [Eidson]'s files, Amidon observed photographic files depicting child pornography. (See id., at 22-23). As a result, the Laser Plus employees alerted the police. (See id, at 26). On that same day, Det. Allen Leed [("Det. Leed")] of the Manheim Township Police Department interviewed [Eidson]. (See id, at 44-45). [Eidson] gave the police permission to examine the computer to determine if there was child pornography on the computer. (See id., at 47-48). A subsequent forensic examination was conducted on [Eidson]'s laptop computer and eight files containing images of child pornography were found. (See N.T. Non-Jury Trial, 3/11/13, at 138) On July 15, 2009, Det. Leed filed charges against [Eidson] for Sexual Abuse of Children.
>
> On December 23, 2011, [Eidson] filed a motion to suppress evidence and a suppression hearing was held on March 11, 2013. The suppression motion was denied based on the Court's findings that the conversations with [Eidson] were all done in a non-custodial situation where he adequately chose to speak voluntarily and that [] [Eidson]'s expectation of privacy to the images on the computer were relinquished to Laser Plus because he knowingly exposed the computer files to the public in the work done by Laser Plus. (See N.T. Suppression, 3/11/13, at 96-99). A non-jury trial followed the suppression hearing. After the non-jury trial, [Eidson] was found guilty of five of the eight counts of Sexual Abuse of a Child.[1] The Court ordered a pre-sentence investigation and an assessment by the S.O.A.B.

[1] 18 Pa.C.S.A § 6312(d).

> [Eidson] was found not to meet the criteria of a sexually violent predator. On June 17, 2013, the Court sentenced [Eidson] to a term of time served to 23 months of incarceration, followed by three years of probation, for the guilty counts, to be served concurrently.

Trial Court Opinion, 8/20/13, at 1-2. The trial court also instructed Eidson that he was required to register with the Pennsylvania State Police for 25 years as a Tier I sex offender. N.T., 6/17/13, at 11.

Eidson timely filed an appeal on July 18, 2013. On August 8, 2013, Eidson filed his Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On appeal, Eidson raises three issues for our consideration and determination:

1. Did not the court err in denying [Eidson's] motion to suppress evidence of the contents of [Eidson's] computer when police took possession of the computer without a warrant and without any proven abandonment by [Eidson] of his privacy interests?

2. Did not the court err in failing to suppress statements that the police obtained from [Eidson] when the statements were not the product of a free, intelligent, and knowing waiver by [Eidson] of his right to consult with counsel prior to interrogation and when the statements were the unlawful fruit of the police's unlawful search and seizure of [Eidson's] computer?

3. Did not the court commit an error of law by imposing a sex offender registration period exceeding 15 years, which is appropriate for a "Tier I offense" under the SORNA statute, by relying on the recidivist portion of the applicable SORNA provision, 42 Pa.C.S.[A.] § 9799.14(d)(16)?

Eidson's Brief at 5.

For his first issue on appeal, Eidson contends that the trial court erred in denying his motion to suppress evidence of the contents of his laptop. Eidson argues that the seizure of his laptop was illegal because the police seized his computer without a warrant and without proving Eidson abandoned his privacy interests. Eidson's Brief at 17.

Our standard of review of an order denying a suppression motion is limited to "whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error." ***Commonwealth v. Taggart***, 997 A.2d 1189, 1193 (Pa. Super. 2010) (citing ***Commonwealth v. Page***, 965 A.2d 1212, 1217 (Pa. Super. 2009)). This Court has further held that

> [b]ecause the Commonwealth prevailed in the suppression court, we consider only the Commonwealth's evidence and so much of the appellant's evidence as is uncontradicted when read in the context of the record as a whole. Where the record supports the suppression court's factual findings, we are bound by those facts and may reverse only if the legal conclusions drawn from them are erroneous.

Commonwealth v. West, 937 A.2d 516, 527 (Pa. Super. 2007) (citing ***Commonwealth v. Van Winkle***, 880 A.2d 1280, 1282 (Pa. Super. 2005)).

Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect citizens from

unreasonable searches and seizures. [2] ***Commonwealth v. Clemens***, 66 A.3d 373, 378 (Pa. Super. 2013). The law is well established that "as a general rule, 'a search warrant is required before police may conduct any search.'" ***Commonwealth v. Williams***, 73 A.3d 609, 614 (Pa. Super. 2013). Thus, "a warrantless search or seizure is presumptively unreasonable." ***Id*.**

Our Supreme Court established that the constitutional protections provided by Article I, Section 8 of the Pennsylvania Constitution, extend only "to those zones where one has a reasonable expectation of privacy interests." ***Commonwealth v. Rushing***, 71 A.3d 939, 962 (Pa. Super.

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[2] Both Eidson and the Commonwealth presented and analyzed this issue under the United States Constitution and the Pennsylvania Constitution as though they are coextensive. However, while the language of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution is similar, this Court has held that Article I, Section 8 provides a greater notion of privacy and, consequently, greater protections than the Fourth Amendment ***with respect to an individual's privacy interests***. ***See Commonwealth v. McCree***, 924 A.2d 621, 626-27 (Pa. Super. 2007) (citing ***Commonwealth v. Edmunds***, 526 Pa. 374, 586 A.2d 887, 899 (1991)) (emphasis added).

Our Supreme Court in ***Commonwealth v. Rekasie***, 566 Pa. 85, 778 A.2d 624 (2001), stated that an analysis under Article I, Section 8 is more restrictive than an analysis under the Fourth Amendment, such that Pennsylvania Constitutional jurisprudence does not automatically deny assertions of expectations of privacy when an individual voluntarily discloses information to another. ***Id*.** at 629-30. Instead, Pennsylvania courts "take into account the circumstances of the situation surrounding the disclosure of information as well as the individual's conduct." ***Id*.** at 631. Thus, for purposes of this appeal, we will focus our analysis on the more restrictive approach advanced by Article I, Section 8 of the Pennsylvania Constitution. If the evidence satisfies Article I, Section 8, then the Fourth Amendment will also be satisfied.

2013) (citing ***Commonwealth v. DeJohn***, 486 Pa. 32, 403 A.2d 1283, 1289 (1979)). Therefore, we must determine whether Eidson "exhibited an actual subjective expectation of privacy and [whether] the expectation is one that society is prepared to recognize as reasonable." ***Id.*** (citing ***Commonwealth v. Rekasie***, 566 Pa. 85, 778 A.2d 624, 628 (2001)).

In determining whether Eidson had an reasonable expectation of privacy to his computer, we must note that "[i]t is axiomatic that a defendant has no standing to contest the search and seizure of items which he has voluntarily abandoned." ***Commonwealth v. Byrd***, 987 A.2d 786, 790 (Pa. Super. 2009) (citing ***Commonwealth v. Tillman***, 621 A.2d 148, 150 (Pa. Super. 1993)). Eidson argues that "there is no evidentiary support for a finding that [he] abandoned a privacy interest in his computer" because there is no proof as to what transpired at Laser Plus between Eidson and Amidon, the employee who received Eidson's computer.[3] Eidson's Brief at 25-26. However, as our Supreme Court held:

> Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. ***All relevant circumstances existing at the time of the alleged abandonment should be considered***. The issue is not abandonment in the strict property-right sense, ***but whether the person prejudiced***

[3] Amidon did not testify at the suppression hearing. Loughman testified that Amidon has been very ill, has been in and out of the hospital, and has been receiving chemotherapy on a regular basis. N.T., 3/11/13, at 26. Counsel for Eidson suggested that Amidon was also on the run from police. N.T., 3/11/13, at 27.

> ***by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search***.

Byrd, 987 A.2d at 791 (citing ***Commonwealth v. Shoatz***, 495 Pa. 545, 366 A.2d 1216 (1976)) (emphasis in original).

The trial court considered whether Eidson evidenced an intent to abandon his laptop computer at Laser Plus by relying on this Court's holding in ***Commonwealth v. Sodomsky***, 939 A.2d 363 (Pa. Super. 2007). Trial Court Opinion, 8/20/13, at 4. Like Eidson, the defendant in ***Sodomsky*** voluntarily took his computer containing child pornography to Circuit City to install and configure hardware and the accompanying software. ***Sodomsky***, 939 A.2d at 364-65. The defendant did not remove the files or change the names of the files. ***Id.*** at 369. When the employees were testing the software, they accessed the defendant's files in a commercially reasonable manner and discovered the child pornography. ***Id.*** at 364-65, 368.

In ***Sodomsky***, this Court held that the defendant evidenced an intent to abandon a privacy interest in his computer when he took it to Circuit City and gave "the employees permission to perform certain actions relative to the computer files." ***Id.*** at 366-68. Thus, this Court held that defendant could not object to the police searching the computer because, "[i]f a person is aware of, or freely grants to a third party, potential access to his computer

contents, he has knowingly exposed the contents of his computer to the public and has lost any reasonable expectation of privacy in those contents." ***Id*.** at 369.

Applying ***Sodomsky*** to the case at bar, we conclude that the trial court did not abuse its discretion in ruling that Eidson abandoned a privacy interest in his laptop computer. Similar to the defendant in ***Sodomsky***, Eidson voluntarily brought his computer to Laser Plus for repairs because the computer was running slowly. N.T., 3/11/13, at 5-6. Testimony at the suppression hearing established that Laser Plus had a standard computer drop-off sheet that each customer filled out, wherein the customer would write down his password, a description of the problem, and any notes, including areas that Laser Plus should refrain from accessing. ***Id*.** at 20-21. Eidson filled out this form, indicated his password to the computer, and did not restrict Laser Plus from looking in any area on the computer. ***Id*.** at 20, 96-97. Furthermore, like the defendant in ***Sodomsky***, Eidson did not attempt to conceal the pornographic files or alter the file names. ***Id*.** at 23-24. In fact, the files were left in tile form, which were approximately an inch-and-a-half in size, allowing Amidon to see the contents of the files. ***Id*.** at 23, 40. The files were found while Amidon copied Eidson's files to an in-house drive at Laser Plus to preserve and protect the files, which is a commercially acceptable method of computer repair in looking for viruses. N.T., 3/11/13, at 19.

As a result, after a review of the record, we conclude that Eidson evidenced an intent to abandon his privacy interest in the computer and, consequently, Eidson cannot assert a reasonable expectation of privacy to the content on his computer. Considering all relevant facts and circumstances, Eidson voluntarily relinquished his privacy interest in the computer by freely granting Laser Plus access to his computer files and knowingly exposing the contents of those files to the public. At the time the employees at Laser Plus discovered the images and contacted the police, Eidson did not retain a reasonable expectation of privacy. Therefore, the constitutional protections afforded to individuals under Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution do not apply, and no search warrant was necessary. The trial court did not err in denying Eidson's suppression motion regarding the evidence of the contents of his computer.

For his second issue on appeal, Eidson argues that his statements made to Det. Leed "were not the product of a free, intelligent, knowing, voluntary, informed and explicit waiver by [Eidson] of his privilege against self-incrimination and his right to consult with counsel prior to interrogation." Eidson's Brief at 18. Eidson further contends that his statements are "independently suppressible as the unlawful fruit of the police's warrantless seizure of [his] computer." Eidson's Brief at 30. For the

reasons that follow, we hold that the trial court did not err in failing to suppress the statements.

The United States Constitution requires that "a suspect subject to a custodial interrogation by police must be … advised of his ***Miranda*** rights prior to custodial interrogation by law enforcement officials." ***Commonwealth v. Cruz***, 71 A.3d 998, 1003 (Pa. Super. 2013) (citing ***Miranda v. Arizona***, 384 U.S. 436, 469 (1966)). However, the safeguards of ***Miranda*** do not apply unless there is both custody and interrogation. ***Id.*** "Statements not made in response to custodial interrogation are classified as gratuitous and are not subject to suppression for lack of ***Miranda*** warnings***.***" ***Id.*** (citing ***Commonwealth v. Heggins***, 809 A.2d 908, 914 (Pa. Super. 2002)).

In this case, ***Miranda*** warnings were not required because Eidson's statements were not made in response to custodial interrogation.

> An individual is deemed to be in custody for ***Miranda*** purposes when he "is physically denied … his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of acting or movement is restricted by the interrogation. The court must consider the totality of the circumstances, including factors such as "the basis for the detention; the duration; the location; whether the suspect was transferred against his will, how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions."

Cruz, 71 A.3d at 1003 (internal citations omitted).

Eidson and Det. Leed interacted on three separate occasions. The first conversation occurred at Laser Plus on March 12, 2009, when the employees discovered the alleged child pornography. After a brief explanation of his concerns about potential child pornography stored on Eidson's computer, Det. Leed asked Eidson "if he would be ***willing*** to accompany [him] back to the police station or follow [him] back to the police station so [they] could follow up with an interview." N.T., 3/11/13, at 43 (emphasis added). Eidson agreed to go with Det. Leed in his car since Eidson had no transportation and rode in the front seat. ***Id.*** at 44. Upon arrival at the police station, Eidson participated in an interview with Det. Leed, which the trial court considered to be the second interaction.

The interview occurred in an interview room inside the detective's office. ***Id.*** The door remained open and Eidson was informed that that he was not under arrest and free to leave at any time. ***Id.*** at 45-46. Eidson signed a written statement acknowledging that he understood this information. ***Id.*** at 46-47. The interview was conducted in a question-and-answer method, which lasted approximately 50 minutes. ***Id.*** at 65. During the interview, Eidson agreed to allow Det. Leed or his examiner "to do a cursory review of [the] computer to determine if there [was] any child pornography on the computer." N.T., 3/11/13, at 70. The interview was typed out in an attempt to be a verbatim account, which was read and signed by Eidson. ***Id.*** at 69-70.

The third interaction between Eidson and Det. Leed occurred in April 2009. After receiving the report from the examiner who conducted a cursory review of Eidson's computer, Det. Leed called Eidson on April 24, 2009 and requested to speak with him on April 25, 2009. ***Id.*** at 74. Eidson agreed to speak with Det. Leed. ***Id.*** Eidson did not have transportation so Det. Leed drove to Eidson's residence to pick him up. ***Id.*** Det. Leed informed Eidson, as he did in the first interview, that Eidson was not under arrest, that "he didn't have to come to the station and he could depart the station at any time he so desired." ***Id.*** at 53. The interview was conducted at Det. Leed's desk in his cubicle and lasted approximately half an hour. N.T., 3/11/13, at 76-78. The interview was conducted in a question-and-answer method like the first interview and was memorialized into a written statement that was read and signed by Eidson. ***Id.*** at 54, 78. At the conclusion of the interview, Det. Leed informed Eidson that he would confer with the district attorney about his charges and then drove Eidson back to his residence. ***Id.*** at 78-79. Eidson rode in the front seat of the car to and from the police station. ***Id.*** at 52, 79.

After a review of the totality of the circumstances, we conclude that Eidson's statements were not made in response to custodial interrogations necessitating ***Miranda*** warnings. On all three occasions, Det. Leed was not in uniform, did not display a gun, and did not display a badge. ***Id.*** at 41-42, 45, 52. Furthermore, Eidson was never arrested, handcuffed or restrained

in any way. N.T., 3/11/13, at 41-42. Det. Leed requested two interviews with Eidson, and Eidson voluntarily agreed to speak with him on both occasions. ***Id.*** at 44, 74. Eidson was informed during both interviews with Det. Leed that he was not under arrest and could leave at any time. ***Id.*** at 46-47, 53. These statements were acknowledged by Eidson and memorialized in written statements signed by Eidson. ***Id.*** at 47, 54.

As a result, we conclude that Eidson's statements were made voluntarily during non-custodial interviews with Det. Leed. As ***Miranda*** rights only extend to situations where both custody and interrogation are present, statements made during non-custodial interviews "are not subject to suppression for lack of ***Miranda*** warnings." ***Cruz***, 71 A.3d at 1003. Accordingly, we hold that the trial court did not err in failing to suppress the statements given by Eidson. Furthermore, we hold that given our disposition of the warrantless seizure of his computer, Eidson's claim that his statements should be suppressed because they are the unlawful fruit of the warrantless seizure of his computer, is moot.

For his third issue on appeal, Eidson argues that the trial court committed an error of law by imposing a sex offender registration period of 25 years. Eidson argues that because the trial court ruled that he is a Tier I offender under the Sexual Offender Registration and Notification Act

("SORNA"),[4] the appropriate registration period is 15 years. Eidson's Brief at 31.

Sexual offender registration requirements are established in section 9799.15 of SORNA. 42 Pa.C.S.A. § 9799.15. The statute provides three tiers of offenses with corresponding registration requirements. Tier I offenses require a registration period of 15 years, Tier II offenses require registration for 25 years, and Tier III offenses require the individual to register for life. 42 Pa.C.S.A. § 9799.15(a)(1)–(3).

In this case, Eidson was convicted of five counts of sexual abuse of a child under 42 Pa.C.S.A. § 6312(d). Sexual abuse of a child pursuant to 42 Pa.C.S.A. § 6312(d) is classified as a Tier I offense. 42 Pa.C.S.A. § 9799.14(b)(9). At sentencing, the trial court ruled that Eidson is a Tier I offender but then instructed him to register with the Pennsylvania State Police for a period of 25 years. N.T., 6/17/13, at 11.

We must agree with Eidson that the trial court erred when notifying Eidson of his SORNA registration requirements. Section 9799.15(a)(1) requires "[a]n individual convicted of a Tier I sexual offense … [to] register for a period of 15 years." 42 Pa.C.S.A. § 9799.15(a)(1). Therefore, we hold that the trial court erred when it instructed Eidson to register for a period of 25 years. Accordingly, we vacate the trial court's imposition of a 25-year registration requirement and remand to the trial court for proper imposition

[4] 42 Pa.C.S.A. § 9799.10, *et seq.*

of SORNA registration requirements pursuant to 42 Pa.C.S.A. § 9799.15(a)(1).

In its Pa.R.A.P. 1925(a) opinion, the trial court acknowledges that "[t]he classification [of Eidson] as a Tier I offender and the required registration period of twenty-five (25) years was incorrect." Trial Court Opinion, 8/20/13, at 10. The trial court asserts that Eidson "should have been classified as a Tier III offender" because he was convicted of multiple Tier I offenses, and therefore, "he should have lifetime reporting requirements." ***Id.***

Echoing the trial court, the Commonwealth argues in its appellate brief that Eidson should be classified as a Tier III offender pursuant to section 9799.14(d)(16), which provides that an individual is a Tier III offender if they have "[t]wo or more convictions of offenses listed as Tier I or Tier II sexual offenses." 42 Pa.C.S.A. § 9799.14(d)(16). The Commonwealth claims that because Eidson was convicted of five counts of the Tier I offense of sexual abuse of a child, he is a Tier III offender and subject to lifetime registration requirements. Commonwealth's Brief at 19.

This Court is without jurisdiction to address the merits of the claims that Eidson is a Tier III offender subject to a lifetime registration requirement. The Commonwealth failed to file a cross-appeal regarding the trial court's classification of Eidson and only raised this issue in its appellate brief. Furthermore, the classification issue was never raised in the trial court

below. Under Rules of Appellate Procedure, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Despite its acknowledgement of error in the 1925(a) opinion,[5] the trial court failed to modify or rescind its order classifying Eidson as a Tier I offender. ***See Commonwealth v. Whanger***, 30 A.3d 1212, 1214-15 (Pa. Super. 2011) (holding that 42 Pa.C.S.A. § 5505, "which limits a court's ability to modify its orders," is not applicable to collateral consequences of a conviction.); ***see also Commonwealth v. Lippert***, 85 A.3d 1095, 1099 (Pa. Super. 2014) ("[O]ur Supreme Court has held that sexual offender registration requirements are collateral consequences" of conviction) (citing ***Commonwealth v. Leidig***, 598 Pa. 211, 956 A.2d 399, 406 (2008)). This issue is not before this Court on appeal, and we have no authority to raise it *sua sponte*. ***See Commonwealth v. Colavita***, 606 Pa. 1, 993 A.2d 874, 891 (2010) ("Where the parties fail to preserve an issue for appeal, the Superior Court may not address that issue *sua sponte*."). Accordingly, we are without jurisdiction to determine whether Eidson is a Tier III offender, as that issue has not been preserved for appeal.

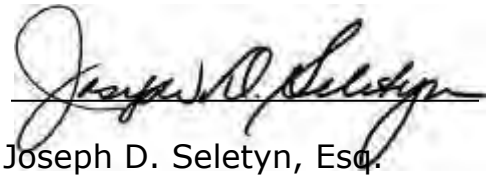
[5] We note "the long-standing rule that trial court opinions are not part of the record." ***See In re D.D.***, 597 A.2d 648, 653 (Pa. Super. 1991); ***See also Reilly by Reilly v. Se. Pa. Transp. Auth.***, 479 A.2d 973, 993 (Pa. Super. 1984) ("We may not take any account of the trial judge's Supplemental Opinion, for it is not part of the record, and 'we are bound by the record, and not by the statements of a judge appearing in his opinion.'") (internal citations omitted).

As a result, the trial court's imposition of a 25-year registration requirement is vacated. We do not disturb Eidson's sentence, which has not been challenged on appeal. Thus, we need not remand for resentencing. We remand to the trial court solely to impose the proper registration requirements for a Tier I offender under SORNA.

Judgment of sentence affirmed. Remand for proper imposition of SORNA registration requirements. Jurisdiction relinquished.

Strassburger, J. files a Concurring Statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/28/2014