

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellant :
: v. :
: TIMOTHY J. SUL, :
Appellee : No. 1365 WDA 2013

Appeal from the Order July 30, 2013,
Court of Common Pleas, Erie County,
Criminal Division at No. CP-25-CR-0000206-2012

BEFORE: GANTMAN, P.J., DONOHUE and FITZGERALD*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED: May 13, 2014

The Commonwealth appeals from the Order entered July 30, 2013 by the Court of Common Pleas, Erie County, granting Timothy Sul’s (“Sul”) Motion to Dismiss on Due Process Grounds. For the reasons that follow, we reverse.

A brief summary of the relevant facts and procedural history are as follows. At approximately 12:40 a.m., on December 2, 2012, Officer Michael Sliker (“Officer Sliker”) of the North East Police Department was on routine patrol when he came to a stop at a traffic light at the intersection of Main Street and Lake Street in North East Borough. N.T., 4/29/13, at 5-6.¹ Officer Sliker was sitting in his marked cruiser on North Lake Street facing

¹ The testimony and evidence elicited at the Suppression Hearing on April 29, 2013 were incorporated into the record at trial on July 30, 2013. N.T., 7/30/13, at 4.

*Former Justice specially assigned to the Superior Court.

South Lake Street. **Id.** at 12, 18. As he was stopped at the traffic light, Officer Sliker observed Sul walk out of a side door of Speed-Eez Sports Bar and Grill, located on South Lake Street. **Id.** at 6-7, 18. Officer Sliker testified that Sul was stumbling and staggering as he walked on the sidewalk. **Id.** at 7. Sul reached the intersection and crossed the intersection at a crosswalk, heading towards a red Ford Mustang that was parked on East Main Street, with an individual standing outside of the vehicle. **Id.** at 10-11, 22.

When the traffic light changed to green, Officer Sliker made a right turn from North Lake Street onto West Main Street because traffic was behind him. **Id.** at 13. Officer Sliker then pulled over to the curb and continued to observe Sul. N.T., 4/29/13, at 13-14. Officer Sliker was concerned that he was going to get in the vehicle and drive. **Id.** at 9. At some point, Officer Sliker made a radio call to his partner that if Sul got into the vehicle and drove, he was going to stop him on suspicion of DUI. **Id.** at 16.

Officer Sliker observed Sul and the individual standing outside of the vehicle enter the car at the same time. **Id.** at 11. The individual entered the passenger's side of the vehicle while Sul got into the driver's seat. **Id.** at 11, 15. Sul proceeded to pull out of the parking area, and drive through the intersection "in compliance with the traffic light." **Id.** at 14-15, 24. As Sul drove past Officer Sliker, Officer Sliker pulled onto the road behind Sul

and began to follow him. N.T., 4/29/13, at 24. Officer Sliker testified that during the time that he followed Sul, Sul did not commit any traffic or moving violations. **Id.**

Officer Sliker activated his lights for the vehicle to pull over approximately two-tenths of a mile after he began following Sul. **Id.** at 15. However, Sul did not stop his vehicle for approximately two-tenths of a mile after Officer Sliker activated his lights. **Id.** at 15. Sul did not come to a stop until he reached a red light at West Main Street and North Mill Street. **Id.** at 15-16. At this time, Officer Sliker exited his vehicle and approached Sul. **Id.** at 16. Sul was then charged DUI violations. Trial Court Opinion, 10/11/13, at 1.

Sul filed an Omnibus Pre-Trial Motion for Relief to challenge the stop and arrest. A hearing was held on April 29, 2013. At the suppression hearing, Officer Sliker testified that when he saw Sul walking towards the vehicle, he formed the opinion that he was under the influence of alcohol. N.T., 4/29/13, at 34. Officer Sliker testified that when he turned right onto Main Street, he believed that it would deter Sul from getting into the vehicle and driving. **Id.** at 31. He intended to approach Sul, but, Sul got into his vehicle and drove past him before he could do so. **Id.**

Officer Sliker admitted that other options were available when he observed Sul walking towards his vehicle that would have prevented him from driving. **Id.** at 31-35. Both the court and counsel for Sul suggested

that Officer Sliker could have turned left at the traffic light and parked directly across the street from Sul and approach him, he could have activated his lights and siren to get Sul's attention, or he arguably could have stopped Sul for public intoxication before he drove. **Id.** Officer Sliker agreed that all of these options were available, but were not the options he ended up taking. **Id.** at 35.

Ultimately, the trial court denied Sul's motion, finding that "Officer Sliker had reasonable suspicion to detain [] Sul for public intoxication before he entered his vehicle which, in turn, established reasonable suspicion of driving under the influence." Trial Court Opinion, 10/11/13, at 2. However, at the conclusion of the hearing, the court noted on the record, his concern regarding Officer Sliker's decision to allow Sul to get into the car when he could have prevented him from doing so. N.T., 4/29/13, at 44-46.

Sul then filed a Motion to Dismiss on Due Process Grounds – Outrageous Police Conduct. Trial Court Opinion, 10/11/13, at 2. Sul stipulated that the evidence was sufficient to establish his guilt, but "argued that the case should be dismissed because Officer Sliker's conduct violated fundamental principles of due process." **Id.**

At trial, Officer Sliker's testimony regarding his initial observations of Sul deviated from his testimony at the suppression hearing. Officer Sliker stated that he could not have cited him with public intoxication before he got into his car because at that point, Sul was not a danger to himself or other

persons. N.T., 7/30/13, at 22. Officer Sliker further testified that he did not stop Sul prior to Sul entering the vehicle because he did not know whether he was getting into the vehicle or if the passenger was the driver of the car. **Id.** at 23.

Sul's counsel argued that Officer Sliker chose to allow Sul to get into his car. **Id.** at 29. Officer Sliker again admitted that he could have taken other actions that may have prevented Sul from getting into the vehicle and driving. **Id.** at 24-25, 29-31. However, Officer Sliker testified that his intent was to stop Sul from driving once he got into the vehicle, but by the time Sul got into the vehicle and Officer Sliker pulled over, Sul was driving. **Id.** at 33.

The trial court granted Sul's motion to dismiss, finding that Officer Sliker's conduct did not pass the test of fundamental fairness and shocked the conscience because he permitted Sul to drive when he was aware that Sul was intoxicated. **Id.** at 54-55. The Commonwealth timely filed a notice of appeal and a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On appeal, the Commonwealth raises the following issue for our review:

1. Did the [c]ourt err as a matter of law in finding the conduct of Officer Sliker rose to a level so grossly shocking and so outrageous as to violate the universal sense of justice?

Commonwealth's Brief at 3.

The defense of outrageous government conduct “is based on the theory that `police involvement in criminal activity may be so outrageous that a prosecution will be barred on due process grounds.” **Commonwealth v. Sun Cha Chon**, 983 A.2d 784, 786-87 (Pa. Super. 2009) (citing **Commonwealth v. Mance**, 652 A.2d 299, 303 (Pa. 1995)). In order to prevail on a claim of outrageous government conduct, “it must be shown that police conduct was so grossly shocking and so outrageous as to violate the universal sense of justice.” **Id.** (citing **Commonwealth v. Benchino**, 582 A.2d 1067, 1069 (Pa. Super. 1990)). This generally requires “proof of government **overinvolvement** in the charged crime and proof of the defendant’s mere passive connection to the government orchestrated and implemented criminal activity.” **Commonwealth v. Boyle**, 733 A.2d 633, 639 (Pa. Super. 1999) (emphasis in original). “Moreover, for due process to bar a conviction, the government’s involvement in the commission of the crime `must be *malum in se* or amount to the engineering and direction of the criminal enterprise from beginning to end.” **Commonwealth v. Nelson**, 666 A.2d 714, 718 (Pa. Super. 1995).

We note that “[t]he judiciary is extremely hesitant to find law enforcement conduct so offensive that it violates the Due Process Clause.” **Sun Cha Chon**, 983 A.2d at 786-87. As this Court held in **Commonwealth v. Lindenmuth**, 554 A.2d 62 (Pa. Super. 1989), a determination of whether police involvement in criminal activity is outrageous is a “legal question to be

determined by the court.” **Id.** at 64; **see also Sun Cha Chon**, 983 A.2d at 786-87.

In this case, the trial court held that “[w]ithin the context of the facts of this case, Officer Sliker’s conduct was outrageous and, more importantly, can only be deterred by invoking due process protections.” Trial Court Opinion, 10/11/13, at 6. The trial court specifically found Officer Sliker’s conduct to be offensive and outrageous because he permitted Sul, “who was clearly intoxicated, to operate his vehicle with a passenger present in an urban area. [Officer Sliker] intentionally permitted a hazardous condition to occur which created a threat to the public’s safety without any justifiable reason.” **Id.** After our review, we conclude that the trial court erred in this determination.

There is no dispute that Officer Sliker had other options available when he decided to make a right turn onto Main Street that may have prevented Sul from getting into the vehicle and driving. N.T., 4/29/13, at 31-35; **see also** N.T., 7/30/13, at 24-25, 29-31. Officer Sliker himself testified that when he made a right turn onto Main Street, he could have taken other actions that may have prevented Sul from operating the vehicle. **Id.** However, Officer Sliker further testified that at the time he made the choice to turn right, he felt it was the best decision. N.T., 4/29/13, at 36.

Although Officer Sliker’s decisionmaking could be challenged for its appropriateness under the circumstances, his conduct does not rise to the

level of outrageous government conduct. As this Court held in ***Commonwealth v. Benchino***, 582 A.2d 1067 (Pa. Super. 1990), “[t]he few appellate decisions in which government conduct has been found to violate due process have generally involved long term police involvement in the establishment and operation of ongoing criminal enterprises.” ***Id.*** at 1071.

In ***Commonwealth v. Mathews***, 500 A.2d 853 (Pa. Super. 1985), for example, this Court found outrageous government conduct when the police encouraged and supplied the defendants with the necessary money to purchase chemicals and to rent a residence to set up a methamphetamine lab. ***Id.*** at 856-57. The police also provided step-by-step instructions in the manufacturing process and helped them transport the necessary equipment. ***Id.*** This Court held that the conduct of the police violated due process because the police were principal players in the defendants’ criminal act. ***Id.*** at 857.

Conversely, in cases where the police did not exhibit a pervasive involvement in the crime at issue, this Court has “generally refused to find due process violations, even where the government’s conduct was unseemly.” ***Benchino***, 582 A.2d at 1071. In its Rule 1925(a) opinion in this case, the trial court cited to ***Commonwealth v. Bonace***, 571 A.2d 1079 (Pa. Super. 1990). In ***Bonace***, an individual was contacted by the defendant to participate in a series of planned burglaries. ***Id.*** at 1080. The

individual agreed to participate and then notified police of the impending burglaries. **Id.** Police intended to prevent the burglaries by fitting the individual with a body wire, and by placing an electronic tracking device in the taillight of his truck to conduct surveillance. **Id.** However, “faulty equipment and hilly terrain [] permitted the receipt of only an intermittent signal from [the individual’s] truck and the wire which he was wearing.” **Id.** at 1081. As a result, police were unaware of the location of the first burglary until it already began. **Id.** The police did not interrupt the burglary because they were notified that one of the burglars was armed and they suspected that residents of the home might be present. **Bonace**, 571 A.2d at 1081. The police were also unaware of the second burglary until after it commenced. **Id.** They likewise did not interrupt the second burglary. **Id.**

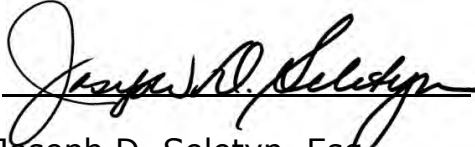
The trial court in **Bonace** found that the conduct of the police “fell short of the level of professionalism in communication and coordinating skills that one would expect.” **Id.** However, the trial court found that their conduct was not outrageous because there was no evidence of “extensive and nefarious police involvement in, and encouragement of, criminal activities.” **Id.** On appeal, this Court adopted the trial court’s rationale and further held that the conduct was not outrageous as to violate due process because the burglaries were planned by the burglars themselves, and “[t]he police did nothing more than allow them to commit their criminal acts before they were arrested.” **Id.** at 1082.

We find **Bonace** to be persuasive in deciding the case presently before this Court. Similar to the police in **Bonace**, Officer Sliker intended to prevent Sul from engaging in criminal conduct. N.T., 4/29/13, at 31. However, Officer Sliker's decisions and actions at the time of the incident ultimately resulted in a situation that permitted Sul to drive his vehicle while intoxicated. Nevertheless, Officer Sliker did not induce Sul to enter his vehicle and drive, and Officer Sliker was not otherwise involved in the establishment and operation of Sul's illegal actions. Officer Sliker did nothing more than allow Sul to commit a criminal act before he was arrested. **See Bonace**, 571 A.2d at 1082.

This Court has held that merely affording the defendant the opportunity to commit a crime does not rise to the level of police overinvolvement, which constitutes a violation of due process. **See Mance**, 619 A.2d at 1382; **see also Commonwealth v. Diliberto**, 582 A.2d 690, 693 (Pa. Super. 1990). Officer Sliker was not pervasively involved in Sul's illegal actions and his conduct was not outrageous and did not constitute a violation of due process. Accordingly, we reverse the trial court's order granting Sul's motion to dismiss on due process grounds.

Order reversed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/13/2014