

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
PATRICK A. MacCRORY,	:	
	:	
Appellant	:	No. 1489 WDA 2013

Appeal from the Judgment of Sentence entered on July 9, 2013
in the Court of Common Pleas of Clearfield County,
Criminal Division, No. CP-17-CR-0000869-2012

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JUNE 20, 2014

Patrick A. MacCrory ("MacCrory") appeals from the judgment of sentence imposed after he was convicted of driving under the influence of alcohol and controlled substances ("DUI"), and the summary offenses of obedience to traffic-control devices, driving on roadways laned for traffic, and careless driving.¹ We affirm.

On August 3, 2012, Jonathon McLister ("McLister"), a motorist traveling westbound on Interstate-80 ("I-80") in Clearfield County, observed MacCrory's Dodge Ram truck in a paved "crossover" section of I-80. N.T., 5/14/13, at 31-32. The vehicle was stationary, and McLister initially thought that the operator, MacCrory, was asleep. **Id.** at 32. Because traffic travelling in the westbound lanes of I-80 was at a standstill due to

¹ **See** 75 Pa.C.S.A. §§ 3802(d)(3), 3111(a), 3309(1), 3714(a).

construction work, McLister was able to observe MacCroy's vehicle for a prolonged period. **Id.** McLister watched as the vehicle began to move forward, whereupon MacCroy narrowly missed striking a reflective post, and slammed on his brakes. **Id.** MacCroy then put the vehicle in reverse, careened into a culvert, and came to a rest at "a pretty extreme angle." **Id.** at 33. Because of the vehicle's erratic behavior, McLister was concerned that there was something wrong with the operator, and pulled over and ran to the vehicle to assist the operator. **Id.** McLister asked MacCroy through the truck's open passenger's side window if he was all right, and immediately noticed that MacCroy smelled of alcohol and his speech was slurred. **Id.** McLister also saw a glass pipe in the cup holder, which he suspected was used for marijuana consumption. **Id.** MacCroy told McLister that he was okay and then attempted to drive out of the culvert, to no avail. **Id.** at 38-39. McLister called 911, as he was concerned for the safety of the public based upon MacCroy's inebriated state. **Id.** at 39. McLister saw MacCroy exit his vehicle and walk over the eastbound lanes of travel on I-80, where traffic was moving at a high rate of speed. **Id.** at 39-40. MacCroy was staggering, and McLister was concerned that he would be struck by a vehicle, but he made it across the roadway and entered a wooded area alongside I-80. **Id.** at 40.

Shortly after McLister's call to 911, Pennsylvania State Trooper Adam Gibson ("Trooper Gibson") responded to the scene, saw a white male

matching the description of the operator of the truck given by McLister enter the woods, and pursued him. *Id.* at 41, 136-38. Upon entering the woods, Trooper Gibson found MacCroy lying on the ground. *Id.* at 139. When MacCroy began to speak to Trooper Gibson, he was disoriented, had difficulty walking, and smelled of alcoholic beverages. *Id.* at 139. Trooper Gibson asked MacCroy if he had been drinking, and he responded that he “had a little too much to drink” and had “smoked a lot” of marijuana. *Id.* at 139-40. Trooper Gibson requested that MacCroy submit to a field sobriety test, to which MacCroy responded, “what’s the point, you got me.” *Id.* at 141.

Trooper Gibson placed MacCroy under arrest and transported him to a hospital for a blood test. *Id.* at 142. The test results revealed that MacCroy had a blood alcohol content of 0.195%, and that he had recently consumed marijuana. *Id.* at 110-11.

The Commonwealth subsequently charged MacCroy with the above-referenced offenses. Prior to trial, MacCroy filed a Motion to Suppress, pointing out that, under the Pennsylvania Motor Vehicle Code (“the Code”), in order to be convicted of DUI, the offense must occur on a “highway” or “trafficway,” as those terms are defined under the Code. Omnibus Pre-Trial Motion, 1/4/13, at 3 (citing 75 Pa.C.S.A. § 3101(b)). According to MacCroy, “[t]he alleged observations of [MacCroy’s] driving by McLister were of [MacCroy] while he was in his vehicle in the highway crossover[,]”

and “a crossover is not a highway or trafficway as defined by the [] Code.” Omnibus Pre-Trial Motion, 1/4/13, at 3; **see also id.** (maintaining that “[t]he crossover was restricted by signage.”). After conducting a hearing, the trial court denied MacCroy’s suppression Motion.

In May 2013, the case proceeded to a jury trial. Notably, after MacCroy’s counsel (“defense counsel”) had concluded his cross-examination of McLister,² the trial court asked the prosecutor and defense counsel if they wanted McLister to remain, or if he could be excused as a witness. N.T., 5/14/13, at 49. Neither counsel objected to McLister being excused, and the court permitted him to leave. **Id.** Subsequently, upon the conclusion of the Commonwealth’s case-in-chief, defense counsel stated that he wished to recall McLister as a witness for the defense. **Id.** at 166. However, McLister had already been excused, and was no longer in the courthouse. **Id.** at 166-67. Defense counsel then moved for a mistrial, which the trial court denied. **Id.** at 169-70.

At the close of trial, the jury found MacCroy guilty of the above-referenced offenses. On July 9, 2013, the trial court sentenced MacCroy to serve 90 days to one year in the Clearfield County Jail, plus a consecutive period of probation of two years. MacCroy timely filed a Notice of Appeal.

On appeal, MacCroy presents the following issues for our review:

- I. Whether the record supports the lower court’s factual findings and the legitimacy of the inferences and legal

² McLister was subpoenaed only by the Commonwealth.

conclusions drawn from those findings in its denial of [MacCrory's] Motion to Suppress Evidence?

- II. Whether the trial court abused its discretion in denying [MacCrory's] Motion for a Mistrial after [] a Commonwealth witness[,] who had not been dismissed[,] was unavailable for [MacCrory's] case-in-chief?

Brief for Appellant at 5 (capitalization omitted).

MacCrory first challenges the trial court's denial of his Motion to Suppress, asserting that the court erred in ruling that the highway crossover section of I-80 in question was not a highway or trafficway, as defined under the Code. *Id.* at 10-11. Although MacCrory concedes that the crossover was publicly-maintained, he "dispute[s] that the cross[]over is open to the use of the public for purposes of vehicular travel." *Id.* at 11. Specifically, he maintains that (1) there were signs posted at the crossover stating that it may only be used by authorized vehicles; and (2) the public is permitted to use the crossover only during emergencies. *Id.* at 11-13.

In reviewing MacCrory's claim, we are mindful that

our role is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. In making this determination, we may consider only the evidence of the prosecution's witnesses and so much of the defense as, fairly read in the context of the record as a whole, remains uncontradicted. When the evidence supports the factual findings of the suppression court, we may reverse only if there is an error in the legal conclusions drawn from those factual findings. As a reviewing court, we are therefore not bound by the legal conclusions of the suppression court and must reverse that court's determination if the conclusions are in error or the law is misapplied.

Commonwealth v. Page, 59 A.3d 1118, 1131 (Pa. Super. 2013) (brackets and citation omitted).

In support of its ruling denying MacCrory's suppression Motion, the trial court stated as follows:

Chapter 38 of the [] Code, which prohibits driving after imbibing alcohol or ingesting drugs, applies to highways and trafficways throughout the Commonwealth. 75 Pa.C.S.A. § 3101(b). Section 102 [of the Code] defines a "highway" as "[t]he entire width between the boundary lines of *every way publicly maintained* when any part thereof is *open to the use of the public for purposes of vehicular travel.*" 75 Pa.C.S.A. § 102 (emphasis added). [MacCrory] avers that the cross[]over, since its public use was restricted by signage, does not constitute a highway or trafficway as defined by statute.^[FN] The [trial c]ourt disagrees with this argument, for a cross[]over clearly falls within the definition of "highway," as set forth by statute. Moreover, the [trial c]ourt left the inquiry of whether the cross[]over was a highway or not in the hands of [the] jury, as a question of fact. At trial, the [trial c]ourt fully informed the jury on the meaning of a highway[,] and the jury afterwards determined that the offense occurred on a highway.

[FN] The Code defines a "trafficway" as "[t]he entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom." 75 Pa.C.S.A. § 102. The [trial c]ourt concedes that this definition is inapplicable in this matter and informed the jury as such.

Even though an emergency cross[]over has a limited use, it can be and is used by the public in certain situations. Cross[]overs are publicly maintained by the Commonwealth, as indicated by the pavement and signage, and are open to the public and emergency personnel for vehicular travel in emergency situations. *Members of the public can easily circumvent the posted entry restrictions and drive upon the cross[]over, just as [MacCrory] did in this instance.* Furthermore, motorists and emergency personnel workers who

utilize cross[]overs on highways have an expectation that such areas will be regulated[,] and serious traffic offenses that occur there will be prosecuted. Therefore, the [trial c]ourt at the Suppression Hearing did not err in determining that [MacCrory] could not demonstrate as a matter of law that the emergency cross[]over was not a highway for the purposes of 75 Pa.C.S.A. § 3101.

Trial Court Opinion, 10/25/13, at 3-4 (footnote in original; citations to record omitted; some emphasis added). We agree with the trial court's sound analysis and legal conclusion, and affirm on this basis in rejecting MacCrory's challenge to the denial of his Motion to Suppress. **See id.**

Next, MacCrory contends that the trial court erred by denying his Motion for a Mistrial. Brief for Appellant at 14. MacCrory points out that defense counsel, at the beginning of the defense's case-in-chief, stated that he wished to call McLister as a witness, but was unable to do so because the trial court had previously excused McLister upon the conclusion of his testimony on behalf of the Commonwealth. **Id.** at 15; **see also** N.T., 5/14/13, at 49, 166-67. MacCrory maintains that the trial court never specifically asked defense counsel if he had any objection to McLister being excused as a witness, which, according to MacCrory, deprived him of due process. Brief for Appellant at 16-17; **see also** N.T., 5/14/13, at 167-70.

"A mistrial is an 'extreme remedy' that is only required where the challenged event deprived the accused of a fair and impartial trial. The denial of a mistrial motion is reviewed for an abuse of discretion."

Commonwealth v. Laird, 988 A.2d 618, 638 (Pa. 2010) (citations omitted).

In its Opinion, the trial court addressed MacCrory's claim as follows:

During [MacCrory's] trial, the Commonwealth's witness, [] McLister, was questioned during direct examination and was then offered for cross[-]examination. [Defense] counsel performed cross[-]examination on [McLister]. [] McLister was subpoenaed to testify for the Commonwealth only. At the conclusion of [defense counsel's] cross[-]examination, the following dialogue transpired between [defense c]ounsel[], Mr. Maines (Counsel for the Commonwealth), and the [trial c]ourt:

[Defense counsel]: Okay. Nothing further, Judge.

The Court: Any redirect for this witness?

Attorney Maines: Nothing further, Your Honor.

The Court: Thank you, sir [McLister]. Is there a desire for this witness to be excused or do you want him to stick around?

Attorney Maines: Your Honor, he can be excused.

Trial Tr., pg. 49 (May 14, 2013). After this conversation, [] McLister was dismissed as a witness. *At no time prior to, during, or after this dialogue did [defense c]ounsel object to the [trial c]ourt excusing this witness. ...*

When the [trial c]ourt later asked if [MacCrory] had any witnesses to present in support of his case-in-chief, [defense c]ounsel responded that they wished to recall [] McLister as a witness. However, [] McLister had already left the courthouse at this time, since he was released by the [trial c]ourt with no objection from [defense c]ounsel. [Defense c]ounsel did not subpoena [] McLister, but merely thought "that he was staying for the trial," because he had been sitting in the courtroom for the majority of the hearing.

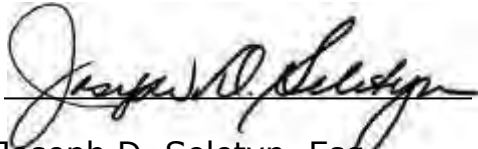
The [trial c]ourt believed that declaring a mistrial under these circumstances was unreasonable. [Defense c]ounsel had an ample opportunity to question [] McLister and could have subpoenaed the witness if he wished to question him further in [MacCrory's] case-in-chief. Moreover, [defense] counsel could have objected when the [trial c]ourt excused [] McLister as a

witness. [Defense c]ounsel did not do any of these aforementioned actions. The [trial c]ourt did not err in denying defense [c]ounsel's oral motion in this instance, and therefore a mistrial was not proper under the circumstances.

Trial Court Opinion, 10/25/13, at 4-6 (emphasis and some citations added; some citations to record omitted). The trial court's cogent analysis is supported by the record and the law, and we discern no abuse of discretion by the court in denying MacCrory's Motion for a Mistrial.³

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014

³ We additionally observe that we find no merit in MacCrory's claim that the trial court deprived him of due process because it never specifically asked defense counsel if he had any objection to McLister being excused. Defense counsel clearly had an opportunity to object when the trial court expressly stated that it was excusing McLister, but defense counsel said nothing. **See** N.T., 5/14/13, at 49; **see also id.** (where defense counsel stated, upon his conclusion of cross-examining McLister, that counsel had "[n]othing further" for this witness); **see also Commonwealth v. Montalvo**, 956 A.2d 926, 936 (Pa. 2008) (stating that in order to preserve a claim on appeal, a party must lodge a timely objection at trial).