NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GARY HAIRSTON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1701 WDA 2012

Appeal from the Judgment of Sentence of October 4, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015261-2008

BEFORE: SHOGAN, OLSON and WECHT, JJ.

MEMORANDUM BY OLSON, J.: FILED JUNE 20, 2014

Appellant, Gary Hairston, appeals from the judgment of sentence entered on October 4, 2012 in the Criminal Division of the Court of Common Pleas of Allegheny County. We affirm.

At the conclusion of trial on July 17, 2012, a jury found Appellant guilty of possession of a controlled substance (heroin) with intent to distribute (PWID) and simple possession.[1] Thereafter, on October 4, 2012, the trial court sentenced Appellant to five to 15 years' incarceration for his PWID conviction. No further penalty was imposed on Appellant's simple possession charge.

---

[1] 35 P.S. §§ 780-113(a)(30) and 780-113(a)(16), respectively.

The relevant facts are as follows. On September 18, 2008, Appellant was arrested and charged with PWID and simple possession. The Commonwealth filed an information on December 3, 2008. On April 15, 2009, Appellant filed an omnibus pre-trial motion that included, among other things, a motion to suppress physical evidence. On September 28, 2010, the trial court convened a hearing on Appellant's suppression motion. The trial court summarized the testimony adduced at the hearing in the following manner:

> At th[e hearing on Appellant's motion to suppress,] Officer Michael Molitaris, a seventeen year veteran of the City of Pittsburgh Police Department, testified about an incident he observed while on duty on September 18, 2008, at approximately 7:00 p.m. Officer Molitaris testified that he saw an individual standing in the middle of Salter Way, a dead end street, speaking with another individual in a Dodge Ram truck. The officer knew the area was considered a high crime area and was aware of previous arrests on this street. After waiting a few minutes, Officer Molitaris along with two other undercover officers drove approximately one hundred feet down Salter Way in an unmarked police vehicle and observed Appellant walking in the street towards them. Appellant was holding a one gallon clear plastic Ziploc bag containing what the officer described as dark objects. Officer Molitaris testified that Appellant looked in the direction of the Chevy Impala driven by the undercover officers and got a "deer in the headlights look on his face." Immediately, Appellant turned sharply to the right and walked quickly out of view.
>
> At that point, Officer Molitaris sped up his vehicle and reestablished visual contact with Appellant. When Officer Molitaris saw him this second time, Appellant had burrs on his clothing indicative of being in a wooded area and was no longer carrying the plastic bag. The officers exited the vehicle and identified themselves as Pittsburgh Police officers. Officer Molitaris went to the location from which he had seen Appellant emerge. After searching the weeded area for less than a

> minute, Officer Molitaris recovered a clear plastic bag containing several bricks of heroin from the same [location] where Appellant had retreated. Once Officer Molitaris recovered the bag, he gave the other officers the code word "Ray Lewis", which meant to place the actor under arrest. Prior to giving the code word, Officer Molitaris observed that Appellant was not in handcuffs. Officer Molitaris testified that when he[, Officer Molitaris,] emerged from the weeded lot, he had burrs on his clothing, and stated that the burrs were the same type as those found on Appellant's clothing. The officer testified that the twenty-six bricks recovered from the gallon-sized Ziploc bag, each at an approximate street value of five hundred dollars, was a substantial amount of heroin and contraindicative of personal use.[2]
>
> Officer Robert Stroschein, one of the other two undercover officers riding with Officer Molitaris, testified that when he got out of the undercover vehicle, he approached Appellant and asked him his name. Appellant was not handcuffed or searched at that time. Once Officer Stroschein heard the code word, he placed Appellant under arrest. Office Stroschein searched Appellant incident to arrest and recovered two thousand two hundred fifteen dollars and three cell phones from Appellant's pockets. Appellant indicated to the officer that he was unemployed. Based on the testimony of these officers, th[e trial c]ourt denied both the suppression and habeas motions.
>
> At trial, all three officers present during this encounter testified consistent with the[ir] testimony at the suppression hearing. Appellant called a neighbor, Jamaica Lee, who testified that she was on her porch and observed the encounter. According to Lee, Appellant did not have a bag in his hand from the time he got out of the car to the point at which he was intercepted by police. However, her ability to observe from her vantage point was impeached on cross-examination by photographs depicting her location in relation to Appellant's car and another car parked beside it. Appellant testified that he parked his car in the alley and spoke with two men working on another car after he exited

---

[2] The phrase "twenty-six bricks" of heroin equates to 1,300 individual packets of the drug.

> his vehicle. Appellant also denied having a plastic bag or anything in his hands upon exiting his vehicle.

Trial Court Opinion, 5/23/13, 3-5.

Based on the forgoing evidence, the jury found Appellant guilty on July 17, 2012 and the trial court imposed sentence on October 4, 2012. Appellant filed a notice of appeal on November 2, 2012. By order entered on November 13, 2012, the trial court directed Appellant to file a concise statement of errors raised on appeal pursuant to Pa.R.A.P. 1925(b). After several extensions, Appellant filed his concise statement on February 19, 2013. The trial court issued its opinion on May 23, 2013.

Appellant raises the following claims for our review:

> Whether [Appellant's] sentence is illegal as no credit was given toward his sentence of incarceration when his bond was revoked upon conviction and credit was not awarded toward any other sentence/case for any part of the pre-sentence confinement?
>
> Whether the Court of Common Pleas erred in not granting [Appellant's] motion to suppress physical evidence?
>
> Whether the Court of Common Pleas erred and/or abused its discretion in denying [Appellant's] request for instruction of the jury on use of inconsistent statements as impeachment and/or substantive evidence?
>
> Whether there is insufficient evidence to sustain [Appellant's] convictions due to the inconclusive and/or decidedly uncertain nature of the testimony and evidence that [Appellant] was, or had been, in possession of the controlled substance recovered shortly after police detectives began pursuit of [Appellant]?

Appellant's Brief at 6.

In his first claim, Appellant alleges that his sentence is illegal because he received no credit for the time he served in custody from the revocation of his bond following his conviction on July 17, 2012 until the court imposed sentence on October 4, 2012.

Section 9760 of the Pennsylvania Sentencing Code, 42 Pa.C.S.A. § 9701, *et seq.*, governs a criminal defendant's entitlement to credit for time served toward a sentence of total confinement. In relevant part, it provides:

> **§ 9760. Credit for time served**
>
> After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa.C.S.A. § 9760(1). A "challenge to the trial court's failure to award credit for time spent in custody prior to sentencing [implicates] the legality of [a] sentence." ***Commonwealth v. Beck***, 848 A.2d 987, 989 (Pa. Super. 2004). As Appellant claims that the trial court improperly denied credit for the time he spent in custody from the date of his conviction until the date his sentence was imposed, we shall review Appellant's claim as a question of law. Hence, our standard of review is *de novo* and our scope of review is plenary. ***See Commonwealth v. Kyle***, 874 A.2d 12, 17 (Pa. 2005)

(entitlement to sentencing credit against term of incarceration under § 9761(1) is primarily issue of statutory construction; thus, scope of appellate review is plenary and standard of review is *de novo*).

Appellant is not entitled to relief on this claim. Our review of the record reveals that, on October 4, 2012, the trial court issued an amended order of sentence that awarded Appellant credit for eighty days of time served from July 17, 2012, the date of Appellant's conviction, to October 4, 2012, the date that Appellant's sentence was imposed. Thus, the record refutes Appellant's first claim of error.

Appellant's second claim asserts that the trial court erred in denying his motion to suppress. In reviewing such claims, we apply a well-established standard of review.

> In reviewing a trial court's denial of a motion to suppress physical evidence, this Court must determine whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. In so doing, we may 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 court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Williams, 980 A.2d 667, 670 (Pa. Super. 2009), *appeal denied*, 990 A.2d 730 (Pa. 2010).

In this case, Appellant claims that the police lacked reasonable suspicion or probable cause to support any detention or seizure. Specifically, Appellant argues that he "was seized by police when their vehicle sped up

to/after him" and that he discarded the Ziploc bag of heroin only after the detectives began a coercive pursuit, which they commenced before they knew what Appellant carried in his possession. ***See*** Appellant's Brief at 41. On the day of his arrest, Appellant claims he was merely walking down Salter Way within 100 feet of the detectives' vehicle and that he darted into the vacant lot because it was his natural inclination to get out of the way of an approaching vehicle. ***See id.*** at 46. Appellant denies any support in the record for a finding that, "[he] fled from or otherwise evaded police." ***Id.*** Citing ***Commonwealth v. Washington***, 51 A.3d 895 (Pa. Super. 2012),[3] Appellant asserts that without evidence that he knowingly evaded the detectives, there is no nexus between his flight into the vacant lot and a reasonable suspicion of criminal activity. Appellant thus maintains that he abandoned the contraband because of an unlawful seizure that the detectives initiated without probable cause or reasonable suspicion. Consequently, Appellant concludes that the trial court should have suppressed the evidence seized by the detectives because the officers undertook a warrantless search and seizure of Appellant without constitutional justification. ***See*** Appellant's Brief at 45.

---

[3] In ***Washington***, we held that flight in a high crime area did not present reasonable suspicion for an investigatory stop where there was no evidence that the defendant knowingly ran from the police. ***Washington***, 51 A.3d at 899.

Appellant's reliance upon ***Washington*** is unavailing. In that case, we acknowledged the now well-established principle that unprovoked flight in a high crime area can establish reasonable suspicion to believe that criminal activity is afoot. ***Washington***, 51 A.3d at 898. We clarified, however, that unprovoked flight supports this assessment only where it occurs upon confrontation with the police or a recognizable police presence in the immediate vicinity. ***Id.*** Absent such a showing, the required nexus is lacking and suppression may be proper. ***Id.*** at 899.[4]

In this case, the Commonwealth adduced sufficient evidence to demonstrate that Appellant knowingly fled from a recognizable police presence when he hurried toward the vacant lot on Salter Way. At the suppression hearing, Officer Molitaris testified that the events in question took place in a high crime area. N.T., 9/28/10, at 7. He further testified that, as the detectives approached by vehicle, Appellant looked in the direction of the officers' Chevrolet Impala (a vehicle frequently used by undercover narcotics agents) and got a "deer in the headlights look on his face." ***Id.*** at 8. Thereafter, Appellant immediately walked out of view and into the vacant wooded area. This testimony, credited by the trial court, was sufficient to connect Appellant's unprovoked flight to a reasonable

---

[4] Of course, courts ultimately look to the totality of circumstances to determine whether the police have established reasonable suspicion. ***Washington***, 51 A.3d at 898.

suspicion of criminal activity. Thus, no relief is due on Appellant's suppression claim.

In his third claim, Appellant alleges that the trial court erred or abused its discretion in denying his request for a jury instruction on the use of inconsistent statements as impeachment or substantive evidence. "[O]ur standard of review when considering the denial of jury instructions is one of deference—an appellate court will reverse a court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Janda***, 14 A.3d 147, 163 (Pa. Super. 2011), *citing* ***Commonwealth v. Galvin***, 985 A.2d 783, 788–789 (Pa. 2009), *cert. denied*, 130 S.Ct. 2345 (U.S. 2010).

On appeal, Appellant identifies discrepancies in two areas of the detectives' testimony that differed slightly from their testimony at a prior proceeding that resulted in a mistrial. The first involved the distance at which the detectives observed Appellant when they first arrived at Salter Way. The second involved the location at which Appellant emerged from the vacant lot. Although Appellant acknowledges that the detectives' testimony wavered only slightly on these topics, he nevertheless claims that he is entitled to a new trial because the court denied his request to charge the jury on prior inconsistent statements. In particular, Appellant claims that the jury should have been instructed that they could reject the officers'

testimony entirely if they found that portions of the officers' testimony lacked credibility.

Though the court denied Appellant's request, our review of the jury charge reveals that the trial court correctly advised the jury that it had the duty to decide which testimony to believe, and which to reject, if it could not reconcile conflicts in the witnesses' statements. The court also instructed the jury to consider whether certain conflicts were matters of importance or merely extraneous detail. Lastly, the court directed the jury to consider whether conflicts in the testimony constituted intentional falsehoods or innocent mistakes. It is well settled that "[t]he trial court has broad discretion to choose its own wording, as long as its instruction clearly, adequately, and accurately reflects the law." ***Commonwealth v. Thomas***, 879 A.2d 246, 265 (Pa. Super. 2005), *appeal denied*, 989 A.2d 917 (Pa. 2010). Since the trial court's jury charge accurately reflected the law, we find no merit in Appellant's arguments on appeal. Thus, Appellant's third claim fails.

In his fourth and final claim, Appellant challenges the sufficiency of the evidence offered in support of his convictions. We evaluate such claims under the following standard of review:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. **In applying the above test, we may not weigh the evidence and substitute our**

> **judgment for the fact-finder.** In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.
>
> This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Although a conviction must be based on more than mere suspicion or conjecture, the Commonwealth need not establish guilt to a mathematical certainty.

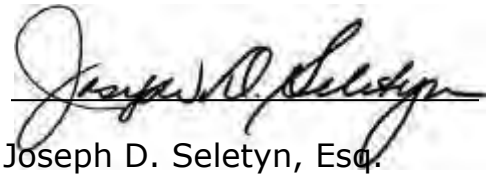
Commonwealth v. Antidormi, 84 A.3d 736, 756 (Pa. Super. 2014) (citations and quotations omitted; emphasis added).

In leveling his challenge to the sufficiency of the evidence, Appellant raises questions about his identification as the individual who possessed the contraband on the day of his arrest and targets various discrepancies in the testimony of the investigating detectives. Essentially, Appellant asks us to re-weigh the evidence introduced at trial and to substitute our conclusions for those of the jury. Pursuant to our well-settled standard of review, we decline Appellant's invitation to usurp the jury's role as fact-finder. Because we conclude that the evidence was more than sufficient to establish Appellant's guilt beyond a reasonable doubt, we deny relief on Appellant's

challenge to the sufficiency of the evidence and affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014