NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RICHARD I. RIVERA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2123 MDA 2013

Appeal from the Judgment of Sentence October 30, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0004571-2012

BEFORE: BENDER, P.J.E, BOWES, and PANELLA, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 23, 2014**

Richard I. Rivera appeals from the judgment of sentence of three and one-half to seven years incarceration that was imposed after he was convicted at a bench trial of two counts of possession of a controlled substance with intent to deliver ("PWID"). We affirm.

We first set forth the facts underlying Appellant's convictions. On May 1, 2012, State Parole Agent Jerry Masucci contacted York City Police Officer Scott Nadzom to conduct a drug investigation at Appellant's residence, which was located in the rear apartment of the first floor of 627 East Market Street, York. The request was made after Appellant's parole officer, Ronald Crone, reported to Agent Masucci that he saw marijuana and packaging materials during a routine home visit to Appellant's apartment. Officer Nadzom, accompanied by another York police officer as well as two state police officers, went to the residence in question.

Upon his arrival, Officer Nadzom spoke with Appellant, advised him that he was a suspect in a drug investigation, and administered ***Miranda*** rights. Appellant stated that he "understood his rights," and then Officer Nadzom "obtained consent through a written consent form to search his residence." N.T. Trial, 8/19/13, at 24. Police discovered approximately $900 in cash, three packages of marijuana, knotted sandwich baggies containing cocaine, a scale, and items used for packaging drugs for sale. The marijuana recovered weighed 3.139 pounds, and the cocaine amounted to 2.31 grams.

Officer Nadzom interviewed Appellant, who told him that he was "on state parole for robbery. [Appellant] said that he was currently unemployed and that he didn't use any type of drug. He told [Officer Nadzom] that he had been selling marijuana for the last couple of months to pay his bills and his rent since he was not working." ***Id***. at 30. Appellant also admitted that the cash recovered by police constituted proceeds from his drug-selling enterprise. Appellant told Officer Nadzom that the cocaine belonged to a friend and that Appellant "allowed him to come there and package the cocaine up and take it and sell it to different people. Basically [Appellant] was holding the cocaine and packaging material for another person." ***Id***. at 32.

After he was convicted of two counts of PWID, Appellant proceeded to sentencing on October 30, 2013, where he received an aggregate sentence of three and one-half to seven years imprisonment. This appeal followed.

We note that counsel initially filed a brief and petition to withdraw pursuant to ***Anders v. California,*** 386 U.S. 738 (1967), and ***Commonwealth v. Santiago,*** 978 A.2d 349 (Pa. 2009), which govern a withdrawal from representation on direct appeal. Appellant's brief was non-compliant with ***Santiago*** in that it failed to establish that issues raised therein lacked merit. We directed counsel to file a proper brief, as outlined in ***Santiago***. Counsel then elected to file a merits brief. Therefore, the petition to withdraw is moot, and we are tasked with analyzing these two questions:

> I. Whether the trial court erred in denying Appellant's motion to suppress evidence because the parole officer had insufficient reasonable suspicion to conduct a search of the home:
>
> > a. Based on positive drug test, when the officer had knowledge that the drug test was only accurate within a 4 to 5 day window of time; and
> >
> > b. Based on the other factors, such as lack of employment and new expensive items in Appellant's residence, when the parole officer was provided with reasons for how Appellant was supporting himself and provided documentation on how such expensive items were acquired?
>
> II. Whether the trial court erred in denying Appellant's motion to dismiss based on Rule 600, when the Commonwealth brought Appellant's case to trial after the adjusted run date and no reasons were recorded in the record of why the Commonwealth failed to bring Appellant's case to trial for at least four consecutive trial terms prior to the expiration of the adjusted run date?

Appellant's brief at 5.

Appellant's first contention is that the trial court erred in refusing to suppress the evidence discovered in his home since it was predicated upon

an improper search by his parole officer. We first outline the applicable standard of review when a defendant appeals a suppression ruling:

> We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by the defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

Commonwealth v. Landis, 89 A.3d 694, 702 (Pa.Super. 2014) (quoting ***Commonwealth v. Feczko***, 10 A.3d 1285, 1287 (Pa.Super. 2010) (*en banc*)).

Herein, the Commonwealth presented the testimony of Appellant's State Parole Agent Ronald Crone at the suppression hearing.[1] At the time of the search, Agent Crone had previously worked for twelve years as a county probation/parole officer, and was employed as a state parole officer for four years. In August 2011, Appellant was released to the York area on parole, and Agent Crone began to supervise him in 2012. Appellant was on parole for aggravated assault and robbery, and Agent Crone was also aware that, prior to his incarceration, Appellant was involved in a gang. Parole officers,

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[1] We are aware that in ***In re L.J.***, 79 A.3d 1073 (Pa. 2013), our Supreme Court applied prospectively a new rule regarding the scope of review in suppression matters. Specifically, it clarified that an appellate court's scope of review in suppression matters includes the suppression hearing record, but not evidence elicited at trial. Here, we have used only the transcript of the suppression hearing for purposes of our review.

as part of their duties, speak with people whom they supervise about their status as to employment, home, any treatment program in which they are participating, and anything else assigned to them as a condition of parole. In 2012, Appellant was unemployed and, as a condition of his parole, Appellant was required to work. Thus, Agent Crone's main focus with respect to Appellant's supervision was to help Appellant obtain work. Appellant was also subject to routine home visits twice each month.

At approximately 10:00 a.m. on May 1, 2012, Agent Crone conducted a routine home visit to Appellant's residence at 627 East Market Street, York, rear apartment, first floor. The previous home visit was approximately two weeks before that date. At that time, even though Appellant was unemployed, Agent Crone viewed two new pieces of electronics consisting of a new flat-screen television between forty-six and fifty-five inches in size and a new Blu-Ray DVD player. Appellant was asked about the items, and he represented that he had pawned jewelry that he already owned to purchase them. Appellant gave Agent Crone three receipts from a pawnshop showing that Appellant had received $1,000 in cash. Agent Crone then administered a routine drug-screening test, which he would have administered absent the suspicious presence of the television and DVD player. The test was positive for the presence of cocaine in Appellant's system.

Agent Crone decided to conduct a search of Appellant's residence on two bases. First, he concluded that Appellant was engaging in illegal activity based upon a variety of factors. Agent Crone articulated that his belief was premised on these facts. Appellant had been unemployed for a significant period of time and had rent and other obligations that he was meeting despite this status. Additionally, there were two new pieces of electronics in Appellant's apartment. Agent Crone was aware of Appellant's prior conviction for robbery and gang affiliations. Agent Crone also viewed the $1,000 obtained from the pawnshop as evidence of wrongdoing. Agent Crone explained that his suspicions were raised since there were three separate receipts from the shop that had been issued within a single week period and there was no logical explanation for not pawning all of what supposedly was Appellant's old jewelry in a single transaction. Agent Crone also was skeptical that old jewelry was pawned based upon Appellant's use of another address on the pawnshop receipts. Secondly, the positive drug test caused Agent Crone to be suspicious that drugs may have been located in Appellant's apartment.

Agent Crone contacted his supervisor, Agent Masucci, and indicated that he wanted to conduct a search of Appellant's home. Agent Masucci arrived at the residence, and Appellant was handcuffed. During the ensuing search, Agent Crone discovered a bag containing what "smelled to be

marijuana." N.T. Hearing, 1/24/13, at 8. At that point, the agents ceased the search and contacted Officer Nadzom.

Initially, we note that parolees are subject to warrantless searches of their residence so long as a parole officer has reasonable suspicion to conduct the search in question. ***See Commonwealth v. Smith***, 85 A.3d 530 (Pa.Super. 2014). A statute, 61 Pa.C.S. § 6153, outlines the supervisory relationship between a state parole agent and a defendant. It states, in pertinent part:

> (b) Searches and seizures authorized.--
>
> > (1) Agents may search the person and property of offenders in accordance with the provisions of this section.
> >
> > (2) Nothing in this section shall be construed to permit searches or seizures in violation of the Constitution of the United States or section 8 of Article I of the Constitution of Pennsylvania.
> >
> > . . . .
>
> (d) Grounds for personal search of offender.--
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> > . . . .
> >
> > (2) **A property search may be conducted by an agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision**.
> >
> > . . . .
> >
> > (6) The existence of reasonable suspicion to search shall be determined in accordance with constitutional

> search and seizure provisions as applied by judicial decision. In accordance with such case law, the following factors, where applicable, may be taken into account:
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> (i) The observations of agents.
>
> (ii) Information provided by others.
>
> (iii) The activities of the offender.
>
> (iv) Information provided by the offender.
>
> (v) The experience of agents with the offender.
>
> (vi) The experience of agents in similar circumstances.
>
> (vii) The prior criminal and supervisory history of the offender.
>
> (viii) The need to verify compliance with the conditions of supervision.

61 Pa.C.S. § 6153 (emphasis added).

Reasonable suspicion that a defendant has engaged in criminal activity must be based upon specific and articulable facts proffered by the investigating officer. ***Commonwealth v. Scarborough***, 89 A.3d 679, (Pa.Super. 2014). "Reasonable suspicion is determined by the totality of the circumstances. As such, each case is fact-specific, but a number of common circumstances have been identified; and where a sufficient number of them coalesce, reasonable suspicion will be found." ***Id***. at 683 (citation omitted). Thus, "When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at

the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." ***Commonwealth v. Walton***, 63 A.3d 253, 257 (Pa.Super. 2013).

In the present case, we affirm the suppression court's conclusion that Agent Crone, a probation/parole agent with sixteen years of experience, had a particularized and objective basis for concluding that Appellant was engaging in legal wrongdoing and the residence contained proceeds of that activity. Appellant was unemployed for a significant period and yet had been able to pay his outstanding rent and utility bills, obtain sustenance, and purchase new electronic devices consisting of a large flat-screen television and a Blu-Ray DVD player. Appellant also had obtained $1,000 in cash by pawning items three times in one week while using another address. Additionally, Agent Crone was aware that Appellant was on parole for robbery and had been involved in gang-related activity prior to his incarceration. Based on all these articulated facts and the totality of the circumstances, Agent Crone possessed reasonable suspicion that Appellant was supporting himself, obtained $1,000 in cash, and purchased the electronics through criminal activity.

We reject Appellant's position that reasonable suspicion was not present herein because he had offered an explanation for his possession of the two new electronic devices to Agent Crone. As noted, Appellant claimed

to Agent Crone that, to purchase the new electronic equipment, he had pawned old jewelry that he already owned, and Appellant gave his parole officer three pawnshop receipts.

However, Agent Crone testified that the pawnshop receipts demonstrating that Appellant had received $1,000 in cash actually supported the agent's belief that Appellant was engaging in criminal activity. Agent Crone provided a specific basis for his conclusion that Appellant may have been pawning stolen merchandise. He noted that Appellant had gone to the pawnshop on three separate occasions in a single week, which was illogical given that Appellant supposedly was using his own jewelry. If legitimately owned goods were being pawned, Agent Crone believed that those items would have been pawned at one time. Thus, the fact that Appellant pledged items for cash three times during a single week was indicative of intervening criminal activity between each visit. Additionally, Appellant used an old address when he pawned what was supposedly items already owned by him. Hence, the pawnshop receipts were incriminatory rather than supportive of innocent behavior.

In his brief, Appellant relies upon his testimony from the suppression hearing as to how he was able to support himself and obtain electronics and cash. The suppression court did not credit these explanations. Trial Court Opinion, 1/23/14, at 5 ("During the suppression hearing," the suppression court did not find Appellant "to be very credible or convincing."). We have

noted, "It is within the suppression court's sole province as fact-finder to pass on the credibility of witnesses and the weight to be given their testimony." ***Walton***, ***supra*** at 256 (citation omitted). Thus, we likewise do not view Appellant's testimony as truthful and cannot reverse on the basis of Appellant's testimony at the suppression hearing.

Furthermore, given the facts at his disposal, Officer Crone was not required to accept as plausible Appellant's representations about how, after a prolonged period of unemployment, he obtained $1,000 from a pawn shop, was able to support himself, and purchased a large flat-screen television and DVD player. Accordingly, we affirm the legality of the search on the ground that Agent Crone possessed reasonable suspicion that Appellant was engaging in criminal activity. We therefore need not address whether the search could have been conducted based upon the positive urine screen.

Appellant also assails the denial of his motion to dismiss this action due to the Commonwealth's violation of Pa.R.Crim.P. 600. "In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion." ***Commonwealth v. Peterson***, 19 A.3d 1131, 1134 (Pa.Super. 2011). Further, we review "the facts in the light most favorable to the prevailing party." ***Id***. at 1135. Our scope of review is "limited to the evidence on the record of the Rule 600 evidentiary hearing, and the findings of the trial court." ***Id***. The Commonwealth has the burden of establishing by a preponderance of the evidence that it exercised due

diligence throughout the prosecution. ***Commonwealth v. Selenski***, 994 A.2d 1083 (Pa. 2010).

As we observed in ***Peterson***, ***supra***, Rule 600 "requires that trial commence for a defendant at liberty on bail within 365 days of the filing of the written complaint." ***Id***. at 1135. However, certain periods are expressly excluded from the Rule 600 calculation. Those periods include the "time between the filing of the written complaint and the defendant's arrest, . . . any period of time for which the defendant expressly waives Rule 600; and/or such period of delay at any stage of the proceedings as results from: (a) the unavailability of the defendant or the defendant's attorney; (b) any continuance granted at the request of the defendant or the defendant's attorney." ***Id***. at 1137. Additionally, the Rule 600 run date is extended by what the courts describe as excusable delay, which are any delays that "occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence." ***Id***.

Herein, the criminal complaint was filed on May 1, 2012, and so the original run date was May 1, 2013. Appellant's trial commenced on August 19, 2013. Thus, there must be 110 days of excludable or excusable time to avoid violation of Rule 600. Appellant filed a suppression motion on September 26, 2012, and the hearing date was originally scheduled for October 30, 2012. This delay was caused by Appellant and results in 33 days of excludable time. ***Commonwealth v. Cook***, 865 A.2d 869

(Pa.Super. 2004) (excludable time included period of delay directly attributable to filing of motion to suppress so long as Commonwealth diligently responded to motion). Hurricane Sandy closed the courts on the date of the scheduled hearing. The court re-scheduled Appellant's hearing for December 28, 2012. The delay caused by the weather and the court calendar was excusable as caused by circumstances beyond the control of the Commonwealth and despite its exercise of due diligence. ***See Commonwealth v. Trippett***, 932 A.2d 188 (Pa.Super. 2007); ***Commonwealth v. Preston***, 904 A.2d 1, 14 (Pa.Super. 2006) (*en banc*). Thus, the run date was extended by another 58 days. The Commonwealth then obtained a continuance of the suppression hearing based upon the fact that its witness was not available due to the holiday. After the court denied Appellant's suppression motion on January 24, 2013, the case was then set to be tried during the March 2013 term.

During the Rule 600 hearing, the district attorney in charge of this case testified as follows. She emailed the defense attorney on March 25, 2013, asking if he was ready to proceed to trial. The defense attorney admittedly emailed a response indicating that he was not prepared. Specifically, he stated that he needed to speak with Appellant about a guilty plea, whether to proceed to a bench or jury trial, and whether he was willing to stipulate as to the results of the laboratory testing of the controlled substances. After two other email requests to resolve matters, the

Commonwealth scheduled trial in this matter on July 24, 2013 for the August trial term. The case was called to trial on August 5, 2013, when defense counsel indicated that he would proceed to a bench trial where certain evidence would be introduced through stipulation. Trial commenced on August 19, 2013. Appellant presented a motion to dismiss under Rule 600, and that motion was denied after a hearing.

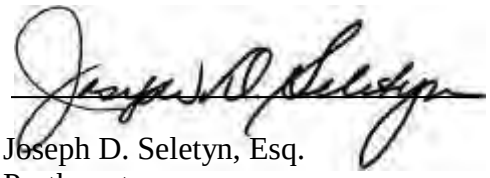
The critical period for determining if dismissal is required revolves around the March trial date. The Rule 600 run date was extended by 91 days by other excludable and excusable delay. Thus, the run date only needs to be extended by another 20 days to avoid violation of Rule 600. Appellant concedes that the case was not tried in March because his attorney indicated that Appellant was not prepared to proceed to trial, which had been scheduled for March. Appellant argues that the delay cannot be considered excludable since he did not formally file a continuance request. While we may agree with that precept, we conclude that this delay nevertheless constitutes excusable delay.

The Commonwealth was ready and willing to try the case in March and specifically asked defense counsel if he also was prepared. Defense counsel indicated that he was not ready to go to trial in March as he had not discussed the case with Appellant. Thus, this delay clearly occurred due to circumstances beyond the control of the Commonwealth and even though it was duly diligent since it was willing to go to trial in March. The next trial

term was April. This excusable delay amounted to 31 days and, coupled with the 91 days of other time that extended the run date computation, the Commonwealth avoided a violation of Rule 600. Accordingly, we conclude that the trial court did not abuse its discretion in denying Appellant's Rule 600 motion.

Petition of Corey Scott Smith, Esquire, to withdraw as counsel is dismissed as moot. Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014