NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAVID KRAUFFMAN,	:	No. 2461 EDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, August 27, 2013,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0002407-2013

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 24, 2014**

David Krauffman appeals from the judgment of sentence of August 27, 2013, following his conviction of possession of marijuana and firearms charges. We affirm.

On February 3, 2013, Officer Michael Mitchell was on routine patrol with his partner, Officer Kevin Hudson, in the area of 3100 East Street in Philadelphia. (Notes of testimony, 8/26/13 at 4.) At approximately 3:40 p.m., Officer Mitchell observed appellant exiting the driver's side of his vehicle with a brown cigar in his mouth. (***Id.*** at 4-5, 12.) Officer Mitchell detected the smell of marijuana coming from appellant's direction. (***Id.*** at 5.) Officer Mitchell testified that it was a high-crime area and he had made drug arrests in that area in the past. (***Id.*** at 5, 9.)

Officer Mitchell stopped appellant and he dropped the brown cigar to the ground. (***Id.*** at 6.) Officer Mitchell testified that when appellant dropped the cigar, or "blunt," to the ground, it was still lit and he could smell marijuana. (***Id.*** at 6-7, 16.) At that time, appellant was placed under arrest and handcuffed. (***Id.*** at 6.) During a subsequent search incident to arrest, Officer Mitchell recovered five clear jars of marijuana from appellant's front pants pocket. (***Id.***) Officer Mitchell also recovered the blunt. (***Id.*** at 7.)

Officer Hudson walked appellant to the back of the police vehicle, at which time a gun fell out of appellant's pants leg onto the ground. (***Id.*** at 8; notes of testimony, 8/27/13 at 8.) Officer Hudson yelled "gun," and Officer Mitchell recovered a black semiautomatic .380 caliber handgun, loaded with one live round in the chamber and six in the magazine. (Notes of testimony, 8/26/13 at 8-9.) Appellant was transported to the police station, at which time police found 13 clear Ziploc packets containing marijuana inside appellant's jacket. (***Id.*** at 10.)

Appellant's motion to suppress was denied, and appellant waived his right to a jury trial. On August 27, 2013, following a bench trial before the Honorable Kenneth J. Powell, Jr., appellant was found guilty of possession of marijuana, possession of firearms prohibited, firearms not to be carried without a license, and carrying firearms on the public streets of

Philadelphia.[1] Appellant received an aggregate sentence of 3½ to 7 years' incarceration followed by three years of reporting probation. This timely appeal followed. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed a Rule 1925(a) opinion.

Appellant has raised the following issues for this court's review:

> 1. Did the trial court commit an error of law by denying appellant's motion to suppress on the basis of finding that P.O. Mitchell had probable cause to arrest appellant in violation of State and Federal Constitutions?
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> 2. Did the trial court commit an error of law by denying appellant's motion to suppress physical evidence as the fruit of an illegal search and/or seizure in violation of State and Federal Constitutions?

Appellant's brief at 1.

> The role of this Court in reviewing the denial of a suppression motion is well-established:
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> > An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, 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 factual findings of

[1] Officer Mitchell's testimony from the August 26, 2013 suppression hearing was incorporated at trial. (Notes of testimony, 8/27/13 at 6.)

> the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.
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> ***Commonwealth v. Stevenson***, 894 A.2d 759, 769 (Pa.Super.2006) (citation omitted). Although we are bound by the factual and the credibility determinations of the trial court which have support in the record, we review any legal conclusions ***de novo***. ***Commonwealth v. George***, 878 A.2d 881, 883 (Pa.Super.2005), ***appeal denied***, 586 Pa. 735, 891 A.2d 730 (2005).

Commonwealth v. Wells, 916 A.2d 1192, 1194-1195 (Pa.Super. 2007).

> Probable cause exists if the facts and circumstances within the knowledge of the police officer at the time of the arrest are sufficient to justify a person of reasonable caution in believing the suspect has committed or is committing a crime. ***Commonwealth v. Rodriguez***, 526 Pa. 268, 585 A.2d 988 (1991); ***Commonwealth v. Elliott***, 376 Pa.Super. 536, 546 A.2d 654 (1988), ***alloc. denied***, 521 Pa. 617, 557 A.2d 721 (1989). In determining whether probable cause existed in a particular situation, a court will look not just at one or two individual factors, but will consider the "totality of the circumstances" as they appeared to the arresting officer:
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> > When we examine a particular situation to determine if probable cause exists, we consider all the factors and their total effect, and do not concentrate on each individual element. . . . We also focus on the circumstances as seen through the eyes of the trained officer, and do not view the situation as an average citizen might. . . . Finally, we must remember that in dealing with questions of probable cause, we are not dealing with certainties. We are dealing with the factual and practical considerations of

> everyday life on which reasonable and prudent [persons] act.
>
> ***Commonwealth v. Simmons***, 295 Pa.Super. 72, 83, 440 A.2d 1228, 1234 (1982), quoting ***Commonwealth v. Kazior***, 269 Pa.Super. 518, 522, 410 A.2d 822, 824 (1979). It is only the probability, and not a ***prima facie*** showing, of criminal activity that is the standard of probable cause for a warrantless arrest. ***Commonwealth v. Kloch***, 230 Pa.Super. 563, 327 A.2d 375 (1974). Probable cause exists when criminality is one reasonable inference; it need not be the only, or even the most likely, inference. ***See e.g. Commonwealth v. Kendrick***, 340 Pa.Super. 563, 571, 490 A.2d 923, 927 (1985) (probable cause "does not demand any showing that . . . a belief [of criminal activity] be correct or more likely true than false"); ***Commonwealth v. Moss***, 518 Pa. 337, 344, 543 A.2d 514, 518 (1988) (in assessing sufficiency of probable cause, the fact that other inferences could be drawn from circumstances does not demonstrate that inference that was drawn by police was unreasonable). As Courts of this Commonwealth have repeatedly emphasized, determinations of probable cause "must be based on common-sense non-technical analysis." ***Commonwealth v. Gray***, 509 Pa. 476, 484, 503 A.2d 921, 925 (1985).

Commonwealth v. Quiles, 619 A.2d 291, 298 (Pa.Super. 1993) (***en banc***).

In this case, Officer Mitchell testified that he stopped appellant's vehicle when he observed appellant with a cigar in his mouth and smelled marijuana.[2] (Notes of testimony, 8/26/13 at 5.) As the officers approached

[2] Appellant does not challenge the propriety of the initial vehicle stop, only the warrantless arrest.

appellant, he dropped the lit cigar to the ground. (***Id.*** at 6.) Officer Mitchell testified that the cigar was still burning when appellant dropped it and that it smelled like marijuana. (***Id.*** at 6-7, 16.) Officer Mitchell was an experienced police officer and had made prior arrests for marijuana in the area, which was known as a high-crime, high-drug area. (***Id.*** at 5, 9.) At that time, Officer Mitchell placed appellant under arrest and performed a search incident to arrest. (***Id.*** at 6.) Clearly, there was a reasonable inference that appellant was then engaged in criminal activity, ***i.e.***, smoking a marijuana blunt. Officer Mitchell had probable cause for a warrantless arrest.

Appellant argues that Officer Mitchell did not examine the cigar until after appellant had already been arrested. (Appellant's brief at 6-7.) However, Officer Mitchell's testimony is clear that he smelled the distinct odor of marijuana emanating from appellant's cigar, which he immediately abandoned when approached by the officers. Officer Mitchell was not required to inspect the cigar or field-test it before placing appellant under arrest.

Appellant also claims that Officer Mitchell never testified he believed appellant was armed and dangerous, putting him in fear for his safety. (***Id.*** at 7.) Appellant's argument in this regard is misplaced. Officer Mitchell did

not pat down appellant for weapons pursuant to a ***Terry*** stop.[3] Once appellant was under arrest, Officer Mitchell could perform a search incident to a lawful arrest. ***See Commonwealth v. Gelineau***, 696 A.2d 188, 194-195 (Pa.Super. 1997), ***appeal denied***, 705 A.2d 1305 (Pa. 1998) ("A well-recognized exception to the warrant requirement is where the search is conducted incident to arrest.") (citations omitted). Whether or not Officer Mitchell had grounds to believe appellant was armed and dangerous is irrelevant.

Appellant also argues that Officer Mitchell believed appellant was smoking marijuana, but was not positive. (Notes of testimony, 8/26/13 at 18.) Appellant points to Officer Mitchell's concession on cross-examination that such belief was insufficient for an arrest. (***Id.***; appellant's brief at 5, 7.)

The issue is whether Officer Mitchell's belief was reasonable, based on the totality of the circumstances. For the reasons discussed above, we have already determined that it was reasonable. Officer Mitchell was not required to be 100% positive that appellant was smoking marijuana to effectuate a lawful arrest. Furthermore, Officer Mitchell's opinion on the ultimate issue of whether or not he had probable cause for arrest is not binding on the

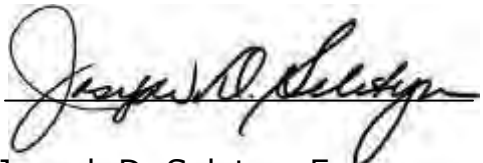
[3] ***Terry v. Ohio***, 392 U.S. 1 (1968). ***See Commonwealth v. E.M./Hall***, 735 A.2d 654, 659 (Pa. 1999) ("If, during the course of a valid investigatory stop, an officer observes unusual and suspicious conduct on the part of the individual which leads him to reasonably believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer garments for weapons").

suppression court or this court. As Judge Powell observed, it should have been objected to by the Commonwealth. (Notes of testimony, 8/26/13 at 23.)

The court did not err in denying appellant's motion to suppress, as Officer Mitchell had probable cause to believe appellant was presently engaged in criminal activity, ***i.e.***, using illegal drugs, at the time of the warrantless arrest. As such, the subsequent search incident to arrest was lawful, and the evidence recovered from appellant's person was admissible. Therefore, appellant's second issue, in which he contends that the physical evidence must be suppressed as fruit of the poisonous tree, likewise fails.

Judgment of sentence affirmed

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014

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