

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PHILLIP A. DIMAIO,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2470 EDA 2010

Appeal from the Judgment of Sentence Entered August 3, 2010  
In the Court of Common Pleas of Delaware County  
Criminal Division at No(s):CP-23-CR-0004602-2009

BEFORE: BENDER, P.J.E., SHOGAN, J., and FITZGERALD, J.\*

MEMORANDUM BY BENDER, P.J.E.:

**FILED JUNE 24, 2014**

Appellant, Phillip A. Dimaio, appeals from his aggregate sentence of six months' probation. Appellant challenges the trial court's failure to suppress physical evidence introduced by the Commonwealth at his trial. After careful review, we affirm.

Appellant proceeded to a jury trial on May 11, 2010. The facts adduced at his suppression hearing were as follows:

4. On April 4, 2009, Officer Shawn Brydges and Officer George Scanlon were working a plain-clothes detail in Ridley Township.
5. They were in the Chick-Fil-A parking lot located in McDade Boulevard in Ridley Township at approximately 8:38 p.m. when they observed a black Chevy operated by [Appellant] pull into the Chick-Fil-A parking lot at a high rate of speed, coming within several feet of hitting several pedestrians.

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\* Former Justice specially assigned to the Superior Court.

6. The Officers called for a marked vehicle to respond to the scene.
7. The marked vehicle responded within seconds.
8. Officer Brydges and Scanlon conducted a traffic stop.
9. Officer Brydges approached the driver's side and Officer Scanlon approached the passenger side.
10. As they approached the vehicle, the Officers observed both [Appellant's] and the passenger, Aaron Robbins['s] ("Robbins"), reaching toward the center console attempting to conceal something.
11. The Officers did not know what the occupants were trying to hide and they were concerned for their safety.
12. The Officers had the occupants exit the vehicle.
13. The Officers patted down [Appellant] and Robbins for weapons.
14. [Appellant] and Robbins were handcuffed and placed in separate vehicles while police searched the car in order to determine what they were concealing in the center console.
15. Once they were inside the vehicle, the officers were able to look through the opening left from the cup holder, which was removed from the center console.
16. When the officers looked down through the hole, they observed several glassine baggies, typically used to package heroin, which they immediately recognized as contraband.

Findings of Fact and Conclusions of Law, 10/9/09, at 2-4.

At the conclusion of Appellant's trial, the jury found him guilty of possession of heroin and conspiracy. On August 3, 2010, Appellant was sentenced to an aggregate term of six months' probation. He filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Appellant now presents the following questions for our review:

- I. The suppression court erred by refusing to suppress evidence unlawfully obtained by Ridley Township police ... during a warrantless search of [] Appellant's vehicle during a traffic stop, and by admitting such evidence at trial.
  - a. The warrantless search of [] Appellant's vehicle was not justified as a plain view search.
  - b. The warrantless search of [] [A]ppellant's vehicle was not lawfully justified as one which was accompanied by probable cause and exigent circumstances.

Appellant's brief at 1.

We first note that Appellant relies on an incorrect constitutional standard in his challenge to the search of his vehicle. Recently, the Pennsylvania Supreme Court announced:

[W]ith respect to a warrantless search of a motor vehicle that is supported by probable cause, Article I, Section 8 of the Pennsylvania Constitution affords no greater protection than the Fourth Amendment to the United States Constitution. Accordingly, we adopt the federal automobile exception to the warrant requirement, which allows police officers to search a motor vehicle when there is probable cause to do so and does not require any exigency beyond the inherent mobility of a motor vehicle.

***Commonwealth v. Gary***, 2014 WL 1686766, at \*1 (Pa. April 29, 2014). As such, we cannot address the merits of Appellant's second issue under the standard put forth in his brief.

Moreover, such an analysis is inapplicable to the search in question. The Appellant does not contest the validity of the stop of his motor vehicle. Here, the police testified that they witnessed Appellant commit a motor vehicle code violation. The trial court credited this testimony, and concluded that the police possessed reasonable suspicion to conduct an investigative

detention. Thus, the situation in the instant case does not involve a question of whether probable cause existed to justify a warrantless search. Rather, the facts of the case before us involve the validity of a so-called Terry frisk as applied to the contents of a motor vehicle.

It is well-established that a police officer may conduct a frisk of a suspect's outer garments for weapons during an investigative detention if that officer possesses specific and articulable facts to believe the suspect is armed and dangerous. ***Terry v. Ohio***, 392 U.S. 1 (1968). Furthermore, a limited protective search of the passenger compartment of a car during a roadside encounter is likewise justified where the officer possesses specific and articulable facts to believe that the suspect is dangerous and he may gain immediate control of weapons from inside the vehicle. ***Michigan v. Long***, 463 U.S. 1032 (1983).

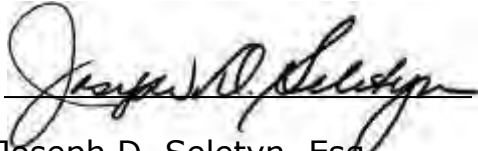
Here, the police articulated specific safety concerns: the stop occurred after dark, there were two suspects and only two officers at the scene, and the suspects appeared to conceal something inside the passenger compartment of the vehicle. Appellant claims that because he and his passenger were removed from the vehicle, the possible contents of the vehicle's console could present no harm to the officers. As noted by the Commonwealth, however, this was merely a stop for a motor vehicle code offense. Under such circumstances, the police could be endangered by a weapon upon returning the occupants to the vehicle at the conclusion of the stop. ***In the Interest of O.J.***, 958 A.2d 561, 566 (Pa. Super. 2008).

Accordingly, we conclude the trial court did not err in finding the police were justified in entering the motor vehicle. Upon entering the vehicle, the police observed the area where they had seen the vehicle's occupants reach, and immediately saw glassine baggies containing heroin. At that point, the police possessed sufficient cause to seize the recognized contraband. See **Commonwealth v. McCree**, 924 A.2d 621, 631 (Pa. 2007) ("[T]he standard for the plain view exception to the warrant requirement requires a determination of whether the police have a lawful right of access to [an] object seen in plain view.") As such, the trial court did not err in denying Appellant's motion to suppress.

Judgment of sentence affirmed.

Justice Fitzgerald concurs in the result.

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: 6/24/2014