NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALIM MORGAN,	:	No. 270 EDA 2011
Appellant	:	

Appeal from the Judgment of Sentence, December 29, 2010,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0000734-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 08, 2014**

Appellant, Alim Morgan, appeals from the judgment of sentence of December 29, 2010, following his conviction of aggravated assault and simple assault. Appellant was sentenced to two and one-half to five years' incarceration for aggravated assault. The conviction for simple assault merged for sentencing purposes, and no further penalty was imposed. We affirm.

The trial court has summarized the facts of this matter as follows:

> On November 11, 2009, at approximately 12:55am, Officer Lewis's tour of duty as a Philadelphia Police Officer took him to the 1000 block of North 70th Street in the city and county of Philadelphia. Officer Lewis was training alongside another officer, Officer Ryder, and both men were seated in the back seat of a marked police vehicle with two senior officers occupying the front two seats.

* Retired Senior Judge assigned to the Superior Court.

> While driving down the street at a rate of five to ten miles per hour, Officer Lewis observed Defendant walking down the street with what he perceived to be a marijuana cigarette by the look and smell of the cigarette. After the senior officer stopped the car, Officers Lewis and Ryder exited the vehicle, at which point Defendant began to flee on foot. The Officers lost track of Defendant momentarily upon turning into an alleyway. Officer Lewis pursued Defendant down the alleyway, gun drawn. With the help of his flashlight, Officer Lewis found Defendant hiding behind a trashcan.
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> Officer Lewis ordered Defendant to come out from behind the trashcan with his hands up. Defendant followed that instruction. Officer Lewis then ordered Defendant to get down, and Defendant went down on one knee while Officer Lewis simultaneously holstered his weapon. At this point, Officer Lewis approached Defendant and Defendant proceeded to leap up and punch Officer Lewis in the face. Officer Lewis was hit with a closed fist on the left side of his face, causing a minor abrasion. Defendant then tried to grab Officer Lewis by his shirt and jacket and push past him. Defendant and Officer Lewis were wrestling when Officer Ryder came upon the struggle to assist Officer Lewis and handcuff the Defendant.
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> At trial, Ms. Tynithia Norris, cousin of Defendant, testified that she was coming home from her mother's house at the time of the incident when she noticed Defendant running. Ms. Norris could not identify initially what or whom Defendant was running from. Ms. Norris explained that from the moment she noticed Defendant running until she observed his arrest there was a period of a couple of minutes when she could not see what was going on with Defendant and the officers in pursuit.

Trial court opinion, 8/2/13 at 2-3 (citations to notes of testimony omitted).

Following his bench trial on November 3, 2010, appellant was found guilty of aggravated assault and simple assault. Appellant was sentenced on December 29, 2010. This timely appeal followed. Appellant presents two issues; namely, whether the police had probable cause to detain him and whether the evidence was sufficient to support his aggravated assault conviction.

In his first argument, appellant contends that the police lacked probable cause to detain him. According to appellant, the police observed behavior that was not immediately identifiable as unlawful. (Appellant's brief at 8.)

A police officer may detain an individual in order to conduct an investigation if the officer has a reasonable suspicion that the individual is engaged in criminal activity. ***Commonwealth v. Zhahir***, 751 A.2d 1153, 1156 (Pa. 2000). In order to demonstrate reasonable suspicion, the police officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in light of the officer's experience. ***Commonwealth v. Jackson***, 698 A.2d 571, 573 (Pa. 1997). Probable cause exists where the facts and circumstances within the knowledge of the officer are reasonably trustworthy and sufficient to warrant a person of reasonable caution in believing that the person has committed the offense. ***Commonwealth v. Van Winkle***, 880 A.2d 1280, 1290 (Pa.Super. 2005), ***appeal denied***, 898 A.2d 1071 (Pa. 2006).

Instantly, the Commonwealth presented evidence that, at the time of the stop, Officer Lewis witnessed appellant walking along the street in the early morning hours of November 11, 2009, with what, by the look and smell of the object, appeared to be a marijuana cigarette. Officer Lewis was sitting in the backseat of a police vehicle with the window open. The vehicle was traveling five miles per hour and was approximately ten feet away from appellant. These facts as testified to by Officer Lewis, who the trial court found credible, clearly meet the less demanding standard of reasonable suspicion. Moreover, these facts actually gave Officer Lewis probable cause to arrest appellant.

In Pennsylvania, "plain smell" is a concept that is analogized to "plain view" to establish probable cause. ***Commonwealth v. Stoner***, 710 A.2d 55, 59 (Pa.Super. 1998). In an earlier decision, ironically with the same name, we implicitly recognized that a police officer is assumed to know how to recognize the odor of marijuana: "[I]t would have been a dereliction of duty for [the arresting officer] to ignore the obvious aroma of an illegal drug which he was trained to identify." ***Commonwealth v. Stoner***, 344 A.2d 633, 635 (Pa.Super. 1975). ***See also Commonwealth v. Stainbrook***, 471 A.2d 1223, 1225 (Pa.Super. 1984) (citing ***Stoner*** for the proposition that a police officer's detection of the odor of marijuana is alone sufficient to establish probable cause). Accordingly, appellant's claim that the police did not have probable cause to detain him fails.

In his second argument, appellant contends there was insufficient evidence to support his conviction for aggravated assault because Officer Lewis did not sustain bodily injury and there was no evidence that he intended to cause injury. (Appellant's brief at 19.) No relief is due here.

For a challenge to the sufficiency of the evidence:

> The standard we apply . . . 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 [trier] 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.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), quoting ***Commonwealth v. B. Jones***, 874 A.2d 108, 120-121 (Pa.Super. 2005).

A person is guilty of aggravated assault of a police officer if he "attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in

subsection (c), in the performance of duty." 18 Pa.C.S.A. § 2702(a)(3). Section 2702(c)(1) specifically identifies police officers as among the "officers, agents, employees or other persons" referenced in Section 2702(a)(3). Bodily injury is defined as "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301.

In a prosecution for aggravated assault on a police officer, the Commonwealth has no obligation to establish that the officer actually suffered a bodily injury; rather, the Commonwealth must establish only an attempt to inflict bodily injury, and this intent may be shown by circumstances which reasonably suggest that a defendant intended to cause injury. ***Commonwealth v. Marti***, 779 A.2d 1177, 1183 (Pa.Super. 2001).

Instantly, appellant was apprehended by Officer Lewis after attempting to flee. As Officer Lewis approached appellant to handcuff him, appellant struck him on the left side of his face with a closed fist. Officer Lewis testified that he felt "a little bit of pain" and there was "a minor abrasion" on his face. (Notes of testimony, 11/3/10 at 13-14.) This evidence was sufficient to convict appellant of aggravated assault. ***See Commonwealth v. Biagini***, 655 A.2d 492, 498 (Pa. 1995) (bodily injury proved where defendant punched police officer in the face); ***Marti***, ***supra*** (evidence sufficient to show bodily injury where defendant struck police officer in the jaw with a closed fist that resulted in slight swelling and pain).

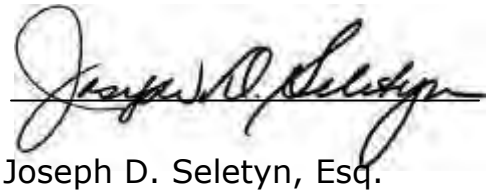
Similarly, the evidence proved appellant attempted to cause bodily injury to Officer Lewis. Officer Lewis testified that as he tried to secure appellant, he jumped up and hit him in the face. The officer further testified that after being struck in the face, appellant grabbed his shirt and jacket, and "we were wrestling." (Notes of testimony, 11/3/10 at 13-14.) Officer Lewis' partner arrived and was able to finally handcuff and arrest appellant. (***Id.*** at 14.) Appellant's conduct, the punch to the face, the grabbing of the officer's clothing, and subsequent wrestling, clearly constitutes an attempt to inflict bodily injury. ***See Commonwealth v. Petaccio***, 764 A.2d 582, 586 (Pa.Super. 2000), ***overruled on other grounds by Commonwealth v. Mouzon***, 812 A.2d 617 (Pa. 2002) (holding that evidence that appellant punched the arresting officer in the jaw and then kicked her in the stomach was sufficient to convict appellant of aggravated assault under § 2702(a)(3)).

Appellant's attempt to argue the trial court incorrectly credited the testimony of Officer Lewis is misdirected. Appellant is asking this court to make a credibility determination which goes to the weight of the evidence. The weight of the evidence is exclusively for the finder-of-fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder-of-fact. ***Commonwealth v. Kim***, 888 A.2d 847, 851 (Pa.Super. 2005). Moreover, credibility determinations are irrelevant to a review of the

sufficiency of the evidence. ***Commonwealth v. Gibbs***, 981 A.2d 274, 282 (Pa.Super. 2009) (an argument that the finder-of-fact should have credited one witness' testimony over that of another witness goes to the weight of the evidence, not the sufficiency of the evidence); ***Commonwealth v. W.H.M.***, 932 A.2d 155, 160 (Pa.Super. 2007) (claim that the jury should have believed appellant's version of the event rather than that of the victim goes to the weight, not the sufficiency, of the evidence).

Additionally, we observe appellant did not preserve a weight of the evidence claim. Such claims must be raised via oral, written, or post-sentence motions in the trial court for the issue to be preserved for appeal. ***See*** Pa.R.Crim.P. 607(A).

Accordingly, appellant's judgment of sentence is affirmed.
Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/8/2014