

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOHN GONZALEZ,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2797 EDA 2012

Appeal from the Judgment of Sentence Entered July 12, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010852-2011

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

CONCURRING AND DISSENTING MEMORANDUM BY BENDER, P.J. **FILED JUNE 02, 2014**

I agree with the Majority's conclusions with respect to all of Appellant's claims but one: I believe the warrant issued to search the Germantown Avenue property was not supported by probable cause. Therefore, I respectfully dissent.

The Majority is correct in its analysis with respect to the warrants issued to search Appellant's truck and residence. Appellant's claim that the information supporting probable cause in those instances was stale is meritless. On August 9, 2011, the police had developed probable cause to arrest Appellant for selling marijuana to the confidential informant. At that time, it was apparent that Appellant had returned to his residence to retrieve

* Retired Senior Judge assigned to the Superior Court.

the contraband before completing the sale. Although two weeks had passed before the warrants were issued on August 23, 2011, that information was refreshed by Officer's Sarris' detection of the odor of marijuana emanating from Appellant's truck and the narcotics dog's detection of the same, evidencing a reasonable likelihood that Appellant was involved in an ongoing illegal enterprise.

However, no observations were made involving the Germantown Avenue property on August 9, 2011. Trial Court Opinion, 3/28/13, at 3-4. Furthermore, Officer Sarris' conclusion on August 23 that Appellant exited the Germantown Avenue property with a one-pound package of marijuana was not credible on its face. Officer Sarris observed a square object in a plastic bag from a distance. *Id.* at 5 n.22. No amount of training and experience can convert that observation into a reasonable conclusion that the bag contained marijuana. Mysteriously, the bag and its alleged contents were never recovered by police, despite the fact that they stopped Appellant, a few blocks away, immediately following his departure from the Germantown Avenue property. *Id.* at 6-7. Moreover, Officer Sarris' prior investigation of the Germantown Avenue property as a suspected marijuana growing operation was eight years stale. *Id.* at 5 n.20.

Given these circumstances, and including Appellant's engagement in "counter-surveillance techniques[,]” I believe the police had, at best, a reasonable suspicion that the Germantown Avenue property was involved in Appellant's single observed sale of marijuana. *Id.* at 5. I would conclude,

therefore, that the trial court abused its discretion in denying Appellant's suppression motion in this regard.

In sum, I would affirm the trial court's order denying Appellant's suppression claim as it relates to the warrants issued for the search of his truck and residence, but I would grant Appellant relief with respect to the warrant issued to search the Germantown Avenue property. I am in agreement with the Majority with respect to its disposition of all of Appellant's remaining claims. However, because I would reverse Appellant's sentence and remand for a new trial, I would only address Appellant's other pre-trial issues in this appeal. In this regard, I would affirm the trial court's order denying Appellant's motion for recusal and the order denying his motion to produce the confidential informant.

I respectfully dissent.