

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WILLIAM REYES

Appellant

No. 892 EDA 2013

Appeal from the Judgment of Sentence entered February 22, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No: CP-23-CR-0000253-2004

BEFORE: SHOGAN, STABILE, and PLATT,* JJ.

MEMORANDUM BY STABILE, J.:

FILED JULY 01, 2014

Appellant, William Reyes, appeals from the trial court's February 22, 2013 judgment of sentence imposing an aggregate 96 to 192 months of incarceration followed by five years of probation for possession with intent to deliver, possession of drug paraphernalia, and carrying a firearm without a license.¹ We affirm.

Police apprehended Appellant with the help of a confidential informant ("CI"). The CI contacted Appellant by cell phone to arrange a controlled drug buy. A police officer was present when the CI made the cell phone call.

* Retired Senior Judge assigned to the Superior Court.

¹ 35 P.S. §§ 780-113a(30), 780-113a(32), 18 Pa.C.S.A. § 6106, respectively.

Even though the CI held the cell phone to his ear during his conversation with Appellant, the police officer overheard Appellant's voice coming through the earpiece. Thus, the police officer overheard Appellant agree to sell cocaine to the CI. Police apprehended Appellant on his way to the controlled buy, and during a search incident to arrest they retrieved cocaine, drug paraphernalia, a Smith & Wesson revolver, cash, a cell phone, and a pager.

Appellant filed a motion to suppress the evidence from the search incident to his arrest. In support of that motion, Appellant argued police violated the Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), 18 Pa.C.S.A. § 5701 *et seq.*, by listening to the cell phone conversation between Appellant and the CI. The trial court denied the motion and the parties proceeded to a stipulated bench trial. The trial court found Appellant guilty of the aforementioned offenses and imposed sentence as set forth above. This timely appeal followed.

Appellant raises three issues for our review:

1. Did the trial court err in refusing to suppress evidence based on a violation of the Wiretap Act by finding that a cell phone is not an electronic device subject to the provisions of [the Wiretap Act]?
2. Did the trial court err in refusing to reconsider its determination that a cell phone was not an electronic device within the scope of the Wiretap Act after the Pennsylvania Supreme Court explicitly rejected such a determination in [***Commonwealth v. Cruttenden***, 58 A.3d 95 (Pa. 2012)]?
3. Did the trial court err in neglecting to provide clear findings of fact and conclusions of law or a complete

opinion justifying its legal determinations of the suppression motion?

Appellant's Brief at 2.

We review an order denying suppression of evidence as follows:

Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth 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 suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Potts, 73 A.3d 1275, 1280 (Pa. Super. 2013), *appeal denied*, 83 A.3d 415 (Pa. 2013).

While this appeal was pending, our Supreme Court issued its opinion in ***Commonwealth v. Spence***, ___ A.3d ___ 2014 Pa. LEXIS 1067 (April 28, 2014).² ***Spence*** is directly on point and dispositive of this appeal. In ***Spence***, the informant placed two cell phone calls to the defendant and allowed a police officer to listen to the conversation via speakerphone. The

² The Supreme Court overruled this Court's decision, which was an unpublished memorandum tabled at 24 A.3d 452 (Pa. Super. 2011).

defendant argued the police officer's conduct constituted unlawful interception of a conversation pursuant to the Wiretap Act. Section 5703 of the Wiretap Act forbids interception of a "wire, electronic, or oral communication" absent prior approval. 18 Pa.C.S.A. § 5703(1). To "intercept" a communication under the Wiretap Act is to engage in "Aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device." 18 Pa.C.S.A. § 5702. "Electronic, mechanical or other device" excludes "Any telephone [...] furnished to the subscriber or user by a provider of electronic communication service in the ordinary course of its business[.]" **Id.**

The defendant in **Spence** argued the police did not obtain his consent for the eavesdropping and that a cell phone was not exempt from the Wiretap Act's definition of device where a police officer dials a number and instructs an informant to place the call via speakerphone. **Spence**, ___ A.3d at ___, 2014 Pa LEXIS 1067 at *7. The Supreme Court disagreed:

[W]e see no basis upon which to categorize the arrestee's cell phone as a device with respect to him, but not as a device with respect to the Commonwealth. The intent of the General Assembly may be discerned from the plain language of the words employed in the statute. The cell phone over which the trooper heard the conversations between the arrestee and Appellee clearly was a telephone furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business. The language of the statute states that telephones are exempt from the definition of device; the language of the statute does not state that it is the **use** to which the telephone is being put which determines if it is

considered a device. We reject the statement by the Superior Court, that only **certain uses** of a telephone may exempt the telephone from being considered a device, as being contrary to the plain language contained in the definitional section of the Wiretap Act. Accordingly, we hold that a state trooper does not violate the Wiretap Act when he listens through the speaker on an informant's cellular telephone as the informant arranges a drug deal.

Id. at ____, 2014 Pa. LEXIS 1067 at *8-9 (emphasis in original).

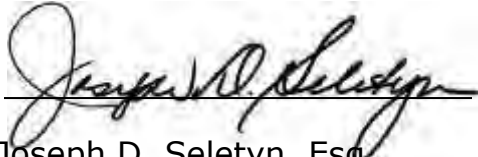
Here, as in **Spence**, the police officer listened to a conversation over an informant's cell phone. The only factual distinction is that the CI in this case did not engage the speakerphone function. This distinction is meaningless, since the earpiece volume on the CI's phone was loud enough to allow the officer to overhear Appellant's end of the conversation. Appellant's Brief urges this Court to conclude that a Wiretap Act violation occurred here, and speculates the Supreme Court would do the same. On the contrary, the Supreme Court's opinion in **Spence**, as quoted above, forecloses any possibility for Appellant to obtain relief on the substantive arguments he offers.³ We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.

³ Concerning Appellant's third argument addressing the sufficiency of the trial court's findings of fact and conclusions of law pursuant to Pa.R.Crim.P. 581(I) and the sufficiency of its Pa.R.A.P. 1925(a) opinion, we conclude the trial court provided sufficient justification for its decision.

J-A12019-14

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: 7/1/2014