NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	No. 918 WDA 2013
	:	
LONNIE RUDNISKY	:	

Appeal from the Order Entered May 2, 2013,
in the Court of Common Pleas of Washington County
Criminal Division at No. CP-63-CR-0001548-2012

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

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MARCH 31, 2014**

This matter before the court is the Commonwealth of Pennsylvania's appeal from the order entered May 2, 2013, dismissing the charge of driving under the influence of alcohol, 75 Pa.C.S.A. § 3802(a)(2), against Lonnie Rudnisky.[1] The trial court dismissed the criminal complaint finding that it was not filed within the time limits imposed by Pa.R.Crim.P. 519(B)(2). Following careful review, we reverse and remand.

The facts of this case, as summarized by the trial court, are as follows:

> On October 22, 2011, at 1:00 a.m., [Rudnisky] was stopped at a DUI checkpoint that the

* Retired Senior Judge assigned to the Superior Court.

[1] The Commonwealth has attached a signed certification to its notice of appeal in which it notes that the trial court's order will substantially handicap the prosecution. Thus, this appeal is properly before this court. ***See*** Pa.R.A.P., Rule 311(d), 42 Pa.C.S.A.; ***Commonwealth v. Dugger***, 506 Pa. 537, 486 A.2d 382 (1985).

> Pennsylvania State Police was conducting in the Borough of California, Washington County, Pennsylvania. At the checkpoint, Trooper Keffer noticed an odor of an alcoholic beverage on [Rudnisky's] breath and then asked him to pull into an adjacent parking lot for further examination. Trooper Sarah Teagarden then went to [Rudnisky's] vehicle and asked him for his registration and license. She asked him if he had been drinking. He responded that he had a few beers. Trooper Teagarden smelled a mild odor of alcohol on his breath. He had no other indicia of the over consumption of alcohol; the Trooper testified that [Rudnisky] did not slur his speech, have glassy eyes, nor was he fumbling when he had to retrieve his documents. Trooper Teagarden asked him to step out of the vehicle and performed a PBT on [Rudnisky], which showed an approximate .10 percent level of alcohol on [Rudnisky's] breath.
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> At the time of the stop, the protocol of the State Police was to obtain a blood test, not a Breathalyzer test, of [Rudnisky] in which they had probable cause to believe had committed a DUI. At this checkpoint, some other individuals were in a police cruiser and were about to leave for Washington Hospital to have blood drawn. Washington Hospital is about 40 minutes [sic] drive [from] California Borough. After administering the PBT, Trooper Teagarden placed [Rudnisky] in the police cruiser for transport to the hospital. The interaction between Trooper Teagarden and [Rudnisky] lasted only a few minutes.
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> [Rudnisky's] blood was drawn on October 22, 2011 and sent to the state police laboratory for testing. The lab report, issued on November 4, 2011 and received November 15, 2011, showed that [Rudnisky's] blood alcohol was .086 percent. The lab report states that the blood sample will be destroyed after thirty (30) days from the date of the report. On February 22, 2012, Trooper Teagarden filed a criminal complaint charging [Rudnisky] with

> one count of DUI pursuant to 75 Pa.C.S.A. § 3802(a)(2).

Trial court opinion, May 2, 2013 at 1-3.

On October 26, 2012, Rudnisky filed an omnibus pretrial motion seeking suppression and dismissal of the one count pursuant to Pa.R.Crim.P. 519. A hearing was conducted on December 7, 2012. Thereafter, on May 2, 2013, the trial court issued an order granting the motion and dismissed the charge of DUI. The Commonwealth filed a timely notice of appeal and raises one issue for our review: Did the Trial court err in dismissing the charge of DUI for a violation of Rule 519 of the Pennsylvania Rules of Criminal Procedure? (Commonwealth's brief at 7.)

This court has explained the scope and standard of review applicable to an appeal of an order granting discharge based on a violation of Rule 519 as follows:

> Our scope of review is limited primarily to questions of law. We are bound by the suppression court's findings of fact, if those findings are supported by the record. In determining whether the findings of fact are supported by the record, we are to consider only the evidence of the appellees and so much of the evidence of the appellant which, as read in the context of the record as a whole, remains uncontradicted. It is for the suppression court as the trier of fact, rather than the reviewing court, to determine credibility. However, we are not bound by findings wholly lacking in evidence. Nor are we bound by the suppression court's conclusions of law.

Commonwealth v. Douglass, 539 A.2d 412, 414-415 (Pa.Super. 1988), ***appeal denied***, 520 Pa. 595, 552 A.2d 250 (1988) (citations omitted).[2]

The procedure for filing criminal complaints in cases involving warrantless arrest, such as this one, is set forth in Pa.R.Crim.P. 519, which provides, in relevant part, as follows:

> **(A) Preliminary Arraignment**
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> (1) Except as provided in paragraph (B), when a defendant has been arrested without a warrant in a court case, a complaint shall be filed against the defendant and the defendant shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay.
>
> . . . .
>
> **(B) Release**
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> (1) The arresting officer shall promptly release from custody a defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met:
>
> (a) the most serious offense charged is a misdemeanor of the second degree or a misdemeanor of the first degree in cases arising under 75 Pa.C.S. § 3802;
>
> (b) the defendant poses no threat of immediate physical harm to any other person or to himself or herself; and

[2] In ***Douglass***, the court reviewed the dismissal under former Rule 130, which is now Rule 519.

> (c) the arresting officer has reasonable grounds to believe that the defendant will appear as required.
>
> (2) When a defendant is released pursuant to paragraph (B)(1), a complaint shall be filed against the defendant within 5 days of the defendant's release. Thereafter, the issuing authority shall issue a summons, not a warrant of arrest, and shall proceed as provided in Rule 510.

Pa.R.Crim.P. 519(A), (B)(1-2). Dismissal for the failure to file a criminal complaint within five days of a defendant's release as required by Rule 519(B)(2) is improper unless a defendant is prejudiced by the delay. ***Commonwealth v. Wolgemuth***, 737 A.2d 757, 760 (Pa.Super. 1999).

> [T]he sanction of dismissal of criminal charges should be utilized only in the most blatant cases. Given the public policy goal of protecting the public from criminal conduct, a trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed.

Commonwealth v. Bowman, 840 A.2d 311, 317 (Pa.Super. 2003). "[D]ismissal in criminal cases is employed only as a last resort, and is limited to cases of extreme and substantial prejudice." ***Id.***

In ***Commonwealth v. Schimelfenig***, 522 A.2d 605 (Pa.Super. 1987) (***en banc***), this court conducted an exhaustive review of prior case law and legislative history related to Rule 130, now Rule 519. The court analyzed the rule in light of the language of Pa.R.Crim.P. 150, which is now Rule 109, which provides:

> A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa.R.Crim.P. 109. The ***Schimelfenig*** court determined that the mandate that a complaint "shall" be filed within five days is directory, not mandatory. The court stated that, as in other instances where the Rule of Criminal Procedure used "the same 'mandatory' language," the Rule "should not be enforced with the dismissal of charges in the absence of prejudice to the defendant." ***Schimelfenig***, 522 A.2d at 609, 613. ***See also Commonwealth v. Talarigo***, 530 A.2d 1375 (Pa.Super. 1987); ***Commonwealth v. Hummel***, 526 A.2d 393 (Pa.Super. 1987).

As the trial court and the Commonwealth note, the Commonwealth could not have complied with the letter of Rule 519(B)(2) as the investigation was not complete within five days of the defendant's release as the state police did not have any evidence with which to charge Rudnisky with a violation. The police had to wait for the results of the blood-alcohol test in order to charge him. The results were not available until, at the earliest, November 4, 2012, which was more than five days from the date he was released. The trial court followed the mandate in ***Schimelfenig***, ***supra***, and held a hearing to determine whether the delay caused Rudnisky

prejudice. Thereafter, the court concluded "[b]ecause the defendant's blood samples were destroyed by the date of filing, the defendant as [sic] unable to secure an independent test to challenge the accuracy of the blood-alcohol content of 0.086%. This is prejudicial to the Defendant." (Trial court opinion, 5/2/13 at 5.)

We agree with the Commonwealth that the trial court erred in making this conclusion.

Rather, the Motor Vehicle Code provides, in relevant part, as follows:

> (g) **Test results available to defendant.**--Upon the request of the person tested, the results of any chemical test shall be made available to him or his attorney.
>
> . . . .
>
> (h) **Test by personal physician.**--The person tested shall be permitted to have a physician of his own choosing administer an additional breath, blood or urine chemical test and the results of the test shall also be admissible in evidence. The chemical testing given at the direction of the police officer shall not be delayed by a person's attempt to obtain an additional test.

75 Pa.C.S.A. § 1547(g), (h) (emphasis added). As is clear from the above, Section 1547 does not confer upon a defendant the right to request or re-test a police obtained blood sample. Rather, it permits a defendant to either (1) request the results of his police administered BAC test in order to challenge their validity, or (2) have an independent physician administer a second, additional BAC test.

In ***Commonwealth v. Demis***, 588 A.2d 30 (Pa.Super. 1991), a defendant, who had been charged with driving under the influence, underwent a blood test. Defendant's counsel contacted the police department several times requesting that the samples be preserved so the defense could have an independent test conducted. Eventually, defendant learned the samples had been destroyed. Defendant's motion to suppress was granted. On appeal, this court reversed, finding that there is no statutory right to an independent analysis of the original blood sample collected by police. ***Id.*** at 32; 75 Pa.C.S.A. § 1547(g),(h). Further, this court, relying on ***California v. Trombetta***, 467 U.S. 479 (1984), concluded that there was no obligation on the part of the police to preserve a blood sample for independent testing:

> [T]he test results and not the sample are evidence. Therefore destruction of the sample is not a violation of due process where the appellant has not shown that the destroyed evidence "posess[es] [both] an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

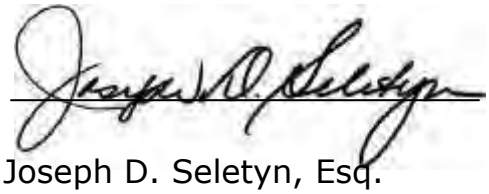
Demis, ***supra*** at 34 (citations omitted).

As Rudnisky had no statutory right to acquire and re-test the blood sample obtained by police, and provides no other reasons why he was prejudiced by the Commonwealth's failure to file a criminal complaint within

the time limits of Rule 519, we find the trial court erred in dismissing the charges as Rudnisky did not demonstrate actual prejudice.

Order reversed. Matter remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/31/2014