J-A07037-17

2017 PA Super 271

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FREDERICK W. KARASH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1440 WDA 2016

Appeal from the Judgment of Sentence September 9, 2016
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-SA-0000091-2016

BEFORE: OLSON, STABILE and STRASSBURGER,* JJ.

CONCURRING AND DISSENTING OPINION BY OLSON, J.:**FILED AUGUST 21, 2017**

This is a difficult case and, as the learned Majority notes, the suppression issue has sharply divided courts throughout the United States. I agree with the Majority's decision to assume jurisdiction over this appeal despite the fact that jurisdiction properly lies with the Commonwealth Court. I also agree with the Majority's conclusion that Appellant waived both his claim that the trial court erred by not holding a separate suppression hearing and his claim that the evidence was insufficient to find him guilty. With respect to Appellant's sufficiency claim, I concur with the Majority's finding of waiver pursuant to Pennsylvania Rule of Appellate Procedure 1925(b)(4)(vii) as Appellant failed to raise a sufficiency challenge in his concise statement of errors complained of on appeal.[1] I disagree,

[1] The Majority also finds that Appellant waived his sufficiency claim on the basis that Appellant did not offer testimony or evidence at trial as to the

* Retired Senior Judge assigned to the Superior Court

however, with the Majority's holding that the Water Conservation Officer ("WCO") in this case needed reasonable suspicion that criminal activity was afoot before ensuring that Appellant's boat complied with all applicable safety regulations. Because I disagree that the challenged stop required reasonable suspicion, I am unable to join the learned Majority's conclusion that Appellant's conviction is constitutionally infirm. Therefore, I respectfully concur in part and dissent in part.

As the Majority correctly notes, jurisdiction over this appeal properly lies with the Commonwealth Court; however, this Court has the authority to assume jurisdiction over this appeal pursuant to Pennsylvania Rule of Appellate Procedure 741(a).[2] Majority Opinion at 1 n.1. I hesitate not to transfer this case to the Commonwealth Court for three reasons.

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number of wearable and throwable devices on his boat; therefore, the trial court could not have considered this issue. Majority Opinion at 5. I disagree with this reason for finding waiver as Appellant did not bear the burden of proving the number of wearable and throwable flotation devices on his boat. ***See Commonwealth v. Sauers***, 159 A.3d 1, 11 (Pa. Super. 2011). As such, Appellant did not waive his sufficiency claim by failing to offer any evidence regarding this fact. ***See*** Pa.R.Crim.P. 606 (A)(7); ***Commonwealth v. Coleman***, 19 A.3d 1111, 1118 (Pa. Super. 2011).

[2] Pennsylvania Rule of Appellate Procedure 741(a) provides:

> The failure of an appellee to file an objection to the jurisdiction of an appellate court on or prior to the last day under these rules for the filing of the record shall, unless the appellate court shall otherwise order, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of law vesting jurisdiction of such appeal in another appellate court.

Pa.R.A.P. 741(a).

First, this case presents an issue which lies at the heart of the Commonwealth Court's jurisdiction. Specifically, this case deals with the constitutionality of a statute defining the scope of authority of a Commonwealth agency. This is the type of case our General Assembly has allocated to the Commonwealth Court and not to this Court.

Second, this Court often cites the argument that the assumption of jurisdiction over appeals improperly taken to this Court is "in the interest of judicial economy." ***Gosselin***, 861 A.2d at 999 n.2; ***see Smith***, 868 A.2d at 1254 n.2 (citation omitted); ***Commonwealth v. Neitzel***, 678 A.2d 369, 370 n.2 (Pa. Super. 1996) (citation omitted); ***Fengfish v. Dallmyer***, 642 A.2d 1117, 1119 n.2 (Pa. Super. 1994). This is true on the micro level. That is, judicial economy with respect to a specific case is furthered when this Court assumes jurisdiction over an appeal improperly brought to this Court when briefing has been completed and oral argument heard. On the macro level, however, this continued exercise of discretion under Rule 741(a) results in an overall decrease in judicial economy. Exercising discretion to assume jurisdiction over appeals taken to the incorrect intermediate appellate court has a disproportionate impact on this Court and its staff. It also tends to increase the time required to adjudicate the large number of cases properly brought to this Court. Thus, on the macro level this decreases judicial economy.

Third, if this Court assumes jurisdiction over appeals improperly brought to this Court there will be no incentive for parties and counsel to bring appeals to the correct intermediate appellate court. There will likewise be no incentive for appellees to object to this Court assuming jurisdiction over such appeals. By transferring improperly filed appeals to the Commonwealth Court, parties will be incentivized to take appeals to the correct intermediate appellate court and objecting when that does not occur.

This case presents two unique circumstances that convince me that assuming jurisdiction over this appeal is appropriate despite these misgivings. First, the decision on the suppression issue presented in this case will affect future appeals brought to both this Court and the Commonwealth Court. ***See Commonwealth v. DeLuca***, 6 Pa. D. & C.5th 306, 323 n.8 (C.C.P. Delaware 2008), *aff'd*, 981 A.2d 309 (Pa. Super. 2008) (Trial court was not bound by a Commonwealth Court decision addressing an issue raised by a suppression motion because the Superior Court was the proper intermediate court to which any appeal would lie; however, the trial court could consider the decision for its persuasive value.).

Second, this Court has extensive experience in addressing suppression issues. Every year, this Court decides hundreds of appeals in which a suppression decision in a criminal case is challenged. Thus, although this case is at the core of the Commonwealth Court's jurisdiction, this Court has significant experience addressing suppression issues. Therefore, I agree

with the learned Majority's decision to assume jurisdiction over this appeal pursuant to Rule 741(a).

Turning to the merits of this appeal, the statute in question provides that:

> Every waterways conservation officer shall have the power and duty to[s]top and board any boat subject to [the Fish and Boat Code] for the purpose of inspection for compliance with [30 Pa.C.S.A. §§ 5101-5507] and the rules and regulations promulgated thereunder. Any boat lying at its regular mooring or berth shall not be boarded without the consent of the owner or a search warrant.

30 Pa.C.S.A. § 901(a)(10).

Appellant was convicted of failing to comply with 58 Pa. Code § 97.1, which requires that a boat must have at least one wearable personal flotation device on board for each person on the boat. Section 97.1 was obviously promulgated to ensure the safety of boaters. Thus, as relevant to this case, section 901(a)(10) permits WCOs to board boats traversing a waterway in this Commonwealth to ensure compliance with safety regulations promulgated by the Fish and Boat Commission.

The Majority cogently sets forth the Supreme Court of the United States' holding in ***United States v. Villamonte-Marquez***, 462 U.S. 579 (1983). ***See*** Majority Opinion at 10-12. I agree with the Majority that any analysis of the suppression issue in this case must be grounded in that decision. Under the framework set forth in ***Villamonte-Marquez***, the focus of this Court's inquiry is on "the question of the reasonableness of the type

of governmental intrusion involved. Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ***Villamonte-Marquez***, 462 U.S. at 588 (internal quotation marks and citation omitted).

The Majority cites ***State v. Carr***, 878 N.E.2d 1077 (Ohio Ct. App. 2007) and ***State v. Lecarros***, 66 P.3d 543 (Or. Ct. App. 2003) as persuasive authority in support of its holding that this balance, as it relates to random, suspicionless boat stops, weighs in favor of finding a Fourth Amendment violation. On the other hand, the Majority finds unpersuasive the reasoning in ***State v. Eppinette***, 838 So.2d 189 (La. Ct. App. 2003), ***State v. Pike***, 532 S.E.2d 543 (N.C. Ct. App. 2000), ***Schenekl v. State***, 30 S.W.3d 412 (Tex. Crim. App. 2000), and ***State v. Giles***, 669 A.2d 192 (Me. 1996).[3] These cases found, at a minimum, that random, suspicionless boat stops to conduct safety inspections do not violate the Fourth Amendment. I find the latter state court decisions, along with decisions from state and federal courts not cited by the learned Majority, more persuasive than ***Carr*** and ***Lecarros***.

In ***Carr***, the lake in question was not open to the sea. ***Carr***, 878 N.E.2d at 1081 ("the waters of Buckeye Lake are not open to the sea"). Thus, the court concluded that a fixed checkpoint was a reasonable

[3] The Majority also finds ***People v. Butorac***, 3 N.E.3d 438 (Ill. App. Ct. 2013) and ***Peruzzi v. State***, 567 S.E.2d 15 (Ga. 2002) unpersuasive.

alternative. ***See id.*** at 1079. In this case, however, Appellant was stopped while traveling on Lake Erie, which is traversed by the international boundary between the United States and Canada. ***See*** Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-U.K, art. II, Sept. 3, 1783, 8 Stat. 80. Thus, a boat could easily flee from the United States to Canada in order to evade the checkpoint proposed in ***Carr***. Thus, I find ***Carr*** distinguishable from the case *sub judice*.

In ***Lecarros***, the court found that the search in question violated Article I, section 9 of the Oregon Constitution. ***See Lecarros***, 66 P.3d at 547. The court did not reach the issue of whether the search violated the Fourth Amendment of the United States Constitution. "There may be occasions when Article I, section 9, of the Oregon Constitution extends its protections when the Fourth Amendment does not." ***State v. Pierce***, 333 P.3d 1069, 1075 (Or. Ct. App. 2014) (citations omitted). As the court in ***Lecarros*** never reached the question of whether the search violated the Fourth Amendment, I find it unpersuasive with respect to the issue presented in the case at bar.

Instead, I find persuasive the reasoning of those courts which have found that random, suspicionless boat stops to conduct safety inspections do not violate the Fourth Amendment. As the Court of Appeals of North Carolina stated, "boats do not display the same safety stickers and licenses as do motor vehicles, neither are all the regulated safety requirements

readily able to be seen by an officer while the boat is moving." ***Pike***, 532 S.E.2d at 549 (citations omitted); ***see Villamonte-Marquez***, 462 U.S. at 589-590 (citation omitted); ***see also State v. Allen***, 425 S.W.3d 753, 760 (Ark. 2013) (Danielson, J., dissenting) ("It would be impossible for an officer to know if a boater was carrying the proper safety equipment without stopping his or her boat."). This is an important distinction between boats and motor vehicles because almost all of the safety requirements for motor vehicles can be seen while the car is moving. For example, an officer can tell if a driver is using a cellular telephone, if a driver is not wearing a seat belt, or if a child is not secured in a child safety seat. Yet, the dangers associated with boating are real and the reduction in fatalities when sufficient personal flotation devices are on board is similar to the reduction in fatalities when a driver is wearing a seat belt. Thus, the law enforcement practice in question is necessary to promote a legitimate government interest. ***Cf.*** Majority Opinion at 8 (footnote omitted) ("Common sense dictates that recreational boater safety is a legitimate and important government interest."). This is particularly so in this case where, as noted above, Appellant could have easily fled to Canadian waters in order to evade any checkpoint, the alternative proposed in ***Carr***.

Even if the international boundary between the United States and Canada did not traverse Lake Erie, the checkpoints proposed in ***Carr***, and relied upon by the learned Majority, are impractical on waterways patrolled

by WCOs. As the Court of Appeals of Louisiana, Second Circuit noted, "Lakes and waterways are different than 60–foot highway right-of-ways and do not easily lend themselves to stationary checkpoints." ***Eppinette***, 838 So.2d at 192. On a roadway, there is a very small right of way over which cars travel – the court in ***Eppinette*** placed that width at 60 feet. This distance may also be limited on certain rivers of this Commonwealth. However, Lake Erie, the body in question in this case, is approximately 57 miles wide – or more than 5,000 times wider than an average roadway. It is impossible to use the precautions taken with a checkpoint on a 60-foot wide highway on a 57-mile wide lake. This again shows why the alternatives proposed in ***Carr*** are not feasible.

The Court of Criminal Appeals of Texas set forth another reason that checkpoints are not practical. As it explained:

> Schenekl argues that fixed checkpoints at docks or boating ramps would be practical, but we disagree. As the ***Villamonte–Marquez*** Court noted, checkpoints at ports would be easy to avoid. The same holds true for lakes. Some boaters dock their boats at their homes rather than using public docks or boating ramps. If checkpoints were established only at public docks, lakeside residents would be forever immune from compliance with boating regulations. Even if checkpoints at docks were established, it would be an ineffective mechanism for enforcement, because a boater could comply with regulations while at the dock but be in noncompliance out on the lake.

Schenekl, 30 S.W.3d at 415–416 (footnotes omitted). This analysis is especially applicable in this case. Lake Erie has over 800 miles of shore and

numerous places where boats can dock. Moreover, approximately one-half of those locations are in Canada, where such checkpoints could not occur.

In addition to the cases cited by the Majority, at least one other state court has held that random, suspicionless boat stops to conduct safety inspections do not violate the Fourth Amendment. ***See State v. Arnold***, 2001 WL 985101, *3-4 (Del. Super. Ct. Aug. 22, 2001). Applying the test set forth in ***Villamonte-Marquez***, the court in ***Arnold*** concluded that a random boat stop was constitutional. It reasoned that "officers must make random stops of boats in order to determine that the boating and fishing laws and regulations are not being violated. The defendant had a minimal expectation of privacy in the boat. The intrusion in this case was minimal." ***Id.*** at *4.

I also find persuasive the decisions of several federal courts of appeals that have addressed an analogous issue. As noted by the Majority, the stop in ***Villamonte-Marquez*** was done pursuant to 19 U.S.C. § 1581(a). ***See*** Majority Opinion at 10. I agree with the Majority that stops pursuant to section 1581(a) are distinguishable from stops made in order to check compliance with safety regulations. ***See id.*** at 11-12. Nonetheless, I believe that certain federal authority regarding random boat stops is instructive.

Specifically, another federal statute provides that:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters

> over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship[']s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

14 U.S.C. § 89(a). There is a significant body of federal case law in which courts have considered whether reasonable suspicion is necessary for the Coast Guard to stop a boat in order to conduct, *inter alia*, a safety inspection. As this case also involves the random stop of a boat to conduct a safety inspection, I find these decisions instructive.

The United States Court of Appeals for the First Circuit has "held that administrative safety and document inspections are permissible even without any particularized suspicion of wrongdoing." ***United States v. Cardona-Sandoval***, 6 F.3d 15, 23 (1st Cir. 1993) (internal quotation marks and citation omitted). The First Circuit requires only "reasonable and articulable grounds for suspecting that the vessel or those on board are engaging in criminal activities before conducting a thorough search beyond checking for compliance with safety regulations." ***Id.*** (internal quotation marks and citation omitted). The First Circuit has reasoned that:

> [L]imited intrusion represented by a document and safety inspection on the high seas, even in the absence of a warrant or suspicion of wrongdoing, is reasonable under the [F]ourth [A]mendment. While not devoid of protection under the [F]ourth [A]mendment, the ordinary vessel . . . carries with it a lesser expectation of privacy than a home or office.

United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980). In this case, there is no allegation that a search beyond that necessary to ensure compliance with safety regulations occurred.

The United States Court of Appeals for the Fifth Circuit has similarly held that section 89(a) "gives the Coast Guard plenary power to stop and board any American flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity." ***United States v. Williams***, 617 F.2d 1063, 1075 (5th Cir. 1980) (*en banc*) (citation omitted). When the Fifth Circuit originally upheld the constitutionality of section 89(a) in ***United States v. One (1) 43 Foot Sailing Vessel "Winds Will,"*** 538 F.2d 694 (5th Cir. 1976) (*per curiam*), it did so on the basis of the district court's opinion. ***Id.*** at 694. The United States District Court for the Southern District of Florida reasoned that:

> The inspection conducted by the Coast Guard was limited to the vessel's safety equipment and other administrative details. No *carte blanc* to search into private books, papers[,] or personal belongings was anticipated or sought. The direct and special interest of the United States in the safety and administrative control of vessels operating under the protection of its flag and authority of its documents may be analogized to the traditionally high government interest in liquor or firearms dealers which have historically justified administrative measures such as limited warrantless inspections or searches.

United States v. One (1) 43 Foot Sailing Vessel "Winds Will," 405 F.Supp. 879, 883 (S.D. Fla. 1975), *aff'd,* 538 F.2d 694 (5th Cir. 1976).

The United States Court of Appeals for the Ninth Circuit has held that the Coast Guard does not need reasonable suspicion in order to board a boat

"in navigable waters to ascertain that the vessel was complying with all federal laws." ***United States v. Todhunter***, 297 F.3d 886, 889 (9th Cir. 2002). The Ninth Circuit has, however, limited safety inspections permitted under section 89(a) to daytime hours. ***See United States v. Troise***, 796 F.2d 310, 312 (9th Cir. 1986). In upholding such searches, the Ninth Circuit relied on ***Villamonte-Marquez***. ***See United States v. Humphrey***, 759 F.2d 743, 746 (9th Cir. 1985). It concluded that the intrusion associated with such limited searches, combined with the strong governmental interest associated with protecting boaters, meant that the balance weighed against finding a Fourth Amendment violation. ***Id.*** at 747.

The United States Court of Appeals for the Eleventh Circuit has held that under section 89(a), "[t]he Coast Guard may stop a vessel and conduct [a document and safety] inspection even without suspicion of criminal activity." ***United States v. Thompson***, 928 F.2d 1060, 1064–1065 (11th Cir. 1991) (citation omitted). The Eleventh Circuit reasoned that "[a]t sea, a person's expectation of privacy may be severely restricted compared with expectations of privacy on land." ***Id.*** at 1064. Nonetheless, the "Coast Guard may not rummage through the private areas utilized by the boat's crew, such as footlockers, knapsacks[,] or duffel bags, while conducting a safety and documents inspection." ***Id.*** at 1065. As noted above, in this case Appellant's boat was boarded in order to conduct a safety inspection.

Thus, Appellant had a severely restricted expectation of privacy which was not violated when the WCO ensured compliance with safety regulations.

The courts of appeals which have addressed this issue, and many of the state courts whose decisions I find persuasive, encompass jurisdictions which have significant boat traffic. Those courts cited by the Majority have much less boat traffic. The disconnect between the decisions cited by the Majority and those upon which I rely appears to emanate from the historic understanding that there is a reduced expectation of privacy on a boat. Although the authorities cited by the Majority do not accept this lesser expectation of privacy, I believe that ***Villamonte-Marquez*** indicates that this lesser expectation of privacy still exists today. Thus, I find the decisions which found random boat searches to ensure compliance with safety regulations more persuasive than those decisions which have found that such searches violate the Fourth Amendment or state constitutional prohibitions against unreasonable searches and seizures.

After discussing cases from other jurisdictions which have confronted the issue presented in this case, the Majority analogizes the instant case to Pennsylvania cases which address random, suspicionless searches in other contexts. As the learned Majority notes, "[w]here regimes of suspicionless searches or seizures are designed to serve governmental 'special needs' that exceed the normal demands of law enforcement, they will be upheld in certain instances." Majority Opinion at 21, *quoting* ***Commonwealth v.***

Beaman, 880 A.2d 578, 582 (Pa. 2005). Unlike the Majority, which finds this case analogous to a situation in which our Supreme Court struck down a random, suspicionless search, I find this case more analogous to a situation in which our Supreme Court has upheld random, suspicionless searches.

The learned Majority focuses on ***Commonwealth v. Tarbert***, 535 A.2d 1035 (Pa. 1987). In ***Tarbert***, our Supreme Court upheld driving under the influence ("DUI") checkpoints; however, it placed restrictions on such checkpoints. ***See id.*** at 1043. For example, DUI checkpoints must occur on a route "which, based on local experience, is likely to be travelled by intoxicated drivers." ***Id.*** The decision regarding which cars to stop must also be made by administrators not in the field. ***See id.*** Waterways are materially different from roadways. In addition to the differences discussed above, it often takes multiple police agencies and dozens of officers to conduct a DUI checkpoint. This is infeasible for a waterway where a single WCO may be assigned to tens or hundreds of square miles of waterway.

More importantly, as noted above, the stop in this case occurred on Lake Erie which is traversed by the international boundary separating the United States and Canada. The types of procedural safeguards that are easy to implement when a driver is unable to flee to another country are unavailable in this setting. Therefore, I find our Supreme Court's decision in ***In re F.B.***, 726 A.2d 361 (Pa. 1999) more instructive than ***Tarbert***.

In ***F.B.***, our Supreme Court addressed a situation where authorities, at times, randomly chose students entering the school to search for weapons. ***See id.*** at 363.[4] It determined that such random, suspicionless searches for weapons did not violate the students' right to be free from unreasonable searches and seizures. Our Supreme Court engaged in the required balancing of interests. It concluded that "keeping weapons out of public schools" is exceedingly important. ***F.B.***, 726 A.2d at 367. On the other hand, our Supreme Court recognized the searches "affected a limited privacy interest[.]" ***Id.*** at 368. Therefore, it held the searches were constitutional. ***See also Vernonia Sch. Dist. 47J v. Acton***, 515 U.S. 646, 652-665 (1995) (upholding random, suspicionless urine tests of public school athletes).

As noted in detail above, the interest in ensuring boater safety, particularly in a body of water which is traversed by an international boundary, is compelling. Moreover, "it has long been recognized that boats . . . are subject to frequent limited intrusions by regulatory and safety officials." ***United States v. Miller***, 589 F.2d 1117, 1125 n.3 (1st Cir. 1978); ***see also Giles***, 669 A.2d at 193 ("[S]eagoing vessels have always been subject to boarding by government officials[.]"). Thus, this case is

[4] Although authorities began by searching every student, at some point during the morning this became impractical. At that time, "students [were] chosen at random" and searched for weapons. ***F.B.***, 726 A.2d at 363.

more akin to ***F.B.***, in which our Supreme Court upheld the searches, than to ***Tarbert***, in which our Supreme Court found the search unconstitutional.

For all of these reasons, I believe that the balancing required by ***Villamonte-Marquez*** weighs in favor of finding that random, suspicionless boat searches in Lake Erie do not violate the Fourth Amendment.[5] Therefore, I would conclude that the trial court properly denied Appellant's suppression motion. As I agree with the learned Majority that Appellant is not entitled to relief on his remaining claims of error, I would affirm his judgment of sentence.

[5] I emphasize that, under this Court's binding precedent, a WCO cannot stop a boat in order to investigate possible criminal activity under the pretext of performing a safety inspection pursuant to section 901(a)(10). ***Commonwealth v. Lehman***, 857 A.2d 686, 687-688 (Pa. Super. 2004), *appeal dismissed*, 886 A.2d 1137 (Pa. 2005).