J-A07037-17

2017 PA Super 271

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
FREDERICK W. KARASH,	:	
Appellant	:	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.

OPINION BY STRASSBURGER, J.: **FILED AUGUST 21, 2017**

Frederick W. Karash (Appellant) *pro se* appeals from the judgment of sentence imposed on September 9, 2016, after he was found guilty of a summary offense for not having the required safety equipment on his boat.[1] This case presents an issue of first impression in Pennsylvania, namely whether the stop of a boat without reasonable suspicion or probable cause on a Pennsylvania waterway violates the Fourth Amendment to the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution.

[1] Jurisdiction over this appeal lies properly with the Commonwealth Court. ***See*** 42 Pa.C.S. § 762(a)(2)(ii)("[T]he Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas … [for] … [a]ll criminal actions or proceedings for the violation of any … [r]ule, regulation or order of any Commonwealth agency[.]"). "Nevertheless, because neither party has raised an objection to the jurisdiction of this Court, we will consider it on its merits in the interests of judicial economy pursuant to 42 Pa.C.S.[] § 704 and Rule 741 of the Pennsylvania Rules of Appellate Procedure." ***Benner v. Silvis***, 950 A.2d 990, 993 (Pa. Super. 2008).

*Retired Senior Judge assigned to the Superior Court.

Concluding that the stop violates the Fourth Amendment,[2] we reverse Appellant's judgment of sentence.

We offer the following factual summary. On May 23, 2016, waterways conservation officer (WCO) James Smolko was patrolling Lake Erie. At 7:30 p.m., he observed people fishing from Appellant's boat. He stopped and boarded Appellant's boat to conduct a "license check under [30 Pa.C.S. §]2703(a)." N.T., 9/9/2016, at 5. After concluding that all who were fishing were compliant with license requirements, WCO Smolko conducted a safety inspection. WCO Smolko determined that there were not enough personal flotation devices (PFDs) for the number of individuals aboard. Appellant was issued a citation for violating 30 Pa.C.S. § 5123(a)(5). WCO Smolko provided an additional PFD and permitted Appellant to continue boating.

A hearing was held before a district magistrate judge on June 23, 2016, and Appellant was convicted of the aforementioned summary offense. Appellant timely filed an appeal for a trial *de novo* to the Court of Common Pleas of Erie County. Prior to trial, Appellant filed a motion to suppress the Commonwealth's evidence arguing that WCO Smolko "did not have reasonable suspicion or probable cause to conduct a stop" and that the stop violated Appellant's rights to "be free of illegal search and seizure." Motion to Suppress, 8/12/2016.

[2] "[W]here we conclude that a search violates the Fourth Amendment to the United States Constitution, such a search perforce violates Article 1, Section 8 [of the Pennsylvania Constitution]." ***Commonwealth v. Mistler***, 912 A.2d 1265 n.7 (Pa. 2006).

A combined motion to suppress and *de novo* hearing was held on September 9, 2016. The Commonwealth argued that WCO Smolko had the authority to stop Appellant's boat pursuant to 30 Pa.C.S. § 901(a)(10), which provides that every WCO "shall have the power and duty to … [s]top and board any boat subject to this title for the purpose of inspection for compliance with Part III (relating to boats and boating) and the rules and regulations promulgated thereunder." 30 Pa.C.S. § 901(a)(10). Thus, the Commonwealth argued that WCO Smolko did not need reasonable suspicion or probable cause to stop Appellant's boat to conduct a safety inspection. Appellant argued that despite the statute, "the stop violated Article 1, Section 8 of the Pennsylvania Constitution; therefore, it was illegal."[3] N.T., 9/9/2016, at 14.

The trial court denied Appellant's motion to suppress, concluding that pursuant to the statute, WCO Smolko had the "power to stop and board any boat without probable cause for the purpose of inspection for compliance with safety rules and regulations." Order, 9/9/2016. The trial court convicted Appellant of violating 30 Pa.C.S. § 5123(a)(5) and fined him $75

[3] "Although the guarantees of security against unreasonable searches and seizures in the Pennsylvania Constitution predate those contained in the United States Constitution, the guarantees under the Fourth Amendment of the United States Constitution are similar." ***Commonwealth v. Parker***, 619 A.2d 735, 738 (Pa. Super. 1993).

plus costs. Appellant timely filed a notice of appeal to this Court. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

On appeal, Appellant presents both constitutional claims and non-constitutional claims. "It is well settled that when a case raises both constitutional and non-constitutional issues, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds." ***Ballou v. State Ethics Comm'n***, 436 A.2d 186, 187 (Pa. 1981).

In Appellant's first non-constitutional claim, he argues that the trial court erred by not conducting a separate suppression hearing prior to trial. ***See*** Appellant's Brief at 29-30. However, Appellant has waived that issue by failing to object to the trial court's procedure at the time it occurred. "In order to preserve an issue for review, a party must make a timely and specific objection." ***Commonwealth v. Duffy***, 832 A.2d 1132, 1136 (Pa. Super. 2003); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Moreover, we have held that a trial court at a *de novo* hearing does not commit "procedural error in not conducting a **separate** suppression hearing." ***Commonwealth v. Breslin***, 732 A.2d 629, 633 (Pa. Super. 1999) (emphasis added).

Appellant also argues that the evidence was insufficient to sustain his conviction because his "boat was equipped with numerous personal flotation

devices sufficient to have a wearable device for every occupant of the boat and have remaining throwable devices." Appellant's Brief at 33.

Appellant did not raise this issue in his Pa.R.A.P. 1925 statement; thus, it is waived on appeal. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.").

Moreover, at trial, Appellant did not offer any testimony or evidence about the number of wearable and throwable devices on his boat; therefore, the trial court could not have considered this situation. Thus, we hold that Appellant has waived this argument for on that basis as well.

In addition, even if we were to consider this argument, he would not be entitled to relief.

The section for which Appellant was convicted provides the following.

> **(a) General Rule.**--The commission may promulgate such rules and regulations as it deems appropriate to provide for the operation and navigation of boats, including the rules of the road for boating, the ways, manner, methods and means of boating, the management of boats and the use thereof and the protection of waters for boating purposes. The rules and regulations may relate to:
>
> ***
>
> (5) Equipment requirements for boats, operators of boats, passengers on boats and persons towed or pulled by boats.

30 Pa.C.S. § 5123(a)(5). Boating safety equipment is governed by 58 Pa. Code § 97.1, which provides that "[a] person may not use a boat unless at

least one wearable PFD is on board for each person and the PFD is used in accordance with requirements of the approval label." A wearable device is defined as "[a] PFD that is intended to be worn or otherwise attached to a person's body." ***Id***. According to WCO Smolko, Appellant's boat "was short one [PFD] which was a wearable [PFD]." N.T., 9/9/2016, at 5.

Having concluded we cannot decide this appeal on non-constitutional grounds, we turn to Appellant's claim that the trial court erred by denying his motion to suppress because the stop was "illegal under the PA Constitution." Appellant's Brief at 23. We review this claim mindful of the following.

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.
>
> [W]e may consider only the evidence of the prosecution 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 record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. McCoy, 154 A.3d 813, 815–16 (Pa. Super. 2017).

Appellant argued at the trial court that his stop was illegal pursuant to Article I, § 8 of the Pennsylvania Constitution. In other words, Appellant challenges the trial court's legal conclusion that WCO Smolko had the authority to stop and search his boat without reasonable suspicion or

probable cause. We point out that "the federal constitution establishes certain minimum levels which are equally applicable to the [analogous] state constitutional provision." ***Commonwealth v. Edmunds***, 586 A.2d 887, 894 (Pa. 1991) (internal quotation marks omitted).

> Both the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution protect the people from unreasonable searches and seizures. The Fourth Amendment and Article I, § 8 have long been interpreted to protect the people from unreasonable government intrusions into their privacy. The reasonableness of a governmental intrusion varies with the degree of privacy legitimately expected and the nature of the governmental intrusion.

Commonwealth v. McCree, 924 A.2d 621, 626 (Pa. 2007) (internal citations and quotation marks omitted). "The Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." ***Commonwealth v. Smith***, 77 A.3d 562, 571 (Pa. 2013). "In order to determine the reasonableness of a particular search or seizure a balancing analysis is utilized, wherein the intrusion on the individual of a particular law enforcement practice is balanced against the government's promotion of legitimate interests." ***Commonwealth v. Blouse***, 611 A.2d 1177, 1167 (Pa. 1992). ***See also Commonwealth v. Johnston***, 530 A.2d 74 (Pa. 1987) (holding that balancing-of-interests analysis is required when determining the reasonableness of a search and seizure).

With respect to the government's promotion of legitimate interests, the Commonwealth argues that due to "public interest in safety inspections of boats in the waterways, the intent of the General Assembly was to grant plenary authority to conduct safety inspections without a warrant, probable cause, or reasonable suspicion." Commonwealth's Brief at 6. Specifically, as to life jacket availability, the Commonwealth sets forth the following.

> In its 2014 Recreational Boating Statistics Report, the United States Coast Guard reported that Pennsylvania had sixty-six boating accidents of which twenty were fatal in addition to twenty-one other deaths…. Most relevant to this matter, the Coast Guard reported that where cause of death was known, 78% of fatal boating accident victims drowned. Of those drowning victims with reported life jacket usage, 84% were not wearing a life jacket.

Id. at 7 (internal citations and quotation marks omitted).

Common sense dictates that recreational boater safety is a legitimate and important government interest.[4] Similar to police having the authority to ensure safety on highways,[5] WCOs have the authority and responsibility to ensure safety on Pennsylvania's many bodies of water. Thus, the issue in this case is not whether Pennsylvania has a legitimate and important interest

[4] Moreover, Appellant does not suggest otherwise.

[5] ***See Commonwealth v. Leninsky***, 519 A.2d 984, 988 (Pa. Super. 1986) ("The Commonwealth of Pennsylvania has a vital interest in ensuring that only those qualified are permitted to operate motor vehicles, and that their vehicles are fit for safe operation. Hence, license, registration, inspection, and proof of financial responsibility requirements protect and enforce the state's compelling interest in maintaining appropriate highway safety standards.").

to promote, because it does, but whether the only or best way to promote that legitimate interest is through the random, suspicionless stoppage of boats authorized by 30 Pa.C.S. § 901(a)(10).

Case law interpreting this provision is sparse. The only published appellate case is ***Commonwealth v. Lehman***, 857 A.2d 686 (Pa. Super. 2004). In ***Lehman***, a U.S. Coast Guard officer and police detective were summoned to a bar where an employee explained that a patron had just left the bar with an open beer and boarded a boat. The officer and detective pursued the boat, stopped it, and boarded it. When they encountered Lehman on the boat, they noticed visible signs of intoxication, and arrested him for boating under the influence.

The ***Lehman*** suppression court concluded that this stop violated Article I, § 8 of the Pennsylvania Constitution because the "sole purpose in making the stop was to investigate suspected criminal activity." 857 A.2d at 687. On appeal, this Court agreed, concluding that "the stop and boarding was made solely in response to the complaint from the employee of the bar; absent this complaint, the Coast Guard vessel would not have stopped [Lehman's] vessel; and the Coast Guard officer never sought to review documents or perform a safety inspection." ***Id***. Accordingly, it is a violation of Article I, § 8 to use the provisions of the statute permitting the stopping and boarding of a boat to conduct a document or safety check as a pretext to investigate criminal activity. ***Id***. at 687-88.

However, ***Lehman*** is distinguishable from the instant matter, and Pennsylvania has not had the opportunity to address the validity of a random, suspicionless stop. Both the United States Supreme Court and other states have, and we turn to them for guidance. We begin with an analysis of the seminal United States Supreme Court decision in ***United States v. Villamonte-Marquez***, 462 U.S. 579 (1983). In ***Villamonte-Marquez***, the Court considered whether a statute that permitted customs officers to "at any time go on board of any vessel … at any place in the United States … and examine the manifest and other documents and papers" was in violation of the Fourth Amendment. ***Id***. at 580 (*quoting* 19 U.S.C. § 1581(a)).[6]

The facts of that case were as follows. In the afternoon of March 6, 1980, in Louisiana, customs officers, accompanied by Louisiana state police officers, were patrolling a channel 18 miles inland from the Gulf coast used to travel between Lake Charles and the open sea. The officers saw a sailboat rock side to side violently after being waked by a much larger vessel. The officers approached the sailboat to check on the welfare of the individuals aboard. When an individual on board "shrugged his shoulders in an unresponsive manner" after being asked if he was all right, the officers boarded the boat and requested documentation. ***Villamonte-Marquez***, 462 U.S. at 583. While examining the documentation, one officer smelled what

[6] 14 U.S.C. § 89(a) grants Coast Guard officers the same powers.

he believed to be marijuana. The officers looked through an open hatch and discovered 5,800 pounds of marijuana. The officers arrested the two men aboard the sailboat, and a jury in the District Court subsequently found them guilty of various drug-related offenses.

On appeal to the Fifth Circuit, the Court of Appeals held the officers' boarding of the sailboat was not reasonable under the Fourth Amendment. The Supreme Court granted *certiorari* to consider this issue because the question "affects the enforcement of Customs laws." ***Id***. at 584.

The Supreme Court balanced the statute's "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." ***Id***. at 588. It acknowledged that "if the customs officers in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion." ***Id***. However, the Supreme Court considered the "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area." ***Id***.

In reversing the Fifth Circuit, the Supreme Court set forth the following.

> the Government's boarding of [this sailboat] did not violate the Fourth Amendment…. Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment, … but stops at fixed checkpoints

> or at roadblocks are. The nature of waterborne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of 'stop' made in this case less likely to accomplish the obviously essential governmental purposes involved. The system of prescribed outward markings used by States for vehicle registration is also significantly different than the system of external markings on vessels, and the extent and type of documentation required by federal law is a good deal more variable and more complex than are the state vehicle registration laws. The nature of the governmental interest in assuring compliance with documentation requirements,[7] particularly in waters where the need to deter or apprehend smugglers is great, are substantial; the type of intrusion made in this case, while not minimal, is limited.

Id. at 593 (footnote added). Thus, the ***Villamonte-Marquez*** holding is two-fold: 1) the federal government has a legitimate interest in promoting compliance with complex documentation requirements that encompass a host of federal and international laws, and 2) the nature of patrolling areas with access to the open sea renders traditional checkpoints not a viable option.[8]

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[7] The Supreme Court referred to documentation that "allow[s] for regulation of imports and exports assisting … government officials in the prevention of entry into this country of controlled substances, illegal aliens, prohibited medicines, adulterated foods, dangerous chemicals, prohibited agricultural products, diseased or prohibited animals, and illegal weapons and explosives." ***Id***.

[8] ***See also United States v. Cilley***, 785 F.2d 651, 655 (9th Cir. 1985) (holding that boarding of a boat 30 miles off the coast of Baja California, Mexico to conduct an above-deck document and safety inspection without probable cause or reasonable suspicion in order to prevent smuggling does not violate the Fourth Amendment because "no other nation or authority may exercise jurisdiction over U.S. vessels on the high seas, [therefore] the right to board and search may be the only practicable means for the United States as a sovereign to exert sufficient power and control over vessels

Both the legitimate government interests underlying the federal regulation of the waterways and the nature of the areas being patrolled are clearly different in Pennsylvania. Although Pennsylvania courts have not addressed these differences, several of our sister states have.[9]

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flying its flag); ***United States v. Humphrey***, 759 F.2d 743, 747 (9th Cir. 1985), (holding that there is no Fourth Amendment violation for "a daytime boarding for the purpose of conducting a safety inspection that is conducted in a minimally intrusive manner, when the vessel is in a location that poses a substantial risk to its occupants" because the "United States is obligated by treaty to enforce documentation laws for United States vessels in international waters" and there was legitimate concern that the vessel would not be able to sail to its home port in San Francisco).

[9] As a point of reference, other states have statutes similar to Pennsylvania and require no level of suspicion for stopping and boarding boats: Arizona (Ariz. Rev. Stat. Ann. § 5-391), Arkansas (Ark. Code Ann. § 27-101-105), Georgia (Ga. Code Ann. § 52-7-25), Idaho (Idaho Code Ann. § 67-7028), Illinois (625 Ill. Comp. Stat. Ann. 45/2-2), Iowa (Iowa Code Ann. § 462A.20), Kansas (Kan. Stat. Ann. § 32-1179), Louisiana (La. Stat. Ann. § 34:851.29), Maine (Me. Rev. Stat. tit. 38, § 285), Maryland (Md. Code Ann., Nat. Res. § 8-727), Massachusetts (Mass. Gen. Laws Ann. Ch. 90B, § 12), Mississippi (Miss. Code Ann. § 59-21-127), Missouri (Mo. Ann. Stat. § 306.165), Nebraska (Neb. Rev. Stat. Ann. § 37-1269), Nevada (Nev. Rev. Stat. Ann. § 488.900), New Jersey (N.J. Stat. Ann. § 12:6-6), New Mexico (N.M. Stat. Ann. § 66-12-22), North Carolina (N.C. Gen. Stat. § 75A-17(a)), North Dakota (N.D. Cent. Code Ann. § 20.1-13-14), Oregon (Or. Rev. Stat. Ann. § 830.035), Rhode Island (46 R.I. Gen. Laws Ann. § 46-22-17), South Dakota (S.D. Codified Laws § 42-8-66), Tennessee (Tenn. Code Ann. § 69-9-220), Texas (Tex. Parks & Wild. Code Ann. § 31-124), Utah (Utah Code Ann. § 73-18-20), Washington (Wash. Rev. Code Ann. § 79A.60.100), and Wyoming (Wyo. Stat. Ann. § 41-13-215(b)(i)).

However, fifteen states have statutes requiring some level of suspicion before stopping and searching boats: Alabama (Ala. Code § 33-6A-8), Alaska (Alaska Stat. Rev. Ann. § 05.25.080), California (Cal. Harb. & Nav. Code § 663), Colorado (Colo. Rev. Stat. Ann. § 33-13-112), Connecticut (Conn. Gen. Stat. Ann. § 15-154), Hawaii (Haw. Rev. Stat. Ann. § 199-7), Kentucky (Ky. Rev. Stat. Ann. § 235.310), Michigan (Mich. Comp. Laws Ann. § 324.80166), Minnesota (Minn. Stat. Ann. § 86B.801), New York (N.Y. Nav.

In ***State v. Carr***, 878 N.E.2d 1077 (Ohio App. 3d 2007), park officers were on routine patrol in the waters of Buckeye Lake State Park. They randomly stopped and approached Carr's "pontoon boat to conduct a safety inspection." ***Id***. at 1079. While conducting this inspection, they observed that Carr was exhibiting signs of intoxication. Accordingly, they arrested him for operating a boat under the influence of alcohol. Carr filed a motion to suppress arguing that the stop of his boat, which was not based upon reasonable suspicion, violated the Fourth Amendment. That motion was denied, Carr pled no contest to the charges, and he then appealed. On appeal, Carr argued that the trial court erred in denying the motion to suppress.

The Ohio court recognized that this was an issue of first impression in that jurisdiction. The Ohio court distinguished ***Villamonte-Marquez***, pointing out that "the waters of Buckeye Lake are not open to the sea, so a checkpoint is a practical alternative." ***Carr***, 878 N.E.2d at 1079. The Ohio court went on to hold that if "an officer does not have reasonable suspicion to stop a watercraft, the officer may still do a safety inspection pursuant to a

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Law § 49-c), Ohio (Ohio Rev. Code Ann. § 1547.51(B)), Virginia (Va. Code Ann. § 29.1-745), West Virginia (W.Va. Code Ann. § 20-7-4), and Wisconsin (Wis. Stat. Ann. § 30.79(3)).

Finally, Delaware, Indiana, Montana, New Hampshire, Oklahoma, South Carolina, and Vermont do not have statutes regarding specifically when officials can stop and board boats.

checkpoint system with controls and procedures in place that place limits on officer discretion." ***Id***. The court pointed out the following.

> We recognize that the state has a strong interest ensuring boating and waterway safety for its citizens, but that interest can be realistically promoted through means other than random, sporadic stops with no limitations placed upon the officer's discretion in the field. The practicality of checkpoints either at docks or marinas or on the water (either at points of entry or no-wake zones) will depend on the specific body of water, but the use of checkpoints can be accomplished in order to decrease the intrusiveness of the stops and limit the discretion of the officers and consequent potential for abuse.

Id. at 1082.[10, 11]

Similarly, in ***State v. Lecarros***, 66 P.3d 543 (Or. App. 2003), an Oregon court, confronted with analogous circumstances, concluded that such a stop was unlawful under Article I, Section 9 of the Oregon Constitution.[12]

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[10] "On July 10, 2013, Ohio Governor John Kasich signed House Bill 29, the 'Boater Freedom Act,'" which codified the ***Carr*** holding. Bastian, Kyle, ***Freedom To Float: Requiring Reasonable Suspicion For Boating Stops On Idaho Waterways***, 52 Idaho Law Review 547 (2016). The Boater Freedom Act provides that officers may only stop and board vessels under certain circumstances: 1) with consent of the owner, 2) by request of the owner, 3) with reasonable suspicion that a violation of the law has occurred, or 4) when the officer is conducting a systematic safety inspection at an authorized checkpoint. ***See*** Ohio Rev. Code Ann. § 1547.51.

[11] The concurring and dissenting opinion would distinguish this case by noting that Buckeye Lake, unlike Lake Erie, does not border Canada. It is hard to image a boater, lacking the required number of PFDs, would flee to Canada to avoid a $75 fine.

[12] "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Or. Const. Art. I, § 9.

The Oregon court distinguished specifically the United States Supreme Court's holding in ***Villamonte-Marquez***, concluding that

> the statute under review in that case deals with customs officials boarding vessels in order to guard against the importation of untaxed goods, and the [Supreme] Court justified the statute's constitutionality by invoking the importance of that particular regulatory purpose and others involving commercial 'documentation.' Further, and relatedly, the [Supreme] Court limited its holding to vessels boarded in the open sea. Thus, the exception that the authors of the Fourth Amendment assertedly intended encompasses searches and seizures by customs officials and others engaged in commercial regulation.

Lecarros, 66 P.3d at 546-57. Thus, the Oregon court concluded that the stop violated the Oregon constitution.

Two other states, Illinois and Georgia, have considered the constitutionality of suspicionless stops of boats. In both cases, the courts found the stops were constitutional because they were conducted during a systematic check of all boats in certain areas.

In ***People v. Butorac***, 3 N.E.3d 438 (Ill. App. Ct. 2013), the Illinois court considered a situation where Butorac's boat was stopped on a day that officers "stopped every boat they saw to check for registration and safety equipment." ***Id***. at 442. Officers inspected "20 to 25 boats before they stopped [Butorac's] boat." ***Id***. After they stopped Butorac's boat, and he was able to show compliance with safety equipment, the officers noticed that Butorac was exhibiting signs of intoxication. Butorac was charged with boating under the influence, and filed a motion to suppress claiming the stop

violated his Fourth Amendment rights. The trial court denied Butorac's motion and Butorac was convicted.

On appeal, the Illinois court analyzed the constitutionality of the stop, in particular based upon differences between roving patrols and stationary checkpoints with respect to automobiles. It noted that "suspicionless stops at fixed checkpoints or roadblocks are favored over suspicionless stops by roving patrols because the objective and subjective intrusions created by the seizure are minimized." ***Id***. at 445. ***See United States v. Brignoni-Ponce***, 422 U.S. 873 (1975) (holding that stops made by roving patrols near borders without suspicion were unconstitutional); ***Delaware v. Prouse***, 440 U.S. 648 (1979) (holding that discretionary spot checks for driver's license compliance were unconstitutional); ***but see City of Indianapolis v. Edmond***, 531 U.S. 32 (2000) (holding that stationary checkpoints to detect ordinary criminal wrongdoing are unconstitutional).

The Illinois court acknowledged the difficulty of setting up a stationary checkpoint on a waterway such as a lake, and concluded that the roving patrol as part of the "officers' systematic efforts to stop every boat they saw" to conduct safety inspections was constitutional. ***Butorac***, 3 N.E.3d at 452. Thus, the Illinois court upheld Butorac's conviction.

In ***Peruzzi v. State***, 567 S.E.2d 15 (Ga. 2002), the Georgia Supreme Court considered the stop of Peruzzi's boat which was conducted pursuant to "a mass inspection, ideally stopping every boat on Lake Peachtree and

checking for proper registration and adequate safety equipment." ***Id***. The officers who stopped Peruzzi's boat "noticed an odor of alcohol." ***Id***. at 16. After conducting field sobriety testing, Peruzzi was arrested, charged, and convicted for boating under the influence. On appeal, Peruzzi contested the legality of the stop and seizure of his boat under the Fourth Amendment.

In concluding the stop was constitutional under the Georgia statute that permits suspicionless stops, the Georgia court offered the following.

> The State certainly possesses an important interest in maintaining safe conditions for boaters on Georgia's lakes and rivers. The procedure used by [Department of Natural Resource] rangers in this case was only minimally intrusive, as they merely asked boaters to stop their boats and show the necessary equipment and license to inspectors….
>
> Further, the rangers in this case were conducting safety checks in substantial accord [with constitutional automobile DUI checkpoints]. The decision to conduct safety and registration inspections on lake Peachtree during the holiday was made by the Fayette County Marshal, not the officers conducting the inspections. The rangers['] goal was to do safety checks of every boat on the lake, limiting their individual discretion in the process.

Id. (internal quotation marks omitted). Based on the foregoing, the Georgia Supreme Court upheld the stop.

Alternatively, three states, Texas, Louisiana, and North Carolina, have determined that permitting random, suspicionless stops of boats for the purpose of conducting document and safety inspections does not violate the

Fourth Amendment.[13] In ***Schenekl v. State***, 30 S.W.3d 412 (Tex. Crim. App. 2000), a Texas court analyzed a midnight stop on a lake for "a routine water safety check." ***Id***. at 413. In that case, the game warden pulled over Schenekl and smelled alcohol. Schenekl was arrested for boating under the influence, and Schenekl filed a motion to suppress alleging that the stop for a routine safety check was in violation of the Fourth Amendment. The Texas court balanced the governmental interests with the intrusion on Schenekl's rights. Citing ***Villamonte-Marquez***, the Texas court pointed out that "checkpoints are impractical" and the lack of license plates on boats to determine compliance renders such stops necessary to obtain information. ***Schenekl***, 30 S.W.3d at 413. The Texas court weighed those factors with the "minimal" level of intrusion, but also acknowledged that random stops "involve[] an unsettling show of authority … [and] create[] anxiety and allow[] for a grave danger of abuse of discretion by officers in the field." ***Id***. However, the Texas court concluded that the scales tipped in favor of the important government interest when coupled with this "brief inspection." ***Id***. Accordingly, it upheld the stop.

In ***State v. Eppinette***, 838 So.2d 189 (La. Ct. App. 2003), a Louisiana court considered the constitutionality of a similar stop. In that case, Eppinette was operating a jet ski on a lake and was "stopped for a

[13] ***See also State v. Giles***, 669 A.2d 192 (Me. 1996) (holding that a Coast Guard officer's conducting a routine document and safety check pursuant to 14 U.S.C. § 89 did not violate the Fourth Amendment pursuant to ***Villamonte-Marquez***).

routine boating safety check." ***Id***. at 190. The officers noticed that Eppinette appeared to be under the influence and conducted field sobriety testing which confirmed their suspicions. Eppinette was arrested and charged with driving while intoxicated. Eppinette moved to suppress the test results on the basis he was stopped without probable cause.

The Louisiana court concluded that since the "statute is not designed to detect general criminal activity, which is prohibited under recent Supreme Court interpretations, but rather is for the specific purpose of insuring safety on Louisiana waterways," it is not in violation of the Fourth Amendment. ***Id.*** at 191. It reasoned that "[b]oth federal and state jurisprudence has made it clear that when an identifiable public safety reason exists, states can make laws that allow for suspicionless stops. Safety on the water is a compelling reason…. Lakes and waterways … do not easily lend themselves to stationary checkpoints." ***Id***. at 191-92. Thus, the court concluded the "initial stop was valid." ***Id***. at 192.

Finally, in ***State v. Pike***, 532 S.E.2d 543 (N.C. Ct. App. 2000), two wildlife resources commission officers were patrolling a lake and "were checking every vessel within that vicinity on that night." ***Id***. at 545. The officers performed a safety check of Pike's pontoon boat and found Pike to be impaired. Pike filed a motion to suppress arguing his Fourth Amendment rights were violated. The trial court agreed and dismissed the charges, and the State appealed. The appellate court concluded that it is "impractical as

well as perhaps, impossible to check that a vessel is complying with statutory safety regulations if the State is unable to verify that the requirements are being met *while the vessel is at sea*." ***Id***. at 548 (emphasis in original). The court pointed out that the "officers' interference with [Pike's] movement was minimal and their detention of him, necessary." ***Id***. at 549. Therefore, it reversed the trial court.[14] Thus, the states are split in assessing random, suspicionless stopping of boats.[15]

However, Pennsylvania has addressed random, suspicionless searches in other contexts. "[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."[16] ***Commonwealth v. Beaman***, 880 A.2d 578, 582 (Pa. 2005).

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[14] We recognize that the officer was conducting a safety check on every boat; however, the court's decision in ***Pike*** focused primarily on the challenges of regulating boats, rather than the risks inherent in unfettered discretion by officers to conduct random stops.

[15] The Commonwealth offered no testimony that Appellant's boat was stopped pursuant to any checkpoint or system, and the Commonwealth conceded that the stop was done without probable cause. ***See*** N.T., 9/9/2016, at 9 (WCO Smolko testifying, "I did not have probable cause.").

[16] ***See In re F.B.***, 726 A.2d 361 (Pa. 1999) (upholding suspicionless point-of-entry search for weapons at public school); ***Commonwealth v. Cass***, 709 A.2d 350 (Pa. 1998) (upholding suspicionless canine-sniff drug search of student lockers at public school); ***Theodore v. Delaware Valley Sch. Dist.***, 836 A.2d 76 (Pa. 2003) (invalidating random drug testing of extracurricular participants and student drivers, where the record contained no evidence that a drug problem existed at the school or that the targeted group was particularly prone to drug use).

Nevertheless, "[a] central concern in balancing the opposing interests is protecting the individual from arbitrary invasions at the unfettered discretion of the officers in the field." ***Commonwealth v. Blouse***, 611 A.2d 1177, 1167 (Pa. 1992).

Our Supreme Court has considered such unfettered discretion with respect to automobile checkpoints, specifically whether "police roadblocks designed to detect persons driving under the influence of alcohol are legally valid." ***Commonwealth v. Tarbert***, 535 A.2d 1035, 1037 (Pa. 1987). After concluding that the government has a strong interest in keeping Pennsylvania's roads free of drunk drivers and the sobriety checkpoints are effective,[17] the Court set forth the following.

> The intrusiveness, both objective and subjective, of a drunk-driving roadblock can be reduced to a constitutionally acceptable degree by the manner in which it is managed and conducted…. For example, the conduct of the roadblock itself can be such that it requires only a momentary stop to allow the police to make a brief but trained observation of a vehicle's driver, without entailing any physical search of the vehicle or its occupants. To avoid unnecessary surprise to motorists, the existence of a roadblock can be so conducted as to be ascertainable from a reasonable distance or otherwise made knowable in advance. The possibility of arbitrary roadblocks can be significantly curtailed by the institution of certain safeguards. First, the very decision to hold a drunk-driver roadblock, as well as the decision as to its time and place, should be matters reserved for prior administrative approval, thus removing the determination of those matters from the discretion of police officers in the field. In this connection it is essential that the

[17] The Court cited to a study which found that the use of sobriety checkpoints changes the behavior of drivers, making them less likely to believe they can avoid police detection by driving carefully. ***See Tarbert***, 535 A.2d at 1042.

> route selected for the roadblock be one which, based on local experience, is likely to be travelled by intoxicated drivers. The time of the roadblock should be governed by the same consideration. Additionally, the question of which vehicles to stop at the roadblock should not be left to the unfettered discretion of police officers at the scene, but instead should be in accordance with objective standards prefixed by administrative decision.
>
> In our view, a drunk-driver roadblock conducted substantially in compliance with the above guidelines would reduce the intrusiveness to a degree which, when balanced against the compelling public interest in apprehending such drivers, would not violate Article I, section 8 of the Pennsylvania Constitution. ***Cf***. ***Little v. State***, 300 Md. 485, 479 A.2d 903 (1984) (upholding similar roadblocks under state and federal constitutions); ***Commonwealth v. Trumble***, 396 Mass. 81, 483 N.E.2d 1102 (1985) (same); ***Lowe v. Commonwealth***, 230 Va. 346, 337 S.E.2d 273 (1985) (same).

Tarbert, 535 A.2d at 1043.[18]

Thus, even where there is a clearly established legitimate government interest, and suspicionless searches are a proven means of promoting that interest, there are still safeguards that must be put in place in order for a stop or search to pass constitutional muster. We see no need to depart from this framework when considering suspicionless searches of Pennsylvania's waterways. The Commonwealth has not demonstrated that it is unable to set up a system of inspection similar to what is done on roadways, and

[18] The precise issue of whether drunken driver roadblocks were constitutional under our state Constitution eluded the Court in ***Tarbert***. However, "it is clear that of the six [justices] who participated [in ***Tarbert***], four [justices] expressed the view that systematic roadblocks are constitutional." ***Commonwealth v. Yastrop***, 768 A.2d 318, 321 n.5 (Pa. 2001) (quoting ***Commonwealth v. Blouse***, 611 A.2d 1177, 1179 (Pa. 1992)).

consistent with other states. Accordingly, we hold that the random, suspicionless stop of Appellant's boat to conduct a safety inspection violates the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution.[19]

Based on the foregoing, we reverse Appellant's judgment of sentence.

Judgment of sentence reversed.

Judge Stabile joins.

Judge Olson files a concurring and dissenting opinion.

[19] Both Appellant and the Commonwealth devote the majority of their briefs on appeal to the question of whether 30 Pa.C.S. § 901(a)(10) is constitutional. However, the issue of whether 30 Pa.C.S. § 901(a)(10) is constitutional has not been preserved for our review because Appellant did not raise the issue specifically before the trial court. ***See Commonwealth v. Little***, 903 A.2d 1269, 1272–73 (Pa. Super. 2006) ("While a claim that a statute is unconstitutional certainly may result in a court's refusal to apply the statute as written, such a claim must be raised and preserved at trial; it cannot be raised for the first time on appeal. Moreover, appellate review of an order denying suppression is limited to examination of the precise basis under which suppression initially was sought; no new theories of relief may be considered on appeal.") (internal citations omitted).

Judgment Entered.

Joseph D. Seletyn, Esq.

Prothonotary

Date: 8/21/2017