NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHNATHON JULIUS MARTIN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2072 MDA 2011

Appeal from the Order October 25, 2011
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0004491-2009

BEFORE: OLSON, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: Filed: January 14, 2013

Johnathon Julius Martin appeals from the York County Court of Common Pleas order, dated October 25, 2011, denying his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On August 13, 2010, a jury convicted Martin of one count of delivery of cocaine, two counts of possession with intent to deliver (cocaine and marijuana), and resisting arrest.[1] On November 15, 2010, the trial court sentenced him to an aggregate term of five to ten years' imprisonment. On PCRA appeal, Martin claims trial counsel, Mark S. Keenheel, Esquire, was

---

* Former Justice specially assigned to the Superior Court.

[1] ***See*** 35 P.S. § 780-113(a)(30) and 18 Pa.C.S. § 5104.

ineffective for failing to file a motion to suppress. Based on the following, we affirm.

On June 12, 2009, at approximately 10:00 a.m., police from the York County Drug Task Force were engaged in a drug investigation and used a confidential informant ("CI") for a controlled buy transaction. The CI stopped a red Kia Soul vehicle, and the driver sold the CI cocaine in exchange for $30.00. The transaction took place within the view of Officer William Wentz. Officer Wentz then contacted Officer Timothy Shermeyer and informed him that the dealer, subsequently determined to be Martin, was driving a red Kia Soul and was an African-American male. The arresting team attempted to follow the vehicle but could not locate it.

That same day, at approximately 10:25 a.m, Officer Wentz instructed the CI to contact the same individual and arrange another drug deal. The CI and Martin initially agreed to meet at the corner of King and Duke Streets in York but then Martin changed the meeting location to the area of King and Queen Streets. The arrest team went to the new location and observed a red Kia Soul, being driven by an African American male, around the intersection of Queen and Princess Streets. The arrest team parked one vehicle in front of Martin's car and another one behind it. Officer Russell Schauer went to the driver's side of the car and yelled "police" repeatedly. Martin did not follow the officer's request and tried to put the vehicle in reverse. He was pulled out of the car and handcuffed. Police searched his

person and found $410.00 in his pants pocket, $30.00 in official funds that had been photocopied, and a knotted sandwich baggie, containing cocaine. The police subsequently searched the car and Martin's backpack, pursuant to a warrant, and found a black plastic bag with marijuana in it, a freezer bag containing six smaller bags of cocaine, a bag with small Ziploc bags in it, two additional bags of marijuana, and $1,400.00 in cash. He was arrested and charged with various related offenses.

On February 8, 2010, Martin pled guilty to one count each of delivery of cocaine, one count of possession with intent to deliver cocaine, one count of possession with intent to deliver marijuana, and resisting arrest. At the plea hearing, Martin's counsel noted that Martin had filed a *pro se* motion to suppress on January 7, 2010, but indicated that Martin was withdrawing and waiving that issue. N.T., 2/8/2010, at 4. The court questioned Martin about his decision and following the exchange, the court accepted Martin's plea of guilty.

On April 30, 2010, Martin filed a motion to withdraw his guilty plea based on miscommunication of plea counsel regarding sentencing. On May 5, 2010, the court granted Martin's motion. The matter then proceeded to trial on August 8, 2010. The next day, the jury convicted Martin of one count of delivery of cocaine, two counts of possession with intent to deliver (cocaine and marijuana), and resisting arrest. On November 15, 2010, the court sentenced Martin to an aggregate term of five to ten years'

incarceration.[2] Martin filed a direct appeal, but subsequently withdrew and discontinued that appeal on April 26, 2011.

On August 11, 2011, Martin filed a PCRA petition, raising his ineffectiveness claim. On October 25, 2011, the PCRA court held an evidentiary hearing, where both Martin and Keenheel testified.[3] At the end of the hearing, the court denied Martin's request for PCRA relief. The court's denial was reflected in an order, entered on the same day. This appeal followed.[4]

In his sole argument, Martin asserts the PCRA court erred in denying his petition because Keenheel was ineffective for failing to file a motion to suppress evidence seized from the search of Martin's car. He claims the police lacked probable cause to stop and arrest him where they only had a vague description of the seller and vehicle involved in the first drug

---

[2] Specifically, the court imposed the following sentences: (1) a term of 18 to 36 months' incarceration for the delivery conviction; (2) a concurrent mandatory term of five to ten years' imprisonment for the possession with intent to deliver cocaine crime; (3) a concurrent term of nine to 18 months' imprisonment for the possession with intent to deliver marijuana conviction; and (4) a period of 12 months' probation, to be served consecutively to the other three sentences.

[3] At the PCRA hearing, Martin indicated he apparently escaped from a halfway house in Harrisburg prior to committing these crimes.

[4] On December 7, 2011, the PCRA court ordered Martin to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Martin filed a concise statement on December 21, 2011. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on January 18, 2012.

transaction. Moreover, he states that he "exhibited little suspicious behavior as he drove down South Duke Street where the second buy was to occur." Martin's Brief at 16. Martin contends counsel did not have a reasonable basis for his inaction. He states that case law, such as ***Commonwealth v. Fassett***, 437 A.2d 1166 (Pa. 1981), and ***Commonwealth v. Valenzuela***, 597 A.2d 93 (Pa. Super. 1991), demonstrates a strong argument for suppression in this matter. Lastly, Martin argues the outcome would have been more favorable for him if the evidence related to the stop was suppressed. Martin's Brief at 17.

Our standard of review regarding an order denying PCRA relief is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Fowler***, 930 A.2d 586 (Pa. Super. 2007).

> To prevail on a claim that counsel was constitutionally ineffective, the [petitioner] must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Hammond, 953 A.2d 544, 556 (Pa. Super. 2008) (citation omitted). "The findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference. We will not disturb the findings of the PCRA court if they are

supported by the record, even where the record could support a contrary holding." ***Commonwealth v. Jones***, 912 A.2d 268, 293 (Pa. 2006).

Moreover, we note it is well-settled that "law enforcement authorities must have a warrant to arrest an individual in a public place unless they have probable cause to believe that 1) a felony has been committed; and 2) the person to be arrested is the felon." ***Commonwealth v. Clark***, 735 A.2d 1248, 1251 (Pa. 1999). "Probable cause to arrest depends on whether, at the moment the arrest is made, the totality of the circumstances within the arresting officer's knowledge regarding a particular situation would warrant a person of reasonable caution to believe that the accused had committed . . . an offense." ***Commonwealth v. Cox***, 686 A.2d 1279, 1287 (Pa. 1996). "Probable cause must be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his experience and training." ***Clark***, 735 A.2d at 1251.

At the October 25, 2011 PCRA hearing, Martin testified that he asked Keenheel about filing a motion to suppress and counsel told him "there was no need to file a motion to suppress . . . due to the fact that [Martin] was on the run from the state." N.T., 10/25/2011, at 5. Martin stated Keenheel also told him that when they pulled his car over, "there was [not] enough to suppress because the search was legal because of me being on the run from the state." ***Id.*** at 6.

Keenheel also testified regarding his representation of Martin. Counsel stated that he was hired by Martin to represent him in two guilty plea cases: (1) Martin's escape from the halfway house, and (2) the underlying drug case. ***Id.*** at 8. Keenheel testified that he did discuss with Martin the possibility of filing a suppression motion:

> [Martin] indicated that that morning he did make a sale. He said he was out riding that morning. I don't know if he had a fight with his wife. He was out, apparently, early in the morning and he was driving down the street and this woman[, the CI,] he knew flagged him down. She sold him, I don't remember, a dime or 20 gram. I don't remember. And then he left. I think he gave her his number.
>
> And shortly after that, he said she called him for another delivery, I think like 40 or 50. I can't remember the exact numbers. And he was going to come back and give it to her. Then he said he didn't know if he was going to give it to her or not. He was basically riding around at that point. He went back in that area and got pulled over by the police. And apparently, the police had a description of the car.
>
> So, I said the two issues as far as the stop was, number one, they had a description of the car, you made the sale. The second thing, he was a fugitive from Harrisburg. So, based on that, my legal opinion was they had probable cause to stop the vehicle at that point.
>
> Now, let me finish. After they stopped the vehicle, they obtained a search warrant. The search warrant was pretty tight. I didn't see anything wrong with the search warrant as far as the sale was made. They searched the car and found the drugs in the book bag.

Id. at 8-10.

Keenheel also testified that he reviewed everything, including the affidavits and police reports. ***Id.*** at 10. He also stated he believed that filing a motion to suppress would be meritless based on the following:

> I thought it had no merit. I thought he had the grounds to stop the vehicle based on the description of the car and the fact that the sale occurred, the fact that Mr. Martin made the sale, the fact that he knew the CI, he sold her it, he gave the number, she called him back. There was conversation back and forth about changing location.

Id. at 22.

Here, the PCRA court found the following:

> Attorney Keenheel testified at the PCRA hearing that he did not file a suppression motion because after reviewing the police reports and affidavit, his opinion was that a motion to suppress was meritless.
>
> We agree. The red Kia Soul, while not an expensive vehicle, is not very common and has a very unique look. The vehicle both times had a black male driver. The vehicle and black male driver were observed making the first transaction and then the vehicle with the black male driver showed up at the scheduled time and location of the second transaction. Based on all of the facts available to the police at the time, we conclude the description was specific enough that the police had the requisite suspicion to arrest [Martin].

PCRA Court Opinion, 1/18/2012, at 6-7.

The record supports the PCRA court's determination that Martin failed to establish the arguable merit prong of ineffectiveness test. Based upon the "totality of the circumstances," when the officers arrested Martin, they had reason to believe that Martin was the individual who had sold the drugs to the CI and committed the felonies of delivery and possession of a

controlled substance. Furthermore, Martin's reliance on ***Fassett*** and ***Valenzuela*** is misplaced.

In ***Fassett***, a police officer pulled over the defendant's car because of a radio dispatch regarding a similar car that was involved in a bank robbery earlier that day. The Pennsylvania Supreme Court reversed the decision of this Court and held that the trial counsel's assistance was ineffective for failing to file a motion to suppress based on an officer's lack of probable cause to stop the defendant's vehicle. The Supreme Court determined that the stop was improper because "the sole factors motivating the stop in question were the light color of the vehicle and the race of the appellant and his companion." ***Fassett***, 437 A.2d at 1168. The Court further noted the following: (1) there was nothing suspicious about the vehicle, its occupants, or its manner of operation; (2) the radio alert issued pursuant to the bank robbery stated there were three or four black males in the vehicle and the defendant's vehicle only contained two occupants; (3) the stop occurred nine hours after the occurrence of the robbery; (4) the location of the stop and the distance from the crime scene was approximately eight miles; and (5) no specific or descriptive facts were provided to the officers in the radio alert, aside from the robbers' race and the lightness of their vehicle's color. ***Id.*** at 1168-1169.

In ***Valenzuela***, state troopers stopped the defendant's car, searched the vehicle, and found marijuana. One of the troopers originally stated that

he stopped the car because the defendant was speeding, but later testified that he made the stop after receiving instructions to stop a car resembling that being driven by the defendant. Further testimony revealed that the state police were involved in an investigation, which included an informant and a wiretap. The trial court suppressed the evidence seized from the search. A panel of this Court affirmed the court's decision, stating: "[W]e cannot conclude that an officer can reasonably suspect criminal activity from the mere fact that a Hispanic-looking person is driving a late model car with out-of-state license plates." ***Valenzuela***, 597 A.2d at 98.

Unlike ***Fassett*** and ***Valenzuela***, here, police observed the CI engaged in a drug transaction with an African American male in a red Kia Soul. Ten minutes later, the officer instructed the CI to contact the same individual and arrange another drug transaction. Around the same time and vicinity as the CI arranged to meet the dealer, the police observed a red Kia Soul being driven by a black male and initiated the traffic stop. As such, the circumstances surrounding the stop are clearly distinguishable from those in ***Fassett*** and ***Valenzuela***.

Therefore, Martin's argument fails, and counsel cannot be considered ineffective for failing to file a motion to suppress. Accordingly, the PCRA court did not err in dismissing Martin's petition.

Order affirmed.