

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

TWYJUAN DEMETRIC JENKINS

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 236 MDA 2012

Appeal from the Order Entered January 25, 2012
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0001653-2011

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J.

Filed: February 6, 2013

The Commonwealth of Pennsylvania appeals from the order entered by the learned Honorable John Tylwalk of the Court of Common Pleas of Lebanon County in favor of the appellee, Twyjuan Jenkins, granting his motion to suppress. Jenkins was charged with two counts of possession with intent to deliver a controlled substance¹ and two counts of possession of a controlled substance². Because the Commonwealth failed to meet its burden of production at Jenkins' motion to suppress hearing, we affirm.

The facts are not at issue in this case. On April 1, 2011 Jenkins was driving a rental vehicle not rented in his name, traveling with a single

¹ 35 Pa.C.S.A. § 780-113 (a)(30).

² 35 Pa.C.S.A. § 780-113 (a)(16).

passenger, when officers of the Pennsylvania State Police pulled him over for a traffic violation. *Aff. of Probable Cause*, at 1. Jenkins consented to a search of the vehicle after the police officer advised Jenkins that he did not have a reasonable expectation of privacy in the vehicle, as the rental contract was not in his name.³ *Id.* With the assistance of a police dog, the police officers found a quantity of ecstasy and marijuana in a backpack in the rear of the car. *Id.* The officers arrested Jenkins and charged him with the above offenses.

Jenkins moved to suppress the evidence as gathered in violation of the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution.⁴ The suppression hearing transpired similarly to

³ We do not rule on whether Jenkins had an expectation of privacy in the rental vehicle. This Court has held that an “[a]ppellant had no constitutional expectation of privacy in a rental automobile, where he was the operator of the vehicle but not the named lessee, he was not an authorized driver, and the return date on the rental agreement had passed.” *Commonwealth v. Jones*, 874 A.2d 108, 112 (Pa. Super. 2005). However, given the lack of evidence on the record, we cannot say if the requirements of *Jones* were met.

⁴ “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.” PA. CONST. art. I, § 8. While this language echoes that of the U.S. Constitution, the Pennsylvania Supreme Court has held that the Pennsylvania Constitution provides a higher level of protection than the Fourth Amendment as interpreted by the United States Supreme Court. *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983). Thus, we examine this case under Pennsylvania law.

the companion case also currently before this Court, ***Commonwealth v. Enimpah***, No. 125 MDA 2012. As in ***Enimpah***, Assistant District Attorney Nichole Eisenhart, Esquire refused to call any witnesses or produce any evidence at the suppression hearing, arguing that Jenkins bore an initial “burden of proof” that he had a reasonable expectation of privacy in the contraband or the car. N.T. Suppression, 1/25/2012, at 4. Judge Tylwalk informed Attorney Eisenhart that the Lebanon County Court of Common Pleas judges had “as a Bench . . . discussed [the] issue” and that he would, like Judge Bradford Charles in ***Enimpah***, grant the motion to suppress unless she presented some evidence. ***Id.***, at 4, 7. Judge Tylwalk explained that the Commonwealth bore a burden of *production* to at least present evidence that would allow the court to examine the merits of the motion. Attorney Eisenhart persisted in her refusal, and Judge Tylwalk granted the motion to suppress. The Commonwealth filed this timely appeal.

The Commonwealth argues that Jenkins had a preliminary burden to prove the existence of a reasonable expectation of privacy prior to the merits phase of a suppression hearing and that the trial court erred in shifting the burden of proof to the Commonwealth pursuant to Pa.R.Crim.P. 581(H) before Jenkins had met that burden. The Rules and caselaw do not support such a legal analysis.

As this is entirely a question of law, the scope of our review is plenary and our standard of review is *de novo*. ***Commonwealth v. Williams***, 920

A.2d 887 (Pa. Super. 2007); ***See also Commonwealth v. Nester***, 709 A.2d 879, 881 (Pa. 1998). We focus on the correct procedure and distribution of burdens when a defendant moves to suppress the Commonwealth's evidence of his possessory offense.

Pennsylvania Rule of Criminal Procedure 581 provides in relevant part:

(A) The defendant's attorney, or the defendant if unrepresented, may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights.

...

(D) The motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof.

(E) A hearing shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). A hearing may be either prior to or at trial, and shall afford the attorney for the Commonwealth a reasonable opportunity for investigation. The judge shall enter such interim order as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

...

(H) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the Defendant's rights. The defendant may testify at such hearing, and if the defendant does testify, the defendant does not thereby waive the right to remain silent during trial.

Pa.R.Crim.P. 581.

This would seem to create an initial burden on a defendant to plead his or her case in a motion to the court, which, if the defendant meets the specificity and particularity requirements of Pa.R.Crim.P. 581(D), would

trigger a hearing to consider the merits of the motion under Rule 581(E). The official comment to Rule 581 states: "In all cases, the burden of production is now upon the Commonwealth. The burden of persuasion is there as well." Official Comment to Pa.R.Crim.P. 581 (internal citations omitted). At the suppression hearing, the Commonwealth has the primary burden of both production under 581(H) and persuasion (as the official comment instructs) to convince the court that the evidence was legally obtained.⁵

These burdens are encompassed by the term "burden of proof." "The burden of proof really consists of two separate burdens, the burden of production or going forward, and the burden of persuasion." ***Commonwealth ex rel. Butler v. Rundle***, 239 A.2d 426, 427 (Pa. 1968). Rule 581(H)'s command that the "Commonwealth shall have the burden of going forward with the evidence" is identical to saying that it has the burden of production, as the Pennsylvania Supreme Court has used the terms "burden of production" and "burden of going forward" interchangeably. ***See id.*** This Court has defined these burdens as "the burden of *producing* satisfactory evidence of a particular fact in issue; and . . . the burden of

⁵ In order to bring a motion to suppress under Rule 581(A), a defendant must first show standing to challenge the evidence, although in possessory offenses such as this, standing is automatic. ***Sell, supra.*** The Commonwealth does not question Enimpah's standing to challenge the search. Commonwealth's Brief, at 16.

persuading the trier of fact that the fact alleged is indeed true.” ***Commonwealth v. Jury***, 636 A.2d 164, 169 n.5 (Pa. Super. 1993) (emphasis added).

Independent of the Rules, our caselaw establishes that a defendant has an “obligation to demonstrate that the challenged police conduct implicated a reasonable expectation of privacy that he personally possessed.” ***Commonwealth v. Millner***, 888 A.2d 680, 691 (Pa. 2005). Thus, our Supreme Court has held that defendants must convince the trial court that the Commonwealth violated his or her reasonable expectation of privacy in order for suppression to be proper. “[A] defendant cannot prevail upon a suppression motion unless he demonstrates that the challenged police conduct violated his own, personal privacy interests.” ***Id.*** at 692. Therefore, while the Commonwealth has the burden of going forward under Pa.R.Crim.P. 581(H), the defendant still must meet a burden of persuasion that his or her expectation of privacy was violated.

The Commonwealth’s position is at odds with this interpretation, arguing that “[a]bsent a showing of a reasonable expectation of privacy in an area searched or items seized, the burden **never** shifts to the Commonwealth to establish the lawfulness of the police conduct.” Appellant’s Brief, at 16 (emphasis in original). This position is incorrect.

In ***Millner***, upon which the Commonwealth extensively relied, the Supreme Court stated that showing a reasonable expectation of privacy is

required to “prevail upon a suppression motion.” *Millner, supra* at 692. As one can only prevail at the merits phase, this suggests the reasonable expectation of privacy inquiry is a part of the merits phase of the suppression hearing. The *Millner* Court also held that “[s]tanding denotes the existence of a legal interest. In the context of this case, the term refers specifically to appellant’s *right to have the merits of his suppression motion adjudicated* without a preliminary showing of ownership or possession in the premises or effects seized.” *Id.* at 691 (emphasis added, quoting *Commonwealth v. Peterson*, 636 A.2d 615, 617 (Pa. 1993)). Given automatic standing, the court must proceed to the merits phase of the hearing under Rule 581(E), where the burden of going forward is placed on the Commonwealth by Rule 581(H).

Based on *Millner*, this Court has explained that “[w]hether [the] defendant has a legitimate expectation of privacy is *a component of the merits analysis* of the suppression motion. The determination whether [the] defendant has met this burden is made upon evaluation of the evidence *presented by the Commonwealth and the defendant.*” *Commonwealth v. Burton*, 973 A.2d 429, 435 (Pa. Super. 2009) (emphasis added).

There is a critical feature to possessory offenses that makes the presentation of evidence by the Commonwealth necessary. Forcing a defendant to assert his expectation of privacy over contraband, as in the

instant case, could be tantamount to forcing him to confess to the crime, in violation of his Fifth Amendment rights against self-incrimination.

We hold, as we did in *Enimpah*, that in the merits phase of a suppression inquiry, it is not enough for the Commonwealth to simply sit on its hands as it did here, but rather it must meet a burden of production, and bring its evidence before the suppression court, which can then make a fully informed decision. This does not, however, excuse the defendant from meeting the burden of persuasion on his or her reasonable expectation of privacy. As the Commonwealth essentially refused to contest Jenkins' motion, Judge Tylwalk was well within his discretion to grant the motion and suppress the evidence.

Order affirmed.