NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. MIGUEL BAEZ, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2559 EDA 2012

Appeal from the Order Entered August 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000980-2012

BEFORE: BENDER, P.J., DONOHUE, J., and MUSMANNO, J.

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 03, 2013**

The Commonwealth appeals from the trial court's order suppressing evidence seized during a vehicle stop. We agree with the trial court that no exception to the warrant requirement applied, and affirm.

On October 19, 2011, Officers Waters and Gorman of the Philadelphia Police Department were patrolling the 25th Police District. Around 11:20 p.m., the officers observed a red vehicle driven by Appellee, Miguel Baez (Baez), failing to obey a stop sign at the intersection of Howard and Somerset Streets. The officers successfully initiated a traffic stop after activating their lights and siren. Officer Waters approached the driver's side of the vehicle, while Officer Gorman approached the passenger, Nestor Aviles (Aviles). As he approached the vehicle, Officer Waters noticed that Baez and Aviles were frantically reaching into the center console located

between the two front seats. He also detected the "strong odor of [burnt] marijuana coming from the vehicle." N.T., 7/30/12, at 11. When asked for his license and registration, Baez appeared extremely nervous, was breathing heavily, and tightly clenched the steering wheel. After asking for identification, the officers removed Baez and Aviles from the vehicle and frisked them for weapons. Neither weapons nor other contraband were found as a result of the pat-down. Baez and Aviles were then placed in the officers' vehicle, but not handcuffed.

After Baez and Aviles were secured in the officers' vehicle, Officer Waters went into the Baez's vehicle and opened the center console. Therein he discovered nine bundles of heroin. Officer Waters then summoned a K-9 unit, which positively alerted to the presence of drugs in the vehicle. Based upon the preceding facts, the officers sought a search warrant for the vehicle. Baez and Aviles were arrested. While the subsequent search, conducted pursuant to a warrant, revealed the nine bundles of heroin, the police did not find any weapons or marijuana in the vehicle.

Baez was subsequently charged with criminal conspiracy, possession (heroin), and possession with intent to deliver (heroin). At a suppression hearing held on July 30, 2012, the Honorable Willis W. Berry, Jr., heard testimony from Officer Waters. Following the hearing, Judge Berry granted Baez's motion to suppress the seized heroin. The Commonwealth filed for reconsideration. Although Judge Berry vacated the suppression order pending a reconsideration hearing, he ultimately granted the motion again.

The Commonwealth appealed from the latter order and now presents the following question for our review:

> Where police lawfully stopped a car at night and saw defendant and his passenger reaching frantically into the center console, and defendant was nervous, fidgety, shaking, and breathing heavily, did the lower court err in suppressing defendant's heroin recovered during a protective search of the console?

Commonwealth's Brief, at 3.

We review the suppression court's grant of a motion to suppress according to the following standard:

> When reviewing the propriety of a suppression order, an appellate court is required to determine whether the record supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. [Where the defendant] prevailed in the suppression court, we may consider only the evidence of the defense and so much of the evidence for the Commonwealth as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

In re O.J., 958 A.2d 561, 564 (Pa. Super. 2008) (*en banc*) (quoting ***Commonwealth v. Mistler***, 912 A.2d 1265, 1268–69 (Pa. 2006)) (internal citations and quotations omitted).

> In ***Michigan v. Long***, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and ***Commonwealth v. Morris***, 537 Pa. 417, 644 A.2d 721 (1994), the respective Supreme Courts promulgated the test for determining whether a police officer may conduct a protective search of the interior compartment of

> a car for weapons. In ***Long***, the United States Supreme Court applied the test announced in ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and held that a weapons search may be performed where an officer has reasonable suspicion that a firearm may be secreted in the car and that the search may encompass any area where a weapon could be hidden and accessible to the defendant in the vehicle. In ***Long***, the High Court made the apt observation that "detentions involving suspects in vehicles are especially fraught with danger to police officers." ***Long***, ***supra*** at 1047, 103 S.Ct. 3469. The ***Long*** Court's specific holding is that
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> > the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. "The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."
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> ***Long***, ***supra*** at 1049–50, 103 S.Ct. 3469 (partially quoting ***Terry***, ***supra*** at 21, 88 S.Ct. 1868).

Commonwealth v. Tuggles, 58 A.3d 840, 842-43 (Pa. Super. 2012) *appeal denied*, 69 A.3d 602 (Pa. 2013).

Here, the Commonwealth contends that:

> In granting defendant's motion to suppress, the lower court erroneously ruled that the search of the console was incident to defendant's arrest and therefore police required a warrant. Because defendant was not under arrest, but rather temporarily detained during a nighttime traffic stop, and police had reasonable suspicion to conduct a protective search of the car for weapons, the lower court should have denied defendant's motion to suppress.

Commonwealth's Brief, at 8 – 9. We disagree.

Initially, we note that no Pa.R.A.P. 1925(a) opinion was filed in this matter because Judge Berry ceased sitting as a Judge in Philadelphia County following the reconsideration hearing held in this case. Accordingly, the Commonwealth's claim that Judge Berry suppressed the evidence in this case premised upon his conclusion that the search in question was conducted incident to Baez's arrest, is an interpretation of Judge Berry's statements at the hearing. Based upon our review of the record, we do not agree with the Commonwealth's interpretation. Judge Berry did clearly note that Baez's placement in the police vehicle was a significant factor in his determination as to whether the officers had a reasonable belief that Baez and Aviles were dangerous. However, the record does not unambiguously support the contention that Judge Berry's ruling was reached by viewing the search solely as one incident to arrest.[1]

Nevertheless, as stated above, the legal conclusions of the lower court are not binding on us. The largely uncontradicted evidence supporting Officer Walters' belief "that the suspect[s] [were] dangerous and [could]

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[1] Judge Berry did say during the reconsideration hearing that "these men were not getting out of that car because the police said they were arrested." N.T., 8/20/12, at 10. That statement is not identical to Judge Berry's declaring that his ruling was premised upon a search incident to arrest, and to assume so largely takes the statement out of the context in which it was issued. A few moments prior to that statement, defense counsel argued that Baez and Aviles were no longer a threat to the officers because they were secured in the police vehicle, suggesting that the basis for a protective sweep of the center console (concern for the safety of the officers) had subsided. Judge Berry immediately responded, "I agree." ***Id***.

gain immediate control of weapons" was as follows. ***Long***, 463 U.S. at 1049–50. Baez's vehicle was lawfully stopped, at night, following his failure to stop at a stop sign. Baez and Aviles were accessing the center console in a suspicious manner while the officers approached, and police detected a strong odor of marijuana. Baez was extremely nervous when asked to produce his documentation.

Weighing against such a finding were the following factors. There was no evidence that the vehicle stop occurred in a high-crime area. Both Baez and Aviles were cooperative throughout their interaction with police. After observing the suspicious movements involving center console, the smell of marijuana, and Baez's nervousness, the police failed to take any immediate protective action. Instead of immediately removing the vehicle's occupants, Officer Waters first requested Baez's documentation. Neither weapons nor other contraband were located on either individual when they were patted down. There was no testimony that either Baez or Aviles appeared intoxicated. When the 'protective sweep' did occur, both Baez and Aviles were safely secured in the police cruiser. Officer Walters never provided any testimony that his training and experience led him to reasonably believe that Baez and Aviles might be armed and/or dangerous.

Given this balance of factors, Judge Berry concluded that the police lacked a reasonable concern for their safety at the time the center console was searched. He stated that he did not attach much weight to the nervousness of Baez and Aviles because "everybody is nervous when they

get stopped by a police car. I could see these two guys sweating when they get stopped by the police even if they had no drugs in the car." N.T., 7/30/12, at 29. Judge Berry then stated that he did not "think it was a situation where [Officer Waters] had a concern for himself and concern for his partner's safety." ***Id***. We discern no legal error in Judge Berry's conclusion, nor the manner in which he reached it.

In ***Tuggles***, we reversed an order granting suppression under similar circumstances. In that case, police stopped the appellee for failure to stop at a stop sign, and police then observed movements consistent with closing the center console. The occupants of the vehicle were removed, patted down (revealing nothing), and secured in a police vehicle. Police then searched the center console under the auspices of a protective sweep, discovering illegal narcotics. ***Tuggles*** is distinguishable from the instant case, however, because one of the passengers in the appellant's vehicle was visibly intoxicated and refused to comply with the police officer's demand that he remove his hands from his pockets. There was also testimony that established that the stop occurred in an area with "high crime, drugs and guns." ***Tuggles***, 58 A.3d at 842.

In ***Commonwealth v. Cartagena***, 63 A.3d 294, 305 (Pa. Super. 2013), *appeal denied*, 70 A.3d 808 (Pa. 2013), we reversed an order denying the appellant's motion to suppress. Therein, the appellant was stopped for having excessively tinted windows. When the police approached his vehicle, the appellant did not immediately respond to requests that he

lower his window(s). When he did comply, he was visibly nervous. The appellant was removed from the vehicle and patted down, revealing nothing. While the appellant was being patted down just outside his vehicle, another officer searched the driver's seat and the center console and discovered a handgun. In concluding that the trial court had erred in finding that the police had a reasonable belief that the appellant was dangerous, we stated that we were

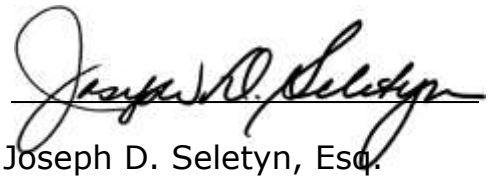
> mindful of the legal standard requiring that we view facts not in isolation but in light of the totality of the circumstances when determining whether the police officers here had reasonable suspicion to have concern for their safety. ***Commonwealth v. Simmons***, 17 A.3d 399, 403 (Pa. Super. 2011). Based upon the evidence of record, we conclude that the totality of the circumstances, taken together, fall short of a reasonable suspicion to conduct the search at issue in this case.

Cartagena, 63 A.3d at 304. In this case, however, Baez and Aviles were secured in the police vehicle during the search of the center console, providing an additional factor not present in ***Cartagena*** that would tend to support a legal conclusion requiring suppression.

Judge Berry's determination that the police did not have a reasonable fear for their own safety when they conducted the protective sweep is adequately supported by the facts of record and the reasonable inferences deriving from those facts, particularly in comparison to the conclusions we reached in ***Cartagena*** and ***Tuggles***. Accordingly, the Commonwealth's claim is meritless.

Order ***affirmed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013