NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEITH COLEMAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 276 WDA 2011

Appeal from the Judgment of Sentence January 11, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0016919-2009

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J. Filed: February 21, 2013

Appellant, Keith Coleman, appeals the judgment of sentence imposed on January 11, 2011, in the Court of Common Pleas of Allegheny County, following his conviction on one count of firearm not to be carried without a license,[1] one count of persons not to possess, use, manufacture, control, sell or transfer firearms,[2] and one count of prohibited offensive weapons.[3] Although we conclude Appellant's convictions are proper, we find his sentence to be illegal. Therefore, we are constrained to vacate his judgment of sentence and remand for resentencing.

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* Former Justice specially assigned to the Superior Court.

1 18 Pa.C.S.A. § 6106(a)(1).
2 18 Pa.C.S.A. § 6105.
3 18 Pa.C.S.A. § 908.

The relevant facts and procedural history are as follows: On October 1, 2009, Appellant was arrested and charged with the aforementioned offenses. On November 5, 2009, following a preliminary hearing, all charges were bound over for court. On October 25, 2010, Appellant filed a counseled pre-trial omnibus suppression motion, and the case was listed for a suppression hearing before then Senior Judge John K. Reilley. Both parties stipulate, and the trial court agrees, that defense counsel and the assistant district attorney appeared for the suppression hearing on November 16, 2010, and the parties stipulated to the facts as contained in the affidavit of probable cause for suppression purposes.[4] ***See*** Rule 1923 Statement, filed 9/12/12, at 4. It is further stipulated, and the trial court agrees, that neither Appellant nor a court reporter were present for the suppression hearing. ***See*** Rule 1923 Statement, filed 9/12/12, at 4; Trial Court's Opinion filed 7/17/12 at 2. Thus, there is no transcription of the proceedings. The parties agree that, during the suppression hearing, Judge Reilly directed the parties to submit briefs in support of their positions, and thereafter, defense counsel and the Commonwealth filed briefs.

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[4] As discussed *infra*, no transcript exists with regard to the suppression hearing. However, pursuant to Pa.R.A.P. 1923, Appellant's counsel prepared a statement in lieu of transcript with regard to the suppression hearing, and by order of court filed on September 12, 2012, the trial court accepted the Rule 1923 statement.

On November 30, 2010, Judge Reilly denied Appellant's motion to suppress, and at the end of 2010, Judge Reilly, who is now deceased, left the trial court's Criminal Division. ***See*** Rule 1923 Statement, filed 9/12/12, at 2. Consequently, Appellant's case was reassigned to the Honorable John A. Zottola, and on January 11, 2011, Appellant and his defense counsel appeared at a stipulated bench trial, at which the following stipulation, based on the affidavit of probable cause, was entered into evidence:

> Had the Commonwealth proceeded to trial in this matter, we would have called Officer Palermo, Officer Simoni, Officer Adametz, Officer Emery, Officer Love, and Sergeant Duffy. They are all of the Pittsburgh Police department.
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> They would have testified substantially that on or about October 1st of 2009, [at] approximately 22:00 hours, Officer Palermero, along with Detectives Simoni, Adametz, Emery and Love, were working a proactive patrol in the North Side section of the City of Pittsburgh; namely, the Perrysville Avenue/North Charles Street area.
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> They were in plain clothes and in an unmarked police vehicle. This is known as a high-crime area [where] [o]fficers made numerous narcotics and firearms arrests. They were conducting patrol due to recent shooting and homicides in the area.
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> While patrolling Legion Street, they observed a male walking on that street towards their location wearing all black clothing and carrying a long object wrapped in a black sweatshirt. The person was carrying the object with both hands.
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> Approximately 20 feet from the officers' location, he observed the vehicle and displayed a facial expression of surprise and shock. He pulled the object he was carrying close to his chest, turned to his right and started running over the hill towards North Charles Street.
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> Based on the officers' training and experience, they believed the object to be a firearm. They immediately gave chase and continued to chase along the side of 2951 North Charles Street.

> They observed the individual running across North Charles Street towards Canter way. At this point, he was no longer carrying the object wrapped in a sweatshirt.
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> During that foot pursuit, Detectives Simoni and Emery observed the individual running on North Charles Street towards Canter Way. They observed him toss the object wrapped in a black sweatshirt that he was carrying into a bush in front of 2951 North Charles Street.
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> Detectives went to that location and observed the butt handle of a firearm in a black sweatshirt laying in a bush. Officers recovered one Savage Arms Model 940E 20-gauge sawed-off shotgun, Serial Number P101925, barrel length approximately 13.25 inches. The barrel length of the sawed-off shotgun classified [it] as a firearm.
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> Based on this, their observations, the individual was placed under arrest. They found him to be Keith Coleman, the [Appellant]. Search incident to arrest recovered a brown bandanna and black gloves.
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> [The police] identified [Appellant] and found that he did not possess a valid license to carry a concealed firearm. The barrel was sawed off and the stock of the firearm was also cut down. The forward grip of the firearm was wrapped in black tape.
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> Detective Love read [Appellant] his Miranda warnings, witnessed by Detective Simoni. [Appellant] stated he understood his rights, and when asked why he had the firearm, he stated, my cousin just got shot and when I saw you guys, I got scared and ran.
>
> He was found to be a person not to possess based on underlying charges of and adjudication of delinquent for aggravated assault and robbery with the disposition date of 10/11/2001.

N.T., 1/11/11, at 5-8.

The trial court convicted Appellant on all charges and, with Appellant and defense counsel present, proceeded immediately to sentencing. At the conclusion of the hearing, the trial court sentenced Appellant at Count 1, firearm not to be carried without a license, to three years to six years in prison, to be followed by five years of probation. No further penalty was

imposed at the remaining counts. The trial court specifically informed Appellant of his post-sentence and appellate rights. N.T. 1/11/11 at 11. This timely appeal followed. Due to Appellant's trial counsel leaving the Public Defender's Office, new counsel was appointed to represent Appellant and, after the trial court directed Appellant to file a Pa.R.A.P. 1925(b) statement, Appellant timely complied. On July 17, 2012, Judge Zottola filed a Pa.R.A.P. 1925(a) opinion.

In his first issue, Appellant contends the suppression hearing, which was held on November 16, 2010, in his absence, violated his constitutional right to confrontation.[5]

Appellant is correct that "[t]he right to confrontation applies at a suppression hearing, as in the instant matter." ***Commonwealth v. Atkinson***, 987 A.2d 743, 746 (Pa.Super. 2009) (citation omitted). ***See Commonwealth v. McLaurin***, 437 A.2d 440 (Pa.Super. 1981). Thus, the general rule is that a defendant has the constitutionally protected right to be present and confront the witnesses against him during a suppression hearing. ***See id.*** "However, such right can be relinquished, e.g., it can be

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[5] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" Article 1, Section 9 of the Pennsylvania Constitution provides: "In all criminal prosecutions the accused hath a right…to be confronted with the witnesses against him…" With regard to the Confrontation Clause, the Pennsylvania Constitution provides a criminal defendant with the same protections as the Sixth Amendment. ***See Commonwealth v. Atkinson***, 987 A.2d 743, 745-46 (Pa.Super. 2009).

waived by one's words or actions." ***McLaurin***, 437 A.2d at 441 (citations omitted).

Here, we need not reach the determination of whether Appellant's confrontation rights were violated by his absence at the suppression hearing since he failed to preserve the issue for our review. It is well-settled that issues cannot be raised for the first time on appeal. ***See*** Pa.R.A.P. 302. Despite being present for his bench trial and sentencing hearing, Appellant never objected or raised the issue regarding his suppression hearing being held in his absence.[6] Additionally, Appellant filed no written motion, including a post-sentence motion, raising the issue, despite the trial court specifically informing him at the sentencing hearing that he had the right to file such a motion. N.T. 1/11/11 at 11. Therefore, we find this issue to be waived.[7] ***See Commonwealth v. Doleno***, 594 A.2d 341 (Pa.Super. 1991) (indicating issues concerning the failure to appear at trial must be raised in the court below).

Appellant's next claim is the trial court erred in denying Appellant's suppression motion. Appellant contends the police did not have reasonable

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[6] In fact, during his bench trial, with Appellant present, defense counsel specifically mentioned that the suppression hearing had been held and denied by Judge Reilly. N.T. 1/11/11 at 5.

[7] To the extent Appellant suggests trial counsel was ineffective in permitting the suppression hearing to take place in Appellant's absence and with stipulated facts, we defer these issues for collateral review. ***See Commonwealth v. May***, 612 Pa. 505, 31 A.3d 668 (2011).

suspicion to stop him, which tainted evidence (a firearm) he discarded (and subsequently was retrieved by police) in a foot chase. Appellant specifically contends that there is no evidence he knew he was running from law enforcement officials, and therefore, reasonable suspicion did not attach, resulting in his unconstitutional forced abandonment of the firearm.

Initially, we note our standard of review:

> When reviewing the denial of a motion to suppress evidence, we examine 'the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in context of the record as a whole.' We then determine 'whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.' Our review of the application of the law to the facts is plenary.

Commonwealth v. Washington, 51 A.3d 895, 897 (Pa.Super. 2012) (citations and quotations omitted).

> Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution afford protections against unreasonable searches and seizures. Among the protections is the requirement that an officer have reasonable suspicion before an investigatory stop.
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> Our [S]upreme [C]ourt has interpreted Article I, § 8 protection more broadly than the Fourth Amendment and has found that a seizure occurs when an officer gives chase. Under Pennsylvania law, any items abandoned by an individual under pursuit are considered fruits of a seizure. Those items may only be received in evidence when an officer, before giving chase, has at least the reasonable suspicion necessary for an investigatory stop. Stated another way, when one is unconstitutionally seized by the police, i.e., without reasonable suspicion or probable cause, any subsequent flight with the police in pursuit continues the seizure and any contraband discarded during the pursuit is

> considered a product of coercion and is not admissible against the individual.

In re M.D., 781 A.2d 192, 196 (Pa.Super. 2001) (citations and quotation marks omitted).

"Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible." ***Commonwealth v. Simmons***, 17 A.3d 399, 402 (Pa.Super. 2011). "[T]o demonstrate reasonable suspicion, an officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in light of the officer's experience." ***Commonwealth v. Holmes***, 609 Pa. 1, 14 A.3d 89, 96 (2011) (quotation and quotation marks omitted). "To determine whether the police have reasonable suspicion, the totality of the circumstances must be examined. Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." ***Commonwealth v. Brown***, 904 A.2d 925, 930 (Pa.Super. 2006) (citations, quotations, and quotation marks omitted).

It is well-settled that "unprovoked flight in a high crime area establish[es] a reasonable suspicion to believe that criminal activity is afoot to allow for a ***Terry*** stop." ***Brown***, 904 A.2d at 930. As this Court indicated in ***Commonwealth v. Washington***, 51 A.3d 895, 898 (Pa.Super. 2012):

> [T]he United States Supreme Court speaks of 'unprovoked flight upon noticing the police' in a high crime area. Additional language [in Supreme Court opinions] also supports the

> conclusion that the suspect must know he is running from law enforcement before a reasonable suspicion can attach….[N]everous, evasive behavior and headlong flight all provoke suspicion of criminal behavior in the context of response to police presence.

(citations and quotations omitted).

Here, viewing the totality of the circumstances as set forth in the affidavit of probable cause,[8] upon which the parties stipulated to and the suppression court relied in deciding Appellant's motion to suppress, ***see*** Rule 1923 Statement, filed 9/12/12, at 4, we find the officers had the necessary reasonable suspicion to chase Appellant, and therefore, the officers' ultimate seizure of the firearm discarded during the chase is not subject to suppression. For example, on October 1, 2009, when it was late at night and dark, five police officers, who were in plainclothes and an unmarked police vehicle, were patrolling a high crime area, where officers had previously made numerous narcotics and firearms arrests, when they observed Appellant, who was dressed all in black, carrying a long object wrapped in a black sweatshirt. When Appellant came within approximately twenty feet of the police, he observed the vehicle and displayed a facial expression of surprise and shock. Appellant pulled the object close to his

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[8] We note the parties also relied upon the affidavit of probable cause, which the Commonwealth substantially read into evidence, during Appellant's stipulated bench trial. N.T. 1/11/11 at 5-8.

chest and started running over the hill. Two police officers immediately gave chase.

Based on the aforementioned, we conclude the police had reasonable suspicion to stop Appellant. That is, under the totality of the circumstances, an objectively reasonable police officer would have reasonably suspected criminal activity was afoot prior to giving chase. ***See Brown***, ***supra***. We specifically find no merit to Appellant's contention the evidence fails to establish he knew he was running from the police. Rather, the evidence reveals that, although the plainclothes police were in an unmarked police vehicle and had not yet exited the vehicle, Appellant, upon observing the vehicle, displayed a facial expression of surprise and shock, and took off running before the police could announce their identity. Additionally, we specifically note that, in addition to unproved flight to the police presence in a high crime area, the police additionally observed Appellant, who was dressed all in black, carrying a long, sweatshirt-wrapped object during the late night hours. Thus, we conclude the suppression court properly denied Appellant's motion to suppress the discarded firearm. ***See Holmes***, ***supra***; ***Washington***, ***supra***; ***Brown***, ***supra***.

Appellant's final claim is his sentence of three years to six years in prison, to be followed by five years of probation, for Count 1, firearm not to be carried without a license, is illegal since it is beyond the statutory limits. We are constrained to agree and remand for resentencing.

"The issue of whether a sentence is illegal is a question of law and our scope of review is plenary." ***Commonwealth v. Crump***, 995 A.2d 1280, 1283 (Pa.Super. 2010) (citation omitted). A claim that a particular sentence exceeds the statutory maximum presents a legality of sentencing claim. ***See id.*** With regard to "split sentences," this Court has held that "[w]hen determining the lawful maximum allowable on a split sentence, the time…imposed cannot exceed the statutory maximum. Thus, [for example,] where the maximum is ten years, a defendant cannot receive a term of incarceration of three to six years followed by five years' probation." ***Commonwealth v. Schutzues***, 54 A.3d 86, 90 n.2 (Pa.Super. 2012) (quoting ***Crump***, 995 A.2d at 1283-84).

Under 18 Pa.C.S.A. § 6106(a)(1), the crime of firearm not to be carried without a license is graded as a felony of the third degree. ***See*** 18 Pa.C.S.A. § 6106(a)(1). 18 Pa.C.S.A. § 1103 provides, in relevant part, the following:

> **§ 1103. Sentence of imprisonment for felony**
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> Except as provided in 42 Pa.C.S. § 9714 (relating to sentences for second and subsequent offenses),[9] a person who has been convicted of a felony may be sentenced to imprisonment as follows:
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> * * *

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[9] We note that 42 Pa.C.S. § 9714 is not applicable to Appellant. ***See*** 42 Pa.C.S. § 9714 (discussing Section 9714 is applicable to persons convicted of "crimes of violence," defining "crimes of violence," and noting applicability of the Section shall be determined at the sentencing hearing).

> (3) In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.

18 Pa.C.S.A. § 1103(3) (bold in original) (footnote added).

Thus, in the case *sub judice*, the statutory maximum sentence for the crime of firearm not to be carried without a license under Section 6106(a)(1) is seven years.[10] As indicated *supra*, the trial court sentenced Appellant to three years to six years in prison, to be followed by a consecutive term of five years of probation. This "split sentence" is beyond the statutory maximum permitted by law, and therefore, it is illegal. ***See Schutzues***, ***supra***. As such, we are constrained to vacate the judgment of sentence and remand for resentencing. ***See Commonwealth v. Person***, 39 A.3d 302 (Pa.Super. 2012) (where the appellate court alters the sentencing scheme the entire sentence should be vacated and the matter remanded to the trial court for resentencing).

For all of the aforementioned reasons, although we affirm Appellant's convictions, we find it necessary to vacate his judgment of sentence and remand for resentencing.

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[10] We note the trial court acknowledged as much at Appellant's stipulated bench trial, which immediately preceded sentencing. N.T. 1/11/11 at 2. Additionally, both the Commonwealth and the trial court urge this Court to vacate Appellant's sentence and remand for resentencing on the basis Appellant's sentence exceeds the statutory maximum permitted by law. ***See*** Commonwealth's Brief at 4-5; Trial Court's Opinion filed 7/17/12 at 1-2.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.