NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
AL HAKIM NUNEZ JR.	:	
Appellee	:	No. 2886 EDA 2011

Appeal from the Order Entered October 5, 2011
In the Court of Common Pleas of Bucks County
Criminal No(s).: CP-09-CR-0004242-2011

BEFORE: GANTMAN, PANELLA and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 12, 2013

The Commonwealth appeals[1] from the order entered in the Bucks County Court of Common Pleas, granting the motion of Appellee, Al Hakim Nunez, Jr., to suppress a statement to a police officer during a vehicle stop.[2] The Commonwealth asserts the court erred in finding the police officer's

* Former Justice specially assigned to the Superior Court.

[1] The Commonwealth has complied with Pa.R.A.P. 311(d) by certifying in its notice of appeal that the court's order will terminate or substantially handicap the prosecution. ***See*** Pa.R.A.P. 311(d).

[2] The trial court's order suppressed Appellee's statement as well as evidence seized following a search of the vehicle. The Commonwealth challenges the suppression of only the statement. Commonwealth's Brief at 24 ("The Commonwealth is not appealing the granting of suppression of the contents of the knap sack, seized following the officer's search of the interior of the vehicle.").

reasons for stopping Appellee's vehicle was subterfuge and thus the stop was unlawful. We affirm.

The trial court summarized the facts as follows. On February 17, 2011, at approximately 3:02 p.m., Lower Makefield Township Police Officer A.J. Poux "was in a stationary position on the median of Route 332 and Stony Hill Road[.] Route 332 is a four lane divided highway, with a speed limit of fifty miles an hour. The weather was clear and there was no adverse conditions." Trial Ct. Op., 12/7/11, at 3. Appellee was driving a 2006 Honda Accord sedan in the slow lane. He had one passenger, who was his girlfriend and the owner of the car.

> Officer Poux initiated a traffic stop, due to "heavy window tint" and "the loud music system." The officer contend[ed] that he could not see the people inside the vehicle. He approached the vehicle on the driver's side and stated that he "noticed an overwhelming aroma of fresh and burnt marijuana emanating from the vehicle." The officer looked inside of the vehicle and saw in plain view, a "tremendous amount of marijuana detritus[, that is, seeds and stems,] strewn about the inside of the vehicle." . . . He then requested [Appellee] to exit the vehicle, " . . . at which time he did so, and that's when I noticed he was manifestly under the influence of marijuana, due to the blood shot eyes and he was just lethargic answering questions." Upon questioning [Appellee] about the presence of marijuana in the vehicle, [Appellee] continued to deny that any such marijuana existed. At the time these questions were being asked, the officer conceded that [Appellee] was not free to leave and was, in fact, detained. The officer searched the entire interior of the vehicle and found burnt marijuana, two digital scales, packaging baggies and less than one ounce of marijuana. It was at this point that [Appellee] admitted that the items belonged to him rather than the female passenger in the vehicle. . . .

Id. at 3-4 (citing N.T., 10/5/11, at 6-10).

The following charges against Appellee were held for court: possession of marijuana, possession of drug paraphernalia, driving under the influence ("DUI") of a controlled substance, and improper sunscreening of a vehicle window.[3] We further note that a charge of disorderly conduct/unreasonable noise was dismissed at the preliminary hearing.[4]

On August 11, 2011, Appellee filed an omnibus pretrial motion seeking, *inter alia*, suppression of the evidence seized and his statement; he argued that Officer Poux lacked probable cause to stop and arrest him, and thus the stop and arrest were unlawful. The court held a hearing on October 5th, at which Officer Poux and Appellee's girlfriend testified. The court granted Appellee's motion the same day. The Commonwealth took this timely appeal.[5] In its opinion, the trial court found: "We had the opporunity to view the windows of the vehicle through [Appellee's] exhibits and . . . concluded that the stop based on the purported overly tinted windows was a subterfuge." ***Id.*** at 1. The Commonwealth raises two claims for our review,

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[3] 35 P.S. § 780-113(a)(31)-(32); 75 Pa.C.S. §§ 3802(d)(1)(i), 4524(e)(1).

[4] ***See*** 18 Pa.C.S. § 5503(a)(2). The court also dismissed charges of possession with intent to deliver a controlled substance, 35 P.S. § 780-113(a)(33), DUI/impaired ability, 75 Pa.C.S. § 3802(d)(2), and obstructed window, 75 Pa.C.S. § 4524(a).

[5] The Commonwealth complied with the trial court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

that trial court erred in finding: (1) the vehicle stop was unlawful; and (2) after Appellee was stopped, the officer lacked probable cause to suspect DUI of a controlled substance.

In its first issue, the Commonwealth advances numerous claims of error in the trial court's findings and legal conclusions. For ease of disposition, we first address the Commonwealth's overarching claim—that the court erred in finding the vehicle stop was unlawful—and then consider its list of related alleged errors.

Citing ***Commonwealth v. Chase***, 960 A.2d 108, 117 (Pa. 2008), the Commonwealth first avers that a vehicle stop for a suspected Motor Vehicle Code violation, including improperly tinted windows,[6] must be supported with reasonable suspicion. It maintains that in this case, the stop was lawful because Officer Poux had reasonable suspicion of tinted windows, as well as reasonable suspicion and probable cause of a violation of the Crimes Code—disorderly conduct. Commonwealth's Brief at 12, 18, 20. Furthermore, the Commonwealth alleges, "following the traffic stop, further investigation was required to determine whether the vehicle's window tint was, in fact, a violation." ***Id.*** at 20.

The Commonwealth then alleges that the reasoning in the trial court's opinion differed from the reasoning provided at the suppression hearing. The Commonwealth raises the following contentions. At the suppression

[6] ***See*** 75 Pa.C.S. § 4524(e).

hearing, the court "seemed to hold[, pursuant to ***Chase***,] that the officer could not reasonably expect to discover any further evidence of criminal activity other than his initial observations [of window tinting and loud music], and therefore, could not validly stop the vehicle for the reasons stated." ***Id.*** at 10-11. However, in its opinion two months later, the trial court "**for the first time** found credibility against Officer Poux," and that "[c]ontrary to its finding at the suppression hearing, the court stated that Officer Poux did **not** stop the vehicle for excessive tinting or for the loud music." ***Id.*** at 12. Furthermore, in its opinion, the trial court failed to "identify or explain its finding of 'subterfuge' on the part of the officer," where Officer Poux's testimony as to the reasons for the stop was uncontradicted. ***Id.*** at 14. Additionally, the fact that the disorderly conduct charge was dismissed "was never a consideration placed before the suppression court," and in any case, "in no way establish[ed] that the officer's testimony concerning the loud music . . . was not true." ***Id.*** at 15. However, in its opinion, the court made a finding, "based **solely** on the fact that the District Court . . . did not find a prima facie case for" disorderly conduct," "that the loud, intrusive music . . . was also not a reason for the stop." ***Id.***

Finally, the Commonwealth asserts that the trial court applied an incorrect standard for determining whether Officer Poux has reasonable suspicion of tinted windows. ***Id.***at 19. It maintains "the suppression court

. . . acknowledge[d] that the windows of the vehicle were tinted, but improperly addressed the 'level of tint' in terms of proof required for conviction and the possible defenses to a charge" of tinted windows. ***Id.*** at 14. Accordingly, it avers: "Instead of evaluating . . . whether the officer articulated sufficient facts establishing that he reasonably believed that there was a violation of [tinted windows], the court, in acknowledging that there [were tinted windows], impermissibly analyzed the testimony and evidence in terms of proof required for conviction." ***Id.*** at 19. We find no relief is due.

We note the relevant standard of review:

> When the Commonwealth appeals from a suppression order, we follow a clearly defined standard of review and consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Boyd, 17 A.3d 1274, 1276 (Pa. Super.) (citation omitted), *appeal denied*, 29 A.3d 370 (Pa. 2011).

> "[I]t is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony." The suppression court is also entitled "to believe all, part or none of the evidence presented." Finally, at a suppression hearing, the Commonwealth has the burden of "establish[ing] by a preponderance of the evidence that the evidence was properly obtained."

Commonwealth v. Galendez, 27 A.3d 1042, 1046 (Pa. Super. 2011) (*en banc*) (citations omitted), *appeal denied*, 40 A.3d 120 (Pa. 2012).

Our Supreme Court has stated:

> There are three relevant cognizable categories of interactions between persons and police: a mere encounter, an investigative detention, and a custodial detention or arrest. A mere encounter need not be supported by any level of suspicion, and does not require a person to stop or respond. An "investigative detention," or ***Terry*** [***v. Ohio***, 392 U.S. 1 (1968),] stop, must be supported by reasonable suspicion; it subjects a person to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. An arrest or custodial detention must be supported by probable cause.

Chase, 960 A.2d at 117 (citations omitted).

To initiate a vehicle stop for suspicion of criminal activity, the quantum of cause is reasonable suspicion. ***Commonwealth v. Feczko***, 10 A.3d 1285, 1290-91 (Pa. Super. 2010), *appeal denied*, 25 A.3d 327 (Pa. 2011). The Crimes Code defines disorderly conduct in part as follows: "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: . . . (2) makes unreasonable noise[.]" 18 Pa.C.S. § 5503(a)(2).

The Pennsylvania Motor Vehicle Code provides that a police officer may stop a vehicle as follows:

> Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal,

> for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S. § 6308(b).

In ***Chase***, our Supreme Court addressed the quantum of cause required for a vehicle stop based on an alleged violation of the Motor Vehicle Code. ***Chase***, 960 at 112. The Court stated that ***Terry***

> requires reasonable suspicion, and its purpose is to allow immediate investigation through temporarily maintaining the *status quo*. If reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the "investigative" goal as it were, it cannot be a valid stop. Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion.

Id. at 114-15. The ***Chase*** Court thus reasoned:

> [A] vehicle stop based solely on offenses not "investigatable" cannot be justified by a mere reasonable suspicion, because the purposes of a ***Terry*** stop do not exist—maintaining the *status quo* while investigating is inapplicable where there is nothing further to investigate. An officer must have probable cause to make a constitutional vehicle stop for such offenses.

Id. at 116. For example, an officer who suspects a driver of driving at an unsafe speed, running a red light, or driving the wrong way on a one-way street would not discover anything further from a stop and investigation. ***Id.*** at 115 (citing ***Commonwealth v. Sands***, 887 A.2d 261, 270 (Pa.

Super. 2005)). The officer would either have or not have probable cause to believe there was a violation of the Motor Vehicle Code. ***Id.***

Section 4524(e) of the Vehicle Code, provides:

> (e) Sun screening and other materials prohibited.
>
> (1) No person shall drive any motor vehicle with any sun screening device or other material which does not permit a person to see or view the inside of the vehicle through the windshield, side wing or side window of the vehicle.
>
> (2) This subsection does not apply to:
>
> (i) A vehicle which is equipped with tinted windows of the type and specification that were installed by the manufacturer of the vehicle or to any hearse, ambulance, government vehicle or any other vehicle for which a currently valid certificate of exemption has been issued in accordance with regulations adopted by the department.
>
> (ii) A vehicle which is equipped with tinted windows, sun screening devices or other materials which comply with all applicable Federal regulations and for which a currently valid certificate of exemption for medical reasons has been issued in accordance with regulations adopted by the department.

75 Pa.C.S. § 4524(e)(1)-(2).

We find that an initial determination of a violation of this statute—whether a vehicle had a windshield or windows tinted such that a person could not see the inside of the vehicle through them—could be made by observing the vehicle. ***See id.*** A vehicle stop would not further any investigative goals. ***See Chase***, 960 A.2d at 114-15. Accordingly, pursuant to ***Chase***, we hold—contrary to the Commonwealth's argument—that the

level of suspicion required to stop a vehicle for suspected violation of the tinted windows statute is probable cause. ***See id.***

In the instant matter, the trial court applied a reasonable-suspicion standard to evaluating the vehicle stop. At the suppression hearing, it stated, "The sole reason for the stop was the loud music and tinted windows," and that "the stop was for investigative purposes." N.T. at 39. The court applied ***Chase*** as follows:

> [A ***Terry*** stop] specially . . . allow[s] investigation through maintaining the status quo and detaining for that purpose. But a stop cannot further the purpose behind the allowance of the stop [sic]. If the officer has a legitimate expectation of investigatory results then the existence of reasonable suspicion allows the stop. But if there is no expectation of getting additional relevant information concerning the suspected criminal activity, then [the] stop does not satisfy the requirements of ***Terry***. In this case I find that the stop was not for the purpose of investigating the crime for which the stop was made and therefore, the ***Terry*** requirements have not been met and therefore the information gained by the officer was pursuant to a stop that was not supported by ***Terry***[.]

N.T. at 39-40.

In the opinion filed in response to Appellant's Pa.R.A.P. 1925(b) statement, the trial court noted: "Officer Poux initiated a traffic stop, due to 'heavy window tint' and 'the loud music system.' The officer contends that he could not see the people inside the vehicle." Trial Ct. Op. at 3. The court then reasoned,

> [T]he officer actually admitted that the tinted windows was not so hazardous as to permit its continued operation, in that the female passenger was permitted to take the

> vehicle and drive it away from the scene while [Appellee] was placed under arrest. [N.T. at 24.[7]]

Id. at 7. The court also noted: "The Commonwealth, in cross examining [Appellee's girlfriend], never asked her whether the tinted windows [were] in any way altered, subsequent to its purchase." ***Id.*** at 9.

The court's findings are supported by the record. The suppression hearing transcript includes the following cross-examination exchange:

> [Appellant's counsel:] Did [Appellee's girlfriend] drive the car away?
>
> [Officer Poux]: Yes, she did.
>
> Q. **So the car wasn't a hazard at all; is that right?**
>
> A. **No, due to the fact that she wasn't, you know, intoxicated.** That's why I let the vehicle drive away.
>
> Q. So there was no reason to, I guess, take car [sic]; right.
>
> A. Correct.
>
> Q. Impounding the car?
>
> A. Correct.

Id. at 24 (emphases added). Officer Poux further testified that he did not have a "window tint meter" that day, and he did not ask Appellee's girlfriend, who was the registered owner of the vehicle, whether the windows had a "factory tint." ***Id.*** at 25.

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[7] The trial court opinion cited page 14 for testimony that the officer allowed Appellee's girlfriend to drive away in the vehicle. Trial Ct. Op. at 7. The correct page for this testimony is 24.

The court also considered a photo, taken on a cell phone,[8] of the vehicle: "[Appellee] offered a depiction of the level of tint in the windows . . . , which to the court[`]s satisfaction indicated that the windows were not so heavily tinted as to warrant the conclusions reached by the officer." Trial Ct. Op. at 7; ***see also id.*** at 9 ("The photograph of the vehicle did not indicate excessive tinting[.]").

With respect to the loud music, we note that Appellee's girlfriend denied that the car radio was loud. N.T. at 38. She testified that when Officer Poux approached their vehicle, they did not "turn [the] radio down at all[,]" and they "were actually in the middle of a conversation." ***Id.*** She agreed that Officer Poux's testimony—that the radio was loud—was "incorrect." ***Id.***

The trial court noted: "[T]he officer testified that the sounds emanating from the vehicle were so loud that 'with his windows rolled up, it was rattling my fillings in my jaw. I mean that's how loud it was, and I'm partially deaf in my left ear.'" Trial Ct. OP. at 7-8 (quoting N.T. at 30). The court did not specifically rule at the suppression hearing on the officer's purported reason of loud music for the stop. ***See*** N.T. at 39-40 (court's ruling). However, it discussed Officer Poux's reasons for the stop in general terms, as we cited above. ***See id.***

[8] The Commonwealth's challenge to the court's consideration of a subsequently-submitted print of the cell-phone photo is reviewed ***infra***.

We agree with the Commonwealth that the court addressed the import of the dismissal of the disorderly conduct/loud music charge for the first time in its opinion. ***See*** Trial Ct. Op. at 9-10 ("We note that despite the officer['s] testimony that the sound emanating from the vehicle was so loud that it rattled his teeth, . . . the District Justice found that there was not a prima facie case[ ] established and dismissed the charge[.]").

Nevertheless, we are satisfied that the court's conclusion—"that the loud music was not the reason for the stop, as well"—is supported by its statement at the suppression hearing, and its finding that Appellee's evidence was credible. ***See*** Trial Ct. Op. at 1, 16. The court was free to believe all, part, or none of the witnesses' testimony. ***See Galendez***, 27 A.3d at 1046.

After careful review of the record, the suppression hearing transcript, and the trial court's opinion, we hold, pursuant to ***Chase***, that the court should have applied a probable-cause standard in evaluating the vehicle stop with respect to the tinted windows. ***See Chase***, 960 A.2d at 116. Nevertheless, we defer to the court's findings, after review of the photograph and the witnesses' testimony, that Officer Poux cited reasons of tinted windows and loud music as "a subterfuge" for stopping the vehicle. ***See*** Trial Ct. Op. at 1. We emphasize Officer Poux's response to the question, "So the car wasn't a hazard at all; is that right?": "**No**, due to the fact that she wasn't . . . intoxicated." ***See*** N.T. at 24. We also note the

directly conflicting testimony of Officer Poux and Appellee's girlfriend with respect to the volume of the music. Applying this reasoning to the proper standard, we hold that the Commonwealth failed to establish Officer Poux had probable cause to suspect a violation of the tinted window and disorderly conduct statutes. ***See Galendez***, 27 A.3d at 1046.

We now resolve the Commonwealth's remaining allegations of error. It contends that the court's findings are not supported by the record, for the following reasons. The only exhibit entered into evidence at the suppression hearing "was a cell phone with pictures[.]" Commonwealth's Brief at 12. A "printout of the picture from the cell phone[, which] was apparently obtained" by the court after the suppression hearing, was not introduced at the suppression hearing, not made a part of the record, and was never provided to it. ***Id.*** at 13-14. In addition, these pictures showed only the view "through the front window of the vehicle, not the **side** windows as described by the officer," and showed only the view from the inside of the car, and thus was not the same view the officer had from outside the vehicle. ***Id.*** at 13.

At the suppression hearing, Appellee introduced a cell phone with a picture, taken during the daytime, of the car in question. N.T. at 25-26, 34. Appellee moved for the admission of the exhibit, and the Commonwealth did not object. ***Id.*** at 34-35. In its opinion, the trial court stated: "[Appellee] offered a depiction of the level of tint in the windows of the vehicle by way of

a cell phone photograph **which was later printed out**[.]" Trial Ct. Op. at 7 (emphasis added). The certified record includes a photograph of the vehicle, printed on regular paper; the photograph is taken from outside the vehicle, and shows the entire left side and hood of the car. The record also includes an "Exhibit List," which bears a handwritten note dated the same day as the suppression hearing:

> ● [Appellee's counsel] asked to supply court with picture from cell phone + put in file (DS1)
>
> ● [Appellee's counsel] took DS1.
>
> 10/5/11

Suppression H'rg Exh. List, 10/5/11.

In light of the foregoing, it is not clear **when** the trial court received the photograph printed on regular paper. According to the Commonwealth, the printed photograph was not introduced at the suppression hearing. Commonwealth's Brief at 13. It cites no authority, and this panel has not discovered any, of the propriety of introducing a photograph in the form of a screen on an electronic device and subsequently adding a paper print of the photograph to the record.

Nevertheless, we note that although the Commonwealth argues the submission of the print was improper, it makes no claim that it was prejudiced by a print of the photograph which was admitted into evidence with no objection. Importantly, we also find the premise of the Commonwealth's argument incorrect; the print in the record does not show

a "view from **inside** the vehicle." ***See*** Commonwealth's Brief at 13. Instead, we are satisfied that the court viewed the photo as presented at the suppression hearing and made its findings accordingly.

The Commonwealth's next contention is made in support of its claim that the "court has not addressed, based on any proper considerations, the loud, intrusive music as testified to by the officer." ***Id.*** at 19. It states: "It is important to note that while Appellee's [girlfriend] merely answered a question posed to her on cross-examination that the music . . . was 'not loud' and that she and Appellee were having a conversation at the time the vehicle was stopped, no evidence of the volume of the music was testified to or elicited . . . by Appellee on direct examination." ***Id.*** at 20.

Implicit in this analysis is reasoning that a "mere[ ]" response to a cross-examination question is less credible than direct examination testimony. ***See id.*** The Commonwealth provides no authority to support such a contention and we decline to apply such a holding.

Finally, the Commonwealth complains that the trial court "mischaracterize[d]" Officer Poux's testimony, where the court stated that the officer did not dispute that Appellee was stopped at a red light when the officer stopped on the shoulder of the road, next to Appellee. ***Id.*** at 13. The Commonwealth contends: "Officer Poux did not confirm that that, in fact, occurred." ***Id.*** We hold that this testimony and the court's

characterization of it is not relevant to whether the officer had the requisite levels of suspicion of a Motor Vehicle Code violation and criminal activity.

The second issue presented in the Commonwealth's brief is that the trial court erred in finding there was no reasonable suspicion or probable cause for additional offenses, such as DUI, "following the valid traffic stop." ***Id.*** at 21. As this claim is premised on a finding that the traffic stop was lawful, we do not reach it.

For the foregoing reasons, we find no relief is due and we affirm the suppression order of the trial court.

Order affirmed.