NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SHAWN LEE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3420 EDA 2012

Appeal from the Judgment of Sentence of December 13, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006772-2012

BEFORE: GANTMAN, DONOHUE AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 11, 2013**

Appellant, Shawn Lee, appeals from the judgment of sentence entered on December 13, 2012, following his bench trial conviction for two counts of driving under the influence of a controlled substance (DUI) and possession of a small amount of marijuana.[1] On appeal, Appellant contends that the Common Pleas Court erred in affirming the municipal court's denial of his pre-trial motion to suppress. We agree with the trial court that Appellant's suppression motion should have been denied. However, we vacate Appellant's judgment of sentence and remand for additional proceedings consistent with this memorandum.

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[1] 75 Pa.C.S.A. §§ 3802(d)(1) and (d)(2); 35 P.S. § 780-113(a)(31).

We briefly summarize the facts and procedural history of this case as follows. On October 18, 2011, Philadelphia Police Officer Chris Kopecki was patrolling in an unmarked police car. Appellant's vehicle was slowly moving through an alleyway behind the 5800 block of Warrington Street. Officer Kopecki pulled up approximately 15-20 feet behind Appellant in an unmarked police vehicle. Officer Kopecki had his window rolled down. He testified that he saw smoke emanating from the driver's side window of Appellant's car and that it smelled of freshly burnt marijuana. Officer Kopecki initiated police lights and a siren and signaled for Appellant to pull over. Upon approaching Appellant's vehicle, Officer Kopecki again smelled marijuana, noticed that Appellant's eyes were blood shot and his speech was slurred, and witnessed a burnt hand-rolled cigar, that he believed contained marijuana, in a cup holder in the center console. Police arrested Appellant and charged him with the aforementioned crimes after tests revealed the presence of marijuana in Appellant's blood and in the cigar.

The Philadelphia municipal court heard the case. Before the hearing, Appellant filed a motion to suppress the evidence, which the municipal court denied. Ultimately, the municipal court found Appellant guilty.[2] On June 7,

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[2] The municipal court apparently found Appellant "guilty of the charges being brought against him." N.T., 3/27/2012, at 37. However, the municipal court docket marked the possession of a small amount of marijuana charge withdrawn. ***See*** Philadelphia County Docket No. MC-51-CR-0044456-2011 at 3. As discussed further ***infra***, Appellant appealed to the Court of Common Pleas of Philadelphia County. The Court of Common Pleas docket
(Footnote Continued Next Page)

2012, the municipal court sentenced Appellant.[3] Appellant appealed to the Philadelphia Court of Common Pleas, challenging the suppression ruling. The trial court permitted Appellant to amend his pleadings to proceed by way of writ of *certiorari*. The Common Pleas Court held a hearing on December 13, 2012, following which it upheld the denial of suppression and

(Footnote Continued) ———————————

also reflects that the possession of a small amount of marijuana charge was withdrawn at the municipal court level. ***See*** Court of Common Pleas of Philadelphia Docket No. CP-51-CR-0006772-2012 at 3. This information is important to our later discussion regarding the Common Pleas Court's scope of review and its subsequent imposition of sentence.

[3] We had difficulty discerning the precise sentence imposed. The municipal court docket reflects Appellant's sentence differently in two separate places. ***See*** Philadelphia County Municipal Court Docket No. MC-51-CR-0044456-2011 at 3, 5. First, the docket states Appellant's sentence as 72 hours to six months of imprisonment, followed by two months of probation. ***Id.*** at 3. On page five of the docket, however, the sentence imposed reads, "Sentence of 72 hours [to four] months [of imprisonment] followed by two months of reporting probation." ***Id.*** at 5. We cannot confirm the sentence imposed because the certified record does not contain the municipal court's sentencing order or the transcripts from that tribunal's sentencing hearing. As discussed ***infra***, the Common Pleas Court reviewed the municipal court's suppression ruling and ultimately issued an opinion stating the initial sentence imposed by the municipal court was 72 hours to four months of imprisonment, followed by two months of reporting probation. ***See*** Trial Court Opinion, 4/5/2013, at 1-2. However, the Court of Common Pleas, on the record, also sentenced Appellant to "72 hours to six months to Philadelphia County Prison" for the two counts of DUI followed by "30 days on [] the small amount of marijuana" charge. N.T., 12/13/2012, at 19-20. In its subsequent decision, the Court of Common Pleas reiterated it "sentenced [Appellant] to a minimum of 72 hours to six (6) months incarceration on [the two counts of DUI] to be followed by thirty (30) days probation on the [p]ossession of [m]arijuana charge[.]" Trial Court Opinion, 4/5/2013, at 3. Again, these distinctions are important to our later discussion regarding the scope of review.

found Appellant guilty of all charges. On the same day, the Common Pleas Court sentenced Appellant to "a minimum of 72 hours to six (6) months [of] incarceration on [DUI,] 75 Pa.C.S. § 3802(d)(1) and (d)(2) to be followed by thirty (30) days probation on the [p]ossession of [m]arijuana charge at 35 [P.S.] §780-113(a)(31)." Trial Court Opinion, 4/5/2013, at 3. This timely appeal resulted.[4]

On appeal, Appellant presents a single issue for our review:

> 1. Did the [c]ourt err in finding as a fact that a police officer driving behind [A]ppellant's moving vehicle could smell marijuana smoke emanating from [A]ppellant's moving vehicle and were its findings of fact legally sufficient to support a car stop based on the "[p]lain smell doctrine?"

Appellant's Brief at 1.

Appellant argues that common sense dictates that the arresting officer's testimony that he saw and smelled marijuana smoke coming from Appellant's car from a distance of 15 to 20 feet, while both the police and Appellant's cars were moving, was not credible. Appellant points to specific testimony, which he claims is contradictory, to support his assertion. ***Id.*** at 5–13. He further relies upon the officer's testimony that he could distinguish marijuana smoke from tobacco smoke based solely upon visual observation,

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[4] Appellant filed a notice of appeal on December 13, 2012. On March 7, 2013, the Common Pleas Court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely. The Common Pleas Court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 5, 2013.

despite acknowledging that the court specifically discredited this testimony. ***Id.*** at 7-8, 16. Appellant also argues that, at the time he was arrested, he was situated behind apartment buildings where other cars were parked and the smell of marijuana may have emanated from them instead. ***Id.*** at 8-13, 16. Appellant distinguishes his case from Pennsylvania case law addressing the plain smell doctrine. ***Id.*** at 14-16. Further, he cites as instructive "[t]he law surrounding the admissibility of dog sniffs as a basis for a search." ***Id.*** at 16-19.

When reviewing a challenge to a trial court's denial of a suppression motion, our standard of review is as follows:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. McAdoo, 46 A.3d 781, 783-784 (Pa. Super. 2012) (citation omitted).

Here, Officer Chris Kopecki, testified at the suppression hearing. Officer Kopecki stated that he had been a police officer for five years at the time of the hearing. N.T., 3/27/2012, at 12. He testified that he pulled up behind Appellant's car in an alleyway at 6:00 p.m. ***Id.*** at 7-8. Officer Kopecki said that there was still daylight. ***Id.*** at 17. He testified that he positioned his car approximately 15 to 20 feet behind Appellant's car and Appellant was driving. ***Id.*** at 8, 18. Both cars were moving. ***Id.*** at 9. Officer Kopecki testified that he saw smoke emanating from the driver's side window of Appellant's car and smelled burning marijuana in the air. ***Id.*** at 8-12, 18. The Court of Common Pleas accepted the notes of testimony from the suppression hearing and made them part of the record. N.T., 12/13/2012, at 17.

Based upon the totality of circumstances and the police officer's training and observations, we agree with the trial court that there was probable cause to stop Appellant and, thus, suppression was unwarranted. An officer with five-years training testified that he saw smoke coming from Appellant's vehicle. He recognized the smell of the smoke as burning marijuana. It would have been a dereliction of duty for the officer to ignore the obvious aroma of an illegal drug. ***Commonwealth v. Copeland***, 955 A.2d 396, 400 (Pa. Super. 2008). Moreover, we may not usurp the lower court's credibility determinations as the findings of fact are supported by the record. Thus, we agree Officer Lopecki had probable cause to stop Appellant's vehicle. Accordingly, the trial court properly denied suppression.

Finally, we reject Appellant's reliance on law pertaining to canine narcotic searches, because clearly police did not utilize drug-sniffing dogs herein.

However, based upon the procedural posture of the case and the aforementioned incongruities with the imposition of Appellant's sentence, we are constrained to vacate Appellant's sentence and remand for additional proceedings. As previously mentioned, Appellant appealed the municipal court's suppression ruling to the Court of Common Pleas by way of writ of *certiorari*. Pursuant to Pa.R.Crim.P. 1006 and Philadelphia County Local Rule 630(F), following a municipal court's ruling in a summary offense case, a defendant has a right to request either a trial *de novo* or file a petition for writ of *certiorari* in the Court of Common Pleas. "A petition for a writ of *certiorari* provides an aggrieved party an alternative to a trial *de novo* in the Court of Common Pleas." ***Commonwealth v. Elisco***, 666 A.2d 739, 741 (Pa. Super. 1995) (citation omitted). "A trial *de novo* gives the defendant a new trial without reference to the [m]unicipal [c]ourt record; a petition for writ of *certiorari* asks the Common Pleas Court to review the record made in the [m]unicipal [c]ourt." ***Commonwealth v. Menezes***, 871 A.2d 204, 207 n.2 (Pa. Super. 2005), *citing* ***Commonwealth v. Ripley***, 833 A.2d 155, 158–159 (Pa. Super. 2003). This Court has held that when a defendant files a petition for a writ of *certiorari*, the Court of Common Pleas sits as an appellate court. ***Commonwealth v. Coleman***, 19 A.3d 1111, 1119 (Pa. Super. 2011). "Certiorari provides a narrow scope of review in a summary

criminal matter and **allows review solely for questions of law**." ***Elisco***, 666 A.2d at 740 (emphasis supplied).

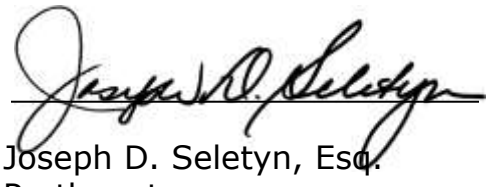
Accordingly, in this case, the Court of Common Pleas was confined to review only the legal determinations of the municipal court's suppression ruling. Instead, the Court of Common Pleas heard all of the testimony related to suppression at the *certiorari* hearing and then adjudicated Appellant guilty of all charges brought against him, including possession of a small amount of marijuana. N.T., 12/13/2012, at 17-19. The Court of Common Pleas sentenced Appellant to "72 hours to six months [in the] Philadelphia County Prison" for the two counts of DUI followed by "30 days [probation] on [] the small amount of marijuana" charge. ***Id.*** at 19-20. Re-determining guilt and resentencing was improper, however, because only the suppression ruling was before the court. Moreover, the Court of Common Pleas' error was compounded because it appears that Appellant's small amount of marijuana offense may have been withdrawn at the municipal court level. ***See*** n.2 ***supra***. Moreover, we cannot discern the initial sentence imposed by the municipal court, which should have remained in place and unaltered following the Common Pleas Court's *certiorari* review of the suppression ruling. ***See*** n.3 ***supra***. We may raise and review an illegal sentence *sua sponte.* ***Commonwealth v. Bowers***, 25 A.3d 349, 352 (Pa. Super. 2011).

In sum, we will not disturb the lower tribunals' determinations that suppression was unwarranted because the police officer had probable cause

to stop Appellant. However, in granting *certiorari* on the suppression issue, the Court of Common Pleas was limited to reviewing the municipal court's legal ruling. Appellant's initial sentence should have remained as originally imposed by the municipal court. As the record is unclear regarding: (1) whether Appellant was convicted of the small amount of marijuana charge by the municipal court or the charge was withdrawn, and (2) the original sentence imposed by the municipal court and whether it was altered by the Court of Common Pleas, we remand for additional determinations.

Denial of suppression affirmed. Judgment of sentence vacated. Case remanded for additional determinations. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/11/2013