

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ROBERT DANIEL PERNA, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 356 EDA 2013

Appeal from the Judgment of Sentence December 13, 2012
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0002716-2011

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.:

FILED DECEMBER 02, 2013

Appellant, Robert Daniel Perna, Jr., appeals from the judgment of sentence entered in the Chester County Court of Common Pleas, following his bench trial convictions for driving under influence of alcohol or controlled substance ("DUI") and possession of a small amount of marijuana.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows.

On May 9, 2011, Trooper Aaron Dykes and Trooper Dennis Peters of the Pennsylvania State Police were on routine patrol on Route 30 in Caln Township, Chester County, Pennsylvania. At approximately 3:07 a.m., the Troopers saw a Jeep Cherokee cross the white fog line and almost hit a tractor-trailer that was parked on the side of the

¹ 75 Pa.C.S.A. § 3802(d)(1)(i), 35 P.S. § 780-113(a)(31), respectively.

road. Trooper Dykes testified that [Appellant] had to make a sudden swerve back into the right lane in order to avoid hitting the truck. The vehicle was traveling at an inconsistent rate of speed, going from 50 m.p.h. to 30 m.p.h. for no apparent reason. The Trooper also testified that [Appellant] applied his brakes several times for no reason. He also saw the vehicle swerve a number of times within its lane. After witnessing all of this, he decided to initiate a traffic stop.

Trooper Peters testified similarly to Trooper Dykes. Trooper Peters stated that he saw the Jeep swerve two times within its lane, hit its brake several times without reason, almost hit a tractor-trailer and swerve violently back into its lane, and reduce its speed to 20 m.p.h.

(Trial Court Order and Opinion, filed May 29, 2012, at 2 n.1).

During the traffic stop, Trooper Dykes observed the odor of alcohol emanating from Appellant's vehicle. Further, Appellant's eyes were bloodshot and his speech was "slow" and "sluggish." (N.T. Suppression, 10/20/11, at 21). Trooper Dykes asked Appellant whether he had ingested any drugs or alcohol, and Appellant admitted having a few drinks earlier that evening at a concert. Trooper Dykes requested Appellant's driver's license, registration, and insurance card, which Appellant retrieved from the center console. At that point, Trooper Peters observed a clear plastic bag containing marijuana. Trooper Peters asked Appellant to hand over the plastic bag, and Appellant complied. Trooper Dykes ordered Appellant out of the vehicle. When Appellant stepped outside, Trooper Dykes noticed the odor of freshly burnt marijuana. After administering field sobriety tests, Trooper Dykes arrested Appellant for DUI.

On August 10, 2011, the Commonwealth filed a criminal information charging Appellant with possession of a small amount of marijuana, DUI, and various Motor Vehicle Code offenses. On September 19, 2011, Appellant filed a motion to suppress all evidence obtained as a result of the traffic stop. In it, Appellant asserted the troopers conducted an illegal vehicle stop, because they “acted without a warrant, and without reasonable suspicion, or probable cause to believe that [Appellant] or the vehicle had violated any law.” (Suppression Motion, filed 9/19/11, at 1). The court conducted a suppression hearing on October 20, 2011. On May 29, 2012, the court denied Appellant’s suppression motion. Following a bench trial, the court convicted Appellant of possession of a small amount of marijuana and DUI.² On December 13, 2012, the court sentenced Appellant to an aggregate term of (1) to two (2) years’ imprisonment. Appellant did not file post-sentence motions or a notice of appeal.

On January 28, 2013, Appellant sought leave to appeal *nunc pro tunc*, which the court granted. That same day, Appellant filed a notice of appeal *nunc pro tunc*. On February 7, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on February 19, 2013.

² The Commonwealth withdrew the remaining charges prior to trial.

Appellant now raises one issue for our review:

DID THE COMMONWEALTH ESTABLISH "SPECIFIC AND ARTICULABLE FACTS" WHICH WOULD HAVE LED AN OBJECTIVELY REASONABLE POLICE OFFICER TO HAVE REASONABLY SUSPECTED THAT THE OPERATOR OF THE VEHICLE WAS DRIVING UNDER THE INFLUENCE?

(Appellant's Brief at 4).

We review the denial of a suppression motion as follows:

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.

[W]e may consider only the evidence of the prosecution 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 record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Williams, 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted). Further, "It 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." ***Commonwealth v. Clemens***, 66 A.3d 373, 378 (Pa.Super. 2013) (quoting ***Commonwealth v. Gallagher***, 896 A.2d 583, 585 (Pa.Super. 2006)).

On appeal, Appellant contends he did not drive erratically prior to the traffic stop. Specifically, Appellant argues he applied the brakes because he came upon a slow-moving vehicle in his lane. Appellant further argues that

he did not improperly weave within his lane; rather, he re-positioned his vehicle to see what was causing the vehicle in front of him to travel so slowly. Regarding the troopers' testimony that Appellant nearly hit a tractor-trailer parked on the shoulder of the road, Appellant maintains the mobile video recorder ("MVR") in the troopers' cruiser did not capture this incident. Moreover, Appellant claims the MVR commenced recording as his vehicle passed the tractor-trailer. Appellant emphasizes that the first frame of the recording shows the front fender of the tractor-trailer on the shoulder of the road and Appellant's vehicle in the center of the right lane. Appellant reasons there is no way he could have come close to striking the tractor-trailer, where the MVR footage shows his vehicle in the center of its lane while passing the tractor-trailer.

Appellant acknowledges the suppression court issued findings of fact to support its conclusion that the troopers possessed reasonable suspicion. Nevertheless, Appellant complains the troopers' testimony and the MVR footage directly contradicted the court's findings. Under these circumstances, Appellant insists the court improperly weighed the evidence. Appellant concludes the troopers did not have reasonable suspicion to support the traffic stop, and the court should have granted his suppression motion. We disagree.

Section 6308 of the Motor Vehicle Code provides:

§ 6308. Investigation by police officers

* * *

(b) Authority of police officer.—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.A. § 6308(b) (emphasis added).

“To establish grounds for ‘reasonable suspicion’...the officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity.” ***Commonwealth v. Fulton***, 921 A.2d 1239, 1243 (Pa.Super. 2007), *appeal denied*, 594 Pa. 686, 934 A.2d 72 (2007) (quoting ***Commonwealth v. Little***, 903 A.2d 1269, 1272 (Pa.Super. 2006)).

[T]o determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. In making this determination, we must give due weight...to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience. Also, the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

Fulton, supra at 1243 (quoting **Commonwealth v. Hughes**, 908 A.2d 924, 927 (Pa.Super. 2006)) (internal citations and quotation marks omitted).

Instantly, the troopers observed Appellant's vehicle traveling westbound in the right lane of the Route 30 bypass. Approaching Route 322, Appellant came upon a tractor-trailer parked on the right shoulder of the road. The troopers indicated that Appellant veered to the right, "nearly striking the tractor-trailer in the rear and then regaining control and coming back into the right lane." (**See** N.T. Suppression at 10.) Trooper Peters testified that Appellant corrected his course by making a "violent" or "sharp jerking motion" to re-enter the right lane. (**Id.** at 60). After Appellant passed the tractor-trailer, the troopers observed his vehicle weaving within the right lane. Appellant also approached a slow moving vehicle in the right lane. Instead of passing that vehicle, Appellant drastically reduced his speed, repeatedly applying the brakes "for no apparent reason." (**Id.** at 10, 61). After following Appellant for approximately two miles, the troopers effectuated a traffic stop.

Under the totality of these circumstances, the troopers properly stopped Appellant's vehicle for further investigation. **See** 75 Pa.C.S.A. § 6308(b); **Fulton, supra**. To the extent Appellant claims the MVR footage did not depict erratic driving, the suppression court evaluated the recording as follows:

The DVD for case number 2716-11 begins with a very quick shot of the front of the tractor-trailer on the side of the road that [Appellant] almost hit. It does not show [Appellant] almost hitting it, but it does show that it was there. It clearly shows [Appellant] swerving repeatedly within [the] lane of travel. It also shows [Appellant] crossing the fog line and yellow center line, although not as clearly. It also shows [Appellant] applying his brakes, but it appears that he did so because the car in front of him applied its brakes.

While the quality of the DVD is not the greatest, it does support the testimony of Troopers Dykes and Peters which the court finds to be credible.

(**See** Trial Court Order and Opinion at 4 n.1.) Here, review of the MVR footage demonstrates the suppression court accurately characterized the events as depicted in the video. Moreover, the suppression court was free to weigh the video evidence as well as the troopers' testimony, which the court found credible. **See Clemens, supra.** The record supports the court's denial of Appellant's suppression motion. **See Williams, supra.** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/2/2013