NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
KALILAH DIANE BRANTLEY,	:	
Appellee	:	No. 376 EDA 2012

Appeal from the Order entered December 22, 2011,
Court of Common Pleas, Delaware County,
Criminal Division at No. CP-23-CR-0004728-2011

BEFORE: PANELLA, DONOHUE and ALLEN, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: January 11, 2013

The Commonwealth of Pennsylvania (the "Commonwealth") appeals from the December 22, 2011 order entered by the Court of Common Pleas, Delaware County, granting the motion to suppress filed by Kalilah Diane Brantley ("Brantley"), the defendant below. After careful review, we affirm.

Corporal Keye Wysocki ("Officer Wysocki") testified to the following at the hearing on the motion to suppress: Officer Wysocki and his partner, dressed in plain clothes, approached Brantley while she was on duty at the ticket counter of the Philadelphia International Airport. N.T., 12/21/2011, 29, 48-49. The Officers introduced themselves and asked Brantley to leave her post so that they could speak with her. ***Id.*** at 29-30, 49. They stepped 10-15 feet away from Brantley's post. ***Id.*** at 31. Officer Wysocki told Brantley that he wanted to speak with her regarding an incident involving

Ms. Burrows, a US Airways manager, and other employees. ***Id.*** at 31, 26. Brantley wanted to know if a US Airways representative could be present, and Officer Wysocki responded in the affirmative but explained that he was investigating a criminal incident, which was not a US Airways matter. ***Id.*** at 31. Brantley also asked if she could have an attorney present. ***Id.*** Officer Wysocki told her that she could have an attorney present and did not have to speak with him without an attorney. ***Id.*** Brantley agreed to speak with the officers. ***Id.***

Officer Wysocki informed Brantley that he believed she had used her cell phone to record a conversation she had with Ms. Burrows. ***Id.*** Officer Wysocki asked if he could see Brantley's cell phone because he wanted to see if there was a recording on it. ***Id.*** at 31-32. Officer Wysocki gave Brantley the option of either voluntarily giving him the cell phone or he would take it and hold it while he applied for a warrant so that the evidence could not be erased. ***Id.*** at 32. Officer Wysocki also told Brantley that if she interfered or resisted his efforts to take her phone, that she could and would be arrested. ***Id.*** at 46. Brantley told Officer Wysocki "that she couldn't be without her phone for any period of time." ***Id.*** at 32. Officer Wysocki also explained to Brantley that it would take two to three weeks for the information to be removed from her cell phone. ***Id.*** Brantley then asked Officer Wysocki for permission to make two phone calls, which he granted. ***Id.*** at 32-33. Brantley made the calls, and then told the officers

they could have her cell phone and acknowledged that she did record Ms. Burrows. ***Id.*** at 33.

Brantley was charged with violating 18 Pa.C.S.A. § 5703(1), intentionally intercepting any wire, electronic or oral communication. On December 11, 2011, Brantley filed a motion to suppress evidence obtained in violation of her rights, as Brantley was not given ***Miranda***[1] warnings and the police officers did not have a warrant. The trial court held a suppression hearing on December 21, 2011, and the Commonwealth presented testimony from Corporal Keye Wysocki, the Officer that questioned Brantley and obtained her cell phone. The trial court granted Brantley's motion to suppress the evidence stating:

> It is further ORDERED that [Brantley's] [m]otion to [s]uppress [e]vidence is GRANTED. As there were no ***Miranda*** warnings given to [Brantley], all statements made by [Brantley] are suppressed. The [c]ourt also finds that there was an unlawful search and seizure of evidence without a warrant and as a result all evidence seized shall be suppressed.

Trial Court Order, 12/22/2011. The Commonwealth filed a motion to reconsider in which it argued the trial court erred in granting Brantley's motion to suppress because (1) Brantley was not in custody for the purpose of triggering ***Miranda*** warnings, and (2) Brantley's consent to the seizure of her cell phone was voluntary, thus no warrant was necessary. The trial court denied the Commonwealth's motion to reconsider on January 25,

[1] ***Miranda v. Arizona,*** 384 U.S. 436, 86 S.Ct. 1602 (1996).

2012. Thereafter, the Commonwealth filed a timely notice of appeal to this Court, stating that the trial court's decision "will terminate or substantially handicap the prosecution," as required by Pa.R.Crim.P. 611(d).[2] The Commonwealth filed a court-ordered Pa.R.A.P. 1925(b) statement, and the trial court filed its Rule 1925(a) opinion.[3]

On appeal, the Commonwealth raises the following two issues for our review:

> [1.] Troopers in plain clothes interviewed [Brantley] in a terminal at the Philadelphia airport. [Brantley] knew she could speak to a lawyer. She was friendly and cooperative. She talked to others during the encounter, directed the troopers' movement in the terminal, and resumed working when the troopers departed. Did the troopers physically restrict [Brantley] so that she was subjected to a custodial interrogation?
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> [2.] The trooper explained to [Brantley] that if she did not consent to a search of her cell phone he would seize it to preserve the evidenced on it, obtain a warrant, and search the phone, a process that could take several weeks. [Brantley] agreed to the search. The trooper immediately searched and

[2] This panel granted the Commonwealth's request for reconsideration of the instant appeal on December 13, 2012 since the appeal was originally erroneously dismissed as a result of a miscalculation of the appeal period.

[3] The Commonwealth points out that the trial court failed to enter findings of fact and conclusion of law, as required by Pa.R.Crim.P. 581(I). However, this failure does not hamper our review. "Where a trial court fails to abide by Rule 581(I), however, this Court may look at the trial court's Rule 1925(a) opinion to garner findings of fact and conclusion of law." ***Commonwealth v. Stevenson,*** 832 A.2d 1123, 1126 (Pa. Super 2003). The trial court's 1925(a) opinion is adequate in this regard, thus we proceed to review the merits of this appeal.

> returned the cell phone to [Brantley]. Did [Brantley] voluntarily consent to the search?

Appellant's Brief at 3-4.

We review an appeal from an order granting a motion to suppress as follows:

> In reviewing an appeal by the Commonwealth of a suppression order, we may consider only the evidence from the appellee's witnesses along with the Commonwealth's evidence which remains uncontroverted. Our standard of review is restricted to establishing whether the record supports the suppression court's factual findings; however, we maintain *de novo* review over the suppression court's legal conclusions.

Commonwealth v. Brown, 606 Pa. 198, 203, 996 A.2d 473, 476 (2010). "The suppression court has sole authority to assess the credibility of the witnesses and is entitled to believe all, part or none of the evidence presented." ***Commonwealth v. Reese,*** 31 A.3d 708, 721 (Pa. Super. 2011) (citation omitted).

In its first issue, the Commonwealth argues that the trial court erred by determining that Brantley was subject to a custodial interrogation and thus entitled to ***Miranda*** warnings. Appellant's Brief at 8. "A law enforcement officer must administer ***Miranda*** warnings prior to custodial interrogation." ***Commonwealth v. Schwing,*** 964 A.2d 8, 11 (Pa. Super. 2008) (citation omitted).

> Whether a person is in custody for *Miranda* purposes depends on whether the person is physically denied

> [] freedom of action in any significant way or is placed in a situation in which [he] reasonably believes that [his] freedom of action or movement is restricted by the interrogation. Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes [his] freedom of action is being restricted.

Commonwealth v. Gonzalez, 979 A.2d 879, 888 (Pa. Super. 2009).

The Commonwealth contends that Brantley was not in custody because the evidence established that Brantley "could not have reasonably believed that the police used physical force or a show of authority to deny her freedom of action or restrain her movement." Appellant's Brief at 10. According to the Commonwealth, Officer Wysocki "did not tell her she was under arrest, could not leave, or would be arrested if she did not cooperate. [Brantley] was always free to leave; she just could not take her cell phone with her." ***Id.*** at 12. Therefore, the Commonwealth concludes that the trial court erred by determining that Brantley could not have reasonably concluded that her movement was restricted based upon Officer Wysocki's statement that if Brantley did not give him the cell phone he would take it from her. ***Id.***

In its 1925(a) opinion, the trial court determined that Brantley was in custody for ***Miranda*** purposes because Officer Wysocki's show of authority could have reasonably led Brantley to believe that "she was not free to decline [his] request[] or otherwise terminate the encounter," thus,

restricting her movement. Trial Court Opinion, 5/24/2012, at 18-19. Specifically, the trial court found troubling the option Officer Wysocki gave to Brantley, *i.e.*, that she either voluntarily give him the phone or he would seize it from her. ***Id.*** at 18. Furthermore, Officer Wysocki testified that he would not let Brantley walk away unless she gave him the phone, and he told Brantley that if she interfered or resisted his effort to take the phone, he could arrest her. ***Id.*** at 18-19. Thus, according to the trial court, Brantley was in custody and entitled to ***Miranda*** warnings. ***Id.*** at 19.

We first point out that this is clearly not a case where the officers used physical restraints, triggering Brantley's right to ***Miranda*** warnings. Instead, we focus our review on whether Brantley was "placed in a situation in which [she] reasonably believ[ed] that [her] freedom of action or movement [was] restricted by the interrogation." ***Gonzalez,*** 979 A.2d at 888.

As noted above, the Commonwealth attacks the trial court's conclusion by asserting that Brantley was always free to leave as long as she did not take her cell phone, as she was never told that she was under arrest, that she could not leave, or that she would be arrested if she did not cooperate. Appellant's Brief at 12. However, as indicated by our review of the record, the Commonwealth fails to acknowledge that Officer Wysocki never told Brantley that she was free to leave or that she could decline Officer Wysocki's request. More importantly, Officer Wysocki specifically told

Brantley that if she did not voluntarily give up her cell phone and if she interfered or resisted him when he physically removed the cell phone from her, he could and would arrest her. ***See*** N.T., 12/21/2011, at 32, 46. We agree with the trial court that the threat of arrest if she resisted the officers' removal of her cell phone when considered in light of the totality of circumstances placed Brantley in a situation where she would reasonably believe her freedom of action or movement was restricted. ***See*** Trial Court Opinion, 5/24/2012, at 18-19.

As the Commonwealth only points to its interpretation of the facts and fails to provide this Court with developed analysis and/or the application of relevant authority to convince us that the trial court erred, we will not disturb the trial court's conclusion that Brantley was subject to custodial interrogation, triggering the requirements of ***Miranda***.

In its second issue, the Commonwealth asserts that the trial court wrongly concluded that Brantley did not voluntarily consent to the search of her phone. Appellant's Brief at 13. This Court has recently stated:

> The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution both protect against unreasonable searches and seizures. U.S. Const. amend. IV; Pa. Const. art. I, § 8; ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 219 (1973); ***Commonwealth v. Cleckley,*** 558 Pa. 517, 528, 738 A.2d 427, 433 (1999). A search conducted without a warrant is constitutionally impermissible unless an established exception applies. ***Commonwealth v. Slaton,*** 530 Pa. 207, 213, 608

> A.2d 5, 8–9 (1992). A consensual search is one such exception, and the central inquiries in consensual search cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent, and the voluntariness of the consent given. ***Schneckloth,*** 412 U.S. at 219; ***Cleckley,*** 558 Pa. at 528, 738 A.2d at 433. To establish a valid consensual search, the Commonwealth must first prove that the individual consented during a legal police interaction. ***Commonwealth v. Strickler,*** 563 Pa. 47, 57, 757 A.2d 884, 889 (2000). Where the underlying encounter is lawful, the voluntariness of the consent becomes the exclusive focus. ***Id.;*** ***Commonwealth v. Acosta,*** 815 A.2d 1078, 1083 (Pa.Super.2003) (*en banc*).

Commonwealth v. Caban, 2012 PA Super 278, 2012 WL 6582404, *4 (Pa. Super. Dec. 18, 2012). It is the Commonwealth's burden to establish that the "consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances…." The voluntariness inquiry is an objective one (***Commonwealth v. Kemp,*** 961 A.2d 1247, 1261 (Pa. Super. 2008) and involves a consideration of the following nonexclusive factors:

> 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel.

Cleckley, 558 Pa. 517, 527 n.7, 738 A.2d 427, 433 n.7.

The Commonwealth takes issue with the two factors that led the trial court to determine that Brantley's consent was involuntary: "that [Officer Wysocki] did not tell [Brantley] she had a right to refuse the search and [that Officer Brantley] used coercion." ***Id.*** at 17. While acknowledging that Officer Wysocki failed to inform Brantley that she had a right to refuse the search, the Commonwealth states that this failure is "merely a factor to be considered by the suppression court" and that Officer Wysocki impliedly informed Brantley of this right by explaining the consequences of her failure to consent, *i.e.*, that he would seize the phone. ***Id.*** The Commonwealth contends that Officer Wysocki's conduct did not amount to coercion, and instead re-characterizes it as "an accurate and truthful explanation of the consequences if [Brantley] refused her consent to search." ***Id.*** at 18. According to the Commonwealth, Brantley consented to the search of her phone because she did not want to be inconvenienced by losing it for a period of time while Officer Wysocki applied for a warrant. ***Id.*** at 14-15.

In its 1925(a) opinion, the trial court concludes that the totality of the circumstances show that Brantley's consent to search her cell phone was not voluntary. Trial Court Opinion, 5/24/2012, at 21-22. The trial court explained:

> Considering the totality of the circumstances, the court determined that [] Brantley did not provide a free and unconstrained consent to the Officer to seize and search her cell phone. Officer Wysocki directed [] Brantley's movements, his demeanor was

> demanding, threatening, and coercive. Officer Wysocki never advised her of the right to refuse the search of her phone. […]
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> * * *
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> [] Brantley was never told that she was free to leave nor was she informed that she was not required to consent to the search. To the contrary, she was told to hand over her phone or the Officer would seize it. The Officer's showing of authority in his statement that 'if she resisted him she would be arrested' would have 'impact[ed] a reasonable citizen-subject's perspective' and tainted the consent given.

Id. at 20-21 (citing ***Strickler,*** 757 A.2d at 902). Our review of the record supports the trial court's conclusions. ***See Brown,*** 606 Pa. at 203, 996 A.2d at 476 (stating that a reviewing court is bound by the trial court's factual findings that are supported by the record); ***Reese,*** 31 A.3d At 721 (citation omitted) (stating that "[t]he suppression court has sole authority to assess the credibility of the witnesses and is entitled to believe all, part or none of the evidence presented").

Contrary to the Commonwealth's claim, the trial court's rationale, set forth above, demonstrates that it considered all of the circumstances of this case in concluding that Brantley's consent was not voluntary. The trial court appropriately considered, *inter alia*, that Officer Wysocki never told Brantley that she had the right to refuse the search. ***See Kemp,*** 961 A.2d at 1261 (stating that "knowledge of the right to refuse to consent to the search is a factor to be taken into account").

With respect to the Commonwealth's re-characterization of the trial court's finding of coercion as an "accurate and truthful explanation of the consequences if [Brantley] refused her consent to search," it relies on ***Commonwealth v. Mack,*** 568 Pa. 329, 796 A.2d 967 (2002), in support of this claim. However, we think the Commonwealth's reliance on ***Mack*** is misplaced. In ***Mack***, our Supreme Court concluded that the appellant's consent to search her luggage was voluntary "when, prior to giving her consent, the police advised [a]ppellant that they would apply for a warrant if she denied them permission to search." ***Id.*** at 334, 796 A.2d at 970. The ***Mack*** Court determined that the options presented to appellant "simply advised her, truthfully, of the consequences of denying permission" and were not a coercive police tactic. ***Id.*** at 335-36, 796 A.2d at 971-72.

The instant case is distinguishable. Unlike in ***Mack***, Brantley was not told that she was free to decline her consent to the search, and she was not informed of her ***Miranda*** rights prior to giving her consent. Furthermore, the option given to Brantley was also different from the option given in ***Mack***, *i.e.*, that appellant could consent to the search or the officers would apply for a warrant. Brantley was told that she could either voluntarily consent to the search or Officer Wysocki would immediately seize her cell phone while applying for a warrant. Importantly, Officer Wysocki also told Brantley that if she interfered or resisted him while physically taking the cell

phone from her, he could and would arrest her. ***See*** N.T., 12/21/2011, at 46. Thus, we think the circumstances of ***Mack*** are readily distinguishable.

Accordingly, we affirm the trial court's order granting Brantley's motion to suppress.

Order affirmed.