NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LEVAR RILEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 406 WDA 2012

Appeal from the Judgment of Sentence of August 6, 2010
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0000879-2006
CP-07-CR-0000880-2006

BEFORE: STEVENS, P.J., BENDER, J., and WECHT, J.

MEMORANDUM BY WECHT, J. Filed: January 7, 2013

Levar Riley ("Appellant") appeals from the judgment of sentence imposed on August 6, 2010, in the Court of Common Pleas of Blair County. We affirm.

In 2006, Appellant was charged in four drug-related criminal cases. Two of those cases, numbers CR 873 & 874 of 2006, stemmed from two heroin sales made by Appellant to a confidential informant. Before Appellant was arrested for those drug transactions, the West Drug Task Force of the Altoona Police Department attempted to coordinate another controlled heroin purchase from Appellant. While en route to make this third sale, Appellant was apprehended and ultimately charged in two other criminal cases. At CR

879 of 2006, Appellant was charged with possession of a controlled substance[1] and criminal attempt – possession with intent to deliver ("PWID")[2] for heroin that was found on his person when he was arrested. At CR 880 of 2006, Appellant was charged with PWID, possession of a controlled substance, and possession of a small amount of marijuana[3] for heroin and marijuana found in a subsequent search of Appellant's apartment.

The trial court has described for us the events that occurred on the date Appellant was arrested:

> On April 6, 2006, the West Drug Task Force (hereinafter Task Force) of the Altoona Police Department undertook surveillance of the intersection between 11th and 17th Avenue (at the bottom of a hill), in the City of Altoona. Detective Thomas Brandt of the Task Force was surveiling this area, waiting for a suspected drug dealer involved in a controlled drug buy operation to emerge from the apartment building at 1123 17th Avenue. At that time, Detective Brandt had two (2) arrest warrants based on previous controlled buys for the suspect which were to be executed when the third drug buy took place on that day. Two (2) other police officers (also from the Altoona Police Department) were present at the intersection of 12th and 17th (the top of the hill). The suspected drug dealer emerged from the apartment building walking a dog and proceeded to 12th Street (or the top of the hill). By the time Detective Brandt had followed the suspect, identified as [Appellant], the two police officers present at the intersection had taken [Appellant] into custody, before the third delivery was made, after receiving instruction not to let the

---

[1] 35 P.S. § 780-113(a)(16).

[2] 18 Pa.C.S. § 901; 35 P.S. § 780-113(a)(30).

[3] 35 P.S. § 780-113(a)(31).

suspect go back to his apartment. A pat down of [Appellant] revealed a bundle of 10 packets of suspected heroin. [Appellant], at the time of his arrest, stated there was nobody at the apartment that could take his dog.

At this point, Detective Brandt went to the Altoona Police Department to [prepare] a search warrant for [Appellant's apartment], as the arrest happened close to the apartment and the Detective believed there was a risk that evidence would be destroyed.

Patrolman Michael Romanowicz, on bike patrol, was one of the officers involved in taking [Appellant] into custody. He and two other officers were dispatched to secure [Appellant's] apartment after [Appellant] was in custody. Upon arriving at the apartment, the officers found the front door unlocked. The Patrolman went to the back and knocked on the back door, with no response. The officers tapped on the front door and opened the door. At this point, one Ms. Charise Gray came downstairs to the front door while the officers were standing outside. The officers advised her that [Appellant] was in custody and that they were seeking a search warrant for drugs to be executed on the premises. According to the Patrolman's testimony, Ms. Gray became visibly nervous and attempted to adjust the lock on the front door. Based on her reaction, the Patrolman stepped through the door way as he believed Ms. Gray would be shutting the door on the officers and he believed it was imperative to prevent the destruction of any evidence in the apartment. Ms. Gray stated that the officers were not invited in the residence and would have to leave. The officers advised her that they were not going anywhere. She stated she needed a cigarette and started walking up the stairs to the second floor of the apartment. However, the Patrolman told her to remain with the officers. As she took steps up the stairs, he took a hold of her arm and pulled her to him. She was advised to "settle down," and she was placed in handcuffs behind her back. The Patrolman stated she was detained, not under arrest and as soon as she settled down, she would be released. The officers checked the apartment for any other persons and found it to be empty. Ms. Gray accompanied the officers during this search. This was the only search done in the apartment at this time. Ms. Gray was brought back down and taken outside. Her handcuffs were removed and she was cuffed in front to smoke a cigarette. According to the Patrolman's testimony, the handcuffs were removed after she had calmed down. The time Ms. Gray had

been in cuffs after coming downstairs was approximately five (5) minutes.

At some later point, while outside, Ms. Gray inquired about doing a consent to search as she wanted the search done as quickly as possible. The officers stated they needed nothing from her as they were going to secure a search warrant for the premises. The Patrolman also stated that Ms. Gray was not the focus of the search and would not be arrested. However, after being told that there was no need for her involvement in the search, Detective Brandt was called and she still indicated she wanted to consent to a search, to speed up the process. Detective Brandt had been at the Altoona Police Department for approximately one and one-half (1-1/2) hours in the process of [preparing] a search warrant. However, he went back to the apartment, without completing his warrant application, with a form for her to consent to the search.

Detective Brandt arrived at the apartment and ascertained that Ms. Gray was a renter at the apartment. He explained the form to her, which states that a party has the right to refuse a search. Ms. Gray's concerns were she wanted the search done quickly so she could be somewhere else. She was assured that she was not the focus of the warrant and the officers were not planning on arresting her that evening. Detective Brandt explained that they already had probable cause for a search warrant however, consent to a search would save time. After thirty (30) minutes, she signed the consent form. Immediately, after she signed the form, she stated to Detective Brandt she had cash in her apartment from the sale of a Cadillac. She produced a handwritten receipt for over eight thousand dollars ($8,000.00). [The] Detective asked where the money was. She took him upstairs to the bedroom and directed him to the bed. [The] Detective walked to the mattress and lifted it to find a large amount of money underneath. As he was putting the mattress back down, he noticed a plastic bag in the area where the headboard would be. Inside the plastic bag, he noticed bundles of heroin. Detective Brandt decided at this point, to apply for and execute a search warrant. Detective Brandt completed his previous search warrant, which was signed by a Magistrate District Judge at 7:10 PM that evening. The warrant (whose statement of probable cause was not based on any of the events that occurred after [Appellant] was taken into custody), was executed within an hour of being signed. By this time, Ms. Gray

> had been in the house for approximately five (5) hours with three to four (3-4) officers.
>
> As a result of the search warrant, one hundred ninety-two (192) packets (nineteen (19) bundles of ten (10) packets and two individual packets) of a controlled substance (later tested to be heroin) were found. All the packets were stamped "Show me the Money." These were seized along with two (2) individual packets of marijuana found on the top of the radiator in the bedroom.

Trial Court Opinion ("T.C.O."), 5/3/2007, at 2-5.

On September 26, 2006, Appellant filed a motion to suppress the evidence obtained from his apartment. The trial court held a hearing on the motion on March 16, 2007. On May 3, 2007, the trial court issued an opinion and order denying Appellant's motion.

On August 27, 2007, per an agreement with the Commonwealth, Appellant pleaded guilty to the charges at numbers CR 873 and 874 of 2006. On the same day, Appellant was sentenced to an aggregate term of four to eight years' imprisonment.

On May 27, 2008, Appellant proceeded to a non-jury trial on the remaining two cases, resulting in Appellant's conviction on all charges. On August 6, 2010, over two years after trial, Appellant was sentenced. At CR 880 of 2006, Appellant was sentenced to three to six years' imprisonment on the PWID charge. This sentence was ordered to run consecutively to the sentence imposed at numbers CR 873 and 874 of 2006. On the possession count (heroin), Appellant was sentenced to six to twelve months' imprisonment, to be served concurrently with all other sentences. No

further penalty was imposed on the possession of a small amount of marijuana count. At CR 879 of 2006, Appellant was sentenced to six to twelve months' imprisonment on the possession of a controlled substance count, which also was ordered to run concurrently to all other sentences. Finally, Appellant was sentenced to another concurrent six to twelve month sentence on the criminal attempt – PWID count. The instant appeal arises from the judgments of sentence imposed at numbers CR 879 and 880 of 2006.

On September 15, 2011, and September 22, 2011, Appellant filed facially untimely post-sentence motions seeking modification of his sentence. These motions were denied on September 23, 2011, and October 3, 2011, respectively.

On October 12, 2011, Appellant filed a *pro se* petition under the Post-Conviction Relief Act ("PCRA")[4] seeking, *inter alia*, reinstatement of his appellate rights. Seemingly recognizing the untimeliness of his petition,[5] Appellant alleged therein that he did not learn until September 12, 2011 that his attorney filed no direct appeal from his judgment of sentence until September 12, 2011. ***See*** PCRA Petition, 10/12/2011, at 3. Thus, it

---

[4] ***See generally*** 42 Pa.C.S. §§ 9541-46.

[5] To be timely, a PCRA petition must be filed within one year of the date that a judgment of sentence became final. ***See*** 42 Pa.C.S. § 9545(b)(1). Appellant's judgment of sentence became final on September 6, 2010. Thus, Appellant's October 12, 2011 PCRA petition was facially untimely.

appears that Appellant was invoking the newly-discovered fact exception to the PCRA's time limit. ***See*** 42 Pa.C.S. § 9545(b)(1)(ii). On February 8, 2012, with the Commonwealth's agreement,[6] the trial court granted Appellant's PCRA petition and reinstated his appellate rights. Accordingly, on February 8, 2012, Appellant filed a timely notice of appeal.[7]

Appellant raises two issues for our review:

> 1. Whether the Commonwealth satisfied its burden to establish a valid consensual search of 1123 17th Avenue, Apartment No. 2, Altoona, Blair County, Pennsylvania?
>
> 2. Whether [Appellant's] speedy trial and due process rights were violated as a result of the substantial delay between verdict and sentencing?

Brief for Appellant at 4.

---

[6] Ordinarily, a defendant seeking reinstatement of his appellate rights via the newly discovered fact exception to the PCRA's time bar must demonstrate that he was duly diligent in ascertaining the status of his direct appeal, or in determining whether counsel filed a requested appeal at all. ***See*** 42 Pa.C.S. § 9545(b)(1)(ii); ***Commonwealth v. Bennett***, 930 A.2d 1264, 1272 (Pa. 2007). In the case ***sub judice***, because the Commonwealth agreed to the reinstatement, and apparently conceded that Appellant acted with due diligence in this regard, we need not consider this issue any further.

[7] The trial court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Consequently, Appellant did not file a statement and the trial court did not issue a Pa.R.A.P. 1925(a) opinion.

Appellant first challenges the trial court's finding that Ms. Gray voluntarily consented to the search of the apartment. Our standard of review in a challenge to a suppression ruling is well-settled:

> An appellate court's 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. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Muhammed, 992 A.2d 897, 899-900 (Pa. Super. 2010).

As a general matter, warrantless searches are unreasonable and constitutionally impermissible, unless an established exception applies. ***Commonwealth v. Strickler***, 757 A.2d 884, 888-89 (Pa. 2000). One such exception is a voluntary consent to search by an authorized person. ***Id.*** "It is axiomatic that a search warrant is not needed when a person with the requisite authority 'unequivocally and specifically consents to a search.'" ***Commonwealth v. Rosas***, 875 A.2d 341, 349 (Pa. Super. 2005) (quoting ***Commonwealth v. Acosta***, 815 A.2d 1078, 1083 (Pa. Super. 2003) (*en banc*)).

> Both the federal and Pennsylvania [C]onstitutions permit third party consent to a search. When police officers obtain the voluntary consent of a third party who has the authority to give consent, they are not required to obtain a search warrant based

> upon probable cause. [T]he Supreme Court explained that a third party possessing common authority over a premises can give valid consent to search against a non-consenting person who shares authority because it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Commonwealth v. Hughes, 836 A.2d 893, 900 (Pa. 2003) (internal citations and quotation marks omitted).

The principal focus when evaluating a challenge to the constitutionality of a consent to search is voluntariness. ***Strickler***, 757 A.2d at 888-89. This inquiry requires an examination of the totality of the circumstances.

> In connection with [the inquiry into the voluntariness of a consent], the Commonwealth bears the burden of establishing that a consent in the product of an essentially free and unrestrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances. . . . [W]hile knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. . . . Additionally, although the inquiry is an objective one, the maturity, sophistication and mental or emotional state of the [person consenting] (including age, intelligence and capacity to exercise free will), are to be taken into account.

Id. at 901-02.

In ***Commonwealth v. Kemp***, 961 A2d 1247 (Pa. Super. 2008), relying upon ***Strickler***, we delineated the following non-exhaustive list of factors for courts to consider in determining whether consent to a search is voluntarily given: (1) the presence or absence of police excesses; (2) whether there was physical contact; (3) whether police directed the citizen's

movements; (4) police demeanor and manner of expression; (5) the location of the interdiction; (6) the content of the questions and statements; (7) the existence and character of the initial investigative detention, including its degree of coerciveness; (8) whether the person has been told he is free to leave; and (9) whether the citizen has been informed that he is not required to consent to the search. ***Kemp***, 961 A.2d at 1261 (citing ***Strickler***, 757 A.2d at 898-99).

We have considered the factors that are applicable to this case as part of our totality of the circumstances review. Like the trial court, we conclude that Ms. Gray's consent was voluntarily given. After Appellant was arrested, and while Detective Brandt was in the process of applying for a search warrant, other police officers went to Appellant's apartment to secure the residence until the warrant was obtained. The police officers knocked on the door. Eventually, Ms. Gray came to the door. After being advised that Appellant was in custody, Ms. Gray became nervous and attempted to close and lock the door on the officers. Before she could do so, the police officers stepped through the door into the apartment, fearing that Ms. Gray would attempt to destroy any evidence inside the residence. Ms. Gray informed the officers that they were not welcome in the home, and asked them to leave. Based upon Ms. Gray's suspicious behavior, the police remained in the apartment.

Ms. Gray's actions continued to arouse the suspicions of the officers. After the police declined to leave the apartment, Ms. Gray attempted to go

upstairs to get a cigarette. She was told that she had to remain with the officers. She resisted, and the officers were forced to drag her down the stairs and handcuff her until she would calm down. She was told that she was not under arrest, and that she would be released from the cuffs as soon as she settled down. Ms. Gray was taken outside and given a cigarette to smoke. Once she calmed down, the handcuffs were removed.[8]

It was not until after the handcuffs were removed that Ms. Gray inquired about consenting to the search. Ms. Gray, clearly nervous and agitated that the police were there, told the officers that she wanted to have the search done as quickly as possible. Detective Brandt, who was still preparing a search warrant application, was called back to the scene. The detective presented a consent to search form to Ms. Gray. Detective Brandt explained the form, including the provision that advises her that she has a right to refuse the search. After considering the terms of the form, coupled with her desire that the search be conducted as quickly as possible, Ms. Gray consented to the search, and signed the form.

It is quite clear that Ms. Gray's consent was voluntary, and not the product of duress or coercion. Most notably, it was not the police who raised the idea of consenting to a search. The evidence plainly demonstrates that

---

[8] Notably, Appellant challenges neither the legality of the police entry, nor the subsequent detention of Ms. Gray. His entire challenge is directed at the voluntariness of Ms. Gray's consent. Accordingly, our analysis is limited to the voluntariness issue.

the police were content to await approval of the search warrant application. Consenting to the search was Ms. Gray's idea, predicated upon her stated desire to expedite the process.

Additionally, Ms. Gray raised the idea of consent only after she calmed down and was released from the handcuffs. In other words, we cannot view the short period of physical restraint, undertaken to calm Ms. Gray down and, more importantly, to prevent her from destroying evidence, as a factor in her decision to offer her consent. It was not as if Ms. Gray offered to consent in exchange for being let out of the cuffs, or in response to any police coercion. Ms. Gray signed the consent form over thirty minutes after the cuffs were removed.

Finally, the voluntary consent form signed by Ms. Gray contained clauses informing her that she had a constitutional right not to have a search performed on her apartment and that she had the absolute right to refuse the search. ***See*** Voluntary Consent Search Form, Exh. 1. Ms. Gray waived those rights, and consented to the search. Because Ms. Gray raised the idea of consent, was not restrained or mistreated at the time of the consent, and was fully apprised of her rights relative to a search of her residence, we cannot conclude, under the totality of the circumstances, that her consent was anything but voluntary.

In his second issue, Appellant alleges that his constitutional speedy trial and due process rights were violated by the two-year delay between his convictions and his sentencing proceeding. Before we can reach the merits

of this claim, we must first determine whether the claim has been properly preserved in the trial court. Appellant addresses preservation in a single sentence: "this issue was raised in Appellant's *pro se* Petition for Post-Conviction [R]elief, and, therefore, is properly before this Court." Brief for Appellant at 15. The issue is not that simple. For the reasons that follow, we disagree with Appellant, and we find the issue to be waived.

It is first necessary to note that Appellant is not raising a challenge to the delay in his sentence pursuant to Pa.R.Crim.P. 704(a), which requires a sentence to be imposed within ninety days after a conviction unless "good cause" exists for the delay. Such a claim is a challenge to the legality of a sentence, and cannot be waived; hence, it can be raised at any juncture in the appellate proceedings. ***Commonwealth v. Guffey***, 710 A.2d 1197, 1198 (Pa. Super. 1998). Appellant raised a Rule 704 challenge at his sentencing hearing, which ultimately was denied by the trial court. ***See*** Notes of Testimony ("N.T."), 8/6/2010 at 4. Presently, Appellant has abandoned that argument. Appellant does not even mention Rule 704, nor does he present an argument relative to the good cause inquiry that is central to such a claim. Instead, Appellant focuses his entire argument on the constitutional claim.

Constitutional speedy trial claims, and the due process concerns attendant to them, are separate and distinct from claims raised under Rule 704. ***See Commonwealth v. Anders***, 699 A.2d 1258, 1263-64 (Pa. Super. 1997), *vacated on other grounds*, ***Commonwealth v. Anders***, 725 A.2d

170 (Pa. 1999). While claims under Rule 704 constitute unwaivable challenges to the legality of a sentence, constitutional speedy trial claims require preservation in the trial court, and are waivable for want thereof. ***See Guffey***, 710 A.2d at 1198; ***Anders***, 699 A.2d at 1264-65. Instantly, Appellant did not raise a constitutional speedy trial challenge before the trial court at sentencing, nor in a timely post-sentence motion. Therefore, the claim is waived.

Appellant attempts to demonstrate that this issue is preserved by pointing out that he raised the issue in his PCRA petition. This argument fails. First, the issue also is waived for purposes of the PCRA proceedings, because it was an issue that could have been raised first on direct appeal. ***See*** 42 Pa.C.S. § 9544(b). Waiver applies even if the PCRA petitioner has never obtained appellate review of his conviction. ***Commonwealth v. Eaddy***, 614 A.2d 1203, 1208 (Pa. Super. 1992). Although Appellant had his appellate rights reinstated through his PCRA petition, that does not permit the revival of claims that were not properly preserved in the first instance before the trial court. Because Appellant's constitutional claim was not preserved before the trial court, it is waived.

The only manner in which the issue could have been revived through the PCRA is by alleging that trial counsel was ineffective for failing to properly preserve the claim below. ***See Eaddy***, 614 A.2d at 1208. In his PCRA petition, Appellant alleged only ineffective assistance of counsel with regard to the failure to file and perfect an appeal. ***See*** PCRA petition,

10/12/11 at 3. Appellant did not specifically allege that trial counsel was ineffective for failing to preserve the constitutional claim.

For the foregoing reasons, Appellant's speedy trial claim is waived.

Judgment of sentence affirmed. Jurisdiction relinquished.