NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CARLOS J. RIVERA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 567 EDA 2012

Appeal from the Judgment of Sentence July 9, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0004823-2007

BEFORE: BOWES, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 3, 2013

Appellant, Carlos J. Rivera,[1] appeals *nunc pro tunc* from the sentence of life imprisonment imposed following his conviction, after a bench trial, of murder of the second degree, robbery, and related offenses.[2] Specifically, Appellant challenges the denial of his motion to suppress physical evidence and an inculpatory statement he made to the police. We affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] Appellant's full name is Carlos Juan Rivera-Romany. (***See*** N.T. Suppression Hearing, 7/07/09, at 31-32). Appellant is also known as Noel Jorge. (***See*** Criminal Docket, CP-51-CR-0004823-2007, at 4).

[2] In addition to murder, the trial court convicted Appellant of two counts of robbery with intent to inflict serious bodily injury, conspiracy, and possessing an instrument of crime. The court sentenced him to life in prison without parole for the murder; all other sentences imposed were concurrent to the life sentence. (***See*** Sentencing Order, 7/09/09, at 1-2).

On October 30, 2006, around 11:00 AM, Appellant and his co-conspirator, José Rodriquez, robbed a food market at 2039 Orthodox Street at the intersection of Torresdale Avenue in Philadelphia, to get money to buy drugs. (***See*** Trial Court Opinion, 3/13/12, at 2). The store was owned and operated by Alejandrina Sanchez and her brother, Julio Brito. During the robbery Rodriquez, after stating "He wants a shot," fatally shot Mr. Brito. He died shortly thereafter after of the single tight-contact gunshot wound to his chest, which damaged his heart and both lungs. After knocking Ms. Sanchez to the floor, Appellant took two hundred dollars from the cash register. He and Rodriquez fled in an older white vehicle which appeared to be a Chevrolet. A witness, Nate Gardner, saw the pair flee.

Meanwhile, Robert Kurtz, a Deputy United States Marshal, was monitoring police radio while driving his unmarked vehicle westbound on Westmoreland Street on unrelated business in the vicinity. He heard a flash description of an armed robbery which had just occurred, including a physical description of two Hispanic males who had fled the store in an older white vehicle, possibly a Chevrolet, with a partial license plate number of 0871.

When Deputy Marshal Kurtz noticed a white vehicle matching the flash description and Rodriquez and Appellant, who also matched the description, he began to follow them and called Philadelphia police. Deputy Marshal Kurtz observed the co-conspirators (and a Hispanic female) park the vehicle, get out, and carry heavy objects into a house at 3512 "I" Street. He also

determined that the last four digits of the vehicle's license plate, 0871, matched the numbers given in the flash description.

Within minutes, eight to ten Philadelphia police arrived and surrounded the house. Highway Patrol Division Sergeant Frank Spires knocked two times on the front door. Appellant appeared at a large picture window. Sergeant Spires asked Appellant to come out and speak with him about the vehicle. Appellant responded "Fuck you. I'm not coming out to talk to you[,]" and ran to the back of the house. (N.T. [Suppression Hearing], 7/07/09, at 125, 126).

As Appellant turned away, Sergeant Spires saw that he was carrying a black handgun. Sergeant Spires opened the door, which was unlocked, and followed. He pursued Appellant to the basement and arrested him. In the basement he also saw another firearm, piles of money, a bloody sneaker, and a running washing machine filled with blood-stained clothes. The blood was later determined to be that of the victim, Julio Brito.

Police arrested Appellant (and Rodriquez, who was upstairs showering), and took him to the police station. There, when Appellant indicated he wanted to tell his side of the story but preferred to do so in Spanish, the lead investigator, Detective John Harkins, summoned Officer Carlos Cruz, a twenty-year veteran of the Philadelphia police department, and a thirteen-year veteran of the homicide unit, who is bilingual.

Officer Cruz testified that he read Appellant the ***Miranda***[3] warnings in Spanish, and translated the interview from English to Spanish and Spanish to English, while Detective Harkins typed the statement. (***See*** N.T. [Suppression Hearing], 7/07/09, at 6-7, 12, 15-16; ***see generally id.*** at 4-30). Appellant signed his name at the bottom of each page, including the end of the statement. (***See id.*** at 29). Officer Cruz also testified that during this process Appellant was not handcuffed; he could go to the bathroom, and he had access to candy, soda, and cigarettes. (***See id.*** at 8).

Appellant moved to suppress the evidence seized at the house on I Street, and his inculpatory statement.[4] After a hearing, the court denied the suppression motion, finding that exigent circumstances existed for the police to enter the house; and that Appellant's statement was voluntary, free from threats or promises, and not obtained by undue or harsh conditions. (***See id.***, 7/08/09, at 71, 79; ***see also*** Order, 7/08/09).

After the bench trial, the court found Appellant guilty of the offenses previously noted, and on July 9, 2009, sentenced Appellant to life

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[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] We note that neither the statement at issue nor the motion to suppress is included in the record before us. However, there is no dispute that the statement was obtained, or about its contents. The available record which we have obtained does include a transcript of the suppression hearing, and the trial court's denial of the motion. (***See infra***, at 6). Therefore, our review of the challenge to the denial of suppression is based on the available certified record, including the trial court's opinion, and the arguments of counsel in the briefs.

imprisonment for second degree murder, and varying concurrent sentences on the remaining convictions.[5] Appellant did not file a post-sentence motion or notice of appeal. However, after he filed a petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546, the PCRA court reinstated his direct appeal rights *nunc pro tunc*. This appeal followed.[6]

On appeal, Appellant raises two questions for our review. He first claims that the suppression court erred in denying the suppression of physical evidence seized after the arrest because the police lacked probable cause (or a search warrant) to enter the house in pursuit of him. (***See*** Appellant's Brief, at 4). He also claims the court erred in admitting his inculpatory statement because of his limited education,[7] limited competence in English, and recent use of heroin. (***See id.***). Appellant seeks a new trial, arguing that the suppression court erred because the police were not legally permitted inside the I Street residence, and because his statement to the

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[5] The trial court also convicted Appellant's co-conspirator, José Rodriquez, of first degree murder, and related offenses, and sentenced him to life imprisonment. (***See*** Trial Ct. Op., 3/13/12, at 1 n.1).

[6] Appellant timely filed a notice of appeal and a statement of errors pursuant to Pennsylvania Rules of Appellate Procedure 1925(b). (***See*** Trial Ct. Op. 3/13/12, at 2).

[7] It appears from various references in the record that Appellant began the 6th grade, but did not complete it.

police was not knowing, intelligent, and voluntary. (***See id.*** at 7-8, 26). We disagree.

> 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. Jones, 988 A.2d 649, 654 (Pa. 2010), *cert. denied*, 131 S. Ct. 110 (2010) (citations and internal quotation marks omitted).

Preliminarily, we observe that counsel for Appellant has failed to insure that the certified record contained the transcripts of the suppression hearing, hindering meaningful review of the claims raised. It is well-settled that the inclusion of transcripts in the reproduced record does not remedy this deficiency. ***See Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006) (*en banc*), *appeal denied*, 916 A.2d 632 (Pa. 2007) ("Simply put, if a document is not in the certified record, the Superior Court may not consider it.") (citation omitted).

We could reject Appellant's claims on that basis alone. Nevertheless, because diligent personnel of this Court, through the generous cooperation of the trial court, have independently obtained a transcript of the suppression proceedings, we shall proceed with a review of the merits of Appellant's claims.

Next, we note that because Appellant offered no evidence at the suppression hearing, and the Commonwealth prevailed, our scope of review is limited to the evidence presented by the Commonwealth. ***See Jones***, ***supra***.

In support of his first question in this appeal, Appellant argues that because the police lacked probable cause to enter the house at 3512 I Street, and had not obtained a search warrant, the evidence seized should have been suppressed as the "fruit of the poisonous tree[.]" (Appellant's Brief, at 7, ***see also id.*** at 9-18; (citing, *inter alia*, ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963))). Appellant posits that "[n]o testimony during the motion supported exigent circumstances." (Appellant's Brief, at 15). Rather, Appellant argues that the police set about to create evidence of exigency to give rise to probable cause. (***See id.***). We disagree.

"In a private home, searches and seizures without a warrant are presumptively unreasonable. . . . Absent probable cause and exigent circumstances, the entry of a home without a warrant is prohibited under

the Fourth Amendment." ***Commonwealth v. Roland***, 637 A.2d 269, 270 (Pa. 1994) (citations and internal quotation marks omitted).

> Exigent circumstances arise where the need for prompt police action is imperative, either because evidence is likely to be destroyed . . . or because there exists a threat of physical harm to police officers or other innocent individuals. When evaluating whether there are exigent circumstances which justify a warrantless search, a court must balance the individual's right to be free from unreasonable intrusions against the interest of society in quickly and adequately investigating crime and preventing the destruction of evidence.

Commonwealth v. Copeland, 955 A.2d 396, 400 (Pa. Super. 2008), *appeal denied*, 962 A.2d 1194 (Pa. 2008) (citations and internal quotation marks omitted).

> > Among the factors to be considered [to determine if there were exigent circumstances] are: (1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is strong reason to believe that the suspect is within the premises being entered, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, *i.e.*, whether it was made at night. These factors are to be balanced against one another in determining whether the warrantless intrusion was justified.
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> Other factors may also be taken into account, such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or a danger to police or other persons inside or outside the dwelling.

Roland, ***supra*** at 270-71 (Pa. 1994) (citations omitted).

Here, the suppression court found exigent circumstances clearly existed for the police to enter the I Street house. (***See*** N.T. [Suppression

Hearing], 7/08/09, at 71). Our review of the record confirms that the Commonwealth presented ample evidence at the hearing to show that the police, at approximately 11:30 AM on the date in question, within less than ten minutes of the fatal robbery, were in hot pursuit of fleeing felons, knew that at least one suspect (in fact, both) was inside the premises, and that Appellant had brandished a firearm before running away from the inquiring police officer, in apparent flight.

Accordingly, the suppression court could properly find that Sergeant Spires had probable cause to believe that Appellant was present, dangerous, and could have escaped from the rear of the house, presenting an extreme threat to the safety of the converging police officers, as well as to neighbors and even bystanders. Similarly, Sergeant Spires had reason to believe that Appellant, one of the described suspects in a robbery murder which had occurred only minutes before, who was observed carrying objects into the house, could or would destroy crucial evidence, if the police halted their pursuit to obtain a search warrant. Therefore, the suppression court's findings of fact are supported by the record, and its legal conclusions are free of error. The police had exigent circumstances to enter the residence without stopping to obtain a search warrant. ***See Copeland***, ***supra***; ***Roland***, ***supra***. Appellant's first issue fails.

Secondly, Appellant challenges the denial of the motion to suppress his inculpatory statement to the police. He maintains that because of his limited

education, limited ability to read or write English, and the after-effects of his having taken heroin at about 9:30 that morning, his confessional statement was not knowing, voluntary or intelligent. (***See*** Appellant's Brief, at 7-8, 18-26). We disagree.

"When a court is called upon to determine whether a confession is voluntary and, hence, admissible at trial, it examines the totality of the circumstances surrounding the confession to ascertain whether it is the product of an essentially free and unconstrained choice by its maker." ***Commonwealth v. Wright***, 14 A.3d 798, 815 (Pa. 2011) (citation and internal quotation marks omitted).

Here, Appellant offers three arguments against the voluntariness of his confessional statement. (***See*** Appellant's Brief, at 7-8, 18-26).

First, he claims that his statement was given while he was under the influence of heroin or suffering from withdrawal symptoms.[8] (***See id.*** at 21). However, aside from brief passing references to heroin, Appellant fails to develop an argument that his claimed heroin use rendered his statement involuntary; nor does he support his claim with citation to pertinent authority. (***See id.*** at 18, 21, 25-26). Accordingly, this argument is waived. ***See*** Pa.R.A.P. 2119(a), (b). Moreover, it would not merit relief.

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[8] The undisputed evidence was that Appellant told Officer Cruz that he had taken heroin about nine-thirty that morning. (***See*** N.T. [Suppression Hearing], 7/07/09, at 25).

Heroin use does not render a confession involuntary *per se*. ***See Commonwealth v. Meachum***, 711 A.2d 1029, 1034 (Pa. Super. 1998), *appeal denied*, 727 A.2d 1119 (Pa. 1998) (holding confession voluntary despite appellant's claim he was high on heroin five and one-half hours earlier, during robbery). The ***Meachum*** Court also took note that the appellant admitted that his high was wearing off by the time he was questioned by the police. ***See id.*** Similarly here, in response to the question, "Are you currently under the influence of drugs, alcohol, or prescription medications?" Appellant told Officer Cruz, "No. I use heroin, but I haven't taken it since before this robbery." (N.T. [Suppression Hearing], 7/07/09, at 44). ***See also Commonwealth v. McFadden***, 559 A.2d 58, 60 (Pa. Super. 1989), *appeal denied*, 568 A.2d 1246 (Pa. 1989) ("Evidence of alcohol consumption does not render a confession inadmissible, it only affects the weight to be accorded to the confession.") (citation omitted). Appellant's first argument lacks merit.

Secondly, Appellant asserts his limited education, having only completed the fifth grade. (***See*** Appellant's Brief, at 7-8, 18, 21). However, apart from the mere bald assertion that limited education rendered his confession unknowing or unintelligent, Appellant fails to develop an argument in support of his claim. (***See id.*** at 21). Accordingly, Appellant's argument is waived. ***See*** Pa.R.A.P. 2119(a), (b).

Moreover, Appellant's claim would not merit relief. Limited education does not render a confession involuntary. ***See McFadden***, ***supra*** at 60 (affirming suppression court's determination that confession was knowing and voluntary even though appellant had limited intelligence, had only a first grade education and could not read or write). Appellant's assertion of limited education is without merit.

Finally, Appellant argues that his inculpatory statement was "lost in translation," asserting, again, his limited 5th grade education, the fact that Officer Cruz was a police officer rather than a certified court translator, and suggesting that Officer Cruz had "an inherent inability to be unbiased." (Appellant's Brief, at 20, 21; ***see generally id.*** at 20-26). His arguments do not merit relief.

Initially, we observe that none of Appellant's translation-based arguments directly address the voluntariness of his confession. Furthermore, we note that Appellant has failed to support his implicit assertion, that his statement was not knowing and intelligent, by reference to pertinent authority. To the contrary, the caselaw Appellant offers is essentially irrelevant.

For example, Appellant cites ***Commonwealth v. Johnson***, 399 A.2d 111 (Pa. 1979), [*abrogated on other grounds*], for the general proposition that a defendant should be granted a new trial "when the statement provided **by police** provided conflicting information **to** the defendant."

(Appellant's Brief, at 22) (emphases added). Moreover, ***Johnson*** addressed the constitutional inadequacy of a ***Miranda*** warning advising the suspect of the availability of counsel "if and when you go to court," a form of notice not at issue here. ***See Johnson***, ***supra*** at 112.

Similarly, Appellant invokes ***Commonwealth v. Gibbs***, 553 A.2d 409 (Pa. 1989), [*cert. denied*, 493 U.S. 963 (1989)]. (***See*** Appellant's Brief, at 22-23). ***Gibbs*** held that a state trooper's statement to a suspect that he would advise the district attorney of the suspect's cooperation if he confessed instead of invoking his right to counsel under ***Miranda*** "constituted an impermissible misleading inducement to [a]ppellant not to pursue further his ambiguous and equivocal inquiry regarding the presence of an attorney." ***Gibbs***, ***supra*** at 410. Here, no such statement is at issue. Rather, Appellant insinuates that he was improperly induced, but fails to develop an argument and fails to cite to anything in the record to support his claim. (***See*** Appellant's Brief, at 22-23). Accordingly, Appellant's claim is waived. ***See*** Pa.R.A.P. 2119(a), (b), (c).

Moreover, the mere bald assertion of bias from use of a police translator would not merit relief. ***See Commonwealth v. Carrillo***, 465 A.2d 1256, 1264 (Pa. Super. 1983) (rejecting claim of *per se* bias, or violation of due process, by police officer's serving as a defendant's interpreter; claim of bias must be supported by the record). Notably, here, Appellant does not claim that there was any specific technical deficiency of

Officer Cruz's translation, or general translation skills. The "lost in translation" argument would not merit relief.

Furthermore, the record supports the suppression court's determination that Appellant was not subject to any deprivations to induce a confession. Appellant was not handcuffed during the interrogation; he was allowed to use the bathroom; he was provided with food and drink. (***See*** N.T. [Suppression Hearing], 7/07/09, at 8; ***see id.***, 7/08/09, at 76). The court expressly found Officer Cruz to be credible in his testimony. (***See id.***, 7/08/09, at 78). The court's findings are supported by the record. We defer to the court's assessment of credibility.

The suppression court properly denied Appellant's motions.

Judgment of sentence affirmed.

Bowes, J., concurs in the result.