

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ELIOT BURNEY A/K/A JASON AUSTIN

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 648 WDA 2012

Appeal from the Judgment of Sentence April 3, 2009
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0007459-2007

BEFORE: SHOGAN, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.

FILED SEPTEMBER 05, 2013

Eliot Burney, a/k/a Jason Austin, appeals *nunc pro tunc* from the judgment of sentence entered on April 3, 2009, in the Allegheny County Court of Common Pleas. The trial judge found Burney guilty of persons not to possess or own a firearm, carrying a firearm without a license, possession of a controlled substance, and the summary offenses of disorderly conduct, driving without a license, and violation of vehicle equipment standards (window tint).¹ Burney was sentenced to serve an aggregate term of

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. § 6105(c)(8); 18 Pa.C.S. § 6106(a)(1); 35 P.S. § 780-113(a)(16); 18 Pa.C.S § 5503(a)(1); 75 Pa.C.S. § 1501(a); and 75 Pa.C.S. § 4107(a)(1), respectively.

incarceration of 60 to 120 months, to be followed by a one year term of probation. Based upon the following, we affirm.

The trial court set forth the relevant facts as follows:

This matter arises out of the arrest of [Burney] after a traffic stop during which his vehicle was towed and subjected to an inventory search. During the inventory search an unlicensed firearm and marijuana were found in [Burney's] vehicle. [Burney] filed a Motion to Suppress in which he alleged that the search of his vehicle was illegal as there was no basis for an inventory search since it was parked on private property after he was stopped and, therefore, did not need to be towed. Further, as the vehicle did not need to be towed, any inventory search was therefore illegal. [Burney] also alleged that he did not give consent to the search and that there were no exigent circumstances to justify a warrantless search of the vehicle.

At the hearing on the Motion to Suppress, the Commonwealth presented the testimony of Officer Shaun Wiesenbach of the McKees Rocks Police Department who testified that he stopped [Burney] on January 7, 2008 at approximately 12:40 a.m. At that time, Officer Wiesenbach was on patrol when he stopped the vehicle [Burney] was operating due to excessively dark tinted windows on the vehicle ... When [Burney] was stopped he pulled his vehicle into the parking lot of an automated self-service car wash. The car wash was described as a 24-hour coin operated car wash with car wash stalls and an area for vacuum cleaners for the cars. When Officer Wiesenbach approached the vehicle he recognized [Burney] from prior encounters with him and obtained his license and information for the vehicle. [Burney] did not have a driver's license, only a valid learner's permit. After Officer Wiesenbach confirmed that [Burney] did not have a driver's license and, therefore, could not drive the vehicle from the car wash, Officer Wiesenbach decided to cite [Burney] for driving without a license and called for a tow truck to tow [Burney's] vehicle. [Burney] was then asked to step from the vehicle at which time he was patted down for weapons and was informed that his vehicle was going to be towed. Pursuant to a written policy established by the McKees Rocks Police Department for conducting inventory searches, Officer Wiesenbach then asked [Burney] if there was anything of value in the vehicle that he should know about so

that he could list it in the inventory. [Burney] stated that there was. While Officer Wiesenbach was conducting the inventory of the vehicle, [Burney] requested his jacket from the backseat of the vehicle, which was given to him. Officer Wiesenbach continued the inventory and opened the glove compartment and saw, in plain view, a medium sized plastic bag containing what appeared to be marijuana. As he did so, [Burney] stated, "Oh, shit" and started running. Officer Wiesenbach attempted to catch [Burney] but eventually lost sight of him. Attempts were made to apprehend [Burney] that evening, but he could not be found. During the continued inventory search of the vehicle, a revolver was located underneath the bag of marijuana in the glove box. A subsequent records check concerning the firearm indicated that it was stolen. [Burney] was later arrested and charged[.]

Trial Court Opinion, 12/18/2012, at 2-3 (record citations omitted). Following a stipulated non-jury trial, the trial court found Burney guilty of the above-stated offenses.

On May 1, 2009, Burney filed a direct appeal, which this Court dismissed on October 19, 2010, for failure to file a brief. Burney then filed a petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, and his direct appeal rights were reinstated by order of the PCRA court dated April 4, 2012. On April 16, 2012, Burney filed a timely notice of appeal.²

Burney raises a single issue for this Court's consideration:

Whether the Trial Court erred in its failure to grant [Burney's] Omnibus Pretrial Motion, specifically, the Motion to Suppress, as the police conducted an illegal search and

² On April 16, 2012, Burney also filed a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

seizure of [Burney's] legally parked vehicle as it occurred in the absence of: (1) consent; (2) a warrant; (3) exigent circumstances; (4) any reason to believe the car could not be temporarily parked on the private property; and (5) borough policy.

Burney's Brief at 3. Burney contends the inventory search was unlawful because his vehicle was not obstructing traffic, nor did it pose a danger to persons or property, and police did not ask him if he consented to towing the vehicle, or give him an opportunity to arrange for a licensed driver to remove the vehicle. Burney asserts there was "[no] reason to believe the car could not be temporarily parked on the private property."³ Additionally, Burney contends that the searching officer's intention was to uncover incriminating evidence. **See** Burney's Brief at 10–11, 15–18. Therefore, Burney claims the court should have granted his motion to suppress.

Our review of Burney's claim is guided by the following principles:

Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we 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. Thompson, 999 A.2d 616, 619 (Pa. Super. 2010)

(citation omitted).

³ Burney's Brief at 11.

“Inventory searches are a well-defined exception to the search warrant requirement.” ***Commonwealth v. Henley***, 909 A.2d 352, 358 (Pa. Super. 2006) (*en banc*), *appeal denied*, 927 A.2d 623 (Pa. 2007) (citations omitted). “An inventory search of an automobile is permitted where: (1) the police have lawfully impounded the automobile; and (2) the police have acted in accordance with a reasonable, standard policy of routinely securing and inventorying the contents of the impounded vehicle.” ***Id.*** at 359 (citations omitted).

In the present case, the record reveals that on January 7, 2008, at 12:40 a.m., police stopped Burney for a Motor Vehicle Code violation. Burney pulled into an automated self-service car wash. The car wash had no designated parking spaces, and Burney parked horizontally in front of the car wash stalls. Upon speaking with Burney, the officer learned Burney did not have a valid drivers’ license. Police then arranged to have the car towed from the car wash, and proceeded to inventory the vehicle pursuant to McKees Rocks Police Department Policy, which states:

Any and all vehicles which are seized following a chase, recovered after having been stolen, located abandoned, towed from an illegal parking area or, legally seized by this department for any reason will be completely inventoried. A reliable witness, generally another officer, should be present. The purpose of the inventory is to preclude liability of the department or to the Borough of McKees Rocks where the owner [or] individual legally empowered to recover the vehicle alleges there was something of value taken from the vehicle. This would include tape decks, stereos, money, collectable[s], spare tire or any other valuable. If deemed appropriate, photographs should be taken prior to and during the inventory.

The inventory is also for the protection of all officers and the public from hidden weaponry, including explosives, which might be concealed in any vehicle. In case of discovery of explosives, immediate and established procedures will be in effect:

1. Determine necessary evacuation and notify the fire department if necessary.
2. Contact the appropriate bomb removal unit.
3. Notify the Public Safety Director or Chief of Police.

Discretion and common sense will prevail in inventorying vehicles. If, for example, a wife, sober and with a valid driver's license, is with a DUI husband, the wife should be permitted to leave with the vehicle. If there are circumstances reasonably indicating criminality, the vehicle should be held for a search after obtaining a valid search warrant. Inventory of a vehicle is not to be construed as a means of illegally searching a vehicle.

Order, 1/26/09, *attaching* Commonwealth's Exhibit 1 (Standard Operation Procedure, McKees Rocks Borough Police Department, Vehicle Inventory Procedures).

The first inquiry is whether the police have lawfully impounded the automobile, *i.e.*, have lawful custody of the automobile. ***See Henley, supra*** at 359. The statute concerning vehicles left on private property provides, in relevant part:

(b) Unattended vehicle on private property.--

(1) No person shall park or leave unattended a vehicle on private property without the consent of the owner or other person in control or possession of the property except in the case of emergency or disablement of the vehicle, in which case

the operator shall arrange for the removal of the vehicle as soon as possible.

75 Pa.C.S. § 3353(b)(1).⁴

On this point, the trial court opined:

[T]his was not a case where a violation had occurred and the driver could be issued a citation and then allowed to leave the scene as in many other motor vehicle code violation cases. Also, the vehicle could not remain where it was parked as it was clearly on private property and to leave it parked on private property would also be a violation of the vehicle code. 75 Pa.C.S. § 3353(b)[.] ...

[Burney] does not dispute and, in fact, argues that the area where his vehicle was stopped was private property and, therefore, there was no need to tow it. The vehicle was, however, stopped in the lot of a private business that required vehicles to move about the lot in order to access the car wash stalls and vacuum area. The evidence also established that this was not a private business where the owners of the business were present on a daily, or even regular basis, which would allow either [Burney] or Officer Wiesenbach to determine if the owners consented to the vehicle being left there. There was also no basis to find that the owners of the property consented to the vehicle being left on the lot. There was no evidence that there was a safe or appropriate place or area to which the vehicle could be moved without being towed. In addition, there is no basis to believe that it would be appropriate for Officer Wiesenbach to move the vehicle, thus exposing himself or the Borough to the potential liability of moving the vehicle nor was it appropriate to permit [Burney] access to the vehicle, if only to move it a short distance. To allow [Burney] to drive the vehicle, with the possibility of his attempting to flee the scene and a resulting vehicle chase, would be potentially dangerous. There was no evidence that anyone else on behalf of [Burney] was readily available to move the car from the carwash. Finally, it would certainly be reasonable for Officer Wiesenbach to believe

⁴ 75 Pa.C.S. § 3353(b)(2) is not applicable because it concerns private parking lots, and in the case at bar, the car wash is not a parking lot.

that leaving a vehicle unattended in a carwash area late at night, even if only for a few hours, could cause it to be vandalized, broken into or stolen.

Trial Court Opinion, *supra* at 6-7. We discern no error in the trial court's conclusion that police took lawful custody of Burney's vehicle.

The second inquiry is whether the police have conducted a reasonable inventory search. As stated in *Henley*, "[a]n inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation." *Id.*, 909 A.2d at 359 (citations omitted).

Here, the search was plainly not part of a criminal investigation. Police asked Burney if there were any valuables in the vehicle, and he stated there were some items of value. N.T., 1/22/2009, at 7. Furthermore, police conducted the inventory search in accordance with the McKees Rocks Borough Police Department's written policy to safeguard Burney's property in the vehicle. Opening the glove compartment was a reasonable part of the inventory search. *See South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search was reasonable where marijuana was found in unlocked glove compartment). Therefore, police did not exceed the scope of the inventory search in opening the glove compartment, whereupon marijuana was immediately recognized by police. In addition, the inventory search properly included continuing to check the glove department, where the firearm was then found.

In conclusion, police had lawful custody of Burney's vehicle and conducted a reasonable inventory search. Therefore, there is no basis upon which to disturb the court's ruling that denied Burney's suppression motion.

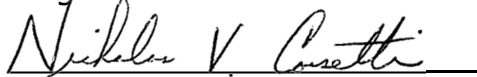
Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Strassburger, J., files a concurring memorandum.

Shogan, J., files a concurring and dissenting memorandum.

Judgment Entered.

A handwritten signature in black ink, reading "Nicholas V. Cussetti", is written over a horizontal line.

Deputy Prothonotary

Date: 9/5/2013