NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FRANCISCO SALDANA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 738 EDA 2012

Appeal from the Judgment of Sentence Entered January 12, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0001907-2011

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J.: **FILED MAY 16, 2013**

Appellant, Francisco Saldana, appeals from the judgment of sentence of 10 to 25 years' incarceration, imposed after he was convicted of various drug and firearm-related offenses. On appeal, Appellant challenges the court's denial of his pretrial motion to suppress. After careful review, we affirm.

Appellant and three co-defendants were arrested on November 3, 2010, after police officers searched a hotel room occupied by Appellant and two of his cohorts, discovering drug packaging materials and other drug paraphernalia. Additionally, a search of Appellant's vehicle, parked outside the hotel room, revealed a large amount of heroin, a gun, and books of "owe sheets" detailing drug transactions. N.T. Trial, 1/12/12, at 10. In light of this evidence, Appellant was charged with possession with intent to deliver a controlled substance (PWID), conspiracy to commit PWID, possession of a

controlled substance, possession of drug paraphernalia, possession of a firearm by a person prohibited, and carrying a firearm without a license.

Prior to the start of his non-jury trial, Appellant filed a motion to suppress the physical evidence in this case and a hearing was conducted on June 6, 2011. On June 24, 2011, the court denied Appellant's motion. His case proceeded to a non-jury trial, after which Appellant was found guilty of the above-stated offenses and was immediately sentenced to an aggregate term of 10 to 25 years' incarceration. He filed a timely post-sentence motion, which was denied. Appellant then filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he presents two issues for our review:

> A. Did the trial court err in denying Appellant's motion to suppress evidence as a result of an unlawful stop of a motor vehicle lacking reasonable suspicion of criminal activity or reasonable suspicion to believe any motor vehicle violation ha[d] occurred[?]
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> B. Did the trial court err in denying Appellant's motion to suppress evidence obtained as a result of an illegal search of a hotel room lacking reasonable suspicion of criminal activity or probable cause to arrest?

Appellant's Brief at 4.

Before addressing each of these issues, we note our standard of review of the denial of a motion to suppress:

> In reviewing an order from a suppression court, we consider the Commonwealth's evidence, and only so much of the defendant's evidence as remains uncontradicted. We accept the suppression court's factual findings which are supported by the evidence and

> reverse only when the court draws erroneous conclusions from those facts.

Commonwealth v. Hoopes, 722 A.2d 172, 174-75 (Pa. Super. 1998).

In his first issue, Appellant challenges the legality of the stop of his vehicle by Bensalem Township Police Officer David Clee. Appellant disputes Officer Clee's testimony that he stopped to investigate Appellant's car because the tint on the vehicle's window was "darker than permissible under the Motor Vehicle Code" (MVC).[1] Appellant's Brief at 10. Appellant argues that the officer "did not measure the tint on the car" and did not cite Appellant with a motor vehicle violation, thus suggesting that the tint on the windows was not actually in violation of the MVC. ***Id.*** Appellant also maintains that the fact that his vehicle was located in a high crime area was not sufficient to establish reasonable suspicion in the officer's mind. ***Id.*** (citing ***Commonwealth v. Greber***, 385 A.2d 1313 (Pa. 1978)).

Before addressing these specific assertions, we note that 75 Pa.C.S. § 6308(b) of the Motor Vehicle Code permits an officer to stop a vehicle when he or she "has reasonable suspicion that a violation of this title is occurring or has occurred." Reasonable suspicion has been defined as,

> a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the

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[1] ***See*** 75 Pa.C.S. § 4524(e)(1) ("No person shall drive any motor vehicle with sun screening device or other material which does not permit a person to see or view the inside of the vehicle through the windshield, side wing or side window of the vehicle.").

> seizure, a police officer must be able to point to "specific and articulable facts" leading him to suspect criminal activity is afoot. In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention. Thus, under the present version of Section 6308(b), in order to establish reasonable suspicion, an officer must be able to point to specific and articulable facts which led him to reasonably suspect a violation of the Motor Vehicle Code[.] ***Commonwealth v. Holmes****,* 609 Pa. 1, 14 A.3d 89, 95–96 (2011) (internal citations omitted) []. "[W]hether an officer had reasonable suspicion that criminality was afoot so as to justify an investigatory detention is an objective one, which must be considered in light of the totality of the circumstances." ***Id.*** at 96.

Commonwealth v. Farnan, 55 A.3d 113, 116 (Pa. Super. 2012) (emphasis omitted).

In this case, after thoroughly reviewing Officer Clee's testimony at the suppression hearing, we are satisfied that he stopped and investigated Appellant's vehicle based on a reasonable suspicion that the vehicle violated the MVC. Specifically, Officer Clee testified that he has been a police officer for approximately 17 years, and had spent the "last ten and a half years" working in "the special investigations unit which is solely dealing with narcotics and vice-related crimes." N.T. Suppression Hearing, 6/6/11, at 89. Based on Officer Clee's further description of the training he has had in narcotics investigation, the parties stipulated that Officer Clee is "an expert in the fields of the investigation[and] prosecution of controlled substances."

Id. at 90. Additionally, Officer Clee testified that he is a "canine certified officer" and described his experience and training in that area. ***Id.*** at 90-91.

Officer Clee went on to explain that his "current assignment … is on the street working in the Route 1 corridor of Bensalem Township," which is a "high crime area" comprised of "a series of hotels" including the Sunrise Hotel. ***Id.*** at 89, 92. Officer Clee testified that the types of criminal activity occurring in that area include narcotics sales, prostitution, and homicides. ***Id.*** at 93. Specifically, in regard to the Sunrise Hotel, the officer stated that he had recently made two arrests for robberies in the parking lot, and "in excess of 50 arrests in the hotel." ***Id.*** at 94.

Officer Clee and his partner, Officer Matthew Tobie, were conducting this routine patrol of the Sunrise Hotel parking lot at approximately 10:00 p.m. on November 3, 2010, when they spotted a Chevrolet Impala parked in the lot. ***Id.*** at 95-96. Officer Clee testified that he observed that the Impala "had New Jersey plates and the window tint on the vehicle was illegal in the states of Pennsylvania and New Jersey." ***Id.*** at 96-97. Accordingly, Officer Clee determined that he "was going to investigate the vehicle." ***Id.*** at 97. As such, he pulled his marked police cruiser behind the car and Officer Tobie activated the cruiser's overhead lights. ***Id.***

We conclude that the totality of these circumstances justified Officer Clee's decision to stop and investigate Appellant's vehicle. Officer Clee, a 17-year veteran of the police force, immediately recognized that the windows on Appellant's vehicle were tinted in violation of the MVC. This

observation, underscored by the late night hour, high crime area, and Officer Clee's knowledge that criminal activity frequently occurred in this hotel parking lot, provided the officer with reasonable suspicion to stop and investigate Appellant's vehicle. ***See*** 75 Pa.C.S. § 6308(b). Furthermore, even if Appellant is correct that Officer Clee's failure to measure the window tint and cite him for that violation suggests that no violation of the MVC really occurred, that fact has no bearing on our assessment of whether Officer Clee possessed the requisite reasonable suspicion to further investigate. ***See Commonwealth v. Muhammed***, 992 A.2d 897, 901 (Pa. Super. 2010) (stating an actual violation of the MVC need not be established to validate a traffic stop as long as there is "a reasonable basis for the officer's belief" that a violation has occurred or is occurring). Accordingly, the stop and investigation of Appellant's vehicle was lawful.[2]

In Appellant's second issue, he maintains that Officer Clee illegally searched a hotel room occupied by Appellant and two of his cohorts. To understand Appellant's argument, we must explain what occurred after

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[2] We acknowledge that at the suppression hearing, Officer Clee testified that he also stopped to investigate Appellant's vehicle because he observed furtive movements by a person sitting inside the Chevrolet Impala, later determined to be Melvin Torres. N.T. Suppression Hearing, 6/6/11, at 96. The trial court relied, in part, on this testimony to conclude that the officer had reasonable suspicion to stop Appellant's vehicle. ***See*** T.C.O. at 10-11. On appeal, Appellant challenges Officer Clee's testimony in this regard. However, we need not address Appellant's argument because the above-stated factors were sufficient to prove that Officer Clee had reasonable suspicion to stop and investigate the vehicle, regardless of whether he saw furtive movements by Torres.

Officer Clee stopped Appellant's vehicle. Officer Clee testified that he approached the driver's side window to speak to Torres, the occupant of Appellant's car. N.T. Suppression Hearing, 6/6/11, at 101. Torres was "extremely nervous" and "didn't want to give up the fact where – whose vehicle it was" or "what room he was possibly renting." ***Id.*** at 19-20. Torres finally told the officer that his cousin owned the vehicle and was in room 161. ***Id.*** at 101. During this interaction, Officer Clee noticed "an extremely large amount of jewelry in a hat that was in the back seat area behind the passenger's seat." ***Id.*** The officer stated that in his experience, jewelry is often removed when a drug transaction is occurring to protect the drug dealer from being robbed. ***Id.*** at 102. Officer Clee testified that Torres provided identification indicating that Torres was from Camden, New Jersey, which the officer knew as "a high drug trafficking area." ***Id.*** at 103-104.

After speaking with Torres, Officer Clee testified that he "was walking to [his] patrol vehicle to turn the overhead lights off on the vehicle…when [he] saw the [door to] room [] 161 open up and the subject stick his head out." ***Id.*** at 106. Officer Clee "made eye contact with the person" before the door shut. ***Id.*** at 106-107. The officer went to the door of the room and "knocked on the door, knocked on the window, and made an announcement that [he] was the police and [he] was looking for somebody that owned the Impala." ***Id.*** at 107. After about 45 seconds, Appellant opened the door to room 161. ***Id.*** at 107, 173. Officer Clee noticed that Appellant had tattoos and a red bandana, which the officer "thought [] may be a gang-related

thing." ***Id.*** at 114-115. Two other men, later identified as Jose Vargas and Raymer Carrasco, were also present in the room. ***Id.*** at 108. Appellant and his cohorts produced identification, which revealed that they all "were from the Camden area." ***Id.*** at 115.

Officer Clee testified that he asked Appellant "about the Impala," but "[n]o one owned up to the fact that the Impala was theirs." ***Id.*** at 108. The officer then asked who rented the room and "[n]obody answered." ***Id.*** at 108-109. Officer Clee stated that the room was dark except for the bathroom light which was on. ***Id.*** at 109. Looking into the room from the doorway, Officer Clee observed a large "silver circular light" which was protruding from a "Tupperware-like container." ***Id.*** at 109-110. The officer also "observed a large apple bag, which [he knew] from [his] training and experience contains approximately 500 new baggies."[3] ***Id.*** at 110. Officer Clee stated that the "apple bag" was empty and was situated "between the trash can and the doorjamb or right next to the door." ***Id.*** at 110, 113. Officer Clee testified that he has come into contact with these "apple bags" "well over a thousand" times, and in all but "one occasion," those bags were used "for repackaging drugs." ***Id.*** at 111, 114.

At that point, Officer Clee detained Appellant and his cohorts, and "decided … that [he] was going to apply for a search warrant for the room."

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[3] The term "apple bag" apparently refers to an Apple Brand, large plastic bag with a zip-lock opening that contains various amounts of smaller zip-lock bags with dimensions of approximately one inch by one inch.

Id. at 118, 154. Therefore, he "asked the three subjects to exit the room and they were detained by another officer while [Officer Clee] went to the rear of the room to see if anybody had got out [*sic*] of the room or threw something out the back window." ***Id.*** at 117. In other words, Officer Clee "entered the room because [he] wanted to clear the room." ***Id.*** at 118. The officer walked through the hotel room and to a window at the back of the room that was open. ***Id.*** at 118. As he passed the bathroom, the officer observed that "the toilet had been flushed" and observed "small black rubberbands that are commonly used for bundles of heroin" floating in the toilet bowl and strewn on the bathroom floor. ***Id.*** at 118-119. Officer Clee also was able to see inside a "black trash bag" that was open, and observed "new packaging material … sitting right on top of that." ***Id.*** at 151. After Officer Clee ensured that no one else was inside the hotel room, the "room was secured by [two] officers." ***Id.*** at 120. Officer Clee stated that nothing inside the room was searched, and in applying for the warrant, he did not include anything that he observed while inside the room. ***Id.*** at 121.

Appellant and his two cohorts were handcuffed and searched outside the hotel room. ***Id.*** at 155. Carrasco was found to be in possession of several bags of suspected heroin. ***Id.*** at 187. Additionally, Officer Clee had his canine conduct a sniff on the outside of the Chevrolet Impala, and the canine gave a "positive indication for narcotics." ***Id.*** at 122. After the search warrant was obtained for the hotel room and Appellant's Chevrolet Impala, officers discovered inside the hotel room "several grinders, three

lamps, thousands of glassine baggies, rubber stamps, wax paper and other items of drug paraphernalia." Trial Court Opinion, 6/13/12, at 7. Furthermore, the search of Appellant's vehicle revealed "two books of owe sheets," as well as "approximately 370 grams of suspected raw heroin and a fully operational, loaded 40 caliber Tauras handgun." N.T. Trial, 1/12/12, at 10.

On appeal, Appellant maintains that Officer Clee illegally entered and searched the hotel room without a warrant, and absent any consent or exigent circumstances. Specifically, he contends that the officer entered the hotel room "six or seven times" and "looked into one of the industrial trash bags in the room." Appellant's Brief at 15. For the reasons that follow, we need not address whether Officer Clee's entry into the room was unlawful, as we conclude that the "independent source doctrine" legitimized the search of the hotel room pursuant to the warrant.

In ***Commonwealth v. Brundidge***, 620 A.2d 1115 (Pa. 1993), our Supreme Court explained the independent source doctrine, stating:

> In ***Murray*** [***v. U.S.***, 487 U.S. 533 (1988)], the United States Supreme Court held that evidence seized improperly could be introduced where it was established that it would have been discovered inevitably through an independent source. In that case, federal law enforcement agents illegally forced entry into a warehouse and observed burlap bags in plain view. These bags were later found to contain marijuana. The agents left the warehouse without disturbing the bags and obtained a search warrant for the warehouse. In applying for the warrant the agents did not mention the prior entry, and did not rely on any observations made during that entry. The magistrate issued the warrant and the agents then conducted a second search of the

warehouse and seized the burlap bags containing the contraband.

In assessing whether the evidence discovered during the second search could be admitted, a plurality of the Court noted that it had developed the independent source doctrine as a corollary to the exclusionary rule because:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, that they would have been in if no police error or misconduct had occurred.... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

Id. at 537, 108 S.Ct. at 2533 (quoting ***Nix v. Williams****,* 467 U.S. 431, 443, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984)).

The Court in ***Murray****, supra,* determined that the ultimate question is:

> whether the search pursuant to a warrant was, in fact, a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during their initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. 487 U.S. at 542, 108 S.Ct. at 2536. Therefore, in determining whether the evidence is admissible under the "independent source" doctrine, the Court devised a two prong inquiry: (1) whether the decision to seek a warrant was prompted by what was seen during the initial entry; and, (2) whether the magistrate was informed at all of the information. The Court then remanded the matter to determine whether government experts would have sought the warrant if they had not earlier entered the site.

Brundidge, 620 A.2d at 1119 - 1120 (Pa. 1993) (footnote and emphasis omitted).

Instantly, Appellant claims that Officer Clee's decision to obtain a search warrant was based on his unlawful entry and observations of items inside the room. Appellant also argues that "the apple baggie in the room was reported to the magistrate," thus tainting the independence – and, hence, the validity - of the search warrant. ***Id.*** at 16. We disagree with each of these arguments.

First, Officer Clee unequivocally and repeatedly stated that he decided to obtain a search warrant *prior* to entering the hotel room. For instance, as set forth *supra*, Officer Clee testified that before "clearing" the room, he "decided at that point that [he] was going to apply for a search warrant for the room." N.T. Suppression Hearing, 6/6/11, at 118. Then, on cross-examination, the officer reiterated this claim, stating:

> [Officer Clee]: … I believe that while I was standing at the door I made the determination that I believed I had probable cause to obtain a search warrant. What information I gathered when I went into the room I figured … wasn't reason for the Judge to grant me a search warrant. I made that decision standing at the door based on the facts I had. I didn't want to cloud the situation by entering the room and noting what I saw in the bag or noting what I saw in the toilet because I made the decision to make that arrest [of Appellant and his cohorts] standing at the door based on the facts that I had in front of me, not the facts that I had inside the room when I walked into the room.

Id. at 163-164; ***see also id.*** at 165 (Officer Clee stating "I made that determination standing at the door that I believed I had probable cause for a search warrant.").

Furthermore, Officer Clee described the factors which compelled his decision to obtain a warrant, bolstering the credibility of his testimony that he made that determination before entering the hotel room. Specifically, the officer stated that he considered Torres' nervous behavior, his failure "to give [Officer Clee] the information for the room right away;" the length of time it took for the occupants of the hotel room to answer the door; the occupants' failure to claim ownership of the Impala or state who rented the room; and the officer's observation of the apple baggie in plain view inside the room. ***Id.*** at 117. Based on all of the above testimony, we conclude that Officer Clee decided to seek a search warrant before he entered the hotel room, thus satisfying the first prong of the independent source test espoused in ***Murray***.

Furthermore, our review of the affidavit of probable cause convinces us that it did not state anything that Officer Clee observed after entering the room. The only facts contained in the affidavit of probable cause that Appellant specifically disputes is Officer Clee's discussion of the "apple baggie." However, it is clear from the officer's testimony that he observed that bag in plain view from his lawful vantage point *outside* the hotel room. Therefore, it was permissible for Officer Clee to include that evidence in the affidavit of probable cause.

In sum, under the independent source doctrine, the evidence in the hotel room was admissible pursuant to the search warrant, regardless of whether Officer Clee illegally entered the room before the warrant was

obtained.[4] Officer Clee testified that he decided to seek a search warrant prior to entering the hotel room, and the warrant was not based on any evidence observed by the officer while inside. Accordingly, we need not address whether there were exigent circumstances justifying Officer Clee's entry, and conclude that the court did not err in denying Appellant's motion to suppress the evidence recovered from the hotel room.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/16/2013

[4] While we do not address the legality of Officer Clee's entry of the room, we are compelled to note our disagreement with the implication of Appellant's claim that the officer "looked into one of the industrial trash bags in the room." Appellant's Brief at 15. Officer Clee testified that as he walked through the hotel room, he "could see into the bag" because the bag was open at the top. N.T. Suppression Hearing, 6/6/11, at 146-47. Thus, while the officer did look into the bag, he did not open the bag in order to see what was inside, as Appellant's argument implies.