J-S12010-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
EDWARD DALE OSBORNE,	:	
	:	
Appellant	:	No. 891 WDA 2012

Appeal from the Judgment of Sentence May 7, 2012,
Court of Common Pleas, Crawford County,
Criminal Division at No. CP-20-SA-0000009-2012

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: May 21, 2013

Edward Dale Osborne ("Osborne") appeals from the judgment of sentence entered following his conviction of unlawful devices and methods, 34 Pa.C.S.A. § 2308(a)(8). We affirm.

The conviction in this case relates to illegal baiting of deer in violation of the Game and Wildlife Code, 34 Pa.C.S.A. § 101 *et. seq.* The facts underlying this charge, as found by the trial court, are as follows:

> [Osborne] owns 200 acres of land in North Shenango Township, Crawford County, which he uses for hunting. The property is posted 'No Trespassing.' Jacob Olexsak, a Wildlife Conservation [O]fficer with the Pennsylvania Game Commission, in November 2011[,] received an anonymous tip that illegal activities may have occurred or were occurring on [] Osborne's property[, specifically, the tipster reported food sources or bait sites on Osborne's property]. Officer Olexsak investigated a few days later and obtained evidence that deer had been illegally baited[.]

*Retired Senior Judge assigned to the Superior Court.

Trial Court Opinion, 4/5/13, at 1-2.

Osborne was subsequently charged with violating § 2308(a)(8) of the Game and Wildlife Code. A magisterial district judge found Osborne guilty of this offense, and Osborne appealed to the Court of Common Pleas ("trial court"). At the hearing *de novo*, Osborne presented a motion to suppress, arguing that Officer Olexsak lacked reasonable suspicion or probable cause to enter Osborne's land to investigate an anonymous tip of illegal baiting. Motion to Suppress Evidence, 5/7/12, at 3-4. The trial court denied this motion, found Osborne guilty of the charged offense, and ordered him to pay a fine of $150.

Osborne timely filed this appeal on June 5, 2012. The trial court entered an order on June 8, 2012 requiring Osborne to file a statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days ("Rule 1925 Order"). This order was served on Osborne's counsel via email only, despite the fact that Osborne's counsel never elected to receive orders via email pursuant to Pa.R.Crim.P. 114(B)(3)(a)(vi).[1] On July 9, 2012, the trial court issued an opinion stating that no Rule 1925(b) statement had been filed and requested that this Court quash Osborne's appeal. We determined, however, that Osborne's counsel was never

[1] This rule provides that service may be made by "sending a copy by facsimile transmission or other electronic means if the party's attorney, or the party if unrepresented, has filed a written request for this method of service … ." Pa.R.Crim.P. 114(B)(3)(a)(vi).

properly served with the Rule 1925 Order, and so we remanded this case to the trial court for re-entry and proper notice of the Rule 1925 Order. The trial court has complied with our directive, and authored a Rule 1925(a) opinion addressing the issue raised by Osborne. As such, this matter is now properly before us for disposition.

Osborne argues that the trial court erred in denying his motion to suppress. When reviewing the denial of a motion to suppress, we are guided by the following standard:

> 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.

Commonwealth v. Jones, 605 Pa. 188, 197-98, 988 A.2d 649, 654 (2010). As the facts in this case are not in dispute, "our review is of the legal conclusions below[,] and review of such questions of law is plenary." ***Commonwealth v. Smith***, 575 Pa. 203, 211, 836 A.2d 5, 10 (2003).

On appeal, as in the trial court, Osborne "advances the notion that an initial investigatory search on a citizen's open fields should be supported by

probable cause or by the minimal standard of reasonable suspicion[,]" despite his acknowledgement that there is no authority for this position. Appellant's Brief at 11. The trial court rejected Osborne's argument, relying on the Pennsylvania Supreme Court's decision in ***Commonwealth v. Russo***, 594 Pa. 119, 934 A.2d 1199 (2007), which held that the protections against unlawful searches and seizures afforded by the Fourth Amendment of the United States Constitution and Article I, Section 8 of Pennsylvania's Constitution "do not extend to open fields." ***Id.*** at 142, 934 A.2d at 1213. Indeed, the trial court stated, "[w]e are unable to distinguish ***Russo*** from the present case with respect to the suppression motions." Trial Court Opinion, 4/5/13, at 4. We agree with the trial court and therefore find no error in its conclusion.

In ***Russo***, a case with facts remarkably similar to those of the case presently before us, our Supreme Court held that the open fields doctrine, recognized by the United States Supreme Court as providing an exception to the protections afforded by the Fourth Amendment, applies equally under the search and seizure provision of the Pennsylvania Constitution.[2] In ***Russo***, the defendant, hunting on his own property, killed a bear within minutes of the opening of bear hunting season. The same day, the Game

[2] The "open fields doctrine" provides that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." ***Commonwealth v. Rood***, 686 A.2d 442, 450 (Pa. Commw. 1996) (quoting ***Oliver v. United States***, 466 U.S. 170, 178 (1984)).

Commission received a tip that Russo's camp was illegally baited. A Wildlife Conservation Officer entered Russo's property, which was posted with "No Trespassing" signs, to investigate. The investigation unearthed ample evidence of baiting and Russo was charged with violating §§ 2307 and 2308 of the Game and Wildlife Code. ***Id.*** at 121-24, 934 A.2d at 1200-02. Russo was found guilty of both offenses before a district magistrate.

Russo pursued a *de novo* hearing before the Court of Common Pleas of Wyoming County. Prior to the hearing, he sought suppression of the evidence by challenging the legality of the Wildlife Conservation Officer's entry onto his property to investigate. The Court of Common Pleas denied this motion and found Russo guilty of the offenses. The Commonwealth Court upheld these convictions, and the Pennsylvania Supreme Court granted Russo's petition for allowance of appeal specifically to address "whether, under Article I, Section 8 of the Pennsylvania Constitution, a landowner has a reasonable expectation of privacy against enforcement of Pennsylvania's Game Code in his open fields." ***Id.*** at 121, 934 A.2d at 1200.[3] The Pennsylvania Supreme Court concluded that the Constitution of this Commonwealth does not provide such protection. In so holding, the Supreme Court found that "[n]othing in the plain text of Article I, Section 8 suggests that open fields are entitled to the same degree of privacy as one's

[3] The Pennsylvania Supreme Court found that "[t]here can be no question that the search *sub judice* was lawful under the Fourth Amendment, given the open fields doctrine." ***Russo***, 594 Pa. at 129, 934 A.2d at 1205.

person, house, papers, and possessions[;]" that "open fields do not provide the setting for the kinds of intimate activities with respect to which citizens would reasonably expect to be free from governmental surveillance[;]" and that this Commonwealth has a long history of protecting and preserving our wildlife, such that we have enacted "a plethora of statutes and regulations designed to enforce the people's right to the preservation of our wildlife." ***Id.*** at 142, 934 A.2d at 1213. Thus, the Court concluded as follows:

> Our Constitution and enacted statutes—as well as the agencies created to enforce them—all confirm that, in Pennsylvania, any subjective expectation of privacy against governmental intrusion in open fields is not an expectation that our society has ever been willing to recognize as reasonable. In short, the baseline protections of the Fourth Amendment, in this particular area, are compatible with Pennsylvania policy considerations insofar as they may be identified.
>
> In light of the foregoing, we hold that the guarantees of Article I, Section 8 of the Pennsylvania Constitution do not extend to open fields; federal and state law, in this area, are coextensive.

Id.

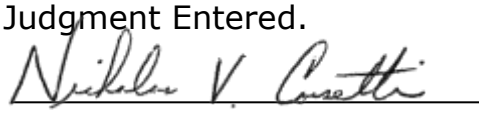
In the present case, as in ***Russo***, a Wildlife Conservation Officer entered onto private property to investigate alleged illegal baiting. Because the alleged illegal activity was occurring in open fields, Osborne did not have an expectation of privacy in the area searched; therefore, there was no requirement that Officer Olexsak have reasonable suspicion, much less probable cause, before entering the area.

Osborne attempts to distinguish ***Russo*** from his case by arguing that ***Russo*** "addresses the validity of a search that already has [sic] sufficient reasonable suspicion to justify the initial search," whereas in his case, there was no finding that the anonymous tip that Officer Olexsak received was sufficiently reliable to establish reasonable suspicion. Appellant's Brief at 13. Osborne misses the point: ***Russo*** held that a search in open fields may occur in the complete absence of probable cause or reasonable suspicion because Constitutional provisions that would require a showing of probable cause or reasonable suspicion to legitimize a search do not apply. Stated another way, we never reach the question of whether the tip Officer Olexsak received was sufficiently reliable to establish reasonable suspicion because he was not required to have reasonable suspicion before conducting the search at issue.

Having found no error in the trial court's application of the law, we affirm.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: May 21, 2013