NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID M. NEFF, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1692 EDA 2013

Appeal from the Judgment of Sentence of May 13, 2013
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000920-2011

BEFORE: GANTMAN, P.J., OLSON and PLATT,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MARCH 04, 2014**

Appellant, David M. Neff, Jr., appeals from the judgment of sentence entered on May 13, 2013. We affirm.

The trial court accurately summarized the factual background of this case as follows:

> On October 30, 2011, at approximately [ ]7:00 p.m.[], Officer Justin M. Sannie [] of the Jim Thorpe Borough Police Department received a call from Officer Dan Long indicating that a female may be in distress in the vicinity of Mauch Chunk Lake Park. Officer Long had previously observed two individuals walking along the breast of the dam near the park and had heard a female voice yell for help. Officer Sannie went to the park to assist in the search for the individuals.
>
> The search was unsuccessful and the officers determined that the last known location of the individuals was on the trail that leads to Flagstaff Road. Officer Sannie headed towards the Flagstaff Road area to continue searching for the individuals. At that time, he had been employed by the Jim Thorpe Borough Police Department for over two [] years and was very familiar

*Retired Senior Judge assigned to the Superior Court.

with the Flagstaff Road location. He stated that it is common for people to park their vehicles along Flagstaff Road to access the trail that runs along the dam. Officer Sannie wanted to check for anyone in that area who may have had information concerning the incident or may have seen the individuals.

Upon arriving at Flagstaff Road, Officer Sannie observed a vehicle traveling at a very low rate of speed. It was the only vehicle in the area at that time. The vehicle was driving towards him in the opposite lane and subsequently passed his police cruiser. Officer Sannie observed two [] female occupants in the vehicle, one [] in the front passenger's seat and one [] in the driver's seat, and a male passenger in the back seat. Officer Sannie observed the female driver look in his direction for a prolonged period of time. She continued to look in Officer Sannie's direction after passing the police cruiser and then abruptly stopped her vehicle, without any prompting from the officer. Officer Sannie then activated his overhead emergency lights and exited the police cruiser to speak with the occupants of the vehicle.

Officer Sannie testified that his actions were based on the circumstances at the time. He had knowledge that people generally parked their vehicles along Flagstaff Road to access the trail. When he arrived in the area there were no other vehicles present, the subject vehicle was traveling at a very, very low rate of speed, the driver looked at the officer for a prolonged period of time, and continued to do so after the officer had passed her vehicle and the vehicle then abruptly came to a stop. Officer Sannie approached the vehicle to check on the safety of the occupants and inquire as to whether they had any information concerning the incident at Mauch Chunk Lake Park. Due to the very slow rate of speed of the vehicle and its complete stop on the roadway, he thought it was possible that they may have been in distress. As Officer Sannie testified at trial, at th[at] time, [he] was not sure of what the circumstances were inside the vehicle.

Officer Sannie approached the vehicle and asked the occupants basic questions. He asked them if everything was okay and whether they had seen anything regarding a girl who had yelled for help. While questioning the occupants of the vehicle, Officer Sannie recognized the two [] female occupants from previous encounters and knew that they were under [ ]21[] years of age.

> He observed a clear liquor bottle on the floor behind the driver's seat in the rear of the vehicle. Officer Sannie asked the male occupant, who was later identified as [Appellant], about the bottle. [Appellant] handed him a bottle of Smirnoff vodka. As [Appellant] was handing the vodka bottle to Officer Sannie, a pocket knife fell out of his left jacket pocket. [Appellant] quickly grabbed the knife and put it back in his pocket. For officer safety reasons, [Appellant] was then asked to exit the vehicle. As [Appellant] was exiting the vehicle, Officer Sannie observed [Appellant] place a small bag containing green leafy vegetable substances on the back seat. When the officer asked what was contained in the bag, [Appellant] responded that it was dirt marijuana. [Appellant also had a box of cigars or blunts on his person. Officer Sannie testified that the blunts are used to smoke marijuana.]

Trial Court Opinion, 9/5/13, at 2-5 (internal quotation marks and citations omitted).

The procedural history of this case is as follows. A three-count information was filed on December 23, 2011 charging Appellant with possession of marijuana,[1] possession of drug paraphernalia,[2] and false identification to law enforcement.[3] Appellant filed his omnibus pre-trial motion on March 16, 2012. An evidentiary hearing was held on April 30, 2012. On June 21, 2012, the trial court granted Appellant's request to dismiss the false identification to law enforcement charge and denied Appellant's request to suppress the marijuana and drug paraphernalia seized by Officer Sannie.

---

[1] 35 P.S. § 780-113(a)(31).

[2] 35 P.S. § 780-113(a)(32).

[3] 18 Pa.C.S.A. § 4914(a).

A bench trial was held on May 13, 2013 and Appellant was found guilty of possession of marijuana and possession of drug paraphernalia. He was immediately sentenced to an aggregate term of 16 to 395 days' imprisonment, to be served concurrently with a sentence imposed in another matter. This timely appeal followed.[4]

Appellant presents one issue for our review:

> Whether the [trial] court erred in denying Appellant's motion to suppress when the Appellant was the subject of an investigative detention for which no reasonable suspicion existed?

Appellant's Brief at 6 (capitalization removed).

"When reviewing a challenge to a trial court's denial of a suppression motion, our standard of review is[] limited to determining whether the [trial] court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." ***Commonwealth v. Delvalle***, 74 A.3d 1081, 1084 (Pa. Super. 2013) (citation omitted). "[O]ur scope of review is limited to the factual findings and legal conclusions of the [trial] court." ***In re L.J.***, 79 A.3d 1073, 1080 (Pa. 2013) (citation omitted). "[W]e are limited to considering only the evidence of the prevailing party, and so much of the evidence of the non-prevailing party as remains uncontradicted when read in the context of the record as a whole." ***Id.*** As

[4] On June 10, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On June 13, 2013, Appellant filed his concise statement. On September 5, 2013, the trial court issued its Rule 1925(a) opinion. The issue raised by Appellant on appeal was included in his concise statement.

the suppression hearing in this matter occurred prior to our Supreme Court's decision in ***L.J.***, we may consider the evidence presented at trial and at the suppression hearing. ***Id.*** at 1088-1089.[5]

"As we have explained, the Fourth Amendment to the United States Constitution and Article I, Section 8 of [the Pennsylvania] Constitution protect citizens from unreasonable searches and seizures. To safeguard these rights, courts require police to articulate the basis for their interaction with citizens in three increasingly intrusive situations." ***Commonwealth v. Clemens***, 66 A.3d 373, 378 (Pa. Super. 2013) (internal alterations, quotation marks, and citation omitted).

We have described three types of police/citizen interactions, and the necessary justification for each, as follows:

> The first of these is a mere encounter (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an investigative detention, must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or custodial detention must be supported by probable cause. . . .
>
> To guide the crucial inquiry as to whether or not a seizure has been effected, the [Supreme Court of the United States] has devised an objective test entailing a determination of whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave. In evaluating

[5] In ***L.J.***, our Supreme Court announced a new rule of law which curtails this Court's scope of review, with one limited exception, to evidence presented at the suppression hearing. ***L.J.***, 79 A.3d at 1085. However, our Supreme Court chose to apply this rule prospectively instead of retroactively. ***Id.*** at 1088-1089.

> the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained. In making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred.

Commonwealth v. Williams, 73 A.3d 609, 613–614 (Pa. Super. 2013) (internal alteration, quotation marks, and citation omitted). The burden is on the Commonwealth to prove, by a preponderance of the evidence, that the evidence seized from Appellant was legally obtained. ***See Commonwealth v. Howard***, 64 A.3d 1082, 1087 (Pa. Super. 2013), *appeal denied*, 74 A.3d 118 (Pa. 2013) (citation omitted).

Appellant contends that the original stop of the car was an investigative detention and that Officer Sannie lacked reasonable suspicion to conduct the stop. The trial court found that the interaction originated as a mere encounter and only later rose to the level of an investigative detention after Officer Sannie saw the bottle of vodka on the back floor. Trial Court Opinion, 9/5/13, at 9-11. On appeal, the Commonwealth agrees with the trial court that the interaction commenced as a mere encounter until Officer Sannie saw the bottle of vodka, at which time it escalated into an investigative detention. Alternatively, the Commonwealth contends that, even if the interaction commenced as an investigative detention, Officer Sannie possessed the necessary reasonable suspicion.

We first consider whether, as Appellant asserts, the Commonwealth stipulated to his argument that the original stop in this case was an investigative detention. At the suppression hearing, the prosecutor stated:

> I think there was a stop here. There is no question. [The] Commonwealth isn't saying there wasn't a stop. There is no question. When the officer stopped his vehicle, turned on his lights, and went over to the vehicle, that that was a stop. So that is not being disputed here. . . . But what is important here is whether this was a proper stop and I believe the standard has always been the same, Your Honor, and that is, did this officer have reasonable suspicion to believe that criminal activity was afoot?

N.T., 4/30/12, at 34.

In general, parties may stipulate to any fact or legal conclusion not "affecting the jurisdiction, business, or convenience of the courts." ***Northbrook Life Ins. Co. v. Commonwealth***, 949 A.2d 333, 337 (Pa. 2008) (citations omitted). This allows a court to narrow the focus of its review to disputed issues of law and fact. ***See id.*** Courts generally cannot disregard such stipulations made by the parties. ***See id.*** However, there is a difference between a stipulation and a concession. When a party merely concedes a legal conclusion being advanced by its opponent, the trial court is not bound by such a concession. ***See In re R.H.***, 791 A.2d 331, 337 (Pa. 2002) (Castille, J. dissenting).

We conclude that the statement by the prosecutor at the suppression hearing was a concession and not a stipulation. There is nothing in the record to indicate that the parties came to a meeting of the minds in which

they agreed to stipulate to the stop being an investigative detention and, thereafter, formalized their agreement and presented it to the trial court. Instead, the prosecutor simply stated his belief that the stop was an investigative detention and not a mere encounter. Furthermore, the statement was made during the prosecutor's argument at the conclusion of the suppression hearing. It was not made at the outset of the suppression hearing or during the introduction of evidence. Thus, Appellant was not prejudiced in his development of the record because of the Commonwealth's concession.

Having determined that the parties did not stipulate to the stop being an investigative detention, we turn to whether the stop began as an investigative detention or a mere encounter. We conclude that the interaction started as a mere encounter, not an investigative detention. We find instructive ***Commonwealth v. Johonoson***, 844 A.2d 556 (Pa. Super. 2004), *appeal denied*, 863 A.2d 1144 (Pa. 2004). In that case, the defendant was driving well-below the posted speed limit, with his hazard lights flashing, on a rural road early in the morning. ***Id.*** at 558. The defendant proceeded to pull off to the side of the road without any prompting from police. ***Id.*** at 559. The police officer pulled in behind the defendant, activated his flashing lights, and proceeded to ask the defendant about damage on the car that the officer noticed while approaching the vehicle. ***Id.***

We concluded that this interaction was a mere encounter and not an investigative detention.[6] ***Id.*** at 561. As we explained:

> Critical to our determination [wa]s the fact that [the defendant] pulled off the road voluntarily and came to a full stop on the side of the road without any prompting from [the police officer]. [The police officer] then parked behind [the defendant's] vehicle, activated his overhead lights, and approached [the defendant] to see if he could be of assistance. [The police officer] did not stop [defendant]'s vehicle.

Id. at 562. Furthermore, we stated that, "flashing overhead lights, when used to pull a vehicle over, are a strong signal that a police officer is stopping a vehicle and that the driver is not free to terminate this encounter. The same is not necessarily true under the factual circumstances presented here." ***Id.*** (emphasis removed). Because of this, we stated that "the relevant inquiry is not whether [the defendant felt] free to leave. Rather, the relevant inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter once the officer approaches the driver and begins asking questions." ***Id.*** at 563 (internal quotation marks omitted), *citing* ***Commonwealth v. Smith***, 836 A.2d 5 (Pa. 2003).

The commencement of the police/citizen interaction at issue in this case was very similar to the start of the encounter in ***Johonoson***. As in ***Johonoson***, the car at issue was traveling at a very slow speed on a rural

[6] We recognize that our discussion of the encounter in ***Johonoson*** was dicta as we previously found that the issue was waived. ***Johonoson***, 844 A.2d at 561.

road. N.T., 4/30/12, at 5. Likewise, in the case at bar, the car came to a complete stop without any prompting from the officer. ***Id.*** Although the time of the encounter differs from that in ***Johonoson, id.*** at 4, and the car did not have its flashers on, ***id.*** at 5, Officer Sannie had different reasons for believing that the passengers might be in distress. The driver in the case at bar stared at the officer for an extended period of time while the patrol car passed. ***Id.*** at 5, 17. Furthermore, Officer Sannie was seeking information about female screams for help that had recently been heard in the area and the vehicle contained two female occupants. ***Id.*** at 5, 27. The questions that Officer Sannie asked the occupants of the vehicle were also similar to the questions asked of the defendant in ***Johonoson***. ***Id.*** at 27. Officer Sannie employed no force or otherwise indicated to the occupants of the vehicle that they could not terminate the encounter. The use of his overhead lights was merely a safety measure, for both Officer Sannie and the occupants of the vehicle. Thus, we believe that "a reasonable person would feel free to decline [Officer Sannie's] requests or otherwise terminate the encounter once [Officer Sannie] approache[d] the driver and beg[an] asking questions." ***Johonoson***, 844 A.2d at 563. As such, the stop began as a mere encounter and not an investigative detention.

Appellant relies upon ***Commonwealth v. Hill***, 874 A.2d 1214 (Pa. Super. 2005), in support of his argument that the stop began as an investigative detention. However, ***Hill*** is distinguishable from the case at

bar. In ***Hill***, the defendant was traveling, at a normal speed, when he saw a car behind him. ***Id.*** at 1216. The defendant pulled to the side of the road to allow the vehicle to pass; however, the vehicle was a police car that pulled behind the defendant and the officers activated their overhead lights. ***Id.*** The officers approached to see if the driver needed assistance. ***Id.*** We held that was an investigative detention and not a mere encounter. ***Id.***

We distinguished ***Hill*** from ***Johonoson*** because in ***Hill*** there was no other indication that the defendant was in need of assistance other than him pulling to the side of the road. ***Hill***, 874 A.2d at 1219. We noted that the situation in ***Johonoson*** was different because the officer had other reasons to suspect that the driver may be in need of assistance. ***Id.*** As we have discussed, in the case at bar, Officer Sannie had more reason to suspect that the occupants of the vehicle were in distress than the mere fact that the vehicle had stopped.

Appellant also argues that this case is similar to ***Hill*** because the officers in both cases testified at their respective suppression hearings that the occupants of the vehicles were not permitted to leave once the overhead lights were activated. ***See id.*** However, the test for determining if an encounter is an investigative detention is objective, not subjective. Therefore, Officer Sannie's personal belief is not dispositive unless he took some outward action to manifest that belief within the mind of a reasonable occupant of a vehicle. ***See Commonwealth v. Douglass***, 539 A.2d 412,

419 (Pa. Super. 1988) (opinion announcing the judgment of the court), *appeal denied*, 552 A.2d 250 (Pa. 1988), *quoting* ***Commonwealth v. Duncan***, 525 A.2d 1177, 1179 (Pa. 1987) (opinion announcing the judgment of the court) ("a police officer's subjective view that a defendant was not free to leave is of no moment").[7] As Officer Sannie took no such action in this case, ***Hill*** is distinguishable.

Appellant also cites ***Commonwealth v. Fuller***, 940 A.2d 476 (Pa. Super. 2007), in support of his argument that the stop began as an investigative detention. However, ***Fuller*** is distinguishable from the case *sub judice* for the same reason that ***Hill*** is distinguishable. In ***Fuller***, the defendant was driving at a reasonable speed when he recognized a police car behind him. ***Id.*** at 478. He pulled over to the side of the road. ***Id.*** The officer pulled behind the defendant and approached the vehicle to ascertain if the driver needed assistance. ***Id.*** We concluded that was an investigative detention. ***Id.*** at 481. We held that ***Fuller*** was indistinguishable from ***Hill*** but distinguishable from ***Johonoson***. ***Id.*** at 480. We noted that the defendant "did not engage in any conduct that would suggest to the police that he needed assistance. He was not driving significantly or unusually below the speed limit[.]" ***Id.*** Thus, ***Fuller*** is distinguishable from the case at bar for the same reason that ***Hill*** is distinguishable.

[7] ***Duncan*** was overruled on other grounds by ***Commonwealth v. Perez***, 845 A.2d 779, 780 (Pa. 2004).

Having determined that the trial court correctly found that the initial stop was a mere encounter, we turn to the remainder of the stop. We conclude that once Officer Sannie was lawfully next to Appellant's vehicle and noticed alcohol in the back seat along with two occupants he knew were underage, he had reasonable suspicion to believe that criminal activity was afoot. ***See Commonwealth v. Elliott***, 546 A.2d 654, 660 (Pa. Super. 1988). Thus, when the nature of the stop changed to an investigative detention, it was supported by reasonable suspicion and Officer Sannie's subsequent actions, including the seizure of the marijuana and drug paraphernalia, were proper. ***See Johonoson***, 844 A.2d at 563

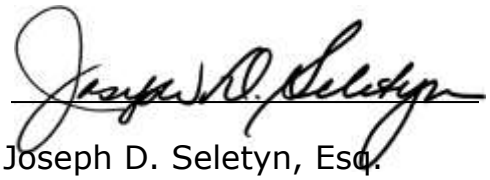
In sum, we conclude that the trial court correctly found that the stop in question began as a mere encounter and did not escalate to an investigative detention until Officer Sannie had reasonable suspicion to suspect criminal activity was afoot. Accordingly, we conclude that the trial court properly denied Appellant's motion to suppress.

Judgment of sentence affirmed.[8]

Gantman, P.J., and Platt, J., concur in the result.

[8] We remind the trial court that it is required to make findings of fact and conclusions of law relating to a suppression motion prior to trial commencing, preferably when it issues its decision on the suppression motion. Pa.R.Crim.P. 581(I); ***L.J.***, 79 A.3d 1073 at 1084.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/4/2014