

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1462-2012
vs. :
: CRIMINAL DIVISION
: SHYNELL WALKER,
: Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's judgment of sentence dated May 30, 2103 and docketed June 5, 2013. The relevant facts follow.

At approximately 4:45 p.m. on August 14, 2012, Officer Thomas Bortz and Officer Brian Chilson were on an “interdiction” detail in the 500 block of Memorial Avenue near Flanagan Park in Williamsport. The officers observed a dark blue or black Volvo parked at the entrance of 565 Memorial Avenue. The vehicle raised Officer Bortz’ suspicions because there is no residence on that side of the street, it is a predominantly minority neighborhood, and the vehicle was occupied by two Caucasian males. The Volvo also had a sticker on the back of it, indicating it had been purchased from a dealer in Berwick or Danville. The driver was laid back in his seat and the passenger was on a cell phone and his “head was on a swivel” – turning as if he was looking for someone. As the officers drove past in their marked vehicle, the driver sat up, backed the Volvo out of its parking spot, and drove west on Memorial Avenue.

The officers turned around to follow the Volvo. Just before the Volvo reached Walnut Street, the driver pulled the vehicle over to the curb and Appellant got into

the rear passenger seat. The Volvo then turned onto Walnut Street. When the vehicle reached the intersection of Walnut and Fourth Streets, it stopped at the red light and the officers were right behind it. The light changed green and the vehicle proceeded into the intersection a few feet as if it was going to continue south on Walnut Street. There was another vehicle traveling north with its left turn signal on. The vehicle in which Appellant was a passenger stopped and the driver waved to signal the driver of the oncoming vehicle to turn left in front of him. After that vehicle turned left, the driver of the Volvo quickly turned on his right turn signal and turned right onto Fourth Street. The police stopped the Volvo, because the driver, who was not a police officer or his designee, unlawfully directed traffic by signaling the oncoming driver to turn left in front of him, and the driver failed to activate his turn signal at least 100 feet before the intersection.

When the officers walked up to the Volvo to speak to the occupants, they immediately noticed an odor of marijuana. After they got the driver and the front seat passenger out of the vehicle to speak to them separately, the officers could still smell the odor of marijuana inside the vehicle. The front seat passenger and the driver told the police that they drove to Williamsport so that the front seat passenger could buy heroin from Appellant. The front seat passenger was going to pay the driver for the ride to Williamsport by giving him some of the heroin. The police took Appellant into custody and searched him. They found ten bags of heroin, four bags of marijuana, some money and a cell phone on Appellant's person.

Appellant was charged with possession with intent to deliver a controlled substance (heroin), possession of a small amount of marijuana, possession of drug paraphernalia, and possession of a controlled substance (heroin).

Appellant filed a motion to suppress on the basis that the police unlawfully stopped the Volvo. The court held a hearing and argument on Appellant's suppression motion on December 14, 2012, and it denied the motion in an Opinion and Order entered December 18, 2012.

Appellant waived his right to a jury trial. A bench trial was held on March 8, 2013, and the court found Appellant guilty of all the charges.

On May 30, 2013, the court sentenced Appellant to 30 to 60 months of incarceration in a state correctional institution. Appellant filed a timely notice of appeal.

Appellant raises two issues on appeal.

First, Appellant avers that the court erred in denying his motion to suppress. The court cannot agree.

Section 3334 of the Vehicle Code states:

- (a) General rule. – Upon a roadway no person shall turn a vehicle or move from one traffic lane to another or enter the traffic stream from a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.
- (b) Signals on turning and starting. – At speeds of less than 35 miles per hour, an appropriate signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. The signal shall be given during not less than the last 300 feet at speeds in excess of 35 miles per hour. The signal shall also be given prior to entry of the vehicle into traffic stream from a parked position.

75 Pa.C.S. §3334 (a) and (b).

At the suppression hearing, Officer Bortz credibly testified that the driver of the Volvo did not activate his turn signal until after he had entered the intersection at Walnut Street and West Fourth Street. Therefore, Officer Bortz had probable cause to believe that

the driver violated section 3334 by failing to continuously use his turn signal for at least 100 feet before he turned right onto West Fourth Street.

Appellant argued that, pursuant to the last sentence of paragraph (b), the driver only needed to use his turn signal immediately prior to turning onto West Fourth Street, because he was entering the traffic stream from a parked position. The court disagreed.

The terms “park” and “stop” are defined in section 102 of the Vehicle Code, as follows:

“Park” or “parking.”

- (1) When required, means the temporary storing of a vehicle, whether occupied or not, off the roadway.
- (2) When prohibited, means the halting of a vehicle, whether occupied or not, except momentarily for the purpose of and while actually engaged in loading or unloading property or passengers.

“Stop” or “stopping.”

- (1) When required, means complete cessation from movement.
- (2) When prohibited, means any halting even momentarily of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control sign or signal.

75 Pa. C.S. §102. Clearly, the driver was not entering the traffic stream from a parked position, as his vehicle was not stored off the roadway. Instead, the driver halted his vehicle momentarily to comply with a traffic-control signal. Therefore, Appellant’s reliance on the last sentence of section 3334(b) is misplaced.

Appellant also submits that the court erred by permitting Officer Bortz to testify as an expert concerning possession with intent to deliver on the basis that the evidence was cumulative in light of the testimony of the two other individuals in the vehicle who testified that they picked up Appellant and intended

to purchase heroin from him. Again, the court cannot agree.

The discussion of this issue can be found on pages 38 through 48 of the nonjury trial transcript. Appellant's counsel relied on the cases of Commonwealth v. Carter, 589 A.2d 1133 (Pa. Super. 1991), appeal denied 597 A.2d 1151 (Pa. 1991); Commonwealth v. Montavo, 653 A.2d 700 (Pa. Super. 1995), and Commonwealth v. Watson, 945 A.2d 174 (Pa. Super. 2008). The prosecuting attorney argued that these cases were distinguishable, and that expert testimony from Officer Bortz was admissible pursuant to Commonwealth v. Brown, 596 A.2d 840 (Pa. Super. 1991), appeal denied, 616 A.2d 982 (Pa. 1992).

The admission of expert testimony is a matter left to the discretion of the trial court and will not be reversed absent an abuse of discretion. Brown, 596 A.2d at 842.

The court found that the cases cited by Appellant's counsel were distinguishable. This was not a jury trial. There was neither direct testimony that any sales took place nor any conduct from which the fact-finder could infer that a delivery actually took place, because the police stopped the vehicle before Appellant could deliver any controlled substances. Officer Bortz' training and experience qualified him to testify as an expert in this case. Although the other occupants in the vehicle testified that the front passenger intended to buy heroin from Appellant, their credibility was challenged on the basis of bias in that they were permitted to enter guilty pleas to possession of drug paraphernalia for only a fine.

Officer Bortz' testimony was relevant and admissible. He provided

unique insight to the reason why Appellant was carrying a bag of rice, that is, to keep the heroin dry. He also noted that while Appellant possessed paraphernalia with which to ingest the marijuana, he did not possess any paraphernalia to ingest the heroin found on his person.

Under the facts and circumstances of this case, the court does believe it abused its discretion in admitting expert testimony from Officer Bortz.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Spring, Esquire (APD)
Martin Wade, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)