IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1231-2016**
v.	:	
	:	
SHAKOOR JOHNSON,	:	**RECONSIDERATION**
Defendant	:	

OPINION AND ORDER

On July 11, 2017, Defense Counsel filed a "Motion to Reconsider Denial of Motion to Suppress", arguing that the Superior Court holding in Commonwealth v. Santiago, 160 A.3d 814 (Pa. Super. 2017)[1] required a different result. Defense Counsel Amended the Motion for Reconsideration on July 20, 2017 based upon Commonwealth v. Shabezz, Nos. 28 EAP 2016, 29 EAP 2016, 2017 Pa. LEXIS 1691 (July 19, 2017).

Background

Shakoor Johnson (Defendant) is charged with Recklessly Endangering Another Person[2], Resisting Arrest or Law Enforcement[3], Fleeing or Attempting to Elude a Police Officer[4], Criminal Conspiracy[5], Delivery of a Controlled Substance[6], Possession

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[1] The Superior Court held [1]-The trial court properly suppressed an officer's out-of-court identification of defendant, as it was the direct product of the same officer's unconstitutional search of defendant's cellphone and suppression was necessary to deter such illegal searches; [2]-It was error to suppress the officer's in-court identification, as the officer's ability to identify defendant in court existed independently of, and arose prior to, the illegal act which otherwise corrupted his out-of-court identification. Commonwealth v. Santiago, 160 A.3d 814 (Pa. Super. 2017) (rehearing denied June 16, 2017).

[2] 18 Pa.C.S. § 2705.

[3] 18 Pa.C.S. § 5104.

[4] 75 Pa.C.S. § 3733(a).

of a Controlled Substance[7], and Criminal Use of a Communication Facility[8]. The charges stem from an incident on May 29, 2016. On that date, Pennsylvania State Trooper Tyson Havens (Havens) was on uniformed duty in a patrol vehicle when he engaged in a police pursuit of the above named Defendant. He recovered as a result of that pursuit a cell phone, which he then used to identify witnesses that would identify Defendant as an individual from whom they have made heroin purchases. Defense Counsel seeks suppression of that identification evidence. Defense Counsel stipulated to the testimony of Havens as presented at the original suppression hearing. Johnson033117bt (testimony of Havens).

Discussion

At the outset, the Court notes that it stated in its original opinion that it did "not reach the question of whether Havens's search of the phone contents without a search warrant was illegal because Defendant does not have a privacy interest in the phone." Johnson033117bt at 6. The Court now addresses that question and holds that Havens did not have to acquire a search warrant prior to his search of the cell phone.

In reaching its decision, the Court first considered, Commonwealth v. Santiago, and found that the decision did not aid its inquiry. Though in circumstances much like here, a discarded cell phone was searched by police, the Commonwealth in Santiago conceded that the search of the cell phone was illegal:

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[5] 18 Pa.C.S. § 903(a)(1).

[6] 35 P.S. § 780-113(a)(30).

[7] 35 P.S. § 780-113(a)(16).

[8] 18 Pa.C.S. § 7512.

> Instantly, the Commonwealth does not dispute the suppression court's ruling that the search of Appellee's cell phone was unconstitutional. See Commonwealth's Brief at 6 n.1. Thus, our review in this case is limited to the scope of the suppression remedy afforded to Appellee as a result of that unconstitutional search.

The Superior Court never considered whether the search of the cell phone was indeed illegal because the parties did not ask the Court to determine that legal question. The Commonwealth made this concession because it wanted the Superior Court to reach the legal question of whether an out-of-court identification being suppressed necessitated the suppression of an in-court identification; i.e. "Did the [suppression] court commit an error of law when it deemed [Appellee]'s identity suppressible fruit of an unlawful search?". Though eyewitness identification testimony is potentially suppressible under the fruit-of-the-poisonous tree doctrine, in Santiago's particular case, the Superior Court found that the in-court identification was not the fruit of a poisonous tree and the trial court's suppression of it was improper.

In its opinion of March 31, 2017, this Court held that the cell phone met the legal definition of abandoned property. A defendant who disavows ownership cannot make a complaint regarding a Fourth Amendment violation. Commonwealth v. Shoatz, 366 A.2d 1216, 1220 (1976) (concluding that act of dropping luggage and fleeing sufficiently indicated abandonment of privacy expectation). In Shoatz, the trial court held that the search of the suitcases was lawful as a search incident to arrest. The Superior Court determined that the facts of record did not support that legal conclusion because the suitcases were searched prior to the arrest of the defendant. But the Superior Court still upheld the warrantless search of the suitcases, finding them to be abandoned property. In Commonwealth v. Smith, 836 A.2d 5 (Pa. 2003), the Supreme Court of Pennsylvania stated:

> Where, as here, an individual's disclaimer of ownership is not the product of improper police conduct and clearly indicates her intention, we can perceive no basis for treating it differently than an act from which an intention to abandon may be inferred... [defendant's] repeated and affirmative denial of ownership of the bag manifested an intention to relinquish any privacy expectations she had in the bag and that manifestation was not the coerced product of an illegal seizure... Therefore, [defendant's] Fourth Amendment rights were not violated by the seizure and search of the bag.

Applying that legal reasoning to the case at bar, the Court now holds that no warrant was required to search Defendant's cell phone. As in Smith, Defendant was clear in his disavowal of ownership of the cell phone. He disavowed his ownership while under arrest pursuant to a valid police chase. Like in Shoatz and Smith, the police were not required to get a warrant prior to the search. Though searches of cell phones incident to arrest still require a warrant; Riley v. California[9], searches of abandoned property do not require a warrant.

In Commononwealth v. Shabezz, a defendant was successful in pursuing a Fourth Amendment suppression of a search of property in which he held no privacy interest, but this was because the initial seizure of the property (in Shabezz, an automobile) was found to be illegal based upon the facts of record. The Supreme Court of Pennsylvania held, adopting the reasoning of US v. Mosely, 454 F.3d at 257-258, that evidence derived from an illegal automobile search constitutes fruit of the poisonous tree as a result of the illegal seizure (unless the taint is removed), and that no further demonstration of privacy interest in the area from which the evidence was seized is required by the Fourth Amendment. Defense Counsel analogizes the situation in Shabezz to the situation here in that even though Defendant has no

[9] 134 S. Ct. 2473 (2014),

privacy interest in the abandoned cell phone, he can complain of the search because the search itself was illegal.

The Court here finds no illegal seizure of Defendant or the cell phone. In the original suppression motion, nor amendments to the same, no objection was raised to Havens's pursuit of Defendant. The Court finds that pursuit of Defendant was a valid police pursuit and the phone was voluntarily abandoned. Havens began to follow the Defendant because he believed he fit the description of a person of known interest to Troop F. Rather than responding to the officer's emergency lights and pulling over the vehicle, Defendant increased his rate of speed and ultimately crashed on a former school property. He ran from the vehicle he was operating and he ran from police. The Court holds that Havens's pursuit of Defendant was legal and that no warrant was required to search the cell phone as the phone was abandoned pursuant to a valid police pursuit.

ORDER

AND NOW, this 27th day of September, 2017, based upon the foregoing Opinion, the Reconsideration Motion is hereby DENIED.

BY THE COURT,

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Nancy L. Butts, P.J.

cc: Nicole Ippolito, Esq. ADA
Nicole Spring, Esq. Defense Counsel
Gary Weber, Esq.