Lycpctr.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0000386-2017**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
DARNELL KELLAM,	:	
Appellant	:	**PCRA**

OPINION AND ORDER

On March 5, 2018, Petitioner, Darnell Kellam was convicted at a non-jury trial, of persons not to possess firearms, firearms not to be carried without a license, and possession with intent to deliver controlled substances. On April 29, 2018, he was sentenced to an aggregate term of five (5) to ten (10) years' incarceration in a state correctional institution.

Defendant took an appeal to the Pennsylvania Superior Court. The conviction and sentence were affirmed by Order dated July 10, 2019. Kellam then filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which that Court denied in an Order dated December 9, 2019.

Kellam filed a pro se PCRA petition on January 6, 2020. The court appointed counsel, who filed an amended petition for post-conviction relief on May 29, 2020. The court held a conference with counsel for the parties on June 9, 2020. Following the conference, Kellam filed a supplemental amended PCRA petition on July 24, 2020, and the Commonwealth filed a response on July 29, 2020.

Kellam claims that he "received ineffective assistance of counsel which, in the circumstances of this particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." (Amended Petition, Paragraph 9).

More Specifically, Kellam claims that prior to the trial, his counsel filed a motion to suppress. Kellam argues that his counsel was ineffective in addressing the suppression motions because he did not address the Commonwealth's probable cause argument, he did not file a motion for reconsideration, and he did not make an effort to assure that a statement allegedly made by Officer Bell was heard by the court.

Kellam's claim specifically relates to the denial of the suppression by Judge Butts. Prior to addressing the applicable law, however, the court's review of the record requires that the court set forth certain facts and procedures that Kellam omitted.

First, in Kellam's omnibus pretrial motion, which included a motion to suppress, Kellam specifically argued that Officer Bell did not have probable cause to search his vehicle. (Omnibus Pretrial Motion Paragraph 12). During the Commonwealth's closing argument, the court interrupted the district attorney and stated "okay. I got to put you into high gear here because I have to go." (Transcript, 7/20/2017, at 54). Following further argument, the court again interrupted the Commonwealth stating: "okay. This case is on the August 22 call of the list. We should definitely have this out by then. Okay. Thanks. Just make sure you bring down the video when you are done." (Transcript, at 55). Finally, shortly thereafter when the Commonwealth finished, the court stated succinctly: "Alright. I got to go. Thank you. Sorry."

Additionally, immediately after the hearing, Kellam filed a motion for special relief noting that while counsel played a selected portion of the relevant video, "seeing the video and hearing the audio in its entirety would be essential for the court rending a fair decision on the motion." (Motion for Special Relief, Paragraph 6). The court summarily granted the motion noting in its June 27, 2017 Order that it had the exhibit and would listen to it and watch it in its entirety. (Order dated June 27, 2017).

Contrary to what Kellam argues, counsel did address the probable cause argument in the motion to suppress and was cut short in addressing it during the argument and hearing. Subsequently, however, Kellam was successful in convincing the court to review the entire video in order to address both the consent and probable cause argument.

Kellam asserts that counsel should have brought out certain facts set forth in the audio, which if brought forth would have caused the court to view the issue differently and to grant the suppression motion. More specifically, Kellam argues that on the tape prior to Officer Bell seeking to obtain consent from Kellam, he had a discussion with the other officer regarding the apparent lack of probable cause and the development of circumstances which could have given the officers' probable cause such as if the defendant had a "prior gun" conviction. Furthermore, Kellam apparently argued that Bell noted that he would try to get consent because he did not have probable cause. Furthermore, Bell apparently noted "I am not quite sold that this cat's not holding."

The law presumes counsel has rendered effective assistance. *Commonwealth v. Williams,* 597 Pa. 109, 950 A.2d 294 (2008). To obtain relief on a claim of ineffectiveness, a petitioner must establish that: "(1) the underlying claim has arguable merit; (2) no

reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different." *Commonwealth v. Johnson,* 263 A.3d 63, 68 (Pa. Super. 2020), citing *Commonwealth v. Pierce,* 527 A.2d 973, 975-76 (Pa. 1987).

If a claim fails under any of the above required elements, the court may dismiss the claim on that basis. *Johnson, id.,* citing *Commonwealth v. Rivera,* 10 A.3d 1276, 1279 (Pa. Super. 2010). The burden of demonstrating ineffectiveness rests on the petitioner. *Id.* Where a petitioner has failed to meet any of the three, distinct prongs of the ineffectiveness test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met. *Commonwealth v. Treiber*, 632 Pa. 449, 121 A.3d 435, 451 (2015), citing *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 701 (1998).

Further, the court need not analyze the elements of an ineffectiveness claim in any particular order; if as stated above, a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1117-18 (Pa. 2012).

While Kellam's argument may have a surface appeal, Kellam neglects the law as it relates to Fourth Amendment jurisprudence. Contrary to Kellam's belief and argument, Officer Bell's subjective belief was not at all relevant to the probable cause analysis. The proper analysis for Fourth Amendment jurisprudence is objective. An action is reasonable, regardless of the officer's state of mind, as long as the evidence viewed objectively justifies

the action. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S.Ct. 2074, 2080 (2011); *Brigham City Utah v. Stuart*, 547 U.S. 398, 404, 126 S.Ct. 1943, 1948 (2006); *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2783 (1985); *Commonwealth v. Martin*, 629 Pa. 623, 649, 101 A.3d 706, 721-22 (2014); *Commonwealth v. Johnson,* 202 A.3d 125, 128 (Pa. Super. 2019).

Moreover and as the Superior Court noted in its opinion in this case, probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to believe that a defendant has committed or is committing an offense. *Commonwealth v. Kellam,* 1149 MDA 2018, at 4 (July 10, 2019) (non-precedential decision). "The evidence required to establish probable case for a warrantless search must be more than a mere suspicion or a good faith belief on the part of the police officer." *Id.* (citing *Commonwealth v. Runyan*, 160 A.3d 831, 837 (Pa. Super. 2017)(citation omitted)). The well- established standard for evaluating if probable cause exists is consideration of the "totality of the circumstances." *Id.*

The Superior Court then concluded that its review of the record reflected that under the totality of the circumstances, Officer Bell had probable cause to search the vehicle without a warrant. Specifically, a credible informant alerted Officer Bell to illegal narcotics activity being conducted utilizing a vehicle fitting the description of the one being operated by Kellam. In addition, Officer Bell observed indications of narcotics trafficking, such as rubber bands hanging on the steering column, heavily tinted windows, and the presence of multiple cell phones in the vehicle. Also, Kellam told Officer Bell that he was coming from Louisa Street, an area which is known as a narcotic trafficking area and highlighting "officer

safety issues." Finally, Bell requested a criminal history check on Kellam, which returned information regarding Kellam's prior involvement with narcotics trafficking and firearms violations.

The Superior Court concluded that the suppression court had a sufficient basis to find that Officer Bell had probable cause to believe that Kellam had committed or was committing an offense and accordingly, the warrantless search of his vehicle was proper. Although the Superior Court did not specifically reference the age of the information in the tip, Kellam admits that counsel's brief on appeal did.

Under these circumstances, there is no material fact at issue and Kellam cannot establish prejudice.

Kellam contends that if his prior counsel had argued the staleness of the information the results of his pretrial motions and his appeal would have been different. Kellam relies heavily on *Commonwealth v. Novak*, 335 A.2d 773 (Pa. Super. 1975). The court cannot agree.

The court finds that Kellam's reliance on *Novak* is misplaced. In *Novak*, the information provided to support the search warrant was a single sentence that a reliable informant stated he had purchased drugs from Novak more than a dozen times within the past two months. The *Novak* Court found that absent more specifics regarding the dates of the purchases, the Court was forced to assume that all of the transactions had occurred approximately seven weeks earlier. There was nothing in the affidavit to show that the criminal activity continued up to or about the time of the warrant.

Unlike *Novak*, Officer Bell's observations here suggested that the criminal

activity was continuing. A confidential informant, who had made several controlled buys and provided reliable information in the past, informed Officer Bell three to four months prior to the traffic stop of Kellam that there was a black Nissan equipped with heavy window tint trafficking heroin from Philadelphia to Williamsport. On the date of the search, Officer Bell observed a black Nissan with heavy window tint in the area of Campbell and High Streets in Williamsport.

As Officer Bell caught up to the vehicle and followed it, he ran the registration. The vehicle was registered to a Philadelphia address.

Officer Bell conducted a traffic stop of the vehicle, as it appeared that the heavy window tint violated the Vehicle Code. Officer Bell was not able to see inside the passenger compartment. Additionally, it is not uncommon for drug dealers to have heavily tinted windows.

Officer Bell approached the vehicle and asked the driver for his paperwork. Kellam was the driver of the vehicle. He provided Officer Bell with paperwork, which showed that the vehicle was registered in Philadelphia and leased to Kellam. Kellam indicated that he was coming from Louisa Street "where all the stuff was happening." Officer Bell stated that Louisa Street was well known for narcotics trafficking, as well as officer safety issues because of shootings that had occurred in that area.

Officer Bell noticed several rubber bands hanging on the turn signal control arm. Drug dealers commonly use rubber bands to bundle large amounts of currency. Officer Bell also personally observed rubber bands used in conjunction with narcotics approximately eight to ten times.

Officer Bell went back to his vehicle and ran a record check on Kellam. The record check showed that Kellam had been arrested for controlled substance and firearms violations in the past.[1] Officer Bell re-approached Kellam's vehicle and had Kellam exit it for officer safety reasons based at least in part on Kellam's prior arrests. Officer Bell then observed two cell phones in the driver's seat where Kellam had been seated. It is common for narcotics traffickers to possess more than one cell phone.

Probable cause is a practical, nontechnical concept turning on the assessment of probabilities in particular factual contexts and is not readily reduced to a neat set of legal rules. *Commonwealth v. Glass*, 754 A.2d 655, 663 (Pa. 2000). Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily even the most reasonable inference. *Commonwealth v. Bragdon*, 220 A.3d 592, 599 (Pa. Super. 2019).

Here, Officer Bell did not search Kellam's vehicle based solely on the information provided by the informant. Kellam's vehicle not only fit the description of the vehicle involved in trafficking controlled substances between Philadelphia and Williamsport, but there were multiple current facts and circumstances to suggest that Kellam was engaged in criminal activity, such as the vehicle's heavily tinted windows, the rubber bands on the turn signal control arm, and Kellam's possession of multiple cell phones. Furthermore, Kellam stated he was coming from Louisa Street, an area known for high drug trafficking activity. Based on the totality of the circumstances, there was a probability that Kellam was

[1] Kellam has convictions for controlled substance violations, including a violation of 35 Pa.C.S.A. §780-113(a)(30) that renders him a person not to possess firearms, but the arrests for firearms violations did not result in convictions.

engaged in criminal activity.

In his supplemental petition, Kellam argued that he had a valid reason for visiting the alleged high crime area and that there are a number of legitimate purposes for possessing rubber bands that do not involve criminal activity. Certainly, either of these activities standing alone would be insufficient to establish probable cause. However, seemingly innocent activity can become suspicious when considered in light of other facts and circumstances including information from a confidential informant. *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S.Ct. 2317, 2335 n.13 (1983). "In making a determination of probable cause the relevant inquiry is not whether the particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to the particular types of non-criminal acts." *Id.*

Since the result would have been the same even if prior counsel had made the arguments suggested by Kellam, he has not suffered prejudice. Therefore, he is not entitled to suppression of the evidence or a new trial.

ORDER

AND NOW, this 12 day of November, 2020, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting any further hearing, none will be scheduled. The court notifies the parties its intention to deny the Petition. Kellam may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the court will enter an order dismissing the petition.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esq.
Helen Stolinas, Esq.
2790 W. College Ave., Suite 800
State College PA 16801
Darnell Kellam, #NJ7630
SCI – Rockview
Box A
Bellefonte, PA 16823-0820
Work file
Gary Weber, Esquire (Lycoming Reporter)