IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-2063-2017**
v.	:	
	:	
	:	
MATTHEW SMITH,	:	
Appellant	:	

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

Appellant files this appeal following the reinstatement of his appellate rights *nunc pro tunc* on May 28, 2020. Appellant filed his Concise Statement of Matter Complained of on Appeal on June 12, 2020. In that Concise Statement, Appellant raises three issues on appeal: (1) Whether the Suppression Court erred in not granting Appellant's Motion to Suppress Identification; (2) Whether the Trial Court erred in denying Appellant's Motion to Exclude Cellphone Evidence; and (3) Whether trial counsel was ineffective for failure to file a suppression motion regarding the seizure of his cellphone without obtaining a search warrant.

Appellant's first issue was previously addressed by Judge Mark Lovecchio by Opinion and Order filed on June 27, 2018. This Court will rely on that Opinion and Order in addressing Appellant's first issue on appeal.

Appellant's second issue arises from Senior Judge Dudley Anderson denying Appellant's Motion to Exclude Cellphone Evidence that was procured by a search warrant a few days prior to trial. *See* N.T. 8/8/18, at 3-21. This Court agrees with Senior Judge Anderson's finding that exclusion was not the appropriate remedy. Under the Pennsylvania Rules of Criminal Procedure, discovery is guided by Rule 573. Under that Rule, the Commonwealth was required to provide Appellant with the results of the search of his phone. *See* Pa. R. Crim. P. 573(B)(1)(f). Although it is clear the Commonwealth could have applied for a search warrant and obtained the evidence

sooner, the information was provided to Appellant soon after the search warrant was executed, exclusion of the evidence is not the appropriate remedy by either statute or precedent, and Senior Judge Anderson gave Appellant the remedy of a last minute continuance, which was rejected by Appellant. *See* Pa. R. Crim. P. 573 cmt. ("This rule is not intended to affect the admissibility of evidence that is discoverable under this rule or evidence that is the fruits of discovery."); *Commonwealth v. Belani*, 101 A.3d 1156, 1163 (Pa. Super. 2014) ("Pa. R. Crim. P. 573 lacks any provision authorizing the exclusion of evidence and does not require that the Commonwealth perform scientific testing in a specified time frame. Further, the proper remedy for 'late' disclosure should have been authorization of a defense continuance; alas, none was requested."); *see also* N.T. 8/8/19, at 18.

The last issue Appellant raises coincides with his second issue, due to the fact trial counsel was aware of the alleged suppressible incident prior to the search warrant of the cellphone. Appellant's cellphone was lawfully in officers' possession during his interrogation, at which time Appellant received incoming calls from "Mike," which were observed by the officers. *See* N.T. 8/8/18, at 17-18. The Pennsylvania Supreme Court in *Commonwealth v. Fulton* held that

> there is little difference between monitoring the internal and external viewing screens on a cell phone and searching the phone's call logs. Both result in accessing more than just phone numbers, but also any identifying information that an individual might add to his or her contacts, including the caller's photograph, the name assigned to the caller or sender of the text message.
>
> 179 A.3d 475, 489 (Pa. 2018).

Despite the high court's strict holding on cellphones requiring a search warrant, this Court believes the instant case is distinguishable. There seems to be no evidence of the officers manipulating the phone and "Mike" was calling the phone while it was lawfully in the officers' custody. Unlike in *Fulton*¸ there are no facts to demonstrate that officers turned on the phone,

scrolled through the contents of the phone, or even were purposefully monitoring the incoming calls of the cellphone. Since, the information was seen by officers while they had lawful possession of the cellphone, due to no manipulation on their part, it falls within the purview of the Plain View Doctrine. Therefore even if trial counsel filed a Motion to Suppress the cellphone evidence, the Motion would have been meritless as the evidence was properly obtained.

DATE: June 17, 2020 By the Court,

Nancy L. Butts, President Judge

xc: DA
Nicole Spring, Esq.

NLB/kp