**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>EDWARD THOMAS ADAMS<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 1445 WDA 2016 |

Appeal from the Judgment of Sentence August 31, 2016
In the Court of Common Pleas of Allegheny County
Criminal Division at No: CP-02-CR-0002870-2016

BEFORE: OLSON, STABILE, and STRASSBURGER, * JJ.

MEMORANDUM BY STABILE, J.: **FILED JUNE 5, 2017**

Appellant, Edward Thomas Adams, appeals from the August 31, 2016 judgment of sentence entered in the Court of Common Pleas of Allegheny County ("trial court") sentencing him to a period of six months' probation following a non-jury trial for driving under the influence (DUI).[1] Upon review, we affirm.

The factual and procedural history of the matter is undisputed.[2] Briefly, on January 10, 2016, at approximately 2:56 a.m., Officer Falconio

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* Retired Senior Judge assigned to the Superior Court.

[1] 75 Pa.C.S.A. § 3802(a)(1).

[2] All facts come from the trial court's December 5, 2016 opinion unless otherwise noted.

observed a white Dodge Dart pulling into the parking area of a shopping plaza, which included a shop owned by Appellant. All shops in the plaza were closed. After the vehicle did not leave the parking lot, Officer Falconio pulled behind the car in the lot. Officer Falconio did not activate his lights or sirens, proceeded to call for backup, approached the vehicle, and knocked on the driver's window. Appellant was behind the wheel of the vehicle; however, the engine and lights were off.

Appellant attempted to exit the vehicle rather than lower the window; however, Officer Falconio closed the door and requested he open the window until backup arrives. Appellant stated he could not do so because he did not have the keys; however, the keys were visible in the rear of the vehicle. After backup arrived, Officer Falconio opened the door and spoke to Appellant. At this time Officer Falconio noticed Appellant exhibited a strong odor of alcohol, bloodshot and glassy eyes, and was slurring his speech. After directing Appellant through field sobriety tests, Officer Falconio arrested Appellant for DUI.

On June 9, 2016, Appellant filed an omnibus pre-trial motion including a motion to suppress. The trial court held a hearing on Appellant's motion on August 25, 2016. After denying Appellant's motion, the trial court conducted a non-jury trial, at the conclusion of which it found Appellant guilty of DUI. On August 31, 2016, Appellant was sentenced to a period of six months' probation. Appellant filed a timely notice of appeal on September 29, 2016, and a concise statement of matters complained of on

appeal on October 12, 2016. The trial court issued a Pa.R.A.P. 1925(a) opinion on December 5, 2016.

> Appellant raises one issue for review, which we quote verbatim.
>
> Whether the trial court erred in denying Appellant's motion to suppress when he was detained for pulling into his own business, when such was closed, and thus the stop and subsequent detention was not supported by probable cause or reasonable suspicion of criminal activity.

Appellant's Brief at 4.

Our standard of review for a denial of a motion to suppress is well established.

> [a]n appellate court may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. However, it is also well settled that the appellate court is not bound by the suppression court's conclusions of law.

***Commonwealth v. Nguyen***, 116 A.3d 657, 663-64 (Pa. Super. 2015) (citations omitted). "To determine whether a mere encounter rises to the level of an investigatory detention, we must discern whether, as a matter of law, the police conducted a seizure of the person involved." ***Commonwealth v. Collins***, 950 A.2d 1041, 1046 (Pa. Super. 2008) (quoting ***Commonwealth v. Reppert***, 814 A.2d 1196, 1201 (Pa. Super. 2002) (citations omitted)). After review of the record, the briefs, and the law, the trial court's December 5, 2016 opinion adequately addresses Appellant's claim. When Officer Falconio approached the vehicle, a mere

encounter ensued, not an investigatory detention. Officer Falconio merely approached a parked vehicle in an empty parking lot at approximately 3:00 a.m. He did not need reasonable suspicion or probable cause to do so. Officer Falconio's subsequent observations, as well as Appellant's actions, permitted Officer Falconio to transform this mere encounter into an investigatory detention based upon articulable facts that suggested criminal activity might be afoot.

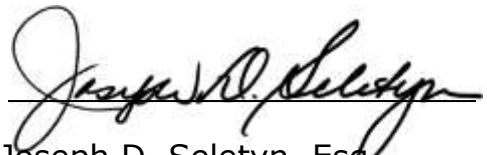
In conclusion, we find Appellant's claim is meritless. Thus, we affirm the judgment of sentence. We direct that a copy of the trial court's December 5, 2016 opinion be attached to any future filings in this case.

Judgment of sentence affirmed.

Judge Olson joins the memorandum.

Judge Strassburger files a concurring memorandum in which Judge Stabile joins.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/5/2017

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : | CRIMINAL DIVISION |
| | : | |
| v. | : | CC 2016-2870 |
| EDWARD THOMAS ADAMS | : | 1445 WDA 2016 |

**OPINION**

BIGLEY. J. December 5th, 2016

This is an appeal from an order of sentence entered on August 31, 2016, which followed a Suppression Hearing and non-jury trial before this court[1]. The Defendant was found guilty of Driving Under the Influence (DUI), 75 § 3802 §§A1, the defendant was sentenced to six (6) months probation, ordered to follow the recommendations from his drug and alcohol evaluation, complete the alcohol highway safety school and pay a fine of $300.00. No Post Sentence Motions were filed and this timely appeal followed. The defendant's Rule 1925(b) Concise Statement of Errors Complained of on Appeal raises one issue on appeal.

[1] The Suppression Hearing and NonJury Trial was held on August 25, 2016.

1. This Honorable Court erred in denying Defendant's Motion to Suppress. Officer Falconio saw a vehicle in the parking lot of a building consisting of at least two businesses, one of which was Defendant's pizza shop, at 3:00 a.m.. That alone presented no more than a hunch by Officer Falconio of suspected but unarticulated criminal activity being carried out by Defendant. Police are not permitted to stop or detain based on a hunch, or on suspicion not rising to the level of reasonable suspicion of probable cause. Defendant was detained without reasonable suspicion or probable cause. Although the police in Commonwealth v. Dewitt, 608 A.2d 1030 (Pa. 1992) conducted a vehicle stop, the observations confronting the officers in Dewitt was similar to that information known by Officer Falconio.

For the reasons set forth below, denial of the Motion to Suppress was not in error and should be affirmed.

The testimony for the Suppression hearing is summarized as follows. On January 10, 2016 Officer James Falconio was on patrol in the Borough of Pleasant Hills in Allegheny County. At approximately 3:00 a.m., Officer Falconio was driving near Curry Hollow Road when he noticed a white Dodge Dart driving north on Green Drive toward Curry Hollow Road. The vehicle made a left into a parking lot for Toby Tyler Hobby Shop and Showcase Pizza and drove behind those businesses which were closed. [T.T.5-7][2]. The Officer proceeded in that direction and kept an eye out to see if the vehicle would emerge from the area. When the vehicle remained behind the building the officer drove behind the building to check the area. He pulled in behind the vehicle but did not activate his emergency lights. [T.T. 9]. The defendant was in the driver's seat of the vehicle and the engine and lights were off. Falconio called in his location and exited his vehicle to speak with the defendant.

[2] T.T. refers to the Trial Transcript dated August 25, 2016, followed by the page number(s).

Officer Falconio approached the defendant's driver side door and knocked on the window. When the defendant immediately attempted to open the driver door the officer pushed the door closed and requested that he open the window so they could speak because backup had not arrived on scene. The defendant stated that he couldn't open the window because he did not have the car keys. Officer Falconio could see the keys on the rear passenger floor area. Within a minute backup arrived on scene and the defendant was still unable to open the window. [T.T. 20]. Officer Falconio then opened the door to speak with the defendant. He immediately noticed a strong odor of alcoholic beverage on his breath, that his eyes were bloodshot and glassy, and his speech was slurred. Based on those observations, he asked the defendant to exit his vehicle to perform field sobriety tests. Initially the defendant would not comply with the request and kept asking the officer what the probable cause was for the vehicle stop. After explaining that this was not a motor vehicle stop and that he was simply checking to see why a vehicle is behind closed businesses at three in the morning, the defendant did exit his vehicle exhibiting poor balance. He exhibited 6 of 6 possible clues on the HGN test. The defendant continued to argue with the officer about probable cause and informing him that the area was private property. Despite that, Officer Falconio attempted to instruct the defendant on how to perform the walk and turn test. After four attempts to instruct him without interruption the defendant was unable to maintain his balance. The officer then placed him into custody for suspicion of Driving Under the Influence [T.T. 8-11]. Officer Falconio opined that, based on his observations, the defendant was under the influence of alcohol to a degree that he was incapable of

safely operating a motor vehicle. The defendant was then transported for chemical testing.

The standard of review in determining whether the trial court erred in denying a suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa. Super. 2006).

Defendant argues that this Court erred in denying his suppression motion, and that Officer Falconi's actions were not supported by probable cause or reasonable suspicion. This court disagreed. The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures. *Com. v. Chase*, 960 A.2d 80, 89 (Pa. 2008) citing *In the Interest of D.M.*, 781 A.2d 1161, 1163 (Pa. 2001). In the context of automobiles, vehicle stops constitute seizures under the Fourth Amendment. *Id.* citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996). In determining if a seizure is constitutional, the key question is the reasonableness of the seizure. *Id.* citing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990). Although a warrantless seizure is presumptively unreasonable under the Fourth Amendment, there are a few well-established and well-delineated exceptions. *Horton v. California*, 496 U.S. 128, 133 n.4 (1990). One such exception permits the police to briefly detain individuals for an investigation and to maintain the *status quo*. *Id.* citing *Terry v. Ohio*, 392 U.S. 1 (1968).

> The Supreme Court of Pennsylvania has defined three types of police citizen interaction: a mere encounter, an investigative detention, and a custodial detention. *Commonwealth v.Boswell*, 554 Pa. 275, 721 A.2d 336, 340 (1998). A mere encounter between police and a citizen "need not be supported by any level of suspicion, and carr[ies] no official compulsion on the part of the citizen to stop or to respond." *Commonwealth v. Riley*, 715 A.2d 1131, 1134 (Pa.Super.1998). An investigatory stop, which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A custodial search is an arrest and must be supported by probable cause. *Id*.

*Commonwealth v. Kendall*, 976 A.2d 506 (Pa.Super. 2009)

The courts have acknowledged that not every instance when an officer pulls near a stopped vehicle and activates his overhead lights rises to the level of an investigatory stop. *Commonwealth v. Johnson*, 844 A.2d 556 (Pa.Super.) 2004. In this case, Officer Falconi did not effectuate a traffic stop, nor did he activate his emergency lights when he pulled behind the defendant's vehicle. Falconi approached the area to insure that the occupant(s) were not attempting to burglarize the businesses or engage in drug activity. [T.T. 9-10]. He did not activate his emergency lights and merely approached to look into the situation. After knocking on the window to speak with the defendant, the defendant attempted to open his door. He asked the defendant to remain in is vehicle until backup arrived one minute later. When the driver door was opened the officer immediately suspected that he was under the influence of alcohol. At that point the focus of the encounter turned to a DUI investigation. The defendant testified that he is the owner of Showcase Pizza and that he informed Falconi of that fact during their interaction. But Officer Falconi was clear and credible when he testified that at the time that the defendant told him he was the owner of one of the businesses his focus was on investigation of a possible DUI.

After considering all of the circumstances this court determined that Officer Falcioni's approach was a mere encounter. Requesting that the defendant remain in his vehicle for officer safety until backup arrived one minute later was not unreasonable under these specific circumstances. This was a dark area behind building housing closed businesses. Once backup arrived and Falconi observed the signs of impairment he conducted a DUI investigation.

FOR ALL OF THE ABOVE REASONS, the denial of the Motion to Suppress was proper and should be affirmed.

BY THE COURT:

, J.

Kelly Bigley