**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br>Appellee<br>v.<br>JEREMIAH BENJAMIN SHOOP,<br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br>No. 1519 MDA 2013 |

Appeal from the Judgment of Sentence entered March 28, 2013, in the Court of Common Pleas of Huntingdon County, Criminal Division, at No(s): CP-31-CR-0000161-2012.

BEFORE: DONOHUE, ALLEN, and MUNDY, JJ.

MEMORANDUM BY ALLEN, J.: **FILED APRIL 21, 2014**

Jeremiah Benjamin Shoop ("Appellant") appeals from the judgment of sentence entered after the trial court convicted him of possession of drug paraphernalia and public drunkenness.[1] We affirm.

The trial court summarized the factual background as follows:

> [O]n February 1, 2012, Officers David Funk, Chris Stevens and Adam McBride of the Huntingdon Borough Police were dispatched to look for an intoxicated male walking with a young girl. Officer Funk quickly found Appellant and a girl he estimated to be five (5) or six (6) walking on the 1200 block of Mifflin Street in the Borough of Huntingdon. [Officer] Funk parked his vehicle and approached [Appellant], with whom he was acquainted. He testified that Appellant displayed signs of intoxication in that he was unsteady on his feet, his speech was slurred, he was lethargic, he had trouble answering questions,

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[1] 35 P.S. § 780-113(a)(32) and 18 Pa.C.S. § 5505.

and he could smell the odor of alcohol. Officer Funk expressed his opinion that [Appellant] was under the influence of alcohol.

Officer Funk accompanied Appellant and the young girl to the apartment where the child lived located on the 1100 block of Mifflin Street. Officers Stevens and McBride followed. At the apartment the mother of the child was contacted and she eventually showed up. At the apartment, Officer Funk took Appellant aside and told him he would be cited for Public Drunkenness. He then told him to empty his pockets. Appellant, he said, was reluctant to comply, but nevertheless began to remove the contents of his pockets. The first thing he removed was a Q-Tip.

Officer Funk testified that at this point he stopped Appellant since based on his experience he assumed that Appellant probably had a syringe, which he did not want the little girl to see. The officer explained to the [trial court] that heroin users use Q-Tips as a filter when they draw heroin into a syringe. Therefore, he passed Appellant out to Officer Stevens who was in the hallway.

Cpl. Stevens completed the search process and recovered a syringe and Four Hundred Fifty and No/100 ($450.00) Dollars. Appellant explained the money as a tax refund. Officer Stevens said he had known [Appellant] for quite a few years and never felt in danger. He also advised the [trial court] that the Pennsylvania State Police Crime lab will not test syringes since they are considered too unsafe. Finally, Officer Stevens opined that Appellant, who is generally well behaved, was under the influence of alcohol or drugs or both that evening.

[Appellant was charged with possession of drug paraphernalia and public drunkenness. He filed a suppression motion on April 23, 2012. The trial court conducted a hearing on May 31, 2012, and on July 16, 2012, denied Appellant's suppression motion.]

[A non-jury trial commenced on January 15, 2013, at the conclusion of which the trial court] found Appellant guilty of the two (2) offenses with which he was charged. He was sentenced March 28, 2013, on the drug paraphernalia charge to pay the costs of prosecution, a fine of Two Hundred and No/100 ($200.00) Dollars and he was placed on probation for one (1)

> year. For the conviction of Public Drunkenness, he was fined Twenty-Five and No/100 ($25.00) Dollars. A Post-Sentence Motion was denied by operation of law.

Trial Court Opinion, 9/17/13, at 2-4 (footnote omitted).

This timely appeal followed. Appellant presents the following issues for our review:

> 1. Whether a police officer who has effected a legal custodial arrest for the summary offense of public drunkenness has the right to search [Appellant] by directing him to empty his pockets without the need to show a belief that [Appellant] was armed or possess[ed] contraband or fruits of a crime?
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> 2. Whether the evidence presented by the Commonwealth was sufficient to support the conviction for possession of drug paraphernalia where, as here, the Commonwealth did not establish that the Q-tip and syringe in question were used or intended to be used by [Appellant] with a controlled substance?

Appellant's Brief at 5.

In his first issue, Appellant challenges the trial court's denial of his suppression motion. Appellant's Brief at 12-15. Our scope and standard of review of such claims is well-settled:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution 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, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

***Commonwealth v. Reese***, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted).

Appellant argues that it was improper for the police officers to search his pockets. Appellant's Brief at 9-10. Specifically, Appellant argues that after Officer Funk observed Appellant's public drunkenness, and prior to the search of Appellant's pockets, Officer Funk did not intend to arrest Appellant but only to issue a citation and release him. *Id*. Appellant therefore claims that his interaction with Officer Funk constituted an investigatory detention, and the search of Appellant's pockets constituted a ***Terry*** frisk that was unsupported by a belief that Appellant was armed and dangerous, and was therefore not justified. *Id.;* ***see also Commonwealth v. Gray***, 896 A.2d 601, 605-606 (Pa. Super. 2006) (an officer may pat-down an individual whose suspicious behavior he is investigating on the basis of a reasonable belief that the individual is armed and dangerous to the officer or others; to validate a ***Terry*** frisk, the police officer must be able to articulate specific facts from which he reasonably inferred that the individual was armed and dangerous). Accordingly, Appellant argues that because there was no evidence that the police officers believed that they were in danger or that Appellant was armed, the search of Appellant's pockets was impermissible. *Id*. We disagree.

The record reflects that Officer Funk, whom the trial court found credible, testified that he conducted a lawful arrest of Appellant for the

summary offense of public intoxication. N.T., 5/31/12, at 5. Specifically, Officer Funk testified: "I advised [Appellant] that he would be cited for public drunkenness, which was my nice way of saying he was under arrest for public drunkenness. I didn't want to alarm the young girl. I even allowed him to empty his own pockets ... because I didn't want to scare the kid." *Id*. at 5-6.

Officer Funk was authorized to arrest Appellant pursuant to 42 Pa.C.S.A. § 8902, which provides:

> (a) General rule.--For any of the following offenses, a police officer shall, upon view, have the right of arrest without warrant upon probable cause when there is ongoing conduct that imperils the personal security of any person or endangers public or private property:
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> (1) Under Title 18 (relating to crimes and offenses) when such offense constitutes a summary offense:
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> 18 Pa.C.S. § 5505 (relating to public drunkenness).

Officer Funk possessed the requisite probable cause to arrest Appellant pursuant to 42 Pa.C.S.A. § 8902 when he observed Appellant, who was visibly intoxicated, walking along a street with a young child. *See* N.T., 5/31/12, at 3-5. "Probable cause is found if the facts and circumstances within the knowledge of the police officer at the time of the arrest are sufficient to justify a person of reasonable caution to believe the suspect has committed a crime." ***Commonwealth v. Canning***, 587 A.2d 330, 332 (Pa.

Super. 1991). Officer Funk testified that after receiving a report of an intoxicated man walking with a child, he observed Appellant walking on the sidewalk with a young girl. N.T., 5/31/12, at 3. Officer Funk then exited his patrol car, and approached Appellant. *Id.*; ***See also Commonwealth v. Cauley***, 10 A.3d 321, 325 (Pa. Super. 2010) ("a mere encounter transpires when an officer approaches a citizen on a public street for the purpose of making inquiries"). Upon approaching Appellant, Officer Funk detected the odor of alcohol, and observed that Appellant appeared drowsy, his speech was slurred, he was unsteady on his feet, and had difficulty answering questions. *Id*. at 4-5. Officer Funk further stated that in his condition, Appellant was not able to provide appropriate supervision of the child, and therefore Officer Funk arrested Appellant for public drunkenness. *Id*. Under these facts, we conclude that Officer Funk possessed the requisite probable cause to believe that Appellant had violated section § 5505 to justify Appellant's arrest. ***See Canning***, ***supra*** (where officer responded to a complaint by neighbors of a partially dressed man pacing on a porch where he did not belong, and on approaching the appellant, the officer noticed an odor of alcohol on his breath and testified that the appellant appeared both confused and intoxicated, the officer possessed probable cause to believe that appellant had violated 18 Pa.C.S. § 5505).

Having established the requisite probable cause to arrest Appellant, we conclude that Officer Funk subsequently conducted a valid search

incident to arrest when he asked Appellant to empty his pockets. "The Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution bars 'unreasonable searches and seizures.' However, an arresting officer may, without a warrant, search a person validly arrested if the search is substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest." ***Commonwealth v. Griffin***, 785 A.2d 501, 506 (Pa. Super. 2001) *citing* ***Commonwealth v. Wright***, 742 A.2d 661 (Pa. 1999). "It is ... axiomatic that an arresting officer may, without a warrant, search a person validly arrested, and the constitutionality of a search incident to a valid arrest does not depend upon whether there is any indication that the person arrested possesses weapons or evidence, as the fact of a lawful arrest, standing alone, authorizes a search." ***Commonwealth v. Trenge***, 451 A.2d 701, 710 (Pa. Super. 1982).

Here, incident to the arrest, Officer Funk conducted a search of Appellant's pockets. Since probable cause existed to arrest Appellant, and Appellant's person was searched incident to a legal arrest, the evidence obtained from the search of Appellant's pockets was properly admitted. Appellant's claim that he was subjected to an investigatory detention and unlawful ***Terry*** stop is unavailing. ***Canning, supra*** (officer had probable cause to arrest defendant for public drunkenness and thus conduct a search incident to arrest of defendant's pockets which revealed illicit drugs); ***see also Commonwealth v. Zock***, 454 A.2d 35, 37 (Pa. Super. 1982)

("[w]arrantless searches of areas immediately accessible to an arrestee are permitted for the protection of the arresting officer or to prevent the destruction or concealment of evidence").

Appellant next argues that the evidence was insufficient to support his conviction for possession of drug paraphernalia because the Commonwealth did not establish that the Q-tip and syringe found in Appellant's pocket were used for, or intended for use with, a controlled substance. Appellant's Brief at 10-11. When reviewing a challenge to the sufficiency of the evidence, we are bound by the following:

> We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

***Commonwealth v. Tarrach***, 42 A.3d 342, 345 (Pa. Super. 2012).

Appellant was found to have violated 35 P.S. § 780-113(a)(32), which prohibits:

> The use of, or possession with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act.

Drug Paraphernalia is defined as follows:

> **"Drug paraphernalia"** means all equipment, products and materials of any kind which are used, intended for use or designed for use in ... injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act. It includes, but is not limited to:
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> (11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injected controlled substances into the human body.
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> In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, statements by an owner or by anyone in control of the object concerning its use, prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance, the proximity of the object, in time and space, to a direct violation of this act, the proximity of the object to controlled substances, the existence of any residue of controlled substances on the object, direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this act, the innocence of an owner or of anyone in control of the object, as to a direct violation of this act should not prevent a finding that the object is intended for use or designed for use as drug paraphernalia, instructions, oral or written, provided with the object concerning its use, descriptive materials accompanying the object which explain or depict its use, national and local advertising concerning its use, the manner in which the object is displayed for sale, whether the owner, or anyone in control of

> the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products, direct or circumstantial evidence of the ratio of sales of the objects to the total sales of the business enterprise, the existence and scope of legitimate uses for the object in the community, and expert testimony concerning its use.

35 P.S. § 780-102.

At trial, Officer Funk testified that he had worked with the drug task force of the Huntingdon Borough Police Department for many years, and had experience with heroin users. N.T., 1/15/13, at 7-8. Officer Funk then testified that "heroin users will use the Q-tip to filter out when they draw the heroin up into the needle. They use it as a filter"; Officer Funk further stated that while there are legitimate uses for Q-tips, he believed in this case Appellant was a heroin user in light of Appellant's intoxicated state, and because he was "getting really nervous" and agitated. *Id*. at 8, 14.

Additionally, the Commonwealth presented the testimony of Corporal Stevens, who testified that he had worked with the Huntingdon County Drug task for twenty-seven years, during which he had interacted with heroin users. Corporal Stevens substantiated Officer Funk's testimony that the Q-tip and syringe were drug paraphernalia, stating that heroin users "use the Q-tip ... to filter when they draw the heroin into the needle before they shoot it." *Id*. at 17. Corporal Stevens further testified that the State Police Crime lab does not accept hypodermic needles for drug testing due to "the unsafe nature of being punctured," and that the needle found on Appellant was therefore disposed of after Appellant's arrest. *Id*. at 18.

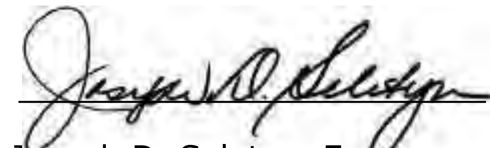
Viewing the above evidence in the light most favorable to the Commonwealth, we conclude that the Commonwealth presented sufficient evidence for the trial court to find Appellant guilty of possessing drug paraphernalia.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Mundy concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014