NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. TIFFANY LEE BARNES Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 91 EDA 2013

Appeal from the Order Entered December 5, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0001473-2012

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.: **FILED JANUARY 15, 2014**

Appellant, the Commonwealth of Pennsylvania, appeals from the order entered in the Monroe County Court of Common Pleas, granting the suppression motion of Appellee, Tiffany Lee Barnes.[1] We affirm.

The suppression court set forth the relevant facts of this appeal as follows:

> On the morning of March 18, 2012, at approximately 3:00 a.m., Trooper Jason Rogowski was on patrol in his police

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[1] Pursuant to Pa.R.A.P. 311(d), the Commonwealth has certified in its notice of appeal that the trial court's suppression order substantially handicapped or terminated the prosecution of the Commonwealth's case. Accordingly, this appeal is properly before us for review. ***See Commonwealth v. Cosnek***, 575 Pa. 411, 836 A.2d 871 (2003) (stating Rule 311(d) applies to pretrial ruling that results in suppression, preclusion or exclusion of Commonwealth's evidence).

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*Retired Senior Judge assigned to the Superior Court.

> car. He was on SR 447 when [he encountered] a dark-colored Jeep Liberty…. The Jeep Liberty was driven by [Appellee]. As he passed by, Trooper Rogowski observed [Appellee's] vehicle turn onto Fawn Road, pull off the roadway and turn off its lights. [Appellee] was parked entirely off the road. [Appellee] did not turn on the vehicle's hazard signals.
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> Trooper Rogowski spun around and pulled behind [Appellee's] vehicle. In the preliminary hearing, the trooper testified that he believed some criminal mischief may have been afoot and he also wished to determine whether any occupants of the vehicle required aid. The trooper was suspicious because the car was parked at night, between two car dealerships. The trooper did not mention what, exactly, he suspected was going on or refer to any prior experience as a police officer. The trooper also testified that [Appellee] was not violating any traffic laws as she drove her car, though he did cite [Appellee] for failing to put on her hazard signal lamps when she stopped. The police report describes the incident as a stop for a traffic violation, which then led to a determination that [Appellee] was driving under the influence of alcohol.
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> The trooper pulled up behind [Appellee's] car. The trooper turned on his overhead lights and then got out of the car to approach [Appellee]. When the trooper did this, [Appellee] felt she would not be permitted to leave the encounter. The trooper testified that if [Appellee] had pulled away at this point, he would have pursued [Appellee's] vehicle and pulled her over.
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> The trooper approached and questioned [Appellee]. He detected a strong odor of alcohol. [Appellee] consented to field sobriety tests. [Appellee] performed poorly in these tests and was arrested for Driving Under the Influence [("DUI")]. [Appellee] submitted to a blood alcohol test and the test results showed that her blood alcohol content was .22%.

(Suppression Court Opinion, filed December 5, 2012, at 2-3) (internal footnotes omitted).

On September 4, 2012, the Commonwealth filed a criminal information charging Appellee with two counts of DUI and summary traffic offenses. On September 21, 2012, Appellee filed a motion to suppress all evidence obtained as a result of her interaction with Trooper Rogowski. Specifically, Appellee contended that the trooper conducted an investigative detention in the absence of reasonable suspicion. The court conducted a hearing on November 16, 2012. On December 5, 2012, the court filed an order and opinion granting Appellee's suppression motion.

The Commonwealth timely filed a notice of appeal on December 24, 2012. On December 28, 2012, the court ordered the Commonwealth to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). The Commonwealth timely filed a Rule 1925(b) statement on January 16, 2013.

The Commonwealth raises one issue for our review:

> WHETHER THE [SUPPRESSION] COURT ERRED IN CONCLUDING APPELLEE WAS SUBJECT TO AN UNLAWFUL SEARCH AND SEIZURE, THUS GRANTING HER SUPPRESSION MOTION AND DISMISSING ALL CHARGES BASED ON THE ERRONEOUS CONCLUSION THAT THE INTERACTION BETWEEN TROOPER ROGOWSKI AND APPELLEE WAS AN INVESTIGATIVE DETENTION, REQUIRING REASONABLE SUSPICION, AS OPPOSED TO A MERE ENCOUNTER, REQUIRING NO SUSPICION?

(Commonwealth's Brief at 4).

When the Commonwealth appeals from a suppression order, the relevant scope and standard of review are:

> [We] consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. As long as there is some evidence to support them, we are bound by the suppression court's findings of fact. Most importantly, we are not at liberty to reject a finding of fact which is based on credibility.

Commonwealth v. Goldsborough, 31 A.3d 299, 305 (Pa.Super. 2011), *appeal denied*, 616 Pa. 651, 49 A.3d 442 (2012) (internal citation omitted). "The suppression court's conclusions of law, however, are not binding on the appellate court, whose duty is to determine if the suppression court properly applied the law to the facts." ***Id.*** (quoting ***Commonwealth v. Keller***, 823 A.2d 1004, 1008 (Pa.Super. 2003), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003)).

The Commonwealth contends Trooper Rogowski saw Appellee execute a turn, pull over, and shut off the lights of her vehicle at approximately 3:00 a.m., which caused the trooper to approach the vehicle to determine whether the occupants needed assistance. The Commonwealth asserts Appellee should have expected such a response, because state police troopers have a duty to assist motorists. The Commonwealth emphasizes that the trooper activated the overhead lights on his vehicle due to safety concerns, because passersby needed some warning of the stationary vehicles on the side of the road. Further, the Commonwealth insists the trooper parked his vehicle in a manner that did not inhibit Appellee's ability to drive away from the scene, and the trooper did not brandish a weapon or

make any statements to demonstrate his authority as he approached Appellee's vehicle. Absent more, the Commonwealth argues the trooper's actions constituted a mere encounter until he made face-to-face contact with Appellee; at that point, the trooper made additional observations that provided reasonable suspicion of DUI. Under these circumstances, the Commonwealth concludes the trial court should have denied Appellee's suppression motion. We disagree.

Contacts between the police and citizenry fall within three general classifications:

> The first [level of interaction] is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an "investigative detention" must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally an arrest or "custodial detention" must be supported by probable cause.

Goldsborough, supra at 305 (quoting ***Commonwealth v. Bryant***, 866 A.2d 1143, 1146 (Pa.Super. 2005), *appeal denied*, 583 Pa. 668, 876 A.2d 392 (2005)).

"A mere encounter can be any formal or informal interaction between an officer and a citizen, but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it carries no official compulsion to stop or respond." ***Commonwealth v. Jones***, 874 A.2d 108,

116 (Pa.Super. 2005) (quoting ***Commonwealth v. DeHart***, 745 A.2d 633, 636 (Pa.Super. 2000)).

> In contrast, an investigative detention, by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest.
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> * * *
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> An investigative detention, unlike a mere encounter, constitutes a seizure of a person and thus activates the protections of Article 1, Section 8 of the Pennsylvania Constitution. To institute an investigative detention, an officer must have at least a reasonable suspicion that criminal activity is afoot.
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> * * *
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> Reasonable suspicion exists only where the officer is able to articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. Therefore, the fundamental inquiry of a reviewing court must be an objective one, namely, whether the facts available to the officer at the moment of intrusion warrant a [person] of reasonable caution in the belief that the action taken was appropriate.

Jones, supra at 116 (internal citations omitted).

"In these matters, our initial inquiry focuses on whether the individual in question has been legally seized." ***Commonwealth v. Coleman***, 19 A.3d 1111, 1116 (Pa.Super. 2011).

> To guide the crucial inquiry as to whether…a seizure has been effected, the United States Supreme Court has devised an objective test entailing a determination of

> whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave. In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained. In making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred.

Commonwealth v. Downey, 39 A.3d 401, 405 (Pa.Super. 2012), *appeal denied*, 616 Pa. 657, 50 A.3d 124 (2012) (quoting ***Coleman, supra*** at 1116).

Instantly, Trooper Rogowski and his partner were on routine patrol in Stroud Township. At approximately 3:00 a.m., Trooper Rogowski observed Appellee, who was driving a Jeep Liberty on Route 447. Appellee executed a left turn onto Fawn Road, pulled off the roadway, and shut the headlights on her vehicle. Trooper Rogowski said he thought Appellee might be experiencing "possible vehicle failure." (***See*** N.T. Preliminary Hearing, 6/22/12, at 5.)[2] The trooper also said he thought it was suspicious that the vehicle pulled over near a car dealership, explaining: "I thought possibly criminal mischief…something was going on, something out of the ordinary." (***Id.***)

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[2] Trooper Rogowski testified at Appellee's preliminary hearing, detailing his interaction with Appellee. Subsequently, Trooper Rogowski did not testify at the suppression hearing. Instead, the Commonwealth submitted the preliminary hearing transcript into evidence without providing additional testimony. (***See*** N.T. Suppression, 11/16/12, at 5.)

Consequently, Trooper Rogowski wanted to check on the vehicle and its occupants. The troopers turned around, pulled up behind Appellee's vehicle, and activated the overhead lights on the patrol car. Trooper Rogowski exited the patrol car, approached the driver's side of Appellee's vehicle, and noticed Appellee attempting to open her door. Trooper Rogowski immediately observed *indicia* of intoxication and ordered Appellee to perform field sobriety tests. Following her poor performance on the tests, Trooper Rogowski arrested Appellee for DUI.

Consistent with the suppression court, we reject the Commonwealth's characterization of this initial interaction between Trooper Rogowski and Appellee as a mere encounter. Trooper Rogowski admitted he had exited his vehicle to investigate the possibility of criminal activity related to the nearby car dealership. Significantly, Trooper Rogowski also testified that Appellee was not free to leave the scene:

> [DEFENSE COUNSEL]: And before you exited the—the police car your lights were activated?
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> [TROOPER ROGOWSKI]: Yes, they were.
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> [DEFENSE COUNSEL]: And is it fair to say that if [Appellee]—if she were to pull off at that point that you would have followed her?
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> [TROOPER ROGOWSKI]: I would have followed her, yes.
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> [DEFENSE COUNSEL]: And pulled her over?
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> [TROOPER ROGOWSKI]: Yes.

(***See*** N.T. Preliminary Hearing at 11.) Further, Appellee indicated that she did not believe she could leave after the trooper activated the overhead lights on the patrol vehicle: "I could not leave. There was a police officer behind me so I had to wait for him to approach me." (***See*** N.T. Suppression Hearing at 7.) Under these circumstances, query whether any reasonable person would think she was free to leave. ***See Downey, supra***. Therefore, Trooper Rogowski's interaction with Appellee constituted a "seizure" that required reasonable suspicion. ***See id.***

Further, the suppression court correctly determined that Trooper Rogowski did not have reasonable suspicion to support an investigative detention:

> Here, the [trooper] suspected something criminal was occurring or about to occur because of [Appellee's] proximity to the car dealerships during nighttime. As per [***Illinois v. Wardlow***, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)], the [trooper's] expectation of criminal activity in an area may be a factor in finding reasonable suspicion. However, very little explanation was made of this comment. The [trooper] did not specify what this led him to suspect or whether his suspicion was based on his prior experience or information he has gained as a police officer. Specifically, no testimony was provided [as to] whether the car dealerships or the nearby area had been the subject of any crime. The [trooper] simply expected crime in this location at this time. Neither did the [trooper] articulate any other reason for the stop.[3]

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[3] Trooper Rogowski testified that he did not witness Appellee violate any traffic laws while operating her vehicle. (***See*** N.T. Preliminary Hearing at 10.) To the extent the Commonwealth originally charged Appellee with failure to turn on vehicular hazard signals, 75 Pa.C.S.A. § 4305, the
(Footnote Continued Next Page)

> Accordingly, we find that the [trooper] did not have reasonable suspicion for the investigatory detention.

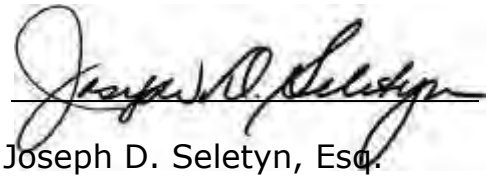
(***See*** Suppression Court Opinion at 8-9) (internal footnote omitted). We agree and emphasize Trooper Rogowski's testimony lacked any specific observations which led him reasonably to conclude, in light of his experience, that criminal activity was afoot. ***See Jones, supra***. ***See also Commonwealth v. Hill***, 874 A.2d 1214 (Pa.Super. 2005) (holding defendant's interaction with trooper constituted seizure and not mere encounter; trooper followed defendant's vehicle, which pulled to the right and stopped abruptly when trooper was approximately nine car lengths away; trooper pulled over behind defendant's vehicle, activated overhead lights, and approached defendant's vehicle to ascertain whether defendant needed assistance; trooper did not observe defendant commit traffic violations; trooper conceded defendant was not free to leave after trooper activated overhead lights). Accordingly, we affirm the order granting the suppression motion.

Order affirmed.

(Footnote Continued) ———————————

suppression court noted, "The statute only requires [Appellee] to activate her hazard signals when she is 'on a highway' and a highway is defined as the space in between the boundary lines of a public road. But the testimony showed [Appellee] was not in between the boundary lines on the road; she was on the dirt or gravel to the side of the road." (***See*** Suppression Court Opinion at 9.) Our review of the record supports the court's determination.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/15/2014