

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ROBERT E. VICTOR

Appellant

No. 856 MDA 2015

Appeal from the Judgment of Sentence May 7, 2015
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0000323-2014

BEFORE: PANELLA, J., MUNDY, J., and STEVENS, P.J.E.*

MEMORANDUM BY MUNDY, J.:

FILED FEBRUARY 01, 2016

Appellant, Robert E. Victor, appeals from the May 7, 2015 aggregate judgment of sentence of 72 hours' to 6 months' imprisonment, plus a \$25.00 fine, imposed after he was found guilty of two counts of driving under the influence (DUI) and one count of failure to stop at a red signal.¹ After careful review, we affirm.

The trial court summarized the relevant factual history of this case as follows.

Factually, the charges originated from an incident that occurred on or about November 8, 2013 in the Borough of Mahanoy City, Schuylkill County, Pennsylvania. Corporal Michael Dissinger and Officer Jonathan McHugh of the Mahanoy City Police Department were on duty in a marked police vehicle

¹ 75 Pa.C.S.A. §§ 3802(d)(2), (d)(1)(i), and 3112(a)(3)(i), respectively.

*Former Justice specially assigned to the Superior Court.

when they observed [Appellant] fail to stop at a steady red light at the intersection of Catawissa and West Center Street. Officer McHugh activated his emergency lights and conducted a vehicle stop of [Appellant]'s vehicle.

Officer McHugh stood by the passenger side of [Appellant]'s vehicle while Corporal Dissinger went to the driver's side of the vehicle and made contact with the driver who was identified as [Appellant.] Officer McHugh testified that [Appellant] was the only occupant in the vehicle and he detected an odor of marijuana emanating from the vehicle. Officer McHugh also observed that [Appellant]'s eyes were bloodshot and glassy. Corporal Dissinger also testified that there was an odor of marijuana emanating from the vehicle, that [Appellant]'s eyes were glassy and that he appeared to be under the influence. Officer McHugh placed [Appellant] under arrest and placed him in the police vehicle. Officer McHugh got the DL-26 form, read it to [Appellant] and then transported him to the hospital to have blood drawn. [Appellant] was found to have marijuana in his system.

Trial Court Opinion, 7/9/15, at 2.

On June 30, 2014, the Commonwealth filed an information, charging Appellant with the above-mentioned offenses, as well as one count each of intentional possession of a controlled substance, possession of a small amount of marijuana, and possession of drug paraphernalia.² Appellant filed a motion to suppress on July 29, 2014. In said motion, Appellant sought suppression of marijuana and heroin found on his person, as well as a statement made by him that he had "a bag" on his person when asked by an

² 35 P.S. § 780-113(a)(16), (a)(31), and (a)(32), respectively.

officer. Appellant's Suppression Motion, 7/29/14, at ¶¶ 9-10. The trial court conducted a suppression hearing on September 4, 2014. During said hearing, Appellant stated to the trial court that he sought suppression of the marijuana, heroin, and his statement to police. N.T., 9/4/14, at 31. After post-hearing briefing, the trial court entered an order on October 20, 2014 granting Appellant's motion to suppress the marijuana and heroin, but denying the motion as it related to the suppression of Appellant's statement to the police. The Commonwealth did not appeal that order to this Court.

Appellant proceeded to a bench trial on March 24, 2015. At the conclusion of said bench trial, the trial court found Appellant guilty of two counts of DUI and one count of failure to stop at a red signal. The remaining charges were *nolle prossed*. On May 7, 2015, the trial court imposed an aggregate sentence of 72 hours' to 6 months' imprisonment for one DUI count, no further penalty on the second DUI count, and a \$25.00 fine for failure to stop at a red signal. Appellant did not file a post-sentence motion. On May 15, 2015, Appellant filed a timely notice of appeal.³

On appeal, Appellant raises the following issue for our review.

Did the police have probable cause to arrest [Appellant] for DUI and have him submit to a test to determine blood alcohol?

Appellant's Brief at 6.

³ Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

Before we can address the merits of this argument, we must determine whether it has been preserved for our review. Pennsylvania Rule of Criminal Procedure 581 requires generally that a motion to suppress “shall be contained in the omnibus pretrial motion set forth in Rule 578[.]” Pa.R.Crim.P. 581(B). Furthermore, “[i]f [a] timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.” **Id.** Rule 581(D) requires that “[t]he motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof.” **Id.** at 581(D).

In this case, as noted above, Appellant filed a pre-trial motion to suppress consistent with Rule 581. In said motion, Appellant only sought suppression of marijuana, heroin, and a statement he made to police on the theory that the police officer’s pat-down and alleged custodial interrogation of Appellant violated his Fourth and Fifth Amendment rights. Appellant’s Suppression Motion, 7/29/14, at ¶¶ 4-5, 9-10. Appellant did not raise any issue pertaining to probable cause to arrest Appellant for DUI and have him submit to chemical testing in his pre-trial motion, or at the suppression hearing. Therefore, Appellant has waived this issue on appeal. **See Commonwealth v. Whiting**, 767 A.2d 1083, 1087 (Pa. Super. 2001) (concluding the trial court improperly decided a suppression issue not included in the motion in addition to those presented in the defendant’s suppression motion), *appeal denied*, 796 A.2d 982 (Pa. 2001);

Commonwealth v. Collazo, 654 A.2d 1174, 1175-1176 (Pa. Super. 1995) (concluding issue not raised in pre-trial suppression motion is waived). Although it appears the trial court permitted Appellant to raise the probable cause issue during closing arguments at Appellant's bench trial, over the Commonwealth's staunch objection, this does not save the issue from waiver. N.T., 3/24/15, at 33-34. This Court has previously held that it is error for the trial court to permit an additional suppression ground to be litigated after the Commonwealth has rested its case at trial. **Commonwealth v. Micklos**, 672 A.2d 796, 804 (Pa. Super. 1996) (*en banc*), *appeal denied*, 686 A.2d 1309 (Pa. 1996). As a result, Appellant has waived this issue on appeal.⁴

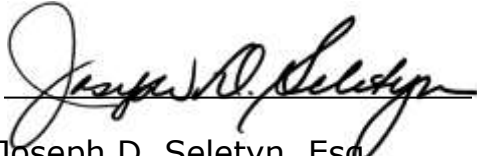
Based on the foregoing, we conclude Appellant's only issue on appeal is waived for lack of preservation in the trial court. Alternatively, even if it were properly before us, Appellant's issue is devoid of merit. Accordingly, the trial court's May 7, 2015 judgment of sentence is affirmed.

⁴ Even if Appellant had properly raised this issue, he would not be entitled to any relief. Here, the officers testified that after stopping Appellant's vehicle for running through a red traffic light, the officers observed the smell of marijuana coming from the vehicle in which Appellant was the sole occupant. N.T., 9/4/14, at 6, 28-29. The officers also testified that Appellant had glassy, bloodshot eyes. **Id.** at 6, 28. This Court recently held that these two circumstances, when taken in their totality, amount to probable cause to arrest for DUI and for the driver to submit to chemical testing. **Commonwealth v. Jones**, 121 A.3d 524, 529 (Pa. Super. 2015). As **Jones** would control the instant case, Appellant would not be entitled to any relief on the merits.

J-S06028-16

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016