NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KEVIN R. MCKNIGHT, Appellant	:	No. 206 EDA 2009

Appeal from the Judgment of Sentence of
December 17, 2008 in the Court of Common Pleas of Philadelphia
County, Criminal Division, No. CP-51-CR-0009926-2008

BEFORE: SHOGAN, LAZARUS and KELLY*, JJ.

MEMORANDUM BY LAZARUS, J. **FILED NOVEMBER 22, 2013**

Kevin R. McKnight appeals from his judgment of sentence, following a non-jury trial, for a violation of the Uniform Firearms Act (VUFA)[1] and related offenses. The charges stemmed from an incident in which McKnight pointed a gun at his ex-girlfriend's brother during a heated argument. We vacate McKnight's judgment of sentence and remand for resentencing.[2]

After a bench trial, McKnight was sentenced to 2-4 years' imprisonment, to be followed by five years of reporting probation on the VUFA conviction.[3]

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[1] ***See*** 18 Pa.C.S. § 6105 (possessing a firearm by a person not to possess).

[2] In a per curiam order, the Pennsylvania Supreme Court remanded this case for further consideration in light of ***Commonwealth v. Wilson***, 67 A.3d 736 (Pa. 2013). ***See Commonwealth v. McKnight***, 2013 Pa. LEXIS 2408 (Pa. Oct. 17, 2013).

[3] McKnight was also found guilty of possession of an instrument of crime, simple assault, terroristic threats, and recklessly endangering another person (REAP). No further penalty was imposed on these charges.

*Judge Kelly did not participate in the consideration or decision of this case.

The trial court also signed an order, on the same date of sentencing, stating that as a condition of McKnight's parole and/or probation he would be subject to suspicionless searches of his residence (limited to the space he occupies) for guns. These searches were to be conducted by agents of the Gun Violence Task Force.

In her Pa.R.A.P. 1925(a) opinion, the trial judge states that such searches were both "reasonable and necessary" to insure that McKnight, a VUFA offender and prior convicted felon, would lead a "law-abiding life." Trial Court Opinion, 6/15/09, at 14. Moreover, the trial court held that "there is no violation of [McKnight's] constitutional protections where the specific condition of probation prevents [him] from residing where anyone has a firearm, and where [he] is advised that there could be random searches to determine whether he is compliant." ***Id.*** at 15.

On appeal, McKnight alleges: (1) the court had no authority to order random searches of his residence during his release on parole and while he was on probation, without the minimal requirements of reasonable suspicion; (2) the trial court abused its discretion by striking the testimony[4] of the only non-party eyewitness who was present and observed him during the entire

[4] We may reverse rulings on the admissibility of evidence only if we find that the trial court abused its discretion. ***Commonwealth v. Lockcuff***, 813 A.2d 857, 860 (Pa. Super. 2002), *app. denied*, 825 A.2d 638 (Pa. 2003).

incident and who testified that he did not possess a gun;[5] and (3) there was insufficient evidence[6] to support his VUFA and REAP convictions.

Random Searches for Guns as Condition of Probation and Parole

Our appellate courts have recently considered whether a probation condition authorizing warrantless and suspicionless searches of a probationer's residence is legal. In ***Commonwealth v. Wilson***, 11 A.3d 519 (Pa. Super. 2010) (en banc) (opinion in support of affirmance), our Court was faced with similar facts to the instant case. There, the defendant, who was convicted of three counts of VUFA and possession of a controlled substance, was sentenced to a term of imprisonment of 2½ to 5 years, followed by 3 years' reporting probation. ***Id.*** at 737-38. As part of his probation, the trial court imposed a series of conditions, including that he submit to random, warrantless searches of his residence for weapons. ***Id.*** at 738.

On appeal, our Court determined that the trial court properly subjected Wilson to random, warrantless searches of his residence, as a condition of probation, because the provision was "clearly tied to Wilson's rehabilitation and protection of the public safety." ***Id.*** at 526. The Court specifically held that

[5] We have renumbered McKnight's issue on appeal to address the Supreme Court's remand issue first.

[6] In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. ***Commonwealth v. Randall***, 758 A.2d 669, 674 (Pa. Super. 2000).

the issue involved one of legality of sentence and was not a discretionary aspect of Wilson's sentence.[7] ***Id.*** at 525.

The Pennsylvania Supreme Court granted Wilson's petition for allowance of appeal, limited specifically to the issue of whether a "probation condition authorizing random, suspicionless searches of [a defendant's] home [is] illegal, as a violation of 42 Pa.C.S. § 9912(d)(2), as well as the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution." ***Commonwealth v. Wilson***, No. 26 EAL 2011, 2011 Pa. LEXIS 1337 (Pa. June 7, 2011). The Court found that such searches violated section 9912(d)(2), a statute that grants a probation officer authority to conduct warrantless searches of an offender's property only if the officer has reasonable suspicion to believe that the property contains contraband or other evidence of violations of the offender's conditions of probation. ***Commonwealth v. Wilson***, 67 A.3d 736, 745 (Pa. 2013).[8] Accordingly, it vacated that portion of our Court's order finding Wilson's probation condition permissible and remanded the case to the trial court for resentencing. ***Id.*** at 745.

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[7] Despite the Commonwealth's contention that McKnight's claim regarding the propriety of the parole/probation condition is waived due to his failure to file a Pa.R.A.P. 2119(f) statement, this issue is meritless due to our ***Wilson*** decision that determined the issue is one of legality and, therefore, cannot be waived. ***Wilson***, 11 A.3d at 525; ***see also Commonwealth v. Alexander***, 16 A.3d 1152, 1154 (Pa. Super. 2011) (en banc). This waiver issue was neither raised by the Commonwealth in its petition for allowance of appeal nor addressed by the Supreme Court in ***Wilson***. ***Wilson***, 67 A.3d at 743 n.8.

[8] The Court did not discuss whether the condition violated our state and/or federal constitutions. ***Wilson***, 67 A.3d at 740.

Similar to the facts in ***Wilson***, the trial court in the present case ordered, as a condition of his probation, that McKnight be subject to random, warrantless searches of his residence for guns. Because the Supreme Court's ***Wilson*** decision controls our disposition of this issue, we conclude that McKnight's probationary condition also violates section 9912(d)(2), has no legal force, and must be vacated.

With regard to the trial court's imposition of the search-for-guns condition on McKnight's parole, we also find this portion of his sentence must be vacated. Where the maximum term of a defendant's sentence is two or more years, the Pennsylvania Board of Probation and Parole, and not the trial court, has the exclusive authority to set the terms of any parole. ***See*** 61 P.S. § 331.26 (sentencing judges have parole authority only when maximum sentence is less than two years). Therefore, any such condition in McKnight's case would be a legal nullity because the trial court lacked the authority to impose the condition. ***Commonwealth v. Mears***, 972 A.2d 1210, 1212 (Pa. Super. 2009). We, therefore, vacate that portion of McKnight's sentence as it relates to parole.

Admissibility of Stricken Evidence

McKnight claims that the trial court improperly struck that portion of a defense witness's testimony that stated that he did not have a weapon at the time of the alleged incident. A review of the record indicates that this claim has not been preserved because counsel failed to challenge the court's ruling.

Thus, it is deemed waived on appeal. Pa.R.A.P. 302(a) (issues not raised in lower court are waived and cannot be raised for first time on appeal).

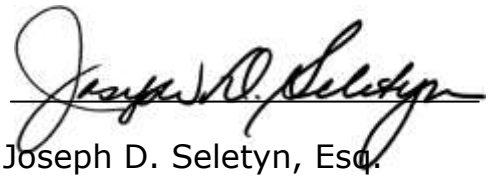
However, even if we were to address the claim on its merits, the witness's answer ("[t]here was no weapon") was non-responsive to defense counsel's query regarding "what, if anything, during that time did you see my client do?" Moreover, if there had been any error in striking the testimony, it would be deemed harmless as there was more than sufficient evidence from the victim's testimony that McKnight did brandish a weapon; the trial judge, as trier of fact, chose to believe him. This was not an abuse of her discretion. ***Lockcuff***, ***supra***.

Sufficiency of the Evidence of VUFA and REAP Charges

After a review of the record, relevant case law and the parties' briefs, we find no merit to these claims. We rely upon the Pa.R.A.P. 1925(a) opinion, authored by the Honorable Susan I. Schulman, in affirming these issues. ***See*** Trial Court Opinion, 6/15/2009, at 2, 6-8 (testimony at trial revealed that during heated argument at McKnight's house, McKnight pulled out gun that was approximately eight inches long, with black handle and silver barrel; he pulled the slide which racked the gun, and with his finger on trigger pointed gun at victim (who was standing two feet away from him) from behind a screen door).

Judgment of sentence vacated and case remanded for resentencing[9] in accordance with this decision. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/22/2013

[9] As the Supreme Court noted in ***Wilson***, striking the probation condition without remanding for resentencing would be improper because finding that this condition is invalid "affects the landscape of options available to the court, and may affect the court's sentencing[.]" ***Id.*** 67 A.2d at 745 n.11. This is especially true in the instant case where the trial court imposed no penalty on four charges of which McKnight was convicted.