NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYHEEM JOHNSTON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 426 EDA 2013

Appeal from the Judgment of Sentence January 14, 2013
In the Court of Common Pleas of Philadelphia County Criminal Division
at No(s): CP-51-CR-0003782-2011

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

MEMORANDUM BY JENKINS, J. **FILED APRIL 22, 2014**

On February 2, 2011, Tyheem Johnston was arrested for drug-related offenses. The court denied Johnston's motion to suppress. After a non-jury trial, the court found Johnston guilty of possession with intent to deliver a controlled substance ("PWID") and possession of drug paraphernalia. On January 14, 2013, the court sentenced Johnston to 5-10 years imprisonment plus three years of probation on the PWID charge and a concurrent term of probation on the drug paraphernalia charge. Johnston filed a timely direct appeal and a timely statement of matters complained of on appeal.

* Retired Senior Judge assigned to the Superior Court.

Johnston raises three issues in this appeal:

> 1. The court erred when it denied [Johnston's] motion to suppress.
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> 2. The witness' credibility was called into question. Therefore, [Johnston] raises a weight of the evidence claim.
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> 3. The court's sentence of 5-10 years state incarceration, followed by 3 years reporting probation[,] was greater than necessary under 42 Pa.C.S. § 9781(d) and 42 Pa.C.S. § 9721(b). Therefore, [Johnston] raises a manifestly excessive sentence claim.

We affirm.

Johnston first objects to the order denying his motion to suppress. In an appeal from an order denying a motion to suppress, our standard of review is as follows:

> An 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 suppression court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. It is also well settled that the appellate court is not bound by the suppression court's conclusions of law.

In Re V.C., 66 A.3d 341, 350-51 (Pa.Super.2013) (quoting ***Commonwealth v. Knox***, 50 A.3d 749, 746-47 (Pa.Super.2012).

On August 3, 2011, the court convened an evidentiary hearing on Johnston's motion to suppress. The following evidence was adduced. On the evening of February 2, 2011, Southeastern

Pennsylvania Transportation Authority (SEPTA) Transit Police Officer Harry Newell was on general patrol at SEPTA's 52nd Street El station in Philadelphia. As Officer Newell stepped off an El train, he observed Johnston standing on the station platform, holding what the officer immediately recognized as a 24 ounce can of Four Loko malt liquor. Officer Newell approached Johnston, who tossed the can into a trash receptacle. The officer arrested Johnston for violating Philadelphia's open container law, Philadelphia Code § 10-604, which provides in relevant part: "No person shall consume alcoholic beverages or carry or possess an open container of alcoholic beverages in the public right-of-way. . ."

Officer Newell conducted a search incident to arrest and discovered crack cocaine and drug-packaging materials in Johnston's coat pocket. When a backup officer arrived, Officer Newell went to the trash receptacle and confirmed that the item Johnston discarded was in fact a Four Loko can.

We conclude that the trial court properly denied Johnston's motion to suppress. From a lawful vantage point, Officer Johnston observed Johnston holding what the officer immediately recognized as an open container of malt liquor. Johnston discarded the container as the officer approached him. Thus, the officer had probable cause to arrest Johnston for violating Philadelphia's open container law. 53 P.S.

§ 13349 ("any police officer. . .upon view of the breach of any ordinance of any city of the first class, is authorized to forthwith arrest the person or persons so offending. . ."); ***Commonwealth v. Rose***, 755 A.2d 700, 702 (Pa.Super.2000) (officer who observed defendant drinking beer on public street corner had statutory authority to arrest defendant for violating city ordinance prohibiting consumption of alcoholic beverages in public right-of-way). Moreover, under the plain view doctrine, the officer had probable cause to seize the container. ***Commonwealth v. Ballard***, 806 A.2d 889, 891-92 (Pa.Super.2002) (plain view doctrine permits warrantless seizure of evidence in view when an officer views object from lawful vantage point, and it is immediately apparent to him that the object is incriminating).

Lastly, the seizure of cocaine from Johnston's person was proper as part of a search incident to arrest. ***Commonwealth v. Ventura***, 975 A.2d 1128, 1139 (Pa. Super. 2009) (citing ***Commonwealth v. Trenge***, 305 Pa. Super. 386, 451 A.2d 701, 710 (1982)) ("an arresting officer may, without a warrant, search a person validly arrested, and the constitutionality of a search incident to 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").

Therefore, Johnston's first issue on appeal is devoid of merit.

In his second issue on appeal, Johnston challenges the weight of the evidence submitted during trial. Johnston has waived this argument.

> Pennsylvania Rule of Criminal Procedure 607(A) provides:
>
> A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
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> (1) orally, on the record, at any time before sentencing;
> (2) by written motion at any time before sentencing; or
> (3) in a post-sentence motion.

Id. Failure to raise a weight-of-the-evidence claim prior to appeal in accordance with Rule 607(A) will result in waiver, regardless of whether the appellant raises this issue on appeal or the trial court addresses the issue in its Rule 1925(a) opinion. ***Commonwealth v. Sherwood****,* 603 Pa. 92, 982 A.2d 483, 494 (2009); ***Commonwealth v. Causey****,* 833 A.2d 165, 173 (Pa.Super.2003) ("the fact that appellant raised the [weight-of-the-evidence] issue in a statement of matters complained of on appeal and that the court then filed an opinion pursuant to Rule 1925(a) does not render the claim reviewable").

In this case, subsequent to the verdict, Johnston did not file a pre-sentence or post-sentence motion objecting to the weight of the evidence. Nor did he raise this objection orally on the record before sentencing. N.T., 1/14/13, pp. 1-13. Therefore, he has waived his

challenge to the weight of the evidence. Even if he had preserved this argument, he would not have been successful. He argues that the evidence is suspect because the Commonwealth did not prove that the open container actually contained alcohol. This argument is irrelevant. The court found Johnston guilty of PWID and possession of drug paraphernalia. There is no dispute about the weight of the evidence supporting these charges, since Officer Newell found crack cocaine and drug paraphernalia on Johnston's person.

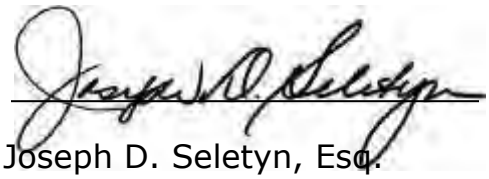
In his third and final issue, Johnston argues that his sentence is excessive. Once again, he has waived this argument. The claim of a manifestly excessive sentence challenges a discretionary aspect of sentencing. ***Commonwealth v. Mann***, 820 A.2d 788, 793 (Pa.Super.2003) (citing ***Commonwealth v. Martin***, 727 A.2d 1136 (Pa.Super.1999)). Challenges to the discretionary aspects of a sentence must be raised first in the trial court, either in a post-sentence motion or during sentencing proceedings. ***Commonwealth v. Rhoades***, 8 A.3d 912, 915 (Pa. Super. 2010) (citing ***Commonwealth v. Shugars***, 895 A.2d 1270, 1273–74 (Pa. Super. 2006)). The failure to do so results in a waiver of all such claims. ***Id.*** In this case, Johnston did not file post-sentence motions, and he did not raise any claims relating to the excessiveness of his sentence during the sentencing hearing. Accordingly, he failed to

preserve any challenges to the discretionary aspects of his sentence for appellate review.

Even if he had preserved this issue for appeal, it would not have warranted relief. An appellant challenging the discretionary aspects of his sentence must demonstrate, *inter alia*, that there is a substantial question that his sentence is not appropriate under the Sentencing Code. ***Commonwealth v. Griffin***, 65 A.3d 932, 935 (Pa. Super. 2013). A bald claim of an excessive sentence does not raise a substantial question that justifies review. ***Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa. Super. 2012). Johnston's challenge to his sentence amounts to a bald claim that does not constitute a substantial question. Therefore, we decline to review it.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014