NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN EDWARD BARRETT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1845 EDA 2013

Appeal from the Judgment of Sentence entered May 23, 2013,
in the Court of Common Pleas of Delaware County,
Criminal Division, at No(s): CP-23-CR-0003548-2012

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: **FILED APRIL 15, 2014**

John Edward Barrett ("Appellant") appeals from the judgment of sentence imposed after a jury convicted him of possession with intent to deliver, conspiracy, carrying a firearm without a license, and receiving stolen property.[1]

The trial court summarized the pertinent facts and procedural history as follows:

> On March 24, 2012, Trooper Brian Richardson of the Pennsylvania State Police executed a traffic stop on a silver Ford Edge SUV that was traveling southbound on I-95. Prior to initiating the traffic stop, Trooper Richardson clocked the vehicle for over 0.3 miles traveling 64 mph in a properly posted 55 mph zone. The Trooper followed the vehicle for approximately one mile before activating his emergency lights and pulling the

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[1] 35 P.S. § 780-113(a)(30), and 18 Pa.C.S.A. § 903(c), 6106(a)(1), and 3925(a).

vehicle over. A registration search revealed the owner of the vehicle was Spallco, a rental company. The vehicle was not reported stolen.

Upon approaching the driver's side of the vehicle to request driver identification and registration information, Trooper Richardson smelled the strong odor of marijuana. The driver, later identified as Tyrone Curtis, did not have a driver's license or other proof of identification on his person and identified himself as "Keith Williams." Co-Defendant Curtis provided a Maryland address, date of birth and Social Security Number. Curtis advised Trooper Richardson that the vehicle was rented by a family friend and that he did not have any rental documentation. The passenger identified himself as [Appellant] John Barrett via his Delaware driver's license.

Trooper Richardson returned to his patrol vehicle and conducted a CLEAN/NCIC query. The search of the name and date of birth given by the driver revealed no social security number, and a search of the social security number provided by the driver revealed a different name. [The] [c]riminal history [check] of the passenger, [Appellant], revealed an extensive criminal history, including drug convictions.

Trooper Richardson requested back-up, and an officer from Tinicum Police Department arrived on scene and pulled in front of the suspect vehicle with lights activated. Trooper Richardson exited his patrol vehicle and asked the driver, Co-Defendant Curtis, to exit the vehicle. Trooper Richardson conducted a pat-down search of Curtis and then requested he sit on the bumper of the patrol vehicle. Trooper Richardson then approached the passenger side of the vehicle and requested that the passenger, [Appellant], exit the vehicle. As [Appellant] opened the door to exit the vehicle, Trooper Richardson viewed a blue and tan "Polo" bag being held up behind [Appellant's] calves below the front passenger seat. Trooper Richardson conducted a pat-down search and then requested that [Appellant] go to where the driver was sitting in front of the patrol car.

Trooper Richardson approached co-Defendant Curtis and asked him for consent to search the vehicle. Co-Defendant Curtis signed the Pennsylvania State Police Waiver of Rights and Consent to Search form with the name "Keith Williams" in the consenter line.

> After receiving consent to search, Trooper Richardson conducted a hand search of the vehicle. A search of the blue and tan polo bag revealed it contained 7 containers containing suspected Marijuana, one digital scale, 9 empty containers commonly used to contain Marijuana, and one Bersa 380 ACP handgun which was loaded with 7 rounds of ammunition.
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> At this time, both [Appellant and Curtis] were arrested and charged with [various crimes].
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> A Preliminary Hearing was held on May 16, 2012, and all charges were held over to the Court of Common Pleas. On June 14, 2012, [Appellant] was arraigned. On July 12, 2012, the Public Defender's Office of Delaware County entered its appearance on [Appellant's] behalf.
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> On October 11, 2012, [Appellant] filed an Omnibus Pre-Trial Motion Nunc Pro Tunc [in which he sought suppression of the evidence obtained as a result of the traffic stop, and sought to have his case severed from that of co-defendant Curtis]. A hearing on the Motion to Suppress was held on October 12, 2012, and on November 30, 2012, an Order was entered Denying [Appellant's] Motion for Suppression. [The trial court also denied Appellant's motion to sever.]
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> On March 19, 2013, a three day jury trial commenced [at the conclusion of which the jury found Appellant guilty of possession with intent to deliver (PWID), conspiracy to possess with intent to deliver, firearms not be carried without a license, and receiving stolen property; the trial court found Appellant guilty of persons not to possess a firearm].

Trial Court Opinion, 8/21/13, at 1-3.

On May 23, 2013, the trial court sentenced Appellant to 5 - 10 years of imprisonment for PWID, a concurrent 2 - 4 years for receiving stolen property, a concurrent 5 - 10 years for persons not to possess a firearm, a concurrent 3½ - 7 years for possession of a firearm without a license, and a consecutive 6 years of probation for criminal conspiracy.

This appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

> 1. WHETHER THE [TRIAL] COURT ERRED IN DENYING [APPELLANT'S] MOTION TO SUPPRESS THE MARIJUANA AND HANDGUN SEIZED WITHOUT A WARRANT FROM THE BLUE AND TAN CANVAS POLO BAG OBSERVED IN [APPELLANT'S] POSSESSION, SINCE THE INVESTIGATING OFFICER SEARCHED THE BAG WITHOUT THE REQUISITE PROBABLE CAUSE, REASONABLE SUSPICION OR VALID CONSENT AS REQUIRED UNDER THE UNITED STATES CONSTITUTION AND PENNSYLVANIA CONSTITUTION.
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> 2. WHETHER THE [TRIAL] COURT ERRED IN DENYING [APPELLANT'S] MOTION TO SEVER WHERE UNDUE PREJUDICE ENSUED AGAINST [APPELLANT] BY HAVING HIM TRIED TOGETHER WITH HIS CO-DEFENDANT, TYRONE CURTIS, THUS ASSOCIATING HIM WITH THE ISOLATED BAD ACTS OF MR. CURTIS IN LYING TO THE POLICE CONCERNING HIS IDENTITY.

Appellant's Brief at 7.

In his first issue, Appellant challenges the trial court's denial of his suppression motion. Appellant's Brief at 12-16. 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).

Here, Appellant argues that the trial court erred in concluding that he had no expectation of privacy in the car or in the contents of the bag found underneath the passenger seat, and therefore the trial court erred in denying his suppression motion. Appellant's Brief at 13-15. Before we address Appellant's claim that the denial of suppression was improper, we must determine whether Appellant had standing to suppress the search, and a reasonable expectation of privacy in the vehicle. ***Commonwealth v. Caban***, 60 A.3d 120, 126 (Pa. Super. 2012).

"[U]nder Pennsylvania law, a defendant charged with a possessory offense has standing to challenge a search." ***Id***. *quoting* ***Commonwealth v. Perea***, 791 A.2d 427, 429 (Pa. Super. 2002). Thus, Appellant, who was charged with possessory crimes, had standing to raise a suppression challenge. However, "[a] defendant must separately establish a legitimate expectation of privacy in the area searched or thing seized." ***Commonwealth v. Burton***, 973 A.2d 428, 435 (Pa. Super. 2009). "[U]nder both our state and the federal constitutions, a defendant cannot prevail upon a suppression motion unless he demonstrates that the challenged police conduct violated his own, personal privacy interests." ***Commonwealth v. Powell***, 994 A.2d 1096, 1108 (Pa. Super. 2010) *quoting* ***Commonwealth v. Millner***, 888 A.2d 680, 692 (Pa. 2005). "The

constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all of the surrounding circumstances." ***Caban***, 60 A.3d at 126. Thus, in order to succeed on his suppression challenge, Appellant was required to demonstrate that he had a reasonable expectation of privacy in the vehicle and/or an expectation of privacy in the bag found under the passenger seat. This Court has held that "an ordinary passenger in an automobile does not by his mere presence have a legitimate expectation of privacy in the entire passenger compartment of that vehicle." ***Commonwealth v. Viall***, 890 A.2d 419, 423 (Pa. Super. 2005). "While passengers in an automobile may maintain a reasonable expectation of privacy in the contents of luggage they placed inside an automobile … it would be unreasonable to maintain a subjective expectation of privacy in locations of common access to all occupants." ***Id***.

The trial court concluded that Appellant lacked an expectation of privacy in the vehicle, explaining that Appellant produced no evidence that he was the owner or lessee, or that he occupied the vehicle with the authorization or permission of the registered owner or lessee. Trial Court Findings of Fact and Conclusions of Law, 11/30/12, at 7. Since Appellant failed to demonstrate an expectation of privacy in the vehicle or the area searched, the trial court denied Appellant's suppression motion. Our review of the record supports the trial court's determination that Appellant presented no

evidence to indicate he was occupying the vehicle with the authority of the owner or lessee. The only evidence presented as to ownership of the vehicle was the testimony of the driver, Mr. Curtis, who stated that "a friend had rented the vehicle," and that the vehicle was owned by a rental company. N.T., 10/12/12, at 24, 31, 82.

Appellant contends that even if he had no expectation of privacy in the vehicle, he had an expectation of privacy in the contents of the bag found under the passenger seat, after Trooper Richardson saw Appellant exert dominion and control over the bag when Appellant attempted to conceal the bag under his seat. *Id.*, at 54, 89-93.

As the trial court observed, it is well established that a passenger does not establish by his mere presence a legitimate expectation of privacy in the entire passenger compartment of that vehicle. ***Viall***, 890 A.2d at 423. Although a passenger may maintain a reasonable expectation of privacy in the contents of luggage they placed inside an automobile, "[w]here joint access or control exists, there can be no reasonable or legitimate expectation of privacy" and "it would be unreasonable to maintain a subjective expectation of privacy in locations of common access to all occupants." ***Id***. Here, although the bag with the contraband was found under Appellant's seat, there is nothing in the record to indicate that both occupants of the vehicle did not have common access to the bag. No evidence was presented that the bag was exclusively in the possession of

Appellant, and although Trooper Richardson stated that he saw Appellant trying to conceal the bag and believed the bag could be Appellant's, he "didn't know whose bag this was." N.T., 10/12/22, at 89-93. ***See Commonwealth v. Lowery***, 451 A.2d 245, 248 (Pa. Super. 1982) ("where two or more people have joint access and control over certain property, the voluntary consent of any of those people will provide the basis for a valid consensual search"). Moreover, following the search of the bag, Appellant denied that the bag or its contents belonged to him, indicating an abandonment of any privacy interest therein. N.T., 10/12/12, at 94.

We reiterate that "[a] defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy. … The determination [as to] whether [a] defendant has met this burden is made upon evaluation of the evidence presented by the Commonwealth and the defendant." ***Powell***, 994 A.2d at 1103-1104 *quoting* ***Commonwealth v. Burton***, 973 A.2d 428, 435 (Pa. Super. 2009) (*en banc*)). Given the deficit of evidence that Appellant had a legitimate expectation of privacy in the vehicle or the contents of the bag containing the contraband, we find no abuse of discretion in the trial court's denial of his suppression motion.

Furthermore, even if Appellant did establish a reasonable expectation of privacy in the bag, the search was permissible based on the consent of the driver, Tyrone Curtis, who authorized the police officers to search the

vehicle. "The apparent authority doctrine allows a third-party to consent to a search, even if the third-party does not have common authority over a premise, where an officer reasonably believes, based upon the facts then available, that the consenting third-party had the authority to consent." ***Commonwealth v. Basking***, 970 A.2d 1181, 1184, n.1. (Pa. Super. 2009).

> The law is settled that a warrantless search may be made with the voluntary consent of a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected. Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, … but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Commonwealth v. Murphy, 795 A.2d 997, 1005 (Pa. Super. 2002) *quoting* ***United States v. Matlock***, 456 U.S. 164, 172 (1974)).

Appellant argues that the "apparent authority" exception is inapplicable because Trooper Richardson observed Appellant exercise dominion and control over the bag when Appellant tried to conceal it under the passenger seat, and therefore Trooper Richardson should have known the bag belonged exclusively to Appellant. Appellant's Brief at 14-15. Accordingly, Appellant contends that the trooper could not have reasonably believed that Mr. Curtis had authority to consent to a search of the bag. *Id*.

"[T]he apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises" ***Commonwealth v. Strader***, 931 A.2d 630, 634 (Pa. 2007). However, "if the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted on facts leading sensibly to their conclusions of probability." ***Id.*** (citations and internal quotations omitted). ***See also Commonwealth v. Abduul Salaam***, 678 A.2d 342 (1996) ("[t]he scope of a search extends to the entire area in which the object of the search may be found and properly includes the opening and inspection of containers and other receptacles where the object may be secreted"). Given that the odor of marijuana that Trooper Richardson was investigating emanated from the confined interior of a car jointly occupied by Appellant and Mr. Curtis, and that the bag was in an area accessible to both Appellant and Mr. Curtis, we conclude that Trooper Richardson's search of the bag was not constitutionally impermissible based on the consent of Mr. Curtis, and that the trial court did not err in denying Appellant's suppression motion.

Appellant next argues that the trial court erred in denying his motion to sever. Appellant claims that he should have been tried separately from Mr. Curtis because Mr. Curtis was charged with additional crimes stemming

from his deception of Trooper Richardson when he provided false information about his identity. Appellant asserts that he suffered prejudice by being tried with Mr. Curtis because the jury could have improperly surmised that Appellant was complicit in the separate criminal conduct of Mr. Curtis in providing false identification information. Upon careful review of the record, we find no abuse of discretion in the trial court's denial of Appellant's motion to sever.

Pennsylvania Rule of Criminal Procedure 582 provides:

> (1) Offenses charged in separate indictments or informations may be tried together if:
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> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
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> (b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. Rule 582(A)(1)(a) and (b) (formerly Pa.R.Crim.P. 1127).

Additionally, Pa.R.Crim.P. 583, pertaining to the severance of offenses, states "[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. Rule 583 (formerly Pa.R.Crim.P. 1128).

Our Supreme Court, considering Pa.R.Crim.P. Rules 582 and 583 together, set forth the following three-part test for deciding a motion to sever:

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the [trial] court must … determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Collins, 703 A.2d 418, 422 (Pa. 1997) *citing* ***Commonwealth v. Lark***, 518 Pa. 290, 302, 543 A.2d 491, 496–97 (1988). In addition, it is well established that "the law favors a joint trial when criminal conspiracy is charged." ***Commonwealth v. Housman***, 986 A.2d 822, 835 (Pa. 2009). We have explained:

> A joint trial of co-defendants in an alleged conspiracy is preferred not only in this Commonwealth, but throughout the United States.
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> It would impair both the efficiency and the fairness of the criminal justice system to require ... that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability.
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> A defendant requesting a separate trial must show real potential for prejudice rather than mere speculation. The defendant bears the burden of proof, and we will only reverse a decision not to sever if we find a manifest abuse of discretion by the trial court.

Commonwealth v. Colon, 846 A.2d 747, 753-754 (Pa. Super. 2004) (citations omitted). "[T]he burden is on defendants to show a real potential for prejudice rather than mere speculation." ***Commonwealth v. Rainey***, 928 A.2d 215, 231-232 (Pa. 2007).

We find no manifest abuse of discretion in the trial court's denial of Appellant's severance motion. Numerous factors militated in favor of joinder, including the fact that the charges against both defendants arose from the same course of events. In addition, the same witnesses (i.e., the law enforcement officers who conducted the traffic stop and provided expert testimony about drug–related crimes) were to testify. Therefore, "[s]everance would have resulted in unnecessary repetition," and joinder was warranted. ***Commonwealth v. Marsh***, 566 A.2d 296, 298 (Pa. Super. 1989). Moreover, as the trial court explained:

> The co-Defendants offered antagonistic defenses at trial. [Appellant] testified at trial. Co-Defendant Curtis did not testify at trial but presented witnesses on his behalf. Each co-Defendant had a different account of the events of the day of their arrest including how and where they met and how they ended up in the same car. If anything, the fact that Curtis concealed his identity from the police aided [Appellant's] defense. [Appellant] pointed to these facts in argument claiming they bolstered his assertion he had no knowledge of the drugs or gun and that those items belonged to Curtis. Therefore, the prejudice alleged [by Appellant] is speculative and lacks support in the record.
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> The fact that the co-Defendants presented antagonistic defenses at trial is not grounds for relief either. Notably, in ***Commonwealth v. Housman***, 986 A.2d 834 (Pa. 2009), the Court held:

> [T]he party seeking severance must present more than a mere assertion of antagonism: [T]he fact that [A]ppellants have conflicting versions of what took place or the extent to which they participated in [the crime], is a reason for rather than against a joint trial because truth may be more easily determined if all are tried together ... Defenses become antagonistic only when the jury, in order to believe the essence of testimony offered on behalf of one Defendant, must necessarily disbelieve the testimony of his co-Defendant.

Housman, 986 A.2d at 834. In ***Housman***, the Court held that even though the co-Defendants blamed one another, separate trials based on antagonistic defenses were unwarranted: "Mere finger pointing alone – the effort to exculpate one by inculpating another – is insufficient to warrant a separate trial ... Indeed, if truth is the goal, having all the fingerpointing before the same fact-finder is quite efficacious." *Id*. (internal citation omitted).

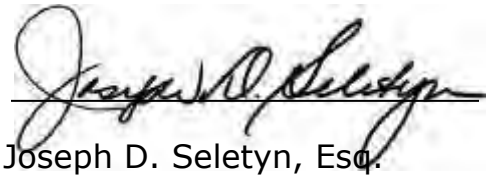
Trial Court Opinion, 8/21/13, at 6-7.

The record supports the trial court's determination. At trial, Mr. Curtis presented testimony that the rental car belonged to his fiancé, and that on the date of the events at issue, Mr. Curtis and his fiancée had been socializing at the mall with a group of friends. N.T., 3/20/13, at 219-244. Mr. Curtis' fiancée testified that at the end of the evening, Appellant asked for a ride, and Mr. Curtis agreed, and that the bag with the contraband had not been in the car at the beginning of the evening. *Id*. Appellant, however, testified that, while at his girlfriend's house, he telephoned Mr. Curtis to ask for a ride, and Mr. Curtis arrived to pick him up. *Id*. at 252-321. Appellant testified that the bag with the contraband belonged to Curtis and was already in the car when Appellant entered it. *Id*. "Although antagonistic

defenses are a factor for a trial court to consider in determining whether to grant a motion to sever, the fact that defendants have conflicting versions of what took place, or the extent to which they participated in it, is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together." ***Rainey***, 928 A.2d at 232. Here, the co-defendants' assignation of blame and conflicting accounts of the events preceding their joint occupation of the car favored a joint trial rather than severance. We therefore find no abuse of discretion in the trial court's denial of Appellant's motion to sever, and affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



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Prothonotary

Date: 4/15/2014