

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WALTER J. HILL,	:	
	:	
Appellant	:	No. 1425 MDA 2012

Appeal from the Judgment of Sentence Entered July 10, 2012,
In the Court of Common Pleas of Cumberland County,
Criminal Division, at No. CP-21-SA-0000007-2012.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WALTER J. HILL,	:	
	:	
Appellant	:	No. 1426 MDA 2012

Appeal from the Judgment of Sentence Entered July 10, 2012,
In the Court of Common Pleas of Cumberland County,
Criminal Division, at No. CP-21-SA-0000068-2012.

BEFORE: SHOGAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED MAY 21, 2013

Appellant, Walter Jackson Hill, appeals from the judgments of sentence entered in the Court of Common Pleas of Cumberland County on July 10, 2012. We affirm.

*Retired Senior Judge assigned to the Superior Court.

The record reveals that Carlisle Borough Police Officer David Rogers stopped Appellant on November 23, 2011 for failing to have a compliant Pennsylvania inspection sticker on his vehicle in violation of 75 Pa.C.S.A. § 4703(a). During the stop, Officer Rogers noticed that Appellant's vehicle had illegal tint on the windows. The officer issued a citation for the noncompliant inspection sticker and verbally warned Appellant to remove the illegal tint. Appellant appeared before the magisterial district justice on December 19, 2011, and was found guilty of violating section 4703(a).

Officer Rogers stopped Appellant again on February 22, 2012 in Carlisle Borough for having noncompliant tinted windows on his vehicle in violation of 75 Pa.C.S.A. § 4107(b)(2). Officer Rogers recognized Appellant from the previous stop and recalled verbally warning Appellant about removing the tint. The officer used a tint meter to measure the tint's compliance with Table 10 of the Pennsylvania Inspection Manual, which requires at least 70 percent of light to pass through the tinted glass. Because the tint on Appellant's windows measured 25 percent light transmittal, Officer Rogers issued a citation. Appellant appeared before the magisterial district justice on April 3, 2012, and was found guilty of violating section 4107(b)(2).

At consecutive summary appeal hearings on July 10, 2012, the trial court convicted Appellant of violating sections 4703(a) and 4107(b)(2) and

then sentenced Appellant to pay the costs of prosecution and a fine of \$25.00 on both convictions. Appellant appealed the judgments of sentence. We consolidated the appeals. Per Curium Order, 9/4/12. Appellant and the trial court complied with Pennsylvania Rule of Appellate Procedure 1925.

On appeal, Appellant presents the following questions for our consideration:

I. Because the affiant officer changed his probable cause for stopping Appellant in two descriptions of same within an hour, is it clear that the affiant officer had no probable cause, so every piece of evidence gathered after the illegal stop, including Appellant's alleged expired inspection sticker, is suppressible?

II. Despite the exigency engendered in a moving automobile, did the affiant officer still not have the right to a warrantless stop of Appellant lacking probable cause?

III. Did the Court of Common Pleas make an error of law in deciding that Commonwealth v. Brubaker, 5 A.3d. 261, (Pa. Super. 2010), decided that, since a statute, later and more specific to the charge against Appellant, was found to be unenforceable, [Brubaker] directly empowers use of an earlier, more general statute?

IV. Because the use of a "tint meter" is not addressed in either of the statutes relevant to this case, nor in the Pennsylvania Code provision used to enforce the earlier statute, did the court of Common Pleas make an error of law in allowing said meter to be used to convict Appellant?

Appellant's Brief at 10 (full capitalization omitted).

Appellant first challenges Officer Rogers' testimony as conflicting and, therefore, insufficient to support a conclusion that he had probable cause to stop Appellant's vehicle for window tint. Thus, Appellant concludes, "any

evidence gathered subsequent is suppressible as 'the fruit of the poisoned tree.'" Appellant's Brief at 11.

Pursuant to Pa.R.Crim.P. 578 (**Omnibus Pretrial Motion for Relief**) and 579 (**Time for Omnibus Pretrial Motion and Service**), all pretrial requests for relief, such as motions to suppress, must be included in one omnibus pre-trial motion, filed and served within thirty days after the defendant's arraignment. If these requirements are not met, the suppression issue is deemed waived. **See** Pa.R.Crim.P. 581(B) ("If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived."). Our review of the record reveals that it does not contain any pre-trial motions, including a motion to suppress Officer Roger's testimony. Thus, we conclude that this issue is waived.¹

¹ Even if not waived, we would agree with the trial court that this issue lacks merit:

[Appellant] argues that the officer's testimony was not credible because he gave inconsistent reasons for the stop. He points to the officer's testimony in the hearing on the 4107(b)(2) violation where he [the officer] stated "this had been the second time I had stopped the defendant for window tint." [N.T., 7/10/12, at 5.] We found nothing inconsistent in that testimony. The first stop was directly related to the expired inspection sticker. Pursuant to that stop [the officer] issued a citation. As an ancillary matter he gave [Appellant] a verbal warning to correct the illegal windshield tint. [Appellant] did not follow through. His lack of action led to the second stop.

Trial Court Opinion, 12/5/12, at 3-4 (footnotes omitted).

Next, Appellant complains that Officer Rogers conducted an illegal warrantless stop because he lacked probable cause. Appellant's Brief at 13. Upon review, we conclude that Appellant has waived this issue on two fronts. First, as discussed above, Appellant did not file a suppression motion. **See** Pa.R.Crim.P. 581(B) ("If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.").

Second, Pa.R.A.P. 2119(a) requires an appellant to present discussion and citation of authorities in support of his position. "[W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." **Commonwealth v. Johnson**, 985 A.2d 915, 924 (Pa. 2009).

Here, Appellant's argument consists only of a rhetorical exercise:

[N]o case law exists which eliminates the requirement for probable cause. Therefore, taken with the discrepancy in the testimony inherent in the transcripts, did probable cause exist for Rodgers [sic] to stop Appellant? If he has none, then the stop is illegal, and any such "evidence" gathered as a result, as an expired inspection sticker, is suppressible and inadmissible.

Id. at 14. Although Appellant has provided citation to authorities, he has not developed his second issue in any meaningful fashion capable of review. For this reason also, his second issue is waived. **Johnson**, 985 A.2d at 924.

Appellant's third issue challenges Officer Rogers' citation for a violation of the more general offense under section 4107(b)(2) of the Motor Vehicle

Code, “which addresses ‘illegal equipment’ on a motor vehicle as identified by 67 Pa.Code 175.67,” rather than the more specific offense under section 4524, “which deals specifically with window tinting on a vehicle.” Appellant’s Brief at 14. According to Appellant, “when a more specific statute is available, the less specific statute cannot be enforced, unless the statutes are identical.” *Id.* (citing ***Commonwealth v. Miller***, 606 A.2d 495, 497 (Pa. Super. 1992), and ***Commonwealth v. Warner***, 476 A.2d 341, 344 (Pa. 1984)).

The trial court rejected Appellant’s argument as waived and meritless:

In the first instance we note that [Appellant] never raised this issue at trial. Therefore, we are not in a position to explain our reasons for not dismissing the prosecution on those grounds.

Nevertheless we are satisfied that under the facts of this case Section 4524(e) does not bar the prosecution of [Appellant] for violating Section 4107(b). The bar to prosecution only applies where the two statutes “irreconcilably conflict.” *Com. v. Gautieri*, 431 Pa. Super[.] 412, 636 A.2d 1153 (Pa. Super. 1994) quoting from *Com. v. Warner*, 504 Pa. 600, 476 A.2d 341 (1984). Section 4524(e) provides in relevant part:

No person shall drive any motor vehicle with any sun screening device or other material **which does not permit a person to see or view the inside of the vehicle through the windshield...**

75 Pa. C.S.A. § 4524(e)(1) (emphasis added). Whereas 4107(b)(2) makes it unlawful to operate a vehicle which is in “violation of department regulations.” 75 Pa. C.S.A. § 4107(b)(2). The applicable department regulations are contained in 67 Pa. Code 175.67(d)(4) and Table X. Those regulations require sun screening on the windshield to have a light transmittal level of at least seventy percent.

These statutes do not irreconcilably conflict. It is clear that a violation of Section 4524(e)(1) would also be a violation of Section 4107(b)(2). If the windshield tint precludes one from seeing inside the vehicle, the light transmittance is obviously less than seventy percent. However, a violation of Section 4107(b)(2) does not necessarily involve a violation of Section 4524(e)(1).

In this case [Appellant] could not have been charged under Section 4524(e) because the officer was able to read the inspection sticker affixed to the inside of the windshield. In *Commonwealth v. Brubaker*, 5 A. 3rd 261 (Pa. Super. 2010) the Court overturned a conviction under Section 4524(e) where the officer testified that he could see through the windshield. It went on to suggest that the proper charge would have been under section 4107(b)(2). *Id.*

Trial Court Opinion, 12/5/12, at 4-5.

We reiterate that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). Here, the record confirms that Appellant did not challenge the Commonwealth’s prosecution under section 4107(b)(2) rather than section 4524 in the trial court. Thus, his third issue is waived.²

² Even if the issue were not waived, we would reject Appellant’s argument on the basis of the trial court’s sound reasoning. We have explained that, “[e]ven if the two [statutory sections] have identical elements in the sense that the special wholly encompasses the general, so long as the general has elements outside the special, the Commonwealth is not precluded from pursuing both charges in one trial.” ***Commonwealth v. Gautieri***, 636 A.2d 1153, 1155 (Pa. Super. 1994) (citing ***Miller***, 606 A.2d at 498 (quoting ***Warner***, 476 A.2d at 344)) (brackets in original).

Here, we disagree with Appellant’s assertion that “the two statutes relevant to this matter are obviously used to curtail precisely the same behavior[.]” Appellant’s Brief at 15. Section 4524(e)(1) is more specific than section 4107(b)(2). The former regulates window tint, “which does not

Lastly, Appellant challenges Officer Rogers' use of a tint meter to measure the light transmittal level of the windshield tint. Appellant's Brief at 16. Specifically, Appellant claims that "[n]owhere in Commonwealth law is the use of a 'tint meter' anticipated for the enforcement of any provision related to vehicular window tinting." *Id.* at 18.

The trial court concluded that the tint meter issue was also waived:

Again we note that we were not asked to address this issue at trial. At no time did [Appellant's] counsel object to the officer's testimony regarding the results of the tint meter. Because we were confused by his disjointed references to the tint meter in his closing argument, we sought clarification of his position with the following exchange:

THE COURT: Do you have a case or a statute that holds that the use of the tint meter is inadmissible, if that's what you were getting at, or are you attacking the credibility of the meter because of the age of the glass?

[COUNSEL]: I'm attacking the credibility of the meter because of the age of the glass.

THE COURT: Okay.

permit a person to see or view the inside of the vehicle through the windshield." 75 Pa.C.S.A. § 4524(e)(1). Contrarily, section 4107(b) regulates all types of equipment violations. Furthermore, the more general section 4107(b)(2) contains an element outside of the more specific section 4524(e)(1). The Commonwealth can prove an equipment violation if it shows a window tint that **does** permit a person to see or view the inside of the vehicle through the windshield, **but does not** meet the light transmittal requirements of the Pennsylvania Code. Therefore, because the general statute is not encompassed by the more specific, there is no bar against the Commonwealth pursuing Appellant under the general statute. *Gautieri*, 636 A.2d at 1155.

[COUNSEL]: I'm also attacking the credibility of the meter because there are no documented records regarding the calibration of the meter. Now, the officer testified that he calibrated it that morning but there are no written records to indicate that he did. There's nothing to verify that basically. [N.T. 7/10/12, at 14, 15.]

As a result we focused upon the reliability rather than the admissibility of the tint measurements.

Based upon the testimony of Officer Rogers we found the results to have been reliable. The tint meter at issue had been in use by the Carlisle Police Department since 1998. It was tested by the officer using pre-certified pieces of glass provided by the manufacturer. The results of the test were well within the plus or minus two percent tolerances required by the manufacturer. The light transmittal measured on [Appellant's] windshield was twenty-five percent, far below the seventy percent reading required to be lawful.

Trial Court Opinion, 12/5/12, at 6 (footnotes omitted).

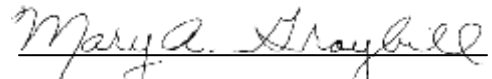
Upon review, we confirm that Appellant did not raise an issue regarding admissibility of the tint meter measurements. The prosecutor questioned Officer Rogers regarding his calibration and use of a tint meter without objection. N.T., 7/10/12, at 4-5. Similarly, on cross-examination defense counsel questioned Officer Rogers about his calibration and use of the tint meter. *Id.* at 6-7. Moreover, Appellant did not raise an issue regarding the weight of the tint meter evidence in the trial court pursuant to Pa.R.Crim.P. 607(A)(1)-(3). Therefore, we agree with the trial court that Appellant has waived his tint meter issue. Pa.R.A.P. 302(a).

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Judgments of sentence affirmed.

COLVILLE, J., Concurs in the Result.

Judgment Entered.


Deputy Prothonotary

Date: 5/21/2013