NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BLAINE OTIS BIDDINGS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1528 WDA 2012

Appeal from the PCRA Order September 28, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015087-2008

BEFORE: STEVENS, P.J., BOWES, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: Filed: May 20, 2013

Blaine Otis Biddings appeals from the September 28, 2012 order denying his first petition for PCRA relief. We affirm.

On January 11, 2009, Appellant was charged with possession of a controlled substance (crack cocaine) with intent to deliver, possession of a controlled substance, possession of drug paraphernalia, driving with a suspended license, driving without a license, and two summary traffic offenses. The charges arose from events that occurred on September 17, 2008.

At approximately 2:15 a.m. on the morning in question, Mount Oliver Police Officer Josh Dobbin observed a Ford Fusion make a U-turn across a double yellow line in the 300 block of Brownsville Road, Mount Oliver. That officer believed that he had witnessed a violation of two provisions of the

Motor Vehicle Code, limitations on turning around, 75 Pa.C.S. § 3332,[1] and obedience to traffic control devices, 75 Pa.C.S. § 3111(a).[2] Officer Dobbin stopped the car, which was occupied solely by Appellant, and asked for Appellant's driver's license and car registration. Appellant produced a photographic identification. Officer Dobbin discovered that Appellant's driver's license was suspended and his identification was inactive. Since Appellant was not permitted to operate the vehicle and since it was not in a legal parking space, Officer Dobbin, acting in accordance with Mount Oliver's

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[1] That section provides:

> **(a) General rule.--**The driver of any vehicle shall not turn the vehicle so as to proceed in the opposite direction unless the movement can be made in safety and without interfering with other traffic.
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> **(b) Turns on curves or grades.--**No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to or near the crest of a grade, where the vehicle cannot be seen by the driver of any other vehicle approaching from either direction within 500 feet.

75 Pa.C.S. § 3332.

[2] That section states,

> Unless otherwise directed by a uniformed police officer or any appropriately attired person authorized to direct, control or regulate traffic, the driver of any vehicle shall obey the instructions of any applicable official traffic-control device placed or held in accordance with the provisions of this title, subject to the privileges granted the driver of an emergency vehicle in this title.

75 Pa.C.S. § 3111(a).

written inventory policy, conducted an inventory search of the car in order to have it towed. He discovered 293.2 grams of crack cocaine, a digital scale with white residue on it, and two plastic bags. Appellant was arrested, and had $2,725 on his person.

After being charged, Appellant filed a motion to suppress all the evidence seized on September 17, 2008. He contested that the vehicular stop was supported by probable cause to believe that a violation of the Motor Vehicle Code had occurred as well as the validity of the inventory search. At the suppression hearing, Officer Dobbin supported the vehicular stop based upon Appellant's violation of the provisions governing U-turns. Officer Dobbins also testified that, after the car was stopped, Appellant did not have a valid driver's license and was not in a legal parking area. He then produced the documents governing the conduct of inventory searches by the Mount Oliver Police Department. The suppression court concluded that the vehicular stop and inventory search were both valid and denied the suppression motion.

The matter proceeded to a bench trial, where the Commonwealth presented the testimony of an expert witness, Pittsburgh Narcotics and Vice Detective Mark Goob. Detective Goob stated that the cocaine had a street value of about $29,000 and, based upon the facts in question, that Appellant possessed that drug with the intent to deliver it. Detective Goob also relayed that drug dealers frequently utilize rental cars.

On cross-examination, Officer Dobbin was asked who owned the vehicle. He responded that it was a rental vehicle owned by P.V. Holding Corporation, Inc. He indicated that he did not know who rented the vehicle because there was no rental agreement in the car. Appellant testified on his own behalf at trial. He relayed that at approximately 2:00 a.m. on September 17, 2008, he encountered a friend, Manika Wood, at a bar. When the bar was closing, he asked Ms. Wood if he could borrow her car to buy some cigarettes. She gave him the keys to the Ford Fusion stopped by Officer Dobbin. Appellant stated that he was unaware of the crack cocaine and scales located in the car.

At the conclusion of the trial, the trial court granted Appellant judgment of acquittal on the summary traffic offense of making an illegal U-turn as no testimony had been presented to support a violation of that provision. Appellant was convicted of all the remaining offenses with the exception of obedience to traffic control devices. On July 23, 2009, the matter proceeded to sentencing, where Appellant received a term of five to ten years of incarceration, one year in excess of the four-year mandatory minimum sentence applicable due to the amount of crack cocaine involved in the matter.

In the ensuing direct appeal, we rejected Appellant's arguments that the sentence should be reduced, that the verdict was against the weight and sufficiency of the evidence, and that his suppression motion was improperly denied. ***Commonwealth v. Biddings***, 30 A.3d 535 (Pa.Super. 2011)

(unpublished memorandum). We deferred to collateral review Appellant's position that he received ineffective assistance of counsel during litigation of the suppression motion. When we reviewed the merits of the suppression decision, we concluded that Officer Dobbin did not have a sufficient basis to believe that Appellant had violated the prohibition against U-turns. We noted that, at the suppression hearing, there was no indication that there was oncoming traffic or that the turn was made in the vicinity of a nearby curve or grade in the road.

Despite finding that there was no probable cause to support a belief that Appellant violated the Motor Vehicle Code, we affirmed the denial of Appellant's suppression motion. Based on the facts adduced at both the suppression hearing and trial, we held that Appellant had not established that he had a constitutionally-cognizable expectation of privacy in the car such that he had the ability to challenge the search. We observed that Officer Dobbin's testimony established that the searched car was owned by a rental company and that Appellant failed to prove that he had permission to drive the car from the person with lawful possession of that vehicle.

Legal precedent in this Commonwealth provides that, in order to prevail on a suppression motion, a defendant, as a preliminary matter, must prove that he possessed an expectation of privacy in the location searched that society is willing to recognize as subject to constitutional protection. Thus, when a vehicle is searched, the defendant must present proof that he was permitted to drive the vehicle by the person with authority to grant that

permission. ***See Commonwealth v. Maldonado***, 14 A.3d 907, 910 (Pa.Super. 2011) (defendant could not object to search of automobile where car was registered to another person and defendant, who was not with owner when vehicle was stopped, failed to establish registered owner gave him permission to use it); ***Commonwealth v. Burton,*** 973 A.2d 428, 435 (Pa.Super. 2009) (*en banc*) (same); ***Commonwealth v. Jones***, 874 A.2d 108, 112 (Pa.Super. 2005) (defendant "had no constitutional expectation of privacy in a rental automobile, where he was the operator of the vehicle but not the named lessee, he was not an authorized driver, and the return date on the rental agreement had passed.").

Following our decision in Appellant's direct appeal, our Supreme Court denied further review on November 30, 2011. ***Commonwealth v. Biddings***, 34 A.3d 825 (Pa. 2011). On December 13, 2011, Appellant filed a *pro se* PCRA petition, counsel was appointed, and counsel filed an amended petition. After issuing notice of its intent to dismiss the petition without a hearing, the trial court performed that action on September 28, 2012. This appeal followed. Appellant raises these allegations:

> 1. Whether trial counsel was ineffective in failing to properly and specifically assert lack of probable cause for the vehicle stop, where this court previously found that the stop was constitutionally impermissible as having been effected without probable cause and where therefore all evidence observed or seized following the stop should have been suppressed.
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> 2. Whether trial counsel was ineffective in failing to properly support Mr. Biddings' suppression motion with available

testimony and legal authority establishing a possessory interest and expectation of privacy in the vehicle.

3. Whether prior appellate counsel was ineffective in failing to seek rehearing or reconsideration or in failing to otherwise preserve a challenge to the erroneous *dicta* contained in this court's previous opinion addressing the standing issue.

Appellant's brief at 5.

We first recite our standard of review. "[T]he standard of review for review of an order denying a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Lambert***, 57 A.3d 645, 647 (Pa.Super. 2012). In this case, we analyze allegations of ineffectiveness of counsel. "To plead and prove ineffective assistance of counsel a [PCRA] petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Commonwealth v. Rykard***, 55 A.3d 1177, 1189-90 (Pa.Super. 2012).

Appellant first assails suppression counsel's ineffectiveness for failing to properly present Appellant's position that Officer Dobbin lacked a probable cause to believe that Appellant had violated the Motor Vehicle Code and thus, unconstitutionally stopped the car. However, our review of the suppression hearing establishes that counsel did present evidence and argue the position that Appellant's stop was not supported by a belief that a

violation of the Motor Vehicle Code had occurred. As noted, Officer Dobbin stopped the Ford Fusion based on his conclusion that Appellant made an illegal U-turn. Suppression counsel cross-examined the police officer about the existence of oncoming traffic, a curve, and a grade in the vicinity of the turn. N.T. Suppression Hearing, 4/28/09, at 7-8. Counsel also argued that Appellant's U-turn was not illegal and that the car was unconstitutionally stopped. ***Id***. at 17. As noted, the suppression court rejected that position and concluded that Officer Dobbin had grounds to believe that Appellant had made an improper U-turn. Despite Appellant's protests to the contrary, counsel at the suppression hearing did present the issue that Appellant claims he did not. The suppression court, according to our prior opinion, did not render the correct ruling; however, the fact that an improper ruling resulted from a correct legal position does not render counsel ineffective. Hence, we must reject Appellant's first position.

Appellant next assails suppression counsel's performance by arguing that counsel should have presented evidence establishing that Appellant had an expectation of privacy in the searched car. Given our conclusion on direct appeal that the vehicle stop was not based upon sufficient facts to support Officer Dobbin's conclusion that Appellant violated the U-turn prohibition but that Appellant did not present evidence of a privacy interest in the car, this position warrants further review. On appeal, we would not have affirmed the suppression ruling had suppression counsel provided

evidence in support of Appellant's position that Manika Wood accorded Appellant permission to use her car on the morning in question.

We conclude that Appellant's proffer as to suppression counsel's ineffectiveness is insufficient. To be entitled to PCRA relief, a PCRA petition must plead and prove by a preponderance of the evidence that he is entitled to PCRA relief. 42 Pa.C.S. § 9543(a). In this case, suppression counsel would have needed to present testimony from Manika Wood to establish that she had the right to and did grant Appellant permission to utilize the Ford Fusion. "Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the appellant." ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1143 (Pa. 2011).

In his PCRA petition, Appellant did not allege any of the following: Manika Wood existed, was available, was willing and able to appear, would have testified that she rented the car and gave Appellant permission to use it. Appellant also did not aver that suppression counsel was or had a duty to be aware of her existence. Indeed, in his amended PCRA petition, Appellant included a certification as to witnesses whom he intended to present at the PCRA hearing, but he did not include the name of Manika Wood. Similarly, on appeal, while Appellant makes the generalized argument that the suppression counsel should have established his reasonable expectation of

privacy in the car, Appellant provides this Court with no indication as to how suppression counsel could have done so. Hence, this position also fails.

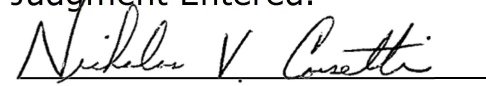
Appellant also challenges our prior ruling during his direct appeal that it was incumbent upon him to establish a constitutionally-recognizable expectation of privacy in the car that was searched before he could prevail on his suppression motion. However, under the law of the case doctrine, this panel is not permitted to revisit the ruling of the prior panel. "The law of the case doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." ***Commonwealth v. McCandless***, 880 A.2d 1262, 1267 (Pa.Super. 2005), *appeal dismissed as improvidently granted*, 933 A.2d 650 (Pa. 2007) (quoting ***Commonwealth v. Starr**,* 664 A.2d 1326, 1331 (Pa. 1995)). The doctrine's application promotes many goals, including judicial economy, consistency in a given case, and achieving a final conclusion in a proceeding. ***McCandless***, ***supra***. Under the doctrine, "when an appellate court has considered and decided a question submitted to it upon appeal, it will not, upon a subsequent appeal on another phase of the case, reverse its previous ruling even though convinced it was erroneous." ***Commonwealth v. McCandless***, ***supra*** at 1268 (Pa.Super. 2005) (quoting ***Benson v. Benson***, 624 A.2d 644, 647 (Pa.Super. 1993)). The doctrine yields only when the needs of justice compel otherwise. ***McCandless***, ***supra.*** The law of the case doctrine

applies in the present case as there was no injustice in our prior determination that Appellant failed to demonstrate a constitutionally-valid privacy interest in a car rented by someone other than Appellant. Rather, that determination adhered to the pertinent law. Thus, Appellant's attempt to obtain relief from our prior ruling fails.

Appellant's final position is that appellate counsel rendered ineffective assistance in failing to challenge the prior panel's decision. He asserts that the ruling regarding his privacy interest in the car was *dicta* and that counsel did not attempt to have our previous ruling overturned. *Dicta* is defined as language that is not essential to the holding of a panel's decision. ***See Haun v. Community Health Systems, Inc.***, 14 A.3d 120, 125 (Pa.Super. 2011). Our ruling on Appellant's privacy interest in the car cannot be characterized as *dicta* because it was pivotal to our affirmance of the denial of Appellant's suppression motion. Without that finding, we would not have been able to affirm; therefore it was essential to the holding on appeal. Furthermore, counsel did attempt to have our ruling overturned, as evidenced by counsel's litigation of a petition for allowance of appeal. Thus, we reject Appellant's contention that appellate counsel was ineffective for failing to challenge our prior ruling as *dicta*.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/20/2013