

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

RICARDO A. PENA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 46 MDA 2016

Appeal from the Order Entered December 16, 2015  
in the Court of Common Pleas of Berks County Criminal Division  
at No(s):CP-06-CR-0003415-2015

BEFORE: BOWES, SHOGAN, and FITZGERALD,\* JJ.

JUDGMENT ORDER BY FITZGERALD, J.:

**FILED AUGUST 26, 2016**

The Commonwealth appeals from the order of the Berks County Court of Common Pleas granting Appellee Ricardo A. Pena's<sup>1</sup> pretrial motion for writ of *habeas corpus* and dismissing the charges of conspiracy and violations of the Wiretap Act against him.<sup>2</sup> The Commonwealth claims that the trial court erred in concluding that a "smartphone" with voice recording capabilities was used as a "telephone" and not an "electronic, mechanical or other device" under the Wiretap Act. **See** 18 Pa.C.S. § 5702. The trial court, in its Pa.R.A.P. 1925(a) opinion, observes that its decision is inconsistent with ***Commonwealth v. Smith***, 136 A.3d 170 (Pa. Super.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> The Commonwealth's appeal from the order dismissing the charges against Appellee's codefendant, Jeffrey Nein, is docketed at 47 MDA 2016.

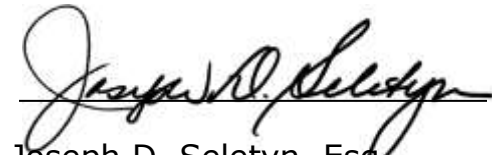
<sup>2</sup> 18 Pa.C.S. §§ 903(a)(1)-(2); 5703(1)-(3).

2016), which was decided while this appeal was pending. **See** Trial Ct. Op., 3/21/16, at 2.

Following our review, we agree with the Commonwealth and the trial court that **Smith** governs the issue raised in this appeal and requires that the trial court's order be reversed.<sup>3</sup> **See Smith**, 136 A.3d at 178 ("although [the defendant] used an app on his smartphone, rather than a concealed tape recorder, to surreptitiously record his conversation with [the complainant], the result is the same. [The defendant's] actions constituted a violation of Section 5703.")

Order reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 8/26/2016

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<sup>3</sup> Appellee did not file a brief in this appeal.