J-S74002-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RYAN DAVID SAFKA Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1312 WDA 2012

Appeal from the Judgment of Sentence June 26, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0013937-2010

BEFORE: PANELLA, J., OLSON, J., and WECHT, J.:

CONCURRING AND DISSENTING MEMORANDUM BY WECHT, J.:

FILED: JUNE 2, 2014

I join the learned Majority's conclusion that the proffered EDR data satisfied the ***Frye***[1] test. However, I respectfully, but adamantly, disagree with the Majority's determination that the trial court was permitted to re-open the evidentiary record in this case *sua sponte*. Therefore, I respectfully dissent from that portion of the Majority's memorandum.

The factual and procedural history of this case is summarized aptly by the Majority, ***see*** Maj. Mem. at 2-3, and a full reproduction of that material is unnecessary here. However, certain events are undisputed, and are worth repeating. Appellant waived his right to a jury trial, and elected to proceed

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[1] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

in a non-jury fashion. At the commencement of the non-jury trial, counsel for Appellant made an oral motion *in limine* seeking to preclude admission of the EDR evidence. The trial court entertained the motion, and held that the EDR evidence was admissible, but that the weight to be assigned to that evidence would be determined after the testimony related to the evidence was presented at trial. The parties then presented their respective evidence, and each party rested its case. The evidentiary record formally was closed. The trial court received closing arguments, and reserved rendering a verdict until the following day. However, rather than rendering a verdict the next day, the trial court *sua sponte* re-opened the record after conducting legal research overnight. The court concluded that additional testimony was necessary to establish the reliability and accuracy of the EDR evidence, material that not only assisted the Commonwealth in meeting its burden of proof, but also was omitted by the Commonwealth during its case-in-chief. Appellant filed a petition for *habeas corpus*, in which he argued that the trial court lacked the authority to re-open the record *sua sponte*. The trial court denied the petition. After the Commonwealth was afforded this second chance to make its case against Appellant, the trial court found Appellant guilty of all counts.

The Majority concedes that no principle of law exists in Pennsylvania that would permit the trial court to re-open the record without a specific request from one of the parties. ***See*** Maj. Mem. at 8. The Majority nonetheless concludes that the trial court possessed the authority to do so in

this case only because of the tardiness of the presentation of Appellant's motion *in limine*, even though the Majority also admits that Appellant's tactic was "permissible." ***Id.*** at 10. I respectfully disagree.

The Majority cites Pennsylvania Rules of Evidence 611(a) and 104 to establish that the trial court was permitted to consider the preliminary question of the admissibility of the EDR evidence in two parts: (1) the actual admission of the evidence; and (2) the subsequent admission of foundational evidence to demonstrate the accuracy and reliability of the challenged evidence. On this point, I agree with the Majority. A trial court, particularly in a non-jury trial, may admit certain evidence and receive evidence later in the trial regarding the reliability and accuracy of that evidence. If the latter evidence properly is admitted, is credible and is sufficient to establish the former's accuracy and reliability, the former evidence properly was admitted. However, if the latter evidence is not introduced by the party offering the former evidence, then the former evidence may have to be stricken from the record. Or, if the latter evidence is introduced, but lacks credibility or sufficiency, the former evidence nonetheless may be admissible but the weight afforded to that evidence may be significantly diminished.

Regardless of the interplay between these rules, and the multiple outcomes that may arise, these rules do not create the authority that the trial court exercised in this case. The Majority claims that these rules justified the trial court in providing "itself with a forum to receive preliminary

evidence on the issue, akin to a hearing on the motion *in limine* – an option that was previously precluded based on Appellant's strategy." Maj. Mem. at 11. This statement falters, both in logic and in fact.

First, it defies both law and common sense to conclude that the trial court is permitted to address a "preliminary" question of admissibility of a particular piece of evidence **after** the parties had ceased introducing evidence. The evidentiary record was closed. The onus is on the party seeking admission of the evidence to establish its admissibility during the evidentiary phase of the trial. The Commonwealth declined to do so, despite having multiple opportunities. The issue was raised before the first witness was called to testify, and discussed by the parties and the court throughout the trial. During the initial discussion on the issue, the trial court asked the Commonwealth whether it intended to call an expert witness to establish the reliability of the EDR material. The Commonwealth asserted that it only intended to call the trooper who downloaded the data, and that any issues regarding its reliability would affect the weight that the trial court would afford the evidence. Notes of Testimony ("N.T."), 2/6/2012, at 12. In other words, the Commonwealth expressly declined to call an expert to establish the reliability of the EDR data. The trial court denied Appellant's motion *in limine* but repeatedly asserted its concern over the weight to be attached to the evidence. The Commonwealth had notice of the issue, and ample opportunity to address the issue during the evidentiary phase of the trial. It did not do so. Rules 611 and 104 simply do not permit the trial court to re-

open the evidentiary record **after** the parties have rested to establish a **preliminary** evidentiary question.

Second, Appellant's "permissible" strategy did not preclude the trial court, or the Commonwealth, from satisfying the evidentiary questions before the close of evidence. Albeit tardy, the Commonwealth was not prevented in any way from calling an expert to establish the reliability and accuracy of the EDR date by Appellant's motion. As noted, Appellant expressed his concern regarding the evidence before the Commonwealth presented a single witness. The Commonwealth expressly declined to present an expert during its case-in-chief. At no point did the Commonwealth or the trial court express concern that the timing of Appellant's motion hindered the ability to establish, or to rule upon, the admissibility of the EDR evidence. The Commonwealth apparently believed that the evidence that it presented sufficed for admissibility purposes. The trial court clearly disagreed. That court lacked the authority to give the Commonwealth another opportunity to present the necessary evidence after the evidentiary record had closed. The timing of Appellant's motion had nothing to do with either the Commonwealth's decisions or the trial court's belated request for additional information.

There is no denying the fact that it would have been more prudent for Appellant to have filed his motion *in limine* earlier in the proceedings. However, the motion did not prevent the Commonwealth from making volitional decisions. The motion did not preclude the Commonwealth from

satisfying its evidentiary burdens. The motion did not prevent the trial court from ruling upon the admissibility of the evidence before the parties rested. Most importantly, the motion **did not** vest in the trial court the authority to re-open an evidentiary record *sua sponte* where no such authority otherwise exists. There is no support in our case law, statutes, or rules of court to support the trial court's actions under these circumstances. Throughout the trial, the trial court suggested that it harbored significant doubt about the contested evidence, and during closing arguments, appeared to question whether the evidence proved Appellant guilty beyond a reasonable doubt. ***See e.g.,*** N.T. at 152-56. Rather than rule upon the evidence presented by the Commonwealth, the trial court did not provide itself a forum to address a preliminary question of admissibility, but instead gave the Commonwealth a second chance to prove its case beyond a reasonable doubt. The court had no authority to do so.

The Commonwealth could have sought leave of court to re-open the case. The Commonwealth did not do so. The Commonwealth was bound to the evidence that it presented at trial. That evidence did not establish the accuracy and reliability of the EDR evidence. The timeliness of Appellant's motion had nothing to do with this inevitable conclusion. I would hold that the trial court erred by re-opening the case without authority to do so, and I would vacate the judgment of sentence, and remand for a new trial.

I respectfully dissent.