NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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(s): CP-02-CR-0013937-2010

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

MEMORANDUM BY PANELLA, J. FILED: June 2, 2014

The ***Frye***[1] test provides that "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." ***Grady v. Frito-Lay***, ***Inc.***, 839 A.2d 1038, 1043-1044 (Pa. 2003). Appellant, Ryan David Safka, argues, among other things, that the admission of evidence as to the speed of his vehicle based solely on the data retrieved from his vehicle's Event Data Recorder ("EDR") fails the ***Frye*** test. Whether EDR data may be used to establish a vehicle's speed is an issue of first impression in this Commonwealth. We hold that determining a vehicle's speed based on data recovered from an EDR is not novel scientific evidence and, thus, does not violate the ***Frye*** test.

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

The trial court set forth the relevant facts and procedural history as follows:

> [Appellant], Ryan Safka, was charged by criminal information with two counts of Homicide by Vehicle (75 Pa. C.S.A. § 3732(a)); three counts of Involuntary Manslaughter (18 Pa. C.S.A. § 2504(a)); one count of Recklessly Endangering Another Person (18 Pa. C.S.A. § 2705); and several other vehicle violations including Reckless Driving (75 Pa. C.S.A. § 3736(a)); Disregard Traffic Lane (Single) (75 Pa.C.S.A. 3309(1)); Speeding (75 Pa. C.S.A. § 3362); and Driving at an Unsafe Speed (75 Pa. C.S.A. § 3361). [Appellant] elected to proceed to bench trial and executed a jury trial waiver.
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> Trial commenced on February 6, 2012. During the Commonwealth's case [Appellant] challenged the admissibility and weight of evidence derived from what was described as an Event Data Recorder (EDR)[2], a device in [Appellant]'s vehicle that records speed and things of that nature, much like the well[-]known "black box" does on commercial aircraft. Testimony was presented concerning the results of the examination of the EDR. [Appellant], although aware that the Commonwealth would present such evidence, did not seek to exclude it pre-trial but, rather, made an oral Motion in Limine seeking to exdude it at the commencement of trial. The [c]ourt allowed the evidence, but, in that it was a non-jury trial, made no determination at that time as the weight that it would be afforded, stating that it would be given the appropriate weight. The parties rested on February 7 and made argument to the [c]ourt. The [c]ourt did not render a verdict, indicating that it would review the matter overnight.
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> After reviewing the record and conducting legal research into the admissibility and reliability of evidence obtained from an EDR, the [c]ourt determined that the record was incomplete with regard to the accuracy and reliability of evidence from an EDR. The [c]ourt advised the parties that it would reopen the record and permit both parties to present evidence concerning the EDR evidence on February 21, 2012. On February 14, 2012[,]

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[2] In this vehicle, a 2007 Dodge Caliber SXT, the EDR is known as the Airbag Control Module.

> [Appellant] filed a Petition for Habeas Corpus and Entry Verdict arguing that the [c]ourt was without power to reopen the record and that the entry of a verdict of Not Guilty was required based upon the evidence presented. The Commonwealth filed a response. The Motion was denied.
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> On February 21, 2012[,] the trial was reconvened and the parties were permitted to present additional evidence concerning the evidence taken from the EDR. The Commonwealth presented additional testimony from the reconstruction expert and from an expert on the functioning of EDR. [Appellant] presented no additional evidence. The parties made additional argument. The [c]ourt then announced it[s] verdicts, adjudging [Appellant] guilty at all counts.
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> On June 26, 2012, [Appellant] was sentenced to not less than ten (10) nor more than twenty-four (24) months at each of the Homicide by Vehicle Counts charged at counts 1 through 3. The sentences [were imposed to] run consecutive to one another. No further penalty was imposed at counts 4 through 6, as they merged with counts 1 through 3. The [c]ourt also imposed no further penalty on the Recklessly Endangering Another Person charge. The aggregate sentence imposed … was not less than thirty (30) nor more than seventy-two (72) months.
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> [Appellant] filed a Post Sentencing Motion seeking a new trial and/or an arrest of judgment and a Post Sentence Motion seeking reconsideration of sentence. Both were denied and [Appellant] appealed.

Trial Court 1925(a) Opinion at 2-4.

Appellant presents two (2) issues for our review:

> I. Whether the trial court erred in the admission of evidence as to the speed of [Appellant's] motor vehicle based solely on the information contained in the vehicle's on board computer in violation of the standard set forth in ***Frye***[?]
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> II. Whether the trial court erred after the close of all the evidence by *sua sponte* requesting both [the] prosecution and [the] defense reopen their case for the presentation of additional evidence[?]

Appellant's Brief at 6.

We begin with Appellant's first claim regarding the admission of the EDR data. When reviewing evidentiary rulings by the trial court, our standard of review is narrow. "[T]he admission of expert scientific testimony is an evidentiary matter for the trial court's discretion and should not be disturbed on appeal unless the trial court abuses its discretion." ***Commonwealth v. Harrell***, 65 A.3d 420, 430 (Pa. Super. 2013) (citation omitted).

The Commonwealth presented expert testimony from Richard Ruth, a retired electrical engineer who was employed by the Ford Motor Company for 33 years. ***See*** N.T. at 185. During his tenure with Ford, Mr. Ruth obtained accident reconstruction training from Northwestern University. ***See id***. Mr. Ruth's testimony detailed the development and functionality of EDR technology. Appellant claims that this testimony fails the ***Frye*** test for admissibility of scientific evidence. ***See*** Appellant's Brief at 24.

> The ***Frye*** test consists of a two-step process, which is as follows:
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> > First, the party opposing the evidence must show that the scientific evidence is "novel" by demonstrating that there is a legitimate dispute regarding the reliability of the expert's conclusions. If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that the expert's methodology has general acceptance in the relevant scientific community despite the legitimate dispute.

Commonwealth v. Foley, 38 A.3d 882, 888 (Pa. Super. 2012) (citation and internal quotation marks omitted). ***See also*** Pa.R.E. 702.

We must first determine whether Mr. Ruth's testimony regarding EDR technology amounts to "novel" scientific evidence. Such a determination "turns on whether there is a legitimate dispute regarding the reliability of the expert's conclusions, which is not necessarily related to the newness of the technology used in developing the conclusions." ***Foley***, 38 A.3d at 888 (citation and internal quotation marks omitted).

Appellant claims that Mr. Ruth's testimony failed to focus on the validity of the EDR technology, and instead was tantamount to that of an accident reconstruction expert. Appellant understates Mr. Ruth's testimony, as there is abundant support to conclude that EDR technology is not a novel science.[3]

The origin of EDR technology dates back to 1974. ***See*** N.T. at 191. In 1994, General Motors was the first manufacturer to utilize it in a production vehicle. ***See id***. Other manufacturers then subsequently adopted it: Ford in 1997, Toyota in 2001, and Chrysler in 2005. The technology was originally designed to detect problems with the vehicle's safety system, specifically, the airbag deployment system. ***See id***. at 192.

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[3] We also disagree with Appellant's assertion that the trial court relied solely on the EDR data to establish the vehicle's speed. There was ample testimony from the Commonwealth's accident reconstruction expert who provided an opinion regarding the speed of Appellant's vehicle using established methodologies that were wholly independent from the EDR data. ***See*** N.T. at 61-65.

To do so, the vehicle first monitors the two drive wheels to determine the speed of the vehicle. ***See id***. at 197. This information is then transmitted to the EDR, and stored in a temporary memory known as a buffer. ***See id.*** The buffer continually collects and temporarily stores the last five (5) seconds of data. ***See id***. In the event of an airbag deployment, the EDR writes the information from the buffer to a permanent memory that can be retrieved after a crash. ***See id***.

The National Highway Traffic Safety Administration, who previously studied the use of EDRs and currently employs the technology in their crash investigations, recognizes the utility of this collected data. ***See id***. at 192. Furthermore, in 1997, the National Transportation Safety Board recommended that EDRs be installed in all newly manufactured automobiles.

This evidence establishes that the technology has existed for almost 40 years, has been adopted by the major automobile manufacturers, and has been recognized as an acceptable tool used by accident reconstruction experts to determine a vehicle's speed prior to an impact. It is not novel science; it is an accepted technology.

In an effort to deflect the technology's acceptance in the automotive industry, Appellant asserts that novelty exists, as there is no Pennsylvania case law addressing the use of this technology for accident reconstruction purposes. While correct, such an omission does not prove novelty. "If this court assessed 'novelty' of scientific evidence based on its previous use in

court, we would be failing to defer to scientists in assessing the reliability of scientific methods." ***Foley***, 38 A.3d at 889.

We note that Florida,[4] Illinois,[5] Massachusetts,[6] and New Jersey[7] have permitted the introduction of EDR data to establish the speed of a vehicle. For the foregoing reasons, we find that there is no legitimate dispute regarding the reliability of EDR technology necessary to consider it a novel science. Therefore, we deny Appellant's argument on this issue.

Appellant next contends the trial court erred by reopening the record *sua sponte*. In doing so, Appellant maintains the trial court improperly interjected itself into the proceedings by allowing the Commonwealth to present additional evidence regarding the accuracy and reliability of EDR technology.

It is within the discretion of the trial court, upon request of either side, to reopen the evidentiary record to present additional evidence prior to submission to the jury. ***See Commonwealth v. Mathis***, 463 A.2d 1167, 1171 (Pa. Super. 1983) (citation omitted). The trial court is afforded such

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[4] ***Matos v. Florida***, 899 So.2d. 403 (Fla. Dist. Ct. App. 2005).

[5] ***Bachman v. General Motors Corp.***, 776 N.E.2d 262, 267 (Ill. App. Ct. 2002).

[6] ***Commonwealth v. Zimmerman***, 873 N.E.2d 1215 (Mass. App. Ct. 2007).

[7] ***State v. Shabazz***, 946 A.2d 626 (N.J. Super. 2005).

discretion to prevent a failure or miscarriage of justice. ***See id***. While permitted upon request of either party, our case law is silent regarding whether a trial court can exercise such discretion on its own accord.

The trial court described its decision to reopen the record as follows:

> The evidence regarding the EDR was necessary for this [c]ourt to determine the proper weight to give that evidence. The evidence was admitted during the trial and the reopened record provided both sides with an opportunity to present additional evidence in support of their positions on its admissibility and the weight it should be afforded. The [c]ourt did this sua sponte, not on the request of either party. After reviewing the law regarding the admissibility of evidence derived from a motor vehicle EDR, the [c]ourt determined that it wanted to hear more about the science behind that device and provided both parties with the opportunity to present such evidence. The [c]ourt had agreed to hear that evidence and had not indicated what weight it would give it or whether it considered it wholly admissible.
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> The record was not kept open, as the defendant seems to suggest, to allow the Commonwealth to supply additional evidence without which a not guilty verdict was required. The [c]ourt did this to assure that its decision was based on a correct ruling as to the admissibility and weight of the evidence from the EDR, not to provide either party to supply "missing" evidence. In doing so, the [c]ourt did not abuse its discretion and neither party was prejudiced.
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> Finally, as the Commonwealth pointed out in its brief opposing [Appellant's] request that this [c]ourt not reopen the record, [Appellant] did not file a Motion to Suppress or any other Motion seeking to prevent the Commonwealth from offering data collected from the EDR into evidence. [Appellant] raised this challenge the day the evidence was to be presented. It was an issue this [c]ourt had never been presented with before. The quick research the [c]ourt's law clerk was able to do during the trial led this [c]ourt to conclude that additional evidence might be necessary for the [c]ourt to properly evaluate this evidence. The [c]ourt did not err by making sure its decisions on admissibility and weight were fully informed.

Trial Court 1925(a) Opinion at 7-8.

Relevant to our discussion is Rule 611(a) of the Pennsylvania Rules of Evidence, which describes the court's control over the presentation of evidence:

> **(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
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> (1) make those procedures effective for determining the truth;
> (2) avoid wasting time; and
> (3) protect witnesses from harassment or undue embarrassment.

Pa.R.E. 611(a)(1)-(3).

Also relevant is Rule 104, which pertains to preliminary questions of admissibility and states, "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." Pa.R.E. 104(a). Rule 104 functions differently during a bench trial than a jury trial.

> The second sentence of Pa.R.E. 104(a) is based on the premise that, by and large, the law of evidence is a 'child of the jury system' and that the rules of evidence need not be applied when the judge is the fact finder. The theory is that the judge should be empowered to hear any relevant evidence to resolve questions of admissibility.

Pa.R.E. 104(a), Comment.

With these considerations in mind, we address Appellant's second claim. In presenting his argument, Appellant appears to lose sight of how the timing of his objection hampered the trial court's ability to decide the evidentiary issue. Appellant was fully aware the Commonwealth planned to utilize the EDR to establish the speed of his vehicle prior to the crash. Curiously, he chose to wait until the commencement of trial to raise an oral motion *in limine*, instead of filing a formal pre-trial motion. While permissible, Appellant cannot escape the consequences such a strategy presents.

By filing a pretrial motion, Appellant could have ensured the trial court would possess all of the preliminary evidence necessary to determine whether the EDR data was accurate and reliable. Instead, his strategy placed the trial court in the unenviable position of deciding an unfamiliar question of law in a short period of time.

Utilizing the discretion afforded to it by Rules 611 and 104, the trial court admitted the data extracted from the EDR, subject to a later determination of whether sufficient foundational facts establish the technology's accuracy and reliability. The Rules of Evidence explicitly endorse such a practice. ***See*** Pa.R.E. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.")

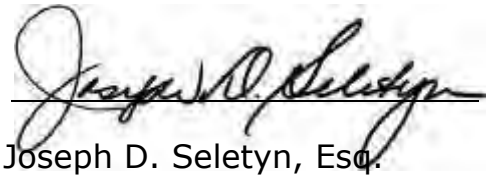
After both parties rested, and prior to rendering a verdict, the trial court determined that further evidence surrounding the accuracy and reliability of the EDR technology was needed. Therefore, the court reopened the record and afforded each party an opportunity to develop their position. In essence, the trial court provided itself with a forum to receive preliminary evidence on the issue, akin to a hearing on a motion *in limine*—an option that was previously precluded based on Appellant's strategy.

Accordingly, the trial court's actions were consistent with the discretion afforded to it by Rules 104 and 611. Furthermore, in exercising such discretion, the trial court actions were entirely reasonable, and were not grounded in bias, prejudice or ill will.

Judgment of sentence affirmed. Jurisdiction relinquished.

Wecht, J. files a concurring and dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/2/2014