NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MOHAMED SITA BERETE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 877 MDA 2012

Appeal from the Judgment of Sentence March 20, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000933-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J. Filed: March 5, 2013

Appellant, Mohamed Sita Berete, appeals from the judgment of sentence entered on March 20, 2012, in the Court of Common Pleas of Berks County. After careful review, we affirm.

The record in the case *sub judice* reveals that, at approximately 10:30 p.m. on February 18, 2011, Officer Christopher A. Cortazzo of the Reading Police Department was on duty, patrolling the area of the 200 block of North Ninth Street, in a marked police car. ***See*** N.T., Trial, 2/29/12-3/2/12, at 116-118. Officer Cortazzo observed an Impala driving along Ninth Street that had tinted front driver- and passenger-side windows. ***See id***., at 118. Officer Cortazzo explained that there was a significant amount of vehicle traffic because a local hockey game had recently ended. ***See id***., at 119. While driving in the left lane along Ninth Street, with a consistent line of

vehicles travelling in the right lane, Officer Cortazzo passed the Impala. According to Officer Cortazzo:

> The vehicle appeared to be going very slow so [he] attempted to slow down so the vehicle could pass [him] and [he] could get behind it and run the plate. As [he] slowed down, it appeared that vehicle was going slower till [he] almost had to stop to permit it to go past [him] so [he] could maneuver behind it, run the plate … And once [he] did that, to ensure it wasn't stolen … [he] activated [his] overheard emergency lighting … [and the Impala stopped in the left lane of traffic.]

Id., at 120-121.

As Officer Cortazzo exited his vehicle and approached Berete's vehicle, he was able to observe Berete through the rear window lean and reach toward the center console area of the vehicle. ***See id***., at 120-122. Officer Cortazzo asked Berete for his license, registration, and insurance. ***See id***., at 122-123. According to Officer Cortazzo, Berete "fumbled around" and then handed him his license. ***Id***., at 123-130. Upon asking again for the insurance and registration, Berete handed Officer Cortazzo a "clump of paperwork from the glove compartment." ***Id***. Officer Cortazzo had to "fish though that paperwork to find the registration and insurance" and "while [he] was doing that, [Berete] again, turned his body to the right blocking what [he] could see with his back and doing something to his right side." ***Id***. Officer Cortazzo had to caution Berete to "stop moving around," "turn forward" and "pay attention." ***Id***. When questioned by Officer Cortazzo as to whether the vehicle was his, Berete responded that the vehicle belong to "Manny." ***Id***. Officer Cortazzo reported that the vehicle was registered to an

Edwin Acevedo. ***See id***. During their conversation about ownership of the vehicle, Berete again turned to his right side after which he was again instructed to " turn around and stop moving" after which Officer Cortazzo asked Berete if "there [were] any weapons in the car" to which he replied "no." ***Id***.

Officer Cortazzo then requested that Berete step out of the vehicle as it was his intent to "pat him down for weapons because of his movements." ***See id***. As Berete exited the vehicle, Officer Cortazzo instructed him to "turn around and face away from [him] face [his] vehicle" after which Berete "looked at [Officer Cortazzo] with a blank stare." ***Id***. Berete was not responding; rather, he was "shifting his weight from right to left and looking around." ***Id***. Unsure of whether Berete was "trying to retrieve or hide a weapon or contraband," on his third request to Berete to face his vehicle, Officer Cortazzo "reached out to turn him; and that's when [Berete] took both hands and punched [him] in the chest, knocking [him] backwards." ***Id***. Officer Cortazzo fell back approximately five feet and Berete turned and fled, running "south against the flow of traffic, in the lane of traffic." ***Id***.

When Officer Cortazzo regained his balance, he chased after Berete on foot, yelling for him to stop. ***See id***. Berete continued to run, forcing Officer Cortazzo to deploy his taser after which Berete immediately dropped to the ground. ***See id***. As Berete fell to the ground, Officer Cortazzo "heard a metal object hit the ground." ***Id***., at 130-131. Officer Cortazzo then saw a small semiautomatic pistol lying next to Berete. ***See id***. Berete repeatedly stated,

"it's not mine." ***Id***., at 133. A search incident to arrest of Berete's vehicle revealed the presence of narcotics.

A serial number scan of the firearm recovered revealed that the owner was George Borgoon, a local store owner who had never met Berete before. ***See id***., at 190. When contacted by police, Borgoon stated that he had not seen the firearm for two years, although he never knew it was missing. ***See id***., at 189-190. He believed that the firearm was secured under his son's desk in the back of the store. ***See id***., at 189. According to Borgoon's testimony at the time of trial, he does not know Berete, and he never gave him permission to have the gun. ***See id***., at 191.

Following a jury trial, Berete was convicted of firearms not to be carried without a license, escape, receiving stolen property, and possession of a controlled substance. The trial judge also found Berete guilty of windshield obstructions and wipers, a summary offense. The jury acquitted Berete of the remaining charges. Subsequent thereto on March 20, 2012, Berete was sentenced to an aggregate term of 62 to 168 months' imprisonment. Berete timely filed a post-sentence motion, which the trial court denied. This appeal followed

On appeal, Berete raises the following issues for our review:

> A. Whether the evidence was insufficient to support the guilty verdicts, where the Commonwealth failed to establish beyond a reasonable doubt that Berete: (1) unlawfully removed himself from official detention in violation of 18 Pa.C.S.A. § 5121(a); (2) intentionally received or retained the moveable property of another, knowing that it had been stolen, or believing that it had probably been stolen, in violation of 18

Pa.C.S.A. § 3925(a); and (3) drove a motor vehicle with a sun screening device which did not permit a person to see or view the inside of the vehicle through the windshield, side wing or side window of the vehicle in violation of 75 Pa.C.S.A. § 4524(e)(1).

B. Whether the guilty verdicts on all counts were against the weight of the evidence, where Officer Cortazzo's testimony was inconsistent, unclear, and embellished, and was the only testimony that established Berete's criminal conduct.

C. Whether the trial court erred by allowing the following evidence and testimony over timely objection and/or motion: (1) Officer Cortazzo's reference to his military service; and (2) Officer Cortazzo's redirect testimony and Commonwealth's Exhibit Number 4, where such evidence went beyond the scope of direct – and cross-examination, and was not required in order to dispel any unfair inferences made on cross-examination.

D. Whether the sentencing court abused its discretion by imposing an aggregate sentence of 64 to 168 months, where such sentence was manifestly excessive and clearly unreasonable, where the sentence was contrary to the fundamental norms underlying the Sentencing Code, and where the court failed to state the reasons for imposing an aggravated sentence on each count.

Appellant's Brief, at 9.

In his first issue, Berete challenges the sufficiency of the evidence related to his convictions for escape, receiving stolen property and windshield obstruction. "The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." ***Commonwealth v. O'Brien***, 939 A.2d 912, 913 (Pa. Super. 2007) (citation omitted). "Any doubts concerning an appellant's guilt

were to be resolved by the trier of fact unless the evidence was so weak and inconclusive that no probability of fact could be drawn therefrom." ***Commonwealth v. West***, 937 A.2d 516, 523 (Pa. Super. 2007) (citation omitted). An appellate court "may not weight the evidence and substitute our judgment for the fact-finder." ***Commonwealth v. Brumbaugh***, 932 A.2d 108, 109 (Pa. Super. 2007) (citation omitted). Further, "the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence." ***Id***., at 110 (citation omitted). Additionally, "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Perez***, 931 A.2d 703, 707 (Pa. Super. 2007) (citations omitted).

Here, Berete claims that there was insufficient evidence to find that he was under official detention as required by the escape statute:

> **§ 5121. Escape**
>
> (a) **Escape**. – A person commits an offense if he unlawfully removes himself from official detention following temporary leave granted for a specific purpose.
>
> ...
>
> (e) **Definition**. – As used in this section, the phrase "official detention" means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but the phrase does not include supervision or probation or parole, or constraint incidental to release on bail.

18 PA.CONS.STAT.ANN. § 5121.

In ***Commonwealth v. Stewart***, 648 A.2d 797 (Pa. Super. 2004), this Court found that § 5121(e)'s phrase, "any other detention for law enforcement purposes," applied to pre-arrest situations. Specifically, we determined that "it is not necessary that the suspect be physically restricted by bars, handcuffs, or locked doors. Escape encompasses more than the traditional notion of a prisoner scaling a prison wall." ***Id***., at 798 (citations omitted). We also stated:

> Not all interactions between the police and citizens involve seizure of persons. Only when the police have restrained the liberty of a person by a show of authority or physical force may we conclude that a seizure has occurred. An evaluation as to whether a seizure has occurred must be viewed in light of all the circumstances and whether a reasonable person would have believed that he or she was free to leave.

Id. (citations omitted). A traffic stop constitutes an investigative detention. ***See Commonwealth v. Feczko***, 10 A.3d 1285, 1290-1291 (Pa. Super 2010).

Here, Officer Cortazzo testified that he observed a green Impala with windows tinted so dark on the windshield and sides that he could not see into the car, a patent violation of the Motor Vehicle Code. ***See*** N.T., Trial, 2/29/12-3/1/12, at 116-118. As such, Officer Cortazzo conducted a traffic stop of Berete's vehicle. Thus, Berete was subject to official detention. Berete unlawfully removed himself from this detention, prior to the traffic stop being concluded, when he punched Officer Cortazzo in the chest with

both hands and then fled on foot. ***See id***., at 124-127, 128-130. Accordingly, we find that the Commonwealth presented sufficient evidence to sustain Berete's conviction for escape.

Next, Berete avers that the evidence was insufficient to sustain his conviction for receiving stolen property. The crime of receiving stolen property is set forth as follows:

> A person is guilty of theft if he intentionally receives, retains, or disposes of moveable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.

18 PA.CONS.STAT.ANN. § 3925(a). In order to obtain a conviction for receiving stolen property, the Commonwealth must establish the following elements beyond a reasonable doubt: (1) the property was stolen; (2) the defendant was in possession of the property; and (3) the defendant knew or had reason to believe the property was stolen. ***See Commonwealth v. Matthews***, 632 A.2d 570, 571 (Pa. Super. 1993).

In the present case, Berete contends that the evidence was insufficient to prove he had knowledge or reason to know that the handgun in his possession was stolen. ***See*** Appellant's Brief, at 26. Upon review, we disagree.

> [A] permissible inference of guilty knowledge may be drawn from the unexplained possession of recently stolen goods without infringing upon an accused's right of due process or his right against self-incrimination, as well as other circumstances, such as the accused's conduct at the time of arrest. Nonetheless, the mere possession of stolen property is insufficient to prove

> guilty knowledge, and the Commonwealth must introduce other evidence, which can be either circumstantial or direct, that demonstrates that the defendant knew or had reason to believe that the property was stolen. This additional evidence can include the nature of the goods, the quantity of the goods involved, the lapse of time between possession and theft, and the ease with which the goods can be assimilated into trade channels. Further, whether the property has alterations indicative of being stolen can be used to establish guilty knowledge. Finally, even if the accused offers an explanation for his possession of stolen property, the trier of fact may consider the possession as unexplained if it deems the explanation unsatisfactory.

Commonwealth v. Parker, 847 A.2d 745, 751 (Pa. Super. 2004) (internal citations omitted).

Here, while Officer Cortazzo did not observe the gun directly on his person, the circumstantial evidence revealed that Berete possessed a stolen handgun. During the traffic stop, Officer Cortazzo recalled Berete continuously reaching to his right side. It was only after Berete escaped detention during a frisk for weapons that he was tased by Officer Cortazzo and a metallic object fell from his person. The object recovered was a handgun, which Berete adamantly denied was his and for which he possessed no permit to carry. The gun's serial number was processed and revealed that it was owned by Borgoon. ***See*** N.T., Trial, 2/29/12-3/1/12, at 189-192. According to Borgoon, he did not discover that the gun was missing until after the police called to inquire. ***See id***. Borgoon did not know Berete and, importantly, never gave him permission to have the gun. ***See id***., at 191.

Viewed in the light most favorable to the Commonwealth as the verdict winner, we find the evidence established beyond a reasonable doubt that Berete possessed the handgun under circumstances that permitted the jury to infer that he knew or had reason to believe the handgun was stolen. While merely possessing the handgun is insufficient to prove "guilty knowledge," we find the Commonwealth introduced other evidence demonstrating that Berete knew or had reason to believe the handgun was stolen—namely, Berete's behavior in the vehicle, during the frisk for weapons, his failure to possess a permit to carry, and his unexplained possession of the stolen handgun. As such, Berete's sufficiency claim fails.

Lastly, Berete argues that the evidence was insufficient to sustain his conviction for 75 PA.CONS.STAT.ANN. § 4524(e)(1), Windshield Obstructions and Wipers. Section 4524 provides in pertinent part:

> (e) Sun screening and other materials prohibited.
>
> (1) 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, side wing or side window of the vehicle.

75 PA.CONS.STAT.ANN. § 4524(e)(1). An officer may properly stop a vehicle for a violation of 75 PA.CONS.STAT.ANN. § 4524(e)(1) if the vehicle has window tinting which does not permit a person to see or view the compartment of the vehicle. ***See Commonwealth v. Brubaker***, 5 A.3d 261, 264 (Pa. Super. 2010).

Here, Berete argues that despite the window tint on the vehicle, dark night and limited visibility, Officer Cortazzo could see him inside the vehicle and, as such, no violation of § 4524 occurred. ***See*** Appellant's Brief, at 25. We disagree.

Officer Cortazzo testified that the "front driver's side and passenger windows had window tint on them so dark that [he] could not see into the vehicle or see the driver." N.T., Trial, 2/29/12-3/1/12, at 118. As such, the Commonwealth presented evidence that Berete drove a motor vehicle with sun screening that did not allow a person to view the inside of the vehicle. Accordingly, Berete's argument must fail.

Next, Berete presents a weight of the evidence claim wherein he avows that the guilty verdicts were against the weight of the evidence based upon inconsistencies in Officer Cortazzo's testimony. We disagree.

Our standard of review is as follows:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.
>
> Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 409 (2003) (internal citations omitted). A verdict is said to be contrary to the

evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal," or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience." ***Commonwealth v. Davidson***, 860 A.2d 575, 581 (Pa. Super. 2004) (citations omitted).

Here, the jury, sitting as the finder of fact, heard the testimony of Officer Cortazzo and chose to find him credible. The trial court did not find that the verdict shocks one's sense of justice. We find no abuse of discretion with that finding.

Berete next argues that the trial court erred by allowing Officer Cortazzo to provide testimony regarding his military service and by allowing the Commonwealth on redirect examination to present evidence that exceeded the scope of direct and cross examination. ***See*** Appellant's Brief at 36. Thus, Berete's argument is two-fold: (1) was Officer Cortazzo's military service irrelevant, highly prejudicial and impermissibly used as character evidence; and (2) was the inquiry by the Commonwealth on redirect examination into Berete's license to carry a firearm impermissible as it exceeded the scope of the direct and cross examination of Officer Cortazzo.

> Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a

> fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.

Commonwealth v. Drumheller, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002) (internal quotation marks and citation omitted)

Pennsylvania Rule of Evidence 401 defines relevant evidence:

> **Rule 401. Definition of "relevant evidence"**
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pa.R.E. 401. Pennsylvania Rule of Evidence 403 limits the admission of relevant evidence as follows:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**
>
> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403. Thus, in determining whether evidence should be admitted at trial, the trial court must weigh the relevance a probative value of the evidence against its prejudicial impact. ***See Commonwealth v. Reid***, 571 Pa. 1, 811 A.2d 530, 550 (2002).

In the present case, the trial court issued a pretrial ruling that certain testimony regarding Officer Cortazzo's service in Iraq and Bosnia would be admissible at trial. After Officer Cortazzo was introduced to the jury, he mentioned his military service as an explanation for the length of time he

has been performing police work. Specifically, Officer Cortazzo testified that "two of those years I was not with the department. I was deployed overseas, combat operations in Iraq with the military." N.T., Trial, 2/29/12- 3/1/12, at 116. Additionally, when he was asked if he had any prior police experience, he replied, "other than with the police department in Reading, no, just my military experience." ***Id***.

Because the length of his employment and previous experience in conducting traffic stops later explained why he removed Berete from his vehicle to frisk for weapons, which led to the foot chase and discovery of the stolen firearm, this testimony was relevant to explain why Officer Cortazzo felt that a frisk was necessary. As such, this testimony, a mere passing reference to Officer Cortazzo's military service, served a relevant purpose and was thus properly admitted. Furthermore, we find that the admission of this testimony created no prejudice to Berete as the trial court specifically instructed the jury regarding the assessment of the credibility of witnesses at length. ***See id***., at 361-365.

Likewise, we find that the trial court properly permitted the Commonwealth to inquire into Berete's licensing status to carry a firearm on redirect examination. "The scope of redirect examination is largely within the discretion of the trial court." ***Commonwealth v. Fransen***, 42 A.3d 1100, 1117 (Pa. Super. 2012) (en banc) (citation omitted). ***See also*** 9 Standard Pennsylvania Practice 2d § 54:125.

Here, Berete was charged with *inter alia* Firearms Not to be Carried Without a License, 18 PA.CONS.STAT.ANN. § 6106(a)(1). In order to prove the elements of the offense, the Commonwealth must introduce evidence that the firearm possessed by Berete was unlicensed and was operable. ***See Commonwealth v. Parker***, 847 A.2d 745 (Pa. Super. 2004). On redirect examination, the trial court permitted the Commonwealth to question Officer Cortazzo regarding whether the gun found by Berete was test fired, was stolen and whether Berete possessed a license to carry the firearm concealed. ***See*** N.T., Trial, 2/29/12-3/1/12, at 167-170.

While Berete argues that this testimony was improper, the Commonwealth introduced testimony that the gun was stolen and operable through other witnesses at trial, rendering Officer Cortazzo's testimony on these subjects cumulative. ***See id***., at 189-191, 208-210. Because the Commonwealth overlooked the admission of the certification that Berete did not have a license to carry the firearm on direct examination, the trial court properly exercised its discretion in permitting the introduction of this evidence on redirect examination. As such, this claim too must fail.

In his last claim on appeal, Berete argues that the trial court abused its discretion in imposing an aggravated range sentence. "Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a

sentence is waived." ***Commonwealth v. Kittrell***, 19 A.3d 532, 538 (Pa. Super. 2011).

In ***Commonwealth v. Ahmad***, 961 A.2d 884 (Pa. Super. 2008), this Court explained that

> [a] challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on the merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, [that] the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We examine an appellant's [Pa.R.A.P.] 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the reasons for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits.

Id., at 886-887 (citations, quotation marks and footnote omitted; emphasis in original).

Instantly, Berete has included the requisite Rule 2119(f) statement in his appellate brief. Therein, he avers that the sentencing court "did not consider any other statutory factor other than the serious natures of Berete's criminal actions." Appellant's Brief, at 18. Specifically, Berete avows that the sentencing court failed to offer reasons for its sentence that comport with 42

PA.CONS.STAT.ANN. § 9721(b). ***See id***. Additionally, Berete contends that the sentencing court failed to state reasons for the imposition of an aggravated range sentence. ***See id***. Such a claim raises a substantial question for our review. ***See Commonwealth v. Rhodes***, 990 A.2d 732, 745 (Pa. Super. 2009).

Our standard of review is as follows:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Bowen, 55 A.3d 1254, 1263, (Pa. Super. 2012) (citation omitted).

The record does not support Berete's claim. The trial court fully complied with 42 PA.CONS.STAT.ANN. § 9721(b) in fashioning an individualized sentence for Berete that took into consideration all the relevant factors. The trial court considered numerous factors in sentencing Berete, including the sentencing guidelines. ***See*** N.T., Sentencing, 3/20/12, at 4-10. Additionally, the trial court specifically noted that it considered the age of the defendant, the nature of the offense, the information contained within the adopted presentence reports, and the facts of the case. ***See id***., at 13-15. While Berete's immigration status did not factor into the formulation of Berete's sentence, the trial court found it significant that while Berete was on federal

probation for possessing a firearm, he possessed yet another loaded, stolen firearm and escaped from police with the use of force. ***See id***., at 14-15. We can find no abuse of discretion in the trial court's sentencing scheme. Accordingly, this claim fails.

Judgment of sentence affirmed.