NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ABDOU SALAM NDOYE,	:	No. 1513 MDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, July 23, 2013,
in the Court of Common Pleas of Cumberland County
Criminal Division at No. CP-21-CR-0002896-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED AUGUST 15, 2014**

Abdou Salam Ndoye appeals from the judgment of sentence entered on July 23, 2013 in the Court of Common Pleas of Cumberland County following his convictions of unlawful possession with intent to deliver a controlled substance (cocaine), unlawful possession of a controlled substance, and one count of unlawful possession of drug paraphernalia. We affirm.

On September 26, 2012, at 2:55 a.m., Troopers Keith Rudy and Kory Wardrop were traveling on routine patrol and observed a green Volvo traveling in the opposite direction with its license plate lights out and "heavily tinted windows." (Notes of testimony, 5/13-15/13 at 46-51.) Trooper Rudy turned his vehicle around to catch up with the Volvo, which

* Retired Senior Judge assigned to the Superior Court.

failed to pull over immediately after the trooper activated the emergency lights.

Appellant was the driver of the vehicle and his co-defendant, Summer Holt, was in the passenger seat. Trooper Rudy noted the vehicle had an illegal, clear plastic license plate cover. Appellant was unable to produce documentation sufficient to establish identity. Upon speaking with the occupants, Trooper Rudy noted a "faint odor of marijuana inside the vehicle." (***Id.*** at 51.) As appellant could not be identified, Trooper Rudy requested that he exit the vehicle so they could speak "so the passenger would not be able to hear [their] conversation." (***Id.*** at 52.) Trooper Wardrop spoke to Holt who remained in the vehicle.

Appellant provided the trooper with his insurance information and vehicle registration, which confirmed that the vehicle belonged to appellant's mother.[1] (***Id.*** at 53, 99.) The trooper testified that during the conversation appellant appeared "very nervous" as he continually dropped items, changed his story, could not stand still, and could not look at the trooper. Trooper Rudy testified that appellant was "a mess." (***Id.*** at 58-59.) Trooper Rudy opined that this behavior indicated that appellant was "very nervous" and "excessively nervous." (***Id.*** at 59-60.)

At this point, Holt was also asked to exit the vehicle. When asked about their travel plans, she provided a different version of events than

[1] It was later verified that appellant lived in Cincinnati.

appellant. (***Id.*** at 62.) Holt also exhibited signs of being nervous, as she looked away from the trooper when she spoke, could also not stand still, and was pacing. (***Id.*** at 63.) Holt admitted to the trooper, after being asked about the odor of marijuana, that appellant had smoked marijuana in New York prior to their leaving. (***Id.*** at 66.)

The trooper then spoke again with appellant who changed his story. When asked about the odor of marijuana, he now admitted to smoking marijuana in New York. (***Id.*** at 68.) Trooper Rudy then requested permission to search the vehicle. (***Id.*** at 68-71.) He testified that this request was based on their behavior and a faint smell of marijuana that emanated from the vehicle and appellant. Appellant agreed and signed the consent to search forms. During the search, the trooper observed that the radio of the vehicle appeared "extremely loose." (***Id.*** at 72.) He removed the radio and discovered a bag of cocaine that was hidden behind the car radio. (***Id.*** at 72.)

Appellant and Holt were arrested. At the Pennsylvania State Police Barracks, Holt provided a statement post-***Miranda***[2] and averred that she had purchased the cocaine in appellant's absence, stating it solely belonged to her, claiming she had a daily habit.[3] (***Id.*** at 90, 92, 100.) She gave the

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] A search warrant was obtained but no evidence of drug paraphernalia for the use of cocaine was found in the vehicle. (***Id.*** at 95.)

officer a needle, a spoon, and a small amount of marijuana that she had placed in her underwear. (***Id.*** at 88.) She also admitted to throwing a small bag of cocaine over the guardrail at the stop. (***Id.*** at 90.) During the course of the interviews, both roadside at the vehicle and at the police barracks, appellant could not provide a consistent version of events that transpired during their trip to and from New York City.

Following a joint jury trial, appellant was found guilty of unlawful possession with intent to deliver a controlled substance, unlawful possession of a controlled substance, and one count of unlawful possession of drug paraphernalia. A sentencing hearing was held on July 23, 2013; at count one, he was sentenced to a term of incarceration of 5 to 10 years and a fine of $15,000; at count two, he was sentenced to a concurrent sentence of 6 to 12 months and a fine of $500; no further penalty was imposed on count three. This timely appeal followed. Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

The sole issue on appeal is as follows:

> Whether the court below erred by overruling the defense objections and limiting cross examination of the Pennsylvania State Police Trooper regarding his characterization of the defendant as "very" nervous and "excessively" nervous where the definition of the alleged "excessive" nervousness was first developed by the Commonwealth, and was virtually the only evidence presented to allege that the defendant had

> any personal knowledge of the presence of the drugs?

Appellant's brief at 4.

The scope of cross-examination lies largely within the discretion of the trial court, whose ruling will not be reversed absent a clear abuse of discretion or error of law. ***Commonwealth v. Snoke***, 580 A.2d 295, 300 (Pa. 1990). As a general rule, a party is entitled to bring out on cross-examination every circumstance relating to the fact that the adverse witness has been called to prove. ***Commonwealth v. Green***, 581 A.2d 544, 558 (Pa. 1990). In criminal cases, the right of cross-examination extends not only to the matters testified to on direct-examination, but also to any facts tending to refute inferences or deductions arising from those matters. ***Id.*** at 558-559.

Appellant directs our attention to the following portions of testimony. First, during cross-examination, the defense attempted to question Trooper Rudy regarding his characterization of nervousness and his definitions thereof.

> [Defense counsel]:
>
> Q: So in your experience, this particular stop happened in a place that was far from his home. Would a person more likely be nervous when he was far away from home and stopped?
>
> [The prosecutor]: Objection, Your Honor, calls for speculation.

> The Court: Sustained.
>
> Q: May it please the Court, he's testified about unusual elements of nervousness. I would like to establish that that would be appropriate for the circumstances.
>
> The Court: You may be able to establish that. You may be able to argue that, but you're calling for speculation. Asking something that may be in the trooper's knowledge, that's one thing, but just asking him a bunch of factors, are you more nervous at 2:00 a.m. or 3:00 a.m., is not really going to get us anywhere. You can certainly argue that.

Notes of testimony, 5/13-5/15/13 at 126-127.

Additionally, on redirect examination of the trooper, the issue of nervousness arose.

> [The prosecutor]: Now you testified he started -- I believe on direct that Mr. Ndoye was acting nervous, correct?
>
> A: Correct.
>
> Q: And he was dropping things, right?
>
> A: That's correct
>
> Q: And at 6 minutes you still hadn't even –
>
> The Court: Mr. Berry.
>
> [Defense counsel]: We keep coming back to nervous.
>
> The Court: He can describe what he sees. You can both argue why.
>
> [Defense counsel]: I would just like –

> The Court: I'm sure the attorneys are going to argue why he's nervous and why he is not nervous. He can describe what he sees. Overruled.

Id. at 155-156.

Appellant argues that the trial court erred in sustaining the Commonwealth's objection to cross-examination regarding the characterization of appellant's nervousness as it called for the witness to speculate. Appellant merely avers that he was precluded from demonstrating the trooper's "unusual perspective" involving when people are "more nervous." (Appellant's brief at 12.)

At the outset, we note appellant offers no case law of any kind in support of his argument. Our rules of court require an appellant to establish a basis for the relief sought by reference to pertinent legal authorities. ***See*** Pa.R.A.P. 2119(b). Appellant has failed to do so. "This Court will not act as counsel and will not develop arguments on behalf of an appellant." ***Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa.Super. 2007).

Nevertheless, we find no abuse of discretion. The judge properly sustained objections to questions which clearly called for speculation on behalf of the trooper. A witness may not speculate, explain, or opinionate; he is competent to testify only to what he perceives. ***Commonwealth v. Galloway***, 485 A.2d 776, 781 (Pa.Super. 1984). The officer's opinion as to appellant's extreme nervousness was based on his perception. As the trial court opined,

> the question of nervousness falls squarely into the lap of the jurors' common sense and everyday knowledge. We are confident that there is not a soul alive who is not anxious upon hearing a siren and seeing flashing lights in the rearview mirror, even if one is only two blocks from home.

Trial court opinion, 12/27/13 at 4. It would have been improper for the trooper to opine on the subject of nervousness in relation to a fictional person as opposed to what he saw and did during the vehicle stop.

Additionally, the trial court reminded defense counsel that he could make an argument as to why appellant was nervous at the stop.

> You may be able to argue that, but you're calling for speculation. Asking something that may be in a trooper's knowledge, that's one thing, but just asking him a bunch of factors, are you more nervous at 2:00 a.m. or 3:00 a.m., is not really going to get us anywhere. You can certainly argue that.

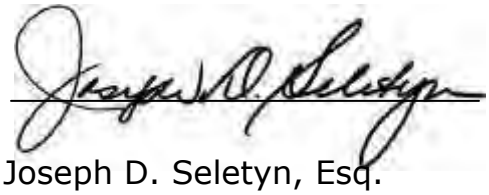
Notes of testimony, 5/13-15/13 at 126-127.

Furthermore, we disagree with appellant's repeated statement that "excessive nervousness" was the only evidence offered that related to appellant's knowledge of the hidden drugs. For instance, the Commonwealth also presented testimony relating to appellant's proximity to the drugs found in his mother's car, the circumstances of appellant's travel, and the differing versions of events appellant provided to the trooper. The trooper's assessment that appellant appeared excessively nervous was not the only incriminating evidence presented.

Finding no abuse of discretion, we affirm.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/15/2014