

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KIMOTHY LAMONT SMITH

Appellant

No. 1051 MDA 2013

Appeal from the Judgment of Sentence May 13, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0002781-2011

BEFORE: MUNDY, OLSON and STABILE, JJ.

MEMORANDUM BY OLSON, J.:

FILED APRIL 04, 2014

Appellant, Kimothy Lamont Smith, appeals from the judgment of sentence entered on May 13, 2013. We affirm in part, reverse in part, vacate Appellant's judgment of sentence, and remand for resentencing.

During Appellant's jury trial, the Commonwealth presented the testimony of Pennsylvania State Trooper Mark Prushinski. Trooper Prushinski testified that he was on routine patrol in Simpson, Pennsylvania on Wednesday, November 9, 2011 and, during this time, the Trooper was wearing a full uniform and was operating a marked police vehicle. N.T. Trial, 12/12/12, at 37-38. The Trooper testified that he exited his vehicle to investigate an abandoned car and, when he did so, he was able to hear an off-road motorbike coming towards him. *Id.* at 38. As the Trooper testified:

I see the vehicle come up Morris Avenue and make a right onto Prospect Street. And at the time I'm standing right in

the middle of the road. So I see that it's obviously an off-road dirt bike and there's things that I look for immediately. It has no light, it has no rearview mirrors, and there's always a bracket on the back that a license plate would go on if a person was going to make it street legal. And although I couldn't see the back of it, I could see as it rounded the corner that the typical spot where the bracket is wasn't there. So at that point I put my hand up and I told the individual to stop the motorbike. And he looked at me, he slowed down but he kept going. So at that point I basically screamed at him, I said: Stop the bike, don't make me chase you. And although he slowed down a little more, about 30 feet from me, he finally came to a stop.

Id. at 39.

Trooper Prushinski testified that he approached the driver and informed the driver of the fact that "you can't have these things on the road . . . [t]here's no license on it" and that the driver was "driving illegally a motor dirt bike on the road." **Id.** at 39 and 52. The Trooper then told the driver to get off of the bike and to produce his license, registration, and proof of insurance. **Id.** at 40. The driver told the Trooper that he had left his license behind at his house. **Id.** The Trooper testified as to what occurred next:

I said: Okay, well, what is your name? And he explained to me the first thing he gave me was Kylen, Kylen Smith is how he pronounced it. And I didn't know how to spell Kylen so I asked him to spell it. . . . I said: Well, spell it one more time so I'm getting it correctly. He did. So I ran [the name] in the car, we have a computer in the car that we can run names . . . and I got no record. So at that point I asked him, I said: Well, it's not coming up Kylen, I said. He spelled it again for me. I said, well, let me check it, make sure I didn't spell it wrong. I ran it again. No record. So I said: Well, it's not coming up as Kylen so if you have a Pennsylvania license it must be under a different name And he said: Try Kinothy. And I said: Well, spell that for

me because I never heard that name before either. . . . And he spelled: K-I-N-O-T-H-Y. So he gave me his name as Kinothy Smith. And he gave me the date of birth that he provided, I believe, was June 22, 1985. I ran that again. No record.

So I'm starting to wonder why I'm not getting any record, but he's insisting he has a Pennsylvania driver's license. So I went up again, I said: Look [], last chance, none of this is coming up, something is not right. And he finally tells me that his name is Kimothy: K-I-M-O-T-H-Y.

Id. at 40-41.

After inputting Appellant's correct name into the computer, the Trooper learned that Appellant's name "did match the date of birth but, however, it was not a driver's license. It was an identification card and it also came back suspended." **Id.** at 43. Further, the Trooper learned that Appellant was not certified to operate a motorcycle on the roadways. **Id.**

As the Trooper testified, he approached Appellant and again informed Appellant of the fact that the motorbike could not be driven on the road. In response, Appellant told the Trooper that he had just purchased the motorbike and that he was bringing the bike home. **Id.** The Trooper then requested that Appellant produce the title to the bike and the bill of sale. Appellant told the Trooper that he did not have either document because he had purchased the vehicle from a man down the street, who was named "George." **Id.** at 44.

Trooper Prushinski testified that he ran the Vehicle Identification Number on the motorbike and discovered that the vehicle had been reported as stolen. **Id.** at 46. Further, Trooper Prushinski testified that, while he was

investigating the matter, an individual approached the Trooper and told him that Appellant had been driving the motorbike “up and down the streets” for at least the past month. *Id.* at 47.

The Trooper arrested Appellant and the Commonwealth charged Appellant with a number of crimes, including: receiving stolen property, providing false identification to law enforcement authorities, driving an unregistered vehicle, driving a vehicle without a license, driving a motorcycle without a Class M license, failing to notify the Department of Transportation of a change in address, driving while operating privilege is suspended or revoked, operating a vehicle without the required financial responsibility, and operating a vehicle without official certificate of inspection.¹ Appellant proceeded to a bifurcated trial, where the jury was tasked with determining whether the Commonwealth had proven Appellant guilty of receiving stolen property and/or providing false identification to law enforcement authorities – and the trial court was tasked with determining whether the Commonwealth had proven Appellant guilty of the Vehicle Code charges.

The Commonwealth presented the above evidence during Appellant’s trial. Further, during trial, Appellant testified on his own behalf. As Appellant testified, he provided a false name to the Trooper because he knew that it was illegal to operate an off-road dirt bike on a street and he

¹ 18 Pa.C.S.A. §§ 3925(a) and 4914(a) and 75 Pa.C.S.A. §§ 1301(a), 1501(a), 1504(a), 1515(a), 1543(a), 1786(f), and 4703(a), respectively.

“just didn’t want to get a ticket for driving on the road.” N.T. Trial, 12/12/12, at 81 and 85.

At the conclusion of trial, the jury found Appellant not guilty of receiving stolen property, but guilty of providing false identification to law enforcement authorities. The trial court found Appellant guilty of all Vehicle Code charges.

On May 13, 2013, Appellant proceeded to sentencing. The trial court sentenced Appellant to serve an aggregate term of six to 18 months in prison, with the sentence constructed in the following manner: a term of three to 12 months in prison for the “providing false identification to law enforcement authorities” conviction; a consecutive term of 45 to 90 days in prison for the “driving without a license” conviction; and, a consecutive term of 45 to 90 days in prison for the “driving while operating privilege is suspended or revoked” conviction.

Following the denial of Appellant’s post-sentence motion, Appellant filed a timely notice of appeal to this Court. Appellant has numbered four claims on appeal:

1. Whether there was insufficient evidence to convict [Appellant of] false identification to law enforcement authorities since [Appellant] provided information about his identity prior to being informed he was subject to an official investigation[?]
2. Whether the charge of false identification to law enforcement authorities was improperly established by surrounding circumstances instead of actual evidence establishing each element of the offense[?]

3. Whether the trial court committed an error of law by entering inconsistent and/or conflicting verdicts on two [] summary convictions, namely driving while operating privilege is suspended or revoked and driving without a license, since a person with a valid license, albeit suspended, may not also be convicted [of] driving without a license under 75 Pa.C.S.A. § 1501[?]

4. Whether the trial court imposed an illegal sentence when it sentenced [Appellant] to [45 to 90] days in jail for 18 Pa.C.S.A. § 1543(a) since the statute only allows a sentence to pay a fine of \$200.00[?]

Appellant's Brief at 4 (some internal capitalization omitted).²

We will consider Appellant's first two claims together, as both claims challenge the sufficiency of the evidence supporting Appellant's "providing false identification to law enforcement authorities" conviction.

We review Appellant's sufficiency of the evidence claim under the following standard:

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. In applying the above test, we may not weigh the evidence and substitute our judgment for [that of] the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every

² The trial court ordered Appellant to file and serve a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and, within his Rule 1925(b) statement, Appellant listed the first three numbered claims that he currently raises on appeal. Appellant did not include his illegal sentence claim in his Rule 1925(b) statement.

possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, 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.

Commonwealth v. Brown, 23 A.3d 544, 559-560 (Pa. Super. 2011) (*en banc*), quoting ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805-806 (Pa. Super. 2008).

According to Appellant's first two claims on appeal, the evidence was insufficient to support his "providing false identification to law enforcement authorities" conviction because – at the time Appellant provided the false identification – the Trooper had not yet explicitly informed Appellant that Appellant was "the subject of an official investigation of a violation of law." Appellant's Brief at 11-12. This claim fails.

The crime of false identification to law enforcement authorities is defined as follows:

A person commits an offense if he furnishes law enforcement authorities with false information about his identity after being informed by a law enforcement officer who is in uniform or who has identified himself as a law enforcement officer that the person is the subject of an official investigation of a violation of law.

18 Pa.C.S.A. § 4914(a).

As our Supreme Court has held:

Under the plain terms of [Section 4914(a)], three conditions must be satisfied before an individual will be found to have violated the statute by providing false information about his identity. First, [the law enforcement officer must either be in uniform or,] if the law enforcement officer is not in uniform, the officer must identify himself as a law enforcement officer. Second, the individual must be informed by the law enforcement officer that he is the subject of an official investigation of a violation of law. Third, the individual must have furnished law enforcement authorities with false information after being informed by the law enforcement officer that he was the subject of an official investigation of a violation of law.

In the Interest of D.S., 39 A.3d 968, 974 (Pa. 2012); ***see also Commonwealth v. Barnes***, 14 A.3d 128, 131 (Pa. Super. 2011) (“[Section 4914] does not make it illegal to provide to a law enforcement authority false information as to one's identity unless and until one is first apprised that he is the subject of an official investigation of a violation of law”).

Thus, according to the plain statutory language of Section 4914, an individual may not be “‘informed’ of an officer’s identity and/or purpose by surrounding circumstances.” ***D.S.***, 39 A.3d at 974-975. Instead, the required information “must come from the law enforcement officer.” ***Id.*** at 975.

According to Appellant, the evidence was insufficient to support his Section 4914(a) conviction because – at the time Appellant provided the false identification – the Trooper had not yet explicitly informed Appellant that Appellant was “the subject of an official investigation of a violation of

law.” The claim is, however, meritless. Indeed, Trooper Prushinski testified that, when he initially stopped Appellant’s off-road dirt bike, he was in uniform and he immediately informed Appellant: 1) of the fact that “you can’t have these things on the road . . . [t]here’s no license on it” and 2) that the reason he stopped Appellant’s vehicle was because Appellant was “driving illegally a motor dirt bike on the road.” N.T. Trial, 12/12/12, at 39 and 52 (“[Appellant’s counsel]: So at that point you informed [Appellant], I guess, that he is driving illegally a motor dirt bike on the road[?] [Trooper Prushinski]: Yes.”). Thus, when Trooper Prushinski initially stopped Appellant’s motorbike, the Trooper **explicitly informed** Appellant of the fact that Appellant was “the subject of an official investigation of a violation of law” (the law in this case being a violation of the Vehicle Code). Further, since the Commonwealth presented evidence that Appellant provided Trooper Prushinski with a false name “after being informed by the law enforcement officer that he was the subject of an official investigation of a violation of law,” we conclude that the evidence was sufficient to support Appellant’s false identification to law enforcement conviction. **D.S.**, 39 A.3d at 974. Appellant’s first two claims on appeal thus fail.

Next, Appellant claims that the evidence was insufficient to support his driving without a license conviction, as his “license was [merely] suspended.” Appellant’s Brief at 17. This claim also fails.

In relevant part, the crimes of "driving without a license" (75 Pa.C.S.A. § 1501) and "driving while operating privilege is suspended or revoked" (75 Pa.C.S.A. § 1543) are defined as follows:

§ 1501. Drivers required to be licensed

(a) General rule.--No person, except those expressly exempted, shall drive any motor vehicle upon a highway or public property in this Commonwealth unless the person has a driver's license valid under the provisions of this chapter. As used in this subsection, the term "public property" includes, but is not limited to, driveways and parking lots owned or leased by the Commonwealth, a political subdivision or an agency or instrumentality of either.

. . .

(d) Penalty.--Any person violating subsection (a) is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of \$200, except that, if the person charged furnishes satisfactory proof of having held a driver's license valid on the last day of the preceding driver's license period and no more than one year has elapsed from the last date for renewal, the fine shall be \$25. No person charged with violating subsection (a) or (b) shall be convicted if the person produces at the office of the issuing authority within 15 days of the violation:

(1) a driver's license valid in this Commonwealth at the time of the violation; or

(2) if the driver's license is lost, stolen, destroyed or illegible, evidence that the driver was licensed at the time of the violation.

75 Pa.C.S.A § 1501(a) and (d).

§ 1543. Driving while operating privilege is suspended or revoked

(a) General rule.--Except as provided in subsection (b), any person who drives a motor vehicle on any highway or trafficway of this Commonwealth after the commencement of a suspension, revocation or cancellation of the operating privilege and before the operating privilege has been restored is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of \$200.

75 Pa.C.S.A. § 1543(a).

Of note, Section 1501 and Section 1543 of the Vehicle Code draw a distinction between driving without a “driver’s license” and driving without “operating privileges.” Thus, Section 1501 prohibits an individual from driving a motor vehicle without “a **driver’s license** valid under the provisions of this chapter,” while Section 1543 prohibits an individual from driving a motor vehicle “after the commencement of a suspension, revocation or cancellation of the [driver’s] **operating privilege.**” The Vehicle Code defines the terms “driver’s license” and “operating privilege” in the following manner:

“Driver’s license.” A license or permit to drive a motor vehicle issued under [Title 75].

. . .

“Operating privilege.” The privilege to apply for and obtain a license to use as well as the privilege to use a vehicle on a highway as authorized in [Title 75].

75 Pa.C.S.A. § 102 (emphasis added).

In this case, the Commonwealth presented evidence that, on the day in question, Appellant drove a motor vehicle **without a valid driver’s license**. *See, e.g.*, N.T. Trial, 12/12/12, at 94-95 and 97; Appellant’s Brief

at 16-17. Indeed, Trooper Prushinski testified that, when he ran Appellant's name through the Pennsylvania State Police data system, the Trooper learned that Appellant **did not** have "a driver's license. **It was an identification card** and it also came back suspended." N.T. Trial, 12/12/12, at 43 (emphasis added). Further, at trial, Appellant admitted that – when he was arrested – he "**didn't have a license**" and that he simply possessed an "identification card." *Id.* at 95 (emphasis added). The evidence was thus sufficient to support Appellant's "driving without a license" conviction, as the Commonwealth proved that – when Appellant drove his motorbike "upon a highway . . . in this Commonwealth" – Appellant did not "[have] a driver's license valid under the provisions of this chapter." 75 Pa.C.S.A § 1501(a).

For Appellant's final argument on appeal, Appellant contends that his sentence for "driving while operating privilege is suspended or revoked" (*per* 75 Pa.C.S.A. § 1543) is illegal. Appellant did not raise this illegal sentencing claim in his court-ordered Pennsylvania Rule of Appellate Procedure 1925(b) concise statement of errors complained of on appeal. Nevertheless, "challenges to an illegal sentence can never be waived and may be raised *sua sponte* by this Court." ***Commonwealth v. Tanner***, 61 A.3d 1043, 1046 (Pa. Super. 2013) (internal quotations and citations omitted). Therefore, we will consider Appellant's claim that his sentence for "driving while operating privilege is suspended or revoked" is illegal; we will also, *sua*

sponte, consider whether Appellant's sentence for "driving without a license" (*per* 75 Pa.C.S.A. § 1501) is illegal.

We have stated:

The scope and standard of review applied to determine the legality of a sentence are well established. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Leverette, 911 A.2d 998, 1001-1002 (Pa. Super. 2006) (internal citations omitted).

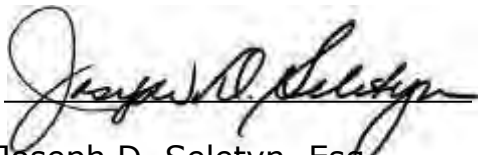
Appellant was convicted of "driving without a license" and "driving while operating privilege is suspended or revoked." With respect to both of the convictions, the trial court sentenced Appellant to serve a term of 45 to 90 days in prison. However, the Commonwealth presented no evidence that Appellant had a prior conviction for either offense. **See** 75 Pa.C.S.A. § 6503 ("Subsequent convictions of certain offenses"). Therefore, under the plain language of Section 1501 and Section 1543, the trial court only had the statutory authority to sentence Appellant "to pay a fine of \$200" for each conviction. 75 Pa.C.S.A §§ 1501(d) and 1543(a). Appellant's sentences for both his Section 1501 and Section 1543 convictions are thus illegal and the sentences must be vacated.

Further, since the trial court ordered that Appellant serve his Section 1501 and Section 1543 sentences consecutive to one another and

consecutive to his “false identification to law enforcement authorities” sentence, our disposition has the potential to disturb the trial court’s overall sentencing scheme. Therefore, we vacate Appellant’s judgment of sentence and remand for resentencing. ***Commonwealth v. Williams***, 997 A.2d 1205, 1210-1211 (Pa. Super. 2010) (“if a correction by this Court may upset the sentencing scheme envisioned by the trial court, the better practice is to remand [for resentencing]”) (internal quotations, citations, and corrections omitted).

Affirmed in part and reversed in part. Judgment of sentence vacated. Case remanded for resentencing. 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: 4/4/2014