APPENDIX A

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KASHIF ROBERTSON	:	
Appellant	:	No. 1161 MDA 2021

Appeal from the Judgment of Sentence Entered August 25, 2021
In the Court of Common Pleas of Dauphin County Criminal Division at
No(s): CP-22-CR-0002292-2019

BEFORE: BENDER, P.J.E., STABILE, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.: **FILED: AUGUST 16, 2022**

Kashif Robertson appeals from the August 25, 2021 modified, aggregate judgment of sentence of 2½ to 5 years' imprisonment, followed by 5 years' probation, imposed after a jury found him guilty of two counts each of possession with intent to distribute a controlled substance ("PWID") and possession of a controlled substance, and one count of possession of drug paraphernalia.[1] After careful review, we affirm the judgment of sentence.

The suppression court summarized the factual background of this case as follows:

> [O]n February 2, 2019, [Appellant] was pulled over for a traffic stop by Officer Chad McGowan of the

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* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. §§ 780-113(a)(30), (a)(16), and (a)(32), respectively.

APPENDIX A

> Harrisburg Police Department for illegal window tint. During the traffic stop, Officer McGowan asked [Appellant] if he was active with probation or parole. [Appellant] responded in the negative. When Officer McGowan returned to his vehicle, he informed Adult Probation Officers [(hereinafter "PO")] [Daniel] Kinsinger and [Bruce] Cutter that [Appellant] indicated that he was not active with probation or parole. [POs] Kinsinger and Cutter knew [Appellant] to be on probation. Officer McGowan returned to [Appellant's] vehicle, returned his documents, and told [Appellant] that he was free to leave.
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> Before [Appellant] left, [POs] Kinsinger and Cutter approached the vehicle to make contact with [Appellant]. [PO] Cutter opened [Appellant's] door and asked him to step out of the vehicle after informing [Appellant] that he was in violation of his conditions of probation. Once out of the vehicle, [POs] Kinsinger and Cutter performed a search of [Appellant]'s vehicle. Inside, they found a purple Crown Royal bag containing cash totaling $8,000 and an empty cigarette container in the center console area that contained loose marijuana.
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> A search of the [Appellant] showed that he was carrying cash totaling $4,598.00 in both his pants pocket and his wallet. The [POs] then took [Appellant] to the front of Officer McGowan's vehicle. At this time, Officer McGowan smelled an odor of marijuana coming from [Appellant's] person. [PO] Kinsinger conducted a second search of [Appellant's] person and felt a hard lump in [Appellant's] groin area. At this time, [Appellant] was detained and placed in handcuffs. As handcuffs were being placed on [Appellant], [Appellant] attempted to break free and run. The officers were able to detain [Appellant]. After [Appellant] was secured, [PO] Kinsinger found six baggies of cocaine and one baggie of marijuana in [Appellant's] groin area.

Suppression court opinion, 2/10/21 at 1-2.

The trial court summarized the relevant testimony presented at trial as follows:

> Amber Gegg (hereinafter, Ms. Gegg) of the Pennsylvania State Police Harrisburg Regional Laboratory offered expert testimony as a drug analyst. Ms. Gegg analyzed the narcotics that were sent to her regarding Appellant. Through testing, Ms. Gegg was able to identify the white substances found in the plastic baggies as cocaine and marijuana. The powder and crack cocaine weighed approximately 26 grams.
>
> Detective John Goshert (hereinafter, "Detective Goshert") of the Dauphin County Criminal Investigation Division offered expert testimony as an expert in the field of street level drug trafficking. Detective Goshert testified about the difference between powder cocaine and crack cocaine. Detective Goshert testified that crack cocaine is cocaine base. Crack cocaine, or cocaine base, is a smokable form of cocaine that holds its shape. Powder cocaine is cocaine that is in a powder form that is either dissolved by a heat source in water in order to be injected or smoked or snorted in its powder. One can differentiate between crack cocaine and powder cocaine by looking at the physical consistency of it. Detective Goshert testified that the Pennsylvania State Police Laboratory does not differentiate between crack cocaine and powder cocaine on their reports. Detective Goshert further testified that Appellant did not have any taxable income from the date Appellant was pulled over by Officer McGowan and prior.
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> Appellant testified that he was in the process of returning drugs that he picked up that day from a dealer when he was pulled over by Officer McGowan. Appellant stated that he tested the drugs and he was not satisfied with the quality. He further testified that he had a large amount of cash in his vehicle because he worked as a barber and the money was to pay taxes.

Trial court opinion, 11/1/21 at 3-4 (citations to notes of testimony omitted).

On August 1, 2019, Appellant filed an ***omnibus*** pretrial suppression motion challenging the legality of the traffic stop; the scope and duration of the traffic stop; the actions of the probation officers at the scene of the arrest; and the legality of the initial pat-down of his person. Appellant filed a supplemental motion on October 29, 2019. Following a hearing, the suppression court denied Appellant's suppression motion on August 11, 2020. On October 7, 2020, Appellant filed a "Petition for Disqualification (Recusal) of Judge [Deborah E. Curcillo]," which was ultimately denied on October 15, 2020.

Thereafter, on March 10, 2021, Appellant proceeded to a jury trial and was found guilty of two counts each of PWID and possession of a controlled substance and one count of possession of drug paraphernalia. On May 26, 2021, the trial court sentenced Appellant to an aggregate term of 4 to 8 years' imprisonment, followed by 5 years' probation. On June 7, 2021, Appellant filed a post-sentence motion to modify his sentence. Following a hearing on August 25, 2021, the trial court modified Appellant's judgment of sentence and resentenced him to 2½ to 5 years' imprisonment, followed by 5 years'

probation. This timely appeal followed on September 2, 2021.[2] Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

> 1. Did the [suppression] court err when it found reasonable suspicion existed to stop [Appellant's] vehicle for a suspected window tint violation, where the seizing officer failed to point to "specific and articulable facts" which led him to suspect criminal activity was afoot for a violation of the inspection manual?
>
> 2. Did the [suppression] court err when it denied [Appellant's] OPTM for the Commonwealth's failure to establish a reasonable suspicion for Dauphin County Adult Probation to seize him after Harrisburg City Police advised him that he was free to leave without an oral or written warning?
>
> 3. Did the [suppression] court err when it denied [Appellant's] OPTM by finding that the duration of the traffic stop was proper as the focus of the stop was the suspected window tint violation, and any inquiry as to [Appellant's] status on supervision or conversations with probation and parole following the officer's initial encounter as well as the duration of the search unnecessarily prolonged the traffic stop?
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> 4. Did the [suppression] court err when it denied [Appellant's] OPTM for suppression of the evidence when it found that probation and parole did not act like "stalking horses" for the police by circumventing the warrant

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[2] We note that although Appellant purports to appeal from the March 10, 2021 guilty verdict, "[i]n a criminal action, appeal properly lies from the judgment of sentence made final by the denial of post-sentence motions." ***See Commonwealth v. Shamberger***, 788 A.2d 408, 410 n.2 (Pa.Super. 2001) (***en banc***), ***appeal denied***, 800 A.2d 932 (Pa. 2002).

requirement based on reasonable suspicion, instead of the heightened standard of probable cause, as the search was nothing more than a ruse for a police investigation[?]

5. Did the [suppression] court err when it denied [Appellant's] OPTM when it found that probation and parole did not exceed the scope of ***Terry*** when the protective search of [Appellant] went beyond what was necessary to determine if he was armed[?]

6. Did the [suppression] court err when it denied [Appellant's] OPTM when it found that the second search of [Appellant] by probation shaking out his pants did not exceed the scope of ***Terry*** or the plain feel doctrine[?]

7. Did the trial court err when it did not recuse itself from this matter due to the appearance of impartiality, bias, prejudice or ill will, where the court denied [Appellant's] right to a full suppression hearing and continuously allowed the Commonwealth to make untimely filings pertaining to the suppression matter and wholly adopted the Commonwealth's findings of fact and legal conclusions[?]

8. Did the Commonwealth present sufficient evidence that [Appellant] possessed a controlled substance, specifically crack cocaine, and that he did so with the intent to deliver it when the only scientific proof presented from the laboratory was a report that identified the substance as cocaine, not cocaine base[?]

9. Did the trial court abuse its discretion in denying counsel's post-sentence motion where the guilty verdict for Count 2 — [PWID] (crack cocaine) was against the weight of the evidence as the Commonwealth failed to present scientific evidence in the form of a laboratory report that confirmed that the substance that was tested was cocaine base[?]

Appellant's brief at 1-2.

I. Suppression Motion

Appellant's first six claims relate to the denial of his suppression motion. Our standard of review in addressing a challenge to a denial of a suppression motion is well settled.

> [Our] standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, [the appellate court is] bound by [those] findings and may reverse only if the court's legal conclusions are erroneous.

Commonwealth v. Jones, 121 A.3d 524, 526 (Pa.Super. 2015) (citation omitted; brackets in original), ***appeal denied***, 135 A.3d 584 (Pa. 2016).

"Both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution guarantee an individual's freedom from unreasonable searches and seizures." ***Commonwealth v. Bostick***, 958 A.2d 543, 550 (Pa.Super. 2008) (citation and internal quotation marks omitted), ***appeal denied***, 987 A.2d 158 (Pa. 2009). "To secure the right of citizens to be free from such intrusions, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to

justify their interactions with citizens to the extent those interactions compromise individual liberty." ***Commonwealth v. Reppert***, 814 A.2d 1196, 1201 (Pa.Super. 2002) (citation omitted).

This court has recognized three types of interactions between members of the public and the police:

> The first of these is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an "investigative detention" must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or "custodial detention" must be supported by probable cause.

Commonwealth v. Way, 238 A.3d 515, 518 (Pa.Super. 2020) (citation omitted). Thus, pursuant to the Fourth Amendment, a person may not be lawfully seized, either by means of an investigative detention or a custodial detention, unless the police possess the requisite level of suspicion.

Appellant contends that the suppression court erred in concluding that Officer McGowan possessed the requisite suspicion to stop his vehicle for a violation of the Motor Vehicle Code ("MVC"). Appellant's brief at 26-32.

The level of suspicion that a police officer must possess before initiating a traffic stop is codified in 75 Pa.C.S.A. § 6308(b), which provides as follows:

> **(b) Authority of police officer.--**Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a

> vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b).

This court has long recognized that "mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation." ***Commonwealth v. Feczko***, 10 A.3d 1285, 1291 (Pa.Super. 2010) (***en banc***) (citation omitted), ***appeal denied***, 25 A.3d 327 (Pa. 2011). Rather, police officers are required to possess probable cause to stop a vehicle based on observed violation of the MVC or otherwise non-investigable offense. ***Id.***

"Pennsylvania law makes clear that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense." ***Commonwealth v. Harris***, 176 A.3d 1009, 1019 (Pa.Super. 2017) (citation omitted).

> Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require only a probability, and not a prima facie showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009) (internal quotation marks and citations omitted).

Instantly, the suppression court found that Officer McGowan's testimony at the suppression hearing established that he possessed the requisite probable cause to stop Appellant's vehicle for illegal window tint in contravention of 75 Pa.C.S.A. § 4107(b)(2).[3] ***See*** suppression court opinion, 2/10/21 at 2-3. We agree with this assessment.

The record reflects that Officer McGowan testified that in the late afternoon hours of February 2, 2019, he was on patrol with members of the Street Crimes Unit when he observed Appellant's vehicle make a right-hand turn and began traveling east on the 400 block of Muench Street. Notes of

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[3] Section 4107(b)(2), **Operating a Vehicle With Unsafe Equipment**, provides as follows:

> (b) Other violations.--It is unlawful for any person to do any of the following:
>
> . . . .
>
> (2) Operate, or cause or permit another person to operate, on any highway in this Commonwealth any vehicle or combination which is not equipped as required under this part or under department regulations or when the driver is in violation of department regulations or the vehicle or combination is otherwise in an unsafe condition or in violation of department regulations.

75 Pa.C.S.A. § 4107(b)(2).

testimony, 2/25/20 at 4-5, 11. Officer McGowan observed that Appellant's "front driver's window was covered with an illegal aftermarket window tint." ***Id.*** at 5, 12. At this point, Officer McGowan activated his lights and sirens to conduct a traffic stop, but Appellant did not immediately pull over to the side of the road. ***Id.*** at 5-6. After pulling over, Officer McGowan observed that Appellant was physically shaking and nervous and exhibited labored breathing. ***Id.*** at 8. Officer McGowan testified that a subsequent test of the window tint revealed that it registered 17% light transmission, which is well below the 70% allowed by law. ***Id.*** at 15. Based on the foregoing, we conclude the suppression court properly determined that Officer McGowan possessed the requisite probable cause to stop Appellant's vehicle for a violation of Section 4107(b)(2).

Appellant next argues that his suppression motion should have been granted because the duration of the traffic stop was improper and Officer McGowan's inquiry as to his probation status unnecessarily prolonged the stop. Appellant's brief at 43-52. We disagree.

The United States Supreme Court has long recognized that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." ***Arizona v. Johnson***, 555 U.S. 323, 333 (2009). In ***Commonwealth v. Ellis***, 662 A.2d 1043 (Pa. 1995), our Supreme Court held that an additional ten to

fifteen minutes of detention did not constitute an impermissible extension of a traffic stop. ***Id.*** at 1049.

Here, the record reflects that the initial traffic stop in question was considerably less than fifteen minutes in length. Officer McGowan testified at the suppression hearing that although he didn't "feel comfortable putting a time limit on [the traffic stop]," he did not "feel like it was very long" and certainly not greater than fifteen minutes. Notes of testimony, 2/25/20 at 10. Moreover, Officer McGowan's inquiry of Appellant with respect to his probation status consisted of a single question, which clearly did not impermissibly extend the traffic stop. ***See id.*** at 8; ***Ellis***, 662 A.2d at 1049. Accordingly, we find that Appellant's claim must fail.

Appellant next argues that the evidence seized as a result of the traffic stop should have been suppressed because PO Kinsinger and Cutter "act[ed] like stalking horses for the police[.]" Appellant's brief at 53-66.

As discussed more fully ***infra***, the record reflects that POs Kinsinger and Cutter did not act as police officers in this matter but were merely carrying out their respective duties as probation officers after being informed by Officer McGowan that Appellant had lied about his probation status. ***See*** notes of testimony, 2/25/20 at 8-9. It is well settled in this Commonwealth that "[a] probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer." ***Commonwealth v. Parker***, 152 A.3d 309, 321 n.6 (Pa.Super. 2016) (citation omitted); ***see also***

Commonwealth v. Altadonna, 817 A.2d 1145, 1152–1153 (Pa.Super. 2003).

The crux of Appellant's remaining suppression claims is that his continued interaction with POs Cutter and Kinsinger transitioned the traffic stop into an unlawful investigative detention. Appellant's brief at 33-42, 67-71. In support of this contention, Appellant avers that POs Cutter and Kinsinger lacked reasonable suspicion to seize him; their protective search exceeded of the scope of ***Terry***[4]; and that they violated the plain feel doctrine. ***Id.***

Preliminarily, we recognize that in ***Rodriguez v. United States***, 575 U.S. 348 (2015), the United States Supreme Court examined the permissible scope of an officer's investigation during a traffic stop. The ***Rodriguez*** Court reasoned:

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called ***Terry*** stop ... than to a formal arrest. Like a ***Terry*** stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission — to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate th[at] purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed.

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[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

Rodriguez, 575 U.S. at 354 (citations and internal quotation marks omitted).

Because Appellant's claims challenge the ability of POs Kinsinger and Cutter to conduct a search of his vehicle and person, we observe the following. "[P]robationers and parolees have limited Fourth Amendment rights because of a diminished expectation of privacy." ***Parker***, 152 A.3d at 316 (citation omitted).

> [POs] need not have probable cause to search a [probationer] or his property; instead, reasonable suspicion is sufficient to authorize a search.
>
> A search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the [PO] had a reasonable suspicion that the [probationer] had committed a [probation] violation, and (2) that the search was reasonably related to the [PO's] duty.

Commonwealth v. Wright, 255 A.3d 542, 549–550 (Pa.Super. 2021) (citations and internal quotation marks omitted), ***appeal denied***, 268 A.3d 374 (Pa. 2021).

Pursuant to 42 Pa.C.S.A. § 9912(a)(1)(i), "[a] personal search of an offender may be conducted by [a PO] . . . if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision[.]" ***Id.*** Subsection 9912(d)(6) sets forth the following factors the court may consider in determining whether reasonable suspicion exists:

(i) The observations of officers.

(ii) Information provided by others.

(iii) The activities of the offender.

(iv) Information provided by the offender.

(v) The experience of the officers with the offender.

(vi) The experience of officers in similar circumstances.

(vii) The prior criminal and supervisory history of the offender.

(viii) The need to verify compliance with the conditions of supervision.

42 Pa.C.S.A. § 9912(d)(6).

In ***Parker***, a panel of this Court observed that,

> [i]n establishing reasonable suspicion, the fundamental inquiry is an objective one, namely, whether the facts available to the officer at the moment of the intrusion warrant a person of reasonable caution in the belief that the action taken was appropriate. This assessment, like that applicable to the determination of probable cause, requires an evaluation of the totality of the circumstances, with a lesser showing needed to demonstrate reasonable suspicion in terms of both quantity or content and reliability.
>
> The threshold question in cases such as this is whether the probation officer had a reasonable suspicion of criminal activity or a violation of probation prior to the search.

Parker, 152 A.3d at 318 (citations, brackets, and internal quotation marks omitted).

Here, our review of the record supports the suppression court's conclusion that Appellant was not subjected to an unlawful investigative

detention when POs Kinsinger and Cutter interacted with Appellant after Officer McGowan returned to the vehicle and informed Appellant that he planned to issue him a warning and that he would be free to leave. Viewing the totality of the circumstances, we conclude that POs Kinsinger and Cutter possessed the requisite reasonable suspicion to justify a second investigatory detention to search Appellant's vehicle and person.

Specifically, the suppression court opined as follows:

> In the instant case, [POs] Kinsinger and Cutter knew [Appellant] was on probation at the time of the traffic stop. [Notes of testimony, 2/25/20 at 27.] Officer McGowan informed them that [Appellant] stated he was not on probation. [***Id.***] At this point, [POs] Kinsinger and Cutter know that [Appellant] is lying about his probation status. They also know that [Appellant] has been pulled over for a traffic stop due to illegal window tint. Using this information, [POs] Kinsinger and Cutter decide that they have reasonable suspicion to search [Appellant] and his property. [***Id.*** at 30-31.] Thus, the probation officers had the requisite reasonable suspicion to search [Appellant's] vehicle and his person. We find [Appellant's] arguments are without merit.

Suppression court opinion, 2/10/21 at 5 (citation formatting corrected).

Following our careful review, we agree with the suppression court's assessment and adopt these well-reasoned conclusions as our own.

II. Motion to Recuse

Appellant next argues that Judge Deborah E. Curcillo was biased against him and erred by denying his motion that she recuse herself. Appellant's brief at 71. Appellant's claim is premised on his belief that Judge Curcillo "denied

[his] right to a full suppression hearing and continuously allowed the Commonwealth to make untimely filings pertaining to the suppression matter and wholly adopted the Commonwealth's findings of fact and legal conclusions." ***Id.*** This claim is meritless.

> Our standard of review of a trial court's determination not to recuse from hearing a case is exceptionally deferential. We recognize that our trial judges are honorable, fair and competent, and although we employ an abuse of discretion standard, we do so recognizing that the judge himself is best qualified to gauge his ability to preside impartially.

Commonwealth v. Harris, 979 A.2d 387, 391–392 (Pa.Super. 2009) (citations and internal quotation marks omitted).

"It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." ***Commonwealth v. White***, 910 A.2d 648, 657 (Pa. 2006) (citation omitted).

Here, our independent review of the multiple transcripts in this matter does not reveal a scintilla of evidence to support Appellant's contention that Judge Curcillo "displayed a deep-seated favoritism to the Commonwealth, which made a fair judgment impossible." Appellant's brief at 74. Nor does the record support Appellant's contention that he was denied his right to a full suppression hearing. The record reveals that trial court conducted a full hearing on February 25, 2020 and only denied Appellant's suppression motion following its comprehensive review of the evidence presented in both parties'

briefs and at the hearing itself. Accordingly, Appellant's claim that the trial court erred in denying his recusal motion must fail.

III. Sufficiency of the Evidence

Appellant next argues that there was insufficient evidence to sustain his convictions for possession of a controlled substance and PWID. Appellant's brief at 77.

> In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to prove every element of the offense beyond a reasonable doubt. As an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. Any question of doubt is for the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Thomas, 988 A.2d 669, 670 (Pa.Super. 2009) (citations omitted), ***appeal denied***, 4 A.3d 1054 (Pa. 2010).

To sustain a conviction for the crime of possession of a controlled substance, the Commonwealth must prove that appellant "knowingly or intentionally possess[ed] a controlled or counterfeit substance" without being properly registered to do so under the act. 35 P.S. § 780–113(a)(16). The crime of PWID requires the Commonwealth to prove an additional element: that Appellant possessed the controlled substance with the intent to manufacture, distribute, or deliver it. 35 P.S. § 780–113(a)(30).

Here, the crux of Appellant's claim is that the Commonwealth failed to prove that he possessed crack cocaine, because "the only scientific proof presented from the laboratory was a report that identified the substance as cocaine, not cocaine base." Appellant's brief at 77. Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we find that this claim is entirely devoid of merit.

The record establishes that during the traffic stop, Appellant was found in possession of 6 clear plastic baggies containing approximately 26 grams of powder and crack cocaine, as well as $12,000 in cash. Notes of testimony, 3/10/21 at 38. Officer McGowan testified that he identified the crack cocaine and powder cocaine by observing the differences in the physical consistencies of each substance. ***Id.*** at 42-44.

At trial, the Commonwealth presented the testimony of Dauphin County Detective John Goshert, who testified as an expert in the field of street level drug tracking. ***Id.*** at 170. Detective Goshert testified at great length about the differences between the powder cocaine and crack cocaine, which is also known as cocaine base, that was found in the six baggies recovered from Appellant. ***Id.*** at 173-176.

The record further reflects that Amber Gegg, an expert in the field of drug analysis with the Pennsylvania State Police Laboratory, testified that the white substances recovered from Appellant tested positive for cocaine. ***Id.*** at 105-106, 114-117. The evidence presented at trial also established that the

Pennsylvania State Police Laboratory does not differentiate between crack cocaine and powder cocaine on its reports. ***Id.*** at 192.

Based on the foregoing, we find that the Commonwealth presented sufficient evidence for the jury to conclude that Appellant knowingly or intentionally possessed crack cocaine with the intent to distribute it. Accordingly, Appellant's sufficiency claim must fail.

III. Weight of the Evidence

In his final claim, Appellant argues that the verdict was against the weight of the evidence because "the Commonwealth failed to present scientific evidence in the form of a laboratory report that confirmed that the substance that was tested was cocaine base." Appellant's brief at 78. We disagree.

"An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." ***Commonwealth v. Galvin***, 985 A.2d 783, 793 (Pa. 2009) (citation omitted), ***cert. denied***, 559 U.S. 1051 (2010). "[A] true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed." ***Commonwealth v. Miller***, 172 A.3d 632, 643 (Pa.Super. 2017) (citation omitted), ***appeal denied***, 183 A.3d 970 (Pa. 2018).

> [W]here 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. Shaffer, 40 A.3d 1250, 1253 (Pa.Super. 2012) (citation omitted).

> Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.
>
> This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained[,] [t]he term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (citations and emphasis omitted).

Upon review, we find that the trial court properly exercised its discretion in concluding that the jury's verdict was not against the weight of the evidence. ***See*** trial court opinion, 11/1/21 at 10-11. "[T]he 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. Andrulewicz***, 911 A.2d 162, 165 (Pa.Super. 2006) (citation omitted), ***appeal denied***, 926 A.2d 972 (Pa. 2007).

Here, the jury clearly found the testimony of the three primary Commonwealth witnesses on this issue – Officer McGowan, Ms. Gegg, and Detective Goshert – credible, and elected not to believe Appellant's version of the events. Appellant essentially asks us to reassess their credibility. We are precluded from reweighing the evidence and substituting our judgment for that of the fact-finder. ***Clay***, 64 A.3d at 1055. Accordingly, Appellant's weight claim must fail.

For all the foregoing reasons, we affirm the trial court's August 25, 2021 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 08/16/2022

Filed 10/26/2022

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 1161 MDA 2021
	:	
v.	:	
	:	
KASHIF ROBERTSON	:	
	:	
Appellant	:	

ORDER

IT IS HEREBY ORDERED:

THAT the application filed August 30, 2022, requesting reargument of the decision dated August 16, 2022, is DENIED.

PER CURIAM

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 563 MAL 2022
Respondent	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
KASHIF M. ROBERTSON,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 9th day of May, 2023, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Amy Dreibelbis, Esquire
As Of 05/09/2023

Attest: Amy J. Dreibelbis
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX D

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS, : DAUPHIN COUNTY, PENNSYLVANIA**
v.	**: NO. 2292 CR 2019**
KASHIF M. ROBERTSON	**: CRIMINAL MATTER**

STATEMENT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO PA.R.CRIM.P. 581(I)

Factually, on February 2, 2019, Defendant was pulled over for a traffic stop by Officer Chad McGowan of the Harrisburg Police Department for illegal window tint. During the traffic stop, Officer McGowan asked Defendant if he was active with probation or parole. Defendant responded in the negative. When Officer McGowan returned to his vehicle, he informed Adult Probation Officer's Kinsinger and Cutter that Defendant indicated that he was not active with probation or parole. Adult Probation Officers Kinsinger and Cutter knew Defendant to be on probation. Officer McGowan returned to Defendant's vehicle, returned his documents, and told Defendant that he was free to leave.

Before Defendant left, Adult Probation Officers Kinsinger and Cutter approached the vehicle to make contact with Defendant. Adult Probation Officer Cutter opened Defendant's door and asked him to step out of the vehicle after informing Defendant that he was in violation of his conditions of probation. Once out of the vehicle, Adult Probation Officers Kinsinger and Cutter performed a search of Defendant's vehicle. Inside, they found a purple Crown Royal bag containing cash totaling $8,000 and an empty cigarette container in the center console area that contained loose marijuana.

A search of the Defendant showed that he was carrying cash totaling $4,598.00 in both his pants pocket and his wallet. The adult probation officers then took Defendant to the front of Officer McGowan's vehicle. (At this time, Officer McGowan smelled an odor of marijuana

APPENDIX B

coming from the Defendant's person. Adult Probation Officer Kinsinger conducted a second search of Defendant's person and felt a hard lump in Defendant's groin area. At this time, Defendant was detained and placed in handcuffs. As handcuffs were being placed on Defendant, Defendant attempted to break free and run. The officers were able to detain Defendant. After Defendant was secured, Adult Probation Officer Kinsinger found six baggies of cocaine and one baggie of marijuana in Defendant's groin area.

Defendant was ultimately arrested and charged with two counts of possessing a controlled substance with the intend to deliver, five counts of resisting arrest, misdemeanor drug charges for a small amount of marijuana for personal use and use or possession of drug paraphernalia, and a summary traffic violation for the illegal window tint.

Procedurally, on August 1, 2019, Defendant filed an Omnibus Pretrial Motion for dismissal of charges and suppression. A suppression hearing was scheduled for September 3, 2019 and was subsequently continued. On October 28, 2019, Defendant filed a supplemental Omnibus Pretrial Motion. A suppression hearing was rescheduled for November 19, 2019, continued to January 21, 2020, and then continued to and held on February 25, 2020.

Following the suppression hearing, the parties were directed to file briefs on the matter. The Defendant filed his brief in support of the motion on March 26, 2020. The Commonwealth filed their brief in opposition to the motion on July 6, 2020. On July 15, 2020, this Court ordered the parties to file proposed findings of fact. The Defendant filed his proposed findings of fact on August 3, 2020. The Commonwealth filed their proposed findings of fact on August 7, 2020. On August 11, 2020, this Court denied Defendant's Omnibus Pretrial motion.

Defendant first argues that the evidence should be suppressed due to the fact that the stop was pretextual in nature as well as the lack of reasonable suspicion. We disagree. Our Superior

Court has stated that an officer must have a reasonable basis in his belief that the Defendant has violated the motor vehicle code. The standard we use in determining the legality of a traffic stop is whether the stop is a result of the officer's reasonable belief that the Vehicle Code is being violated. Commonwealth v. Benton, 655 A.2d 440, 446 (Pa.Super.1995). Further, "Pennsylvania law makes clear that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense." Commonwealth v. Harris, 176 A.3d 1009, 1019 (Pa.Super.2017). In the instant case, Officer McGowan testified at the suppression hearing that he tested the window tint and it came back to 17% which is well below the 70% allowed. (Notes of Testimony, Suppression Hearing, 2/25/20, 15).[1] This supports a valid and legal traffic stop. Thus, we find this argument without merit.

Defendant next argues that the evidence should be suppression because the probation officers were acting as police officers. We disagree. Our Pennsylvania Supreme Court has stated, "[p]arole and probation officers cannot act like stalking horses for the police." Commonwealth v. Pickron, 634 A.2d 1093, 1097 (Pa. 1993) (*internal quotations omitted*). However, "[a] probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer." United States v. Williams, 417 F.3d 373, 377 (3d.Cir.2005). The Court in *Williams* went on to say that a showing of a collaborative effort between police and probation is not enough to invalidate a search. 417 F.3d at 377. "Indeed, such a collaboration is expected given the similar duties of parole officers and police officers." *Id.* Here, Adult Probation Officers Cutter and Kinsinger were not acting as police officers after Officer McGowan completed the traffic stop. They were informed about the stop, the reason for it, and the fact that the Defendant

[1] Hereinafter, "N.T."

lied about being on probation. (N.T., 27). In this incident, the probation officers were carrying out their duties as probation officers. Therefore, we find this argument lacks merit.

Defendant next argues that the evidence should be suppressed because of the duration of the traffic stop. We disagree. Our laws allow police officers to ask general questions so long as the questions do not impermissibly extend the traffic stop longer that necessary. "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Our Pennsylvania Supreme Court has stated that an additional ten (10) to fifteen (15) minutes during a traffic stop was not an impermissible extension of time. Commonwealth v. Ellis, 662 A.2d 1043, 1049 (1995). Here, Officer McGowan's traffic stop was less than fifteen (15) minutes in duration. (N.T., 10). It is clear that Officer McGowan's question about Defendant's probation status did not impermissibly extend the traffic stop. Thus, we find this argument lacks merit.

The next four arguments Defendant makes, (1) the stop exceeding the scope of an investigatory stop, (2) an unlawful pat down, (3) the search exceeding the scope of *Terry*, and (4) the plain feel doctrine, involve a probation contact. We will discuss them together.

First, our caselaw specifically states that probationers enjoy a diminished expectation of privacy because they are on probation. Commonwealth v. Parker, 152 A.3d 309, 316 (Pa.Super. 2016). This includes a limitation of their Fourth Amendment constitutional rights. *Id.* Those on probation do not share the same rights to privacy, that law-abiding citizens, not on probation, are afforded. Commonwealth v. Moore, 805 A.2d 646, 620 (Pa.Super. 2002).

The relevant statute regarding the relationship between probationers and probation officers states, "[a] property search may be conducted by an officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." Parker, 152 A.3d at 318; 61 Pa.C.S.A. § 6153(d)(2). Additionally, "A personal search of an offender may be conducted by an agent if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision." 61 Pa.C.S.A. § 6153(d)(1)(i). Thus, a probation officer must have reasonable suspicion to perform the search. Parker, 152 A.3d at 318; 61 Pa.C.S.A. § 6153(d)(2), (d)(1)(i). A probation officer may consider certain factors when determining if there is reasonable suspicion for him to search a probationer. 61 Pa.C.S.A. § 6153(d)(6). These factors include information gathered by the probation officer and information provided by others. 61 Pa.C.S.A. § 6153(d)(2)(i), (ii).

In the instant case, Adult Probation Officers Kinsigner and Cutter knew Defendant was on probation at the time of the traffic stop. (N.T., 27). Officer McGowan informed them that Defendant stated he was not on probation. *Id.* At this point, Adult Probation Officers Kinsinger and Cutter know that Defendant is lying about his probation status. They also know that Defendant has been pulled over for a traffic stop due to illegal window tint. Using this information, Adult Probation Officers Kinsinger and Cutter decide that they have reasonable suspicion to search Defendant and his property. (N.T., 30-31). Thus, the probation officers had the requisite reasonable suspicion to search Defendant's vehicle and his person. We find these four arguments are without merit.

Next, Defendant argues that the evidence should be suppressed because he was strip searched in public while it was daylight. We disagree. In this case, the probation officer felt

something in the Defendant's pants and unbuckled his belt to reach inside to retrieve the items. (N.T., 33). Defendant has six (6) baggies of cocaine in his pants. (N.T., 23, 35). Defendant was not undressed. (N.T., 34-35). The probation officer made as little intrusion as possible to retrieve the items in Defendant's pants after they would not shake loose. (N.T., 33). Thus, we find this argument is without merit.

Finally, Defendant argues that the probation officers lacked the reasonable suspicion necessary to make a lawful arrest, so there is insufficient proof to prosecute Defendant for resisting arrest. We disagree. "[I]n order to support the charge of resisting arrest, the underlying arrest must be lawful." Commonwealth v. Maxon, 798 A.2d 761, 770 (Pa.Super.2002). The probation contact resulted because Defendant violated probation. (N.T., 30-31). The probation officers had the requisite reasonable suspicion to search Defendant's person and his vehicle. The lawfulness of the underlying arrest supports the charge of resisting arrest in this case.

BY THE COURT:

Deborah E. Curcillo, J.

Distribution:
Hon. Deborah E. Curcillo
Christopher Cooper, Esq., Dauphin County District Attorney's Office
Shawn M. Dorward, Esq., The Dorward Law Firm, LLC, 4400, Deer Path Road, Suite 102, Harrisburg, PA 17110
Clerk of Courts

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
	: DAUPHIN COUNTY, PENNSYLVANIA
	:
v.	**: NO. 1161 MDA 2021**
	: 2292 CR 2019
	:
KASHIF ROBERTSON	**: CRIMINAL APPEAL**

TRIAL COURT MEMORANDUM OPINION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(A)

Appellant, Kashif Robertson ("Appellant" or "Mr. Robertson") appeals from this Court's Order dated August 25, 2021, which modified Appellant's sentence. This opinion is written pursuant to Pa.R.A.P. 1925(a).

Procedural History

Following a jury trial that took place on March 10, 2021, Appellant was found guilty of two counts of manufacture, delivery, or possession with intent to manufacture or deliver,[1] one count of use/possession of drug paraphernalia,[2] and two counts of intentionally possessing a controlled substance by a person not registered.[3]

On May 10, 2021, Appellant filed an optional Pre-Sentence Motion claiming that the Commonwealth failed to provide sufficient evidence that Appellant committed the traffic offense of unlawful activities pursuant to 75 Pa.C.S.A. § 4107(b)(2).[4] On May 11, 2021, Appellant's deferred sentencing was continued after further sentencing issues were brought up during the hearing. On May 24, 2021, Appellant field a Motion to designate Appellant with a prior record score of five (5).

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[1] 35 P.S. § 780-113(A)(30).
[2] 35 P.S. § 780-113(A)(32).
[3] 35 P.S. § 780-113(A)(16).
[4] Count 10, regarding window tint violation.

APPENDIX C

On May 26, 2021, Appellant was sentenced to four (4) to eight (8) years in state prison on count 1, five (5) years of state supervision on count 2 to be consecutive to count 1, and no further penalty on count 9.

On June 7, 2021, Appellant field a Post-Sentence Motion. Following a review hearing held on August 25, 2021, Appellant's sentence was modified at count 1 from four (4) to eight (8) years to two and one-half (2 ½) to five (5) years in state prison and the remaining post-sentence issues denied.

On September 1, 2021, this Court received a timely Notice of Appeal filed with the Superior Court of Pennsylvania. This Court ordered Appellant on September 7, 2021, to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied with said Order on September 28, 2021, and on September 29, 2021.[5]

Factual Background

The following facts were established at a jury trial that was held on March 10, 2021.

On February 2, 2019, Officer Chad McGowan (hereinafter, Officer McGowan) was working with the Street Crimes Unit. (Notes of Testimony, Jury Trial, 3/10/21, p. 28-29) (hereinafter, "N.T.). Officer McGowan initiated a traffic stop with Appellant due to a window tint violation. (N.T., 30). Officer McGowan initiated his lights and sirens to get Appellant to pull over for the traffic stop. (N.T., 32). Appellant did not immediately pull over to the side of the road. *Id.* After pulling over, Appellant identified himself with his Pennsylvania driver's license. (N.T., 31). Officer McGowan observed that Appellant was physically shaking and exhibited labored breathing. (N.T., 33). Another member of the Street Crimes Unit approached the vehicle while Officer McGowan was at his vehicle checking on Appellant's information. (N.T., 34).

[5] Appellant filed a Supplemental Concise Statement of Errors Complained of on Appeal.

Appellant exited his vehicle and was taken to the front of Officer McGowan's vehicle. (N.T., 35). Officer McGowan could smell a fresh odor of marijuana coming from Appellant. *Id.* Officer McGowan notified another member of the Street Crimes Unit regarding the odor of marijuana. (N.T., 36). A search of the vehicle recovered a small amount of marijuana and a large sum of cash, approximately $8,000. (N.T., 36-37; 220). At this point, the decision was made to search the Appellant. (N.T., 37). The search of Appellant's person recovered three clear knotted plastic baggies containing powder crack cocaine, three clear knotted plastic baggies containing crack cocaine, one clear knotted plastic baggie containing marijuana, and approximately $4,500 cash. (N.T., 38). Additionally, Officer McGowan identified the difference between crack cocaine and powder cocaine by observing the physical differences between the two. (N.T., 42-44).

Amber Gegg (hereinafter, Ms. Gegg) of the Pennsylvania State Police Harrisburg Regional Laboratory offered expert testimony as a drug analyst. (N.T., 105-106). Ms. Gegg analyzed the narcotics that were sent to her regarding Appellant. (N.T., 110). Through testing, Ms. Gegg was able to identify the white substances found in the plastic baggies as cocaine and marijuana. (N.T., 114-118). The powder and crack cocaine weighed approximately 26 grams. (N.T., 114-117).

Detective John Goshert (hereinafter, "Detective Goshert") of the Dauphin County Criminal Investigation Division offered expert testimony as an expert in the field of street level drug trafficking. (N.T., 170). Detective Goshert testified about the difference between powder cocaine and crack cocaine. (N.T., 173-174). Detective Goshert testified that crack cocaine is cocaine base. *Id.* Crack cocaine, or cocaine base, is a smokeable form of cocaine that holds its shape. (N.T., 173-176). Powder cocaine is cocaine that is in a powder form that is either dissolved by a heat source in water in order to be injected or smoked or snorted in its powder

form. (N.T., 174-175). One can differentiate between crack cocaine and powder cocaine by looking at the physical consistency of it. (N.T., 196-197). Detective Goshert testified that the Pennsylvania State Police Laboratory does not differentiate between crack cocaine and powder cocaine on their reports. (N.T., 192). Detective Goshert further testified that Appellant did not have any taxable income from the date Appellant was pulled over by Officer McGowan and prior. (N.T., 184-185).

Appellant testified that he was in the process of returning drugs that he picked up that day from a dealer when he was pulled over by Officer McGowan. (N.T., 203; 208). Appellant stated that he tested the drugs and he was not satisfied with the quality. (N.T., 208). He further testified that he had a large amount of cash in his vehicle because he worked as a barber and the money was to pay taxes. (N.T., 208-209).

Appellant's Statement of Matters Complained of on Appeal

1. Denial of Robertson's Omnibus Pretrial Motion (OPTM) – Traffic Stop. The trial court erred when it found reasonable suspicion existed to stop Robertson's vehicle for a suspected window tint violation, where the seizing officer failed to point to "specific and articulable facts" which lead him to suspect criminal activity was afoot for a violation of the inspection manual. Officer McGowan failed to state that he could not see inside the vehicle from the front driver side window or windshield; he did not testify when he apparently checked the window tint and he failed to confirm whether the vehicle possessed a valid certificate of exemption. Therefore, after acquired evidence stemming from the unlawful traffic stop should have been suppressed to Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment.

2. Denial of Robertson's OPTM – Probation Contact. The trial court erred when it denied Robert's OPTM for the Commonwealth's failure to establish a reasonable suspicion for Dauphin County Adult Probation to seize him after Harrisburg City Police advised him that he was free to leave without an oral or written warning. The trial court's reliance on the suspected window tint and Robertson's statement that he was not on supervision was insufficient to support a violation of his probation conditions when the Commonwealth failed to admit into evidence any of Robertson's conditions imposed by the sentencing court.

3. Denial of Robertson's OPTM – Prolonged Traffic Stop. The trial court erred when it denied Robertson's OPTM by finding that the duration of the traffic stop was proper. As the focus of the traffic stop was the suspected window tint violation, any inquiry as to Robertson's status on supervision or conversations with probation and parole following the officer's initial encounter with Robertson as well as the duration of the search (4:43 p.m. traffic stop to 6:24 p.m. when dispatch was called) unnecessarily prolonged the traffic stop and all after acquired evidence should have been suppressed pursuant to Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution.

4. Denial of Robertson's OPTM – Stalking Horse. The trial court erred when it denied Robertson's OPTM when it found that probation and parole did not act like "stalking horses" for the police when they conducted their search of Robertson when Officer McGowan lacked the necessary reasonable suspicion or probable cause to do so on his own. Indeed, the parole and probation officers on scene acted as stalking horses for the Harrisburg City Police Department to circumvent the warrant requirement under the probable cause standard to conduct searches of Robertson's person and property, opposed to the lesser standard of reasonable suspicion that probation officer's must meet, as the search was nothing more than a ruse for a police investigation when the probation officer's on scene had no prior dealings with Robertson nor were they aware of his conditions of probation, thus violating Article I, Section 8 of the Pennsylvania Constitution. Moreover, the Commonwealth waived this claim as they failed to argue the "stalking horse" claim on state grounds.

5. Denial of Robertson's OPTM – Terry Search. The trial court erred when it denied Robertson's OPTM when it found that probation and parole did not exceed the scope of Terry. The protective search of Robertson went beyond what was necessary to determine if he was armed and therefore, the after acquired evidence should have been suppressed pursuant to Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution as the probation officers on scene lacked the necessary reasonable suspicion to search Robertson or his vehicle.

6. Denial of Robertson's OPTM – Plain Feel Doctrine. The trial court erred when it denied Robertson's OPTM when it found that the second search of Robertson by probation shaking out his pants did not exceed the scope of Terry or the plain feel doctrine.

7. Recusal. The trial court erred when it did not recuse itself from this matter due to the appearance of impartiality, bias, prejudice or ill will, where the court denied Robertson's right to a full suppression hearing and continuously allowed the Commonwealth to make untimely filings pertaining to the suppression matter and wholly adopted the Commonwealth's findings of fact and legal conclusions.

8. Sufficiency of the Evidence. The Commonwealth presented insufficient evidence that Robertson possessed a controlled substance, specifically crack cocaine, and that he did so with the intent to deliver it. See generally *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003) (a claim challenging the sufficiency of the evidence asserts that there is

insufficient evidence to support at least one material element of the crime); see also *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (as this court well knows, the standard of review is to review the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence"). Even in the light most favorable to the Commonwealth, the evidence is insufficient as a matter of law to sustain the burden of proof as to Count 2 – 35 P.S. § 780-113(a)(30) as the Commonwealth failed to present a laboratory report confirming the substance tested was crack cocaine. The only substance that was confirmed was cocaine and therefore, this Honorable Court should vacate its finding of guilt as to this offense.

9. Weight of the Evidence. The trial court abused its discretion in denying counsel's post-sentence motion where the guilty verdict for Court 2 – Possession with Intent to Deliver (crack cocaine) was against the weight of the evidence as the Commonwealth failed to present scientific evidence in the form of a laboratory that confirmed that the substance that was tested was cocaine base. The only laboratory report that was presented as evidence confirmed that the substance was cocaine and not cocaine base. See generally *Commonwealth v. Clay*, 64 A.3d 1049, 1055 (Pa. 2013) ("Discretion is abused where the course pursued represents not merely an error in judgment, but where the judgment is manifestly unreasonable or where the law is not applied to where the record shows that the action is a result of partiality, prejudice, bias, or ill-will).

10. Denial of Robertson's Omnibus Pretrial Motion – Strip Search. The trial court erred when it denied Robertson's OPTM when it found that the search of his genitalia on a public street, in daylight without a warrant was reasonable. This search exceeded Terry and the "plain feel" doctrine and as such, the trial court should have suppressed the evidence obtained during this search as it violated Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution.

Discussion

Appellant's first through sixth and tenth errors complained of on appeal relate to Appellant's Omnibus Pre-Trial Motion for suppression. This Court thoroughly addressed these issues in our Statement of Findings of Facts and Conclusions of Law Memorandum filed on February 10, 2021. Thus, we incorporate by reference our Memorandum which details the facts in this matter and our reasons for denying Appellant's Omnibus Pre-Trial Motion.[6]

We now turn to Appellant's remaining errors complained of on appeal. In Appellant's seventh error complained of on appeal, Appellant claims this Court erred when it did not recuse

[6] Statement of Findings of Facts and Conclusions of Law, filed on February 10, 2021. Attached.

itself upon request. Specifically, Appellant claims that this Court had the "appearance of impartiality, bias, prejudice or ill will, where the court denied Robertson's right to a full suppression hearing and continuously allowed the Commonwealth to make untimely filings pertaining to the suppression matter and wholly adopted the Commonwealth's findings of fact and legal conclusions." (Appellant's Concise Statement of Matters Complained of on Appeal, error 5.7). We disagree.

Our Supreme Court of Pennsylvania has established the standard for recusal:

> It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.

Commonwealth v. White, 910 A.2d 648, 657 (Pa. 2006) (quoting *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998)).

Upon Appellant's motion for recusal, this Court determined that recusal was not appropriate as there was no evidence establishing bias, prejudice, or unfairness. This Court determined it was able to continue to assess Appellant's case in an impartial manner. Specifically, this Court did afford a full suppression hearing to Appellant on February 25, 2020. Following the hearing, this Court ordered both parties to file briefs in support of their respective positions. Following a meaningful review of the briefs and based upon the testimony established at the suppression hearing, this Court issued its ruling on August 11, 2020. Following a request

by Appellant, this Court issued its statement of facts and conclusion of law regarding the ruling on February 10, 2021. This Court's reasons for denying Appellant's motion for suppression are based upon independent review and consideration of the facts and evidence established at the suppression hearing and by the parties' briefs.

In Appellant's eighth error complained of on appeal, Appellant claims that the Commonwealth presented insufficient evidence that Robertson possessed a controlled substance, specifically crack cocaine, and that he did so with the intent to deliver it. We disagree.

The Superior Court said the following regarding sufficiency of evidence presented at trial:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Robinson, 817 A.2d 1153, 1158 (Pa.Super. 2003).

Additionally, the Superior Court in *Commonwealth v. Fitzpatrick*[7] stated, "[a]ny 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 Supreme Court of Pennsylvania explained the appropriate standard of review when an appellate court is required to review an insufficiency of the evidence claim:

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[7] *Commonwealth v. Fitzpatrick*, 159 A.3d 562, 567 (Pa.Super. 2017) (quoting *Commonwealth v. Hutchinson*, 947 A.2d 800, 805-806 (Pa.Super. 2008)).

> Normally, the evidence is deemed to be sufficient where there is testimony offered to establish each material element of the crime charged and to prove commission of the offense by the accused beyond a reasonable doubt. The question of credibility is left to the jury and the verdict will not be disturbed if the jury determined the evidence is worthy of belief. We have, however, made exception to the general rule that the jury is the sole arbiter of the facts where the testimony is so inherently unreliable that a verdict based upon it could amount to no more than surmise or conjecture.

Commonwealth v. Karkaria, 625 A.2d 1167, 1170 (Pa. 1993).

In order to address a sufficiency of the evidence argument, we must review the elements of said crime. *Id.* The appellant argues that the evidence was insufficient to prove Appellant guilty of possession with intent to deliver a non-controlled substance, as there was insufficient evidence to prove that Appellant possessed crack cocaine, specifically. We disagree. The statute regarding possession with intent to deliver a non-controlled substance states in relevant part:

> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

See 35 P.S. § 780-113(a)(30).

In reviewing the evidence in a light most favorable to the verdict winner, we believe the verdict rendered is supported by the evidence. The Commonwealth presented evidence through Officer McGowan, Ms. Gegg, and Detective Goshert that Appellant possessed with the intent to deliver crack cocaine. Officer McGowan testified that Appellant was found with three baggies of crack cocaine and three baggies of powder cocaine. (N.T., 38). Officer McGowan identified the difference between crack cocaine and powder cocaine by observing the physical differences

between the two. (N.T., 42-44). Ms. Gegg, the drug analyst, identified that the substances in the six plastic baggies was cocaine. (N.T., 114-118). The Pennsylvania State Police Laboratory does not differentiate between crack cocaine and powder cocaine in their reports. (N.T., 192). However, Detective Goshert, an expert in the field of street level drug trafficking, explained the physical differences between crack cocaine and powder cocaine by physically referring to the two different substances contained in the six baggies recovered from Appellant. (N.T., 173-197). The Commonwealth established that three of plastic baggies contained a cocaine substance that differed in physical consistency than the other three plastic baggies also containing cocaine. Additionally, the Commonwealth established that Appellant had the intention of delivering the controlled substances. Appellant was found with approximately $12,000, over 26 grams of powder and crack cocaine, and without any personal drug paraphernalia. (N.T., 113-117; 36-37; 220; 38). The evidence presented by the Commonwealth was sufficient enough for the jury to find that Appellant possessed crack cocaine with the intent to deliver it.

In Appellant's ninth error complained of on appeal, Appellant claims that this Court abused its discretion in denying Appellant's post-sentence motion where the guilty verdict for Court 2 – Possession with Intent to Deliver (crack cocaine) was against the weight of the evidence as the Commonwealth failed to present scientific evidence in the form of a laboratory that confirmed that the substance that was tested was cocaine base. We disagree.

The court in *Commonwealth v. Taylor* held the following as a standard for weight of the evidence arguments:

> Whether new trial should be granted on grounds that verdict is against weight of evidence is addressed to sound discretion of trial judge, whose decision will not be reversed on appeal unless there has been an abuse of discretion. [The] [t]est in determining whether new trial should be granted on grounds that verdict is against weight of evidence is not whether court would have

> decided case in same way but whether verdict is so contrary to evidence as to make award of new trial imperative so that right may be given another opportunity to prevail.

Commonwealth v. Taylor, A.2d 1228 (Pa. Super. 1984).

Additionally, "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. Cruz, 919 A.2d 279, 282 (Pa. Super. 2007).

As discussed above, both Officer McGowan and Detective Goshert identified the difference between crack cocaine and powder cocaine by observing the physical differences between the two different substances admitted as evidence. (N.T., 42-44; 173-197). Officer McGowan, a police officer with the street crimes unit, and Detective Goshert, an expert in street level drug trafficking have knowledge of both crack cocaine and powder cocaine and how the two have physical differences. The Commonwealth established that three of plastic baggies contained a cocaine substance that differed in physical consistency than the other three plastic baggies also containing cocaine. Therefore, we must disagree with the Appellant's contention that the verdict the jury issued was against the weight of the evidence presented at his jury trial. As stated by the court in *Taylor*, the decision as to whether the verdict is against the weight of the evidence is left with the sound discretion of the trial judge. Taylor, 471 A.2d at 1228. Thus, this Court will stand by the jury's verdict.

For these reasons, we ask the Superior Court to uphold and affirm our judgment.

Respectfully submitted:

Deborah E. Curcillo, Judge

Dated: 11-1-21

Distribution: 11/1/21 @ 3:16pm
The Superior Court of Pennsylvania mail
Hon. Deborah E. Curcillo ~~to~~
Ryan Lysaght, Esq., Dauphin County District Attorney's Office to
Shawn Dorward, Esq., 4400 Deer Path Road, Suite 102, Harrisburg, PA 17110 mail
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Clerk of Courts fb

APPENDIX I

APPENDIX I MATERIAL

Constitutional Amend.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.
Article 1 § 8 of the Pennsylvania Constitution.

The right of the people to be secure in their persons, houses papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
United States Constitution Fourth Amendment.

Pennsylvania Statutory Provision(s)
75 Pa.C.S.A. 4107 (b)(2)- (b) other violations.- It is unlawful for any person to do any of the following: (2) Operate, or cause or permit another person to operate, on any highway in this Commonwealth any vehicle or combination which is not equipped as required under this part or under department regulations or when the driver is in violation of department regulations or the vehicle or combination is otherwise in an unsafe condition or in violation of department regulations.

75 Pa.C.S.A. § 4524(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. (2) This subsection does not apply to: (i) A vehicle which is equipped with tinted windows of the type and specification that were installed by the manufacturer of the vehicle or to any hearse, ambulance, government vehicle or any other vehicle for which a currently valid certificate of exemption has been issued in accordance with regulations adopted by the department. (ii) A vehicle which is equipped with tinted windows, sun screening devices or other materials which comply with all applicable Federal regulations and for which a currently valid certificate of exemption has been

issued in accordance with regulations adopted by the department.
75 Pa.C.S. § (e)(1), (e)(2)(i)(ii).

75 Pa.C.S.A. § 6308(b): Authority of Police Officer.- Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

PENNSYLVANIA CONSOLIDATED STATUTE(S)

On proceeding page

Title 42 Pennsylvania Consolidated Statute's (S)

§ 9754. Order of probation.

(a) ***General rule.*** — In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision. The court shall consider probation guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing) and 2154.1 (relating to adoption of guidelines for restrictive conditions).

(b) ***Conditions generally.*** — The court shall attach reasonable conditions authorized by section 9763 (relating to conditions of probation) as it deems necessary to ensure or assist the defendant in leading a law-abiding life.

(c) ***Specific conditions.*** (Deleted by amendment).

(d) ***Sentence following violation of probation.*** — The sentence to be imposed in the event of the violation of a condition shall not be fixed prior to a finding on the record that a violation has occurred.

HISTORY:

Act 1979-127 (H.B. 830), P.L. 556, § 1, approved Dec. 14, 1979, eff. immediately; Act 1980-142 (H.B. 1873), P.L. 693, § 401, approved Oct. 5, 1980, eff. in 60 days; Act 1988-79 (H.B. 1308), P.L. 464, § 6, approved June 30, 1988, eff. immediately; Act 2019-115 (S.B. 501), § 4, approved December 18, 2019, effective December 18, 2019.

§ 9776. Judicial power to release inmates.

(a) ***General rule.*** Except as otherwise provided under this chapter or if the Pennsylvania Parole Board has exclusive parole jurisdiction, a court of this Commonwealth or other court of record having jurisdiction may, after due hearing, release on parole an inmate in the county correctional institution of that judicial district.

(b) ***Petition required.*** No inmate may be paroled under this section except on petition verified by the oath of the inmate or by the inmate's representative and presented and filed in the court in which the inmate was convicted.

(c) ***Hearing.*** On presentation of the petition, the court shall fix a day for the hearing. A copy of the petition shall be served on the district attorney and prosecutor in the case at least ten days before the day fixed for the hearing. Proof of service on the district attorney and the prosecutor shall be produced at the hearing.

APPENDIX I

(d) ***Order.*** After the hearing, the court shall make such order as it may deem just and proper. In case the court paroles the inmate, it shall place the inmate in the charge of and under the supervision of a designated probation officer.

(e) ***Recommit.*** The court may, on cause shown by the probation officer that the inmate has violated his parole, recommit and reparole the inmate in the same manner and by the same procedure as in the case of the original parole if, in the judgment of the court, there is a reasonable probability that the inmate will benefit by being paroled. The court may also recommit for violation of that parole.

(f) ***Limitation.***

(1) Subject to the provisions of paragraph (2), the power of a court to parole an inmate under this section shall extend for a period not to exceed the maximum sentence provided by law for the offense of which the inmate was convicted.

(2) A court may release on parole, on petition to any other court, an inmate committed to a correctional institution by any magisterial district judge and shall have the same power to recommit an inmate paroled under this section.

HISTORY:

Act 2009-33 (S.B. 112), P.L. 147, § 4, approved Aug. 11, 2009, eff. in 60 days; Act 2021-59 (S.B. 411), § 4, approved June 30, 2021, effective June 30, 2021.

§ 9912. Supervisory relationship to offenders.

(a) ***General rule.*** Officers are in a supervisory relationship with their offenders. The purpose of this supervision is to assist the offenders in their rehabilitation and reassimilation into the community and to protect the public.

(b) ***Searches and seizures authorized.***

(1) Officers and, where they are responsible for the supervision of county offenders, State parole agents may search the person and property of offenders in accordance with the provisions of this section.

(i) Officers may search, in accordance with the provisions of this section, the person and property of any offender who accepts ARD as a result of a charge of a violation of 18 Pa.C.S. Ch. 31 (relating to sexual offenses) if the court has determined that the offender shall be subject to personal and property searches as a condition of the offender's participation in the ARD program.

(ii) The court shall notify each offender so offered ARD, prior to admission to an

ARD program, that the offender shall be subject to searches in accordance with this section.

(iii) Nothing in this section shall be construed to permit searches or seizures in violation of the Constitution of the United States or section 8 of Article I of the Constitution of Pennsylvania.

(c) ***Effect of violation.*** No violation of this section shall constitute an independent ground for suppression of evidence in any probation and parole or criminal proceeding.

(d) ***Grounds for personal search.***

(1) A personal search of an offender may be conducted by an officer:

(i) if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision;

(ii) when an offender is transported or taken into custody; or

(iii) upon an offender entering or leaving the securing enclosure of a correctional institution, jail or detention facility.

(2) A property search may be conducted by an officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.

(3) Prior approval of a supervisor shall be obtained for a property search absent exigent circumstances. No prior approval shall be required for a personal search.

(4) A written report of every property search conducted without prior approval shall be prepared by the officer who conducted the search and filed in the offender's case record. The exigent circumstances shall be stated in the report.

(5) The offender may be detained if he is present during a property search. If the offender is not present during a property search, the officer in charge of the search shall make a reasonable effort to provide the offender with notice of the search, including a list of the items seized, after the search is completed.

(6) The existence of reasonable suspicion to search shall be determined in accordance with constitutional search and seizure provisions as applied by judicial decision. In accordance with such case law, the following factors, where applicable, may be taken into account:

(i) The observations of officers.

(ii) Information provided by others.

(iii) The activities of the offender.

(iv) Information provided by the offender.

(v) The experience of the officers with the offender.

(vi) The experience of officers in similar circumstances.

(vii) The prior criminal and supervisory history of the offender.

(viii) The need to verify compliance with the conditions of supervision.

(e) ***Nonresident offenders.*** No officer shall conduct a personal or property search of an offender who is residing in a foreign state except for the limited purposes permitted under the Interstate Compact for the Supervision of Parolees and Probationers. The offender is held accountable to the rules of both the sending state and the receiving state. Any personal or property search of an offender residing in another state shall be conducted by an officer of the receiving state.

(e.1) ***Status of seized items.***

(1) Notwithstanding the provisions of Article XIII.1 of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code, to the contrary, all contraband that is seized from an offender shall be considered abandoned and unclaimed, and no property right may exist in it, except as otherwise provided in this section, if the following criteria have been met:

(i) The parolee or probationer from whom the item was seized is no longer under the jurisdiction of the court.

(ii) Two years have elapsed from the date the parolee or probationer was no longer under the jurisdiction of the court under subparagraph (i).

(iii) Notice that the item will be declared abandoned was mailed to the last known address of the parolee or probationer from whom the item was seized at least 60 days prior to the date the item is to be declared abandoned.

(iv) No other claimant of the item has notified the county adult probation and parole department of his claim or is known to the county adult probation and parole department.

(v) The item has not been forfeited in accordance with any forfeiture statute, including, but not limited to, Chapter 68 (relating to forfeitures) and as permitted by Pennsylvania common law.

(2) Contraband seized under this section may not be subject to replevin, but shall be

deemed to be in the custody of the county adult probation and parole department. The county adult probation and parole department shall tag and secure the contraband at a place designated by it for such time as is necessary to secure its use as evidence in a violation, revocation or criminal proceeding. In no event may the county adult probation and parole department retain the property for a period of less than 180 days after the hearing conducted under paragraph (3).

(3) (i) No later than the time of the first-level hearing to determine whether probable cause exists to believe that a violation of probation, parole or intermediate punishment has been committed, the county adult probation and parole department shall provide notice to the offender that abandonment will be sought if the offender does not claim the seized contraband within two years after sentence completion.

(ii) If the hearing is waived or there is a new criminal charge arising from the incident that included the seizure of the contraband, then notice under this paragraph shall be given at least five days before an abandonment hearing is held and the hearing shall be scheduled by the county adult probation and parole department within a reasonable time.

(4) If it has been determined that property is contraband that shall be declared abandoned, the contraband shall be retained by the county adult probation and parole department until all appeal periods are exhausted to provide an opportunity for any additional parties to assert a claim of ownership or lienhold interest in the contraband. If the county adult probation and parole department receives notice of such a claim, the claimant or claimants shall be provided a hearing pursuant to paragraph (3).

(5) (i) Whenever contraband is declared abandoned under this subchapter, the contraband shall be transferred to the custodial care of the county adult probation and parole department. After the expiration of the necessary time period specified in this section, the county adult probation and parole department shall itemize all such abandoned contraband within its custodial care in a report to the Treasury Department.

(ii) Within 10 business days following receipt of an itemized contraband report from a county adult probation and parole department, the Treasury Department shall provide an itemized list of all such abandoned contraband that it will not accept into its custodial care.

(iii) All abandoned contraband not accepted by the Treasury Department pursuant to this section shall remain under the custodial control of the county adult probation and parole department. Abandoned contraband not otherwise refused by the Treasury Department shall be transferred to the custodial control of the Treasury Department as directed by the Treasury Department.

(6) All abandoned contraband refused by the Treasury Department and remaining under the custodial control of the county adult probation and parole department shall be deemed property of the county department and title to the property shall transfer. Thereafter, the county probation and parole department shall be entitled to any or all of the following:

(i) Retain the contraband for official use.

(ii) Destroy the contraband.

(iii) Donate the contraband to a nonprofit organization or governmental entity.

(iv) Sell any contraband that is not required to be destroyed by law.

(v) If the item is of de minimis value, as determined by the county adult probation and parole department, dispose of the item, without sale.

(7) The county treasurer of each county shall establish and administer a community correction forfeiture fund consisting of all cash or proceeds obtained under this section. The county treasurer shall disburse money from this fund only at the discretion of the president judge of the court of common pleas, subject to paragraph (8).

(8) Cash or proceeds generated by the sale of any abandoned contraband shall first be made available to satisfy any restitution owed by the offender to crime victims who are known at the time of the seizure by the Pennsylvania Commission on Crime and Delinquency's Office of Victim Services or by the courts of the Commonwealth where the offender was sentenced.

(9) The county adult probation and parole department and its employees shall be immune from liability for good faith conduct under this section.

(10) The Department of Corrections may enact regulations that are necessary to implement this subsection on a uniform basis throughout this Commonwealth. If regulations are promulgated, a county adult probation and parole department must comply with the regulations.

(11) The provisions set forth in this subsection shall apply to all contraband seized after the effective date of this subsection.

(12) Contraband seized prior to the effective date of this subsection may be disposed of in the manner set forth in paragraph (5) after notice is given to the offender from whom it was seized and any claimant known to the county adult probation and parole department. The county adult probation and parole department shall provide the notice within a reasonable time prior to holding a hearing at which abandonment shall be determined.

(13) (i) An appeal of an abandonment determination may be made by filing an appeal with the court of common pleas. The appeal must be received by the court of common pleas within 30 days of the mailing date of the county adult probation and parole department's order.

(ii) When a timely appeal of an abandonment determination has been filed, the abandonment may not be deemed final for purpose of appeal to a court until the court has mailed its decision on the appeal.

(iii) The scope of review of an appeal shall be limited to whether the decision is supported by substantial evidence, an error of law has been committed or there has been a violation of constitutional law.

(iv) The failure of an appeal to present with accuracy, brevity, clearness and specificity whatever is essential to a ready and adequate understanding of the factual and legal points requiring consideration shall be a sufficient reason for denying the appeal.

(v) A second or subsequent appeal and an appeal that is untimely filed under this paragraph shall not be received.

(vi) The procedure for appeal contained in this subsection may not be construed to alter or replace any procedures provided by law for the timely filing of appeals to appellate courts.

(14) The county adult probation and parole department shall annually post a report specifying the abandoned property or proceeds of the abandoned property obtained under this section on the county's publicly accessible Internet website and make the report available as a public document. The report shall give an accounting of all proceeds derived from the sale of abandoned property and the use made of unsold abandoned property.

(f) ***When authority is effective.*** The authority granted to the officers under this section shall be effective upon enactment of this section, without the necessity of any further regulation by the board.

§ 9763. Conditions of probation.

(a) ***General rule.*** — In imposing probation, the court shall consider guidelines adopted by the Pennsylvania Commission on Sentencing under section 2154 (relating to adoption of guidelines for sentencing) or 2154.1 (relating to adoption of guidelines for restrictive conditions) and specify at the time of sentencing the conditions of probation, including the length of the term of restrictive conditions under subsection (c) or (d). The term of restrictive conditions under subsection (c) shall be equal to or greater than the mandatory minimum term of imprisonment required by statute.

(b) ***Conditions generally.*** — The court may attach any of the following conditions upon the defendant as it deems necessary:

(1) To meet family responsibilities.

(2) To be devoted to a specific occupation, employment or education initiative.

(3) To participate in a public or nonprofit community service program.

(4) To undergo individual or family counseling.

(5) To undergo available medical or psychiatric treatment or to enter and remain in a specified institution, when required for that purpose.

(6) To attend educational or vocational training programs.

(7) To attend or reside in a rehabilitative facility or other intermediate punishment program.

(8) (Deleted by amendment).

(9) To not possess a firearm or other dangerous weapon unless granted written permission.

(10) To make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.

(11) To be subject to intensive supervision while remaining within the jurisdiction of the court and to notify the court or designated person of any change in address or employment.

(12) To report as directed to the court or the designated person and to permit the designated person to visit the defendant's home.

(13) To pay a fine.

(14) To participate in drug or alcohol screening and treatment programs, including outpatient programs.

(15) To do other things reasonably related to rehabilitation.

(16) (Deleted by amendment).

(17) (Deleted by amendment).

PENNSYLVANIA CODE DEPARTMENT OF TRANSPORTATION

*59916 67 Pa. Code § 175.67

WEST'S PENNSYLVANIA ADMINISTRATIVE CODE
TITLE 67. TRANSPORTATION
PART I. DEPARTMENT OF TRANSPORTATION
SUBPART A. VEHICLE CODE PROVISIONS
ARTICLE VII. VEHICLE CHARACTERISTICS
CHAPTER 175. VEHICLE EQUIPMENT AND INSPECTION
SUBCHAPTER E. PASSENGER CARS AND LIGHT TRUCKS

Current through Pennsylvania Bulletin, Vol. 49, Num. 8, dated February 23, 2019

§ 175.67. Glazing.

(a) Condition of glazing. Glazing shall meet the requirements of Chapter 161 (relating to glazing materials). See 75 Pa.C.S. § 4526 (relating to safety glass).

(b) Safety glazing. A vehicle specified under this subchapter shall be equipped with safety glazing in all windshields, windows and wings. The requirements of this subsection do not apply to a vehicle manufactured or assembled before January 1, 1934, if the original glazing is not cracked or discolored.

(c) Stickers. Stickers shall be located as follows:

(1) Truck weight classification sticker--trucks only--shall be affixed to lower left hand corner of the windshield to the immediate right of the certificate of inspection.

(2) The following stickers are authorized to be affixed to windshield or windows, as indicated:

(i) Out-of-State inspection stickers, tax stamps, road use permits or other government-related permits--municipalities and states--may be placed at the lower left or right-hand corner of the windshield.

(ii) A Delaware River Port Authority Bridge Travel Permit may be affixed to the left rear window. This permit is 2-1/4 inches by 4-1/4 inches and is an automatic triggering device for passing vehicles through toll gates on a bridge.

(iii) The suggested manufacturer's retail price sheet may be affixed to a new vehicle of a dealer. These labels are permitted only on the lower portion of a side window, as far to the rear of a vehicle as possible. When the vehicle is sold, this label shall be removed.

(d) Obstructions. A vehicle specified under this subchapter shall have glazing free from obstructions as described in § 175.80 (relating to inspection procedure).

(1) With the exception of materials in paragraph (4), signs, posters or other materials whose design prevents a driver from seeing through the material may not be placed on the windshield, a side wing, a side window or rear window so as to obstruct, obscure or impair the driver's clear view of the highway or an intersecting highway. Under FMVSS No. 205, these restrictions do not apply to the rear side windows, rear wings or rear window of trucks or multipurpose passenger vehicles.

*59917 (2) With the exception of materials in paragraph (4), signs, posters or other materials whose design prevents a driver from seeing through the material may not be placed on a rear side window, rear wing or rear window of a passenger car which either covers more than 20% of the exposed portion of the windows or wings, or extends more than 3 1/2 inches above the lowest exposed portion of the windows or wings.

(3) This subsection also applies to glass etchings, except those used for vehicle identification.

(4) A sun screening device or other material which does not permit a person to see or view the inside of the vehicle is prohibited, unless otherwise permitted by FMVSS No. 205, or a certificate of exemption has been issued in compliance with § 175.265 (relating to exemption provisions). See Table X for specific requirements for vehicles subject to this subchapter. Passenger car requirements relating to the rear window are delineated by vehicle model year in Table X.

(5) Vehicles specified under this subchapter may not have an obstruction forward of the windshield which extends more than 2 inches upward into the horizontally projected vision area of the windshield with the exception of windshield wiper components.

Adopted Feb. 1, 1983; Amended Feb. 1, 1983; Readopted Dec. 3, 1988; Amended Sept. 28, 1996; Amended May 13, 1999.

§ 175.265. Exemption provisions.

*Glazing material which is intentionally made so that only a portion of a single sheet has a luminous transmittance of not less than 70 percent shall be marked at the edge of the sheet to show the limits of the area that may be used at levels requisite for driving visibility. The marks A S1 or A S2 etc., shall be used with the arrow pointing to the portion of the sheet having a luminous transmittance of not less than 70 percent and the number indicating the item with which that portion of the sheet complies.

*Glazing material which is intentionally made so that only a portion of a single sheet has a luminous transmittance of not less than 70 percent shall be marked at the edge of the sheet to show the limits of the area that may be used at levels requisite for driving visibility. The marks A S1 or A S2 etc., shall be used with the arrow pointing to the portion of the sheet having a luminous transmittance of not less than 70 percent and the number indicating the item with which that portion of the sheet complies.

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(a)

(1) A hearse, ambulance or government vehicle.

(2) A vehicle for which a certificate of exemption has been issued by the Department under subsection (b).*Exempt vehicles.* The following vehicles are exempt from § 175.263

(relating to sun screening location):

(b)

(1) A vehicle which was registered in this Commonwealth as of September 8, 1984, and was equipped with a prohibited sun screening device or other prohibited material prior to September 9, 1984. Requests for this type of exemption shall be accompanied by an application for a certificate of exemption, made on a form furnished by the Department, which shall contain a description of the vehicle by make, year, model, vehicle identification number, windows and wings equipped with sun screening device or other material and other information as the Department may prescribe.

(2)

(i) A description of the vehicle by make, year, model and vehicle identification number.

(ii) A medical certification of need due to a disability from a licensed physician or optometrist.

(iii) Other information as the Department may prescribe.A vehicle owned by a person who is afflicted with a condition for which the Department has determined, in consultation with the Medical Advisory Board, that the use of prohibited sun screening devices or other materials is justified; or a vehicle owned by a person residing with a person who is so afflicted, if the afflicted person normally drives or is driven in the vehicle. An application for a certificate of exemption will be granted only for colorless sun screening device or other material and shall be made on a form furnished by the Department, which shall contain the following:*Certificate of exemption.* The Department will issue a certificate of exemption from § 175.263 for the following vehicles:

(c) *Display of certificate issued for vehicles registered as of September 8, 1984.* Upon compliance with the criteria in subsection (b)(1), the Department will issue a certificate of exemption which shall be carried in the vehicle at all times by the operator of the vehicle and shall be displayed upon request of a police officer. The certificate of exemption shall also be submitted to the inspection station upon submission of the vehicle for inspection.

(d) *Display of certificate issued for medical reasons.* Upon compliance with the criteria in subsection (b)(2), the Department will issue a certificate of exemption authorizing the installation of a colorless sun screening device or other material which filters ultraviolet light. This certificate of exemption shall be carried in the vehicle at all times by the operator of the vehicle and shall be displayed upon request of a police officer. The certificate of exemption shall also be submitted to the inspection station upon submission of the vehicle for inspection.

(e) *Sale or transfer of exempted vehicle.* Upon the sale or transfer of a vehicle for which a

certificate of exemption has been issued under subsection (b)(2), the certificate of exemption is void. Prior to the sale or transfer of a vehicle exempted under subsection (b)(2), it is the sole responsibility of the owner or seller of the vehicle to remove sun screening devices or other materials which do not comply with Departmental regulations. The owner or seller shall destroy the certificate of exemption and provide the purchaser with a notarized statement specifying the name and address of the owner or seller, the vehicle identification number, year and model, and the business entity and process used to remove the sun screening device or other material.

*A label, permanently installed between the sun screening device or other material and the glazing to which it is applied, shall contain the name of the device or material manufacturer or a registration number and the statement, ``Complies with VESC-20.``

***60128 67 Pa. Code Table X**

WEST'S PENNSYLVANIA ADMINISTRATIVE CODE
TITLE 67. TRANSPORTATION
PART I. DEPARTMENT OF TRANSPORTATION
SUBPART A. VEHICLE CODE PROVISIONS
ARTICLE VII. VEHICLE CHARACTERISTICS
CHAPTER 175. VEHICLE EQUIPMENT AND INSPECTION
SUBCHAPTER O. VEHICLE SUN SCREENING DEVICES

Current through Pennsylvania Bulletin, Vol. 49, Num. 8, dated February 23, 2019

TABLE X. ACCEPTABLE LIGHT TRANSMITTANCE LEVELS FOR VEHICLE GLAZING

All light transmittance levels listed below assume a 3% accuracy (±3%).

Vehicle Type	Windshield	Front Side Windows/Wings	Rear Side Windows/Wings	Rear Window
Pre-1998 Passenger Cars	70%	70%	70% [FN*]	VESC-20
1998 & Newer Passenger Cars	70%	70%	70%	70%
Trucks & Multi-Purpose Passenger Vehicles	70%	70%	No Requirement	No Requirement
Medium/Heavy Trucks & Buses	70%	70%	No Requirement	No Requirement
All Other Vehicles	70%	70%	No Requirement	No Requirement

FN [FN*] A label, permanently installed between the sun screening device or other material and the glazing to which it is applied, shall contain the name of the device or material manufacturer or a registration number and the statement, Complies with VESC-20.

Adopted Sept. 28, 1996.

PENNSYLVANIA RULES OF COURT

Pennsylvania Rule of Criminal Procedure

Rule 581. Suppression of Evidence

(A) The defendant's attorney, or the defendant if unrepresented, may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights.

(B) Unless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

(C) Such motion shall be made to the court of the county in which the prosecution is pending.

(D) The motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof.

(E) A hearing shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). A hearing may be either prior to or at trial, and shall afford the attorney for the Commonwealth a reasonable opportunity for investigation. The judge shall enter such interim order as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

(F) The hearing, either before or at trial, ordinarily shall be held in open court. The hearing shall be held outside the presence of the jury. In all cases, the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 110 and 111.

(G) A record shall be made of all evidence adduced at the hearing.

(H) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The defendant may testify at such hearing, and if the defendant does testify, the defendant does not thereby waive the right to remain silent during trial.

(I) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights, or in violation of these rules or any statute, and shall make an order granting or denying the relief sought.

(J) If the court determines that the evidence shall not be suppressed, such determination

shall be final, conclusive, and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its suppressibility.

Rule 126. Citations of Authorities Pennsylvania Rule of Appellate Procedure

(a) When citing authority, a party should direct the court's attention to the specific part of the authority on which the party relies. A party citing authority that is not readily available shall attach the authority as an appendix to its filing. If a party cites a decision as authorized in paragraph (b), (c), or (d), the party shall indicate the value or basis for such citation in a parenthetical following the citation.

(b) Non-Precedential Decisions.

(1) As used in this rule, "non-precedential decision" refers to an unpublished non-precedential memorandum decision of the Superior Court filed after May 1, 2019 or an unreported memorandum opinion of the Commonwealth Court filed after January 15, 2008.

(2) Non-precedential decisions as defined in (b)(1) may be cited for their persuasive value.

(c) Single-Judge Opinions of the Commonwealth Court.

(1) A reported single-judge opinion in an election law matter filed after October 1, 2013, may be cited as binding precedent only in an election law matter.

(2) All other single-judge opinions, even if reported, shall be cited only for persuasive value and not as binding precedent.

(d) Law of the Case and Related Doctrines.-- Any disposition may always be cited if relevant to the doctrine of law of the case, *res judicata*, or collateral estoppel, or if relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding.

Note: Paragraph (a)

Pa.R.A.P. 126 is intended to ensure that cited authority is readily available to the court and parties. Paragraph (a) encourages parties to provide citations to the specific pages of cases and sections or parules

subsections of statutes or rules that are relevant to the reason for the citation.

Although the rule does not establish rules for citation, the following guidelines regarding the citation of Pennsylvania cases and statutes are offered for parties' benefit:

Regarding cases, the rule does not require parallel citation to the National Reporter System and the official reports of the Pennsylvania appellate courts. Parties may cite to the National Reporter System alone.

Regarding statutes, Pennsylvania has officially consolidated only some of its statutes. Parties citing a statute enacted in the Pennsylvania Consolidated Statutes may use the format "1 Pa.C.S. § 1928." Parties citing an unconsolidated statute may refer to the Pamphlet Laws or other official collection of the Legislative Reference Bureau, with a parallel citation to *Purdon's Pennsylvania Statutes Annotated*, if available, using the format, "Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104" or "Section 3(a) of the Act of May 16, 1923, P.L. 207, *as amended*, 53 P.S. § 7106(a)." Parties are advised that *Purdon's* does not represent an official version of Pennsylvania statutes. *In re Appeal of Tenet* HealthSystems Bucks Cnty., LLC, 880 A.2d 721, 725-26 (Pa. Commw.

2005), appeal denied, 897 A.2d 1185 (Pa. 2006).

Litigants are directed to provide, as far as practicable, citations to non-precedential decisions from electronic databases, such as LEXIS or Westlaw or any other readily available website. Opinions of the appellate courts are posted at http://www.pacourts.us and that website has searching and filtering capabilities. If another Rule of Appellate Procedure requires a paper copy, one should be provided.

Prior to Pa.R.A.P. 126, the format for citation was discussed only in Pa.R.A.P. 2119(b), a rule applicable to briefs. The format guidelines are not mandatory, and a party does not waive an argument merely by failing to follow the format. The guidelines do, however, provide assistance to parties looking for generally acceptable citation format in Pennsylvania's appellate courts.

Paragraph (b)

Paragraph (b) defines non-precedential decisions and their value for citation purposes. The new term is intended to harmonize the designations of intermediate appellate court opinions. Thus, "non-precedential decision" encompasses what are referred to as unpublished non-precedential memorandum decisions of the Superior Court and unreported memorandum opinions of the Commonwealth Court.

Additional material from this filing is available in the Clerk's Office.