NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TRAVIS WAGNER FOWLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 790 MDA 2013

Appeal from the Judgment of Sentence of April 19, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0003325-2009

BEFORE: PANELLA, OLSON and PLATT,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 09, 2014**

Appellant, Travis Wagner Fowler, appeals from the judgment of sentence entered on April 19, 2013 in the Criminal Division of the Court of Common Pleas of York County. We affirm.

The trial court summarized the factual and procedural history in this matter as follows:

> A criminal complaint was filed on April 7, 2009 charging [Appellant] with [m]urder of the [t]hird [d]egree, 18 Pa.C.S.A. § 2502(c); [h]omicide by [v]ehicle while [d]riving [u]nder the [i]Influence (DUI), 75 Pa.C.S.A.§ 3735(a); [a]ccident/[v]ictim [d]ies, 75 Pa.C.S.A. § 3742(b)(3); [a]ccident [i]nvolving [d]eath/[i]njury – not properly licensed, 75 Pa.C.S.A. § 3742.1(b)(2); [d]riving [u]nder [s]uspension – DUI [r]elated, 75 Pa.C.S.A. § 1543(b)(1.1)(i); DUI, 75 Pa.C.S.A. § 3802(a)(1); DUI – [h]ighest [r]ate, 75 Pa.C.S.A. § 3802(c); [r]eckless [d]riving , 75 Pa.C.S.A. § 3736(a); and, [c]areless [d]riving, 75 Pa.C.S.A. § 3714(b).
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> [T]he charges arose from a vehicle accident that occurred on July 19, 2008 on Route 30 East near Kreutz Creek Road in York

*Retired Senior Judge assigned to the Superior Court.

County. The Hellam Township Police were dispatched at approximately 1:11 a.m. [Upon arrival at the accident scene,] Officers Heaton and Pollack found a motorcycle lying in the middle of Route 30. A male, appearing to have major injuries, was lying in the grass.

Officers Diehl and Golder were on patrol in the area of Cool Springs Road at the time of the dispatch and also responded to the accident scene. In the 200 block of Cool Springs Road, prior to hearing the dispatch, they had just observed a maroon Dodge Durango with front end damage [that appeared] to have severe mechanical problems.

A witness to the crash, Edward Dill, was still on the scene when the officers arrived. Mr. Dill reported to police that he saw a red [sport utility vehicle (SUV)] approaching him from the rear at a high rate of speed. The red SUV passed him, possibly traveling around 100 m.p.h., and struck a motorcycle in front of him. Mr. Dill said that he never saw the red SUV slow down nor activate [its] brake lights.

The Dodge Durango, spotted previously, was stopped in Wrightsville. [Appellant] was the operator of the Dodge Durango. Officer Golder spoke with [Appellant] when he was pulled over[. During his conversation with Appellant, Officer Golder] detected a strong odor of alcohol and bloodshot glassy eyes. [Appellant] was arrested for DUI and taken into custody. [Appellant] was taken to Memorial Hospital for a blood draw. [Appellant's] blood alcohol content (BAC) was .221% at the time of the blood draw.

Hellam Township Police were notified on July 19, 2008 that Nelson Newcomer, the motorcycle driver, had died as a result of the injuries he sustained in the crash.

[Appellant was] informally arraigned on April 7, 2009. [Appellant] waived his preliminary hearing on June 2, 2009 and was arraigned in the Court of Common Pleas on June 18, 2009[.]

Harry Ness, Esquire entered his appearance for [Appellant] on July 1, 2009.[fn] On July 14, 2009[, Appellant] filed an [o]mnibus [p]re-trial [m]otion that included a [m]otion to [s]uppress [s]tatements made by [Appellant] on July 19, 2008; a [m]otion to [d]ismiss the [t]hird[-d]egree [h]omicide charge; a [m]otion

in [l]imine to exclude evidence of [Appellant's four (4) prior DUI conviction; and, a [m]otion *in [l]imine* to exclude evidence of driver safety classes and/or alcohol awareness classes attended by [Appellant].

[fn] The Honorable [Harold] Ness was elected to the bench of the York County Court of Common Pleas in 2009 and subsequently withdrew his appearance prior to taking office in 2010.

At a hearing on September 28, 2009, [Appellant] withdrew several of his requests and proceeded only on the [m]otions *in [l]imine*. [The trial court] gave [Appellant] and the Commonwealth additional time to brief the issues and a status conference was scheduled for October 30, 2009. Both parties filed [m]emoranda prior to the conference.

[While Appellant's motion was pending, another trial judge on the York County Court of Common Pleas issued a ruling in ***Commonwealth v. Fetrow***, docketed at CP-67-CR-0008136-2008. The issue in ***Fetrow*** concerned whether the Commonwealth could introduce evidence of driver safety classes and/or alcohol awareness classes attended by a DUI defendant. The trial court gave the parties additional time to file briefs in light of the recent ruling in ***Fetrow***. Appellant] filed a [s]upplemental brief on December 4, 2009. [New trial counsel] entered his appearance on behalf of [Appellant] on December 17, 2009 due to [former counsel's] election to the [York County] bench.

The Commonwealth filed a [s]upplemental brief on August 31, 2010 and the trial court issued an [o]rder and [o]pinion on March 24, 2011.[fn] [The trial court] found the basis for [Appellant's] motions *in limine* [] to be virtually identical to those raised in [the ***Fetrow*** case and found it appropriate to follow the authority of the ***Fetrow*** decision. Accordingly, [the trial court] dismissed [Appellant's] [m]otions *in [l]imine* to exclude the evidence of his prior DUI convictions and alcohol/driver safety classes.

[fn] [The trial court in the ***Fetrow*** case] ruled that evidence of Fetrow's prior DUI convictions and [] her attendance at DUI safety classes [was] admissible in a [] case involving a charge of [t]hird [d]egree [m]urder. Ms. Fetrow took an

> interlocutory appeal but [this Court] declined to hear the appeal. Ms. Fetrow pled guilty to [t]hird [d]egree [m]urder and was sentenced on July 7, 2010.

[Appellant filed an interlocutory appeal to this Court raising the issue of the admissibility of his prior DUI convictions and the alcohol/driver safety classes] but [this Court] denied the petition for review on August 8, 2011. The Pennsylvania Supreme Court denied review on February 29, 2012. The case was then assigned to [a different trial judge] and a pre-trial conference was scheduled for April 19, 2012. The pre-trial conference was continued once and then a guilty plea was scheduled for August 1, 2012. At that hearing, [Appellant] indicated his desire to take the case to trial and fired his attorney. The McShane Law Firm entered its appearance on August 17, 2012. On August 21, 2012, trial was scheduled for the December 2012 term. On November 26, 2012, [Appellant] filed a [m]otion for [p]rotective [o]rder on [b]ehalf of NMS Labs which was granted by [o]rder dated November 28, 2012. [Appellant] waived his right to a jury trial on December 4, 2012 and trial was scheduled to begin in the January 2013 trial term.

On January 10, 2013, [Appellant] filed a [m]otion to [b]ar [f]urther [p]rosecution based on the Commonwealth's failure to preserve [certain] evidence, specifically the motorcycle driven by the victim. The Commonwealth filed a responsive brief on January 14, 2013. Prior to the start of the trial on January 16, 2013, [the trial court heard argument and] entered an [o]rder denying [Appellant's] [m]otion to [d]ismiss the charges due to the disappearance of the victim's motorcycle. [In its order, the trial court determined that Appellant's motion was untimely and, alternately, that the Commonwealth did not violate Appellant's due process rights.]

A non-jury trial [commenced] on January 16, 2013 [and ran] through January 18, 2013[,] and then reconvened on March 7, 2013. The verdict was entered on March 7, 2013 finding [Appellant] guilty on all counts.

Sentencing occurred on April 19, 2013. The aggregate sentence was 15 years [and nine] months to 31 years[.] incarceration in a state correctional facility. [Appellant's] Notice of Appeal was timely filed on April 26, 2013. [The requirements of Pa.R.A.P. 1925 have been satisfied by Appellant and the trial court.]

Trial Court Opinion, 7/1/13, at 1-8 (certain footnotes omitted).

> Appellant's brief presents the following questions for our review:
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> [Does the Commonwealth's failure to preserve potentially useful evidence (*i.e.* a motorcycle) constitute bad faith and a violation of Appellant's due process rights where the Commonwealth did not take appropriate corrective action in response to a prior similar loss of potentially useful evidence?]
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> [Does Article 1, Section 9 of the Pennsylvania Constitution afford greater protection than its federal counterpart, thus allowing this Court to depart from a "bad faith" standard and find a due process violation where the Commonwealth's actions constitute only recklessness or negligence?]

See Appellant's Brief at 4-5.[1]

Appellant challenges the trial court's January 16, 2013 order denying his motion to bar further prosecution of the charges in this case in light of the loss or destruction of the victim's motorcycle. The trial court denied Appellant's motion on grounds that it was untimely and because Appellant failed to demonstrate bad faith on the Commonwealth's part. ***See*** N.T. Trial, 1/16/13, at 45-48. We first address Appellant's claim that the trial court erred in concluding that the motion was untimely[2] and then proceed to

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[1] For purposes of clarity, we have paraphrased Appellant's recitation of the issues.

[2] Appellant did not include this procedural claim within his statement of the questions involved. Moreover, his procedural challenge is not fairly suggested by the substantive claims set forth in that section of Appellant's brief. Hence, Appellant's procedural issue is subject to waiver. ***See*** Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the
(Footnote Continued Next Page)

consider the substantive claims advanced in Appellant's statement of questions involved.

Appellant initially asserts that the trial court erred in denying his motion as untimely. Specifically, Appellant argues that his motion fell within an exception to our rules of criminal procedure governing the timely submission of pre-trial requests for relief. Appellant claims that his motion was exempt from the time constraints found in our procedural rules because defense counsel was unaware of the grounds for the motion until December 17, 2012 when the Commonwealth forwarded notice that the victim's motorcycle had been lost or destroyed. Appellant also claims that the Commonwealth waived its objection to the timeliness of the motion because it never raised that issue during argument before the trial court.

Rule 578 of the Pennsylvania Rules of Criminal Procedure states: "Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion." Pa.R.Crim.P. 578. Rule 579 contains the timeliness requirement for filing an omnibus motion pursuant to Rule 578. In relevant part, Rule 579 provides: "the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless

(Footnote Continued) ———————————

statement of questions involved or is fairly suggested thereby.") As Appellant's omission has not materially hampered our review, we shall overlook this misstep.

. . . the defendant or defense attorney . . . was not aware of the grounds for the motion[.]" Pa.R.Crim.P. 579(A).

In this case, Appellant first moved to preclude further prosecution on January 15, 2013, long after the 30-day deadline triggered by his formal arraignment on June 18, 2009. Appellant explains this delay by pointing out that neither he, nor his counsel, was aware of the destruction of the motorcycle until December 16, 2012 when the Commonwealth initially gave notice that the vehicle had been destroyed. Thereafter, he filed his motion within 30 days of the date he first received notice of the grounds for the motion. Appellant's counsel explained this further delay by noting that he needed time to ascertain the Commonwealth's evidence retention policy and obtain an export report describing the need to examine the missing motorcycle. Appellant also argues that, during argument on the motion, the Commonwealth never raised the issue of timeliness. The Commonwealth suggests that such an argument was unnecessary since the trial court raised the issue on its own at the outset of the proceedings. Based upon the circumstances presented in this case, we conclude that because neither Appellant nor his counsel was aware of the grounds for the motion until December 16, 2012, Appellant's motion to preclude further prosecution falls within Rule 579(A)'s exception to the 30-day filing deadline. ***See Commonwealth v. Borovichka***, 18 A.3d 1242, 1248 (Pa. Super. 2011) (suppression claim falls within exception to 30-day deadline found in

Pa.R.Crim.P. 579(A) where defense counsel first learned of basis for claim on morning of suppression hearing). Although we conclude that the trial court erred in determining that Appellant's motion was untimely, we hold, for the reasons that follow, that Appellant is not entitled to relief on his substantive claims that the loss or destruction of the victim's motorcycle violated his due process rights.

Appellant's next contention alleges that the Commonwealth's failure to preserve the victim's motorcycle violated his rights to due process of law. In developing this claim, Appellant acknowledges, and we agree, that the motorcycle constitutes potentially useful evidence rather than materially exculpatory proof. "Potentially useful" evidence is evidence that "could have been subjected to tests, the results of which might have exonerated the defendant." ***Arizona v. Youngblood***, 488 U.S. 51, 57 (U.S. 1988). Appellant maintains that the loss of the motorcycle frustrated his plans to assert at trial that: "(1) the motorcycle's rear light was not present; (2) the motorcycle's rear light failed to illuminate; []or, (3) the motorcycle's rear light failed to work as designed [on] the night in question." Appellant's Brief at 14. Given Appellant's proposed use of the motorcycle, we agree with his assertion that, if the Commonwealth had preserved the evidence, he could have examined or tested it for potentially exonerating information. ***See*** Appellant's Brief at 15. Hence, we apply the law applicable to a claim that

the loss or destruction of potentially useful evidence violated the defendant's right to due process.

This Court recently summarized the principles that govern such a claim:

> [I]n ***Commonwealth v. Snyder***, 963 A.2d 396, 405 (Pa. 2009), the Pennsylvania Supreme Court adopted the [United States Supreme Court's approach in ***Illinois v. Fisher***, 540 U.S. 544 (2004)] as the "governing standard." In ***Snyder***, defendants, who had been charged with violations under the Solid Waste Management Act, filed a motion to suppress the results of the tests on the soil sample, which they claimed was destroyed before they could independently test it. The [Pennsylvania Supreme] Court granted the Commonwealth's petition for allowance of appeal to consider whether the Commonwealth Court erred in affirming the trial court's order suppressing the test results.
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> Pursuant to ***Fisher***, the ***Snyder*** Court held that a showing of bad faith is required for a due process violation where the Commonwealth destroys potentially useful evidence before the defendant has an opportunity to examine it, no matter whether the evidence is introduced at trial and no matter how useful the evidence is to the prosecution or the defense.[fn] ***Id.*** at 404–405. Because the evidence at issue was only potentially useful and no bad faith was shown, the ***Snyder*** Court determined that the trial court improperly granted suppression. ***Id.*** at 406.
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> [fn] In so holding, the Pennsylvania Supreme Court abrogated ***Commonwealth v. Deans***, 610 A.2d 32 (Pa. 1992), making [Appellant's] reliance on [that case] misplaced.

Borovichka, 18 A.3d at 1252 (parallel citations omitted).

Appellant's bad faith claim—based upon the Commonwealth having lost or destroyed the victim's motorcycle before he had notice thereof—is unavailing. Appellant acknowledges that the Commonwealth had a policy,

albeit an unwritten one, which provided that evidentiary materials such as the victim's motorcycle may not be destroyed without direct authorization by the district attorney's office. Moreover, Appellant cites no proof that the Commonwealth issued such an instruction to the individuals and/or entities that where under contract to store the motorcycle. Appellant relies heavily upon the fact that the district attorney prosecuting his case had previously been involved in a criminal matter where a motor vehicle was lost. Appellant leverages these circumstances into a claim that the Commonwealth owed a duty to preserve evidence relating to a fatal accident investigation and that it breached this duty by failing to develop a written policy and take other corrective measures such as more active oversight of salvage yards or maintaining more frequent contact with the storage contractors. We reject Appellant's contention that these factors support a finding of bad faith, particularly in the absence of any evidence whatsoever that the Commonwealth played any affirmative role in the loss or destruction of the victim's motorcycle.

We also discern no merit in Appellant's claim that "[it is possible that] the Commonwealth `lost' the motorcycle **before** it charged [Appellant] with [the present] crimes." Appellant's Brief at 18 (quotations and emphasis in original). This Court rejected an identical claim in ***Borovitchka***. In that case, we noted that Pennsylvania Rule of Criminal Procedure 503 provides: "When a defendant is arrested without a warrant, it is the arrest itself which

institutes the proceedings, followed by the filing of the complaint." Pa.R.Crim.P. 503 cmt.; ***see also*** Pa.R.Crim.P. 502. Thus, Appellant's arrest on July 19, 2008 instituted the present proceedings, not the charges that were later filed against him. Furthermore, Appellant's arrest and the events of that evening should have alerted him and his counsel to the significance of the victim's motorcycle in the prosecution that was certain to follow. If Appellant or his counsel had acted with due diligence, then they could have requested inspection of the motorcycle before it was destroyed. No one on behalf of Appellant asked to inspect the victim's motorcycle until August 2012, four years after the collision. Moreover, Appellant did not consult an expert until after he received notice that the motorcycle was missing. Based upon the totality of circumstances, particularly the passage of time between the collision and counsel's request to examine the motorcycle, it is Appellant's failure to promptly request inspection that that was a greater contributing factor in precluding examination of the evidence, not any action or inaction on the part of the Commonwealth. Thus, Appellant's claim that the Commonwealth could have lost the motorcycle before it filed any charges is misplaced. As we observed in ***Borovitchka***, "the constitutionality of storing and destroying evidence in a criminal prosecution does not hinge on when [charges are filed; r]ather, it is tied to the standards articulated in ***Youngblood***, ***Fisher***, and ***Snyder***, which focus on the materiality of the

evidence at issue and whether the state acted in bad faith in destroying it." ***Borovitchka***, 18 A.3d at 1252.

The record in this case is devoid of any evidence indicating that the Commonwealth acted in bad faith. The victim's motorcycle was destroyed because of the actions of third parties, not because of any malicious or nefarious intent harbored by the district attorney's office. The Supreme Courts of both the United States and this Commonwealth have clearly held that bad faith, not negligence, gross negligence, or recklessness, is the touchstone of a due process violation when potentially useful evidence is lost or destroyed. Moreover, these Courts have made clear that due process does not impose upon police the "absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." ***Youngblood***, 488 U.S. at 57. Because the evidence here was at best "potentially useful" and there was no showing that the Commonwealth acted in bad faith, Appellant's claim fails. The trial court, therefore, did not err in denying Appellant's motion. ***See Snyder***, ***supra***.

In his final challenge to the trial court's ruling, Appellant asks this Court to construe the due process provision of the Pennsylvania Constitution more broadly than its federal counterpart. Characterizing the federal constitution as a mere baseline protection, Appellant implores us to consider the centrality of the missing evidence to the Commonwealth's case in deciding whether a state due process violation has occurred. ***See***

Appellant's Brief at 22, *citing* ***Snyder***, A.2d at 409 (Baer, J., concurring). Appellant further suggests that ***Commonwealth v. Edmunds***, 586 A.2d 887, 894 (Pa. 1991), a case that considered the exclusionary rule and the reach of state constitutional provisions pertaining to unreasonable searches and seizures, supplies the analytical framework through which we should examine the comparative scope of the due process provision of the Pennsylvania Constitution. Applying ***Edmunds***, Appellant argues that the text of the due process provision found in the Pennsylvania Constitution, the history of that provision, case law from Pennsylvania and other states, and policy considerations, support his claim that the Pennsylvania Constitution affords greater protection than its federal counterpart does.

Appellant is not entitled to relief on this claim. We have carefully reviewed the proceedings before the trial court. In his motion to bar further prosecution and during his presentation to the court, counsel for Appellant raised a generalized due process claim but never advanced a claim predicated upon broader and distinct due process rights implicit in the Pennsylvania Constitution. ***See*** N.T., 1/16/13, 1-46; ***see also*** Motion to Bar Further Prosecution, 1/10/13, at 7 (not paginated). Where potentially useful evidence has been lost and a defendant first raises on appeal a separate and distinct violation of state due process standards, our Supreme Court has observed:

> Turning to [a]ppellant's entitlement to relief under the state due process clause, [a]ppellant did not claim before the trial court

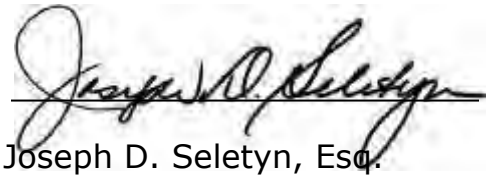
> that the Pennsylvania Constitution provided an independent basis for relief. His state due process claim, therefore, is waived. ***Commonwealth v. Colavita***, 993 A.2d 874, 891 (Pa. 2010) ("[C]ourts should not reach claims that were not raised below."); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Moreover, as explained above, this Court's focus on the centrality of the missing evidence to the Commonwealth's case in [***Commonwealth v. Deans***, 610 A.2d 32 (Pa. 1992)] was overruled by this Court in ***Snyder***. Although one member of the Court expressed approval of this concept for purposes of state law in a concurring opinion, ***see Snyder***, 963 A.2d at 409 (Baer, J., concurring), the Court has never held that the state due process clause differs from the federal due process clause in this respect. We decline to consider whether state due process should depart from federal due process with regard to missing evidence where this argument was not directly advanced in the court below. Although this is a troubling issue, we conclude that no relief is warranted.

Commonwealth v. Chamberlain, 30 A.3d 381, 405-406 (Pa. 2011).

For the reasons expressed by our Supreme Court in ***Chamberlain***, we conclude that Appellant has waived appellate review of his due process claim pursuant to the provisions of the Pennsylvania Constitution. Accordingly, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/9/2014