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EYEWITNESS IDENTIFICATION: EXPERT TESTIMONY

On Jan. 27, 2003, jewelry store owner was assaulted and burglarized in his home by two masked individuals, who tied store owner's hands with flex ties and placed duct tape over his eyes. Store owner was able to remove the duct tape from one of his eyes, and saw the face of one of the individuals. He informed police of the incident and reviewed two photo arrays, but was unable at this time to identify appellant as one of the perpetrators. However, in January 2005, store owner reviewed another photo array and identified appellant.

Appellant was charged with numerous offenses, included kidnapping to facilitate a felony, criminal attempt of burglary, criminal conspiracy, and other related crimes.

Prior to trial, appellant moved in limine to admit expert testimony from a leading expert on human memory concerning psychological factors that influence the accuracy of eyewitness identifications. The trial court denied the motion.

After other procedural methods for relief were unsuccessful, a jury found appellant guilty of all charges. The trial court sentenced appellant to 32 ½ to 65 years of incarceration.

On appeal, appellant claimed that the trial court violated his constitutional right to present a defense by precluding expert testimony on the subject of human memory and perception as it relates to the identification process.

A panel of the superior court affirmed. It concluded that the trial court did not abuse its discretion as it was following established case law and the long-standing principle that the jury must decide issues of credibility.

The Pennsylvania Supreme Court remanded in light of *Commonwealth v. Walker*, 93 A.3d 766, 792–93 (2014), which held that "the admission of expert testimony regarding eyewitness identification is no longer per se impermissible in Pennsylvania."

The superior court remanded.

For over 20 years, Pennsylvania placed a per se ban on expert testimony regarding the reliability of eyewitness identification, as such testimony would intrude upon the jury's function of deciding credibility.

After *Walker*, however, the trial court may permit testimony regarding the fallibility of eyewitness identification in light of "advances in scientific study . . . that eyewitnesses are apt to erroneously identify a person as the perpetrator of a crime when certain factors are present." (*Id.* at 782–83). According to the supreme court, such expert testimony is limited to certain cases, and trial courts must exercise their traditional role in determining the admissibility of expert testimony. Defendant must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the particular eyewitness identification and how it will assist the jury in its evaluation. The proof should establish the presence of factors (e.g., stress or differences in race between the witness and defendant) which may be shown to impair the accuracy of eyewitness identification in aspects beyond the common understanding of laypersons.

Here, the trial court excluded the proposed expert testimony based upon the then-existing per se ban against its introduction in all cases, not based upon the analysis set forth by the Walker Court.

Case remanded.

Commonwealth v. Selenski, 2015 Pa. Super. 126, No. 352 EDA 2010 (May 27, 2015)

MIRANDA RIGHTS: ANTICIPATORY INVOCATION

Appellee allegedly shot and killed victim, then fled to Florida, where his mother lived. Police learned of appellee's whereabouts, obtained an arrest warrant and notified Florida law enforcement. Federal authorities in Florida detained appellee, then 17-years old, in a juvenile facility to await extradition to Pennsylvania. The day after his arrest, appellee's father contacted the Defender Association of Philadelphia. A lawyer from the defender's office faxed a form letter to Florida counsel representing appellee in connection with extradition proceedings, asking appellee to sign and return the document. The letter, which reflected a clear putative invocation of the *Miranda*-based right to counsel, read as follows:

> "PLEASE BE ADVISED THAT I . . . DO NOT WISH TO SPEAK WITHOUT AN ATTORNEY PRESENT.
>
> "I WISH TO BE REPRESENTED BY A LAWYER, UNTIL SUCH TIME AS I HAVE AN OPPORUTNITY TO FULLY DISCUSS THE DETAILS OF MY CASE WITH MY LAWYER . . ., I STATE THE FOLLOWING TO YOU:
>
> "I DO NOT WISH TO BE QUESTIONED OR HAVE ANY DISCUSSION WITH THE POLICE.
>
> "I DO NOT WISH TO SPEAK TO YOU WITHOUT MY ATTORNEY PRESENT.
>
> "I WILL NOT WAIVE OR GIVE UP ANY OF MY RIGHTS UNDER MIRANDA V. ARIZONA, NOR WILL I GIVE UP ANY OF MY PENNSYLVANIA OR FEDERAL CONSTITUTIONAL RIGHTS EITHER ORALLY OR IN WRITING WITHOUT THE PRESENCE OF MY LAWYER."

Appellee signed the letter and returned it to the defender's association, which forwarded copies to the Philadelphia Police Department and the district attorney.

Later, appellee waived extradition and was taken to Philadelphia where he remained in police custody. Six days after appellee signed the aforementioned

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form, a detective gave him *Miranda* warnings. During the ensuring questioning, appellee ultimately confessed to murder and, after consulting with his father, also provided a written confession.

Charged with murder, firearms violations, and several related offenses, appellee moved to suppress his written statement, claiming that police violated his *Miranda* rights, and Article 1, Section 9 of the Pennsylvania Constitution (the commonwealth's equivalent to the Fifth Amendment). The court granted appellee's motion and suppressed admission of the confessions into evidence, without any independent treatment of state constitutional considerations.

In its opinion, the court explained *Miranda* and referred to the *Edwards* requirement that, once a detainee invokes his *Miranda*-based right to counsel during custodial interrogation, questioning must cease. (*Edwards v. Arizona*, 451 U.S. 477, 484–485 (1981).) In terms of the timing of appellee's invocation, the court relied on broad language from *Miranda* specifying that, if an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning." (*Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).) Thus, the court determined that, because appellee had personally asserted his rights by signing the non-waiver letter, he made an effective invocation, and uncounseled interrogation was proscribed even six days later.

A divided, three-judge panel affirmed, essentially adopting the reasoning of the suppression court. The dissent held that appellee's invocation of the Fifth Amendment rights were anticipatory of custodial interrogation and, therefore, not a valid exercise of constitutional rights.

The Pennsylvania Supreme Court reversed and remanded.

Consistent with the weight of authority, valid invocations of *Miranda* rights should be made in close temporal proximity to the circumstances giving rise to the relevant concern, i.e., upon or after actual or imminent commencement of in-custody interrogation. The Fifth Amendment does not prohibit voluntary self-incrimination, only compelled self-incrimination. Moreover, the burden of invoking the right to counsel in close proximity to custodial interrogation is outweighed by legitimate law-enforcement objectives: the widely-prevailing Miranda regime strikes an appropriate balance, and there is no present apparent reason to expand it to encompass all custodial situations.

Todd, M.J., dissenting, considered appellee's written request a valid invocation of his Fifth Amendment rights under Miranda, which, she emphasized, does not require that a request for assistance of counsel made by an individual in custody take place "in close temporal proximity to" police interrogation. Here, appellee's request was sufficient to trigger constitutional protections because it was made while he was in custody, and it was done with the express purpose of securing counsel's assistance for any interrogation to which he would be subjected.

Order reversed. Case remanded.

Commonwealth v. Bland, J-66-2016, No. 33 EAP 2013 (May 26, 2015)

POSSESSION OF FIREARMS BY CONVICTED FELON: 18 U.S.C. § 922(G)

A federal district court ordered petitioner, a U.S. Border Patrol agent charged with the felony offense of distributing marijuana, to surrender all firearms as a condition of his release on bail. The FBI took custody of the weapons. Shortly thereafter, petitioner pled guilty as charged. As a result of that conviction, petitioner was prevented from legally repossessing his firearms under 18 U.S.C. § 922(g), which makes it unlawful for any person convicted of a felony to possess any firearm or ammunition.

Following release from prison, petitioner requested the FBI to transfer his guns to a friend who had agreed to purchase them for an unspecified price. The FBI denied the request, explaining that release of the firearms to a third party would violate section 922(g) as it would amount to felon's constructive possession of the guns.

Petitioner then asked the court to release his firearms to the third party. The trial court denied the motion,

and the United States Court of Appeals for the Eleventh Circuit affirmed. Both courts agreed that granting petitioner's motion would amount to giving a felon constructive possession of his firearms in violation of section 922(g).

The United States Supreme Court vacated and remanded.

A federal court has equitable authority to order a law enforcement agency to turn over property to the rightful owner, even after a criminal proceeding has ended. Under section 922(g), a court may not instruct an agency to return guns to a felon-owner. However, section 922(g) does not prevent a court from directing an agency to transfer such firearms to a third party.

Section 922(g) does not prohibit a felon from owning firearms, but prevents the felon from knowingly possessing—either actually or constructively—his (or any other person's) guns. Thus, section 922(g) prevents a felon not only from holding his firearms himself but also from maintaining control over those guns in the hands of others. However, section 922(g) does not affect the right merely to sell or otherwise dispose of those items. The crucial question is whether the felon will have the ability to use or direct the use of his firearms after the transfer. That is what gives the felon constructive possession.

Accordingly, a court may approve the transfer of guns consistently with section 922(g) provided that the disposition prevents felon from later exercising control over those weapons. For example, a court may order the guns turned over to a firearms dealer, independent of the felon's control, for subsequent sale on the open market (and, absent exceptional circumstances, whether or not felon has picked the vendor) or approve transfer of felon's guns to a person who expects to maintain custody of them without allowing felon to exert any influence over their use. (A court may properly seek certain assurances, such as asking the proposed transferee to promise to keep the guns away from felon, and to acknowledge that allowing felon to use them would aid and abet a section 922(g) violation.) When a court is satisfied that felon will not retain control over his guns, section 922(g) does not apply, and the court has equitable power to accommodate felon's request.

Judgment vacated and remanded for courts below to assess petitioner's motion for transfer in accord with these principles.

Henderson v. United States, 575 U.S. ___ (2015)(Slip op.), No. 13-1487 (May 18, 2015)(unanimous court, resolving split among circuits)

PRIOR BAD ACTS (RAPE): COMMON SCHEME OR PLAN AND ABSENCE OF MISTAKE

On July 31, 2010, G.B. left work because she felt ill after donating plasma. G.B. asked appellee, a casual acquaintance, to bring her some food. Appellee arrived at G.B.'s apartment and stayed while she fell asleep. During the early morning hours of Aug. 1, 2010, G.B. awoke to find appellee having vaginal intercourse with her. Appellee told G.B. that she had taken her pants off for him. G.B. claimed she told appellee to stop and he complied. After falling back asleep, G.B. awoke again and found appellee naked in her kitchen. She claimed to have told appellee she did not want to have sex with him and returned to bed. Shortly thereafter, she again awoke to find appellee having vaginal intercourse with her. G.B. told appellee to stop and asked him what he was doing. Appellee told G.B. that her eyes were open the whole time. G.B. told appellee to leave her apartment, and then went to the hospital for treatment.

Commonwealth charged appellee with rape and related crimes. It moved in limine for permission to introduce evidence of appellee's 2001 conviction for rape in Delaware based on common scheme or plan and to show that appellee did not "mistakenly" conclude G.B. "consented" to sexual intercourse with him (see Rule 404(b)). Appellee moved to preclude his prior rape conviction.

The court denied commonwealth's motion and declared appellee's prior conviction inadmissible. A panel of the superior court affirmed.

On reargument, the superior court reversed and remanded.

Evidence of prior crimes is not admissible to demonstrate a criminal's propensity to commit crimes. However, evidence may be admissible when relevant for some other legitimate purpose, i.e., proof of an actor's knowledge, plan, motive, identity, or absence of mistake or accident. When offered for a legitimate purpose, evidence of prior crimes is admissible if its probative value outweighs its potential for unfair prejudice.

When ruling upon the admissibility of evidence under the common plan exception, courts must first examine the details and surrounding circumstances of each incident to assure that the evidence reveals criminal conduct distinctive and so nearly identical as to become the signature of the same perpetrator. Thus, the court must examine habits or patterns of action, as well as the time, place, and types of victims typically chosen by the perpetrator. Common plan evidence may not be too remote in time to be probative (remoteness in time is inversely proportional to the similarity of the crimes in question). The court must then balance the potential prejudicial impact of the evidence with such factors as the degree of similarity established between the incidents, commonwealth's need to present evidence, and the ability of the trial court to caution the jury concerning the proper use of such evidence by them in their deliberations. Evidence of a prior crime may also be admitted to show a defendant's actions were not the result of a mistake or accident where the manner and circumstances of two crimes are remarkably similar.

Here, the circumstances of each incident are sufficiently similar to satisfy the common plan or scheme exception to Rule 404. Both reflect a clear pattern where appellee was legitimately in each victim's home, appellee was cognizant of each victim's compromised state; and appellee had vaginal intercourse with each victim in her bedroom in the middle of the night while victim was unconscious. Furthermore, evidence of appellee's prior rape conviction is not too remote in time to negate its probative value.

Additionally, the probative value of appellee's prior conviction (i.e., the substantial similarity between the two incidents) outweighs its potential for unfair prejudice. One factor of the undue prejudice analysis—commonwealth's need to present evidence under the common plan exception—weighs heavily in favor of commonwealth. Identity is not an issue (appellee admitted that he had sex with G.B.), only consent. If evidence of appellee's prior conviction is excluded, commonwealth must rely solely on the uncorroborated testimony of G.B. to counter appellee's defense of consent to vaginal intercourse. Thus, commonwealth has a significant need for the prior crime evidence to prove appellee had non-consensual sex with G.B.

Likewise, the trial court should have declared the evidence admissible under the absence of mistake or accident exception to Rule 404. Appellee disputes G.B.'s account that she was asleep when appellee initiated sexual intercourse and maintains that he thought G.B. consented to the act. Given the relevant similarities between the two incidents, evidence of appellee's prior rape would tend to prove he did not "mistakenly believe" G.B. was awake or gave her consent. Rather, the evidence would tend to show appellee recognized or should have recognized that, as with prior victim, G.B.'s physical condition rendered her unable to consent. Appellee's prior conviction is highly probative on the issue of consent, but not so remote in time or unduly prejudicial as to bar its admission under the absence of mistake or accident exception to Rule 404.

Donohue, J., dissenting (with Bender, P.J.E. and Ott, J., joining), held that the majority overemphasized the similarities of the cases while completely ignoring several important differences and misconstrued existing case law to permit prior acts evidence to bolster the credibility of commonwealth's only witness, who was not otherwise impeachable.

Commonwealth v. Tyson, 2015 Pa. Super. 138, No. 1292 MDA 2013 (June 10, 2015)

PRIOR BAD ACTS: KNOWLEDGE EXCEPTION

On Nov. 12, 2012, at approximately 9:00 p.m., Regina Qawasmy was returning home from work when she noticed a pick-up truck driving very close to her rear bumper. Qawasmy repeatedly applied her brakes to get the truck to back off, to no avail. Qawasmy then

put on her turn signal to indicate that she was going to make a right turn. The driver of the truck immediately revved the engine, and accelerated to the left around Qawasmy's turning vehicle.

As the truck sped around Qawasmy, it struck and killed a 16-year-old boy who was standing in the center lane of the roadway. Both Qawasmy and the pick-up pulled over and parked the vehicles.

The first office dispatched to the scene located the victim lying against a curb, bleeding from the nose, mouth, and ear. Victim was transported to the hospital, where he died that night.

While the officer was attending to victim, appellee's girlfriend (Denise) stated that she was the driver of the pick-up truck. Officer directed Denise to a local hospital for a blood draw to ascertain whether she was operating the truck under the influence of alcohol. Officer did not take appellee or anyone else to the hospital for a blood draw.

Officer also took two written statements from appellee, one on the night of the accident, and one five days later. In his initial statement, appellee claimed that Denise was driving at the time of the accident, and that he was riding in the front passenger seat.

Denise had provided police a written statement on the night in question that conformed to appellee's version of events. However, upon reviewing statements from Denise and appellee, officer noticed some material inconsistencies. He decided to re-interview both individuals. In her second interview, Denise admitted that she was not the driver of the pick-up truck, that appellee was driving, and that she had said she was driving because appellee had a criminal history and she feared that he would face severe consequences if arrested. Denise also told officer that appellee had consumed a few alcoholic beverages prior to driving the truck.

When officer re-interviewed appellee, appellee admitted that he was driving the truck on the date in question. He acknowledged that he had been convicted of vehicular manslaughter in Alabama in 2004, after he struck and killed a pedestrian with his vehicle. Appellee had served a significant sentence for that crime, and he feared that, if he was charged and convicted of a crime for the instant accident, he would be severely punished. Therefore, he instructed Denise and her children (also in the car at the time of the accident) to lie to police about who was driving the vehicle. Appellee also admitted to drinking three beers before driving that evening.

A detective, who testified on behalf of commonwealth as an expert in the field of accident reconstruction, was called to the scene on the night of the accident and spoke with appellee. During the conversation, detective noticed an odor of alcohol emanating from appellee. Appellee admitted to detective that he had drunk a few beers, but denied that Denise had been drinking. Detective also concluded that the tailgating and speed of the pick-up truck coincided to cause the accident.

Appellee was charged with multiple vehicular and criminal offenses. He moved in limine to preclude commonwealth from introducing: evidence of false statements that appellee made to police during the investigation; evidence of appellee's prior homicide by vehicle conviction; and evidence of appellee's consumption of alcohol before the accident.

The trial court granted appellee's motion, and precluded commonwealth from introducing any of the challenged evidence.

The superior court vacated in part and affirmed in part.

First, the admissibility of evidence that appellee lied to police as a demonstration of appellee's consciousness of guilt was not yet ripe for review. Commonwealth's claim was predicated upon evidence that it might admit at trial if appellee pled guilty to the crimen falsi offenses. Thus, appellee must plead guilty before commonwealth's argument ripens.

Next, commonwealth challenged the trial court's holding that appellee's Alabama conviction for homicide by vehicle was inadmissible at appellee's upcoming trial. It argued that the conviction was admissible as a prior bad act pursuant to Rule of Evidence 404(b) to prove appellee's knowledge that his conduct could result in the death of another person for purposes of proving the recklessness element of homicide by vehicle.

Generally, evidence of prior bad acts is inadmissible to show a defendant's propensity to commit the current crime. However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact (e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident). To establish an exception to the rule, commonwealth must show a close factual nexus sufficient to demonstrate the connective relevance of the prior bad acts to the crime in question. In determining admissibility, the trial court must balance the probative value of such evidence against its prejudicial impact. (See Commonwealth v. Sherwood, 982 A.2d 483, 497 (Pa. 2009); Commonwelath v. Ross, 57 A.3d 85, 105–106 (Pa. Super. 2012).)

Here, appellee was charged with, inter alia, homicide by vehicle. A person is guilty of that crime if he "recklessly or with gross negligence causes the death of another person while engaged in the violation of any law . . . or municipal ordinance applying to the operation or use of a vehicle . . ., when the violation is the cause of death." (18 Pa.C.S. § 3732(a).)

Commonwealth argued that appellee's prior homicide by vehicle conviction was admissible because "[e]ven without ever having been in an accident, most people generally know that reckless driving can kill others." This argument is tenuous. It does not take a prior conviction for homicide by vehicle for a person to understand or have "knowledge" that hazardous or reckless driving creates risk. Every driver knows this. Thus, the evidence did not meet the requirement for the "knowledge" exception, or any other exception set forth in the rule. In fact, Rule 404(b) is designed specifically to keep evidence of the prior accident, unconnected in any way to the latter accident, from the jury.

Moreover, even if the prior conviction was somehow admissible under the knowledge exception, commonwealth failed to show that the probative value of this conviction outweighed the "potential for unfair prejudice." (Pa.R.E. 404(b)(2).) Here, the prejudice appellee would suffer was "practically insurmountable," even if the jury was given a cautionary instruction. Thus, the trial court's order excluding this evidence was not an abuse of discretion.

Finally, commonwealth argued that the trial court erred by precluding any evidence of appellee's consumption of three alcoholic beverages before driving the pick-up truck. For purposes of determining whether a driver was reckless, Pennsylvania Courts distinguish between evidence that a driver was intoxicated and evidence that the driver only had been drinking, but was not intoxicated. Although evidence of intoxication does not establish recklessness per se, such evidence is relevant and admissible. However, where, as here, commonwealth cannot demonstrate that driver actually was intoxicated, evidence that driver had been drinking (e.g., the odor of alcohol emanating from driver) is inadmissible to prove that a person was driving recklessly.

Wecht, J., concurring and dissenting, agreed that evidence pertaining to any crime falsi offenses was premature and that evidence related to appellee's consumption of three alcoholic beverages approximately three hours before driving the truck was inadmissible. However, appellee's prior vehicular manslaughter conviction in Alabama was admissible as a prior bad act to prove appellee's knowledge that his conduct could result in the death of another person for purposes of proving, inter alia, the recklessness element of homicide by vehicle, because the facts of appellee's Alabama conviction bore a sufficient resemblance to those in the current case. In both cases, appellee was operating a motor vehicle too closely to another vehicle while travelling at an excessive speed and attempted to pass the other vehicle when it braked; that combination of factors led to the death of another person while appellee attempted the pass. Thus, the Alabama conviction was admissible to demonstrate that appellee knew that his hazardous driving created a substantial risk that death of another might result from his actions. The conviction was also relevant to prove that appellee not only knew of the risk, but consciously disregarded it.

Order vacated in part and affirmed in part.

Commonwealth v. Sitler, 2015 Pa. Super. 122, No. 3015 EDA 2013 (May 21, 2015)

SEARCH AND SEIZURE: SEARCH OF PERSONAL COMPUTER

On Oct. 15, 2004, appellee brought his desktop computer to Circuit City store to have an optical drive and DVD burner installed. A sales assistant informed appellee that, as part of the installation process, they would "have to make sure [that the DVD burner] works" and directed appellee to return in approximately one hour.

After the DVD drive and software had been installed, employee performed a general search for a video file on appellee's computer to test the new DVD drive. Specifically, employee did a generic search of the PC. Once the search button was activated, the computer automatically loaded the requested files and continued to enlarge itself. The first few video titles that appeared from appellee's video list were innocuous. However, as the video log continued to compile on the computer screen, some of the files appeared to be pornographic in nature due to their titles (e.g., masculine first names, ages of either 13 or 14, and sexual acts). Employee clicked on "the first one" that appeared questionable: the video contained the lower torso of an unclothed male, and when a hand approached the male's penis, employee immediately stopped the video, contacted his manager, and called the police.

Three officers responded to the call and viewed the same video clip while at the store. When appellee arrived to retrieve his computer, police informed him that it was being seized because they suspected that it contained child pornography. Police took the computer to the station, obtained a warrant to search it, and discovered child pornography.

On March 11, 2005, appellee was charged with two counts of sexual abuse of children, and one count of obscene and other sexual materials and performances. He moved to suppress the evidence seized from his computer. The trial court granted the motion.

Commonwealth appealed, arguing that the trial court erred in concluding that appellee retained a privacy interest in the computer because he volitionally relinquished any expectation of privacy in that item by delivering it to store employees knowing that they were going to install and test a DVD device.

A panel of the superior court reversed and remanded, concluding that appellee had no reasonable expectation of privacy because he had "abandoned" his computer, for one hour, for the installation of a DVD drive.

On remand, appellee introduced new evidence in the form of two experts, who testified that opening the computer's video files was not a proper method for testing the installation of a DVD burner, and that the methods used by store were not consistent with industry standards. The suppression court again found that appellee had a reasonable expectation of privacy in the digital data on his computer, and granted appellee's suppression motion.

The superior court reversed and remanded. Based upon a theory of abandonment, the panel concluded that the trial court erred in finding appellee retained a legitimate expectation of privacy in the video files.

On remand, appellee filed a petition to re-open suppression based on the United States Supreme Court's decision in United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012)(search occurred when government physically occupied private property for purpose of obtaining information by installing a GPS tracking device on a suspect's car). The suppression court granted appellee's petition and again granted appellee's suppression motion, concluding that the search of appellee's computer files and the seizure of his computer violated the Fourth Amendment.

Commonwealth appealed, arguing inter alia, that appellee failed to identify any intervening change in the law that applied to his suppression claim, that Jones did not apply where, as here, appellee gave up his property rights, and that the plan view exception applied to the police view of 19 seconds of the video Circuit City employees viewed. It further argued that, based upon the evidence, appellee relinquished his property rights and any expectation of privacy in the video clip used by employees to test the DVD burner.

The superior court affirmed.

The United States Supreme Court has long held that the Fourth Amendment protects possessory and liberty interests, even when privacy rights are not implicated. In several cases, the Court applied a property-based analysis, culminating in 2014 with Riley v. California, 134 S. Ct. 2473, which held that police may

not, without a warrant, search digital information on a cell phone seized incident to an arrest. In holding that an unconstitutional search of defendant's papers and effects had occurred, the Supreme Court emphasized the quantity and quality of information stored on a cell phone.

Here, the same quality and quantity of information found on a cell phone also is digitally stored on a desktop computer. For the same reasons that the *Riley* Court considered it necessary to protect the digital data stored on a cell phone, such protections naturally extend to the digital data stored on a desktop computer, regardless of appellee's reasonable expectation of privacy.

The plain view doctrine permits the warrantless search and seizure of an object when: an officer views the object from a lawful vantage point; it is immediately apparent to him that the object is incriminating; and the officer has a lawful right of access to the object. In determining whether the incriminating nature of an object is "immediately apparent," courts should evaluate the totality of the circumstances.

Here, it is undisputed that police were lawfully present in Circuit City and that appellee's computer was in plain view. However, the record does not support a finding that the digital data forming the basis of the charges against appellee was in plain view, or that the incriminating nature of appellee's computer was immediately apparent. Officers were called to the store after an employee conducted a search of video files on appellee's computer. Upon arriving at the store, police asked employee to describe what he had seen on appellee's computer. Upon the express direction of officer, employee double-clicked on the file to open it, and then played the video file for officer. The file was not visible on appellee's computer until officer directed employee to open the video data file.

Thus, the evidence, viewed in a light most favorable to appellee, established that the suspect video file was not in "plain view" when officers arrived at the scene, nor was its criminal nature readily apparent. The incriminating nature of the video became apparent only after officer directed employee to open and play the digital data file. By directing employee to open and play the computer digital data file, officer effectuated a warrantless search of the digital data stored on appellee's desktop computer.

Under Jones and Riley, the warrantless search of appellee's digital data files, stored on his desktop computer, violated appellee's Fourth Amendment protections. Consequently, officers' subsequent seizure of the computer, and additional searches conducted thereafter, were unlawful as "fruits of the poisonous tree."

Order affirmed.

Commonwealth v. Sodomsky, 2015 Pa. Super. 133, No. 870 MDA 2014 (June 5, 2015)

SEARCH AND SEIZURE: WARRANTLESS BLOOD DRAW

On Dec. 29, 2012, at approximately 3:30 p.m., officer was on patrol in Philadelphia when he received a radio bulletin of a person screaming at a specified location. The flash was for a maroon SUV.

Officer arrived at the location and observed a maroon SUV with its engine running and its brake lights repeatedly going on and off. Appellee was observed in the driver's seat of the vehicle. Officer activated his overhead lights and siren and pulled up behind the SUV. He watched as appellee exited the vehicle and immediately began staggering towards officer's car. Appellee tried to say something, but his speech was slurred and officer could not understand him. Officer convinced appellee, who smelled moderately of alcohol, to have a seat on the steps in front of a nearby building. Based on his five years of experience with the police force, officer believed appellee was intoxicated. Officer also observed a brandy bottle in plain view on the front seat of the vehicle. Officer arrested appellee and transported him to the hospital to have him medically cleared.

Later that same day, around 4:45 p.m., another officer arrived at the hospital and observed appellee, unconscious and unresponsive, in the emergency ward. (Appellee had been given four milligrams of Haldol by medical staff just a few minutes before officer arrived.) Officer unsuccessfully attempted to make contact with unconscious appellee. Nevertheless, officer read appellee the standard informed consent warnings

and requested hospital to perform a warrantless blood draw. The blood draw occurred at 5:01 p.m.

Appellee was charged with DUI (general impairment/incapable of safe driving). He moved to suppress, inter alia, evidence of the warrantless blood draw because there were no exigent circumstances to support it.

The Philadelphia Municipal Court suppressed the test results, and the court of common pleas affirmed.

The superior court affirmed.

In Missouri v. McNeely, 133 S. Ct. 1552, 1568 (2013), the United States Supreme Court held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," and that in such situations, where police may reasonably obtain a warrant before a blood sample can be drawn, they must do so. Whether a warrantless blood draw is reasonable must be determined on a case-by-case basis, considering the totality of the circumstances.

Here, commonwealth failed to present competent evidence that there was an exigency which would justify officer's decision to order a warrantless blood draw. Appellee was unconscious when the blood draw was performed. As such, he did not have the opportunity to decline or refuse to have his blood sample taken. Moreover, the arresting officer did not testify that he could not secure a warrant in the time it took to transport appellee to the hospital.

Order affirmed.

Commonwealth v. Myers, 2015 Pa. Super. 140, Np. 2774 EDA 2013 (June 15, 2015)