[J-194-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 24 MAP 2004
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered on April 8, 2003, at No. 1694 MDA
v.	:	2001, which vacated the Judgment of
	:	Sentence of Court of Common Pleas of
	:	York County, Criminal Division, entered on
ADAM A. PAKACKI,	:	September 24, 2001, at No. 2376 CA
	:	2001.
Appellee	:	
		ARGUED: December 2, 2004

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: July 18, 2006**

Although I join in full the Majority's conclusion that the Superior Court erred in reversing the trial court's denial of the suppression motion at issue, I respectfully choose a different path to reach that outcome. Like the Majority, I agree that the initial stop and frisk was supported by reasonable suspicion based on the information the trooper received prior to approaching Appellant. Additionally, I join the Majority's conclusion that the record before the suppression court supports that court's conclusion that the incriminating nature of the pipe was immediately apparent to the trooper under the plain feel doctrine. N.T., 8/13/01, at 25 ("The testimony before the Court, which we accept as true, is that upon the pat-down search for weapons, the trooper felt a pipe, which he recognized, based on his experience, as being a drug pipe."). Accordingly, like the Majority, I would hold the pipe admissible pursuant to the plain feel doctrine and find the

accumulated evidence sufficient to support Appellant's conviction for possession with intent to use drug paraphernalia. See 35 P.S. § 780-113(a)(32).

I diverge from the Majority only to the extent it conclusively holds that the incident subsequent to the initial stop and frisk did not constitute a custodial detention and interrogation implicating Miranda, as I believe the relevant inquiry into the admissibility of Appellant's statement, as opposed to the pipe, requires a discussion of the impact of the trooper's question concerning the contents of Appellant's pocket. In a footnote, the Majority states that "we need not address whether the question about the pipe constituted interrogation" based on the prior conclusion that Appellant was not in custody prior to the trooper's question. Maj. Slip. Op. at 7 n.6. I respectfully differ as I believe a colorable argument can be made that once the officer knew, *via* plain feel, that the Appellant had contraband in his pocket and the Appellant presumably knew that the officer had felt the pipe, the incident transformed into a custodial detention involving coercive conditions under which the Appellant could reasonably believe that his freedom of action or movement was restricted. See Commonwealth v. Gonzalez, 546 A.2d 26, 29 (Pa. 1988), Commonwealth v. Boczkowski, 846 A.2d 75, 90 (Pa. 2004) ("The question of custody is an objective one, focusing on the totality of the circumstance, with due consideration given to the reasonable impression conveyed upon the person being questioned."). Under the totality of the circumstances, it is then reasonable to assume that a question concerning the object, known by both the trooper and Appellant to be contraband, was likely to elicit an incriminating response. See Commonwealth v. Hughes, 639 A.2d 763, 771 (Pa. 1994) ("Interrogation has been held to encompass not only express questioning, but also any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating statement."). If we were to conclude that a custodial interrogation

occurred, any subsequent statement such as that given by Appellant would be inadmissible absent duly administered Miranda warnings. See Commonwealth v. Gwynn, 723 A.2d 143, 149 (Pa. 1998) ("Miranda warnings are required where a suspect is subject to custodial interrogation.").

Regardless of my conclusion in this regard, even if Appellant's statement in response to the officer's question was admitted improperly, the error would be harmless given the proper admissibility of the pipe under the plain feel doctrine. While Appellant argues that the pipe would be barred as the fruit of the poisonous tree, such assertion lacks merit given that the pipe was fully admissible under the plain feel doctrine prior to the trooper's question. Commonwealth v. Stevenson, 744 A.2d 1261, 1265 (Pa. 2000) (acknowledging that under the plain feel doctrine "a police officer may seize non-threatening contraband detected through the officer's sense of touch during a Terry frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object.").

Accordingly, I, like the Majority, would reverse the decision of the Superior Court.

Mr. Chief Justice Cappy joins this opinion.