[J-29-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 33 EAP 2006
	:	
Appellee	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 3/24/04 at No. 3158 EDA
v.	:	2001 affirming the Order entered on
	:	10/23/01 in the Court of Common Pleas,
	:	Philadelphia County, Criminal Division at
	:	Nos. M.C. 0104-4918 and M.R. 01-913326
NATHAN DUNLAP,	:	
	:	
Appellant	:	ARGUED: April 17, 2007

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 28, 2007**

Like Mr. Justice Eakin, I believe that a police officer's experience may fairly be regarded as a relevant factor in determining probable cause. However, although I recognize that reasonable minds may differ concerning outcomes, the majority appropriately develops that this Court has not been comfortable with a general rule crediting an aggregation of a few circumstances that, independently and collectively, are also consistent with legitimate behavior. Rather, in determining probable cause, the Court has generally looked for the presence of some factor more distinctly associated with the criminal offense or offenses under observation or investigation to elevate reasonable suspicion to the necessary reasonable belief. See, e.g., Commonwealth v. Banks, 540 Pa. 453, 455, 658 A.2d 752, 753 (1995) (delineating, among circumstances

that are sufficient to support a determination of probable cause, observation by a trained narcotics officer of drugs or containers commonly known to hold drugs being exchanged, "multiple, complex, suspicious transactions," and response to a reliable tip). Presently, I believe that the majority appropriately upholds Banks, as it represents a legitimate and reasoned effort to implement the compromise embodied in the probable cause standard between safeguarding citizens from undue interference with their constitutionally-protected liberty and privacy interests, and the affordance of fair leeway to the government in its enforcement of the law and protection of our communities. See Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949).

I also agree with the majority's position that a colorable argument that the experience of a police officer should be credited as a relevant factor in the probable cause setting requires more than a cursory assertion of its existence and relevance. Professor LaFave provides the following explanation, which I find persuasive:

> [T]he probable cause determination must ultimately be made by a judicial officer, who is not an expert in matters of law enforcement, and . . . consequently it is incumbent upon the arresting or searching officer to explain the nature of his expertise or experience and how it bears upon the facts which prompted the officer to arrest or search. For example, if an officer at a hearing on a motion to suppress were to say that he made the arrest because he saw what he as an expert recognized as a marijuana cigarette, this is not a showing of probable cause. Under the probable cause standard, it must be possible to explain and justify the arrest to an objective third party, and this is not accomplished by a general claim of expertise. On the other hand, if the officer testifies fully concerning his prior experience with marijuana cigarettes and explains in detail just how it is possible to distinguish such a cigarette from other hand-rolled cigarettes, this testimony cannot be disregarded by the judge simply because it involves expertise not shared by the judge.

WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE §3.2(c), at 44-45 (4th ed. 2004) (footnotes and internal quotation marks omitted).

Here, there is little foundation of record to support reliance on the experience factor to advance the objective, judicial inquiry in this matter. The following passage from the very brief direct testimony of Officer Devlin at the suppression hearing encompasses the record development of the experience factor:

> Q. Officer Devlin, as of [the date of Appellant's arrest], how long had you been a police officer?
>
> A. Almost five years. Just shy of five years.
>
> Q. And how long had you worked for the [narcotics] strike force?
>
> A. About nine months.
>
> Q. The vicinity of 2700 North Warnock Street[, where Appellant was first observed], could you classify that?
>
> A. It's a high drug and crime area, residential.
>
> Q. Approximately how many narcotics arrests have you been a part of in that area?
>
> A. As of that date?
>
> Q. Yes.
>
> A. About fifteen or twenty.
>
> Q. You just classified that area as residential, are there any vendors in that area, any stores?
>
> A. Not vendors. It's row homes, brick row homes.
>
> Q. What did you believe you were observing on that day?
>
> A. A narcotics transaction.

Notes of Testimony, August 16, 2001.

Aside from the specific location within the City, which is discussed below, this testimony does not offer an indication of anything about the exchange in which Appellant was involved that, by reference to knowledge gained from specialized training and experience, would inform the judicial assessment of whether it could be sufficiently distinguished from a legitimate one (for example, making change for a dollar) to support the ripening of reasonable suspicion into probable cause. Without further development, the mere fact that the arresting officer could attest to training and experience with prior drug arrests seems to me to add very little to the circumstances that were before the Court in Banks. Accord WILLIAM E. RINGEL, 2 SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS §23:8 (2004) ("Even in the presence of a trained officer . . . gestures and motions commonly associated with drug use may also be so well associated with innocent activities that they do not suffice to establish probable cause."). Indeed, I believe that very little would be left of Banks if references to training and experience abstract from an explanation of their specific application to the circumstances at hand would be deemed sufficient to overcome its holding.

In addition, with respect to the alleged high incidence of drug activity in the location of the arrest, a number of courts have been similarly circumspect concerning the degree of weight that should be attributed to the location of conduct in a high-crime venue in the probable cause assessment, particularly in light of the socioeconomic connotations that may accompany (or be attributed to) such judgments. See, e.g., United States v. Davis, 458 F.2d 819 (D.C. Cir. 1972) ("A delicate balance must be struck between the right of the often-victimized innocent ghetto inhabitant to adequate, unhampered police protection and the rights guaranteed to him under the Fourth Amendment."). Concerning this factor, Professor LaFave has suggested that due

recognition can be afforded to it, while appropriate perspective is maintained, by "cautiously using the crime problem in the area only to give meaning to highly suspicious facts and circumstances." See 2 LAFAVE, SEARCH AND SEIZURE §3.6(g), at 369. I am in accord with this observation. Thus, in the absence of some particular circumstance that does not substantially overlap with legitimate behavior, I do not believe that the high-drug-activity location factor should be given the sort of weight which would tip the totality scales in favor of finding probable cause to arrest.

Unless and until disavowed by the United States Supreme Court, I regard Banks as a reasoned effort on the part of the Court to strike the necessary balance and, as noted, I join the majority in affording it due effect in the present case.

Mr. Chief Justice Cappy and Mr. Justice Fitzgerald join this concurring opinion.