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

COMMONWEALTH OF PENNSYLVANIA,	:	No. 33 EAP 2006
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 3158 EDA 2001 dated March
	:	24, 2004 which affirmed the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County at Nos. MC 0104-4918 and 01-
	:	913326 dated October 23, 2001
NATHAN DUNLAP,	:	
	:	
Appellant	:	ARGUED: April 17, 2007

DISSENTING OPINION

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

I respectfully dissent from the majority's conclusion "a police officer's training and experience is not a probable cause factor …." Majority Slip Op., at 8. To the contrary, if included in the affidavit, relevant training and experience is properly considered "a probable cause factor."

My dissent arises from the questionable logic and merit of the oft-cited Banks[1] decision. In my view, a single surreptitious transaction witnessed by a trained police officer may indeed give rise to probable cause. To say every street corner transaction creates probable cause is of course not possible, but just as untenable is the statement that a surreptitious exchange witnessed by a trained police officer can never be enough.

[1] Commonwealth v. Banks, 658 A.2d 752 (Pa. 1995).

Indeed, if proper education and training allows a witness to offer an expert opinion in court, a fortiori it should be permissible in a common sense evaluation of probable cause. This decision must depend, as does every probable cause review, on the totality of the circumstances, see Illinois v. Gates, 462 U.S. 213 (1983), yet the pronouncement in Banks is continually considered to mean the watching of a single transaction cannot be enough, no matter what.

Where police observe surreptitious street corner transactions, a drug sale is often, if not always, the most plausible explanation of the exchange. While an innocent explanation is certainly possible, we are not talking about certainties, but probabilities, and only probabilities that are reasonable. I have yet to come across an innocent explanation of such conduct in a brief or argument in any similar case that is arguably likely, much less equally probable. If a drug transaction is the most likely explanation, why should this Court permit continuation of the formulaic fiction that one transaction can never comprise probable cause? In this regard I believe Banks, which I acknowledge remains the prevailing precedent, was wrongly decided and overbroad, and ought to be revisited.