

[J-133-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF D.M.	:	No. 14 E.D. Appeal Dkt. 1997
	:	
APPEAL OF: D.M.	:	Appeal from the judgment of the
	:	Superior Court entered on July 31,
	:	1996 at No. 2779PHL95 affirming
	:	the order of the Court of Common
	:	Pleas of Philadelphia County, Juvenile
	:	Division, at 4098-95-6
	:	
	:	
	:	
	:	RE-SUBMITTED: June 17, 1998

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: April 1, 1999

Since I disagree with the majority's conclusion that Officer Williams possessed the reasonable suspicion necessary to make the initial investigatory stop of Appellant D.M., I must respectfully dissent.

Here, as noted by the majority, Officer Williams received a flash radio call at approximately 8:40 p.m. on June 6, 1995, indicating that there had been an armed robbery near the intersection of 22nd and South Streets in Philadelphia. While the majority correctly states that a police officer may rely upon information broadcast over a police radio in effectuating an investigatory stop, the radio call in the instant matter supplied Officer Williams with only the most general information of a robbery by "four or five" black males. No further details regarding height, weight, age, clothing or other physical characteristics were provided to refine this generic description of the robbery suspects in any way. Clearly, such a description, consisting merely of race and gender and literally applicable

to any group of black males in the area, falls far short of providing a specific and articulable basis for a reasonable belief that D.M. and his companions were involved in the reported robbery. See Commonwealth v. Jackson, 359 Pa. Super. 433, 438, 519 A.2d 427, 430 91986) (police must have identification specific enough to reasonably conclude that the party they are stopping is actually the person they are seeking).¹

The majority finds, however, that this description, in conjunction with the other information available to Officer Williams at the time of the stop, provided him with reasonable suspicion under the totality of the circumstances. Specifically, the majority notes that not only did D.M. and his companions fit the general description broadcast, in that they were black males in a group of “four or five,” but that they were the only males in the vicinity of the crime within minutes of the report. Furthermore, according to the majority, D.M. and his companions acted suspiciously by abruptly changing their direction when Officer Williams’ police car approached. I can not agree that these added facts create a “whole picture,” in the words of the majority, which give rise to a reasonable suspicion of criminal activity.²

The majority points out that D.M. and his companions were the only males near the crime scene within minutes of the report. While I agree that spatial and temporal proximity to the crime scene are factors to be considered in determining whether reasonable

¹ The majority states that “the fact that the police radio report came from the crime victim herself, not from an anonymous source, imparted a high degree of reliability to the report.” Maj. Op. at 6. Of course, it is the brevity, and not the accuracy, of the report relayed to Officer Williams that is at issue here. Office Williams was still only told that it was four or five black males, with no further description, that had been involved in the reported robbery.

² The majority chastises D.M. for examining the individual factors in the instant case instead of focusing on the totality of the circumstances - or the whole picture- available to Officer Williams at the time he made the stop. While Appellant does in fact argue that there was no reasonable suspicion under the totality of the circumstances, I would note that the totality of the circumstances is necessarily comprised of individual circumstances.

suspicion existed under the totality of the circumstances, the mere presence of D.M. and his companions in the vicinity of a recently reported crime can not be said to create a sufficient basis to warrant a forcible investigatory stop. See Commonwealth v. Allen, 452 Pa. Super. 200, 681 A.2d 778 (1996) (presence in the vicinity of recently reported crime is not enough to justify investigative stop). Significantly, D.M. and his companions were subjected to the stop at approximately 8:40 p.m. in early June and on a public street, not an unusual time or place for people to be walking. Moreover, Officer Williams actually observed D.M. and his companions walking *towards* the scene of the robbery.

The majority also notes that, in addition to the “matching description” and the spatial and temporal proximity to the crime scene, Officer Williams observed D.M. and his companions abruptly change their direction when they saw his police car, amounting to a display of suspicious behavior. Again, I can not agree that the fact that D.M. was walking near the scene of a recently reported crime, with a group of “four or five” black males who changed their direction at the sighting of the police constitutes the type of unusual conduct which supports a conclusion of reasonable suspicion. The record reflects that when Officer Williams’ police car appeared, D.M. and his companions merely turned and *walked* in the opposite direction. Although Officer Williams did testify that the boys were “walking quickly,” the record does not reflect any testimony suggesting that the boys were running, out of breath or exhibited any other indication that they were in flight. Given the meager physical description available to Officer Williams, walking towards the scene of a recently reported crime and turning in the opposite direction of police can not, in my view, be considered inherently suspicious or reasonably suggestive of criminal activity so as to justify an investigatory stop under these circumstances. See Commonwealth v. Arch, 439 Pa. Super. 606, 613, 654 A.2d 1141, 1144 (1995) (mere fact that defendant turned around and walked back toward rear of motel after allegedly seeing police patrol car did not

amount to display of suspicious behavior, constituting proper grounds for investigatory stop).

Although the majority attempts to distinguish Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 344 (1970), I agree with Appellant that Berrios supports his position that the investigatory stop in the instant case was unjustified. In Berrios, police officers received information over the radio that a shooting had occurred and that three males, two black males in dark clothing and a Hispanic man in light clothing, had been observed leaving the scene and walking east on a given street. Within twenty minutes of the broadcast, officers saw a black man in dark clothing and a Hispanic man in light clothing walking east on the given street, approximately three blocks from the reported shooting. The responding officer stopped and frisked the men, discovering a gun on Berrios. In concluding that this information did not create a reasonable suspicion to justify a stop and frisk, this Court stated:

At the time of the stopping and the search, Berrios and his companion were merely walking on the street and acting in a normal manner . . . the policemen had no reason to connect them with the reported shooting, except that they were walking near the area; that one was [black] and the other was Puerto Rican, who wore clothes of the general color reportedly worn by those involved. The policemen had no information of the physical make-up or characteristics of the men they were seeking and hence, did not know if Berrios and his companion were of the same description. If the policemen were constitutionally justified in searching Berrios under these circumstances, then every Puerto Rican wearing light clothing and walking with a [black male] in this area could likewise be validly searched.

Berrios, 437 Pa. at 341-42, 263 A.2d at 344.

Despite the condemnation in Berrios of conducting a stop and frisk under these circumstances, this is almost exactly what happened to D.M., who was observed walking down a public street, with his companions, in the area of a recently reported crime. In fact, Officer Williams did not even have the vague clothing description that was included in the physical description found to be inadequate in Berrios.

The majority, however, essentially finds that Berrios is inapposite since the stop in Berrios, unlike the one here, involved the wrong number of suspects, who were walking only three blocks away from the crime scene after a significant passage of time. However, the fact that more time had elapsed in Berrios between the call and the stop, and that the police stopped two suspects instead of the three reported to be involved over the radio, does not undermine the rationale of Berrios. Berrios is clear that an exceedingly general description, supplying the police with only the approximate number, race and gender of suspects, is not, standing alone, constitutionally sufficient to justify a stop where no unusual conduct suggesting criminal involvement has been observed. This is what occurred here.

Simply stated, the whole picture available to Officer Williams was not sufficient to meet the quantum of suspicion required to conduct a lawful investigatory stop. In effect, under the majority's holding, any group of four to five individuals who were walking near 22nd and South Streets at approximately 8:40 p.m. on June 6, 1995, and who happened to be black and male, were proper targets of a police stop and frisk.

I would reverse the order of the Superior Court.

Mr. Chief Justice Flaherty joins in the Dissenting Opinion.