

**[J-165-98]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 108 W.D. Appeal Docket 1997
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on June 24, 1997 at No.
	:	1524PGH96, reversing the Order of the
v.	:	Court of Common Pleas of Erie County,
	:	Criminal Division, entered on July 24,
	:	1996 at No. 541 of 1996.
PHILLIP A. CLARK,	:	
	:	
Appellant	:	ARGUED: September 16, 1998
	:	
	:	
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**OPINION**

**MR. JUSTICE NIGRO**

**DECIDED: AUGUST 17, 1999**

On January 18, 1996, at approximately two o'clock in the morning, Officer Lester Fetterman of the Erie Police Department was on routine patrol. While on patrol, he received information from a radio dispatcher that a person had called the police and reported seeing two African-American males, one wearing a blue jacket and the other wearing a blue jacket with yellow sleeves, shining a flashlight into his vehicle parked in the driveway of his house at 722 East 22<sup>nd</sup> Street. Shortly thereafter, the radio dispatcher reported that the suspects had left the area of the house and were last seen walking west on East 22<sup>nd</sup> Street.

A few seconds later, Officer Fetterman heard another report over the radio from an officer. The officer reported that he and his partner had apprehended one of the suspects on the 600 block of East 22<sup>nd</sup> Street, but that the other suspect had evaded apprehension and was last seen running towards the 600 block of East 21<sup>st</sup> Street.

Upon hearing this report, Officer Fetterman drove to the 600 block of East 21<sup>st</sup> Street. At first, he observed no one. Suddenly, however, he saw Appellant, who was wearing a blue jacket with yellow sleeves, pop out from between two houses, slowing down from a run to a walk. Officer Fetterman immediately stopped Appellant and observed that he was out of breath. He then placed Appellant under arrest and conducted a search incident to the arrest. Upon reaching into Appellant's pocket, Officer Fetterman recovered a plastic bag of cocaine.

Appellant was charged by information with the crimes of loitering and prowling at night time,<sup>1</sup> possession of a controlled substance,<sup>2</sup> and possession of a controlled substance with the intent to deliver.<sup>3</sup> Prior to trial, Appellant filed a motion to suppress alleging in part that the search incident to his arrest violated his rights under Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution, because the officer lacked probable cause to believe that Appellant was the person who had committed the crime and because the officer lacked probable cause to believe that a felony had been committed. The trial court granted the motion,

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<sup>1</sup> 18 Pa. C.S. § 5506.

<sup>2</sup> 35 Pa. C.S. § 780-113(a)(16).

<sup>3</sup> 35 Pa. C.S. § 780-113(a)(30).

finding that there was insufficient evidence to establish that Officer Fetterman had probable cause to believe that Appellant was the person who had committed the crime.<sup>4</sup>

On appeal, the Superior Court panel reversed the trial court's order without producing a majority opinion. Judge Hudock found that the trial court improperly reached its decision by focusing individually on each circumstance surrounding Appellant's arrest. Considering the totality of the circumstances and the evidence presented, Judge Hudock concluded that Officer Fetterman had probable cause to believe that Appellant was the person who had committed the crime. In addition, Judge Hudock rejected Appellant's alternative additional argument that his warrantless arrest was unlawful because the officer lacked probable cause to believe that a felony had been committed.

In a concurring opinion, Judge Eakin focused on the reasons for the arrest rather than the sufficiency of the evidence. Responding to Appellant's alternative argument, Judge Eakin found that the officer could have concluded that the crime of theft was afoot, and explained that a warrantless arrest for theft is authorized by 18 Pa. C.S. § 3904. While recognizing that the charges ultimately filed against Appellant were for a misdemeanor, Judge Eakin stated that this fact does not mean the officer lacked probable cause to believe that the crime of theft had been committed, and thus the warrantless arrest of Appellant was lawful.

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<sup>4</sup> At the suppression hearing, Officer Fetterman admitted that upon seeing Appellant, he placed him under arrest and searched his pockets as part of a full search incident to the arrest. The Commonwealth did not argue before the lower courts, nor does it argue here, that Officer Fetterman attempted to conduct an investigative stop and pat down of Appellant.

Judge Brosky, however, dissented. Considering the facts of this case, Judge Brosky found that Officer Fetterman only had reason to suspect that the misdemeanor crime of loitering and prowling at night time may have been committed. Judge Brosky explained that a warrantless arrest for a misdemeanor is lawful only when committed in the arresting officer's presence or when authorized by statute. Finding neither of these conditions present, Judge Brosky concluded that the warrantless arrest of Appellant was unlawful.

We granted Appellant's Petition for Allowance of Appeal to determine whether the warrantless arrest of Appellant was lawful. Based on our consideration of the relevant law as applied to the facts of this case, we now reverse the decision of the Superior Court.

The Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution provide that individuals shall be free from unreasonable searches and seizures. U.S. Const. amend. XIV; Pa. Const. art. I, § 8. An officer may conduct a full custodial search of a suspect when the suspect is lawfully arrested. Commonwealth v. Long, 489 Pa. 369, 374, 414 A.2d 113, 115 (1980). When an officer makes an unlawful arrest, any evidence seized during a search incident to the arrest must be suppressed. See Commonwealth v. Lovette, 498 Pa. 665, 676-77, 450 A.2d 975, 981 (1982). Consequently, the propriety of a search depends upon the validity of the arrest. In considering whether the illegal drugs recovered from the search of Appellant are admissible into evidence, therefore, we must first determine whether the officer's search of Appellant was made pursuant to a lawful arrest.

In determining whether Appellant was lawfully arrested, we begin with the notion that law enforcement authorities must have a warrant to arrest an individual in a public

place unless they have probable cause to believe that 1) a felony has been committed; and 2) the person to be arrested is the felon. Commonwealth v. Travaglia, 502 Pa. 474, 484, 467 A.2d 288, 292 (1983). A warrant is also required to make an arrest for a misdemeanor, unless the misdemeanor is committed in the presence of the police officer. Commonwealth v. Freeman, 356 Pa. Super. 332, 340, 514 A.2d 884, 888 (1986); Commonwealth v. Reeves, 223 Pa. Super. 51, 52-53, 297 A.2d 142, 143 (1972).

The legislature, however, has authorized law enforcement officers to make warrantless arrests for misdemeanors committed outside their presence in certain circumstances. Relevant to this case, the legislature has provided that officers have the same right of warrantless arrest for any grade of theft and attempted theft that they have for a felony. See 18 Pa. C.S. § 3904; Commonwealth v. Walker, 434 Pa. Super. 70, 641 A.2d 1204 (1994).<sup>5</sup>

Here, it is undisputed that Appellant did not commit a misdemeanor in the presence of Officer Fetterman. Upon hearing a report from the radio dispatcher, Officer Fetterman proceeded to the 600 block of East 21<sup>st</sup> Street. While driving down the street, he saw Appellant run out from between two houses and gradually slow down. Without a warrant, he immediately placed Appellant under arrest. Since Officer Fetterman did not observe Appellant commit a misdemeanor, the warrantless arrest of Appellant was unlawful unless Officer Fetterman had probable cause to believe that Appellant had committed either a

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<sup>5</sup> Other examples include 75 Pa. C.S. § 3731(c), which authorizes officers to make warrantless arrests where they have probable cause to believe that an individual is driving under the influence of alcohol, and 18 Pa. C.S. § 2711(a), which authorizes officers to make warrantless arrests in certain instances of domestic violence.

felony or a misdemeanor outside of his presence for which the legislature has authorized warrantless arrests.

The Commonwealth argues that Appellant's arrest was lawful because Officer Fetterman had probable cause to believe that Appellant had committed either the crime of theft or attempted theft. A person commits the crime of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with the intent to deprive him thereof. 18 Pa. C.S. § 3921. Similarly, a person commits the crime of attempted theft if, with the intent to commit theft, he does any act which constitutes a substantial step toward the commission of the theft. 18 Pa. C.S. § 901(a). Although theft and attempted theft may be classified as either felonies or misdemeanors,<sup>6</sup> this classification is not relevant in this case since, as noted above, the legislature has authorized warrantless arrests for all grades of theft and attempted theft committed outside the presence of an officer. See 18 Pa. C.S. § 3904. Thus, in considering whether Appellant's arrest was lawful under the Commonwealth's theory, we must determine whether the officer had probable cause to believe that 1) the crime of theft or attempted theft was committed and 2) Appellant was the person who committed it. Travaglia, 502 Pa. at 484, 467 A.2d at 292.

To determine whether probable cause exists to justify a warrantless arrest, we must consider the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 233, 103 S. Ct. 2317, 2329 (1983); Commonwealth v. Evans, 546 Pa. 417, 422, 685 A.2d 535, 537 (1996). “[P]robable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an

offense has been or is being committed.” Evans, 546 Pa. at 423, 685 A.2d at 537 (quoting Commonwealth v. Gibson, 536 Pa. 123, 130, 638 A.2d 203, 206 (1994)).

Probable cause must be “viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his experience and training.” Id. (quoting Commonwealth v. Norwood, 456 Pa. 330, 334, 319 A.2d 908, 910 (1974)).

Here, Officer Fetterman was on routine patrol at two o'clock in the morning when he was informed by a radio dispatcher that a person had called the police. The caller reported that two males had been in his driveway shining a flashlight into his vehicle and that they had left the area of his house. Shortly thereafter, an officer reported that he and another officer had attempted to stop two men, who met the description given by the radio dispatcher, and that one of them ran away.

These facts are not sufficient to establish that Officer Fetterman had probable cause to believe that a theft or an attempted theft had been committed. It was not reported that any property was unlawfully taken. In addition, it was not reported that the men had touched the vehicle in any way, or otherwise exercised control over the vehicle, to suggest that they were trying to steal it. There was also no information to suggest that the men were in possession of tools which would be used to steal a car. Instead, all that was reported was that two individuals were in a driveway shining a flashlight into a vehicle. This conduct, with nothing more, does not constitute a substantial step towards an

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(...continued)

<sup>6</sup> See 18 Pa. C.S. § 3903 (setting forth different grades of theft). Generally, attempted theft receives the grade that the crime would have received if the theft had actually been committed. 18 Pa. C.S. § 905.

unlawful taking. Thus, the reported activity did not provide Officer Fetterman with probable cause to believe that the crimes of theft or attempted theft had been committed.

As recognized by Judge Brosky, the caller in this case only reported conduct which fit the crime of loitering and prowling at night time. This crime is classified as a misdemeanor.<sup>7</sup> Since the crime was not committed in Officer Fetterman's presence and since the legislature has not authorized warrantless arrests for this crime, a warrant was necessary to lawfully effectuate Appellant's arrest.

In sum, we conclude that the arrest of Appellant was unlawful because Officer Fetterman did not have probable cause to believe that Appellant had committed a crime which would justify his warrantless arrest. Since the arrest was not lawful, the illegal drugs which were seized from Appellant during the search incident to his arrest must be suppressed. Lovette, 498 Pa. at 676-77, 450 A.2d at 981. We, therefore, reverse the decision of the Superior Court.

Mr. Justice Castille files a Dissenting opinion in which Madame Justice Newman joins.

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<sup>7</sup> The statute states "[w]hoever at night time maliciously loiters or maliciously prowls around a dwelling house or any other place used wholly or in part for living or dwelling purposes, belonging to or occupied by another, is guilty of a misdemeanor of the third degree." 18 Pa. C.S. § 5506.