IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 0206000433
v.	:	
	:	
BENJAMIN GIBBS,	:	
	:	
Defendant.	:	

Submitted: July 7, 2004
Decided: August 2, 2004

ORDER

Upon Defendant's Motion to Suppress Evidence.
Denied.

James J. Kriner, Esquire, Deputy Attorney General, Dover, Delaware; attorneys for the State of Delaware.

Deborah L. Carey, Esquire, Assistant Public Defender, Dover, Delaware; attorneys for the Defendant.

WITHAM, J.

State v. Benjamin Gibbs
I.D. No 0206000433
August 2, 2004

Introduction

Before this Court is Defendant Gibbs' motion to suppress evidence seized following a pat down search. The State opposes the motion, contending that the detention and search were proper.

Background

This Court conducted a pre-trial suppression hearing on July 7, 2004, during which Officer Nicholas Berna was the only witness. The facts are taken from his testimony. On June 3, 2002, Dover Police received a call reporting a fight in progress in the area of the "Farmer's Market" in Dover, Delaware.[1] Officer Berna, a twelve year veteran on the police force, and his partner, Officer Barrett, were dispatched to the area of the fight. Officer Melvin responded as well in a marked police car. Officer Berna testified that Officer Melvin was in front of his vehicle as the two cars entered the parking lot. Because it was the end of race weekend, the area was crowded with trailers and people. Officer Berna saw a person walk out between the trailers parked in the lot. The person, whom Officer Berna identified as the Defendant, was watching Officer Melvin as he threw something to the ground. According to Officer Berna's testimony, the Defendant's body was facing Berna, but his face was turned toward Officer Melvin. Officer Melvin was not watching the Defendant and the Defendant was apparently unaware

[1] This area is located at the intersection of three roads; U.S. Route 13, North State Street, and Leipsic Road in Dover, Delaware.

that Officers Berna and Barrett were watching him. Officer Berna stated that he was approximately 20 feet away from the Defendant when the object was thrown but could not tell what was thrown.

Because the Defendant had his head turned watching Officer Melvin when he threw the object, Officer Berna became suspicious. After the Defendant threw the object, Officers Berna and Barrett exited their vehicle, approached the Defendant and instructed him to stop. The Defendant complied and was brought back to the police car and searched. While conducting the pat down search, Officer Berna " immediately noticed a bag in his [Defendant' s] left rear pocket with marijuana in it."[2] On cross-examination, Officer Berna testified that he could actually see the bag when he was doing the search. The Defendant was placed under arrest for possessing marijuana. Officer Berna then walked to the area where the object had been thrown and found a small handgun on the ground.

Defendant argues that the evidence seized should be suppressed because the police did not have probable cause to seize him and conduct the search. Defendant asserts that under the circumstances, the officers' conduct went beyond the brief detention permitted under 11 Del. C. § 1902 and actually constituted an arrest, as he was not free to leave after the officers approached him. Further, Defendant contends that even if this was merely a detention, the police did not have reasonable articulable suspicion of past or present criminal activity to stop him. The State,

[2] Rough Draft Transcript, p.12.

however, asserts that this was a brief detention and that reasonable articulable suspicion arose when Officer Berna observed the Defendant throw an object while intently watching another police officer. In the alternative, the State asserts that, even if the officers did not have reasonable articulable suspicion to conduct a pat down search, under the inevitable discovery rule, the marijuana still would be admissible. In support of this, the State contends that if the police had found the weapon first they would have then properly discovered the marijuana in defendant' s pocket as a search incident to arrest.

Discussion

When a warrantless search is conducted, the State bears the burden of proof on a motion to suppress evidence seized as a result of the seizure and search.[3] In this case, the officers did not have a warrant to seize or search the Defendant, therefore the burden is on the State to establish that the search was conducted properly and the evidence was seized appropriately.

The Fourth Amendment to the United States Constitution protects citizens from illegal searches and seizures. A seizure occurs when a person is " physically forced to stop or … submits to a show of authority by the police."[4] The Court must " look[ ] to see if, under all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he/she was not

[3] *Hunter v. State,* 783 A.2d 558, 560 (Del. 2001).

[4] *Quarles v. State,* 696 A.2d 1334, 1336 (Del. 1997).

free to terminate the encounter with the officers."[5] The Delaware Supreme Court has identified two categories of citizen-police encounters which qualify as seizures under the Fourth Amendment: first, a limited intrusion generally referred to as a *Terry*-stop[6] and, second, a full-scale seizure such as an arrest.[7] A *Terry*-stop requires the officers to have a reasonable and articulable suspicion that the suspect has committed or is about to commit a crime, while the arrest requires the officers to have probable cause that the suspect has actually committed a crime.

In this case, the officers approached the Defendant and told him to stop. The Defendant complied, thus submitting to a show of authority by the police. Based on these facts, a reasonable person would not have believed that he or she was free to terminate the encounter. Accordingly, the Court finds that the Defendant was seized at the point when the officers ordered him to stop.

However, the Defendant argues that the actions of the officers constituted more than merely a *Terry*-stop and thus required a showing of probable cause, rather than reasonable articulable suspicion. Whether a seizure is an arrest or an investigatory detention depends on the reasonableness of the level of intrusion under the totality of the circumstances."[8] Considerations relevant to the Court's

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[5] *Id.* at 1336-37 (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

[6] *See Terry v. Ohio*, 392 U.S. 1 (1968).

[7] *Quarles*, 696 A.2d at 1337.

[8] *State v. Biddle*, 1996 Del. Super. LEXIS 374, *25.

determination include the amount of force used by the police, the need for such force, and the extent to which the individual's freedom of movement was restrained.[9] In addition, the Court should consider the duration of the stop, whether handcuffs were used, and the number of agents involved.[10]

In this case, two officers detained the Defendant. They walked toward him and asked him to stop. The Defendant complied and the officers took him to their vehicle 20 feet away. There was no testimony that the officers used any type of force to detain the Defendant, and it appears the detention was for a short time prior to the pat-down search and discovery of the marijuana. Based on the evidence presented at the hearing, it appears to the Court that the officers' initial detention of the Defendant was merely an investigatory stop and did not rise to the level of an arrest until after the marijuana was discovered. Therefore, the police officers needed only reasonable articulable suspicion of past or potential criminal conduct to stop the Defendant.

The next question is whether the officers possessed the suspicion necessary to justify detaining the Defendant. A seizure is improper if there is no reasonable and articulable suspicion to provide grounds for it. To determine whether reasonable and articulable suspicion exists, a court must examine the totality of the circumstances surrounding the situation "as viewed through the eyes of a

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[9] *Id.*

[10] *Id.* (citing *United States v. Perea*, 986 F.2d 633, 645 (2nd Cir. 1993)).

reasonable, trained police officer in the same or similar circumstances, combining these objective facts with such an officer's subjective interpretation of those facts."[11] The officer must be able to point to specific and articulable facts which, together with any rational inferences therefrom, reasonably warrant the intrusion.[12]

Dover Police were called to the scene of a fight in progress at the farmer's market on the final day of race weekend. Officer Berna was closely watching pedestrians in the area to determine whether any had been involved in a fight. While viewing the area, Officer Berna observed the Defendant looking at Officer Melvin intently. Officer Berna testified that when the Defendant could see that Officer Melvin was not watching him, the Defendant threw an object onto the ground. Officer Berna, a trained and experienced police officer, could not tell what the item was but testified that this behavior caused him to be suspicious. Officer Berna identified specific facts which raised his suspicion. Based on the facts as presented at the hearing, it appears that the police had reasonable articulable suspicion to detain the Defendant. Based on the facts as given by Officer Berna, including the Defendant's suspicious behavior coupled with the throwing down of an unidentified object, it was reasonable for the police to believe that the Defendant was engaged in some sort of criminal conduct. For example, the object thrown down by the

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[11] *Jones v. State,* 745 A.2d 856, 861 (Del. 1999).

[12] *Terry,* 392 U.S. at 27.

Defendant could have been a bomb or some other device that could have endangered the lives of the other pedestrians in the crowded market. Although the officers could not say that they actually witnessed the Defendant commit a crime, the behavior on the part of the Defendant was sufficient to raise suspicion. Thus, the seizure of the Defendant in this case was appropriate under the circumstances.

After detaining the Defendant, Officer Berna conducted a pat-down search of the Defendant. During the course of the search, the officer saw a bag of marijuana in the Defendant's back pocket and removed the bag. No other weapons or contraband were found on the Defendant's person. Pat-down searches are permitted to check a suspect for weapons when the police have reason to believe the suspect may be armed. It was reasonable in this case for the officers to believe the defendant was armed. Although Officer Berna did not testify with respect to an officer safety concern, the facts in this case establish to the Court that there was a risk. The officers were unaware of what the Defendant had thrown, therefore it was appropriate for them to pat him down to check for weapons. In the course of the proper search, Officer Berna saw the bag of marijuana in the Defendant's pocket. Because it was immediately obvious to Officer Berna that the bag contained marijuana, a contraband, the seizure of the drugs was appropriate.

Conclusion

Based upon the information presented at the hearing, this Court concludes that the police officers had reasonable articulable suspicion that Gibbs had committed or was about to commit a crime. Therefore, the detention and search were properly

conducted. Accordingly, Defendant's motion to suppress the evidence is ***denied***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File