NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAH DILLARD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1042 EDA 2011

Appeal from the Judgment of Sentence March 30, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0015436-2009

BEFORE: PANELLA, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J. Filed: February 7, 2013

Appellant, Michah Dillard, appeals from the judgment of sentence entered March 30, 2011, by the Honorable Daniel J. Anders, Court of Common Pleas of Philadelphia County. We affirm.

The trial court summarized the pertinent facts as follows:

> On January 30, 2009, Philadelphia Police Officer Phillip Sprague was on patrol with Officer Christopher Doughtery. Sprague was in plainclothes and in an unmarked vehicle. At approximately 2 p.m., Sprague observed [Dillard] disregard a stop sign at 12th and Dauphin Streets in Philadelphia while driving a silver Grand Marquis. Sprague activated his lights and sirens to pull over [Dillard]; he also called for a marked backup unit.
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> Upon approaching the vehicle, Sprague observed [Dillard] making furtive movements towards his groin with his right arm for several seconds. Sprague proceeded to the driver's side of

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* Former Justice specially assigned to the Superior Court.

> the vehicle and asked [Dillard] for his driver's license, vehicle registration and proof of car insurance. [Dillard] was "very nervous" during his encounter with Sprague. He went into the glove box, but stopped. He then started to go into his pocket, but stopped and hesitated. Based on these actions, Sprague believed that [Dillard] might be concealing a weapon in his groin area.
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> Sprague removed [Dillard] from the vehicle to conduct a protective frisk of [Dillard]. Sprague conducted a frisk with an open palm. While conducting the frisk, Sprague felt a bulge with several small squares inside. Based upon his training and experience, he immediately recognized the bulge and individual small squares as consistent with the packaging of illegal narcotics. Sprague had previously conducted hundreds of car stops and had frequently made narcotic arrests; he also received narcotics training at the police academy and as part of the Narcotics Enforcement Team.
>
> Sprague recovered a clear plastic sandwich baggie from [Dillard's] groin area. The baggie contained 36 blue-tinted Ziplock packets containing an off-white chunky substance. The substance later tested positive for cocaine base with a total weight of 5.628 grams. [Following a] [s]earch incident to [Dillard's] arrest, police officers recovered a total of $625 in United States currency from [Dillard's] person. The United States currency consisted of 24 twenty dollar bills, 8 ten dollar bills, 7 five dollar bills, and 30 one dollar bills. [Dillard] did not have any user paraphernalia on his person.

Trial Court Opinion, 12/22/11 at 1-2 (record citations omitted).

Prior to trial, Dillard filed a motion to suppress physical evidence. Following a hearing, the trial court denied Dillard's suppression motion. Dillard proceeded to a non-jury trial, after which he was convicted of

possession with intent to deliver ("PWID")[1] and possession of a controlled substance.[2] This timely appeal followed.

On appeal, Dillard raises the following issues for our review:

> 1. Did not the trial court err in denying appellant's motion to suppress physical evidence, insofar as appellant was stopped and searched without reasonable suspicion that criminal activity was afoot, that he was armed and dangerous and during the frisk the police officer seized an item from [a]ppellant's groin area even though its incriminating nature was not immediately apparent?
>
> 2. Was not the evidence insufficient to convict appellant of possession with intent to deliver a controlled substance?

Appellant's Brief at 3.

We first address Dillard's challenge to the denial of his suppression motion. Our standard of review is well-settled:

> [W]e are limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We may consider the evidence of the witnesses offered by the prosecution, as verdict winner, and only so much of the defense evidence that remains uncontradicted when read in the context of the record as a whole.

Commonwealth v. McAliley, 919 A.2d 272, 275-276 (Pa. Super. 2007) (citation omitted). "Moreover, if the evidence supports the factual findings of the suppression court, this Court will reverse only if there is an error in

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[1] 35 PA.STAT. § 780-113(a)(30).
[2] 35 PA.STAT. § 780-113(a)(16).

the legal conclusions drawn from those findings." ***Commonwealth v. Powell***, 994 A.2d 1096, 1101 (Pa. Super. 2010).

The record supports the suppression court's factual findings. As such, we proceed to determine whether the suppression court's legal conclusion, that the seizure in this case was lawful, is correct. Preliminarily, we note that there is no dispute that Dillard was the subject of a lawful investigatory detention. As such, the officers needed only reasonable suspicion to conduct a pat-down.

> During [an] investigatory stop, the officer can pat-down the driver when the officer believes, based on specific and articulable facts, that the individual is armed and dangerous. Such pat-downs, which are permissible without a warrant and on the basis of reasonable suspicion less than probable cause, must always be strictly limited to that which is necessary for the discovery of weapons that might present a danger to the officer or those nearby. When assessing the validity of a pat-down, we examine the totality of the circumstances ... giving due consideration to the reasonable inferences that the officer can draw from the facts in light of his experience, while disregarding any unparticularized suspicion or hunch.

Commonwealth v. Parker, 957 A.2d 311, 315 (Pa. Super. 2008) (internal citations, quotation marks, and emphasis omitted).

As previously noted, Officer Sprague testified that upon approaching Dillard's vehicle, he observed Dillard "making furtive movements to his groin area." N.T., Motion/Waiver Trial, 2/10/11 at 7. The movements lasted a "couple [of] seconds." ***Id***. at 8. When Officer Sprague asked for Dillard's license and registration, Dillard appeared nervous and again reached for his

pocket, but stopped and hesitated. ***Id***. Based upon Dillard's furtive movements, Officer Sprague was concerned "he could have been concealing a weapon…." ***Id***. at 10.

The furtive movements of Dillard, coupled with his nervous behavior, would plainly have justified a pat-down search for officer safety. ***See***, ***e.g.***, ***Commonwealth v. Mesa***, 683 A.2d 643, 646 (Pa. Super. 1996) (finding that an officer articulated specific facts to conclude that Mesa might be armed and dangerous, thus justifying a pat down search of his person, where upon being pulled over "appellant was moving around a great deal and this led [the officer] to believe that appellant could be armed and dangerous and was attempting to conceal something"); ***Parker***, ***supra***. While conducting such a pat-down an officer might even feel non-threatening contraband. "Under the plain feel exception, a police officer may seize *non-threatening contraband* detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object." ***Commonwealth v. Wilson***, 927 A.2d 279, 287 (Pa. Super. 2007) (citation and quotation marks omitted).

When Dillard alighted from the vehicle, Officer Sprague conducted a pat-down for officer safety and felt a bulge of square packets in Dillard's pocket that he believed were consistent with the illegal packaging of

narcotics. N.T., Motion/Waiver Trial, 2/10/11 at 12-13. Officer Sprague testified that he had "no doubt" that the objects he felt in Dillard's pocket were narcotics. ***Id***. at 24. Based on the legality of the pat down as discussed above, we find Officer's Sprague immediate recognition of the narcotics in Dillard's pocket rendered the seizure valid. ***See Wilson***, ***supra***. Accordingly, we affirm the denial of Dillard's suppression motion.

Lastly, Dillard challenges the sufficiency of the evidence to support his conviction of possession with intent to deliver. Our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact[-]finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Helsel, 53 A.3d 906, 917-918 (Pa. Super. 2012) (citation omitted).

To establish the offense of possession with intent to deliver, the Commonwealth must prove beyond a reasonable doubt that Dillard had both possession of the controlled substance and the intent to deliver the substance. ***Commonwealth v. Lee***, 956 A.2d 1024, 1028 (Pa. Super. 2008) (citation omitted). Possession of a controlled substance can be established by showing that the defendant had the substance on his person. ***Commonwealth v. Parsons***, 570 A.2d 1328, 1334 (Pa. Super. 1990). Intent to deliver may be inferred from a large quantity of controlled substance. ***Lee***, 950 A.2d at 1028 (citation omitted). If it is unclear whether a substance is being used for personal consumption or distribution, other factors may be analyzed. ***Id***. (citation omitted). Such factors include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant. ***Commonwealth v. Ratsamy***, 594 Pa. 176, 184, 934 A.2d 1233, 1237-38 (2007) (citation omitted). Expert opinion testimony is admissible concerning whether the facts surrounding the possession of the controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use. ***Id***.

Here, the evidence supports a finding that Dillard had possession with intent to deliver crack cocaine. Officer Sprague removed the cocaine from Dillard's pocket. N.T., 02/10/11 at 8-9. This is sufficient to establish proof of possession of the cocaine. The intent to deliver was also established by the Commonwealth's narcotic expert, Officer Brian Reynolds. Officer

Reynolds testified that the 36 individually packaged baggies of cocaine that could be sold for approximately $20.00 was consistent with an intent to deliver. ***Id***. at 40. He also stated the denominations of the $625.00 discovered on Dillard's person was consistent with that carried around the streets of Philadelphia by drug dealers. ***Id***. at 41. Finally, he noted that there was no drug paraphernalia for personal use, which indicates intent to deliver. ***Id***. at 41. The totality of factors are sufficient to prove Dillard's intent to deliver. Therefore, Dillard's argument that there is insufficient evidence to prove possession with the intent to deliver fails.

Judgment of sentence affirmed.