NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. JAQUINE L. GILLARD, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1060 EDA 2012

Appeal from the Order Entered February 29, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012473-2011

BEFORE: GANTMAN, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: Filed: January 4, 2013

The Commonwealth of Pennsylvania appeals from the order entered on February 29, 2012, granting a motion to suppress a recovered firearm and a statement made to police by Appellee, Jaquine L. Gillard. For the reasons that follow, we reverse and remand for further proceedings.

The trial court summarized the facts of this case as follows:

> Philadelphia Police Officer Daniel Godlewski, Badge Number 7455, of the 14th Police District, testified that on October 15, 2011, at approximately 7:10 p.m., he and his partner were on routine patrol in the 6400 block of Musgrave Street in the City of Philadelphia.
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> The officer testified that he had observed a silver Buick Century proceeding southbound on Musgrave Street and indicated he saw it proceed through a stop sign without making a complete stop. At that time, the police vehicle's lights and sirens were activated and the driver of the observed vehicle immediately pulled over. [Appellee] was a passenger in the vehicle. There was no issue as to the legality of the stop at the [suppression] hearing.

*Former Justice assigned to the Superior Court.

> This officer testified that when he approached the passenger side of the vehicle, he immediately smelled the strong odor of marijuana. He wasn't sure whether it was burnt or fresh marijuana, but there was no doubt in his mind that he smelled a strong odor of marijuana. He also testified that he observed [Appellee] make a "movement" towards his right hip. The officer testified he "believed to be at that time going towards a weapon." It was this movement and not the smell of marijuana that prompted the occupants' removal from the vehicle.
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> Officer Godlewski testified that he then ordered all of the occupants out of the vehicle and, in his own words, "in order to frisk" them. Officer Godlewski testified that prior to being frisked, [Appellee] stated "I'm going to keep it real with you, I got a gun on me." [Appellee] was then frisked and a handgun with live rounds was recovered from his waist area. Prior to this, Officer Godlewski testified that all of the occupants of the vehicle were cooperative, provided identification and he had never lost sight of [Appellee's] hands. Further, no marijuana or other drugs were found during a search of the vehicle.

Trial Court Opinion, 7/3/2012, at 2-3 (not paginated in original).

Prior to trial, Appellee filed a motion to suppress the recovered firearm and his statement to police. The trial court held a suppression hearing on February 29, 2012. The trial court determined that the "police officer lacked reasonable suspicion to order [Appellee] and the other occupants out of the vehicle with the express purpose to frisk them based upon the totality of the circumstances." N.T., 2/29/2012, at 37. Accordingly, the trial court entered

an order that same day granting Appellee's motion for suppression of both the firearm and Appellee's statement to police. This timely appeal followed.[1]

On appeal, the Commonwealth raises a single issue for our review:

> Where, during a lawful stop of a vehicle, a police officer smelled a strong odor of marijuana, saw [Appellee] reach toward his hip as if for a weapon, and ordered [Appellee] to exit the vehicle, and [Appellee] then volunteered that he had a gun, did the lower court err in suppressing that gun, a fully loaded semi-automatic weapon, and [Appellee's] volunteered statement?

Commonwealth's Brief at 3.

Our standard of review is well settled:

> Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. When reviewing a decision from the suppression court, our responsibility is (1) to determine whether the record supports the factual findings of the court below, and (2) to evaluate the legitimacy of the inferences and legal conclusions drawn from those findings. Where, as here, it is the Commonwealth who is appealing the decision of the suppression court, we must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution which when read in the context of the record as a whole, remains uncontradicted. If the

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[1] The Commonwealth filed a timely notice of appeal on March 26, 2012 certifying that the suppression order terminated or substantially handicapped the prosecution pursuant to Pa.R.A.P. 311(d). The trial court did not order the Commonwealth to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Regardless, the Commonwealth filed a Rule 1925(b) statement on March 28, 2012. On July 3, 2012, the trial court specifically addressed the sole issue raised in the Commonwealth's Rule 1925(b) statement in an opinion pursuant to Pa.R.A.P. 1925(a).

record supports the factual findings below, we are bound by those findings.

However, while we are bound by the suppression court's findings of fact if supported by the record, we are not bound by the court's legal conclusions which are drawn from the facts of the case. In the present case, both parties are in agreement as to the facts; therefore, the question which remains is whether the court committed an error in its legal conclusions drawn from those facts.

* * *

Specifically, it is hornbook law that the Fourth Amendment to the United States Constitution as well as Article I, § 8 of the Pennsylvania Constitution protect citizens from unreasonable searches and seizures. Warrantless searches and seizures (such as occurred in this case) are unreasonable *per se*, unless conducted pursuant to specifically established and well-delineated exceptions to the warrant requirement. One such exception, the ***Terry*** stop and frisk, permits a police officer to briefly detain a citizen for investigatory purposes if the officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot. ***Terry v. Ohio***, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Terry further held that when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others the officer may conduct a pat down search to determine whether the person is in fact carrying a weapon. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.

In order to conduct an investigatory stop, the police must have reasonable suspicion that criminal activity is afoot. In order to determine whether the police had reasonable suspicion, the totality of the circumstances—the whole picture—must be considered. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. To conduct a pat down for weapons, a

> limited search or frisk of the suspect, the officer must reasonably believe that his safety or the safety of others is threatened. If either the seizure (the initial stop) or the search (the frisk) is found to be unreasonable, the remedy is to exclude all evidence derived from the illegal government activity.
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> The ***Terry*** totality of the circumstances test applies to traffic stops or roadside encounters in the same way that it applies to typical police encounters. Moreover, the principles of ***Terry*** apply to all occupants of the stopped vehicle, not just the driver. Indeed, as we have observed, roadside encounters, between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect.
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> Indeed, on multiple occasions we have held that [] furtive movements, when witnessed within the scope of a lawful traffic stop, provided a reasonable basis for a protective frisk.

Commonwealth v. Simmons, 17 A.3d 399, 402-403 (Pa. Super. 2011) (quotations and most citations omitted), *appeal denied*, 25 A.3d 328 (Pa. 2011).

In this case, the Commonwealth challenges the trial court's decision that police lacked reasonable suspicion to conduct a frisk. More specifically, relying upon our decision in ***Commonwealth v. Reppert***, 814 A.2d 1196 (Pa. Super. 2002) (*en banc*), the trial court determined

> that the defendant made a single, simple furtive movement only. The officer never lost sight of his hands. Police Officer Godlewski only conducted his detention on the basis of the furtive movement he had observed at that point. Officer Godlewski did not order the vehicle's occupants out of the vehicle upon noticing the smell of marijuana. The

> removal of the defendant and the others from the vehicle was solely based on this one observed movement and nothing more. He did not testify that he was conducting a frisk to determine if any occupants possessed the marijuana he claimed to have smelled. The smell of marijuana at the time he approached the vehicle may have given him reasonable suspicion that drugs were in the vehicle or on the person, but he did not testify to that. Officer Godlewski testified that it was only the defendant's movement that initiated the intent to remove people from the vehicle and to frisk them.

Trial Court Opinion, 7/3/2012, at 3-4 (not paginated in original).

The trial court's reliance on ***Reppert*** is misplaced. As we further discussed in ***Simmons***:

> ... ***Reppert*** **is distinguishable** [] **because in** ***Reppert*** **the search and seizure in question took place after the lawful traffic stop had concluded.** Specifically, in ***Reppert*** the defendant was a passenger in a vehicle which was lawfully pulled over for a registration sticker violation. During a brief pursuit of the vehicle, the officer observed the defendant in the back seat engaged in movements suggestive of stuffing something into his pockets or between the seat cushions of the car. Apparently, however, the defendant's movements did not significantly concern the officer, because rather than immediately frisk the defendant, he proceeded with the traffic stop. The officer interacted with the driver, and eventually accepted his explanation for the registration sticker violation, deciding not to issue a citation. At that point, we concluded that the officer had realized the purpose for the stop and had no further reason to detain the driver of the vehicle or its occupants under the guise of the original traffic infraction. Nevertheless, the officer then ordered the defendant to exit the back seat, at which time he observed bulges in the defendant's pockets. Claiming that he was concerned for his safety, the officer ordered the defendant to empty his pockets which revealed cash, narcotics, and a small scale. The defendant was consequently arrested.

> At trial [in ***Reppert***], the defendant moved to suppress the materials emptied from his pockets based upon an inappropriate ***Terry*** stop and search. The Commonwealth attempted to justify that search and seizure based upon the furtive movements observed during the officer's pursuit of the vehicle. However, we rejected that argument, explaining that because the lawful traffic stop had concluded, any subsequent seizure and search of one of the occupants of the vehicle required a renewed showing of reasonable suspicion. In ***Reppert*** we went on to hold that, given that the initial traffic stop had concluded, the defendant's pre-stop furtive movements, **without more,** did not provide the requisite renewed reasonable suspicion to seize and/or search the defendant.
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> Contrary to the trial court's interpretation, ***Reppert*** did not hold that furtive movements are irrelevant to the totality of the circumstances test set forth in ***Terry***. **When properly understood, *Reppert* stands for the proposition that pre-stop furtive movements, by themselves, may not be used to justify an investigative detention and search commenced after the conclusion of a valid traffic stop where the totality of circumstances has established that the furtive movements did not raise immediate concern for the safety of the officer who undertook the initial vehicle detention.**

Simmons, 17 A.3d at 404-405 (internal citations, quotations, and footnote omitted) (some emphasis in original; some emphasis added).

In contrast with ***Reppert***, the totality of the circumstances of this case involved an ongoing stop. Officer Godlewski testified that he approached the stopped vehicle and "observed the strong odor of marijuana coming from inside that vehicle." N.T., 2/29/2012, at 8. The officer then observed Appellee, a passenger in the rear of the vehicle, "make a movement to his right hip" which the officer believed was an attempt to retrieve a weapon.

Id. at 8, 10. Officer Godlewski promptly ordered Appellee out of the vehicle and Appellee volunteered a statement that he was carrying a firearm. ***Id.*** at 8.

Because the traffic stop in this case had not concluded, our decision in ***Simmons*** permitted Officer Godlewski to rely on Appellee's hand-to-hip movement as grounds to proceed with a ***Terry*** frisk for weapons. Here, Appellee made a furtive movement during a valid traffic stop. The furtive movement immediately led Officer Godlewski to reasonably believe that Appellee was concealing a weapon. Unlike in ***Reppert***, in this case, Officer Godlewski's concern for his safety occurred contemporaneously with the traffic stop. Accordingly, Officer Godlewski had valid grounds to conduct a protective frisk. As such, suppression of the subsequently recovered firearm was not warranted. Furthermore, upon alighting from the vehicle, Appellee volunteered information to police that he was carrying the firearm and, thus, his statement should not be suppressed. ***See Commonwealth v. Garvin***, 50 A.3d 694, 698 (Pa. Super. 2012) ("When a defendant gives a statement without police interrogation, we consider the statement to be volunteered and not subject to suppression."). Therefore, based upon all of the foregoing, we reverse the trial court's suppression order and remand for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.