

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellant

v.

K.L., A MINOR

Appellee

No. 1127 MDA 2012

Appeal from the Order May 29, 2012
In the Court of Common Pleas of Berks County
Juvenile Division at No(s): 319-J-2012

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.:

FILED MAY 30, 2013

The Commonwealth appeals from the order entered on May 29, 2012 in the Court of Common Pleas of Berks County granting K.L.'s motion to suppress physical evidence and statements. The Commonwealth claims the trial court erred in suppressing the physical evidence because the search of K.L. was by consent.¹ Following a thorough review of the submissions by the parties, the certified record and relevant law, we affirm.

Our standard of review is well settled.

When reviewing the propriety of a suppression order, an appellate court is required to determine whether the record

* Retired Senior Judge assigned to the Superior Court.

¹ The Commonwealth does not appeal the suppression of the statements taken from K.L. pursuant to questioning and prior to his being read his ***Miranda (v. Arizona)***, 384 U.S. 436 (1966)) warnings.

supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. [Where the defendant] prevailed in the suppression court, we may consider only the evidence of the defense and so much of the evidence for the Commonwealth as remains uncontradicted when read in the context of the record as a whole.^[2] Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Cartegena, 63 A.3d 294, 298 (Pa. Super. 2013).

Our review of the conclusions of law is plenary. ***Commonwealth v. Mistler***, 912 A.2d 1265, 1268 (Pa. 2006).

While on patrol on May 5, 2012, at approximately 10:32 p.m., Reading Police Officer James Demsko received a radio call of a report of a suspicious person in the area of 5th and Spruce in Reading who might be selling drugs. The person was reportedly wearing a tan button-down shirt and a hat. N.T. Suppression Hearing, 5/29/12, at 5

Officer Demsko, wearing a uniform, went to the vicinity of the report and parked his vehicle several blocks away. He met another police officer who was in the same location and walked with him to the reported intersection where they saw two males; one was on a porch and one was on the sidewalk. The other

² Because K.L. presented no evidence, we review only the evidence presented by the Commonwealth.

officer talked to the male on the sidewalk,³ but he remained in view of the male on the porch. Officer Demsko spoke to the male on the porch, the juvenile, K.L. The juvenile was wearing a black shirt and black pants. Officer Demsko stated he did not have any problems communicating with the juvenile who spoke somewhere between fragmented English and conversational English. Officer Demsko admitted that if it were not for the telephone call, he would have had no reason to question the juvenile because he had no reason to believe that the juvenile was actually involved in any kind of criminal activity. Officer Demsko testified that he talks to anybody when a call is received, so he is able to put in a report that the police took some action and did something about the resident's complaint, regardless of whether or not the call is legitimate. Therefore, Officer Demsko frequently approaches people and asks them if they are engaged in hypothetical charges.

Officer Demsko asked the juvenile if he lived at that location. The juvenile answered that he did not. Officer Demsko told the juvenile that he was investigating thefts in the area and asked the juvenile if he knew anything about them or if he was involved in them. The juvenile responded no. Officer Demsko asked the juvenile if he could check him for anything that could have been taken from the car thefts. The juvenile stated he could do so. The juvenile began pulling things out of his pockets and showing them to the police officer. Because he was worried about his safety, Officer Demsko then asked if he could check the pockets himself. Forty-one bags of heroin were recovered from the pocket of the juvenile's pants. The search was conducted within five minutes of Officer Demsko's arrival.

Pa.R.A.P. 1925(a) Opinion, 8/27/12, at 1-2.

The Commonwealth claims this evidence demonstrates Officer Demsko conducted a consent search, and was, therefore, constitutionally permissible.

A search conducted without a warrant is constitutionally impermissible unless an established exception applies. A consensual search is one such exception, and the central

³ There is no indication that the person on the sidewalk was apprehended.

inquiries in consensual search cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent, and to the voluntariness of the consent given. To establish a valid consensual search, the Commonwealth must first prove that the individual consented during a legal police interaction.

Commonwealth v. Caban, 60 A.3d 120, 127 (Pa. Super. 2012 (internal citations omitted)).

Pennsylvania law recognizes three categories of interaction between police officers and citizens. Only two are relevant to the instant matter:

The first is a "mere encounter," which need not be supported by any level of suspicion. The second is an "investigative detention," which must be supported by reasonable suspicion. This interaction "subjects a suspect to stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest.

Id. (internal citations omitted).

The trial court, based on the facts recited, determined that Officer Demsko subjected K.L. to an investigative detention, despite the officer's admission that he had no cause to suspect K.L. was involved in any criminal activity. Our review of the certified record leads us to agree with the trial court's legal conclusion.

Officer Demsko approached K.L. at approximately 10:30 p.m. and told him he was investigating thefts from cars. Officer Demsko testified at the suppression hearing that this information was false; it was a pretext to engage K.L. in conversation so that he could write in his report that he had responded to the anonymous tip involving drug dealing. Nevertheless, Officer Demsko asked K.L. if he knew anything about the fictitious crimes,

whether he had taken part in the crimes, whether he possessed any proceeds from the break-ins, and whether K.L. would consent to show him what was in his pockets to prove he had not taken part in the break-ins. Officer Demsko testified that he believed this questioning of K.L. about his involvement in criminal activity was “small talk.” N.T. Suppression Hearing, 5/29/12, at 22. However, the unavoidable consequence of questioning was to suggest that Officer Demsko was investigating actual criminal activity and that K.L. was a subject of that investigation. Additionally, this impression was reinforced when Officer Demsko conducted a **Terry**⁴ search of K.L. The trial court determined these facts, coupled with the admission that Officer Demsko had no reason to believe K.L. was involved in any criminal activity, showed K.L. was subject to an investigative detention. We can find no abuse of discretion or error of law in this finding.

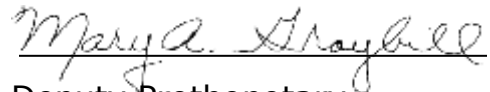
Because there was no reasonable suspicion supporting the detention and questioning, the investigative detention was invalid. The validity of a consent search is initially based upon the validity of the police/citizen interaction. **Caban, supra**. The invalid investigative detention requires a determination the consent to search was also invalid.

⁴ **Terry v. Ohio**, 392 U.S. 1 (1968) (**Terry** pat-down requires reasonable suspicion based on specific and articulable facts that detained person may be armed and dangerous). Because Office Demsko gave no reasons why he believed K.L. was armed and dangerous, the **Terry** search was also invalid.

Order affirmed. This matter is remanded for action consistent with this decision. Jurisdiction relinquished.

Colville, J., concurs in the result.

Judgment Entered.


Deputy Prothonotary

Date: 5/30/2013