NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
NORMAN MICHAEL VEGA, JR.,	:	
Appellant	:	No. 1160 MDA 2012

Appeal from the Judgment of Sentence Entered December 15, 2010,
In the Court of Common Pleas of Berks County,
Criminal Division, at No. CP-06-CR-0003292-2010.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: February 26, 2013

Appellant, Norman Michael Vega, Jr., appeals from the judgment of sentence entered on December 15, 2010. We affirm.

Factually, between 1:00-2:00 a.m. on August 8, 2010, Appellant was seated in a parked vehicle that was obstructing a portion of the southbound lane of traffic. Three plainclothes officers stopped their unmarked vehicle behind him, approached on foot, and surrounded his vehicle. Appellant was asked for identification. Commensurately, his passenger, Gracie Perez, was removed from the vehicle for an outstanding warrant during which time she became wild and boisterous. Appellant initially gave the officers a different name before properly identifying himself. When questioned as to whether he possessed any weapons or contraband, Appellant stated he did not,

*Retired Senior Judge assigned to the Superior Court.

exited the vehicle of his own volition and consented to a search of his person. Officer Lackner proceeded to pat down Appellant's pockets when he felt several objects in Appellant's pocket, which he believed to be heroin. At this time, Appellant pulled away and revoked his consent to search. Officer Lackner withdrew a sandwich bag containing a total of 38 packets of heroin.

Appellant was found guilty of Possession of a Controlled Substance (Heroin), and not guilty of Possession with the Intent to Deliver a Controlled Substance (Heroin), following a jury trial held on December 13-14, 2010. On December 15, 2010, the trial court sentenced Appellant to 18 months to 36 months of incarceration. Following denial of post-sentence motions, Appellant, through counsel, filed a timely appeal. This appeal was ultimately dismissed on May 18, 2011, due to previous counsel's failure to file a brief. New counsel was appointed and the trial court granted Appellant an appeal *nunc pro tunc*. This appeal followed.

Appellant raises the following issues on appeal:

> 1. Whether the trial court erred in denying Appellant's motion to suppress the physical evidence where the stop and subsequent search of the Appellant was based upon neither probable cause nor reasonable suspicion that criminal activity was afoot?
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> 2. Whether the trial court erred in denying Appellant's motion to suppress the physical evidence, because the police seized the evidence in question in violation of the plain feel doctrine and without the consent to search?

> 3. Whether the trial court abused its discretion in imposing a maximum sentence where the record does not support a sentence in the aggravated range?

Appellant's Brief at 5.

Appellant first asserts that the trial court erred in denying his motion to suppress physical evidence as the facts did not justify an investigatory detention, also known as a ***Terry*** stop,[1] and search of Appellant. The standard of review we apply in an appeal from the denial of a motion to suppress is set forth below:

> We determine whether the court's factual findings are supported by the record and whether the legal conclusions drawn from them are correct. Where, as here, it is the defendant who is appealing the ruling of the suppression court, we consider only the evidence of the prosecution and so much of the evidence for the defense which remains uncontradicted when fairly read in the context of the whole record. If, upon our review, we conclude that 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.

Commonwealth v. Daniels, 999 A.2d 590, 596 (Pa. Super. 2010) (citation omitted).

> With respect to factual findings, we are mindful that it is the sole province of the suppression court to weigh the credibility of the witnesses. Further, the suppression court judge is entitled to believe all, part or none of the evidence presented. However, where the factual determinations made by the suppression court are not supported by the evidence, we may reject those findings. Only factual findings which are supported by the record are binding upon this [C]ourt.

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

Commonwealth v. Benton, 655 A.2d 1030, 1032 (Pa. Super. 1995) (citations omitted). In addition, we are aware that questions of the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. ***Commonwealth v. Freidl***, 834 A.2d 638, 641 (Pa. Super. 2003).

Essentially, Appellant argues that the trial court erred in determining that the police had reasonable suspicion to justify an investigative detention and search of Appellant when the police "did not observe any unusual behavior which would lead a reasonable person to conclude that Appellant was armed and dangerous." Appellant's Brief at 12-13. We disagree.

To secure the right of citizens to be free from intrusions by police, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. ***Commonwealth v. Beasley***, 761 A.2d 621, 624 (Pa. Super. 2000), *appeal denied*, 565 Pa. 662, 775 A.2d 801 (2001).

Furthermore, we note that:

> State case law recognizes three categories of interaction between police officers and citizens, which include: (1) a mere encounter, or request for information, which need not be supported by any level of suspicion, but which carries no official compulsion to stop or to respond; (2) an investigative detention, which must be supported by reasonable suspicion as it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional

> equivalent of an arrest; and (3) arrest or custodial detention, which must be supported by probable cause.

Commonwealth v. Bolton, 831 A.2d 734, 735 (Pa. Super. 2003) (citing ***Commonwealth v. Acosta***, 815 A.2d 1078 (Pa. Super. 2003) (*en banc*), *appeal denied*, 576 Pa. 710, 839 A.2d 350 (2003)). In the instant matter it is not in dispute that Appellant was subject to an investigative detention. Appellant's Brief at 11.

To effectuate an investigative detention, the officers are required to have reasonable suspicion that unlawful activity was in progress. In order to demonstrate reasonable suspicion of unlawful activity, the police must be able to point to specific facts and reasonable inferences drawn from those facts in light of the officer's experience. ***Commonwealth v. Cook***, 558 Pa. 50, 57, 735 A.2d 673, 677 (1999). The reasonable suspicion upon which an investigative detention is based must be "assessed based upon the totality of the circumstances" and "viewed through the eyes of a trained police officer, not an ordinary citizen." ***Commonwealth v. Johnson***, 734 A.2d 864, 869 (Pa. Super. 1999), *appeal denied*, 560 Pa. 721, 745 A.2d 1219 (1999).

Our Supreme Court described "reasonable suspicion" as follows:

> A police officer may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct. This standard, less stringent than probable cause, is commonly known as reasonable suspicion. In order to determine whether the police

> officer had reasonable suspicion, the totality of the circumstances must be considered. In making this determination, we must give "due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience." Also, the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

Commonwealth v. Rogers, 578 Pa. 127, 134, 849 A.2d 1185, 1189 (2004) (citations omitted).

The trial court offered the following discussion concerning Appellant's claim:

> It is clear that the Defendant was in violation of 75 Pa.C.S.A. § 3354(a) when the Officers drove past the vehicle. That section provides "... every vehicle standing or parked upon a two-way highway shall be positioned parallel to and with the right-hand wheels within 12 inches of the right-hand curb ... 75 Pa.C.S.A. § 3354(a) (West 2010). The fact that CI Lackner did not cite him for the violation is of no consequence. Unlike the typical traffic stop, Vega was already stopped and the car was parked. No lights were activated on the police vehicle. No sirens were blared. CI Lackner merely approached Vega and illuminated the car with a flashlight. There were ample facts to suggest that criminal activity was afoot at the time CI Lackner engaged in dialogue with Defendant. There can be little doubt that, upon seeing an automobile parked illegally, CI Lackner had specific and articulable reasons to believe that a violation, if not multiple violations, of the law of the Commonwealth were being committed. . . .
>
> [I]n this case, the police had more than reasonable suspicion to believe that a traffic violation had occurred. Therefore, the police were justified in approaching the vehicle and it was not pre-textual in any way. Moreover, the Superior Court has held that "facts gathered during a valid traffic stop [may] be utilized to justify an investigatory detention occurring after a police officer has indicated that a defendant is free to leave."

Commonwealth v. Kemp, 961 A.2d 1247, 1260 (Pa. Super. 2008). Defendant Vega was never free to leave during this incident. The officers continued to gather facts during the legal traffic stop and these contributed to the justification of Defendant's investigatory detention. The facts necessary for the detention were not required to be fully apparent when the officers spotted the vehicle. Thus, we conclude the initiation of the traffic stop was properly and legally conducted. Moreover, due to the facts surrounding the incident, the officers were justified in the continued investigatory detention of Defendant. . . .

Furthermore, it is well-established that "when an officer detains a vehicle for violation of a traffic law, it is inherently reasonable that he or she be concerned with safety and, as a result, may order the occupants of the vehicle to alight from the car." *Commonwealth* v. *Rosa,* 734 A.2d 412, 414 (Pa. Super. 1999). It is important to note that Vega spontaneously and voluntarily exited his vehicle. Had CI Lackner ordered him to step out of the vehicle, we would afford Lackner's decision great weight given the totality of the circumstances.

Next, we turn to the seizure of the suspected heroin from the defendant's person upon voluntary exit from the car. An officer may perform a *Terry* frisk if he has "a reasonable suspicion, based on specific and articulable facts, that the detained individual may be armed and dangerous." *Commonwealth v. Stevenson,* 744 A.2d 1261, 1264 (Pa. 2000). . . .

Here, the record establishes that CI Lackner made many narcotics arrests and was familiar with the drug trafficking that regularly took place in this area. The Defendant was illegally parked in a high crime and drug trafficking area at 1 am. This area was also known for its numerous homicides and shootings. The interior light of the car, initially on, was rapidly turned off when the Defendant noticed the presence of the officers.

The Defendant was in the car with a person who had a warrant out for her arrest and was involved in an incident where she fired shots at another person. She was instantly recognizable to CI Lackner, who knew her from prior police contacts regarding drug trafficking and firearms. The officers'

> heightened concern for their safety was further justified by Perez's wild and boisterous behavior. People were beginning to come out of their houses and this could have put the officers in an even more dangerous position. Furthermore, Defendant initially lied to [] CI Lackner about his name and about having a valid license. . . .
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> All of these facts would contribute to a reasonable suspicion that Defendant was involved in some form of criminal activity and that, possibly, Defendant might have been carrying a weapon. . . .

Trial Court Opinion, 11/17/10, at 16-18.

When we evaluate the above stated factors in view of the totality of the circumstances in the instant case, we conclude that the trial court properly held that the police possessed the requisite reasonable suspicion when they stopped Appellant. Here, our review of the record reflects that Appellant was illegally parked, in violation of 75 Pa.C.S.A. § 3354(a) of the motor vehicle code, in an area known to the officers for drug and gun-related offenses, thus justifying the detention of Appellant.[2] Appellant originally misidentified himself when questioned as to his identity. Appellant's passenger, Perez, who became loud and hostile during the interaction, was known to officers for her prior involvement in drug activity and gun-related crimes. N.T., 12/13-14/10, at 10-16. Such factors support

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[2] We reiterate, however, that a police officer has probable cause to stop a motor vehicle if the officer observed a traffic code violation, even if it is a minor offense. ***Commonwealth v. Chase***, 599 Pa. 80, 89, 960 A.2d 108, 113 (2008).

the trial court's conclusion that reasonable suspicion existed for the detention and search of Appellant. Appellant's first claim fails.

Appellant next asserts that the trial court erred in denying his motion to suppress because the police seized the evidence in violation of the plain feel doctrine without the consent to search. Appellant's assertion is belied by the record.

If an officer possesses reasonable suspicion based on "specific and articulable facts" that the individual is armed and dangerous, he may conduct a frisk of that person's outer clothing for weapons. ***Commonwealth v. Stevenson***, 560 Pa. 345, 352, 744 A.2d 1261, 1264-1265 (2000). Even further, under the "plain feel" doctrine, the officer may seize non-threatening contraband concealed on the person during a ***Terry*** stop if the officer is "in a position to lawfully 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." ***Id.*** at 353, 744 A.2d at 1265 (citing ***Minnesota v. Dickerson***, 508 U.S. 366, 373-375 (1993)).

> Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband. If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object.

Id. (citation omitted). The court may consider the totality of the circumstances surrounding the attendant frisk, including "the nature of the objects, its location, the conduct of the suspect, the officer's experience, and the reason for the stop." ***Commonwealth v. Zhahir***, 561 Pa. 545, 751 A.2d 1153, 1163 (2000).

Regarding the plain feel doctrine, the trial court concluded:

> In the instant case, CI Lackner simply asked Defendant if he had any weapons or contraband on him. The Defendant said "no" and then *voluntarily* exited the vehicle and indicated that CI Lackner could search his person. CI Lackner proceeded to pat-down Vega in order to insure his safety before reaching into any pockets. The Defendant was compliant with the pat-down until CI Lackner felt the heroin bundles. Only at that time did the Defendant state that he did not want to be searched. Regardless of how the search was initiated, CI Lackner possessed the reasonable suspicion necessary to warrant the continued pat-down. Because the 200 block of South 9th Street is known as a high crime and drug area, we afford a decision to frisk Defendant with great weight. We further determine that the detention in order to frisk Defendant was reasonable under these circumstances, even after he revoked his consent. Thus, any evidence seized from Defendant was legally obtained during the course of a valid warrantless search pursuant to reasonable suspicion that Defendant was armed and that his actions posed a threat to officer and civilian safety. . . .
>
> The initial stop of the vehicle was lawful for the reasons stated above. CI Lackner had a great deal of knowledge about narcotics investigation along with ample training and work experience in investigating illegal narcotics. Based on his experience, the identity of the objects in Defendant's pocket was immediately apparent and consistent with packages of heroin. We must therefore conclude that CI Lackner's warrantless seizure of the plastic baggies containing a substance appearing to be heroin from the defendant's person was legal and not violative of the defendant's constitutional rights. . . .

> Thus, upon review of the finding of facts, the totality of the circumstance reveals that the record lacks any indicia that Defendant was coerced into consenting to the search and that Defendant's consent was voluntary and valid. In fact, the Defendant invited CI Lackner to search him. CI Lackner asked him if he had weapons or contraband, but at no time did he ask to search the Defendant. There was no excessive police conduct. No physical contact occurred between the police and Vega, and the officer did not display his weapon. CI Lackner did not need to order Vega to exit the car even though it would have been necessitated by the fact that Vega was not a licensed driver and had to move out of the driver's seat.

Trial Court Opinion, 11/17/10, at 19-21.

When we evaluate the above stated factors in view of the totality of the circumstances in the instant case, we conclude that the trial court correctly held that Officer Lackner first performed a proper pat down and plain feel seizure of the contraband from the search of Appellant's person.

Here, the record reflects that Appellant lied about the true nature of his identity and voluntarily exited the vehicle. His passenger was known to officers for her prior involvement in drug activity and gun-related crimes and had a warrant for her arrest. Appellant stated that he possessed no contraband and allowed Officer Lackner to search him. Appellant, thus, initially consented to the search. Officer Lackner conducted a pat down of Appellant, for his own safety, prior to performing a search of Appellant's person. During the pat down, based upon his experience and training, he felt packets he believed to be heroin in Appellant's pocket. At this point, Appellant pulled away, withdrawing permission for the search. Officer

Lackner retrieved 38 packets of heroin from Appellant's pockets, consistent with his experience, training and belief that contraband existed. N.T., 12/13-14/10, at 10, 12-16. Such factors indicate the pat down of Appellant by Officer Lackner was justified and supported by reasonable suspicion. The plain-feel discovery of the heroin was proper. Appellant's second claim fails.

Appellant finally argues that the trial court abused its discretion in sentencing him in the aggravated range without sufficient reasons on the record. Our standard of review is one of abuse of discretion. Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa. Super. 2006).

Where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and an appellant's appeal should be considered to be a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

> [a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
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> > [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see***

> Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Id. at 170 (citing ***Commonwealth v. Evans***, 901 A.2d 528 (Pa. Super. 2006)). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed. ***Id***. (citing ***Commonwealth v. Mann***, 820 A.2d 788 (Pa. Super. 2003)).

Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002). As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. ***Id***.

Herein, the first three requirements of the four-part test are met because Appellant brought a timely appeal, raised the challenge in his post-sentence motion and included in his appellate brief the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we will next determine whether

Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed by the sentencing court.

In Appellant's Rule 2119(f) statement, he asserts that the sentencing court abused its discretion in imposing an excessive and unreasonable sentence because the sentencing court failed to provide a sufficient statement of reasons for imposing a sentence in the aggravated range. Appellant's Brief at 8. The failure to state sufficient reasons for a sentence on the record raises a substantial question. ***Commonwealth v. Twitty***, 876 A.2d 433, 439 (Pa. Super. 2005), *appeal denied*, 892 A.2d 823 (Pa. 2005). Accordingly, we will address the merits of the claim.

Upon review, we discern no abuse of discretion by the trial court in sentencing Appellant. At the time of sentencing, the trial court noted that it reviewed the pre-sentence report in the case, and took into account the testimony heard and the information and arguments provided by counsel for Appellant and for the Commonwealth. N.T., 12/15/10, at 8. Furthermore, the trial court made the following observation concerning the pre-sentence report and the escalating nature of the crimes committed by Appellant:

> The PSI here presents a pretty dismal picture, so far as from 1998 to the present, there appears to be only six years in which [Appellant] did not commit any crimes, and five of those he was incarcerated. The crimes also seem to escalate in seriousness, not counting the last one that we are concerned with here today, but we have a number of felony theft offenses and we have, also, of course, a felony forgery and we have these

> very serious firearms charges which are the subject of [Appellant's] parole.

Id. The court then questioned the sincerity of Appellant's statement to the court about his concern for his family in light of Appellant showing no inclination to hang around with anyone other than the wrong kind of people. ***Id***. at 9. Based on our review, we conclude that the trial court gave adequate consideration to the relevant factors and provided sufficient reasons prior to imposing sentence in the aggravated range of the sentencing guidelines. Accordingly, we discern no abuse of the trial court's discretion in fashioning Appellant's sentence.

Judgment of sentence affirmed.