

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT SIMMONS,	:	
	:	
Appellant	:	No. 1199 WDA 2011

Appeal from the Judgment of Sentence entered on June 29, 2011
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CP-02-CR-0013053-2009

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

DISSENTING MEMORANDUM BY BOWES, J.: Filed: February 21, 2013

Unlike the distinguished majority, I do not believe that we are constrained to reverse. Rather, I believe that the officer articulated both specific and reasonable reasons for his belief that Appellant possessed a concealed firearm. Accordingly, I respectfully dissent.

First, I note that the majority's discussion of a pat down search is irrelevant and unnecessary for the disposition in this matter. Police did not discover the gun via a pat down search of Appellant. Instead, Appellant fled and discarded his weapon. The critical question in this case is whether Officer Saldutte articulated sufficient reasons to show that reasonable

suspicion of criminal activity existed, justifying his request for Appellant to stop and show him his hands.¹

It is well established that “even a combination of innocent facts, when taken together, may warrant further investigation[.]” ***Commonwealth v. Kemp***, 961 A.2d 1247, 1255 (Pa.Super. 2008) (*en banc*); ***see also Commonwealth v. Cook***, 735 A.2d 673, 676 (Pa. 1999). As this Court cogently stated in ***Commonwealth v. Riley***, 715 A.2d 1131, 1135 (Pa.Super. 1998), “Merely because a suspect’s activity may be consistent with innocent behavior does not alone make detention and limited investigation illegal. . . . Rather, we view the circumstances through the eyes of a trained officer, not an ordinary citizen.” In my view, the majority overlooks these important principles.

Officer Saldutte testified that he was in a marked cruiser patrolling a high crime area in the East Liberty section of Pittsburgh around midnight.

¹ I note that merely asking Appellant to stop does not alone result in an investigative detention. ***See Commonwealth v. Lyles***, 54 A.3d 76 (Pa.Super. 2012) (approaching a person and asking why there are at a location held to be a mere encounter). However, Officer Saldutte candidly stated that Appellant was not free to leave. While the officer’s subjective belief is not dispositive, ***id.***, I agree that by directing Appellant to stop and show him his hands this was more than a mere encounter.

I also am aware, as was the suppression court, that Officer Saldutte was on administrative leave at the time of the suppression hearing in this matter due to his involvement in the high profile Jordan Miles case. Despite trial counsel’s highlighting that the officer incorrectly believed in that case that Mr. Miles possessed a gun, the suppression court found the officer to be credible.

He provided that the area is known for numerous shootings, burglaries, robberies, aggravated assaults, firearm offenses, and drug activity. Officer Saldutte himself had made four or five firearms arrests in 2009 in this area alone. Also, as the majority acknowledges, Officer Saldutte received specialized training from the Bureau of Alcohol, Tobacco and Firearms regarding recognizing persons carrying concealed firearms. As part of this training, the officer learned that persons who possess illegal contraband frequently, without realizing they are doing it, pat the area where the item is located to ensure that the item is still there. Officer Saldutte testified that Appellant exhibited this precise behavior. Specifically, Officer Saldutte related that Appellant

kept his hand on top of his pants and his right pocket was swaying and that was one of the traits we look for a firearm. Due to its weight when you have a pocket or loose article of clothing it will actually, as you are walking, it will move separate of your body, of your pants or your jacket, whatever you are wearing.

In this case it was his pants in his front right pocket. He was trying to hold his pants close to his body to prevent that firearm from swinging.

It is a reaction that people do a lot of times. They don't even realize it. They know that they have something that they shouldn't have, such as a firearm, and they put their hand over it to check on it. It is called like a security feel or security pat. He was doing that.

I could see the bulge in his pocket. It was like a medium set – excuse me, medium size firearm, which metal was heavier than the average object that you would have put in your pocket.

You could actually see the object swaying and the weight of it in his pocket.

N.T. Suppression Hearing, 1/26/11, at 6.

The majority reasons that Appellant's mannerisms were equally consistent with legal activity, and I agree that Appellant's behavior was not itself illegal. However, this disregards the proper analysis. **See Riley, supra.** Appellant's actions and the facts known to the officer cannot be viewed in a vacuum. While I could agree that, when viewed independently of one another, the facts herein do not give rise to reasonable suspicion, I believe that, assuming the credibility of the officer, as we must, Officer Saldutte exercised common sense and had reasonable suspicion to conduct the interdiction. The majority's claim that Officer Saldutte's testimony was non-specific is, in my view, a misrepresentation of the record.

In sum, the combination of police observation of a heavy object in Appellant's pocket, Appellant's continual patting of that pocket after seeing police, Appellant's presence in a high crime area, and the midnight hour, warranted a brief **Terry** stop. Indeed, a suspect's hand movements that are known by police to be consistent with secreting a weapon strengthens the case for a stop and subsequent protective weapons search. **See Commonwealth v. Foglia**, 979 A.2d 357, 361 (Pa.Super. 2009) (*en banc*). Thus, I would uphold the trial court's decision and respectfully dissent from the majority's conclusion that we are constrained to reverse.