

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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| 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.

MEMORANDUM BY MUSMANNO, J.:

Filed: February 21, 2013

Robert Simmons (“Simmons”) appeals from the judgment of sentence entered following his conviction of firearms not to be carried without a license, possession of firearm prohibited, and resisting arrest.¹ We reverse and remand for further proceedings.

The suppression court set forth its findings of fact giving rise to the instant appeal as follows:

1. On or about August 9, 2009, City of Pittsburgh Police Officer Michael Saldutte [“Officer Saldutte”] was working the 12 midnight to 8:00 a.m. shift in Zone 5. Officer Saldutte was in full uniform on routine patrol in a marked vehicle in the East Liberty section of the city.
2. Officer Saldutte testified based on his personal experience that East Liberty is a known high crime area. Shortly after midnight[,] he was proceeding in the 500 Block of Sheridan

¹ 18 Pa.C.S.A. §§ 6106, 6105 and 5104.

Avenue when he observed [Simmons] and another male walking towards him.

3. As officer Saldutte got closer to [Simmons,] he observed him stop next to a parked vehicle and place his right hand on his right pocket. [Simmons] then started walking again. Officer Saldutte observed that [Simmons] kept his hands on top of his right pocket[,] which was swaying due to a weighted object. Officer Saldutte testified that [Simmons's] right pocket was moving separately from his body[,] which was consistent with someone who was carrying a firearm.

4. As Officer Saldutte reached [Simmons, the officer] stopped his vehicle and put down his passenger window. Based on his training and experience[,] he believed that [Simmons] was carrying a firearm. At that time[,] he ordered [Simmons] and the other man to stop[,] which they both did.

5. As Officer Saldutte had exited his vehicle[, Simmons] turned and ran. Officer Saldutte pursued on foot and caught [Simmons] approximately 30 to 40 yards away. At that time[, Simmons] was arrested and charged with firearms violations.

Suppression Court Order, 3/3/11, at 1-2 (unnumbered).

Based upon the foregoing, the suppression court concluded that Officer Saldutte had set forth

specific and articulable facts sufficient to support an investigatory stop. Based on the totality of the circumstances along with Officer Saldutte's training in firearms recognition warranted [*sic*] an investigatory stop of [Simmons]....

Id. at 2 (unnumbered).

Following a non-jury trial, the trial court found Simmons guilty of the above-described charges. The trial court subsequently imposed an aggregate sentence of two to four years in prison, and a consecutive term of probation of five years. Thereafter, Simmons filed the instant timely appeal,

followed by a court-ordered Concise Statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Simmons now presents the following claims for our review:

[] Whether the [suppression court] erred/abused its discretion in denying [Simmons's] motion to suppress where:

a. Officer [Saldutte] failed to sufficiently articulate a legitimate concern that [Simmons] posed a risk to the safety of the community as well as the officer in order to justify the investigative detention and seizure of [Simmons's] person[; and]

b. Officer [Saldutte] illegally seized [Simmons], based on his own hunch and suspicions and therefore lacked reasonable suspicion in order to justify the investigative detention and seizure of [Simmons's] person[?]

Brief for Appellant at 4.

Simmons claims that the suppression court improperly denied his suppression Motion. *Id.* at 10. Specifically, Simmons claims that Officer Saldutte failed to articulate sufficient and reasonable facts that would justify the initial investigatory stop. *Id.* According to Simmons, under the totality of the circumstances, Officer Saldutte had no basis for believing that "a crime was occurring and being committed by [Simmons]." *Id.* at 14. In support, Simmons directs our attention to Officer Saldutte's testimony that the officer was not responding to reported criminal activity; Simmons was wearing loose clothing; Officer Saldutte did not know what was in Simmons's pocket, only that it was heavy; and that the object required Simmons to adjust his pants once. *Id.*

"The appellate standard of review of suppression rulings is well-settled. This Court is bound by those of the suppression court's factual findings which find support in the record, but we are not bound by the court's conclusions of law." ***Commonwealth v. Millner***, 888 A.2d 680, 685 (Pa. 2005). ***See also Commonwealth v. Booze***, 953 A.2d 1263, 1269 (Pa. Super. 2008) (stating that "[w]here the record supports findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.") (citation omitted)).

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures. ***Commonwealth v. Pratt***, 930 A.2d 561, 563 (Pa. Super. 2007).

Fourth Amendment jurisprudence has led to the development of three categories of interactions between citizens and police. The first of these is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an "investigative detention" must be supported by a reasonable suspicion; 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. Finally, an arrest or "custodial detention" must be supported by probable cause.

Commonwealth v. Hudson, 995 A.2d 1253, 1256-57 (Pa. Super. 2010).

Our Supreme Court has adopted an objective test for determining whether a police officer has restrained the liberty of a citizen such that a seizure occurs:

The pivotal inquiry in making this determination is whether a reasonable [person] innocent of any crime, would have thought he [or she] was being restrained had he been in the defendant's shoes. A Court must examine all surrounding circumstances evidencing a show of authority or exercise of force, including the demeanor of the police officer, the manner of expression used by the officer in addressing the citizen, and the content of the interrogatories or statements. If a reasonable person would not feel free to terminate the encounter with police and leave the scene, then a seizure of that person has occurred.

Commonwealth v. Guess, 53 A.3d 895, 900 (Pa. Super. 2012) (citation omitted).

Further, we are cognizant that

In order for police to detain someone for investigative purposes, known as making a "***Terry***-stop", they must have a reasonable suspicion that criminal activity is afoot. ***Commonwealth v. Smith***, 575 Pa. 203, 836 A.2d 5 (Pa. 2003) (citing ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "The fundamental inquiry is an objective one, namely, whether "the facts available to the officer at the moment of the [intrusion] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." ***Commonwealth v. Blair***, 2004 PA Super 394, 860 A.2d 567, 573 (Pa. Super. 2004) (citation omitted). This standard is less strict than the probable cause standard, and requires a lesser showing in terms of both content and reliability. ***Id.*** However, a mere hunch is not enough; the police officer must have an articulable reason to stop the individual. ***Id.*** ***Terry v. Ohio***, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Commonwealth v. Simmons, 17 A.3d 399, 402-03 (Pa. Super. 2011). "In order to determine whether the police had reasonable suspicion, the totality of the circumstances — the whole picture — must be considered." ***Simmons***, 17 A.3d at 403. "Based upon that whole picture the detaining officer[] must have a particularized and objective basis for suspecting the

particular person stopped of criminal activity." **United States v. Cortez**, 449 U.S. 411, 417-18 (1981); **accord Simmons**, 17 A.3d at 403.

Further,

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. **Commonwealth v. Arch**, 439 Pa. Super. 606, 654 A.2d 1141, 1144 (Pa. Super. 1995). 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. **Commonwealth v. Gibson**, 536 Pa. 123, 638 A.2d 203, 206-207 (Pa. 1994).

Simmons, 17 A.3d at 403.

At the suppression hearing, Officer Saldutte testified that, while driving on patrol at night, he observed Simmons and a male companion walking down Sheridan Street in Pittsburgh. N.T., 1/26/11, at 4. Officer Saldutte stated that the area was a high crime area, "numerous shootings, shots fired, calls, ag [*sic*] assaults, burglaries, robberies, gun arrests, [and] drug arrests." **Id.** According to Officer Saldutte, Simmons stopped next to a car for a few seconds, placed his right hand in his front pocket, and then continued walking down the street. **Id.** at 5. Officer Saldutte observed that as Simmons walked, his right pocket swayed as though it carried a heavy object. **Id.** at 6. Officer Saldutte further testified that he could actually see the object swaying and the weight of it in Simmons's pocket. **Id.** at 7.

Based upon these observations and his training, Officer Saldutte rolled down the window of his marked police cruiser and said "something along the lines of stop, show me your hands or hold up, guys, show me your hands."

Id. Officer Saldutte testified that at that time, Simmons was not free to leave. *Id.* at 18. Thus, Officer Saldutte's own testimony established that he had effectuated a **Terry** stop of Simmons. Accordingly, we next determine whether Officer Saldutte had articulable and reasonable suspicion that Simmons was engaged in criminal activity to justify the **Terry** stop. **See Simmons**, 17 A.3d at 402-03 (explaining the legal analysis for determining the legality of a **Terry** stop).

At the suppression hearing, Officer Saldutte testified that he had received special training, from the federal Bureau of Alcohol and Firearms, on the recognition of persons carrying concealed weapons. N.T., 1/26/11, at 5. As mentioned above, Officer Saldutte observed Simmons's right front pocket swaying as he walked, as though Simmons was carrying a heavy object in it. *Id.* at 6. Based upon this training and his experience, Officer Saldutte believed that Simmons was carrying a firearm. **See id.** at 7.

During cross-examination at the suppression hearing, Officer Saldutte admitted that when he first saw Simmons reach for his pocket, he did not know that Simmons had a firearm. *Id.* at 14. As Simmons continued walking, Officer Saldutte again admitted, the officer did not know what Simmons was carrying in his pocket. *Id.* at 16. Finally, Officer Saldutte testified that he stopped Simmons based upon "his mannerisms, the way that he was acting, I told you that numerous traits that he had of the way that his clothing was fitting, sagging, his hands, his reactions" *Id.* at 17.

While Officer Saldutte testified that Simmons's mannerisms might be consistent with someone carrying a concealed weapon, they also are equally consistent with legal activity, *i.e.*, a person carrying a heavy object. Officer Saldutte's testimony failed to establish the reasonable and articulable belief that criminal activity was afoot necessary to support a ***Terry*** stop. Officer Saldutte's testimony was, at best, non-specific and insufficient to overcome the constitutional prerequisites for a ***Terry*** stop.

Based upon the foregoing, we are constrained to conclude that the suppression court erred in denying Simmons's suppression Motion. Accordingly, we reverse the judgment of sentence, and remand for further proceedings.

Judgment of sentence reversed; case remanded for further proceedings consistent with this Memorandum; Superior Court jurisdiction relinquished.

Bowes, J., files a Dissenting Memorandum.