

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: L.B.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	
	:	
APPEAL OF: L.B.,	:	
	:	
Appellant	:	No. 1480 WDA 2012

Appeal from the Disposition Order entered on August 27, 2012
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. Caselog No. T-172214 ;
Docket No. 342-08; JID No. 38989-B

BEFORE: FORD ELLIOTT, P.J.E., OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: FILED: September 12, 2013

L.B. appeals from the disposition Order entered after the juvenile court found him guilty of possession of a controlled substance and possession of a small amount of marijuana.¹ We affirm.

The pertinent facts of this case are as follows:

On March 27, 2012 at approximately 11:00 p.m.[,] Officer [James A.] Zigarella responded to a call for someone smoking marijuana at an apartment building located at 2421 Bedford Avenue in the Hill District area of the City of Pittsburgh. **See** Adjudication Hearing Transcript (“H.T.”), p. 22. The Hill District is known to be an area of high criminal activity, including violent crimes such as homicides and weapons violations, and Officer Zigarella has participated in hundreds of drug arrests in the area. H.T. at p. 22. The location of the call was a large brick building with three stories of public housing. **Id.** at p. 23. There were approximately twelve (12) apartments spread among the three floors. **Id.** There was a hallway to gain entrance into the apartments, then six or

¹ 35 Pa.C.S.A. §§ 780-113(a)(16), (a)(31).

seven steps up to a landing, with two more flights of similar steps leading to the floors above. *Id.*

Upon arriving at the scene, Officer Zigarella could smell burnt marijuana coming from one of the upstairs hallways and he heard someone walking around. *Id.* at p. 24. He walked into the building and stood underneath the last flight of steps waiting for the person to come down the steps. [*Id.*] When L.B. came down the last flight of steps[,] Officer Zigarella, who was in full uniform, approached him. *Id.* at 24-25. L.B. saw Officer Zigarella and immediately placed his hands inside his pockets. *Id.* at 25. Officer Zigarella, fearing that L.B. may have a weapon, told him to “[G]et your hands out of your pocket.” *Id.* When L.B. did not obey the command, Officer Zigarella grabbed onto his wrist and told him to “[P]ut your hands behind your back” and handcuffed him. *Id.* Officer Zigarella observed the fresh smell of burnt marijuana on L.B.’s person. [*Id.*] After handcuffing L.B., Officer Zigarella patted him down and felt something that felt like contraband in L.B.’s front right jeans pocket. *Id.* at p. 26. It turned out to be 22 stamp bags of heroin in a plastic baggie. *Id.* The heroin was packaged in two bundles of ten stamp bags, each bundle wrapped with a rubber band, and two loose bags. *Id.* at 26-27.

Officer Zigarella proceeded to the third floor of the apartment building and found a partially smoked marijuana blunt that was still warm to touch. [*Id.*] Officer Zigarella did not observe anybody else in the stairwell. *Id.* The Allegheny County Crime Lab later determined that the baggies seized from L.B. contained heroin and the partially smoked blunt recovered from the scene contained marijuana.

Juvenile Court Opinion, 1/23/13, at 3-4.

On April 2, 2012, the Commonwealth filed a juvenile delinquency Petition against L.B., alleging that he committed the above-mentioned crimes as well as the crime of possession with intent to deliver a controlled substance. **See** 35 Pa.C.S.A. § 780-113(a)(30). L.B. filed a Motion to suppress the evidence. After a hearing, the juvenile court denied the

Motion. Immediately thereafter, the juvenile court conducted an adjudication hearing, after which the juvenile court dismissed the charge of possession with intent to deliver, and found L.B. guilty of committing the other two above-mentioned charges. The juvenile court entered an Adjudication and Disposition Order on August 27, 2012, committing L.B. to Mid-Atlantic Youth Services. L.B. then filed this timely appeal and a timely Concise Statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

L.B. raises the following issues on appeal:

1. Whether the trial court abused its discretion in denying defense counsel's Motion to suppress where the evidence of concern was seized subsequent to an arrest which was effectuated without probable cause?
2. Whether an officer who does not possess a reasonable belief that a detainee is armed and dangerous can use a **Terry** frisk^[2] as a means of searching for non-threatening contraband, and seize items not in plain view which are not immediately recognizable as illegal?
3. Whether sufficient evidence exists to prove beyond a reasonable doubt each element of the crime of possession of a small amount of marijuana where that marijuana was recovered two floors away from [L.B.] in the hallway of a public housing complex, and the only evidence tying him thereto was that he, like the building in general, smelled like marijuana?

Brief for Appellant at 4 (footnote added).

L.B. first contends that the juvenile court abused its discretion in denying his Motion to suppress, where the evidence was seized pursuant to

² **Terry v. Ohio**, 392 U.S. 1 (1968).

an arrest effectuated without probable cause. L.B. asserts that Officer Zigarella's actions towards him constituted an arrest, not an investigative detention or *Terry* stop. L.B. contends that Officer Zigarella could not specifically link him to the smell of marijuana; therefore, he argues, Officer Zigarella did not have probable cause to arrest him, or even a reasonable suspicion to conduct a *Terry* stop.

Our standard of review of an order denying a motion to suppress is as follows:

An appellate court may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the suppression court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. It is also well settled that the appellate court is not bound by the suppression court's conclusions of law.

In re V.C., 66 A.3d 341, 350-51 (Pa. Super. 2013).

There are three categories of interaction between citizens and the 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 to respond. The second, an "investigative detention" must be supported by 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.

In the Interest of S.J., 713 A.2d 45, 47 n.3 (Pa. 1998) (citations omitted).

"[A] police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot." *Id.* at 47. "If, during the course of a valid investigatory stop, an officer observes unusual and suspicious conduct on the part of the suspect which leads him to reasonably believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer garments for weapons." *Id.* at 48. In determining whether the police had a reasonable suspicion to stop a person, the totality of the circumstances must be considered. *In the Interest of D.M.*, 781 A.2d 1161, 1163 (Pa. 2001).

The following factors are considered in determining whether a detention is investigative or custodial in nature:

the basis for the detention (the crime suspected and the grounds for suspicion); the duration of the detention; the location of the detention (public or private); whether the suspect was transported against his will (how far, why); the method of detention; the show, threat or use of force; and, the investigative methods used to confirm or dispel suspicions.

In the Interest of S.J., 713 A.2d at 47.

In the instant case, Officer Zigarella, an officer with fourteen years of experience, testified that, on March 27, 2012, at 11:00 p.m., he received a call that people were smoking marijuana in an apartment building at 2421 Bedford Avenue in the Hill District section of the City of Pittsburgh. N.T., 8/27/12, at 22. Officer Zigarella stated that Bedford Avenue was known to be "an area of high criminal activity," that he had participated in hundreds of

drug arrests there, and that the area has had numerous weapons violations and homicides. *Id.* at 22-23. When Officer Zigarella responded to the designated three-story public housing apartment building, he smelled “burnt marijuana” coming from one of the upstairs hallways, and heard “somebody walking around.” *Id.* at 23-24. Officer Zigarella stood underneath a flight of stairs and waited for a couple of minutes. *Id.* Thereafter, Officer Zigarella heard someone walking down the steps. *Id.* at 25. When the person got to the last flight, Officer Zigarella “walked out” and observed L.B. *Id.* Upon seeing Officer Zigarella, L.B. placed his hands inside of his pockets. *Id.* Officer Zigarella stated that he did not know if L.B. had a weapon; therefore, the officer ordered L.B. to take his hands out of his pockets. *Id.* When L.B. did not obey, Officer Zigarella grabbed L.B.’s wrist and said, “Put your hands behind your back.” *Id.* Officer Zigarella then handcuffed L.B. *Id.* The officer testified that L.B. had the smell of fresh burnt marijuana on his person. *Id.* After placing the handcuffs on L.B., Officer Zigarella performed a pat-down of L.B.’s person and “easily recognized” an object in L.B.’s pocket that “felt like contraband.” *Id.* at 26. Officer Zigarella pulled the object out, and observed that it consisted of two bundles of heroin, with each bundle containing ten stamp bags. *Id.* Subsequently, Officer Zigarella proceeded to the third floor of the apartment building, where he discovered a “partially smoked marijuana blunt that was still warm to touch.” *Id.* at 25.

Officer Zigarella testified that he handcuffed L.B. because the officer smelled marijuana on L.B.; they were in an area of high criminal activity; and the officer was afraid L.B. might possess a weapon. *Id.* at 26-27. Officer Zigarella stated that L.B. was not under arrest until the officer found the heroin. *Id.* at 27.

The juvenile court determined that Officer Zigarella had conducted an investigative detention of L.B., which was supported by reasonable suspicion. *See* Juvenile Court Opinion, 1/23/13, at 4-5. Based on our review of the record, we conclude that the juvenile court's findings are supported by the record and the juvenile court's conclusion is correct. The evidence showed that Officer Zigarella conducted a brief stop and frisk of L.B. in order to investigate the report of persons smoking marijuana. Because of the location in a high crime area, L.B.'s placing of his hands in his pockets when he saw the officer, and L.B.'s refusal to remove his hands upon the officer's direction, the officer placed L.B. in handcuffs for safety and to further investigate. We conclude that the juvenile court correctly determined that the encounter with L.B. amounted to an investigative detention. *See Commonwealth v. Gillespie*, 745 A.2d 654, 660-61 (Pa. Super. 2000) (holding that, while the act of handcuffing may be custodial in nature in many cases, where such action is merely part of ensuring the safe detention of individuals during a *Terry* stop, and where other factors militate against a finding of custodial detention, *e.g.*, minimal duration of detention,

no transport against will, no show or threat of use of force, the act of handcuffing will not require a finding of a custodial detention/arrest).

Further, the evidence supported the juvenile court's conclusion that the investigative detention of L.B. was supported by reasonable suspicion. Officer Zigarella had confirmed the call concerning the use of marijuana in the building, located in a high crime area. Officer Zigarella subsequently encountered L.B., who smelled distinctly of marijuana, acted suspiciously by placing his hands in his pockets upon noticing the officer, and failed to comply with Officer's Zigarella's order to remove his hands from his pockets. Based on the totality of the circumstances, we conclude that the juvenile court did not err in concluding that the investigative detention of L.B. was supported by reasonable suspicion.

L.B. next contends that the juvenile court erred in denying his Motion to suppress because the search of L.B. exceeded the lawful scope of a ***Terry*** frisk. L.B. asserts that the search was improper because Officer Zigarella did not testify to seeing any bulge in L.B.'s pocket that he believed might be a weapon. L.B. argues that there was no objective basis for Officer Zigarella to believe L.B. was armed and dangerous, and that the officer conducted the search in order to discover contraband.

If it becomes clear to the police officer during the pat-down that the suspect does not have any weapons on his person, the plain feel doctrine exists as an exception to allow for the seizure of "non-threatening contraband" when the officer feels an object "whose mass or contour makes its criminal character immediately apparent." The contraband is "immediately

apparent” when “the officer readily perceives, without further exploration or searching, that what he is feeling is contraband.” The object cannot be seized if, “after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search.”

Commonwealth v. Parker, 957 A.2d 311, 315 (Pa. Super. 2008) (citations omitted).

L.B.’s contention that the officer conducted the search to discover contraband is belied by the record. Officer Zigarella testified that, when he encountered L.B., he did not know if L.B. had a weapon. Therefore, he ordered L.B. to take his hands out of his pockets. When L.B. did not obey, Officer Zigarella grabbed L.B.’s wrist and told L.B. to place his hands behind his back. Officer Zigarella then placed handcuffs on L.B. and conducted a pat-down, during which Officer Zigarella “easily recognized” an object that “felt like contraband.” Further, the officer testified that he encountered L.B. in a high crime area, wherein numerous weapons violations, homicides, and drug arrests had occurred.

As to L.B.’s claim that the pat-down search exceeded the scope of a proper ***Terry*** frisk, the record does not support this claim. As previously indicated, during the pat-down of L.B., Officer Zigarella “easily recognized” an object that “felt like contraband.” Contrary to L.B.’s assertion, the evidence supports the juvenile court’s finding that the nature of the object as contraband was immediately apparent to Officer Zigarella. Therefore, we conclude that the juvenile court did not err in this regard. **See**

Commonwealth v. Pakacki, 901 A.2d 983, 989-90 (Pa. 2006) (holding that, where state trooper testified that he smelled marijuana emanating from the defendant, patted down the defendant and felt, based on his past experience, what he believed to be a marijuana pipe, Superior Court erred in concluding that the nature of the contraband was not immediately apparent to the trooper); ***Commonwealth v. Parker***, 957 A.2d 311, 316-17 (Pa. Super. 2008) (concluding that, where police officer testified that, during a pat-down of the defendant, the officer felt two plastic bags in the defendant's pocket with some hard rigid objects, and the officer believed, based on his training and experience, that the objects were consistent with packaged crack cocaine, the trial court did not err in denying motion to suppress and the officer's actions did not go beyond the scope of the plain feel doctrine because the officer was immediately able to identify the object he felt as packaged crack cocaine); ***Commonwealth v. Bryant***, 866 A.2d 1143, 1145 (Pa. Super. 2005) (holding that trial court erred in granting motion to suppress evidence where, during a pat-down of the defendant, police officer felt an item that, based on his training and experience, he

believed was a package of narcotics; the incriminating nature of the packaged drugs was immediately apparent to the officer).³

L.B. next contends that the evidence introduced at the evidentiary hearing was insufficient to prove beyond a reasonable doubt that he constructively possessed marijuana. L.B. asserts that Officer Zigarella did not observe L.B. smoke or handle marijuana, or exhibit any symptoms of marijuana intoxication. L.B. argues that, although the officer smelled marijuana on L.B., that smell permeated the entire building, and that the marijuana blunt found by the officer was located on the third floor of the building.

Our standard of review of a challenge to the sufficiency of the evidence is as follows:

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing all the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offense charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt. This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime

³ The cases L.B. relies on are distinguishable. *See, e.g., Commonwealth v. Stevenson*, 744 A.2d 1261, 1266-67 (Pa. 2000) (where the state trooper felt a cigar and pill bottle during his frisk of the defendant for weapons, and the incriminating contents of those objects was detected only after the trooper seized and inspected them, held that the “immediately apparent” requirement of the plain feel doctrine was not satisfied); *Commonwealth v. E.M.*, 735 A.2d 654, 660 (Pa. 1999) (wherein police officer testified that he frisked the defendant because he wanted to see if a baggie the defendant had placed in his pocket contained drugs).

beyond a reasonable doubt. Moreover, it is the province of the trier of fact to pass upon the credibility of witnesses and the weight to be accorded the evidence produced. The factfinder is free to believe all, part or none of the evidence. The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence, but the question of any doubt is for the [factfinder] unless the evidence be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.

In re T.B., 11 A.3d 500, 503-04 (Pa. Super. 2010).

Where contraband is not found on a defendant's person, the Commonwealth must establish that the defendant had constructive possession of the seized items. *Commonwealth v. Brown*, 48 A.3d 426, 430 (Pa. Super. 2012).

Constructive possession is a legal fiction ... to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion[,] ... [which is] the power to control the contraband and the intent to exercise that control." ... [C]onstructive possession may be established by the totality of the circumstances.

Id. (citations omitted).

In ruling on this issue, the juvenile court reasoned as follows:

The Commonwealth offered the testimony of Officer Zigarella at the hearing. Officer Zigarella has been in law enforcement for approximately fourteen (14) years, including the last seven (7) years with the City of Pittsburgh Police Department. He has participated in hundreds of drug arrests in the Hill District area of the City of Pittsburgh and has had instruction from the police academy and various police instructors. *See* H.T., pp. 23, 27. Based upon Officer Zigarella's testimony, this Court concluded L.B. was in possession of the marijuana. This conclusion was based on a

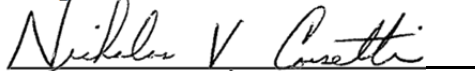
totality of the circumstances, including the following: (i) the officer was called to the scene for a report of someone smoking marijuana at the apartment building, (ii) upon arriving at the scene, Officer Zigarella observed the smell of burnt marijuana coming from an upper floor of the apartment building and heard someone walking around, (iii) the officer waited at the bottom of the steps and L.B. came down from the upper floor of the apartment building, (iv) Officer Zigarella observed the fresh smell of burnt marijuana on L.B.'s person, (v) Officer Zigarella proceeded to the third floor of the apartment building and found a partially smoked marijuana blunt that was still warm to touch, and (vi) Officer Zigarella did not observe anybody else in the stairwell. The Court found this evidence to be sufficient to adjudicate L.B. delinquent on the charge of possession of a small amount of marijuana.

Juvenile Court Opinion, 1/23/13, at 6-7.

Based on our review of the record under our standard of review, we conclude that the evidence supports the juvenile court's conclusion that L.B. constructively possessed marijuana.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetti", is written over a horizontal line.

Deputy Prothonotary

Date: 9/12/2013