

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MALCOLM GRAVES,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1481 WDA 2011

Appeal from the Judgment of Sentence entered August 15, 2011,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0008102-2010

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.:

Filed: February 26, 2013

Malcolm Graves appeals the judgment of sentence of two years' probation imposed following his conviction of Firearms Not To Be Carried Without a License, Possession of a Controlled Substance, and Possession With Intent to Deliver. **See** 18 Pa.C.S. § 6106(a)(1); 35 P.S. § 780-113(a)(16), (30) (respectively). Graves asserts that the trial court erred in denying his omnibus pre-trial motion seeking suppression of the evidence seized from his person during a patdown when police officers arrested his companion, Brian White, after White had conducted an armed robbery. The victim of the robbery had called police, identified White by name, and picked him out of a photo array, following which the officers located him in Graves' company as the two men walked down the street.

Following Graves' arrest on the foregoing charges, and a hearing on his suppression motion, respective counsel stipulated the facts of the case and the trial court found Graves guilty of the foregoing charges. In ruling on the suppression motion, the trial court, The Honorable Randal B. Todd, concluded that the totality of the circumstances known to the arresting officers when they conducted Graves' patdown did provide reasonable suspicion that he might be armed and dangerous. Judge Todd concluded accordingly that the police had conducted a lawful search and seizure pursuant to our holding in *In the Interest of N.L.*, 739 A.2d 564 (Pa. Super. 1999). Upon review of Judge Todd's Pa.R.A.P. 1925(a) Opinion, the briefs of counsel, and the certified record, we find the trial court's determinations free from error. Judge Todd's Opinion addresses the issue before us in a cogent and comprehensive manner. Accordingly, we adopt that Opinion as our own and rest on its conclusions for purposes of further appellate review. For the reasons stated therein, we affirm Graves' judgment of sentence.

Judgment of sentence **AFFIRMED**.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

CRIMINAL DIVISION

vs.

CC NO: 201C08102

MALCOLM GRAVES,

APPEAL

Defendant.

OPINION

JUDGE RANDAL B. TODD

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DEPT. OF COURTS
CRIMINAL DIVISION
ALLEGHENY COUNTY PA

APPENDIX A

when they got out of their car in full uniform with their guns drawn and ordered Mr. Graves and his companions to the ground.

- ii. The officers conducted a pat down for weapons without reasonable suspicion that Mr. Graves was armed and dangerous.”

BACKGROUND

This matter arises out of the arrest of Defendant, Malcolm Graves, on April 12, 2010. Defendant was charged with Possession of a Firearm with an Altered Manufacturer's Number, Carrying a Firearm without a License and Possession of a Controlled Substance, Cocaine. Prior to trial, Defendant filed a Motion to Suppress evidence obtained at the time of his arrest. A suppression hearing was held on March 23, 2011. At that time, the Commonwealth presented the testimony of Officer Daniel Eberman of the Clairton Police Department who testified that on April 12, 2010 while on patrol, he received a report of a robbery with a firearm having occurred on Soltis Drive in Clairton. (T., 6) The suspect in the robbery, Brian White, was known to Officer Eberman. (T., p. 5) As Officer Eberman and his partner were responding to the robbery call, he saw White walking along the street accompanied by Defendant, Malcolm Graves, and a third person. (T., p. 4) Officer Eberman testified that White and Defendant were in close proximity to each other and talking as he drove by. (T., p. 9) Officer Eberman and his partner passed White and Defendant, turned their patrol vehicle around and then approached White with their guns drawn due to the report of White being armed. White, and Defendant because he accompanied White, were ordered to the ground, handcuffed and then patted down for weapons. (T., p. 5) As Officer Eberman began patting Defendant down, he asked Defendant if he had any weapons on him and Defendant stated he had a pistol in his front pocket. Officer Eberman retrieved the pistol from Defendant's pocket and placed Defendant under arrest. (T., p. 6)

DISCUSSION

In his Concise Statement, Defendant contends that it was error to deny Defendant's Motion to Suppress because Defendant was subject to an unreasonable search and seizure. Specifically, Defendant contends that the officers seized Defendant without reasonable suspicion that he was involved in criminal activity and conducted a pat down for weapons without a reasonable suspicion that Defendant was armed and dangerous.

The types or categories of encounters between police and a citizen have been described as follows:

"There are three categories of police interactions which classify the level of intensity in which a police officer interacts with a citizen, and such are measured on a case by case basis. Traditionally, Pennsylvania Courts have recognized three categories of encounters between citizens and the police. These categories include (1) a mere encounter, (2) an investigative detention, and (3) custodial detentions. The first of these, 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. *Commonwealth v. Mendenhall*, 552 Pa. 484, 488 715 A.2d 1117, 1119 (1998) (citing *Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 375 (2000))." *Commonwealth v. Collins*, 950 A.2d 1041, 1044-49 (Pa. Super. 2008)

The issue of the right of a police officer to search a companion of an arrestee has been addressed in several Pennsylvania cases. In the case of *In re: N.L.*, 739 A.2d 564 (Pa. Super. 1999), the Superior Court considered the circumstances in which the police responded to a robbery during which the victim indicated that she was approached by two individuals, one of whom motioned towards his mid-section, leading her to believe that he had a gun. The police, accompanied by the victim, proceeded to another location where they encountered four males sitting on a corner stoop. The victim identified one of the four males as the individual who

robbed her. The appellant was seated directly beside the perpetrator of the robbery. The police officer ordered the three individuals seated with the perpetrator, including appellant, to stand up and put their hands on a wall in order to pat them down for the officers' safety while arresting the robber. During the pat down an automatic weapon was found on the appellant.

In considering the issue of whether or not the pat down of appellant, who was a companion of the arrestee, was in violation of the Pennsylvania and United States Constitutions, the Superior Court found that such a search was reasonable. The Court discussed the "automatic companion" rule, which deals with the right of police officers to pat down individuals found in the company of an arrestee. The rule has been described as follows:

"All companions of [an] arrestee within the immediate vicinity capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat down' reasonably necessary to give assurance that they are unarmed." *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971); *In re: N.L.*, 739 A.2d 564, 567 (Pa. Super. 1999)

The Court in *In re: N.L.* noted that the constitutionality of the "automatic companion" rule was addressed in *Commonwealth v. Graham*, 685 A.2d 132 (1996) rev'd on other grounds 721 A.2d 1075 (1998). The Court also noted that the *Graham* Court rejected a per se rule that a companion of an arrest may be subject to a "pat down" regardless of the justification for such search. The Court, however, noted the following language from *Graham*:

"In light of the extreme risks facing lawmen in performing arrests, it will always be reasonable for officers to take some actions to insure their safety concerning companions of arrestees. To find otherwise, would be equivalent to turning a blind eye to reality and declaring open season on our protectors of the peace. Consequently, it is inherently reasonable for a law enforcement officer to briefly detain and direct the movement of an arrestee's companion, regardless of whether reasonable suspicion exists that the companion is involved in criminal activity. Such minimal intrusion upon the companion's federal and state constitutional rights are clearly outweighed by the need to extinguish the risks otherwise posed to the lawman's well-being. Accordingly, the first prong of the 'stop and frisk' test is a nullity in cases involving an arrestee's companion. 685 A.2d at 136-37. Thus, in cases involving the frisk of an arrestee's companion, the

sole question becomes whether the police officer had a reasonable belief that the companion was armed and dangerous.” *In re: N.L.*, 739 A.2d 564, 568 (Emphasis added)

In *Commonwealth v. Jackson*, 907 A.2d 540 (Pa. Super. 2006) police officers observed two men engaging in a narcotics transaction. One of the men was stopped a short time later, but the second man walked out of the police officer’s sight. He was located a short time later with a group of other men. Uniformed officers were sent to apprehend the man from the group. For safety reasons, the officers instructed the group to turn and face a fence so that they could be checked for weapons. One of the men, Jackson, pulled away from the fence line twice and also kicked backwards, striking one of the officers. Jackson was taken into custody and searched and found to have marijuana and crack cocaine and was placed under arrest. Jackson challenged the legality of his search asserting there was no independent evidence that he was involved in criminal activity and was searched solely incident to the arrest of the other man. The Court, citing *In re: N.L.*, again noted that there was no per se “automatic companion” rule, but also noted the circumstances under which an officer may search a companion. The Court stated:

“Said another way, an arrestee’s companion may be stopped and frisked when there is reasonable suspicion that the companion is armed and dangerous.”
In re: N.L., 739 A.2d at 566-588.

In *Jackson* the Court found that the officer had reasonable suspicion to search the companions where one of the drug transaction suspects was with a group of men in an area known for drug problems, gun problems and most significantly, violent reactions to the police. The Court found that under the totality of these circumstances, viewed through the eyes of trained officer, there was reasonable suspicion that the drug suspect’s companions were armed and dangerous. *Commonwealth v. Jackson*, 907 A.2d 540, 545 (Pa. Super. 2006)

In *Commonwealth v. Reed*, 19 A.3d 1163 (2011) the Superior Court again discussed the "automatic companion" rule. In *Reed*, the police stopped a vehicle for a motor vehicle violation and determined that the driver had an outstanding warrant for her arrest. The defendant Reed, who was a passenger in the vehicle, was asked if he was the owner of the vehicle and Reed responded by giving the officer a fictitious name and date of birth. When confronted, Reed then provided his real name and address. The police determined that Reed had no outstanding warrants, nevertheless asked appellant to exit the vehicle and conducted a protective frisk, recovering a loaded 9 millimeter pistol from Reed's right rear pocket. Reed was arrested and an additional search recovered narcotics. Reed challenged both the request for his name and the protective pat down. The Court concluded that there were no constitutional implications in requesting Reed to identify himself and further, examined the "automatic companion" rule. In discussing the issue of whether or not the police had a reasonable belief that Reed was armed and dangerous the Court, citing *Commonwealth v. Taylor*, stated:

"The officer need not be absolutely certain that the individual was armed; the issue is *whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or the safety of others was in danger*. The existence of reasonable suspicion to frisk an individual must be judged in light of the totality of the circumstances confronting the officer." *Commonwealth v. Taylor*, 771 A.2d 1261, 1268-1269 (2001) (Emphasis added); *Commonwealth v. Reed*, 19 A.3d 1163, 1170 (Pa. Super. 2011)

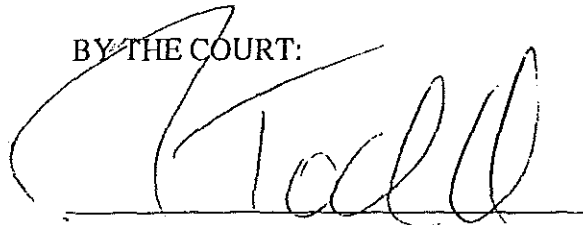
The Court concluded that, based on the totality of the circumstances, there was sufficient grounds to frisk Reed.

In the present case there is no dispute that Officer Eberman was responding to an armed robbery, which specifically identified Brian White as the perpetrator. Officer Eberman undoubtedly had probable cause to believe that White was armed and dangerous. The report was that the victim of the robbery was apparently walking on the street when the robbery occurred at

gunpoint. There is also no dispute that when Officer Eberman saw White walking on the street, not long thereafter, Defendant was in close proximity as Officer Eberman passed them and then returned to carry out an arrest of White. Clearly, this was a particularly volatile situation.

Officer Eberman had specific information that White was armed and recently brandished a gun during a street robbery. Officer Eberman certainly had a reasonable and justifiable belief that any encounter with White in an attempt to arrest him could be extremely dangerous. In addition, Officer Eberman could not fully know what connection there was between White and Defendant as they approached, passed or returned to arrest White. As noted in *Graham*, it would be reasonable for Officer Eberman to take some action to ensure his safety and the safety of his partner concerning White's companions. As specifically noted in *Graham*, "to find otherwise would be equivalent to turning a blind eye to reality." Officer Eberman did not need to be absolutely certain that Defendant was armed, but it clear that Officer Eberman would be acting in a reasonably prudent manner to believe that his safety, and the safety of others, was in danger, if he were to encounter and attempt to arrest White without briefly detaining and directing the movement of White's companions. Officer Eberman was also justified in assuring himself that, under the circumstances, White's companions were not also armed. Consequently, under the totality of the circumstances presented to Officer Eberman, the detention and search of Defendant was appropriate and Defendant's Motion to Suppress was appropriately denied.

BY THE COURT:



TODD, J.