

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

CASSEEM CAIN,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1832 EDA 2012

Appeal from the Order June 1, 2012
in the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0006252-2011

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED NOVEMBER 27, 2013

The Commonwealth appeals from the court's order granting Appellee, Casseem Cain's, motion to suppress.¹ Specifically, the Commonwealth argues that the court erred in finding that the police lacked reasonable suspicion to stop and frisk Appellee. We affirm.

* Retired Senior Judge assigned to the Superior Court.

¹ The Commonwealth may take an appeal of right from an order that does not end the entire case if the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution. **See** Pa.R.A.P. 311(d); **see also Commonwealth v. Torres**, 764 A.2d 532, 536 n.2 (Pa. 2001). The Commonwealth has filed such a certification in this case. (**See** Notice of Appeal, 6/27/12, at 1).

On April 17, 2011, the Commonwealth arrested Appellee, charging him with various weapons and drug violations.² On July 26, 2011, Appellee moved to suppress the evidence, claiming that the officer did not have reasonable suspicion to stop and frisk him. On May 7, 2012, the suppression court held a hearing on Appellee's motion. The court aptly set forth the relevant facts of this case in its January 18, 2013 opinion:

At the [m]otion to [s]uppress hearing, the Commonwealth presented the testimony of the arresting officer, Philadelphia Police Officer Robert Campbell. Officer Campbell testified that he was patrolling the 18th District of Philadelphia in a marked car on April 17, 2011 when shortly after midnight he received a radio call for gunshots at 100 South Peach St. He testified that fifteen to twenty minutes passed between the time he received the radio call and the time he arrived at the area of 100 South Peach St., more specifically, half a block away at 5400 Sansom Street. Upon arrival, he noticed [Appellee] standing on the corner of 54th and Sansom. Officer Campbell and his partner were the only police personnel in the immediate area at the time. The Officer testified that as he observed [Appellee] on the corner, he "don't [sic] know if [Appellee] seen [sic] me. [Appellee] turned, went to his waistband with both hands, and started walking westbound. So now his back is towards me. That's when we stopped and investigated." The Commonwealth offered no evidence as to whether the officers observed anyone else in the area. When the Officer was asked by the Commonwealth to specify "what, if anything, did you see [Appellee] doing with his waistband", he responded by stating, "just—it looked like he was trying to adjust his belt or his waist, his jeans. And he turned

² Specifically, the Commonwealth charged Appellee with one count each of possession of a firearm prohibited, firearm not to be carried without a license, carrying a firearm on the public streets of Philadelphia, possession of an instrument of crime, simple possession of a controlled substance, possession with intent to deliver a controlled substance, and possession of marijuana. **See** 18 Pa.C.S.A. §§ 6105(a)(1), 6106(a)(1), 6108, 907(a); 35 P.S. §§ 780-113(a)(16), (30), and (31), respectively.

away, started walking away from us.” The Officer was then asked “what if anything, did [he] believe [Appellee] was doing at that time?” He answered “I thought—honestly, I thought he had a gun . . . and immediately jumped out, put him up against the wall and did a **Terry**[³] frisk.” The “**Terry** frisk”, that he described as a “pat-down for weapons”, resulted in the recovery of a gun from [Appellee’s] person. The officer stated that he “immediately placed [Appellee] in handcuffs and he was arrested.” Incident to the arrest, the police also recovered live rounds of ammunition, alleged crack cocaine and alleged marijuana.

(Suppression Court Opinion, 1/18/13, at 2-3 (record citations omitted)).

Appellee filed a supplemental motion to suppress on May 18, 2012 and the court granted suppression on June 1, 2012. The Commonwealth timely appealed and filed a Rule 1925(b) statement on June 27, 2012.⁴ **See** Pa.R.A.P. 1925(b).

The Commonwealth raises one question for our review: Did the trial court err in finding that Officer Campbell lacked reasonable suspicion to stop and frisk Appellee? (**See** Commonwealth’s Brief, at 4).

Our standard and scope of review of a court’s grant of a motion to suppress is well-settled:

When reviewing an [o]rder granting a motion to suppress we are required to determine whether the record supports the suppression court’s factual findings and whether the legal conclusions drawn by the suppression court from those findings are accurate. In conducting our review, we may only examine the evidence introduced by appellee along with any evidence

³ **Terry v. Ohio**, 392 U.S. 1 (1968).

⁴ The court filed an opinion on January 18, 2013. **See** Pa.R.A.P. 1925(a).

introduced by the Commonwealth which remains uncontradicted. Our scope of review over the suppression court's factual findings is limited in that if these findings are supported by the record we are bound by them. Our scope of review over the suppression court's legal conclusions, however, is plenary.

Commonwealth v. Gutierrez, 36 A.3d 1104, 1107 (Pa. Super. 2012), *appeal denied*, 48 A.3d 1247 (Pa. 2012) (citation omitted).

The Commonwealth argues that "there was reasonable suspicion to stop and frisk where an officer responding to a radio call reporting shots fired after midnight in a high[-]crime area saw [Appellee], half a block from where the shots were reported fired, make eye contact with the officer, grab at his waistband, and begin to leave." (Commonwealth's Brief, at 8). We disagree.

"A primary purpose of both the Fourth Amendment and Article I, Section 8 is to protect citizens from unreasonable searches and seizures."

Commonwealth v. Smith, 836 A.2d 5, 10 (Pa. 2003) (citation and internal quotation marks omitted).

When . . . the underlying source of the police department's information is an anonymous telephone call, the courts have recognized that the tip should be treated with particular suspicion. . . . [A] **Terry** stop may be made on the basis of an anonymous tip, **provided the tip is sufficiently corroborated by independent police work to give rise to a reasonable belief that the tip was correct.** . . .

* * *

The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before. And since there is no gun

exception to the **Terry** requirement for reasonable suspicion of criminal activity, in the typical anonymous caller situation, the police will need an independent basis to establish the requisite reasonable suspicion.

[In other words,] before the police may undertake a stop and frisk on the basis of an anonymous tip of a man with a gun, the police must establish that they have a reasonable suspicion that the individual is involved in, or about to commit a crime. If the tip contains sufficient information, the police can do this by corroborating sufficient details of the tip. Otherwise, **the police must investigate further by means not constituting a search and seizure.**

Commonwealth v. Jackson, 698 A.2d 571, 573-75 (Pa. 1997) (footnote, quotation marks, and citations omitted) (emphases added).

Here, our review of the record reveals the following: the anonymous individual who called about shots fired in the area of 100 Peach Street did not identify the shooter's appearance in any way. (**See** N.T. Motion Hearing, 5/07/12, at 7-9). Officer Campbell arrived at the area of 100 South Peach Street approximately twenty minutes later, where he saw Appellee standing at the corner of 54th and Sansom Streets.⁵ (**See id.**). The officer testified that, when he saw Appellee, he "[did not] know if [Appellee] seen [sic] me[,]'" but he then agreed with counsel that he made eye contact with Appellee. (**Id.** at 11). When the Commonwealth specifically questioned the officer about "what, if anything, did you see [Appellee] doing with his

⁵ The 54th and Sansom Street location was approximately half a block from 100 South Peach Street. (**See** N.T. Motion Hearing, 5/07/12, at 9).

waistband?" he responded that "[j]ust—it looked like he was trying to adjust his belt or his waist, his jeans." (*Id.*). Finally, when the Commonwealth queried, "[w]hat if anything, did you believe [Appellee] was doing at that time?", he answered, "[w]e—for the reason being in the area [(the anonymous call)], I thought—honestly, I thought he had a gun [and] I immediately jumped out, put him up against the wall and did a **Terry** frisk." (*Id.* at 11-12).

Further, our independent review of the record reveals that the Commonwealth failed to provide any evidence that Appellee was involved in, or about to commit a crime. In fact, the officer's testimony does not reveal any independent investigation to establish his reasonable suspicion to stop and frisk Appellee. (*See id.* at 7-15). Also, although Officer Campbell stated that he had conducted between thirty and fifty arrests in the area, he did not testify to any dangerous gun violence in the neighborhood; thus, although the area might have been "high crime," as alleged by the Commonwealth, the officer testified that the crimes were "[n]arcotics mainly[,] and it failed to establish that this crime involved violence. (*Id.* at 8-9; *see also* Commonwealth's Brief, at 4, 8).

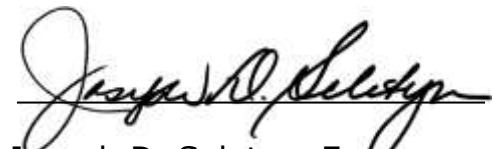
Based on the facts that the anonymous caller failed to identify Appellee, the officer arrived at the scene nearly twenty minutes after the phone call, it was not clear whether Appellee actually saw him before turning and starting to walk away, Appellee did nothing to indicate his involvement

in a crime, and the officer conducted no independent investigation before he “immediately jumped out, put [Appellee] up against the wall and did a **Terry** frisk[,]” we conclude that the suppression court properly found that the Commonwealth failed to prove that Officer Campbell sufficiently corroborated the anonymous call for reasonable suspicion to support a **Terry** stop and frisk. (N.T. Motion Hearing, 5/07/12, at 12; **see also** Suppression Ct. Op., 1/18/13, at 7); **Jackson, supra** at 573-75; **Gutierrez, supra** at 1107.

The Commonwealth attempts to argue, alternatively, that Officer Campbell “was also entitled to stop [Appellee] as a potential witness to the shooting he was investigating.” (Commonwealth’s Brief, at 11). However, even assuming that Officer Campbell was entitled to detain Appellee briefly to determine if he was a potential witness, the Commonwealth fails to establish that this fact alone gave the officer a basis to stop and frisk Appellee. (**See id.**). The Commonwealth’s argument lacks merit.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/27/2013