

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant		
v.		
DONALD PAYNE,		
Appellee		No. 1392 WDA 2013

Appeal from the Order Entered August 15, 2013
In the Court of Common Pleas of Washington County
Criminal Division at No(s): CP-63-CR-0002661-2012

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 15, 2014

Appellant, the Commonwealth of Pennsylvania, appeals from an order granting suppression of physical evidence. The Commonwealth argues the suppression court erred in finding the evidence in question was unlawfully seized. For the reasons that follow, we vacate the suppression court's order, and remand for further proceedings.

On October 5, 2012, Appellee, Donald Payne, was arrested and charged with multiple violations of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-101 – 780-113.1. On March 12, 2013, Payne filed a pretrial suppression motion. A hearing on the motion was held

* Retired Senior Judge assigned to the Superior Court.

on June 27, 2013. The court summarized the facts adduced at the suppression hearing as follows:

In the early morning of October 5, 2012, Officer Elijah Defassio of [t]he Chaleroi Police Department was patrolling the 600 block area of Fallowfield Avenue in his police vehicle. The [O]fficer brought his vehicle to stop near Cherry Way Avenue, which is a dead-end alley, when he observed two adult males emerge from said area. Through the Officer's experience, the Cherry Way Avenue Alley was a high crime area for drug transactions and prostitution. In his brief time of one year and eleven months working for the Police Department, the Officer had made approximately fifteen [] arrests in the alley. The Officer was also aware of other members of his department making arrests in that area.

The Officer immediately recognized one individual as Cortez Tiller but did not know the identity of the other individual, who was later identified as [Payne]. The [O]fficer knew Mr. Tiller from previous interactions. Approximately[] one week earlier, Mr. Tiller and the [O]fficer had discussed what rights he was entitled to if he had acquired a license to carry a concealed weapon. From his past dealings with Mr. Tiller, the Officer knew Mr. Tiller to carry a weapon.

While the [O]fficer's vehicle was stopped, he asked the individuals for their identities and where they were coming from. The Officer did not activate the police vehicle's overhead lights. The individuals accurately identified themselves, and the Officer asked Mr. Tiller if [he] was carrying a firearm. Mr. Tiller responded that he was in possession of a firearm. Officer Mike Carsello of the Charleroi Police Department then arrived at the scene. Officer Defassio stated that he did not request Officer Carsello's presence, but it was routine for the [o]fficer[]s patrolling in the area to stop and assist other officer[]s when they observed them engaging with citizens.

Officer Defassio then exited his vehicle and requested if Mr. Tiller would consent to a search of his person for weapons. Mr. Tiller consented to the search. While Officer Defassio was conducting his search of Mr. Tiller, [Payne] walked away from the area and sat down on a set of stairs some yards away.

[Payne] moved to the area on his own accord, as the Officer made no commands to [Payne] to move and [Payne] did not request any permission to move to said area.

The Officer then observed [Payne] empty his pocket and place several wrappers on the ground next to him. Though it was dark at approximately 2:00 a.m., the area where [Payne] was sitting was illuminated by a street light. The Officer approached [Payne] and asked him what he had thrown on the ground, but [Payne] had denied throwing anything. When the Officer observed the wrappers, he discovered that [they] contained a small amount of marijuana in raw form.

Based on this discovery, the Officer asked [Payne] if he would consent to a search [of] his person. [Payne] consented to the search. The Officer located a small plastic bag of twelve [] individually wrapped bags of suspected crack cocaine.

Trial Court Opinion (TCO), 8/15/13, at 1 – 3 (unnumbered pages). On August 15, 2013, the court granted suppression in part, and denied suppression in part. Specifically, the court found that the marijuana Payne removed from his pocket was admissible, but that the cocaine found in Payne's pocket was inadmissible.

The Commonwealth filed a timely notice of appeal, and certified that the suppression court's order would terminate or substantially handicap the prosecution in the instant case. Likewise, the Commonwealth filed a timely Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, and now presents the following questions for our review:

1. Did the suppression court err in failing to apply the search incident to arrest exception to the warrant requirement for a valid search and seizure?
2. Did the suppression court err in failing to apply the inevitable discovery doctrine?

3. Did the suppression court err in finding that the cocaine was unlawfully seized from [Payne's] pocket because the officer did not obtain valid consent to search?

Commonwealth's brief at 6.

Our standard of review in addressing a challenge to an order granting suppression of evidence is well-settled: "The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts." ***Commonwealth v. Chernosky***, 874 A.2d 123, 124 (Pa. Super. 2005) (internal citations omitted). We conclude that the factual findings of the suppression court in the instant case are supported by the record. However, we conclude that the suppression court erred in applying the law to those facts.

We have long held that interactions between police and citizens fall within three classifications: mere encounter, investigative detention, and custodial detention or arrest.

"Interaction" between citizens and police officers, under search and seizure law, is varied and requires different levels of justification depending upon the nature of the interaction and whether or not the citizen is detained. Such interaction may be classified as a "mere encounter," an "investigative detention," or a "custodial detention." A "mere encounter" can be any formal or informal interaction between an officer and a citizen, but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it "carries no official compulsion to stop or respond." ***Commonwealth v. Allen***, 452 Pa. Super. 200, 681 A.2d 778, 782 (1996) (citing ***Florida v. Royer***, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)).

In contrast, an “investigative detention,” by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest. Since this interaction has elements of official compulsion it requires “reasonable suspicion” of unlawful activity. ***Id.*** In further contrast, a custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest. ***Id.***

Commonwealth v. DeHart, 745 A.2d 633, 636 (Pa. Super. 2000).

We agree with the suppression court that the police interaction in the instant case began as a mere encounter. The record demonstrates that Payne was not seized at the outset of the interaction. As noted by the suppression court, “the [O]fficer did not activate his overhead lights or make any other displays of force. The Officer merely requested basic information of the identities of the individuals.” TCO at 5 (unnumbered pages). The police did not draw their weapons, nor did they issue any commands for Payne to stop. Payne walked away from the police, and sat down elsewhere. He was demonstrably free to leave, and he did leave.

Payne then removed items from his pocket, and threw those items on the ground. An officer approached Payne and asked what he had thrown. Payne denied throwing anything. This exchange did not transform the nature of the interaction, which remained a mere encounter.

However, when the officer observed the items Payne had thrown, he immediately recognized the items, which were on the ground in plain sight, as packets containing marijuana. As such, the police then possessed

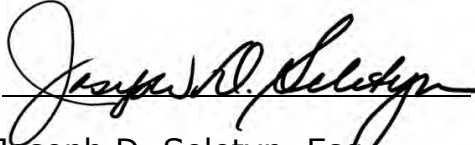
probable cause to arrest Payne for possession of marijuana. **See Commonwealth v. Thompson**, 778 A.2d 1215, 1222 (Pa. Super 2001) (“Probable cause exists where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense ... is being committed.”) (internal citations omitted).

Once the police possessed probable cause to arrest Payne, they could have chosen to handcuff Payne and search his person incident to that lawful arrest. **See Commonwealth v. Thompson**, 778 A.2d at 1221 (“An officer may conduct a full custodial search of a suspect when the suspect is lawfully arrested.”). The fact that the officer instead asked for Payne’s consent to do so did not eliminate that probable cause. As such, the seizure of cocaine from Payne’s pocket was justified as a search incident to arrest. Accordingly, we conclude that the court erred in granting suppression of that cocaine.¹

Order vacated. Case remanded for further proceedings consistent with this Memorandum. Jurisdiction relinquished.

¹ As our decision vacates the suppression court’s order on this basis, we do not address the Commonwealth’s remaining claims.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014