NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: K.G., A MINOR,	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: COMMONWEALTH OF PENNSYLVANIA,	
Appellant	No. 22 WDA 2015

Appeal from the Order Entered December 1, 2014
In the Court of Common Pleas of Beaver County
Juvenile Division at No(s): CP-04-JV-0000245-2014

BEFORE: SHOGAN, OTT, and STABILE, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED FEBRUARY 1, 2016**

Appellant, the Commonwealth of Pennsylvania ("the Commonwealth"), appeals from the order entered on December 1, 2014, that granted a motion to suppress filed by Appellee, K.G., a juvenile.[1] After careful review, we reverse and remand for further proceedings.

The record reveals that on September 12, 2014, at approximately 10:30 p.m., Aliquippa Police responded to a report of a fight in the Linmar Terrace neighborhood. Affidavit of Probable Cause, 9/12/14, at 4; N.T., 11/24/14, at 9-10. Officer Giovanni Trello testified at the suppression

---

[1] In its notice of appeal, the Commonwealth certified that the December 1, 2014 order will terminate or substantially handicap the prosecution of this case. Accordingly, this Court has jurisdiction over this appeal pursuant to Pa.R.A.P. 311(d).

hearing that when he arrived at the scene, he was in uniform and in a marked patrol car. N.T., 11/24/14, at 11. Officer Trello stated that he saw a group of people standing in the street. ***Id***. at 10. The crowd of approximately twenty to twenty-five people dispersed upon the arrival of police. ***Id***. at 10-11. Officer Trello testified that he exited his patrol car and approached the closest group of people to "see what was going on[.]" ***Id***. at 11-12. The officer stated that he saw three individuals get into a silver GMC Yukon SUV. ***Id***. at 12. Officer Trello said that as he approached the SUV, he saw Appellee, who was in the backseat, begin to "feel around his waistband." ***Id***. at 14. The officer testified that Appellee's movements caused him to believe that Appellee may be in possession of a firearm. ***Id***. at 16. Officer Trello said that because the Linmar Terrace is a high crime and high drug-trafficking area and because the police were responding to a fight, he feared for his own safety and the safety of the other officers who arrived on the scene. ***Id***. at 16. The officer told Appellee to raise his hands and stop moving. ***Id***. at 16. Officer Trello directed another police officer, Officer Jonnie Schooley, to remove Appellee from the vehicle. ***Id***. at 17. When Officer Schooley opened Appellee's door, bags of suspected heroin fell from Appellee's lap onto the floor of the SUV. ***Id***. at 17. The officers collected forty stamp bags of suspected heroin from the baggie Appellee dropped. ***Id***. at 19.

Officer Schooley similarly testified that when he approached the vehicle that Appellee entered, he saw Appellee acting "fidgety." N.T., 11/24/14, at 48. He said that when Officer Trello told the group to stop moving, Appellee did not comply and continued "messing with" something near his seat or his leg. ***Id***. at 55. The officer testified that he opened the door of the SUV to determine if Appellee had a weapon. ***Id***. at 56. Officer Schooley stated that if the suspected heroin had not fallen from Appellee to the floor of the SUV, Appellee would have been free to walk away. ***Id***.

Appellee was arrested and alleged delinquent for possession with intent to deliver heroin. Affidavit of Probable Cause, 9/12/14, at 4; Petition for Alleging Delinquency, 9/16/14. Appellee filed a motion to suppress, and the juvenile court held a hearing on November 24, 2014. On December 1, 2014, the juvenile court granted Appellee's motion to suppress and ordered that "all evidence obtained during the search is considered to be 'fruit of the poisonous tree.'" Order, 12/1/14. This timely appeal followed.[2]

On appeal, the Commonwealth challenges the juvenile court's order granting the suppression motion. The Commonwealth's Brief at 3. Our standard of review is as follows:

> When the Commonwealth appeals from a suppression order, we follow a clearly defined standard of review and consider only the

---

[2] The record does not reflect that the juvenile court instructed the Commonwealth to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

> evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of facts 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. Diego, 119 A.3d 370, 373 (Pa. Super. 2015) (citations omitted).

> The Fourth Amendment of the Federal Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. Likewise, Article I, Section 8 of the Pennsylvania Constitution states, "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures...." Pa. Const. Art. I, § 8. Under Pennsylvania law, there are three levels of encounter that aid courts in conducting search and seizure analyses.
>
> > 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 reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or "custodial detention" must be supported by probable cause.
>
> ***Commonwealth v. Williams***, 73 A.3d 609, 613 (Pa.Super.2013) (citation omitted), *appeal denied*, ___ Pa. ___, 87 A.3d 320 (2014).

Commonwealth v. Carter, 105 A.3d 765, 768 (Pa. Super. 2014).

> "The Fourth Amendment permits brief investigative stops ... when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of

criminal activity." ***Navarette v. California***, ___ U.S. ___, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014). It is axiomatic that to establish reasonable suspicion, an officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." ***United States v. Sokolow***, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (internal quotation marks and citation omitted). Unlike the other amendments pertaining to criminal proceedings, the Fourth Amendment is unique as it has standards built into its text, *i.e.*, reasonableness and probable cause. ***See generally*** U.S. Const. amend. IV. However, as the Supreme Court has long recognized, ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) is an exception to the textual standard of probable cause. ***Florida v. Royer***, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). A suppression court is required to "take[ ] into account the totality of the circumstances—the whole picture." ***Navarette***, ***supra*** (internal quotation marks and citation omitted). When conducting a ***Terry***[3] analysis, it is incumbent on the suppression court to inquire, based on all of the circumstances known to the officer *ex ante*, whether an objective basis for the seizure was present.[4] ***Adams v. Williams***, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In addition, an officer may conduct a limited search, *i.e.*, a pat-down of the person stopped, if the officer possesses reasonable suspicion that the person stopped may be armed and dangerous. ***United States v. Place***, 462 U.S. 696, 702, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (citation omitted).

> [4] To further illustrate the scope of the required analysis, we note that although the officer in this case was correct that the bulge in [a]ppellee's jacket was a gun, the Commonwealth does not get

---

[3] ***Terry v. Ohio***, 392 U.S. 1 (1968). The Supreme Court in ***Terry*** held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others" the officer may conduct a pat down search "to determine whether the person is in fact carrying a weapon." ***Terry***, 392 U.S. at 24. The purpose of a ***Terry*** stop is not to discover evidence of crime; it is to allow the officer to pursue his investigation without fear of violence. ***Comonwealth v. Simmons***, 17 A.3d 399, 403 (Pa. Super. 2011) (citing ***Adams v. Williams***, 407 U.S. 143, 146 (1972)).

> rewarded as a constitutional matter. Conversely, the Commonwealth would not be penalized if the officer had been wrong because ***Terry***, by its very nature, "accepts the risk that officers may stop innocent people." ***Illinois v. Wardlow***, 528 U.S. 119, 126, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

Carter, 105 A.3d at 769.

An investigative detention must be supported by reasonable suspicion, which is a less stringent standard than probable cause. ***Commonwealth v. Foglia***, 979 A.2d 357, 360 (Pa. Super. 2009). Given the totality of the circumstances, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." ***Commonwealth v. Simmons***, 17 A.3d 399, 403 (Pa. Super. 2011) (quoting ***Unites States v. Cortez***, 449 U.S. 411, 417-418 (1981)). "[W]e must give due weight to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience." ***Commonwealth v. Kemp***, 961 A.2d 1247, 1255 (Pa. Super. 2008) (*en banc*) (citation and quotation marks omitted). Furthermore:

> the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

Commonwealth v. Hughes, 908 A.2d 924, 927 (Pa. Super. 2006) (citations and internal quotations omitted). Additionally, suspicious behavior of the suspect may ultimately provide reasonable suspicion that justifies an

investigative detention. ***Foglia***, 979 A.2d at 360-361. We have clarified the type of observable behavior that would be relevant to this inquiry:

> Evasive behavior also is relevant in the reasonable suspicion mix. [***Illinois v.***] ***Wardlow,*** [528 U.S. 119 (2000)]***; accord Commonwealth v. Freeman,*** 563 Pa. 82, 757 A.2d 903, 908 (2000) ("nervous, evasive behavior such as flight is a pertinent factor in determining reasonable suspicion"). Moreover, whether the defendant was located in a high crime area similarly supports the existence of reasonable suspicion. ***Wardlow, supra.*** Finally, if a suspect engages in hand movements that police know, based on their experience, are associated with the secreting of a weapon, those movements will buttress the legitimacy of a protective weapons search of the location where the hand movements occurred. ***In Interest of O.J.,*** 958 A.2d 561 (Pa. Super. 2008) (*en banc*).

Id. at 361.

"To justify a frisk incident to an investigatory stop, the police need to point to **specific and articulable** facts indicating the person they intend to frisk may be armed and dangerous; otherwise, the talismanic use of the phrase 'for our own protection' … becomes meaningless." ***Commonwealth v. Cooper***, 994 A.2d 589, 593 (Pa. Super. 2010) (citation omitted; emphasis in original). This Court is "guided by common sense concerns, giving preference to the safety of the officer during an encounter with a suspect where circumstances indicate that the suspect may have, or may be reaching for, a weapon." ***Commonwealth v. Mack***, 953 A.2d 587, 590 (Pa. Super. 2008).

Here, the Commonwealth argues that the interaction among the police officers and Appellee began as a mere encounter and escalated into an

investigative detention. The Commonwealth's Brief at 8-9. However, because the officers were responding to reports of a fight in a high crime area, when the officers saw Appellee reach towards his waist and continue to fidget as the officers approached, the officers feared for their safety and were concerned that Appellee possessed a weapon. While the juvenile court found that no one was acting nervous or unusual, Findings of Fact and Order, 12/1/14, that finding is not supported by the record. As noted above, Officers Trello and Schooley both testified that Appellee was reaching around his waist area, and he was fidgety. N.T., 11/24/14, at 14, 48. Based on a totality of the circumstances, we conclude that the juvenile court erred in finding that the officers were not justified in conducting a ***Terry*** stop of Appellee for their own safety. ***Carter***, 105 A.3d at 769; ***Mack***, 953 A.2d at 590.

Moreover, because we conclude that the officers were permitted to conduct the ***Terry*** stop to ensure their safety, when the packets of suspected heroin fell from Appellee's waist, they were in plain view. The plain view doctrine permits a warrantless seizure if the following conditions are met: 1) the police did not violate the Fourth Amendment during the course of their arrival at the location where they viewed the item in question; 2) the item was not obscured and could be seen plainly from that location; 3) the incriminating nature of the item was readily apparent; and

4) the police had the lawful right to access the item. ***Commonwealth v. Wright***, 99 A.3d 565, 569 (Pa. Super. 2014).

In the case *sub judice*, the police were lawfully conducting a ***Terry*** stop, and they did not violate Appellee's Fourth Amendment rights. Next, the packets that Appellee dropped were directly in front of Officer Schooley and were not obscured. Third, Officer Schooley testified that the item that fell was suspected heroin; because the officers were lawfully conducting a ***Terry*** stop and the suspected heroin fell immediately in front of Officer Schooley on the door jamb, the police had the lawful right to access the item. ***Wright***, 99 A.3d at 569.

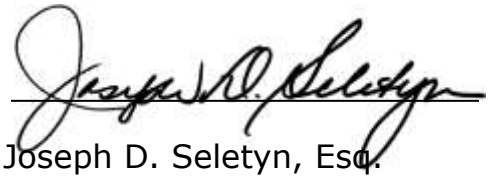
For the reasons set forth above, we conclude that the juvenile court erred in granting Appellee's suppression motion. The officer lawfully conducted a ***Terry*** stop and discovered suspected heroin in plain view. Accordingly, we reverse the juvenile court's order and remand for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.

Judge Stabile joins the Memorandum.

Judge Ott files a Concurring Statement in which Judge Stabile joins.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016