

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	
v.	:	
	:	
	:	
NEIL MASSIE	:	No. 499 WDA 2017
	:	
Appellant	:	

Appeal from the Judgment of Sentence March 1, 2017  
 In the Court of Common Pleas of Allegheny County Criminal Division at  
 No(s): CP-02-CR-0009106-2016

BEFORE: BOWES, J., DUBOW, J., and MURRAY, J.

MEMORANDUM BY MURRAY, J.:

**FILED JUNE 26, 2018**

Neil Massie (Appellant) appeals from the judgment of sentence imposed after the trial court found him guilty of persons not to possess a firearm, firearms not be carried without a license, and possession of drug paraphernalia.<sup>1</sup> For the reasons that follow, we affirm.

We summarize the relevant facts and procedural history of this case as follows. On June 17, 2016, at 1:25 a.m., Officer Matthew Costabile (Officer Costabile) of the City of Pittsburgh Police Department received a call for an armed burglary at 601 Pressley Street in the North Side neighborhood of the City. During the call, dispatch informed Officer Costabile that the victim provided the following description of the three perpetrators: “[o]ne light

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<sup>1</sup> 18 Pa.C.S.A. §§ 6105(a)(1), 6106(1); 35 P.S. § 780-113(a)(32).

skinned black male wearing a blue hoodie and light jeans; one black male wearing a blue mask, blue, white and red flannel shirt, dark jeans and blue boat shoes; one dark skinned black male wearing a blue hoodie with black jeans.” N.T., 12/5/16, at 9. Dispatch then informed Officer Costabile that the possible location of the suspects was 1630 Sandusky Court, a high-crime area approximately two to three minutes from the scene of the burglary.

When he arrived at 1630 Sandusky Court, Officer Costabile observed another officer questioning a potential suspect. Upon learning that another potential suspect was located nearby, Officer Costabile went in search of that individual. Almost immediately after he began his search, Officer Costabile saw Appellant, who was wearing clothing partially matching the description of one of the burglary suspects, approaching at a quick pace and reaching for his waistband. Officer Costabile then drew his firearm and ordered Appellant to place his hands on a fence. Another officer conducted a protective pat-down of Appellant and recovered a firearm and drug contraband.

On September 8, 2016, Appellant was charged with the aforementioned crimes. On November 22, 2016, Appellant filed a motion to suppress, in which he argued that the police lacked the probable cause and reasonable suspicion necessary to detain and search him. The trial court held a hearing on Appellant’s suppression motion on December 5, 2016 and subsequently denied the motion on February 27, 2017.

On March 1, 2017, the trial court held a stipulated, non-jury trial, at the conclusion of which it found Appellant guilty of all charges. The same day, the trial court sentenced Appellant to 42 to 84 months of incarceration. On March 31, 2017, Appellant timely appealed to this Court. Both the trial court and Appellant have complied with the mandates of Rule 1925 of the Pennsylvania Rules of Appellate Procedure.

On appeal, Appellant presents the following issue for review:

Whether the trial court committed reversible error in denying [Appellant]'s suppression motion where he only partially matched the description of a burglary suspect, and officers failed to articulate any probable cause or reasonable suspicion to justify his seizure?

Appellant's Brief at 4.

Appellant argues that the trial court erred in denying his suppression motion. Our standard of review for suppression rulings is as follows:

When reviewing the propriety of a suppression order, an appellate court is required to determine whether the record supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. . . . Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

***Commonwealth v. Cartagena***, 63 A.3d 294, 298 (Pa. Super. 2013) (*en banc*) (citation omitted).

There are three categories of interactions between police and a citizen evaluated pursuant to Article I, Section 8 of the Pennsylvania Constitution:

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 a 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. Downey***, 39 A.3d 401, 405 (Pa. Super. 2012) (citation omitted).

"To guide the crucial inquiry as to whether or not a seizure has been effected, the United States Supreme Court has devised an objective test entailing a determination of whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave."

***Commonwealth v. Strickler***, 757 A.2d 884, 889 (Pa. 2000). In evaluating the totality of the circumstances, our focus is whether, "by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained." ***Id.*** at 889. In making this determination, no single factor dictates "the ultimate conclusion as to whether a seizure has occurred." ***Id.***

At the outset, Appellant asserts that his encounter with the police constituted a custodial detention (*i.e.*, an arrest) because when the police approached him, they immediately drew their firearms and ordered him to put his hands against a fence. Appellant contends that by holding him at gunpoint,

the police placed him under arrest. Thus, Appellant argues that the appropriate inquiry into whether his detention was legal is whether the police had probable cause to arrest him.

“An encounter becomes an arrest when, under the totality of the circumstances, a police detention becomes so coercive that it functions as an arrest.” ***Commonwealth v. Stevenson***, 894 A.2d 759, 770 (Pa. Super. 2006). Courts analyze numerous factors to determine whether a detention has become an arrest, including, “the cause for the detention, the detention’s length, the detention’s location, whether the suspect was transported against his or her will, whether physical restraints were used, whether the police used or threatened force, and the character of the investigative methods used to confirm or dispel suspicions.” ***Id.***

Here, we conclude that Appellant’s encounter with the police constituted an investigatory detention, not an arrest. This Court has stated that the fact that police officers draw their firearms on a defendant does not *per se* elevate an investigatory detention to an arrest. ***Commonwealth v. Johnson***, 849 A.2d 1236, 1238 (Pa. Super. 2004). In this case, Officer Costabile testified that he drew his weapon when he encountered Appellant because he believed Appellant matched the description of one of the suspects in the recently reported burglary, and the victim had reported that the perpetrators possessed a gun. N.T., 12/5/16, at 15-16. Thus, under the circumstances of this case, it was not unreasonable for the officer to instinctively draw his

firearm. Additionally, there is no evidence that Appellant's detention was for an unreasonable length of time, that the police utilized physical restraints (*i.e.*, handcuffs), or that they transported him against his will prior to discovering the firearm and drug contraband on his person. Instead, because they had reason to believe Appellant was armed, the police officers approached him with firearms drawn, asked him to place his hands against a fence, and conducted a protective pat-down. On this record, we conclude that the police officers' encounter with Appellant was an investigatory detention.

Because the police encounter with Appellant was an investigatory detention, we must determine next whether the police possessed the reasonable suspicion necessary to stop, detain, and frisk Appellant. When evaluating the legality of investigative detentions, Pennsylvania has adopted the holding of ***Terry v. Ohio***, 392 U.S. 1 (1968), where the United States Supreme Court held that police may conduct an investigatory detention if they have reasonable suspicion that criminal activity is afoot. ***In re: D.M.***, 781 A.2d 1161, 1163 (Pa. 2001). These encounters with police are commonly known as ***Terry*** stops. In order to prove reasonable suspicion, "the police officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in light of the officer's experience." ***Commonwealth v. Cook***, 735 A.2d 673, 677 (Pa. 1999). "The determination of whether an officer had reasonable suspicion that criminality was afoot so as to justify an investigatory detention is an objective one, which must be

considered in light of the totality of the circumstances.” ***Commonwealth v. Walls***, 53 A.3d 889, 893 (Pa. Super. 2012).

This Court has explained:

It is well settled that an officer may pat-down an individual whose suspicious behavior he is investigating on the basis of a reasonable belief that the individual is presently armed and dangerous to the officer or others. To validate a ***Terry*** frisk, the police officer must be able to articulate specific facts from which he reasonably inferred that the individual was armed and dangerous. In determining whether a ***Terry*** frisk was supported by a sufficient articulable basis, we examine the totality of the circumstances.

***Commonwealth v. Gray***, 896 A.2d 601, 605-06 (Pa. Super. 2006). Thus, police may conduct a limited pat-down of a person’s outer clothing “in an attempt to discover the presence of weapons which may be used to endanger the safety of police or others.” ***Commonwealth v. Wilson***, 927 A.2d 279, 285 (Pa. Super. 2007) (citation and internal quotation marks omitted).

Appellant argues that the police lacked the reasonable suspicion to stop and frisk him because he only partially matched the description of one of the suspects of the burglary. Appellant further asserts that he exhibited no furtive movements giving the police the reasonable belief that he was armed and dangerous.

With respect to Officer Costabile’s decision to stop and frisk Appellant, the certified record confirms that in the early morning hours of June 17, 2016, Officer Costabile responded to a call of a home invasion. N.T., 12/5/16, at 7-8. The victim of the burglary reported that the perpetrators were three men

with a gun. **Id.** at 8. The victim provided the police with the following description of the three men: “[o]ne light skinned black male wearing a blue hoodie and light jeans; one black male wearing a blue mask, blue, white and red flannel shirt, dark jeans and blue boat shoes; one dark skinned black male wearing a blue hoodie with black jeans.” **Id.** at 9. Shortly thereafter, Officer Costabile received information from dispatch that persons matching the description of the burglary suspects were observed at 1630 Sandusky Court, which was located approximately two to three minutes from the scene of the burglary, in a high-crime area. **Id.** at 9-10.

When Officer Costabile arrived at Sandusky Court, another police officer had already stopped and was questioning a potential burglary suspect. **Id.** at 10, 15-16, 25. Officer Costabile learned from that officer that another potential suspect was somewhere in the area. **Id.** at 10, 15-16, 25. At this time, Officer Costabile began searching for the other potential suspect. **Id.** Officer Costabile testified that almost immediately, Appellant came out from around a nearby building and began moving toward him at a quick pace while reaching for his waistband. **Id.** at 13, 16. He reported that Appellant was African American and wearing a blue and white flannel shirt and shorts, which partially matched the description of one of the burglary suspects. **Id.** at 12, 17. Officer Costabile stated that he believed Appellant was armed and dangerous because Appellant partially matched the description of one of the burglary suspects, and approached him quickly while reaching for his



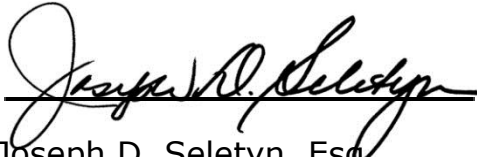
waistband, a place, based on the officer's training and experience, that he has observed criminals attempt to conceal weapons. *Id.* at 15-16. Consequently, Officer Costabile drew his firearm, and ordered Appellant to place his hands on a fence while another officer conducted a protective pat-down during which the police recovered a firearm. *Id.* at 16, 26.

We therefore conclude, based on the totality of the circumstances, that the trial court did not err in determining that the police possessed the reasonable suspicion necessary to conduct a stop and frisk of Appellant. The record reflects that during the early morning hours, in a high crime area, the police encountered Appellant wearing clothing partially matching the description of an armed burglary suspect, close in time and location to when and where the burglary occurred, where the police observed Appellant approaching at a rapid pace while reaching for his waistband, an area criminals commonly conceal firearms. As this Court has explained, we will not require our police officers "to take any more risks than those already inherent in stopping" a criminal suspect. *See Johnson*, 849 A.2d at 1239. Given that the police were looking for armed burglary suspects and Appellant approached Officer Costabile quickly while grabbing at his waistband, it was both "prudent and safe" for the officer to draw his firearm as Appellant approached and conduct an investigatory stop and frisk. *See id.* Accordingly, we conclude that the trial court did not err in denying Appellant's suppression motion.

Judgment of sentence affirmed.

J-A09039-18

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/26/2018