NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DWAYNE BERNARD THOMAS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 206 EDA 2012

Appeal from the Judgment of Sentence August 22, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): MC-51-CR-0011593-2011

BEFORE: PANELLA, J., DONOHUE, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J. Filed: January 3, 2013

Appellant, Dwayne Bernard Thomas, appeals from the judgment of sentence entered on August 22, 2011, in the Court of Common Pleas of Philadelphia County. We affirm.

On March 18, 2011, Officers Nathaniel Harper and Anthony Gamble were on duty in plain clothes and in an unmarked car driving Philadelphia. At approximately 6:40 p.m., the officers observed Thomas in the street straddling a bicycle and engaging in a brief conversation with another individual. The officers observed the individual hand Thomas cash during their conversation. The officers immediately stopped their vehicle and upon exiting identified themselves as police officers. Upon seeing the officers, Thomas stuck his hands in his pockets. Concerned for his and his partner's

safety, Officer Gamble frisked Thomas. Officer Gamble grabbed the part of Thomas's hand that was not in his pocket, and told him not to move.

When queried by the officer as to whether he had anything in his pocket, Thomas responded, "no." While Thomas was still straddling the bicycle, Officer Gamble frisked him. During the frisk, Officer Gamble felt a small circular object, the shape of a pill, in Thomas's pocket. He asked Thomas what it was to which Thomas told him that it was a morphine pill. Thomas was subsequently arrested. A search incident to arrest yielded a single pill, later confirmed to be morphine, and a bag of marijuana.

The officers then radioed for a marked car to come and transport Thomas. While they waited, the officers had Thomas sit on the ground. When the marked car arrived, Officer Harper helped Thomas stand up after which he discovered a baggie containing four yellow packets of crack cocaine directly beneath where Thomas had been sitting. Thomas was charged with two counts of possession of controlled substances.

Thomas filed an omnibus pre-trial motion to suppress, which was denied. Following a bench trial in municipal court on August, 22, 2011, Thomas was found guilty of knowingly or intentionally possessing both a small amount of marijuana and a controlled or counterfeit substance. Thereafter, Thomas was sentenced to a period of nine months' probation. Thomas then filed a petition for a writ of certiorari to the Court of Common Pleas from the denial of his motion to suppress. That court denied Thomas'

petition, finding the record supported the findings of fact and conclusions of law made with respect to Thomas's suppression issues. This appeal followed.

On appeal, Thomas raises the following issue for our review:

> Did not the trial court and reviewing court err in denying petitioner's motion to suppress the evidence recovered from petitioner where the petitioner was frisked and searched without reasonable suspicion or probable cause and subjected to custodial interrogation without the requisite Miranda warnings in violation of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution and the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution and the evidence recovered was the fruit of the unlawful search and illegal questioning?

Appellant's Brief, at 3.

The issue raised by Thomas challenges the propriety of the trial court's denial of Thomas's motion to suppress. The standard of review an appellate court applies when considering an order denying a suppression motion is well-established. We may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. ***Commonwealth v. Russo***, 594 Pa. 119, 126, 934 A.d 1199, 1203 (2007) (citation omitted). Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. ***Id***. However, it is also well settled that we are not bound by the suppression court's conclusions of law. ***Id***.

> With respect to factual findings, we are mindful that it is the sole province of the suppression court to weigh the credibility of the witnesses. Further, the suppression court judge is entitled to believe all, part or none of the evidence presented. However, where the factual determinations made by the suppression court are not supported by the evidence, we may reject those findings. Only factual findings which are supported by the record are binding upon this [C]ourt.

Commonwealth v. Benton, 655 A.2d 1030, 1032 (Pa. Super. 1995) (citations omitted).

Thomas advances a three-pronged argument that the trial court erred in denying his motion to suppress the physical evidence found on his person. First, Thomas contends that the police lacked reasonable suspicion to perform an investigatory stop. Thomas next argues that the protective pat-down search was not justified because the police possessed no reasonable basis to believe that he was armed and dangerous. Finally, Thomas asserts that the police exceeded the permissible bounds of the pat-down search by manipulating the objects found in his pants.

After a thorough review of the certified record, the parties' briefs, and the applicable law, we find no merit to Thomas's issues raised herein on appeal. We agree with the reasoning of the trial court and affirm on the basis of its comprehensive, well-written opinion with regard to this claim. ***See*** Trial Court Opinion, 2/16/12, at 1-13.

Judgment of sentence affirmed. Jurisdiction relinquished.

FILED
FEB 16 2012
Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO.: MC-51-CR-0011593-2011
:
v. :
:
DWAYNE BERNARD THOMAS :
:

OPINION

PALUMBO, J.

Dwayne Bernard Thomas appeals this court's order denying his writ of certiorari and upholding the Municipal Court's denial of his suppression motion. The court now submits the following Opinion in support of its ruling and in accordance with the requirements of Pa. R.A.P. 1925. For the reasons set forth herein, the court's decision should be affirmed.

FACTUAL HISTORY

On March 18, 2011, Philadelphia Police Officers Harper and Gamble were driving by 1400 South 24th Street in the City and County of Philadelphia in an unmarked police car, wearing plain clothes. Notes of Testimony from the suppression hearing before Judge Pew on June 1, 2011, pp. 4-5 (hereinafter, "N.T. 6/1/11"). At approximately 6:40 p.m., the officers observed Thomas on a bicycle, having a conversation with another man "on the highway...." *Id.* at 5-6. The other male handed Thomas some United States currency, at which point Officers Harper and Gamble exited their vehicle and identified themselves as police officers. *Id.* at 6.

Thomas stuck his hands into his pockets, so Officer Gamble conducted a pat down for officer safety. *Id.* Officer Gamble felt what he believed to be a pill in Thomas's pocket, so he

asked him what it was. Thomas responded that it was a morphine pill he got from his girlfriend. *Id.* at 10-11. At that point, the officers placed Thomas under arrest. *Id.* at 11. During their search incident to arrest, the officers recovered a clear baggie of marijuana from Thomas's left pants pocket. *Id.* at 7. The officers then allowed Thomas to sit down while they waited for a transport vehicle to pick him up. When he arose, they recovered a yellow baggie containing crack cocaine from the ground where he was sitting. *Id.* at 15-16.

Officer Harper testified that the area in which the incident occurred is a high-drug area. *Id.* at 6. Officer Harper further testified that he had observed around 50 narcotics sales previous to this incident and had made numerous narcotics arrests in the area. *Id.* at 8. Officer Gamble testified to having made "many, many, many" narcotics arrests. *Id.* at 16.

PROCEDURAL HISTORY

Thomas brought an unsuccessful suppression motion before Judge Pew on June 1, 2011. He was later found guilty of Knowing or Intentionally Possessing a Controlled or Counterfeit Substance under 35 P.S. § 780-113(a)(16) and Possession of a Small Amount of Marihuana under 35 P.S. § 780-113(a)(31) on August 22, 2011. Thomas then, on October 3, petitioned for a writ of certiorari to the Municipal Court from the Court of Common Pleas. This court denied the writ on December 15.

The next day, December 16, 2011, Thomas filed the instant appeal. On December 19, this court issued an order for a concise statement of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b) (hereinafter, "Statement"), and Thomas responded on January 9, 2012, with a Statement and a motion for a time extension to file a supplemental statement of errors complained of on appeal. This court granted his motion on January 12, ordering a Statement be

filed by February 12. As of the filing date of this Opinion, no supplemental statement has been filed.

In his Statement, Thomas complains that this court erred because he was stopped and searched in violation of the Fourth Amendment of the U.S. Constitution and Article I § 8 of the Pennsylvania Constitution, and because he was questioned in violation of the Fifth Amendment of the U.S. Constitution and Article I § 9 of the Pennsylvania Constitution.

DISCUSSION

The filing of a Rule 1925 statement, when ordered to do so, is a "prerequisite to appellate merits review" and is "elemental to an effective perfection of appeal." *Commonwealth v. Burton*, 973 A.2d 428 (Pa. Super. 2009), *citing Commonwealth v. Halley*, 582 Pa. 164 (2005). Thus, the Supreme Court of Pennsylvania has established a bright-line rule for Rule 1925 compliance, mandating a finding of waiver of all issues on appeal in the event of non-compliance with Rule 1925. *See Commonwealth v. Lord*, 553 Pa. 415 (1998); *Commonwealth v. Butler*, 571 Pa. 441 (2002). As Mr. Thomas has failed to comply with this court's order directing him to file and serve such a statement, he has waived all issues on appeal. However, this court will address the substance of his appeal.

Dwayne Bernard Thomas's rights were not violated by Officers Harper and Gamble when they investigated him on March 18, 2011. The officers possessed reasonable suspicion that criminality was afoot and that Thomas was armed and dangerous, so their stop and frisk of Thomas was constitutionally sound. Furthermore, since Thomas was not in police custody when questioned by Officer Gamble, his *Miranda* rights were not violated.

Stop and Frisk

The standard of review over a suppression ruling is well settled:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole...[T]he conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Jones, 988 A.2d 649, 654 (Pa. 2010) (internal citations omitted). In the instant case, the Municipal Court came to the correct legal conclusion. Thomas's constitutional rights were not infringed upon.

There are three levels of interaction between citizens and police officers. They are (1) mere encounter, (2) investigative detention, and (3) custodial detention. *Commonwealth v. Jones*, 874 A.2d 108, 116 (Pa. Super. 2005).

> 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. 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. 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.

Commonwealth v. Coleman, 19 A.3d 1111, 1115-16 (Pa. Super. 2011) (quoting *Jones*, 874 A.2d at 116 (citation omitted)).

In these matters, the initial inquiry focuses on whether the defendant was legally seized. 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 the view of all surrounding circumstances, a reasonable person would believe that he was free to leave. In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained; in making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred.

Commonwealth v. Strickler, 757 A.2d 884, 889-90 (Pa. 2000) (citations omitted).

Here, Thomas was subjected to an investigatory detention by Officers Harper and Gamble. While it may have been only a mere encounter when the officers initially approached Thomas and identified themselves, the situation quickly ripened into an investigatory detention because Officer Gamble almost immediately told Thomas that he was going to pat him down. N.T. 6/1/11 at p. 14. This, combined with the officers' approach and self-identification, projected enough authority to leave a reasonable person with the impression that he was not free to leave. As such, the interaction between Thomas and Officers Harper and Gamble is properly characterized as an investigatory detention.

The police may stop a suspect to investigate suspected criminal activity if they have reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968), *Commonwealth v. Hicks*, 253 A.2d 276 (Pa. 1969). "In order to demonstrate 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). Furthermore, following the totality of the circumstances approach from *Illinois v. Gates*, 462 U.S. 213 (1983), a police officer's training and experience may be considered, so long as the Commonwealth demonstrates a nexus between the officer's experience and the stop. *Commonwealth v. Thompson*, 985 A.2d 928, 935 (Pa. 2009). Lastly, "if the officer has a reasonable suspicion, based on specific and articulable facts, that the detained individual may be armed and dangerous, the officer may then conduct a frisk of the individual's outer garments for weapons." *Commonwealth v. Stevenson*, 744 A.2d 1261, 1264 (Pa. 2000) (citing *Terry*, 392 U.S. at 24).

Officers Harper and Gamble had reasonable suspicion to stop Thomas. This result is mandated by *Commonwealth v. Banks*, 658 A.2d 752 (Pa. 1995). In *Banks*, the Supreme Court held that a suspicious transaction followed by suspect flight, with nothing more, fell "narrowly short of establishing probable cause." *Banks*, 658 A.2d at 753. Here, the officers observed Thomas making a suspicious transaction in a high-drug area. N.T. 6/1/11 at pp. 5-6. While Thomas did not flee, he did put his hands into his pockets when the officers identified themselves, an action that Officer Harper testified to be out of the norm.[1] *Id.* at 6. Furthermore, both officers testified to having the sort of narcotics experience that the officer in *Banks* did not testify to. *Id.* at 8, 16. "Accordingly, it is logical to conclude that since the facts in *Banks* fell

[1] This action is properly part of the reasonable suspicion analysis because, as discussed above, the encounter between Thomas and the police officers did not ripen into an investigatory detention until after Thomas put his hands in his pockets.

only 'narrowly' short of probable cause, similar facts, like those present in the instant case, demonstrate reasonable suspicion." *Commonwealth v. Cook*, 735 A.2d 673, 678 (Pa. 1999).

Officer Gamble was further entitled to frisk Thomas. As has been well-settled:

> To justify a frisk incident to an investigatory stop, the police need to point to specific and articulable facts indicating that the person they intend to frisk may be armed and dangerous; otherwise, the talismanic use of the phrase "for our own protection," [becomes] meaningless. An expectation of danger may arise under several different circumstances. The police may reasonably believe themselves to be in danger when the crime reported to have been committed is a violent crime, when a perpetrator is reported to possess or have used a weapon, when the police observe suspicious behavior such as sudden or threatening moves, or the presence of suspicious bulges in a suspect's clothing, or when the hour is late or the location is desolate. A frisk might also be implemented to protect innocent bystanders within the vicinity of an encounter.

Commonwealth v. Jackson, 519 A.2d 427, 431 (Pa. Super. 1986) (citations omitted).

In the instant case, Officers Harper and Gamble articulated sufficient facts to support frisking Thomas. Specifically, Thomas put his hands into his pockets when the plain-clothes officers approached him and identified themselves. N.T. 6/1/11 at p. 6. As Officer Harper testified, "[N]ormally when we approach people, you tell them you're police, they put their hands up." *Id.* So here, the officers testified that they approached a suspect, and, after they had identified themselves as police, he acted in an unusual manner, reaching for a place in which a weapon could be hidden. As such, they have testified to sufficient specific and articulable facts to support a *Terry* frisk.

Thomas also argues that, even if the stop and frisk were permissible, Officer Gamble violated the plain feel doctrine when he felt the morphine pill in his pocket. However, Officer Gamble did not overstep the bounds of a *Terry* frisk. Our Supreme Court has enunciated the following standard for plain feel:

> [A] police officer may seize non-threatening contraband detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object....[T]he plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent. Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband. If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object.

Commonwealth v. Stevenson, 744 A.2d 1261, 1265 (Pa. 2000) (internal citations omitted).

An examination of the record, through the lens of the proper standard of review, reveals no basis to overturn the suppression court's ruling on plain feel. Officer Gamble testified to the following on direct examination:

> **Q** What did you feel?
>
> **A** I felt a pill, the shape of a pill, a round circle and I asked him what it was and he told me it was a pill, a morphine pill, I believe.
>
> **Q** At the time you touched it –

A I felt it and then I placed my hand around the object itself. Then he told me what it was....

N.T. 6/1/11 at p. 15.

On cross examination, defense counsel elicited further details about the frisk:

Q When you do a pat down, you feel a small bump in his pocket?

A No, not a small bump. I felt a small circular object. It felt circular at that time.

Q And you were able to pinch it with your fingers?

A Yeah, with two fingers going around.

Q Then you asked him what it is?

A I asked him specifically what that is.

Q And he said it was morphine?

A Yeah, he told me.

Id. at 17-18. While defense counsel supplied the term "pinch" and the officer agreed, Officer Gamble himself said, "two fingers going around" a small, circular pill, which could also be consistent with a permissible open-palm pat down. Therefore, the suppression court's implicit finding that Officer Gamble did not manipulate or otherwise impermissibly search Thomas during the frisk is supported by the record.[2]

Miranda

Thomas's rights were not violated when Officer Gamble asked him what was in his pocket because he was not subjected to such coercive conditions as to be tantamount to an arrest. The watershed *Miranda* decision requires that certain warnings be given to suspects before they

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[2] The court also observes that since Officer Gamble asked Thomas about the pill contemporaneously with feeling it, this could also be a case of inevitable discovery. *See, e.g., Commonwealth v. Miller*, 724 A.2d 895, 900 n.5 (Pa. 1999) (recognizing the inevitable discovery doctrine). However, because the plain feel issue is properly disposed of by the deference owed to the suppression court under the standard of review, this court does not address it.

may be subjected to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). Here, even if Officer Gamble interrogated Thomas, *Miranda* warnings were not required because Thomas was not in custody.

"Miranda warnings are required only where a suspect is in custody." *Commonwealth v. Ford*, 650 A.2d 433, 439 (Pa. 1994).

> The key difference between an investigative detention and a custodial one is that the latter involves such coercive conditions as to constitute the functional equivalent of an arrest. In determining whether an encounter with the police is custodial, the standard...is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the troopers or the person being seized...and must be determined with reference to the totality of the circumstances.

Commonwealth v. Pakacki, 901 A.2d 983, 987 (Pa. 2006) (internal quotations and citations omitted). Our Supreme Court follows the U.S. Supreme Court, which "has elaborated that, in determining whether an individual was in custody, the 'ultimate inquiry is...whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 987-88 (quoting *Commonwealth v. Boczkowski*, 846 A.2d 75, 90 (Pa. 2004)) (internal quotations and citations omitted).

Commonwealth v. Pakacki is instructive on this point. In *Pakacki*, State Trooper Keppel was on uniformed patrol in a marked police car when he was dispatched to investigate a shooting. *Pakacki*, 901 A.2d at 985. Trooper Keppel was given the defendant's name as a suspect. *Id.* He found the defendant walking along a country road, stopped him and did a frisk for officer safety. *Id.* As he approached to do the frisk, Trooper Keppel smelled marijuana

emanating from the defendant, and during the frisk he felt a pipe in the defendant's pocket. *Id.* Trooper Keppel asked what it was, and the defendant replied, "I am not going to lie to you, it is a pipe." *Id.* The trooper then put the defendant under arrest. *Id.*

On review, the Pennsylvania Supreme Court ruled that Trooper Keppel did not violate Pakacki's *Miranda* rights. *Id.* The Court wrote that:

> Not every detention is custodial for *Miranda* purposes, and the situation here was an investigation based on reasonable suspicion, as delineated by *Terry*. In a *Terry* situation, the officer possesses reasonable suspicion that criminal activity is afoot, and is thereby justified in briefly detaining the suspect in order to investigate. If, during this stop, the officer observes conduct which leads him to believe the suspect may be armed and dangerous, the officer may pat down the suspect's outer garments for weapons. If no weapons are found, the suspect is free to leave if the officer concludes he is not involved in any criminal activity…This interaction was the classic scenario contemplated by *Terry* and did not constitute custody; after the frisk and a "moderate number of questions" about the shooting, [Pakacki] would have been free to leave, had the trooper not smelled marijuana and felt the pipe. This was not the functional equivalent of an arrest….

Id. at 988.

At his suppression hearing, Thomas argued that *Commonwealth v. Ingram*, 814 A.2d 264 (Pa. Super. 2002), controlled the instant case. There, a complainant reported to the Clairton Police that the defendant was in possession of his car, which had been stolen several weeks earlier. *Id.* at 268. He also reported the defendant's location, appearance, and that he had a gun. *Id.* Three police vehicles arrived at the defendant's location, and two police officers approached him to conduct a *Terry* frisk, telling the defendant that they needed to frisk him before they could

talk. *Id.* at 271. During the frisk, Officer Magerl felt an object in the defendant's pocket. He asked him what it was, and the defendant responded that it was "chronic." *Id.* Officer Magerl confirmed that it was marijuana and then arrested the defendant. *Id.* at 269. The Superior Court found that the defendant had been subjected to a show of authority tantamount to an arrest and was therefore entitled to *Miranda* warnings before Officer Magerl asked him what was in his pocket. *Id.* at 271.

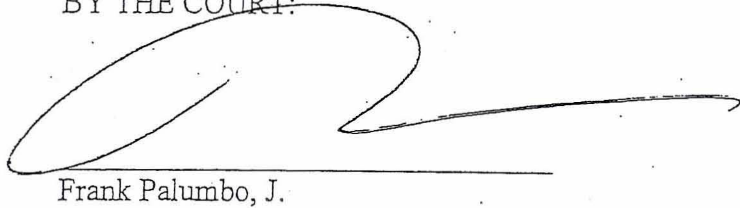
The case *sub judice* is more similar to *Pakacki*, and the court follows the reasoning of that case. Indeed, the *Pakacki* Court distinguished the facts of *Ingram* in making its decision. *Pakacki*, 901 A.2d at 986-87. In *Pakacki*, the defendant was approached by one police vehicle, stopped by one officer, and subjected to a typical *Terry* frisk. *Id.* at 985. The defendant in *Ingram*, in contrast, was approached by three police vehicles and stopped by two officers who immediately subjected him to a pat down. *Ingram*, 814 A.2d at 271.

Here, Thomas was approached by one unmarked police car and stopped by two plain-clothes officers. N.T. 6/1/11 at pp. 4-6. He was not frisked until after he put his hands into his pockets, and Officer Gamble told him that the frisk was just for officer safety. *Id.* at 14. This situation is of the sort contemplated by *Terry*, and, more importantly, it was not the sort of situation present in *Ingram*—an overwhelming show of police authority punctuated by a frisk. As such, Thomas was never in police custody and was thus never entitled to a *Miranda* warning.

CONCLUSION

For the foregoing reasons, the court's decision upholding the denial of Thomas's suppression motion should be affirmed.

BY THE COURT:



Frank Palumbo, J.

Dated: 2/16/12