NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. PAUL THOMAS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2973 EDA 2011

Appeal from the Judgment of Sentence entered September 15, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002717-2010.

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.: Filed: March 7, 2013

Appellant, Paul Thomas, appeals from the judgment of sentence entered September 15, 2011, sentencing him to five to 10 years' incarceration for conviction of possession of a controlled substance with intent to deliver ("PWID").[1] For the following reasons, we affirm.

The certified record reflects the factual and procedural background of this matter as follows.

On February 1, 2010, Officer Eric Hidalgo was on patrol in full uniform and driving a marked car. Over a period of about two weeks prior to that date, Officer Hidalgo had received several phone calls from unidentified persons complaining about drug sales in the area of 15th and Clearfield

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[1] 35 Pa.C.S.A. § 780-113(a)(30).

*Retired Senior Judge assigned to the Superior Court.

Streets. Officer Hidalgo described that location as an area "long known…for years and years [of open-air] drug sales." N.T., 7/18/2011, at 9 & 17.

On that day, at approximately 1:25 pm, Officer Hidalgo received a phone call, informing him of a man described as "black, with a black coat, green sweater, brown pants," and was "about 5'5," selling drugs "heavily" at 15th and Clearfield Streets. ***Id.*** at 7-9. In response to the call, Officer Hidalgo drove to the corner and saw Appellant who matched the tip's description. ***Id.*** at 9. Appellant was on the corner talking with his friend, John Sims. ***Id.*** at 9-10.

Officer Hidalgo testified that he "just wanted to get in contact with [Appellant], get a name, talk to him." ***Id.*** at 11. According to Officer Hidalgo's testimony, however, before he was able to approach Appellant to talk, and before he had gotten out of his car, Appellant ran away at a fast pace. ***Id.*** Officer Hidalgo testified that he exited his car and chased Appellant through a park and towards an apartment building. ***Id.*** Officer Hidalgo lost Appellant when he took refuge under a parked car. ***Id.*** at 11-12. When Officer Hidalgo discovered Appellant's hiding spot, Appellant again took flight and ran into the apartment complex at 3116 North 15th Street. ***Id.*** at 12-13.

Officer Hidalgo testified that Officer Nieves then arrived to assist him in the chase. ***Id.*** Both officers followed Appellant into the apartment building and up to the third floor, following approximately 10 steps behind Appellant. ***Id.*** As Officer Hidalgo reached the third floor, he saw Appellant

discard a gray sock. ***Id.*** at 13. Appellant was then detained, after which Officer Hidalgo picked up the sock and confirmed that it contained 73 packets of what was later discovered to be crack cocaine and three packets of marijuana. ***Id.*** at 13-15. Officer Hidalgo placed Appellant under arrest and found $301.00 cash on his person. ***Id.*** at 16.

On July 18, 2011, Appellant litigated a motion to suppress, arguing that he was improperly chased and arrested by Officer Hidalgo, and that his abandonment of the sock was unlawfully coerced. At that hearing, Officer Hidalgo testified as summarized above. In addition, Appellant presented the testimony of John Sims. According to Sims' testimony, on the day in question, he and Appellant were hanging out for several hours before the police arrived. ***Id.*** at 27. He explained that he and Appellant had purchased marijuana, and were walking towards the playground when he turned and saw a police officer pull over and exit his vehicle. ***Id.*** at 28. According to Sims, the officer ordered him and Appellant to their knees while pointing at a gate or wall and said "get on it," which Sims took to mean "put your hands up." ***Id.*** at 29-30. According to Sims, it was after being ordered to the ground that Appellant ran. ***Id.*** at 30.

At the conclusion of the suppression hearing, the trial court denied the motion to suppress. The matter proceeded to trial, at which time Appellant

was convicted of PWID. The trial court sentenced Appellant on September 15, 2012. This timely appeal followed.[2]

Appellant presents one issue for appeal:

> Did not the trial court err when it denied [A]ppellant's motion to suppress physical evidence (a sock containing various narcotics) where the recovery of narcotics by police was a product of forced abandonment, discarded by [A]ppellant after the police unlawfully stopped, seized and pursued [A]ppellant without either reasonable suspicion or probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution?

Appellant's Brief at 3.

When reviewing the denial of a motion to suppress, we must consider only the evidence of the prosecution 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. Foglia***, 979 A.2d 357, 360 (Pa. Super. 2009). We are bound by the suppression court's findings if they are supported by the record. ***Id.*** "Factual findings wholly lacking in evidence, however, may

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[2] Due to the trial court judge's retirement, the trial court submitted a letter to the Prothonotary of the Superior Court, informing our Court that the appeal was being submitted without an opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a). Additionally, the docket reflects that the trial court did not order Appellant to file, and indeed Appellant did not file, a concise statement of errors complained of on appeal pursuant to Rule 1925(b). While we do not condone this unconventional disregard of Rule 1925, and suggest that the better option would have been to assign the case to a current trial court judge for Rule 1925 practices, we are nevertheless able to affirm Appellant's judgment of sentence based upon the certified record before us.

be rejected." ***Commonwealth v. Dangle***, 700 A.2d 538, 539-540 (Pa. Super. 1997), *citing* ***Commonwealth v. Johnson***, 663 A.2d 787, 789 (Pa. Super. 1995). We may only reverse the suppression court if the legal conclusions drawn from the findings are in error. ***Foglia***, 979 A.2d at 360.

Moreover, with respect to our scope of review, our Supreme Court has held: "it is appropriate to consider **all** of the testimony[, including that at trial], not just the testimony presented at the suppression hearing, in determining whether evidence was properly admitted." ***Commonwealth v. Chacko***, 459 A.2d 311, 318 n.5 (Pa. 1983) (emphasis in original); ***see also Commonwealth v. Charleston***, 16 A.3d 505, 516-518 (Pa. Super. 2011) (collecting cases and explaining ***Chacko***).

Appellant's issue on appeal challenges whether the police had the requisite level of suspicion to constitutionally justify his stop. Arguing that the necessary level of suspicion was absent, Appellant submits that the drugs discovered in the gray sock abandoned by him should have been suppressed because they were discovered as a result of an illegal seizure, and are therefore fruit of the poisonous tree.

To determine the legality of Appellant's stop, we first consider what type of interaction occurred between Appellant and police. Under well-accepted Pennsylvania law, there are three types of encounters with police. Specifically:

> Fourth Amendment jurisprudence has led to the development of three categories of interactions between citizens and the police.

> 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. ***See Florida v. Royer***, 460 U.S. 491 (1983); ***Florida v. Bostick***, 501 U.S. 429 (1991). The second, "an investigative detention," [often called the ***Terry*** stop], 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. ***See Berkemer v. McCarty***, 468 U.S. 420 (1984); ***Terry v. Ohio***, 392 U.S. 1 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. ***See Dunaway v. New York***, 442 U.S. 200 (1979); ***Commonwealth v. Rodriguez***, 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 662 A.2d 1043, 1047-1048 (Pa. 1995) (footnote and parallel citations omitted).

In this matter, both Appellant and the Commonwealth agree that discovery of the sock containing narcotics was the result of an investigatory detention of Appellant. Appellant, however, argues that Officer Hidalgo lacked reasonable suspicion to initiate that detention. The Commonwealth disagrees.

To properly establish the requisite grounds to justify a ***Terry*** stop, the police must have reasonable articulable suspicion that criminal activity may be afoot. ***Commonwealth v. Fitzpatrick***, 666 A.2d 323, 325 (Pa. Super. 1995). We consider the totality of circumstances in determining whether reasonable suspicion existed to justify an investigative [] stop. ***Commonwealth v. Fulton***, 921 A.2d 1239, 1243 (Pa. Super. 2007).

Furthermore, establishing reasonable suspicion based upon information received from an anonymous tip requires an additional level of

corroboration. Specifically, when considering information provided by an anonymous source, we have explained:

> [i]t is a fundamental truth that an informant's cloak of anonymity may also be a shield behind which the [anonymous tipster] may hurl unwarranted and unfounded accusations with impunity, secure in the belief that he or she will never reap the consequences of his or her mendacity. It is this elemental principle of human nature which has caused the Supreme Court of our Commonwealth to reject the notion that the word of an anonymous [tipster] alone, without any knowledge of that [tipster's] reliability or any independent corroboration or observation of illegal activity by the police, can serve as the basis for subjecting an individual citizen to detention and a physical search of his or her person. This is because, in our free and democratic society, a stop of a citizen by a police officer and a search of that citizen is not to be regarded as a minor or trifling disruption of that citizen's constitutionally guaranteed right to be free of unreasonable searches and seizures.

Commonwealth v. Hayward, 756 A.2d 23, 28 (Pa. Super. 2000). Consequently, we have held that when responding to an anonymous tip, "[s]ome additional corroboration of that person's involvement in criminal activity is required before a ***Terry*** stop may be undertaken." ***Id.*** at 32.

The crux of the issue in this appeal revolves around when Officer Hidalgo initiated an investigatory detention of Appellant; i.e. before or after Appellant fled. Determining the time of initiation of the investigatory detention is significant because it affects whether, at the time of initiation, Officer Hidalgo had reasonable suspicion that Appellant was involved in criminal activity.

According to Appellant's argument, Officer Hidalgo detained him before he fled. Specifically, in his brief, Appellant submits that immediately upon

his arrival at the corner of 15th and Clearfield Streets, Officer Hidalgo exited his vehicle and ordered Appellant to "get on it" and put his hands against an object, either a wall, gate, or car. Appellant argues that, at that moment in time, he was subject to an investigatory detention, as no reasonable person would feel free to leave. Appellant argues that he fled only after being ordered to respond and place his hands where directed.

Relying upon that sequence of events, and emphasizing that he was subject to an investigative detention prior to his flight, Appellant argues that Officer Hidalgo did not have reasonable suspicion to initiate that investigatory detention because Officer Hidalgo failed to corroborate the information received from the anonymous tip. Indeed, upon arriving at the scene, the only information that Officer Hidalgo had was a description of someone matching Appellant's size and dress accused of selling narcotics at that location. In support of his argument, Appellant cites to Pennsylvania precedent, wherein we have held that similar anonymous information (a description and location), without additional corroboration, fails to rise to the level of reasonable suspicion necessary to justify an investigatory detention. ***See*** Appellant's Brief at 12-13, *citing* ***Commonwealth v. Hawkins***, 692 A.2d 1068 (Pa. 1997) (*plurality*); ***Commonwealth v. Kue***, 692 A.2d 1076 (Pa. 1997) (*plurality*); ***Commonwealth v. Jackson***, 698 A.2d 571 (Pa. 1997); ***Commonwealth v. Hayward***, 756 A.2d 23 (Pa. Super. 2000).

If the certified record supported Appellant's suggested sequence of events, we would be inclined to agree that Officer Hidalgo lacked reasonable

suspicion when he detained Appellant immediately upon arrival and prior to Appellant's flight. However, and significantly, the record does not support Appellant's suggested sequence of events.

Rather, at both the suppression hearing and at trial, Officer Hidalgo testified that Appellant took off running when his patrol car pulled up and before he had the opportunity to exit the car, roll down the window, or in any way speak to Appellant. ***See*** N.T., 7/18/2011 at 11 & 20-21; N.T., 7/19/2011 at 15 & 35. Furthermore, at trial Appellant agreed with Officer Hidalgo's sequence of events and admitted that he ran as soon as Officer Hidalgo pulled up. ***See*** N.T., 7/19/2011, at 96 ("Soon as [Officer Hidalgo] pulled up, I knew I just bought three bags of weed. I got scared and I ran."); & 109 ("I was already running before he even got out of the car.") That Appellant fled immediately upon seeing Officer Hidalgo, and not after being ordered to stop, is significant because Appellant's flight provided Officer Hidalgo the additional corroboration necessary to verify the anonymous tip and establish reasonable suspicion necessary to initiate a constitutional investigatory detention. ***See Commonwealth v. Brown***, 904 A.2d 925, 930 (Pa. Super. 2006) (unprovoked flight, in a high crime area, provides authorities with reasonable suspicion to effectuate a ***Terry*** stop); ***In the Interest of D.M.***, 781 A.2d 1161, 1164 (Pa. 2001) (same).

Appellant, however, challenges our authority to accept that sequence of events, pointing out that, based upon the trial court's finding of fact at the conclusion of the suppression hearing, the trial court believed that Officer

Hidalgo initiated the detention prior to Appellant's flight. Specifically, at the conclusion of the suppression hearing, the trial court set forth as follows:

> What happened here is the police officer has a phone call with description of the size and clothes that the defendant had on at that particular time. The last two weeks he had four or five other calls that talked about drug sales in that particular area. So he comes on the scene and he sees the young man that fits the description he had gotten over the phone. **He goes up and talks to them and tells them at that time to put their hands down on the car.**
>
> **The defendant runs.** He hides under a car and is found under the car and runs into an apartment, chased up the second floor, leaves the second floor, runs to the third floor. He's stopped up there. He tosses the sock. The policeman takes the sock. In the sock there's drugs.

N.T., 7/18/2011, at 44-45 (emphasis added).

Appellant argues that, because the trial court was the finder of fact at the suppression hearing, we are bound by its credibility and factual determinations, and that based upon the emphasized text set forth above, the trial court believed that Officer Hidalgo initiated a detention before Appellant fled. Consequently, Appellant argues that, regardless of his testimony at trial (admitting that he ran prior to initiation of his detention), we are bound by the suppression court's factual determination otherwise. That factual determination, Appellant argues, obligates us to hold that Officer Hidalgo lacked reasonable suspicion to initiate the investigatory detention.

Appellant is correct that we are bound by the suppression court's findings of fact if they are supported by the record. Factual findings

unsupported by the record, however, may be rejected. ***See Dangle***, 700 A.2d at 539-540. Considering Appellant's own admission that he fled before Officer Hidalgo had a chance to exit his vehicle or speak to him in any manner, this is one of those rare occasions when our review of the evidence reveals that the trial court's factual finding at the suppression hearing was not supported by the record. We are therefore not bound by the trial court's finding.

Consequently, though we reject the trial court's factual finding with respect to when Officer Hidalgo initiated an investigatory detention of Appellant, we affirm the trial court's ultimate determination that the detention was supported by reasonable suspicion arising from Appellant's immediate flight upon arrival of the police. Having held that the investigatory detention was supported by reasonable suspicion, we agree with the trial court that the narcotics seized as a result of that detention were not fruit of the poisonous tree. We therefore affirm the trial court's order denying Appellant's motion to suppress, though on other grounds.[3]

Judgment of sentence affirmed.

Colville, J., concurs in result.

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[3] ***See Commonwealth v. Dixon***, 997 A.2d 368, 373 (Pa. Super. 2010) (*en banc*) ("Moreover, even if the suppression court did err in its legal conclusions, the reviewing court may nevertheless affirm its decision where there are other legitimate grounds for admissibility of the challenged evidence." *quoting* ***Commonwealth v. Wilson***, 927 A.2d 279, 284 (Pa. Super. 2007)).