

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

GARY YEISER,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3154 EDA 2012

Appeal from the Order October 19, 2012
in the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0003284-2012

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED DECEMBER 26, 2013

The Commonwealth appeals from the order of October 19, 2012, which granted Appellee, Gary Yeiser's, motion to suppress.¹ We reverse and remand.

The underlying facts in this matter are taken from the suppression court's January 15, 2013 opinion.

On February 26, 2012 at approximately 12:20 [a.m.], Philadelphia Police Officer Samuel Allen and his partner Santos

* Retired Senior Judge assigned to the Superior Court.

¹ The Commonwealth may take an appeal of right from an order that does not end the entire case if it certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution. **See** Pa.R.A.P. 311(d); **see also Commonwealth v. Torres**, 764 A.2d 532, 536 n.2 (Pa. 2001). The Commonwealth has included such a certification in this case.

Higgins were on patrol in a marked car around the area of 19th Street and Washington in the city of Philadelphia. Officer Allen observed a gray Dodge Charger, driven by [Appellee], disregard a stop sign. Based on his observation, Officer Allen initiated a traffic stop.

Upon approaching the driver-side door, Officer Allen observed that [Appellee] was "very nervous, visibly shaken", breathing heavily and "pressing his back into the seat." Upon request, [Appellee] produced a driver's license but was unable to supply any information for the vehicle. [Appellee] made no furtive movements and Officer Allen never lost sight of [Appellee's] hands. Because of the nervous behavior of [Appellee], Officer Allen requested that [Appellee] get out of the vehicle. Upon exiting the vehicle [Appellee] shifted his hands along his pockets and waistband. [Appellee] was then frisked for weapons, despite Officer Allen's candid testimony that he did not even have a hunch that [Appellee] was armed. The frisk revealed that [Appellee] was not in possession of a weapon.

Before [Appellee] was allowed back into the vehicle, Officer Higgins conducted a cursory search of the driver-side and passenger-side of the car. Seeing nothing in plain view, he slid his fingers along the outside of the hard plastic gear-shift curtain on the passenger side of the vehicle and felt a plastic bag containing numerous hard packets. Based upon his training and experience he believed the bag to contain narcotics. Without further manipulation of the bag, Officer Higgins alerted his partner of what he had felt.

[Appellee] was placed back in the vehicle while a K-9 unit was called to the scene. The dog was taken around the vehicle and signaled a positive result at the front bumper. [Appellee] was detained and the vehicle was placed on a property receipt and transported to Narcotics Headquarters.

Subsequently a search warrant was obtained and Officer Allen recovered a plastic bag containing alleged crack cocaine from underneath the driver's seat and a large bag containing forty-five smaller bags containing alleged crack cocaine from inside the gearshift. Additionally, \$247 of United States currency was recovered from [Appellee].

(Trial Court Opinion, 1/15/13, at 2-3) (record citations and footnote omitted).

The police arrested Appellee and charged him with several offenses relating to the possession and distribution of narcotics. On April 9, 2012, Appellee filed a motion to suppress. The trial court held a hearing on September 19, 2012, after which it granted Appellee's motion to suppress. The Commonwealth filed a motion for reconsideration, which the trial court denied.² The instant, timely appeal followed.³

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

Were the police justified in performing a limited, protective frisk of the vehicle [Appellee] was driving where they pulled him over in the middle of the night after he ran a stop sign, he was unable to provide any paperwork for the vehicle, he was very nervous, his chest was heaving, he was pressing his back into the seat, and he was shifting his hands along his waistband and pants pocket, where the officers knew that weapons are often carried?

(Commonwealth's Brief, at 4).

The Commonwealth challenges the trial court's grant of Appellee's motion to suppress. When the Commonwealth appeals from a suppression

² The suppression court vacated its order granting suppression pending a hearing. After the hearing, the court reinstated its grant of suppression, on October 19, 2012.

³ The Commonwealth filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and the trial court issued an opinion. **See** Pa.R.A.P. 1925.

order, this Court follows a clearly defined scope and standard of review: we consider only the 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. **See Commonwealth v. Henry**, 943 A.2d 967, 969 (Pa. Super. 2008), *appeal denied*, 959 A.2d 928 (Pa. 2008). This Court must first determine whether the record supports the factual findings of the suppression court and then determine the reasonableness of the inferences and legal conclusions drawn from those findings. **See id.** In appeals where there is no meaningful dispute of fact, as in the case *sub judice*, "our duty is to determine whether the suppression court properly applied the law to the facts of the case." **Commonwealth v. Ruey**, 892 A.2d 802, 807 (Pa. 2006).

Initially, we note Appellee's motion to suppress was limited to the validity of the search of Appellee's automobile. (**See** N.T. Motion Hearing, 9/19/12, at 5). Thus, the only issue before us is the propriety of the trial court's decision granting the motion to suppress the evidence seized in the motor vehicle search.⁴

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protects

⁴ We note that, for reasons not apparent from the record, the trial court ruled on the propriety of the frisk of Appellee's person, an issue that was not properly before it; the Commonwealth did not challenge this ruling on appeal. (**See** Trial Court Opinion, 1/15/13, at 6-9; **see also** Commonwealth's Brief, at 4).

individuals from unreasonable searches and seizures, thereby ensuring the right of each individual to be let alone. Searches by the state shall be permitted only upon obtaining a warrant issued by a neutral and detached magistrate. Thus, as a general proposition, warrantless searches are unreasonable for constitutional purposes. Evidence obtained from an unreasonable search or seizure is inadmissible at trial.

Commonwealth v. Bell, 871 A.2d 267, 272-73 (Pa. Super. 2005), *appeal denied*, 882 A.2d 1004 (Pa. 2005) (citations and quotation marks omitted).

However, in ***Michigan v. Long***, 463 U.S. 1032 (1983), the United States Supreme Court held that protective, warrantless searches of the passenger compartment of a car, limited to areas where a weapon may be hidden, are constitutional when police officers have a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of the weapons.” ***Id.*** at 1049-50 (citations, footnote, and internal quotation marks omitted).

The Pennsylvania Supreme Court in ***Commonwealth v. Morris***, 644 A.2d 721 (Pa. 1994), *cert. denied*, 513 U.S. 1031 (1994), held that the ***Long*** rule comported with Article 1, § 8 of the Pennsylvania Constitution.⁵

⁵ The trial court incorrectly concluded that the standard of review for this appeal was whether the Commonwealth had probable cause to search the vehicle. (***See*** Trial Court Opinion, 1/15/13, at 10). Appellee agrees in his brief that reasonable suspicion is the correct standard of review. (***See*** Appellee’s Brief, at 9-13).

Thus, an officer may conduct a warrantless search of the passenger compartment of a car if the officer has “a **reasonable belief** based on specific and articulable facts” that the suspect is dangerous and can gain immediate control of a weapon. ***Morris, supra*** at 723 (emphasis added, internal quotation marks omitted).

This Court has recognized that police face a heightened risk of danger, including murder, during traffic stops. ***See In the Interest of O.J.***, 958 A.2d 561, 565 (Pa. Super. 2008) (*en banc*), *appeal denied*, 989 A.2d 918 (Pa. 2010) (noting that a significant percentage of murders of police officers occur during traffic stops). This is particularly true of stops that occur at night. ***See id.*** at 566; ***Commonwealth v. Rosa***, 734 A.2d 412, 416, 419 (Pa. Super. 1999), *appeal denied*, 751 A.2d 189 (Pa. 2000) (holding protective search of automobile for weapons was justified and relying, in part, on fact that stop took place late at night).

In ***Commonwealth v. Murray***, 936 A.2d 76 (Pa. Super. 2007), police officers were sitting at an intersection in a high-crime area around 9:15 p.m. when they observed a vehicle make a right turn without signaling. The officers pulled the vehicle over. Because the car’s windows were tinted, they were unable to observe anything other than the driver making “a lot of movement inside the vehicle.” ***Murray, supra*** at 77. After conducting a protective frisk of the driver, the police searched the “immediate area where [the defendant] was sitting at [sic] to his immediate right, arm rest, pulled

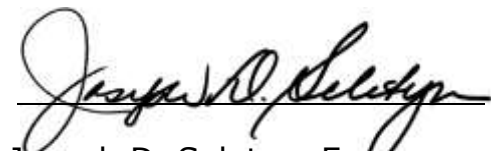
the top of the arm rest up and found a black Glock, model 23, .40 caliber handgun loaded with 14 live rounds.” **Id.** This Court found that the facts articulated by the police, *i.e.*, that they were patrolling in a high-crime area, that the stop occurred at night, that the car windows were tinted, and that the defendant was seen making excessive movement in the vehicle prior to the stop, justified a limited search of the vehicle. **See id.** at 80.

There are no significant differences between the circumstances in the instant matter and those articulated in **Murray**. Here, the officers were patrolling in an industrial area that does not get much traffic at night, the stop occurred even later at night than the stop in **Murray**, after the police signaled Appellee to pull over they observed Appellee to be “visibly shaken,” his chest was heaving, his hands were shaking, and he was pressing back into the seat. (**See** N.T. Motion Hearing, 9/19/12, at 7-9, 15). Appellee was unable to produce any paperwork for the vehicle. (**See id.** at 8). Police Officer Samuel Allen testified that Appellee was so disturbed that it made him nervous. (**See id.**). When Appellee exited the car, he began “shifting his hands along his pocket and waistband,” an area where Officer Allen knew weapons are often carried. (**Id.** at 16). Because of this, Officer Allen’s partner, Officer Santos Higgins, conducted a search of the passenger compartment limited to areas where Appellee could reach for a weapon. (**See id.** at 20-23).

Under these circumstances, the limited search of the passenger compartment was justified. **See Commonwealth v. Rogers**, 849 A.2d 1185, 1189-90 (Pa. 2004) (holding that defendant's extreme nervousness and trembling were factors that give rise to reasonable suspicion that criminal activity is afoot); **O.J., supra** at 566 (limited protective search of passenger compartment of automobile justified where officers were patrolling at night in high-crime area and police observed "a lot of movement" of arms and hands in center area of car); **Commonwealth v. Mack**, 953 A.2d 587, 591 (Pa. Super. 2008) (reversing grant of suppression order and holding that protective frisk of automobile was justified where defendant was acting nervous and was unable to produce any paperwork relating to automobile). Accordingly, we reverse the order of October 19, 2012, and remand for further proceedings consistent with this decision.

Order reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/26/2013

