NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. CARLTON MOORMAN, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3216 EDA 2012

Appeal from the Order October 15, 2012
in the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0005648-2012

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

MEMORANDUM BY PLATT, J. **FILED NOVEMBER 22, 2013**

The Commonwealth appeals from the order granting the motion to suppress of Appellee, Carlton Moorman. Specifically, the Commonwealth challenges the suppression court's finding that the police lacked reasonable suspicion to pursue Appellee.[1] After thorough review, we reverse.

On May 18, 2012, the Commonwealth filed an information charging Appellee with one count each of carrying a firearm without a license and

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* 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 the Commonwealth 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 filed such a certification in this case. (***See*** Notice of Appeal, 11/09/12, at 1).

carrying a firearm in Philadelphia.[2] On July 25, 2012, Appellee moved to suppress the firearm, claiming that the officer did not have reasonable suspicion to pursue him. The trial court aptly set forth the facts of this case, as presented at the October 15, 2012 hearing on Appellee's motion to suppress:

> The only witness in this case, Philadelphia Police Officer William McKenna, . . . testified that on February 27th of 2012, at approximately 1:49 pm, he responded to an anonymous radio call of a person with a gun. The call indicated that the person was reportedly wearing a grey sweatshirt and was sitting on the steps of 6500 North Hubert Street in the City and County of Philadelphia.
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> Officer McKenna stated he arrived 2 to 3 minutes after the call and observed [Appellee] sitting on the steps of 6500 Hubert Street. He was wearing a gray sweatshirt. He was eight to ten car lengths from [Appellee] when he started to walk away from this police officer as he approached his marked patrol car.
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> Patrol Officer McKenna stated that he pulled up in his marked police vehicle and in full uniform and asked [Appellee] if he could have a word with him. At that point, Police Officer McKenna testified that [Appellee] fled and that he pursued him in his vehicle.
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> [Appellee] ran down an alleyway while being pursued and discarded a black object, . . . which turned out to be a cell phone[,] and continued to run while being pursued.
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> [Appellee] was then observed by this police officer discarding a firearm. [Appellee] was stopped by another police officer shortly thereafter. Police Officer McKenna testified that he returned to the area where he saw the weapon discarded and recovered a 9mm handgun that was placed on a property receipt.

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[2] 18 Pa.C.S.A. §§ 6106 and 6108, respectively.

(Trial Court Opinion, 5/22/13, at 2-3 (record citations omitted)). After the hearing, the court granted Appellee's motion and suppressed the firearm seized by Officer McKenna. On November 9, 2012, the Commonwealth timely appealed and filed a Rule 1925(b) statement.[3] ***See*** Pa.R.A.P. 1925(b).

The Commonwealth raises one question for our review: "Did the [trial] court err in finding that there was no reasonable suspicion to pursue [Appellee] where he fit the description in an anonymous tip of a man with a gun and ran away when an officer asked to speak to him?" (Commonwealth's Brief, at 4).

Our standard and scope of review of a court's grant of a motion to suppress is well-settled:

> When reviewing an [o]rder granting a motion to suppress we are required to determine whether the record supports the suppression court's factual findings and whether the legal conclusions drawn by the suppression court from those findings are accurate. In conducting our review, we may only examine the evidence introduced by appellee along with any evidence introduced by the Commonwealth which remains uncontradicted. Our scope of review over the suppression court's factual findings is limited in that if these findings are supported by the record we are bound by them. Our scope of review over the suppression court's legal conclusions, however, is plenary.

Commonwealth v. Gutierrez, 36 A.3d 1104, 1107 (Pa. Super. 2012), *appeal denied*, 48 A.3d 1247 (Pa. 2012) (citation omitted).

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[3] The court filed an opinion on May 22, 2013. ***See*** Pa.R.A.P. 1925(a).

Here, the court found that "[s]ince the necessary testimony to establish the basis for a proper seizure of [Appellee] was absent in this case, the evidence was insufficient for this [c]ourt to conclude that Officer McKenna had reasonable suspicion to detain [Appellee]." (Trial Ct. Op., 5/22/13, at 5). Specifically, the court based its decision on the fact that "[t]here was no testimony elicited from [Officer McKenna] at the suppression hearing that this area was known as a high crime area . . . ." (***Id.*** at 3-4). The Commonwealth counters that "[b]ecause [Appellee] matched the description of a person reported to have a gun, was at the specified location, and ran when approached by police, the police had reasonable suspicion to pursue him," regardless of whether it was a high crime area. (Commonwealth's Brief, at 7; ***see id.*** at 9-10). We agree with the Commonwealth.

> It is well settled that the purpose of both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution is to protect citizens from unreasonable searches and seizures. In the seminal case of ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968), the United States Supreme Court indicated that police may stop and frisk a person where they had a reasonable suspicion that criminal activity is afoot. In order to determine whether the police had a reasonable suspicion, the totality of the circumstances—the whole picture—must be considered. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

In re D.M., 781 A.2d 1161, 1163 (Pa. 2001) (citations and quotation marks omitted).

In ***D.M.***, the police received an anonymous radio call that "included a description of the 'man with a gun' as a black male, wearing a white t-shirt, blue jeans and white sneakers." ***Id.*** at 1162. The police were only one block away from the specified location at the time and, upon arriving at the scene, the police found that D.M. was at the identified location and matched the description of the radio report. ***See id.*** When police approached D.M., he fled the scene. ***See id.*** The officers stopped Appellee and frisked him, at which point a gun fell out of his pants leg. ***See id.*** The officers secured the gun and arrested D.M. ***See id.***

As correctly observed by the Commonwealth, the ***D.M*** Court held that "**appellant's flight coupled with the anonymous caller's information was sufficient** to arouse the officer's suspicion that criminal activity was afoot at the time he stopped appellant." (Commonwealth's Brief, at 9 (citing ***D.M.***, ***supra*** at 1164)) (emphasis added); ***see also Illinois v. Wardlow***, 528 U.S. 119, 124 (2000) ("Headlong flight—**wherever it occurs**—is the consummate act of evasion[.]") (emphasis added).

Furthermore, applying ***D.M.*** and ***Wardlow***, this Court recently held that "unprovoked flight, **even when not in a high crime area**, combined with Appellee's proximity to the location described in the flash, and Appellee's matching the description of the suspect, does give rise to reasonable suspicion that criminal activity was afoot." ***Commonwealth v. Walls***, 53 A.3d 889, 894 (Pa. Super. 2012) (emphasis added).

The facts of this case are nearly indistinguishable from those of ***D.M.*** ***See D.M.***, ***supra*** at 1162. At 1:49 p.m., Officer McKenna received flash information that a black man with a gun, wearing a gray sweatshirt, was sitting on the steps of 6500 North Hubert Street. (***See*** N.T. Suppression Hearing, 10/15/12, at 3-4). The officer arrived at the location two to three minutes later in a marked police vehicle. (***See id.*** at 5). He observed Appellee, who matched the radio description, sitting on the steps of the specified address. (***See id.***). When the police vehicle was eight to ten car lengths from Appellee, he began walking away at a fast pace, looking back "a couple times in [the officer's] direction." (***Id.*** at 6; ***see id.*** at 7). The officer pulled up next to Appellee in his vehicle, rolled down the window, and asked to have a word with him. (***See id.*** at 7). Appellee immediately ran down an alley and discarded his gun during the ensuing pursuit. (***See id.*** at 8).

Based on the above, and our own review, we conclude that the court erred when it found that Officer McKenna did not have reasonable suspicion to approach and detain Appellant because there was no testimony that the incident occurred in a high crime area. (***See*** Trial Ct. Op., 5/22/13, at 5); ***see also Gutierrez***, ***supra*** at 1107. Therefore, we are constrained to reverse the court's order suppressing the evidence seized by the police in

this matter. ***See Wardlow***, ***supra*** at 124; ***D.M.***, ***supra*** at 1164; ***Walls***, ***supra*** at 894.[4]

Order reversed. Case remanded. Jurisdiction relinquished

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[4] Appellee also argues that Officer McKenna was "stalking" him when he pulled up and asked to speak with him. (Appellee's Brief, at 10, 14). He asserts that this amounted to a "constructive seizure" that "provoked" his flight. (***Id.*** at 10, 11). This argument lacks merit.

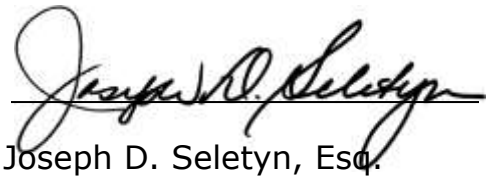
It is well-settled that, in the absence of coercion, police officers always are free to initiate contact with a member of the public and request information. ***See In Interest of Jermaine***, 582 A.2d 1058, 60 (Pa. Super. 1990), *appeal denied*, 607 A.2d 253 (Pa. 1992) ("There is nothing in the Constitution which prevents a policeman from approaching a person . . . in a public place in order to make inquiries of that person.") (citations omitted). Such an encounter is not a seizure and requires no level of suspicion. ***See Walls***, ***supra*** at 894.

Appellee's argument that his flight was provoked is likewise unavailing. (***See*** Appellant's Brief, at 12-13). As the United States Supreme Court stated:

> when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore police and go about his business. And any refusal to cooperate, without more does not furnish the minimal level of objective justification needed for detention or seizure. But unprovoked flight is not a mere refusal to cooperate. Flight, by its very nature is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, ***supra*** at 125 (citations and most quotation marks omitted). Based on the foregoing, we conclude that Appellee's argument is not legally persuasive.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/22/2013