

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HAKIM CARTER,	:	
	:	
Appellant	:	No. 3273 EDA 2011

Appeal from the Judgment of Sentence June 1, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-1300941-2006

BEFORE: DONOHUE, OLSON and FITZGERALD*, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: January 10, 2013

Hakim Carter (“Carter”) appeals *nunc pro tunc* from the June 1, 2007 judgment of sentence imposed following his convictions for possession of cocaine, possession with intent to deliver (“PWID”) cocaine, and use or possession of drug paraphernalia.¹ After careful review, we affirm.

The trial court summarized the facts of this case as follows:

While on duty on the night of July 20, 2006, Officer Leocao and his partner received a call to respond to an alleged assault at 1200 North Farson Street, which is a high-crime area in Philadelphia. N.T. 3/28/2007 at 9-10, 13. Near that location at 5100 Kershaw Street, the officers encountered [Carter], who was in a crowd of about [100] to [150] people, and was yelling obscenities at someone who lived in the house where a woman had been assaulted. [*Id.*] at 13-14, 16-17. After dispersing the crowd, Officer Leocao transported the assault victim to the hospital. [*Id.*] at 15, 19-21.

¹ 35 P.S. § 780-113(a)(16), (30), (32).

*Former Justice specially assigned to the Superior Court.

Around [15] to [20] minutes later, Officer Leocao and several other police officers returned to the same area where the first disturbance occurred, this time responding to a report of a large crowd and a person with a gun. [*Id.*] at 21-22, 26. [Carter] was again in a large crowd, and this time [he] was yelling obscenities at the brother of the [victim of the assault that occurred earlier] []. The officers again dispersed the crowd. [*Id.*] at 24-26.

Soon thereafter, Officer Leocao returned to the same area a third time after receiving a call about a man in a group of black males with a gun near 51st and Kershaw Streets, only one-quarter block from the original disturbance. [*Id.*] at 26-28. When Officer Leocao arrived at that location, he again found [Carter] and about four or five other black males who were yelling obscenities in the direction of the house where the original disturbance occurred. [*Id.*] at 28-30.

Officer Leocao and his partner got out of their car and told the men not to move and that they were under investigation. [*Id.*] at 31, 54. In response, [Carter] immediately ran for approximately one block until he reached an alley off of Farson Street where he reached into his waistband and threw objects into the alley just before Officer Leocao grabbed him, placed him in handcuffs, and put him in the back of Officer Leocao's patrol car. [*Id.*] at 31-33. When Officer Leocao went into the alley to retrieve the items that [Carter] threw, he recovered a clear plastic bag containing crack cocaine and a small, clear plastic bag that contained several smaller plastic bags used in the packaging of narcotics. [*Id.*] at 32-33.

Trial Court Opinion, 2/13/2012, at 3-4.

On October 25, 2006, the Commonwealth charged Carter with the above referenced crimes. On November 15, 2006, Carter's counsel filed an

omnibus pretrial motion that included, *inter alia*, a motion to suppress. Therein, Carter alleged that the Officers obtained the physical evidence in violation of his rights under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. Following a hearing at which Officer Leocao and Carter testified, the trial court denied Carter's motion to suppress.

Thereafter, Carter waived his right to a jury trial, and the trial court found him guilty of all charges on April 17, 2007 and ordered presentence investigation and mental health reports. On June 1, 2007, the trial court sentenced Carter to serve three to six years of imprisonment for his conviction of PWID cocaine. No further penalty was imposed.

Carter failed to file a direct appeal. However, Carter's direct appeal rights were reinstated *nunc pro tunc* on December 9, 2011, following proceedings filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546.

On December 12, 2011, Carter filed a timely notice of his direct appeal *nunc pro tunc* to this Court followed by a court-ordered Pa.R.A.P. 1925(b) statement. The trial court filed a Rule 1925(a) opinion on February 13, 2012.

On appeal, Carter raises the following issues for our review:

1. Did the [trial] court err in denying the motion to suppress? This includes all subsidiary questions, including because the original call was for girls

fighting or 'someone being assaulted' and [] Carter was not a girl, because another supposed justification was 'a person with a gun,' which as a matter of law is not illegal in Pennsylvania and does not justify even an investigatory detention (or black males with a gun,^{[FN]2} which is insufficiently descriptive to identify a male in the area where [] Carter was seized), and even if it might [sic] was insufficiently specific to authorize the seizure of [] Carter, and that [] Carter was unconstitutionally seized before the police found (or saw) any controlled substance, and that he was unconstitutionally forced to abandon anything the police claim he abandoned; this also includes the subsidiary matter that the findings of fact and conclusions of law at 3/28/2007, at 75-79, were not sufficient to support the denial of the motion to suppress, and [] Carter objects to any attempt to enlarge or otherwise modify them on appeal.

2. Did the [trial] court err in admitting the chemist's testimony in violation of the confrontation clause of the [S]ixth [A]mendment to the federal [C]onstitution and [A]rticle I, [S]ection 9, of the Pennsylvania [C]onstitution? Mary Katherine McBride was testifying about what Johnson Varghese and perhaps other people did, not solely what she did (or saw or perceived).^{[FN]3}

[3]. The court reporting system denied [] Carter his constitutional right to a complete transcript by losing notes related to June 1, 2007, and [] Carter preserves any claim he could have raised if he had access to those notes.

^{[FN]2} This also includes the subsidiary question of whether the court erred in believing (to the extent the court did believe) that the second radio call was anything other than 'person with a gun,' as the court itself repeatedly questioned Jimmy Leocao who

confirmed that that radio call was limited to 'person with a gun' (N.T. 3/28/2001, at 26 and 27 lines 2-11), only later to add 'black males.' In any event, 'black males with a gun' did not provide any constitutional reason to stop [] Carter. In addition, because the various police reports omitted many of the additional details offered by Jimmy Leocao, the court erred in believing the augmented testimony.

[FN]3 This legal error is apparent from the existing record, and trial counsel could not have had any reasonable basis for omitting this ground for objection, and was ineffective to the extent he omitted it.

Appellant's Brief at 2-3.

In his first issue on appeal, Carter contends that the trial court erred by denying his motion to suppress the physical evidence. Appellant's Brief at 4-5. The following standard governs our review of the denial of a motion to suppress:

Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may 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. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Galendez, 27 A.3d 1042, 1045 (Pa. Super. 2011) (*en banc*), *appeal denied*, ___ Pa. ___, 40 A.3d 120 (2012). "The suppression court has sole authority to assess the credibility of the witnesses and is

entitled to believe all, part or none of the evidence presented.” ***Commonwealth v. Reese***, 31 A.3d 708, 721 (Pa. Super. 2011) (citation omitted).

Pursuant to Fourth Amendment jurisprudence, there are three categories of interactions between police and a citizen:

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), *appeal denied*, 50 A.3d 124 (2012). An investigative detention occurs if “under the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to leave.” ***Commonwealth v. Williams***, 980 A.2d 667, 671 (Pa. Super. 2009), *appeal denied*, 605 Pa. 700, 990 A.2d 730 (2010) (*quoting Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619, 623 (1994)). In this case, it is undisputed that Officer Leocao was conducting an investigative detention at the time he told the group of men: “Don’t move. Stop. We have to investigate you.” **See** N.T., 3/28/2007, at 54. Immediately thereafter, Carter fled and discarded the cocaine and

paraphernalia during his attempt to elude the police. Therefore, this Court must determine whether the officers had reasonable suspicion for an investigative detention prior to Carter fleeing and discarding the contraband, as the abandonment of contraband as a result of an unconstitutional search and seizure requires that the contraband/evidence be suppressed as the fruit of an illegal search. ***Commonwealth v. Jackson***, 548 Pa. 484, 494, 698 A.2d 571, 576 (1997) (citing ***Commonwealth v. Jeffries***, 454 Pa. 320, 311 A.2d 914 (1973); ***Commonwealth v. Matos***, 543 Pa. 449, 672 A.2d 769 (1996)).

“Reasonable suspicion” required to justify an investigative detention has been defined as “specific and articulable facts” to suspect “criminal activity is afoot.” ***Commonwealth v. Guzman***, 44 A.3d 688, 692-93 (Pa. Super. 2012). “The test for reasonable suspicion is an objective one: [...] whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” ***Id.*** (citation omitted). This inquiry is the same under both Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution. ***Commonwealth v. Ayala***, 791 A.2d 1202, 1208 (Pa. Super. 2002). “The assessment of reasonable suspicion, like that applicable to the determination of probable cause, requires an evaluation of the totality of the circumstances, with a

lesser showing needed to demonstrate reasonable suspicion in terms of both quantity or content and reliability.” *Guzman*, 44 at 693.

In his appellate brief, Carter contends that an investigative detention was unwarranted, and therefore, he was “unconstitutionally forced to abandon anything the police claim he abandoned.” Appellant’s Brief at 5. Carter concludes as such based on his claim that Officer Leocao did not know the source of the police radio call regarding a person with a gun,² which was insufficiently specific and uncorroborated. *Id.* at 4-5.

In its 1925(a) opinion, the trial court explained that “the facts adduced at the suppression hearing clearly established reasonable suspicion sufficient for an investigative detention of [Carter] prior to the time that he was ordered not to move by the police.” Trial Court Opinion, 2/13/2012, at 6. The trial court found the following facts relevant to its determination that the officers had reasonable suspicion that criminal activity was afoot since an obstreperous Carter repeatedly returned to the scene of an assault despite police warnings to disperse:

² In footnote five in his brief, Carter asserts that the trial court abused its discretion by finding that the third police radio call was regarding a group of black males with a gun. Appellant’s Brief at 5 n.5. At the suppression hearing, Officer Leocao testified that the third radio call referenced a person with a gun and a group of black males, and he further clarified that the radio call was “for a group of black males armed with a gun.” N.T., 3/28/2012, at 26-29. The trial court found that radio call involved a man with a gun in a group of black males. *See id.* at 77; Trial Court Opinion, 2/13/2012, at 3. Therefore, we find no abuse of discretion in this determination, as we are bound by the trial court’s findings that are supported by the record. *Galendez*, 27 A.3d at 1045.

Before issuing the order [not to move], police had observed [Carter] in an unruly crowd on three separate occasions within one hour in the same area in a high[-]crime neighborhood. On each occasion, [Carter] was observed yelling obscenities in the direction of a home where a woman had just been assaulted. The police also knew that [Carter] had returned to the area twice after having been ordered to disperse after the first two encounters. Finally, before the second and third encounters, the police had received a report that a man in the crowd had a gun.

Id. Our review confirms that the trial court's factual findings, as stated above, are supported by the record. We point out that it is solely within the province of the suppression court "to assess the credibility of the witnesses and is entitled to believe all, part or none of the evidence presented." *Reese*, 31 A.3d at 721 (citation omitted). Thus, as a reviewing court, "we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts." *Galendez*, 27 A.3d at 1045.

Carter challenges the trial court's legal conclusion that Officer Leocao acted with reasonable suspicion by asserting that the police radio call, which was based on an unknown source, did not provide Officer Leocao with reasonable suspicion. We agree that if Officer Leocao acted solely on the police radio call regarding a person with a gun in a group of black males he did not act with reasonable suspicion. *See Commonwealth v. Hayward*, 756 A.2d 23, 32 (Pa. Super. 2000) (stating that "a simple lone statement by an anonymous individual that a person in a particular location has a gun

does not, in of itself, furnish the requisite reasonable suspicion to make an investigative detention"); *Commonwealth v. Kue*, 547 Pa. 668, 671, 692 A.2d 1076, 1078 (1997) (finding that when police act on an anonymous tip, there must be an *independent basis* in order to satisfy the requirement of reasonable suspicion).

The record shows, however, that Officer Leocao did not act solely on the police radio call, as he had an independent basis to believe that criminal activity was afoot. As noted above, the encounter occurred in a high-crime area at approximately 10:53 p.m., and it was Officer Leocao's third time responding to a police radio call regarding related events in the same general location. N.T., 3/28/2007, at 11, 30. Upon arriving at the scene, after having previously ordered the group of people, including Carter, to disperse on two prior occasions, Officer Leocao again observed Carter standing in a group of four to five black males cursing and shouting towards the house where the previous assault occurred. *Id.* at 28-30. These facts indicate that Carter's conduct arguably violated at least two criminal statutes, namely, failure to disperse, 18 Pa.C.S.A. § 5502,³ and disorderly

³ Section 5502 states:

§ 5502. Failure of disorderly persons to disperse upon official order

Where three or more persons are participating in a course of disorderly conduct which causes or may reasonably be expected to cause substantial harm or

conduct, 18 Pa.C.S.A. § 5503.⁴ Thus, in total, an officer could reasonably suspect that criminal activity was afoot, based upon the officer's observations, which were independent of the police radio call regarding a person with a gun in a group of black males.

We find support for this conclusion in *Commonwealth v. Shine*, 784 A.2d 167, 171 (Pa. Super. 2001), *appeal denied*, 568 Pa. 682, 796 A.2d 316 (2002). In *Shine*, Philadelphia Police Officer Davis was on routine patrol in a marked car around midnight when he received a radio call stating "Black males on the highway with guns." *Id.* at 169. Upon arriving at the designated location, Officer Davis observed Appellant and another male in the midst of an argument. *Id.* A woman was also present at the scene, attempting to keep the men from fighting. As a result of the possible fight and disturbance on the highway, Officer Davis patted down the Appellant and found a gun in his pants pocket. *Id.* A later safety pat down of

serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor of the second degree.

18 Pa.C.S.A. § 5502.

⁴ "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior." 18 Pa.C.S.A. § 5503(a)(1).

appellant's left front pocket revealed a cellophane wrapper containing 10 packets of cocaine. *Id.* The trial court denied appellant's motion to suppress the evidence and concluded that the stop and frisk was proper:

[G]iven the nature of the radio call, along with the Officer's observations of the threatening behavior of the two males with someone in the middle trying to stop the impending fight, at [12:00 a.m.] on a street corner that the safety of those involved along with that of the police officer were at stake.

Id. (quoting Trial Court Opinion, 7/18/2000, at 4).

On appeal, appellant argued that the police radio call from an unknown source was insufficient to stop appellant and that Officer Davis' independent observations did not justify the stop. *Id.* This Court affirmed the trial court's ruling because Officer Davis observed the two men engaged in a heated argument and about to fight, the characterization of which the trial court believed. *Id.* at 171-72. Thus, we found that "Officer Davis possessed reasonable suspicion that [a]ppellant was involved or would be actively involved in the commission of a crime in the immediate future[.]" such as disorderly conduct, 18 Pa.C.S.A. § 5503(a)(1). *Id.* at 172. Likewise, in the instant case, we cannot conclude that Officer Leocao acted solely on the police radio call, as the trial court found that the officers observed Carter cursing and shouting towards the assault victim's house before instituting the investigative stop.

In his second issue, Carter baldly asserts that his confrontation clause rights were violated by certain aspects of Mary Katherine McBride's ("McBride") testimony. At the non-jury trial, McBride was qualified as an expert in forensic chemistry and testified regarding the identification and chemical testing of the cocaine. **See** N.T., 4/17/2007, at 10-16. However, Carter never raised this claim below, nor did he file an objection to McBride's testimony on this basis. Therefore, we find Carter's claim has been waived for purposes of this appeal. **See** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); **Commonwealth v. Melendez-Rodriguez**, 856 A.2d 1278, 1287 (Pa. Super. 2004) (*en banc*) (finding a challenge to the admissibility of evidence waived on appeal where counsel failed to lodge a contemporaneous objection before the trial court).

In connection with this waived claim, Carter also contends that his trial counsel was ineffective for failing to raise the objection to McBride's testimony in the court below. Appellant's Brief at 6, n.7. However, allegations of counsel's ineffectiveness must wait until collateral review unless the appellant makes an express, knowing, and voluntary waiver of PCRA review, which has not occurred in this case. **See Commonwealth v. Barnett**, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*).

In his final issue, Carter contends that the court reporting system denied Carter his constitutional right to a transcript because it lost the notes

of testimony from the June 1, 2007 sentencing hearing. This claim has been waived. Carter provides absolutely no argument or discussion of this claim in the argument section of his brief, and we will not consider it. **See *Commonwealth v. Kane***, 10 A.3d 327, 331 (Pa. Super. 2010) (stating that it is the appellant's burden to develop arguments for meaningful appellate review, and if briefing defects impede our review, we may find the issue waived); Pa.R.A.P. 2119.

Judgment of sentence affirmed.