

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
MICHAEL BLACK,	:	No. 3278 EDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, April 14, 2011,  
in the Court of Common Pleas of Philadelphia County  
Criminal Division at No. CP-51-CR-0103091-2006

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 16, 2013

Michael Black appeals from the judgment of sentence of April 14, 2011, following his conviction of drug and firearms offenses. On appeal, appellant challenges the denial of his pre-trial suppression motion. After careful review, we affirm.

On April 19, 2005, appellant was pulled over after running a stop sign. Officers asked appellant to exit the vehicle and conducted a pat-down search, which revealed a firearm. Appellant was arrested and placed in the police vehicle. Officers returned to appellant's vehicle to check on an infant in the back seat, who was crying. When they opened the rear car door, they detected a strong odor of marijuana. At that time they observed, in plain view, packages of marijuana on the floor of appellant's vehicle. Police seized

the marijuana, as well as two cell phones, from the vehicle, and issued appellant a traffic citation for disregarding the stop sign.

Following a suppression hearing held September 25, 2007, appellant's motion to suppress the evidence based on an illegal search of his person was denied. Appellant had absconded prior to the suppression hearing, and was tried *in absentia* on March 2 and 4, 2011. Following the jury trial, appellant was found guilty of possession of drug paraphernalia, possession with intent to deliver (marijuana) ("PWID"), carrying a firearm without a license, and carrying a firearm on public streets in Philadelphia. On April 14, 2011, appellant was sentenced *in absentia* to an aggregate of 11½ to 18 years' imprisonment.<sup>1</sup>

Shortly after sentencing, appellant was finally located and arrested on an open murder charge.<sup>2</sup> Appellant filed a timely post-sentence motion for reconsideration of sentence on April 21, 2011. Following a hearing, the motion was denied on May 20, 2011. On November 4, 2011, appellant filed a petition to have his direct appeal rights reinstated *nunc pro tunc*, averring that trial counsel had disregarded his request to file an appeal on

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<sup>1</sup> Appellant received a flat sentence of 5 years' imprisonment for the PWID conviction, because the mandatory minimum of 5 years was also the statutory maximum. The trial court also imposed a consecutive sentence of 3 to 6 months for criminal contempt, based on appellant's failure to appear.

<sup>2</sup> Apparently, appellant had sent someone to his sentencing hearing to report back to him as to what transpired. This individual was noticed sitting in the gallery and was trailed to appellant's residence by homicide detectives. (Notes of testimony, 5/20/11 at 13.)

his behalf. On December 7, 2011, appellant's direct appeal rights were reinstated *nunc pro tunc*, and appellant filed a notice of appeal on December 9, 2011. Appellant complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed a Rule 1925(a) opinion.

On appeal, appellant challenges the trial court's denial of his motion to suppress physical evidence.<sup>3</sup> Appellant argues that the pat-down search was illegal. According to appellant, the officers had no reasonable basis to believe that he posed any risk to their safety.

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. When reviewing rulings of a suppression court, 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. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

***Commonwealth v. Korenkiewicz***, 743 A.2d 958, 962 (Pa.Super. 1999)

(citations omitted).

When a police officer lawfully stops a motorist for a violation of the Pennsylvania Motor Vehicle Code, the officer is permitted to ask the driver to step out of the vehicle "as a matter of right." ***Commonwealth v. Wilson***, 927 A.2d 279, 284, (Pa.Super.2007), citing, ***Pennsylvania v. Mimms***, 434 U.S. 106, 98

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<sup>3</sup> In his Rule 1925(b) statement, appellant also raised a challenge to the discretionary aspects of sentencing. (Docket #D10.) However, this claim has been abandoned on appeal.

S.Ct. 330, 54 L.Ed.2d 331 (1977). During this investigatory stop, the officer can pat-down the driver “when the officer believes, based on specific and articulable facts, that the individual is armed and dangerous.” ***Commonwealth v. Stevenson***, 894 A.2d 759, 772 (Pa.Super.2006), ***appeal denied***, 591 Pa. 691, 917 A.2d 846 (2007), citing, ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); ***Commonwealth v. Hicks***, 434 Pa. 153, 253 A.2d 276 (1969); ***Commonwealth v. Robinson***, 410 Pa.Super. 614, 600 A.2d 957, 959 (1991), ***appeal denied***, 533 Pa. 599, 617 A.2d 1273 (1992). Such pat-downs, which are permissible “without a warrant and on the basis of reasonable suspicion less than probable cause, must always be strictly limited to that which is necessary for the discovery of weapons” that might present a danger to the officer or those nearby. ***Commonwealth v. Ingram***, 814 A.2d 264, 269 (Pa.Super.2002) (quotation omitted), ***appeal denied***, 573 Pa. 671, 821 A.2d 586 (2003). When assessing the validity of a pat-down, “we examine the totality of the circumstances . . . giving due consideration to the reasonable inferences that the officer can draw from the facts in light of his experience, while disregarding any unparticularized suspicion or hunch.” ***Wilson***, 927 A.2d at 284 (citation omitted).

***Commonwealth v. Parker***, 957 A.2d 311, 314-315 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 755, 966 A.2d 571 (2009) (emphasis deleted).

“We must be guided by common sense concerns that *give preference to the safety of the police officer* during an encounter with a suspect where circumstances indicate that the suspect may have, or may be reaching for, a weapon.” ***Id.*** at 316, quoting ***Stevenson***, 894 A.2d at 772 (citation omitted) (internal quotation marks omitted) (emphasis in original).

The following evidence was adduced at the suppression hearing of September 25, 2007. Officer David Marcellino testified that on April 19, 2005, at approximately 11:25 a.m., he and his partner, Officer John Martin, were in a marked police unit patrolling the area of 1200 Arrott Street. (Notes of testimony, 9/25/07 at 8-9.) Officer Marcellino observed appellant disregard a stop sign at the intersection of Oakland and Arrott streets. (*Id.* at 10.) They activated their lights and siren and effectuated a stop of appellant's vehicle. (*Id.* at 13.) As they approached the vehicle, Officer Marcellino observed appellant making furtive gestures:

As we approached the vehicle, I observed [appellant] moving around very fast in the front seat from side to side, also to the rear of the seat that he was sitting in.

Again, he was doing it in a very fast manner. As we got closer to the vehicle, [appellant] took his hands, and put them immediately on to his lap and stayed still as Officer Martin was next to him at the window.

Officer Martin asked if he had license, insurance, registration. [Appellant] moved his hands, had nothing in his hands.

*Id.* at 10. "The whole time I'm watching him, he's constantly moving. He was turning his head and arms were moving back and forth very fast." (*Id.* at 25.)

Officer Marcellino testified that when they got to the car, appellant suddenly placed his hands in his lap: "When I got up to, I'd say probably to the back door while I'm next to the back door, when he was moving his

hands around, immediately he threw his hands right on his lap, and kept them still, intense.” (*Id.* at 25.) “It’s now a safety issue. He’s moving his hands around, moving back and forth. When I get to the window, he moves on the lap, like he wasn’t doing nothing [sic]. That’s a safety issue.” (*Id.* at 27-28.) When Officer Martin asked appellant for identification, he had nothing in his hands. (*Id.* at 28.)

At that time, Officer Martin asked appellant to step out of the vehicle and conducted a pat-down search. (*Id.* at 10.) Officer Martin removed a loaded, .9-millimeter semi-automatic handgun from appellant’s waist area. (*Id.* at 11.) Appellant was placed under arrest and put into the back of the police vehicle. (*Id.*)

Officer Marcellino returned to appellant’s car to check on a baby in the back seat, who was crying. (*Id.*) Officer Marcellino detected an extremely strong odor of marijuana. (*Id.*) Officer Marcellino observed a diaper bag on the floor containing a large amount of marijuana. (*Id.*) The diaper bag contained 11 clear plastic Ziploc baggies of marijuana. (*Id.* at 11-12.) Police also recovered a Pampers baby wipes container with 11 Ziploc baggies of marijuana, a Huggies baby wipes container with 2 large Ziploc bags of marijuana, an electric scale, and two Nokia cell phones. (*Id.* at 12.)

Appellant argues that the only basis for the officers’ conclusion that he might be armed and dangerous were his furtive movements. (*Id.* at 27.) Appellant pulled his car over right away, the traffic stop occurred during the

daytime, and there was no allegation that this was a high-crime area. Appellant distinguishes ***Commonwealth v. Simmons***, 17 A.3d 399 (Pa.Super. 2011), ***appeal denied***, 611 Pa. 651, 25 A.3d 328 (2011), relied upon by the trial court (trial court opinion, 5/7/12 at 5), on the basis that in ***Simmons***, the defendant was stopped at night in a high-crime area. In that case, police pulled over a vehicle in which the defendant was a passenger for traveling without brake lights. ***Id.*** at 401. The incident occurred on January 9, 2009 at 6:45 p.m. ***Id.*** After they stopped the vehicle, police observed the defendant making furtive movements. ***Id.*** An officer conducted a protective frisk, recovering narcotics from the defendant's person. ***Id.*** The officer testified that this was a high-crime, high-drug area, and that he had made hundreds of arrests in that area. ***Id.***

The Commonwealth filed an appeal from the order granting the defendant's suppression motion, and this court reversed and remanded, finding that considering the totality of the circumstances, the officer reasonably believed his safety was threatened:

The record in this matter establishes that the vehicle in question was stopped at night in a high drug and high crime area. Furthermore, Officer Galiczynski testified that prior to exiting his police vehicle, he witnessed Simmons, the passenger in the vehicle, reach down towards the floor and then reach across his chest. Officer Galiczynski, an officer with over 12 years of experience, believed that Simmons' movements were consistent with concealing a weapon, and warned his partner about his concern.

***Id.*** at 404.

Under such circumstances, we hold that Officer Galiczynski's observation of furtive movements, within the scope of a lawful stop, led him to reasonably be concerned for his safety and therefore justified the **Terry** protective frisk. Indeed, on multiple occasions we have held that similar furtive movements, when witnessed within the scope of a lawful traffic stop, provided a reasonable basis for a protective frisk.

**Id.** (collecting cases).

According to appellant, all the cases cited by **Simmons** provided additional facts justifying a pat-down search beyond just furtive movements. (Appellant's brief at 13.) However, in **Commonwealth v. Mesa**, 683 A.2d 643 (Pa.Super. 1996), the defendant was stopped for driving at a high rate of speed and weaving in and out of traffic. **Id.** at 645. After the stop, the investigating officer testified that the defendant was moving around "a lot" in the passenger seat. **Id.** As in the instant case, in **Mesa**, there was no allegation that the defendant was stopped at night or in a high-crime area. The officer conducted a pat-down search and recovered illegal contraband. **Id.** This court concluded that the pat-down search of the defendant was permissible based on the officer's observation of furtive movements:

At the suppression hearing, Detective Lamberton set forth the specific facts that led him to conclude that appellant might be armed and dangerous. Lamberton testified that as he was approaching the [Chevrolet] Beretta, appellant was moving around a great deal and this led him to believe that appellant could be armed and dangerous and was attempting to conceal something.



*Id.* at 646 (footnote omitted). Based on this testimony, we found that the officer had articulable suspicion that the defendant might be armed and dangerous, thereby warranting a *Terry* search for his protection. *Id.*

Similarly, in *Parker, supra*, the defendant was pulled over for a malfunctioning brake light. *Parker*, 957 A.2d at 313. As he was stopped behind the vehicle, the police officer noticed that the defendant “began to reach down, dipping his shoulders right and left.” *Id.* He believed that the defendant might be attempting to conceal a weapon. *Id.* After the defendant was unable to produce any identification, he was ordered out of the vehicle for a pat-down search, resulting in the discovery of contraband. *Id.* This court found that the officer articulated sufficient facts to constitute reasonable suspicion for a pat-down. Notably, although the stop did occur at 11:47 p.m. (*id.*), that fact did not play a major role in our decision. Rather, the arresting officer focused on the defendant’s furtive gestures as the reason for patting him down: “Based on his movements, my safety in my opinion was in jeopardy, because I didn’t know if he was trying to get a weapon or not. I wanted to be sure he did not possess a weapon, so we were both safe on the traffic stop.” *Id.* at 315-316 (citation to the record omitted). This court concluded, “Examining the totality of the circumstances, the suspicious gestures and movements of [the defendant] could have caused the officer to reasonably conclude, in light of his experience, that [the defendant] was armed and dangerous.” *Id.* at 316.

Thus, appellant appears to be mistaken that furtive movements, standing alone, can never be enough to justify a **Terry** search. The stop need not occur at night in a high-crime area. Rather, courts must examine the totality of the circumstances in each case when assessing the validity of a pat-down search. Here, Officer Marcellino testified that appellant was moving around "very fast." (Notes of testimony, 9/25/07 at 10.) When he and Officer Martin neared the vehicle, appellant suddenly placed his hands in his lap and remained still. (*Id.* at 10, 25.) Obviously, appellant was not busy retrieving his documentation, because when Officer Martin asked him for identification, he had none. (*Id.* at 28.) This justifiably led to Officer Marcellino's conclusion that appellant might have been concealing a firearm and that his and Officer Martin's safety was in jeopardy. (*Id.* at 27.) "Indeed, as we have observed, 'roadside encounters, between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect.'" **Simmons**, 17 A.3d at 403, quoting **In re O.J.**, 958 A.2d 561, 564 (Pa.Super. 2008) (*en banc*), citing **Michigan v. Long**, 463 U.S. 1032, 1049 (1983).

We find that the officers had valid grounds based on appellant's furtive movements inside the vehicle to conduct a protective frisk. Consequently, the trial court did not err in denying appellant's suppression motion and we will affirm the judgment of sentence.

J. S76005/12

Judgment of sentence affirmed.