

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

KHYNESHA E. GRANT

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 772 EDA 2012

Appeal from the Order Entered February 1, 2012
In the Court of Common Pleas of Philadelphia County
Municipal Court at No(s): MC-51-CR-0026060-2011

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.:

Filed: February 7, 2013

Appellant, the Commonwealth of Pennsylvania, appeals from the order entered in the Philadelphia County Court of Common Pleas, denying the Commonwealth's petition for a writ of *certiorari* filed after the Municipal Court granted the motion of Appellee, Khynesha E. Grant, to suppress evidence.¹ We vacate and remand for further proceedings.

The relevant facts and procedural history of this appeal are as follows.
On June 16, 2011, at approximately 10:50 p.m., Officer Andre Boyer

¹ Pursuant to Pa.R.A.P. 311(d), the Commonwealth has certified that the suppression order substantially handicapped or terminated the prosecution of the Commonwealth's case. Accordingly, this appeal is properly before us for review. ***See Commonwealth v. Cosnek***, 575 Pa. 411, 836 A.2d 871 (2003) (stating Rule 311(d) applies to pretrial ruling that results in suppression, preclusion or exclusion of Commonwealth's evidence).

patrolled the 1200 block of North Hollywood Street. Officer Boyer's captain assigned the patrol due to complaints of drug dealing on the block. Officer Boyer observed a white Chevrolet Impala idling with its passenger-side wheels on the sidewalk. Specifically, half of the vehicle covered the sidewalk and half of the vehicle remained in the street. Appellee was sitting in the driver's seat of the vehicle, talking with two unidentified men on the passenger's side. The engine of the vehicle was running. Officer Boyer exited his vehicle to investigate why Appellee's vehicle was on the sidewalk. As Officer Boyer approached, the unidentified men walked away. Officer Boyer's partner, Officer Celce, stopped the men; and Officer Boyer commenced a conversation with Appellee.

During the conversation, Officer Boyer noticed "a very, very overwhelming...odor of marijuana coming from the vehicle." (N.T. Suppression Hearing, 10/28/11, at 7). A thirteen-year veteran of the police force, Officer Boyer had training in narcotics and had encountered the odor of marijuana on numerous occasions. Nevertheless, Officer Boyer did not immediately question Appellee about the odor. Rather, the officer asked Appellee for her driver's license and the paperwork associated with the vehicle. Officer Boyer also ordered Appellee to step outside the vehicle. Appellee produced the documents, exited the vehicle, and stood at the rear of the vehicle while Officer Boyer checked the license and paperwork. As Appellee stood outside the car, Officer Boyer smelled the odor of marijuana

coming from Appellee's clothing. Officer Boyer also saw that Appellee's eyes were bloodshot and watery, which led him to believe that Appellee might be under the influence of marijuana.

Officer Boyer completed his check of the license and paperwork without discovering any inconsistencies. Consequently, the officer returned the documents to Appellee, who started to walk away. At that point, Officer Boyer asked Appellee to explain why she smelled like marijuana. Appellee walked back to the officer and stated she had "just smoked some weed with somebody...." (*Id.* at 19). Based upon the odor of marijuana and Appellee's statement, Officer Boyer presented Appellee with a consent form for a warrantless vehicle search:

I presented the consent form to [Appellee]...and told her she wasn't going to get any tickets or anything like that if everything came back correct with her vehicle information.

She then signed the form, after reading it in my presence...and I did [a] systematic search of the vehicle....

(*Id.* at 9).²

² The record is unclear regarding the circumstances surrounding the execution of the consent form. Appellee disputed the officer's testimony, claiming the officer threatened to arrest her if she did not sign the consent form. (*Id.* at 31). Appellee told the officer that she had borrowed the vehicle, which was a rental, from a woman named Theresa Billups. (*Id.* at 30-31). Appellee also testified that she did not actually sign the consent form; instead, she wrote Ms. Billups' name on the signature line. (*Id.* at 31-32). Significantly, the suppression court's findings of facts regarding the execution of the consent form are incomplete. Although the court acknowledged Officer Boyer's testimony about promising not to issue a (*Footnote Continued Next Page*)

Thereafter, Officer Boyer searched the vehicle and discovered a pill bottle in the armrest. The prescription label was missing, and the bottle contained Xanax. Officer Boyer questioned Appellee about the bottle, but she refused to respond. Officer Boyer placed Appellee under arrest and continued to search the vehicle. Officer Boyer recovered a baby bag from the back seat. Upon opening the bag, Officer Boyer discovered a prescription pad, three (3) bottles of Codeine syrup, Xanax, and Percocet pills.

On June 18, 2011, the Commonwealth filed criminal complaints at six (6) separate docket numbers, charging Appellee with six (6) counts of receiving stolen property and one (1) count each of possession of a controlled substance and possession of a controlled substance with intent to deliver. On October 28, 2011, the Municipal Court conducted a hearing. At the beginning of the hearing, Appellee orally moved for suppression of all physical evidence obtained through her interaction with the officer. Appellee argued that the officer had no reasonable suspicion or probable cause to support any type of seizure. In the alternative, Appellee argued her consent to the vehicle search was involuntary and coerced. Moreover, Appellee claimed she was not a party who could provide a valid consent. After

(Footnote Continued) _____

parking ticket if "everything checks out," the court did not expressly rule on the credibility of the testimony from Officer Boyer or Appellee. (*Id.* at 46-47).

receiving testimony from Officer Boyer and Appellee, the court granted Appellee's suppression motion, concluding Officer Boyer should have issued ***Miranda***³ warnings before asking Appellee why she smelled like marijuana. The court further concluded that all evidence obtained after the officer's initial question amounted to "fruit of the poisonous tree."

On November 23, 2011, the Commonwealth filed a notice of appeal and petition for writ of *certiorari* with the Court of Common Pleas ("CCP"). That same day, the Commonwealth filed a petition in support of the appeal. In it, the Commonwealth asserted Officer Boyer conducted a valid investigative detention, any statements Appellee made during the detention were admissible, and the officer's observation of the odor of marijuana provided additional reasonable suspicion of criminal activity to support further investigation. After receiving argument from counsel, the CCP denied the petition for writ of *certiorari* on February 1, 2012. The CCP determined: 1) Appellee had a reasonable expectation of privacy in the vehicle; 2) the interaction between Appellee and Officer Boyer was not a mere encounter; 3) Officer Boyer's testimony regarding the smell of marijuana was incredible; 4) Officer Boyer did not have reasonable suspicion to detain Appellee; 5) Appellee did not voluntarily consent to the vehicle search; and 6) Officer Boyer had no probable cause or exigent circumstances

³ ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to support a warrantless search. (Trial Court Opinion, filed July 18, 2012, at 5-17).

On March 2, 2012, the Commonwealth timely filed a notice of appeal. That same day, the Commonwealth filed a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

The Commonwealth raises two issues for our review:

DID THE MUNICIPAL COURT ERR BY RULING AS A MATTER OF LAW THAT THE POLICE WERE REQUIRED TO GIVE **MIRANDA** WARNINGS DURING A ROADSIDE INVESTIGATION BEFORE REQUESTING CONSENT TO SEARCH A CAR?

DID THE COMMON PLEAS COURT ERR, ON APPEAL FROM THE MUNICIPAL COURT SUPPRESSION ORDER, BY RE-DETERMINING CREDIBILITY AND DECIDING, BASED ON THE COLD RECORD, THAT THE POLICE OFFICER'S SUPPRESSION HEARING TESTIMONY WAS INCREDIBLE?

(Commonwealth's Brief at 2).

When the Commonwealth appeals from a suppression order, the relevant scope and standard of review are:

[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. As long as there is some evidence to support them, we are bound by the suppression court's findings of fact. Most importantly, we are not at liberty to reject a finding of fact which is based on credibility.

The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Goldsborough, 31 A.3d 299, 305 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 49 A.3d 442 (2012) (internal citations and quotation marks omitted).

In its first issue, the Commonwealth contends that an officer must provide ***Miranda*** warnings only before a custodial interrogation. The Commonwealth submits there was no custodial interrogation here, because Appellee was not in custody when the officer briefly questioned her while investigating the parking violation. The Commonwealth emphasizes that the officer did not touch Appellee, place her in handcuffs, or transport her against her will. Under these circumstances, the Commonwealth concludes the Municipal Court erred when it ruled that the officer should have provided ***Miranda*** warnings before questioning Appellee about the marijuana odor. We agree.

Contacts between the police and citizenry fall within three general classifications:

The first [level of interaction] 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.

Police must have reasonable suspicion that a person seized is engaged in unlawful activity before subjecting that person to an investigative detention.

Reasonable suspicion exists only where the officer is able to articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. Therefore, the fundamental inquiry of a reviewing court must be an objective one, namely, whether the facts available to the officer at the moment of intrusion warrant a [person] of reasonable caution in the belief that the action taken was appropriate.

Goldsborough, supra at 305-06 (internal citations and quotation marks omitted).

"***Miranda*** warnings are only required in a custodial interrogation."

Commonwealth v. Houseman, 604 Pa. 596, 625, 986 A.2d 822, 839 (2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 199, 178 L.Ed.2d 120 (2010).

Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of...***Miranda*** rights. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom of action in any significant way. The ***Miranda*** safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. Thus, [i]nterrogation occurs where the police should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect. In evaluating whether ***Miranda*** warnings were necessary, a court must consider the totality of the circumstances....

Whether a person is in custody for ***Miranda*** purposes depends on whether the person is physically denied of [her] freedom of action in any significant way or is placed in a situation in which [she] reasonably believes that [her] freedom of action or movement is restricted by the interrogation. Moreover, the test for custodial

interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes [her] freedom of action is being restricted.

Said another way, police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest.

Thus, the ultimate inquiry for determining whether an individual is in custody for *Miranda* purposes is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Commonwealth v. Gonzalez, 979 A.2d 879, 887-88 (Pa.Super. 2009)

(internal citations and quotation marks omitted).

Additionally, "A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies." ***Commonwealth v. Kemp***, 961 A.2d 1247, 1260 (Pa.Super. 2008) (quoting ***Commonwealth v. Strickler***, 563 Pa. 47, 56, 757 A.2d 884, 888 (2000)). "One such exception is consent, voluntarily given." ***Kemp, supra*** at 1260 (quoting ***Strickler, supra*** at 56, 757 A.2d at 888). "To establish a valid consensual search, the Commonwealth must first prove that the consent was given during a legal police interaction."

Commonwealth v. Acosta, 815 A.2d 1078, 1083 (Pa.Super. 2003) (*en banc*), *appeal denied*, 576 Pa. 710, 839 A.2d 350 (2003).

It is the Commonwealth's burden to prove that a defendant consented to a warrantless search. To establish a voluntary consensual search, the Commonwealth must

prove that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances.

Id. at 1083 (internal citations and quotation marks omitted).

Instantly, Officer Boyer patrolled the 1200 block of North Hollywood Street due to complaints of drug dealing on the block. Officer Boyer observed Appellee's vehicle idling with the passenger-side wheels on the sidewalk. The officer's observation of a vehicle partly on the sidewalk created reasonable suspicion of a Motor Vehicle Code violation, thereby justifying an investigative detention. **See** 75 Pa.C.S.A. § 3353(a)(1)(ii) (prohibiting individuals from stopping vehicles on sidewalks). Thereafter, Officer Boyer approached the vehicle and conversed with Appellee.⁴ Officer Boyer immediately noticed a strong odor of marijuana emanating from the vehicle. Officer Boyer asked Appellee for identification and asked Appellee to step out of the vehicle. Appellee produced identification and paperwork for the vehicle, exited, and stood at the rear of the vehicle. Officer Boyer did not place Appellee in handcuffs. (**See** N.T. Suppression Hearing at 18.)

With Appellee outside, Officer Boyer smelled marijuana on Appellee's clothing. Officer Boyer also observed Appellee's bloodshot and watery eyes,

⁴ Officer Boyer's partner, Officer Celce, stopped two males who had been speaking with Appellee. Officer Celce and the males remained approximately ten (10) feet away from Officer Boyer and Appellee throughout the remainder of the detention. (*Id.* at 23).

leading him to believe that Appellee was under the influence of marijuana. After checking Appellee's identification and the vehicle paperwork, Officer Boyer returned the items to Appellee. As Appellee walked away, Officer Boyer asked her to explain why she smelled like marijuana. To the extent that the initial traffic stop ended when Officer Boyer returned the paperwork to Appellee and she started to walk away, the officer's observations during the detention regarding the possible presence of marijuana created a reasonable suspicion that Appellee possessed contraband. **See Kemp, supra** (holding facts gathered during valid traffic detention can be utilized to justify second investigatory detention occurring after officer has indicated defendant is free to leave).

Whereas the suppression court concluded Officer Boyer should have provided **Miranda** warnings before asking Appellee about marijuana, the record demonstrates that Officer Boyer did not initiate a custodial interrogation. Officer Boyer had briefly detained Appellee in public on a residential block to investigate a possible Motor Vehicle Code violation. Officer Boyer did not transport Appellee from the scene, use restraints, or make any threats or show of force. Under the totality of these circumstances, the suppression court erroneously concluded Officer Boyer should have administered **Miranda** warnings. **See Gonzalez, supra**. Thus, Appellee's statement was gratuitous and not subject to suppression. **Id.**

THE COURT: Yes, if everything checks out. Okay. So now...the officer said he's not going to give her any parking tickets if she signs this document and everything checks out. I don't know where that's coming from. Okay. Now, counsel asked the officer, did he read [the consent form] to her?

And the officer said that basically when he gives a document to a person and they look at it, he just assumes that they're reading it.

* * *

It sounds like this document might be the fruit of the poisonous tree based on that statement that he took from her...that she had been committing a crime without [giving] her the *Miranda* rights.

(*See* N.T. Suppression Hearing at 46-47.)

Here, the suppression court provided no findings of fact or conclusions of law regarding whether the consent was "an essentially free and unconstrained choice" on Appellee's part. *See Acosta, supra*. Consequently, the best resolution of this case is to vacate and remand for further proceedings in the Municipal Court. *See Commonwealth v. Grundza*, 819 A.2d 66, 68 (Pa.Super. 2003) (explaining appellate court does not make findings of fact and conclusions of law in first instance; where suppression court does not provide adequate findings of fact and conclusions of law, appellate court can remand for formal findings of fact). Upon remand, the court must determine whether it requires additional testimony and exhibits from the parties regarding the voluntariness of the consent to search. Should the court deem it necessary, it can conduct a new

evidentiary hearing on the matter. Thereafter, the court shall issue a formal statement of findings of fact and conclusions of law in accordance with Pa.R.Crim.P. 581(I), addressing the validity of the consent form and any related issues. Accordingly, we vacate and remand for further proceedings.⁶

Order vacated; case remanded with instructions. Jurisdiction is relinquished.

⁶ Due to our disposition, we do not address the Commonwealth's second issue.