[J-114A&B-98]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	100 M.D. Appeal Dkt. 1997
	:	
Appellee,	:	Appeal from the Order of the Superior
	:	Court dated December 12, 1996 at 0541
v.	:	PHL 1996, affirming the Order of the Court
	:	of Common Pleas of Bucks County, dated
	:	January 12, 1996, at No. 1007-95.
E.M., A JUVENILE,	:	
	:	
Appellant	:	ARGUED: April 30, 1998

COMMONWEALTH OF PENNSYLVANIA,	:	49 E.D. Appeal Dkt. 1997
	:	
Appellee,	:	Appeal from the Judgment of the Superior
	:	Court entered on March 5, 1997, at 281
v.	:	PHL 1996 affirming the Judgment of
	:	Sentence entered on December 27, 1995
CHRISTOPHER HALL,	:	in the Court of Common Pleas,
	:	Philadelphia, County, Criminal Division at
Appellant.	:	3144 March Term, 1991.
	:	
	:	ARGUED: April 30, 1998

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: JULY 21, 1999**

I concur with the reasoning of the majority in Commonwealth v. E.M but must dissent from the majority's holding in Commonwealth v. Christopher Hall. In my view, the holding of the majority in Hall amounts to an unwarranted expansion of this Court's holding in Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995)(Castille, J., dissenting). With all due respect to the doctrine of stare decisis, I believe that the Banks

decision was the nadir in the history of this Court's search and seizure jurisprudence. Consequently, I am constrained to dissent from a decision which expands the holding in Banks and fails even to acknowledge that it is doing so.

It is instructive to begin with fundamental precepts regarding the concept of "probable cause" -- precepts which this Court recently has tended to overlook. Probable cause is present when there is reasonably trustworthy information which warrants a reasonable person in the belief that the suspect has committed or is committing a crime. Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988, 990 (1991). The United States Supreme Court has stated: "[p]erhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception." See Illinois v. Gates, 462 U.S. 213, 230 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)). Quoting Chief Justice John Marshall, the Court added that probable cause means "less than evidence which would justify condemnation . . . it imports a seizure made under circumstances which warrant suspicion." See id. at 235 (quoting Locke v. United States, 7 Cranch 339, 348 (1813)). In elaborating further on the probable cause standard, the Court noted: "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers." Id. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). What may initially appear to be innocent behavior frequently will provide a basis for a showing of probable cause; to require otherwise

would be to sub silentio impose a far more rigorous definition of probable cause than the security of our citizens demands. Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983).

In Banks, supra, the issue was whether the officer had observed conduct which gave rise to probable cause for an arrest. The officer had observed the defendant, in the middle of the afternoon, hand an unidentifiable object to an unknown female who, in turn, gave appellant an undetermined amount of cash. When the officer's patrol car drew near, the appellant attempted to flee, but was subsequently apprehended. In stating that these facts fell "narrowly short" of establishing probable cause, the Banks Court emphasized that the officer was not a trained narcotics officer and that the containers he observed were not commonly known to hold drugs. Id. at 455, 658 A.2d at 753. By way of contrast, the Banks Court cited with approval a leading Superior Court decision, Commonwealth v. Burnside, 425 Pa. Super. 425, 625 A.2d 678 (1993), in which probable cause was found where the officer had observed the defendant on the street at night holding blue plastic packets typically used to store narcotics and the defendant, upon seeing the officer, put the packets in his pocket and walked away.

Here, in addition to the suspicious exchange of small items for cash coupled with flight, which in the view of a majority of this Court fell "narrowly short" of establishing probable cause in Banks, the following factors were also present: (1) the officer saw appellant holding a plastic baggie of the same type which the officer, on many previous occasions, had seen used as a storage container for drugs, unlike the innocuous container at issue in Banks; (2) the officer, who was trained in detecting and investigating narcotics trafficking, had personally made narcotics arrests at that same exact location in the recent past, unlike the inexperienced officer in Banks; (3) the officer

observed a three-person transaction, directed by appellant, involving the use of hand signals, rather than the simple two-person exchange observed in Banks; (4) this quick and surreptitious exchange occurred in a high-crime area at 12:30 a.m., unlike the mid-afternoon exchange in Banks; (5) following the transaction, upon seeing the police, appellant immediately concealed the baggie which he had been holding and then fled; (6) pursuant to what the majority acknowledges was a lawful patdown for the officer's own protection, the officer felt something which was "bulky" and "crunchy" in Hall's left pocket, which, based on his past experience, felt like vials of crack.

In sum, the factors which the Banks Court held to be necessary to establish probable cause were present here, and the factors which were present in Burnside -- the Superior Court case cited with approval by the Banks Court -- were present here. Indeed, additional suspicious factors not even contemplated by the Banks Court were present here, such as the fact that appellant actually felt what he reasonably believed to be crack vials in appellant's left pocket, and the fact that appellant was directing a transaction between two other individuals. In this regard, it is important to note the sequence of events observed by the officer here: (1) the two men standing a few feet from appellant were looking at him as he held out his plastic baggie towards them; (2) appellant motioned to the two men with his free hand; (3) one of the two men then handed the other small items which fit into the palm of his hand, while the other handed him United States currency in return. The advantages of conducting illegal narcotics transactions in this manner are widely understood by the law enforcement community. When a seller maintains a small inventory of narcotics while conducting the actual transactions with customers and the "bagman" maintains the principal stash, if the seller

is apprehended, he will be caught with only a small amount of drugs -- perhaps not enough to qualify for a mandatory minimum sentence. Also, as the seller is generally the immediate focus of attention, the bagman may be able to escape with the drug supply in the event that the customer is an undercover officer, since apprehending two individuals is obviously more difficult than apprehending one. Because probable cause determinations must be made "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," Gates, supra, the officer here was entitled to be even more suspicious on the basis of his observations of this orchestrated, three-person transaction.

Notwithstanding that the facts present in this case overwhelmingly support the conclusion that probable cause existed under this Court's jurisprudence, appellant argues that the absence of certain other factors rendered probable cause absent. Specifically, appellant points to the fact that police did not receive anonymous tips that drugs were being sold from the location at issue, nor did police witness a series of transactions. Appellant fails to explain how the police could have witnessed a series of transactions when he fled at the sight of them, or why an anonymous tip was necessary when the officer here had personally observed illegal narcotics trafficking from the location at issue. In any event, an infinite number of circumstances can contribute to a finding of probable cause, only a handful of which need be present in any given case.

While appellant is full of ideas concerning what factors the officer failed to observe, I believe it is more instructive that neither appellant nor the majority make any suggestion as to what innocent activity it was that the officer did observe at 12:30 a.m. on a street corner behind the Rose Electric supply yard, if it was not an illegal narcotics

transaction. Certainly it was not a covert midnight sale for Rose Electric of miniature light fixtures for doll houses. Nor would one reasonably suspect that appellant was working around the clock and insisting on cash payments at this street corner for legitimate commercial activities in his climb up the corporate ladder. Perhaps the officer reasonably disregarded these alternative explanations which require a somewhat myopic view of the facts and, instead, reasonably concluded that these circumstances were, in the words of Chief Justice Marshall, "circumstances which warrant[ed] suspicion." Locke v. United States, supra, 7 Cranch at 348 (1813). It is just possible that the officer did not defy the canons of reason in concluding that few businessmen, other than drug dealers, would set up shop on a desolate street corner in a high-crime area after midnight, distance themselves from their customers by using an intermediary to physically conduct sales and collect cash pursuant to surreptitious hand signals, then hide their wares and flee the scene when confronted with a police presence.

This decision troubles me for a number of reasons, not the least of which is my firm belief that it is rooted in misapplied law and unsound policy. The most troublesome reason, however, is that in Banks, this Court, while finding that probable cause had not been substantiated, attempted nevertheless to provide police officers in this Commonwealth a blueprint on how to substantiate probable cause in the future, by stating: "This is not a case where a trained narcotics officer observed either drugs or containers commonly known to hold drugs being exchanged." Banks, supra, 658 A.2d at 752, 540 Pa. at 454. Here, a police officer waited until his observations had satisfied this Court's own blueprint and then some, then initiated a search incident to arrest which uncovered a clear plastic baggie containing one hundred vials of cocaine. Yet this

Court now pulls the rug out from under that officer's feet and tells him that it was unreasonable for him to believe that the suspect was committing or had committed a crime, such that probable cause would be substantiated under Commonwealth v. Rodriguez, supra, 526 Pa. at 272, 585 A.2d at 990 (1991). This sort of scattershot jurisprudence should alarm not only our law enforcement community, but also the citizens of this Commonwealth who rely on our law enforcement officers to enforce the law and keep them safe -- a task which this Court renders exceedingly difficult with decisions such as this one. Accordingly, I respectfully dissent.

Madame Justice Newman joins this concurring and dissenting opinion.