[J-29-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 33 EAP 2006
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 3158 EDA 2001, dated March
	:	24, 2004 which affirmed the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County at Nos. MC 0104-4918 and 01-
	:	913326 dated October 23, 2001
NATHAN DUNLAP,	:	
	:	
Appellant	:	ARGUED: April 17, 2007
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 28, 2007**

I respectfully dissent.

The issue accepted for review involves the application of Commonwealth v. Banks, 658 A.2d 752 (Pa. 1995), a case I continue to believe was wrongly decided, as is ably explained in the reasoned dissent penned by my colleague Mr. Justice Eakin, which I join. As I noted in my Banks dissent, "[w]hile a single surreptitious 'commercial transaction' may not give rise to probable cause, and while flight alone does not give rise to probable cause, the totality of those circumstances surely does, especially when the flight following a transaction consistent with an illicit drug sale, is unprovoked by any actions of the police other than their 'mere presence.'" Id. at 754 (Castille, J. dissenting) (citations omitted). For present purposes, however, I accept that Banks is a governing Fourth Amendment precedent of this Court. I respectfully dissent in this case because I believe that the courts below properly applied our precedent.

Banks did not exhaust the variety of circumstances that attend street drug sales. This case is identical to Banks in that it involves the common, surreptitious exchange paradigm, but it is different in other material respects. Weighing against probable cause is the absence of flight. The factors weighing in favor of probable cause here, which were absent in Banks, include the fact of the officer's training in narcotics investigation, his hands-on experience, which included his experience in this very neighborhood, and the high volume of drug dealing in this particular neighborhood. In my view, even accepting Banks' unwisely hostile rule, these factors justified the suppression judge in concluding that the experienced police officer here acted upon probable cause.

We observed in Banks that, "movement of an unknown item, or the mere exchange of an unknown item or items, plus flight, with nothing more, does not establish probable cause to arrest under the Fourth Amendment." Id. at 753-54. We emphasized that those facts fell "narrowly short." Id. Here, the Majority, adopting the Superior Court dissent below, recharacterizes the additional factors of the specific police officer training and experience as a mere "lens" through which to view other factors, rather than as factors in the analysis in and of themselves. I confess that I do not understand the distinction. Indeed, the value of importing concepts from optometry escapes me. Moreover, this sort of post-New Age speak is contrary to the manner in which the law generally treats those with special expertise. When a doctor testifies as an expert witness in a medical malpractice action, he is not providing a "lens" by which to view his conclusions: he is offering relevant testimony that may be accepted for its factual truth. The U.S. Supreme Court -- the final word on Fourth Amendment matters -- has never embraced the "lens" theory of probable cause review. I would squarely reject it.

Metaphors are unnecessary to properly decide the rather prosaic probable cause issue here. The issue posed in the Banks line of cases concerns the practical application of the probable cause requirement in a common scenario involving street-level drug

dealing. To declare that the Majority feels practical police experience is only a "lens" through which to view probable cause factors provides no useful guidance to reviewing courts or police officers. Stating that an officer's training and experience are a "lens" does not provide an analytical framework so much as a Rorschach test. How, and to what extent, the courts are to consider the "lens of experience" in reviewing an officer's conduct remains open to infinite permutations. The Commonwealth entrusts the protection of the public to police officers, and to ensure that they discharge their duty effectively, and fairly, provides them with specialized training, which is further enhanced by their on-the-job experience. Judges enhance their basic training in their field of expertise the same way.

What should be preeminent is that the U.S. Supreme Court does not share the Majority's view on the relevance of high crime locations and an officer's experience in the probable cause equation. That Court has long recognized that crime problems common in the location at issue, and of which police are aware, are an important factor in determining whether probable cause exists. E.g. United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975); Brinegar v. United States, 338 U.S. 160, 167-69 (1949); Carroll v. United States, 267 U.S. 132, 160 (1925). Accord Commonwealth v. Zhahir, 751 A.2d 1153, 1157 (Pa. 2000). Further, the High Court has recognized the relevance of the expertise and experience of police officers. United States v. Cortez, 449 U.S. 411, 418 (1981) (police may rely on their training and experience to draw "inferences and make deductions . . . that might well elude an untrained person"). See also United States v. Montoya de Hernandez, 473 U.S. 531, 542-43 (1985); United States v. Ortiz, 422 U.S. 891, 897 (1975); Brignoni-Ponce, 422 U.S. at 885; Terry v. Ohio, 392 U.S. 1 (1968). Accord Commonwealth v. Norwood, 319 A.2d 908, 910 (Pa. 1974). These precedents are the equivalent of the large

"E" on the diagnostic eye chart. The Majority's preference for optometric metaphor leads to probable cause blindness.[1]

The Majority's statement that this Court has never considered an officer's training and experience to be a relevant factor, "without more," in the probable cause analysis means little. Maj. Slip. Op. at 6. In a totality analysis, most factors, standing alone, will not satisfy the governing test. The proper analysis of probable cause looks for all relevant factors, in their totality. The officer here testified that he had personally made between 15 and 20 drug arrests in this area. He knew from his experience that the neighborhood was one plagued by a high number of drug crimes; intelligent policing, of course, targets high crime areas. The officer's relevant experience, to which he testified, well positioned him to understand the significance of appellant's conduct. That conduct led to him conclude that this surreptitious transaction on this notorious street corner was likely to involve the sale of drugs. That, of course, is the single most likely explanation. Police are not required to distort the lens of their practical experience and discount the probable in favor of the fanciful. The U.S. Supreme Court has often explained probable cause in terms of what it does not require -- *i.e.*, it requires less than a showing that the officer's belief is factually correct, e.g., Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990), or even "more likely true than false," Texas v. Brown, 460 U.S. 730, 742 (1983). This Court has recognized the same essential point. Indeed, in Commonwealth v. Lawson, upon which the Majority places so much reliance, we articulated the test as "whether law enforcement officers have acted arbitrarily or have acted on the basis of probable cause." 309 A.2d at 394. There

[1] The Majority fails to cite or discuss a single case from the U.S. Supreme Court respecting probable cause, notwithstanding the centrality of such precedent to the Commonwealth's presentation.

was nothing arbitrary in the police conduct here. I would affirm the courts below, which properly applied Banks.[2]

Today's decision provides no useful standard for the courts. It provides even less to the police officers who witness surreptitious transactions in high-crime areas. Standards under the Fourth Amendment should be "workable for application by rank and file, trained police officers," "reasonable," and "objective." Illinois v. Andreas, 463 U.S. 765, 772-73 (1983). In the wake of today's decision, officers on the street will now be left to guess the magic number of drug arrests before their observations will be deemed sufficiently supported by experience to allow the relevant factors to give rise to probable cause. And, in the interim, the criminally-oppressed good citizens living in these neighborhoods will be consigned to a Court-ordered state of helplessness.

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[2] As the Superior Court majority, per Judge Klein, aptly noted below:

> In this case, there are two significant . . . factors. First, the testimony came from an experienced officer *who had been on the drug strike force for nine months*. Second, the transaction took place in a high drug area in which [the officer] *himself* had participated in fifteen to twenty drug arrests. These facts are similar to those found in[Commonwealth v.] Nobalez, [805 A.2d 598 (Pa. Super. 2002) appeal denied 835 A.2d 709 (Pa. 2003)] where we also found the arresting officer possessed probable cause in light of his personal knowledge and professional experience.
>
> We think the judges below reasonably rejected the alternative that this was merely a person giving change or making a sale of cigarettes or M & M's or something equally innocuous. The municipal court judge, who had the opportunity to observe the witnesses and judge all of the circumstances, and the common pleas court judge, who affirmed the municipal court judge's decision, both held that there was probable cause to believe there was a drug transaction. While recognizing that this is a close case, it was well within the municipal court judge's discretion to draw the conclusion that in this neighborhood, with these observations, and considering the experience of the police officer, the officers had probable cause to believe that a drug transaction was being carried out.

Commonwealth v. Dunlap, 846 A.2d 674, 677 (Pa. Super. 2004) (emphasis in original) (citations omitted).

A further difficulty in the Majority's approach is its failure to appreciate just how reasonable and non-arbitrary the limited police response is in a case such as this. Because the central command of the Fourth Amendment is reasonableness, the restraints that courts impose on police should account for the practical realities of law enforcement. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made."); New Jersey v. T.L.O., 469 U.S. 325, 338, 340-41 (1985) (fundamental command of Fourth Amendment is reasonableness). The police officer here did nothing unreasonable. An apprehension following a street drug sale does not lend itself to the traditional "intermediate response" of a stop and frisk for weapons. A weapons frisk is of no avail when the object being sought is not a weapon, but a tiny vial or packet of drugs, or drug transaction proceeds. To conclusively confirm or dispel a reasonable belief that a suspect was dealing illegal narcotics, police need to see the goods. That is all the officer did in this case. The search was targeted and minimally intrusive. Such a limited search immediately confirms or dispels suspicion. The Fourth Amendment admits a more flexible analysis.

Finally, the Majority acknowledges, but elects not to decide, the second issue accepted for review, an overarching jurisprudential issue concerning the precedential effect of the *per curiam* reversals which were entered by this Court in the wake of Banks. I would reach that question and make entirely clear that a *per curiam* decision, while "certainly binding as the law of that case, by definition . . . establishes no precedent beyond the authority cited in the order." Commonwealth v. Smith, 836 A.2d 5, 17 (Pa. 2003). I would reject appellant's inaccurate claim that the post-Banks *per curiam* reversals "must mean something in terms of an instructive, and therefore precedential, nature" because the

argument both ignores Smith and erroneously conflates "instructive" with "precedent." The Superior Court majority below properly enforced our precedent in this case, and it should be affirmed.

I respectfully dissent.