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

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

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
	:	

OPINION

MADAME JUSTICE BALDWIN **DECIDED: December 28, 2007**

In this case, a trained police officer, working in what the officer termed a high-crime neighborhood, observed Appellant and another individual exchange currency for an unknown object without seeing any other suspicious activity. Shortly thereafter, Appellant was arrested and searched without a warrant. As it turned out, Appellant was in physical possession of crack-cocaine. He was thereafter charged with various narcotics-related offenses. Prior to trial, Appellant moved to suppress the seized narcotics. The motion was denied by the trial court and affirmed by the Superior Court, which found the observing officer's training and experience particularly relevant in determining that probable cause existed to support the seizure. We granted allocatur to determine whether the Superior Court's decision was inconsistent with our decision in Commonwealth v. Banks, 540 Pa.

453, 658 A.2d 752 (1995). We reaffirm Banks and hold that probable cause was lacking in the instant case, in violation of the Fourth Amendment to the United States Constitution. For the reasons explained in greater detail below, we reverse the conviction.

On May 4, 2001, Officer Devlin of the Philadelphia Police Department and his partner were conducting plainclothes surveillance at 2700 North Warnock Street in North Philadelphia, which is at the corner of Warnock and Somerset Streets. Officer Devlin watched as Nathan Dunlap (Appellant) approached another individual standing on that same corner. After approaching, Appellant engaged in a brief conversation with the other man, handed him money, and was, in return, handed "small objects." Commonwealth v. Dunlap, 846 A.2d 674, 675 (Pa. Super. Ct. 2004). After Appellant walked away, Officer Devlin broadcasted Appellant's description over police radio. Officer Richard Stein apprehended Appellant a short distance from the Warnock and Somerset corner. A search of Appellant revealed three packets that contained crack-cocaine.

Officer Devlin testified that, at the time of the subject citizen-police encounter, he had been a police officer for almost five years. Further, he had been a member of the drug strike force for nine months. Officer Devlin testified that he had conducted "about fifteen to twenty" narcotics arrests in the general geographic area. According to him, North Warnock is a residential area that suffers from a high rate of nefarious activity, including drug crimes. Based on his experience and his characterization of the neighborhood, Officer Devlin believed that the transaction he witnessed involved illegal drugs.

Prior to trial, Appellant filed a motion to suppress the evidence, alleging that the police lacked probable cause to conduct the warrantless arrest and subsequent search. The trial court heard Officer Devlin's testimony. The court denied the motion. Immediately

thereafter, Appellant was convicted of possession of a controlled substance in the Philadelphia Municipal Court. 35 P.S. § 780-113(a)(16). Appellant then petitioned for a writ of certiorari in the Court of Common Pleas of Philadelphia County, arguing that the Municipal Court erred in denying his motion to suppress. The Court of Common Pleas rejected Appellant's argument and affirmed the verdict and judgment of sentence. Commonwealth v. Dunlap, No. 01-913326, slip op. at 2-3 (Ct. of Com. Pleas of Philadelphia Cty. Jan. 2, 2002). Appellant timely appealed to the Superior Court. In a published opinion, the Superior Court, sitting en banc, affirmed in a five to four decision, finding that probable cause existed to support the warrantless arrest and subsequent search. Dunlap, 846 A.2d at 675.

Although the court acknowledged that this Court's decision in Banks held that "absent other factors, the mere fact that a regular police officer sees a transaction on the street in which money passes from one person to the other and some unknown objects are given in return does not amount to probable cause to arrest for a drug transaction, even where the suspect has fled on seeing the police," Dunlap, 846 A.2d at 675 (citing Banks, 540 Pa. at 455, 658 A.2d at 753), it found the instant facts distinguishable. The distinctions between the instant matter and Banks which the Superior Court noted were: (1) "an experienced narcotics officer makes the observations;" (2) "the transaction takes place in what the officer knows from personal, professional experience as well as reputation to be a high drug-crime area;" and (3) "based on his or her training, experience as an officer and knowledge of the area, the officer reasonably concludes that he or she probably witnessed a drug transaction." Dunlap, 846 A.2d at 675. Based on these "key differences," the majority concluded that probable cause existed to support the police action.

Judge Johnson, joined by three other judges, dissented, taking issue with the majority's use of police training and experience as a factor in determining the existence of probable cause. The dissent relied on Commonwealth v. Lawson, 454 Pa. 23, 309 A.2d 391 (1973), where this Court enunciated a non-exhaustive list of factors for courts to examine in assessing whether probable cause existed in situations where police observe a commercial street transaction of an unknown item. In the view of the dissenters, an officer's experience is not a factor to be included in the probable cause formula, but rather it serves only as a "lens through which to view [the Lawson] factors." Dunlap, 846 A.2d at 679 (emphasis added). Indeed, the dissent would find that "the officer's experience governs the manner of examination called for by Lawson, but cannot *of itself* rise to probable cause. Thus, it is the totality of the circumstances, especially those six factors identified in Lawson, as *perceived* by an officer (not a layperson) that we must consider." Id. (emphasis in original). Utilizing this framework, the dissent, citing Banks, would have found probable cause to be lacking.

We begin our discussion with the relevance of police training and experience to the probable cause determination. "To be constitutionally valid, an arrest must be based on probable cause." Commonwealth v. Dickerson, 468 Pa. 599, 605, 364 A.2d 677, 680 (1975); United States Const., Amend. IV.[1] The existence or non-existence of probable

[1]The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

cause is determined by the totality of the circumstances. Commonwealth v. Clark, 558 Pa. 157, 164, 735 A.2d 1248, 1252 (1999) (citing Illinois v. Gates, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329 (1983), and Commonwealth v. Evans, 546 Pa. 417, 422, 685 A.2d 535, 537 (1996) (Opinion Announcing the Judgment of the Court)). The totality of the circumstances test requires a Court to determine whether "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." Commonwealth v. Rodriguez, 526 Pa. 268, 272-73, 585 A.2d 988, 990 (1991).

Our decision in Lawson is particularly important here as it set forth the relevant factors to be considered in situations such as the one presented in this case.[2] In that case, police officers observed Mr. Lawson and his wife standing on a street corner at 11:50 p.m. Lawson, 454 Pa. at 25, 309 A.2d at 392. They watched using binoculars, and at least one officer used high powered day and night binoculars. Id. at 25, 309 A.2d at 393. The officers observed three separate transactions occur. In each transaction, a third person approached and handed money to Lawson. Lawson would then walk to his wife, who would retrieve a small sack from her bosom. Lawson's wife would then take a small item from the sack and hand it to Lawson, who would in turn hand it to the third person. Id. After observing the third transaction conducted in this manner, the police approached the

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[2] While Lawson was decided prior to Gates and our subsequent adoption of the totality of the circumstances test, we nonetheless applied a totality of the circumstances test to evaluate whether probable cause existed. See Lawson, supra. We have never overruled Lawson, and, while the case was decided over thirty years ago, it remains viable precedent.

Lawsons, who fled into a local bar where they were soon apprehended. Id. at 26, 309 A.2d at 393. In determining that probable cause existed to arrest the Lawsons, we indicated:

> All the detailed facts and circumstances must be considered. The time is important; the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where small items were kept by one of the sellers is important; the movements and manners of the parties are important.

Id. at 28, 309 A.2d at 394. This list is not, nor did this Court ever intend it to be, exhaustive. Rather, it offers an illustration of the types of factors properly considered in assessing the existence of probable cause. Nonetheless, the absence of police training and experience from this list is notable.

Since Lawson, we have never formally recognized an officer's training and experience, *without more*, as a factor -- in the Lawson sense -- for purposes of the totality of the circumstances test. Instead, we have utilized officer training and experience as an aid in assessing the Lawson factors. As mentioned, we review probable cause pursuant to the totality of the circumstances test. In conjunction, we have long held that in applying this test to warrantless arrests, probable cause ". . . is to be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his training and experience." Commonwealth v. Norwood, 456 Pa. 330, 334, 319 A.2d 908, 910 (1974) (emphasis added); See also Clark, 558 Pa. at 165, 735 A.2d at 1252; Banks, 540 Pa. at 458, 658 A.2d at 754; and Evans, 546 Pa. at 423, 685 A.2d at 423. Thus, we hold that police training and experience, *without more*, is not a fact to be added to the quantum of evidence to determine if probable cause exists, but rather a "lens" through which courts view the quantum of evidence observed at the scene. We do not seek to minimize the experience gained through years serving on the police force. Quite to the contrary, we recognize that many officers, particularly those with specialized training, are able to recognize trends and methods in the commission of various crimes. For instance,

an officer who has specialized in drug crimes may be more suspicious that a package contains illegal narcotics because of the form of packaging used to conceal those drugs. See Evans, infra. He or she may recognize criminal activity where a non-police citizen may not. However, a court cannot simply conclude that probable cause existed based upon nothing more than the number of years an officer has spent on the force. Rather, the officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence. By doing so, a court aware of, informed by, and viewing the evidence as the officer in question, aided in assessing his observations by his experience, may properly conclude that probable cause existed. This is true even where the court may have been unable to perceive the existence of probable cause had the court viewed the same evidence through the eyes of a reasonable citizen untrained in law enforcement.

For instance, in Evans, we found the investigating officer's experience particularly relevant in upholding a warrantless arrest. The officer there signaled Evans to pull his vehicle to the side of the road. Rather than doing so, Evans attempted to pull away, an effort that was thwarted when the officer blocked the vehicle with his police cruiser. Evans then exited his vehicle and walked towards the back of it. The officer approached and ordered Evans to produce some identification and registration for the vehicle. Evans moved back towards the front of the car in a suspicious manner, causing the officer to follow him. At this point, the officer looked over Evans' shoulder and observed an object protruding from under the driver's seat, which the officer believed to contain narcotics. The object was packaged in a way that the officer knew to be common in drug trafficking. The officer's belief was based on his thirteen years of experience and approximately fifty observations of narcotics being bundled in a similar manner. Evans, 546 Pa. at 420-21, 685 A.2d 535.

In Evans, Justice Cappy, now Chief Justice, in this Opinion Announcing the Judgment of the Court, would have ruled that probable cause existed to seize the

package. Justice Cappy's opinion explained that the officer's experience was relevant to the probable cause determination. However, it was the officer's experience in identifying commonly used forms of narcotics packaging that was relevant, not simply that he was on the force for thirteen years. Id. at 426, 685 A.2d at 539. This finding of the nexus between facts observed and officer experience, is in accord with the holding we announce today. In the Evans Opinion Announcing the Judgment of the Court, probable cause existed, not simply because an officer with thirteen years of experience made the arrest, as the Superior Court in effect held in the case sub judice. Rather, it was due to the officer's thirteen years of experience that he could identify that drugs were packaged in such a manner and that is what was important. In other words, the officer's experience informed the officer's conclusion that the packaging in question was indicative of illegal drug trafficking, the crime suspected.

To be clear, we hold that, in reviewing probable cause, a police officer's training and experience is not a probable cause factor in the Lawson sense. If that were the case, the concept of probable cause as a constitutional barrier between the privacy of the citizen and unwarranted governmental intrusions would be undermined by an officer's ability to bootstrap a hunch based on constitutionally insufficient objective evidence simply by adverting to his experience as the foundation of his suspicion. While probable cause is a fluid concept, and requires only a showing that criminal activity may be reasonably inferred from a set of circumstances and need not be shown to, in fact, exist, Commonwealth v. Weidenmoyer, 518 Pa. 2, 13, 539 A.2d 1291, 1297 (1988), we must nonetheless remain true to its purposes, one of which is protecting citizens from arbitrary police intrusions. If we were to conclude that a police officer's experience was a factor to be added to every probable cause determination, rather than serve as a lens through which to view the facts, then every time an experienced officer begins a shift, probable cause begins to be assessed against all citizens every time they fall under the watchful eye of a suspicious

officer who has been on the job for a meaningful period of time. The danger of this, of course, is the potential for innocent citizens being unlawfully seized and/or searched, i.e., being searched or seized with less than probable cause.

For these reasons, we conclude that the Superior Court erred in this case by adding Officer Devlin's training and experience, as though it were a stand-alone factor, to the tally prescribed by Lawson. For the reasons that follow, and in light of our cases in this area, we are compelled to conclude that probable cause did not exist to support the warrantless arrest here, even viewing the facts and circumstances through the eyes of a trained officer. Thus, we find that the arrest and subsequent search of Appellant was unconstitutional.

We begin by reaffirming the premise that "every commercial transaction between citizens on a street corner when unidentified property is involved does not give rise to probable cause . . . ." Lawson, 454 Pa. at 29, 309 A.2d at 394. First, we find that this case is immediately distinguishable from Lawson. In that case, officers observed three separate transactions. In each transaction, a random individual would approach Lawson and hand him currency. Lawson would then retreat to where his wife was located and retrieve an object, which he would then hand to the purchaser. Id. at 25-26, 309 A.2d at 392-93. After observing the multiple transactions, the officers became suspicious and approached the Lawsons. They, undoubtedly fearing apprehension, fled into a local bar. Id. In the case at bar, Officer Devlin observed only a single transaction, not multiple, complex transactions like in Lawson. Additionally, Appellant made no attempt to flee upon police intervention as Lawson and his wife did.

This case is more analogous to Banks than it is to Lawson. In Banks, a marked police unit observed Banks standing on a Philadelphia street corner. As an unknown female approached, Banks reached into his pocket and retrieved an unknown object and handed it to the female. She, in turn, handed cash to Banks. As the police car

approached, Banks fled but was apprehended very shortly thereafter. Banks was searched resulting in the recovery of cocaine. Banks, 540 Pa. at 454, 658 A.2d at 752.

We expressly noted that Banks was not a case where "a trained narcotics officer observed either drugs or containers commonly known to hold drugs being exchanged," where "police observed multiple, complex, suspicious transactions," or where a "police officer was responding to a citizen's complaint or to an informant's tip." Id. (citations omitted). Rather, the case consisted simply of a commercial street transaction of an unknown object between citizens, coupled with flight.

After acknowledging that flight alone was insufficient to constitute probable cause, see Commonwealth v. Jeffries, 454 Pa. 320, 311 A.2d 914 (1973), we nonetheless recognized that flight coupled with additional facts may establish sufficient probable cause. However, we held that Banks was not such a case:

> [T]he additional factors here do not by themselves "point to guilt." We find that mere police observation of an exchange of an unidentified item or items on a public street corner for cash (which alone does not establish probable cause) cannot be added to, or melded with the fact that flight (which alone does not establish probable cause to arrest) to constitute probable cause to arrest. Such facts, even when considered together, fall narrowly short of establishing probable cause.

Banks, 540 Pa. at 456, 658 A.2d at 753 (emphasis added).

Similarly, this Court's non-precedential but nonetheless persuasive decision in Commonwealth v. Greber, 478 Pa. 63, 385 A.2d 1313 (1978) (Opinion Announcing the Judgment of the Court), supports reversal. In Greber, an officer set up surveillance from a building where he could observe the parking lot of a bowling alley in Mt. Lebanon, Pennsylvania. The officer characterized this neighborhood as a "high crime area." Greber, 478 Pa. at 65, 385 A.2d at 1315. Around 10:20 p.m., the officer observed a juvenile making several trips to the parking lot of the bowling alley. Eventually, a car entered the lot

and was approached by the juvenile. An occupant of the car handed a bag out of the window to the juvenile, who promptly smelled the bag and placed it at his feet. He pulled out what appeared to be a wallet. The officer testified that at that point he could see the flash of a bill or bills. The juvenile retrieved the bag from his feet and headed back towards the entrance to the bowling alley. Id. at 66, 385 A.2d at 1315.

In Greber, the officer admitted that the juvenile's activity did not appear to be criminal. However, he noted that it was common for drug purchasers to sniff the items during the sale. He testified that he assumed that a drug sale had just occurred. Shortly thereafter, the juvenile and the occupants of the vehicle were arrested. Marijuana was found in the bag that was handed to the juvenile. A search warrant was obtained for the car, which revealed a scale and half of a kilogram of marijuana. Id. at 67, 385 A.2d at 1315-16.

The Commonwealth conceded that probable cause was lacking, but contended that the evidence was nonetheless admissible under a Terry stop[3] analysis as the officer had reasonable suspicion that criminal activity was afoot. This Court agreed that probable cause was lacking under the Fourth Amendment, but also rejected the Commonwealth's reasonable suspicion argument. We cited the Lawson principle that every commercial transaction between citizens does not give rise to probable cause, and held that it applied to the case even though the Court was reviewing the facts for reasonable suspicion. The

[3] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). We recognize that the Greber decision was focused primarily on reasonable suspicion, rather than probable cause and that the lead analysis did not garner a majority. The disagreement among the members of this Court centered on whether reasonable suspicion existed to believe that a street drug transaction was occurring. The Commonwealth conceded, and this Court easily concluded, that probable cause, a higher legal standard than reasonable suspicion, was absent. As such, we find Greber persuasive on the instant probable cause determination in the street drug transaction scenario.

facts, we held, were different from Lawson because what occurred was "one isolated transaction, not a series of transactions which, under certain circumstances might indicate that an exchange of drugs was taking place." Greber, 478 Pa. at 68, 385 A.2d at 1316. Further, we found it critical that the officer had no prior information that a drug transaction was about to occur. The officer's observations amounted to nothing more than a hunch that illegal activity was taking place, which does not rise to the level of probable cause or reasonable suspicion that criminal activity was afoot. Id.

The search at issue here meets the same ineluctable fate as those in Banks and Greber: the evidence must be suppressed and the conviction reversed. Here, Officer Devlin observed a single, isolated transaction. The transaction occurred in what Officer Devlin claimed was a high crime area, a Lawson factor, which in and of itself does not give rise to probable cause. Based on this limited information, the officer's actions were based only on mere suspicion, not probable cause. It is well-settled that mere suspicion alone will not support a finding of probable cause. Commonwealth v. Kelly, 487 Pa. 174, 178, 409 A.2d 21, 23 (1979). This is not a case where the officer had prior reason to expect that Appellant was involved in drug activity or was tipped off by an informant that a drug transaction was set to occur. The officer observed nothing that he could identify as narcotics, or even narcotics paraphernalia. Moreover, in Banks, we found that a similar transaction fell narrowly short of probable cause, even coupled with flight. In this case, Appellant did not even attempt to flee. Accordingly, if probable cause was absent in Banks with flight, it must certainly be absent here as well.

Even as we view the circumstances from the perspective of a reasonable, experienced police officer, as we must for the reasons detailed above, probable cause

remains absent. Because there was no probable cause to arrest and search Appellant, we reverse.[4]

Mr. Chief Justice Cappy and Messrs. Justice Baer and Fitzgerald join the opinion.

Mr. Justice Saylor files a concurring opinion in which Mr. Chief Justice Cappy and Mr. Justice Fitzgerald join.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion.

[4] Because we reverse this case in favor of the Appellant, we need not reach the other issue presented in his appeal, which is whether this Court's per curiam decisions reversing orders denying suppression motions, where Banks is cited as the basis for reversal, have precedential value.