

[J-107-98]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 141 M.D. Appeal Dkt. 1997
	:	
Appellant	:	
	:	Appeal from the Order of Superior Court
	:	dated 4/10/97 at 2338 PHL 1996 vacating
v.	:	the order dated 6/13/96 at No. 936
	:	Criminal 1995 and remanding to the Court
	:	of Common Pleas of Monroe County
BELISARIO POLO,	:	
	:	
Appellee	:	Argued: April 29, 1998

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: October 2, 2000

I join in the majority's disposition, as I believe that the seizure of contraband from Appellee's bag was tainted by an illegal detention under Fourth Amendment jurisprudence. In this regard, the applicable test, set forth in Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991), is whether, in the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. Id. at 439, 111 S. Ct. at 2389.¹ Regardless of the ostensible consent of a bus driver, I believe that there

¹ Generally, the test to determine whether a seizure has occurred under the Fourth Amendment entails consideration of whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave. See Commonwealth v. Strickler, ___ Pa. ___, ___, 757 A.2d 884, 889 (2000). The United States Supreme Court, however, has devised the above, modified analysis for application in circumstances in which factors independent of police conduct restrict a subject's freedom of movement, such as when the person is a passenger on a bus.

are sufficient indicia of coercion present -- the interruption of the normal activity of a commercial bus by removing it from the stream of traffic at a highway tollbooth, boarding of the bus by law enforcement officers, searching through passenger tickets and questioning of occupants without advising them that they are free to decline consent -- to cause a reasonable person to believe that he was not free to refuse consent or otherwise terminate the encounter. Accord United States v. Cuevas-Ceja, 58 F. Supp. 2d 1175, 1187-88 (D. Ore. 1999). But see United States v. Hernandez-Zuniga, 215 F.3d 483, 488-89 (5th Cir. 2000), cert. pending, No. 00-5362 (Jul. 24, 2000).² Since the Pennsylvania Constitution guarantees at least as much protection as is available under the United States Constitution, I do not see a need to depart from the federal construct in this case. Significantly, Appellee did not provide an analysis under Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991), that would justify a departure from the prevailing totality-of-the-circumstances analysis or develop empirical evidence of record concerning additional considerations that may be relevant to the

² The majority's approach diverges from the federal constitutional analysis in several respects. First, its initial focus is upon the officers' subjective purpose for the stop (drug interdiction); whereas, the United States Supreme Court has maintained that such motivations are generally irrelevant to the determination of whether a seizure has occurred. See Ohio v. Robinette, 519 U.S. 33, 38, 117 S. Ct. 417, 420 (1996)(citing Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996)). Additionally, the majority's assessment hinges upon the vehicle stop alone, without a totality assessment concerning its impact upon a reasonable passenger's perceptions. It is unclear, however, whether federal jurisprudence would always foreclose an encounter which entails the stopping of a vehicle on a consensual basis, even where the police have the ability to communicate with the driver to obtain his consent without employing coercive means. See generally Hernandez-Zuniga, 215 F.3d at 488-89 (holding that a warrantless stop of a bus was reasonable, in light of the bus company's consent to random stops). Indeed, the majority's approach seems tantamount to application of a per se rule, which has been eschewed by the United States Supreme Court in the Fourth Amendment context. See, e.g., Bostick, 501 U.S. at 437-38, 111 S. Ct. at 2388; see also Robinette, 519 U.S. at 39, 117 S. Ct. at 421.

imposition of a per se rule. Cf. Strickler, ___ Pa. at ___ & n.28, 757 A.2d at 902 & n.28. Under such circumstances, the Court has in the past deferred consideration of expanded protections under the Pennsylvania Constitution, see, e.g., id., and I would do likewise in this case.

Mr. Justice Castille joins this concurring and dissenting opinion.