[J-107-98]

THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 0141 M.D. Appeal Docket 1997
v.	:	Appeal from the Order of Superior Court dated April 10, 1997 at 2338PHL96 vacating the Order dated June 13, 1996 at
BELISARIO POLO, Appellee	:	No. 936 Criminal 1995 and remanding to the Court of Common Pleas of Monroe County
	:	ARGUED: April 29, 1998

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: October 2, 2000**

I respectfully dissent because I believe that the Pennsylvania Constitutional claims are not properly before us and the encounter at issue here did not violate Appellee's Fourth Amendment rights. Although Appellee Polo challenged the questioning by the police based on Pennsylvania Constitutional grounds in his appeal to the Superior Court, he did not provide a separate argument. Because the Superior Court concluded that he was entitled to relief based on the Fourth Amendment of the United States Constitution, it did not reach the Pennsylvania Constitutional claim. The Commonwealth is the Appellant in the current appeal and did not address or raise the Pennsylvania Constitutional issue in its statement of the questions involved or statement of the case. Pa. R. App. P. 2111. Polo did not add a counter-statement of the questions involved or a counter-statement of the case; he did not focus on the

Pennsylvania claims in his brief, and did not file a cross-appeal to preserve the Pennsylvania claim. Rule of Appellate Procedure 2112 provides that "unless the appellee does so … it will be assumed the appellee is satisfied with [the issues presented by the Appellant], or with such parts of them as remain unchallenged." Id. Accordingly, we should decide this case strictly on Fourth Amendment grounds.[1]

Applying Fourth Amendment jurisprudence here, I cannot discern any basis to support the Superior Court's reversal of the trial court. In reviewing a suppression ruling, we first decide whether the record supports the factual findings. Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, cert. denied, 474 U.S. 950 (1985). Where the defendant appeals the denial of suppression, we consider only the prosecution's evidence and that portion of the defendant's evidence that, when read in context of the record as a whole, remains uncontradicted. Id. We are bound by the facts that the record supports and we may only reverse if the legal conclusions that the suppression court drew from them are in error. Id. Agent Paret was the only witness to testify at the suppression hearing. Because the facts of the case are not in dispute here, we now turn to whether the trial court reached the correct conclusion of law.

The Fourth Amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . ." This amendment protects against unreasonable searches and seizures but does not prohibit every encounter between police and citizens. Police officers are permitted "to

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[1] In footnote two, the majority contends that Appellee preserved his Pennsylvania constitutional claim because he raised the issue before the Superior Court, and therefore it is appropriate for this Court to review the issue. My criticism, however, is that regardless of whether an issue has been preserved, we should nevertheless limit our review to the issue for which we granted the Commonwealth's Petition for Allowance of Appeal -- namely, whether the Superior Court correctly decided this case on Fourth Amendment grounds.

approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate." Florida v. Bostick, 501 U.S. 429, 431 (1991). It is only when the officer, through physical force or a show of authority, restrains the liberty of the citizen that a seizure occurs. Terry v. Ohio, 392 U.S. 1, 20 n. 16 (1968). As long as the police do not imply that compliance is required, they are permitted to ask general questions, to request to see identification, and even to request consent to search baggage. See Florida v. Bostick, supra; INS v. Delgado, 466 U.S. 210 (1984).

In Florida v. Bostick, a case factually similar to the present case, two officers boarded a bus bound for Atlanta from Miami during a scheduled stopover in Fort Lauderdale. The officers donned badges and one was holding a recognizable zipper pouch containing a pistol. They randomly, without articulable suspicion, asked Terrance Bostick to see his ticket and identification. After inspecting both, they returned them to Bostick. The officers explained that they were narcotics agents looking for illegal drugs and requested consent to search Bostick's bags but informed him that he could refuse. Bostick consented and the officers found cocaine in the bag. Bostick, 501 U.S. at 431-32. He was charged with trafficking in cocaine and moved to suppress the cocaine claiming the seizure violated his Fourth Amendment rights. The trial court denied his suppression motion. Id. at 432. Bostick then plead guilty, although he reserved the right to appeal the denial of his suppression motion. Id.

The Florida District Court of Appeals affirmed, however it certified the question to the Florida Supreme Court, which reversed. Id. at 432-33. The Florida high court concluded that a reasonable person in Bostick's situation would not have felt free to leave the bus. Id. at 433. In so concluding, it set forth a per se rule that "'an

impermissible seizure result[s] when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage.'" Id. (quoting Florida v. Bostick, 554 So.2d 1153 (Fla. 1989)).

The United States Supreme Court rejected this per se rule based on a Fourth Amendment analysis and remanded the case to the Florida court to apply the correct legal standard. Initially, the Court noted that "[t]here is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure." Bostick, 501 U.S. at 434. The Court therefore looked at the effect of the location of the encounter on the determination of whether a seizure took place. In this regard, the Court declined to apply the "free to leave" test[2] and instead stated the following:

> The state court erred, however, in focusing on whether Bostick was "free to leave" rather than on the principle that those words were intended to capture. When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.
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> Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his

[2] The test previously applied was whether a reasonable person in the citizen's position would have felt free to leave. Michigan v. Chesternut, 486 U.S. 567, 573 (1979).

> decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

Id. at 435-36. Bostick's "freedom of movement" was a result of a factor independent of the police action, therefore, it was only one of many factors to be considered in the determination of whether a seizure took place. The appropriate inquiry to reach this determination is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Id. at 437.

Thus here, contrary to the Superior Court's holding, the single fact that the officers asked the driver of the bus if he would pull the bus to the side of the road once he cleared the tollbooth could not alone constitute a seizure of the entire bus and its passengers. Bostick. The location of the bus is but one factor to consider within the totality of the circumstances. Id. Other relevant factors include the number of officers present, the display of weapons, physical touching of the citizen, the officer's tone of voice, and the questions asked. Id. There is no indication in the case sub judice that the officers displayed their weapons, physically touched Polo, or that they spoke to him, or the other passengers, in a way that would convey to the reasonable person that he or she was compelled to answer questions and comply with requests. Furthermore, the officers did not request to search Polo's bag until after they had questioned all other passengers. Thus, they dispelled any suggestion that Polo was being singled out from the other passengers. It was only after Polo voluntarily claimed possession of the bag that the officers requested consent to search it. Polo freely gave his consent. The fact that the officers boarded the bus while it was temporarily stopped at a tollbooth does not, by itself, render this encounter a seizure. The officers were in a place where they

were lawfully permitted to be, and they did not engage in any coercive or threatening behavior.

Accordingly, I agree with the trial court that a reasonable person in Polo's position would have felt free to decline to answer the officers' questions. No seizure in violation of the Fourth Amendment occurred; therefore, the officers did not need reasonable suspicion that criminal activity was afoot.[3] Accordingly, I would reverse the Order of the Superior Court and reinstate the conviction and judgment of sentence.

[3] I note that the recent decision in Bond v. United States, 120 S.Ct. 1462 (2000) does not change the analysis. In that case, a border patrol agent boarded a bus to check immigration status of passengers. As the agent walked off the bus, he squeezed soft-sided luggage placed in the overhead storage compartment and detected a brick-like substance. The passenger, at the agent's request, consented to a search of the bag. The material turned out to be drugs. The issue certified to the United States Supreme Court was whether the agent's tactile manipulation of the passenger's bag, without consent, was an unreasonable search. The Supreme Court held that it was, rejecting the government's contention that the passenger had lost any expectation of privacy in the bag because it was exposed to the public. Unlike the matter before us now, there was no argument in Bond that the defendant's consent to the search was a basis for admitting the evidence, and there was no argument that Florida v. Bostick was inapplicable.