[J-165-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 108 W.D. Appeal Docket 1997
	:	
Appellee,	:	Appeal from the Order of the Superior
	:	Court entered on June 24, 1997 at No.
	:	1524PGH96, reversing the Order of the
v.	:	Court of Common Pleas of Erie County,
	:	Criminal Division, entered July 24, 1996 at
	:	No. 541 of 1996.
PHILLIP A. CLARK,	:	
	:	
Appellant.	:	
	:	ARGUED: September 16, 1998
	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: AUGUST 17, 1999**

I respectfully dissent from the majority's decision that the warrantless search of appellant was unlawful thereby resulting in the suppression of the fruits of that search. Appellant was apprehended by police after he was observed on a darkened driveway, in the early morning hours, shining a flashlight into a car that he did not own, which was parked on a private residential property that he did not own. The only reasonable inference that can possibly be drawn from appellant's conduct is that he and his co-conspirator were attempting to steal the car in question or items within the car. The law is abundantly clear that a police officer has the same right to arrest a suspect without a warrant for any grade of theft as exists for the commission of a felony. 18 Pa.C.S. § 3904. Because the police

could reasonably have concluded in this case that appellant and his co-conspirator were attempting a theft, a warrantless arrest was lawful.

A warrantless arrest is appropriate where probable cause exists, which is determined by the totality of the circumstances test. Illinois v. Gates, 462 U.S. 213 (1983). 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).

Here, the arresting officer responded to a radio dispatch that a suspect who had been observed earlier shining a flashlight into a car parked in the owner's driveway and whose description appellant matched was approaching the 600 block of East 21st Street. The officer drove to the 600 block and at first saw no one, but then appellant suddenly emerged from between two houses, slowing from a run to a walk. I believe that the totality of these circumstances clearly gave the officer probable cause to believe that appellant had been in the process of attempting to commit the crime of theft. Thus, pursuant to 18 Pa.C.S. § 3904, the officer acted within his authority in arresting appellant without a warrant and conducting a search incident to a lawful arrest. See Commonwealth v. Gwynn, 555 Pa. 86, --, 723 A.2d 143, 149 (1998) (stop and search of appellant proper where appellant was seen four times in short time period with a knapsack with something sticking out of it by a police officer in a high crime area where a burglary had been reported resulting in a reasonable conclusion that crime was afoot).

The majority asserts that this factual situation is not sufficient to establish probable cause for appellant's arrest. Certainly, any person of "reasonable caution" would conclude that appellant was in the process of committing either a theft of the vehicle itself (a third degree felony) or the theft of the contents of the vehicle. The law is clear that the

commission of a crime includes the preparation to commit the crime, all steps toward the commission of the crime, the actual commission of the crime and flight following commission of the crime. Here, the conduct of appellant and his co-conspirator can hardly be deemed innocent conduct. I fail to see why it is unreasonable to conclude that two persons, unknown to the potential victim, who enter upon private residential property in the dead of the night with no license or permission to do so and who shine a flashlight into the interior of a private vehicle obviously looking for the keys to the vehicle or for items of value in the vehicle and who take flight at the arrival of a police cruiser are not, as the majority concludes, taking a substantial step towards the commission of a theft crime? There is, beyond peradventure, no lawful or salutary purpose that can be associated with the conduct in question or the subsequent flight from the authorities upon their arrival.

Notwithstanding this failure on the part of the majority to link this conduct to criminal activity, the majority further fails to realize the practical problems associated with its suppression of the evidence. The majority would have the police officers in this situation who are called to a darkened scene by a concerned citizen first seek an arrest warrant before seizing a person such as the appellant. The difficulty arising from this requirement is as to just who will be named in this arrest warrant and just what becomes of the detainee while the police are seeking this warrant. The "who" can only be ascertained after detention of the suspect by the police officers, an act which the majority would conclude to be unlawful. However, once appellant is detained by the police in this situation, his freedom of movement is curtailed and he can be considered arrested. Since appellant is now arrested, what logical purpose is there in obtaining an arrest warrant? Would an arrest warrant somehow absolve the original arrest of the illegality which the majority perceives?

Under the circumstances of this matter, police are placed on the horns of an unsolvable dilemma. On the one hand, if the officers act efficiently and prevent a crime

from occurring, they risk suppression of potentially relevant evidence.[1] On the other hand, under the majority's reasoning, the officers would have to allow the crime to develop to full fruition in order to lawfully seize potential evidence such as stolen property following the commission of the theft. Either scenario is fraught with negative consequences -- either the evidence is suppressed, or the crime is permitted to be culminated under the watchful eye of the police. Neither result should be condoned by this Court.

Accordingly, I agree with the position espoused by Judge Eakin of the Superior Court that the suppression court erred in suppressing the fruits of the search. Even though the charges that were ultimately filed against appellant were for a misdemeanor, that does not mean that the arresting officer lacked probable cause to believe that appellant was involved in the act of attempting to commit the crime of theft for which no warrant of arrest is required. Accordingly, I would affirm the decision of the Superior Court on this basis.

Madame Justice Newman joins this dissenting opinion.

[1] Even though the seizure here involved cocaine, it could just as easily have involved stolen items, burglary tools or a weapon.