[J-256-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 98 M.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, dated December 31, 1997, at No.
	:	248 Harrisburg 1997, affirming the Order
v.	:	of the Court of Common Pleas of Dauphin
	:	County, dated February 13, 1997, at Nos.
	:	3055 and 3055(a) C.D. 1995
GREGORY SPENCER COOK,	:	
	:	--- A.2d --- (Pa. Super. 1997)
Appellant	:	
	:	ARGUED: November 19, 1998

DISSENTING OPINION

MR. JUSTICE ZAPPALA **DECIDED: JULY 23, 1999**

Because I can discern no meaningful distinction between the facts of this case and those of Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996), I respectfully dissent.

In accordance with the protections afforded our citizens under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, there are only two situations where police may “seize” an individual. Both require a showing of antecedent justification: first, an arrest based upon probable cause, Commonwealth v. Duncan, 525 A.2d 1177 (Pa. 1987); second, an investigatory detention based upon reasonable suspicion, Terry v. Ohio, 392 U.S. 1 (1968), *accord* Commonwealth v. Hicks, 253 A.2d 276 (Pa. 1969). An investigatory detention is justified only if the "police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot ...." Terry, 392 U.S. at 30.

Matos involved three consolidated appeals. As aptly summarized by the majority, "in all three factual scenarios involved in the Matos decision, the police had no reason, other than the appellants' flight, to suspect that criminal activity was afoot." (Majority Op. at 9).[1] This Court concluded that under such circumstances, the officers possessed neither probable cause nor reasonable suspicion to justify a seizure. Accordingly, we held that the contraband discarded by the Matos appellants as they were fleeing from police officers had to be suppressed as the "fruit" of an illegal seizure.

The Majority attempts to distinguish Matos from the instant case based on the existence of an additional factor not present in Matos; that is, that "the police made firsthand observations of suspicious conduct before approaching [Appellant]." (Majority Op. at 9). However, this supposedly "suspicious conduct" was in reality nothing more than a speculation that an unidentified item was being exchanged in a high crime area. As summarized by the trial court:

> The officers testified that while traveling east on Market Street, in an unmarked gray Ford Thunderbird, they noticed three individuals standing on the northwest corner of Fourteenth and Market Streets,[fn2] engaged in conversation. (N.T. 16). Further testimony established that as the officers proceeded past the gathering at a "very, very slow rate," they observed [Appellant] take his left hand out of his front pocket in a fist position and reach toward one of the other individuals present on the corner. (N.T. 16-17). Acknowledging this gesture, that individual reached out to [Appellant] and attempted to receive the item from his hand.[fn3] To further investigate this conduct, Officer Heffner, the driver of the vehicle, made a U-turn at the intersection and drove up to the area where the individuals were congregating. (N.T. 43). The instant [Appellant] spotted the vehicle and the officers, he brought his hand abruptly back into his pocket and started to

[1] In the lead case of Commonwealth v. Danny Matos, the police officers encountered the appellant while responding to a "radio broadcast that unknown persons were selling narcotics in the vicinity of Reese Street," whereas in the companion cases of Commonwealth v. Andrew McFadden and Commonwealth v. Richard Carrol, the police ecountered the appellants while on routine patrol. Matos, 672 A.2d at 770-771.

> back away from the group. (N.T. 19). Responding to this suspicious action, Officer Juba exited the vehicle and identified himself as a Harrisburg Police Officer. (N.T. 19). As the officer approached, [Appellant] immediately began running in "almost a dead sprint." (N.T. 39).
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> [fn2] At the hearing, Officer Juba affirmed that "14th and Market is a high drug trafficking area." (N.T. 17). In addition, he noted that there had been prior drug complaints and arrests on the specific corner at issue. (N.T. 17).
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> [fn3] Neither Officer identified the item in Mr. Cook's hand. (N.T. 25, 32).

(Trial Ct. Op. at 1-3). Thus, the officers did not observe what, if anything, was in Appellant's hand as it was outstretched toward another individual present on the corner of Market and 14th Streets, nor did they observe an exchange of any kind actually take place.

Based on my reading of the facts of this case, it was unreasonable for Officers Juba and Heffner to attempt to subject Appellant to an investigatory detention. The possible attempted exchange of an unidentified object in a "high crime area," coupled with Appellant's nervous behavior and flight in response to the appearance of uniformed police officers, provides no reasonable basis for the officers to believe that Appellant might have been engaged in the illegal sale of narcotics. These factors, whether considered separately or in the aggregate, do not establish reasonable suspicion of criminal conduct. Officers Juba and Heffner approached Appellant merely on the basis of an unsupported hunch that Appellant was involved in narcotics trafficking.

As the police officers possessed insufficient antecedent justification to lawfully subject Appellant to an investigatory detention, Appellant's flight and abandonment of contraband during the officers' subsequent pursuit must be interpreted as a coerced abandonment pursuant to this Court's decision in Matos. Appellant's suppression motion should have therefore been granted. Accordingly, I dissent and would reverse the order of the Superior Court.