

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1241-2017
 :
 HAFIZ AR-RAHMAN MALEK-EL : Omnibus Pretrial Motion
 Defendant : (Motion to Suppress)

OPINION AND ORDER

The defendant is charged by Information filed on August 4, 2017, with possession with intent to deliver a controlled substance, criminal use of a communications facility and related charges.

According to the testimony presented at a September 28, 2017 hearing on a motion to suppress that was filed by the defendant, on July 1, 2017, at approximately 3:30 in the afternoon, Officer Clinton Gardner of the Williamsport Bureau of Police was patrolling the area of Little League Boulevard and Campbell Street in the city of Williamsport.

Officer Gardner has been employed as a police officer with Williamsport for approximately two years. He has training and experience in narcotics investigations, interdiction, arrests and prosecutions.

He described the area in which he was patrolling as a “high narcotics traffic area.” He specifically noted that he handled many arrests in that particular area of the city and in the last month prior to July 1, 2017, he was involved in three felony narcotics arrests in that particular area of the city.

He was patrolling the area in an unmarked patrol unit but in full uniform. He was stopped at the intersection of Little League Boulevard and Campbell Street facing west.

He noticed a black male with dreadlocks, later identified as the defendant, walking north on Campbell Street toward Memorial Avenue. The defendant was talking on the phone while walking north toward Memorial Avenue. While the defendant was walking, he looked back at Officer Gardner two or three times in a span of 30 seconds. Officer Gardner could not say whether the defendant made eye contact with him; just that the defendant was looking in the direction of the unmarked police vehicle. Officer Gardner could also not say how much he was visible to the defendant except that he believed that an individual could look through the front windshield of the undercover vehicle and recognize that Officer Gardner “was a cop.” He also indicated that because there are only two undercover vehicles utilized in the city, most of them are likely known by drug dealers.

The defendant continued walking north on Campbell and then started walking west on Memorial Avenue while still talking on the phone. Due to what Officer Gardner concluded was suspicious behavior being conducted in the high narcotics trafficking area, Officer Gardner decided to investigate further.

Accordingly, Officer Gardner drove north on Campbell Street past Memorial Avenue losing sight of the defendant. Officer Gardner turned west onto Park Place and drove to the intersection of Park Place and First Avenue. He then parked his unit on First Avenue near the intersection of Park Place facing south.

Officer Gardner soon noticed the defendant walking north on First Avenue toward where Officer Gardner was parked. According to Officer Gardner, the defendant “looked up and saw” him. The defendant then “doubled back” toward Memorial Avenue and

while doing so “got back on his cell phone.”

Officer Gardner remained stationary for approximately thirty seconds to a minute. He observed the defendant walk back to Memorial Avenue and then head west. Officer Gardner then moved his unit from First Avenue to Memorial Avenue traveling in a westerly direction on Memorial.

He observed the defendant enter into a red sedan on the front passenger area. The vehicle pulled out “pretty quickly.” The red sedan was “already parked” when the defendant got in. The defendant was not on his phone as he got into the car.

It took Officer Gardner “a little bit at first” to catch up with the red sedan but by the intersection of Memorial Avenue and Fourth Avenue, he was directly behind the red sedan. Officer Gardner was approximately one-vehicle length “or so” behind it.

He noticed that there was a white female in the rear passenger seat. This passenger looked back toward Officer Gardner and then looked forward. She looked back again and appeared to be “surprised.” Her eyes “got big” and she appeared to be talking to the others in the front of the vehicle.

Based on his observations, Officer Gardner decided to stop the vehicle for a further narcotics investigation. He initiated the stop because the activity occurred in a high narcotics trafficking area. He had personally been involved in drug interdictions in that particular area in the recent past. He believed the individuals were coordinating a drug transaction via the phone, because the defendant kept looking back toward the officer when the defendant was walking north on Campbell Street toward Memorial Avenue; when the

defendant saw the officer parked on First Avenue, he doubled back onto Memorial Avenue while getting back on the phone; the defendant entered a vehicle which soon pulled out; the officer was aware of this method as being utilized to traffick drugs; and the passenger looked surprised and appeared to be talking to the others in the front as soon as she looked back at the officer.

When Officer Gardner activated his lights and siren, the vehicle immediately pulled over on the north side of the roadway just east of Fourth Avenue. As soon as the vehicle stopped, the defendant jumped out and fled north on Fourth Avenue.

Officer Gardner followed the defendant north on Fourth Avenue. Mid-block, the defendant cut through some yards heading east toward Third Avenue. Officer Gardner stopped his vehicle, jumped out and initiated a foot chase yelling at the defendant for him to stop.

While Officer Gardner pursued the defendant on foot, he continued to yell multiple times for the defendant to stop. The defendant, however, kept running through yards, shrubs and bushes. Anticipating where the defendant was heading, Officer Gardner “cut up” to High Street where he confronted the defendant about mid-block between Second and Third Avenues.

In front of 926 High Street, Officer Gardner confronted the defendant and ordered him to stop while drawing his firearm on the defendant. The defendant complied. The defendant also complied with Officer Gardner’s directions to show his hands and to go to the ground. According to Officer Gardner, the defendant was immediately arrested.

In justifying his immediate arrest of the defendant, Officer Gardner submitted that he believed that a narcotics transaction was occurring, the defendant fled, and the pursuit was both extensive and lengthy.

Defendant argues that Officer Gardner failed to have reasonable suspicion to stop the vehicle and, alternatively, that Officer Gardner did not have probable cause to effectuate his immediate arrest of the defendant. The defendant provided a memorandum in support of his motion as well as supporting case law. The Commonwealth chose not to submit any memorandum or opposing case law.

As indicated previously, the defendant raises two issues. The first issue is whether Officer Gardner had reasonable suspicion to stop the vehicle in which the defendant was a passenger.

Police are permitted to stop a motorist and briefly detain its occupants when the police have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot. If a police officer is making a traffic stop for an offense where he has a reasonable expectation of learning additional evidence related to the suspected criminal activity, the stop must be supported by reasonable suspicion. *Commonwealth v. Chase*, 599 Pa. 80, 960 A.2d 108, 115-16 (2008); *Commonwealth v. Feczko*, 10 A.3d 1285, 1290-91 (Pa. Super. 2010).

In order to establish reasonable suspicion, the officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts that lead the officer to believe that criminal activity is afoot. *Commonwealth v. Cook*, 558 Pa. 50, 735

A.2d 673, 677 (1999).

The reasonable suspicion standard is less stringent than probable cause. *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1189 (2004). In determining whether reasonable suspicion exists, the court must give due consideration to the reasonable inferences a police officer is entitled to draw from the facts in light of his experience. *Id.* Because the burden is on the Commonwealth, it must establish by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Bryant*, 866 A.2d 1143, 1145 (Pa. Super. 2005) (quoting *Commonwealth v. DeWitt*, 608 A.2d 1030, 1031 (Pa. 1992)).

As well, in determining reasonable suspicion, the court must consider the factual and practical considerations of everyday life on which reasonable and prudent persons act. *Commonwealth v. Winbush*, 561 Pa. 468, 750 A.2d 807, 818 (2000). To justify a decision to stop and briefly detain an individual, “the police need not establish their suspicions to a level of certainty, a preponderance, or even a fair probability.” *Commonwealth v. Epps*, 415 Pa. Super. 231, 233, 608 A.2d 1095, 1096 (1992). The fundamental inquiry in a reasonable suspicion analysis is whether facts available to the officer at the moment of the intrusion warrant a man of reasonable caution in believing that the action taken was appropriate. *Commonwealth v. Taggart*, 997 A.2d 1189, 1193 (Pa. Super. 2010). “This assessment...requires an evaluation of the totality of the circumstances, with a lesser showing needed to demonstrate reasonable suspicion in terms of both quantity or content and reliability.” *Id.*

Defendant argues that Officer Gardner lacked reasonable suspicion to stop the vehicle. In support of his position, Defendant relies on *Commonwealth v. Carter*, 779 A.2d 591 (Pa. Super. 2001); *In the Interest of D.M.*, 566 Pa. 445, 781 A.2d 1161 (2001); *Commonwealth v. Donaldson*, 786 A.2d 279 (Pa. Super. 2001) and *Commonwealth v. Key*, 789 A.2d 282 (Pa. Super. 2001).

In *Commonwealth v. Carter*, 779 A.2d 591 (Pa. Super. 2001), the court held that similar circumstances did not even rise to reasonable suspicion. A police officer saw the defendant talking to passengers in a truck. The defendant reached into his left pocket. He looked towards the police cruiser and indicated to the passengers that there was an officer, and he walked away. This occurred in the city of Pittsburgh in the Hazelwood section, a known high drug and crime area. As the officer pulled his vehicle in front of the truck, he recognized one of the occupants of the truck as a self-described heroin user. The observations, the court concluded may have led the police officer to an educated hunch but were “insufficient to create a reasonable suspicion” that the defendant was engaged in the sale of illegal drugs on the date in question. *Id.* at 595.

In the Interest of D.M., 566 Pa. 445, 781 A.2d 1161 (2001), the police received an anonymous tip that the defendant was on a corner with a gun. The tip also described the defendant’s clothes. When the police approached the defendant, he turned and fled. The defendant’s unprovoked flight was among the relevant considerations in assessing the totality of the circumstances and, in that it was in a high crime area, it was sufficient to create a reasonable suspicion to justify an investigative detention.

In *Commonwealth v. Donaldson*, 786 A.2d 279 (Pa. Super. 2001), the court noted that Pennsylvania law “seemingly” requires the observation or observance of an exchange of some sort in order to establish reasonable suspicion of criminal activity involving a drug transaction. The court concluded that “on balance, [the officer’s] observations were simply insufficient to rise to the level deemed reasonable to allow the intrusion of investigative detention. While observing an individual entering and exiting appellant’s vehicle, she observed no exchange of items or transaction. The actions of individuals entering and exiting the vehicle are not anymore indicative of a drug transaction than was the fraternizing between a pedestrian and the occupants of a vehicle that occurred in [other cases].” *Donaldson*, supra. at 284. The court noted that while certain activity may seem generally suspicious or fishy, it does not necessarily equate to “reasonable suspicion.” *Donaldson*, supra. at 282.

Finally, in *Commonwealth v. Key*, 789 A.2d 282 (Pa. Super. 2001), officers of the Reading Police Department were working undercover as part of a high crime unit plain clothes detail in an area of Reading that was described as a “high crime area.” While patrolling, they observed the defendant talking with another male. Upon seeing the officers watching, the defendant quickly turned and walked north away from the officers. The officers eventually confronted the defendant and found controlled substances on defendant’s person.

The court concluded that the interaction between the defendant and the officers amounted to an investigative detention which was not supported by reasonable

suspicion, let alone probable cause.

Although it is a close question, the court finds, based on the cases cited by defense counsel, that Officer Gardner lacked reasonable suspicion to justify the traffic stop of the red sedan. The court cannot consider the defendant's flight in this analysis because it occurred after Officer Gardner activated his lights and stopped the vehicle. While Officer Gardner clearly had a "hunch" that Defendant was attempting to coordinate a drug transaction, he did not observe any exchange of items or furtive movements in the vehicle prior to initiating the stop.

The court also cannot say that Officer Gardner's assumption that the defendant recognized he "was a cop" while he was walking along Campbell Street, Memorial Avenue or First Avenue was reasonable because there is no information in the record to demonstrate how close the defendant was to Officer Gardner's vehicle. Officer Gardner was in an unmarked vehicle. Although he was in full uniform, Officer Gardner could not say how much he was visible to the defendant except that he believed an individual could look through the front windshield of the unmarked vehicle and recognize that he was a cop. Furthermore, Officer Gardner could not say that the defendant made eye contact with him; just that the defendant was looking in the direction of the unmarked vehicle. If the defendant was only a few feet away from Officer Gardner's vehicle, the defendant might have been able to see that Officer Gardner was a uniformed police officer. If, however, the defendant was several yards or more away, it is unlikely that he would be able to tell what Officer Gardner was wearing. It was the court's impression that the defendant was some distance

away from Officer Gardner's vehicle, particularly when the defendant allegedly "doubled-back" on First Avenue when Officer Gardner was parked near the intersection of First Avenue and Park Place. This impression is bolstered by the fact that the defendant walked south on First Avenue, turned west on Memorial Avenue and was entering a red sedan parked on Memorial Avenue by the time that Officer Gardner waited 30 seconds or so and then drove south from the intersection of First Avenue and Park Place to the intersection of First Avenue and Memorial Avenue and turned west on Memorial Avenue to follow the defendant.

Even if Defendant looked back or changed direction because he recognized Officer Gardner was law enforcement, based on *Key* and *Carter* mere avoidance of the police is not sufficient to constitute reasonable suspicion of criminal activity.

Assuming for the sake of argument that Officer Gardner had reasonable suspicion to stop the vehicle, he lacked probable cause to immediately arrest the defendant.

The court notes initially that both parties agree that an arrest occurred once Officer Gardner confronted the defendant. Officer Gardner testified that upon confronting the defendant between Second and Third Avenues on High Street, he drew his weapon, pointed it at the defendant, ordered the defendant to show his hands and to go to the ground. The defendant complied and was, according to Officer Gardner, "immediately arrested." With the assistance of Officer Bell, the defendant was immediately taken into custody.

Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and in which the officer has reasonably trustworthy information

are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances. *Commonwealth v. Weaver*, 76 A.3d 562, 565 (Pa. Super. 2013), quoting *Commonwealth v. Williams*, 941 A.2d 14, 27 (Pa. Super. 2008).

The court must view the totality of the circumstances as seen through the eyes of a trained officer, and not as an ordinary citizen would view them. *Commonwealth v. Nobalezi*, 805 A.2d 598, 600 (Pa. Super. 2002), appeal denied, 835 A.2d 709 (Pa. 2003). It is the probability, and not a prima facie showing of criminal activity that is the standard of probable cause. *Commonwealth v. Thompson*, 604 Pa. 198, 985 A.2d 928, 931 (2009). Probable cause exists when criminality is one reasonable inference; it need not be the only inference. *Commonwealth v. Burnside*, 625 A.2d 678, 681.

Further, a police officer is authorized to arrest without a warrant in many situations, including upon probable cause when the offense is a felony or misdemeanor committed in the presence of the officer making the arrest. Pa. R. Crim. P. 502 (2), *Weaver*, supra.

Officer Gardner testified that he immediately arrested the defendant because of his prior reasonable suspicion that a drug transaction was taking place coupled with the fact that defendant fled as well as the length and extent of the pursuit. Specifically, the pursuit took place over a two to three block area across yards, alley ways, bushes, shrubs and roadways.

Without question, if Officer Gardner had merely approached the defendant without activating his lights or ordering him to stop, Officer Gardner would have had reasonable suspicion to stop the defendant and investigate further when the defendant fled in a high crime area. As the United States Supreme Court noted in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), “headlong flight – whenever it occurs – is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” The court further explained, “unprovoked flight is simply not a mere refusal to cooperate. Flight by its very nature is ‘not going about one’s business’; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.” *Id.* at 125. See also *In the Interest of D.M.*, 566 Pa. 445, 781 A.2d 1161 (2001); *Commonwealth v. Miller*, 876 A.2d 427 (Pa. Super. 2005). In these cases, the police were justified in stopping the defendant because of the defendant’s presence in a high crime area coupled with his headlong flight gave rise to reasonable suspicion.

Officer Gardner, however, did not investigate further; he immediately arrested the defendant.

In reviewing the totality of the circumstances, the court concludes that Officer Gardner lacked probable cause to arrest the defendant. The case law submitted by the defendant supports this conclusion.

There is no evidence whatsoever that Officer Gardner or any other police

officer observed any exchange of any items let alone contraband or money. There is no evidence that Officer Gardner or any other police officer observed any controlled substances or paraphernalia on any individual including the defendant or the occupants of the vehicle prior to arresting the defendant. There is no evidence that Officer Gardner or any police officer was informed by anyone prior to arresting the defendant that any illegal activity had taken place. At no time prior to defendant's arrest did any police officer smell the odor of an illegal substance. There was no information provided by any confidential informant or even any anonymous tip that a drug transaction or any other type of illegal activity was taking place. There was no evidence regarding the registration of the vehicle being checked or the identity of the occupants being investigated prior to defendant being arrested, which may have linked any of the occupants, the vehicle or the defendant to any past prior criminal conduct. There were no intercepts of the telephone conversations that were taking place. There were no cell phones or any other communication devices found, prior to defendant being arrested, in the vehicle or on the driver or the passenger. There was no information supplied by any citizen or neighbor who lived in the area as to suspicious conduct or illegal activity taking place. There was no prior surveillance or any prior investigation which would have connected the defendant, the vehicle or occupants of the vehicle to any prior criminal activity. There is no evidence that either the defendant or any occupant of the vehicle recognized Officer Gardner as a police officer either while the defendant was walking on the street or while the parties were in the vehicle. Officer Gardner surmised that drug traffickers knew what undercover vehicles were utilized by the police and surmised that his badge could

probably be seen from another vehicle through his front windshield but could not confirm that anyone in particular had admitted to recognizing him as a police officer. There is no evidence that the defendant ever made eye contact with Officer Gardner. Officer Gardner specifically testified that the defendant looked in his area but could not confirm that he made eye contact. The same is true when the defendant double backed to Memorial Avenue. There is no evidence that the defendant's conduct was indicative of someone who was under the influence of any controlled substance. There is no evidence that the operation of the vehicle was such that it was indicative of the operator being under the influence of a controlled substance. Other than the back passenger looking at Officer Gardner with a surprised look and then saying something to somebody in the vehicle, there is no evidence that the occupants of the vehicle after allegedly seeing Officer Gardner made any furtive movements or any other movement such as to hide or conceal a controlled substance, contraband or even money.

In this particular case, given the lack of evidence, the court easily concludes that Officer Gardner did not have probable cause to immediately arrest the defendant. As our Supreme Court has acknowledged, "the seriousness of criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause." *Commonwealth v. Polo*, 563 Pa. 218, 226, 759 A.2d 372, 376, (quoting *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769, 775-76 (Pa. 1996)).

ORDER

AND NOW, this 19th day of December 2017, following a hearing and argument, the defendant's motion to suppress is **GRANTED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)
Nicole Spring, Esquire, (APD)
Work file
Gary Weber, Esquire, Lycoming Reporter