IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-11,588
	:
vs.	: CRIMINAL DIVISION
	: Motion to Suppress
REGINALD JOHNSON,	:
Defendant	:

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress, filed January 31, 2001. A hearing on the Motion was held March 21, 2001.

Defendant has been charged with two (2) counts of aggravated assault, two (2) counts of simple assault, two (2) counts of recklessly endangering another person, and possessing an instrument of crime, in connection with an incident which occurred on September 26, 2000 in which two (2) victims were injured. Upon being dispatched to the scene, officers were given a description of the perpetrator and a possible address of his residence, as well as a first name "Reggie". After the officers proceeded to Defendant's residence, confirmed his name, Reginald Johnson, and observed that he generally matched the description of the perpetrator, the officers brought eyewitnesses from the scene to Defendant's home and while Defendant stood on the porch, had the witnesses attempt to identify Defendant as the perpetrator. The witnesses did identify Defendant as the perpetrator and Defendant was then placed under arrest.

In his Motion to Suppress, Defendant contends he was in police custody at the time of the "show-up" and therefore entitled to counsel, but was not informed that he had such a right, and therefore, the identification must be suppressed. Defendant also contends that the circumstances of the identification were unduly suggestive and conducive to irreparable mistaken identification and for that reason as well must be suppressed. Finally, Defendant also contends that the subsequent search warrant was tainted by the improper identification and that any evidence obtained through execution

of that warrant must also be suppressed.

Were the Court to find Defendant was in custody at the time of the porch identification, Defendant did indeed have the right to counsel which was not afforded him. Commonwealth v Melson, 556 A.2d 836 (Pa. Super. 1989). A suspect is considered "in custody" whenever he is physically deprived of his freedom or placed in a situation where he reasonably believes movement or freedom of action is restricted. The standard is objective but due consideration must be given to the reasonable impression conveyed to the suspect. The crucial test is whether the police conduct would communicate to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Commonwealth v Oppel, 754 A.2d 711 (Pa. Super. 2000). Further, the Court agrees with the observations of the Superior Court in Commonwealth v Zogby, 689 A.2d 280 (Pa. Super. 1997), whereby the Court noted:

> In considering the transaction which occurred [between the suspect and the officer] it must be remembered that a police officer is an authority figure and that an officer's authority is commonly reinforced when encountering a "suspect". For instance, if a driver is stopped under suspicion of a simple traffic violation, the driver may be asked for a driver's license and registration, or may be asked to step out of the vehicle. These requests are not postured in such a way as to suggest that one is given a real choice to comply or not. As stated by the Supreme Court of Ohio, "[m] ost people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him." (Citations omitted.) The reality of the matter is that when a police officer requests a civilian to do something, even something as simple as "move along," it is most often perceived as a command that will be met with an unpleasant response if disobeyed. Thus, unless told that they have a right to decline, most individuals are not likely to perceive a request from a police officer as allowing for a choice. Justice Stevens recognized this fact when he wrote in his Dissent to Robinette: "[r]epeated decisions by ordinary citizens to surrender that interest [the right to privacy in their vehicles and the right to refuse consent to a search] can not satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so."

Zogby, 689 A.2d at 282 (Footnote omitted).

In the instant matter, it appears Defendant was at home watching television when three (3) police officers in full uniform knocked on his door and asked to come in and speak with Defendant. According to the testimony of Officer Miller, the police did not indicate to Defendant why they were there until after they were inside although, according to the testimony of Officer Bailey, who questioned Defendant, Defendant was told about the incident prior to the officers entering his home. Officer Bailey questioned Defendant about his participation in the incident and informed him that eye witnesses had indicated that the perpetrator lived at that particular residence. Officer Bailey then asked Defendant if he would go out onto his porch in order that the officers might have some of the eyewitnesses view him for a potential identification. Defendant agreed to go out onto his porch for this purpose. Officer Miller went to the scene and returned with three (3) eyewitnesses. The witnesses remained in the car while Officer Miller shone a spotlight on Defendant. Officer Miller then informed Officer Bailey, out of Defendant's hearing, that the witnesses believed the perpetrator was wearing glasses. Officer Bailey asked Defendant if he wore glasses and when he responded that he did, Officer Bailey asked him to go back into his home and put on his glasses. While Defendant returned into his residence, one of the officers followed him in and kept an eye on him while he retrieved his glasses from the coffee table in the living room. Defendant was then asked to go back onto the porch and put on the glasses. The witnesses identified Defendant as the perpetrator. Officer Miller then returned to the scene with the eyewitnesses, and then returned to Defendant's residence with a fourth eye witness and again Defendant waited on his porch while being viewed by the fourth eye witness. This eye witness also identified Defendant as the perpetrator. According to Defendant's testimony, which was not contradicted by the officers, between the two show-ups he asked to use the bathroom and was followed into the bathroom by an officer who told him to leave the door open while he used the bathroom. Defendant testified that he cooperated with the officers as he felt he had no choice but to do what they were asking of him. After Defendant was placed under arrest and transported to City Hall, he refused to sign the Miranda form and refused to give a statement.

Considering the circumstances, the Court finds that a reasonable person in Defendant's situation would not have felt that he was free to leave or to ask the officers to leave and, therefore, that Defendant was in custody for purposes of his Miranda rights. The case is akin to Commonwealth v Zogby, supra, wherein an officer entered Mr. Zogby's home, aroused him from a sound sleep and requested he get dressed and come downstairs to answer some questions. There the Court found that Mr. Zogby was not informed that he could decline the request and given the degree of intrusion, that it was highly unlikely Mr. Zogby believed, or that anyone similarly situated would believe, they could simply turn over and go back to sleep. The Court also noted that the officer testified that had Mr. Zogby not come downstairs as requested, he would have returned to his room and asked him again and would have continued to ask him had he continued to refuse, presumably until he complied. In the instant case, Officer Bailey testified that had Defendant stopped cooperating with him, he would have gone ahead and arrested him. And while Defendant was never told he had to step out on the porch, he was also never told he could refuse.[1]

Accordingly, the identification of Defendant made while Defendant was standing on his porch must be suppressed.[2]

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[1]By contrast, the defendant in Commonwealth v Mannion, 725 A.2d 196 (Pa. Super. 1999), was found to be not in custody based on evidence which showed that the officers telephoned the defendant and obtained her permission to speak with them and that she chose to have them come to her home to do so, that they informed her upon arrival that she was not required to speak with them, could refuse to speak at any time, and could ask them to leave at any time, that during the meeting when the telephone rang, the defendant asked permission to answer and was again informed that she was free to do as she pleased, and that at all times the officers made no show, threat or use of force. In addition, the record there reflected no testimony that the Defendant indicated she felt intimated by the officers or that her freedom was restricted.

[2]A further hearing will be scheduled to determine whether an independent basis exists to allow any other identifications, as well as whether the search warrant could have been issued without the tainted identification.

ORDER

AND NOW, this 11th day of April, 2001, for the foregoing reasons, Defendant's Motion to Suppress is granted in part and the identifications of Defendant while standing on his porch shall not be introduced into evidence at the trial in this matter.

By the Court,

Dudley N. Anderson, Judge

cc: DA
William Miele, Esq.
Nancy Borgess, Court Scheduling Technician
Gary Weber, Esq.
Hon. Dudley N. Anderson