

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-11,849
	:
	:
vs.	: CRIMINAL DIVISION
	: Suppression Motion
WILLIAM R. WEST,	:
Defendant	:

**OPINION AND ORDER**

Defendant was charged with possession of cocaine, possession with intent to deliver cocaine, and possession of drug paraphernalia, following his arrest on September 19, 2000, which arrest was precipitated by the report of a confidential informant that the informant had witnessed Defendant involved in a drug transaction. In the instant Suppression Motion, filed October 22, 2001, Defendant challenges the officers' actions in stopping him, patting him down and discovering the cocaine on his person, as well their subsequent actions in obtaining certain admissions from him.

First, Defendant challenges the officers' initial stop. An officer may conduct an investigative detention if he has a reasonable suspicion, based on specific and articulable facts, that criminality is afoot. Commonwealth v Shine, 784 A.2d 167 (Pa. Super. 2001). Defendant contends the officers did not have a reasonable suspicion to support the stop in the instant matter. The Court does not agree. Officer Mayes testified that while patrolling in an unmarked car in the area of Timberland Apartments, he and Officer Hagan received a call informing them that a certain confidential informant, identified by number, had called police to report his observation of what the caller believed to be a drug transaction at a certain location, a few blocks away from the officers at the time of the call, involving a black male wearing a gray hooded sweatshirt and black jogging pants. Officer Mayes testified he knew the confidential informant by number, knowing him to be a reliable source, and

thereafter proceeded to the location identified. He passed Defendant and two (2) other individuals on the way to the location, arrived at the location, and finding no one, turned around and drove back past Defendant. At that time, the other two (2) individuals had left and the officers stopped Defendant. Defendant was wearing a gray hooded sweatshirt and dark jogging pants and was stopped relatively close to the location identified in the report. The Court has no trouble finding the officers had a reasonable suspicion, based on specific and articulable facts, that criminality was afoot.

Second, Defendant contends the continued detention escalated into a custodial arrest which was not supported by probable cause. The Court has held that the key factor to be examined in determining whether a detention lasts so long that it escalates from an investigative detention into a custodial arrest is whether “the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” Commonwealth v Ellis, 662 A.2d 1043, 1048 (Pa. 1995). In Ellis, the officers detained the defendant for approximately 10 to 15 minutes, the first officer allowing a second officer to view the crime scene and to transport a witness to the scene of the stop for an on-scene identification. The Court there found the actions reasonable attempts to confirm or dispel the officers’ suspicions and further found the actions were diligently pursued. That particular detention was found not to mature into a custodial arrest. In the instant case, testimony of the officers indicates a stop of no more than 15 minutes during which Defendant was questioned regarding the report from the confidential informant, and Officer Mayes contacted to obtain verification. The Court finds the length of the detention and the actions of the officers, specifically their attempts to confirm or dispel their suspicion of Defendant, support a finding that the detention did not mature into a custodial arrest.

Next, Defendant contends the officers’ frisk of his person was improper. From the testimony of both Officers Mayes and Hagan, it appears that once Officer Mayes contacted the confidential informant and confirmed in his mind Defendant was the individual observed by the informant, he returned to the area where Defendant had been waiting with Officer Hagan and rather quickly thereafter frisked Defendant for weapons. Such a frisk may properly be conducted if the officer possesses a justified belief that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous. Commonwealth v Shine, supra.; Commonwealth v Zhahir,

751 A.2d 1153 (Pa. 2000). Defendant contends the officers did not have a reasonable and articulable suspicion that he was armed and dangerous. Again, the Court does not agree. Officer Mayes testified that he performed the frisk based on a concern for his safety and the safety of Officer Hagan, that upon returning to Defendant and Officer Hagan after contacting the confidential informant, Officer Hagan had informed him that Defendant had been acting extremely nervous, he himself observed that Defendant was agitated and nervous, Defendant's mother had arrived on the scene and was participating in the exchange in a loud and troublesome way, that it was, in his experience, common for persons selling drugs to be armed, that the stop was in an area known for drug activity, and that eight (8) days previously he had investigated a shooting in that area, Defendant generally fitting the description of the alleged perpetrator. That a stop is made in an area of expected criminal activity and that the person stopped exhibits nervous or evasive behavior, are both relevant considerations in determining whether an officer had a reasonable suspicion that the person stopped was armed and dangerous, justifying a Terry stop. Commonwealth v Zhahir, *supra*. Also to be considered is the nature of the suspected criminal activity, specifically whether weapons are usually involved. Id. After reviewing all of the circumstance, the Court finds the frisk justified.

Next, Defendant contends the subsequent seizure of the cocaine, following the frisk, was not justified by the Plain Touch Doctrine. That Doctrine allows for seizure of contraband in addition to weapons, during a weapons frisk, where, through touch, the item is immediately apparent as contraband. Zhahir, *supra*. In determining whether the identification of an item as contraband is "immediately apparent" the Court must consider the totality of the circumstances, specifically considering the nature of the object, its location, the conduct of the suspect, the officer's experience and the reason for the stop. In the instant case, Officer Mayes testified that during the pat down he felt what he immediately knew to be packaged cocaine. He stated that when he touched the waistband area of Defendant's person, something made a crinkling noise, similar to a baggie. He also testified that he felt the zipper part of the baggie. Officer Mayes testified that based on his experience on the Drug Task Force, he immediately knew Defendant was concealing packaged cocaine. While Defendant cites Commonwealth v Spears, 743 A.2d 512 (Pa. Super. 1999) for the proposition that a search may exceed its lawful bounds if the officer moves the object or manipulates it in any way in

order to identify it, the Court finds that such action did not occur in the instant case.

Finally, Defendant contends the admissions made at the police station must be suppressed as such were made after he invoked his right to remain silent. The Court agrees. According to the testimony of Officer Hagan, once Defendant was taken to the police station he was read his Miranda rights and invoked his right to remain silent. Corporal Ungard, the supervisor on duty at the time, spoke with Defendant, who then agreed to answer questions. Defendant was read his rights again, agreed to continue the interview without an attorney present and made the admissions. According to the testimony of Corporal Ungard, he did not speak with Defendant, but, rather, spoke with another officer in the presence of Defendant, and merely discussed the mandatory minimums which would apply, considering a School Zone Enhancement. Defendant then began to make a statement but Corporal Ungard told him not to talk until they read him his rights again, which was then done. According to Corporal Ungard, he was never alone with Defendant. Either scenario requires the suppression of the subsequent statements made by Defendant. Once a defendant invokes his right to remain silent, interrogation must cease. Commonwealth v Grandison, 296 A.2d 730 (Pa. 1972). While an exception has been recognized where there is new evidence or changed circumstances, the Courts having held that such new evidence or changed circumstances may be presented by police to a suspect even though that suspect has invoked his right to remain silent, Commonwealth v Harris, 443 A.2d 851 (Pa. Super. 1982), that exception does not apply in the instant matter. Further, interrogation has been defined as police conduct “calculated to, expected to, or likely to evoke admission.” Commonwealth v Mannion, 725 A.2d 196 (Pa. Super. 1999). Whether Corporal Ungard actually spoke with Defendant in an attempt to have him change his mind and speak with the officers, or whether he simply discussed the possible penalties with another officer in Defendant’s presence, the Court finds his conduct was calculated to evoke an admission. That admission must therefore be suppressed.

ORDER

AND NOW, this 26<sup>th</sup> day of February, 2002, for the foregoing reasons, Defendant's Suppression Motion is hereby denied in part and granted in part. The admissions made by Defendant after speaking with Corporal Ungard are hereby suppressed. All other relief is denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA  
Eric Linhardt, Esq.  
Gary Weber, Esq.  
Hon. Dudley N. Anderson