

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

COMMONWEALTH	:	
	:	
v.	:	No.: 03-11,484
	:	
LARRY BURDEN,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Motion to Suppress filed on May 24, 2004 and heard before the Court on July 9, 2004, in which he asserts that his stop and detention were illegal therefore a firearm which was found near him should be suppressed. The Defendant argued that although there was no Miranda¹ violation, the fact that the he was required to provide his name and date of birth amounts to an unconstitutional seizure of evidence to be used against him. The facts of the case as presented at the evidentiary hearing follow:

On September 23, 2004, Williamsport Bureau of Police Officers Eric Houseknecht and Thomas Bortz were on patrol at approximately 2:30 a.m. when they stopped to clear a piece of debris from the road. Officer Houseknecht, who had remained in the patrol unit, noticed the Defendant getting out of a red Ford Festiva parked next to the officer. The Defendant got out of the passenger side, which was the side farther away from the Officer. As the Defendant emerged from the car, the officer heard the sound of metal dropping onto the pavement, which he immediately recognized as

¹ Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

the sound of a gun dropping to the street. The officer observed the Defendant to be unsteady with glossy eyes and believed that he was intoxicated. He watched the Defendant for a few moments before the Defendant's body language indicated that he had seen the officers and was surprised by their presence. The Defendant then began to move his upper body from side to side and scan repeatedly between the two officers. At the same time, Officer Houseknecht heard the sound of metal scraping against pavement. When Officer Bortz returned to the patrol unit after removing the debris from the road, Officer Houseknecht told him that the Defendant had just thrown a gun from the car next to them. They drew their service weapons and went to investigate. The Defendant was instructed to put his hands on the top of the car. Officer Houseknecht went around the Ford Festiva toward the Defendant and, as he was doing so, glanced under the Festiva, where he observed a handgun on the road beneath the car. The officer then secured the Defendant and moved him away from the Festiva because it would have been unsafe for the officer to bend down so close to the Defendant to retrieve the gun. The Defendant was asked for his name and date of birth, which he provided. The officer then requested a criminal history check and a gun permit check on the Defendant, which came back showing several past felony arrests without any record of disposition and no permit found on file in Lycoming County. At that point, the Officer considered the Defendant, who was already in the back of the patrol car, to be under arrest for carrying a firearm without a license.

The Defendant now argues that both the gun and the information as to his name and date of birth were illegally seized because the officers improperly raised the level of the contact between themselves and the Defendant to a detention when nothing more than a mere encounter was appropriate. He further asserts that if he ever possessed the gun, it was still within his custody at the time that it was seized by the officers. Alternatively, with respect to the gun, he argues that if the Court finds that the weapon was not in the Defendant's custody at the time it was seized, but that it was in his possession and then abandoned by him, that the abandonment was forced by the contact from the officers and therefore the gun cannot be used as evidence against him pursuant to Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (Pa. 1996).

In Pennsylvania, a police officer "may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct." Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 676 (Pa. 1999). "This standard, less stringent than probable cause, is commonly known as reasonable suspicion." Id. When a Court determines whether a police officer had reasonable suspicion to support an investigative detention of a particular individual, "the totality of the circumstances must be considered." In re D.M., 566 Pa. 445, 781 A.2d 1161, 1163 (Pa. 2001). The Court must also give "due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience." Commonwealth v. Rogers, ___ Pa. ___, 849

A.2d 1185 (Pa. 2004), citing Cook, supra. at 676 (quoting Terry v. Ohio, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). The Rogers case further holds that the totality of the circumstances test “does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, “even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.” Rogers, supra., citing Cook, supra. at 676.

In the case at hand, the Court finds that the officer possessed reasonable suspicion that criminal activity was afoot when he detained the Defendant to investigate a sound that he had identified as that of a gun dropping to the pavement. The incident occurred at approximately 2:30 a.m. The Defendant appeared to the officer to be intoxicated. When the Defendant noticed the officers’ presence, he was visibly surprised and acted in a nervous manner, scanning from one officer to the other and moving his body side to side. The Defendant’s movements created a sound that the officer was able to identify as metal scraping against pavement. At that time, the officer believed that the Defendant was attempting to hide the fallen gun by pushing it beneath the car. The Court finds that, given the totality of the circumstances, the officer’s reasonable suspicion adequately supports an investigative detention of the Defendant.

The Defendant next contends that if the Court finds that he possessed the gun, then the seizure of the gun must be suppressed as a forced abandonment as set forth in Commonwealth v. Matos, 543 Pa. 449,

672 A.2d 769 (Pa. 1996). The Court finds Matos is distinguishable from the facts in this case. The Pennsylvania Supreme Court has explained in the more recent case of In re D.M., supra. that Matos stands for “the **pursuit** of an appellant by police officers (that) amount(s) to a seizure. Matos, 672 A.2d at 771. . . Matos did not address whether the police needed some level of requisite cause at the time they initially approached the appellant.” In re D.M., supra. (emphasis in the original). Here, the police possessed reasonable suspicion to detain the Defendant and investigate his activity, so that Matos does not apply. The Court finds that the Defendant did possess the gun. The evidence offered at the suppression hearing shows that the gun was dropped when the Defendant emerged from the Ford Festiva, but not because of any action or coercion on the part of the officers. The testimony shows that the Defendant was not aware of the officers’ presence until after the gun was on the ground. At that time, he turned toward the Festiva and noticed the police cruiser just beyond it, as was evidenced by his reaction and body language. It is also clear from the testimony that at the time he first noticed the officers, the Defendant was aware of the gun on the ground. He attempted to hide it by pushing it under the car. However, the Court also finds that there was no pursuit of the Defendant in this case. The gun was dropped before he was aware that the officers were present. Matos is therefore inapplicable to this case because the Defendant could not have been coerced or forced into abandoning the gun by the police and therefore forced abandonment does not apply.

The Defendant next contends that his identity was effectively seized from him when the officer asked him to provide his name and date of birth. Defendant asserts that this information was necessary evidence to obtain a conviction against him in this case and therefore he cannot be forced to provide incriminating information. At the time of the suppression hearing, Defendant's attorney affirmed that this "seizure" was not a violation under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), although it is agreed by both parties that no Miranda warnings were read to the Defendant. Counsel argued instead that the Defendant's name and date of birth had been seized from him in violation of the United States and Pennsylvania Constitutions.

"Both the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution protect citizens from unreasonable searches and seizures." Commonwealth v. Cook, 558 Pa. 50, 53, 735 A.2d 673, 675 (1999). The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Pennsylvania Constitution provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8.

Although these two provisions differ slightly in their wording, the Pennsylvania and United States Constitutions provide identical protection against self-incrimination. See Pa. v. Muniz, 496 U.S. 582, 588, 110 S. Ct. 2638; 110 L. Ed. 2d 528 (U.S. 1990); Commonwealth v. Conway, 368 Pa. Super. 488, 498, 534 A.2d 541, 546 (1987).

The Court finds that the information provided by the Defendant as to his name and date of birth does not fall within the Constitutionally protected areas of either the IV Amendment of the United States Constitution or Article I, § 8 of the Pennsylvania Constitution. In order to be protected under the IV Amendment or Article I, § 8, the seized item must be either the Defendant's physical person or some other physical, tangible object in or on his person or in his possession. Words spoken by the Defendant indicating his name and date of birth do not fall into these categories, and the Defendant's claim that his statement containing his name and date of birth should be suppressed on constitutional grounds must fail.

ORDER

AND NOW, this ____ day of July, 2004, upon consideration of Defendant's Motion to Suppress and for the reasons set forth above, it is ORDERED and DIRECTED that the Motion is DENIED.

By The Court,

Nancy L. Butts, Judge

xc: CA
DA
PD (JP)
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire