

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-387-2010  
vs. :  
: Opinion and Order re  
RASHEN HICKMAN, : Defendant's Motion to Reconsider  
Defendant : Denial of Suppression

**OPINION AND ORDER**

This matter came before the Court on Defendant's motion to reconsider the Court's denial of his suppression motion.

In his original motion to suppress, Defendant asserted the police did not have sufficient reasonable suspicion to conduct a pat down of Defendant. During cross-examination of Trooper Tyson Havens, it became apparent that during the pat down Trooper Havens lifted Defendant's sweatshirt and discovered a plastic baggie. At that time, however, defense counsel did not argue that Trooper Havens exceeded the permissible scope of a lawful pat down by lifting Defendant's sweatshirt. Therefore, the Court did not address that issue in its Opinion dated July 19, 2010.

Defense counsel filed a motion to reconsider on July 22, 2010, raising the issue of the scope of the pat down. This motion was originally argued August 3, 2010. During this argument, the Commonwealth indicated that if the Court was going to entertain granting the motion, it would like the opportunity to call Trooper Havens to question him further since this issue was not the focus of the first hearing. The Court agreed that the testimony at the first hearing did not focus on the circumstances surrounding Trooper Havens lifting Defendant's sweatshirt. Rather, this testimony was elicited during cross-examination

as a credibility issue because Trooper Havens claimed that Defendant lifted his own sweatshirt at the suppression hearing when that was not his testimony at the preliminary hearing. Unfortunately, the Commonwealth was not prepared to call Trooper Havens on August 3. Therefore, upon stipulation of the parties, the Court rescheduled this matter for a hearing on September 30, 2010.

On September 30, 2010, the Commonwealth moved to dismiss the motion to reconsider, arguing that the Court no longer had jurisdiction pursuant to 42 Pa.C.S.A. §5505. The Court deferred ruling on this motion and took Trooper Havens testimony.

Trooper Havens testified that Defendant was wearing jeans and a baggy, hooded sweatshirt that fell past his hips. Trooper Havens began the pat down at Defendant's waist. He did not feel anything that felt like a weapon. As he proceeded patting down Defendant's legs, Defendant reached underneath his sweatshirt in his pants toward his genital area. Trooper Havens told Defendant to keep his hands out of his pants. Defendant did not stop, but kept reaching in his pants. Trooper Havens described Defendant's movements as quickly reaching into and out of the waistband of his pants. Trooper Havens indicated Defendant did this at least three times in a span of 10-15 seconds. Trooper Havens testified that he was concerned he may have missed something, so he lifted up Defendant's sweatshirt and observed the top of a plastic baggie.

At the previous hearing Trooper Havens indicated that in response to Defendant putting his hands in his pants Trooper Havens stepped back and asked Defendant if he had anything in his pants or hidden in his underwear because the police had started

noticing that drug dealers and users were hiding drugs in the front flap of their underwear. N.T., July 14, 2010, at p. 9. Defendant's response was no and he pulled his sweatshirt up a bit. Id. At that point Trooper Havens lifted the sweatshirt up further and observed the top of a plastic baggie sticking out of his pants. Id. at 15. Trooper Havens told Defendant he had a plastic baggie sticking out of his pants and Defendant said that it was just marijuana. Id. at 9. Trooper Havens then asked Defendant if he was going to give him the marijuana or if he was going to have to obtain it through a search warrant. Id. at 9-10. Defendant pulled the baggie out, but it contained crack cocaine and Defendant immediately jammed the baggie back into his pants. Id. at 10. Trooper Havens then arrested Defendant and searched him incident to the arrest.

Initially, the Commonwealth argued the Court lost jurisdiction to entertain the motion pursuant to 42 Pa.C.S.A. §5505. In response, Defendant argued that section 5505 only applied to final orders. Since Defendant could not appeal the denial of his motion to suppress, the order denying his motion was not final. In the alternative, Defendant contended the Court could consider his motion as a supplemental or additional motion to suppress, which the Court in its discretion could allow for reasons such as the defense was not aware of the grounds for the motion or in the interests of justice. See Pa.R.Cr.P. 579 and 581.

The Court rejects the Commonwealth's argument that the Court has lost jurisdiction to entertain Defendant's motion to reconsider. The Court's denial of the defendant's motion to suppress was an interlocutory order. Section 5505 does not bar the

Court from reconsidering an interlocutory order. Commonwealth v. Bowden, 456 Pa. 278, 280-282, 309 A.2d 714, 716-717 (1973); Commonwealth v. Gordon, 438 Pa. Super. 166, 176, 652 A.2d 317, 322 (1994), affirmed by 543 Pa. 513, 673 A.2d 866 (1996); Commonwealth v. McMillan, 376 Pa. Super. 25, 34, 545 A.2d 301, 305 (1988); Commonwealth v. Baker, 352 Pa. Super. 260, 267, 507 A.2d 872, 876 (1986).<sup>1</sup>

Defendant contends Trooper Havens exceeded the scope of a pat down for weapons by lifting Defendant's sweatshirt. The Commonwealth has the burden of establishing by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Cr.P. 581(H); Commonwealth v. Wilson, 927 A.2d 279, 283 (Pa. Super. 2007) quoting Commonwealth v. Anderson, 753 A.2d 1289, 1291 (Pa. Super. 2000). After a review of case law and Trooper Havens' testimony, the Court finds the Commonwealth has not met their burden of proof.

Pennsylvania case law provides that during the course of a valid investigatory stop, police may conduct a pat-down of a suspect's outer garments for weapons if an officer observes unusual and suspicious conduct on the part of the individual which leads the officer to reasonably believe that the suspect may be armed and dangerous. Commonwealth v. E.M., 558 Pa. 16, 735 A.2d 654, 659 (Pa. 1999). The officer's actions must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden

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<sup>1</sup> Even if the Commonwealth were correct in its argument, the Court would treat the motion as a supplemental or additional motion to suppress in the interests of justice. The initial date set for the motion to reconsider was within thirty days of the Court's order denying Defendant's motion to suppress. If it weren't for the Commonwealth's request to present further testimony from Trooper Havens, the Court would have issued a decision on the motion to reconsider during the relevant thirty day period. Furthermore, the substantive issue in this case is not frivolous. The Court believes that in the long run, it will be better for everyone involved for the Court to address this issue before trial rather than wait for it to be raised through other avenues such as post

instruments for the assault of the police officer.” Commonwealth v. Canning, 402 Pa. Super. 438, 587 A.2d 330, 331 (Pa. Super. 1991), quoting Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884 (1968). Following a pat-down search of a suspect’s person, a more intrusive search can only be justified where the officer feels something that he reasonably believes could be a weapon. Canning, supra (“In order to reach into a suspect’s pocket during a frisk, the officer would have to feel something that appears to be a weapon.”).

In the case at bar, there was no testimony that Trooper Havens ever felt anything that he reasonably believed was a weapon. Moreover, according to his testimony at the first suppression hearing, Trooper Havens response to Defendant reaching in the front of his pants was not to ask Defendant whether he possessed weapons, but to inquire whether he possessed any contraband, because the police noticed that drug dealers and users had begun hiding drugs in the front flap of their underwear. N.T., July 14, 2010, p.9. At that hearing, Trooper Havens initially claimed he observed a plastic bag in Defendant’s pants when Defendant lifted up his own sweatshirt. Id. at pp. 9, 13. Upon further questioning when confronted with his preliminary hearing testimony, however, Trooper Havens admitted that it was only after he (Trooper Havens) pulled up the sweatshirt some more that he observed a plastic bag sticking out of Defendant’s pants. Id. at pp. 15, 19. At the subsequent hearing, Trooper Havens confirmed that he lifted up Defendant’s sweatshirt. Given this evidence, the Court is constrained to find that Trooper Havens exceeded the scope of a lawful pat down by lifting Defendant’s sweatshirt.

**ORDER**

**AND NOW**, this \_\_\_\_ day of October 2010, the Court GRANTS Defendant's motion to reconsider and SUPPRESSES the evidence obtained from Defendant's person on March 4, 2010 and any statements Defendant made as a result of Trooper Havens lifting his sweatshirt and observing a plastic bag.

By The Court,

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Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire  
Nicole Spring, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file