

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**ANTHONY ANGELO,
Defendant**

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**CR: 1099-2012
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed a Motion to Suppress Evidence on August 28, 2012. At the request of the Defendant, a hearing on the motion was continued to April 10, 2012.

Background

On June 18, 2012, Lieutenant Steven Helm (Helm) of the Williamsport Bureau of Police (WBP) received a phone call from a resident on the 900 block of Almond Street reporting potential drug activity at the intersection of Almond and Tucker Streets. The informant described the suspects as three (3) black males and two (2) white males. In addition, the informant stated that the individuals at the intersection were associated with the address of 916 Tucker Street. Helm recognized the voice of the informant as belonging to Scott Miller, a resident in the east end of the city who had previously reported crime to WBP. Helm contacted Corporal Daman Hagan (Hagan) of WBP, who responded to the call after approximately thirty (30) minutes when he became available after a prior call.

When Hagan arrived at the location he observed two (2) white males and one (1) black male in the area, who began to walk away from the area once they saw the marked police vehicle arrive. Hagan pulled his vehicle left into the opposing lane and told the three males to “hold on.” Anthony Angelo (Defendant) and his witness Nathan Fry (Fry) testified that Hagan told them to

“stop.” Hagan stopped his vehicle and after immediately exiting smelled the odor of fresh marijuana. Hagan believed that one or possibly more of the individuals was in possession of marijuana and requested consent to search after he ran their names for warrants. Fry and another individual present agreed to be searched; however, the Defendant did not consent. Hagan had to wait for another officer to arrive with consent forms and to assist before he could conduct the search.

Hagan suspected that the Defendant was in possession of marijuana as he did not consent to the search. Hagan believed that he was only in possession of a small amount of marijuana and told him that if he cooperated he would recommend that he only get a fine if he had no prior record or probation if he did have a prior record. Hagan noticed that the Defendant appeared nervous, was moving around, and was concerned about what the next steps were going to be. Hagan told the Defendant that he was not sure what would happen next and that he would have to call his Lieutenant.

The Defendant began to compliment Hagan on how he was treating them to Fry and the other individual when he suddenly ran away. Hagan chased the Defendant and after threatening to use a Taser he slowed down and was taken into custody. Hagan asked the Defendant “where was it?” and he responded “in my back pocket.” Hagan located a bag that had six (6) smaller bags of marijuana. A search incident to arrest located a clear plastic bag with twelve (12) individual bags of cocaine of varying weights, seventeen (17) pills of Xanax, a .22 caliber semi-automatic pistol, and \$220.00. The Defendant then made unsolicited statements to police stating that the marijuana was for personal use, he was a middleman for the pills, and that he had the gun because he knew someone was after him. After being transported to City Hall, the Defendant waived his Miranda rights and agreed to speak without an attorney present.

The Defendant was charged with two counts of Possession with Intent to Deliver,¹ two counts of Possession of a Controlled Substance,² one count of Firearms Not to be Carried without License,³ one count of Possession of drug Paraphernalia,⁴ one count of Possession of a Controlled Substance-Small Amount,⁵ and one count of Receiving Stolen Property.⁶ The Defendant has alleged the stop was done without reasonable suspicion and that the search of the Defendant by Hagan was performed without reasonable suspicion, a warrant, or exigent circumstances. Further, the Defendant contends that he was questioned while in custody and without being Mirandized.

Motion to Suppress

a. Whether the Defendant was legally stopped.

Defendant argues that any evidence seized from the Defendant after he was stopped by Hagan should be suppressed because there was no reasonable suspicion on the part of the police to suspect him of being involved in criminal activity. The Pennsylvania Courts have defined three forms of police-citizen interaction: (1) mere encounter; (2) investigative detention; and (3) custodial detention. A mere encounter between police and a citizen “need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond.” Commonwealth v. Ellis, 541 Pa. 285, 293-94, 662 A.2d 1043, 1047 (Pa. 1995). If a police action becomes too intrusive, a mere encounter may escalate to an investigatory detention or seizure. Commonwealth v. Boswell, 554 Pa. 275, 721 A.2d 336, 339-40 (Pa. 1998). For the

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

³ 18 Pa.C.S. § 6106.

⁴ 18 P.S. § 780-113(a)(32).

⁵ 18 P.S. § 780-113(a)(31)(i).

⁶ 18 Pa.C.S. § 3925(a).

determination of whether a mere encounter has risen to an investigatory detention, the Court must determine whether police have conducted a seizure of the person involved. Commonwealth v. Mendenhall, 552 Pa. 484, 715 A.2d 1117, 1119 (Pa. 1998).

To decide whether a seizure has occurred, we apply the following objective test: a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. In applying this test, it is necessary to examine the nature of the encounter. Circumstances to consider include, but are not limited to, the following: the number of officers present during the interaction; whether the officer informs the citizen they are suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. Otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Commonwealth v. Beasley, 2000 Pa. Super. 315, 761 A.2d 621, 625-26 (Pa. Super. 2000).

In Moore, an officer saw a man standing inside the doorway of an abandoned property. The officer approached and asked the man to step out. Commonwealth v. Moore, 2010 Pa. Super. 236, 11 A.3d 538, 540-41 (Pa. Super 2010). While the officer spoke with the man he noticed a large lump in his mouth that was constantly moving around. The officer determined that it was narcotic packaging in his mouth. The Superior Court determined that this was a mere encounter because there was no indication that the officer wanted to do anything but talk, the man voluntarily exited the vacant structure when asked, and there was no evidence of a threatening, coercive, or intimidating manner. See also In the Interest of D.M., 566 Pa. 445, 781 A.2d 1161 (Pa. 2001) (finding a mere encounter when an officer saw a person that matched the description of a man with a gun and told him to "come over" because at the time it was unclear whether police intended to do anything other than talk); Commonwealth v. Martin, 705 A.2d 887 (Pa. Super. 1997) (determining a mere encounter when an officer approached someone and asked if they would "step outside," and indicated they wanted to talk to them).

In this case, the Court finds that Hagan requesting the individuals to “hold on” or “stop” was no more than a mere encounter.⁷ Hagan requested to talk to the three individuals and parked his marked vehicle on the side of the road. Neither the patrol vehicle nor Hagan blocked the Defendant from moving or leaving. There was no suggestion that Hagan acted in a coercive manner or spoke forcefully to Defendant. Hagan asked the individuals to “hold on” or “stop” as he wanted to talk to them. This is similar to Moore, in that the Defendant voluntarily waited for Hagan and voluntarily spoke with him.

Based on the smell of fresh marijuana detected by Hagan after exiting the vehicle, the Court finds he had reasonable suspicion that criminal activity was afoot. Reasonable suspicion is decided by the court after reviewing the totality of the circumstances and a finding that the facts support a reasonable belief that the law is being broken. Commonwealth v. Fulton, 921 A.2d 1239, 1243 (Pa. Super. 2007). “In making this determination, we must give ‘due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience.’” Id. (citing Commonwealth v. Cook, 735 A.2d 673, 76 (Pa. 1999)). To establish reasonable suspicion the officer must be able to articulate specific observations that led him to reasonably conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. Commonwealth v. Little, 903 A.2d 1269, 1272 (Pa. Super. 2006).

Here, Hagan arrived near the intersection of Almond and Tucker Streets after a resident reported drug activity. The informant was identified, known to have lived in the area of the reported activity, and was familiar with individuals in the neighborhood. Hagan responded thirty

⁷ The Court believes there is no distinction whether Hagan used “hold on” or “stop,” however, as a finding of fact the Court found Hagan to be more credible than the Defendant or Fry.

(30) minutes after the call and only identified three (3) males and not the five (5) that was reported. However, once he made contact with the three individuals he smelled the odor of fresh marijuana, which did not dissipate while he talked to them. Hagan has over ten (10) years of experience on the Lycoming County Drug Task Force and was familiar with the smell of fresh marijuana. Adding to the fact of the Defendant acting nervously and pacing while he was being questioned about the odor, Hagan had reasonable suspicion to stop and ask questions of the Defendant.

b. Whether the Defendant was properly searched.

The Defendant has alleged that police improperly searched his person after he fled. The Commonwealth has argued that the flight of the Defendant was enough for the police to search the Defendant. See Commonwealth v. Woody, 939 A.2d 359 (Pa. 2007) (relied upon by the Commonwealth to show that police may have searched the Defendant based solely on the charge of Escape). The Court disagrees with the reasoning of the Commonwealth as the Defendant here has not been charged with Escape and there is a question of whether he was officially detained prior to his flight. The Court, however, agrees that the search of the Defendant does not need to be suppressed.

Evidence of flight is permissible to establish guilty knowledge. . . . the essence of this doctrine is based upon a premise that the person who flees does so in recognition of his wrongdoing and is seeking to avoid punishment for that conduct. Even though flight alone is not sufficient to establish probable cause to arrest, flight may be coupled with additional facts which point to the suspect's guilt and establish probable cause to make an arrest.

Commonwealth v. Gease, 450 A.2d 989, 990 (Pa. Super. 1982) (citations omitted).

In Gease, an individual told an officer that he had been chasing a man that had stolen a women's purse and that he was sitting in a bus behind the officer's car. Id. at 989-90. While the

officer approached the bus the only passenger exited and began to run. Id. at 990. The defendant was eventually subdued and placed under arrest. Id. The Superior Court found that the police had probable cause to arrest the defendant solely on the informant's statement and the flight. See also Commonwealth v. Smith, 979 A.2d 913 (Pa. Super. 2009) (finding probable cause where police saw an exchange of an unidentified object and the defendant fled); Commonwealth v. Legg, 392 A.2d 801 (Pa. Super. 1978) (determining probable cause was present from flight and an anonymous tip that the robber could be found at a residence).

Here, the Court finds that Hagan had probable cause to arrest the Defendant after he fled and as a result could have conducted a search incident to arrest. Prior to the Defendant fleeing police, a resident of the neighborhood called police to report five (5) individuals engaging in drug activity. When Hagan arrived on the scene he did not see a group of five (5) but of three (3). Immediately after exiting his patrol vehicle he observed the Defendant acting nervous and could smell the odor of fresh marijuana, which did not dissipate. The Defendant running from the scene along with the other circumstances listed is sufficient to establish probable cause and therefore Hagan could have searched the Defendant incident to arrest.

Any error that may have resulted from Hagan asking "where was it?" does not result in the suppression of the evidence found on the Defendant. The Pennsylvania Supreme Court has adopted the inevitable discovery doctrine stating that "where the evidence obtained as the result of illegal police activity would have been discovered in the course of a lawfully conducted investigation, no purpose is served in applying the exclusionary rule." Commonwealth v. Wiley, 904 A.2d 905, 909 (Pa. 2006); see Commonwealth v. Ingram, 814 A.2d 264 (Pa. Super. 2002) (finding that search incident to a lawful arrest would have produced the drugs that were

unlawfully found). Hagan would have found the marijuana following a legal search incident to a lawful arrest.

- c. *Whether statements made by the Defendant should be suppressed because he had not been given his Miranda rights.*

The Defendant contends that the Defendant was questioned without being Mirandized and that his statements should be suppressed. Miranda rights are required before a custodial interrogation or when police questions are “calculated to, expected to, or likely to elicit an incriminating response, or that the questions were asked with an intent to extract or an expectation of eliciting an incriminating statement.” Commonwealth v. Davis, 331 A.2d 406, 407 (Pa. 1975) (citing Commonwealth v. Yount, 314 A.2d 242, 246 (Pa. 1974)).

[N]ot every statement made by an individual during a police encounter constitutes an interrogation. Miranda rights are required only prior to a custodial interrogation. “Custodial interrogation is ‘questioning initiated by law enforcement officers after a person has been taken into custody otherwise deprived of [his] freedom of action in any significant way.’” Furthermore, volunteered or spontaneous utterances by an individual are admissible without the administration of Miranda warnings. “When a defendant gives a statement without police interrogation, we consider the statement to be ‘volunteered’ and not subject to suppression Interrogation is police conduct ‘calculated to, expected to, or likely to evoke admission.’”

Commonwealth v. Garvin, 50 A.3d 694 (Pa. Super. 2012) (citations omitted).

The Court finds that a custodial interrogation occurred when Hagan asked “where was it?” The Defendant had been pursued by Hagan, threatened to be tased if he kept fleeing, and was taken to the ground. As stated above, Hagan had probable cause to arrest the Defendant and search his person incident to arrest. The Defendant was in custody when asked “where was it?” Further, such a question by Hagan was expected to elicit an incriminating response by the Defendant. Therefore, the Court finds the Defendant’s response to Hagan of “in my back pocket” should be suppressed.

The Court, however, finds that all the unsolicited statements made by the Defendant do not need to be suppressed. The Court does not believe that Hagan's lone question of "where was it?" required the Defendant's later remarks to police. Defendant's statements were not responsive to any statements or questions by police and appeared to be volunteered or spontaneous utterances. Defendant's comments about having the marijuana, Xanax, and the gun found on his person were spontaneously made to police. Defendant was not subject to custodial interrogation, he did not have to be advised of his Miranda rights, and these statements need not be suppressed.

ORDER

AND NOW, this _____ day of August, 2013, after a hearing and based upon the foregoing Opinion, Defendant's Motion to Suppress is hereby GRANTED in part and DENIED in part. The Court finds that only the Defendant's statement of "in my back pocket" was the result of a custodial interrogation. The Court, however, finds that Hagan's contact with the Defendant was a mere encounter, resulting in probable cause to arrest. Accordingly, it is ORDERED and DIRECTED that the Defendant's statement of "in my back pocket" is hereby SUPPRESSED. In all other regards, the Defendant's Motion to Suppress is DENIED.

By the Court,

xc: Nancy
DA
Michael Morrone, Esq.
Eileen Dgien, Dep. CA

L. Butts, President Judge