

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1676-2013
 :
 ISHMEAL SHORT, :
 Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s motion to suppress nunc pro tunc. The court held a hearing on Defendant’s motion on March 26, 2014. At the close of the hearing, counsel for Defendant requested thirty (30) days within which to file a brief. The court granted that request and gave defense counsel until April 30, 2014 to file a brief and counsel for the Commonwealth until May 30, 2014 to file any responsive brief. The relevant facts follow.

At about 8:23 a.m. on September 27, 2013, Assistant Chief James Bies of the Penn College Police heard a dispatch from Lycoming County Communications about a black male, who was a possible suspect in a shooting on Edwin Street on September 23, 2013. The dispatch indicated that the black male was wearing a red shirt and driving a white Buick Enclave in the 800 block of Second Street in Williamsport. When Asst. Chief Bies reached the middle of the block on Campbell Street, he saw the Buick Enclave parked on Second Street and four males walking north on Campbell Street, one of whom was wearing a red shirt as described in the dispatch. Asst. Chief Bies parked his vehicle, got out and walked toward the males from behind them. He said, “Hey fellas, can I talk to you a minute?” Two of the males took off running west down Third Street. The other two, including the one in

the red shirt, turned and looked at Asst. Chief Bies. The one in the red shirt, however, had his hand in his waistband of the front of his pants. Asst. Chief Bies was concerned that the male in the red shirt may be armed so he drew his service weapon and ordered the two males to the ground. Then he radioed that the other two black males fled westbound on Third Street, because he was alone and concerned that those individuals would circle back and try to come at him from behind.

Asst. Chief Bies also testified that the area was a high crime area. The shooting that occurred a few days earlier on Edwin Street was about three blocks north of where he saw the four individuals. There were multiple burglaries within a block either way of where the individuals were located. Furthermore, within the last year or two a woman had been shot at a convenience store in that area.

About twenty seconds after two of the males fled, Officer Michael Engel pulled up, made sure Asst. Chief Bies was okay, and drove off to look for the two males who fled. Officer Engel drove west on Third Street looking for the individuals, but he did not see them. He then drove south on Maynard Street and east on Second Street and pulled in behind the white Buick Enclave in case the individuals returned to the vehicle.

As Toni Carr was walking down Third Street toward Campbell Street with her daughter-in-law and granddaughter, she saw two black males running toward her. The two males split up. Defendant, who was wearing an orange hooded sweatshirt, ran through the bushes near a house in the 800 block of Third Street, and the other individual ran across Third Street. Ms. Carr did not see any police officers chasing the two black males. When

she reached the corner of Third and Campbell Streets, she saw a police officer with a gun standing over another young man and three or four police cars pull up. She motioned for one of the police officers to come across the street so she could talk to him.

Chief Christopher Miller walked across the street to talk to Ms. Carr, who told him where the two black males ran. Chief Miller and Officer Ben Laurenson walked over to the area where Defendant had fled. As Officer Laurenson turned into the gravel parking lot near 811 Third Street, he yelled for the Chief to come over. They saw a plastic baggie and several small plastic containers like one would get toys out of a coin-operated machine in the grocery store, scattered in and around the bushes. The baggie and the plastic containers contained marijuana. The bushes were covered in dew, but there was no dew on the baggie or the small plastic containers.

Officer Engel was standing outside his vehicle on Second Street when he heard other officers ask for a description of the individuals and the response that one individual was wearing a blue hoodie and the other was wearing an orange hoodie. Then he saw Defendant, who was wearing an orange hoodie, walking down an alley toward the white Buick Enclave. Defendant had something black in his hand. Concerned that the object may be a weapon, Officer Engel pulled his gun and ordered the individual to stop. The object in Defendant's hand was a black cell phone. Williamsport police officers handcuffed Defendant until they could figure out what was going on.

Defendant was arrested for possession with intent to deliver a controlled substance, possession of a controlled substance, and possession of drug paraphernalia and

transported to the Penn College police station. Asst. Chief Bies read Defendant his Miranda rights. Defendant waived those rights and agreed to speak with Asst. Chief Bies. Defendant told Asst. Chief Bies that he ran because he was scared. Asst. Chief Bies asked Defendant if he was scared because of the marijuana. Defendant initially said he did not have any marijuana on him, and he did not know why there was marijuana on the ground. He also told Asst. Chief Bies that he came back to the white Buick Enclave, because he had done nothing wrong. Then Chief Miller came in, explained finding the marijuana, and indicated that they should be able to obtain good fingerprints. When Asst. Chief Bies told Defendant that the items would be sent for fingerprint analysis, Defendant hung his head and said, "That will show me." Then Defendant requested an attorney and the interview ceased.

Defendant contends all the evidence against him must be suppressed because Asst. Chief Bies' request to speak to the group amounted to an investigatory detention of Defendant for which there was no reasonable suspicion.¹ He also contends that there was a forced abandonment of the marijuana due to the police pursuit of him without reasonable suspicion. The court cannot agree.

Fourth Amendment jurisprudence has led to the development of three categories of interactions between citizens and the police. The first of these is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an "investigative detention" must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or

¹ Defendant concedes that there may have been reasonable suspicion to stop the individual in the red shirt, but Asst. Chief Bies readily admitted that he did not have any reasonable suspicion or probable cause that Defendant committed any crime when he asked to speak to the individuals.

‘custodial detention’ must be supported by probable cause.

Commonwealth v. Ellis, 541 Pa. 285, 293-94, 662 A.2d 1043, 1047 (1995); see also Commonwealth v. Pakacki, 587 Pa. 511, 518, 901 A.2d 983, 987 (2006); Commonwealth v. Smith, 575 Pa. 203, 211, 836 A.2d 5, 10 (2003).

To decide whether a seizure has occurred, the court considers the totality of the circumstances, which 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.” Commonwealth v. Maxon, 798 A.2d 761, 766 (Pa. Super. 2002)(citation omitted).

Clearly, Asst. Chief Bies’ request to speak with the group was a mere encounter. In Commonwealth v. Lyles, 26 EAP 2013 (Pa. July 21, 2014), the police questioned an individual, asked for identification and began to write down the information from the identification card. The Pennsylvania Supreme Court found that the interaction was a mere encounter and stated,

This Court and the United States Supreme Court have repeatedly held a seizure does not occur where officers merely approach a person in public and question the individual or request to see identification. Officers may request identification or question an individual ‘so long as the officers do not convey a message that compliance with their requests is required.’

Id. at 6 (citations omitted).

Asst. Chief Bies did nothing prior to Defendant’s flight to convey a message that compliance with his request was required. He did not activate his lights or sirens when

he approached the individuals. He did not draw his weapon or order the individuals to stop. He simply asked, “Hey fellas, can I talk to you a minute?” Although he subsequently drew his weapon and ordered the two remaining individuals to the ground, he did so only because the individual in the red shirt, a possible suspect in a shooting, turned around with his hand in the waistband at the front of his pants as if he possessed a weapon.

The court also rejects Defendant’s claim of forced abandonment.

Abandonment is only “forced” when it is the product of unlawful police action.

Commonwealth v. Riley, 715 A.2d 1131, 1134 (Pa. Super. 1998). Here, there was no unlawful police action. Asst. Chief Bies merely approached the individuals and asked if he could talk to them. Such is clearly a lawful mere encounter.

While the individuals, including Defendant, were free to ignore the request and go about their business, there is a distinction between a refusal to cooperate and headlong flight. As the United States Supreme Court noted in Illinois v. Wardlow, 528 U.S. 119, 124 (2000), “Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” The Court further explained, “unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.” Id. at 125.

The court also rejects Defendant’s contention that the police were unlawfully

chasing him which forced the abandonment of the contraband. It is clear from the testimony of Ms. Carr and Officer Engel that the police were not chasing Defendant, but rather were looking for him and the other individual who fled. Regardless of how one categorizes the police efforts in response to Defendant's flight, however, at that point the police were justified in stopping Defendant because his presence in a high crime area coupled with his headlong flight gave rise to reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119 (2000); In the Interest of D.M., 566 Pa. 445, 781 A.2d 1161 (2001); Commonwealth v. Miller, 876 A.2d 427 (Pa. Super. 2005).

This reasonable suspicion ultimately ripened into probable cause to arrest Defendant for controlled substance violations. Chief Miller and Officer Laurenson discovered a baggie and small, plastic containers marijuana scattered in and around a bush near the residence at 811 West Third Street. The foliage was covered with dew, but the baggie and plastic containers of marijuana were not. Ms. Carr told Chief Miller that the individual in the orange hoodie ran in that direction. Defendant, who was wearing an orange hoodie, was stopped by Officer Engel less than a block away from that residence within minutes of Asst. Chief Bies' dispatch about the two individuals who fled. These facts, and the reasonable inferences that can be drawn from them, gave the police probable cause to believe that Defendant discarded the baggie and containers of marijuana as he fled, justifying his arrest.

Accordingly, the following order is entered.

ORDER

AND NOW, this ___ day of July 2014, the court denies Defendant's motion to suppress, nunc pro tunc.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Nicole Spring, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file