

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-2145-2015
v.	:	
	:	
NELLIE MARIE DYMECK,	:	CRIMINAL DIVISION
Defendant	:	

OPINION AND ORDER

Defense Counsel filed the Omnibus Pretrial Motion on April 5, 2016, and the Court heard the motion on June 13, 2016. The Court notes that the motion did not set forth specific facts and events and legal grounds for suppression as required by the Pennsylvania Rules of Criminal Procedure 578 and 581¹. In addition, the pretrial motion was not filed within 30 days of arraignment² and the Commonwealth objected to the timeliness of Defendant’s motion however, the Court allowed it in the interests of justice.

Background

Officer Stevens Testimony

Officer Andrew Stevens (Stevens) of the Williamsport Bureau of Police (WBP) testified that he has been a Williamsport police officer for one year and served in Bradford County for three years. He explained that he has experience in investigating illegal narcotics and that on September 28, 2015, he was on an aggressive patrol with another WBP officer Eric Derr (Derr) in an area known for drug trafficking. He stated that he and Derr were in uniform and in an unmarked vehicle. He observed a parked vehicle with three females inside of it, ran the plates

¹ (D) The motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof. Pa.R.Crim.P. 581.

² Pa.R.Crim.P. 579.

and determined that the vehicle was registered to an address in Watsontown, Northumberland County. From his knowledge and experience, he knows that people come from Watsontown to this specific neighborhood in Williamsport [the vicinity of Brandon Pl., Wilson St. and Penn St.] to purchase drugs. He observed Nellie Dymeck (Defendant) exit the vehicle and approach two black males. He then observed the two black males gesticulate to Defendant in a manner that Stevens interpreted as a gesture to “get away”. He watched Defendant return to the stationary vehicle. The officers approached the vehicle but did not activate lights or sirens. Defendant was in the front passenger seat in the vehicle. The driver side occupant of the vehicle granted Stevens permission to search the vehicle. He observed that the Defendant was nervous and argumentative and appeared to be trying to hide a yellow pill in her mouth. He requested that she exit the vehicle. He testified that when she exited the vehicle she began stomping on her cell phone so he could not see the content and she was handcuffed. The others were then also handcuffed for officer safety until they began the search of the vehicle. While handcuffed, Stevens testified Defendant was placed on the sidewalk and that he and Derr had to restrain her. He testified that a female officer was requested to search Defendant; WBP Officer Brittany Alexander (Alexander) searched Defendant. Alexander found another yellow pill incident to that search. Stevens testified that Defendant told Alexander it was Xanax after Defendant was handcuffed. On October 22, 2015 Defendant was charged by the Williamsport Bureau of Police Count 1, Tampering with or Fabricating Physical Evidence³, a misdemeanor of the second degree; Count 2, Possession of a Controlled Substance⁴, an ungraded misdemeanor ; and, Count 3, Possession of Drug Paraphernalia⁵, an ungraded misdemeanor.

³ 18 Pa. C.S. § 4910(1).

⁴ 35 P.S. § 780-113(a)(16).

⁵ 35 P.S. § 780-113(a)(32).

Defendant's testimony

Defendant testified that on the date in question she was going to football practice. She testified that she was nervous and mad that police approached her. She testified that yellow pill Stevens saw her put into her mouth was a piece of gum. She testified that one of the black males she was approaching was her boyfriend. She testified that she did not try to hide anything. She testified that she did not tell the officers anything, and that they pulled her out of the vehicle, and threw her to the ground and handcuffed her. She testified that she asked the officers to pull down her shirt and they would not.

Issue: Whether there was probable cause for the stop and search.

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. See Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. Commonwealth v. Ellis, 541 Pa. 285, 293-294 (Pa. 1995) (some citations omitted). An arrest is defined as any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest. Whether an arrest has occurred is based upon the totality of the circumstances and the test is an objective one, i.e., viewed in the light of the reasonable impression conveyed to the person subjected to the seizure rather than the strictly subjective view of the officers or the persons being seized. Commonwealth v. Butler, 729 A.2d 1134, (Pa.Super 1999). The

Pennsylvania Supreme Court has been careful to state that not every time an individual is placed in handcuffs that it arises to the level of an arrest, see Commonwealth v. Carter, 643 A.2d 61, 537 Pa. 233, 247 (Pa. 1994); however, placing Defendant in handcuffs can no longer be considered to be a mere encounter with the Defendant. A person placed in handcuffs by the police could not reasonably think she is free to leave the scene and her liberty, if only to move her arms, is curtailed.

The Commonwealth contends that the Officers' contact with Defendant was a mere encounter so there was no need for probable cause to approach the vehicle. During a "mere encounter" between police and a member of the public, the police have no legal requirement that there be cause for their actions i.e. situations in which a reasonable person would feel free to leave or where police engage in conduct that does not amount to search i.e. simply viewing something in public view or engaging in a safety check.

Stevens articulated specific facts and observations that led him to believe that Defendant may have been engaged in criminal activity. He was a uniformed police officer on aggressive patrol in a high crime area. While talking to black males is not a crime, their gesticulating to Defendant to "get away" seemed suspicious to the officer. Defendant's reaction when Stevens and Derr approached her was even more suspicious. She testified that she became angry. She corroborated Stevens testimony that she was in handcuffs on the ground.

It is axiomatic that Defendant has a reasonable expectation of privacy in her person and property. The driver of the vehicle's consent to having her vehicle searched is not relevant to the inquiry as to whether it was legal to search Defendant's person. Had Defendant been placed under arrest than the search of her person would have been reasonable as a search incident to arrest. Stevens testified Defendant was not under arrest. A frisk of her person to ensure that she

was not carrying any dangerous weapons and to ensure the safety of the officers would have been reasonable pursuant to the police's constitutional authority to engage in a stop and frisk when they have a reasonable suspicion that the Defendant is engaged in criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). A search of pockets when someone is being detained during an investigative detention is not permissible.

Issue: Whether to suppress evidence obtained without a warrant.

Under Pennsylvania state law, a defendant who is charged with a possessory offense has automatic standing to challenge an illegal search or seizure. Commonwealth v. Sell, 470 A.2d 457,469, 504 Pa. 46 (1983). If police frisked Defendant at an investigative detention for a reasonable, articulable concern for their safety and recovered a weapon; the weapon would be admissible into evidence. See Terry v. Ohio but also see Commonwealth v. Cartagena, 63 A.3d 294 (2013) (where the Superior Court upheld the suppression of a gun seized pursuant to a motor vehicle violation stop: passengers nervousness and delay in stopping did not justify a seizure following a traffic stop). In Commonwealth v. Reppert, 814 A.2d 1196, (2002), the Superior Court in an *en banc* opinion reversed the decision of a Trial Court that did not exclude evidence of drugs that were seized from a passenger's pockets after he was ordered to alight from a vehicle. The Court in Reppert found that the police officer did not have a reasonable suspicion that Reppert was engaged in criminal activity based on furtive movements and nervousness. In the case at bar, we do find that Stevens had a reasonable suspicion that criminal activity was afoot; however, at the level of investigate detention, only a Terry frisk would have been constitutionally allowable, not a search of the Defendant's pockets for illegal drugs.

ORDER

AND NOW, this _____ day of August, based upon the foregoing Opinion, the Motion to Suppress Evidence is **GRANTED**. The Court finds that the police did not have the required probable cause to search Defendant. Therefore, the evidence obtained by Office Alexander from the search of the Defendant's person is hereby **SUPPRESSED**.

BY THE COURT,

Nancy L. Butts, President Judge

cc: Jerry Lynch, Esq.
Nicole Ippolito, Esq.
Gary Weber, Lycoming Law Reporter