IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1895-2016**
v.	:	
	:	
BREILUN MCCLOE,	:	**MOTION TO SUPPRESS**
Defendant	:	**EVIDENCE**

OPINION AND ORDER

Breilun McCloe (Defendant) was arrested on September 4, 2016 on one count of Firearms Not to be Carried without a License,[1] one count of Possession of a Controlled Substance with the Intent to Manufacture or Deliver,[2] one count of Possession of a Controlled Substance,[3] and one count of Possession of Drug Paraphernalia.[4] The charges arise from police encountering Defendant while on foot patrol at the intersection of 4th Ave and Memorial Ave, Williamsport, PA 17701. Defendant filed this Motion to Suppress Evidence on April 19, 2018. A hearing on the motion was held by this Court on September 21, 2018.

In his Motion to Suppress, Defendant challenges whether the police had reasonable suspicion to conduct an investigatory detention of Defendant. Defendant contends any evidence obtained as a result of his unlawful initial seizure is unlawful and should be suppressed.

Background and Testimony

Officers Tyson Minier (Minier) and Zachary Geary (Geary) of the Williamsport Borough Police testified on behalf of the Commonwealth. Their testimony established the following. On September 4, 2016 around 9:00 p.m., they were acting in their official capacity

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[1] 18 Pa. C.S. § 6106(a)(1).
[2] 35 P.S. §780-113(a)(30).
[3] 35 P.S. §780-113(a)(16).
[4] 35 P.S. §780-113(a)(32).

as police officers while on foot patrol in the area of Waltz Place and 4th Avenue, which is known to the officers to be a "high crime area." Minier and Geary both received training in the United States Marine Corps and Army, respectively, and in the Police Academy on what signs to look for when an individual is carrying a weapon. On September 4, 2016, multiple factors led officers to believe Defendant was carrying a firearm. They observed a male walking south on 4th Avenue demonstrating an unusual gait, Defendant's right arm was not swinging, he was continually moving his hand from his from pocket to his waist as if attempting to hold up his pants, and his gait was awkward and asymmetrical. All this indicated to the officer that Defendant was carrying a firearm or some other "heavy object." Neither Minier nor Geary knew of Defendant from any previous contacts. At this point, Minier asked Defendant if he "had a minute." Defendant then turned and "bladed his body," meaning he turned while keeping his right side hidden from the officers. Minier then told Defendant "don't fucking run" and the officers split and approached from both the left and right side. Minier stated he then immediately saw a wood grain handle of a firearm sticking out of Defendant's pocket. Both officers from their training and experience acknowledged this is an uncommon way for someone licensed to carry a firearm. Minier then took the firearm out of Defendant's pocket and initiated a pat down for other weapons. Upon patting Defendant down, he stated "you might as well check in that one," indicating his other pocket, in which the officers found a scale and suspected cocaine.

Whether Minier and Geary had Reasonable Suspicion for an Investigatory Detention

Defendant alleges that he was detained by police in violation of his constitutional rights, therefore any evidence seized by the police should be suppressed. There are three categories when dealing with interactions between citizens and the police:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicions, but carries no official compulsion to stop or 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 "custodial detention" must be supported by probable cause.
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> *Commonwealth v. Gutierrez*, 36 A.3d 1104, 1107 (Pa. Super. 2012).

The Pennsylvania Supreme Court has adopted the United States Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), permitting police to effectuate a precautionary seizure when there is "reasonable suspicion criminal activity is afoot." *Commonwealth v. Matos*, 672 A.2d 769, 773-74 (Pa. 1996) (citing *Commonwealth v. Hicks*, 253 A.2d 276 (Pa. 1969)). The Court views a totality of the circumstances to determine whether "a reasonable person would believe that he was not free to leave." *Commonwealth v. Collins*, 672 A.2d 826, 829 (Pa. Super. 1996). "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences he is entitled to draw from the facts in light of his experience." *Commonwealth v. Cook*, 735 A.2d 673, 676 (Pa. 1999) (quoting *Terry*, 392 U.S. at 27). Case law has established certain facts alone do not create reasonable suspicion, but a totality of the circumstances may create it. *See Commonwealth v. DeWitt*, 608 A.2d 1030 (Pa. 1992) (flight alone does not establish reasonable suspicion); *Commonwealth v. Kearney*, 601 A.2d 346 (Pa. Super. 1992) (mere presence in a high crime area alone does not create reasonable suspicion). Reasonable suspicion is evaluated as an objective assessment, the officer's subjective intent is irrelevant. *Commonwealth v. Foglia*, 979 A.2d 357, 361 (Pa. Super. 2009) (citing *Scott v. United States*, 436 U.S. 128, 136 (1978)).

Defendant relies upon *Dewitt*, 608 A.2d 1030 and *Commonwealth v. McClease*, 750 A.2d 320 (Pa. Super. 2000). Although both cases outline situations involving reasonable

suspicion, one glaring difference is that both cases involved defendants in legal parked vehicles. Likewise, the Commonwealth cites *Commonwealth v. Stevenson*, 894 A.2d 759 (Pa. Super. 2006), while important is similarly distinguishable. In *Stevenson*, the officers "observed the outline of a small handgun in Appellant's pocket." 894 A.2d at 769. Alternatively, this Court finds *Commonwealth v. Carter*, 105 A.3d 765 (Pa. Super. 2014), to be a better representation of the present factual situation. In *Carter*, the officers were patrolling a high crime area in their vehicle, when they saw the defendant standing on the corner with a large bulge in his jacket pocket. 105 A.3d at 769-70. They circled the block multiple times and each time the defendant would walk in the opposite direction of them. *Id.* When they stopped and approached the defendant he turned so that the bulge was facing away from the officers. *Id.* There the court found that the "totality of the circumstance," the officers observations of a bulge in the defendant's jacket, consistent with someone carrying an unlicensed firearm, his walking in the opposite direction of them, his presence in a high crime area, and his turning in such a way that the bulge in his jacket was not visible to the officers provided enough reasonable suspicion to effectuate a *Terry* stop. *Id.* at 773-75.

When viewing the totality of the circumstances, Minier and Geary both testified to their training and experience with regards to firearms in both the military and at the police academy. Both officers witnessed an individual walking late at night in a high crime area. They observed his unusual gait, his lack of arm swing, and his consistent reaching to his waist/pocket area. In their training and experience they believed this to be consistent with an individual carrying a firearm. At this point Minier asked Defendant "if he had a minute," this does not yet cross the threshold into an investigatory detention and is simply a mere encounter. Defendant then faces the officers but "blades his body away" from them consistent with someone trying to conceal a

firearm. Minier then told Defendant "don't fucking move." With this statement the officers began an investigatory detention as it is clear Defendant was no longer able to leave. Officers at this point had to have "reasonable suspicion criminal activity [was] afoot." *Matos*, 672 A.2d at 773-74.

The Court finds that the requisite reasonable suspicion was present at this time. Like in *Carter*, Defendant was walking in a high crime area and was demonstrating characteristics consistent with carrying an unlicensed firearm. 105 A.3d at 773-75. Analogous to the bulge and walking away from police presence in *Carter*, here Defendant demonstrated an unusual gait and was continuously reaching to his waist/pocket area, which is consistent with that of an individual concealing a firearm in their pants. *Id.* at 769-70. Also as in *Carter*, the last distinguishing factor before police determined a *Terry* pat down was necessary was that Defendant "bladed himself away" from officers. *Id.* at 770. Therefore, Minier and Geary's investigatory detention of Defendant was support by reasonable suspicion. Before officers had the chance to administer a pat down, Minier could already see the wooden grain handle of a firearm sticking out of Defendant's pocket.

In addition, Defendant contends that there were no "reasonable and articulable grounds" to believe he was carrying a firearm **without a license**. This is incorrect when viewing the facts. The Superior Court has determined that "police safety, and the safety of other citizens, must always be afforded great weight when balanced against the privacy rights of an individual during an investigatory detention and pat down or frisk for weapons when the police have a reasonable suspicion that an individual is armed." *Stevenson*, 894 A.2d at 772. In *Stevenson*, the court determined reasonable suspicion existed prior to determining whether the defendant had a license to carry:

> [O]fficers observed that Appellant possessed a concealed weapon; that Appellant acted suspiciously and in a manner that suggested that his weapon may be illegal or unlicensed; that Appellant carried his weapon in a location on his person that, in [the officer's] experience, indicated that the weapon may be illegal or unlicensed; and that [the officer] had the requisite training and experience to make the necessary assessments as to whether Appellant was carrying an illegal or unlicensed weapon. The totality of these circumstances wholly support the trial court's conclusion that the officers had a reasonable suspicion that Appellant may have been engaged in criminal activity.

Id. at 773.

As explained above, Minier and Geary determined there was reasonable suspicion Defendant was carrying a firearm in his waist or pocket and upon Defendant "blading" himself, they determined that criminal activity was afoot. Once Minier observed the wooden grain handle they had additional reasonable suspicion to secure the weapon, conduct a pat down of Defendant, and investigate whether Defendant had a license to carry.

Conclusion

The Court finds officers acted with requisite reasonable suspicion for an investigatory detention. Therefore, there is no violation of Defendant's constitutional rights and the evidence resulting shall not be suppressed.

ORDER

AND NOW, this _____ day of November, 2018, based upon the foregoing Opinion, the Defendant's Motion to Suppress Evidence is DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Joseph Ruby, Esquire, ADA
Peter Campana, Esquire

NLB/kp