

COMMONWEALTH	: No. CP-41-CR-0000485-2018
	:
vs.	:
	: Opinion and Order re:
NAIM TAYLOR	: Commonwealth's Motion for
	: Reconsideration of Omnibus Pretrial
	: Motion Opinion and Order

OPINION AND ORDER

By Opinion and Order dated June 29, 2018, the court granted Defendant's Motion to Suppress. The court adopts the facts as set forth in said Opinion and Order. Said Order was based on the court's erroneous conclusion that the Commonwealth conceded that the defendant was subject to an investigatory detention when he walked back to Officer Gardner.

By Order dated July 23, 2018, the court granted the Commonwealth's motion for reconsideration and vacated the prior order. Argument on the reconsideration was held before the court on October 25, 2018 following the preparation of the transcript of the prior June 20, 2018 hearing.

The defendant maintains that he was subject to an investigatory detention when Officer Gardner yelled at him the second time, he walked back to Officer Gardner and was asked incriminating questions. The Commonwealth contends that the defendant was not subject to an investigatory detention until after Officer Gardner searched the defendant pursuant to the defendant's "voluntary consent." Prior to that, the Commonwealth contends that the interaction was a mere encounter.

As the court noted in its prior opinion, an investigative detention carries an official compulsion to stop and respond. *Commonwealth v. DeHart*, 745 A.2d 633, 636 (Pa. Super. 2000).

To determine whether a mere encounter rises to the level of an investigatory detention, [the court] must discern whether...the police conducted a seizure of the person involved. To decide whether a seizure has occurred, the court must consider all of the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person that he or she was not free to decline the officer's request or otherwise terminate the encounter. Thus, the focal point of [the] inquiry must be whether, considering the circumstances surrounding the incident, a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes.

Commonwealth v. Collins, 950 A.2d 1041, 1046 (Pa. Super. 2008)(quoting *Commonwealth v. Reppert*, 814 A.2d 1196, 1201-1202 (Pa. Super. 2002)(citations omitted)).

No single factor controls the ultimate conclusion as to whether a seizure occurred. *Commonwealth v. Singleton*, 169 A.3d 79, 83 (Pa. Super. 2017). Indeed, there are a host of cases that conclude that police officers do not subject an individual to a seizure when they approach that subject in a public place and ask him questions. *Id.*; *Commonwealth v. Au*, 615 Pa. 330, 42 A.3d 1002 (2012); *Commonwealth v. Ickes*, 582 Pa. 561, 873 A.2d 698 (2005).

Officers may request identification or question an individual "so long as the officers do not convey a message that compliance with their request is required." *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 2388 (1991); see also *In Re: D.M.*, 566 Pa. 445, 781 A.2d 1161, 1164-1165 (2001). In *Commonwealth v. Baldwin*, 147 A.3d 1200 (Pa. Super. 2016), for example, officers approached a defendant in their marked patrol car in a parking lot without activating their emergency lights. The officers did not block the defendant's path.

They believed that he may have discarded contraband behind the vehicle and approached the vehicle and asked for identification from the defendant. This was held to be a mere encounter.

The court concludes that these cases are distinguishable from the instant case.

First, Officer Gardner and the Commonwealth contend that because he did not direct the defendant to return to him or otherwise direct him to stop, that it was a mere encounter. When asked if he yelled at them for the purpose of having them come and talk to him, Officer Gardner replied: “Whatever happened from that point on was on them. I never instructed them to come back to me.” He specifically noted during his testimony that he “didn’t stop them, they came back to me.”

Indeed, the Commonwealth’s argument as to the level of the encounter between the defendant and Officer Gardner is based in large part, if not solely, on the fact that Officer Gardner did not tell the defendant that he was being detained and did not order or instruct the defendant to return to speak to him.

This argument rests on the premise that the level of encounter is dependent upon the particular words used by law enforcement as if those words constitute a type of talisman that magically converts one level of encounter to another.

Are the words used by officers so determinative that they create an immutable conclusion as to the level and nature of the interaction? Clearly, they are not.

As the courts direct, in this case, the defendant was restrained by a show of coercive authority. Officer Gardner encountered the defendant at night in a high crime area. While the defendant was parked in a vehicle, Officer Gardner circled right next to the vehicle, drove past the vehicle, circled around and then parked behind the vehicle within ten feet of it. Officer Gardner was in full uniform in a marked patrol car.

His conduct was such that he believed the defendant and the other passenger immediately left the vehicle in an attempt to disassociate themselves from the vehicle. The timing of Officer Gardner leaving his vehicle is critical. As soon as the defendant left his vehicle, Officer Gardner departed from his vehicle and immediately started following the defendant and the other occupant.

Officer Gardner immediately yelled “what’s up” to the defendant and the other occupant as they were walking toward the store. He insinuated that the defendant was involved in some type of criminal activity by continuing to follow the defendant and yelling a second time “hey, what’s up.” Officer Gardner’s conduct clearly conveyed a message to the defendant that the defendant was required to stop and comply with his question. While it was not a mandate to comply by physical restraint, it certainly was a show of authority.

Moreover, the cases require that consideration be given to the reasonable impression conveyed to the person being stopped. *Singleton, id.* In other words, would a reasonable person in the defendant’s position felt free to leave? *Commonwealth v. Parker*, 161 A.3d 357, 364 (Pa. Super. 2017). The defendant’s shoes were those of a young black man being confronted by a police officer. The police officer first drove around the defendant’s vehicle, apparently making observations and then based on his observations stopped behind the vehicle. The defendant and the occupant immediately left at which time the police officer also immediately left and twice questioned the defendant. In order for them to have felt free to leave, they would have had to twice ignore Officer Gardner by either continuing to walk into the store or to return to their vehicle and drive away. Under the circumstances, this makes absolutely no sense whatsoever.

While the vehicle could have pulled away, Officer Gardner's parking of his vehicle certainly made it more difficult, as Officer Gardner parked no more than ten feet behind the vehicle.

Officer Gardner virtually admits such when the following exchange took place during his testimony:

Question: "So then when they got out of the car you detained them?"

Answer: No. I did not detain them.

Question: You made them come over and talk to you?

Answer: They walked over to me.

Question: But because you called them, right?

Answer: Correct."

He further indicated that when he said what's up, he was intending to convey the message to them that he wanted to talk to them.

Question: "And what did you say at that time?"

Answer: Again, what's up?

Question: So you indicated that they were...that you wanted to talk to them?

Answer: Yes."

The second time Officer Gardner asked what's up, the defendant and the other occupant turned around and walked back to Officer Gardner and the vehicles. Officer Gardner asked them to sit on the bumper of their vehicle. They did. Officer Gardner asked them what they were doing, and they said they were just hanging out. Officer Gardner asked how long they had been parked there, and they said they weren't parked there very long. Officer Gardner asked if they had identification on them, and they said they did not but they did

provide their names and dates of birth.¹ Then Officer Gardner asked if they had anything illegal on their persons. They denied having anything illegal and “offered a voluntary consent to search their persons.” While searching the defendant, Officer Gardner observed marijuana flakes all over the upper right portion of his leg.

At some point during Officer Gardner’s questioning while the defendant and the other occupant were sitting on the bumper, Officer Gardner called for back-up.

The court cannot find that the interaction between the defendant and Officer Gardner was a mere encounter. Officer Gardner was controlling the defendant’s actions and movements. In a mere encounter, the individual is permitted to ignore the officer and continue on his way. Officer Gardner did not allow the defendant to ignore him. He found the mere failure to respond to him to be suspicious and called out to the individuals again. Once the defendant and the other occupant turned around and walked back to Officer Gardner, he had them sit on the bumper of their vehicle and then he questioned them.

Furthermore, the questioning of the defendant and the other occupant was not merely inquisitive; it was incriminating. The questions inferred to the defendant and the other occupant that Officer Gardner suspected that they had been doing something wrong and was investigating such. Officer Gardner asked if they had anything illegal on them, suggesting that he was investigating them for possession of controlled substances or other contraband. Officer Gardner admitted that he was suspicious of the defendant because of his “apparent association” with a suspected narcotics trafficker and a suspected narcotics trafficking vehicle. The

¹ There is nothing in the record to indicate whether the individuals volunteered this information or whether Officer Gardner requested or commanded it. While individuals without identification might volunteer their name, in this court’s experience individuals typically do not volunteer their date of birth; officers typically request or command it so that they can “run” a detained suspect’s name for warrant and criminal history information.

suggestion that an individual in the defendant's situation would have felt free to leave prior to the search of his person begs logic.

As the Superior Court noted in *Commonwealth v. Yashinski*, 723 A.2d 1041, 1043 (Pa. Super. 1998), "The overwhelming majority of lay people do not feel free to simply ignore police officers questions and continue driving along." "[T]he reality of the matter is that when a police officer requests a civilian to do something, even as simple as move along, it is most often perceived as a command that will be met with an unpleasant response if disobeyed." *Id.*, citing *Commonwealth v. Zogby*, 689 A.2d 280, 282 (Pa. Super. 1997).

In a mere encounter, an individual is permitted to ignore the officer and continue on his way. Officer Gardner circled around the vehicle in which the defendant was a passenger and parked within ten feet behind it. The defendant and the other occupant got out of the vehicle and began to walk toward the store. Officer Gardner called out to them, "what's up?" They continued to walk toward the store. Officer Gardner, however, did not allow them to ignore him. He persisted in asking "what's up?" Once the defendant returned to Officer Gardner, Officer Gardner had the defendant sit on the bumper of the vehicle. Officer Gardner then started asking him incriminating questions and requested back-up. Under the totality of the circumstances in this case, the court finds that a reasonable person would not think that he was free to simply ignore Officer Gardner, return to his vehicle, back out and leave. See *Commonwealth v. Mulholland*, 794 A.2d 398 (Pa. Super. 2002); *Commonwealth v. DeHart*, 745 A.2d 633 (Pa. Super. 2000) (investigative detention found where troopers approached a legally stopped vehicle and began asking questions, concluding that the overwhelming majority of lay people do not feel free to simply ignore police officers' questions and continue driving along). Because this court has concluded that the defendant was subject to an

investigative detention, the reasonable suspicion standard must apply. Consistent with this court's prior Opinion and Order, the court finds that Officer Gardner lacked reasonable suspicion.

ORDER

AND NOW, this ____ day of October 2018 following a hearing, argument and the submission of written authority, the Court **GRANTS** the defendant's Motion to Suppress. All of the evidence discovered following the defendant's illegal seizure is suppressed.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire
Aaron Gallogly, Esquire, District Attorney
Gary Weber, Lycoming Reporter
Work File