

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-858-2019**
v. :
 :
DONDRE MCMILLAN, : **MOTION TO SUPPRESS**
Defendant :

OPINION AND ORDER

Dondre McMillan (Defendant) was arrested on May 26, 2019 for Persons not to Possess Firearms¹ and Firearms Not to be Carried without a License.² These charges arise from police encountering Defendant while on patrol at 300 Market St., Williamsport, PA 17701. Defendant filed this Motion to Suppress on October 11, 2019. A hearing on the Motion was held by this Court on December 13, 2019. Both parties were then given the opportunity to brief the issue. Defendant submitted his brief on January 13, 2020 and the Commonwealth submitted its brief on January 22, 2020. 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 was impermissible and should therefore be suppressed.

Background and Testimony

Officers Michael Corter (Corter) and Zachary Saylor (Saylor) of the Williamsport Bureau of Police testified on behalf of the Commonwealth. Additionally, Defendant testified on his own behalf and submitted three sketches as exhibits. This evidence established the following. On May 25, 2019 approximately 1:40 a.m., Corter and Saylor were acting in their official capacity as police officers while on patrol in the area of Downtown Williamsport,

¹ 18 Pa. C.S. § 6105(a)(1).

² 18 Pa. C.S. § 6106(a)(1).

which was relatively busy as it was a weekend night. N.T. 12/13/19, at 4-5. As Corter and Saylor were driving through the Jersey Shore State Bank parking lot at approximately three miles per hour with the windows open, they observed Defendant walk through the parking lot to a Maroon SUV. *Id.* at 6. Defendant was observing the officers as they passed through the parking lot. *Id.* at 11. Officers had not received any report of criminal activity and have never encountered Defendant prior to this occasion. *Id.* at 11-12. Corter heard the “unmistakable sound of a gun hitting the pavement” and said to Saylor that it sounded like a gun had hit the pavement. *Id.* at 6. Saylor at this point verified that the sound was a gun, which he observed at the feet of Defendant who was at the rear driver’s side car door. *Id.* at 7, 24. The officers were approximately fourteen feet from Defendant at this time. *Id.* at 11. Corter pulled the vehicle over and the officers walked back towards Defendant. *Id.* at 7. When asked about whether he ordered Defendant out from between the vehicles, Corter stated:

I didn’t order anything. So if I did ask him, I don’t recall that. But I wouldn’t have said you need to come over here right now or – I believe it was just kind of a – more of a mutual – he was over here. He doesn’t – at that point any mere encounter, hey, can you come here and talk to me. They can come over and talk to me.

Id. at 19.

Corter approached Defendant as Saylor approached the driver’s front door of the vehicle from the opposite side, for safety reasons. *Id.* at 8. When officers reached Defendant the gun was no longer at his feet where it had been. *Id.* at 7, 25. Corter asked if he had dropped a gun, but Defendant stated he did not, but he had dropped his cellphone. *Id.* at 8. Corter then patted Defendant down for weapons and nothing was retrieved as a result of that search. *Id.* at 16. Saylor observed inside the vehicle a cylinder, which contained suspected marijuana. *Id.* at 8, 26. Based on this Defendant was detained while Saylor searched the vehicle. *Id.* at 8. In the

pocket of the driver's side door a .40 caliber magazine was located. *Id.* at 27. Defendant still denied having a handgun. *Id.* The owner of the vehicle approached as this was happening and stated that he had a firearm in the center console. *Id.* at 9. Upon searching the vehicle, a firearm was not recovered from the center console and instead was found under the SUV. *Id.* at 9. Defendant testified that he dropped his phone in the parking lot and when he reached down and retrieved it both Corter and Saylor were surrounding him with flashlights. *Id.* at 38. Defendant stated he had no way to leave and felt like he had to answer Corter. *Id.* at 40-41.

Whether Corter and Saylor had Reasonable Suspicion for an Investigatory Detention

Defendant alleges that he was detained by police in violation of his constitutional rights, and 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.

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, and 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 *Commonwealth v. Hicks* to support his position. *Hicks*, a recently decided case by the Pennsylvania Supreme Court, overruled the long standing precedent in Pennsylvania that possession of a concealed firearm in public alone was sufficient to establish reasonable suspicion. *Commonwealth v. Hicks*, 208 A.3d 916, 921 (Pa. 2019). In *Hicks*, the defendant was seen by a remote camera operator putting a firearm in his waistband and covering it with his shirt. *Id.* at 949-50. As the defendant walked towards the gas station the firearm was holstered outside his waistband and covered by his shirt, but the outline was clearly visible. *Id.* at 950. Based on these observations, the defendant was stopped by officers as he was attempting to pull out of the gas station. *Id.* The Court found that although an “officer certainly is entitled to consider probabilities and to employ common sense . . . the whole picture of the circumstances must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.” *Id.* at 939 (internal quotations omitted). In concluding, the Court held that an officer cannot assume any person carrying a firearm, “absent some other circumstances giving rise to a suspicion of criminality,” is violating the law. *Id.* at 945.

The issue presented is whether, pursuant to *Hicks*, Corter and Saylor had sufficient reasonable suspicion to conduct an investigatory detention, besides just the mere possession of the firearm. First it is important to distinguish that Defendant was not spotted with a holstered weapon as in *Hicks*, but instead dropping a firearm on the ground at his feet when he recognized police officers in the area. Officers did not turn on their sirens or lights and did not block the vehicle in. Corter states that Defendant came out to him as Saylor was at the front driver's side door, but he was not ordered to come out from in between the vehicles. Saylor states Defendant was at the rear driver's side door, Corter was at the rear, and he was at the driver's side door looking for the firearm. Defendant contends that he dropped his phone and when he got back up both Saylor and Corter were on either side of him within an arm's length. This Court does not credit Defendant's testimony. It is self-serving to his case and not realistic. All parties agree the police vehicle was parked out of sight and away from Defendant and the interaction began because of an item being dropped on the pavement. But Defendant's testimony that in the time it took him to drop his cellphone, bend over to get it, and stand back up, officers were already within arm's length of him with flashlights out is unrealistic. Instead this Court agrees that the officers' version of events that although both in close proximity with Defendant, they were not trapping him between the cars. Then once Defendant stated that he did not drop a firearm or have a firearm, the facts of this case diverge from those in *Hicks*. A citizen lawfully carrying a firearm has no reason to lie to officers about possessing a firearm and Saylor's testimony was clear that he saw a firearm at Defendant's feet. Officers at this point had the requisite "reasonable suspicion criminal activity [was] afoot" to conduct an investigatory detention. *Matos*, 672 A.2d at 773-74.

Regardless of reasonable suspicion, this Court agrees with the Commonwealth's contention the firearm was abandoned. Although the theory of abandonment does not apply when unlawful police conduct occurs, it is clear from the testimony the gun was put under the car before police got to Defendant. It is well established case law that "no one has standing to complain of a search or seizure of property that he has voluntarily abandoned." *Commonwealth v. Shoatz*, 366 A.2d 1216, 1220 (Pa. 1976). "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *Commonwealth v. Barnette*, 760 A.2d 1166, 1170 (Pa. Super. 2000). A court should determine "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id.* at 1171. As the Commonwealth points out in their brief, Defendant's case is similar to that of *Commonwealth v. Byrd*. In *Byrd*, the defendant was seen throwing an object under a car and walking away from the vehicle. *Commonwealth v. Byrd*, 987 A.2d 786, 787 (Pa. Super. 2009). The Pennsylvania Superior Court found this to be clear voluntary abandonment. *Id.* at 791.

Although Defendant does not walk away from the vehicle after he discards the firearm, his actions still constitute an attempt to distance himself from the firearm. Additionally, he denies there being any firearm or him having a firearm. From these statements his words convey that he wishes to abandon the firearm. *See Commonwealth v. Bennett*, 604 A.2d 276, 280 (Pa. Super. 1992) ("defendant's disclaimer of ownership constituted an abandonment of the duffle bag which he had previously been carrying" although the bag was still within five feet of him). The actions in response to police presence also credit a finding of abandonment. *See In the Interest of Evans*, 717 A.2d 542, 545 (Pa. Super. 1998) (throwing away a bag in response to

seeing police officers constituted abandonment). Therefore this Court finds that Defendant abandoned the handgun and does not have the requisite standing to challenge its suppression.

Conclusion

The Court finds officers acted with requisite reasonable suspicion for an investigatory detention. Additionally, Defendant abandoned the firearm by his words and actions and no longer has the constitutional standing to request this Court to suppress the firearm. Therefore, there is no violation of Defendant's constitutional rights and the evidence shall not be suppressed.

ORDER

AND NOW, this 31st day of January, 2020, based upon the foregoing Opinion, the Defendant's Motion to Suppress is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (JR)
Matthew Welickovitch, Esquire

NLB/kp