

COMMONWEALTH OF PA : No. CP-41-CR-0001265-2020
:
vs. :
:
TIMOTHY KELLY, JR. : Omnibus Pretrial Motion

OPINION AND ORDER

By Information filed October 3, 2020, Defendant is charged with criminal use of a communications facility, possession with intent to deliver and related offenses.

Defendant filed a Motion to Suppress on October 16, 2020 and a hearing was held on February 3, 2021. Following the hearing, the record was closed. The parties were given the opportunity to submit written briefs. Defendant’s brief was submitted on or about February 19, 2021, and the Commonwealth’s brief was submitted on or about March 5, 2021.

The case is presently on the trial list. Defendant remains incarcerated in lieu of bail but the court indicated in a prior Order that it would reconsider the bail issue after hearing the evidence on Defendant’s Motion to Suppress and making a decision with respect to such.

According to the evidence presented at the hearing, Officer Stevens of the Williamsport Bureau of Police (WBP) was on duty and patrolling Williamsport in a marked unit on September 14, 2020 when he noticed a vehicle traveling on Fifth Avenue. The vehicle had a Pennsylvania license plate but no inspection sticker. Intending to stop the vehicle for a motor vehicle violation, he made a U-turn and started to travel in the same direction somewhat behind the vehicle. The vehicle subsequently made a right-hand turn from Fifth Avenue onto Park Avenue traveling a westerly direction. While the vehicle was turning, Stevens lost sight of it for approximately 15 seconds.

After turning onto Park Avenue, Stevens noticed that the vehicle had pulled over in a parking area on the street. He pulled his vehicle behind while activating his lights in order to effectuate the vehicle stop. As Stevens got out of his unit and started approaching the vehicle, he was approached from behind by an adult female subsequently identified as Ms. Rodriguez. She apparently was coming from or going to her Jeep vehicle that was parked on Park Avenue behind where Stevens pulled in.

Ms. Rodriguez informed Officer Stevens that she saw a black male with long dreads down his back exit the vehicle and start running northbound between some houses. Stevens immediately radioed out the information. He then proceeded with the vehicle stop while assisting officers obtained identification from Ms. Rodriguez including her full name, address and contact information.

Officer Minnier of WBP was on duty and patrolling at the same time near the incident. He heard the radio dispatch from Stevens and started traveling north on Fourth Avenue parallel to Fifth Avenue hoping to find the individual. Upon turning east on an adjacent street, he noticed a black male with long dreads approaching the street from the south between two houses. As Officer Minnier was stopping his vehicle, the individual immediately sat on the steps of an adjacent home. Officer Minnier eventually stopped his vehicle in the middle of the street, got out, approached the individual, and directed him not to run.

The individual, subsequently identified as Defendant, immediately started running north between houses. Officer Minnier followed him and engaged in a foot pursuit. The pursuit involved traveling in different directions, over at least one fence, across and between residential properties with houses, across a highly traveled street, and eventually under a tree. Once Defendant passed under the tree, he dropped to the ground and surrendered.

While doing so, however, he threw a pill bottle over his head. Officer Minnier secured Defendant in handcuffs and then he looked at the pill bottle. Officer Minnier determined that the pill bottle was illegal contraband in that it contained a large amount of assorted pills and had an obliterated label. He subsequently arrested Defendant and searched him incident to the arrest. Defendant was in possession of a large amount of cash, an iPhone, contraband, and controlled substances.

Defendant was transported back to City Hall. Officer Minnier began the process of inventorying the seized items. They were placed on a table near each other. Officer Minnier planned on identifying them, packaging them and securing them in an evidence locker.

During this process, he noticed that the screen on Defendant's iPhone displayed an incriminatory message. He took note of such but did not activate the phone nor do anything to it to obtain or retrieve any messages. The message simply appeared on the screen in plain view.

Defendant filed a brief in support of Defendant's Motion to Suppress on February 19, 2021. The brief conflates and confuses the issues by intermingling probable cause and reasonable suspicion standards. From what the court can glean from the brief along with Defendant's motion, Defendant argues that when Officer Minnier first approached Defendant, Officer Minnier arrested him without sufficient probable cause. Defendant seems to argue that the stop of Defendant while he was sitting on the porch was without the requisite probable cause and that Defendant's flight failed to provide additional probable cause for his subsequent arrest.

Defendant initially cites *Commonwealth v. Dewitt*, 608 A.2d 1030 (Pa. 1992) in support of his claim. In *Dewitt*, the court concluded that a police officer did not have probable

cause to carry out a lawful traffic stop. It did not involve the stop of a pedestrian. In *Dewitt*, the court held as well that the officer did not have reasonable suspicion of criminal conduct to justify the traffic stop.

Both the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution guarantee individuals freedom from unreasonable seizures. *Commonwealth v. Bostick*, 958 A.2d 543, 550 (Pa. Super. 2008), *appeal denied*, 987 A.2d 158 (Pa. 2009). “To secure the right of citizens to be free from such intrusions, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens to the extent those interactions compromise individuals liberty.” *Commonwealth v. Reppert*, 814 A.2d 1196, 1201 (Pa. Super. 2002).

The three categories of interactions between citizens and police include a mere encounter, an investigative detention and an arrest or custodial detention. *Commonwealth v. Pakacki*, 901 A.2d 983, 987 (Pa. 2006). A mere encounter need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. An investigative detention must be supported by 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. *Id.*

In evaluating the level of interaction, courts conduct an objective examination of the totality of the surrounding circumstances. *Commonwealth v. Lyles*, 97 A.3d 298, 302 (Pa. 2014).

In considering the totality of the circumstances, the court must focus on whether the suspect has in some way been restrained by physical force or show of coercive authority.

Commonwealth v. Young, 162 A.3d 524, 529 (Pa. Super. 2017). The non-exhaustive list of relevant factors include the number of officers present during the interaction, whether the officer informed the citizen that 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. Boswell*, 721 A.2d 336, 340 (Pa. 1998); *Commonwealth v. Collins*, 950 A.2d 1041, 1047 n. 6 (Pa. Super. 2008) (en banc).

When Officer Minnier initially approached Defendant, the court cannot conclude that it was an arrest. Rather, it was an investigative detention. Officer Minnier parked in the street, stepped out of his vehicle, and directed Defendant not to run. He did not maintain a hold on Defendant. He did not handcuff Defendant, he did not draw his weapon nor did he exercise any physical force to refrain Defendant from moving. Officer Minnier did not present himself in a coercive or aggressive manner that conveyed a demand for compliance or indicated that there would be tangible consequences for a refusal. He did not inform Defendant that he was suspected of any criminal activity, nor does the record suggest that his demeanor or tone of voice was threatening.

An investigatory detention is justified only when an officer can point to specific and articulable facts which, in conjunction with rational inferences derived from those facts, give rise to a reasonable suspicion of criminal activity. *Commonwealth v. E.M.*, 735 A.2d 654, 659 (Pa. 1999). The officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Commonwealth v. Carter*, 105 A.3d 765, 768-69 (Pa. Super. 2014).

"In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. In making this determination, the courts must

give due weight to the specific, reasonable inferences the police officer is entitled to draw from the facts in light of his experience. Also, the totality of the circumstances test does not limit the inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.” *Commonwealth v. Stilo*, 138 A.3d 33, 36 (Pa. Super. 2016), quoting *Commonwealth v. Foglia*, 979 A.2d 357, 360 (Pa. Super. 2009)(en banc), *appeal denied*, 990 A.2d 727 (Pa. 2010)(citations and internal quotes omitted).

Moreover, in determining reasonable suspicion, the court may consider tips, the reliability of informants, time, location and suspicious activity, including flight. *Commonwealth v. Millburn*, 191 A.3d 891, 898 (Pa. Super. 2018).

In this particular case, there was clearly reasonable suspicion for Officer Minnier to detain Defendant. The facts and reasonable inferences demonstrate that while Defendant was a passenger in the vehicle, he realized that Officer Stevens was going to stop the vehicle after Officer Stevens made a U-turn to get behind the vehicle. As the vehicle turned the corner, Defendant opened the door and started running away trying to avoid being detained as part of the traffic stop. Officer Stevens lawfully stopped the vehicle based on the vehicle lacking an inspection sticker.

Clearly, Defendant would have been legally detained if he had remained in the vehicle, because it was lawfully stopped. *Commonwealth v. Dunham*, 203 A.3d 272, 280 (Pa. Super. 2019)(“a lawful traffic stop constitutes a seizure of all occupants of the vehicle for the duration of the stop, with no additional, particularized suspicion required”). By jumping out of the car and running, Defendant demonstrated consciousness of guilt in the face of knowing that he would be detained as a passenger.

By continuing to run, he again confronted law enforcement after coming out between two houses. In an effort to continue to deceive law enforcement, he sat down on the front stairs of an unknown house. When confronted by police and told not run, he disobeyed and immediately took off running.

Defendant knew that he was running from law enforcement. His headlong flight was the consummate act of evasion and while it was not indicative of wrongdoing, it was certainly suggestive of such. *Commonwealth v. Washington*, 51 A.3d 895, 898 (Pa. Super. 2012).

Officer Minnier's pursuit of Defendant was an investigative detention supported by reasonable suspicion. Knowing that Officer Minnier was pursuing him, Defendant continued to run over and through obstacles attempting to evade being caught. Eventually, he gave up but, in the process, he threw a pill bottle from his possession to remove it from his person. After Officer Minnier apprehended Defendant, Officer Minnier determined that the discarded pill bottle contained illegal contraband and he arrested Defendant.

Defendant's pursuit and confrontation with officers both when he was seated on the steps and initially placed in cuffs was an investigatory detention supported by reasonable suspicion.

Defendant's subsequent arrest was supported by probable cause.

Probable cause is made out when the totality of the facts and circumstances that are in the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution and the belief that suspect has committed or is committing a crime. *Commonwealth v. Thompson*, 985 A.2d 928, 931 (Pa. 2009). The question is not whether the officer's belief was correct or more likely

true than false. *Id.* What is required is only a probability and nothing more. *Id.* Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily the most reasonable inference. *Commonwealth v. Spieler*, 887 A.2d 1271, 1275 (Pa. Super. 2005).

Certainly, the police had probable cause to arrest the defendant after the series of incidents involving him. The factor of greatest weight was the defendant throwing the pill bottle, which contained illegal contraband. Moreover, Defendant essentially asks that the court ignore information from Ms. Rodriguez. To the contrary, the courts have recognized that ordinary citizens reporting their observations enjoy a presumption of trustworthiness. *Commonwealth v. Lyons*, 79 A.3d 1053, 1064-65 (Pa. 2013). Such citizen reports are particularly compelling because members of a particular neighborhood are uniquely well qualified to observe what is going on in their community and should be supported in reporting criminal activity to the police. *Commonwealth v. Dennis*, 612 A.2d 1014, 1016 (Pa. Super. 1992); *Commonwealth v. Brogden*, 220 A.3d 592, 600 (Pa. Super. 2019).

Finally, the court cannot ignore Defendant's headlong flight, the consummate act of evasion. *Washington*, 51 A.3d at 898.

The court concludes that when Officer Minnier first approached Defendant the approach was an investigative detention supported by reasonable suspicion. When Defendant fled and Officer Minnier continued running after him, it continued to be an investigative detention even after Defendant was initially handcuffed. *Commonwealth v. Smith*, 172 A.3d 26, 32 (Pa. Super. 2017)(handcuffing a suspect, by itself, does not convert an investigative detention into an arrest). That too was supported by reasonable suspicion. Defendant's eventual arrest constituted a custodial detention supported by probable cause.

Defendant next contends that what the officer viewed on the screen of Defendant's phone should be suppressed. Defendant argues that the courts have stated that there is little difference between monitoring the internal and external viewing screens on a cell phone and searching the phone's call logs.

The court recognizes that the Pennsylvania Supreme Court made such a statement in *Commonwealth v. Fulton*, 179 A.3d 475, 489 (Pa. 2018), but the court finds *Fulton* distinguishable. In *Fulton*, the appellant's phone was seized as part of an investigation of drug activity and firearms violations. This investigation occurred in an area where a shooting had occurred two days earlier and on the date when the victim of the shooting succumbed to his injuries. Although several other items of evidence from the drug and firearms investigation were placed on property receipts, the appellant's phone was not. Rather, the phone was transferred to the Homicide Division and searched without a warrant as part of the murder investigation. Specifically, a homicide detective flipped open the appellant's cell phone, powered it on, searched its menu to determine its assigned phone number, and monitored the incoming calls and texts by viewing the internal or external display screens. The *Fulton* Court found that these activities constituted searches of the phone without a warrant.

While powering on a cell phone and examining and monitoring its contents without a warrant or consent violates the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution, such did not occur here. Officer Minnier neither powered on nor searched Defendant's phone. As Officer Minnier was logging the phone into evidence, a text message appeared on the external screen. Officer Minnier merely observed what appeared in plain view as he logged the phone into evidence. Plain view is an established exception to the general rule that warrantless searches are presumptively

unreasonable. *Commonwealth v. Wilmer*, 194 A.3d 564, 567-68 (Pa. 2018); *Commonwealth v. Luczki*, 212 A.3d 530, 546 (Pa. Super. 2019); *Commonwealth v. Kurtz*, 172 A.3d 1153, 1159 (Pa. Super. 2017). A plain view observation is not a search within the meaning of the Fourth Amendment and no warrant is required. *Commonwealth v. Weik*, 521 A.2d 44, 45 (Pa. Super. 1987). Accordingly, Officer Minnier did not conduct an unlawful search of Defendant's phone and he did not seize any information in violation of the United States or Pennsylvania Constitutions.

ORDER

AND NOW, this ____ day of March 2021, following a hearing, argument and the submission of briefs, Defendants Motions to Suppress are **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Andrea Pulizzi, Esquire
Joseph Ruby, Esquire ADA
Gary Weber, Lycoming Reporter
Judge Marc F. Lovecchio