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Commonwealth v. Burriss

COMMONWEALTH OF PENNSYLVANIA  
v. WILLIAM STANLEY BURRISS, Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Fulton County Branch  
Criminal Action No. 53 of 2011

*Arrest; On Criminal Charges; Investigatory Stop; Grounds for Stop or Investigation; Reasonable Suspicion. Automobiles; Offenses; Arrest, Stop or Inquiry; Conduct of Arrest, Stop or Inquiry; Ordering occupants out of vehicle.*

1. Courts have identified three (3) levels of interaction between citizens and police officers.
2. A mere encounter occurs where there is any formal or informal interaction between the two, but most often occurs in the form of questioning by the officer of the citizen. In such an encounter, there is no obligation on the part of the citizen to stop or respond.
3. An investigative detention carries an official compulsion both to stop and to respond, but the detention is temporary absent formation of probable cause for an arrest.
4. An investigative detention occurs where police conduct would communicate to a reasonable person that they were not free to decline an officer's request or leave and terminate the encounter, and requires a reasonable suspicion of unlawful activity.
5. A custodial detention occurs where the "nature, duration, and conditions of an investigative detention become so coercive" as to constitute the "functional equivalent" of a formal arrest.
6. Reasonable suspicion exists where the officer has a reasonable and articulable belief that criminal activity is occurring linked to observations of suspicious or irregular behavior by the individual detained.
7. Where a motorist is stopped for violation of the Motor Vehicle Code, the officer may request the person to step out of the vehicle.
8. After a vehicle has been stopped, license and registration requested, and a computer check completed, if the documents are valid the driver must be allowed to proceed without further delay. To justify any further detention, the officer must have reasonable suspicion of an illegal drug transaction or another serious crime.
9. Nervousness may indeed be a relevant factor to consider, but absent further indicia of criminality, cannot alone establish reasonable suspicion.
10. To establish a valid consensual search, the Commonwealth must show the consent was given during a legal police interaction.
11. Late hour, out of town registration, turn onto rarely travelled alley, and nervousness of driver is insufficient to establish reasonable suspicion, where all documentation requested was in order, and driver's explanation for conduct was reasonable and fully explained his presence and behavior.

Appearances:

Travis L. Kendall, Esq., *Fulton County District Attorney*

Tamela Mellott Bard, Esq., *Counsel for Defendant*

## OPINION

Van Horn, J., July 15, 2011

### Statement of Facts

In the early morning hours of December 31, 2010, Defendant William Stanley Burriss [hereinafter "Burriss" or "Defendant"] was a passenger in the vehicle of Seth Alan Hoffman [hereinafter "Hoffman"], a grey Jeep Cherokee, driving on Route 30 towards McConnellsburg, Fulton County. That night, Pennsylvania State Police (PSP) Troopers Gary Hibner and Matt Wadsworth were acting as roving patrol in the McConnellsburg borough. Sighting the Cherokee, the officers began to follow the vehicle, typed in the license plate number, and found the Jeep was registered to a Chambersburg, Pennsylvania address.<sup>[1]</sup> Trooper Hibner testified at hearing this fact struck him as "a little bit" unusual, but "not at that point so much." (T.P. at 8:11-13.)

The officers continued to follow the vehicle, closely tailing the Jeep as it made a left hand turn onto Fifth Avenue, a small alley that is rarely travelled except by residents of the homes situated along it. Trooper Hibner testified at hearing the officers thought the turn "could be kind of suspicious." (Id. at 9:4.) The officers continued to follow as the vehicle came to a full stop at the intersection of Fifth Avenue with Pine Street, and then continued straight ahead. At the next stop, executed in compliance with applicable traffic law, the Jeep turned right onto East Maple Street, and the troopers continued to follow. After another full stop at a stop sign at the intersection of East Maple and Fourth Street, the vehicle turned right onto Fourth Street, and the officers continued their pursuit.

Thereafter, the Jeep made a right hand turn onto East Pine Street, doubling back in the direction from which it had come. The officers found it "really suspicious a vehicle from Chambersburg with a Chambersburg address [was] driving around in a circle late at night in a McConnellsburg back alley." (Id. at 11:5-7; Commonwealth Exhibit Number 1.) The Affidavit of Probable Cause recounts that such action would make little sense unless the driver were lost, though at hearing Hibner testified he never considered at any time the possibility the driver was lost. (See Id. at 38.) Hibner also testified that in order to get to the driveway, it would be necessary to back-track down at least one street perpendicular to Lincoln Way in such a manner. (See Id. at 36.) On Pine Street only a moment, the driver made a left-hand turn into a long driveway, and omitted to use a turn signal. The Jeep halted at the end of the driveway, at the top of which was a garage with a residence situated behind, and turned off its headlights. The troopers moved down Pine Street, past the driveway, following the road up a hill and over the crest, pulling far enough down the other side so that the driveway and the Jeep were no longer visible. The officers pulled off the road and turned off the headlights of the cruiser.

After executing a three point turn, the troopers returned over the hill. Trooper Hibner estimated at hearing the maneuver took about twenty (20) seconds. Approximately twenty (20) seconds later, the vehicle pulled out of the driveway and began travelling back the way it had come. The Jeep turned onto Fourth Street without using a turn signal, and the troopers activated the overhead lights of their vehicle and initiated a traffic stop near the intersection of Fourth Street and East Maple. The stop is logged as having begun at 12:25 a.m., though it may have occurred five (5) minutes earlier.

After the Jeep came to a halt, Trooper Hibner approached from the driver's side while Wadsworth approached on the side of the passenger. Hibner advised the driver, Hoffman, he had pulled the vehicle over due to the failure to signal, and requested his drivers' license, registration, and proof of insurance. The officer testified that he immediately noticed the driver was "extremely nervous," stating his "heart was beating fast," his "breathing was hard," and his "chest was moving at a high pace." (See T.P. at 15:12-16.)

The driver searched for the requested documents in the glove box, handing them to Trooper Hibner. Hibner testified Hoffman's hands were shaking "bad," and that he "never seen hands shake that much," describing them as "trembling." (T.P. 15:19-23.) At that time, the officer asked why the Jeep was "traveling around in a circle," to which Hoffman replied that he was dropping off a friend, Ryan Knepper, at his home. (Id. at 15:23-24.) At this point, the officer asked Hoffman if Knepper lived at the home, to which the answer was affirmative, after which Hibner asked the question again in a tone the officer described as hinting that he knew no one by that name resided in the residence. Hoffman, stating he was "pretty sure" Knepper resided there, explained the home belonged to Knepper's father, and that his mother lived in Franklin County. The officer asked why the trip was made so late, to which Hoffman replied the three had been at his home "hanging out" when Knepper asked for a ride to his father's. Hibner testified Hoffman seemed to grow more nervous after answering.

The trooper then requested identification from the Defendant, to which Burriss replied he did not have any forms of ID,

and had never possessed a driver's license. As requested by Hibner, Burriss told the officer his name and date of birth. The trooper returned to his vehicle and used his computer to request information on both individuals. No information was available on Burriss. However, the officers found that Hoffman had a drug arrest for a small amount of marijuana in August of 2010. There was no obvious discrepancy regarding any information provided to Hibner by Defendant or Hoffman.

At this point, Hibner and Wadsworth returned to the vehicle and asked both men to step outside the Jeep, walking them to the rear of the vehicle in front of the police patrol car. Hibner patted each down, feeling nothing he suspected was a weapon. He did feel a square object in the pocket of Burriss' hooded sweatshirt, which the Defendant told him was a cellular phone. The officer testified he did not believe at that time that the object was drug paraphernalia or a weapon.

Hibner, retaining Hoffman's license, registration and insurance card, then requested permission from Hoffman to search the vehicle, which Hoffman gave, signing a consent form. (See Commonwealth Exhibit Number 2.) While the officer could not recall the light source available in the alley, he did recall the overhead lights of the police cruiser remained lit, and that he and Wadsworth were standing near the Defendant and Hoffman by the bumper of the Jeep. Hibner then searched the vehicle, opening the center console of the Jeep in the process, and finding the end of a cigar that contained marijuana, commonly referred to as a "blunt."

Thereafter, having decided first that the two would be charged with the crime of possession of a small amount of marijuana, and having formed the intention to release them at the scene, Hibner conducted a second pat down of both men. This time, the officer removed the square object from Burriss' pocket, discovering it was a digital scale containing marijuana residue. The officer then asked Burriss what the scale was used for, to which Defendant replied he used it while purchasing marijuana to avoid being cheated. Though the officer stated the search was "incident to arrest," due to his intention to charge the two men, there was no testimony the officer issued any *Miranda* warning prior to asking the question.

Hoffman and Burriss were charged with Possession of a Small Amount of Marijuana<sup>[3]</sup> Burriss for the cigar piece and the digital scale, and Hoffman for the cigar piece. No traffic citation was issued at the time, and indeed, the trooper testified it is not his practice to issue citations for failure to signal, but rather to issue warnings. The summary offense of Turning Movements and Required Signals, under Section 3334(a) of the Vehicle Code, was charged against Hoffman in the criminal complaint.

#### Issues for Decision

In his Omnibus Pre-Trial Motions, Defendant filed a Motion to Suppress the marijuana, cigar wrapper, digital scale, and any statements, alleging the evidence was obtained as a result of an illegal search and seizure. Burriss alleges the officers had no articulable, reasonable grounds to suspect criminal activity was afoot, such that the detention was an unlawful seizure. The Commonwealth responds that grounds for reasonable suspicion were indeed present, that the search of the both men was legal, and the evidence therefore admissible.

#### Discussion

### **I. Legal Principles**

Courts have identified three (3) levels of interaction between citizens and police officers. The first, a mere encounter, occurs where there is any formal or informal interaction between the two, but most often occurs in the form of questioning by the officer of the citizen. See Commonwealth v. Coleman, 19 A.3d 1111, 1115 (Pa. Super. Ct. 2011) (citation omitted). In such an encounter, there is no obligation on the part of the citizen to stop or respond. See Id. The second level, an investigative detention, carries an official compulsion both to stop and to respond, but the detention is temporary absent formation of probable cause for an arrest. See Commonwealth v. Jones, 874 A.2d 108, 116 (Pa. Super. Ct. 2005). Here, the coercive conditions attendant a formal arrest are absent, but due to the elements of official compulsion, the Fourth Amendment guarantee against unreasonable searches and seizures is activated, requiring reasonable suspicion of unlawful activity. See Id. An investigative detention occurs where police conduct would communicate to a reasonable person that they were not free to decline an officer's request or leave and terminate the encounter. See Commonwealth v. Strickler, 757 A.2d 884, 889-90 (Pa. 2000). Finally, a custodial detention occurs where the "nature, duration, and conditions of an investigative detention become so coercive" as to constitute the "functional equivalent" of a formal arrest. Jones, 874 A.2d at 116.

Reasonable suspicion is a standard "less stringent than probable cause," demonstrated where, considering the totality of the circumstances, an officer "reasonably suspects an individual is engaging in criminal conduct." Commonwealth v.

Rogers, 849 A.2d 1185, 1189 (Pa. 2004). The officer must have a reasonable and articulable belief that criminal activity is occurring linked to observations of suspicious or irregular behavior by the individual detained. See Commonwealth v. Lopez, 609 A.2d 177, 180 (Pa. Super. Ct. 1992). In determining whether reasonable suspicion exists, the Court must give "due weight to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience." Id. Indeed, even a "combination of innocent facts, when taken together, may warrant further investigation by the police officer." Id. However, if the officer's observations do not demonstrate, or even suggest, illegal activity, or where law enforcement is unable to articulate a basis for their suspicions, the detention is unlawful, and any evidence obtained as a result must be suppressed. See Commonwealth v. Sierra, 723 A.2d 644, 647 (Pa. 1999).

## **II. Application**

The Defendant concedes the initial stop of the vehicle was valid, based upon probable cause to believe a violation of the Pennsylvania Vehicle Code had occurred. See 75 Pa. C.S.A. §6308 (b). Indeed, Hoffman failed to signal when turning from East Pine Street onto Fourth Street. However, Defendant argues that following the stop, after obtaining Hoffman's driver's license and registration, checking the information and discovering no outstanding warrants or suspensions, no reasonable suspicion existed to justify their continued detention.

The Commonwealth admits the officers' questioning did constitute an investigative detention, and both sides agree the initial questioning was lawful. However, under the law, after a vehicle has been stopped, license and registration requested, and a computer check completed, if the documents are valid the driver must be allowed to proceed without further delay. See Lopez, 609 A.2d at 181-82. To justify any further detention, the officer must have reasonable suspicion of an illegal drug transaction or another serious crime. See Id. at 182.

In order to justify the continued detention, the Commonwealth points to several facts asserted to give rise to a reasonable suspicion of criminal activity. First, it is argued the mere fact the Jeep was driving late at night is suspicious. Second, the Chambersburg registration is dubbed suspect, as the vehicle was driving in Fulton County. Third, the turn down Fifth Street, a small alley, is also put forth as creating a reasonable suspicion, as the alley contains mostly businesses. Fourth, the route of the Jeep, proceeding down Fifth Street as it curves around, and then making the turn onto East Pine, is dubbed extremely suspicious, as the route doubled back briefly pending the turn into the driveway. Finally, the Commonwealth points to the nervousness of the driver.

Even taken together, the Court does not find these facts created a reasonable suspicion of criminal activity. The citizens of this Commonwealth are not subject to curfew, and may drive on any streets they chose, at any time, if they follow applicable traffic laws. The mere fact of late night driving cannot be called suspicious. Nor can the fact the Jeep was registered in Chambersburg, less than a thirty (30) minute drive from McConnellsburg, be deemed suspicious. Numerous members of Franklin and Fulton Counties commute back and forth for work and pleasure daily, have family in one county while living in the other, or reside in one place but visit friends in the other. Indeed, the two counties are part of the same judicial district. A person from Chambersburg driving in McConnellsburg late at night does not create a reasonable suspicion of criminal activity.

Nor does the Court find that the turn into a seldom travelled alley constitutes suspicious or even irregular activity, especially given the explanation that a resident of a street off the alley was being driven home. Hibner initially asserted that the alley was flanked by businesses, but later admitted in his testimony it also contains residences. As such, that a car would turn down the alley after business hours is understandable, as a resident could be returning home. Nor is the route taken suspect or indicative of criminal activity, despite the fact the Jeep retraced its route briefly before turning into the alley. All these facts combined were clearly explained by Hoffman during the initial interview, and the Court can find no reason the situation should have aroused suspicion in the officers that criminal behavior was occurring.

Finally, having been followed for several blocks by a police cruiser, at close range, and having been stopped, the driver's nervousness was understandable. Hibner obviously had a hunch the two were involved in criminal activity based on the late hour and the Chambersburg registration, and treated Hoffman accordingly in the initial interview. His tone when asking whether Hoffman was "certain" he had dropped off Knepper and if Knepper lived at the residence up the driveway likely increased the driver's unease. So too, the positions of the officers each on one side of the vehicle likely contributed to the nerves Hoffman was feeling, and his reaction was neither irregular nor suspicious. Nervousness may indeed be a relevant factor to consider, but absent further indicia of criminality, cannot alone establish reasonable suspicion. See Commonwealth v. Wilson, 927 A.2d 279, 285 (Pa. Super. Ct. 2007). Here the officers' actions and demeanor could very reasonably induce a driver to feel nervous. Nerves coupled with a late night drive and a turn into a seldom travelled alley still do not create the requisite reasonable suspicion.

Our appellate courts have found that where a motorist is stopped for violation of the Motor Vehicle Code, the officer may

request the person to step out of the vehicle. See Commonwealth v. Parker, 957 A.2d 311, 314-15 (Pa. Super. Ct. 2008). Further, a Terry frisk may be conducted during such investigatory stop where the officer believes, based on "specific and articulable facts" the individual is "armed and dangerous." Id. The scope of such a search must be strictly limited to acts required to discover weapons presenting a danger either to the officer or to individuals nearby. See Id. Here, even for the Terry frisk, the Court did not hear Hibner articulate any facts to support the idea either man was armed and dangerous. Rather, the officer merely testified that he asked the two to step out of the vehicle, and then patted them down for safety reasons. Hibner gave no explanation for such safety concerns.

Finally, the officers cannot rely solely upon Hoffman's arrest for possession of a small amount of marijuana several months prior to justify the Defendant's continued detention after the information gleaned in the initial discussion yielded no irregularities. Indeed, a prior criminal record, without more, does not give law enforcement carte blanche to stop and detain an individual for questioning. Further, unparticularized suspicions or an officer's hunch or gut feeling does not satisfy the Fourth Amendment test. See Lopez, 609 A.2d at 182 (citing Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed.2d 890 (1980)). Nor is the fact the officers did not see a person exit the Jeep, when they were admittedly out of sight for a period of more than twenty seconds, sufficient to demonstrate reasonable suspicion.

The Commonwealth points to several cases as justification for the continued detention of the Defendant after no irregularities appeared in the documentation submitted to the officers based upon the above-recounted facts characterized as "suspicious." Yet in each cited case, there was far more indicia of criminal activity than instantly. In Rogers, the Defendant's severe trembling, in combination with conflicting, incomplete and plainly fraudulent paperwork, as well as his inability to answer simple questions regarding his origin, was sufficient to find reasonable suspicion for an investigative detention. Rogers, 849 A.2d at 1189. Here, the license, registration and insurance given to Hibner contained nothing abnormal or suspicious, no suspicious cargo was present in the car, and Hoffman's answers were reasonable and provided a complete explanation for his actions. In Coleman, the Defendant matched the description of a robbery suspect, and fumbled in his pockets suspiciously upon the officers' initial questioning. Coleman, 19 A.3d at 1116-17. Here, Hibner testified neither man behaved suspiciously during the initial encounter, nor did they fumble in the vehicle before, during, or after the stop, and the Jeep came to the troopers' attention on roving patrol, rather than due to a call from dispatch describing like-appearing individuals.

The subsequent consent by the driver does not vitiate or ameliorate the illegal nature of the continued detention of the Defendant. To establish a valid consensual search, the Commonwealth must show the consent was given during a legal police interaction. See Commonwealth v. Acosta, 815 A.2d 1078, 1083 (Pa. Super. Ct. 2003). Because the detention was illegal, the consent to search the Jeep is tainted and thus cannot justify the search. Cf. Lopez, 609 A.2d at 182. At the time the consent was requested, the officer had no grounds to reasonably suspect drug activity or a serious crime, such that there was not justification for a continuing detention of the Defendant. Cf. Commonwealth v. Helm, 690 A.2d 739, 742 (Pa. Super. Ct. 1997). The evidence gleaned as a result of the search of the Jeep, and thereafter, in the second search of the Defendant,<sup>[4]</sup> being the "fruit of the poisonous tree" shall be suppressed. Cf. Wong Sun v United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963).

### Conclusion

The Courts of this Commonwealth have been vigilant in the protection of the privacy of our citizens guaranteed by Article I Section 8 of our Constitution. See Commonwealth v. Beasley, 761 A.2d 621, 624 (Pa. Super. Ct. 2000). This Court must be equally watchful. While the Court does not approve of the use of illegal substances, it cannot condone an equally illegal invasion of privacy by law enforcement. Because the investigative detention of the Defendant was not supported by reasonable suspicion, the attached Order of Court grants the Defendant's request for suppression.

### ORDER OF COURT

July 15, 2011, the Court having reviewed the Omnibus Pre-Trial Motion filed by the Defendant May 6, 2011, having held hearing thereupon and received written argument from the parties, and reviewed the applicable law; it is hereby ordered that the Motion to Suppress is granted and the marijuana, cigar/cigar wrapper, the digital scale, and any statements made during the course of the illegal detention of the Defendant are hereby suppressed.

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[1]The Thirty-Ninth Judicial District of Pennsylvania encompasses both Franklin County, seated in Chambersburg,

Pennsylvania, and Fulton County, seated in McConnellsburg, Pennsylvania. The distance between Chambersburg and McConnellsburg is 22.4 miles, a drive of about thirty minutes.

[<sup>2</sup>]35 P.S. §780-113(a)(31)(i).

[<sup>3</sup>]35 P.S. §780-113(a)(32).

[<sup>4</sup>]The Court does not address whether it is possible for a search to be "incident to arrest" when prior to the search, the officer has formed the intention not to arrest a Defendant, but rather plans to release him.