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Commonwealth v Shuman

COMMONWEALTH OF PENNSYLVANIA

v. DYLAN SHUMAN, Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania

Franklin County Branch

Criminal Action No. 1099 of 2010

*Investigatory Detention*

1. There are three different levels of police and civilian interaction: mere encounter, investigative detention, and custodial detention.
2. In determining whether a stop is a mere encounter or an investigative detention, a totality-of-the-circumstances approach should be used.
3. An investigative stop must be supported by a reasonable and articulable suspicion that criminal activity is occurring while a custodial detention must be supported by probable cause.
4. The length of the stop may aid in the determination of whether the stop was reasonable based on the initial justification for the stop.

*Applicable Standard for Seizures*

1. A seizure has occurred if a reasonable person would not feel free to terminate the police encounter and leave the scene.
2. In evaluating the circumstances to determine whether a seizure has been effected, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained.
3. Courts must apply the totality-of-the-circumstances approach when analyzing whether a seizure has occurred, therefore, no single factor should dictate the ultimate conclusion.

Appearances:

Franklin County District Attorney's Office

Karl Rominger, Esq.

Defendant

OPINION

Meyers, J., January 4, 2011

Statement of the Case

On October 29, 2009, Shippensburg Police Officer Thomas Young was on duty in the area around Nancy Grayson Elementary School at approximately 10:48 p.m. N.T. Transcript of Proceedings Omnibus Pre-Trial Motion (September 4, 2010) at P. 6. While on patrol in full uniform and in a marked vehicle, Officer Young notice two individuals wearing dark clothing and walking through the playground attached to the Nancy Grayson Elementary School. Id. at 8. The school and adjacent playground were closed due to the hour, but the playground itself was not enclosed by a fence or gate. Id. at 7. Officer Young testified that the school had been subject to recent vandalism, and, as a result, he pulled into the school's parking lot. Id. at 6.

Officer Young testified that he parked his cruiser, exited the vehicle, and approached the two men. Id. at 8-9. The lights from the Officer's car were directed towards the men, catching them in the headlights and illuminating the area. Id. at 8. Both men stopped, and Officer Young engaged them. Id. at 9. Officer Young did not tell the individuals to stop, he did not draw his weapon, nor did he physically touch them at this point. Id. at 10. The Officer could not remember if he told the

men to stop or come over to him, and he did not recall asking them why they were on the school property. Id. at 11.

Officer Young testified that he could not remember what conversation he engaged in with the men, but he spoke with them for approximately two minutes. Id. at 23. Officer Young testified that during the conversation, the Defendant was acting nervous and made the comment that he wanted to leave. Id. Officer Young testified that he knew Dylan Shuman from past incidents involving the sale of controlled substances, and that he knows the Defendant lives within a half mile from the playground. Id. at 32.

At this point, Officer Young asked the Defendant if he had anything on him that the Officer needed to be aware of. Id. at 11. The Defendant stated he had a pocket knife in his back pant's pocket, which the Officer retrieved. Id. at 12. Officer Young asked the two individuals to walk over to the police car, the Officer grabbed the Defendant's arm and escorted the Defendant and his companion to his police cruiser, which was approximately one hundred feet away. Id. at 12-13. Officer Young had called for backup prior to exiting his vehicle. Id. at 25. Officer Palamara responded to Officer Young's location and patted down the Defendant's companion while Officer Young patted down the Defendant. Id. at 27.

Officer young testified that the fact that the Defendant possessed a pocket knife made him believe that the Defendant was armed and dangerous. Id. at 24. The Officer stated he moved the Defendant closer to his vehicle for his personal safety and proceeded to conduct a pat down. Id. Officer Young has been an officer with the Shippensburg Police Department for two years.<sup>[1]</sup> Id. at 5.

Officer Young conducted a pat down of the Defendant outside the police cruiser. Id. The Officer recovered two glass pipes from the Defendant's front pant's pocket, as well as a scale and three small baggies of marijuana. Id. at 14-15. The Officer laid these items on the hood of the police cruiser. Id. at 15. He indicated to the Defendant that he was in trouble. Id. at 28. The Officer did not indicate to the Defendant that he was trespassing on school property. Id. at 32. The Officer stated that he gave the Defendant the name of Detective Wolfe in the Cumberland County Drug Task Force and then released the Defendant.<sup>[2]</sup> Id. at 57.

On May 19, 2010, Officer Young filed a criminal complaint against the Defendant for Possession with Intent to Deliver a Controlled Substance, Unlawful Possession of Drug Paraphernalia, and Possession of a Weapon on School Property arising out of the above incident.

On September 24, 2010, an Omnibus Hearing was held to address the Defendant's Motion to Suppress the search of the Defendant on October 29, 2009 and Motion to Quash evidence relating to the Defendant's interactions with Detective Wolfe. The Court heard argument as to the matters and then issued a briefing schedule for the Commonwealth and Defense counsel. On November 5, 2010, the Court granted the Defendant's Motion to Suppress, which made the Motion to Quash moot.

On November 9, 2010, the Commonwealth filed a timely Notice of Appeal with the Court. On November 18, 2010, the Commonwealth filed a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) raising two issues. The Commonwealth asserts that the Court erred as a matter of law in finding the Defendant was subject to an investigatory detention on October 29, 2009. The Commonwealth also avers that the Court erred as a matter of law in applying a subjective standard as to whether the Defendant was free to leave during his interaction with the police on October 29, 2009.

For the following reasons, the Court respectfully requests that the Superior Court rule that the Commonwealth's claims lack merit and should be denied.<sup>[3]</sup>

## Discussion

### **1. Investigatory Detention**

There are three different levels of police and civilian interaction: mere encounter, investigative detention, and custodial detention. Commonwealth v. Daniels, 999 A.2d 590 (Pa. Super. 2010). A "mere encounter" or request for information need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. Commonwealth v. Strickler, 757 A.2d 884 (Pa. 2000). Instances of police questioning of a citizen that involve no seizure or detentive aspect, which are mere or consensual encounters, need not be supported by any level of suspicion in order to maintain validity. Id. In order to distinguish between an investigative detention and a mere encounter the test is whether, considering all the facts and circumstances surrounding an interaction between a police officer and an individual, a reasonable individual would have thought he was being restrained by the police officer; if so, then an investigative detention has occurred. Id.

In Strickler, the Supreme Court adopted the totality-of-the-circumstances approach delineating a non-exclusive list of factors to consider in making the assessment of whether the stop is a mere encounter or an investigative detention, including: (1) the presence or absence of police excesses; (2) whether physical contact occurred; (3) whether police directed the individual's movements; (4) police demeanor and manner of expression; (5) the location and time of the interdiction; (6) the content of the questions and statements; (7) the existence and character of the initial investigative detention, including its degree of coerciveness; (8) whether and to what degree the transition between the investigative detention and the subsequent encounter can be viewed as seamless, thus suggesting to the individual that his movements may remain subject to police restraint; and (9) whether the police expressly told the individual that he was free to leave - this latter factor being an objective and potent one. Id.

To maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion, whereas a custodial detention is legal only if based on probable cause. Id. The duration of a stop is relevant to determine if the stop was reasonable in light of the initial justification for the stop. Commonwealth v. Key, 789 A.2d 282 (Pa. Super. 2001). If a reasonable person would not feel free to terminate the encounter with the police and leave the scene, then a seizure of that person has occurred. Id.

Here, the stop of Dylan Shuman was an investigatory detention and not a mere encounter based on the totality of the circumstances. In the encounter on October 29, 2009, Officer Young directed the movements of the Defendant. While the Defendant initially stopped of his own accord, he desired to leave and voiced his desire. Although voicing his desire to leave, Officer Young did not reply with a comment that the Defendant was free to do so. Furthermore, Officer Young exhibited physical control over the Defendant by grabbing his arm and physically moving him to a different location.

Officer Young was unable to articulate the contents of his two minute interaction with the Defendant. While the Officer knew that the Defendant lived near the playground, he could not articulate whether he asked the Defendant what he was doing on the playground or whether he was cutting through the playground to get home. Additionally, the Officer was unable to articulate what, if anything, he asked the Defendant in the course of the two minutes he spoke with him other than if he had anything on him that the officer should be aware of. Officer Young never indicated that the Defendant was free to leave at any time during the encounter. The Officer did not testify that he questioned the Defendant as to vandalism. Nor did the Officer indicate that he was able to observe any indicia of vandalism, or that he needed to move the Defendant into a better lit area to see if the Defendant had spray paint residue on his fingertips. The Officer was unable to articulate any reason for why he suspected the Defendant to be armed and further why he reached into his pocket. The Officer initiated the contact with the Defendant, moved the Defendant, placed him by the police car, called back up, placed the other gentleman in the back of the police car, and then conducted a pat down and investigation into what the Defendant had on his person.

Considering all the facts and circumstances surrounding an interaction between Officer Young and the Defendant, a reasonable individual would have thought he was being restrained by the police officer. Therefore, an investigatory detention occurred. An Officer needs reasonable suspicion to believe a crime is afoot in order to conduct an investigatory detention. Officer Young could not reasonably articulate specific facts that indicated why he believed a crime was afoot. Additionally, Officer Young reasonably would have been able to determine if the Defendant was engaging in vandalism or not within the two minute conversation, could have articulated the questions asked and the responses given that would have lead him to believe or not believe the veracity of those answers. Officer Young could not articulate any questions he asked regarding vandalism or what facts lead him to believe that criminal activity was afoot. Therefore, the search of the Defendant was illegal.

## **2. Applicable Standard for Seizures**

An individual has been seized only if there is an objective reason to believe they are not free to end their conversation with the police and proceed on their way. Commonwealth v. Hoak, 700 A.2d 1263 (Pa. Super. 1997). A seizure does not occur simply because a police officer approaches an individual and asks a few questions. Commonwealth v. Cooper, 994 A.2d 589 (Pa. Super. 2010). In evaluating the circumstances to determine whether a seizure has been effected, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained; in making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred. Commonwealth v. Au, 986 A.2d 864 (Pa. Super 2009). Any determination as to whether a seizure occurred is based upon the totality of circumstances and whether a reasonable person would have believed he or she was free to leave. Commonwealth v. Santana, 959 A.2d 450 (Pa. Super. 2008). In determining whether a mere encounter has risen to the level of an investigative detention, the focus of a court's inquiry is on whether a seizure of the person has occurred, and within this context, courts employ the

following objective standard to discern whether a person has been seized: whether, under all the circumstances surrounding the incident at issue, a reasonable person would believe he was free to leave. Commonwealth v. McCleave, 750 A.2d 320, 324 (Pa. Super. 2000).

Here, the Defendant was subject to a seizure based on an objective, totality of the circumstances approach. Examples of circumstances that might indicate a seizure even where the person did not attempt to leave would be the threatening presence of several officers, the display of a weapon, some physical touching of the person, or use of language or tone of voice indicating that compliance with the officer's request might be compelled. McCleave, *supra*. Because the Officer could not articulate what he said to the Defendant, that the Defendant repeatedly asked to leave and did not, the officer could not recall telling the Defendant he was free to leave, that the Officer grabbed the Defendant and escorted him over to the car and stated that he was going to conduct his pat down regardless of what the Defendant wanted, no reasonable person would have felt free to disregard Officer Young and leave. The standard necessarily focuses on how a reasonable person would perceive a police officer's conduct and does not in any way consider the subjective intent of the purportedly seized person. This Court applied the objective standard in rendering its conclusion. To reiterate, Officer Young's show of authority in interrogating the Defendant for two minutes would cause a reasonable person to believe that he or she was not free to leave. Accordingly, the Defendant was seized, and the investigative detention commenced.

#### Conclusion

This Court believes the Commonwealth's claims are without merit. The Defendant was subject to an investigatory detention on October 29, 2009 and the Court applied an objective standard in assessing the Defendant's seizure and investigatory detention. Accordingly, this Court respectfully requests that the Superior Court affirm its decision.

An Order is attached.

#### ORDER OF THE COURT

January 4, 2011, the Clerk of Courts is directed to transmit this Opinion and Order together with the record in this case to the Superior Court.

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[1]At the time of this incident, Officer Young had been a police officer for one year.

[2]At the conclusion of Officer Young's testimony, the Court engaged the Officer in questioning. The Court's inquiry as to what the Officer did with the Defendant after the pat down, where he was positioned during the pat down, what the lighting situation was at the time of the pat down, and whether the Defendant knew he was trespassing in order to gain a better understanding of the factual scenario. Id. at 30-32.

[3]Since the issuance of this Opinion, the Superior Court has affirmed this Court's decision in an unpublished opinion and the Pennsylvania Supreme Court has denied certiorari.