NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMES LAMONTE KEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1709 MDA 2013

Appeal from the Judgment of Sentence August 23, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000702-2013

BEFORE: GANTMAN, P.J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 11, 2014**

Appellant, James Lamonte Key, appeals from the judgment of sentence entered in the Berks County Court of Common Pleas, following his bench trial conviction for possession of a controlled substance.[1] We affirm.

The trial court opinion set forth the relevant facts and procedural history of this appeal as follows:

> On November 12, 2012, members of the Reading Police Department were in a plain-clothes detail in an unmarked vehicle when they saw two persons at 1:00 a.m. on Carpenter Street in the City of Reading. The officers circled the block and then approached the males. The officers were wearing street attire which had the words, "Police" across the front of the clothing. The officers indicated that they knew [Appellant] from prior encounters and came up to talk to him. After talking for a minute or

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[1] 35 P.S. § 780-113(a)(116).

> two, Officer Linderman asked if [Appellant] was still on probation and parole, to which [Appellant] answered in the affirmative. Officer Linderman then asked if [Appellant] had anything illegal, to which [Appellant] replied that he did not. Officer Linderman then asked if it would be okay to check and [Appellant] consented to be searched. Upon search, a single bag of what was later determined to be crack cocaine was found.
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> [Appellant] filed an Omnibus Pre-Trial Motion on March 28, 2013, including a Motion to Suppress Evidence. A hearing was held on April 24, 2013. [The] [c]ourt] [d]enied [Appellant's] Motion to Suppress on May 2, 2013. Following a bench trial on July 10, 2013, [Appellant] was convicted of Possession of a Controlled Substance. On August 23, 2013 [the] [c]ourt imposed a sentence of not less than 177 days nor more than 23 months of confinement in Berks County Prison. On September 20, 2013 [Appellant] filed a Notice of Appeal [from the sentence] entered on August 23, 2013. [Appellant] timely filed a Concise Statement of [Errors] Complained of on Appeal on October 10, 2013….

(Trial Court Opinion, filed on November 8, 2013, at 1-2) (footnote omitted).

Appellant raises the following issue for our review:

> WHETHER THE TRIAL COURT ERRED IN DENYING [APPELLANT'S] PRE-TRIAL MOTION TO SUPPRESS PHYSICAL EVIDENCE IN THAT IT ERRONEOUSLY DECIDED THAT [APPELLANT] WAS NOT SUBJECTED TO AN INVESTIGATIVE DETENTION PRIOR TO CONSENTING TO A SEARCH. AS [APPELLANT] WAS SUBJECTED TO AN INVESTIGATIVE DETENTION THAT WAS NOT SUPPORTED BY REASONABLE SUSPICION, THE CONSENT WAS SO TAINTED BY THE ILLEGAL SEIZURE AS TO MAKE IT INVOLUNTARY AND THE FRUITS OF SAID SEARCH SHOULD BE SUPPRESSED AS TAINTED.

(Appellant's Brief at 4).

Appellant argues the physical evidence the police officers found on him should be suppressed because the officers subjected him to an illegal detention and searched him without his consent. Appellant claims the search was unreasonable and illegal, given the surrounding circumstances which show that the interaction between Appellant and the officers was an investigative detention and not a mere encounter. Appellant alleges that, even if the interaction began as a mere encounter, it escalated to an investigative detention when the officers abruptly approached Appellant in the street with their weapons visible, shined a flashlight in Appellant's face, and asked him if he was on probation or if he had anything illegal on him, without informing Appellant he was free to leave or to refuse consent. Appellant also contends the content of the officers' questions indicated Appellant was being detained, because the questions went well beyond the scope of innocuous information and a reasonable person would not have felt free to leave. Appellant maintains the officers lacked the requisite level of reasonable suspicion necessary to execute a legal investigative detention, because the officers failed to articulate sufficient facts to link Appellant's behavior to criminal activity. Appellant also avers his "consent" to the search was involuntary and tainted because the officers subjected him to an illegal investigative detention and the consent was a product of that illegal detention. Appellant concludes the trial court erred in denying his motion to suppress, and this Court should vacate the judgment of sentence and

remand for further proceedings with instructions to suppress the evidence. We disagree.

"Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." ***Commonwealth v. Williams***, 941 A.2d 14, 26 (Pa.Super. 2008) (*en banc*) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 115 (Pa.Super. 2005)).

> [W]e may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Id. at 27 (quoting ***Jones, supra***).

The focus of search and seizure law "remains on the delicate balance of protecting the right of citizens to be free from unreasonable searches and seizures and protecting the safety of our citizens and police officers by allowing police to make limited intrusions on citizens while investigating crime." ***Commonwealth v. Moultrie***, 870 A.2d 352, 356 (Pa.Super. 2005) (quoting ***Commonwealth v. Blair***, 860 A.2d 567, 571 (Pa.Super. 2004)) (internal quotation marks omitted). "[I]n assessing the lawfulness of citizen/police encounters, a central, threshold issue is whether…the citizen-subject has been seized. Instances of police questioning involving no

seizure or detentive aspect (mere or consensual encounters) need not be supported by any level of suspicion in order to maintain validity." ***Commonwealth v. Strickler***, 563 Pa. 47, 57, 757 A.2d 884, 889 (2000). "A mere encounter is characterized by limited police presence and police conduct and questions that are not suggestive of coercion. It is only when such police presence becomes too intrusive, the interaction must be deemed an investigative detention or seizure." ***Commonwealth v. Hill***, 874 A.2d 1214, 1220-21 (Pa.Super. 2005) (quoting ***Commonwealth v. Reppert***, 814 A.2d 1196 (Pa.Super. 2002)) (internal quotation marks omitted). "Thus, the law recognizes some level of intrusiveness when a mere encounter occurs." ***Id.*** at 1221.

Additionally, "[t]he central Fourth Amendment inquiries in consent cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent; and, ultimately, the voluntariness of consent. Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus." ***Moultrie, supra*** (quoting ***Commonwealth v. LaMonte***, 859 A.2d 495 (Pa.Super. 2004)) (internal quotation marks omitted).

> In determining the validity of a given consent, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have

> understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant…. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Smith, ___ Pa. ___, 77 A.3d 562, 573 (2013) (internal citations and quotation marks omitted). Furthermore,

> [T]here is no requirement that a police officer advise a person that he…may refuse consent to be searched. Unless the totality of factors indicate[s] that the consent was the product of express or implied duress or coercion…the mere fact that a police officer did not specifically inform an appellant that he…could refuse the request will not in and of itself result in a determination that the subsequent search was involuntary.

Moultrie, supra at 360 (citing ***Commonwealth v. Key***, 789 A.2d 282, 291 (Pa.Super. 2001)).

Instantly, the trial court discussed Appellant's issue as follows:

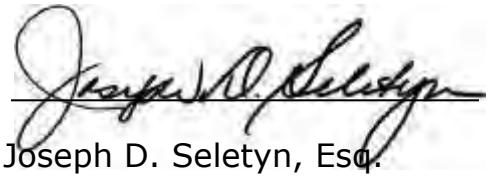
> Not every encounter between police officers and ordinary citizens amounts to a "seizure" triggering constitutional safeguards. Police officers may approach citizens on the street and question them without any suspicion that the individual is engaged in wrongdoing. ***Commonwealth v. Beasley***, 761 A.2d 621, 624 (Pa.Super. 2000). A mere encounter escalates into an investigative detention when under the totality of the circumstances a reasonable person in [Appellant's] position would not feel free to leave. ***Id.*** at 624. While no single factor is controlling, the following circumstances should be considered: the number of officers present, whether the individual was told they are suspected of criminal activity, the officers' demeanor and tone, whether restraints or the use or threat of force was used, and the time and location of the incident. ***Id.***

> A mere encounter is a[s] simple as a request for information. There is no level of suspicion required and there is no official compulsion to stop or respond. [***See Key, supra***]. The interaction between Officers Linderman and Hackney was a mere encounter with [Appellant] and did not rise to being an investigative detention at any time. The questions asked were minimally intrusive. The consent from [Appellant] was freely given to Officer Linderman and [Appellant's] request for suppression was denied.

(Trial Court Opinion at 2-3). The record supports the court's decision. Appellant's interaction with the officers was a mere encounter; thus, the officers did not require any reasonable suspicion to question Appellant about whether he was still on probation or if he had anything illegal on him. ***See Strickler, supra***. Moreover, the court found Appellant's consent was valid because it was not the result of duress or coercion. ***See Smith, supra***. Therefore, Appellant's encounter with the officers was lawful, and they were not required to inform Appellant that he could leave or refuse to consent to the search. ***See Moultrie, supra***. Accordingly, we affirm the trial court's decision.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/11/2014