

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MARKIS GOMAC

Appellant

No. 3191 EDA 2013

Appeal from the Judgment of Sentence November 16, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000303-2010

BEFORE: GANTMAN, P.J., ALLEN, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 28, 2014

Appellant, Markis Gomac, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial convictions for possession with intent to deliver a controlled substance ("PWID") and firearms not to be carried without a license.¹ We affirm.

In its opinion, the trial court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises one issue for our review:

¹ 35 P.S. § 780-113(a)(30); 18 Pa.C.S.A. § 6106(a)(1), respectively.

*Former Justice specially assigned to the Superior Court.

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S
MOTION TO SUPPRESS?

(Appellant's Brief at 3).

In his sole issue, Appellant argues that when the police officers approached his car, the gun was hidden between the front seats of the vehicle and not in plain view. Appellant further contends no exigent circumstances existed to justify the police officer's warrantless seizure of the gun. Appellant concludes the trial court erred in denying his motion to suppress the gun and drugs obtained from Appellant's vehicle. We disagree.

We review the denial of a suppression motion as follows:

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.

[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.

Commonwealth v. Williams, H., 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted). Further, "It is within the suppression court's sole province as fact finder to pass on the credibility of witnesses and the weight to be given their testimony." ***Commonwealth v. Clemens***, 66 A.3d 373, 378 (Pa.Super. 2013) (quoting ***Commonwealth v. Gallagher***, 896 A.2d 583, 585 (Pa.Super. 2006)).

Contacts between the police and citizenry fall within three general classifications:

The first [level of interaction] is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or "custodial detention" must be supported by probable cause.

Commonwealth v. Bryant, 866 A.2d 1143, 1146 (Pa.Super. 2005), *appeal denied*, 583 Pa. 668, 876 A.2d 392 (2005). To determine if an interaction rises to the level of an investigative detention, *i.e.*, a ***Terry***² stop, "the court must examine all the circumstances and determine whether police action would have made a reasonable person believe he was not free to go and was subject to the officer's orders." ***Commonwealth v. Jones***, 874 A.2d 108, 116 (Pa.Super. 2005) (quoting ***Commonwealth v. Stevenson***, 832 A.2d 1123, 1127 (Pa.Super. 2003)).

Police must have reasonable suspicion that a person is engaged in unlawful activity before subjecting that person to an investigative detention.

Commonwealth v. Cottman, 764 A.2d 595 (Pa.Super. 2000).

Furthermore,

[T]o establish grounds for reasonable suspicion, the officer

² ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. The question of whether reasonable suspicion existed at the time [the officer conducted the stop] must be answered by examining the totality of the circumstances to determine whether the officer who initiated the stop had a particularized and objective basis for suspecting the individual stopped. Therefore, the fundamental inquiry of a reviewing court must be an objective one, namely, whether the facts available to the officer at the moment of the [stop] warrant a [person] of reasonable caution in the belief that the action taken was appropriate.

Commonwealth v. Basinger, 982 A.2d 121, 125 (Pa.Super. 2009)

(internal citations and quotation marks omitted).

A police officer need not personally observe unusual or suspicious conduct reasonably leading to the conclusion that criminal activity is afoot and that a person is armed and dangerous; this Court has recognized that a police officer may rely upon information which is broadcast over a police radio in order to justify an investigatory stop.

Commonwealth v. Jackson, 519 A.2d 427, 430 (Pa.Super. 1986) (citation and internal quotation marks omitted).

“A warrantless search or seizure is presumptively unreasonable under the Fourth Amendment and Article I, § 8, subject to a few specifically established, well-delineated exceptions.” ***Commonwealth v. McCree***, 592 Pa. 238, 247, 924 A.2d 621, 627 (2007). “The ‘plain view’ doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable...” ***Id.*** (quoting ***Horton v. California***, 496 U.S. 128, 133, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112, ____ (1990)). The

plain view doctrine permits the “warrantless seizure of an object when: (1) an officer views the object from a lawful vantage point; (2) it is immediately apparent to him that the object is incriminating; and (3) the officer has a lawful right of access to the object.” **Commonwealth v. Miller**, 56 A.3d 424, 429 (Pa.Super. 2012).

Initially, the court must decide if “the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” **McCree, supra** at 244, 924 A.2d at 625. Additionally,

In determining whether the incriminating nature of an object [is] immediately apparent to the police officer, we look to the totality of the circumstances. An officer can never be one hundred percent certain that a substance in plain view is incriminating, but his belief must be supported by probable cause. **Commonwealth v. Turner**, 982 A.2d 90, 92 (Pa.Super. 2009). In viewing the totality of the circumstances, the officer’s training and experience should be considered. **See Commonwealth v. Liddie**, 21 A.3d 229 (Pa.Super. 2011) (*en banc*).

Miller, supra at 430. Finally, under the limited automobile exception to the warrant requirement, police may conduct a warrantless search of an automobile “when there exists probable cause to search and exigent circumstances necessitating a search.” **Commonwealth v. Copeland**, 955 A.2d 396, 400 (Pa.Super. 2008) (citation omitted).³ “Exigent circumstances

³ In **Commonwealth v. Gary**, ___ Pa. ___, 91 A.3d 102 (2014), our Supreme Court adopted the federal automobile exception to the warrant requirement, “which allows police officers to search a motor vehicle when there is probable cause to do so and does not require any exigency beyond (*Footnote Continued Next Page*)

arise where the need for prompt police action is imperative, either because evidence is likely to be destroyed...or because there exists a threat of physical harm to police officers or other innocent individuals.” **Id.** Additionally, an officer has a lawful right of access to evidence observed in plain view in a vehicle when there is “inadequate time and opportunity to obtain a warrant” to otherwise secure the search. **McCree, supra** at 252, 924 A.2d at 630 (quoting **Commonwealth v. Rodriguez**, 526 Pa. 268, 274, 585 A.2d 988, 991 (1991)).

Instantly, Officer Rich received information that a Hispanic male driving a white vehicle was selling drugs at a location in South Philadelphia, an area known for drug crimes. In response, Officer Rich and his partner conducted narcotics surveillance at the South Philadelphia location. The officers observed Appellant arrive in a white vehicle. Appellant then gave a small blue packet to another man in exchange for money. After the quick and stealthy exchange, both Appellant and the other man immediately left the area. Over police radio, Officer Rich relayed a description of Appellant and information that Appellant was involved in a potential drug sale. Officer Gibson and Officer Wims located Appellant and pulled him over. At that point, Officer Gibson and Officer Wims had reasonable suspicion to justify an
(Footnote Continued) _____

the inherent mobility of a motor vehicle.” **Id.** at ____, 91 A.3d at 104. The incident in the instant case, however, took place before **Gary** was decided. Therefore, we analyze the police seizure of Appellant’s gun and drugs under the law as it stood prior to **Gary**.

investigative detention of Appellant based on the following facts and circumstances: (1) information provided to Officer Rich that Appellant was selling drugs; (2) Officer Rich's observation of an exchange of money and a small blue packet between Appellant and an unknown male; (3) the quick, stealthy nature of the exchange, coupled with the immediate departure of both Appellant and the other man; (4) Officer Rich's experience as a Philadelphia police officer in the Strike Unit and Narcotics Field Unit; (5) the location of the transaction in a known drug crime area. **See Cottman, supra; Basinger, supra.**

Officer Gibson testified that he approached Appellant's car and observed a gun in plain view on the passenger seat within Appellant's reach, which presented a clear threat to the officers' safety. The trial court was free to reject Appellant's contrary testimony that the gun was not clearly visible. **See Clemens, supra.** Moreover, the officers had no advance notice that Appellant would be driving in a vehicle containing a firearm. Therefore, under the plain view doctrine and limited automobile exception to the warrant requirement, Officer Gibson lawfully entered the car to seize the gun. **See McCree, supra; Miller, supra; Copeland, supra.** As Appellant exited the vehicle, Officer Gibson and Officer Wims observed in plain view several packets of heroin on the driver side floor. Thus, the officers' warrantless seizure of the drugs also was lawful. **See id.** Based on the foregoing, the court properly denied Appellant's motion to suppress the

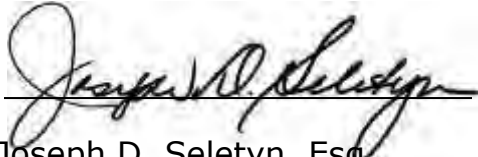
physical evidence obtained from Appellant's vehicle. Accordingly, we affirm.⁴

Judgment of sentence affirmed.

⁴ Appellant received a mandatory minimum sentence. We are mindful of the United States Supreme Court's recent decision in **Alleyne v. United States**, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), in which the Court expressly held that any fact increasing the mandatory minimum sentence for a crime is considered an element of the crime to be submitted to the fact-finder and found beyond a reasonable doubt. **Id.** at ___, 133 S.Ct. at 2155, 2163, 186 L.Ed.2d at ___. Here, the court imposed the mandatory minimum sentence per 42 Pa.C.S.A. § 9712.1 (mandating five-year minimum sentence for defendant convicted of PWID when at time of offense defendant was in physical possession or control of firearm, whether firearm was visible, concealed, or within defendant's reach or in close proximity to controlled substance) for Appellant's PWID conviction. Pursuant to Section 9712.1(c), the court determines applicability of the mandatory minimum at sentencing by a preponderance of the evidence (arguably in violation of **Alleyne**). In the present case, however, the Commonwealth's evidence established that the gun was on the passenger seat of Appellant's vehicle and the heroin was on the floor of the driver side. Appellant was in the driver seat at the time. This evidence was uncontradicted except for Appellant's testimony that the gun was actually located between the seats, which would place the gun even closer to Appellant. Therefore, by virtue of convicting Appellant of PWID and the firearms charge, the court found beyond a reasonable doubt that Appellant was in control of a firearm at the time of the PWID offense. Therefore, we see no issue implicating the legality of Appellant's sentence. **See Commonwealth v. Watley**, 81 A.3d 108 (Pa.Super. 2013) (*en banc*) (holding imposition of mandatory minimum sentence was proper, where jury determined beyond reasonable doubt that appellant possessed firearms in connection with drugs). **See Commonwealth v. Edrington**, 780 A.2d 721 (Pa.Super. 2001) (explaining challenge to application of mandatory minimum sentence is non-waivable challenge to legality of sentence which, assuming proper jurisdiction, this Court can raise *sua sponte*).

J-S43003-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION – CRIMINAL SECTION

FILED

DEC 11 2013

Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF PENNSYLVANIA

v.

MARKIS GOMAC

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CP-51-CR-0000303-2010

CP-51-CR-0000303-2010 Comm. v. Gomac, Markis
Opinion



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OPINION

CARPENTER, J.

December 11, 2013

Defendant Markis Gomac ("Gomac") was charged with and found guilty of Possession with Intent to Deliver a Controlled Substance ("PWID") (F) and Carrying Firearms Without a License ("VUFA § 6106") (F3) on bill of information CP-51-CR-0000303-2010. These charges arose from Gomac's possession of narcotics and a handgun on August 9, 2005 near the 500 block of Washington Avenue in the City and County of Philadelphia. This court requests that the Superior Court uphold this court's denial of the motion to suppress, the convictions, and affirm the sentence imposed in this matter.

PROCEDURAL HISTORY

On July 2, 2010, this court heard Gomac's motion to suppress the narcotics and firearm recovered by police officers and this court denied the motion. Following the motion, Gomac signed a written waiver of his right to a jury trial and following an

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appropriate colloquy ensuring that such waiver was knowingly and intelligently made, this court incorporated the admissible testimony from the motion and the Commonwealth moved its exhibits into evidence. After the Commonwealth and defense had rested, this court, de novo and sitting without a jury, found Gomac guilty of PWID (F) and VUFA § 6106 (F3). At the conclusion of the trial, sentencing was deferred to November 16, 2010, for the completion of a Pre-Sentence Investigation Report. On November 16, 2010, this court sentenced Gomac to the mandatory 5–10 years of incarceration on the PWID (F) charge and 1–2 years of incarceration on the VUFA § 6106 (F3) charge, to run concurrently.

On May 9, 2011, Gomac filed a timely PCRA petition. PCRA counsel was appointed on November 28, 2011 and, on February 28, 2013, counsel filed an amended PCRA petition. The matter was first listed before this court for decision on May 31, 2013 and was continued several times for a September video hearing date, as per request of PCRA counsel. PCRA counsel failed to appear for the video hearing on September 23, 2013. On October 3, 2013, following a review of the record, this court granted Gomac's petition, reinstated appellate rights nunc pro tunc, removed PCRA counsel, and appointed new appellate counsel.

On October 31, 2013, this court received a Notice of Appeal and on November 4, 2013, Gomac was served an Order directing him to file a concise statement of the matters complained on appeal pursuant to Pa.R.A.P.1925(b). On November 25, 2013, this court received Gomac's 1925(b) response which raised the following issue on appeal:

[This] court erred when it denied Appellant's motion to suppress.

FACTS

On August 9, 2005, at approximately 4:30 p.m., Officer Rich and his partner were conducting a narcotics surveillance on the 800 block of Wharton Street in the City of Philadelphia. Officer Rich had received information about drug sales on that block, known as a drug area, made by a "Hispanic male who drove a white vehicle."¹ While on the block, Officer Rich observed defendant Gomac, a Hispanic male, exit a white Pontiac and walk to the corner of 9th Street and Wharton Street. He approached a white male on the corner, the two men had a brief conversation, and then they walked to Pat's Steaks and sat down at a table right next to Officer Rich's vehicle. The officer observed the white male slide U.S. currency across the table to Gomac after which Gomac reached into his pocket and pulled out a bundle of blue packets, alleged heroin. Gomac pulled one packet from the top of the bundle and slid it across the table to the white male. The white male then left the area and was never located, despite Officer Rich radioing a description to backup officers. Gomac then walked to 842 Wharton Street, knocked on the door, and was let in to the property. He exited the property after approximately five minutes and went directly to the same white Pontiac that Officer Rich had observed him exit earlier that afternoon. Gomac entered the vehicle and departed from the area, heading northbound on 9th Street. Officer Rich radioed a description of what he had observed to backup officers.

Officer Gibson and his partner, Officer Wims, heard the radio description and observed a white Pontiac pulling out onto 9th Street where began to pursue the vehicle. The officers followed the vehicle to the 500 block of Washington Avenue and they stopped the vehicle on the south side of the intersection. Officer Gibson approached

¹ N.T. 7/2/2010 at 7:20-21.

the on passenger's side of the vehicle, while Officer Wims approached on the driver's side. Officer Gibson observed a gun on the passenger's seat and relayed this information to his partner. Officer Wims removed Gomac from the vehicle and while the officers were securing Gomac. Officer Gibson observed packets of alleged heroin on the driver's side floor of the vehicle. From the vehicle, the officers recovered thirteen (13) clear, heat sealed packets with a blue insert and a red Sunoco stamp, a Berretta Thunder .380 gun that was loaded with seven (7) live rounds. From Gomac's person, the officers recovered \$1,746 of U.S. currency.

DISCUSSION

Denial of the Motion to Suppress

The standard under which a reviewing court evaluates a motion to suppress is "to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings."² Further, if the suppression court has determined the evidence to be admissible, the reviewing court "will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted."³ Thus, if the evidence is sufficient to support the suppression court's ruling and that court has not misapplied the law, a reviewing court will not substitute its credibility determination for that of the suppression court judge.

In the instant appeal, Gomac asserts that this court improperly denied his motion to suppress the narcotics and the firearm recovered by the officers on August 9, 2005.

² *Com. v. Hubble*, 504 A.2d 168, 171 (Pa. 1986).

³ *Id.*

This court disagrees. Probable cause is required for a full custodial arrest and full search of a person or property.⁴ "Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed."⁵ In order to determine if probable cause existed, the standard applied by Pennsylvania courts utilizes an objective "totality of the circumstances" test.⁶ In *Commonwealth v. Lawson*,⁷ the Pennsylvania Supreme Court elaborated that:

All of the detailed facts and circumstances must be considered. The time is important; the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the small items were kept by one of the sellers is important, the movements and manners of the parties are important.⁸

The Court further held in *Commonwealth v. Thompson*⁹ that "a police officer's experience may be fairly regarded as a relevant factor in determining probable cause," but cautioned that "an officer's testimony in this regard shall not simply reference 'training and experience abstract from an explanation of their specific application to the circumstances at hand.'"¹⁰

In the instant case, the totality of the circumstances would have provided Officer Rich, and subsequently Officers Gibson and Wims, with the requisite probable cause to stop and search the defendant. Officer Rich's experience as a Philadelphia police officer – in the Strike Force as well as the Field Unit – guided his decision to set up a surveillance of the 800 block of Wharton Street because it is an area known for

⁴ *Com. v. Douglass*, 539 A.2d 412, 418 (Pa. Super. 1989).

⁵ *Com. v. Clark*, 735 A.2d 1248, 1252 (Pa. 1999).

⁶ See *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983); *Com. v. Gray*, 503 A.2d 921, 925 (1985).

⁷ *Com. v. Lawson*, 309 A.2d 391 (Pa. 1973).

⁸ *Id.* at 394.

⁹ *Com. v. Thompson*, 2009 Pa. LEXIS 2793 (Pa. 2009).

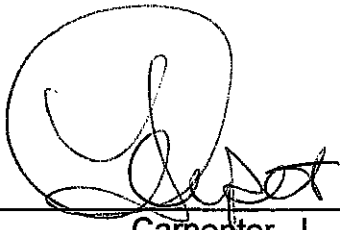
¹⁰ *Id.* at 16-17 (citing *Com v. Dunlap*, 941 A.2d 671 (Pa. 2007) (Saylor, J., concurring)).

narcotics sales, specifically heroin and pills. This experience combined with objective factors, such as the time and area where the transactions occurred, the place where the items exchanged were kept, and the movements and manners of the parties, provided Officer Rich with the necessary probable cause.

The transaction was conducted in an area known for drug crime, specifically the sale of heroin and pills, where Officer Rich had made several arrests. The small item involved in the observed exchange was a blue packet that the defendant removed from a larger bundle in his pocket after receiving US currency from the white male. The quick, stealthy nature of the exchange, coupled with the immediate departure by both the white male and the defendant after their transaction further contributed to the totality of the circumstances leading Officer Rich to believe he had observed a drug transaction. The totality of the circumstances provided Officer Rich with probable cause to stop and search the defendant. Officer Rich radioed this information to his back-up team and remained in constant communication with the pursuing officers and, in this manner, provided Officers Gibson and Wims with the requisite probable cause to stop and search the defendant. Upon stopping the defendant's vehicle, Officer Gibson observed a gun on the passenger's seat, within the reach of the defendant, which further supported this court's determination that the officers had the requisite probable cause to remove the defendant from his vehicle and recover the gun and the heroin packets. Having found that the officers' actions were supported by the requisite probable cause, this court denied Gomac's motion to suppress.

CONCLUSION

For the reasons set forth in this Opinion, the Superior Court should affirm this court's denial of the motion to suppress, this court's finding of guilt, and the sentence imposed in this matter.



Carpenter, J.

**First Judicial District of Pennsylvania
Honorable Linda A. Carpenter
1418 Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 19107**

Commonwealth v. Markis Gomac
CP-51-CR-0000303-2010

Date: December 11, 2013

PROOF OF SERVICE

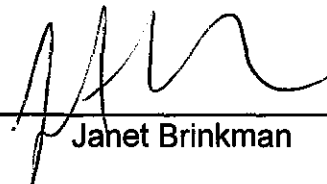
I hereby certify that I am this day serving the foregoing upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

Defense Counsel/Party: Jennifer Santiago, Esquire
Land Title Building
100 S. Broad Street, Suite 1419
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Type of Service: () Personal (X) First Class Mail () Other, please specify: _____

District Attorney: Hugh J. Burns, Jr., Esq.
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107 - 3499

Type of Service: () Personal (X) First Class Mail () Other, please specify: _____



Janet Brinkman