

**[J-23-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 32 MAP 2010
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court at No. 2002 MDA 2007 dated
v.	:	December 1, 2009 Affirming the Order of
	:	the Centre County Court of Common
	:	Pleas, Criminal Division, at No. CP-14-
JOHN D. AU,	:	CR-1363-2007 dated October 30, 2007
	:	
Appellee	:	ARGUED: APRIL 12, 2011

DISSENTING OPINION

MR. JUSTICE BAER

DECIDED: April 26, 2012

The Majority holds that a police officer may solicit the identification of the occupants of a legally parked vehicle without any indicia of reasonable suspicion that there is criminal activity afoot. In my view, while an officer may certainly check on the safety and welfare of occupants of a parked car at night, to solicit identification from those occupants after ensuring all was well constitutes an investigatory detention, which, under the Fourth Amendment to the United States Constitution, requires reasonable suspicion of criminal activity. The Commonwealth has conceded that, at no time relevant to this appeal, did the officer possess reasonable suspicion; yet, the Majority finds the police officer's actions lawful. I respectfully disagree, and therefore dissent.

As noted by the Majority, during the evening of May 31, 2007, Ferguson Township Police Sergeant Ryan Hendrick observed a vehicle parked in the lot of an establishment known as the Dariette. The business had already closed for the day.

Sgt. Hendrick pulled his marked cruiser into the parking lot to “merely [check] on the vehicle.” Notes of Testimony (N.T.), Oct. 4, 2007 at 21. In so doing, Sgt. Hendrick positioned his cruiser at a 45-degree angle to the parked car, aligning his headlights to illuminate the passenger side. Dressed in full uniform, Sgt. Hendrick then exited his cruiser, and approached the front-passenger door of the car. As he neared the vehicle, the front-passenger window rolled down, and Sgt. Hendrick observed six individuals in the car: two in the front seat, and four in the back. Sgt. Hendrick walked up to the window, and asked the occupants, “What’s going on?” Id. at 6. One of the individuals in the backseat responded that they were “Hanging out.” Id. Noticing that all of the occupants “looked very young to [him],” id., Sgt. Hendrick then asked if everyone in the vehicle was eighteen years’ old, to which some of the individuals in the backseat responded that they were not.

At this point, it is noteworthy that Sgt. Hendrick testified that there was no smell of alcohol or drugs emanating from the car, id. at 23; nor did he observe any beer cans, indicia of alcohol or drug usage, or, indeed, any signs that there was criminal activity afoot. Id. Moreover, no curfew ordinances were in effect at the time of the incident. Id. at 38.

Nonetheless, Sgt. Hendrick sought to investigate further, and thus asked the person sitting in the front-passenger seat (later identified as Appellee, John Au), for his identification. Appellee opened the glove compartment to retrieve it, allowing Sgt. Hendrick to observe what he believed to be two baggies of marijuana. After further investigation, Sgt. Hendrick placed Appellee and the driver of the vehicle under arrest for possession of marijuana. Appellee was subsequently charged via summons with possession of a small amount of marijuana. After waiving his right to a preliminary hearing, Appellee filed an omnibus pre-trial motion challenging, *inter alia*, the legality of

Sgt. Hendrick's contact and interaction with him and the contemporaneous seizure of the marijuana.

The trial court granted suppression, and an *en banc* panel of the Superior Court affirmed on the Commonwealth's certified appeal. Specifically, the Superior Court determined that while Sgt. Hendrick's initial interaction with the occupants of the vehicle was a mere encounter, as he was only checking on their welfare, the interaction escalated into an investigatory detention upon the solicitation of Appellee's identification. The court so concluded finding that no reasonable person, seated in a car facing a fully uniformed police officer, with "the headlights of a police car shining in his face," and solicited to hand over his identification, "would have felt free to terminate the encounter." Commonwealth v. Au, 986 A.2d 864, 867 (Pa. Super. 2009) (*en banc*). For the reasons that follow, I agree with the conclusion of both the trial court and the Superior Court, and would thus affirm.

Under the Fourth Amendment,¹ mere encounters are found in situations where a reasonable person would feel free to leave, decline to answer questions posed by the officer, or otherwise terminate the interaction with a police officer. Commonwealth v. Strickler, 757 A.2d 884, 889 (Pa. 2000). The baseline for the distinction between a mere encounter and an investigatory stop begins with the seminal case of Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968): "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we

¹ As the Majority notes, see Maj. Slip Op. at 11-12, the parties in this case have framed the issue of suppression solely under the Fourth Amendment, and not under Article I, Section 8 of the Pennsylvania Constitution. I agree with the Majority that, to the extent the parties have not focused their advocacy on the privacy-based interests of Article I, Section 8, we should not expand the decision in this case, whatever the outcome, beyond the Fourth Amendment.

conclude that a ‘seizure’ has occurred.” Such a seizure, of course, must be supported by reasonable suspicion of criminal activity. Id. at 21. It cannot, however, be generalized; for example, the restraint of liberty may not be justified even by the ever-growing, global threat of crime in the large metropolitan areas of this nation. Brown v. Texas, 443 U.S. 47, 52 (1979). Moreover, police cannot stop and demand identification from a person without “any specific basis for believing he is involved in criminal activity.” Id. In essence, a balance must be achieved “between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.” Id. at 50 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)). In striking this balance, however, the Supreme Court has been clear that it must “til[t] in favor of freedom from police interference.” Brown, 443 U.S. at 52.

The Majority bases its reasoning on drug interdiction cases² decided in recent years by the U.S. Supreme Court: “Appellee’s circumstances as a passenger in a parked car upon [Sgt. Hendrick’s] approach were roughly analogous to those in the bus-and-airport encounter decisions” Maj. Slip Op. at 8. The Majority then cites these cases, discussed in detail below, for the general proposition that police officers may approach and ask an individual for identification without implicating the protections of the Fourth Amendment. Id. (citing, e.g., Florida v. Bostick, 501 U.S. 429, 434-35 (1991) (“We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual [and] ask to examine the

² In most cases, drug interdiction consists of teams of specially trained officers assigned to “observe and investigate travelers who arrive [at mass transportation centers] from ‘[drug] source cities.’” Commonwealth v. Boswell, 721 A.2d 336, 338 (Pa. 1998) (equally divided court). “Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions.” Florida v. Bostick, 501 U.S. 429, 431 (1991).

individual's identification.")). In my view, the drug interdiction cases are not "roughly analogous" to the instant appeal; rather, they are completely distinguishable.

In Bostick, perhaps the seminal opinion from the U.S. Supreme Court concerning drug interdiction cases, the Court examined a *per se* rule announced by the Florida Supreme Court concluding that when officers boarded a bus for the purpose of conducting a drug interdiction, the passengers were immediately seized for purposes of the Fourth Amendment because of the restricted space within a bus. In that case, during a regularly scheduled stop at a depot, officers boarded the bus for purposes of conducting a drug interdiction, identified themselves and their purpose, and informed the passengers that they were free to refuse to cooperate. The officers then approached each passenger and asked to see their identification and ticketing information. Upon reaching the defendant's seat, the officers asked him for this information. After examining it, the police asked to search the defendant's baggage. He consented, and the search revealed marijuana, resulting in the defendant's conviction of multiple charges.

The Florida Supreme Court vacated the conviction, finding that the officers improperly seized the defendant (and, indeed, all the passengers) when they boarded the bus for the interdiction sweep without reasonable suspicion of criminal activity. The United States Supreme Court reversed. First, the Court noted that in most improper seizure cases, the relevant inquiry concerns whether the subject felt "free to leave." Id. at 436 (citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988)). The Court asserted however, that people on a bus generally do not "want to leave." Thus, the Court focused on whether the subject of police scrutiny would have felt free to terminate the encounter or not answer the officer's inquiries, rather than whether he would have felt free to leave the bus. Id. at 436-37. With this standard established, the Court reversed

the *per se* rule of the Florida Supreme Court, and remanded to that court for a determination consistent therewith.

The High Court then expounded upon the Bostick rule in United States v. Drayton, 536 U.S. 194 (2002), another drug interdiction case involving a person riding on a bus. In Drayton, three Tallahassee, Florida police officers boarded a bus at a regularly scheduled stop for the purpose of conducting a drug interdiction sweep. The officers informed the passengers that they were police officers and that they boarded the bus to look for drugs. As one officer positioned himself in the rear of the bus, and the other in the front, the third officer went from passenger to passenger, requesting identification and ticket information, as well as inquiring into any luggage each passenger had on board. Unlike Bostick, however, these officers did not inform the passengers that they had a right to refuse to cooperate.

When the officer reached the defendant, he initially inquired regarding the defendant's identification, ticket, and luggage without finding anything suspicious. The officer then noticed that the defendant was wearing baggy, loose fitting clothing, which he viewed as stereotypical of drug runners. The officer asked if he could search the defendant's person, and upon receiving consent, found almost 300 grams of cocaine duct-taped to the defendant's inner thighs. The defendant was charged with multiple federal crimes,³ and, prior to trial, he moved to suppress the cocaine on the basis that the officers had improperly seized him without reasonable suspicion of criminal activity. The court granted suppression, finding that the officer's failure to inform the passengers that they could refuse to cooperate elevated the encounters to investigatory detentions

³ The Drayton decision does not explain why the defendant, who was arrested by Tallahassee city police officers, was charged in federal court.

unsupported by reasonable suspicion, and the United States Court of Appeals for the Eleventh Circuit affirmed.

On appeal, the Supreme Court reversed on two grounds. First, the Court determined that the lower courts erred in creating a *per se* rule that officers must inform passengers of their right to not cooperate. As in Bostick, the Court declined to create a *per se* rule. Rather, it reiterated that in Fourth Amendment cases, an officer's actions must be examined based on the totality of the circumstances, of which the fact that the incident occurred on a bus and that the officer did not inform passengers of their right to refuse to cooperate are part, but not conclusive, of the examination.

Second, in examining the totality of the circumstances, the High Court opined that “[t]he Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse.” Id. at 197. “Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage - provided they do not induce cooperation by coercive means.” Id. at 201. In finding that the officers in Drayton did not improperly seize the defendant, the Court found of great import,

there was nothing coercive [or] confrontational about the encounter. There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure.

Id. at 204 (internal citations omitted).

This Court then had the opportunity to examine an interaction between drug interdiction agents and passengers in a train station. In Commonwealth v. Lewis, 636 A.2d 619 (Pa. 1994), we found that when four plain-clothed agents approached the defendant and his companion within the confines of a train station because they fit the generalized description of drug couriers, backed them into a wall, and then extensively questioned them concerning their residences and business in the Commonwealth, the officers seized them without reasonable suspicion. Basing the decision solely on the Fourth Amendment, this Court found that under the totality of the circumstances, the officers had curtailed the defendants' liberty, without reasonable suspicion of criminal activity. Id. at 623 (citing Reid v. Georgia, 448 U.S. 438 (1980) (“[A]ny curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.”)).

The appeal *sub judice* is not a bus terminal or train station case, however. Rather, this case concerns six young members of society sitting in a parked car being investigated by a uniform police officer. The very confines of the vehicle, coupled with Sgt. Hendrick's interactions with the occupants, particularly Appellee, in my view distinguish this case from those cited by the Majority. Indeed, while this Court has not had occasion to examine police-citizen encounters with the occupants of parked cars, the Superior Court has, and I believe its jurisprudence is enlightening and supportive of the rulings of the lower courts in this case to grant suppression.

In Commonwealth v. DeHart, 745 A.2d 633 (Pa. Super. 2000), after monitoring a radio call describing a “suspicious vehicle,” two state troopers observed and followed it to a residential street, where it legally parked. The two occupants of the vehicle then conversed with a man standing on the sidewalk. The state trooper who was driving a marked cruiser, pulled to the side of the subject vehicle, so that his partner in the

passenger seat could speak to the driver without anyone exiting their respective cars. Eventually, however, the troopers became suspicious of the activity between the occupants of the car and the man on the sidewalk. They then exited their cruiser, requested that the occupants exit their vehicle and produce identification, and questioned them separately, leading to the discovery of marijuana on the defendant.

In reviewing DeHart, the Superior Court reached three holdings pertinent to the appeal before us. First, the court determined that when the troopers pulled alongside the suspicious vehicle and began conversing with its occupants, they did not effectuate a stop, which would have had to be supported by reasonable suspicion, because the car was already parked. Second, the car-to-car conversation was merely that - a conversation - and thus was only a mere encounter. Finally, however, when the troopers exited their cruiser and began to question the defendants separately, they escalated the interaction into an investigative detention, which remained unsupported by reasonable suspicion of criminal activity. Id. at 637-38.

Two years later, in Commonwealth v. Mulholland, 794 A.2d 398 (Pa. Super. 2002), a panel of the court considered a case factually similar to the instant appeal. There, the defendant was seated in his parked van in a vacant parking lot at night. An officer on patrol spotted the van, and pulled into the parking lot to “check to see if everything [was] all right.” Id. at 399. In doing so, the officer blocked any means of egress, and shined his cruiser’s spotlight into the vehicle. He then approached the driver’s side of the car, and began to speak with the defendant, who told the officer that he was fine and was merely waiting for an acquaintance. Nevertheless, the officer continued questioning the defendant. During the conversation, the officer smelled burnt marijuana, and subsequent inquiries eventually led to the discovery of that drug.

The Superior Court properly looked to the totality of the circumstances of the interaction between the police officer and the defendant, and concluded that the officer's conduct amounted to an investigatory detention without reasonable suspicion. Reading the opinion fairly and in the context of the other cases reviewed herein, the officer's initial action of checking on the well-being of the defendant may have been well intentioned and appropriate. However, the manner in which he did so, by blocking the egress out of the parking lot, shining his alley light into the car, and continually interrogating the defendant at night after he provided a reasonable explanation for his presence in the parking lot, led the Superior Court to determine that by the time the officer smelled the burnt marijuana he "had already subjected [defendant] to a period of illegal detention without such reasonable basis for suspicion." Id. at 402.

In Commonwealth v. Johonoson, 844 A.2d 556 (Pa. Super. 2004), a state trooper observed a defendant driving his vehicle

substantially lower than the speed limit, with his four-way hazard lights flashing. [The defendant] then pulled off the side of the road, without any signal from the [t]rooper. The [t]rooper followed [the defendant] off the side of the road, parked his patrol car, and then activated the lights on his car for safety purposes.

Id. at 558-59. As the trooper walked up to the vehicle, he noticed significant damage to it. Subsequent conversation with the defendant revealed overt signs of intoxication, and, field sobriety tests confirmed the same. After his arrest for DUI, the defendant moved to suppress all evidence of his intoxication, arguing that it was obtained during an illegal seizure by the trooper. In support, the defendant contended that by activating his overhead emergency lights the trooper signaled to the defendant that he was not free to leave the area or terminate the encounter.

The Superior Court disagreed, finding of great significance that the trooper did not activate his emergency lights to effectuate a traffic stop. Not until the defendant voluntarily pulled his vehicle off to the side of the road did the trooper turn on his lights, and only then so that he could safely render aid to a motorist in a damaged vehicle. Id. at 562. By moving to the side of the road at 3:00 a.m. after driving slowly with his hazard lights on, the defendant put the police in the position where the only responsible action was for the trooper to pull over and render aid. Id. The Court therefore concluded that the officer's assistance to the motorist was a mere encounter, as the motorist was free to decline the officer's offer of assistance.

Finally, in Commonwealth v. Hill, 874 A.2d 1214 (Pa. Super. 2005), the court sharpened the "mere encounter/investigatory detention" demarcation in motorist-assist, parked car cases. In Hill, the defendant was travelling on a rural highway in the dark when a vehicle approached him from behind and flashed its high beams. Thinking the driver of the car wanted to pass him, the defendant pulled his vehicle over to the side and stopped. The following car, which was a marked state police cruiser, pulled in behind the defendant, and the troopers inside activated their emergency lights. Upon exiting their cruiser and approaching the defendant, the troopers observed a strong odor of alcohol and arrested the defendant for DUI.

The defendant moved to suppress the evidence, contending that the troopers improperly seized him when they activated the cruiser's emergency lights. Unlike Johonoson, the Superior Court in the Hill case determined that an improper seizure had indeed occurred, finding that the defendant

did nothing more than pull his truck to the side of the road in an effort to allow another motorist to pass. Appellee had no reason to expect that a police officer would stop to render aid. Indeed, Appellee testified that when the oncoming

vehicle pulled in behind him, he considered leaving until Trooper Koebley activated his overhead flashing lights.

Hill, 874 A.2d at 1219. The Superior Court further observed that, during the suppression hearing, the troopers testified that “Once the emergency lights were activated ... [the defendant] would have been required to stay stopped.” Id. Thus, because the troopers had no reasonable suspicion of criminal activity when they “seized” defendant, suppression of all evidence of DUI was warranted.

These parked car cases demonstrate that general statements, such as, “a request for identification is not to be regarded as escalatory in terms of the coercive aspects of a police-citizen encounter,” Maj. Slip Op. at 8, cannot be a bright line in analyzing a police officer’s conduct. Indeed, as the Majority notes, the U.S. Supreme Court has eschewed from bright lines in the context of the Fourth Amendment, see e.g. Bostick; Drayton, supra pp.4-8. Rather, all of the above jurisprudence reveals that courts must examine the totality of the circumstances of the stop. After reviewing the entirety of the record in the case *sub judice*, I agree with the Superior Court that Sgt. Hendrick’s solicitation that Appellee produce his identification, coupled with: the way the sergeant positioned his squad car, his use of his cruiser’s headlights to illuminate the interior of the vehicle, his being in full uniform with service weapon holstered, interacting with the vehicle’s passengers late at night, his positioning himself immediately outside Appellee’s door, at least impeding his ability to exit the vehicle, and his prior scrutiny and questioning of Appellee and the remaining occupants of the vehicle, subjected Appellee to an investigatory detention, which was unsupported by reasonable suspicion of criminal activity.

Moreover, while I recognize and acknowledge the Drayton line of cases cited by the Majority, they are indeed distinguishable. Sgt. Hendrick did not merely approach Appellee in an airport, bus terminal, or like facility and ask to see his identification,

ticket, and luggage. Rather, as noted, at the origin of this incident, the sergeant pulled his marked cruiser into a parking lot at an angle to the car in which Appellee was seated to position the police officer's headlights so that they would shine directly into the car and at Appellee; exited his cruiser; approached the car in full uniform with holstered gun evident; positioned himself immediately outside Appellee's door; and began to interrogate Appellee and the other occupants of the vehicle regarding their purpose for being in the lot at 12:30 a.m.

I emphasize these facts because they are part of the totality of the circumstances, and not because standing alone they rise to an unconstitutional stop requiring reasonable suspicion. Indeed, a convincing argument can be made that the illumination of the interior of the car and the conspicuous movement of the uniformed police officer toward it were measures appropriate for officer safety. At that juncture, the individuals in the car could have assured the officer of their well-being. The officer having responsibly carried out his duties, and being satisfied that these young people were just "hanging out," could have told them to be careful, wished them well, and sent them on their way. If that is how this scenario would have concluded, there would have been no infringement of Appellee's constitutional rights.

Instead, with no basis or necessity, the sergeant sought Appellee's identification, as he was obviously unsatisfied with the answers he had received to his inquiries to that point. When this solicitation for identification is considered in the context of all the other elements of this interaction, it escalated from a scenario where a reasonable, innocent person in Appellee's position would have felt free to speak or not speak with Sgt. Hendrick, to one in which such person no longer felt free to ignore or refuse the sergeant's solicitation for identification. Accord Commonwealth v. Barnett, 398 A.2d 1019, 1021 (Pa. 1979) (while an officer approaching an individual to ask a question is

permissible, when the conduct associated with the approach, however laudable, creates a coercive environment, suppression of any subsequently obtained evidence is proper).

To conclude, the Majority parenthetically observes that “there remains substantial room for reasonable disagreement concerning how [the reasonable, innocent person] might feel in any given set of circumstances” concerning his right to refuse inquiries by an officer. *Maj. Slip Op.* at 9. While the facts of this case, combined with the aforementioned precedent, certainly exemplify this sentiment, the U.S. Supreme Court has made clear that where a balance is to be achieved “between the public interest and [a citizen’s] right to personal security and privacy,” such balance must “til[t] in favor of freedom from police interference.” Brown, 443 U.S. at 52. Here, Sgt. Hendrick’s solicitation of Appellee’s identification constituted just that: unlawful police interference with lawful private conduct. As such interference constitutes an investigatory detention unsupported by reasonable suspicion of criminal activity, the Superior Court correctly affirmed the trial court’s granting of suppression. As the Majority reaches the opposite result, I respectfully dissent.

Madame Justice Todd joins this dissenting opinion.