

[J-23-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 32 MAP 2010
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court at No. 2002 MDA 2007 dated
	:	12/1/09 affirming the order of Centre
v.	:	County Court of Common Pleas, Criminal
	:	Division at No. CP-14-CR-1363-2007,
	:	dated 10/30/07
	:	
JOHN D. AU,	:	
	:	
Appellee	:	ARGUED: April 12, 2011

OPINION

MR. JUSTICE SAYLOR*

DECIDED: April 26, 2012

Appeal was allowed to review the Superior Court's conclusion that a police-citizen encounter ripened into an investigative detention when an officer requested identification from vehicle occupants.

In May 2007, Appellee was arrested by a Ferguson Township police officer and charged with possession of a small amount of marijuana. See 35 P.S. §780-113(a)(31)(i). Appellee sought suppression and a hearing ensued.

The arresting officer testified that, while on routine patrol in the early morning hours, his attention was drawn to an automobile parked in the lot of a business

* This matter was reassigned to this author.

premises. According to the officer's testimony, it was unusual to see a car in the location at such time, and he decided to make further inquiry. The officer did not activate the emergency lights of his police cruiser, but he positioned his vehicle at an angle relative to the parked automobile so as to illuminate the passenger side. The officer said that he did so without blocking the egress of the vehicle, which he then approached, probably with a flashlight. Further, he explained:

As I walk up the passenger rolled down the window. I walked up and just stated what's going on and they stated that they were hanging out. I noticed that there were six individuals in the vehicle, four in the back seat and two in the front-seat. The individuals all looked very young to me, especially those in the back. So I asked if everyone was 18 and the individuals in the back said no.

* * *

Now, at this point I asked the passenger for his identification. He opened the glove box, which was seated right in front of him. When he did there was two baggies of which were clearly marijuana in the glove box direct -- in his immediate control. I kept talking to him, requested another officer to come out because of the illegal drugs. I went over to the driver's side opened up the door and asked for his identification as well. When I did that there was also drugs on that side of the vehicle.

N.T., Oct. 4, 2007, at 5-6. In his testimony, the officer identified Appellee as the front-seat passenger.

The common pleas court awarded suppression of the drug evidence. The court framed the issue as whether the arresting officer had the legal authority to approach the parked vehicle and ask for identification from the occupants when there was no evidence of any criminal activity or a violation of the Motor Vehicle Code. See generally Commonwealth v. Strickler, 563 Pa. 47, 58, 757 A.2d 884, 889 (2000) ("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[.]”). On its review, the court found such authority to be lacking. See Commonwealth v. Au, No. CP-14-CR-1363-2007, slip op. at 6 (C.P. Centre, Oct. 30, 2007) (“The Court finds that the interaction with [the arresting officer] was, from its inception, an investigative detention.”).

Initially, the suppression court discussed the boundary between the two relevant types of police-citizen interactions -- namely, a mere encounter and an investigative detention -- defined by whether a seizure of the person has occurred. See generally Strickler, 563 Pa. at 57-58, 757 A.2d at 889. The court explained that the seminal inquiry turns on whether, considering the totality of the circumstances, a reasonable person would believe he was free to leave. Accord id. (explaining that, “[i]n evaluating the circumstances, 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” (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980) (plurality))).¹

The suppression court then indicated that its decision was controlled by Commonwealth v. Mulholland, 794 A.2d 398 (Pa. Super. 2002) (holding that police had

¹ The United States Supreme Court has further explained that the reasonable person test “presupposes an innocent person.” Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991) (emphasis in original).

This litmus also has been refined to account for circumstances in which a citizen may not wish to leave, or in which leaving may be impractical as an option for reasons other than police presence. See, e.g., id. at 436, 111 S. Ct. at 2387. In such circumstances, the appropriate inquiry is whether a reasonable person would have felt free to decline the officer’s requests or otherwise terminate the encounter. See id.

undertaken an investigative detention upon confronting an occupant of a parked van). Notably, however, whereas the court recognized that Mulholland concerned a situation in which a police officer had positioned his own vehicle so as to make it difficult or impossible for the vehicle under investigation to depart, the court did not reconcile this with the evidence -- reflected in the arresting officer's testimony in Appellee's case -- that the officer had not impeded the egress of the parked vehicle in which Appellee was a passenger.

On appeal, a three-judge panel of the Superior Court initially affirmed, and that result was sustained by an en banc panel of the Superior Court in a deeply divided opinion on reargument. See Commonwealth v. Au, 986 A.2d 864 (Pa. Super. 2009) (en banc). At the outset, the majority differed with the suppression court's conclusion that the encounter between the arresting officer and Appellee was an investigatory detention from the beginning. See id. at 867 ("[T]he law clearly recognizes that when an officer approaches a citizen and talks to that citizen without any assertion of authority, then what has transpired is a mere encounter." (citing Commonwealth v. Ellis, 541 Pa. 285, 293-94, 662 A.2d 1043, 1047 (1995))). According to the majority, however, the interaction "ripened into an investigative detention" when the officer requested information from the vehicle occupants. Id. at 867. The majority emphasized that the cruiser headlamps were shined directly into the parked vehicle, and the officer, in full uniform, apparently was unsatisfied with the occupants' response to his initial inquiry. From the majority's point of view:

In such a situation, no person would have felt free to terminate the encounter and depart the scene; particularly Appellee, who sat there with the headlights of a police car shining into his face. While a person in Appellee's situation may have surmised that the officer initiated the encounter to merely check upon the vehicle and its occupants, the subsequent request for identification from all of the vehicle's

occupants would have signaled to any reasonable person that the officer was unsatisfied with the response that the occupants were just hanging out, and that the officer wanted to investigate further. Knowing that the officer sought to investigate further and that this was no longer a situation where the officer was just checking in to see if the occupants were in need of assistance, no reasonable person would have felt free to terminate the encounter. See Commonwealth v. DeHart, 745 A.2d 633, 639 (Pa. Super. 2000) (holding that an investigative detention occurred when the officer, after an initial inquiry, exited the vehicle and approached its occupants because the officer “chose to escalate the encounter to afford greater investigation, which, of course, is consistent with the purpose of an investigative detention”).

Au, 986 A.2d at 867-68.

Judge Shogan authored the dissent and was joined by three other judges. In its discussion, the dissent highlighted the following passage from the decision of the United States Supreme Court in Hiibel v. Sixth Judicial District of Nevada, 542 U.S. 177, 124 S. Ct. 2451 (2004):

Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. “[I]nterrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.”

Id. at 185, 124 S. Ct. at 2458 (quoting INS v. Delgado, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762 (1984)). Additionally, the dissent reviewed a series of Pennsylvania decisions applying Fourth Amendment precepts and concluding that police inquiries and requests for identification, even in constrained locations, do not necessarily reach beyond the level of a mere encounter. See, e.g., Commonwealth v. Smith, 575 Pa. 203, 217-18, 836 A.2d 5, 13-14 (2003) (holding that an interaction in which law enforcement officers boarded a passenger bus upon a scheduled terminal stop; upon reaching the

appellant's seat, requested to view her identification and ticket; and asked questions regarding her destination and luggage, did not amount to a seizure); Commonwealth v. Dowds, 563 Pa. 377, 387, 761 A.2d 1125, 1130 (2000) (concluding the appellant was not seized under the Fourth Amendment when initially approached by law enforcement officers in an airport, who were in plain clothes, did not display weapons, identified themselves, explained their duties at the airport, and requested ticket and identification information).

According to the dissent:

[T]he request to see identification was not an intrusion of Appellee's privacy. Rather, it is the type of question permitted during a mere encounter, which is itself a request for information that needs no level of suspicion. In addition, of significant importance is the testimony which clearly indicates [the officer] parked his cruiser in a manner which permitted the parked vehicle to exit the parking lot at any time. Thus, there was not restraint on the movement of Appellee or the vehicle by the conduct of the officer or the placement of the police cruiser. Consequently, in analyzing the factors surrounding the interaction, none of the conditions which would indicate that a seizure occurred were present.

Au, 986 A.2d at 872-73 (Shogan, J., dissenting).

Presently, the Commonwealth maintains that, at the time the arresting officer observed baggies of marijuana in the glove box, his interaction with the vehicle occupants remained nothing more than a mere encounter. The Commonwealth relies primarily on the line of cases invoked in the Superior Court dissent. In addition, the Commonwealth discusses a series of social policy considerations, as follows:

[S]ociety expects police officers to keep the peace, and to aid stranded motorists. The owners of businesses . . . would not want the police to simply ignore nocturnal activity in their parking lots after hours. And, motorists often require

assistance late at night. Requiring officers to have reasonable suspicion before requesting identification from individuals while performing these salutary duties is too onerous. There is no legitimate purpose to be gained by such a rule.

. . . In the instant case, [the officer] was trying to balance his own safety interests with that of the [Appellee] and the passengers of the vehicle. He did not use any unreasonable or excessive means to achieve this balance. He used his regular headlights, walked up to the vehicle, and asked what's going on. When the occupants indicated there were juveniles in the vehicle out late at night, he simply asked for identification.

Brief for Appellant at 12-13 (citation omitted); see also id. at 9 (“This scenario . . . presents an extremely important public policy safety issue for police officers who work late at night, often by themselves, and approach vehicles with unknown occupants inside.”); id. at 12 (“[P]articularly late at night, at a closed business . . . an officer must be permitted to know with whom s/he is dealing.”).

Appellee, like the suppression court, places substantial emphasis on the Mulholland decision in urging that the interaction was an investigative detention from the outset. He also offers an argument in the alternative which tracks the analysis of the Superior Court majority in contending that the encounter ripened into a seizure scenario upon the arresting officer's request for identification. Accord Brief for Amicus Pa. Ass'n of Criminal Def. Lawyers at 8 (“The reality of the matter is that when a police officer requests a civilian to do something . . . it is most often perceived as a command that will be met with an unpleasant response if disobeyed.” (quoting DeHart, 745 A.2d at 638)).

Although arising in the suppression context, the question presented -- whether a seizure occurred in the circumstances reflected in the arresting officer's undisputed testimony -- is one of law, as to which our review is plenary. See Commonwealth v.

Jones, 605 Pa. 188, 197-98, 988 A.2d 649, 654 (2010) (discussing the standard of review pertaining to suppression rulings).

Upon review, we find that Judge Shogan's dissent reflects the appropriate application of prevailing Fourth Amendment law. As she suggested, Appellee's circumstances as a passenger in a parked car upon the arresting officer's approach were roughly analogous to those in the bus-and-airport-encounter decisions such as Smith and Dowds.² In both lines of cases, the travelers were asked for identification by law enforcement officers, but no seizure was found to have occurred at such juncture. See Smith, 575 Pa. at 217, 836 A.2d at 13; Dowds, 563 Pa. at 387, 761 A.2d at 1130. See generally Hiibel, 542 U.S. at 185, 124 S. Ct. at 2458 ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); Bostick, 501 U.S. at 434-35, 111 S. Ct. at 2386 ("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 individual's identification[.]" (internal citations omitted)); United States v. Hicks, 2009 WL 3150394, at *4 (E.D. Pa. Sept. 23, 2009) ("A uniformed police officer, who would be expected to carry a gun, may approach a legally parked vehicle and ask the occupants questions without implicating the Fourth Amendment.").³

It is thus apparent that, under Fourth Amendment law as reflected in the decisions of the United States Supreme Court, a request for identification is not to be regarded as escalatory in terms of the coercive aspects of a police-citizen encounter.

² The parked vehicle scenario is to be distinguished from a traffic stop. See Brendlin v. California, 551 U.S. 249, 251, 127 S. Ct. 2400, 2403 (2007) (holding that a passenger of a vehicle stopped by police has been subjected to a seizure).

³ In this regard, a request obviously differs from a demand.

Cf. Delgado, 466 U.S. at 216, 104 S. Ct. at 1762 (“What is apparent from [past decisions] is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation.”). The Superior Court majority, therefore, departed from this precedent in attributing such effect to the arresting officer’s request along these lines.

We recognize the conceptual difficulties inherent in the administration of the reasonable-person standard. Although the test is cast in objective terms, absent empirical proofs, there remains substantial room for reasonable disagreement concerning how such a hypothetical person might feel in any given set of circumstances. Such differences have been manifested, at both the federal and state level, in many divided opinions on the subject. See, e.g., Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983) (plurality); Mendenhall, 446 U.S. at 544, 100 S. Ct. at 1870 (plurality); Commonwealth v. Boswell, 554 Pa. 275, 721 A.2d 336 (1998) (equally divided Court).⁴ Nevertheless, the High Court has settled on an approach allocating

⁴ The contraposition to the prevailing view also has been developed at length in many dissenting opinions in the United States Supreme Court and in this Court. See, e.g., Bostick, 501 U.S. at 450, 111 S. Ct. at 2394-95 (Marshall, J., dissenting) (describing an “aura of coercion and intimidation that pervades” police-citizen encounters during drug interdiction operations on passenger busses); Smith, 575 Pa. at 226-27, 836 A.2d at 19 (Nigro, J., dissenting) (taking the position that “police officers inherently display their authority and are intimidating solely by virtue of their position”); Dowds, 563 Pa. at 389-90, 761 A.2d at 1132 (Nigro, J., dissenting) (“From the moment the police approach a person and identify themselves, the average citizen is, in my view, seized because he or she does not feel free to ignore the police officers and go about their business.”). See generally David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard, 99 J. CRIM. L. & CRIMINOLOGY 51, 87 (2009) (positing that empirical data shows that the Supreme Court has been determining that “people who do not in fact feel free to leave are free to leave”); David T. McTaggart, Reciprocity on the Streets: Reflections on the Fourth Amendment and the Duty to Cooperate with the Police, 76 N.Y.U. L. REV. 1233, 1249 (2001) (“Under the ‘free to leave’ standard, . . . the standard of permissible intimidation is quite high. . . . The inevitable consequence of such a high standard is that many ‘reasonable people’ will be intimidated by, and submit (...continued)

very modest weight to the possibility for psychological coercion arising from a fairly wide range of police conduct which may be regarded as being appropriate to and inherent in the circumstances facilitating the interaction. Cf. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §9.4(a), at 425 (4th ed. 2004) (observing that “the confrontation is a seizure only if the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse[,]” which include moral and instinctive pressures to cooperate).

In the present case, the arresting officer’s un rebutted testimony indicates that he did not: activate the emergency lights on his vehicle, see N.T., Oct. 4, 2007, at 5, 32; position his vehicle so as to block the car that Appellee was seated in from exiting the parking lot, see id. at 22; brandish his weapon; make an intimidating movement or overwhelming show of force, see id. at 6, 23, 24; make a threat or a command; or speak in an authoritative tone. See id.; United States v. Drayton, 536 U.S. 194, 204, 122 S. Ct. 2105, 2112 (2002) (“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.”).⁵ In terms of the

(continued...)

to, police who lack any suspicion whatsoever, yet their submission will be regarded as consensual, and not as a seizure.”).

⁵ There is also no evidence that the officer retained Appellee’s driver’s license for longer than necessary to discern Appellee’s identity. See generally People v. Paynter, 955 P.2d 68, 75 (Colo. 1998) (explaining that “the sequence of events that occurs after a citizen voluntarily provides an officer his identification, including the length of time that the officer retains the identification card or a request, if any, by a citizen to be left alone or to be permitted to go about his or her business, could result in such a restraint that a citizen is not free to leave.” (emphasis in original)). In any event, by the time Appellee retrieved his license from the glove box, the officer had observed the baggies of marijuana, and, therefore, at such juncture, detention was warranted.

use of the arresting officer's headlights and flashlight, this was in furtherance of the officer's safety, and we conclude it was within the ambit of acceptable, non-escalatory factors. Indeed, as suggested by Judge Shogan, such lighting would appear to create a lesser potential for psychological coercion than the circumstances surrounding systematic drug interdiction efforts at bus terminals and airports. Thus, we do not find this to be the sort of escalatory factor upon which a determination of a seizure may be founded for Fourth Amendment purposes.

We also appreciate that the arresting officer could have informed Appellee that he was free to leave and had the right to refuse the request for identification, which might have ameliorated the potential for perceptions of restraint or coercion. In this area of Fourth Amendment law, however, the United States Supreme Court has eschewed bright-line rules in favor of the totality assessment. See, e.g., Drayton, 536 U.S. at 203, 122 S. Ct. at 2112 (finding the Eleventh Circuit erred by adopting a per se rule that, in the absence of warning passengers that they may refuse cooperate, any evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed).⁶

Finally, we realize that this area of the law may be colored by a line of decisions in which the United States Supreme Court, increasingly, is premising application of the exclusionary rule upon deterrence of police misconduct. See, e.g., Herring v. United States, 555 U.S. 135, 144, 129 S. Ct. 695, 702 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it,

⁶ Cf. Ohio v. Robinette, 519 U.S. 33, 39-40, 117 S. Ct. 417, 421 (1996) (rejecting Ohio's per se rule that, in the absence of reasonable suspicion of criminal activity separate and apart from the predicate traffic violation, once an initially valid stop is concluded, a police officer must inform the motorist that the legal detention has ended before seeking consent to search).

and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”). Such exclusively deterrence-based rationale is in tension with the independent search-and-seizure jurisprudence under Article I, Section 8 of the Pennsylvania Constitution, grounded on privacy interests of the citizenry. See, e.g., Commonwealth v. Edmunds, 526 Pa. 374, 398, 586 A.2d 887, 899 (1991). It should be apparent from the Court’s decisions, however, that all Justices are not of one mind concerning the justification for, limits of, and future course of such jurisprudence. Cf. Commonwealth v. Russo, 594 Pa. 119, 133-34, 934 A.2d 1199, 1207-08 (2007) (questioning some of underpinnings of the departure cases). For this reason, in particular, those litigants wishing to advance lines of departure, under Article I, Section 8, from Fourth Amendment doctrine, must bring the matter into sharp focus in their advocacy. See id. at 136 n.11, 934 A.2d at 1209 n.11 (“We reiterate that we believe that state constitutional decisions are more secure when they are supported by the searching inquiry contemplated by Edmunds.”).⁷

Pursuant to governing Fourth Amendment law, we hold that the arresting officer’s request for identification did not transform his encounter with Appellee into an unconstitutional investigatory detention.

The order of the Superior Court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

⁷ Here, as we read the litigants’ briefs, the arguments are tethered to general Fourth Amendment principles.

Madame Justice Orié Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Eakin and McCaffery join the opinion.

Mr. Justice Baer files a dissenting opinion in which Madame Justice Todd joins.