

[J-3-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 39 EAP 2009
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on April 18, 2008 at No.
	:	3288 EDA 2006 affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Philadelphia County, Criminal Division,
	:	dated November 9, 2006 at No. CP-51-
LEKEYIA GRAHAME,	:	CR-0511061-2006
	:	
Appellant	:	
	:	SUBMITTED: March 25, 2010

CONCURRING OPINION

MADAME JUSTICE TODD

DECIDED: November 17, 2010

I concur in the result reached by the Majority and support its rejection of a “guns follow drugs” presumption to justify a protective search for weapons. I write separately, however, to express my disagreement with certain foundational aspects of the Majority Opinion.

Initially, I note that the Majority sets forth an incomplete recitation of the investigative stop standard as articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968) and its progeny. Specifically, the Majority offers that the United States Supreme Court in Terry held that “a law enforcement officer who approaches a citizen in the course of an investigation may conduct a pat-down search for weapons if the officer reasonably believes that the person is ‘armed and presently dangerous to the officer or to others.’” Majority Opinion at 6 (quoting Terry, 392 U.S. at 23-24). This rendition of the Terry standard, however, is incomplete, as the investigatory stop must initially be lawful before a

pat-down search for weapons may be conducted. As more fully developed by the high Court, “[t]he Court [in Terry] upheld ‘stop and frisk’ as constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, Terry determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.” Arizona v. Johnson, 129 S.Ct. 781, 784 (2009).

Furthermore, I believe the Majority’s articulation of the standard morphs from a standard that echoes Terry, to one that is at best imprecise, and arguably incorrect. Compare Majority Opinion at 6 (“arresting officer must be able to point to specific facts which support an objectively reasonable determination that the suspect was armed and dangerous”) with Majority Opinion at 8 (“police cannot frisk an individual for weapons unless the officer observes suspicious behavior or has prior knowledge of the individual’s criminal propensities.”).

Most importantly, while the Majority properly offers that “the arresting officer must be able to point to specific facts which support an objectively reasonable determination that the suspect was armed and dangerous,” Majority Opinion at 6 (quoting Terry, 392 U.S. at 21-22), and that “a protective search cannot be justified under Terry unless the officer can articulate facts that establish an individualized, objective basis for perceiving a threat of armed violence,” Majority Opinion at 9, in analyzing whether a stop and frisk under Terry was justified, the Majority looks to factors that are wholly divorced from its previously-stated standards.

Specifically, the Majority observes that no one “from the task force knew if Appellant had a criminal record,” Majority Opinion at 11, a factor that, without more, such as a criminal history of violence, is unrelated to an individualized basis for perceiving a threat of being armed and dangerous. Similarly, the Majority states as a permissible consideration

that “there was no indication that D.W. and Appellant were involved in a common enterprise,” Majority Opinion at 11, again, a factor irrelevant to the issue of whether the individual was potentially violent. Finally, the Majority opines that Appellant’s presence “during the drug transaction or D.W.’s subsequent arrest” were factors that could inform the question of whether one was potentially threatening to a police officer’s safety. Majority Opinion at 11 n.9. Curiously, these factors set forth by the Majority all share a strong likeness to the “guns follow drugs” presumption that the Majority properly rejects. Contrary to the Majority, I would limit the analysis under Terry to those factors which are indicative of whether a police officer reasonably believes an individual is armed and presently dangerous.

For these reasons, I concur in the result reached by the Majority.