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

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

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

OPINION

MADAME JUSTICE ORIE MELVIN **DECIDED: November 17, 2010**

The issue presented on appeal is whether the Superior Court correctly determined that a police officer had reasonable suspicion to conduct a warrantless search of a woman's handbag for safety reasons based solely on the fact that the owner of the handbag was located inside a residence where another individual had been selling illicit drugs. For the reasons that follow, we hold that the Superior Court erred in adopting a "guns follow drugs" presumption in order to justify a protective search for weapons pursuant to Terry v. Ohio, 392 U.S. 1 (1968). Accordingly, we reverse the order in question.

On November 13, 2005, a drug task force composed of Philadelphia police officers used a confidential informant to make a controlled purchase of crack cocaine from D.W., a male juvenile who was dealing drugs from a house at 126 North Salford Street. As officers watched from an undisclosed location, the informant walked up to the front of the

residence, and D.W. emerged from the house. Following a brief conversation, the informant handed D.W. pre-recorded currency in exchange for two red-tinted packets of crack cocaine. Once the transaction was completed, D.W. re-entered the home, and the informant transported the drugs to a police officer who was waiting nearby.

The task force maintained surveillance on the house and arrested D.W. when he exited the structure approximately ten minutes later. After D.W. had been taken into custody, every officer in the unit approached the home to investigate further.[1] Officer Renee Russell knocked on the front door, spoke briefly with the young man who greeted her, and asked to speak to D.W.'s guardian. D.W.'s mother, Virginia, came to the door and was informed that D.W. had just sold drugs from the house. Officer Russell asked Virginia to sign a consent form permitting a search of the residence, and Virginia complied.

Upon entering the home, Officer Russell observed Appellant, Lekeyia Grahame, sitting on the living room couch with a black purse at her feet. Officer Russell asked Appellant if the purse belonged to her, and she responded in the affirmative. Without asking any additional questions, Officer Russell proceeded to open the purse and search the interior, finding a small baggie of marijuana, a container of unused plastic packets commonly used as packaging for illegal drugs, a pay stub listing 126 North Salford Street as Appellant's address, a key to the residence, and a brown bag containing $900 in cash. Appellant was arrested and charged with various drug offenses.

Appellant filed a motion to suppress the evidence seized from her purse, and an evidentiary hearing was conducted. Officer Russell testified that she searched the purse because she feared it might contain a firearm, stating "the drugs was [sic] coming out of the property[.] The boy had drugs on him and drugs and guns go hand-in-hand." N.T.

[1] It is unclear how many police officers participated in this operation. Officer Renee Russell identified two officers by name at the suppression hearing and alluded to at least one other backup officer. See N.T. Suppression Hearing, 9/29/06, at 8.

Suppression Hearing, 9/29/06, at 13. The suppression court concluded that police were justified in searching the purse for weapons because they had observed drug activity at the house. The motion was denied, and Appellant was convicted of possession of a controlled substance and possession of drug paraphernalia at a bench trial. She then filed a direct appeal arguing that Virginia lacked authority to consent to a search of the house and that the search of her purse violated the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.[2]

A divided three-judge panel of the Superior Court affirmed the judgment of sentence in a published opinion. With respect to the first issue, the majority found that police did not need a warrant to search 126 North Salford Street for drugs because Virginia had apparent authority to consent to a search of the residence. In support, the majority noted that Virginia answered the front door, identified herself as D.W.'s mother, signed a consent form, and invited Officer Russell inside the house.[3] See Commonwealth v. Grahame, 947 A.2d 762, 765 (Pa. Super. 2008). Applying the totality-of-the-circumstances test endorsed in Commonwealth v. Strader, 931 A.2d 630, 635 (Pa. 2007), the Superior Court concluded that the facts available to Officer Russell during the encounter would lead a reasonable person to believe that Virginia had authority over the premises.

The majority also upheld the search of Appellant's purse, reasoning as follows:

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[2] The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…." U.S. Const. amend. IV. Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures…." Pa. Const. art. I, § 8.

[3] Appellant never argued that she owned or leased any portion of 126 North Salford Street in support of her claim that Virginia lacked authority to consent to a search of the residence; Appellant merely asserted that Virginia did not have authority over the premises. The record is silent as to who owned or lawfully resided at the house on the day in question.

> [Appellant] had a large bag, easily capable of holding a gun. Also, a few minutes prior to the search [D.W.] emerged from the house after selling drugs to a confidential informant. Drugs and guns frequently go hand in hand. The officer had a right to conduct a minimally intrusive search for weapons in order to protect herself. [D.W.] could have easily dropped a gun in the large bag on the way out of the house. This is akin to a Terry stop, except instead of patting down someone's body to check in pockets, the officer opened and checked a woman's handbag in her immediate control.

Grahame, 947 A.2d at 764 (footnote omitted). In so holding, it likened the case to Commonwealth v. Davidson, 566 A.2d 897 (Pa. Super. 1989), where the Superior Court held that police had reasonable suspicion to search a purse for weapons following a traffic stop because the bag was unusually heavy, the driver of the vehicle had been arrested on drug trafficking charges, and the female passenger who owned the purse reached for the bag after a police officer had asked her to refrain from touching it.

Judge Kelly authored a dissenting opinion wherein he asserted that third-party consent to search a residence does not extend to a visitor's personal belongings and that the warrantless search of Appellant's handbag was invalid under Terry v. Ohio, supra, and its progeny because Officer Russell did not observe any behavior that would lead a reasonably prudent person to conclude that Appellant was armed and dangerous. In reaching that conclusion, Judge Kelly commented that the case was factually similar to Ybarra v. Illinois, 444 U.S. 85 (1979), where the United States Supreme Court held that an individual's mere proximity to suspected criminals is insufficient to justify a warrantless search for weapons, even when police are lawfully on the premises to conduct a narcotics investigation. As there were no additional reasons to conduct a warrantless search of Appellant's purse aside from Officer Russell's belief that guns tend to be found in close proximity to drugs, Judge Kelly concluded that the majority's analysis was flawed and that the contraband seized by Officer Russell should have been suppressed.

Appellant filed a petition for allowance of appeal, and we granted review limited to the issue of whether the Superior Court erred in finding that Officer Russell had reasonable suspicion to search Appellant's purse for weapons under Terry v. Ohio, supra, based upon a "guns follow drugs" presumption. In reviewing the propriety of a suppression ruling, we are bound by the suppression court's factual findings if they are supported by the record. Commonwealth v. Galvin, 985 A.2d 783, 795 (Pa. 2009). The suppression court's conclusions of law, however, are subject to de novo review and can be reversed if they are erroneous. Id. When the defendant is bringing the appeal, "we consider only the evidence of the prosecution, and so much of the evidence for the defense which remains uncontradicted when fairly read in the context of the entire record." Id.

There are no disputed factual issues in this case because Officer Russell was the sole witness at the suppression hearing, and the defense accepted her version of the incident. Thus, we need only address the Superior Court's determination that Officer Russell was justified in searching Appellant's handbag for weapons in this scenario. Appellant contends that the ruling in question ignores our pronouncement in Commonwealth v. Zhahir, 751 A.2d 1153, 1162 (Pa. 2000), that Pennsylvania courts should not employ a "guns follow drugs" presumption to uphold protective searches conducted during drug investigations because reasonable suspicion is evaluated under the totality of the circumstances. She also maintains that when the evidence is subjected to the totality standard, the search of her handbag cannot pass constitutional muster because Officer Russell did not observe any unusual behavior that would lead a reasonable person to conclude that Appellant was armed and dangerous. Surprisingly, the Commonwealth has changed its position on the legality of the search, and it now concedes that the

contraband recovered from the handbag should have been suppressed.[4] Nevertheless, we will conduct an independent analysis to resolve the apparent conflict with Zhahir and to clarify our position on the use of the "guns follow drugs" presumption in this context.

The United States Supreme Court addressed the constitutionality of protective searches in Terry v. Ohio, supra. Recognizing that "American criminals have a long tradition of armed violence," the Court departed from traditional notions of Fourth Amendment jurisprudence and 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." Id. at 23-24. In adopting the reasonable suspicion standard, which enables police to stop and frisk suspects without probable cause, the Supreme Court stressed that a protective search cannot be premised on a good-faith belief that a threat of armed resistance existed; the arresting officer must be able to point to specific facts which support an objectively reasonable determination that the suspect was armed and dangerous. Id. at 21-22. This indispensable requirement protects citizens from governmental overreaching because the officer's conduct, viewed in light of the attendant circumstances, must withstand judicial scrutiny in order for a search or seizure to be upheld.[5] Id. at 21.

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[4] On direct appeal, the Commonwealth successfully argued that the search was justified because Officer Russell knew that D.W. was using 126 North Salford Street as his base of operations, she knew from experience that drug dealers often arm themselves, and it was logical for her to conclude that D.W.'s companions might also be armed and dangerous. The Commonwealth now admits that the evidence should have been suppressed because: (1) Appellant was never linked to any criminal activity; (2) she was not walking with D.W. when he was taken into custody; (3) the police did not have a warrant to search 126 North Salford Street; (4) the Commonwealth never established the nature and extent of Officer Russell's experience with the drug task force; and (5) Appellant did not make any furtive movements or appear nervous when Officer Russell inquired about the handbag.

[5] In Michigan v. Long, 463 U.S. 1032, 1051 (1983), the Supreme Court explained that the touchstone of any Terry-based analysis is the reasonableness of the governmental (continued…)

Eleven years after Terry was decided, the Supreme Court granted certiorari in Ybarra v. Illinois, supra, to assess the constitutionality of an Illinois statute that authorized police officers to detain and search anyone present during the execution of a search warrant in order to detect concealed weapons and prevent the destruction of evidence sought in the warrant. The controversy arose after police obtained a warrant to search a tavern and its bartender based on information that the bartender often kept large quantities of heroin inside the establishment, presumably for sale to bar patrons. When investigators arrived to execute the warrant, they promptly frisked every individual on the premises for weapons. As an officer conducted a pat-down search of patron Ventura Ybarra, he felt a cigarette pack in Ybarra's pants pocket that contained several small objects. The officer subsequently retrieved the cigarette pack, inspected the interior, and discovered six packets of heroin. Ybarra was arrested and convicted of heroin possession after a judge refused to suppress the drugs on Fourth Amendment grounds.

The United States Supreme Court reviewed the case and concluded that the heroin was the fruit of an illegal search. In reversing the judgment, the Court rejected the state's contention that the initial pat-down search was justified under Terry, reasoning that police cannot frisk an individual merely because he happens to be present when investigators enter a building to execute a drug-related search warrant. The Court stated:

> The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons. Adams v.

(…continued)
intrusion upon a citizen's personal security. It has also stated that "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996). Courts often refer to this inquiry as the totality-of-the-circumstances test. See, e.g., In the Interest of D.M., 781 A.2d 1161, 1163 (Pa. 2001).

> Williams, 407 U.S. 143, 146; Terry v. Ohio, supra, at 21-24, 27. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.
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> The Terry case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, e.g., Adams v. Williams, supra (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons. The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

Id. at 92-94 (footnotes omitted).

Thus, notwithstanding Ybarra's proximity to the target of a narcotics investigation, the Supreme Court invalidated the search and reaffirmed that police cannot frisk an individual for weapons unless the officer observes suspicious behavior or has prior knowledge of the individual's criminal propensities. In Michigan v. Long, 463 U.S. 1032

(1983), the Court explained that this rule applies not only to pat-down searches of the human body but to any search conducted pursuant to Terry.[6] Consistent with that position, the Long Court held that police can search the passenger compartment of an automobile for weapons during a roadside encounter "as long as they possess an articulable and objectionably reasonable belief that the suspect is potentially dangerous." Id. at 1051.

These cases instruct 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. In developing this precedent, the Supreme Court has made it abundantly clear that an individual's location, standing alone, does not provide sufficient grounds for a Terry search. Ybarra, supra; see also Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990) ("Even in high crime areas, where the possibility that any given individual is armed is significant, Terry requires individualized, reasonable suspicion before a frisk for weapons can be conducted."). Furthermore, as we observed in Commonwealth v. Zhahir, supra, courts cannot abandon the totality-of-the-circumstances test and rely exclusively upon the preconceived notion that certain types of criminals regularly carry weapons.

The defendant in Zhahir was arrested on drug charges after a lawful pat-down search of his person led to the discovery of ninety-eight vials of crack cocaine. His motion to suppress the cocaine was denied, and he was convicted on all counts. The Superior Court found that the cocaine was properly seized under the plain feel doctrine, which had not yet been adopted in Pennsylvania, and we granted review.[7] The defendant urged us to

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[6] The respondent in Long argued that the sweep of his car could not be upheld under Terry because that case applied only to pat-down searches of people. The Supreme Court rejected this claim, noting that Terry anticipated future developments in the protective search arena. Hence, the Long Court declined to interpret Terry "as restricting the preventative search to the person of the detained suspect." Long, 463 U.S. at 1047.

[7] Under the plain feel doctrine, which was adopted by the United States Supreme Court in Minnesota v. Dickerson, 508 U.S. 366 (1993), a police officer may lawfully seize (continued…)

reject the plain feel doctrine on the basis that some courts had rendered decisions indicating that they were predisposed to uphold protective searches of drug suspects. Specifically, the defendant complained that judges had begun to take judicial notice that drug traffickers are frequently armed, thereby diminishing the protections afforded by Terry v. Ohio. The Zhahir Court condemned that practice, stating that "as a general policy consideration, taking judicial notice that all drug dealers may be armed as in and of itself a sufficient justification for a weapons frisk clashes with the totality [of the circumstances] standard, as well as the premise that the concern for the safety of the officer must arise from the facts and circumstances of the particular case." Id. at 1162.

Zhahir is illustrative of our longstanding adherence to the principles derived from Terry and its progeny. Pennsylvania courts have always followed Terry regardless of whether the appellant's claim was predicated on the Fourth Amendment or Article I, Section 8 of the Pennsylvania Constitution.[8] See Commonwealth v. Chase, 960 A.2d 108, 117 (Pa. 2008). As a result, we have repeatedly declined to lessen the restrictions on protective searches despite claims that drug investigations often unearth weapons. See Commonwealth v. Rodriguez, 614 A.2d 1378, 1383 (Pa. 1992) (refusing to lower the reasonable suspicion standard to help police fight the "war on drugs"); cf. Commonwealth v. Lovette, 450 A.2d 975, 980 (Pa. 1982) (advocating scrupulous adherence to Terry and

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(…continued)
contraband discovered "through the sense of touch during an otherwise lawful search" as long as the item's incriminating character is immediately apparent to the officer. Id. at 375.

[8] We have observed on numerous occasions that the constitutional safeguards articulated in Terry v. Ohio also apply to claims arising under Article I, Section 8 of the Pennsylvania Constitution. See Commonwealth v. Revere, 888 A.2d 694, 699 n.6 (Pa. 2005) (in stop-and-frisk cases, Pennsylvania courts employ the same approach regardless of whether the issue is couched in terms of the Fourth Amendment or Article I, Section 8); see also Commonwealth v. Jackson, 698 A.2d 571, 573 (Pa. 1997) (Pennsylvania follows Fourth Amendment jurisprudence in matters involving Terry searches and seizures).

denouncing unnecessary police conduct that "increased the intrusiveness of the encounter"). We see no reason to deviate from this precedent in the case at bar.

By her own admission, Officer Russell conducted a protective search of Appellant's purse based on a generalization that firearms are commonly found in close proximity to illegal drugs. No one from the task force knew if Appellant had a criminal record, and there was no indication that D.W. and Appellant were involved in a common enterprise. Indeed, the police witnessed a single drug transaction, and it occurred outside of Appellant's presence. Furthermore, upon entering the house, Officer Russell did not detect any unusual behavior or furtive movements on Appellant's part nor did she observe a suspicious bulge in Appellant's purse. Since the Commonwealth failed to elicit any facts that supported an objectively reasonable belief that Appellant was armed and dangerous, the Superior Court's decision cannot be sustained.[9] See Commonwealth v. Reece, 263 A.2d 463, 466 (Pa. 1970) (police officer lacked reasonable suspicion to search defendant for weapons because officer did not possess any background information on defendant, and defendant's conduct did not convey threat of danger to officer).

For the reasons stated herein, we find that the courts below erred in concluding that Officer Russell had reasonable suspicion to conduct a protective search of Appellant's handbag pursuant to Terry. As noted supra, a police officer must have a particularized, objective basis for a protective search; an individual's mere proximity to others engaged in criminal activity is insufficient. Thus, consistent with Ybarra, the contraband discovered in Appellant's handbag should have been suppressed.

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[9] The record belies the Superior Court's contention that this case is analogous to Commonwealth v. Davidson, 566 A.2d 897 (Pa. Super. 1989). A protective search of a woman's purse was upheld in Davidson because the owner had been riding in a car next to a man who possessed a large sum of cash and cocaine, and she reached for her purse after a police officer asked her not to touch it. By contrast, Appellant was cooperative with police, and she was not present during the drug transaction or D.W.'s subsequent arrest.

The order of the Superior Court is reversed.

Mr. Chief Justice Castille and Messrs. Justice Saylor and Baer join the opinion.

Mr. Justice Eakin files a concurring opinion in which Mr. Justice McCaffery joins.

Madame Justice Todd files a concurring opinion.