[J-9-2014][M.O. – Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 26 EAP 2013
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on 9/10/12 at No. 1052
	:	EDA 2011 reversing and remanding the
v.	:	appeal from the order dated 3/15/11 of
	:	the Court of Common Pleas,
	:	Philadelphia County, Criminal Division
	:	at No. CP-51-0009421-2009
HALEEM L. LYLES,	:	
	:	
Appellant	:	ARGUED: March 11, 2014

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 21, 2014**

I respectfully dissent, since I find the exclusionary ruling of the suppression court to be supported by the record, viewed in the light most favorable to Appellant, and free from legal error.

Preliminarily, I differ with the majority's portrayal of the question of whether a seizure has occurred as a pure question of law. See Majority Opinion, slip op. at 6 (citing Commonwealth v. Jones, 605 Pa. 188, 197-98, 988 A.2d 649, 654 (2010)). Rather, I agree with those courts which have concluded that, "the question of when a person is seized for Fourth Amendment purposes is a mixed question of fact and law." United States v. Goddard, 491 F.3d 457, 465 (D.C. Cir. 2007); accord State v. Courchesne, 998 A.2d 1, 23 (Conn. 2010) (citation omitted). The Jones case upon

which the majority relies does not say any differently, as it was focused entirely on a discrete suppression challenge turning upon "allegations of legal error." Jones, 605 Pa. at 198, 988 A.2d at 654.

In any event, appropriate appellate review of a suppression ruling entails a determination whether the record supports the suppression court's factual findings and whether that court's findings are free from legal error. See In re L.J., ___ Pa. ___, ___, 79 A.3d 1073, 1079-80 (2013) (setting forth the general appellate-level standard of review relative to suppression rulings). Significantly, relative to the facts, the record is to be read in a light most favorable to the prevailing party, here, Appellant. See, e.g., Commonwealth v. Worthy, 598 Pa. 470, 477, 957 A.2d 720, 724 (2008); Commonwealth v. Robinson, 518 Pa. 156, 159, 541 A.2d 1387, 1388-89 (1992); In re Wilks, 418 Pa. Super. 73, 76, 613 A.2d 577, 578 (1992).

In my view, assessed in the light most favorable to Appellant, the record in this case plainly supports the suppression court's determination that Appellant was seized. Indeed, the arresting officer provided credited testimony at the suppression hearing that he had, in fact, "stop[ed]" Appellant before Appellant began making the furtive gestures which led to the discovery of incriminating evidence. N.T., March 15, 2011, at 6. On cross-examination, the officer elaborated as follows:

> Q. What you observed is two males standing there in front of a property; is that correct?
>
> A. On the steps. . . .
>
> Q. Based on that, you decided to stop them; is that correct?
>
> A. Yes, to find out who they were and why they were on the steps of that property.
>
> Q. When you got out of your vehicle, you approached my client and Mr. Meadows, was it; is that correct?

A. Yes.

Q. You immediately told them that you wanted identification; correct?

A. After asking why they were on the steps of the property, I proceeded to ask them what their name was.

Q. They weren't free to leave, though, were they?

A. Well, while I was writing down their information, no.

Id. at 12-13 (emphasis added).

The majority categorizes the officer's statement that Appellant was not free to leave as a subjective one, see Majority Opinion, slip op. at 12 n.6, albeit it was related in objective terms.[1] From my point of view, however, the officer's testimony that he stopped Appellant, that he took possession of Appellant's identification card, and that Appellant was not free to leave at such time is manifestly sufficient to support a determination that a reasonable person would have felt restrained, in the circumstances.

The decision in Commonwealth v. Au, 615 Pa. 330, 42 A.3d 1002 (2012), expressed reservations about the application of the governing standard -- whether a reasonable person would have felt free to leave -- on the terms on which such standard has evolved in the Fourth Amendment jurisprudence of the United States Supreme Court. In this regard, Au explained:

[1] There is some justification for the majority's approach arising from the record, since the suppression court also treated the testimony as expressing only a subjective viewpoint. See Commonwealth v. Lyles, No. CP-51-CR-0009421-2009, slip op. at 4 (C.P. Phila. July 13, 2011). Nevertheless, the suppression court added that "the fact the officer in question did not believe Appellee was free to leave is highly suggestive of the tenor of the encounter." Id.

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); [United States v.] Mendenhall, 446 U.S. [544,] 100 S.Ct. [1870 (1980)] (plurality); Commonwealth v. Boswell, 554 Pa. 275, 721 A.2d 336 (1998) (equally divided Court).[fn] Nevertheless, the High Court has settled on an approach allocating 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).

[fn] 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., [Florida v.] Bostick, 501 U.S. [429,] 450, 111 S.Ct. [2382,] 2394–95 [(1991)] (Marshall, J., dissenting) (describing an "aura of coercion and intimidation that pervades" police-citizen encounters during drug interdiction operations on passenger busses); [Commonwealth v.] Smith, 575 Pa. [203,] 226–27, 836 A.2d [5,] 19 [(2003)] (Nigro, J., dissenting) (taking the position that "police officers inherently display their authority and are intimidating solely by virtue of their position"); [Commonwealth v.] Dowds, 563 Pa. [377,] 389–90, 761 A.2d [1125,] 1132 [(2000)] (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 to, police who lack any suspicion whatsoever, yet their submission will be regarded as consensual, and not as a seizure.").

Id. at 338-39 & n.4, 42 A.3d at 1007-08 & n.4 (alterations adjusted).

Despite the circumspection reflected in Au, in view of the precedent set by the Supreme Court of the United States, the Au majority found that it was obliged to apply its direction, for purposes of Fourth Amendment law, that a mere request from a law enforcement officer of a citizen for identification does not convert what otherwise is a mere encounter into a seizure. See id. at 338, 42 A.3d at 1007. To my knowledge, however, the U.S. Supreme Court has never held that no seizure occurs where an officer stops a citizen, takes possession of an identification card, and later explains that the citizen was not free to leave in the circumstances.

For this reason, and viewing the record in the light most favorable to Appellant as the successful party at the suppression stage, I believe the suppression court was free to recognize the prevailing reality in the present circumstances. Accordingly, I would reverse the Superior Court's decision to overturn the suppression ruling.

Mr. Justice Baer and Madame Justice Todd join this dissenting opinion.