

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JEFF DOBSON	:	
	:	
Appellant	:	No. 2099 EDA 2021

Appeal from the Judgment of Sentence Entered September 20, 2021
In the Court of Common Pleas of Delaware County Criminal Division at
No(s): CP-23-CR-0001612-2019

BEFORE: McLAUGHLIN, J., McCAFFERY, J., and PELLEGRINI, J.*

DISSENTING MEMORANDUM BY McCAFFERY, J.: **FILED JUNE 28, 2022**

I respectfully dissent, as I would conclude Police Officer Jerome Duncan’s pat-down search of Appellant was not based on articulable facts from which an officer could reasonably infer Appellant was armed and dangerous. I would conclude Officer Duncan lacked reasonable suspicion, the pat-down was unlawful, and therefore the trial court erred in denying suppression.

I incorporate the Majority’s apt discussion of the relevant law on **Terry** stops. **See** Maj. Mem. at 7-10. I emphasize:

It is well settled that an officer may pat-down an individual . . . on the basis of a reasonable belief that **the individual is presently armed and dangerous** to the officer or others. To validate a **Terry**^[1] frisk, the police officer must be able to articulate specific facts from which he reasonably inferred that **the**

* Retired Senior Judge assigned to the Superior Court.

¹ **Terry v. Ohio**, 392 U.S. 1 (1968).

individual was armed and dangerous. In determining whether a **Terry** frisk was supported by a sufficient articulable basis, we examine the totality of the circumstances.

Commonwealth v. Gray, 896 A.2d 601, 605-06 (Pa. Super. 2006) (citations omitted and emphases added).

The trial court considered Officer Duncan's credible testimony² that: the officer was responding to a report of shots fired; the location was a high crime and violent crime area; the officer observed a vehicle travel through a steady red light; when the officer "attempted to conduct a lawful traffic stop, the vehicle slowed but did not stop[;]" the vehicle then "turned into an apartment complex to avoid another police vehicle blocking its way[;]" and after the stop, the officer learned "that the driver had a suspended license for DUI and the rear passenger had an active arrest warrant." Trial Ct. Op., 2/12/20, at 7-8. At the suppression hearing, Officer Duncan was asked "what fear [he held] at that time" to justify the pat-down, and he responded, "Possibly concealing a weapon of any sort." N.T., 1/9/20, at 18. The court concluded these "facts" gave Officer Duncan reason to believe Appellant could be armed and thus a pat-down was justified for officer safety. Trial Ct. Op. at 8.

Under the totality of the circumstances standard, however, I further consider the following facts. The Commonwealth made no claim that the

² "It is within the exclusive province of the suppression court to 'pass on the credibility of witnesses and determine the weight to be given to their testimony.'" **Commonwealth v. Fudge**, 213 A.3d 321, 326 (Pa. Super. 2019) (citation omitted).

report of gunshots involved any description of a vehicle. Instead, Officer Duncan testified that when he arrived at the area of 6th and Lloyd Streets, he was canvassing for “[s]hell casings, . . . struck vehicles[, *i.e.* vehicles struck by gunfire], struck houses, [and] a victim.” N.T. at 9.

During the canvas, Officer Duncan observed a vehicle disregard a red light. There was no high-speed chase. **See** N.T. at 22 (officer agreeing the vehicle “was not going very quickly, very fast”). Instead, Officer Duncan’s undisputed testimony was that “the vehicle began to slow down and pull over to the right,” moving at “no more than five miles per hour” for “seconds,” before turning into Dorian Court and parking in a parking space. N.T. at 10, 12, 22. Thus, Officer Duncan observed only a Motor Vehicle Code violation — the vehicle drove through a steady red light — and there was no indicator or even suspicion of any violent offense.

The Commonwealth presented no evidence that Appellant, or even the driver or rear seat passenger, were uncooperative, exhibited nervousness, or made furtive movements at any time, while the car was in motion or after it stopped.³ Indeed, Officer Duncan testified that while the driver was already

³ **Compare with, e.g., Commonwealth v Buchert**, 68 A.3d 911, 916-17 (Pa. Super. 2013) (combination of defendant's “furtive movement of leaning forward and appearing to conceal something under his seat, along with his extreme nervousness and [a] night time stop, was sufficient to warrant a reasonable police officer to believe that his safety was in danger and that [the defendant] might gain immediate control of a weapon”); **Commonwealth v. Simmons**, 17 A.3d 399, 404 (Pa. Super. 2011) (protective frisk was justified by reasonable suspicion where: vehicle was stopped at night in high drug and high crime area; prior to exiting his police vehicle, witnessed the

out of the car when he approached, both Appellant and the rear seat passenger complied with the officers' instructions, including remaining seated in the car while the officers conducted NCIC checks. **See** N.T. at 23; Trial Ct. Op. at 8. When Officer Duncan finally requested Appellant to step out of the vehicle, he complied. N.T. at 18. Furthermore, the Commonwealth did not argue the driver or rear seat passenger were wanted for violent crimes. Rather, the passenger had a suspended license for DUI, and the warrant for the rear seat passenger was for nonpayment of child support.⁴ **Id.** at 24.

After considering the totality of all the above circumstances, I would conclude Officer Duncan failed to articulate any facts to support a reasonable belief that Appellant was armed and dangerous. **See Gray**, 896 A.2d at 606. Although his stated reasons — the failure to stop at a steady red signal — justified the vehicle stop, it is uncontradicted that Appellant was not the driver but merely a passenger, and as discussed above, Officer Duncan cited no suspicious behavior by Appellant or any other passenger in the vehicle, while the car was in motion or after the stop. Accordingly, I disagree that the officer's testimony supported a reasonable belief that Appellant could be

defendant/passenger "reach down towards the floor and then reach across his chest;" and the officer, who had more than 12 years' experience, believed these movements were consistent with concealing a weapon and warned his partner).

⁴ Officer Duncan testified he did not remember the basis for the rear seat passenger's warrant. N.T. at 24.

armed and dangerous. To the contrary, if we were to allow a pat-down of every person travelling in a vehicle in a high crime area, the protections of the Fourth Amendment would be meaningless.

I further point out the evidence presented would not support even a protective sweep of the vehicle. This Court has explained:

A protective sweep is “a quick and limited search of [the] premises, incident to an arrest and conducted to protect the safety of police officers or others.” There are two levels of protective sweeps: (1) officers can, without probable cause or reasonable suspicion, look in closets and other spaces close to the place of arrest from which an attack could be launched and (2) officers can search for attackers further away from the place of arrest if they can sufficiently articulate specific facts that justify a reasonable fear for the safety of officers on the premises.

Commonwealth v. Harrell, 65 A.3d 420, 435-36 (Pa. Super. 2013) (citations omitted). As discussed above, the facts cited by Officer Duncan, for conducting the pat-down, do not specifically relate to Appellant nor do they provide a reasonable belief that he may be armed and dangerous.

For the foregoing reasons, I would reverse the order denying Appellant’s suppression motion, vacate the judgment of sentence, and remand for further proceedings.