COMMONWEALTH v. RASHEED

*Criminal Law and Procedure—Drug, Device and Cosmetic Act and the Pennsylvania Motor Vehicle Code—35 Pa. C.S.A. Section 780-113(A)(30)—Controlled Substance—Vehicle Search—Motion to Suppress Evidence—Burden of Proof—Preponderance of the Evidence—Review of the Merits Without a Preliminary Showing of Ownership or Possession in the Premises or Items Seized—Automatic Standing—United States Constitution—Fourth Amendment—Searches and Seizures Clause—Reasonableness—Balancing—Freedom to Leave—Actions of the Police Officer—Pennsylvania Constitution—Article I, Section 8—Protection of Privacy—*Terry v. Ohio, *392 U.S. 1 (1968)—Reasonableness Standard—Motor Vehicles—Vehicle Stop—Federal Circuit Courts—Constitutionality—Vehicular* Terry *Stop to Investigate Suspected Criminal Activity—Police Officers Vested in Pennsylvania to Stop Vehicles—Reasonable and Articulable Grounds to Suspect a Violation of the Vehicle Code—Investigatory Purpose—Probable Cause—Reasonable Suspicion—Totality of the Circumstances—Requirements—Parked Vehicle—Seizure—Show of Authority—Factors—Police and Citizen Interactions—Three Levels—Mere Encounter, Investigative Detention, and Custodial Detention—Not Mere Encounter—Lack of Reasonable Suspicion—Validation of a* Terry *Frisk—Articulated Specific Facts—Reasonable Inference—Armed and Dangerous—Pennsylvania Supreme Court—Mere Possession of Firearm Alone Is Not Suggestive of Criminal Activity—Valid Traffic Stop Versus Legally Parked Vehicle—Hunch of Criminal Activity—Legally Insufficient—Police Right to Ask Questions—Actions Giving Rise to an Investigative Detention—Judicial Balancing—Appellate Case Law—Fact Intensive Analysis on a Case-by-Case Basis—Record Devoid of Evidence to Support Investigative Detention—Plain Feel Doctrine—Non-Applicability—Seizure Violative of Constitutional Mandates—All Evidence Obtained After the Illegal Seizure Is Hereby Suppressed—Motion GRANTED—Appeal Filed to Superior Court of Pennsylvania—Court of Common Pleas' Order—AFFIRMED.*

1. Upon the filing of a motion to suppress evidence the Commonwealth bears the burden of proof, by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights.

2. This rule entitles a defendant to review of the merits of a suppression motion without a preliminary showing of ownership or possession in the premises or items seized.

3. It is well-settled that a defendant charged with a possessory offense has automatic standing to challenge the seizure of evidence.

4. The Fourth Amendment protects people from "unreasonable searches and seizures" of their "persons, houses, papers, and effect." The United States Constitution does not forbid all searches and seizures; rather, it forbids unreasonable searches and seizures.

5. A determination of whether a search is reasonable requires balancing the public interest in conducting the search or seizure against an individual's right to be free from arbitrary intrusions by law enforcement officers.

6. In the context of the Fourth Amendment, a person is considered seized only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In evaluating those circumstances, the crucial inquiry is whether the officer, by means of physical force or a show of authority, has restrained a citizen's freedom of movement.

7. Article I, Section 8 of the Pennsylvania Constitution, though similarly phrased, generally provides greater protection than that provided by the Fourth Amendment, because the core of its exclusionary rule is grounded in the protection of privacy while the federal exclusionary rule is grounded in deterring police misconduct.

8. *Terry v. Ohio* sets forth the reasonableness standard for Article I, §8 of the Pennsylvania Constitution.

9. It is well settled that motor vehicles are within the ambit of Fourth Amendment protection. Furthermore, a vehicle stop is recognized as a seizure under the Fourth Amendment.

10. The federal circuit courts acknowledge the constitutionality of a vehicular *Terry* stop to investigate suspected criminal activity.

11. In the Commonwealth of Pennsylvania, the legislature has vested police officers with authority to stop vehicles whenever they have reasonable and articulable grounds to suspect a violation of the Vehicle Code.

12. An actual violation of the Vehicle Code need not ultimately be established to validate a vehicle stop.

13. Where a vehicle stop has no investigatory purpose, the police officer must have probable cause to support it.

14. In order to determine whether the police officer has reasonable suspicion, the totality of the circumstances must be considered.

15. Reasonable suspicion requires a finding that based on the available facts, a person of reasonable caution would believe the intrusion was appropriate.

16. In the matter *sub judice,* Defendant's vehicle was parked and, accordingly, there was no need to execute a vehicle stop.

17. A seizure can occur while a motor vehicle is stopped or parked and law enforcement exhibits a show of authority, such as activating emergency lights.

18. Factors considered often include the appearance of more than one police officer, the directives given, tone of voice and, in this instance, two police cruisers approaching defendant's vehicle with the officers immediately alighting from the same and thereafter issuing a command to exit one's vehicle or, in the alternative, pulling Defendant from the vehicle.

19. Interaction between citizens and police officers, under search and seizure law, is varied and requires different levels of justification depending upon the nature of the interaction and whether or not the citizen is detained.

20. The three levels of interaction are mere encounter, investigative detention, and custodial detention.

21. A mere encounter can be any formal or informal interaction between an officer and a citizen but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it carries no official compulsion to stop or respond. In contrast, an investigative detention, by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest. Since this interaction has elements of official compulsion it requires reasonable suspicion of unlawful activity. In further contrast, a custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest.

22. In the matter *sub judice,* the Court finds there was never occasion for a mere encounter and the decision to investigate in this fashion was not based upon reasonable suspicion.

23. To validate a *Terry* frisk, the police officer must be able to articulate specific facts from which he reasonably inferred that the individual was armed and dangerous.

24. In the matter *sub judice,* the officers here failed to identify any specific and articulable facts relative to defendant to suggest he may have had a weapon or that he engaged in any conduct suggesting he presented a threat. Additionally, the Court notes that the Supreme Court of Pennsylvania recently decided carrying a firearm is not an inherently illegal activity in Pennsylvania and mere possession alone is not suggestive of criminal activity.

25. An officer conducting a valid traffic stop may order the occupants of a vehicle to alight to assure his own safety.

26. In the matter *sub judice,* the police did not conduct a traffic stop and defendant was legally parked in a motel parking lot.

27. Facts evince nothing more than a hunch is legally insufficient.

28. In the matter *sub judice,* the record establishes that the officers, in the absence of observing an activity which gave rise to the notion criminal activity was afoot, acted upon a hunch without developing that hunch further into reasonable suspicion.

29. Police have a right to approach a citizen and ask questions. However, when two police cruisers suddenly appear in proximity to an individual's vehicle, coupled with the officers immediately alighting from their vehicles under the circumstances present here, it is clear to us an investigative detention has ensued.

30. Courts are constantly challenged with balancing the laudable efforts of law enforcement to keep our communities safe and protect themselves while at the same time upholding the constitutional rights of citizens. The appellate cases present a fact intensive analysis on a case-by-case basis. The application of developing law to the factual circumstances is rarely clear and judges are compelled to make the determination as to when the circumstances demand they protect Fourth Amendment rights without chilling effective policing.

31. The record in this case is devoid of evidence to support the immediate investigative detention that ensued.

32. Under the plain feel doctrine, a police officer may seize non-threatening contraband detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object.

33. In the matter *sub judice,* the officers here were not lawfully in such a position.

34. For the reasons set forth, the Court finds the seizure violative of constitutional mandates and as a direct result all evidence obtained after the illegal seizure is hereby suppressed. Accordingly, Defendant's Motion to Suppress is GRANTED.

35. Appealed to the Superior Court of Pennsylvania—Order of Court of Common Pleas AFFIRMED. *See* Pennsylvania Superior Court No. 775 MDA 2021 (August 16, 2022).

*In the Court of Common Pleas of Luzerne County—Criminal Division—No. 1026 of 2020—Appeal Filed to Superior Court of Pennsylvania—AFFIRMED—August 16, 2022—No. 775 MDA 2021—Non-Precedential Decision—*See *Superior Court I.O.P. 65.37—Upon Motion of District Attorney—Order*

of Court of Common Pleas of Luzerne County—ORDERED NOLLE PROSSED—August 18, 2022. See *Criminal Docket No. 1026 of 2020.*

Jillian Sosnoski, Esquire, Luzerne County Assistant District Attorney, for Commonwealth.

Girard J. Mecadon, Esquire, Luzerne County Assistant Public Defender, for Defendant.

Before: Sklarosky, J.

SKLAROSKY, JR., J., June 4, 2021:

Pa. R.Crim.P. 581 Factual Findings and Legal Conclusions

I. Abridged Procedural History

1. On March 14, 2018, the criminal complaint was filed alleging various violations of the Drug, Device and Cosmetic Act and the Pennsylvania Motor Vehicle Code.[1]

2. On April 23, 2020, the criminal information was filed charging Defendant with one count in violation of Title 35, Pa. C.S.A. Section 780-113(A)(30).

3. On August 10, 2020, Defendant filed an omnibus pretrial motion seeking to suppress evidence and in support thereof alleged that police officers did not possess reasonable suspicion that criminal activity was afoot and/or thereafter probable cause to arrest. In response thereto, on August 13, 2020, the Commonwealth filed a motion to strike Defendant's pretrial motion. The Commonwealth averred that Defendant's omnibus pretrial motion was untimely pursuant to Pa. R.Crim.P. 579. On

[1]35 Pa. C.S.A. §780-113(A)(30), Manufacture, delivery, or possession with intent to manufacture or deliver (a controlled substance); 35 Pa. C.S.A. §780-113(A)(16) Intentional possession of a controlled substance (2 counts); 75 Pa. C.S.A. §1543A Driving while operating privileges suspended or revoked.

August 27, 2020, we entertained the respective arguments and subsequently denied the Commonwealth's motion by order dated September 3, 2020 (filed of record on September 4, 2020).

4. The suppression hearing was conducted on November 9, 2020, with the transcript filed March 11, 2021. The Commonwealth's Supplemental Response to Defendant's Suppression Motion was filed November 12, 2020. Defendant's Supplemental Brief was filed January 13, 2021. The Commonwealth's Second Supplemental Response to Defendant's Suppression Motion was filed March 3, 2021. The briefs, supplements thereto and record have been reviewed and the matter is now ripe for decision.

II. Findings of Fact

1. The Commonwealth presented the testimony of Plains Township Police Department officers (officers) who encountered Defendant on the date in question that ultimately led to his arrest. The first, Frank Oatridge, III (Oatridge) testified he was then employed as a police officer in Plains Township for approximately 6 1/2 years. Notably, his job duties were that of a patrol officer. Oatridge briefly testified to training he obtained in the course of his employment to include "Nik Kit" and thereafter noted his involvement with respect to search warrant raids. Oatridge stated he made a few dozen arrests throughout the course of his career, conducted surveillance and executed search warrants related to drug activity.

2. On March 14, 2018, Oatridge was working the 11 p.m. to 7 a.m. shift. At approximately 3:00 a.m., he testified, he was sitting in his vehicle in the Jack Wil-

liams [tire store and vehicle service] parking lot located directly across the street from the Red Roof Inn (Inn) in Plains Township. Oatridge identified the area in question as a "high crime" location. In support thereof, he referenced generally calls for drugs activity, property crimes and assaults. He testified numerous search warrants were executed at the Inn, although no time frame was provided.

3. Oatridge observed a vehicle not otherwise described pull into the parking lot of the Inn and stated the same vehicle exited within three to four minutes thereafter. The vehicle he saw exit traveled north on Route 315 toward the casino with Oatridge in pursuit for the purpose of observation, insofar as he believed the short duration between entering and exiting the Inn was indicative of drug activity. He testified " ... my purpose of following the vehicle was just to obtain registration and more information on the vehicle." *See* N.T. Suppression Hearing, 11/9/2020, at pp. 31-32. However, the record is devoid of any specific testimony resulting from that endeavor.

4. Oatridge continued to follow the vehicle to a point where he observed the driver pull into the parking lot of a business identified as the Microtel. He elected to park his vehicle across the street from the Microtel and continue his surveillance. Notably, although he observed the vehicle for approximately 20 minutes (in addition to following the same from the Inn), Oatridge did not witness any specific and articulable activity that would lead a reasonable person to conclude criminal activity was afoot. More specifically, Oatridge testified he did not observe anyone exit the vehicle, nor did he observe anyone come from the Microtel to the vehicle. Parenthetically, we note that the record is unclear as to whether Defendant was a guest at the Microtel.

5. The testimony reflects two individuals were seated in the vehicle during Oatridge's period of observation. Notwithstanding his observations of activity completely consistent with lawful behavior, Oatridge contacted another Plains Township patrolman because he perceived the activity as suspicious. Under the circumstances, Oatridge thought it peculiar that the occupants were just sitting in the parking lot of the Microtel for twenty minutes.

6. A second patrolman, Timothy Minnick (Minnick) traveled to Oatridge's location. After meeting with Oatridge, Minnick suggested the two officers approach the subject vehicle. The record reflects that neither of the police vehicles activated their emergency lights or sirens. The record further demonstrates neither officer drew a weapon at any point in time. The two police officers placed their patrol vehicles at a location behind the vehicle of Defendant; however, they did not block Defendant's vehicle. Oatridge stated " ... the front [of] his vehicle was positioned directly behind the vehicle parked *next* to [Defendant]" with Minnick's vehicle parked behind his. He opined that Defendant was able to back out of the space although, notably, Oatridge stated he would have pursued Defendant if he did. *See* N.T. Suppression Hearing, 11/9/2020, at pp. 32, 34.

7. The two police officers immediately exited their vehicles and approached Defendant's vehicle with Minnick on the driver's side door and Oatridge converging on the passenger side door of the vehicle.

8. After exiting their vehicles both police officers testified they observed furtive[2] movements. The movements described consisted of Defendant (driver) moving toward the right near the center console. The officer[s]

[2]"Furtive. Stealthy; by secret or stealth." *Black's Law Dictionary,* 5th Edition.

perceived this activity—coupled with the Defendant looking into his rearview mirror—as a safety issue. Notwithstanding, the record does not reflect either officer verbally identified themselves or issued verbal instruction[s] as they abruptly encountered Defendant. The record does not reflect whether Defendant's vehicle engine was running and, as stated, neither officer removed his firearm or any other defensive device.

9. Based upon the facts as set forth, Oatridge testified Minnick pulled the driver out of the vehicle while he focused his attention on the passenger. *See* N.T. Suppression Hearing, 11/9/2020, at p. 9. At a later point in his testimony, Oatridge stated that Defendant and the passenger we re asked to exit the vehicle and noted they were cooperative. Given the conflicting accounts, we accept the initial account from Oatridge that Defendant was removed from the vehicle by Minnick.

10. Cross-examination revealed that Oatridge was not able to identify the color or other specifics of the car that initially entered the Red Roof Inn. He did not offer any testimony evincing the car exiting was one and the same other than his belief. He was certain the color of the vehicle exiting the Inn was blue based upon an approaching vehicle shedding light upon said vehicle. However, he agreed he could not identify the color of the vehicle that entered a short time prior thereto. Again, he did not provide other identifying information suggesting the vehicles were one and the same.

11. In sum, Oatridge's testimony demonstrates there was no evidence supporting a violation of the Motor Vehicle Code or a reasonable belief any other criminal activity was afoot prior to the physical encounter with Defendant.

12. Minnick was thereafter called to testify. His testimony largely corroborates that provided by Oatridge. Accordingly, we will dispense with duplicating consistent testimony.

13. Minnick generally described training related to the identification of drugs and/or drug paraphernalia, drug trends, patrol duty and drug interdiction as well as NIK testing. Neither of the witnesses provided testimony elaborating upon the specific training or experience that aided their decisions and/or assessments as it relates to this encounter. Suffice it to say Minnick's involvement was occasioned by nothing more than the request for assistance from Oatridge.

14. Minnick testified that as he approached the driver's side of the vehicle, he observed the Defendant " ... become nervous looking in the rear view, and it appeared he was shoving or reaching for something in the center console area." *See* N.T. Suppression Hearing, 11/9/2020, at p. 40. He stated these observations raised a "safety concern" and as a result he requested the driver exit the vehicle. Minnick could not state whether Defendant's window was open as he approached and confronted Defendant by verbal command to exit the vehicle. Minnick did not describe any actions of Defendant upon exiting the vehicle giving rise to a safety concern. To the contrary, the record reflects Defendant and the passenger were cooperative. Notwithstanding, Minnick conducted a pat down of Defendant and he testified he felt an object in Defendant's right front jacket pocket consistent with packaged drugs or narcotics. He described the item removed as a plastic bag with a rock or rock-like feel to it such as crack cocaine. *See* N.T. Suppression Hearing, 11/9/2020, at p. 42.

15. At this point, Defendant was secured in handcuffs and only thereafter asked for consent to search the vehicle. It is alleged Defendant consented to the search once in handcuffs. A check of the center console area led to the discovery of a black drawstring bag with narcotics. Additional items seized included two cell phones and United States currency. The record reflects Defendant and the passenger were transported to the Plains Township Police Station. The passenger of the vehicle was released after Defendant informed the officers that the drugs seized belonged to him.

III. Discussion and Conclusions of Law

1. Upon the filing of a motion to suppress evidence "the Commonwealth bears the burden of proof, by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights." *Commonwealth v. Wallace,* 42 A.3d 1040 (Pa. Super. 2012). Further, "[t]his rule entitles a defendant to review of the merits of a suppression motion without a preliminary showing of ownership or possession in the premises or items seized." *Commonwealth v. Enimpah,* 106 A.3d 695, 698 (Pa. 2014). It is well-settled that a defendant charged with a possessory offense has automatic standing to challenge the seizure of evidence. *Id.*

2. In the first instance, we note "[t]he Fourth Amendment protects people from 'unreasonable searches and seizures' of their 'persons, houses, papers, and effects'" *United States v. Donahue,* 764 F.3d 293, 298-99 (3d Cir. 2014) *citing* U.S. Const. amend. IV.; *see also,* Pa. Const. art. I, §8; *Commonwealth v. Leonard,* 951 A.2d 393 (Pa. Super. 2008). "The United States Constitution does not forbid all searches and seizures; rather, it forbids *unreasonable* searches and seizures. A determination

of whether a search is reasonable requires balancing the public interest in conducting the search or seizure against an individual's right to be free from arbitrary intrusions by law enforcement officers. Furthermore, in the context of the Fourth Amendment, a person is considered seized only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In evaluating those circumstances, the crucial inquiry is whether the officer, by means of physical force or a show of authority, has restrained a citizen's freedom of movement." *Commonwealth v. Livingstone,* 174 A.3d 609, 619 (Pa. 2017) (internal quotations/citations omitted) (emphasis in original).

3. "Article I, § 8 of the Pennsylvania Constitution, though similarly phrased, generally provides greater protection than that provided by the Fourth Amendment, because the core of its exclusionary rule is grounded in the protection of privacy while the federal exclusionary rule is grounded in deterring police misconduct. [citation omitted] However, this Court has held that federal jurisprudence, specifically Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (investigatory stop subjecting suspect to stop and limited period of detention requires reasonable suspicion criminal activity is afoot), sets forth the reasonableness standard for Article I, § 8 of the Pennsylvania Constitution." *Commonwealth v. Brown,* 996 A.2d 473, 476 (Pa. 2010) (internal quotes omitted); *see also, Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991).

4. It is well settled that motor vehicles are within the ambit of Fourth Amendment protection.[3] Furthermore, a vehicle stop is recognized as a seizure under the Fourth

[3]Albeit to a lesser degree than one's abode.

Amendment. *Delaware v. Prouse,* 440 U.S. 648 (1979); *see Commonwealth v. Chase,* 960 A.2d 108 (Pa. 2008); *Commonwealth v. Garibay,* 106 A.3d 136 (Pa. Super. 2014). We also note that the federal circuit courts "acknowledge the constitutionality of a vehicular *Terry* stop *to investigate suspected criminal activity." See Chase,* 960 A.2d at 91 (cases cited therein). *See also, Terry,* supra; *United States v. Arvizu,* 534 U.S. 266 (2002); *United States v. Delfin-Colina,* 464 F.3d 392 (3d Cir. 2006) (*Terry* reasonable suspicion standard applies to routine traffic stops).

5. In the Commonwealth of Pennsylvania "[t]he legislature has vested police officers with authority to stop vehicles whenever they have reasonable and articulable grounds to suspect a violation of the Vehicle Code." *Commonwealth v. Mickley,* 846 A.2d 686, 690 (Pa. Super. 2004); 75 Pa. C.S.A. Section 6308(b). Furthermore, we are mindful that " ... an actual violation of the [Vehicle Code] need not ultimately be established to validate a vehicle stop. ... " *Commonwealth v. Snell,* 811 A.2d 581, 584 (Pa. Super 2002);[4] *see also, Commonwealth v. Palmer,* 751 A.2d 223, (Pa. Super. 2000).

6. "Where a vehicle stop has no investigatory purpose, the police officer must have probable cause to support it." *Commonwealth v. Enick,* 70 A.3d 843, 846 (Pa. Super. 2013) *quoting Commonwealth v. Feczko,* 10 A.3d 1285, 1291 (Pa. Super. 2010) *(en banc).*

7. In order to determine whether the police officer has reasonable suspicion, the totality of the circumstances must be considered. *In Interest of A.A.,* 195 A.3d 896,

[4]"While an actual violation of the [Vehicle Code] need not ultimately be established to validate a vehicle stop, a police officer must have a reasonable and articulable belief that a vehicle or driver is in violation of the [Vehicle Code] in order to lawfully stop the vehicle." (citation omitted).

904 (Pa. 2018). "Reasonable suspicion requires a finding that based on the available facts, a person of reasonable caution would believe the intrusion was appropriate." *Commonwealth v. Jones,* 874 A.2d 108, 116 (Pa. Super. 2005)[5] *citing Commonwealth v. Stevenson,* 832 A.2d 1123 (Pa. Super. 2003); *see also, United States v. Delfin-Colina,* 464 F.3d 392, 396 (3d Cir. 2006).[6]

8. In the case before us, Defendant's vehicle was already parked and, accordingly, there was no need to execute a vehicle stop.[7] However, as observed in *Livingstone,* a seizure can occur while a motor vehicle is stopped or parked and law enforcement exhibits a show of authority—in that instance, activating emergency lights. *Livingstone,* 174 A.3d 609. Factors considered often include the appearance of more than one police officer, the directives given, tone of voice and, in this instance, two police cruisers approaching Defendant's vehicle with the officers immediately alighting from the same and thereafter issuing a command to exit one's vehicle or, in the alternative, pulling Defendant from the vehicle.[8] *See Commonwealth v. Strickler,* 757 A.2d 884,

---

[5]"An investigative detention, unlike a mere encounter, constitutes a seizure of a person and thus activates the protections of Article 1, Section 8 of the Pennsylvania Constitution. To institute an investigative detention, an officer must have at least a reasonable suspicion that criminal activity is afoot. Reasonable suspicion requires a finding that based on the available facts, a person of reasonable caution would believe the intrusion was appropriate." *Commonwealth v. Stevenson,* 832 A.2d 1123, 1127 (Pa. Super. 2003).

[6]"Under *Terry* and subsequent cases, an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. Reasonable, articulable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, and only a minimal level of objective justification is necessary for a *Terry* stop." (internal quotes /citations omitted).

[7]"We are unaware of any search and seizure law that treats a police officer approaching a stopped vehicle as a traffic stop." *Commonwealth v. DeHart,* 745 A.2d 633, 636 (Pa. Super. 2000) (internal quotes omitted).

[8]*See* N.T. Suppression Hearing, 11/9/2020, at p. 28.

897-98 (Pa. 2000); *Commonwealth v. Moyer*, 954 A.2d 659, 665 (Pa. Super. 2008).

9. "Interaction between citizens and police officers, under search and seizure law, is varied and requires different levels of justification depending upon the nature of the interaction and whether or not the citizen is detained. The three levels of interaction are mere encounter, investigative detention, and custodial detention. A mere encounter can be any formal or informal interaction between an officer and a citizen but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it carries no official compulsion to stop or respond.[9] In contrast, an investigative detention, by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest. Since this interaction has elements of official compulsion it requires reasonable suspicion of unlawful activity. In further contrast, a custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest." *Commonwealth v. Jones*, 874 A.2d 108, 116 (Pa. Super. 2005) (internal citations and quotation marks omitted, footnote added).

10. In the instant matter,[10] two police cruisers occupied by Minnick and Oatridge approached Defendant's ve-

[9]This in essence presents a legal fiction when one draws upon human nature and life experiences. While it may be true that criminal charges may not ensue in a mere encounter situation, we suspect the reality is that most citizens—if not all—will behave as though their cooperation is required.

[10]All cases reviewed and cited hereafter are indeed factually distinguishable. However, each and every case is demonstrable with respect to police conduct that escalates the nature of the interaction.

hicle and parked directly to the rear of a vehicle located next to that of Defendant. *The two immediately alighted from their respective vehicles* and proceeded to the driver and passenger side doors, essentially surrounding Defendant's vehicle.[11] Minnick pulled Defendant from his vehicle[12] (a conflicting account has Minnick verbally directing Defendant to exit his vehicle.).[13] Upon these facts, we find there was never occasion for a mere encounter and the decision to investigate in this fashion was not based upon reasonable suspicion. *See Commonwealth v. Holmes,* 14 A.3d 89, 95 (Pa. 2011).[14] In a matter of seconds here, the contact escalated from an investigative detention to a custodial detention in the absence of any attempt to speak with Defendant, to include when he was removed from his vehicle. Additionally, there is no specific evidence of record to suggest Defendant was engaged in criminal activity or was armed and dangerous prior to—or when—he exited his vehicle; notably, he was described as cooperative. *See Arizona v. Johnson,* 555 U.S. 323, 326-27, 129 S. Ct.

[11]"In essence, by deciding to exit the vehicle and approach its occupants, he chose to escalate the encounter to afford greater investigation which, of course, is consistent with the purpose of an investigative detention." *Commonwealth v. DeHart,* 745 A.2d 633, 638 (Pa. Super. 2000).

[12]*See* N.T. Suppression Hearing, 11/9/2020, at p. 28.

[13]"[W]hen the officers then asked the Defendants to get out of the car, matters had clearly escalated to an investigatory detention for which there had to be reasonable suspicion." *Commonwealth v. DeHart,* 745 A.2d 633, 637 (Pa. Super. 2000).

[14]"Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the seizure, *a police officer must be able to point to "specific and articulable facts" leading him to suspect criminal activity is afoot.* In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention." *Commonwealth v. Holmes,* 14 A.3d 89, 95 (Pa. 2011) (internal quotes, citations omitted).

781, 784, 172 L. Ed. 2d 694 (2009);[15] *Commonwealth v. Adams,* 205 A.3d 1195, 1204 (Pa. 2019), *cert. denied sub nom. Pennsylvania v. Adams,* 140 S. Ct. 2703, 206 L. Ed. 2d 842 (2020).[16] Notwithstanding, a *Terry* frisk was conducted here by the officer (Minnick).

"To validate a *Terry* frisk, the police officer must be able to articulate specific facts from which he reasonably inferred that the individual was armed and dangerous." *Commonwealth v. Preacher,* 827 A.2d 1235, 1239 (Pa. Super. 2003) (citations omitted); *Commonwealth v. Cooper,* 994 A.2d 589, 593 (Pa. Super. 2010) (internal quotes, citation omitted);[17] *Sibron v. New York, 392* U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968). We have not been presented here with sufficient evidence in support thereof.

The officers here failed to identify any specific and articulable facts relative to Defendant to suggest he may have had a weapon or that he engaged in any conduct suggesting he presented a threat. Additionally, we note that the Supreme Court recently decided carrying a firearm is not an inherently illegal activity in Pennsylvania

---

[15]"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."

[16]"The courts below ignored the first step of the *Terry* test as they never assessed whether Officer Falconio had reasonable suspicion of criminal activity to justify the seizure of Adams. Instead, the courts substituted a finding that the action was permissible in the interest of officer safety in lieu of considering whether the officer had reasonable suspicion of criminal activity. Although an officer's subjective concern for his safety is, of course, a legitimate interest, it does not enter into a Fourth Amendment analysis unless the investigative detention was initially supported by reasonable suspicion of criminal activity."

[17]"To justify a frisk incident to an investigatory stop, the police need to point to specific and articulable facts indicating the person they intend to frisk may be armed and dangerous; otherwise, the talismanic use of the phrase 'for our own protection,' a phrase invoked by the officers in this case, becomes meaningless."

and mere possession alone is not suggestive of criminal activity. *Commonwealth v. Hicks*, 208 A.3d 916, 937 (Pa. 2019), *cert. denied*, No. 19-426, 2019 WL 6689877 (U.S. Dec. 9, 2019).

11. We are mindful that "[o]ur Supreme Court has recognized expressly that an officer conducting a valid traffic stop may order the occupants of a vehicle to alight to assure his own safety." *Commonwealth v. Reppert*, 814 A.2d 1196, 1202 (Pa. Super. 2002). However, as stated above, here the police did not conduct a traffic stop and Defendant was legally parked in a motel parking lot.

12. Furthermore, the testimony of record simply does not demonstrate that the observations of the officers prior to entering the Microtel parking lot support the notion that criminal activity was afoot; rather, the facts evince nothing more than a "hunch," which is legally insufficient. *See United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989); *Commonwealth v. Donaldson*, 786 A.2d 279, 282 (Pa. Super. 2001); *Commonwealth v. Arch*, 654 A.2d 1141, 1144 (Pa. Super. 1995); *Terry*, supra, 392 U.S. at 27, 88 S. Ct. at 1883. The record demonstrates Oatridge failed to gain reasonable suspicion of criminal activity through surveillance or other intelligence gathering. Notwithstanding, he nonetheless decided to confront Defendant and enlisted the assistance of Minnick. More importantly, the decision to compel Defendant to exit his vehicle, if believed, was based solely on the allegation of furtive movement[s] viewed in the mere moments that elapsed from the time the officers stopped the cruisers to the rear of Defendant's vehicle and alighted to surround him on the driver and passenger sides. Recall the furtive movement is specifically described on but one occasion

as Defendant " ... shoving or reaching for something in the center console area"—an action entirely consistent with innocent activity, especially in the absence of any prior observations of criminal activity.[18] *See* N.T. Suppression Hearing, 11/9/2020, at p. 40. This alleged activity coupled with an observation that Defendant looked in his rear or sideview mirror reportedly led to the perception he was nervous. Having observed the demeanor of the witnesses in the context of the entire record, we simply do not find the testimony in this regard credible.[19] The record before us establishes that the officers, in the absence of observing any activity which gave rise to the notion criminal activity was afoot, acted upon a hunch without developing that hunch further into reasonable suspicion.[20]

Glancing in a rearview mirror after two police cruisers—or any vehicles for that matter—appeared at approximately 3:00 a.m. in a hotel parking lot is not, in our judgment, unusual conduct. Indeed, it is hard to imagine anyone would not glance into a rearview mirror or, in the alternative, turn to see who was approaching when two vehicles parked to the rear of his/her car.[21]

---

[18]In our judgment, "furtive movement" in the absence of a traditional traffic stop with lights and sirens carries much less significance and should be afforded less weight in support of subsequent police action insofar as the movements are more likely innocuous conduct. In other words, somebody who is being pulled over by law enforcement is more likely to be hiding something than somebody who is either unaware they are under surveillance or who is merely approached by law enforcement without the prior notification of lights and sirens and the resulting obligation to stop.

[19]"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, 326-27 (Pa. Super. 2019) (internal citation omitted).

[20]We acknowledge that good police work often starts with a "hunch" that develops into reasonable suspicion after surveillance and other intelligence gathering.

[21]"As indicated by the trial court, Commonwealth v. Sierra, 555 Pa. 170, 723 A.2d 644 (1999), reasonably suggests that a police officer's assessment that the occupants of a vehicle appear nervous does not provide reasonable suspicion for an investigative detention." *Commonwealth v. DeHart,* 745 A.2d 633, 637 (Pa. Super. 2000).

13. The scenario depicted by the officers leaves little doubt that neither Defendant nor any reasonable person could conclude they were free to simply back out of the parking spot once the two police cruisers arrived, police immediately alighted from their vehicles and, in essence, surrounded Defendant's vehicle. *See Commonwealth v. Lewis*, 636 A.2d 619, 622-23 (Pa. 1994).[22] Importantly, we accept Oatridge's testimony that he would have pursued the Defendant had he attempted to leave. *See* N.T. Suppression Hearing, 11/9/2020, at p. 34.

14. We acknowledge the police have a right to approach a citizen and ask questions. *See Commonwealth v. Guzman*, 44 A.3d 688, 694 (Pa. Super. 2012). However, when two police cruisers suddenly appear in proximity to an individual's vehicle, coupled with the officers immediately alighting from their vehicles under the circumstances present here, it is clear to us an investigative detention has ensued. *See Reppert*, 814 A.2d 1196, 1203 (Pa. Super. 2002);[23] *Adams*, 205 A.3d 1195, 1199 (Pa. 2019);[24] *Terry*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968); *Strickler*, 757 A.2d 884, 889 (Pa. 2000).

15. We are constantly challenged with balancing the laudable efforts of law enforcement to keep our com-

---

[22]"When an officer, by means of physical force or show of authority, has restrained the liberty of an individual, a 'seizure' has occurred. Any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity."

[23]We are mindful of the facts in *Reppert* noting the state police were initially speaking with an individual prior to electing to escalate the encounter by exiting the vehicle. We note they may have blocked the defendant's vehicle as well. However, in this instance, the issue we are concerned with is whether a reasonable person would have felt free to leave and avoid any interaction with the police based upon the facts set forth herein and to that end we find *Reppert* instructive.

[24]" ... [W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen we may conclude that a 'seizure' has occurred." (citations and internal quotes omitted).

munities safe and protect themselves while at the same time upholding the constitutional rights of citizens. The appellate cases present a fact intensive analysis on a case-by-case basis. The application of developing law to the factual circumstances is rarely clear and we are compelled to make the determination as to when the circumstances demand we protect Fourth Amendment rights without chilling effective policing. In our judgment, the record in this case is devoid of evidence to support the immediate investigative detention that ensued. The witnesses failed to articulate facts supporting a reasonable belief that criminal activity was afoot prior to the seizure of Defendant. We reject the notion that every time a police officer utters the words "furtive movement[s]" or subjectively opines that a defendant exhibited nervousness while engaged in routine conduct, that a panacea exception to the Fourth Amendment is thereby created.

Defendant here was subjected to a heightened level of scrutiny upon a belief he entered the Red Roof Inn and exited a few minutes thereafter. We do not believe this is supported in the record before us. However, he remained under police surveillance while legally parked in the Microtel parking lot for a time period of at least twenty minutes. Oatridge never observed any activity that was inconsistent with innocent, lawful conduct. Moreover, the officers never received a complaint about the vehicle or Defendant and the Defendant did not appear to require assistance. *See Livingstone*, 174 A.3d 609, 627 (Pa. 2017).

16. In closing we note, "[u]nder the plain feel doctrine, a police officer may seize non-threatening contraband detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect

the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object." *Commonwealth v. Pakacki*, 901 A.2d 983, 989 (Pa. 2006) (citations and parallel citation omitted). The officers here were not lawfully in such a position.

For the reasons outlined above, we find the seizure violative of constitutional mandates and as a direct result all evidence obtained after the illegal seizure is hereby suppressed. *See Commonwealth v. Gibson*, 638 A.2d 203, 206-207 (Pa.1994);[25] *Strickler*, 757 A.2d 884, 889 (Pa. 2000); *Moyer*, 954 A.2d 659, 670 (Pa. Super. 2008).

ORDER

AND NOW, upon consideration of the Defendant's Motion to Suppress and after hearing held thereon, and after review of the testimony and evidence of record and the multiple briefs of counsel, it is hereby ORDERED, DECREED, AND DIRECTED as follows:

1. Defendant's Motion to Suppress is GRANTED as more fully set forth in the attached Findings of Fact and Conclusions of Law which are incorporated herein by reference;

2. This case shall be Jury Ready Monday, June 21st, 2021, at 9:30 a.m.

---

[25]"If either the seizure (the initial stop) or the search (the frisk) is found to be unreasonable, the remedy is to exclude all evidence derived from the illegal government activity."

[EDITOR'S NOTE: Court of Common Pleas Order AFFIRMED by Superior Court of Pennsylvania—August 16, 2022—No. 775 MDA 2021—Non-Precedential Decision—*See* Superior Court I.O.P. 65.37—Upon Motion of District Attorney NOLLE PROSSED ORDERED—August 18, 2022. *See* Criminal Docket No. 1026 of 2020.]