

[J-24-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF D.M. : No. 21 E.D. Appeal Docket 1998
: :
: Appeal from Judgment of Superior Court
: entered on November 19, 1997 at No.
: 3538 PHL 1996 affirming the Order
: entered on October 2, 1996 in the Court of
: Common Pleas, Philadelphia County,
: Family Division at No. 04074-96-06
: :
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APPEAL OF: D.M. : ARGUED: February 3, 1999

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: December 27, 1999

As the majority notes, this Court's precedent establishes that an anonymous report of an armed individual on a public street is not, in and of itself, sufficient to support an investigatory detention/protective frisk, Commonwealth v. Jackson, 548 Pa. 484, 493, 698 A.2d 571, 575 (1997), nor is an individual's flight from an approaching police officer alone sufficient for such purpose. See Commonwealth v. DeWitt, 530 Pa. 299, 308, 608 A.2d 1030, 1034 (1992). While the United States Supreme Court has granted certiorari in cases implicating both of these holdings,¹ at this juncture I therefore agree, in the present case,

¹ See Florida v. J.L., ___ U.S. ___, 120 S. Ct. 395 (1999)(granting certiorari to review J.L. v. State, 727 So.2d 204 (Fla. 1998), in which the Florida Supreme Court held that an anonymous tip providing only a description and location of a person possessing a firearm is insufficient to warrant an investigative detention); Illinois v. Wardlow, ___ U.S. ___, 119 S. Ct. 1573 (1999)(granting certiorari to review People v. Wardlow, 701 N.E. 2d 484, 486 (continued...))

that neither the informer's tip nor D.M.'s flight independently constitutes a sufficient justification for the investigatory detention of D.M.

I differ with the majority, however, in the assessment of the totality of the circumstances presented. See generally United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981) (stating that "the essence [of the determination of reasonable suspicion] . . . is that the totality of the circumstances – the whole picture – must be taken into account"); In re D.M., 556 Pa. 160, 168, 727 A.2d 556, 559-60 (1999)(same). Here, in addition to identifying potentially dangerous behavior, the anonymous informer provided descriptive information about the subject in terms of race, attire and venue. Such information was corroborated by police observation upon immediate arrival at the designated location.² As the uniformed officer approached, D.M. fled to avoid the encounter. Thus, at this point, I believe that the circumstances had ripened into an objectively reasonable basis for suspicion.

The majority asserts that, as D.M. was approached, the officer's suspicions were not aroused, and therefore, D.M.'s subsequent flight merits no consideration in the totality of the circumstances. It is unclear to me, however, in what sense the majority employs the

(...continued)

(Ill. 1998), in which the Illinois Supreme Court held that a defendant's flight upon the approach of a police vehicle patrolling a high-crime area, alone, was insufficient to justify an investigatory stop).

² Since the tip lacked predictive information, it was not, by itself, adequate to justify an investigative detention. See Alabama v. White, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417 (1990). I do not read Alabama v. White, however, as foreclosing consideration of a non-predictive anonymous tip as a component of the totality of the circumstances in a case in which independent information (here, D.M.'s flight) is also present. See generally United States v. Roberson, 90 F.3d 75, 80 (3rd Cir. 1996)(noting that the omission of predictive information from an anonymous tip would not necessarily have invalidated it as a consideration in the totality of the circumstances, if, after corroborating readily observable facts, police had also observed unusual or suspicious conduct on the suspect's part).

word “suspicion” in this analysis. I believe that, prior to D.M.’s departure, based upon the partially corroborated tip, the officer did in fact “suspect” (in the subjective, common sense usage of that word) that the juvenile with whom he was confronted might possess a weapon and therefore be engaged in a criminal act. It is for that reason that the officer approached D.M. in the first instance; indeed, the officer would have been remiss in his responsibilities if he had not conducted some further investigation.

The majority’s analysis appears to contemplate some intermediate degree of suspicion -- between that which would prompt further, limited police investigation (for example, a mere encounter) and the objectively reasonable degree necessary to justify an investigative detention -- which must be present before flight will take on any legal significance in the totality of the circumstances. In my view, however, this form of analysis departs from the fundamental inquiry, namely, whether “the facts available to the officer at the moment of the search and seizure ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate,” Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)(citations omitted), and creates the potential for confusion among police officers in the course of day-to-day encounters. Nor am I able to meaningfully distinguish the quantum of information that was available to the officers in Commonwealth v. Cook, ___ Pa. ___, 735 A.2d 673 (1999), a case in which the Court found that the defendant’s flight from police did have significance in the totality of the circumstances, from that which was available here.³

³ I am also unable to meaningfully distinguish the decision in Commonwealth v. Lagana, 517 Pa. 371, 537 A.2d 1351 (1988), in which the Court concluded that a partially corroborated tip plus suspicious behavior in the form of the use of binoculars (giving rise to a suspicion that the defendant was “casing” a business establishment) formed a sufficient basis for objectively reasonable suspicion. In this regard, I note that the use of binoculars in this situation, and D.M.’s flight in the present case, would seem equally to be activities that would generate suspicion on the part of an investigating officer, but at the same time would carry some possibility of legitimate explanation.

Accordingly, I would hold that the circumstances present in this case formed an objectively reasonable basis for suspicion, thus justifying the investigatory detention.