IN THE COURT OF COMMON PLEAS 29th JUDICIAL DISTRICT
LYCOMING COUNTY

IN THE INTEREST OF	:
	:
C. H.,	:
	: NO. 00-30,078
A JUVENILE	: SUPPRESSION HEARING

A Juvenile, who was petitioned into Court on the charge of possession of marijuana, was a passenger in an automobile stopped for a traffic violation. After the motor vehicle violation investigation was completed the driver gave his consent to search the vehicle. After exiting the vehicle at the request of the police officer the juvenile was asked to consent to a pat down search and freely consented. During the pat down the officer felt a lump in the Juvenile's knit hat, squeezed the lump and heard a plastic bag sound where upon he looked into the hat, saw a hole with a bag with a leafy substance in it which proved to be marijuana.

The Juvenile's consent to a pat down was lawfully obtained, however, the pat down exceeded a ***Terry*** frisk when it was not immediately apparent to the officer that the lump he felt was contraband. The evidence was suppressed, based upon ***Commonwealth v. Stevenson/R.A.***, (Nos. 191 and 192 M.D. Pa. Supreme Court, 1/20/2000, 2000 WL 44041).

OPINION AND ORDER

The Commonwealth has filed a juvenile petition charging the above-captioned youth with unlawfully possessing a small amount of marijuana, an ungraded misdemeanor violation of §780-113(a)(31) of the Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa.C.S. §780-101, *et seq.*[1]

[1] The Preliminary Conference Order of March 29, 2000, had directed the adjudication and disposition hearing to be held June 16, 2000. However, in view of the suppression issues and the youth being detained, a conference was held on April 11, 2000. At that time, a continuance was requested by the Commonwealth and the youth's counsel and the hearing was rescheduled for April 17th. At a subsequent conference between the Court and counsel on April 14, 2000, it was determined that it would be more appropriate for the hearing to occur on April 27th. The petition, filed February 7, 2000, alleges the offense occurred December 31, 1999. The Pennsylvania State Police filed an arrest report with the Juvenile Probation Office of Lycoming County on February 4, 2000. A preliminary conference was held March 29, 2000, at which time the youth requested an adjudication hearing. At that time, the youth was detained at the Tioga County Detention Center because he had failed to appear at an earlier preliminary conference scheduled for March 1, 2000. A Bench Warrant was issued for his apprehension. He was detained at the Detention Center pursuant to the Bench Warrant on March 12, 2000. At the March 29th preliminary conference

The juvenile's Public Defender counsel filed a Motion to Suppress Evidence on March 21, 2000. A hearing was held before this Court on April 27, 2000, which served both as a suppression hearing and an evidentiary hearing on all facts related to the allegations of the Petition. The suppression motion challenges the seizure of marijuana from the juvenile, asserting that the rights guaranteed under the Fourth Amendment of the U. S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution were violated when the juvenile, a passenger in a motor vehicle which had been stopped by the arresting police officer, was subjected to a search of his person. Based upon the facts adduced at the evidentiary hearing, as well as the application of controlling Pennsylvania appellate case law, this Court agrees that the marijuana was seized from the juvenile during the course of an unlawful search and accordingly must be suppressed. As a result, the juvenile petition based upon possession of the marijuana must be dismissed.

Facts

The following relevant facts were established by the uncontested evidence presented by the Commonwealth at the suppression hearing.

On December 31, 1999, Trooper Loffredo of the Pennsylvania State Police, stationed at Montoursville, was on routine patrol in the early evening hours. He was in full uniform in a marked police car as he observed traffic. He observed a white Mercury Cougar go past his stationary position three times. He then decided to follow the vehicle. As he followed, the white Cougar it proceeded westerly on Interstate 180 in the Montoursville, Loyalsock Township area. While observing the vehicle on Interstate 180 over a distance of approximately one and one-half miles, Trooper Loffredo observed that the vehicle

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it was also determined that, while the youth was in detention, a psychological evaluation should be completed.

crossed the fog lane on the right side of the highway on two occasions. He decided to stop the vehicle because of this Vehicle Code violation (failing to drive entirely within the lane of travel). Trooper Loffredo used his red lights to signal the vehicle to stop. Instead, it sped up slightly and started onto the Third Street exit ramp. As the vehicle in question started onto the exit ramp, the Trooper activated his siren and the vehicle pulled over.

There were three occupants in the vehicle, two in the front seat and one in the back. The juvenile, C.H., age 14, was seated in the front passenger seat. As the Trooper asked the operator of the vehicle for identification, insurance and registration and license cards, he noticed that both the driver and C.H. were jittery and shaky. C.H., in particular, moved around a lot, squirmed and moved his hands a lot while seated in the car. After making these observations, the Trooper returned to his patrol vehicle to run a status check on the driver and vehicle.[2] Finding nothing unlawful, the Trooper then returned to the stopped vehicle and issued the driver a verbal warning to drive safely and stay in his lane of travel because there might be someone walking along the highway that he could injure. The Trooper returned the cards to the driver. He then said to the driver, "That is all."

The Trooper then asked the driver, "do you mind if I search your vehicle?" The driver made some type of verbal affirmative response, indicating his permission. The Trooper then asked the driver if he had any drugs, bongs, guns, knives, weapons or anything that he should not have in the vehicle.

[2] Upon cross-examination, Trooper Loffredo confirmed a statement in his report to the effect that during the course of the stop he had observed a strong odor of cologne emanating from the vehicle. Trooper Loffredo never attributed this odor to any suspicion or reason for any action taken by him.

The driver responded with a negative verbal response. The Trooper then asked the driver, "Do you mind if I search your vehicle?" The driver said "No," indicating his permission to search the vehicle.

Trooper Loffredo then requested the three occupants of the vehicle to exit the vehicle so he could proceed with the search of the vehicle based upon the driver's consent. Specifically, he asked them to remove themselves from the vehicle during the search for the convenience of searching the vehicle and also for his own safety while conducting the search. He told the three passengers to stand between their vehicle and his police cruiser, parked immediately to the rear of the stopped vehicle, and instructed them to stay off the highway.

The three occupants stepped to the rear of their vehicle, at which time the Trooper asked them collectively, "Do you have any drugs, guns, knives or anything you shouldn't have on your person?" All of them verbally replied in some way, "No." Trooper Loffredo testified he then asked the occupants, as a group, "…if they minded if we checked. They said no." The Trooper also testified that the juvenile, C.H., did not object.

At some point prior to this last question another Pennsylvania State Police Trooper, Trooper Scott, had driven his marked patrol car in behind Trooper Loffredo's vehicle. Trooper Scott was also in uniform. He took up a position from where he could observe what was going on and, if necessary, provide back-up security for Trooper Loffredo.[3]

[3] At another point, the exact time of which is unclear, a Montoursville Borough Police Officer also appeared at the scene in a marked police cruiser. That officer remained at the scene for an undetermined amo unt of time and made undetermined observations.

Trooper Scott testified he saw Trooper Loffredo get all of the occupants out of the vehicle and that they came to the rear of their vehicle. Trooper Scott testified he had heard all three say no when Trooper Loffredo asked them if they would mind if they would check (their persons). Trooper Scott's recollection of the words used by Trooper Loffredo in questioning the three collectively was "do you have any problem if we search you?" Trooper Scott did not recall if one or if all of them had said no in response. Trooper Scott then approached C.H., who was closest to him. Upon approaching, Trooper Scott said to him, "can I pat you down?" C.H. replied "I don't have any problem with that." In conducting the pat down, Trooper Scott removed the knit hat that was being worn by the juvenile. It was being worn in a normal manner, basically pulled down on his head in an appropriate fashion. Trooper Scott stated he did so because in conducting a pat down, he always removed the individual's hat because of a concern that it might hold a handcuff key, razor blade or weapons. Upon removing the hat, he felt a lump in it. He squeezed it. When he squeezed it, it sounded like a type of bag. He then looked inside the hat and saw a hole in the hat. Looking into the hole, he saw a plastic bag containing a green leafy substance. He pulled it out and discovered it was some marijuana. The marijuana was turned over to Trooper Loffredo who immediately placed it in his cruiser. C.H. was placed under arrest for possession of marijuana and taken to the Montoursville State Police barracks for processing. A field test was conducted upon the substance, confirming that it was in fact marijuana (for purposes of these proceedings counsel stipulated that the substance was in fact marijuana, consisting of a small amount for personal use).

Trooper Loffredo asked C.H. what the substance was when Trooper Scott handed it to Trooper Loffredo. C.H. replied that it was marijuana. Trooper Loffredo asked C.H. where he got it, the youth replied that he bought it at Chatham Street that night.

Discussion

The contention of the juvenile is that once Trooper Loffredo had returned the operator's cards to the driver and issued him a verbal warning for driving over the fog line, there was no legitimate basis to suspect that criminal activity was afoot. Therefore, the Trooper had no legitimate basis to detain the occupants of the vehicle any longer, and the continued detention thereafter and subsequent search were unlawful. The Juvenile bases this contention is based upon the decision of the Pennsylvania Supreme Court in the case of ***Commonwealth v. Sierra***, 555 Pa. 170, 723 A.2d 644 (1999). This decision was that of an equally divided court. The ***Sierra*** Court affirmed the Superior Court's suppression of evidence where an officer continued to question a driver regarding the contents of his vehicle after he had issued a traffic citation. The Superior Court had determined this constituted an investigative detention that had been carried out when the officer had no reasonable suspicion of criminal activity justifying such investigative detention. Therefore, the consent to search was vitiated by the taint of the illegal detention.

The Commonwealth, on the other hand, argues that the detention was lawful pursuant to ***Commonwealth v. Hoak***, 700 A.2d 1263 (Pa.Super. 1997). In that case, the officers had told the individuals that they were free to go and therefore they were not illegally detained; they knew that they did

not have to comply with the request to search and they voluntarily consented to remain at the scene and undergo the search.

This Court reaches the conclusion that it was appropriate for Trooper Loffredo to stop the vehicle in which the juvenile, C.H., was riding. Clearly a motor vehicle violation had occurred which justified the vehicle stop. In applying the criteria enunciated in ***Commonwealth v. Hoak***, *supra*, as well as the criteria enunciated in the opinions of the Pennsylvania Supreme Court in their equally divided decision in ***Commonwealth v. Sierra***, *supra*, this Court finds that Trooper Loffredo obtained a valid consent from the driver. After completing the vehicle stop and returning the driver's ownership cards to him, the Trooper said to him, "That is all." This is a clear indication that he was free to leave. The act of returning the driver's cards to him and stating words which released the driver from the traffic stop are crucial factual differences from the fact of ***Sierra***. In ***Sierra*** the officer had not returned the cards to the driver and had not made any statement to the driver indicating the driver was no longer required to remain at the scene of the traffic stop.

There is no evidence that the driver in any way felt compelled to remain at the scene or did not understand that he was free to drive off after Trooper Loffredo returned his cards and said "That's all." At that time, there appears to have been only one officer at the scene, Trooper Loffredo, and his car was parked behind the stopped vehicle. There is no evidence of any gestures, voice, attitude nor anything else on the Trooper's part that would have in any way made the driver feel he was compelled to answer any further questions or to give any consent to search the vehicle. The driver knew or should have known

that he was free to leave. It is clear that under the law the driver was not compelled to answer the subsequent inquiry or to give consent. From all the evidence introduced to this Court it can only be inferred that the driver after he was free to leave, voluntarily answered the Trooper's questions and voluntarily consented to the search of his car.

At that point in time, the rights of C.H. had not been unlawfully affected. He was a passenger in a vehicle which the Trooper had been given permission to search by the operator. The juvenile had no right to object. *See* ***Commonwealth v. Shelley***, 703 A.2d 502 (Pa.Super. 1997).

Further, Trooper Loffredo was clearly within his rights in asking, both for his safety as well as for the convenience of the search, that the individuals step out of the vehicle. He also appropriately asked them to stand between the two vehicles, which would have been in an area of safety.

When the occupants stepped to the rear of their vehicle the Trooper was in a situation of having a mere encounter with the juvenile. There was nothing expressed by the Trooper that in any suggested he felt that any crime had occurred. At this point, in the sequence of events, there is no assertion whatsoever that Trooper Loffredo, nor Trooper Scott had any reasonable articulable suspicion that any kind of criminal activity was afoot or was being perpetrated by any of the occupants in any way. Nor did they testify that there was any particular act or actions by any of the occupants which in any way placed the troopers in fear of danger from the occupants.[4]

[4] The only possible evidence presented in either regard was Trooper Loffredo's observations that there was a strong odor of cologne emanating from the vehicle (which the trooper never claimed was suspicious in any way), that the driver and passenger both appeared nervous and that the passenger, C.H., moved around a lot and particularly moved his hands around a lot. The Commonwealth has not asserted through the direct testimony of the troopers nor by argument, that anything observed by the troopers would have justified an investigative detention, necessitating a frisk or search of the juvenile.

If the troopers had observed unusual conduct such that they could testify to specific and articulable facts which rationally would indicate that criminal activity was afoot, and during the subsequent investigative detention observed unusual or suspicious conduct which would lead the trooper to reasonably believe the suspects were armed and dangerous, a pat down of the suspect's outer garments for weapons could be conducted; in other words, a "***Terry*** search" could occur, without consent. *See* ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); ***Commonwealth v. E.M./Commonwealth v. Hall***, 735 A.2d 654, 659 (Pa. 1999). No such evidence was presented here. Accordingly, without the consent of the juvenile, a pat down search as conducted by Trooper Scott would not have been permitted. However, this Court is satisfied, based upon the only evidence introduced before it, that the juvenile clearly and freely consented to the pat down frisk. An analysis of the suspicions of the officers is not necessary where consent to search is given but rather it should be the court's inquiry as to whether the consent is freely given. *See*, ***Commonwealth v. Shelley***, *supra*, at 502. The evidence in this case is clear and unrebutted that the Troopers did not use any coercive tactics in dealing with the juvenile and his companions. Even if the juvenile did not personally respond to Trooper Loffredo's inquiry as to whether he would mind if he was checked for weapons, he certainly made no objection when the others consented to being checked.[5] The juvenile did specifically reply in the affirmative when Trooper Scott approached

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[5] The Court acknowledges that Trooper Loffredo's inquiry to the group of individuals was to ask them whether they had any drugs, guns, knives, or anything they shouldn't have on their person. Although this inquiry went beyond asking about weapons or things that would put the officer in danger, this Court does not view that the youth and his companions stated that they did not mind if being checked extended to a consent to be searched for drugs or illegal contraband of any type. The officer would not have had any right or privilege to ask for permission to search for the same. The officer's right to inquire and to conduct a pat down frisk of the individuals in this case is based solely upon protecting the officer's safety and looking for weapons or other things that might cause danger to the officers under the

him and asked if he could do a "pat down." The unrebutted testimony of Trooper Scott was that the juvenile replied "No, I don't have any problem with that."

This Court is satisfied that the Troopers acted properly up to this point as they were authorized to conduct a pat down frisk of the juvenile. However, this Court also finds that, based upon controlling case law, the manner in which the pat down frisk was conducted constituted an unlawful search. It is certainly appropriate for officers out along the highway to ask for consent to check a person for weapons for their own safety. Where that consent is obtained, they may do just that under the limitations that would apply to a typical ***Terry*** type of frisk. Nevertheless, the frisk may not go beyond what is authorized by ***Terry***.[6] Trooper Scott's actions, unfortunately, as viewed under controlling case authority and the law of the Commonwealth of Pennsylvania, went beyond the conduct of a ***Terry*** frisk. This issue has been most recently addressed by the Pennsylvania Supreme Court in the case of ***Commonwealth of Pennsylvania v. Stevenson/In The Interest of R.A., a minor,*** (Nos. 191 and 192, M.d. 1998, decided January 20, 2000, 2000 WL 44041). The law as stated by the ***Stevenson/R.A.*** Court is as follows:

> It is well established that a police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude that criminal activity may be afoot. ***Terry v. Ohio***, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). Moreover, if the officer has a reasonable suspicion, based on specific and articulable facts, that the detained individual may be armed

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circumstances.

[6] If in this case, the juvenile had not consented to the pat down, the Troopers then would have had to evaluate the situation as to whether to proceed with the vehicle search, wait for further backup to assure their safety, or abandon their endeavor.

> and dangerous, the officer may then conduct a frisk of the individual's outer garments for weapons. ***Id***. at 24, 88 S.Ct. at 1881. Since the sole justification for a ***Terry*** search is the protection of the officer or others nearby, such a protective search must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." ***Id***. at 26, 88 S.Ct. at 1882. Thus, the purpose of this limited search is not to discover evidence, but to allow the officer to pursue his investigation without fear of violence. ***Adams v. Williams***, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).
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> Recently, however, the United States Supreme Court considered the question of whether an officer may also properly seize non-threatening contraband "plainly felt" during a ***Terry*** frisk for weapons. ***Minnesota v. Dickerson***, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Answering the question in the affirmative, the ***Dickerson*** Court adopted the so-called plain feel doctrine and held that 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. ***Dickerson***, 508 U.S. at 373-75, 113 S.Ct. at 2136-37. As ***Dickerson*** makes clear, the plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent. ***Id.*** at 375, 113 S.Ct. at 2137; ***Commonwealth v. E.M./Hall***, 558 Pa. 16, 735 A.2d 654, 663 (Pa. 1999). Immediately apparent means that the officer readily perceives, without further exploration of searching, that what he is feeling is contraband. ***Id.*** If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object. ***Id.***; *see also* ***Commonwealth v. Graham***, 554 Pa. 472, 485-86, 721 A.2d 1075, 1082 (1998) (opinion announcing the judgment of the Court) (if officer needs to conduct further search to determine incriminating character of object, seizure of object is not justified under plain feel doctrine).

Commonwealth v. Stevenson/R.A., at 4 (footnote omitted).

The ***Stevenson/R.A.*** Court also cited with approval ***Commonwealth v. Fink***, 700 A.2d 447 (Pa. Super. 1997) and ***Commonwealth v. Stackfield***, 651 A.2d 58 (Pa. Super. 1994) for the proposition that

> . . .(T)he immediately apparent requirement of the plain feel doctrine is not met when an officer conducting a ***Terry*** frisk merely feels and recognizes by touch an object that could be used to hold either legal or illegal substances, even when the officer has previously seen others use that object to carry or ingest drugs. To find otherwise would be to ignore ***Dickerson's*** mandate that the plain feel doctrine is a narrow exception to the warrant requirement that only applies when an officer conducting a lawful ***Terry*** frisk feels an object whose mass or contour makes it identity as contraband immediately apparent.

Stevenson/R.A., at 5. In this case, the testimony of Trooper Scott established that he took off the knit hat of C.H. to check it out for a handcuff key, razor blades or weapons. As he held the hat, he felt a lump. He squeezed it (the lump). When he squeezed it he heard the sound of a type of bag. At this point he had not testified in any way that he recognized this bag as contraband or a weapon in any way and in fact it very well could have been a legitimate bag which for some purpose was in the youth's hat, whatever that may have been.[7] Regardless, he did not testify that he immediately knew that he was touching or patting contraband inside the hat. Nor did he testify that in any way he confused this lump with any type of weapon.

Trooper Scott then proceeded to testify that he looked inside the hat. In doing so, he saw a hole in the hat. Upon looking into the hole, he saw a bag, which had a green leafy substance in it.

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[7] This Court is aware that given the place of concealment more likely than not the item so concealed in the hat would be unlawful drugs, c.f., dissenting opinion of Justice Castille in ***Commonwealth v. Stevenson/R.A.***, *supra* at 9,10, which suggests the totality of the circumstances of the discovery of such items should be examined to determine if the item

He did not testify even at this point that he recognized the green leafy substance as being contraband. The Trooper pulled the bag out of the hat and then discovered that this bag did in fact contain marijuana. These actions constitute the type of improper transformation of the pat down frisk into a search, which the Supreme Court in ***Stevenson/R.A.*** says is not permissible. *See also* ***Commonwealth v. E.M./Hall***, *supra*. Nor does the fact that the juvenile consented to the pat down frisk in any way justify in any way the type of search that Trooper Scott conducted. *See* ***Commonwealth v. Fink***, *supra.*

Even if Trooper Scott had been able to immediately identify the lump as a plastic bag, rather than identifying it after hearing how it sounded when he squeezed it, the contraband would not have been immediately apparent. In ***Stackfield***, the Superior Court found that an officer's testimony that during the ***Terry*** frisk he felt what he knew was packaging materials for drugs, namely zip-lock baggies, this did not support a conclusion that the officer felt an item he immediately recognized as contraband. ***Id.*** at 562.

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may have been recognizable by the officer as contraband.

> Plainly stated, the law of this Commonwealth is as follows:
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> > Once the initial pat-down dispels the officer's suspicion that the suspect is armed, any further poking, prodding, squeezing, or other manipulation of any objects discovered during that pat-down is outside the scope of the search authorized under ***Terry***.

Commonwealth v. Graham, 721 A.2d 1075, 1082 (Pa. 1998). Here, Trooper Scott's frisk of C.H. exceeded the boundaries of a ***Terry*** frisk. Accordingly, the Court is constrained to grant the juvenile's Motion to Suppress.

Accordingly, the following Order will be entered.

O R D E R

AND NOW, this 4th day of May 2000, based upon the foregoing Opinion, it is hereby ORDERED and DIRECTED that the Motion to Suppress filed by the juvenile is GRANTED. The evidence, consisting of marijuana seized from the juvenile's person is hereby suppressed.

Based upon the foregoing Opinion, the Court also dismisses the petition filed in this matter is hereby DISMISSED. The County shall pay the costs.

The Juvenile shall be discharged from detention and released into the custody of his mother, TonHandra T. Hamilton, as soon as he can be transported from the Tioga County Detention Center, which shall occur not later than tomorrow, Thursday, May 4, 2000, at 5:00 p.m.

BY THE COURT,

William s. Kieser, Judge

cc: JPO (2)
District Attorney (HM)
Public Defender (JY)
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)