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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Commonwealth of Pennsylvania v. Leandre Sims

Criminal Appeal—Grand Jury Disclosures

Defendant was indicted through the grand jury. Later, the Commonwealth nolle prossed the case. In a subsequent civil action, Defendant sought disclosure of the grand jury materials. The trial court denied disclosure because Defendant was no longer a defendant in a proceeding and no other section applied to him warranting disclosure.

No. CP-02-CR-07810-2018. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 9, 2022.

OPINION

On June 13, 2018, City of Pittsburgh Police Department filed charges against Appellant, Leandre Sims, and three other individuals as a result of an incident in which three juveniles were shot. The case proceeded to an indicting grand jury upon a finding that witness intimidation either had occurred or was likely to occur. Charges were filed on June 13, 2018. On September 25, 2019, the Commonwealth nolle prossed the case against all four defendants. On June 11, 2020, Appellant filed a Praecipe for Writ of Summons in the civil division of the Court of Common Pleas, listing the City of Pittsburgh and the Allegheny County Office of the District Attorney among the defendants. Next, Appellant, on September 27, 2021, filed a Motion seeking disclosure of all grand jury material relative to the criminal investigation. This Court denied the Motion on October 18, 2021. Appellant filed a Notice of Appeal on November 17, 2021, and a Concise Statement on December 22, 2021.

ERRORS COMPLAINED OF ON APPEAL

Appellant alleges this Court erred in denying the Motion for Disclosure of grand jury materials because the Court's ruling was "a misapplication of the rules, statutes, case law and provisions" governing Grand Jury protections and "in contrast to its intent." (Statement of Errors to be Raised on Appeal, p. 2).

DISCUSSION

Appellant asserts that this Court misapplied the rules regarding Grand Jury secrecy. The disclosure of grand jury materials is governed by Pa.R.Crim.Pro. 556.10, which states:

> Rule 556.10. Secrecy; Disclosure
>
> (B) Disclosure. No person may disclose any matter occurring before the grand jury, except as provided below.
>
> (1) Attorney for the Commonwealth. Upon receipt of the certified transcript of the proceedings before the indicting grand jury, the supervising judge shall furnish a copy of the transcript to the attorney for the Commonwealth for use in the performance of official duties.
>
> (2) Defendant in a Criminal Case. If a defendant in a criminal case has testified before the indicting grand jury concerning the subject matter of the charges against him or her, upon application of such defendant, the supervising judge shall order that the defendant be furnished with a copy of the transcript of such testimony.
>
> (3) Witnesses
>
> (a) A grand jury witness may disclose his or her testimony unless the attorney for the Commonwealth obtains an order from the supervising judge that the interests of justice dictate otherwise.
>
> (b) The attorney for the Commonwealth may request that the supervising judge delay the disclosure of a grand jury witness' testimony, but such delay in disclosure shall not be later than the conclusion of direct testimony of that witness at trial.
>
> (4) Other Disclosures:
>
> (a) Disclosure of grand jury material or matters, other than the grand jury's deliberations and the vote of individual jurors, may be made to any law enforcement personnel that an attorney for the Commonwealth considers necessary to assist in the enforcement of the criminal law.
>
> (b) Upon motion, and after a hearing into relevancy, the supervising judge may order that a transcript of testimony before an indicting grand jury, or physical evidence before the indicting grand jury, may be released to an investigative agency under such conditions as the supervising judge may impose.
>
> (5) Pretrial Discovery. Pretrial discovery in cases indicted by a grand jury is subject to Rule 573. Pretrial discovery does not include testimony or other evidence that would disclose the identity of any witness or victim who has been intimidated, is being intimidated, or who is likely to be intimidated. Disclosure of such testimony or other evidence shall be only as ordered by the supervising judge.

Pa.R.Crim.Pro. 556.10 (B).

Since the charges against Appellant have been nolle prossed, he no longer qualifies as a "Defendant in a Criminal Case" and subsection 556.10 (B) (2) does not applies to him. Likewise, Appellant is neither "law enforcement personnel" or "an investigating agency," so subsection 556.10 (B) (4) does not apply.

> In Pennsylvania, grand jury proceedings have traditionally been conducted in secrecy, and for a salutary reason. The secrecy of grand jury proceedings is "indispensable to the effective functioning of a grand jury." In re Investigating Grand Jury of Philadelphia Co. (Appeal of Philadelphia Rust Proof Company), 496 Pa. 452, 437 A.2d 1128, 1130 (1981). The grand jury serves multiple critical purposes:
>
> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the

> grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.
>
> Id.; Accord Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896, 905 (1975) ("The secrecy surrounding grand jury proceedings is a mechanism to ensure the safety and reputation of witnesses and grand jurors.")

In re Dauphin Cty. Fourth Investigating Grand Jury, 19 A.3d 491, 502–03 (Pa. 2011). This Court correctly applied the letter and spirit of the Grand Jury rules in denying Appellant's Motion for Disclosure.

CONCLUSION

For all the above reasons, no reversible error occurred, and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

Commonwealth of Pennsylvania v. Curtis Davis

Criminal Appeal—Suppression—Firearm

Appellant convicted of Carrying a Firearm without a License challenges trial court's denial of suppression stating that police did not have reasonable suspicion to support the investigative detention which lead to a seizure of a firearm. Court opines that due to the officer's observations of Appellant entering a car, removing the firearm from his waistband, and attempting to conceal it under the car seat raised a reasonable suspicion that criminal activity was afoot.

No. CC202101364. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Todd, J.—February 28, 2022.

OPINION

This is an appeal by Defendant, Curtis Davis, following a stipulated non-jury trial on October 14, 2021 in which he was found guilty of one count of Carrying a Firearm Without a License and sentenced to 18 months probation. On November 10, 2021 Defendant filed a timely Notice of Appeal to the Superior Court. On December 27, 2021 Defendant filed his Concise Statement of Errors Complained of on Appeal and set forth the following:

> "I. The evidence was insufficient to convict Mr. Davis of Carrying a Firearm Without a License. The Commonwealth failed to prove beyond a reasonable doubt, that the firearm recovered from Mr. Davis was operable. At the suppression hearing, the Commonwealth established that the police seized a firearm from Mr. Davis. At the non-jury trial, the parties agreed to enter into evidence the testimony adduced at the suppression hearing, and they also stipulated that a firearm was operable. However, the Commonwealth failed to produce any evidence proving that the firearm recovered from Mr. Davis was, in fact, the same operable firearm stipulated to at trial.
>
> II. The trial court erred in denying Mr. Davis' Motion to Suppress. Contrary to the trial court's conclusion, Mr. Davis was seized as soon as the officers activated the emergency lights on their marked police cruiser, and, at that precise moment, they did not have reasonable suspicion to believe that criminal activity was afoot.
>
> III. The trial court erred in denying Mr. Davis' Motion to Suppress evidence. The police illegally entered the vehicle Mr. Davis was a passenger in when they retrieved the firearm from under the passenger seat. The police did not have probable cause to seize the firearm in question, nor did the police have a warrant to enter the vehicle, or any justification under an exception to the warrant requirement.
>
> IV. Mr. Davis' sentence is illegal. At the time of sentencing, Mr. Davis had a prior record score of zero and did not stand convicted of any other offense. As a result, Mr. Davis should have been sentenced at Count 1 - Carrying a Firearm Without a License, graded as a Misdemeanor of the 1st degree rather than a Felony of the 3rd degree."

BACKGROUND

This matter arises out of Defendant's arrest on November 10, 2020 after which he was charged with Carrying a Firearm without a License, 18 Pa.C.S. §6106(a)(1) and Possession of a Small Amount of Marijuana, 35 P.S. §780 (a)(31). Defendant filed a motion to suppress and a hearing was held on August 26, 2021 at which the Commonwealth called Detective Santino Mammarelli who testified that he had taken part in hundreds of narcotic investigations in the eight years that he worked in the City of Pittsburgh Department of Narcotics and Vice. (T., p. 3) Mammarelli testified that on November 10, 2020 at 10:00 p.m. he was on patrol with his partner in the Rochelle Towers area of Knoxville, which he described as a high crime area and well known for open drug transactions. (T., p. 4) Mammarelli testified that the specific intersection where they encountered Defendant was the scene of gun arrests and shootings and that he had been shot at that same area. (T., p. 4) Mammarelli also testified that he has made hundreds of weapons arrests and attended classes regarding concealed weapons.

Mammarelli testified that while driving on Rochelle Street they observed a vehicle parked with all four tires on the curb directly under a no parking sign with a female in the driver's seat and Devis standing outside the driver's window. (T., p. 5) Mammarelli and his partner activated their lights and sirens and pulled up behind the vehicle. As he exited the vehicle Mammarelli, observed Defendant reach with his right hand to his waistband and cradle his hand as if he was concealing a

firearm. (T., p. 6) He described Davis as "gripping" at his waistband and "then he didn't let go" and Davis then quickly went around the back of the vehicle and got inside the passenger's side front seat. (T., p. 6) Mammarelli testified he then approached the passenger side from the back of the vehicle and using a flashlight and the light from a nearby streetlight observed Defendant remove a firearm from his waistband and place in under the passenger seat. (T. p. 7) Mammarelli testified that at that point he ordered Defendant out of the vehicle where he stood at the rear of the vehicle with his partner and then Mammarelli recovered the firearm from under the seat. (T., p. 7) On cross examination Mammarelli testified that when he first observed Defendant outside the vehicle he did not observe a firearm but did observe the characteristics of carrying a firearm and then observed him place it under the front seat. He further testified that as Defendant was at the back of the vehicle he stated that he had marijuana on his person and that after retrieving the firearm Defendant was asked if he had a permit for the firearm but he did not respond and after checking through NCIC it was determined that he did not have a license and he was placed under arrest. (T., p. 11)

The motion to suppress was denied and a nonjury trial was held on October 14, 2021 at which it was stipulated that the testimony from the suppression hearing would be submitted. (T., p. 6) The prosecutor also stated that it was offering three exhibits, "all of which have been stipulated in terms of the admissibility and authenticity." (T., pp. 6-7) Exhibit 1 was the certified Pennsylvania State Police gun licensure form which established that on the date of the arrest that Davis did not possess a valid license to carry a firearm. Exhibit 2 was the Allegheny County Laboratory report which established a .380 auto caliber Kel-Tec pistol was test fired and found to be operable. (T., p. 7) Exhibit 2 also specifically identified the "Participant" as "Curtis Davis" and the offensive tracking number or OTN as "G8773030" the number assigned to instant case against Defendant. (T., p. 7) Exhibit 3 was the transcript of the August 26, 2021 suppression hearing. The Commonwealth did not submit any evidence related to the alleged marijuana found on Defendant at the time of his arrest. (T., pp. 7-8) In argument, defense counsel argued that "[b]ased upon the suppression hearing, it still doesn't rise to beyond a reasonable doubt that my client was carrying a firearm without a license. . ." The Commonwealth responded by stating that, "Based on Commonwealth's Exhibits 1 and 2, we know that the defendant did not have a valid license to carry said firearm, and the firearm was operable, and based on the testimony of Detective Mammarelli, he was clearly carrying it on his person." (T., p. 11)

Based on the evidence presented Defendant was found not guilty of possession of marijuana and guilty of carrying a firearm without a license. Defendant waived a presentence report and defense counsel, after noting that the sentencing guidelines showed a zero prior record score and probation in the mitigated range, stated:

> "My client, although this is – this is his first major case, and although it is a felony, he has not gotten in much trouble in his life, and he would just like to get this behind him and continue to be an upstanding member of society." (T., p. 12)

It was also noted by the Commonwealth that Defendant would be required to submit DNA "given it's a felony." (T., p. 12) Defendant was then sentenced to 18 months of probation. (T., p. 13)

DISCUSSION

In his first issue on appeal, Defendant alleges that the evidence was insufficient to convict him of carrying a firearm without a license. Defendant argues that although the Commonwealth established through the testimony of Detective Mammarelli at the suppression hearing that the police seized a firearm from Defendant, that the Commonwealth failed to produce any evidence proving that the firearm recovered from Defendant was, in fact, the same operable firearm stipulated to at trial. Defendant argues that by stipulating to the admission of Exhibit 2, that he only stipulated that a firearm was operable, not that it was the firearm that was in the possession of Defendant at the time of his arrest. However, this argument fails because Exhibit 2 identifying the firearm as operable clearly indicated that Defendant was the "participant" with whom the firearm was associated and further identified the correct offense tracking number associated with the charges for which Defendant was being tried. The evidence further established that only one firearm was in Defendant's possession. Further, had the stipulated laboratory report referred to a firearm that was not one in Defendant's possession at the time of his arrest then the report had no relevance to the trial. In a dissenting opinion by Justice Wecht in Commonwealth v. Copenhaver, 229 A.3d 242 (Pa. 2020), a case in which the parties had entered into a stipulation at a suppression hearing regarding the actions of a deputy sheriff in conducting a traffic stop, the definition of a "stipulation" from Black's Law Dictionary was referenced as follow:

> BLACK'S LAW DICTIONARY (11th ed. 2019) ("A voluntary agreement between opposing parties concerning some relevant point; esp., an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding.") Commonwealth v. Copenhaver, 229 A.3d 242, 249 (Pa. 2020)

In the present case, the stipulation that the firearm was operable not only identified it as related to Defendant, but also, by definitions, stipulated that it was related to a "relevant point" in the proceedings. The only relevant point the stipulation could involve, when considering the record as a whole, was that it was referring to the firearm that was observed by Detective Mammarelli in Defendant's possession at the time of his arrest. Therefore, the evidence was sufficient to sustain Defendant's conviction.

Defendant next issue on appeal is that it was error to deny the suppression motion because Defendant was seized as soon as the officers activated the emergency lights on their marked police cruiser, and, at that precise moment, they did not have reasonable suspicion to believe that criminal activity was afoot. In discussing what constitutes a seizure , the Supreme Court in Commonwealth v. Hicks, 652 Pa. 353 (2019) stated:

> "For purposes of the Fourth Amendment, a person is "seized" when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). When a police officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Brown, 443 U.S. at 50 (quoting Terry, 392 U.S. at 16). In assessing the impression that would be given to a reasonable person, a court must determine "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (Citations omitted) Commonwealth v. Hicks, 652 Pa. 353, 370-71, 208 A.3d 916, 926-27 (2019)

In the present case, the testimony of Detective Mammarelli was that while he and his partner were driving on Rochelle Street they observed a vehicle parked with all four tires on the curb and was "directly under a no parking sign" at which point they activated their lights and sirens and pulled up behind the vehicle. (T, p. 5) Detective Mammarelli also testified that they observed a female in the driver's seat and Defendant standing outside the driver's window. Defendant asserts that "at that precise moment" he was seized despite the fact that there was no reasonable suspicion that criminal activity was afoot. However, there is nothing in the record to indicate that Defendant was seized at that moment. There is no evidence that Defendant was given any instruction or direction by Detective Mammarelli or his partner at that time or in any way was restricted in his movement. In fact, the testimony establishes that Defendant, of his own volition, left his position at the driver's window, walked around the back of the vehicle and then entered the passenger's side front seat. The evidence establishes that the activation of the lights and siren of Detective's Mammarelli's vehicle was related to the observation of the vehicle parked with all four tires on the curb directly under a no parking sign. The fact that at the same time that the police vehicle pulled behind the illegally parked vehicle Detective Mammarelli also observed Defendant clutching at his waistband does not establish that Defendant was illegally seized at that moment. The testimony establishes that it was not until Mammarelli observed Defendant remove a firearm from his waistband and conceal it under the front seat that he was given an instruction to exit the vehicle. Considering the totality of the circumstances, the attempt to conceal the firearm under the front seat of the vehicle created a reasonable suspicion that Defendant's possession of the firearm was unlawful or other criminal activity was afoot and warranted Detective Mammarelli's further investigation and securing the firearm while interacting with Defendant and the driver of the vehicle. Therefore, Defendant was not illegally seized as alleged and the motion to suppress was appropriately denied.

Defendant next contends that the police illegally entered the vehicle Defendant was a passenger in when they retrieved the firearm from under the passenger seat. Further that the police did not have probable cause to seize the firearm, did not have a warrant to enter the vehicle nor any justification under any exception to the warrant requirement.

As discussed above, the testimony in this case established that Defendant was first observed outside of the vehicle parked directly under a no parking sign and then he voluntarily walked to the passenger side of the vehicle and sat in the passenger seat as Detective Mammarelli approached the vehicle. As he approached the vehicle Detective Mammarelli observed Defendant take a firearm from his waistband and place it under the seat. Defendant was then asked to exit the vehicle. It is recognized that during a traffic stop that officers have the right to control the movement of the occupants of the vehicle. In Commonwealth v. Malloy, 257 A.3d 142, (Pa. Super. 2021) it was noted as follows:

> Out of concern for officer safety, Pennsylvania search and seizure jurisprudence also permits certain limited intrusions upon the liberty of passengers in lawfully detained vehicles. Hence, officers may order passengers to remain in a car for the duration of a lawful stop. See Commonwealth v. Pratt, 2007 PA Super 217, 930 A.2d 561, 567 (Pa. Super. 2007) ("police officer may lawfully order a passenger who has exited and/or attempted to walk away from a lawfully stopped vehicle to re-enter and remain in the vehicle until the traffic stop is completed[] without offending the passenger's rights under the Fourth Amendment"), appeal denied, 596 Pa. 743, 946 A.2d 686 (Pa. 2008). Law enforcement officials may also inquire about the presence of weapons. See Commonwealth v. Clinton, 2006 PA Super 217, 905 A.2d 1026, 1031 (Pa. Super. 2006) (officer's inquiry regarding presence of weapons during lawful traffic stop reasonably furthered interest in officer safety and constituted tolerable, minimal intrusion), appeal denied, 594 Pa. 685, 934 A.2d 71 (Pa. 2007). Lastly, police officials may compel passengers to exit a lawfully stopped vehicle. See Commonwealth v. Rodriguez, 695 A.2d 864, 868-869 (Pa. Super. 1997) (Fourth Amendment permits police to ask both drivers and passengers to alight from lawfully stopped vehicles without reasonable suspicion that criminal activity is afoot). The authority to carry out these actions do not, in and of themselves, expand the grounds for detaining or investigating passengers who are merely present in a lawfully stopped vehicle. See Maryland v. Wilson, 519 U.S. 408, 413-415, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) (reasoning that officer's authority to order passengers out of lawfully stopped vehicle stems from potential safety risks to officers and not from independent grounds to detain passengers). Commonwealth v. Malloy, 257 A.3d 142, 150,(Pa. Super. 2021)

In Malloy an officer, while conducting a traffic stop asked Malloy, a passenger in the vehicle, if he was armed and when Malloy indicated he had a firearm, the officer instructed Malloy to exit the vehicle, secured the firearm and then asked if Malloy was properly licensed to carry the firearm. The trial court, in denying a motion to suppress the firearm, concluded that the officer's request for documentation of Malloy's license to carry a firearm constituted an ordinary inquiry incident to the traffic stop that police officers are permitted to make. In reversing the trial court the Superior Court discussed the Supreme Court's decision in Commonwealth v. Hicks, 208 A.3d 916, (Pa. 2019) stating:

> Hicks overruled a prior decision of this Court which held that the "possession of a concealed firearm by an individual in public is sufficient [in and of itself] to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed [to carry a firearm]." Hicks, 208 A.3d at 921, quoting Commonwealth v. Robinson, 410 Pa. Super. 614, 600 A.2d 957, 959 (Pa. Super. 1991). Commonwealth v. Malloy, 2021 PA Super 90, 257 A.3d 142, 153

The Court further stated:

> Hicks offers the following general principles of search and seizure law which govern our review. [Pennsylvania courts] recognize only two types of lawful, warrantless seizures of the person, both of which "require an appropriate showing of antecedent justification: first, an arrest based upon probable cause; second, a 'stop and frisk' based upon reasonable suspicion." Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 228 (Pa. 1996), quoting Commonwealth v. Rodriquez, 532 Pa. 62, 614 A.2d 1378, 1382 (Pa. 1992). Here, we are concerned with this latter type of seizure—interchangeably labeled an "investigative detention," a "Terry stop," or, when coupled with a brief pat-down search for weapons on the suspect's person, a "stop and frisk." "To maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion." Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884, 889 (Pa. 2000). The asserted grounds for an investigative

> detention must be evaluated under the totality of the circumstances. See United States v. Cortez, 449 U.S. 411, 417-418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). So long as the initial detention is lawful, nothing precludes a police officer from acting upon the fortuitous discovery of evidence suggesting a different crime than that initially suspected[.] However, an unjustified seizure immediately violates the Fourth Amendment rights of the suspect, taints the evidence recovered thereby, and subjects that evidence to the exclusionary rule. See, e.g., Melendez, 676 A.2d at 229-230. Commonwealth v. Hicks, 652 Pa. 353, 208 A.3d 916, 927-928 (Pa. 2019) (parallel citations omitted). Commonwealth v. Malloy, 257 A.3d 142, 153-54 (Pa. Super. 2021

It should also be noted, however, that in its discussion concerning the observations of the officer of Malloy prior to questioning him about the weapon, the Court stated:

> Before issuing this request, Officer Henry possessed no evidence showing that Appellant was involved in criminal activity, that Appellant had engaged in furtive movements, that recent gun-related criminal activity had occurred in the vicinity of the stop, or that criminal activity (apart from an improperly displayed license plate) had taken place in the vehicle in which Appellant was traveling as a passenger. In addition, neither the trial court nor the Commonwealth points to evidence linking Appellant to criminal activity or furtive movements prior to Officer Henry's request that Appellant produce documentary proof that he was authorized to carry a firearm. In short, Appellant's possession of a firearm was the only fact offered by the Commonwealth to support the investigative detention that occurred when Officer Henry restrained Appellant's movement to pursue an investigation of Appellant's legal authority to carry a firearm. Commonwealth v. Malloy, 257 A.3d 142, 154 (Pa. Super. 2021) (Emphasis added)

Clearly the facts in the present case are distinguishable from Malloy in that Detective Mammarelli testified that he did observe "furtive movements" in that he saw Defendant attempt to conceal the firearm that he had in his waistband by placing it under the front passenger seat. (T., p. 7) The apparent attempt to conceal the weapon by removing the firearm from his waistband and placing it under the seat was inconsistent with lawful possession of the firearm and, at least, raised a reasonable suspicion that criminal activity was afoot. 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. Commonwealth v. Melendez 676 A.2d 226, 228 (Pa. 1996) In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts considering the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention. Commonwealth v. Cook, 735 A.2d 673, 676 (Pa.1999)

It is also clear that police officers may, for their own safety, request that drivers or passengers exit a vehicle and may conduct pat down frisks and wingspan searches of the occupants on a finding of reasonable suspicion. Commonwealth v. Morris, 644 A.2d 721, 723 (Pa. 1994) In this case, Defendant's actions in attempting to conceal the firearm in his possession created reasonable suspicion that justified the actions of Detective Mammarelli. Therefore, the motion to suppress was appropriately denied.

Defendant's final issue is that his sentence is illegal because at the time of sentencing he had a prior record score of zero and did not stand convicted of any other offense and, therefore, he should have been sentenced for carrying a firearm without a license, graded as a misdemeanor of the 1st degree rather than a felony of the 3rd degree.

The offense of Firearms Not To Carried Without a License is set forth at 18 Pa.C.S. § 6106 as follows:

> (a) Offense defined.
>
> (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.
>
> (2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

Defendant contends that because he was found not guilty of any other offense and had a prior record score of zero, that he should have been convicted and sentenced under section (a)(2) as a misdemeanor of the first degree. However, in discussing this issue in Commonwealth v. McKown, 79 A.3d 678, (Pa. Super. 2013) and citing Commonwealth v. Coto, 932 A.2d 933, 940 (Pa. Super. 2007) the Court stated:

> Instantly, upon review of the relevant statutes and the case law interpreting them, we conclude that the Legislature intended to establish an opportunity for a defendant to present mitigating factors at sentencing following a conviction under 18 Pa.C.S.A. § 6106(a), which the Commonwealth would then be free to attempt to rebut. Thus, we hold that the defendant carries the burden to prove, by a preponderance of the evidence, that the exception under Section 6106(a)(2) applies, utilizing some or all of the factors enumerated in 18 Pa.C.S.A. §§ 6105 and 6109. Commonwealth v. McKown, 79 A.3d 678, 691-92 (Pa. Super. 2013)

In this case, at the time of sentencing there was no attempt or offer by Defendant to prove by a preponderance of the evidence that he was otherwise eligible to possess a valid license to carry a firearm and the fact that he had a zero prior record score does not establish that eligibility. Defendant waived a presentence report and defense counsel, after noting that the sentencing guidelines showed a zero prior record score and a sentence of probation was in the mitigated range, stated:

> "My client, although this is – this is his first major case, and although it is a felony, he has not gotten in much trouble in his life, and he would just like to get this behind him and continue to be an upstanding member of society." (T., p. 12) (Emphasis added)

Not only was it conceded by defense counsel that the offense was felony but counsel also referred to to previous "trouble" that Defendant in which Defendant was involved. There was no evidence presented at sentencing that would warrant a sentence based on a misdemeanor violation as set forth in §6106(a)(2).

BY THE COURT:
/s/Todd, J.