

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
 :
 : CRIMINAL ACTION
 :
 v. :
 :
 :
 : NO. 05-CR-702
 EUGENE PARKER :

SURRICK, J.

APRIL 13, 2006

MEMORANDUM & ORDER

Presently before the Court is Defendant's Motion To Suppress (Doc. No. 22). For the following reasons, the Motion will be denied.

I. BACKGROUND

Defendant Eugene Parker is charged with two counts of possession with intent to distribute cocaine, two counts of possession with intent to distribute heroin, and one count each of possession with intent to distribute cocaine base, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a convicted felon. (Doc. No. 2.) These charges arise out of two separate incidents.

A. April 25, 2005 Arrest

On April 25, 2005, at approximately 11:30 a.m., Philadelphia police officers Dennis Lopez, Daniel McGee, Jason Winslow, and Sergeant Murphy were driving on Lancaster Avenue near 42nd Street in Philadelphia. This area was known to the officers to be a high drug-trafficking area. (Apr. 7, 2006 Tr. at 6.) All of the officers were plain-clothed and traveling in an unmarked car. (*Id.* at 9.) Officer Lopez was sitting in the passenger seat in the front of the car. While the car was stopped at the traffic light at the 4200 block of Lancaster Avenue, Lopez

observed Defendant standing approximately fifteen to twenty feet from Lopez on the southwest corner of the intersection, talking with a black male. (*Id.* at 11.) Lopez saw the black male hand Defendant an unknown amount of United States currency, which Defendant placed in his left pants pocket. (*Id.* at 12.) Defendant then reached into the same pocket and pulled out a small bag. (*Id.* at 11.) Lopez observed Defendant retrieve a small object from the bag and place it in the palm of the black male's hand. (*Id.*) The black male closed his hand around the object, and then started to walk southbound on 42nd Street. (*Id.* at 11-12.) Defendant started to walk westbound on Lancaster towards the unmarked police car. (*Id.* at 11, 12-13.) Lopez has been a police officer for over sixteen years, has experience in dealing with narcotics offenses, has made over one hundred arrests for illegal drugs, has spoken with people who have been arrested for the sale of narcotics, is familiar with the packaging of drugs for distribution and sale, has observed over one hundred "hand to hand" drug transactions, has conducted surveillances in narcotics investigations, and is familiar with the narcotics trafficking in the 4000 and 4200 blocks of Lancaster Avenue. (*Id.* at 5-8.) Based on his experience and training, Lopez believed he had just observed a "hand to hand" sale of narcotics. (*Id.* at 15.) When Lopez informed his fellow officers that he had just seen a drug sale, Officer McGee confirmed that he had seen it also. (*Id.* at 13.)

The officer driving the unmarked vehicle then crossed the intersection and made a u-turn in order to follow Defendant. (*Id.* at 13-14.) As they approached Defendant, Lopez exited the vehicle, physically stopped Defendant and, with the help of Officer McGee, positioned Defendant against the car and patted him down as a safety precaution. (*Id.* at 14, 25.) While patting him down, Lopez felt a plastic bag and objects inside the bag in Defendant's left pants

pocket. (*Id.* at 14, 27) What Lopez felt was consistent with the “hand to hand” sale of narcotics he had observed. When Lopez examined the bag, he saw that it contained several packs of powdery substances. (*Id.* at 14.) Based on his experience, Lopez believed to that the bag’s contents were narcotics, and that the bag was the same bag that he had seen Defendant use in the transaction with the unknown black male a few moments earlier. (*Id.* at 14, 15.) Lopez also recovered \$988 cash from Defendant’s left front pocket. (*Id.* at 15.) Defendant was arrested, charged with drug trafficking offenses, and released on bail pending trial.

B. August 28, 2005 Arrest

On August 28, 2005, at approximately 5:30 a.m., Philadelphia police officer Sean Lemard was driving a marked police car when he received a radio call regarding a shooting at 52nd and Jefferson Streets. (*Id.* at 32-33, 35.) The radio call also stated that a black male was the shooter. (*Id.* at 36, 49.) Lemard was aware that narcotics street sales often occurred in the area around 52nd and Jefferson Streets. (*Id.* at 33, 34-35.) Lemard has been a police officer for ten years during which time he has made more than one hundred arrests for narcotics offenses. He is familiar with the packaging of narcotics for sale and distribution. In fact, he sees packaged illegal narcotics on a nightly basis as he patrols the 19th Police District. (*Id.* at 29-32.)

Lemard responded to the radio call by driving directly to 52nd and Jefferson. (*Id.* at 36.) Lemard saw Defendant standing alone on the corner under a street light a half block away from the site of the shooting, at 52nd and Heston Streets. (*Id.*) Defendant was the only person in the area. (*Id.* at 36, 47-48.) The officer pulled up to Defendant and asked him whether he had seen a shooting or heard any gunshots. (*Id.* at 37.) As Lemard drove up to Defendant, Defendant turned to the side. (*Id.*) Defendant was standing approximately three to five feet away from Lemard.

(*Id.* at 45-45.) Lemard saw that Defendant was holding a small black book, similar to an address book, in one of his hands. (*Id.* at 37-38.) The book was open, and Defendant appeared to be looking into it. (*Id.* at 38.) While Lemard was speaking to Defendant, a small packet fell from the book to the ground. (*Id.*) The packet was clear and tinted yellow, and Lemard recognized it as narcotics packaging. (*Id.* at 38-39.) Lemard also observed a white powdery substance inside the packet. (*Id.* at 39.) When the packet fell from the book, Defendant turned towards Lemard, exclaimed “oh shit,” and placed his foot on top of the packet. (*Id.*)

Lemard then got out of the car to investigate. Lemard asked Defendant if he had any guns or drugs on him. (*Id.* at 40, 53.) Defendant responded by informing Lemard that he had a gun in his waistband. Lemard frisked Defendant, felt a bulge in the front waistband, and recovered a loaded .380 semi-automatic firearm. (*Id.* at 40, 44.) Defendant also shook the book that he was holding in his hand in response to Lemard’s question, causing multiple packages to fall from the book. (*Id.* at 41-42.) Lemard seized the packets from the ground and the book from Defendant. (*Id.* at 41.) Inside the book were additional packets of narcotics. (*Id.*) Lemard recovered \$1,170 cash from Defendant’s person. (*Id.* at 44.) Defendant was placed under arrest and taken into custody.

II. DISCUSSION

Defendant has moved to suppress the firearm and drugs seized from Defendant as the fruits of illegal searches and seizures. (Doc. No. 22 ¶ 8.) Defendant argues that the police officers lacked reasonable suspicion to warrant the investigatory stops on both April 25, 2005 and August 28, 2005. The Government responds that the officers in question not only had

reasonable suspicion to stop and frisk Defendant, but they also had probable cause to arrest Defendant. (Doc. No. 29 at 4-10.)

Evidence obtained as the result of a search or seizure that violated the Fourth Amendment may not be admitted in trial because it is the “fruit” of an unlawful action. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). A warrantless public arrest does not violate the Fourth Amendment “where there is probable cause to believe that a criminal offense has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). To determine whether an officer had probable cause to arrest an individual, a court must “examine the events leading up to the arrest, and then ‘decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). A search of an individual incident to a lawful arrest is permissible under the Fourth Amendment. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) (“[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”).

Investigative stops, or seizures,¹ can be justified under the Fourth Amendment if they are made based on a police officer’s reasonable suspicion. *See United States v. Roberson*, 90 F.3d 75, 77 (3d Cir. 1996) (citing *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that an investigative stop may be justified by less than the probable cause for an arrest)). Reasonable suspicion must be

¹ A warrantless stop is categorized as a seizure. *See Terry v. Ohio*, 392 U.S. 1, 16 (1968) (there is a seizure “whenever a police officer accosts an individual and restrains his freedom to walk away”).

based upon “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. The Supreme Court has noted “the fact that the stop occurred in a ‘high crime area’ among the relevant contextual considerations in a *Terry* analysis.” *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (internal citations omitted). Upon conducting an investigative stop, a police officer may conduct “a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual” *Terry*, 392 U.S. at 27. A *Terry* protective frisk may be justified when the individual is suspected of drug activity. “Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction.” *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005); *see also United States v. Childs*, 131 Fed. App’x 347, 349 n.2 (3d Cir. 2005).

With respect to the April 25, 2005 incident, Officer Lopez observed Defendant take money from another man’s hand, put the money in his pocket, and pull out a bag of small objects. He then saw Defendant take an object from the bag and place it in the hand of the other man. Officer Lopez testified that in his sixteen plus years with the Philadelphia Police Department, he has participated in multiple narcotics arrests, including over one hundred narcotics arrests in the area where Defendant was stopped. (April 7, 2006 Tr. at 5-7.) Of those narcotics arrests in that area, Lopez stated that approximately ninety percent of those arrests were for “hand to hand” transactions. (*Id.* at 8.) A “hand to hand” drug transaction is when the seller places his hand over the buyer’s hand to transfer the concealed drugs. (*Id.* at 7-8.) Based on his experience and training, Lopez concluded that he witnessed a “hand to hand” drug transaction

between Defendant and the black male. Upon review of the evidence, we are satisfied that Officer Lopez possessed the requisite reasonable suspicion to stop and frisk Defendant. We also conclude that Lopez had probable cause to arrest and to subsequently search Defendant incident to the lawful arrest because Lopez had observed Defendant engaged in what a reasonable officer would believe to be a drug transaction.

On August 28, 2005, when Officer Lemard pulled up in his police car to ask Defendant some questions about the shooting in the area, this was not a seizure under the Fourth Amendment. “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Terry*, 392 U.S. at 20 n.16. Lemard questioned Defendant about the shooting because he was the only person that Lemard saw in the area, and Lemard sought more information about the shooting. “Police officers may approach individuals without reasonable suspicion or probable cause, and may question such individuals without implicating the Fourth Amendment.” *United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004) (internal citations omitted); *see also United States v. Drayton*, 536 U.S. 194, 200 (2002) (“Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.”). Lemard’s questioning of Defendant alone did not constitute an investigatory stop.

While Lemard was talking to Defendant, a packet dropped from the book that Defendant was holding. Defendant uttered an expletive, and then attempted to conceal the packet with his foot. Lemard believed that the packet contained narcotics. Lemard has participated in over one hundred narcotics arrest during his ten years with the Philadelphia Police Department. (April 7,

2006 Tr. at 30.) He has seen packaged narcotics numerous times, and has learned to recognize items that are the same size and shape of the packet in question as packaged narcotics. (*Id.* at 31-32.) Lemard was familiar with the area in which he arrested Defendant, and knew that it was a high drug-trafficking area. Based on his personal observations, Defendant's conduct, and his previous law enforcement experience with illegal drugs, Lemard reasonably believed that the packet which Defendant dropped contained narcotics. We conclude, based upon the record, that Lemard had probable cause to arrest Defendant based upon this reasonable belief. Lemard's search of Defendant's person was lawful as incident to Defendant's arrest.

The search and arrest of Defendant on April 25, 2005, and the search and arrest of Defendant on August 28, 2005 were proper. Defendant's constitutional rights were not violated on either occasion. Defendant's Motion to Suppress is without merit.

An appropriate Order follows.

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ORDER

AND NOW, this 13th day of April, 2006, upon consideration of Defendant's Motion To Suppress (Doc. No. 22), and all papers filed in support thereof and in opposition thereto, and after a hearing in open court, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

/s R. Barclay Surrick

R. Barclay Surrick, Judge