IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

EAP 2024 NO. 50

COMMONWEALTH OF PENNSYLVANIA

V.

PHILLIP SHIVERS,
Appellant

BRIEF FOR APPELLANT

Appeal From The Judgment Of The Superior Court Filed On September 7, 2023 At No. 538 EDA 2022 Affirming The January 27, 2022 Judgment Of Sentence Of Philadelphia County, Court Of Common Pleas, Criminal Trial Division At CP-51-CR-0005546-2019.

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September, 2024

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STATEMENT OF JURISDICTION

This Court's jurisdiction to grant an allowance of appeal to review a final order of the Superior Court is established by 42 Pa.C.S. §724(a).

ORDER IN QUESTION

On February 10, 2021, Philadelphia Common Pleas Court Judge Donna Woelpper denied a motion to suppress evidence, a firearm police recovered from Mr. Shivers' person. "The defendant's unprovoked flight in a high crime area gave the officers reasonable suspicion to pursue and stop him, and recover the weapon." N.T. 12/10/21, 6. The Superior Court affirmed that result. *Commonwealth v. Shivers*, 538 EDA 2022, 2023 WL 5771571 (Pa. Super., Sept. 7, 2023) (non-precedential).

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The scope of review for an appeal from the denial of a motion to suppress is the hearing on the motion to suppress evidence. *In the Interest of J.L.*, 79 A.3d 1073 (Pa. 2013). The standard of review for the legal constitutional issue involved in this appeal is *de novo*. *E.g.*, *Commonwealth v. Shabbaz*, 166 A.3d 278, 285 (Pa. 2017).

STATEMENT OF THE QUESTION INVOLVED

On July 11, 2024 this Court granted an allowance of appeal *per curiam* to resolve the following issue that it rephrased for clarity:

> Because flight alone by an individual at the sight of police does not provide the necessary reasonable suspicion of criminal activity for a stop, does it violate Article 1, Section 8 to hold that there is reasonable suspicion based solely on the location of the flight in a "high crime area," a factor that involves no additional conduct by the person police pursue and stop?

The Court further ordered that the parties address in their brief "whether Petitioner Phillip Shivers preserved his "departure claim" in light of this Court's decisions in *Commonwealth v. Bishop*, 217 A.3d 833 (Pa. 2019), and *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020)."

STATEMENT OF THE CASE

A. Procedural History And Place Of Preservation.

Mr. Shivers appeals from the Superior Court's order affirming the denial of a motion to suppress evidence. The opinion of the Superior Court panel, filed September 7, 2023, is attached as Exhibit A. *Commonwealth v. Shivers*, 538 EDA 2022, 2023 WL 5771571 (Pa. Super., Sept. 7, 2023) (non-precedential). The opinion of the trial judge, the Honorable Donna

Woelpper, Judge of the Philadelphia Court of Common Pleas, is attached at Exhibit B.

On July 18, 2019, Philadelphia police arrested Mr. Shivers. They recovered a gun from his pants pocket after they chased and tackled him in an area they described as high crime. He was charged with VUFA offenses and giving false identification to law enforcement in Information No. CP-51-CR-0005546-2019.

Counsel filed a motion to suppress evidence, the gun, alleging violations of the Fourth Amendment and Article I, Section 8. Before the suppression hearing, counsel filed a "Motion to Compel Evidence Relating to 'High Crime Area,' Or, In The Alternative, Preclude Testimony Of High Crime Area." Judge Donna Woelpper held a hearing on the motion on January 10, 2020. The judge held the motion under advisement, and denied it on July 1, 2020. The motion to suppress hearing took place on November 16, 2020, and counsel again raised an Article I, Section 8 claim. Judge Woelpper denied the motion to suppress on February 10, 2021.

On November 18, 2021, Mr. Shivers waived his right to a jury trial and was tried by Judge Woelpper. She found him guilty of the charges,

and on January 27, 2022 she sentenced Mr. Shivers to an aggregate term of three years of probation.

Mr. Shivers filed a timely appeal to the Superior Court, and a court ordered Rule 1925(b) statement of errors raised the specific issue before the Court now. In her opinion Judge Woelpper held that police had reasonable suspicion to stop Shivers because of his unprovoked flight in a high crime area. Relying on Superior Court cases, she rejected the claim that under Article I, Section 8 this does not permit the seizure of a person. Exhibit B, 6–9.

The Superior Court also rejected the Article I, Section 8 claim on the merits. Exhibit A, at *2–3. The preservation of the claim raised here is fully addressed *infra* at 42–48.

B. Suppression Hearing Facts.

The only witness at the hearing was Philadelphia police officer Michael Sidebotham. N.T. 11/16/20, 4–21. The Commonwealth also introduced body camera evidence. N.T. 11/16/20, 11, 13, 20 (C-1 and C-2).

The officer's testimony was that he was on routine patrol in a car with two other officers at about 7:30p.m. on July 18, 2019 in the area of a gas station at 5945 North Front Street in Philadelphia. They had no

report of a crime or disturbance. N.T. 11/16/20, 7, 9, 15–17. The officers got out of their patrol car, and walked closer to the gas station. All three officers were White. Mr. Shivers, a 20 year old[1] Black man who was sitting on the curb in front of the gas station, got up and ran. Two officers chased him and tackled him. While he was on the ground the officers saw the outline of a gun in his pants pocket and recovered it. N.T. 11/16/20, 9–18; C-1.

The officers knew nothing about Mr. Shivers when they decided to chase and tackle him. Officer Sidebotham testified "I never met your client a day in my life." N.T. 11/16/20, 18.

Officer Sidebotham further testified that he is very familiar with the area, and the gas station specifically. It is a residential area, but there have been numerous shootings in the area. A gang, the Ozone Gang, operates in the area and is known for its drug selling and gun violence. That day he saw two gang members in front of the store who were not with Mr. Shivers. N.T. 11/16/20, 5–9, 18–19.

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[1] Docket, p.2 ("Date of Birth 8/29/1998").

SUMMARY OF ARGUMENT

In *Illinois v. Wardlow*, 526 U.S. 1126 (2000), the United States Supreme Court held that flight in a high crime area, but not in other areas, provides reasonable suspicion for a police pursuit and stop. Since then, the Superior Court has applied this Fourth Amendment framework to Article I, Section 8. This Court should reject that conclusion and hold that under Article I, Section 8 flight in a high crime area by itself does not provide the requisite reasonable suspicion for the police intrusions. *Wardlow* is inconsistent with the heightened privacy and personal securities protections guaranteed by Pennsylvania's independent Constitution.

Consideration of a high crime area as a factor involves no conduct by the individual suspect. It accounts for only the past criminal conduct of others, but nonetheless allows the past conduct of complete strangers to reduce the rights of the person targeted. But a person has a right to avoid contact with the police where there is no constitutional basis for a police intrusion. Even the United States Supreme Court in *Wardlow* acknowledged that there are many possible innocent reasons for flight,

refusing to accept *Illinois*' argument that it *per se* provides reasonable suspicion.

There are also lawful reasons why an individual may have a concealed firearm. That is why this Court held that this conduct alone does not provide reasonable suspicion for a stop, **and** that the fact that the conduct occurred in a high crime area could not provide any additional support for a finding of reasonable suspicion. *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019). Likewise, in *Commonwealth v. Barr*, 266 A.3d 25 (Pa. 2021), because many people now lawfully can possess marijuana, the Court held that this conduct alone could be not be the basis for the requisite probable cause finding in that case. This Court concluded that "it is of no moment whether the area in which the stop occurred is known as a 'high crime area.'" *Id.* at 94.

Reliance on an area's crime rate as a factor to justify denying privacy and security rights to the people who live or work there is also discriminatory. Several Justices have stated as much, and a majority of this Court recognized this truth in *Barr*. Many people have no choice but to live in crime riddled areas, and they are often minorities. They cannot afford to move elsewhere.

In *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996), this Court parted ways with the United States Supreme Court and held that a police pursuit of a fleeing person is a seizure under Article I, Section 8, requiring a showing of reasonable suspicion. *Matos* involved three cases from Philadelphia. The Court ordered the suppression of evidence discarded during the police pursuit in each of the cases as the fruit of an unreasonable seizure without reasonable suspicion. The Court did not discuss the nature of each location, whether high crime or otherwise. In other words, this Court considered the location irrelevant to its suppression ruling. This Court should make the implicit holding of *Matos* explicit and hold that a police pursuit and stop because flight is in a high crime area is without reasonable suspicion and violates Article I, Section 8.

ARGUMENT

A. Since Flight Alone From Police Does Not Provide Reasonable Suspicion For Police To Chase And Stop An Individual, Article I, Section 8 Prohibits The Police From Doing So Solely Because Of The Location Of The Flight, 'A High Crime Area', Involving No Additional Conduct By The Individual.

1. The Court should overrule the Superior Court's Article I, Section 8 flight in a high crime area decisions.

The United States Supreme Court held that police need no justification at all for chasing a person who runs away upon seeing them. *California v. Hodari D.*, 499 U.S. 621 (1991).

This Court, based on Article I, Section 8's greater concerns for personal security and protecting individuals from coercive police activity, parted ways with the Court and held that a police chase of an individual is a seizure under the Pennsylvania Constitution that must be justified by individualized reasonable suspicion. *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996).

Building on its decision in *Hodari D.*, the United States Supreme Court held that when police catch up and physically stop an individual, there is reasonable suspicion for that seizure if the suspect fled in a high crime area. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

Whether this Court should follow *Wardlow* as a matter of state constitutional law is an issue of first impression for this Court. In *In the Interest of D.M.*, 743 A.2d 422, (Pa. 1999) ("*D.M. I*"), police received an anonymous phone call of a man with a gun on a street corner in Philadelphia. The call stated that he was a Black male and described his clothes. The officer was only a block away when he heard the radio call. He drove to the corner and saw D.M. who matched the description. *Id.* at 424. D.M. ran from the officer and police caught him. The Court held that his flight was irrelevant to the reasonable suspicion analysis because D.M. did nothing to arouse the officer's suspicion before he fled. *Id.* at 426. Finding the matching of the non-detailed clothing description alone insufficient to provide reasonable suspicion for a seizure the Court held that there was a violation of the Fourth Amendment and Article I, Section 8. *Id.* at 425–26.

The United States Supreme Court vacated the decision in *D.M.* and ordered reconsideration in light of *Wardlow*. On remand, in light of *Wardlow*, the Court reversed its earlier Fourth Amendment ruling and held that it incorrectly ruled before that flight was irrelevant to the reasonable suspicion analysis. "[T]he totality of the circumstances test, by its very

definition, requires that the whole picture be considered when determining whether the police possessed the requisite cause to stop appellant," and "flight was clearly relevant." *In the Interest of D.M.*, 781 A.2d 1161, 1164–65 (Pa. 2001) (*D.M. II*).

The Court, without any analysis, stated in a footnote that D.M. was also not entitled "to relief on independent state grounds." *Id.* at 1165 n.2. Three Justices dissented from the Article I, Section 8 ruling that there was reasonable suspicion to seize D.M. *Id.* at 1165 (Zappala, J., dissenting) (joined by Flaherty, C.J., and Nigro, J.).

The *D.M.* case had nothing to do with flight in a high crime area. There were no high crime area facts, and no discussion of whether in such a case, Article I, Section 8 would permit a pursuit and stop. *Id.* at 1162. "Once again, the sole issue before our court is whether the police demonstrated the requisite cause to stop appellant, based on an anonymous tip, where appellant fled when the officer approached him" *Id.* It is well settled by this Court that "the holdings of judicial decisions are to be read against their facts." *Morrison Informatics v. Members 1st Federal Credit Union*, 139 A.3d 1241, 1247 (Pa. 2016). *See, e.g.*, *Commonwealth v. Marconi*, 64 A.3d 1036, 1041 n.4 (Pa. 2013). *See also*, e.g., *In re L.J.*, 79 A.3d

1073, 1081 (Pa. 2013) (statement in prior case was *dicta* "because the passage was not necessary to the outcome of the case.").

Even though *D.M. II* was not about and did address the relevance or effect of a "high crime area" on search and seizure rights under state law, for decades the Superior Court has believed it controls the question. Ever since *Commonwealth v. Jefferson*, 853 A.2d 404, 407 (Pa. Super. 2004), the Superior Court has erroneously held that it may not even consider the Article I, Section 8 issue presented here because it is bound by this Court's decision in *D.M. II*. *See, e.g.*, *Commonwealth v. Rice*, 304 A.3d 1255, 1262–63 (Pa. Super. 2023); *Commonwealth v. Barnes*, 296 A.3d 52, 58–59 (Pa. Super. 2023). That was the reason for the ruling on the merits here as well. "We are not free, as Shivers requests, to reach a contrary conclusion under the Pennsylvania law. This Court is bound to follow the *D.M.* majority's clear adoption of *Wardlow* for state constitutional purposes. *See Commonwealth v. Jefferson*, 853 A.2d 404, 407 (Pa. Super. 2004)."[2] *Shivers*, 2023 WL 5771571 at *3.

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[2] The Superior Court noted in *Jefferson* that it disagreed with the state constitutional holding in *D.M. II*, but that it felt compelled to find that flight in a high crime area provides reasonable suspicion for a seizure. "Although the dissent in *D.M. II* makes a compelling argument that the state constitutional issue was decided in a contrary manner in *Matos*, we recognize that we are bound to follow the *D.M. II* majority's clear adoption of *Wardlow*." 853 A.2d at 407 n.2.

This Court should find that *Jefferson* was wrong. *D.M. II* did not decide whether flight in a high crime area alone is sufficient to justify a seizure under Article 1, Section 8. If, however, the Court concludes that *Jefferson* was right in finding that *D.M. II* is precedential on the issue, then this Court should overrule *D.M. II*. *Stare decisis* should not control the disposition of this case. "[S]*tare decisis* 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our previous decisions.'" *Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020), *quoting Agostini v. Felton*, 521 U.S. 203, 235 (1997). *See, e.g.*, *Commonwealth v. Moore*, 103 A.3d 1240, 1250 (Pa. 2014) ("*Stare decisis* is not a vehicle for perpetuating error"); *Commonwealth v. Hvidza*, 116 A.3d 1103, 1105 (Pa. 2015) (Court holds that the prior decision was "incompletely reasoned on the relevant point and should not remain controlling authority.").

Because finding reasonable suspicion when there is flight from police solely because the conduct occurred in a high crime area is inconsistent with the values of Article I, Section 8 and this Court's privacy decisions the Court should make clear to the Superior Court that running

at the sight of police does not justify a seizure of the person no matter where it occurs.

2. An *Edmunds* analysis compels a holding that the location of flight in a high crime area cannot justify a finding of reasonable suspicion under Article I, Section 8.

In *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), this Court held that as a general rule litigants should aid the Court in its independent analysis under the Pennsylvania Constitution by briefing the following factors:

1) text of the Pennsylvania constitutional provision;

2) history of the provision, including Pennsylvania case-law;

3) related case-law from other states;

4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Id. at 895.

a. The text of the Pennsylvania Constitution supports a right for all people to avoid contact with the police.

The text of Article I, Section 8 is similar to that of the Fourth Amendment. However, in some respects it protects privacy interests

more than the United States Constitution.[3] *See*, *e.g.*; *Commonwealth v. Alexander*, 243 A.3d 177, 186–87 (Pa. 2020).

With the right of people to be secure in their persons, the Pennsylvania Constitution places more emphasis on this right than the Fourth Amendment. While the Fourth Amendment generally requires that a warrant be based on probable cause, Article I, Section 8 specifies that a warrant based on probable cause is required "to seize any person." In addition, the particularity requirement for all warrants is stronger than the Fourth Amendment. It provides that whether the seizure of a person or a search, no warrant "shall issue without describing them as nearly as

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[3] Article I, Section 8 provides:

> Section 8. The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

The Fourth Amendment provides:

> Amendment IV.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

may be. . . ." *See, e.g., Commonwealth v. Grossman*, 555 A.2d 896, 899 (Pa. 1989) (particularity requirement for warrants "is more stringent than that of the Fourth Amendment.").

This case involves the privacy right to be left alone by avoiding contact with the police unless there is reasonable suspicion of criminal activity. This right is guaranteed to all under the text of Article I, Section 8, including those living in high crime areas. There is another provision of the Pennsylvania Constitution that has no federal counterpart that textually fortifies these search and seizure rights. Article I, Section I states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursing their own happiness.

In a case similar to this one involving an unjustifiable seizure of an individual by an official, the Superior Court held that this violated freedom of locomotion guaranteed by Article I, Section I. *Commonwealth v. Doe*, 167 A. 241, 242 (Pa. Super. 1933).

> We have here in the case before us a man walking away from a car which he had attempted to enter. He had committed no crime within sight of the

> officer, he had a right to go wherever he pleased, and the constable had no right to stop him. The officer by interposing his body sought to stop him, and thus prevent defendant's further progress; the latter had the right to push him aside, using as much force as was reasonably necessary. He was not required to remain and submit to the inquiries of the officer. Freedom of locomotion, although subject to proper restrictions, is included in the "liberty" guaranteed by our Constitution (see article 1, §§ 1, 9). *Id.*

Textually, there is no support for a conclusion that Article I, Section 8 does not protect individuals in high crime areas, unlike other areas, from what would otherwise be an unconstitutional pursuit and stop.

b. The history of Article I, Section 8 and this Court's many decisions protect greater privacy and the security of the person.

That the history of Article I, Section 8 is independent of the Fourth Amendment is established by the fact that it was part of the original 1776 Constitution (Clause 10), many years before the adoption of the Fourth Amendment. *See, e.g.*, *Commonwealth v. Sell*, 407 A.2d 457, 466 (Pa. 1983) (holding that defendants have automatic standing under Article I, Section 8). "[T]he survival of that language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as

part of our organic law in 1777 continues to enjoy the mandate of the people of this Commonwealth." *Id.* at 467. And, Article I, Section 8 still enjoys that mandate from the people twenty years after *Sell*. This Court has repeated the *Sell* quote many times in different contexts where it has recognized independent Article I, Section 8 rights. *See*, *e.g.*, *Commonwealth v. Alexander*, 243 A.3d 177, 183 (Pa. 2020); *Edmunds*, 586 A.2d at 897; *Commonwealth v. Matos*, 672 A.2d 769, 773 (Pa. 1996).

For at least forty-five years, as the United States Supreme Court diminished its view of the importance of privacy rights under the Fourth Amendment, this Court has independently charted its own path protecting the privacy of Pennsylvania citizens. Beginning with *Commonwealth v. De John*, 403 A.2d 1283 (Pa. 1979), this Court held that that unlike the Fourth Amendment, Article I, Section 8 protects the privacy of a person's bank records and "tied" Article I, Section 8 "into the implicit right to privacy in this Commonwealth." *Id.* at 1291.

Since then, in a variety of contexts, this Court has held that individuals have more search and seizure privacy rights then conferred under the Fourth Amendment. *See, e.g.*, *Commonwealth v. Shaw*, 770 A.2d 295 (Pa. 2001) (police need a warrant to obtain an individual's blood test

results); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) (no good faith exception to the exclusionary rule for defective search warrants); *Commonwealth v. Sell*, *supra*; *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989) (warrant required to obtain the phone register of an individual).

In *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), this Court held that in order to protect privacy interests in the contents of a person's car, Article I, Section 8 requires a warrant authorizing the search. The Court rejected the Commonwealth's argument that Pennsylvania should follow the Fourth Amendment rule that police may search a car based on their own estimation of probable cause.

> [A] steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth. *Edmunds*, 586 A.2d at 898. It would hold that the unshakable links forged by our cases should never have been formed. But fortunately, the links have been established. We must follow the chain and acknowledge the greater privacy protections established by the Pennsylvania Constitution and our precedents.

Id. at 207.

Particularly relevant here, this Court has also been vigilant in protecting individuals from intrusions on the person. "[A]n invasion of one's

person is, in the usual case, [a] more severe intrusion than on one's property." *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993) (holding that unlike a canine drug sniff of a locker, such a sniff of a satchel an individual is carrying requires probable cause). *See*, *e.g.*, *Commonwealth v. Arter*, 151 A.3d 149, 152 (Pa. 2016) (Article I, Section 8 requires suppression in revocation proceedings where probationer was illegally searched). *Commonwealth v. Johnson*, 86 A.3d 182, 187 (Pa. 2014) (Article I, Section 8 requires suppression where evidence is obtained from an arrest of the person not based on probable cause); *Theodore v. Delaware Valley School District*, 836 A.2d 76, 89 (Pa. 2003) (recognizing Article I, Section 8 rights for urine testing of students).

i. The significance of *Commonwealth v. Matos.*

In *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996), this Court held that Article I, Section 8 guarantees greater protection from seizures than provided under the Fourth Amendment. In *California v. Hodari D.*, 499 U.S. 621 (1991), the United States Supreme Court considered an issue involving a person running at the sight of police in a high crime area. The youth fled, and while running dropped a "rock" later found to be crack cocaine. *Id.* at 622. California had conceded in the lower court that

there was no reasonable suspicion for the chase if it was considered a seizure. The Court found the concession was irrelevant, even if right, because the only issue for review was whether Hodari had been seized at the moment he dropped the cocaine while running away from a police pursuit. *Id.* at 623 n.1. And, the Court held that under the Fourth Amendment a police chase needs no justification because it is not a seizure. *Id.* at 629 (the defendant "was not seized until he was tackled").

In *Matos* this Court declined to follow *Hodari D.*, holding that under Article I, Section 8 a police chase is a seizure that must be supported by reasonable suspicion. The Court did an *Edmunds* analysis, noting that "[t]his Court has clearly and emphatically recognized that our citizens enjoy a strong right of privacy, and that our citizens are therefore entitled to broader protection in certain circumstances under our state constitution." *Id.* at 775. "Certainly the [Article I, Section 8] rights of individuals to be free from intrusive conduct by police is implicated when the police pursue an individual, absent reasonable suspicion . . . ." *Id.* at 773. The Court agreed with its past decisions that "exhibit a concern for protecting individuals against coercive police conduct." *Id.* at 774.

The Court held that "we reject *Hodari D.* as incompatible with the privacy rights guaranteed to the citizens of this Commonwealth under Article I, Section 8 of the Pennsylvania Constitution." *Id.* at 776. It also approvingly cited and discussed the Court's earlier decision in *Commonwealth v. Jeffries*, 311 A. 2d 914 (Pa. 1973), "a case factually indistinct from the cases subjudice . . . ." *Id.* at 774 (footnote omitted). Not only did *Matos* agree with *Jeffries* that a police chase is a seizure, it emphasized that the remedy for forced abandonment should be suppression.

> The Court applied the exclusionary rule and held that the abandoned contraband must be suppressed because "[t]he causative factor in the abandonment . . . was the unlawful and coercive action of the police in chasing Jeffries in order to seize him . . ." 454 Pa. at 327, 311 A.2d at 918. Thus, the Court found both that Jeffries had been seized by the conduct of the police in chasing him, and that the contraband abandoned by Jeffries must be suppressed.

Id.

Matos involved three separate Philadelphia cases where police chased an individual, evidence was discarded, and the trial judge suppressed the evidence. In discussing the facts of each case and upholding the trial court's suppression orders, the Court never mentions the location of the flight, whether a high crime area or otherwise. *Id.* at 770–71.

> The three instant appeals were consolidated for oral argument and will be disposed of together in this opinion since they raise a single identical issue; namely, whether contraband discarded by a person fleeing a police officer are the fruits of an illegal 'seizure' where the officer possessed neither 'probable cause' to arrest the individual nor reasonable suspicion to stop the individual and conduct a *Terry* frisk. In each case, we reverse the Superior Court and hold that the discarded contraband must be suppressed.

Id. at 770 (footnote omitted).

Matos did not carve out an exception because the location of the unprovoked flight is a high crime area. This Court should hold that *Matos* and Article I, Section 8 are incompatible with finding reasonable suspicion based solely on the discriminatory factor involving no further conduct, the location of a "high crime area."

c. State court decisions reject *Wardlow*'s high crime area rationale.

There are few decisions ruling on state constitutional grounds whether *Wardlow* should be followed. That is likely for two reasons. One, it is useless for litigants in many states to raise a state constitutional issue because, as this Court has noted, several use a lockstep approach, always holding that the state constitution provides the same rights as

the Fourth Amendment. *See*, *e.g., Commonwealth v. Edmunds*, 586 A.2d 887, 900 n.11 (Pa. 1991).

The second reason is that factually many of the police pursuit cases involve contraband discarded while police are pursuing the individual. For states that follow *Hodari D.*, there is no reasonable suspicion analysis necessary because the United States Supreme Court held the police chase is not a seizure under the Fourth Amendment. *See*, *e.g.*, *State v. Agundis*, 903 P.2d 752, 756–57 (Idaho 1995); *Johnson v. State*, 8645. W.2d 708, 722–23 (Texas 1993); *Perez v. State*, 620 So.2d 1258 (Fla. 1993). Counsel is aware of only two decisions that have considered *Wardlow* on state constitutional grounds and no decisions that firmly support its conclusion independently under state law.

In *State v. Nicholson*, 188 S.W. 3d 649 (Tenn. 2006), the Tennessee Supreme Court held that it was not following *Wardlow* as a matter of state constitutional law because there were too many possible innocent reasons for flight in a high crime area. *Id.* at 661. "[I]nnocent reasons for flight abound in high crime areas, including fear of retribution for speaking to officers; unwillingness to appear as witness, and fear of being wrongly apprehended as a guilty party." *Id.*

One other court employs this logic to reject *Wardlow* on factual bases, even though it purports to adopt *Wardlow*'s legal conclusion as a matter of state law. In *Washington v. State of Maryland*, 287 A.3d 301 (Md. 2022), Maryland's Supreme Court held that it was following its longstanding lockstep approach, adhering to the holding in *Wardlow* on state constitutional grounds. *Id.* at 309, 337. However, it reached the very dubious conclusion that *Wardlow* did not hold that there must be a Fourth Amendment finding of reasonable suspicion where there is flight in a high crime area. The court interpreted *Wardlow* as holding that the weight of the high crime factor could be reduced under a fact-based totality of the circumstances analysis. *Id.* at 308–09, 322, 325.

Relying on substantial evidence, it concluded that Baltimore had an established pattern of discriminatory stops of Black people, producing a fear of police contacts which could lead to unprovoked flight. *Id.* at 324–25, 337. The Maryland court held that consistent with *Wardlow*, the fact that "people, particularly young African American men, may flee police for innocent reasons, may be considered in the Fourth Amendment reasonable suspicion analysis." *Id.* at 325. Thus, the one case that purported

to follow *Wardlow* on state constitutional grounds was hardly an endorsement of that United States Supreme Court decision.[4]

There is a lack of any persuasive state court authority in support of this Court following *Wardlow* under Article I, Section 8 of the Pennsylvania Constitution.

d. Policy considerations strongly favor holding that the discriminatory location factor of flight in a high crime area cannot be the sole decisive factor for a finding of reasonable suspicion.

Whether the location of suspected criminal activity, a high crime area, should ever be considered a factor in determining whether there is reasonable suspicion to believe a particular individual is engaged in criminal activity has been questioned in many opinions of this Court in recent years. Nevertheless, in a recent case, *In the Interest of T.W.*, 261 A.3d 409 (Pa. 2021), where the defense conceded that there was reasonable suspicion for a stop and frisk (*id.* at 418), this Court held that the fact

[4] Very recently, in a Fourth Amendment case, the District of Columbia noted in a case involving unprovoked flight from police that "our court has long warned against reliance on the 'high crime area' phrase as 'talismanic litany to justify *Terry* stops . . . ." *Mayo v. United States*, 315 A. 3d 606, 633 (D.C. Ct. Appeals 2024). The Court explained the many reasons why a person may run away from police, particularly young males. Without more information, flight does not suggest consciousness of guilt, as "the much stronger inference would be that these individuals were seeking to avoid having their liberty suspended and their dignity compromised." *Id.* at 626.

that the conduct occurred in a high crime area was a relevant fact in determining whether the officer acted reasonably after the frisk in removing an object from the suspect's pocket. *Id.* at 414, 422. *See Commonwealth v. Thompson*, 985 A.2d 928 (Pa. 2009) (same).

These decisions apply only Fourth Amendment law in upholding "high crime area" as a factor in determining the constitutional legitimacy of police action directed at an individual. This is the first case raising an independent Article I, Section 8 claim. Thus, this Court could distinguish those decisions on state constitutional grounds based on the invalidity of the factor or choose to overrule them.[5] On the other hand, the Court could issue a narrower ruling because of the blatant unfairness of consideration of high crime area in this context. The only conduct that is the basis for the seizure here is flight, a factor held to be inadequate by itself to establish reasonable suspicion. A high crime area being the only place where flight alone can give rise to a finding of reasonable suspicion should be

[5] The problem of "high crime area" being considered a factor in motion to suppress proceedings is compounded by a recent Superior Court decision holding that "high crime area" can be a factor for a jury at trial to consider when determining whether a defendant is guilty of an offense. In *Commonwealth v. Jemeil Murphy*, 926 EDA 2022, 2023 WL 8434799 (Pa. Super., Dec. 5, 2023) (non-precedential), the issue for the jury to resolve was whether the defendant possessed a firearm. The Superior Court rejected a claim that evidence of a "high crime area" is irrelevant at trial or too prejudicial, holding that it was admissible relevant evidence. *Id.* at *9.

constitutionally impermissible for two reasons. One, it involves no conduct by the particular individual, adding nothing to flight when considering whether the intrusion on **the individual** was constitutionally permissible. Second, it unfairly discriminates and diminishes the constitutional rights of those who live or work in these neighborhoods with a lot of crime. In *Matos* the Court implicitly decided this Article I, Section 8 issue by ordering the suppression of evidence in three cases where police chased fleeing individuals in Philadelphia with no discussion of the location of the conduct in any of the cases. *See supra* at 20–23. This Court should now make that ruling explicit.

i. Flight should be considered a weak conduct factor in assessing whether there is reasonable suspicion.

The starting point for an analysis of whether unprovoked flight upon seeing police should be considered a factor tending to indicate criminal activity is recognition that individuals have a constitutional right to avoid contact with the police. Without reasonable suspicion to detain, police may approach the individual, but "the person addressed has an equal right to ignore his interrogation and walk away." *Terry v. Ohio*, 392 U.S., 33 (1968) (Harlan, J., concurring). *See*, *e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (same). "A refusal to cooperate without more

does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

There is no requirement that a person must wait to be confronted face to face with an officer's approach and questioning to exercise this constitutional right to be left alone. Thus, an individual who walks away upon seeing police in a high crime area provides no reasonable suspicion for a seizure. *E.g.*, *In the Interest of J.G.*, 860 A.2d 185, 189 (Pa. Super. 2004). Even when the person chooses to walk away quickly, the police have no basis to pursue him. *Commonwealth v. Martinez*, 588 A.2d 513, 514 (Pa. Super. 1991). *See Commonwealth v. Jeffries*, 311 A.2d 914, 915 (Pa. 1973) (no reasonable suspicion where defendant "quickened his pace," police pursued, and he then ran).

When an individual merely quickens his pace as police approach they can easily catch up to him to engage him, with at a minimum a constitutionally acceptable approach and questioning that is not considered a seizure. The majority of the United States Supreme Court in *Wardlow* (a 5–4 decision) characterized running away at the sight of police as "headlong flight . . . the consummate act of evasion. It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow*,

528 U.S. at 124. One could just as easily characterize running away as the most effective way of exercising the constitutional right to avoid contact with the police.

Because the Court had to acknowledge "that there are innocent reasons for flight from police" (*id.* at 125), in effect it recognized that flight is ambiguous, and rejected the state's *per se* contention that flight by itself provides a basis for a finding of reasonable suspicion justifying a seizure. *Id.* at 130, 136 (Stevens J, dissenting). However, the Court held that Wardlow's seizure was based on reasonable suspicion because his unprovoked flight occurred in a high crime area. *Id.* at 124–25.

The Court in *Wardlow* noted that "courts do not have empirical studies" (*id.* at 124), and that "the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior." *Id.* at 125. For the four dissenters, the opinion by Justice Stevens suggested that if the location of the flight is to be considered a factor, the Court arguably got it backwards in singling out those who live in high crime areas for a finding of reasonable suspicion. Justice Stevens noted that "[a]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is

entirely innocent." *Id.* at 132, n.7 (explaining reasons and evidence why minority residents are more likely to flee). "[B]ecause many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so." *Id.* at 139.

Empirical studies and several court decisions based on these studies support the conclusion that flight should be given little value in indicating possible criminal activity, particularly with minorities because of their experiences with police.[6]

Philadelphia, for example, has been party in federal district court to a consent decree since 2011 to try to eliminate or reduce race as a factor in police behavior with minority residents.[7] While there has been some

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[6] After analyzing data from the New York Office of the Attorney General commentators concluded that flight "is a very poor indicator that crime is afoot." Tracey L. Mears & Bernard E. Harcourt, Foreword, *Transparent Adjudication and Social Science Research*, *in Constitutional Criminal Procedure*, 90 J. CRIM. L. CRIMINOLOGY, 733, 792 (2000).

[7] This is not usually the result of overt racism in Philadelphia or elsewhere. Rather, studies show that police, like other individuals, are susceptible to implicit biases based on cultural stereotypes associating people of color with criminality. *See, e.g.,* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, And Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOLOGY, Vol. 6, 887–91 (2004); Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response To The Implicit Black-Crime Association, in Racial Divide: Racial and Ethnic Bias In The Criminal Justice System*, 39, 41–43 (2008) (discussing and documenting the "considerable and growing literature" on implicit bias).

progress, a 2020 district court decision, with the parties agreeing, found that "full regression analysis shows that the large disparity in stops and frisks between white and minority residents of Philadelphia are not explained or justified by non-racial factors . . . ." *Bailey v. Philadelphia*, C.A., No. 10-5952 (E.D.Pa.) (2020 Tenth Report).

Several state courts have concluded, based on studies like this in big cities, and the effect the disparate discriminatory treatment has on minorities, that flight should be given very little weight in assessing reasonable suspicion.[8]

In *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016), the Massachusetts Supreme Court noted that given the realities of studies

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[8] With many recent incidents of police shootings of Black men, their "flight is hardly" unprovoked; "it is a result of racial profiling and media-fueled fear of fatal encounters." Note, *Don't Make A Run For It: Rethinking* Illinois v. Wardlow, *In Light Of Police Shootings And The Nature Of Reasonable Suspicion*, 31 U. FLA. J.L. 2 Pub Pol'y, 137, 138 (2020). For example, in June, 2021 Minneapolis police officer Derek Chauvin was sentenced to 22 ½ years in prison for the May, 2020 murder of George Floyd after a pedestrian stop. The video footage of the murder by Officer Chauvin was widely distributed nationally. *See, e.g.*, https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder.

It is not just stops but arrests, and other police conduct that may affect the desire of minorities and those in high crime areas to avoid any police contacts. *See, e.g., United States v. Mateo-Medina*, 845 F.3d 546, 552 (3d Cir. 2017) (holding that an arrest record may not be considered at sentencing, and referencing many recent studies that concluded that where a person lives, his socioeconomic status, and race may affect police decisions whether to arrest or not).

showing that Black men are disproportionally stopped by police in Boston, flight "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to avoid criminal activity." *Id.* at 342. The court concluded that flight "should be given little, if any, weight as a factor probative of reasonable suspicion." *Id.* at 341.

Other courts have followed *Warren*'s lead because statistics in their state's major urban areas show the same racial disparities. *See*, *E.g.*, *Washington v. State of Maryland*, *supra* (Baltimore) *People v. Horton*, 142 N.E. 2d 854, 867–68 (Ill. App (1st) 2019) (Chicago); *See also*, *e.g.*, *State v. Clinton-Amiable*, 232 A.3d 1092, 1103 (Vt. 2020) (noting problem with stops in Vermont); *State v. Arreola-Botello,* 451 P. 3d 939, 949 n.9 (Or. 2019).

There is no basis for treating unprovoked flight from the police as anything other than a weak factor in any totality of the circumstances analysis of whether police have a reasonable basis to seize a person. When this weak factor of conduct is the sole conduct observed by the police officer, the non-conduct discriminatory factor of the flight's location

in a high crime area should be held to fall far short of providing a basis for a finding of reasonable suspicion.

ii. Because "high crime area" involves no additional conduct by the suspect it cannot be the sole basis for finding reasonable suspicion.

There has been justifiable criticism of the current state of affairs of officers giving subjective testimony to establish the vague and undefined term "high crime area."[9] However, if new strict objective evidentiary standards are enforced for this determination the real problem would still remain.

The reasonable suspicion determination for a seizure is "to discern whether there was a particularized and objective basis for suspecting the detained individual of criminal activity." *Commonwealth v. Jackson*, 302 A.3d 737 (Pa. 2023) (evenly divided court) (Brobson J., OISA).[10] Answering the question, three dissenting Justices each explained why high crime area should not be considered as a factor in the analysis and would have found the facts did not otherwise support reasonable suspicion. *See id.* at

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[9] In this case both the prosecutor and the judge acknowledged that police subjective testimony in cases was "a joke" that resulted in every area of Philadelphia being considered a high crime area. N.T. 7/1/20, 22–24.

[10] "OISA" will be used to designate the opinion in support of affirmance, while "OISR" will indicate the opinions in support of reversal.

767 (Dougherty, J., OISR); at 756 (Donohue, J., OISR); at 769 (Wecht, J., OISR). Justice Brobson's opinion did not consider the high crime factor, concluding that other circumstances provided reasonable suspicion independent of any area considerations. *Id.* at 751. Justice Brobson favorably explained the holding in *Commonwealth v. Rohrbach*, 267 A.3d 526 (Pa. Super. 2021), and contrasted it with the facts of *Jackson* where there had been shots fired shortly before Jackson was stopped.

The Superior Court held in *Rohrbach* that there was no reasonable suspicion for police to stop the defendant's car in a gym parking lot where the driver backed away his car to evade the police.

> On appeal, the Superior Court concluded that the troopers lacked reasonable suspicion to detain the defendant because the troopers did not have a particularized basis for suspecting the defendant of criminal activity. Rather, because the troopers relied on vague reports of random criminal conduct police had received in the past and not any specific report about the defendant's vehicle, the Superior Court opined that there was "as much likelihood that [the trooper's] car (or anyone else's) fit the owner's reports. On these facts, no one had reasonable grounds to stop the trooper's cruiser for an investigative detention, any more than the troopers had reasonable grounds to stop [the defendants'] for one." *Id.* at 529. Thus, as the Superior Court emphasized, there was no particularized connection between the alleged criminal activity that occurred in the parking lot and the defendant.

> Rather, the troopers had only observed the defendant's "car pull away from them in a high-crime area," which was insufficient to support reasonable suspicion to detain the defendant. Id. at 529–30.

Id. at 752.

On somewhat similar facts where the driver of a car in a church parking lot attempted to evade police, this Court held that prior criminal behavior in the parking lot could not justify a finding of reasonable suspicion because it was conduct by other people, not the defendant. *Commonwealth v. DeWitt*, 608 A.2d 1030, 1034 (Pa. 1992). "Although the police had previous notice from the property owner of criminal behavior in the church parking lot, there was absolutely no evidence that the vehicle in question was engaged in the type of activity complained of." *Id.* (footnote omitted).

The need for an objective finding that the individual defendant's conduct warranted a finding of reasonable suspicion was also emphasized pre-*Wardlow* in *Brown v. Texas*, 443 U.S. 47, 51 (1979). The officer observed *Brown* in an alley walking in the opposite direction from another man. The "area . . . where appellant was stopped had a high incidence of drug traffic." *Id.* at 49. Finding Brown's conduct insufficient to establish

reasonable suspicion, the Court held that the fact that he was in a high crime area "is not a basis for concluding that appellant himself was engaged in criminal conduct." *Id.* at 52.

Two recent decisions of this Court highlight the principle that when an individual's conduct may be innocent, and by itself cannot support a finding of a justification for the police action, the fact that the conduct was in a high crime area does not change that conclusion.

In *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019), this Court held that criminal activity justifying a stop could not be inferred from carrying a concealed gun in public because many people have licenses to carry firearms. *Id.* at 936–37. This Court emphasized that "[t]he individualized nature of the justification for a seizure is central to the *Terry* doctrine . . . ." *Id.* at 928. It rejected a Superior Court rule that permitted all those possessing concealed weapons to be stopped. With that "rule, consideration of the individual had been substituted for categorical treatment of a rather large class . . . ." *Id.* at 939.

The Commonwealth argued that because Hicks was in possession of a gun at 3:00 a.m. in a high crime area, the stop was justified. *Id.* at 947. *Hicks* noted that the time and location's "high crime" designation

"can serve as relevant contextual consideration in a totality of the circumstances inquiry," *id.* at 951. However, because the conduct at issue was solely possession of the gun, "there remains no particularized basis upon which to suspect that Hick's mere possession of a concealed firearm was unlawful." *Id.*

In *Commonwealth v. Barr*, 266 A.3d 25 (Pa. 2021) similarly, the Commonwealth claimed that there was probable cause to search a car solely because police smelled marijuana after a lawful traffic stop, and the stop was in a high crime area. Because the Medical Marijuana Act ("MMA") now permits many people to have a license to possess marijuana, this Court, explaining and relying on *Hicks*, held that the intrusion was unconstitutional. *Id.* at 43–44. The Court concluded that "it is of no moment whether the area in which the stop occurred is known as a 'high crime area.'" *Id.* at 94.

Where the conduct at issue is essentially a single fact, concealed possession of a gun (Hicks), possession of marijuana (Barr), or flight here, that cannot support a finding of a constitutional police intrusion, high crime area, involving no conduct, cannot fill the void.

iii. High crime area as a factor is discriminatory and unfairly diminishes the Fourth Amendment rights of those living in these areas.

Attaching significance to a high crime area is not only wrong because it is not reflective of the individual's conduct. As Chief Justice Todd noted in *Commonwealth v. Thompson*, 985 A.2d 928 (Pa. 2009), the problem is "compounded" by it also being discriminatory.

> Three reasons suggest caution in allowing the nature of an area to carry weight in assessing whether activity that occurs in the area is likely to be criminal in nature. The dangers are those of committing the ecological fallacy (impermissibly attributing the characteristics of the area to individuals within the area); of legitimizing an impermissibly high incidence of false positives (arresting innocent parties), compounded by the likely correlation of factors such as race and socioeconomic status with the erroneous seizure decisions; and of giving valid definition to the concept of a 'high-crime area,' especially since police behavior can largely produce the measure or indicators of such areas (the problem of a 'self-fulfilling prophecy').

Commonwealth v. Thompson, 985 A.2d at 952 n. 9 (Todd, J., dissenting).

In *Thompson*, the late Chief Justice Baer also disagreed with the majority's reliance on high crime area as a factor "because the rights of Pennsylvania residents in both high-crime and low-crime areas remain the same under our Constitution." *Id.* at 944 (Baer, C.J., concurring). He

concluded that subjecting those in high crime areas to searches while it would constitutionally be unacceptable in low crime areas "is particularly offensive to our longstanding constitutional principles protecting every person in our society from intrusive action by the state." *Id.*

In *Barr*, the majority opinion on behalf of this Court also noted that this is another reason for a court not to depend on the conduct's location in a high crime area in judging the constitutionality of police conduct directed to a particular individual. This Court quoted approvingly from the late Judge Strassburger's Superior Court opinion in *Barr*.

> The late Honorable Eugene Strassburger, III, penned a brief but thoughtful concurring opinion. Judge Strassburger joined the Majority Opinion in its entirety. He wrote "separately to note [his] discontent with the Commonwealth's reliance on the "high-crime area" factor in support of a finding of probable cause." *Id.* at 1291 (Strassburger, J., concurring). Judge Strassburger expressed his view that "the status of the neighborhood at issue as a 'high-crime area' should not be relevant to the probable cause determination." *Id.* In his opinion, "[p]eople who live in poor areas that are riddled with crime do not have fewer constitutional rights than people who have the means to live in 'nice' neighborhoods." *Id.* The two other judges on the panel joined Judge Strassburger's Concurring Opinion.

Barr, 266 A.3d at 35.

Most people do not choose to live in crime riddled areas. Many of those living in low socioeconomic high crime areas cannot afford to move elsewhere to better protect themselves and their families. And many of these are poor Black people. As we have shown, study after study shows that they suffer discriminatory treatment by police. Flight is a weak factor that does not support a finding of criminality in part because past discriminatory treatment is a significant innocent reason for a person to try and avoid contact with the police. *See supra* at 30–35.

This Court should not compound the problem of discriminatory treatment by conferring fewer search and seizure rights for those in high crime areas. "Article I, Section 8 'is tied into the implicit right to privacy in this Commonwealth.'" *Commonwealth v. Alexander*, 243 A.3d 177, 206 (Pa. 2020), *quoting Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979). Consistent with privacy rights guaranteed by Article I, Section 8 and this Court's decisions, particularly *Matos*, the Court should hold that flight in all areas, including high crime ones, does not provide reasonable suspicion for police to pursue and stop an individual.

B. The Defendant Preserved The Article I, Section 8 Departure Claim That Was Decided By The Lower Court And The Superior Court On The Merits.

This case stands in sharp contrast to *Commonwealth v. Bishop*, A.3d 833 (Pa. 2019), where this Court held that a Pennsylvania Constitution issue was waived. *Bishop* presented an issue of first impression. *Id.* at 836. Counsel only alleged in broad terms a Pennsylvania Constitution violation in the trial court and Superior Court. They gave no reasons why those courts should depart from federal constitutional rulings and hold that the Pennsylvania Constitution provided more protection for the particular right against self-incrimination claim. *Id.* at 840–43. As a result, the Commonwealth never had a chance to meaningfully respond to the departure in those courts because it "was never previously put on notice . . . ." *Id.* at 842. The Court decided to "deem it appropriate, in our discretion, to enforce the waiver here." *Id.*

This case does not demand the same result. Reasons were provided in the lower court for a departure under Pennsylvania's Constitution, the Commonwealth was put on notice, and it contested the claim. More importantly, both the suppression court and the Superior Court were powerless to grant relief. For twenty years the Superior Court has rejected

the Article I, Section 8 claim presented here. *Commonwealth v. Jefferson*, 853 A.2d 404 (Pa. Super. 2004) and its progeny held that it was bound by a decision of this Court. *See supra* at 9–13.

This case presents a question of waiver in substantially the same context as in *Commonwealth v. Alexander*, 243 A.3d 117 (Pa. 2020), one different from the earlier decision in *Bishop*. In *Alexander* counsel requested the Court to decide an Article I, Section 8 issue that the Court had rejected in *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014). Even though counsel in the lower court never explicitly asked for *Gary* to be overruled, this Court held that the Article I, Section 8 issue was "sufficiently preserved." It was raised in a pre-printed omnibus motion to suppress, and the lawyer at the motion to suppress hearing noted that one ground was "the broader protections of Article I, Section 8." *Id.* at 393 n.8.[11]

This Court's issue preservation holding in *Alexander* is consistent with Pa.R.A.P. 302(a) and its purpose. That rule provides that "[i]ssues

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[11] The Court has noted that a litigant who urges a reversal of a prior precedent faces "long odds," and therefore may seek only to distinguish a prior case. The Court has held that where it deems it necessary for a proper disposition of the issue it will decide whether the prior decision should still be considered controlling on the issue. *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414, 446 n.49 (Pa. 2017).

not raised in the trial court are waived and cannot be raised on appeal for the first time." The primary purpose of Rule 302 is to give the lower court "the opportunity to correct its errors as early as possible." *In the Interest of F.C. III*, 2A.3d 1201, 1212 (Pa. 2010).

Because the lower courts have no authority to "correct" a ruling that is compelled by a higher court decision, issue identification, as in *Alexander* should always be sufficient in a case like this. The issue has been "raised in the trial court." Pa.R.A.P. 302(a). There is no waiver here where much more was done to preserve the Pennsylvania Constitution issue than in *Bishop* and *Alexander*.

The omnibus motion to suppress alleged that the physical evidence was obtained in violation of federal constitutional rights and "independently protected rights secured by the Pennsylvania Constitution," in that "he was subjected to a stop and frisk on less than reasonable suspicion," and other rights violations.

Before the motion to suppress hearing, counsel filed a "Motion To Compel Evidence Relating To 'High Crime Area', Or, In The Alternative Preclude Testimony of High Crime Area." The Motion alleged the following:

> 6. Prior to the United States Supreme Court's decision in *Illinois v. Wardlow*, 528 U.S. 119 (2000), Pennsylvania Courts had specifically held that flight in a high crime area alone was not a sufficient basis for reasonable suspicion. See, e.g., *In the Interest of D.M.*, 743 A.2d 422 (Pa. 2000) (remanded post-*Wardlow* and reversed, *In the Interest of D.M.*, 781 A.2d 1161 (2001)). Since that time, "high crime areas" have become a fact of constitutional law and the term can now transform an unconstitutional seizure into a constitutional one merely by its invocation without any additional evidence save the testifying officer's subjective opinion.

The Motion specified the objective data the court should compel the Commonwealth to produce in support of a "high crime area claim." Paragraph 5. The motion asserted that without requiring the Commonwealth to produce the requested data, high crime area testimony was devoid of meaning and lacked any foundation. Paragraphs 3. and 8. If the court was not going to compel the Commonwealth to produce objective data, the motion alternatively asked that the court order that any testimony concerning high crime testimony be banned at the suppression hearing.

At a hearing on the motion to compel on January 10, 2020, counsel argued that denying the motion to compel, and relying on just police testimony of what is a high crime area "is dangerous to everybody's Constitutional rights under the Fourth Amendment and Article I, Section 8 of

the Pennsylvania Constitution . . . .” N.T. 1/10/20, 4–5. Counsel pointed out that while *Wardlow* stated there was no empirical data, there were studies in New York City that showed that police making pedestrian stops claimed in essence that the entire city was a high crime area. Further, that there was only one arrest for every 45 stops. N.T. 1/10/20, 6–7.

Both the judge, the Honorable Donna Woelpper, and the prosecutor acknowledged at the hearing that police testimony at motion to suppress hearings in Philadelphia characterize every area in Philadelphia as a high crime area. N.T. 1/10/20, 22–24. Nevertheless, Judge Woelpper denied the motion, refusing to compel the Commonwealth to produce objective verifiable data, or to bar officer testimony of high crime area at the suppression hearing.

Judge Woelpper presided over the motion to suppress hearing on November 16, 2020. Counsel argued among other grounds that there was no reasonable suspicion to justify the stop of Mr. Shivers “under the 4th and 14th Amendments of the U.S. Constitution as well as the broader protections of the Pennsylvania Constitution, Article One Section Eight.” N.T. 11/16/20, 3–4.

After the conviction and the filing of a timely appeal, counsel filed a timely 1925(b) statement contending that seizing someone based on flight in a high crime area does not constitute reasonable suspicion under the Pennsylvania Constitution. It asserted that Article I, Section 8 is more protective than the U.S. Constitution in protecting against unwanted intrusions, including a police seizure of the person. In her opinion (Exhibit B), Judge Woelpper discussed and rejected the Article I, Section 8 claim on the merits. Exhibit B, 4–9.

In our Superior Court brief, the principal issue was whether flight in a high crime area provided reasonable suspicion under Article I Section 8 for a seizure of the person. The Commonwealth responded on the merits, contending that controlling precedent compelled the Superior Court to reject the claim.[12] The Superior Court decided the Article I, Section 8 issue on the merits. Exhibit A, *3. This Court should do the same.

[12] In a footnote it stated only that "it is not entirely clear that defendant properly preserved this claim for appellate review." *See* Commonwealth Superior Court brief, 9–10, n.1.

CONCLUSION

The Court should hold that the suppression court erred by ruling that Mr. Shivers' flight in a high crime area provided reasonable suspicion for police to pursue and tackle him. The Superior Court opinion that sustained that ruling should be reversed, and this Court should award a new trial.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 26th day of September, 2024, that the Brief For Appellant filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 10,269 as counted by Microsoft Word.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

/S/

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EXHIBIT A

305 A.3d 970 (Table)
Unpublished Disposition
NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Phillip **SHIVERS**, Appellant

No. 538 EDA 2022
|
Filed September 7, 2023

Appeal from the Judgment of Sentence Entered January 27, 2022, In the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-0005546-2019

BEFORE: KING, J., SULLIVAN, J., and STEVENS, P.J.E. *

MEMORANDUM BY SULLIVAN, J.:

***1** Phillip **Shivers** ("**Shivers**") appeals from the judgment of sentence imposed following the denial of his motion to suppress and his conviction for violations of the Uniform Firearms Act ("VUFA"), resisting arrest, and furnishing false identification to law enforcement. [1] We affirm.

The trial court summarized the evidence at the suppression hearing, its ruling, and its trial verdict as follows:

> [**Shivers**] was arrested in the City [of Philadelphia]'s 35th district where Officer [Michael] Sidebotham had been assigned for the entirety of his eleven ... year career as a police officer. Officer Sidebotham conducts "gang intelligence" in the area and attempts to associate people with certain groups or gangs in the district".... He testified that he is familiar with the specific location of [**Shivers's**] arrest, that the area is mostly residential but contains a gas station and a 7-eleven store, that he conducted numerous narcotics investigations in the area, that the area has high narcotics and gun activity, that a gang called the "Ozone Gang" operates in the immediate area and "sells narcotics," that the Ozone Gang is known for drug activity and gun violence, and that the Ozone Gang "feud[s]" with another gang in the area....
>
> Around 7:30 p.m. on July 18, 2019, Officer Sidebotham and two fellow officers, Officers Del Ricci and Officer Lutz, [2] were on routine patrol wearing police uniforms and traveling in an unmarked patrol car. The [o]fficers went to the gas station at 5945 Front Street because they "know a lot of the guys that are over there." Upon pulling into the parking lot, Officer Sidebotham saw [**Shivers**] at the front of the store to the right of several other males, two of whom Officer Sidebotham recognized as "Ozone Gang members." [**Shivers**] was "right in front of the door" to the gas station, blocking the entranceway to the store....
>
> As the [o]fficers exited the patrol car, [**Shivers**] started "backing away." When the [o]officers walked closer, [**Shivers**] "ran through the parking lot and then he ran southbound on Front Street." Officer Sidebotham testified that [**Shivers**] ran with his hands in front of him, in a manner consistent with people "holding onto a firearm or holding their pants up." Officers Sidebotham and Lutz chased [**Shivers**] on foot, and Officer Lutz tackled him. While [**Shivers**] was on the ground, Officer Sidebotham saw the outline of a firearm in [**Shivers's**] right pants pocket. Officer Sidebotham testified that he had recovered firearms from "hundreds" of suspects and discerned immediately, based on his experience, that the object in [**Shivers's**] pocket was a firearm. Reaching inside [**Shivers's**] pants pocket, Officer Sidebotham recovered a .32 caliber handgun....
>
> Based on the above testimony, as well as the body[-]worn camera footage, this [c]ourt denied [**Shivers's**] suppression motion and ruled that his "unprovoked flight in a high crime area gave the officers reasonable suspicion to pursue and stop him." This [c]ourt further held that "Officer Sidebotham lawfully recovered a firearm from inside the front pocket of [**Shivers's**] pants." ...
>
> ***2** At trial, the Commonwealth again presented the body[-] worn camera footage and testimony of Officer Sidebotham, which mirrored his testimony from the hearing on [**Shivers's**] suppression motion. At the conclusion of trial, this [c]ourt found [**Shivers**] guilty of violating Sections 6105, 6106, and 6108 of the

Uniform Firearms Act, resisting arrest, and providing false information to a law enforcement officer.

Trial Court Opinion, 4/14/22, at 2-4 (internal citations omitted). The trial court imposed a sentence of three years of probation. ***See*** N.T., 1/27/22, 9.

Shivers appealed from the judgment of sentence, and he and the trial court complied with Pa.R.A.P. 1925.

On appeal, **Shivers** presents the following issues for our review:

1. Was there not a lack of reasonable suspicion to justify a seizure under article 1, section 8 of the Pennsylvania Constitution and the Fourth Amendment based solely on the flight in this case in a high crime area?

2. Was not the tackling of [**Shivers**] in this case violative of federal and state law because it was an intrusion that amounted to an arrest and required probable cause?

Shivers's Brief at 3 (unnecessary capitalization omitted).

Shivers's issues implicate the denial of his suppression motion. Our standard of review of a challenge to a trial court's denial of a suppression motion is limited to determining whether the court's findings of fact are supported by the record and the legal conclusions drawn from those facts are correct. ***See Commonwealth v. Thomas***, 273 A.3d 1190, 1195 (Pa. Super. 2022). This Court may only consider the evidence of the prosecution and so much of the defense evidence as remains uncontradicted when read in the context of the record. It is the suppression court's sole province as fact-finder to pass on the credibility of witnesses and the weight to give their testimony. ***See id.*** When the record supports the suppression court's factual findings, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions from those facts. ***See Commonwealth v. Williams***, 941 A.2d 14, 27 (Pa. Super. 2008) (*en banc*).

Our scope of review is limited to the evidentiary record at the hearing on the pre-trial suppression motion. ***See Commonwealth v. Smith***, —— A.3d ——, ——, 1278 WDA 2022 (Pa. Super., August 7, 2023, slip op. at 6). Where an appellant asserts legal error in a suppression court's ruling, it is the Court's duty to determine if the suppression court properly applied the law to the facts. ***See id.*** at 7.

The law recognizes three distinct levels of interaction between police officers and citizens: (1) a mere encounter, (2) an investigative detention; and (3) a custodial detention. ***See Commonwealth v. Barnes***, 296 A.3d 52, 56 (Pa. Super. 2023). A court examines the totality of the circumstances in considering an interaction between officers and citizens and assesses whether a reasonable person would have felt free to leave or otherwise terminate the encounter. ***See Commonwealth v. Lyles***, 97 A.3d 298, 302-03 (Pa. 2014). The totality of the circumstances test centers on whether the suspect has in some way been restrained by the show of physical force or coercive authority; a seizure does not occur when police merely approach a person in public. ***See id.*** at 302.

Unprovoked flight in a high crime area is sufficient to create a reasonable suspicion to justify a ***Terry***[3] stop under the federal constitution. ***See Illinois v. Wardlow***, 528 U.S. 119, 124-25. The same is true under Article I, Section 8 of the Pennsylvania constitution. ***See In re D.M.***, 781 A.2d 1161, 1163 (Pa. 2011); ***Barnes***, 296 A.3d at 58 (also stating that "[w]hile additional facts may negate reasonable suspicion, ***Wardlow*** requires no additional facts to establish reasonable suspicion"). The pertinent factors in assessing reasonable suspicion include "nervous, evasive behavior ... [and] [h]eadlong flight—wherever it occurs—is the consummate act of evasion...." ***See D.M.***, 781 A.2d at 1164 (quoting ***Wardlow***, 528 U.S. at 124).

3** **Shivers** asserts that: (1) the police provoked his flight by pursuing him as he walked away, (2) even if ***Wardlow controls, this Court should reach a contrary conclusion under the Pennsylvania constitution, (3) a high crime area should not be a factor in a reasonable suspicion analysis, (4) ***Wardlow*** is inconsistent with other United States Supreme Court cases, (5) other courts assessing reasonable suspicion have given flight very little weight, and (6) the police lacked reasonable suspicion to seize him.

The trial court credited the evidence that **Shivers** engaged in unprovoked flight after seeing Officer Sidebotham in a high crime area, which established reasonable suspicion and supported **Shivers's** detention. ***See*** Trial Court Opinion, 4/14/22, at 5-9.

Viewing the Commonwealth's evidence and the uncontradicted defense evidence in the light most favorable to the Commonwealth, the testimony established Officer Sidebotham's approach of **Shivers** constituted a mere encounter. ***See Lyles***, 97 A.3d at 302. **Shivers's** unprovoked flight upon seeing Officer Sidebotham in a high crime area established reasonable suspicion to stop and frisk him under Pennsylvania law, which is coterminous with federal law. ***See D.M.***, 781 A.2d at 1163; ***Barnes***, 296 A.3d at 58. [4]

We are not free, as **Shivers** requests, to reach a contrary conclusion under the Pennsylvania law. This Court is bound to follow the ***D.M.*** majority's clear adoption of ***Wardlow*** for state constitutional purposes. ***See Commonwealth v. Jefferson***, 853 A.2d 404, 407 (Pa. Super. 2004). ***See also Commonwealth v. Martin***, 205 A.3d 1247, 1252 (Pa. Super. 2019) (stating that Superior Court is bound by existing precedent under the doctrine of *stare decisis* and follows controlling precedent). **Shivers's** contention that ***Wardlow*** is inconsistent with other United States Supreme Court precedent does not free this Court from its obligation to follow Pennsylvania Supreme Court precedent, nor does his contention that courts of other states and commentors have asserted that flight should not be given significant weight. [5]

Shivers's second issue asserts that a police officer tackling him amounted to an arrest and required the existence of probable cause. [6] Every ***Terry*** stop requires a detention during which a suspect is not free to leave but subject to the control of the detaining officer. ***See Commonwealth v. Guillespie***, 745 A.2d 654, 660 (Pa. Super. 2000). In some instances, police may handcuff a suspect during an investigative detention without that detention being converted into an arrest. ***See Commonwealth v. Carter***, 643 A.2d 61, 67 n.2 (Pa. 1994); ***Commonwealth v. Valentin***, 748 A.2d 711, 714 (Pa. Super. 2000) (holding that physically grabbing a suspect does not convert a detention into an arrest). The need to secure a suspect to permit an investigative detention may permit transportation of the suspect. ***See Commonwealth v. Revere***, 888 A.2d 696, 707-08 (Pa. 2005).

4** **Shivers** asserts police are required to use the least intrusive means to conduct a ***Terry stop, tackling exceeds what ***Terry*** permitted, police were required to yell to him before tackling him, and tackling constituted an arrest.

We discern no error of law in the trial court's ruling, which implicitly sanctions the tackling of **Shivers** for the purposes of an investigative detention. The evidence shows that the pursuing officers first attempted to grab **Shivers**, ***see*** N.T. 11/16/20, at 13; Exhibit C-2 at 00:00-01. An officer only tackled **Shivers** after **Shivers** tore his own shirt trying to break from the grasp of an officer who sought to detain him. ***See*** Exhibit C-2 at 00:01-02. **Shivers's** active resistance compelled stronger restraint to allow the police to conduct the investigative detention the facts supported. [7] Accordingly, the tackling of **Shivers** did not constitute an arrest but an investigative detention. ***See Revere***, 888 A.2d at 707-08; ***Valentin***, 748 A.2d at 714; ***Carter***, 643 A.2d at 67.

Judgment of sentence affirmed.

All Citations

305 A.3d 970 (Table), 2023 WL 5771571

Footnotes

* Former Justice specially assigned to the Superior Court.

1 ***See*** 18 Pa.C.S.A. §§ 6105, 6106, 6108, 5104, 4914.

2 The officers' first names cannot be determined from the record.

3 ***Terry v. Ohio***, 392 U.S. 1 (1968).

4 The record does not support **Shivers's** assertion that he walked away from the officers; the trial court found that he ran away, a finding supported by the video evidence introduced at the suppression hearing. ***See*** N.T., 11/16/20, 9; Exhibit C-1 at 00:30-38.

5 **Shivers** also asserts that ***Commonwealth v. Barr***, 266 A.3d 25 (Pa. 2021), establishes that a high crime area is not a factor that should be assessed in examining the legality of a stop. ***See* Shivers's** Brief at 16. In ***Barr***, the Court held that a high crime area is irrelevant where officers saw nothing suspicious ***before*** initiating a stop. ***See Barr***, 266 A.3d at 44. ***Barr*** did not purport to overturn ***D.M.*** Indeed, only two months before ***Barr***, the Supreme Court affirmed that a suspect's presence in a high crime area may be considered in assessing reasonable suspicion. ***See Interest of T.W.***, 261 A.3d 409, 424 n.5 (Pa. 2021).

6 **Shivers** does not argue probable cause was lacking in this case. To the extent **Shivers** requests that this Court independently hold that there was a violation of state law or the state constitution, ***see* Shivers's** Brief at 38, we decline to issue such a pronouncement. ***See Commonwealth v. Fuentes***, 272 A.3d 511, 521 (Pa. Super. 2022) (stating that an intermediate appellate court is obligated to follow Supreme Court precedent and does not have the prerogative to enunciate new principles of law or expand existing legal doctrines).

7 **Shivers** cites the United States Supreme Court's statement in ***Florida v. Royer***, 460 U.S. 491, 500 (1983), that "the least intrusive means reasonably available [should be employed] to verify or dispel the officer's suspicion," after a suspect's detention. ***See* Shivers's** Brief at 36. However, ***Royer*** does not address the means by which police detain a suspect but instead their conduct ***after*** a seizure has occurred. ***See Royer***, 460 U.S. at 500. Further, on the facts of this case, where **Shivers** continued to flee after a uniformed officer grabbed him in an attempt to detain him, it is unclear what lesser method than tackling the police could have employed, nor is there any reason on this record to believe, as **Shivers** asserts, that shouting "stop" would have resulted in his compliance, where an attempt at lesser physical restraint had failed.

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EXHIBIT B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0005546-2019
VS.	:	
PHILLIP SHIVERS	:	538 EDA 2022

OPINION

WOELPPER, DONNA, J.

Phillip Shivers ("Appellant") appeals his convictions and sentence, and this Court submits this Opinion in accordance with Pa.R.A.P. 1925, recommending that its judgment be affirmed.

I. PROCEDURAL HISTORY

Appellant was charged with unlawfully carrying a firearm without a license (18 Pa.C.S.A. § 6106), unlawfully possessing a firearm as a convicted felon (18 Pa.C.S.A. § 6105), unlawfully carrying a firearm on the public streets of Philadelphia (18 Pa.C.S.A. § 6108), resisting arrest (18 Pa.C.S.A. § 5104), and providing false identification to a law enforcement officer (18 Pa.C.S.A. § 4914). Before trial, Appellant filed a motion to compel the Commonwealth to produce statistical evidence regarding whether Appellant's arrest occurred in a "high crime area," and a motion to suppress physical evidence.

On January 10, 2020, this Court conducted a hearing on Appellant's motion to compel, and after holding the matter under advisement, denied the motion on July 1, 2020. (N.T. 1/10/20; N.T. 7/1/20). On November 16, 2020, this Court conducted a hearing on Appellant's suppression motion, and after holding the matter under advisement, denied the motion on February 10, 2021.

On November 18, 2021, following a bench trial, this Court found Appellant guilty of the above charges. (N.T. 11/18/21 at pg. 20). On January 27, 2022, this Court sentenced Appellant to an aggregate term of three (3) years' probation. (N.T. 1/27/22 at pg. 9).

On February 16, 2022, Appellant filed a timely notice of appeal to the Superior Court, and on March 21, 2022, he filed a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b).

II. FACTS

Appellant filed a motion to suppress physical evidence arguing that police officers had neither reasonable suspicion nor probable cause to conduct the *Terry*[1] stop that led to his arrest for unlawfully possessing a firearm. At the hearing on Appellant's motion, the Commonwealth presented the testimony of Police Officer Michael Sidebotham ("Officer Sidebotham"), who arrested Appellant in the area of 5945 North Front Street Philadelphia, Pennsylvania. The Commonwealth also presented video fromOfficer Sidebotham's body worn camera.

Appellant was arrested in the City's 35th district, where Officer Sidebotham had been assigned for the entirety of his eleven (11) year career as a police officer. Officer Sidebotham conducts "gang intelligence" in the area and attempts to "associate people with certain groups or gangs in the district." (N.T. 11/16/20 at pgs. 5-6). He testified that he is familiar with the specific location of Appellant's arrest, that the area is mostly residential but contains a gas station and a 7-eleven store, that he conducted numerous narcotics investigations in the area, that the area has high narcotics and gun activity, that a gang called the "Ozone Gang" operates in the immediate area and "sells narcotics," that the Ozone Gang is known for drug activity and gun violence, and that the Ozone Gang "feud[s]" with another gang in the area. (Id. at pgs. 5-8).

[1] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Around 7:30 p.m. on July 18, 2019, Officer Sidebotham and two fellow officers, Officer Del Ricci and Officer Lutz, were on routine patrol wearing police uniforms and traveling in an unmarked patrol car. The Officers went to the gas station at 5945 North Front Street because they "know a lot of the guys that are over there." Upon pulling into the parking lot, Officer Sidebotham saw Appellant at the front of the store to the right of several other males, two of whom Officer Sidebotham recognized as "Ozone Gang members." Appellant was "right in front of the door" to the gas station, blocking the entranceway to the store. (Id. at pgs. 5-9, 16).

As the Officers exited the patrol car, Appellant started "backing away." When the Officers walked closer, Appellant "ran through the parking lot and then he ran southbound on Front Street." Officer Sidebotham testified that Appellant ran with his hands in front of him, in a manner consistent with people "holding onto a firearm or holding their pants up." Officers Sidebotham and Lutz chased Appellant on foot, and Officer Lutz tackled him. While Appellant was on the ground, Officer Sidebotham saw the outline of a firearm in Appellant's right pants pocket. Officer Sidebotham testified that he had recovered firearms from "hundreds" of suspects and discerned immediately, based on his experience, that the object in Appellant's pocket was a firearm. Reaching inside Appellant's pants pocket, Officer Sidebotham recovered a .32 caliber handgun. (Id. at pgs. 9-18).

Based on the above testimony, as well as the body worn camera footage, this Court denied Appellant's suppression motion and ruled that his "unprovoked flight in a high crime area gave the officers reasonable suspicion to pursue and stop him." This Court further held that "Officer Sidebotham lawfully recovered a firearm from inside the front pocket of [Appellant's] pants." (N.T. 2/10/21 at pg. 6).

At trial, the Commonwealth again presented the body worn camera footage and testimony of Officer Sidebotham, which mirrored his testimony from the hearing on Appellant's suppression motion. At the conclusion of trial, this Court found Appellant guilty of violating Sections 6105, 6106, and 6108 of the Uniform Firearms Act, resisting arrest, and providing false identification to a law enforcement officer.

III. ISSUES RAISED ON APPEAL

Appellant raises the following issues on appeal:

1. "This Court erred as a matter of law and violated Appellant's rights under the Pennsylvania and U.S. Constitutions by failing to suppress evidence of the firearm. There was no reasonable suspicion to seize Appellant by chasing and tackling him. The testimony by the police officer at the motion to suppress did not adequately establish the area where Appellant was chased by police was a 'high crime area.' Further, the chasing and tackling of Appellant constituted an arrest, and there was no probable cause for such an intrusion."

2. "This Court erred and abused its discretion by denying Appellant's motion to compel discovery, or in the alternative preclude testimony by police about the area in question being a 'high crime area,' because the information requested by Appellant was relevant to this Court's determination of whether the area where Appellant was chased and tackled by police was, in fact, 'a high-crime area.' The denial of the motion was an abuse of discretion under Pa.R.Crim.P. 573(B)(2)(iv) because the defense established that disclosure would be in the interests of justice. The denial of the motion also violated fundamental fairness as provided by Article I, Section 1 of [the] Pennsylvania Constitution, as well as the Fourteenth Amendment to the U.S. Constitution, because discovery was necessary to prepare for and defend against critical evidentiary determinations of the Commonwealth's claim that the area where Appellant was arrested was a 'high crime area.'"

3. "This Court violated Appellant's rights under Article I, Section 8 of [the] Pennsylvania Constitution by holding that police had reasonable suspicion to seize Appellant by chasing and tackling him merely because he fled from them in a so-called high crime area. That the seizure occurred in a high crime area should be irrelevant under the Pennsylvania Constitution because that factor unreasonably denies citizens living in those areas the same search and seizure protections of those who are fortunate enough to live in areas with less crime. Further, 'high crime area' is a vague factor incapable of an acceptable nonarbitrary factual determination necessary to determine an individual's constitutional rights. The Pennsylvania Constitution is more protective than the U.S. Constitution in protecting individuals from unwanted intrusion by police

particularly those involving seizure of the person. *See, e.g., Commonwealth v. Matos*, 672 A.2d 767 (Pa. 1996)."

IV. DISCUSSION

Legal Standard

"In an appeal from the denial of a motion to suppress, [the appellate court's] role is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings." Commonwealth v. Miller, 876 A.2d 427, 429 (Pa. Super. 2005) (citations omitted here). "In making this determination, [the appellate court] may consider only the evidence of the prosecution's witnesses and so much of the defense as, fairly read in the context of the record as a whole, remains uncontradicted." Id. "When the evidence supports the factual findings of the suppression court, [the appellate court] may reverse only if there is an error in the legal conclusions drawn from those factual findings." Id.

1 and 3. Whether the police had reasonable suspicion to stop and frisk Appellant.[2]

Appellant claims the suppression hearing testimony "did not adequately establish the area where Appellant was chased by police was a 'high crime area,'" and that the circumstance of "a high crime area should be irrelevant under the Pennsylvania Constitution because that factor unreasonably denies citizens living in those areas the same search and seizure protections of those who are fortunate enough to live in areas with less crime." Appellant further argues that "high crime area is a vague factor incapable of an acceptable nonarbitrary factual determination necessary to determine an individual's constitutional rights."

[2] As issues 1 and 3 overlap, the Court will address them first, together.

Appellant's argument conflicts with Pennsylvania law. "[P]olice may stop and frisk a person where they had a reasonable suspicion that criminal activity is afoot." In re D.M. (II), 566 Pa. 445, 449 (2001) (citing Terry, 392 U.S. 1). "In order to determine whether the police had a reasonable suspicion, the totality of the circumstances – the whole picture – must be considered." Id. "Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. "Pennsylvania courts have consistently followed *Terry* in stop and frisk cases, including those in which the appellants allege protections pursuant to Article 1, Section 8 of the Pennsylvania Constitution." Id. "Thus, Article 1, § 8 [of Pennsylvania's Constitution] provides citizens no greater protections from *Terry* stops than the Fourth Amendment." Commonwealth v. Jackson, 2021 Pa. Super. 253 (2021).

Although "mere presence in a high crime area [is] insufficient to support a finding of reasonable suspicion," a court can "consider the fact that the stop occurred in a high crime area in assessing the totality of the circumstances." In re D.M., 566 Pa. 445, 450 (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.")). Furthermore, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion and headlong flight – wherever it occurs – is the consummate act of evasion." Id.; Wardlow, 528 U.S. 119, 125 ("[U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to

stay put and remain silent in the face of police questioning."). Accordingly, "unprovoked flight in a high crime area is sufficient to create a reasonable suspicion to justify a *Terry* stop[.]" Id.

In accord with In re. D.M. (II) and Wardlow, supra, the Superior Court has held that a defendant's presence in a high crime area, coupled with his unprovoked flight from police officers, provide officers a reasonable suspicion justifying a *Terry* stop. See e.g., Commonwealth v. Jefferson, 853 A.2d 404 (Pa. Super. 2004); Commonwealth v. Miller, 876 A.2d 427 (Pa. Super. 2005). In Jefferson, "[p]olice were on marked patrol in a Philadelphia neighborhood in which drug sales were common and a shooting recently occurred." Jefferson, 853 A.2d 404, 405. "When the officers saw appellant and another man on the street in the area, the men promptly ran away." Id. "The police then gave chase and during the pursuit, appellant tossed a bag containing PCP to the ground." Id. Relying on In re. D.M. (II) and Wardlow, the Superior Court held that the defendant's unprovoked flight in a high crime area had justified an investigative seizure under both the United States and Pennsylvania Constitutions. Id. at 407 ("In light of the Pennsylvania Supreme Court's holding in *D.M. II*, and the explicit reasoning set out in that case, we conclude that the court adopted the rationale of *Wardlow* for state constitutional purposes. As a result, we are compelled to find that appellant here was not entitled to suppression because the facts established reasonable suspicion under both federal and state principles.").

Similarly, in Miller, police officers investigated a "quality of life complaint" regarding street corner gambling, and the defendant, who was not observed gambling, fled upon seeing the officers. Miller, 876 A.2d 427, 428-429. The officers pursued, apprehended the defendant, and recovered a handgun. Id. At the hearing on the defendant's suppression motion, the defendant argued that "the pursuit was unjustified because he was not engaged in illegal activity prior to his flight, and flight alone does not establish reasonable suspicion." Id. at 431 fn. 4. However, the

Court noted that one of the arresting officers testified that the area of the pursuit is a "high drug area." Id. Following Jefferson, the Court therefore held that the defendant's "presence in a high crime area coupled with his unprovoked flight from the officers gave [the officers] reasonable suspicion that criminal activity was afoot." Id.

Here, Officer Sidebotham testified that he patrolled the district of Appellant's arrest for eleven years. He conducts "gang intelligence" in the area and attempts to "associate people with certain groups or gangs in the district." (N.T. 11/16/20 at pgs. 5-6). Officer Sidebotham testified that he is familiar with the specific location of Appellant's arrest, that he conducted numerous narcotics investigations in the area, that the "Ozone Gang" operates in the area and "sells narcotics," that the Ozone Gang is known for drug activity and gun violence, and that the Ozone Gang "feud[s]" with another gang in the area. In fact, on the evening in question, Officer Sidebotham observed Appellant standing in the immediate vicinity of known Ozone Gang members. (Id. at pgs. 5-9).

As factfinder, this Court determined that Officer Sidebotham credibly testified that the location of his encounter with Appellant is a high crime area. Pennsylvania courts consistently accept an officer's testimony, based on his or her relevant professional experience, as sufficient evidence that a location is a "high crime area" for purposes of establishing reasonable suspicion. See e.g., Miller, supra; Jefferson, supra. Furthermore, Pennsylvania courts consistently hold that "high crime area" is a relevant factor in assessing whether an officer had reasonable suspicion to detain a suspect. Id.; see also, Wardlow, 528 U.S. 119, 124 ("[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.").

Accordingly, the Commonwealth established that Appellant fled from police officers, without provocation, in a high crime area. Consistent with Pennsylvania law, the officers' pursuit and detention of Appellant was supported by a reasonable suspicion, and Appellant's argument to the contrary is unavailing.

2. **Whether this Court abused its discretion by denying Appellant's motion to compel the Commonwealth to produce data regarding the prevalence and categories of crime in the area of Appellant's seizure.**

Preliminarily, this Court did not preclude Appellant from presenting evidence to refute the claim that his seizure occurred in a "high crime area." This Court rather denied Appellant's motion to compel the Commonwealth to produce statistical data regarding the prevalence and categories of crime in the area. Furthermore, in denying Appellant's motion, this Court found that the Commonwealth sustained its burden of establishing "high crime area" through the testimony of Officer Sidebotham.

"[A] police officer's experience may fairly be regarded as a relevant factor in determining probable cause" or reasonable suspicion. Commonwealth v. Thompson, 604 Pa. 198, 209-210 (2009). However, "an officer's testimony in this regard shall not simply reference training and experience abstract from an explanation of their specific application to the circumstances at hand." Id. "Rather, the officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence." Id.

Here, there is a direct nexus between Officer Sidebotham's experience and his testimony that Appellant's stop occurred in a high crime area. Officer Sidebotham testified that he patrolled the district of Appellant's seizure for eleven years. He conducts "gang intelligence" in the area and attempts to "associate people with certain groups or gangs in the district." (N.T. 11/16/20 at

pgs. 5-6). Officer Sidebotham testified that he is familiar with the specific location of Appellant's arrest, that he has conducted numerous narcotics investigations in the area, that the "Ozone Gang" operates in the area and "sells narcotics," that the Ozone Gang is known for drug activity and gun violence, and that the Ozone Gang "feud[s]" with another gang in the area. (Id. at pgs. 5-8).

Based on his considerable experience investigating gangs, drugs, and gun violence in the *same* location as his encounter with Appellant, Officer Sidebotham credibly testified that the location is a "high crime area." As noted, Pennsylvania courts regularly accept an officer's testimony, based on his or her professional experience, as sufficient objective evidence that a location is a "high crime area" for purposes of establishing reasonable suspicion. Officer Sidebotham's testimony in this regard, coupled with Appellant's unprovoked flight, therefore sufficed under Pennsylvania law to establish a reasonable suspicion justifying the *Terry* stop. See e.g., Miller, supra; Jefferson, supra.

V. CONCLUSION

For the reasons set forth in the foregoing Opinion, this Court's judgment should be affirmed.

BY THE COURT:

DATE: 4/14/22

DONNA WOELPPER, J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-00005546-2019
	:	538 EDA 2022
	:	
	:	
vs.	:	
	:	
	:	
PHILLIP SHIVERS	:	

PROOF OF SERVICE

I hereby certify that I am this 14th day of April, 2022, serving the foregoing Opinion on the persons indicated below:

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