

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-467-2016**
:
vs. :
:
RASHEED BOND, :
Defendant :

OPINION AND ORDER

This matter came before the court for a hearing and argument on Defendant’s omnibus pretrial motion. The sole witness to testify at the hearing was Officer Eric Derr of the Williamsport Bureau of Police.

Officer Derr testified that at approximately 7:14 p.m. on February 8, 2016, he was on duty in full uniform, alone, and in a marked patrol unit. As he drove through the parking lot of the convenience store located at the intersection of 6th Avenue and High Street, he observed a sedan with heavily tinted windows. He continued through the parking lot and positioned his vehicle on 6th Avenue about 80 to 100 yards away. He could not see the driver of the vehicle and suspected the driver was inside the convenience store.

When the vehicle pulled out of the parking lot, the driver did not use his turn signal before he drove onto 6th Avenue. At the time, Officer Derr believed the driver had committed a turn signal violation, and he was certain that the window tint was a violation. As the vehicle drove on 6th Avenue, Officer Derr quickly caught up to it. The vehicle only traveled on 6th Avenue for a short distance before the driver pulled the vehicle over to the curb as if to park. Officer Derr then activated his lights to conduct a traffic stop for the window tint and failure to use a turn signal. The tint was so dark that he could not see anything inside the vehicle. From only ten feet behind the driver’s door, he could not see

through the side window.¹

Officer Derr approached the vehicle and made contact with the driver, Defendant Rasheed Bond. Defendant seemed “extremely nervous.” He talked a lot and browsed all areas of the vehicle with his hands and eyes. He was “in and out of every console and pocket.” Officer Derr asked Defendant if there were any drugs or weapons in the vehicle. He also asked Defendant if there was any “weed” in the car or if he had smoked weed. Defendant said the he had smoked weed within an hour of driving.

Officer Derr noticed cell phones all over the car. There were phones on the floor, in the console, in the glove box and in the door pockets. Officer Derr also noticed cash randomly placed in those locations. Officer Derr testified that Defendant did not have a good answer regarding why the phones and the cash were throughout the vehicle. Instead, Defendant became silent and put his head down.

Officer Derr asked for Defendant’s license, registration and insurance. Defendant provided an ID card, and he showed Officer Derr his insurance card on his phone, but he did not provide a registration card. Officer Derr checked on the status of Defendant’s license and whether there were any warrants for his arrest. There were no warrants, but Defendant’s operating privilege was suspended.

Officer Derr testified that, in light of Defendant’s statement that he had smoked weed within an hour of driving, he decided to conduct field sobriety tests to

¹ Subsequent to Defendant’s preliminary hearing, Officer Derr learned that Defendant’s failure to use a turn signal when he exited the parking lot was not a traffic violation.

determine if Defendant was driving under the influence of marijuana. Officer Derr admitted he had “no idea” that Defendant could be under the influence prior to asking him about possessing or smoking marijuana.

Although he readily admitted that he did not believe Defendant was armed and dangerous, Officer Derr removed Defendant from the vehicle and conducted a “pat down” of Defendant for weapons because it was his practice to do so prior to conducting field sobriety tests. Defendant did not threaten Officer Derr or make any movements toward Officer Derr or his weapon, and Officer Derr did not see any bulges or anything that looked like a weapon in the vehicle or on Defendant’s person. Furthermore, by the time Officer Derr removed Defendant from the vehicle and conducted the pat down, other officers had arrived and surrounded them.

During the pat down, Officer Derr felt the sharp edge of Ziploc bags bundled together, which he immediately recognized as narcotics packaging, in Defendant’s groin area. Officer Derr immediately took Defendant into custody and placed him in the back of his patrol car. He shone his flashlight around in the back seat and floor of his patrol car. He told Defendant that he had searched his patrol car prior to the start of his shift, there was nothing in the back of his vehicle, and he would know that anything found in there was Defendant’s. Shortly thereafter, Defendant summoned Officer Derr back to the vehicle. Defendant told Officer Derr that the package was sliding down his leg and he asked Officer Derr to remove it. Officer Derr opened the “fly” of Defendant’s pants and removed a foil Back Woods cigar package, which contained marijuana. Officer Derr then observed seven bundles of heroin inside a plastic sandwich bag on the rear passenger floor board of his patrol

car.

Officer Derr searched Defendant's vehicle and discovered a total of eight cell phones and \$348.

Officer Derr also testified that 6th Avenue and High Street was a "high crime" area. He indicated that he was involved in at least a dozen narcotics investigations in that area. He also noted there were several robberies, weapon offenses and assaults in that area as well. He referred to Commonwealth's Exhibit 1, which depicted the UCR reported crimes within 1000 feet of 6th Avenue and High Street.

Defendant was charged with possession with intent to deliver (heroin), possession of a controlled substance (heroin), possession of a controlled substance (marijuana), and possession of drug paraphernalia.

Defendant filed an omnibus pretrial motion in which he sought suppression of the evidence against him because: (1) Officer Derr lacked probable cause that a violation of the Vehicle Code was occurring or had occurred; (2) Officer Derr made an illegal arrest after "feeling some type of object in the crotch area" of Defendant's pants; and (3) Officer Derr questioned Defendant without reading his Miranda rights. The omnibus motion also included a petition for writ of habeas corpus on the basis that the Commonwealth improperly relied on the opinion of Officer Jeremy Brown, who was not present to testify.

Defendant first asserts that Officer Derr lacked probable cause that a violation of the Vehicle Code was occurring or had occurred. The court cannot agree.

First, in light of the exceptions and exemptions contained in the Vehicle Code provisions regarding window tint, see 75 Pa. C. S. A. §4524(e)(2) and (3), the court believes

that a window tint violation is an offense that is subject to further investigation. Therefore, the appropriate standard would be reasonable suspicion, not probable cause. *Commonwealth v. Chase*, 960 A.2d 108, 116 (Pa. 2008).

Even if the standard is probable cause, however, the court finds the Commonwealth presented sufficient evidence to prove that Officer Derr had probable cause to believe Defendant had committed a Vehicle Code violation.

Probable cause exists when

the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require *only a probability*, and not a prima facie showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009)(citations and internal quotation marks omitted).

Officer Derr testified the side and rear windows were tinted. The window tint was so dark that he could see nothing. Based on this testimony, Officer Derr reasonably believed that Defendant was violating 75 Pa. C. S. §4524(e). See *Commonwealth v. Brubaker*, 5 A.3d 261, 265-66 (Pa. Super. 2010)(window tint violates section 4534(e) if it does not permit a person to see inside the vehicle).

Defendant next asserts that he was illegally arrested because Officer Derr merely felt an object in his pants. Again, the court cannot agree.

Pennsylvania has adopted the plain feel doctrine. This doctrine is applicable where the officer conducting a frisk “feels an object whose mass or contour makes its

criminal character immediately apparent. Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he feels is contraband.”

Commonwealth v. Pakacki, 901 A.2d 983, 989 (Pa. 2004)(quoting *Commonwealth v. Stevenson*, 744 A.2d 1261, 1265 (Pa. 2000)).

Officer Derr testified that while conducting the pat down of Defendant he felt the sharp edge of bags bundled together to make little hard cubes, which he easily recognized as narcotics packaging. Officer Derr had found narcotics in a person’s groin area during pat downs dozens of times in the past. Therefore, contrary to Defendant’s assertions, Officer Derr did not merely feel an object in Defendant’s pants. Instead, the incriminating nature of the narcotics packaging was immediately apparent to Officer Derr from its tactile impression. Since it was readily apparent that Defendant was in possession of drug paraphernalia, Officer Derr had probable cause to arrest Defendant.

Defendant also seeks suppression of his statements because Officer Derr did not read *Miranda* rights to him.

Miranda warnings are required only when a suspect is in custody.

Commonwealth v. Ford, 539 Pa. 85, 650 A.2d 433, 439 (1994). The test for custody is an objective one that focuses on the reasonable impression conveyed by the actions of the police to the person being questioned. *Commonwealth v. Sherwood*, 603 Pa. 92, 982 A.2d 483, 499 (2009).

A person is in custody for *Miranda* purposes only when he ‘is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation.’ *Commonwealth v. Johnson*, 556 Pa. 216, 727 A.2d 1089, 1100 (1999). The U.S. Supreme Court has elaborated that, in determining whether an individual was in custody, the “ultimate

inquiry is ... whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

Sherwood, supra., quoting *Commonwealth v. Boczkowski*, 577 Pa. 421, 846 A.2d 75, 90 (2004)(footnote and parallel citations omitted). “[T]he dictates of *Miranda* do not attach to an investigatory detention.” *Commonwealth v. Kondash*, 808 A.2d 943, 948 (Pa. Super. 2002).

When Defendant made his incriminating statements regarding the use of marijuana, he was not in custody. Rather, Officer Derr was conducting an investigatory detention at that point. Therefore, there was no violation of Defendant’s *Miranda* rights.

Defendant also seeks a writ of habeas corpus with respect to the felony possession with intent to deliver charge based on an assertion that his confrontation rights were violated when the Commonwealth improperly relied upon the opinion of Jeremy Brown, who was not present to testify, to establish that Defendant possessed the heroin with the intent to deliver it.

The court rejects this argument. Despite Defendant’s consternation with the Superior Court decision in *Commonwealth v. Ricker*, 120 A.2d 349 (Pa. Super. 2015), this court is bound to follow that decision until it is reversed or overruled by the Pennsylvania Supreme Court.² Moreover, even without Officer Brown’s opinion testimony, the court believes that the Commonwealth established a prima facie case of possession with intent to deliver from the evidence that Defendant possessed 70 individual wax bags of heroin, 8 cell phones and \$348 in cash. The sheer number of bags of heroin and cell phones would lead

² The Pennsylvania Supreme Court accepted allowance of appeal in *Ricker*. The court understands that defense counsel is preserving this issue in the event that the Pennsylvania Supreme Court reverses *Ricker*.

one to conclude that this is not a case of simple possession for personal use.

Accordingly, the following Order is entered.

ORDER

AND NOW, this 30th day of May 2017, the court denies Defendant's omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Philip M. Masorti, Esquire
Work file
Gary Weber, Esquire, Lycoming Reporter