

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **CP-41-CR-0000204-2017**
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 :
 LEO STEVEN GARDNER, :
 Defendant : **SUPPRESSION**
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Leo Steven Gardner (Defendant), through Counsel, filed a Motion to Suppress on March 30, 2017. A hearing was held on August 31, 2017. At the close of the hearing Defense Counsel requested that a briefing schedule be set. Briefs were submitted and the following is the decision of the Court.

Background

Defendant is charged with two counts of Criminal Conspiracy to Commit Possession with Intent to Deliver¹, both ungraded felonies; one count of Possession with Intent to Deliver², an ungraded felony; three counts of Possession of a Controlled Substance³ (heroin, crack cocaine, and oxycodone), all ungraded misdemeanors; and Possession of Drug Paraphernalia⁴, an ungraded misdemeanor. The charges arise out of motor vehicle stop occurring in Lycoming County, Pennsylvania on January 20, 2017.

¹ 18 Pa.C.S. § 903(a)(1).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(16).

⁴ 35 P.S. § 780-113(a)(32).

Testimony

Testimony of Trooper Tyson Havens

Trooper Tyson Havens (Havens) has been an officer with the Pennsylvania State Police for 24 years. Defense Counsel stipulated that Havens is an expert in investigating and prosecuting Possession with Intent to Deliver offenses.

On January 20, 2017, Havens was on duty with Trooper Ed Dammer (Dammer). At 3:50 pm, they received a telephone call from a male individual on Maybee Hill Road in Loyalsock Township regarding suspicious activity with cars parked on the road. The caller believed that the individuals in the parked vehicles were waiting for someone to come and deliver them drugs.

Havens and Dammer were in full uniform and proceeded to travel in a marked police vehicle towards Maybee Hill Road. While en route they received another phone call from the caller reporting that they had “just missed” a four door silver sedan pull off and was traveling south on Bloomingrove Road. A pick-up truck left and was traveling north on Bloomingrove Road.

Havens testified that he and Dammer were not close enough to get to Bloomingrove Road and Grampian Boulevard in time and recalled that the caller had told him before that one of the suspicious vehicles he had also seen at the Michael Ross project. N.T., 8/31/2017, at 5.

Because the officers were not close enough to intercept what was being reported to them as a drug transaction, they decided to go to the Michael Ross project and see if a four door silver sedan showed up.

While travelling to the Michael Ross project, they observed a four door silver sedan traveling towards them on Sherman Street approaching Heim Avenue. The vehicle turned east on Heim Avenue. As it continued past, the officers were unable to see into the vehicle due to heavy window tint. The officers conducted a traffic stop based on the suspected window tint violation. The vehicle parked on Sherman Street in response to the officer's activation of emergency lights.

Havens approached the driver's side and Dammer approached the passenger's side. The passenger, later determined to be Walter Gardner, got out of the vehicle. He was told by the officer to get back inside the vehicle. Havens testified that the passenger's attempt to distance himself was a "red flag".

Havens also testified that he had arrested the Defendant/driver in 2006 for False Identification to Law Enforcement. Havens testified that the Defendant had an extensive criminal history including four arrests for the sale and manufacture of controlled substances, numerous firearm arrests in Philadelphia; an aggravated assault arrest; and the false identification arrest that Havens himself had personally made. Havens said that criminal history indicated to the officers that they were to be wary of Defendant and passenger. Id. at 16. However it was not clear from Havens' testimony or the motor vehicle recording (MVR) whether the criminal history was ascertained when the troopers returned to their vehicle after the initial traffic stop or in preparation for the suppression hearing.

Havens testified that Defendant had a large bulge in each sweat pant pocket and what appeared to be a hard object in his front hoodie pocket. He believed Defendant could be in possession of weapon.

Havens observed within the vehicle a half dozen round cylinder disk air fresheners and air freshener spray, which is often used as a masking agent to obscure the smell of narcotics. Havens also described Defendant's demeanor during the traffic stop as both argumentative and verbally combative.

The passenger, Walter Gardner (passenger), gave the name of "Amir Brown" and said he had a Pennsylvania Identification Card. Havens suspected that this was not the passenger's name and requested that he exit the vehicle so he could be questioned about Defendant. Havens testified that the passenger also had bulges in his pants pockets, and a small bulge in his hoodie front pouch. Havens was concerned that the passenger was also in possession of a weapon.

Havens testified that he eventually performed a Terry⁵ frisk. He testified that they waited to frisk the vehicle occupants for weapons because if they take risks by not immediately performing a safety frisk, they might be able to get a Defendant to cooperate and be willing turn over drugs.

During the pat down of the passenger, Havens felt a plastic bag and the firmness of the objects within felt like bundles of heroin. Havens was not 100% sure but was fairly confident that it was heroin. Havens testified that he asked the passenger if he would give him what he had or did Havens need to get a search warrant. From the consent search, Havens recovered three (3) bundles of heroin, and two were ten (10) bag bundles and the third bundle was four (4) bags. Havens also

⁵ Terry v. Ohio, 392 U.S. 1, 30 (U.S. 1968). We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

recovered a vial of crack cocaine; two cellular telephones, and \$510 in cash. He felt that the amount of drugs recovered and the amount of cash recovered indicated that the passenger was a drug dealer and not drug user. He arrested the passenger.

Havens then arrested Defendant, and conducted a “probable cause” search of car.

From the vehicle, of which Defendant is the registered owner, Havens recovered 81 oxycodone pills and a cell phone in center console. The vehicle was towed back to PSP barracks. Defendant and passenger were also brought back to the barracks and received their Miranda⁶ warnings. Defendant was processed but did not consent to a swipe of his hands to test for illegal drugs. A search warrant was obtained and the drug swipe of Defendant’s hands was performed. The test result was positive for cocaine and opiates.

Motor Vehicle Recording (MVR)

At 0:39 a silver Chevrolet is seen coming towards the police vehicle. Next, the passenger is seen doing what Havens testified to “got out of the vehicle and started walking away from the vehicle and was told to get back inside.” N.T. 8/31/2017, at 6. The officers explain the reason for the stop was regarding a window tint violation and that vehicle windows in PA are required to have between 70 and 100% light emission.

At 2:45 Havens is back inside the police vehicle with Dammer and states that “Leo Gardner is a bad man” and says there are air fresheners all throughout the car. He states that “he [Defendant] is not going to give consent; he flies off the deep end; he’s good, he’s going to be good”. Havens returns to the silver sedan and tells the

⁶ Miranda v. Arizona, 396 U.S. 868, 90 S. Ct. 140 (U.S. 1969).

passenger that nothing came back on “Amir Brown”. It is not clear from the MVR whether a criminal history search was performed on the Defendant at the time of the stop. Although Havens testified to the Defendant’s criminal history, it is not clear that this was known at the time of the stop. Id. at 8.

At 5:27 Dammer goes around the vehicle checking the window tint, opening the doors, first the driver’s side front, next the driver’s side rear, and lastly the passenger’s side rear. He informs the Defendant/driver that the window tint is at 26% and that it has to be between 70-100%. Both Defendant/driver and passenger are in the car during the tintometer search. The Defendant/driver is protesting the officer opening all of the vehicle doors and states that the tint is the same on every window, to give him a citation, and that he will remove the tint the following day.

At 7:10 the MVR indicates that officers “want to get in car”. At 8:21 Havens asks “Amir Brown” to get out of the car. “Brown” consents to a search of his person. At 10:28 Havens empties “Brown’s” pockets and pats him down. It is also not clear what was found on Brown’s person as Dammer is occluding the view of the portion of the video that shows the drugs taken out of the Defendant’s pocket although a package can be seen being put by Dammer into the right front pocket. Havens testified to it being “three bundles of heroin and two vials of crack cocaine. The heroin was packaged in two-10 bundles or two-10 bag bundles and the third bundle was four bags and the two vials of crack cocaine. He was also in possession of two cellular phones and \$510 cash.” Id. at 12. At this time in the motor vehicle stop Havens informs “Brown” that they are investigating a tip. At 12:32 indicates that he will make application for a search warrant. He cuffs “Brown” at this point but makes a point of

saying that he is not under arrest at this point and will be let go. At 13:30 he orders Defendant out of his vehicle. No bulges are visible on Defendant's person. At 14:11 Defendant tells Havens not to go into his pocket and indicates that there is only cash in his right pocket. Havens finds a cell phone and \$135 on Defendant. Defendant is argumentative through the entire exchange and repeatedly states that Havens is "out of pocket". At 25:20 Havens tells Defendant and passenger that they are not under arrest but they are in custody and he proceeds to provide them with Miranda warnings on the drive back to the barracks in Montoursville.

Discussion

Should the evidence obtained as a result of the traffic stop effected by Trooper Tyson Havens on or about January 20, 2017 of the vehicle driven by [Defendant] be suppressed as violative [sic] of the Defendant's...Constitutional rights?

Police will often stop and search individuals based on radio calls or other anonymous information about alleged criminal activity. This type of information does not establish grounds even for an investigative detention in Pennsylvania or under the Fourth Amendment. Commonwealth v. Jackson, 698 A.2d 571 (Pa. 1997); Commonwealth v. Kue, 692 A.2d 1076 (Pa. 1997); Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997); Commonwealth v. Goodwin, 750 A.2d 795 (Pa. 2000); Commonwealth v. Wimbush, 750 A.2d 807 (Pa. 2000); Florida v. J.L., 120 S. Ct. 1375, 146 L.Ed.2d 254 (2000). In Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992) the court "emphatically reject[ed] the 'ends justify the means' analysis in drug cases" and stated:

The seriousness of the criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of

every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause.” Rodriguez at 1383.

Here the Court finds that the facts provided to the police officers via the anonymous tip alone were insufficient to justify the vehicle stop. The series of events that began the criminal investigation was an anonymous tip. The anonymous tipster was unable to give a make or model of the vehicle that was engaged in the alleged drug transaction. No vehicle registration number was provided to police. The anonymous tipster was unable to identify whether it was his belief that the pick-up truck traveling north on Bloomingrove or the silver sedan traveling south on Bloomingrove was the buyer or the seller in the drug transaction. The anonymous tipster also did not describe to the police officer the occupants of the silver sedan he was reporting. The Court finds that given the case law cited above the anonymous tip simply did not provide enough information to the police that their detention of that silver sedan on January 20, 2017 was objectively reasonable and supported by the facts supplied to the police.

Next, Defense Counsel challenges the probable cause for the motor vehicle stop. The officers could personally see the vehicle windows and that would justify a motor vehicle stop to further investigate the suspected motor vehicle violation. Commonwealth v. Feczko, 10 A.3d 1285 (Pa. Super. 2010). The Supreme Court of Pennsylvania recently held that evidence derived from an illegal automobile search constitutes fruit of the poisonous tree as a result of the illegal seizure unless the taint is removed. Commonwealth v. Shabazz, 166 A.3d 278, 287 (Pa. 2017). Here the taint of the lack of reasonable suspicion from the anonymous tip is removed by the observation by the troopers of the window tint violation. Though there was not

reasonable suspicion to detain the silver sedan based upon the information provided by the anonymous tipster, the next subsequent fact, that the Defendant was operating a motor vehicle with a suspected window tint violation removes the taint of illegality from the seizure.

Defense Counsel then argues that there was no legal basis to order the Defendant out of the vehicle. During a motor vehicle stop police may request both drivers and their passengers to alight from a lawfully stopped car without even reasonable suspicion that criminal activity is afoot. Commonwealth v. Pratt, 930 A.2d 561, 564 (Pa. Super. 2007) (citing Commonwealth v. Brown, 654 A.2d 1096, 1102 (1995)). Therefore, it was legal for the officer to order both the passenger and the Defendant out of the vehicle.

Next, Defense Counsel challenges the probable cause to search the vehicle. In Pennsylvania, no search warrant is required to search a vehicle where probable cause exists to perform the search. Commonwealth v. Gary, 91 A.3d 102 (Pa. 2014) (at a motor vehicle stop for a window tint violation stop the officer asked the driver if there were anything in the car law enforcement should be concerned about; driver indicates “weed”, no search warrant required for subsequent search of vehicle for contraband). Here two searches of the vehicle occurred. The first search occurred at 5:27 when Dammer went around the vehicle with the tintometer and the second at 14:57 when Havens searched the interior for illegal drugs. As the search of the interior of the vehicle occurred after drugs had been recovered from the passenger who consented to the search of his person, the Court finds that probable cause existed to search the vehicle for more contraband.

Lastly, Defense Counsel challenges the probable cause supporting the search warrant to swipe Defendant's hands for the presence of illegal narcotics. Taking the statements in the affidavit of probable cause as true, that Walter Gardner (passenger) was picked up by Defendant on the 1400 block of Memorial Avenue, that at the time of the pick up Walter Gardner did not have in his possession of crack cocaine and heroin, that he obtained the crack cocaine and heroin while inside Defendant's vehicle, it was sufficient to believe that it was likely that Defendant might have opiate and cocaine residue on him. Probable cause exists when the facts and circumstances set forth in the affidavit are sufficient to warrant a man of reasonable caution in believing that the contraband to be seized will be in the specified place.

Commonwealth v. Eicher, 605 A.2d 337 (Pa. Super. 1992).

Conclusion

Though the initial information provided to police did not provide the reasonable suspicion required to make an investigate stop of Defendant's vehicle, the subsequent events leading to the collection of evidence against Defendant were supported by the required level of suspicion. As such, the Court will not suppress the evidence arising from the vehicle stop and search and seizure of Defendant.

ORDER

AND NOW, this 15th day of December, 2017, for the reasons stated in the foregoing opinion, the Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: George Lepley, Jr. Esquire
Scott Werner, Esquire
Gary Weber, Esquire