

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**WILLIAM WEST,
Defendant**

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CR-1340-2016

SUPPRESSION

OPINION AND ORDER

On September 29, 2016, the Defendant filed an Omnibus Pretrial Motion requesting physical evidence be suppressed arguing it was obtained in violation of Defendant's constitutional right to be free from unreasonable search and seizures.

Defendant amended his Pretrial Motion on November 28, 2016, alleging more specifically that the search warrant that was obtained was obtained as a result of an illegal search and seizure and therefore the result of that search should be suppressed. The Court denied the Amended Omnibus due to late filing at the start of the Omnibus hearing on November 29, 2016 and proceeded with the hearing limited to the issues raised in the first Omnibus Pretrial Motion.

Hearings were held on November 29, 2016, and March 21, 2017. Defense requested a continuance of the November 29, 2016 hearing¹, as he wanted the Court and both parties to view the motor vehicle recording on the record and in open court.

Background

William West (Defendant) is charged in a criminal information filed August 10, 2016, with two counts of Possession with Intent to Deliver¹; six counts of Possession of a Controlled Substance²; one count of Possession of a Controlled Substance

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

(marijuana – personal use)³, one count of Possession of Drug Paraphernalia⁴; and one count of Driving while Operating Privilege Suspended/Revoked.⁵ The charges arise out of a motor vehicle stop of Defendant on April 14, 2016, at 10:51 am at the corner of Cherry Street and Brandon Avenue in Williamsport, PA.

Testimony of Pennsylvania State Trooper Robert Williamson

Williamson testified that he has been a PSP Trooper since May of 2014. Prior to being a Pennsylvania State Trooper he was an officer with the Williamsport Bureau of Police for three years. He testified that he received his Act 120 training and that at the police academy he was trained to detect the odor of marijuana. He has assisted in twenty PWID cases and hundreds of possession cases. He conducted the traffic stop of the blue 2010 Ford Taurus, as he believed the window tint was darker than the legal limit. Williamson called in the vehicle stop and Trooper Morse responded to the stop as courtesy back-up.

Williamson observed that Defendant was nervous at the motor vehicle stop. Williamson testified that the Defendant was chain smoking. He also testified that he detected no odor of marijuana from the vehicle. He also testified that he saw no other indicia of illegal drug use.

The PA identification card Defendant provided Williamson was not a valid license to operate a motor vehicle. Williamson neither issued a traffic citation then nor at any point during the stop. Williamson testified that the Defendant's hands were quivering when he handing him his documents. Williamson attempted to run a criminal

³ 35 P.S. § 780-113(a)(31)(i).

⁴ 35 P.S. § 780-113(a)(32)/

⁵ 75 Pa. C.S. § 1543(a).

background check on Defendant but his computer system was not giving him the results quickly. While Williamson was in his police vehicle trying to research Defendant's criminal history, Trooper Morse was talking to Defendant. He testified that Morse told him that Defendant moved his backpack. He testified that after 15 minutes and without Defendant's criminal history he decided to search the car due to Defendant stating that he had federal firearms violations.

Testimony of Officer Devin Thompson

Officer Thompson of the South Williamsport police testified to his training and experience as a dog handler as well to the training of his animal. The Court observed the canine search of Defendant's car from the MVR and Thompson testified that the dog alerted at all seams of the vehicle. Thompson testified that he has been a canine handler officer since 2008. He testified that he was contacted at 11:10 AM to conduct a dog sniff (19 minutes after the initial vehicle stop). He testified that he arrived at 11:18 AM.

Motor Vehicle Recording

The Court watched the motor vehicle recording during the hearings. The Defendant asked, "may I ask, why did you stop me?" Williamson said it was because of the window tint. Williamson asked where he was going. Defendant said to pick up his dogs that were apparent to the officers. Trooper Morse at this point arrived on scene. Two people across the street were yelling from across the street (the people who had Defendant's dogs); however, return responses of yelling by the Defendant did not occur as it would have been audible on the recording. The officers' discussion while attempting the criminal background check is audible. At minute 12:47 into the

vehicle stop the officers asked Defendant to consent to a search of his motor vehicle. Defendant declined. The officer states that it is a search for guns and at that time Defendant says that he went to federal prison over 12 years ago for firearms convictions. At minute 21:45 the barracks contact Williamson and are able to determine that Defendant served federal time for guns, but Williamson states while in the cruiser (not to Defendant) that he is looking for drugs. At minute 23:13 he called for the canine handler. At minute 29:20 the Defendant is heard on the phone with PennDOT regarding the suspended license. At minute 32:21 Defendant was removed from the vehicle and patted down for weapons. At minute 32:50 the officers tell Defendant, that if he walks away, that they are going to get a warrant. At minute 33:08, they tell Defendant that he is not free to leave. At minute 36 Morse mentioned that he does have a tint meter in his vehicle. At minute 36:09 Officer Thompson arrived to conduct the canine search. At minute 40:45 the officers tell Defendant that he is free to go.

Findings of Fact

1. Defendant was detained for 40 minutes. He was not free to leave.
2. Williamson had probable cause for a motor vehicle stop; he had personal knowledge of facts and circumstances that would warrant a prudent man to believe that an offense has been committed, i.e. Williamson could see that the window tint was likely beyond the legal limit. The stop occurred in mid-morning when the windows were easy to see. Williamson testified that when he approached the vehicle the tint was so dark he could not see inside.
3. Williamson's purpose was not to further investigate the window tint violation.

4. Williamson's purpose was to detect criminal activity, specifically activity in regards to the illegal trafficking of drugs.
5. The reason for the motor vehicle stop was to conduct an investigation. Williamson testified "I am an investigator".

Discussion

Whether Trooper Williamson had probable cause for the vehicle search.

The only vehicle search the Court addresses is the external search of the vehicle by the dog sniff; the complaint regarding the search warrant that resulted as the result of the dog sniff search was denied by the Court.

Dog sniff searches are searches in Pennsylvania, however they only "need be supported by reasonable suspicion...one's expectation of privacy on the exterior of one's vehicle is more modest [then one's expectation of privacy in his/her body]. Commonwealth v. Rogers, 849 A.2d 1185, 1191 (Pa. 2004). In Rogers, the Supreme Court of Pennsylvania explained reasonable suspicion as follows:

A police officer may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct. This standard, less stringent than probable cause, is commonly known as reasonable suspicion. In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. In making this determination, we must give due weight to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience. Also, the totality of the circumstance test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

Rogers at 1188 (internal citations and quotation marks omitted).

In Rogers, a Pennsylvania State Trooper stopped a vehicle, exceeding the speed limit by 18 mph, with an expired temporary Tennessee registration plate. After stopping the vehicle the officer noted that Appellant was extremely nervous, so much

so that he had difficulty retrieving the relevant documents for the trooper's examination. Appellant produced for the Trooper incomplete and fraudulent documents. The Trooper noted that that in the vehicle was an open box of "Tide" powdered laundry detergent, an open box of "Bounce, and fabric softener dryer sheets, and a used roll of "Scotch" packaging tape. The Trooper knew from his training and experience that these items were used in the packaging of certain illegal drugs. Id. A dog sniff of the car resulted in positive alerts and the vehicle was towed to police barracks where 52 pounds of marijuana were recovered.

The suppression court in Rogers suppressed the statements and physical evidence obtained by police, concluding that the Trooper's investigative detention of Appellant was illegal because it was not supported by reasonable suspicion that criminal activity was afoot.

The Superior Court reversed the decision of the suppression court as the totality of the circumstances did indicate that criminal activity was afoot. The Supreme Court affirmed the Superior Court in this regard and went on to clarify that the quantum of suspicion necessary for an outside vehicle dog sniff search in Pennsylvania is reasonable suspicion. The facts of Rogers gave rise to reasonable suspicion:

Appellant was unusually agitated; the paperwork for his vehicle was out of order in several key respects; his answers regarding the location he had just departed were vague; and, most importantly, the back seat of his car contained products that the Trooper knew, via his extensive professional experience, are commonly used in the packaging of illegal narcotics. These facts taken in their totality lead to the conclusion that the Trooper had reasonable suspicion to suspect that criminal activity was afoot.

Rogers at 1190.

The Federal criminal law also requires reasonable suspicion for an officer to conduct a dog sniff search. The Supreme Court of the United States recently held that “absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.” Rodriguez v. United States, 135 S.Ct. 1609 (US 2015).

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

Rodriguez at 1611.

The Supreme Court of the United States remanded the Rodriguez matter to determine “whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation.” Rather than making the determination of whether the officer in Rodriguez’s motor vehicle stop had independently supported, individualized suspicion of a criminal activity, the 8th Circuit Court of Appeals relied on prior Supreme Court precedent, Davis v. US⁶ that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule”.

We thus “repeatedly [had] upheld dog sniffs that were conducted minutes after the traffic stop concluded.” Rodriguez, 741 F.3d at 907. The magistrate judge, the district court, and this court all determined that the seven- or eight-minute delay in this case constituted a *de minimis* intrusion on Rodriguez's personal liberty and that Rodriguez's seizure was lawful under our then-binding precedent. Under Davis, therefore, the exclusionary rule does not apply because the circumstances of Rodriguez's seizure fell squarely within our case law and the search was conducted in objectively reasonable reliance on our precedent.

⁶ 564 U.S. 229 (U.S. 2011).

The 8th Circuit did not engage in the totality of the circumstances reasoning it was directed to by the Supreme Court. Rather it reasoned that as long as the dog sniff took place minutes after the traffic stop, reasonable suspicion was not necessary.

The length of the police stop in Rodriguez was eight minutes until the dog sniff. It is unknown what the conditions were or the officer's observations were in regarding to calling for a dog sniff, because the 8th Circuit of Appeals did not take facts on the totality of the circumstances to determine whether reasonable suspicion of criminal activity justified detaining Rodriguez.

The length of the investigative detention was not at issue in Rodgers, however in Commonwealth v. Ellis⁷, the Pennsylvania Supreme Court said that

The key factor to be examined in determining if a detention lasts too long to be justified as an investigative stop, is whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Ellis at 1047.

In Ellis, police received a report of a burglary at Perma Caram in their township with a description of the vehicle seen leaving the area of the burglary and with the description of two actors, white or possibly Mexican. As the officer responding to the call closed within a half mile of the burglary location, he spotted a vehicle traveling south which fit the radioed description of the vehicle seen leaving the area of the burglary. In addition, the vehicle's location corresponded to the position where a car would be had it left the burglary site at the time of the broadcast. The officer proceeded to pull the vehicle over. Both driver and passenger were African American and they were ordered out of the vehicle. The officer patted them down for weapons

⁷ 662 A.2d 1043 (Pa. 1995).

and the glove compartment was searched for weapons. The officer noticed a screwdriver on the floorboard. The driver was issued a citation for driving without a license. Another officer, in the meantime, had responded to the burglary scene and noted pry marks on the door. He contacted the witness that had made the burglary call and took the witness to the scene of the vehicle stop. They arrived at the vehicle stop 10 to 15 minutes after the initial stop of the Appellant's vehicle. Ellis argued in his allocatur petition to the Supreme Court of Pennsylvania that

he is entitled to a new trial on the basis of counsel's failure to argue for the suppression of evidence on the grounds that (1) the continued detention after the initial stop of his vehicle was unsupported by reasonable suspicion, and (2) that the lengthy roadside stop to which he was subjected amounted to a custodial detention unsupported by probable cause.

Id.

Appellant was not granted a new trial and the Supreme Court found, germane to the case at bar, that the officer's investigative detention of Appellant was based on a reasonable suspicion:

- (1) Appellant's vehicle was the only vehicle on the roadway near the burglary scene at that house;
- (2) the car was in the area the vehicle would have been if it left the area of the burglary when the call was broadcasted; and
- (3) the car matched the description of the one seen at the crime.

The one contradictory factor, i.e. that Appellant was black not white or Mexican was not sufficient to dispel the officer's suspicion. The Court further relied on United States v. Sharpe, 470 US 675 (US 1985), that an Officer is justified in detaining an suspect for the period of time necessary for the police to pursue a means of investigation likely to confirm or dispel their suspicions quickly. In Sharpe, the Defendants were detained for twenty minutes. In Ellis the detention was 15. The Court

also noted in Ellis that “most of this time was used for the legitimate purpose of issuing Appellant a citation for driving without a license. Ellis at 1049. The Ellis court noted in its reasoning that “nothing in the record indicates that Appellant would have been barred from leaving if he had failed to further cooperate with the police investigation.” Id.

For as much as the case before this Court shares similar facts with the cases cited there are not enough to support reasonable suspicion and no undue police delay. Although there was a window tint violation and a driving on a suspended license violation, the officer issued no traffic citation for either infraction. Therefore, none of the 40-minute detention was spent in the process of issuing Defendant a traffic citation. Although there is no bright line test as to length of time, officers must pursue diligently and quickly a means of investigation that will confirm or dispel their suspicions. In the cases cited here, the officers were able to do more in much less time. The length of the detention was twice that in the Sharpe case.

Despite the lack of the Trooper’s diligence in confirming suspicions quickly, there was lack of an objective basis for those suspicions. The Court finds there was no objective nexus between actual drug activity and the officer’s suspicion of that activity; reasonable suspicion requires an objective belief, not subjective. In Rogers there were items related to drug activity visible in the car. In Ellis there were facts that indicated that the van driver may have just committed a burglary. Not only was the officers’ suspicion objectively reasonable in Ellis and Rogers but, they were able to quickly investigate their suspicions i.e. a 10 minute stop in Rogers, and a 15 minute

stop in Ellis. The record here establishes that Defendant was subject to a custodial detention for 40 minutes; he was not free to leave until 40 minutes after the stop.

The facts related by Williamson to establish reasonable suspicion are that Defendant is smoking and nervous. Williamson listed the violations as driving on a suspended license and a window tint likely too dark. In Commonwealth v. Cartagena, 63 A.3d 294 (Pa. Super. 2013), the Superior Court upheld the suppression of an illegal firearm found in a center console as the “the Court opined that extreme nervousness combined with tinted windows and a night time stop were insufficient to justify the search of the console.” Commonwealth v. Buchert, 68 A.3d 911, 914 (Pa. Super. 2013).

Buchert and Cartegna involved protective frisks for weapons. This case involved a search for drugs and Williamson was unable to testify to any indicia of drug use or activity by the Defendant. Although he testified he was suspicious, the Court finds them not objectively reasonable. The Defendant had an explanation for his whereabouts; in fact, the officers knew he was going to his friends’ home across the street as the friends were yelling over to Defendant.

As Williamson stated on the MVR, he wanted to find a criminal history involving drugs, but he was unable to find that criminal history without undue delay. At 11 minutes into the stop they are still discussing the computer and trying to establish a criminal history. At minute 21:45 they are able to establish that the Defendant served federal time for guns but Williamson states “I am looking mainly for drugs”. It was not until minute 19 that he pursued the hunch he had from the beginning of the traffic stop; he requested a drug dog to come to the scene. Therefore the officer’s suspicion

was not objectively reasonable; he was not able to dispel his subjective suspicions in a timely manner. The remedy in Pennsylvania for violations of Article 1 Section 8⁸ of the Pennsylvania Constitution is exclusion of the evidence. Commonwealth v. Johnson, 86 A.3d 182 (2014). Although Williamson may have acted in good faith, there is no good-faith exception in Pennsylvania.

Whether the Trooper's failure to read Defendant Miranda warnings was in error.

Since the Court has determined that the evidence obtained from the stop of Defendant must be suppressed, this issue is moot.

⁸ **Security from searches and seizures.** The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures.

ORDER

AND NOW, this _____ day of July, 2017, based upon the foregoing Opinion, Defendant's Motion to Suppress is hereby GRANTED. As the dog sniff of Defendant's vehicle was conducted without the required quantum of suspicion, it is ORDERED and DIRECTED that all physical evidence obtained as a result of the dog sniff that established the probable cause for the search warrant is SUPPRESSED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Michael Morrone, Esq.
Nicole Ippolito, Esq.
Gary Weber, Esq.