

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No: 02-10,928

VS :

ERICK JOHN OLSON :

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress. A hearing on the motion was held August 8, 2002. After a review of the testimony presented, the Court finds the following facts relevant to Defendant's motion.

On April 12, 2002 at approximately 5:00 p.m., Darvin Donahey¹ was driving south on Route 42 in the Muncy area. Donahey's wife was in the car, and friends followed behind them in a separate vehicle. Donahey testified that as he drove, he observed the vehicle in front of him, a red van, cross the center line of the roadway on two separate occasions. Donahey testified that the van had swerved so far into the on-coming lane that vehicles approaching in the opposite direction were forced off the roadway to avoid a collision. Donahey testified that he was so concerned with what he observed, and the fact that he observed children in the vehicle, that he attempted to call the state police from his cell phone. He was unable to receive a signal or reception in that area. Moments later, the van pulled into a service station for gas and Donahey pulled in behind it.

Donahey immediately exited his vehicle and approached the Defendant, the van driver. Donahey asked the Defendant if he was Ok, and explained that he had observed the van swerving on the roadway. The Defendant stated that he was fine, and he proceeded to pump his gas. Donahey testified that he smelled a strong odor of

¹ Mr. Donahey is employed as a Police Officer at the Bloomsburg University Campus.

alcohol on the Defendant, and the Defendant had difficulty walking and speaking. Donahey attempted again to call the state police from his cell phone, but could not get through. Seeing Donahey with the phone, the Defendant questioned who he was calling. Donahey told the Defendant that he was calling the state police because he did not feel that the Defendant was able to drive safely and was concerned about the children in the Defendant's vehicle. The Defendant followed Donahey as he walked into the store to place the call to the state police.

The Defendant tried to persuade Donahey not to make the call, and insisted that he was fine. At some point thereafter, after Donahey placed the call to PSP, Donahey informed the Defendant that he was an off-duty police officer and from what he had observed he did not believe he was capable of driving in his condition. Donahey testified that although he mentioned that he was an off-duty officer, at no time did he insist that the Defendant remain at the station, nor did he restrain him in any way.² Donahey never asked the Defendant for his name, identification, or the keys to the vehicle. Additionally, Donahey had parked behind the Defendant's vehicle, he had not blocked his exit. Donahey testified that he just watched the Defendant until the state police responded.

Pennsylvania State Police Trooper Matthew Roth responded to the scene approximately 15-20 minutes after receiving Donahey's call. Roth testified that Donahey and the Defendant were not in close proximity when he responded to the scene. He met Donahey outside. The Defendant was initially inside the store with his

² The Defendant testified that after hearing that Donahey was an off-duty officer, he did not feel as though he was free to leave the scene.

children, but came outside shortly after he arrived on the scene. Roth eventually arrested the Defendant for driving under the influence.

The Defendant argues that the evidence obtained must be suppressed, as the fruit of an unlawful detention by Donahey who was outside his jurisdiction. The Court does not agree. Contact between an individual and a police officer can be characterized as a mere encounter, a non-custodial or investigative detention, a custodial detention, or a formal arrest. See [Commonwealth v. Peters](#), 434 Pa.Super. 268, 642 A.2d 1126, 1129 (1994), *appeal denied*, 538 Pa. 668, 649 A.2d 670 (1994). A mere encounter with a police officer does not constitute a seizure under the Fourth Amendment and, therefore, triggers no constitutional protections. *Id.* Investigative and custodial detentions, and formal arrests, however, are seizures implicating constitutional rights. *Id.*

The Pennsylvania Supreme Court, in [Commonwealth v. Mendenhall](#), 552 Pa. 484, _____, 715 A.2d 1117, 1120 (1998), set forth the test to distinguish between an investigative detention and a mere encounter as follows: "[T]he pivotal inquiry is whether, considering all the facts and circumstances [surrounding an interaction between a police officer and an individual], a reasonable [individual] would have thought he was being restrained" by the police officer. *Id.* If so, then an investigative detention has occurred. If not, then a mere encounter has occurred. *Id.*

In [Mendenhall](#), an officer left his proper jurisdiction to render aid at the scene of a vehicle accident. Once there, he told the defendant to "stick around" until state police officers arrived. While waiting, the defendant got back into his truck and at one point attempted to put the keys into the ignition. In finding this constituted a mere encounter,

the Court focused on the fact that the officer "did not attempt to restrain the defendant from trying to start his vehicle or otherwise restrict the defendant's movements in any other way." [Id. 715 A.2d at 1119](#). The Court reasoned that "nothing in the record, aside from [the][o]fficer ... telling the defendant to 'stick around,' evidenced an exercise of force or demonstration of authority that would [have] indicate[d] to a reasonable person that [he or she was] not free to leave. Rather, the fact that the defendant freely moved in and out of his vehicle strongly suggests that a reasonable person in the defendant's shoes would [have felt] free to leave." [Id., 715 A.2d at 1120-21](#)

Applying the test from Mendenhall to the instant case, the Court finds that the facts and circumstances surrounding the encounter between the Defendant and Donahey suggest no demonstration of authority by Donahey that would have led a reasonable person to conclude that he was not free to leave. Donahey, dressed in plain clothes approached the Defendant out of concern, not only for the Defendant, but the two small children he observed in the vehicle. Upon observing the odor of alcohol and the Defendant's slurred speech and difficulty in walking, he tried to call the state police with his cellular phone as the Defendant pumped his gas. When he was unable to get reception on his cellular phone, Donahey walked into the store to call the state police. At no time did Donahey tell the Defendant that he had to remain at or near his car, or that he had to "stick around". The Defendant, in fact, moved around freely the whole time. He pumped his gas, went to the bathroom, and purchased food for his children.

Although at some point Donahey did acknowledge that he was an off-duty officer, and that he did not feel the Defendant was able to safely drive in his condition, Donahey did not assert any additional control over the Defendant at that time. Donahey was, in

fact outside, waiting for the state police to arrive, as the Defendant was in the store with his children. The Court finds that the facts of this case suggest nothing more than a mere encounter between Donahey and the Defendant.³ Having found the circumstances constituted a mere encounter, the Court finds that there was no unlawful detention, and the Court denies the Defendant's Motion to Suppress on this basis.

³ *But compare*, [Commonwealth v. Bradley](#), 724 A.2d 351 (Pa.Super. 1999), in which the court concluded that the conduct of the off-duty officer rose to the level of *at least* an investigative detention of the defendant. In [Bradley](#), an off-duty police officer observed the defendant swerve into oncoming traffic, making exaggerated turns and narrowly missing a telephone pole. The officer made radio contact with the police department in the jurisdiction. The officer continued to follow the defendant while waiting for the department to respond. When the defendant pulled into a church parking lot and stopped, the off-duty officer pulled in and blocked the defendant's vehicle. He then approached the vehicle, opened the door, turned off the engine, and took the keys. The off-duty officer informed the defendant that he was an off-duty officer, and that he had requested other officers to respond to the scene. He told the Defendant to sit there and not cause any trouble while waiting for the officers to arrive. The off-duty officer waited and kept the person under surveillance while waiting for the officers to respond. In finding that this constituted *at least* an investigative detention the court reasoned that a reasonable person in the defendant's circumstances would have felt restrained by the officer's actions. By parking his car in front of the defendant's, telling him he was an off-duty police officer, taking the defendant's keys, and telling him to "sit there" and not cause any trouble, demonstrated authority such that a reasonable person would have thought that he or she was not free to leave the scene.

ORDER

AND NOW, this _____ day of August, 2002, based on the foregoing argument, the Defendant's Motion to Suppress is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: John Campana, Esquire
Robert Ferrell, Esquire
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire