

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 02-10,550
	:
	:
vs.	: CRIMINAL DIVISION
	: Omnibus Pre-Trial Motion
DAVID A. DESOUSA,	:
Defendant	:

OPINION AND ORDER

Before the Court are a Motion to Suppress and a Petition for Writ of Habeas Corpus, both contained in Defendant’s Omnibus Pre-Trial Motion, filed May 9, 2002.¹ A hearing on the motion was held July 22, 2002.

Defendant has been charged with driving under the influence of a controlled substance, two counts of possession with intent to deliver a controlled substance, delivery of drug paraphernalia, two counts of possession of drug paraphernalia, and two summary offenses, after Defendant was stopped by Corporal Mark Giza of the South Williamsport Police Department on Hastings Street in South Williamsport on or about March 14, 2002. Corporal Giza testified that on that date, he observed Defendant driving the wrong way on Hastings Street, which is Route 15 North, that Defendant slammed on his brakes and stopped, at which point Corporal Giza directed him into a parking lot for a vehicle stop. Corporal Giza testified that at that point he observed Defendant making furtive movements, as though he were hiding something. As Corporal Giza approached Defendant’s vehicle, he observed the driver’s side window down and noted an odor of burnt marijuana. He asked Defendant to produce his driver’s license, his registration and proof of insurance. According to Corporal Giza, Defendant appeared to be under the influence of marijuana, his eyes were red and glassy; he moved slowly and appeared “stoned”. Officer Giza directed Defendant’s attention to the odor of marijuana and Defendant

¹ The Court notes the remaining issues raised in the motion have been withdrawn by Defendant without prejudice to re-file such in the future.

admitted that he had smoked marijuana within the last 30 minutes. Corporal Giza then asked Defendant to get out of his vehicle as he wished to do a pat-down search for officer safety. Corporal Giza testified that upon patting Defendant down, he felt in Defendant's right pants pocket a bulge, which he immediately recognized as a pot pipe. Corporal Giza asked Defendant if it was a pipe and Defendant replied that it was a pot pipe. Defendant was then placed under arrest and handcuffed. Corporal Giza removed the pipe from Defendant's pocket, and discovered a small bag of marijuana wrapped around the pipe. He also found \$482.50 in cash and more marijuana in Defendant's pockets. He read Defendant his Miranda rights and Defendant waived those rights. Corporal Giza then asked Defendant for consent to search his vehicle and after a discussion regarding that issue, Defendant gave his consent. Corporal Giza searched the vehicle but found no controlled substances. He then searched a back-pack in the front seat of the vehicle, after asking Defendant for permission to do so, which permission was given, and inside the bag found drug paraphernalia and more drugs.

In his Motion to Suppress, Defendant challenges the pat-down search and the vehicle search, and also seeks to suppress statements made by Defendant following his arrest. With respect to the pat-down search, such a search is constitutionally permitted if the officer has a reasonable suspicion that a crime has been committed and that the individual searched may be armed and dangerous. Commonwealth v Stoner, 710 A.2d 55 (Pa. Super. 1998). The officer's suspicion must be based on specific, articulable facts, and reasonable inferences drawn from those facts. Id. In the instant case, Corporal Giza testified that he observed furtive movements made by Defendant, as though he were hiding something, which could possibly have been a weapon, and noted the odor of burnt marijuana. He also observed that Defendant appeared to be under the influence of a controlled substance, after having seen him driving the wrong way on Route 15. The Court believes this testimony is sufficient to support the conclusion that Officer Giza had a reasonable suspicion that a crime had been committed and that Defendant might be armed and dangerous.

Defendant also argues the evidence seized as a result of the pat-down search should be suppressed, contending that removal of the pot pipe from Defendant's pants pocket exceeded the permissible scope of such a search. The search in the instant matter implicates the "Plain

Feel Doctrine”, which applies when an officer is lawfully in a position to detect contraband, the incriminating nature of the contraband is immediately apparent, and the officer has a lawful right of access to the object. Stoner, supra. Defendant argues specifically that the incriminating nature of the contraband could not have been immediately apparent, as although the officer was able to tell simply by touching the outside of Defendant’s pocket that it contained a pipe, he would not have been able to tell, simply by touching, that such was a pot pipe. As in Stoner, there were more facts available to the officer than simply the touch of the object, however. Corporal Giza also had for consideration at the time he felt the pipe in Defendant’s pocket the fact that Defendant appeared to be under the influence of a controlled substance, the odor of marijuana, and Defendant’s admission that he had smoked marijuana within the last 30 minutes. The Court therefore has no difficulty in finding that the Plain Feel Doctrine is appropriately applied in this case to allow the seizure of the pot pipe.

Defendant also contends the vehicle search, specifically the search of the backpack, the only place where contraband was found, was illegal. The Commonwealth seeks to justify the search based on the consent given by Defendant. Such a search will be justified where the consent was given intelligently, knowingly and voluntarily. It is the Commonwealth’s burden to show the consent was given in such a manner. In the instant case, Corporal Giza testified that after reading Defendant his Miranda rights, he asked for consent to search Defendant’s vehicle. Defendant inquired about the request and Corporal Giza explained what he meant by “consent to search.” Defendant then asked Corporal Giza what would happen if he refused to consent and Corporal Giza told him that he could refuse to consent and in that event he would have to apply for a search warrant. He then advised Defendant of the steps he would have to take in order to obtain a search warrant. According to Corporal Giza, at that point Defendant indicated that a warrant was not needed and that he would consent to such a search. Corporal Giza testified further that when he located the backpack in the front seat of the vehicle, he asked Defendant for specific permission to search the backpack and Defendant gave that permission. The Court finds that this testimony supports a finding that Defendant’s consent was voluntarily given, that it was intelligent and knowing, and thus the search was proper.

The last issue raised by Defendant in his suppression motion addresses the statements

made by Defendant following his arrest. Defendant argues that the Miranda warning provided to him was defective inasmuch as Corporal Giza said that anything he said “could” be used against him in Court, rather than “can and will” be used against him. In Duckworth v Eagen, 492 U.S. 195 (1989), the Supreme Court of the United States indicated that no “talismanic incantation” is required to satisfy the strictures of Miranda. Duckworth, supra at 203. In the particular case before it, while the specific issue being reviewed was not the difference between “could” and “can and will”, but rather, the advice that counsel would be appointed “if and when you go to Court”, the particular warning being reviewed had indeed indicated to the defendant in that case that anything he said could be used against him. The word “will” was not used but the Court found no violation of Miranda. The Court therefore believes that the warning given in the instant matter is also sufficient to satisfy Miranda.

Finally, in his Petition for Writ of Habeas Corpus, Defendant contends the evidence was insufficient to establish a prima facie case of the charge of driving under the influence of a controlled substance, specifically that Defendant was under the influence of a controlled substance to a degree which rendered him incapable of safe driving. The Court does not agree. The evidence indicated that Defendant appeared under the influence to the Officer, that the officer noted an odor of marijuana, and Defendant admitted that he had smoked marijuana within the last 30 minutes. The evidence also showed that Defendant had been driving the wrong way on Route 15, a rather busy highway. The Court finds this evidence sufficient to establish a prima facie case of driving under the influence of a controlled substance.

ORDER

AND NOW, this 27th day of August, 2002, for the foregoing reasons, Defendant's Suppression Motion and Petition for Writ of Habeas Corpus are both hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA
Joseph Amendola, Esq. 110 Regent Court, Suite 202, State College PA 16801
Gary Weber, Esq.
Hon. Dudley N. Anderson