IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
v.	:	**No.: 04-11,614**
BARRY DAVIS,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress filed December 15, 2004. Defendant is charged with Possession of Drug Paraphernalia, Possession of a Controlled Substance, Driving While Operating Privilege is Suspended/Revoked and General Lighting Requirements. These charges arose from a vehicle stop of Defendant by Williamsport Bureau of Police (WBP) on May 23, 2004. The relevant facts are as follows:

Officer Brown (Brown) of WBP stopped Defendant's vehicle at approximately 3:00 a.m. due to non-functioning registration/license plate lighting. Brown and a fellow officer approached Defendant's vehicle to alert Defendant of the violation. Both officers were in uniform and armed. The officers asked for identification and registration information, returned to their vehicle, and ascertained that Defendant was operating under a suspended license. The officers again approached Defendant and told him to exit the car. Defendant was directed to the rear of his car at which point he was shown and signed a citation. Brown then instructed Defendant that he was free to go. Defendant turned and began to walk back toward the front of his car. At this point the facts related through

Brown's testimony diverge from those of Defendant. According to Brown, Defendant was walking away from him when he asked if the Defendant had any contraband. The testimony related that Defendant said "no" and that Brown then asked whether Defendant would allow a search of his person, at which point Defendant walked back toward the officer and answered in the affirmative. Brown testified that Defendant's demeanor was relaxed and "normal." Brown searched Defendant, found a small white pill and seized it to be tested as an illegal narcotic. Brown then asked Defendant if he could search his vehicle to which Defendant replied "no." Defendant proceeded to leave the area.

The Defendant's testimony differed on several key points. Defendant asserts that after the officers told him he was free to go, Defendant got back into his car to replace his identification and registration information. Defendant next testified that Brown had followed the Defendant to his driver's-side door and asked through the open window if Defendant had any contraband. Defendant said "no" and began to exit the car when the Officer said "hold on" and asked, that since he had no contraband, would the Defendant allow Brown to search him. Defendant testified that the officer "never stopped talking" and Defendant never felt free to leave. Defendant does not dispute that he denied Brown's request to search the vehicle and then walked away.

Defendant's first argument is that after Brown informed Defendant he was free to go, the subsequent interaction between Brown and Defendant was unlawful and resulted in an invalid consent.

"The Fourth Amendment inquiries in consent cases entail a twoprong [sic] assessment: first, the constitutional validity of the citizen/police encounter giving rise to the consent and, second, the voluntariness of said consent." *Commonwealth v. Johnson,* 2003

Pa.Super 365, 833 A.2d 755, 759 (2003). "Where the purpose of an initial, valid traffic stop has ended and a reasonable person would have believed that he was free to leave, the law characterizes a subsequent round of questioning by the officer as a mere encounter." . . . "However, where the purpose of an initial traffic stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest." Id. at 760-61. To justify a new investigative detention or arrest, an officer must show a new reasonable suspicion or probable cause, respectively. In the absence of new reasonable suspicion or probable cause, the detention is unlawful and the consent is invalid unless there is a showing of a break in the causal chain between the illegality and seizure of evidence. Id.; see also, *Commonwealth v. Freeman,* 563 Pa. 82, 757 A.2d 903 (2000).

In the present case, Defendant concedes that the initial stop was valid. The officers gave a warning and a citation to the Defendant for the lighting violation and suspended license, respectively. The purpose of the original, valid stop had therefore come to an end. The relevant inquiry becomes whether after the purpose of the original stop was concluded, upon an examination of the totality of the circumstances, a reasonable person would have felt free to leave. The Supreme Court of this Commonwealth set forth factors relevant to such an assessment:

> "the existence and nature of any prior seizure; whether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review (for example – the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them or directed their movement, the content or manner of interrogatories or statements, and 'excesses' factors stressed by the United States Supreme Court); geographic, temporal and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject

> was free to decline the request for consent to search. In general, a full examination must be undertaken of all coercive aspects of the police/citizen interaction."

Freeman, 757 A.2d at 906-07. The differences between the Officer and Defendant's testimony are crucial to weighing the voluntariness of the consent in this case. The Officer's account is that the Defendant was walking away from him when asked if he had any contraband and freely returned towards the officers to allow the search. The Defendant contends he had returned to his car when the officer followed Defendant's path and re-approached his car window. The Defendant further asserts that the officer said 'hold on', words that could certainly be construed as authoritative when spoken by an armed, uniformed officer. Brown's account relates that his language was couched in terms of a request, rather than as an order or demand. Further, the Officer's testimony relates that Defendant acted relaxed and "normal," while Defendant asserts that throughout the encounter he felt he was not free to leave. While the test is objective, the behavior of the Defendant may evidence the presence or extent of any coercion by the officers.

Two distinct pictures emerge from the divergent testimonies. By one account, the Defendant was clearly instructed he was free to leave and acted relaxed and at ease. He was not re-approached by the officers, but on the contrary was in the act of walking away when the officers requested the search. On the other hand, the Defense presents an account involving coercive officers who, while mentioning that the Defendant was "free to go," never ceased addressing the Defendant and followed him back toward the car to ask if he had contraband. When the Defendant replied he did not, the Officers said "hold on" and asked him, since he had no contraband, would the Defendant mind being searched. The

Defendant, alone at 3:00 a.m. and confronted by two armed, uniformed officers, asserts that he did not feel free to go.

The Court finds based on the evidence presented at the hearing and a totality of the circumstances that a reasonable person would have felt free to leave. Defendant signed the citation and Brown clearly instructed Defendant that he was free to go. The Defendant began to leave and whether he was walking away or got back into his car, could be reasonably certain that the purpose of the stop had ended and that he was in fact free to go. The subsequent request to consent to a search was therefore a mere encounter. The interaction occurred at 3:00 a.m., involved uniformed, armed officers addressing a lone driver, and the officers did not specifically reassure Defendant he could deny the request to search. However, in weighing the testimony, it is apparent that the Defendant was at ease and relaxed at this point in the confrontation, evidencing a lack of coercion from the officers. The officers did not physically touch Defendant, or attempt to restrain his movement. Also notable is the fact that following the search and seizure of an alleged narcotic on the person of Defendant, he felt free to deny the officer's subsequent request to search his vehicle and walked away. The mere encounter never escalated into an investigatory stop.

This Court reached a different conclusion in the recent case, *Commonwealth v. Donovan Fenty*, No. 04-11,095. In *Fenty*, the Defendant was stopped for a similar lighting failure. For purposes of clarification, and because these cases seem to straddle the fine line at issue, the Court would like to point out the most important distinguishing factors. Perhaps most important was the establishment by officers of an *endpoint* to the original encounter. In the present case, the evidence showed that officers had created an environment in which

the Defendant was aware that the purpose of the stop had ended. He signed his citation, had been given his warning, was advised he was free to go and began to walk away. By contrast, in *Fenty* the testimony never sufficiently evidenced a point at which the officers conveyed that the original stop had reached its conclusion. The purpose of the stop was *in fact* complete, and the officers told the Defendant he was free to go, but there was never a clear point established at which a reasonable person would have felt released from the interaction or that he had permission to walk away. Further, the Defendant in *Fenty* did not have the added license suspension, or any similar issue, which might have required increased interaction with police. The lighting violation, without more, should have required the barest police-citizen interaction. Another important factor is the character of the police presence. Both cases involved an early-morning stop by armed officers confronting a lone driver. In the present case however, the Defendant showed no signs of being coerced by officers and testimony from both parties indicates a lack of duress or intimidation. The evidence in *Fenty* presented a different picture. The Defendant in *Fenty* described an environment where a reasonable person would not have felt free to leave. The officer placed undue pressure on the Defendant, magnified by the fact that the only suggestion of criminal activity was a malfunctioning registration light.

Defendant also argues that the Officers did not have authority to seize the pill because they lacked sufficient information regarding its status as an illegal narcotic. The argument asserts that a single white pill about the size of an aspirin could not have been sufficiently identified by Brown as evidence of criminal activity.

It is well settled that if a person voluntarily consents to a search, evidence found as a result of that search is admissible against him. *Commonwealth v. Washington*, 438 Pa.

Super. 131**,** 651 A.2d 1127 (1994). Defendant consented to a search of his person for contraband. The white pill found in the watch pocket was well within the scope of this search. Further, Brown had probable cause to believe the substance was evidence of criminal activity. "The probable cause standard requires that the facts available to the police officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime." *Commonwealth v. Parker,* 422 Pa.Super 393, 619 A.2d 735, 740 (1993). Brown recognized the isolated, uniquely marked pill as a potential narcotic and validly seized it pursuant to a voluntary search.

ORDER

AND NOW, this ____ day of March, 2005, for the reasons set forth above, the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

_____ J.
Nancy L. Butts, Judge

xc: DA (RC)
M. Morrone, Esquire
Hon. Nancy L. Butts
Law Clerk
Gary Weber, Esquire