

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

COMMONWEALTH

v.

**THOMAS FISHER,
Defendant**

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No.: 533-2005

OPINION AND ORDER

Before the Court is Defendant's motion to suppress, filed June 15, 2005. Defendant has been charged with Driving Under the Influence of Alcohol (DUI) and related offenses as a result of an encounter with Pennsylvania State Police (PSP) that occurred on January 15, 2005. The motion alleges that the Defendant was stopped by PSP without reasonable suspicion. The motion also alleges that statements were elicited from Defendant after he had been placed in custody without being given *Miranda* warnings. Based on the asserted violations of Defendant's rights, the motion argues that the evidence obtained from the stop in question should be suppressed.

PSP Trooper Shadle (Shadle) testified that on January 15, 2005, he observed a vehicle partially pulled off of the roadway and with its hazard lights activated. Off the road approximately twenty to thirty feet, Shadle observed a van. A group of four individuals were apparently attempting to free the van from a muddied field. One individual was in the driver's seat while another was attempting

to push the van. Shadle observed that the van was running, moving slightly, but with its tires spinning in the mud. Shadle pulled his police vehicle behind the roadside vehicle and approached the individuals, including Defendant. As he pulled up and stopped at the scene, one member of the group made a comment audible to Shadle that the Trooper's arrival 'wasn't good.' Shadle positively stated that the person who made the comment was the individual pushing the van, and that it was not Defendant. Shadle recognized another of the individuals, Marie Haywood, as a former schoolmate. Shadle asked whose vehicle had been stuck and Defendant indicated it was his, that he had been driving and that there were no passengers. Shadle asked Defendant if he'd been drinking and how long ago the accident had occurred, to which Defendant responded that he had in fact consumed alcohol and that the accident occurred a few minutes prior to Shadle's arrival when he had swerved to avoid a deer in the roadway. Shadle then asked for Defendant's license and vehicle registration. Shadle and Defendant walked toward the van to retrieve the documentation. During the conversation with Defendant and while walking with him towards the van, Shadle testified that he detected the odor of alcohol emanating from Defendant, glassy eyes and a stagger and swaying to Defendant's movement. By the time he obtained the license and registration, Shadle determined that Defendant was incapable of safe driving and gave Defendant the "horizontal gaze," field sobriety test which, according to Shadle, Defendant failed. Shadle testified that his normal duties do not require administration of field sobriety tests; therefore he called for another Trooper to come to the scene to assist with the potential DUI violation. While waiting for assistance, Defendant was placed in the

passenger seat of the police vehicle. While in the van, Shadle testified that no specific questions about the incident were discussed; rather, Defendant and Shadle primarily discussed that day's football games until Trooper Weindorf (Weindorf) arrived at the scene less than thirty minutes later.

Weindorf testified that when he arrived at the scene, he asked Defendant what had happened and if he had been drinking. Defendant repeated to Weindorf that he had swerved to avoid hitting a deer and went off the road. He also told Weindorf he had consumed, "one or two beers." Weindorf administered additional field sobriety tests and concluded that Defendant was incapable of safe driving. He arrested Defendant and transported him to the DUI treatment center. Weindorf did not inform Defendant of his *Miranda* rights and testified that during this encounter Defendant would not have been free to leave or otherwise terminate the encounter.

Anna Kohler (Kohler) testified that she was a friend of Defendant's and present at the time of the encounter. After Defendant had veered off the road, he walked to her house and she, along with a few other friends, drove Defendant back to his van. Kohler testified that at the time Shadle arrived the group was walking back towards the parked car; that they were no longer attempting to free the van from the mud. Shadle got out of his police vehicle and asked, "whose van?" Defendant responded that it was his van. Shadle indicated that he smelled alcohol and asked for Defendant's license and registration. Kohler testified that she is almost positive that she heard the entire conversation between Shadle and Defendant and that the only questions asked by Shadle were "whose van" and a request for Defendant's license and registration. After Defendant was placed in the

police vehicle Kohler and the other individuals left the scene. Kohler testified that Shadle instructed them to get into their car and at that point she felt that they 'had to leave.'

Marie Haywood (Haywood) also testified that she was a friend of the Defendant and that she was present during the encounter in question. She also testified that by the time Shadle pulled up the group was no longer in the act of attempting to free the van, but were merely walking across the field toward the parked car, which belonged to Haywood. Shadle asked "whose vehicle is this?" Defendant indicated it was his. Haywood testified that the Trooper then indicated that he smelled alcohol and asked for Defendant's license and registration. According to the testimony Shadle then ordered the individuals to get into their car. Haywood initially testified that she was not close enough to have positively heard everything said between Shadle and Defendant as they walked toward the van. After further examination however, she asserted that she would have heard everything until Defendant was placed in the police vehicle. Haywood also estimated that the group would have gone to the field around 8:30 p.m., three hours after the estimation by Kohler. She initially denied that anyone made a comment that the arrival of PSP 'wasn't good,' but ultimately testified that Defendant did in fact make such a statement. Haywood also failed to identify Shadle as the Trooper on the scene. She instead pointed out Weindorf as the Trooper that made contact with the group.

Defendant also testified. He asserted that it was his own comment when Shadle appeared; that this 'wasn't good.' He told Shadle that the van was in fact

his. Defendant then testified that Shadle announced that he smelled alcohol and asked Defendant for his license and registration. Defendant was told to wait in the police vehicle following a field sobriety test, which Defendant described as Shadle simply flashing a light in his eyes. Shadle called out on his radio for assistance and the Defendant waited with Shadle for the arrival of Weindorf. While waiting, Defendant asserts that Shadle did ask questions about the incident, including how it had occurred. Defendant admitted that he did not feel constrained or arrested prior to giving Shadle his license and registration but testified that after Shadle had his license and registration it was not returned to him until after processing at the DUI center.

Defendant's first assertion is that the 'stop' made by PSP was done without reasonable suspicion to believe that criminal activity was afoot and that Defendant was involved in said criminal activity. Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. Pa.R.Crim.P. 323(h). See *Commonwealth v. Iannaccio*, 505 Pa. 414, 480 A.2d 966 (1984), *cert. denied*, 474 U.S. 830, 106 S.Ct. 96, 88 L. Ed. 2d 78 (1985). In Pennsylvania, law enforcement officers are required to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. *Commonwealth v. Beasley*, 2000 PA Super 315, 761 A.2d 621, 624 (2000). "Our Supreme Court has defined three forms of police-citizen interaction: a mere encounter, an investigative detention and a custodial detention." See *Commonwealth v. Boswell*, 554 Pa. 275, 721 A.2d 336, 340 (1998). A mere

encounter between police and a citizen “need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond.” *Commonwealth v. Riley*, 1998 Pa. Super. LEXIS 863, 715 A.2d 1131, 1134 (1998), appeal denied 558 Pa. 617, 737 A.2d 741 (1999). “No constitutional provision prohibits police officers from approaching a citizen in public to make inquiries of them.” *Boswell*, 721 A.2d at 339-40.

“To determine whether a mere encounter has risen to the level of an investigatory detention, or seizure, we must discern whether, as a matter of law, police have conducted a seizure of the person involved.” *Beasley*, 761 A.2d at 624. To decide whether a seizure has occurred, we apply the following objective test: a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. *Id.* If the encounter has risen to the level of investigatory detention, the officer must harbor at least a reasonable suspicion that the person seized is then engaged in unlawful activity. *Beasley*, 761 A.2d at 625.

In *Commonwealth v. Hill*, 2005 PA Super 156, 874 A.2d 1214, (2005), the Superior Court found that a police-citizen interaction was more than a mere encounter when the driver pulled to the side of the road to allow the officer to pass and the officer proceeded to pull his vehicle behind the driver, activate his lights and initiate an interaction. The Court held that the driver was performing an entirely safe and legal maneuver and had no expectation that the officer would stop to render aid. The Court found that once the officer had activated his lights, the driver was

not free to leave and therefore the encounter was elevated to an investigatory detention without reasonable suspicion. Conversely, in *Commonwealth v. Johonoson*, 2004 PA Super 17, 844 A.2d 556 (2004), the Court found that where a driver did have an expectation that an officer would stop to render aid, the ensuing interaction did fall within the parameters of a mere encounter. In *Johonoson*, the driver's vehicle was moving very slowly and the vehicle's hazard lights were flashing. Further, the vehicle had signs of damage from an accident. In light of such facts, the Court found that an officer who activated his emergency lights and performed a stop was doing so as a mere encounter, since, "[i]t is one traditional function of State Troopers, and indeed all police officers patrolling our highways, to help motorists who are stranded or who may otherwise need assistance. Such assistance is to be expected, and is generally considered welcome." *Id.*, at 562. The Court went on to find that even with the officer's emergency lights activated, the interaction was a mere encounter because the driver had reason to expect that an officer would render aid and the lights served several purposes such as notice to traffic and other officers as well as safety precaution.

In the present case, the Court makes a finding of credibility in favor of the Commonwealth. Shadle came upon a vehicle with hazard lights activated and parked partially off the side of the roadway. Shadle noticed the van off the roadway and a group of people in the vicinity. The individuals were actively attempting to free the van from the mud with one individual behind the wheel, attempting to drive the van off the field.

The scene sufficiently created a reasonable expectation that a passing State Trooper would stop to determine whether assistance was needed. At the time Shadle stopped and exited his car there is nothing to suggest that any of the individuals would have felt prohibited from leaving or free to decline the Trooper's assistance. The Defendant's own testimony reveals that at this time he did not feel detained. Shadle then asked about the vehicle and Defendant stepped forward.

When he heard the comment that his own appearance on the scene was 'not good,' Shadle's suspicion was raised. When Defendant verbally revealed he had had a few drinks, Shadle smelled alcohol on Defendant and noticed Defendant's glassy eyes and swaggering movement, Shadle was able to formulate a reasonable suspicion of criminal activity. The Court finds that these indicators were apparent leading up to and as Defendant gave his license and registration to Shadle, and well before Defendant was placed in the van. Therefore, the Court finds that Shadle formulated a reasonable suspicion of criminal activity before the interaction escalated into an investigative detention.

Defendant's second contention is that the information elicited from Defendant after he was placed in Shadle's police vehicle should be suppressed due to the officers' failure to inform him of his *Miranda* rights. "There are two separate requirements, custody and interrogation, that have to be found in order for *Miranda* to apply." *Commonwealth v. Turner*, 2001 PA Super 79, 772 A.2d 970, 973 (2001). "Police detentions in Pennsylvania become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest." *Id.*

In the present case, the issue is whether the Defendant's statements were made before he was in custody. As indicated above, it is on this point that the testimony diverged at the hearing. Shadle testified that the account of the accident and the admission that Defendant had been drinking was given before Defendant was placed in the van. Defendant testified that Shadle made the queries after Defendant was placed in the police vehicle. The witnesses for the defense testified that the only questions asked outside of the police van concerned ownership of the vehicle and a request for license and registration, leading to an insinuation that any other information elicited would have come during custody.

The Court finds based on the testimony and according to *Turner*, that when Defendant was placed in the police vehicle he was in custody for purposes of *Miranda*. However, the Court also finds that Defendant's statements to Shadle were made prior to Defendant being in custody. Any testimonial statements made as a result of Weindorf's questions would have occurred after Defendant was in custody and should be suppressed. Physical evidence gathered by Weindorf such as observations and field sobriety and blood alcohol test results are not affected by this ruling.

ORDER

AND NOW, this _____ day of September 2005, based upon the foregoing Opinion, Defendant's motion to suppress is hereby GRANTED IN PART and DENIED IN PART. Testimonial statements made by Defendant in response to

questions posed by Trooper Weindorf are hereby SUPPRESSED. In all other respects Defendants motion is DENIED.

By the Court,

Nancy L. Butts, Judge

XC:

DA (WS)
M. Morrone, Esq.
Judges
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esq.