

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. CR-1881-2005  
 :  
 KENNETH J. JOHNSON, : CRIMINAL ACTION - LAW  
 :  
 Defendant : MOTION TO SUPPRESS  
 : EVIDENCE

**DATE: February 6, 2006**

**OPINION and ORDER**

Before the court for determination is the Motion to Suppress Evidence of Defendant Kenneth J. Johnson (hereafter “Johnson”) filed January 12, 2006. The motion is denied.

**I. BACKGROUND**

**A. Facts**

On August 27, 2005, then Corporal and now Agent Ray Kontz was on patrol in a marked cruiser in the city of Williamsport. Corporal Kontz was a member of the Williamsport Police Department. Between 1:30 a.m. and 2:00 a.m., Corporal Kontz came to the intersection of Catherine Street and Washington Boulevard in the city of Williamsport. While at the intersection, Corporal Kontz observed a tan sports utility vehicle (hereafter “SUV”) backing up on Washington Boulevard. Corporal Kontz was able to determine that the vehicle was in reverse because of the movement and the vehicle’s reverse lights were on.

The tan SUV was located in the portion of the roadway customarily used to park vehicles. Corporal Kontz estimated the speed of the vehicle to be about five miles per hour. Corporal Kontz observed the vehicle weaving towards the curb and into the lane of traffic as it reversed along

Washington Boulevard. Corporal Kontz observed the vehicle strike the curb with its tires, occasionally causing the right front tire to go up onto the curb resulting in an evident tilt of the front end of the SUV. Corporal Kontz also observed the SUV's rear enter and extend out into the lane of traffic for about the width of the SUV. During its course of travel, the SUV covered about 100 yards.

Corporal Kontz then observed the SUV move forward along its original path of travel to approximately the same point where it had begun to reverse its direction. Upon reaching this point, Corporal Kontz observed the tan SUV again begin to backup. During this second backwards excursion, Corporal Kontz observed a repeat of the first. He again observed the tan SUV weaving as it attempted to backup along Washington Boulevard. Corporal Kontz witnessed the SUV strike the curb with the tires and again causing the right front tire to go up onto the curb. Corporal Kontz again witnessed the rear end of the tan SUV enter and extend into the lane of traffic. At this point, Corporal Kontz turned onto Washington Boulevard and activated his emergency lights.

Corporal Kuntz positioned his cruiser behind the tan SUV. While doing so, Corporal Kontz radioed for backup assistance. Corporal Kontz did not state the purpose of the vehicle stop during the radio call, only that he needed assistance with a vehicle stop. The driver of the tan SUV started to exit the vehicle while Corporal Kontz was behind him. Corporal Kontz instructed the driver to get back into his vehicle, which he did. Corporal Kontz further instructed the driver to close the driver's side door, which the driver did. Corporal Kontz approached the driver's side of the tan SUV to make contact with the driver. The window was down on the driver's side door. While at the driver's side door, Corporal Kontz detected an odor of alcohol coming from the driver as he talked

to him. Corporal Kontz asked the driver for his driver's license. The driver produced his license and was identified as the Defendant, Kenneth Johnson.

Lycoming County Deputy Sheriff James Dorman and Chief Staccone of the Lycoming Township Police Department were on patrol in a marked cruiser as part of the Lycoming County roving DUI patrol that night. Hearing Corporal Kontz's request for assistance, they made their way to his location. They arrived after Corporal Kontz had stopped Johnson.

Deputy Dorman made contact with Corporal Kuntz. Corporal Kontz relayed to Deputy Dorman his observations concerning Johnson's operation of the SUV while attempting to backup and that this might be a possible DUI. Corporal Kontz then turned over the investigation to Deputy Dorman.

Deputy Dorman then made contact with Johnson. Deputy Dorman detected an odor of alcohol emanating from Johnson. Deputy Dorman asked Johnson to exit the vehicle in order to perform some field sobriety tests. Johnson was unable to perform the tests due to his medical conditions, of which Deputy Dorman was made aware. Deputy Dorman then requested Johnson to submit to a portable breath test. Johnson did, and the results were a 0.107%. Deputy Dorman then placed Johnson under arrest for DUI.

Deputy Dorman transported Johnson to the Lycoming County DUI Processing Center so that a blood test could be performed to determine Johnson's blood alcohol content. A test was performed. The results of the test indicated a BAC of 0.11%.

Both Corporal Kontz and Deputy Dorman were experienced police officers who had dealt with DUI arrests in the past. Corporal Kontz had made thousands of DUI arrests and had received

specialized DUI training to become a member of the Lycoming County DUI Processing Center staff. Deputy Dorman had received training in DUI investigations and had made several DUI arrests as a deputy sheriff and as a municipal police officer.

**B. Johnson’s Argument in Support of Suppression**

Johnson contends that the evidence obtained after Corporal Kontz stopped him must be suppressed because Corporal Kontz did not possess justification to stop him. Johnson asserts that Corporal Kontz did not have justification because Corporal Kontz did not have probable cause to suspect that Johnson was in violation of the Motor Vehicle Code (hereafter “MVC”), 75 Pa.C.S.A. §§ 101- 9805. At most, Johnson claims his striking of the curb and occasional sideways movements constituted momentary and minor erratic driving. Johnson argues that momentary and minor erratic driving does not establish probable cause to believe that a violation of the MVC has occurred.

**II. ISSUE**

(1) Whether Corporal Kontz was justified in stopping Johnson when he observed Johnson operate his SUV in reverse two times and on both occasions Johnson was weaving back and forth, striking the curb with the tires of his SUV, occasionally causing the front right tire to go onto the curb, and the rear end of the vehicle to enter and extend out into the lane of traffic?

(a) What level of suspicion is required by the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in order to

justify a stop of a vehicle for violating the driving after imbibing provision of the MVC?

- (b) Whether Corporal Kuntz had reasonable suspicion to justify his stop of Johnson for possibly violating the driving after imbibing provision of the MVC?

### **III. DISCUSSION**

The discussion section of the opinion will be divided into three sections. The first section will set forth why reasonable suspicion is the requisite level of suspicion needed to justify a vehicle stop for a suspected violation of the driving after imbibing provision of the MVC.<sup>1</sup> The second

---

<sup>1</sup> Section 3802 of the MVC defines the offense of driving after imbibing. The relevant portion provides:

(a) **General Impairment.** –

- (1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.
- (2) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

- (b) **High rate of alcohol.** -- An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

- (c) **Highest rate of alcohol.** -- An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven,

section will set forth what constitutes reasonable suspicion. The third section will set forth why Corporal Kuntz had reasonable suspicion to believe that Johnson was in violation of the driving after imbibing provision of the MVC on August 27, 2005 thereby justifying the vehicle stop.

Preliminarily, when a motion to suppress evidence has been filed, the Commonwealth bears both the burden of production and persuasion to prove that the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H); *Commonwealth v. West*, 834 A.2d 625, 629 (Pa. Super. 2003), *app. denied*, 2005 Pa. LEXIS 2545 (Nov. 22, 2005). The Commonwealth bears the burden of establishing by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Lindblom*, 854 A.2d 604, 605 (Pa. Super. 2005), *app. denied*, 868 A.2d 1198 (Pa. 2005); *Commonwealth v. Smith*, 784 A.2d 182, 186 (Pa. Super. 2001).

**A. Reasonable Suspicion is Required to Justify a Vehicle Stop for a Suspected Violation of the Driving After Imbibing Provision of the MVC**

Section 6308(b) of the MVC addresses a police officer's authority to enforce the provisions of the MVC. It provides:

Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has *reasonable suspicion* that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

---

operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(a)-(c).

75 Pa.C.S.A. § 6308(b) (emphasis added). Section 6308(b) had been amended on September 30, 2003 in order to delete the language “articulable and reasonable grounds” and replace it with “reasonable suspicion.” The amended section became effective February 1, 2004. The amended Section 6308(b) applies to this case because the offense Johnson allegedly committed occurred after the effective date of the amendment.

The Pennsylvania Supreme Court had interpreted the “articulable and reasonable grounds” language of the prior Section 6308(b) to mean probable cause. *Commonwealth v. Gleason*, 785 A.2d 983, 988 (Pa. 2001); *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1116 (Pa. 1995). Thus, in order for a police officer to exercise the authority granted under the prior § 6308(b), he had to be able to “... articulate specific facts he possessed at the time of the ... stop that provided probable cause to believe that the vehicle or the driver was in violation of a specific provision of the [MVC].” *Commonwealth v. Chernosky*, 874 A.2d 123, 127 (Pa. Super. 2005).

In *Commonwealth v. Sands*, 2005 Pa. Super. 372 (Pa. Super. 2005), the Pennsylvania Superior Court addressed the issue of whether the amended Section 6308(b), which permitted a police officer to stop a vehicle based upon reasonable suspicion that the driver was in violation of the MVC, violated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. The Superior Court limited its analysis and holding to a suspected violation of the driving after imbibing provision of the MVC. It did not address whether the amended Section 6308(b)’s grant of authority for a police officer to stop a vehicle based upon reasonable suspicion that the driver was violating the MVC violated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution where the

suspected violation was not driving after imbibing. *Id.* The Superior Court held “... that the limited intrusion permitted by Section 6308(b) in the case of a vehicular stop based upon a reasonable suspicion that the driver is driving under the influence, as balanced against the Commonwealth’s salutary interest in preventing DUI violations, violates neither the Fourth Amendment nor Article I, Section 8.” *Id.* Thus, a vehicle stop for suspected driving after imbibing must be supported by reasonable suspicion.

### **B. Reasonable Suspicion**

In order to establish reasonable suspicion, a police officer “... must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, ... that criminal activity was afoot and that the person he stopped was involved in that activity.” *Commonwealth v. Reppert*, 814 A.2d 1196, 1204 (Pa. Super. 2002). The inquiry into whether a police officer possessed reasonable suspicion is an objective one and centers on whether “... the facts available to the officer at the moment of the [intrusion] warrant a man of reasonable caution in the belief that the action taken was appropriate.” *Commonwealth v. Tucker*, 883 A.2d 625, 630 (Pa. Super. 2005); *Commonwealth v. Rosas*, 875 A.2d 341, 347 (Pa. Super. 2005). The determination of whether a police officer possessed reasonable suspicion must be based upon the totality of the circumstances. *Commonwealth v. Rogers*, 849 A.2d 1185, 1189 (Pa. 2004); *Tucker*, 883 A.2d at 630.

Reasonable suspicion does not require that the activity at issue be unquestionably criminal before a police officer may investigate. *Rogers*, 849 A.2d at 1190. “Rather, the test is what it purports to be – it requires a suspicion of criminal conduct that is reasonable based upon the facts of

the matter.” *Ibid.* Reasonable suspicion is dependent upon both content and the degree of reliability of the information possessed by a police officer, as both quantity and quality are considered in evaluating the totality of the circumstances. *Commonwealth v. Lohr*, 715 A.2d 459, 461 (Pa. Super. 1998).

In examining the totality of the circumstances, “ ‘[a]mong the factors to be considered in forming a basis for reasonable suspicion are tips, the reliability of the informants, time, location, and suspicious activity, including flight.’ ” *In re M.D.*, 781 A.2d 192, 197 (Pa. Super. 2001) (quoting *Commonwealth v. Lynch*, 773 A.2d 1240, 1244 (Pa. Super. 2001)). Two important factors that must be considered in evaluating whether reasonable suspicion exists are the police officer’s knowledge and experience. *Reppert*, 814 A.2d at 1204. In evaluating the totality of the circumstances, “ ‘... due weight [must be given] to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience.’ ” *Tucker*, 883 A.2d at 630 (quoting *Rogers*, 849 A.2d at 1189).

### **C. Corporal Kontz Possessed Reasonable Suspicion Justifying the Vehicle Stop**

Corporal Kontz had justification to stop Johnson because Corporal Kontz possessed reasonable suspicion to believe that Johnson was in violation of the driving after imbibing provision of the MVC. It is common knowledge that alcohol impairs an individual’s motor skills. The observations Corporal Kontz made on August 27, 2005 would reasonably allow one to conclude that the motor skills of the tan SUV’s driver were impaired.

The course the tan SUV attempted to negotiate was a relatively easy one and should have been accomplished without difficulty. The road was straight and without obstacles. The terrain was

relatively level, with a slight downward grade towards the path of the SUV's travel as it reversed. Since it was between 1:30 a.m. and 2:00 a.m. when Johnson was reversing his SUV, it was dark out. But, his SUV's reverse lights were operational. There were no external factors which could account for the erratic movement of the SUV as it reversed along Washington Boulevard.

Despite this, Johnson was unable to negotiate this relatively easy course. During both attempts, Johnson weaved his SUV toward the curb and into the lane of traffic. The weaving was not momentary and minor as might occur with an individual attempting to reverse a large vehicle. Johnson's weaving was pronounced. When he would weave toward the curb, Johnson would strike the curb with the SUV's tires and occasionally cause the right front tire to go up onto the curb. When Johnson would weave into the lane of traffic, the rear end of the SUV would extend out a distance of approximately the width of the vehicle. Further, Johnson weaved his vehicle towards the curb and into the lane of traffic numerous times over the 100 yard course of travel on both attempts.

Corporal Kontz is an experienced police officer who has made numerous DUI arrests and has been involved in a number of DUI investigations. He is aware of the physical manifestations of alcohol impairment, both in how an individual controls his person and operates a vehicle. Using this knowledge, Corporal Kuntz could compare Johnson's conduct with that of previous DUI cases and draw a reasonable conclusion that Johnson's weaving was the result of his motor skills being impaired by alcohol. Accordingly, Corporal Kontz could have reasonably concluded that Johnson was in violation of the driving after imbibing provision of the MVC thereby justifying the vehicle stop on August 27, 2005.

#### **IV. CONCLUSION**

Johnson's motion to suppress evidence must be denied.

**ORDER**

It is hereby ORDERED that the Motion to Suppress Evidence of Defendant Kenneth Johnson (hereafter "Johnson") filed January 12, 2006 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Gregory Drab, Esquire  
District Attorney  
Judges  
Christian Kalas, Esquire  
Gary Weber, Esquire