

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 579 – 2007
:
vs. : CRIMINAL DIVISION
:
MICHAEL POLK, :
Defendant : Motion in Limine

OPINION AND ORDER

Before the Court is Defendant’s Motion in Limine, filed July 9, 2007. A hearing on the motion was held September 5, 2007.

Defendant was charged with Driving Under the Influence on February 4, 2007, after his vehicle was struck by another vehicle which ran a red light. In the instant motion, Defendant seeks to preclude introduction of a video of the accident scene and of Defendant performing field sobriety tests at the police station, filmed by the officer’s in-car camera. He argues the entire film should be excluded based on his assertion that the probative value of the tape is outweighed by its prejudicial effect, and in the alternative argues at least the audio portion should be excluded because he never consented to the filming and such was done without his having been given Miranda warnings.

With respect to the first issue, while Defendant argues the film is prejudicial because it shows behavior which he says can be explained by certain mental conditions from which he suffers, and that it is likely to be mis-perceived by the jury, the evidence is nevertheless probative of intoxication.¹ Defendant will be able to counter any possibility of mis-perception by introducing medical testimony to explain the behavior, leaving the jury free to draw their own conclusions as to whether the behavior should be interpreted as indicative of intoxication or something else, thus eliminating the possible prejudice. The Court therefore does not agree that the tape must be excluded on this basis.

¹ In the video, Defendant frequently uses foul language and makes socially inappropriate remarks, directed at the arresting officer, and also exhibits what could be termed “silliness” while performing the field sobriety tests.

With respect to the argument that the absence of consent or Miranda warnings renders the audio portions of the tape inadmissible, the Court notes that the Supreme Court and Pennsylvania courts have admitted videotapes of a suspect performing coordination tests when the videotape is non-testimonial in nature. Commonwealth v. Weaver, 768 A.2d 331 (Pa. Super. 2001). These courts have reasoned that requiring a driver to perform field sobriety tests does not violate the privilege against self-incrimination because the evidence procured, one's movement, is physical in nature and not testimonial. Id. Further, the audio portions have also been admitted in spite of the lack of Miranda warnings where it was determined that utterances made by a suspect during the filming were "voluntary" in the sense that they were not elicited in response to custodial interrogation. Pennsylvania v. Muniz, 496 U.S. 582 (1990). In the instant case, although Defendant was not provided with a Miranda warning, he was not questioned by the arresting officer, nor did the officer say or do anything which did or could reasonably be expected to elicit an incriminating response.² Therefore, any statements made by Defendant on the video need not be suppressed.

ORDER

AND NOW, this 7th day of September 2007, for the foregoing reasons, Defendant's motion to exclude the videotape in question is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson

² For this reason, Defendant's reliance on Commonwealth v. Conway, 534 A.2d 541 (Pa. Super. 1987), and Commonwealth v. Waggoner, 540 A.2d 280 (Pa Super. 1988), is misplaced. In both of these cases, the statements suppressed by the Court therein were either made in response to police questioning or as a result of police instructions.