

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

SEAN DURRANT

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No. 07-10,616
CRIMINAL

OPINION AND ORDER

Before this Honorable Court is the Defendant's Omnibus Pre-Trial Motion filed August 31, 2007. Hearings on the Motions were held October 10, 2007 and October 24, 2007. At the time of the hearings, many of the issues raised in the omnibus motion had been resolved, or were agreed to be handled at a later date. The resolution of these issues is outlined in the Order following this Opinion. The main issues remaining before the Court at this time are Count I and Count II of Defendant's Motion to Suppress.

Background

The following is a summary of the facts presented at the Preliminary Hearing on May 15, 2007 and the Suppression Hearing on October 10, 2007 and October 24, 2007. On March 31, 2007 at approximately 1:56 a.m., Officer Thomas Bortz and his partner, Officer Jimmie Rodgers, were patrolling the west end of the city in a marked patrol unit. Officer Bortz was driving with the windows down on the patrol car, going westbound on Park Avenue towards a stop sign at High Street, at the northeast corner of Textron Lycoming, when he heard a shotgun blast, and then a few seconds later a second shotgun blast. Officer Bortz then flipped out the lights on his patrol unit and radioed Lycoming County Control that there was a shotgun blast northwest from

him in the small unnamed alley.¹ He also testified that the unnamed alley is consistent with where he heard the shots, that the shots were close enough to him and that he wondered if they were shooting at him.²

Officer Bortz testified that at the time of the shotgun blasts, there were no dogs barking, he saw nothing, no people running, no cars, and then all of the sudden a blue Mercury Mountaineer SUV, came out of the unnamed alley. He testified further that the vehicle came out of the alley within approximately ten seconds of the second shotgun blast. Officer Bortz testified that upon exiting the unnamed alley, the vehicle turned east, coming in front of his patrol unit, at which time, he flipped on the headlights, and saw two black males looking directly south at his patrol unit. The vehicle passed in front of the patrol unit and Officer Bortz began to follow it. Officer Bortz testified that at that time he simply followed the vehicle, as City Police do not effectuate traffic stops until a second police unit arrives. Officer Bortz followed the vehicle as it turned south on Krouse Ave, then turned stopped before turning east onto Park Ave, then went past Wildwood Boulevard to Cemetery³, at the stop sign the vehicle turned south down to Memorial Ave and then turned east, traveling to the Fifth Ave intersection. Once the vehicle got to Fifth Ave, two units arrived, a Pennsylvania College of Technology patrol unit and a city patrol unit. At that time, Officer Bortz activated the overhead lighting and siren to effectuate a traffic stop. Officer Bortz testified that they continued to follow the vehicle, while it traveled from the Memorial Ave and Fifth Ave intersection, and then turned north onto Third Ave, where

¹ Officer Bortz testified that the unnamed alley was overgrown with weeds, the pavement was rough, and was only about the width of an automobile. Additionally, he stated that the unnamed alley extends from Dale Place to High Street.

² Officer Bortz stated that he believed the shots were close enough to be only 50 yards away.

³ Officer Bortz testified that he activated the in-car camera at some point around this area.

the driver indicated he was going to turn into Waltz Place.⁴ Officer Bortz followed the vehicle into Waltz Place where he turned the siren off and over the loud speaker, ordered the driver to “stop the vehicle [and] pull to the side of the street.” N.T. 10/10/07, p.33. Officer Bortz testified that the vehicle did not stop until it got to Waltz Place and Second Ave. Officer Bortz testified further that the vehicle could have pulled over on any of the streets it traveled on, however, it continued on even with the patrol unit indicating the vehicle should pull over.

Officer Bortz testified that once the vehicle came to a stop the passenger side door opened, the barrel of a shotgun came out along with the passenger, who was dressed in black. Officer Bortz testified that the passenger quickly got out, looked towards the Police, and ran east, which is in the opposite direction. As the passenger was running, there is a place in the street for the water to run down, and at that time, “it looked like . . . the ground went out from under him and the – shotgun spilled out along with like these blue gloves . . .” Id. at 35. Officer Bortz testified that Officers Jody Miller and Jeremy Brown were in the second unit back, and at that time, Jeremy Brown ran right past him, to give foot chase to the passenger. Officer Bortz stated that he stayed trained on the driver, “trained meaning I have my duty pistol drawn on the driver.” Id. Officer Bortz testified that he and his partner, Jimmie Rodgers approached the vehicle and checked for individuals. He stated that when he approached the driver’s side, the window was up, and at this point his face was 16 inches away from the window, which “had this substance on it, the truck was covered with dust, but right away I was met with this pinkish foreign substance,

⁴ Officer Bortz testified that Waltz Place is a narrow and dark alley. Officer Bortz also testified that the vehicle was traveling at 10 to 15 miles per hour at most and did not violate any traffic laws.

didn't make any connection as to what it was at the time,⁵ made contact with the driver and ordered him not to move." N.T. 5/15/07, p.8.

Officer Bortz testified that he saw the Defendant minutes later, after Officer Brown had taken Defendant into custody, and brought him back. Officer Bortz testified that Defendant was the same individual that exited the passenger side of the vehicle.

Officer Bortz also testified as to his training and experience. Officer Bortz served in the United States Navy from 1988 to 1994, where he was a fire control man, which means he worked with weapon systems. He stated that "[i]t's the directional radar and directional systems for missiles and guns." N.T. 10/10/07, p.22. Officer Bortz testified that his duties involved firing of guns and ascertaining how far away you would have to shoot. He was also employed by Textron Lycoming for six years prior to becoming a Police Officer in January of 2003. While employed at Textron Lycoming, Officer Bortz became very familiar with that area and the various sounds originating from the area. He also testified that he was very familiar with the unnamed alley because of his employment with Textron Lycoming.

Agent Leonard Dincher of the Williamsport Bureau of Police, Criminal Investigation Unit, testified that he was called by Lycoming County Control around 2:00 or 3:00 a.m., for a suspected homicide. Agent Dincher testified that Lycoming County Control stated that "they had a dead person on an unnamed alley just north of High Street in the vicinity of Textron Lycoming." *Id.* at 52. Agent Dincher testified that he arrived at the Police Station around 2:30 or 3:00 a.m., where Officers Bortz, Brown, Miller, and Rodgers gave him an overview of the situation. Agent Dincher testified that he came into contact with Defendant around 8:30 a.m.,

⁵ Officer Bortz testified that eventually he found out that the matter was "flesh-type material, human brain matter." N.T. 5/15/07, p.8.

when they took him over to Captain Weber's Office. Agent Dincher told Defendant that he and Agent Kontz wanted to talk to him. Agent Dincher stated that "I asked him would you talk to me and he said yes and he started talking and he talked about this – an individual by the name of Faheem, Faheem did it, Faheem was in the car, Faheem did bad things." N.T. 10/10/07, p. 55. Officer Dincher asked Defendant to stop because he was informed this was a two person event and now Defendant was involving a third person, and Agent Dincher had not advised Defendant of his Miranda⁶ rights. Agent Dincher then went and asked the Officers if there was a third person in the vehicle, to which the Officers informed him there was not.

Agent Dincher went back into Captain Weber's Office and asked Defendant "if he would like to tell [them] the truth about this thing and he said yes." N.T. 10/10/07, p.57. At this point Agent Dincher got out the Miranda form and slid it to Defendant. Agent Dincher read Defendant his Miranda⁷ rights, and then asked him if he understood his rights. Agent Dincher testified that Defendant said "yes" and then he printed "yes" and initialed it. Agent Dincher then proceeded to ask Defendant if he wanted to talk to them without having an attorney present. Agent Dincher testified that Defendant responded "yes" and then said "no in writing and initial[ed] it." Id. at 60. At this point Agent Dincher said to Defendant "I thought you wanted to tell us the truth? I thought you wanted to talk to us?" Id. Agent Dincher stated that he was perplexed by Defendant's oral response and then his written response. Agent Dincher told Defendant that he and Agent Kontz were going outside of the room to give Defendant "some time to think about what he had just done." Id. at 69. Agent Dincher and Agent Kontz then left the room around 8:40 a.m. The Agents reentered the room around 8:45 a.m., and asked Defendant again "if he wanted

⁶ Miranda v. Arizona, 384 U.S. 436, (1966).

⁷ Id.

to tell [them] the truth.” Id. at 61. Agent Dincher testified that “I didn’t know if he wanted to talk to us or not . . . I was confused hence my reason to go back in at 8:45 and ask him again.” N.T. 10/10/07, p. 71. Agent Dincher went back over the rights with Defendant and asked him if he wanted to talk. Agent Dincher testified that he was trying to clarify Defendant’s original oral answer versus his written answer. After Defendant indicated he wanted to talk, Agent Dincher asked him if he wanted to “talk to [them] without having an attorney present? This time Defendant “indicated yes and he scratched out the word no, wrote the word yes and that was at 8:45 a.m.” Id. at 62. The Defendant then made various statements about the incident. Agent Dincher also testified that although tape recording and videotaping where available, this initial interview was not tape recorded or videotaped. He testified further that his practice was to talk to Defendants about general things for about 15 to 20 minutes, find out if they are willing to talk, and then give Miranda warnings.

Discussion

According to the Pennsylvania Supreme Court, “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.” Commonwealth v. Bryant, 866 A.2d 1143, 1145 (Pa. Super. Ct. 2005) (quoting Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992)).

The Police Officers had reasonable suspicion to stop the vehicle in which Defendant was a passenger

Under Count I of Defendant’s Motion to Suppress, he asserts that the Police Officers lacked reasonable suspicion and/or probable cause to stop the vehicle, in which he was a passenger.

According to the Pennsylvania Superior Court, “the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.” Bryant, 866 A.2d at 1146 (citing Commonwealth v. Dennis, 433 A.2d 79, 82 (Pa. Super. 1981)). “On the contrary, Terry and its progeny recognize that the essence of good police work is for the police to adopt an intermediate response where they observe a suspect engaging in ‘unusual and suspicious behavior.’” Bryant, 866 A.2d at 1146 (citing Dennis, 433 A.2d at 81 n.6, 82).

The analysis used in determining whether reasonable suspicion exists for an investigatory stop, is the same under both Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. See Commonwealth v. Lynch, 773 A.2d 1240, 1244 (Pa. Super. Ct. 2001). The standard is whether the officers “‘observed unusual and suspicious conduct by such person which may reasonably lead [them] to believe that criminal activity is afoot.’” Dennis, 433 A.2d at 81 n.5, (quoting Commonwealth v. Galaydna, 375 A.2d 69, 71 (Pa. Super. Ct. 1977)); See also Lynch, 773 A.2d at 1245. According to the Pennsylvania Superior Court,

it cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. The courts have rather consistently upheld such police conduct when the circumstances (e. g., suspicion that the occupants of a car are the persons who just committed an armed robbery) indicated that it was a reasonable precaution for the protection and safety of the investigating officers.

Dennis, 433 A.2d at 81 n.5 (quoting Galaydna, 375 A.2d at 71 (Pa. Super. Ct. 1977)); See also Commonwealth v. Ferraro, 352 A.2d 548 (Pa. 1975) (Court did not believe that the police officer by withdrawing “his service revolver while directing appellant to alight from the Lincoln turned the investigatory stop into an arrest.”).

The Court is satisfied that the Officers had reasonable suspicion to conduct the traffic stop. Officer Bortz testified that at 1:56 a.m., he heard two shotgun blasts coming from the direction of the unnamed alley. Officer Bortz testified further that on the morning in question, he saw nothing, no people running, heard no dogs barking, saw no cars, and then all of the sudden a blue Mercury Mountaineer SUV, came out of the unnamed alley. Officer Bortz testimony that he heard the two shotgun blasts coming from the direction of the unnamed alley, and then the vehicle's subsequent exit from the alley, provided at least reasonable suspicion to effectuate a traffic stop. Further, the Pennsylvania Superior Court has determined that

“[e]ven when a police officer's initial stop or pursuit of an individual is not based upon either a reasonable suspicion of crime or probable cause, subsequent actions by the detainee during the encounter may be the basis for a lawful arrest and the subsequent denial of a suppression motion regarding evidence seized after the arrest.

Commonwealth v. Hall, 929 A.2d 1202, 1207 (Pa. Super. Ct. 2007), (citing Lynch, 773 A.2d at 1246-48). “Under Pennsylvania law, any items abandoned by an individual under pursuit are considered fruits of a seizure.” Lynch, 773 A.2d at 1243 (citing Commonwealth v. Matos, 672 A.2d 769, 770 (Pa. 1996)). In order for abandoned items to be admitted into evidence, “the officer, before giving chase, has at least the reasonable suspicion necessary for an investigatory stop.” Lynch, 773 A.2d at 1243 (citing Matos, 672 A.2d at 771. n1).

Therefore, even if the initial traffic stop was a violation for lack of reasonable suspicion or probable cause, the Defendant's subsequent abandonment of the shotgun upon exiting the vehicle, gave police probable cause to arrest the Defendant. Therefore, the Court finds that the shotgun is not the fruit of an unlawful arrest and may be admitted into evidence. As the Commonwealth has met its burden, Count I of Defendant's Motion to Suppress is denied.

The Agents did not violate Defendant's Miranda rights

In Count II of Defendant's Motion to Suppress, he asserts that his statements should be suppressed, because the Agents violated his Miranda rights by ignoring what he wrote on the form, which stated that he did not wish to waive his rights.

In order for a waiver of Miranda rights to be valid, it must be made knowingly, voluntarily, and intelligently. 384 U.S. at 475; See also Commonwealth v. Scarborough, 491 Pa. 300, 421 A.2d 147 (1980) (holding that "the Commonwealth need only show by a preponderance of the evidence that a voluntary, knowing and intelligent waiver of a constitutional right was made"). There are two requirements to determine if a Miranda waiver is valid. First, the waiver of one's Miranda rights must have been voluntary, in that "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Colorado v. Spring, 479 U.S. 564, 573 (U.S. 1987) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)). The Court in determining the validity of a waiver under Miranda and the voluntariness of a confession looks to the "totality of the circumstances surrounding the interrogation." Spring, 479 U.S. at 573 (quoting Fare, 442 U.S. at 725). See also Commonwealth v. Carter, 546 A.2d 1173 (Pa. Super. Ct. 1988).

"If the individual indicates in any manner, at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Commonwealth v. Davis, 526 A.2d 1205, 1209 (Pa. Super. Ct. 1987) (quoting Miranda, 384 U.S. at 473-74). If in the absence of counsel, a subsequent encounter is initiated the "suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspects executes a

waiver and his statements would be considered voluntary under traditional standards.”

Commonwealth v. Wyatt, 669 A.2d 954, 957 (Pa. Super. Ct. 1995).

In Davis, the Court addressed a similar situation to the one at hand. In that case, the Police Officers read the Appellant his Miranda rights, Appellant stated he understood, and then the Police Officers asked him if he wanted to talk. The Appellant said he wanted to talk and was given a Miranda form. The Appellant wrote “yes” that he understood his rights and initialed next to it. Next to the second question “[h]aving these rights in mind do you wish to talk to us now?”, he wrote “No”. Davis, 526 A.2d 1205, 1208 (Pa. Super. Ct. 1987). The Police Officers testified at trial that they were confused by the Appellant’s written answer of “no” in contradiction to his prior oral statement that he wished to talk. “As a result, they asked why he wrote ‘no’ to the second question and appellant answered that he meant, ‘I don’t want an attorney.’ After this exchange, the appellant wrote the word ‘yes’ to this second question and his initials thereafter in substitution of the word ‘no’”. Davis, 526 A.2d at 1208. The appellant then gave an oral statement, which he signed and initialed. The Appellant later argued that he did not mean to change his answer. The Superior Court, in finding that Appellant’s consent was voluntary, stated that the Appellant gave mixed signals to the Police Officers, which “posed understandable questions in the minds of the police, who like most humans possess prescient powers that sweep away all the concerns of reasonable doubt. If there is any situation where police inquiry is appropriate this is such a case.” Davis, 526 A.2d at 1209. The Court stated further that the questions asked by the Police Officers, in order to clarify the appellant’s intent in making the contradictory statements, “were appropriate and commendable.” Id. The Court found that the questions were asked “to determine whether appellant wanted to make a statement as he first orally indicated or whether he wanted to remain silent as he subsequently indicated in

written form.” Id. As such the Court found that the statements were not “coercive or threatening.” Id.; See also Commonwealth v. Reiss, 655 A.2d 163, 167 (Pa. Super. Ct. 1995) (the appellant in this case, stated he did not wish to have an attorney present, but then on the waiver form, he wrote “yes” next to the question. The Court affirmed the lower court’s refusal to suppress evidence finding that “the details of the events which transpired regarding the consent, coupled with the fact that Appellant made conflicting statements regarding his desire for an attorney on the consent form itself, leads sufficient support for the court’s refusal to suppress evidence.”).

In the instant case, Defendant told Agent Dincher that he would talk, but then said “no in writing and initial[ed] it.” N.T. 10/10/07, p. 60. At this point Agent Dincher said to Defendant “I thought you wanted to tell us the truth? I thought you wanted to talk to us?” Id. Agent Dincher stated that he was perplexed by Defendant’s oral response and then, his contradictory written response. Agent Dincher told Defendant that he and Agent Kontz were going outside of the room to give Defendant “some time to think about what he had just done.” Id. at 69. Agent Dincher and Agent Kontz reentered the room five minutes later and asked Defendant again if he wanted to tell the Agents the truth. Agent Dincher said that he went back again to ask Defendant if he wished to talk because he was confused, and was trying to clarify Defendant’s original answer versus his written answer. Agent Dincher went back over Defendant’s rights with him and asked him if he wanted to talk. This time when Agent Dincher asked Defendant if he wanted to talk to them without an attorney present, Defendant “indicated ‘yes’ and he scratched out the word ‘no’, wrote the word ‘yes’ and that was at 8:45 a.m.” Id. at 62. The Defendant then made various statements about the incident.

The Court is satisfied that Defendant's waiver was made knowingly, voluntarily, and intelligently, and therefore, that his Miranda rights were not violated. Defendant gave mixed signals to the Agents, which "posed understandable questions in the minds of the police." Davis, 526 A.2d at 1209. The Court finds that the questions asked by the Agents were merely to determine whether the Defendant wished to talk as he first stated, or remain silent as indicated on the form. Further, the Court finds that in our case, the Agents actions were even less threatening and coercive, than those of the Police Officers in Davis. Here, the Court believes that by leaving the room to give Defendant time to think, the Agents actions were less threatening and coercive, than they would be by remaining in the room. As such the Court finds that Defendant's waiver of his Miranda rights valid and therefore, Count II of the Defendant's Motion to Suppress is denied.

ORDER

AND NOW, this ____day of January 2008, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

- I. Count I of Defendant's Motion to Suppress evidence based on lack of reasonable suspicion/probable cause is DENIED.
- II. Count II of Defendant's Motion to Suppress statements made while in police custody is DENIED.
- III. The Court does not need to address the Defendant's Motion for Change of Venue at this time. Defense Counsel's record is preserved as to this issue.
- IV. The Court does not need to address the Defendant's Motion for Individual Voir Dire at this time. Defense Counsel's record is protected as to this issue.

- V. The Court does not need to address the Defendant's Motion for Discovery, as Counsel has indicated that the items requested will be provided when they become available. This may, however, be revisited if a concern is raised regarding future discovery.
- VI. The Defendant's Motion to Preserve Samples is DENIED.
- VII. The Defendant's Motion to Exclude Photographs is DEFERRED until the time of trial. The Commonwealth shall provide copies of the photographs (similar size and manner of presentation) that they intend to introduce at trial to the Defense counsel for review on the date of jury selection for this case.
- VIII. The Defendant's Motion to Supplement the Omnibus Motion is GRANTED upon a further showing that as a result of receiving additional discovery they have been made aware of the grounds for the supplemental motion.

By the Court,

Nancy L. Butts, Judge

cc. DA (KO)
PD (Miele & Spring)
Hon. Nancy L. Butts
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)