

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 167-2007
 :
 JERMAR HINES, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : MOTION TO SUPPRESS EVIDENCE

DATE: March 18, 2008

OPINION IN SUPPORT OF THE OCTOBER 2, 2007 OMNIBUS SUPPRESSION ORDER

Before the court for determination is the Omnibus Pretrial Motion of Defendant Jermar Hines filed July 23, 2007. The motion seeks to suppress evidence seized from his vehicle which was discovered pursuant to a traffic stop. The motion was denied by an order entered on October 2, 2007. This opinion sets forth the court's reasons for denying the motion and issuance of that order.

I. BACKGROUND

On February 17, 2007, an evidentiary hearing was held before the court. Based upon the testimony received at the hearing, the court makes the following findings of fact.

On December 23, 2006, at approximately 1:30 a.m., the Defendant Jermar Hines, a black male driving a Cadillac, was stopped by Sergeant Joseph Hope of the Old Lycoming Township Police Department for traveling 47 miles per hour in a 35 mile per hour zone. Prior to approaching the Defendant's vehicle, Sergeant Hope radioed for back-up. Sergeant Hope proceeded to approach the Defendant's vehicle and requested license and registration information, which the Defendant promptly provided.

Sergeant Hope looked inside the vehicle with his flashlight to determine if there were any illegal contents in the vehicle. In this inspection he noticed a child's seat and piece of paper in the back seat. He observed no other items. About the same time, Officer Samar of the Old Lycoming Township Police Department arrived to assist Sergeant Hope. Hope requested the Defendant move his vehicle to a bank parking lot located at the end of the block as the location of the vehicle stop was close to an intersection. Before leaving, Sergeant Hope looked once again in the back seat with his flashlight, this time he noticed other items.

The Defendant complied with Sergeant Hope's request to move his vehicle and proceeded to drive to the parking lot with Sergeant Hope and Officer Samar following closely behind. Once in the otherwise empty parking lot, the Defendant conducted a series of three-point turns in order to maneuver his vehicle into a parking space. The Defendant was also moving around inside his vehicle while parking his car. These actions were suspicious to both Sergeant Hope and Officer Samar. Samar believed the Defendant was preparing to flee. Therefore, he responded by parking his police cruiser in the entrance of the parking lot in order to block the Defendant's exit path.

Once the cars were parked in the bank parking lot, Sergeant Hope proceeded to verify the Defendant's identification information while Officer Samar approached the Defendant's vehicle. Officer Samar looked in the back of the Defendant's vehicle and noticed a torn-off corner of a black garbage bag tied closed with a knot lying on the floor behind the driver's seat. Officer Samar immediately recognized the piece of bag as a way in which drugs are packaged, specifically eight balls of cocaine. The size and shape of the contents of the bag were also consistent with an eight ball package. Officer Samar asked the Defendant what was wrapped in

the plastic and requested that the Defendant give him the package. The Defendant refused to answer Officer Samar and then attempted to reach for the package.

Officer Samar ordered the Defendant to stop and step out of the car. The Defendant did not comply and was ordered out of the car several additional times before exiting the vehicle. This action on the part of the Defendant was also suspicious to the officers. Once the Defendant was out of the car, he was taken to the back of the police cruiser and patted down for weapons by Sergeant Hope. No weapons were found on the Defendant.

Officer Hope then confirmed that he had not seen the black garbage bag in the car when he had first stopped the Defendant and initially inspected the car's interior with his flashlight. The Defendant was then placed in handcuffs by Sergeant Hope for safety purposes. Officer Samar returned to the car to retrieve the piece of black garbage bag. When he reached the car, Officer Samar could not see the bag from the front driver's side door, so he opened the back driver's side door and noticed the bag partially concealed under the console.

Officer Samar seized the bag and placed it on the trunk of the car. He then opened the bag and found what he believed to be crack cocaine. The Defendant was placed under arrest, and subsequently charged with Possession with Intent to Deliver-Cocaine and other related offenses.

Hines asserts that although the police officers were at a lawful vantage point to view the black garbage bag in his car, the plain view doctrine was not satisfied, rendering the evidence obtained from the bag unconstitutional under the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. Specifically, Hines

argues that because the bag's incriminating nature was not immediately apparent under the totality of the circumstances, the police did not have probable cause to conduct the search.

II. DISCUSSION

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*, 889 A.2d 1216 (Pa. 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 primary purpose of both the Fourth Amendment to the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution "... 'is to protect citizens from unreasonable searches and seizures.'" *Commonwealth v. Smith*, 835 A.2d 5, 9 (Pa. 2003) (quoting *In re D.M.*, 781 A.2d 1161, 1163 (Pa. 2001)). The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Article I, Section Eight provides that:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8. The Fourth Amendment and Article I, Section Eight do not prohibit all searches and seizures only unreasonable ones. *Commonwealth v. Beaman*, 880 A.2d 578, 582 (Pa. 2005). “Thus, the central question in any litigation challenging a particular search or seizure is whether that search or seizure was constitutionally “reasonable.”” *Ibid.*

Except for a few established exceptions, warrantless searches and seizures are considered to be unreasonable. *Commonwealth v. Hughes*, 836 A.2d 893 (Pa. 2003); *Commonwealth v. Cleckl*

Under the plain view doctrine, the warrantless seizure of a piece of evidence which is in plain view is permissible when two criteria are met. First, the evidence must be seen from a lawful vantage point. Second, it must be immediately apparent to the viewer that the object observed is incriminating evidence. In other words, the observing officer must have probable cause to believe the evidence in question is contraband or incriminating evidence. See *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321, (1987).

The Supreme Court of Pennsylvania’s standard for evaluating whether probable cause exists is the “totality of the circumstances” test set forth in *Illinois v. Gates*, 462 U.S. 213 (1983). See *Commonwealth v. Rodriguez*, 526 Pa. 268, 585 A.2d 988 (1991). In applying this test in the context of the plain view doctrine, the court must determine whether the facts and circumstances existing at the time of the seizure would have the arresting officer reasonably believe that the evidence in question was incriminating in nature. *Commonwealth v. Ellis*, 541 Pa. 285, 298 (Pa. 1995). “Probable cause exists when criminality is one reasonable inference; it need not be the only, or even the most likely inference.” *Commonwealth v. Burnside*, 425 Pa. Super. 425, 625 A.2d 678, 681 (1993). The court in *Burnside* also commented that “we

focus on the circumstances as seen through the eyes of the trained officer, and do not view the situation as an average citizen might.” *Id.*

In applying this standard to the instant case, we find that Officer Samar and Officer Hope did have probable cause to believe the torn off corner of plastic garbage bag was being used as a container for illegal substances. The contents of the black garbage bag must not be suppressed because the Commonwealth has succeeded in satisfying the plain view doctrine. The Commonwealth has established that the (1) Officer viewed the plastic bag from a lawful vantage point, and (2) the incriminating characteristic of the bag was “immediately apparent” to the investigating officer.

The Defendant concedes that the Officer viewed the plastic bag from a lawful vantage point. See Defendant’s Brief in Support of Defendant’s Motion to Suppress, pg. 1. At issue is whether the incriminating characteristic of the piece of knotted garbage bag was “immediately apparent” to the investigating officer. The court finds that under the totality of the circumstances, the incriminating characteristics of the bag were immediately apparent to the investigating officer because (1) the way in which the corner of the bag had been torn off and knotted tightly, along with the bag’s size and shape, was consistent with the packaging commonly used for eight balls of cocaine, and (2) the Defendant’s actions inside the car consisting of unnecessary three point turns, movements inside the vehicle and refusal to exit the vehicle raised a reasonable suspicion that the Defendant was attempting to conceal the bag from the Officers’ plain view.

The manner in which the bag was formed and knotted rendered its incriminating nature immediately apparent to the investigating officers. “[W]hile a particular type of container may

have lawful purposes, the circumstances under which a trained narcotics detective views its use may be tantamount to a view of actual contraband.” *Burnside*, 625 A.2d at 681. Some types of narcotics packaging, like vials or small aluminum packages, have been viewed by courts as “single purpose containers which ‘by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance.’”

Commonwealth v. Mallory, 418 Pa. Super. 614, 614 A.2d 1174, 1177 (1991) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764-765 n. 13 (1979)).

In our case, the piece of torn off plastic bag was more akin to the vials and other single purpose packaging found in *Mallory*. First, the bag was not a complete bag as would be used for the carrying of every day objects or garbage, but was a torn off corner of a garbage bag tightly knotted into a small soft package. Upon seeing the knotted piece of bag the officers testified that they immediately recognized the piece of bag as a common way in which eight balls of cocaine were contained. While a full, un-tampered, garbage bag may not have had an appearance to give rise to an officers reasonable suspicion it contained drugs, the torn-off corner of this garbage bag, tied tightly into a knot around a small object clearly had an outward appearance consistent with drug packing and this raised a reasonable suspicion in the mind of Officers Hope and Samar justifying their seizure of the bag. This type of packaging would have raised such a reasonable suspicion in the mind of any reasonably trained officer.

Adding to the totality of the circumstances for a finding of probable cause, were the movements of the Defendant upon being stopped by the officers. In *United States v. Embry*, 546 F.2d 552, 556 (3rd Cir. 1976), the court held that the defendant’s discarding of a package recognized as one in which narcotics are frequently transported—rolled shape ball of

aluminum foil—, combined with his flight from the scene, satisfied the probable cause requirement for the defendant's arrest.

As in *Embry*, both the recognizable drug packaging and the Defendant's actions raise sufficient probable cause under the plain view doctrine. In our case, the officers testified that when the Defendant was asked to pull into the parking lot, he made a series of three point turns. The officers testified that they believed these turns indicated that the Defendant was getting ready to flee the scene. During the three point turns the officers stated that they could see the Defendant rummaging around inside his car around the center consol. When the officers approached the vehicle and asked the Defendant to exit, the Defendant refused and did not exit until he was asked several times to do so. The Officers found these actions on the part of the Defendant to be suspicious, and when combined with the easily recognizable drug container, it was reasonable for them to believe they had established probable cause to seize the incriminating item.

IV. CONCLUSION

Based upon the incriminating nature of the piece of plastic bag being immediately recognizable to the arresting officers, along with the Defendant's suspicious movements inside the car and refusal to exit the car, the plain view doctrine is satisfied and probable cause existed to seize the plastic bag. Accordingly, the order of October 2, 2007 was entered denying Hines' motion to suppress the evidence.

BY THE COURT,

William S. Kieser, Judge

cc: Janan Tallo, Esq.
District Attorney
Judges
Rebecca Penn, Esquire (Law Clerk)
Gary L. Weber, Esquire (Lycoming Reporter)