

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1013-2008
:
vs. : CRIMINAL
:
HEATHER FOGELMAN, : Motion to Suppress
Defendant :

OPINION AND ORDER

Defendant is charged in a three count Information with the following: (1) driving under the influence, incapable of safe driving, 75 Pa.C.S. §3802(a)(1); (2) driving under the influence, high rate of alcohol (BAC .11), 75 Pa.C.S. §3802(b), and (3) careless driving, a summary offense. The offenses allegedly occurred on April 6, 2008.

The Court held a suppression hearing on this matter on January 12, 2009.

Testimony was provided by two Pennsylvania State Troopers, Trooper Travis Doebler and Trooper Kenneth Fishel. The troopers' testimony established that on April 6, 2008 around 4:18 a.m. the troopers were patrolling in a marked cruiser in the area of Greevy Road in Loyalsock Township near the boat ramp. The troopers were traveling east and they passed a white Cadillac sedan traveling west on Greevy Road toward a cul-de-sac at the end of the road. The troopers noted there had been incidents of vandalism in this area so they turned their cruiser around so they could check the vehicle.

After turning they initially did not see the vehicle, but they caught up with the vehicle at the end of the cul-de-sac. As they approached, they observed the Cadillac sitting the end of the cul-de-sac with the lights off.¹ They observed Defendant moving from an area near the driver's door around to the back of the car. Three other people remained in the car.

¹ The testimony of the troopers was not clear regarding whether the vehicle engine was running. Trooper Doebler testified the engine was running. When the video of the confrontation was played for Trooper Fishel, he

At the suppression hearing, the Commonwealth played a videotape made from a camera in the cruiser, which showed an individual moving toward the back of the car.

Upon arriving, the troopers used the PA system in their cruiser to tell Defendant to get back into her vehicle. Defendant complied and returned to the driver's seat in her vehicle.²

Trooper Fishel then approached the driver's side of the vehicle. He immediately asked Defendant for her driver's information. He noticed Defendant had bloodshot and glassy eyes and an odor of alcohol. He informed Trooper Doebler of his observations. Trooper Doebler then had Defendant exit the vehicle so he could have her perform field sobriety tests. Defendant failed the field tests. Trooper Doebler also noticed Defendant had slurred speech and bloodshot, glassy eyes. Thus, he arrested Defendant for the offense of driving under the influence of alcohol.

The Court believes the basic issue raised by the suppression is whether Trooper Fishel's ordering Defendant back into her vehicle over the PA system upon arriving at the cul-de-sac was a seizure of Defendant as opposed to a mere contact between a law enforcement officer and a citizen. The difference between a mere encounter and a seizure is important because if this was a seizure the Constitutional rights of Defendant are implicated and probable cause or Terry grounds for the seizure must be shown by the Commonwealth.

Clearly, after Defendant was told to get back into her vehicle and the trooper approach Defendant, his observations would soon satisfy a Terry seizure and then probable cause to arrest.

noted the keys were in the ignition, but the car engine was not running.

² Trooper Fishel testified that he ordered Defendant to get back into her car. At another point in his testimony he testified he told Defendant "to have a seat in her vehicle."

The concern the Court has with his matter is that it does not believe the State police had reasonable and articulable facts to believe a crime was being committed based on seeing Defendant's vehicle sitting in the cul-de-sac. When Defendant is ordered or told to go back into her vehicle over the PA system any reasonable person would assume they were not free to leave and had to comply with the request by uniformed officer. Thus, the Court cannot conclude this was a mere encounter.³

While not criticizing the troopers and understanding the difficulty of their job, including inherent dangers, if they simply would have approached Defendant outside her vehicle to initiate an encounter, the observations they would have made would have quickly led to "Terry" information and then probable cause.

However, in light of our findings, the Court is constrained to grant the defense motion and all observations and evidence obtained from the police contact with Defendant in her vehicle are hereby suppressed as evidence for use at trial.

The follow is entered:

³ Recent case law, in recognizing the inherent danger police officers face in street encounters with citizens, has allowed officers after valid traffic stops or Terry stops to momentarily control drivers or vehicle passengers by ordering them back into or out of a vehicle for officer safety. See Commonwealth v. Pratt, 930 A.2d 561 (Pa.Super. 2007). Such orders to re-enter a vehicle are seen as a "mere inconvenience." However, the predicate requirement even for this minimal intrusion is a lawful stop. The Court has not seen the concept applied to a case without the predicate of an initial lawful stop. The Court has not seen this concept applied to a mere encounter. Even a minor seizure of a person would seem to be inconsistent with the concept of an encounter.

Perhaps our Appellate Courts, in the interest of police officer safety, will consider allowing a momentary seizure, such as ordering a driver or passenger into a vehicle, in the context of a late night encounter with a citizen when there is not the predicate lawful stop for a vehicle violation or sufficient facts to justify a Terry stop. However, the Court is not aware of any such case law to date.

ORDER

AND NOW, this ____ day of February 2009, Defendant's Motion to Suppress Evidence is hereby **GRANTED**.

By The Court,

Kenneth D. Brown, P.J.

cc: George Lepley, Esquire
Paul Petcavage, Esquire (ADA)
Gary Weber, Esquire (Lycoming Reporter)
Work File