

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-422-2009
vs. :
:
RYAN SIMCOX, :
Defendant :

OPINION AND ORDER

This matter came before the Court on Defendant's Omnibus Pre-trial Motion.

The relevant facts follow.

Just after 6:00 p.m. on December 10, 2008, while Trooper Tyson Havens was traveling north on Wallis Run Road in an unmarked police car on his way home, he observed a green Pontiac partially on the roadway and partially in a pull off area. It did not have its headlights or its four-way flashers on. The road was very winding; it was almost like a dark hollow. Trooper Havens pulled in behind the vehicle and activated his lights.

The vehicle pulled out, went about 100 yards then stopped. The driver jumped into the rear passenger seat and the passenger jumped into the driver's seat. The person who jumped into the rear passenger seat was moving up and down, as if taking off or putting on an article of clothing. The trooper initially thought it may have been a couple parking, but when he got out of his vehicle and reached the Pontiac, he saw two males and noticed a strong odor of marijuana. Defendant was the individual who jumped from the driver's seat into the rear passenger seat. Both individuals had bloodshot, glassy eyes and slurred speech. Trooper Havens believed both individuals were under the influence of marijuana.

In order to ascertain what was going on, Trooper Havens began asking questions of the individuals. Trooper Havens asked the individuals their names. He

recognized Defendant's name from a possession with intent to deliver a controlled substance case that Trooper John Nett had filed against Defendant; Trooper Nett had asked Trooper Havens to be an expert witness in that case. Defendant did not possess any firearms in that case, which ended in a plea to simple possession.

Trooper Havens asked Defendant why he jumped into the backseat, and Defendant claimed he did not. The trooper asked to whom the vehicle belonged and both individuals replied that the vehicle was not theirs.

Since Trooper Havens was alone and there were two individuals in the vehicle who were acting strangely, he was concerned about weapons that could pose a danger to him. He got the other individual out of the driver's seat and patted him down for weapons. Finding none, he asked the individual to go back and sit by his unmarked police vehicle. Reaching between the front seats, Trooper Havens then patted down Defendant as he sat in the backseat. Trooper Havens also checked the area around Defendant for weapons. Trooper Havens then moved to the driver's seat to do a wingspan search of that area. During this wingspan search, Trooper Havens discovered a baggie of marijuana underneath the driver's seat.

Trooper Havens arrested both individuals for driving under the influence (DUI) and possession of marijuana. Trooper Havens found 3 cell phones and a couple hundred dollars cash on Defendant. The trooper called a wrecker to transport the vehicle to the state police barracks in Montoursville. While transporting the individuals back to the barracks, Trooper Havens stopped at the Loyalsock Valley School and read them their *Miranda* rights. The trooper testified that he believed it was then that Defendant told the trooper the vehicle was registered to Defendant's mother.

At the barracks, Trooper Havens conducted a custodial inventory search of the vehicle pursuant to state police policy. Trooper Havens testified that as of June 2008 he was told if he did not conduct an inventory search when a vehicle was taken into custody, it was a violation of the operations manual. In the trunk of the car, but visible and accessible through the back seat armrest, Trooper Havens saw a black puffy coat. Trooper Havens pulled the jacket through the armrest to see if it contained any valuables. Trooper Havens could tell there was something in the sleeve when he first picked up the jacket. He pulled the item out and there were 36 baggies of marijuana in two shopping bags that had been stuffed in the sleeve. The marijuana weighed approximately ¼ of a pound.

Based on the marijuana found under the seat and in the jacket, Trooper Havens obtained a search warrant to search the vehicle. No other contraband was found.

Defendant, through his counsel, filed an omnibus pretrial motion seeking suppression of the evidence. In the motion, the defense contends Trooper Havens conducted an unconstitutional search of the vehicle and he exceeded the scope of an inventory search.

In asserting that the search of the vehicle was unconstitutional, the defense notes that Article 1, §8 of the Pennsylvania constitution provides greater protection than the federal Constitution when it comes to the automobile exception to the warrant requirement. The defense relies on *Commonwealth v. Hernandez*, 594 Pa. 319, 935 A.2d 1275 (Pa. 2007) for the proposition that Pennsylvania requires both probable cause and exigent circumstances beyond the mere mobility of the vehicle to justify a warrantless vehicle search. The defense then argues based on *Hernandez* that neither probable cause nor exigent circumstances were present in this case. The Court finds that both probable cause and exigent circumstances are present in this case.

The Court finds Trooper Havens had probable cause to believe Defendant was driving, operating or in actual physical control of a vehicle while he was under the influence of marijuana. “Probable cause exists where the facts and circumstances within the officers’ knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Commonwealth v. Gibson*, 536 Pa. 123,130, 638 A.2d 203, 206 (1994). “It is only the probability, and not a *prima facie* showing, of criminal activity that is the standard of probable cause for a warrantless arrest. Probable cause exists when criminality is one reasonable inference; it need not be the only, or even the most likely, inference.” *Commonwealth v. Quiles*, 422 Pa. Super. 153, 167, 619 A.2d 291, 298 (1993)(en banc)(citations omitted); see also *Commonwealth v. Smith*, 2009 PA Super 155, p.7 (Aug. 10, 2009); *Commonwealth v. Lindblom*, 854 A.2d 604, 607 (Pa. Super. 2004).

Trooper Havens observed a green Pontiac parked half on and half off the roadway without its headlights or four-way flashers on. He pulled in behind the vehicle and activated his lights. The vehicle pulled away and traveled about 100 yards before stopping and pulling over. Defendant jumped from the driver’s seat to the back seat and began moving up and down. During these furtive movements, Trooper Havens saw Defendant’s head move up, down and sideways as he approached the vehicle. When Trooper Havens reached the vehicle and began to speak to the occupants about what was going on, he immediately noticed a strong odor of marijuana. Both occupants had slurred speech, and glassy, blood shot eyes. Based on these facts, it was reasonable for Trooper Havens to infer that Defendant had driven, operated or been in actual, physical control of the movement of a motor vehicle while he was under the influence of marijuana. Therefore, Trooper Havens

had probable cause.¹

The Court also believes exigent circumstances were present to justify a protective sweep for weapons. In *Hernandez*, the Pennsylvania Supreme Court acknowledged that potential danger to police or the public satisfied the exigency requirement for warrantless vehicle searches in Pennsylvania. 594 Pa. at 331-332, 935 A.2d at 1282. When a police officer notices facts that give rise to concern for officer safety or the safety of the public, he can conduct a protective search for weapons. The scope of this search includes not only patting down the occupants of the vehicle, but also includes a limited search of any place in the passenger compartment of the vehicle where a weapon could be concealed. See *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469; *Commonwealth v. Morris*, 537 Pa. 417, 644 A.2d 721 (Pa. 1994). Here, Trooper Havens had a legitimate concern for his safety. He was alone and outnumbered in a secluded, rural area that was like a dark hollow. The vehicle was parked half on the road and half off the road with no headlights or four-way flashers on. The occupants of the vehicle were acting furtively. When the trooper initially pulled behind the vehicle and activated his lights, the vehicle pulled out and traveled about 100 yards before stopping. Defendant jumped from the driver's seat to the rear passenger seat and was moving up and down. When Trooper Havens reach the driver's door of the vehicle, he immediately noticed a strong odor of marijuana. Both occupants had slurred speech and blood shot, glassy eyes, leading Trooper Havens to believe both were under the influence of marijuana. Defendant also was not truthful with Trooper Havens. Trooper Havens asked Defendant why he jumped into the back seat and Defendant claimed he did not. Trooper

¹ The Court also believes the facts would justify a reasonable belief that the occupants of the vehicle had committed or were committing the crime of possession of a controlled substance.

Havens also recognized Defendant's name from a case where Defendant was charged with possession of a controlled substance with the intent to deliver it and Trooper John Nett has asked Trooper Havens to testify as an expert for the preliminary hearing. Based on the totality of the circumstances, Trooper Havens' concern for his safety was reasonable and justified a protective search for weapons of the passenger compartment of the vehicle.² During this search for weapons, Trooper Havens discovered a baggie of marijuana underneath the driver's seat.

Even if Trooper Havens exceeded the scope of a protective search, the marijuana beneath the driver's seat would have been discovered during the inventory search. Since both individuals appeared to be under the influence of marijuana, Trooper Havens could not let either one drive the vehicle from the scene. In fact, Trooper Havens arrested both for DUI. Therefore, Trooper Havens had to call for a wrecker and have the vehicle transported to the barracks. Trooper Havens testified that the policy of the state police since

² The defense argues that like *Hernandez* there was a mere assertion of danger in this case. The Court finds *Hernandez* factually distinguishable. In *Hernandez*, the operations manager of Yellow Freight contacted the local police and reported that a Hispanic male had arrived to pick up a shipment of 20 boxes, for which a fee of over \$2,000 was due on delivery. The man, whom the manager described as nervous, was unaware that he would have to pay for the shipment and promised to return with the cash. The manager became suspicious and inspected one of the boxes of the shipment, in which he observed packets of marijuana wrapped in plastic. The police instructed the manager to allow the Hispanic male to pick up the shipment. Less than thirty minutes later, the Hispanic male arrived driving a U-Haul truck, paid the shipping fee in cash and the boxes were loaded into the truck. Meanwhile, the police had staked out the area and waited for the U-Haul truck to exit the terminal. When it did, the police stopped the truck, and ordered the man from it. Another officer arrived on the scene and noticed the rollup rear door was closed with a latch, but unlocked. Drawing his weapon, he opened the rollup door and circled the pallet of boxes contained inside. He noticed an open box and saw that it contained a brown package maybe 12 to 18 inches in length that from his training and experience he recognized as consistent with some kind of narcotics. The officer testified that he entered the rear of the truck for officers' safety reasons to see if there was someone else in the truck. The Supreme Court found that there was no evidence in the record to support police claims of danger from a second person and thus the search of the rear of the truck was not supported by exigent circumstances. The Court, however, did not suppress the evidence because the search warrant affidavit for the vehicle contained sufficient facts to establish probable cause without the officer's observations of the rear of the truck. This case did not involve a pat down of the Hispanic male or a protective search of the passenger compartment of the U-Haul truck. Even if it had, the same concern for safety would not be present as there were multiple officers and one suspect in *Hernandez* as compared to one officer and multiple suspects acting furtively during a vehicle stop in a secluded area in the case sub judice.

June 2008 was to conduct an inventory search of every vehicle in their custody.

The defense also asserts Trooper Havens exceeded the scope of an inventory search when he searched the black jacket that was discovered in the trunk. Again, the Court cannot agree. The purposes of an inventory search include protecting a defendant's property while he is in custody and protecting the police against theft claims when a defendant is released. *Commonwealth v. Nace*, 524 Pa. 323, 327, 571 A.2d 1389, 1391 (Pa. 1990).

When Trooper Havens removed the jacket through the armrest opening between the back seat and the trunk, he realized there was something in the sleeve of the jacket. To protect Defendant's property and protect the police from a claim of theft, Trooper Havens needed to inventory not only the jacket, but the item in the sleeve. The Court does not believe this exceeded the proper scope of an inventory search. See *Nace*, supra. (police did not exceed inventory search when they opened the defendant's wallet and took out a slim address book, which had the victim's phone number written on the outside back cover).

ORDER

AND NOW, this ____ day of September 2009, the Court DENIES

Defendant's Omnibus Pretrial Motion which sought suppression of the evidence seized by Trooper Havens.

By The Court,

Kenneth D. Brown, President Judge

cc: Henry Mitchell, Esquire (ADA)
Lance Marshall, Esquire
Masorti & Sullivan, 302 S. Burrowes St., State College PA 16801
Gary Weber, Esquire (Lycoming Reporter)
Work file