

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-539-2009**
vs. :
 :
TAWAN MILLER, :
Defendant :

OPINION AND ORDER

This matter came before the Court on Defendant’s motion to suppress evidence. The relevant facts follow.

Defendant was arrested and charged with possession of a small amount of marijuana and possession of drug paraphernalia as a result of contact with the State Police on February 5, 2009. Defendant filed a motion to suppress evidence. The Court held hearings on July 6, 2009 and October 16, 2009. Four witnesses testified at the hearings: Trooper Tyson Havens; Trooper Scott Davis; Defendant; and Defendant’s girlfriend Nija Stafford.

Trooper Havens testified that on February 5, 2009 at approximately 11:00 p.m. he and Trooper Davis were working patrol in Randall Circle when they observed a black Ford Taurus with its four-ways/hazards on alongside the right side of the circle, in an area that was designated “No Parking.” There were available legal parking spaces a short distance away on the left. Trooper Havens activated the overhead lights on his marked police cruiser. He and Trooper Davis exited their vehicle and approached the Taurus. Trooper Davis approached the driver’s side of the vehicle and Trooper Havens approached the passenger side. The vehicle was occupied by one passenger, who was identified as Defendant. Trooper Havens asked Defendant for some identification. Defendant provided identification. Trooper Havens testified he was trying to ascertain what was going on. Defendant explained that his girlfriend was dropping off her daughter at the child’s

grandmother's residence in Randall Circle. While speaking to Defendant, Trooper Havens said he detected a slight odor of marijuana. The odor was faint enough that Trooper Havens, despite his 16 years of experience, could not tell if the odor was burnt marijuana or fresh marijuana. He asked Defendant to exit the vehicle because he wasn't sure where the odor was coming from, so he tried to separate Defendant from the vehicle to help him determine whether the odor was coming from Defendant or the vehicle. Defendant was very cooperative and Trooper Havens did not believe Defendant was armed or dangerous. When Defendant stepped out of the vehicle, Trooper Havens did not believe he still smelled the odor on or about Defendant's person. Nevertheless, Trooper Havens asked Defendant if he had any marijuana. Defendant said no. Trooper Havens then asked Defendant if he would consent to a search of his person. He explained to Defendant that he did not have to consent and if Defendant did not consent he would have to get a warrant to search him. According to Trooper Havens, Defendant consented to being searched. Trooper Havens testified he did not pat down Defendant; he searched him. Trooper Havens went through Defendant's pockets and he found a smaller than 1" x 1" bag of old, dried out marijuana in Defendant's left rear pocket. Defendant indicated he had forgotten the marijuana was there. When Trooper Havens saw the marijuana from Defendant's pocket, he did not believe that was what he smelled. He explained that marijuana is somewhat like onions; it has a potent odor that is difficult to get off clothes or out of your car and can linger for awhile. He believed that at some point in the recent past, someone smoked marijuana in the vehicle and small pieces of marijuana fell on the seat or carpet and running the heater in the vehicle had reactivated the smell of marijuana. Trooper Havens seized the vehicle and transported it back to the barracks. Defendant's girlfriend owned the vehicle. At a later time, she provided

consent to search the vehicle. Nothing was found in the car.

Trooper Davis testified that he observed the vehicle in the no parking zone. He approached the driver's side and Trooper Havens approached the passenger. Trooper Davis observed the contact between Trooper Havens and Defendant. Trooper Havens asked Defendant for identification. Trooper Davis testified he did not smell the odor of marijuana, but he wasn't leaning over to speak to anyone in the car. He heard Trooper Havens tell Defendant he believed he smelled marijuana in the vehicle and he asked him to exit the vehicle. Trooper Havens then asked Defendant if he could search him and told him he did not have to consent. Defendant agreed and Trooper Havens searched his pockets. After Trooper Haven's found the marijuana, Defendant's girlfriend came out and she was irate.

Defendant's girlfriend, Nija Stafford, testified that she pulled her car next to the right curb, left the engine running and took her daughter into her daughter's grandmother's apartment at 1602 Randall Circle. It was very cold outside. She was inside for less than ten minutes. When she came out, Defendant was at the back of a police car. His hands were on the trunk and his shoes and coat were off. Trooper Havens was behind Defendant. When she got to the front of her vehicle, Trooper Havens told her he found weed in her car and he showed her the packet of marijuana that was on the trunk. She went to shut off her vehicle and Trooper Havens asked her for identification. She went to get her purse out of the back seat. While doing this, she was upset and said some things, including the F word. One of the troopers escorted her away from her the rear driver's side door. She was handcuffed and told to take off her shoes. Trooper Havens went into backseat for her purse and identification. Trooper Havens asked if he could search the car. She said no. He said then we're towing it. Once they towed the car, they took the cuffs off of her. She had to call

the barracks to find out where her car was. That night she went to the barracks and met Trooper Havens. Trooper Havens told her that if she signed a paper for them to search the car, she could get the car back the next day. If he had to take it to a judge, he might say there is not enough to search, but that might not be until Tuesday or Wednesday of the next week. She could not be without her car that long, so she signed the consent form.

Defendant testified he was sitting in the vehicle reading the apartment guide when the police pulled up beside the vehicle and asked him to roll the window down. It was cold outside and all the windows were up. Defendant leaned over and rolled down the driver's side window. Trooper Havens asked what was going on and why he was there. Defendant told him that his girlfriend was dropping her daughter off at the daughter's grandmother's apartment. The police backed up their vehicle and parked behind the vehicle in which Defendant was seated. Trooper Havens got out of his vehicle and approached the Taurus on the driver's side. He asked Defendant for identification. Defendant reached across to the driver's side and handed Trooper Havens his identification. Trooper Havens took his identification and went back to the police cruiser. He came back to the driver's side and told Defendant he did not think he was the individual on the identification card, so the trooper asked him for his social security number. Defendant handed Trooper Havens his social security card. Trooper Havens then walked to the passenger side of the vehicle, opened the door, leaned in and started to pat down Defendant. Defendant thought the trooper called it a wingspan search. The trooper asked him for the registration for the vehicle and went to go inside the glove box. Defendant explained he could not give him the registration because the glove box was locked. Then the trooper asked him to step out of the vehicle. Defendant asked for what reason. The trooper told Defendant he smelled marijuana in the

car. Defendant told the trooper he couldn't be smelling marijuana; they just finished eating in the vehicle. The trooper then took him to the back of the vehicle. The trooper took his jacket and searched it. Then the trooper searched his person and made him take his shoes off.

Defendant claimed the trooper planted the marijuana on him. He also said another person came outside and the troopers told him to go back in his house. Defendant acknowledged that he never reported Trooper Havens to the state police for planting drugs on him. He also stated he did not get his identification back that night. He got it back in a yellow envelope when his girlfriend got her vehicle back.

Trooper Havens was recalled in rebuttal. He testified he did not conduct a wingspan search; he did not try to look in the glove box; and he did not pull Defendant out the vehicle. He searched him with his consent and found marijuana in his pocket; he did not plant the marijuana on Defendant.

Trooper Davis was also recalled in rebuttal. He also testified that Trooper Havens did not search Defendant while he was inside the vehicle and he did not see Trooper Havens plant marijuana on Defendant. He heard Havens ask to search and explain that Defendant did not have to consent. Trooper Davis said he did not hear Defendant consent, but Defendant did not resist or anything. Trooper Davis also explained that although the cruiser was equipped for videotaping capabilities, it had been malfunctioning for about a month, so there was no videotape available of their interaction and conversation with Defendant.

Although the Court does not find the defense witnesses credible, the Court is not convinced that the police had reasonable suspicion to request consent to search Defendant's person under the facts and circumstances of this case. First, the testimony of the

two troopers was not consistent with respect to the odor of marijuana. Trooper Havens testified he smelled a slight odor of marijuana, but Trooper Davis testified he did not smell marijuana. Second, Trooper Havens testified that he asked Defendant to step out of the vehicle to try to determine whether the odor that he allegedly smelled was coming from Defendant or the vehicle. When the Court was questioning Trooper Havens to clarify what happened, Trooper Havens indicated that when Defendant stepped out of the vehicle, he did not believe he still smelled the odor of marijuana. The reasonable inference from this testimony is that the odor was coming from the vehicle and not from Defendant. Third, Trooper Havens testified that he did not think the smell came from the small amount of old marijuana he found in Defendant's pocket. Instead, he testified that he thought either someone had smoked marijuana in the vehicle in the recent past or small pieces of marijuana had fallen onto the seat or carpet and the odor was reactivated from the heat of the vehicle. Fourth, Trooper Davis testified on rebuttal that he did not hear Defendant consent to the search, but he did not resist or anything. Given the totality of these circumstances, the Court is not convinced that the police had reasonable suspicion to search Defendant's person or that Defendant consented to the search as opposed to merely acquiescing when Trooper Havens searched his pockets.

ORDER

AND NOW, this 2nd day of December 2009, the Court **GRANTS**
Defendant's Motion to Suppress.

By The Court,

Kenneth D. Brown, President Judge

cc: Henry Mitchell, Esquire (ADA)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file