

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-700-2009
:
vs. : Decision re: Defendant's Motion to Suppress
: and Petition for Habeas Corpus
THERIM POWELL, :
Defendant :

OPINION AND ORDER

This matter came before the Court on Defendant's Omnibus Pretrial Motion seeking suppression of evidence. The relevant facts follow.

On December 4, 2008, Trooper Edward Dammer and Trooper McMunn were on patrol working the midnight shift (10 p.m. to 6 a.m.). At approximately 0245 hours, they drove into the Sheetz parking lot and observed a silver van. The van's lights were on and the engine was running, but the van appeared to be unoccupied. The police drove past the vehicle toward the end of the parking stall. The van was in about the middle of the stalls. The police stopped their vehicle and walked back to the silver van to determine whether someone left a running vehicle unattended in violation of section 3701 of the Vehicle Code.

When Trooper Dammer reached the driver's side door, he observed an individual later identified as Amien Patton reclined in the front passenger seat. Patton leaned up and opened the driver's side door. As soon as the door opened, Trooper Dammer smelled a strong odor of freshly burnt marijuana. Patton slid into the driver's seat. Trooper Dammer asked Patton about the smell of marijuana. He explained they had been with some girls earlier and they had smoked marijuana, but he claimed they smoked all of it and there were no drugs in the vehicle.

Trooper Dammer noticed two packages of Backwoods cigars in the front

console that appeared to contain something. He testified the external leaves of these cigars are commonly removed and then the cigars are re-rolled with drugs.

About 30 seconds or a minute after Trooper Dammer started speaking with Patton, Defendant Therim Powell came out of Sheetz and approached the van. Defendant placed his purchases in the van.

The troopers asked Defendant and Patton for identification. Neither individual had photo identification, but they provided their name and date of birth to the troopers. Patton indicated he was the owner of the van, and he showed Trooper Dammer a pink slip that listed him as the purchaser of the vehicle.

Trooper Dammer noted that both individuals appeared very nervous. They had blood shot eyes, they were very lethargic and there was an odor of marijuana clinging to their persons. Trooper Dammer believed both were under the influence of marijuana and if he could have determined who drove the van to Sheetz, he would have arrested that individual for driving under the influence of marijuana.

Trooper Dammer asked Patton for consent to search the van. He refused. Trooper Dammer then told Patton he would be detained until the troopers found out who he was. Trooper Dammer also told Patton he was seizing the van.

Trooper McMunn ran the names in their in-car computer to verify their identities and determine their criminal histories. Patton had a history of firearm violations and Defendant had a history of controlled substance violations. During his conversations with the police, Defendant made statements that they had come up from Philadelphia, he had just gotten off probation in Lycoming County for drug offenses and he mentioned Trooper Davis, who deals primarily with drug interdiction.

Once their identities were confirmed, Patton and Defendant were free to leave. Defendant went into Sheetz again and called his girlfriend to pick them up. She arrived a few minutes later in another van, and Patton and Defendant left the scene.

Trooper Dammer had the van towed back to the State Police barracks in Montoursville. Trooper Dammer applied for and obtained a search warrant to search the van. During the search, the police found a bag of cocaine in the driver's door. In the passenger door they found two bags of powder cocaine, a bag of crack cocaine and two vials of codeine. Under the driver's seat, they found a .45 caliber pistol. They checked the serial number on the pistol and discovered it had been reported stolen. In the passenger door, the police found a Springfield 9 mm pistol. The serial number on that firearm had been ground off, so the police sent this weapon to the crime lab to see if the serial number could be lifted or recovered. They also examined the Backwoods cigar packages. It turned out to be the paper and foil packaging material and some tobacco, but no intact cigars.

The police charged Defendant with two counts of possession of a controlled substance with the intent to deliver it, two counts of possession of a controlled substance, receiving stolen property, possession of firearm prohibited, alter/obliterate mark of identification, firearms not to be carried without a license, possession of firearm with manufacturer number altered, and possession of drug paraphernalia.

Defendant filed an omnibus pretrial motion seeking to suppress the evidence seized by the police. This motion essentially presented three issues: (1) whether the police had reasonable suspicion to approach the vehicle and detain Defendant; (2) whether the police had probable cause to seize the vehicle; and (3) whether the police stated sufficient information in the affidavit for the search warrant to establish probable cause to search the

vehicle.

The Court finds Trooper Dammer did not need reasonable suspicion to approach the vehicle and his initial contact with Defendant was a mere encounter. The Pennsylvania Supreme Court recently reiterated differences between the various types of interactions police have with individuals in *Commonwealth v. Chase*, 599 Pa. 80, 960 A.2d 108 (Pa. 2008) as follows:

There are three relevant cognizable categories of interactions between persons and police: a mere encounter, an investigative detention, and a custodial detention or arrest. A mere encounter need not be supported by any level of suspicion, and does not require a person to stop or respond. *Id.* An "investigative detention," or *Terry* stop, must be supported by reasonable suspicion; it subjects a person to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. An arrest or custodial detention must be supported by probable cause.

Id. at 97, 960 A.2d at 177, citing *Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 375 (Pa. 2000). Trooper Dammer drove past the van and stopped his police car in a stall 15 to 20 yards beyond it. The van was not blocked and Patton's ability to drive away was not hindered in any way. Trooper Dammer did not activate his lights or siren. In short, neither Defendant nor his vehicle were detained in any way prior to Trooper Dammer noticing an odor of marijuana coming from the vehicle and Patton's person.

Even if Trooper Dammer needed reasonable suspicion to approach the van, Trooper Dammer had reasonable suspicion to believe there was a vehicle code violation when he approached the van. Section 3701 of the Vehicle Code prohibits leaving a vehicle unattended with the engine running. 75 Pa.C.S. §3701. When the police pulled into the Sheetz parking lot, the van's lights were on, the engine was running and no occupant could be seen, because Patton's seat was reclined. It was not until after Trooper Dammer was next

to the van and Patton sat up and opened the driver's side door that Trooper Dammer realized the vehicle was occupied. There is nothing in the record to indicate that Trooper Dammer in any way compelled or requested Patton to open the door. When Patton sat up and opened the door, he negated Trooper Dammer's belief that the vehicle was unoccupied, but the strong odor of marijuana emanating from the vehicle gave Trooper Dammer at least reasonable suspicion that a controlled substance violation had been or was being committed. Since Trooper Dammer now had reasonable suspicion concerning a controlled substance violation, he had a legitimate basis to detain Patton and Defendant to ascertain their identity and conduct a pat down for weapons to ensure the troopers' safety during the investigatory detention.¹ Therefore, the Court rejects Defendant's contention that the police unlawfully or improperly approached the van and detained Defendant.

Defendant next asserts the police lacked probable cause to seize the vehicle. The Court cannot agree with Defendant's assertion.

"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).

¹ Trooper Dammer did not find or seize anything from Defendant as a result of the pat down.

Based on the evidence presented at the hearing, the Court finds Trooper Dammer had probable cause to believe a crime had been or was being committed. When Patton sat up and opened the driver's door, Trooper Dammer immediately noticed a strong odor of marijuana. During their conversations with Patton and Defendant about the smell of marijuana and their identity, the troopers observed that they was very nervous, their eyes were bloodshot, and there was an odor of marijuana clinging to their persons. Trooper Dammer also observed two packages of Backwoods cigars in the console. In Trooper Dammer's training and experience individuals would remove the outer leaves of the Backwoods cigars and the cigars would be re-rolled with drugs. Based on the totality of the circumstances, a reasonable person in Trooper Dammer's position would believe Patton and Defendant recently had possessed and/or was in possession of marijuana and drug paraphernalia. Therefore, Trooper Dammer had probable cause to seize the van.

Defendant next asserts the four corners of the warrant do not establish probable cause to search the vehicle. The affidavit indicates Trooper Dammer detected an odor of marijuana coming from within the vehicle when Patton leaned over and opened the door. Shortly thereafter Defendant exited Sheetz. Trooper Dammer requested identification from both individuals, but neither could provide any type of photo ID. Both individuals provided the police with their names and dates of birth. When Trooper Dammer told Patton he could smell marijuana coming from the vehicle, Patton responded that they had been with girls earlier in the day and had been smoking marijuana. Patton claimed they had smoked all they had and there were no controlled substances in the vehicle. Patton identified himself as the owner of the vehicle and provided a sales slip which showed him as the purchaser. Criminal history checks showed Patton had an 8 page rap sheet which contained firearms

violations and Defendant had a 15 page rap sheet, which contained numerous Act 64 arrests, including felony possession with intent to deliver violations. Based on the odor of marijuana, the lack of photo identification on the individuals and their criminal histories for possessing firearms and possessing controlled substances with the intent to deliver them, a prudent person in Trooper Dammer's position would conclude there was a reasonable probability that there were controlled substances in the vehicle, despite Patton's statement to the contrary.

ORDER

AND NOW, this ____ day of November 2009, the Court **DENIES** Defendant's motion to suppress contained in his Omnibus Pretrial motion.

The Court also **DENIES** Defendant's request for habeas relief as the Court believes the totality of the circumstances are sufficient to show both individuals had actual or constructive possession of firearms and contraband.

By The Court,

Kenneth D. Brown, President Judge

cc: Mary Kilgus, Esquire (ADA)
Robert Cronin, Esquire (APD)
George Lepley, Esquire (counsel for Therim Powell)
Gary Weber, Esquire (Lycoming Reporter)
Work file