

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-342-2010
vs. :
DONTAY BUTLER, : Opinion and Order re
Defendant : Defendant's Omnibus Pre-trial Motion
:

OPINION AND ORDER

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

On December 15, 2009 at approximately 1:19 a.m., Trooper Kenneth Fishel and Trooper Daniel Young were traveling east on Federal Avenue in a marked state police vehicle. At the intersection of Federal Avenue and Wayne Avenue, the troopers observed a Buick automobile with heavily tinted side and back windows traveling south on Wayne Avenue toward the entrance to the Newberry Estates apartment complex. The window tinting on the Buick was so dark that when the vehicle passed through the light emanating from the headlights of the police vehicle, the troopers could not see the interior of the Buick. Trooper Fishel activated the lights and siren on his police vehicle to effectuate a traffic stop for a violation of 75 Pa.C.S.A. §4524(e)(1). Although the Buick was traveling slowly, it did not immediately stop. Instead, it proceeded further on Wayne Avenue, turned right onto a roadway into Newberry Estates, and then proceeded another 100 to 150 yards before stopping in the middle of the roadway. In total, the Buick traveled approximately 250 yards after Trooper Fishel activated the lights and siren before stopping in the middle of the trafficway. Trooper Fishel testified that it was his impression the vehicle was taking a long time to stop, because it wasn't traveling at a high speed. This, in turn, led Trooper Fishel to

form the opinion that the occupants were either trying to retrieve or hide an object, possibly a weapon.

The police shined the spotlight of their vehicle onto the Buick. They could see the silhouettes of people in the vehicle, but the tinting was so dark that they could not see anything else.

Trooper Fishel approached the driver and identified him as Marvin Turner. Trooper Fishel recognized Mr. Turner from prior contacts. He knew Mr. Turner had a prior criminal history that included drug trafficking and he was aware that Mr. Turner had “alleged associations with the ‘Blood’ street gang.”

As Trooper Young approached the passenger, he tried to look in the rear compartment area of the Buick with his flashlight, but could not see through the heavy tinting. He knocked on the front passenger window, and the passenger rolled the window down about eight inches. Trooper Young asked the passenger for his name. The passenger told the trooper his name was Kyle Baxter. Trooper Young asked him if he had any identification, but the passenger said ‘no.’

Trooper Young walked back to their police vehicle to run a background check on the passenger. The name Kyle Baxter did not check out. Trooper Fishel came back to the vehicle and told Trooper Young that he recognized the driver as Marvin Turner, an individual who he knew had a criminal history involving drugs and was a member of a street gang.

Due to the time of night, the dark tinting on the vehicle, the failure of the

vehicle to immediately stop and continuing to drive slowly, Mr. Turner's history and the troopers' opinion that the area was a "high crime" area, the troopers decided to remove the occupants from the vehicle, frisk them and then search the interior of the vehicle for weapons before returning them to the vehicle and issuing a traffic citation for the window tinting. The occupants of the vehicle were brought to the rear of the vehicle and patted down. The troopers did not discover any weapons, but Trooper Fishel felt what appeared to be a large amount of cash and two cell phones in Turner's pockets and Trooper Young felt what appeared to be a cell phone in one of the passenger's pockets.

Turner and the passenger stood at the rear of the vehicle with Trooper Young while Trooper Fishel conducted a wing span search of the vehicle for weapons. Trooper Fishel went to the driver's side of the vehicle and looked under the seat, in the door pocket and in the center console, but did not see any weapons. He then went to the passenger side of the vehicle. He opened the glove box and found a utility knife. On the floor in front of the passenger seat, Trooper Fishel saw three bundles wrapped in pornographic paper that, based on their size and shape, he immediately thought were bricks of heroin. He picked up the bundles and opened one. Inside were waxed paper packets with a red stamp that said "next high" on them. The bundles contained a total of 150 waxed paper packets. The packets were held together in bundles of 10 with rubber bands and the bundles were packaged into bricks with rubber bands. The substance contained in the packets had the same color and texture as heroin. The packets were sent to the state police lab. One packet was tested and the test revealed that the substance was, in fact, heroin.

The troopers arrested both individuals. They were searched incident to arrest. In addition to the cell phones that the troopers felt during the pat down of the individuals, Mr. Turner possessed \$795 in mixed currency. When the passenger was being transported back to the barracks, he revealed his true identity as Dontay Butler, the defendant in this case.

Defendant filed an omnibus pretrial motion. This motion is comprised of three different parts: a request to suppress the evidence seized from the vehicle; a petition for writ of habeas corpus; and a motion for discovery.

Motion to Suppress

In his motion to suppress, Defendant claims the search of the vehicle was unlawful because the police did not see any movements to suggest that the occupants may be armed and dangerous. Defendant further argues there was no legitimate reason to search the vehicle because the occupants were at the rear of the vehicle under Trooper Young's control and the troopers' assertion that the occupants were going to be returned to the vehicle was a pretext under the facts and circumstances of this case.

During a lawful traffic stop, the police may order the driver and the occupants out of the vehicle without any particularized suspicion. Pennsylvania v. Mimms, 434 U.S. 106, 110-111, 98 S.Ct. 330, 333 (1977); Maryland v. Wilson, 519 U.S. 408, 415, 117 S.Ct. 882 (1997); Commonwealth v. Brown, 439 Pa. Super. 516, 654 A.2d 1096, 1102 (Pa. Super. 1995). When the police have a reasonable belief that an individual may be armed and dangerous, the police may lawfully frisk the individual for weapons. Terry v. Ohio, 392 U.S.

1, 27, 88 S.Ct. 1868, 1883 (1968). Similarly, where a police officer possesses a "reasonable belief, based on specific and articulable facts which, taken together with the rational inferences from those facts" that the individual is dangerous and may gain immediate control of weapons, he may conduct a search of the passenger compartment of the individual's vehicle. Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469 (1983). The police need not be absolutely certain that the individual is armed and dangerous; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Terry, supra.

Under the totality of the circumstances in this case, the Court finds the police were justified in frisking the driver and Defendant and searching the passenger compartment of the vehicle for weapons. These circumstances include the following: the time of night; the area where the vehicle was stopped was a high crime area;¹ the heavily tinted windows on the vehicle; the troopers' testimony that the vehicle took a long time to stop given the slow speed at which it was traveling, leading the troopers to believe the occupants were either secreting or retrieving something, possibly a weapon; Trooper Fishel's knowledge of the driver's criminal history of drug trafficking and information that the driver was involved in a gang; and the fact that Defendant gave the troopers a false name.

Defendant argues that since section 4524 states that "no person shall drive a vehicle with any sun screening or other material which does permit a person to see or view the inside of the vehicle," the police could not lawfully allow the occupants to return to the

¹ At the preliminary hearing, Trooper Tyson Havens also testified regarding the area where the stop occurred. In addition to stating that the area had a higher incidence of drug activity, Trooper Havens noted that there had

vehicle and drive away. Thus, Defendant concludes that there was no reason to search the interior of the vehicle because there was no reason to return the occupants to the vehicle; the police simply could have issued the citation outside the vehicle. The flaw with that argument in this case is that the driver stopped the vehicle in the middle of the roadway. Preliminary Hearing Transcript, p. 4, line 21. The vehicle could not simply remain where it was stopped. Someone would have to enter the vehicle to move it out of the roadway.²

Habeas Corpus

In his brief, Defendant contends he is entitled to habeas corpus relief on two different grounds. When reviewing a motion for habeas corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth. See Commonwealth v. Santos, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005). At this stage of the proceedings, the Commonwealth must present a prima facie case that a crime has been committed and the Defendant was the one who probably committed it. Commonwealth v. Mullen, 460 Pa. 336, 333 A.2d 755, 757 (Pa. 1975). A

been a recent shooting two blocks north of Newberry Estates. Preliminary Hearing Transcript, p. 39-40.
² The Court is aware of the recent Pennsylvania Supreme Court case of Commonwealth v. Grahame, 39 EAP 2009, 2010 Pa. LEXIS 2591 (Pa., Nov. 17, 2010), but does not believe that case would change the result in this case. First, although defense counsel argues mere presence in this case, he ignores the fact that Defendant arguably showed consciousness of guilt by giving the police a false name. Second, and more importantly, even if the police did not have sufficient facts to justify a pat down of Defendant, that does not mean the search of the vehicle was unlawful. There were several facts that led the police to believe the driver of the vehicle was armed and dangerous that justified not only a pat down of the driver, but a search of the interior of the vehicle for weapons. The heroin found at the front of the passenger seat would have been discovered if a wingspan search had been conducted solely on the basis that the police believed the driver was armed and dangerous, because an individual's wingspan encompasses the entire passenger compartment of a vehicle. See Michigan v. Long, 463 U.S. 1032, 1049-50, 103 S.Ct. 3469, 3480-81 (1983) (articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which a suspect might reach in order to grab a weapon). As previously noted, the vehicle stopped in the middle of the roadway, so even if a citation had been issued while the occupants were outside the vehicle someone (presumably the driver) would have needed to get back into the vehicle to move it to a lawful parking spot.

prima facie case exists when the Commonwealth presents evidence of each of the material elements of the crimes charged and establishes sufficient probable cause to warrant a belief

that the accused committed the offenses. Santos, supra, quoting Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003). Probable cause is not structured to assure certainty, but rather is a test of probabilities dealing with the factual and practical considerations of every day life on which reasonable and prudent persons act. Commonwealth v. Miller, 497 Pa. 257, 260, 429 A.2d 1167, 1169 (1982), citing Commonwealth v. Dickerson, 468 Pa. 599, 364 A.2d 677 (1976); Commonwealth v. Angel, 946 A.2d 115, 118 (Pa. Super. 2008), citing Commonwealth v. Williams, 941 A.2d 14, 27 (Pa. Super. 2008).

First, Defendant asserts the evidence was insufficient to establish a prima facie case that he possessed the heroin found in the vehicle to support the charges of possession of a controlled substance and possession with intent to deliver a controlled substance. Because no controlled substances or paraphernalia were found on the Defendant's person, the Commonwealth must satisfy the burden of proving possession by showing constructive possession. Commonwealth v. Valette, 531 Pa. 384, 613 A.2d 548, 549-50 (Pa. 1992). Constructive possession of controlled substances "requires proof of the ability to exercise conscious dominion over the illegal substance, the power to control the contraband, and the intent to exercise such control." Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. 2007), quoting Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa. Super. 2005). Constructive possession may be established by the totality of the circumstances. Id.

The troopers testified that given the speed that the vehicle was traveling when they activated their lights and siren, it took a long time for the vehicle to stop, as if the occupants were trying to retrieve or conceal something prior to stopping the vehicle. Three

bricks of heroin were found on the floor at the front of the front passenger seat. Defendant was seated in the front passenger seat at the time the vehicle was stopped. Trooper Young approached and tried to see inside the vehicle with his flashlight, but he could not due to the dark tinting. When Trooper Young knocked on the passenger side window, Defendant only put the window down about eight inches. When the police asked Defendant for his name, he gave a false name of Kyle Baxter, arguably evincing his consciousness of guilt. The occupants were ordered out of the vehicle. When Trooper Fishel conducted the wingspan search of the interior of the vehicle, he testified he wasn't sure whether he had to open the driver's side door, but he remembered he had to open the passenger door.

Although this case certainly is not the strongest case the Court has seen, the Court finds the evidence and the reasonable inferences to be drawn therefrom circumstantially show that Defendant constructively possessed the heroin in question. The fact-finder could infer that by only partly rolling down his window and by giving a false name Defendant was doing what he could at the scene to prevent the police from discovering the drugs and Defendant's true identity. This consciousness of guilt evidence shows that Defendant was more than simply present in a vehicle in which drugs were found. Whether the fact-finder will actually draw these inferences and whether this circumstantial evidence will be sufficient to prove Defendant's guilt beyond a reasonable doubt are issues for trial.

Defendant next asserts he is entitled to habeas corpus relief on the charge of possession with intent to deliver, because only one bag of heroin was tested. Again, the Court cannot agree. At this stage of the proceedings, the Commonwealth only needs to

establish a prima facie case. The police recovered 150 wax packets stamped with the words “next high” in red ink. The packets were held together in bundles of 10 with rubber bands and the bundles were packaged into three bricks with rubber bands. The bricks were wrapped in pornographic paper. Trooper Fishel testified that based on the size, shape, weight and packaging, he immediately believed the items wrapped in the pornographic paper were bricks of heroin. The substance contained in the packets had the same color and texture as heroin. One packet was tested and the results revealed the substance was heroin. Trooper Tyson Havens testified it was his expert opinion that the occupants of the vehicle possessed the heroin with the intent to deliver it. This opinion was based on the packaging, the number of packets, the amount of cash found on the driver of the vehicle, and the lack of paraphernalia to use the substance such as needles or cotton balls. Based on this evidence and the reasonable inferences to be drawn therefrom, the fact-finder could reasonably conclude that Defendant possessed 150 packets of heroin with the intent to deliver them.

Discovery

In his motion, Defendant requested several items of discovery. First, Defendant notes that Trooper Fishel testified at the preliminary hearing that the stop and search was recorded on the police vehicle camera and he has not received a copy of that recording. At the argument on this matter the prosecutor indicated that she intended to copy any such recording and send it to defense counsel.

Next, Defendant asks for the curriculum vitae (CV) of the individual who conducted the lab testing of the substances contained in the wax packets. Defendant also

requests information concerning: (a) training of this expert; (b) any proficiency tests the expert has participated in and the results thereof; (c) proficiency evaluations of the lab; (d) accreditation evaluations of the lab; (e) chain of custody of the alleged substance; (f) verification testing with respect to the alleged substance; (g) bench notes; and (h) the subject matter, substance of the facts, summary of the expert's opinions and grounds for each opinion.

The Court notes that the defense has received a copy of the lab report in this case. From the lab report, the defense can conclude that the expert from the lab will testify on the subject matter of drug testing and that the expert's opinion is the alleged substance is heroin. What cannot be determined from the report is the how the expert came to that opinion. For example the report does not state the method or manner in which the substance was tested and the number of packets actually tested. The Commonwealth shall contact the expert to obtain this information as this information is covered by Rule 573(B) (1)(c) and (2)(b) and provide it to defense counsel within thirty days of the date of this Opinion and Order.

The request for proficiency tests and evaluations does not squarely fall within the Rule 573(B)(1)(c) or (B)(2)(b). Defendant has not made a showing that this information is in the possession or control of the Commonwealth or that the disclosure of this information would "be in the interests of justice." Pa.R.Cr.P. 573(B)(2)(a)(iv). Therefore, the Court will deny this request without prejudice to Defendant attempting to obtain this evidence by subpoena.

Finally, Defendant requests information regarding any expert who will be called to testify in support of the charge of possession with intent to deliver. The Court notes that Trooper Tyson Havens testified as such an expert at the preliminary hearing. Although Trooper Havens has not issued an expert report, the defense has a transcript of his testimony which states his opinion and the facts and grounds for his opinion. If the Commonwealth intends to call Trooper Havens in this capacity at trial, it need only inform defense counsel of that fact in writing within 14 days of the date of this Opinion and Order. With respect to the disciplinary records requested in paragraph 7 (h), if the Commonwealth intends to have Trooper Havens testify as an expert in this case and has the alleged disciplinary records within its possession and control, it shall provide a copy to the Court for in camera review within 14 days. If the Commonwealth does not have those records in its possession and control, it shall so notify the Court and defense counsel in writing within 14 days, so defense counsel can attempt to subpoena those records from the Pennsylvania State Police.

If the Commonwealth intends to call someone other than Trooper Havens to provide an expert opinion that Defendant possessed the heroin with the intent to deliver it, the Commonwealth shall provide an expert report that meets the requirements of Rule 573(B)(2)(b) to defense counsel within sixty (60) days of the date of this Order, unless the Commonwealth seeks and obtains an extension of this time period from the Court for good cause shown..

ORDER

AND NOW, this ____ day of November 2010, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Omnibus Pre-trial Motion. The Court **DENIES** Defendant's motion to suppress and request for habeas corpus relief.

The Court **GRANTS** Defendant's request for discovery as follows:

1. If the Commonwealth has not already done so, it shall provide a copy of the video recording of the vehicle stop within 14 days of the date of this Order.
2. The Commonwealth shall notify defense counsel within 14 days whether it intends to utilize Trooper Tyson Havens as its expert to offer the opinion that Defendant possessed the heroin in question with the intent to deliver it. If the Commonwealth intends to call Trooper Havens and it has the requested disciplinary records of Trooper Havens in its possession, the Commonwealth shall provide a copy of such records to the Court for in camera review within 14 days of the date of this Order.

If the Commonwealth intends to utilize an expert other than Trooper Havens on this issue, the Commonwealth shall provide an expert report that complies with Rule 573(B)(2)(b) to defense counsel within 60 days of the date of this Order, unless it requests and obtains an extension from the Court for good cause shown.

3. The Court **DENIES** Defendant's request for information regarding accreditation and proficiency tests and evaluations, as it does not appear that the information is within the possession and control of the Commonwealth and Defendant has not made a showing that the disclosure of this information would be "in the interests of justice." This

ruling is without prejudice to Defendant trying to obtain this information directly from the expert or lab through the subpoena process.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
Ronald Travis, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file