

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1929-2008
vs. :
 :
 :
JAMES GILDER, : Opinion and Order re
Defendant : Defendant's Omnibus Pretrial Motion

OPINION AND ORDER

This matter came before the Court on Defendant's Omnibus Pretrial Motion.

A hearing was held on February 17, 2010. The relevant facts follow.

On January 16, 2008 at approximately 2:30 p.m., Trooper Alexandra Schaffer, a Pennsylvania State police officer stationed at the Lamar barracks in Mill Hall (Clinton County), was dispatched to the Farrandsville area. Farrandsville is a small, rural community, through which there is only one paved road. There was an individual residing in Farrandsville, who was a suspect in several burglaries and a bank robbery and was an alleged drug user and drug dealer.¹ The State Police in Lamar had received several phone calls that three Black males in a vehicle with New Jersey registration plates had picked up this individual at his residence and then returned him a short time later. Trooper Schaffer did not know if the callers were anonymous or if they gave their name and phone number when they called the barracks.

Trooper Schaffer and a Trooper Bletz were waiting at the Jay Street Bridge for the vehicle with New Jersey plates to drive by as it left Farrandsville.² The troopers

1 Trooper Schaffer testified that she was not sure whether charges were pending against the individual for these offenses at that time, but the individual has been convicted of these offenses.

2 Trooper Schaffer was in a marked Ford Crown Victoria and Trooper Bletz was in an unmarked Ford F150 pickup truck.

observed a Nissan Murano with New Jersey plates and three Black male occupants. They followed the vehicle onto Route 220 North. After the vehicle entered Lycoming County, it sped up to 67 miles per hour in an area with a posted speed limit of 55 miles per hour. At that point Trooper Schaeffer initiated a traffic stop of the vehicle for speeding.

Trooper Schaeffer asked the driver, Defendant James Gilder, and the two other occupants of the vehicle for identification. Trooper Schaeffer also received from Defendant a copy of the rental agreement for the vehicle. The occupants were Dan McCallum and Carl Alford. Trooper Schaeffer ran a computer check through NCIC and/or CLEAN of the vehicle's plates and all the individuals in the vehicle. The vehicle was a rental from New Jersey and Defendant was confirmed as the individual who rented it. All three individuals had extensive criminal histories containing drug convictions; however there were no pending warrants for any of them.

While Trooper Schaeffer was running the computer check on the individuals, Trooper Kim Bedell, of the PSP Montoursville Barracks arrived on the scene with his canine, Ellie. Trooper Schaeffer and Trooper Bedell approached the driver's side of the vehicle. Trooper Schaeffer returned the rental agreement to the Defendant and the identification to the individuals and gave Defendant a written warning for speeding. The troopers told Defendant he was free to go and they took "five steps back" from the vehicle. As Defendant turned to get back into the vehicle, the troopers then returned and asked him for consent to search the vehicle. Defendant refused and said he was in a hurry and "too busy." At that point, Trooper Bedell stepped in and told Defendant he had a "right to" and reasonable suspicion to

run his canine, Ellie, around the vehicle.

Before Trooper Bedell had Ellie conduct a sniff of the vehicle for drugs, he removed all the individuals from the vehicle and patted them down for weapons for “officer safety issues.” As part of the pat down, Trooper Bedell directed the Defendant to empty his pockets and remove his shoes. Defendant had \$200 in his pocket and \$700 in his shoes. When the police got Mr. McCallum out of the vehicle and attempted to pat him down, a bit of a struggle ensued. When the Trooper conducting the pat down got to Mr. McCallum’s arm, Mr. McCallum jerked it away. The police discovered approximately a one-half brick of heroin and in excess of \$2000 on McCallum’s person.

The police arrested Defendant and charged him with conspiracy to deliver a controlled substance and possession with intent to deliver a controlled substance. Defendant, through his attorney, filed an Omnibus Pretrial Motion seeking suppression of the evidence and habeas corpus relief. After a review of the testimony presented at the hearing held on February 17, 2010, the Court finds that the evidence must be suppressed and the charges dismissed.

Although the Troopers had reasonable suspicion to believe Defendant violated the Vehicle Code by speeding, when they returned his documents and told him he was free to leave, that justification ceased to exist and they needed reasonable suspicion of some other criminal activity to continue to detain them. *Commonwealth v. Freeman*, 563 Pa. 82, 757 A.2d 903 (2000). Before law enforcement may utilize a drug detection dog, they must have reasonable suspicion that drugs will be present in the place they want the dog to sniff.

Commonwealth v. Johnston, 515 Pa. 454, 530 A.2d 74 (1987); see also *Commonwealth v. Rogers*, 578 Pa. 127, 136, 849 A.2d 1185, 1190-01 (2004)(reasonable suspicion is required for a canine sniff of a place and probable cause is required for a canine sniff of a person).

The Commonwealth argues that the Troopers had reasonable suspicion to believe the occupants of the vehicle were engaged in drug activity; therefore, they could lawfully detain the individuals, pat them down and conduct a canine sniff of the vehicle. Trooper Schaffer testified that the police had reasonable suspicion to believe the individuals in the vehicle were involved in the delivery of heroin based on the following: (1) the phone calls to the Lamar barracks that the suspect who resided in Farrandsville had been picked up and dropped off a short time later by individuals in a vehicle with New Jersey plates; (2) an out-of-state vehicle was unusual in Farrandsville, except in the summertime when people came into town for races; and (3) the individuals in the vehicle had a prior record for drug violations. The Court cannot agree.

Although several people called the Lamar barracks about the suspect being picked up and dropped off a short time later by individuals in a vehicle with New Jersey plates, Trooper Schaffer did not know whether these callers gave their name or were anonymous. In light of this testimony, the Court is constrained to initially analyze this case under the law governing anonymous tips. Anonymous tips are insufficient to establish reasonable suspicion without some corroboration of the illegal activity by the police or the tipster providing accurate information regarding future criminal activity. *Commonwealth v. Wimbush*, 561 Pa. 368, 750 A.2d 807 (2000). There was no indication in Trooper Schaffer's

testimony that the callers provided information regarding future activity of the individuals in the vehicle with New Jersey plates.

Further, the police did not observe any activity indicative of a drug violation and it is not illegal to be in a small town with out-of-state registration plates, or to visit a residence. The police did not observe any drugs, any paraphernalia or any other items utilized in drug transactions. While Trooper Schaffer was concerned about the fact the vehicle picked up the resident and returned him later, postulating that this is how drug deals take place, this conduct is equally consistent with legal activity. As well, neither the suspect in Farrandsville nor any of the occupants of the vehicle, including Defendant, had any pending criminal charges against them for drug violations. While the hunch of the troopers was correct, it was neither reasonable nor legal. The police did not have reasonable suspicion that drugs would be present in the vehicle, and accordingly, they did not have valid reason to detain the individuals and pat them down for officer safety as a precursor to the canine sniff of the vehicle.

Even if the police had reasonable suspicion to believe the individuals were engaged in drug activity, there was no testimony presented to show they had any reason to suspect that these individuals were armed and dangerous. In order to conduct a *Terry* frisk of a suspect, in addition to having reasonable suspicion that criminal activity is afoot, the police must be able to point to facts that lead them to believe the suspect may be armed and dangerous. These facts could include furtive movements or bulges in the individual's pockets that could be weapons. No such testimony was provided in this case. The mere fact

that the individuals are suspected in drug activity is insufficient. *Commonwealth v. Zhahir*, 561 Pa. 545, 562, 751 A.2d 1153, 1162 (2000)(“as a general policy consideration, taking judicial notice that all drug dealers may be armed as in and of itself a sufficient justification for a weapons frisk clashes with the totality standard, as well as the premise that the concern for officer safety must arise from the facts and circumstances of the particular case”).

Therefore, the evidence presented was insufficient to justify a pat down in this case. See *In the Interest of S.J.*, 551 Pa. 637, 713 A.2d 45 (1998)(although the police officer had reasonable suspicion to believe the defendant may have been involved in a group smoking marijuana to justify an investigatory detention, he did not state any unusual or suspicious conduct that led him to believe the suspect was armed and dangerous; therefore the frisk of the defendant was unlawful).

The police also exceeded the proper scope of a *Terry* frisk in this case. A *Terry* frisk is a pat down of a suspect’s outer garments for weapons. *Commonwealth v. E.M.*, 558 Pa. 16, 25, 735 A.2d 654, 659 (1999). The testimony presented at the hearing was that Trooper Bedell directed the individuals to empty their pockets and take off their shoes. In, *E.M.*, *supra*, the Pennsylvania Supreme Court found a seizure of soft items from an individual’s pocket exceeded the scope of a permissible *Terry* frisk when the items clearly were not weapons, but also were not immediately recognizable as drugs during the frisk. *Id.* at 28-29, 735 A.2d at 661. Similarly, in *Commonwealth v. Graham*, 554 Pa. 472, 721 A.2d 1075 (1998) the Pennsylvania Supreme Court held a police officer exceeded the proper scope of a *Terry* frisk when he shined his flashlight down into the defendant’s pocket to see what

was inside a Lifesaver's Holes container. Based on these cases, the Court finds that Trooper Bedell exceeded the proper scope of a *Terry* frisk when he directed Defendant and the other individuals to empty their pockets and remove their shoes.

Trooper Bedell discovered the \$200 in Defendant's pocket and the \$700 in his shoe as a result of the unlawful frisk. Therefore this evidence must be suppressed. Without this evidence, the Commonwealth does not have sufficient evidence to prove a prima facie case for the charges filed against Defendant.³

For the foregoing reasons, the Court will grant Defendant's motion to suppress evidence and his motion for habeas corpus relief contained in his omnibus pretrial motion.

ORDER

AND NOW, this ____ day of February 2010, the Court GRANTS Defendant's motion to suppress and motion for habeas corpus relief contained in his omnibus pretrial motion. All the evidence seized after the police issued Defendant a written warning for speeding is SUPPRESSED and all the charges are DISMISSED.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
Jeana Longo, Esquire (APD)

³ The Court does not believe the Commonwealth presented sufficient evidence to establish a prima facie case even it did not suppress the money found on Mr. Gilder. There were numerous inaudible notations in the preliminary hearing transcript. There was nothing in the audible portions to indicate Mr. Gilder lacked a source of income or that there was anything other than his mere presence in the vehicle to connect him to the drugs found on Mr. McCallum.

Gary Weber, Esquire (Lycoming Reporter)
Trooper Alexandra Schaffer, PSP Lamar
Trooper Kim Bedell, PSP Montoursville
Work file