IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	
vs.	**:**	**No. 1020-2009**
	:	
ZAID ALI,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant is charged by Information filed on July 17, 2009 with two counts of DUI, two counts of possession of marijuana, one count of possession of paraphernalia and two traffic summaries. Before the Court is Defendant's Motion to Suppress and Petition for Writ of Habeas Corpus. These Motions were part of an Omnibus Pretrial Motion that was filed by Defendant on July 24, 2009. Following numerous continuances, a hearing was eventually held on March 25, 2010.

At the March 25, 2010 hearing, the Commonwealth presented the testimony of Troopers Kevin Cramer and Tyson Havens, and Corporal Brett Hanlon of the Pennsylvania State Police. The Commonwealth also presented the testimony of Lieutenant Scott Hunter of the Pennsylvania State Police and Lycoming County Adult Probation Officers, John Stahl and Jim Schriner.

While the Defendant did not present testimony at the suppression hearing, without objection of the Commonwealth and with approval of the Court, Defendant orally amended the Motion to include a Motion to Suppress the urine sample that was obtained from the Defendant by the Adult Probation Officers. Consistent with the written Motion, Defendant submits that the search of his vehicle and the jewelry box found within it was unconstitutional. Defendant further submits that the possession and DUI charges should be dismissed because of the failure of the Commonwealth to present prima facie evidence with respect to such charges.

On April 21, 2009 at approximately 7:30 p.m., Trooper Havens and Trooper Cramer were on duty in the City of Williamsport. They noticed a vehicle with New Jersey license plates pass by them. They pulled behind the vehicle and followed it for approximately one to two blocks. The purpose in following the vehicle was to check the "tags for investigation purposes." After traveling for a short distance, the vehicle pulled onto Second Street and parked. The Defendant exited the vehicle. Simultaneously, Trooper Havens parked the police cruiser behind the Defendant's vehicle and both troopers exited the cruiser and approached the Defendant.

Trooper Havens recognized the Defendant from a prior incident where the Defendant pled guilty to possession of marijuana. Trooper Havens suspected that the Defendant was currently under the supervision of the Lycoming County Adult Probation Office and that the Defendant's driving privileges were likely suspended. Upon observing the Defendant exit his vehicle, Trooper Havens attempted to engage him. The Defendant asked if he was in any trouble. Trooper Havens responded that the Defendant was not, that the Defendant did not have to speak with him and that the Defendant was free to leave. Trooper Havens asked the Defendant if his license was currently valid. Defendant advised Trooper Havens that it was, to Defendant's knowledge. Trooper Havens then asked the Defendant if he would mind briefly speaking with him. The Defendant indicated that he did not want to speak with Trooper Havens and walked away going into his house that was adjacent to the roadway.

After the Defendant departed, Trooper Havens checked Defendant's driver's license status on the trooper's cruiser computer and found that Defendant's driving privileges

were then currently suspended apparently because of a prior DUI. Because of such, Trooper Havens contacted the Defendant's Adult Probation Officer and advised him that the Defendant was operating a vehicle on a suspended license. Trooper Havens also called his supervisor because in the past Trooper Havens "had problems" with the Defendant and the Defendant's family. The Adult Probation Officers requested that Trooper Havens remain on the scene until they arrived. Trooper Havens' supervisor, Lieutenant Hunter, indicated as well that he would soon come to the scene.

While waiting for the Probation Officers and Lieutenant Hunter to arrive on scene, Trooper Havens and Trooper Cramer approached the Defendant's vehicle and looked through the closed window. It was 7:30 p.m. at night and there was still some light. While looking through the windows, Trooper Havens observed one lone marijuana seed laying in plain view in the middle of the driver's seat. Trooper Havens had been around marijuana and has seen marijuana seeds hundreds, if not thousands, of times. Trooper Havens described the seed as being the size of the head of a wooden match, round, brown with a touch of green or blue. He described marijuana seeds as unique although he conceded that maybe other seeds could look like a marijuana seed but he was unaware of any seeds that were similar. Trooper Cramer observed the seed as well but did not recognize the seed as a marijuana seed.

Trooper Havens subsequently called for a canine drug detection dog as well as for a tow truck. The Adult Probation Officers soon arrived and at the request of Trooper Havens, viewed the marijuana seed and both confirmed that it was, in fact, a marijuana seed. Both Adult Probation Officers testified that they had seen marijuana seeds before, clearly

recognized the seed as a marijuana seed and described the size, shape and color of the seed consistent with the description given by Trooper Havens.

Trooper Hanlon and the canine dog arrived. While Trooper Hanlon was conducting a safety check of the vehicle and at the request of Trooper Havens he too observed the marijuana seed in the middle of the driver's seat. He described it as a "distinctive seed." Trooper Hanlon indicated that over his 14 years in law enforcement, he has seen these seeds thousands of times and nothing else looks like them. He used his narcotics trained K-9 to conduct an exterior sniff of the vehicle. The canine alerted on the front passenger side wheel well area of the vehicle. Trooper Hanlon described the difference between alerting and indicating on an area and conceded that the canine dog alerted on the vehicle but did not indicate. Alerting signifies the presence of recognizable odors while indicating pinpoints the source of the odor.

Lieutenant Hunter subsequently arrived and at the request of Trooper Havens looked in the window and saw what appeared to be a single marijuana seed on the front driver's seat. Lieutenant Hunter indicated that it immediately looked like a marijuana seed. Lieutenant Hunter was 100% sure that the seed was a marijuana seed. Lieutenant Hunter opened up the door at which time Trooper Havens reached in and grabbed the seed and put it in his front pocket.

After arriving on scene, talking with Trooper Havens and observing the marijuana seed, the Adult Probation Officers went into Defendant's residence and spoke with the Defendant. Defendant admitted that he had smoked marijuana days earlier. The Adult Probation Officers "ultimately" secured a urine from Defendant. The urine field tested positive

for the presence of marijuana metabolites. APO Schriner informed Trooper Havens either prior to leaving the scene or soon after he arrived at his office, that the urine sample had tested positive for marijuana. Defendant was placed in custody and transported to the Adult Probation Office. Trooper Havens testified that the urine was sent to the lab to be tested and the test showed 250 nanograms per milliliter of THC. Trooper Havens verified that the lab technician would be available at trial.

The vehicle was subsequently towed from the scene and secured by the Pennsylvania State Police. Trooper Havens testified that the vehicle was towed to secure the vehicle in order to make an application for a search warrant. Trooper Havens conducted a custodial inventory search of the vehicle "according to PSP policy" to identify and secure any valuables inside the vehicle. The Court was not provided with any evidence regarding the specifics of the "PSP policy." During the inventory search, Trooper Havens encountered a small, 3 inch x 3 inch cardboard jewelry box in an open compartment in the dashboard underneath the radio. This area was within arm's reach of the driver's seat. Upon opening the box, Trooper Havens observed a small plastic bag containing a leafy substance. The substance was packaged in a small, 1 inch x 1 inch, square zip lock bag. The bag contained roughly two grams of the substance and was packed full. The substance field tested positive for marijuana. As a result, Trooper Havens applied for a search warrant of the vehicle.

As previously indicated, Defendant is charged with two counts of driving under the influence of a controlled substance, one count of possession of a controlled substance (marijuana), another count of possession of a controlled substance (small amount of marijuana), one count of possession of drug paraphernalia, two counts of driving while

operating privilege is suspended or revoked (one relating to driving under the influence), another count of driving while operating privilege is suspended or revoked, and a traffic summary.

The first issue that the Court must consider is whether the impoundment of Defendant's vehicle violated Defendant's constitutional rights. Impoundment of a vehicle constitutes a seizure subject to the protections of the Fourth Amendment. Commonwealth v. Milyak, 508 PA. 2, 493 A.2d 1346 (1985). As a general rule, the seizure without a warrant of an individual's vehicle is deemed unreasonable for constitutional purposes. Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978).

Where, however, a warrantless seizure of an automobile occurs after the owner has been placed into custody, where the vehicle is located on public property and where there exists probable cause to believe that evidence of the commission of a crime will be obtained from the vehicle, it is reasonable for constitutional purposes for the police to seize and hold the vehicle until a search warrant can be obtained. Holzer, supra; Milyak, supra.

In this case, the seizure of Defendant's vehicle to make application for a search warrant did not violate Defendant's constitutional rights. The Defendant had previously been placed into custody by the Adult Probation Officers, the vehicle was located on a public street and there existed probable cause to believe that evidence of the commission of a crime would be obtained from the vehicle. More specifically, a marijuana seed was seen in plain view on the front seat, a drug detection dog alerted on the vehicle, the Defendant was not cooperative with the police, the Defendant admitted to smoking marijuana in the past and the Defendant's urine tested positive for the presence of marijuana metabolites.

The next issue concerns whether the warrantless inventory search of Defendant's vehicle following its seizure, was constitutional.

The Commonwealth contends that the search of Defendant's vehicle constituted a permissible inventory search. Defendant contends that the search of his vehicle constituted an impermissible warrantless investigatory search. An inventory search is a permissible exception to the search warrant requirement. A warrantless investigatory search is impermissible absent a showing of both probable cause to search and exigent circumstances. Commonwealth v. Hennigan, 753 A.2d 245, 255 (Pa. Super. 2000).

The Court must first determine whether a proper inventory search occurred. The initial inquiry is whether the police have lawfully impounded the automobile. Hennigan, supra. As set forth previously in this Opinion, the Court has determined that the Pennsylvania State Police lawfully seized and/or impounded the automobile.

The second inquiry is whether the police conducted a reasonable inventory search. Hennigan, supra. An inventory search is reasonable if it is conducted pursuant to reasonable, standardized police procedures, in good faith and not for the sole purpose of investigation. Hennigan, supra.

The Commonwealth failed to introduce any testimony demonstrating the particulars of the PSP policy, such as whether it contained a standard for opening closed containers. Furthermore, there was no evidence upon which the Court could determine if the PSP policy was reasonable. Accordingly, the search cannot be upheld as a valid inventory search. Commonwealth v. West, 937 A.2d 516, 526-29 (Pa. Super. 2007); Florida v. Wells, 495 U.S. 1, 4-5, 10 S.Ct. 1632, 1635, 109 L.Ed.2d 1, 5-6 (1990).

The hearing judge must also be convinced that the police intrusion into the automobile was for the purpose of taking an inventory of the car and not for the purpose of gathering incriminating evidence. Hennigan, supra. at 255-56. The facts and circumstances which the hearing judge must consider include the scope of the search, the procedure utilized in the search, whether any items of value were in plain view, the reasons for and nature of the custody, the anticipated length of the custody, and any other factors which the Court deems important in its determination. Hennigan, supra at 256.

In reviewing the evidence in this case, the Court is not convinced that the search of Defendant's automobile was for the purpose of taking an inventory. Significantly and perhaps determinatively, Trooper Havens testified that the vehicle was initially seized in order to make an application for a search warrant. Trooper Havens testified that his "intention was to get a search warrant to search the vehicle." Given that stated intention, there is no reason to explain why the police did not simply secure the vehicle, obtain the intended search warrant and then search it accordingly. The Court is only left to speculate why the search warrant was not requested or obtained until two days after the vehicle's seizure. Moreover, Trooper Havens as the investigating trooper conducted the search shortly after seizing the vehicle. Finally, and as testified by Trooper Havens, the search was thorough and complete; so much that the search following the issuance of the search warrant revealed "nothing further."

Because the Court concludes that the Commonwealth failed to demonstrate that the stated inventory search was in accordance with the relevant legal standards articulated above, the evidence seized as a result of the search is suppressed.

Defendant further asserts that Counts 1 and 2 driving under the influence, as well as Counts 3, 4 and 5, respectively possession and paraphernalia charges must be dismissed.

In order to meet its burden in connection with a Petition for Writ of Habeas Corpus, the Commonwealth must present legally competent evidence with regard to each of the material elements of the charges. Commonwealth v. Wodjak, 502 Pa. 359, 369, 466 A.2d 991, 996 (1983). The absence of any element of the crime charged is fatal and the charge should be dismissed. Commonwealth v. Austin, 394 Pa. Super. 146, 150, 575 A.2d 141, 143 (1990).

Because this Court has suppressed the marijuana and packaging materials, the Commonwealth is unable to present prima facie evidence of possession of marijuana, possession of a small amount of marijuana or possession of drug paraphernalia

With respect to Count 1, the Commonwealth must prove that the Defendant drove, operated or was in actual physical control of the movement of a vehicle when there was in his blood any amount of a schedule I controlled substance as defined in the Controlled Substance, Device and Cosmetic Act. 75 Pa. C.A. § 3802 (d) (1) (i).

With respect to Count 2, the Commonwealth must prove that the Defendant drove, operated or was in actual physical control of the movement of a vehicle when there was in the Defendant's blood any metabolite of a substance under subsection (i) referenced above. 75 Pa. C.S.A. § 3802 (d) (1) (iii).

Clearly the Defendant drove, operated or was in actual physical control of the movement of a vehicle. Both Trooper Havens and Trooper Cramer testified that they witnessed the Defendant driving his vehicle, parking it and then exiting it.

The next issue concerns whether the evidence is sufficient for prima facie purposes to prove that the Defendant had a schedule I controlled substance in his blood or had a metabolite of said controlled substance in his blood. It is without contention that marijuana is a schedule I controlled substance under the Controlled Substance, Drug, Device and Cosmetic Act.

Defendant contends that the evidence is insufficient for prima facie purposes because there was no evidence presented to show that Defendant had any controlled substance in his blood while he was operating his vehicle, no evidence that the Defendant was driving unsafely and no evidence to indicate that the Defendant had smoked marijuana immediately prior to or while driving. The Commonwealth contends in response, that the positive urine screen and subsequent lab test are sufficient to establish the presence of both marijuana in the Defendant's blood and a marijuana metabolite in the Defendant's blood. The Commonwealth also contends that the test results are sufficient for prima facie purposes.

Contrary to what Defendant contends, a conviction under §§ 3802 (d) (1) (i) and/or (iii) does not require that the driver be impaired; rather it prohibits the operation of a motor vehicle by any driver who has any amount of specifically enumerated controlled substances or metabolites of a controlled substance in his blood, regardless of impairment. Commonwealth v. Etchison, 916 A.2d 1169, 1173-74 (Pa. Super. 2007).

Furthermore, in any criminal proceeding in which a Defendant is charged with a violation of § 3802, the amount of a controlled substance in the Defendant's blood as shown by chemical testing of the person's urine is admissible in evidence. 75 Pa. C.S.A. § 1547 (c); Commonwealth v. Williamson, 962 A.2d 1200 (Pa. Super. 2008), appeal denied 980 A.2d 608 (Pa. 2009). At the hearing in this matter, Adult Probation Officer Schriner testified that the Defendant submitted a urine test which resulted in a positive reading for a marijuana metabolite. Trooper Havens testified that the urine was submitted to an approved lab, tested and confirmed to have the presence of a marijuana metabolite. Trooper Havens testified that the lab personnel would be available for trial to testify as necessary.

No evidence was presented verifying that there was any controlled substance in the Defendant's blood at the time he drove his vehicle. The testimony was limited solely to the presence of a marijuana metabolite. Accordingly, Count 1 is dismissed.

Defendant's arguments, however, fail with respect to Count 2. The testimony clearly indicated that the chemical testing of Defendant's urine resulted in the presence of a controlled substance metabolite. The DUI statute proscribes driving a vehicle, as Defendant did, with a controlled substance metabolite in one's blood, as Defendant had in his blood as confirmed by the urine tests. While at trial, viable defenses may be raised absent appropriate testimony or other evidence regarding the language and requirements of the applicable statutes, a prima facie case has been made out at this point with respect to Count 2.

ORDER

AND NOW, this ____ day of April, 2010, following a hearing on Defendant's Omnibus Pretrial Motion, the Court grants the Defendant's Suppression Motion and precludes the Commonwealth from utilizing in its case in chief or in rebuttal, any and all evidence seized from Defendant's vehicle following its seizure and impounding, including but not limited to, the marijuana and packaging material located in the cardboard jewelry box found underneath the dashboard. Additionally, the Court grants the Defendant's Petition for Habeas Corpus with respect to Counts 1, 3, 4 and 5 of the Information and accordingly dismisses said counts. The Court denies Defendant's Petition for Habeas Corpus with respect to Count 2.

BY THE COURT,

_____
Marc F. Lovecchio, Judge

cc: Jeana A. Longo, Esquire
Mary Kilgus, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File