

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH	: No. CR-342-2010
vs.	:
	:
DONTAY BUTLER,	:
Defendant	:

OPINION AND ORDER

Before the Court are Defendant's Motion to Reconsider and Supplemental Motion to Reconsider Denial of Motion to Suppress and Denial of Habeas Corpus.

Defendant is charged by Information filed on March 31, 2010 with one count of Possession of a Controlled Substance (heroin) and one count of Possession with Intent to Deliver Heroin. These charges arise out of the stop and search of a vehicle in which the Defendant was a passenger.

Defendant previously filed an Omnibus Pretrial Motion which included a Motion to Suppress and a Petition for Habeas Corpus Relief. A hearing was held and by Order dated November 22, 2010, the Court denied Defendant's Motion to Suppress and Petition for Hebeas Corpus Relief.

Defendant subsequently filed a Motion to Reconsider along with a Supplement Motion to Reconsider. Defendant argues that the Court's Opinion and Order were based on both incorrect facts and a misapplication of the relevant law. In support of his claims, among other things, Defendant introduced a copy of the video

from the Pennsylvania State Police cruiser that was provided to the Defendant after the November 22, 2010 Court Order.

As a result of Defendant's claims and in order to be entirely thorough, the Court ordered that a transcript of the original Suppression Hearing be provided. The Court reviewed such transcript. Furthermore, the Court obtained and viewed in depth a copy of the PSP video.

In the Court's Opinion and Order of November 22, 2010, the Court noted that the Buick automobile, in which the Defendant was a passenger, was traveling slowly and did not immediately stop following the trooper's activation of the lights and sirens. (Opinion and Order, pp. 1, 5, 7). Defendant argues in his Motions to Reconsider that a review of the video fails to show that the vehicle was traveling at a "slow speed" before stopping.

After reviewing the video, the Court disagrees in part.

Shortly after the vehicle passed the troopers, the troopers activated their lights and sirens. The PSP cruiser caught up with the Buick just as the Buick was turning into the Newberry Estates. The Buick continued at a slow rate of speed traveling what appears to be at least 100 to 150 yards before pulling over and stopping. It is apparent on the video, however, that because of parked vehicles and at least one building located on the right side of the roadway that the Buick could not have pulled over earlier than it did.

The Court in its original Opinion and Order also concluded that

following the stop, Trooper Young approached the passenger side of the vehicle and spoke briefly with the Defendant who identified himself as Kyle Baxter. Trooper Young then walked back to the police vehicle to run a background check on Kyle Baxter. Trooper Fishel then came back to the vehicle and told Trooper Young that he recognized the driver as Marvin Turner. The troopers then decided to remove the occupants from the vehicle. (Opinion and Order, pp. 2, 3). Defendant contends that the record does not support the finding that prior to conducting a wingspan search of the vehicle, the troopers became aware that Kyle Baxter was a false name provided by the Defendant.

At the hearing on July 28, 2010, Trooper Young specifically testified that following the stop, he and Trooper Fishel approached the vehicle. Trooper Young spoke with the passenger who identified himself as Kyle Baxter. Trooper Young testified that both of the troopers returned to the patrol vehicle. Trooper Fishel indicated that he knew the driver and the driver's criminal history. Trooper Young indicated that he "relayed the information that the passenger" gave him "as Kyle Baxter and date of birth." Trooper Fishel explained that he did not know that individual. He then explained that the troopers decided to get the driver and passenger out of the vehicle to do a wingspan search and issue a citation. Trooper Young testified that they then went back to the vehicle and he "got the passenger out." Trooper Young further testified that when the troopers went back to the patrol vehicle, they were intending to "run the individuals to see if they were wanted or anything." He did not

specifically remember, however, if he ran “Mr. Baxter’s” name.

During the preliminary hearing, Trooper Kenneth Fishel testified on behalf of the Commonwealth. The preliminary hearing transcript was introduced in evidence as Commonwealth’s Exhibit 1.

Trooper Fishel testified that he checked out the name of “Kyle Baxter” and that it was not “accurate.” While he did not specify at what point he checked the name out, it can reasonably be inferred that it was prior to the Troopers asking the individuals to exit the vehicle. (Preliminary Hearing Transcript, p. 7).

The PSP tape, however, evidences a different version than as testified to by the troopers. Once the troopers exited their vehicle, they approached the Buick on different sides and in shortly less than two minutes, Trooper Fishel requested the driver to exit the vehicle. During that time span, neither of the troopers returned to the cruiser or had any lengthy conversation between them. Indeed, the troopers stayed on different sides of the vehicle during this entire time span. Once the driver was removed from the vehicle, he was patted down. Less than two minutes later, Trooper Young then requested the Defendant to exit the vehicle. Defendant was then patted down and escorted to the back of the vehicle.

Less than 45 seconds after Defendant was removed from the vehicle, Trooper Fishel opened the front driver-side door and began a search of the driver-side compartment. The search lasted a little over 30 seconds. Trooper Fishel then shut the door and proceeded to the passenger side where he opened the door and searched the

passenger side compartment of the vehicle. After approximately one minute, Trooper Fishel apparently discovered something which caused the troopers to draw their weapons on both the driver and the Defendant and place them under arrest.

The Court also concluded in its original Opinion and Order that the Buick vehicle was stopped in the middle of the roadway. (Opinion and Order, pp. 1, 6). Defendant argues that a review of the videotape shows that the subject vehicle did not stop “in the middle of the roadway.”

A review of the videotape supports Defendant’s assertion. While Trooper Fishel testified that the vehicle stopped “in the middle of the roadway” (Preliminary Hearing Transcript, p. 4), the videotape clearly shows that the vehicle pulled over to the right side of the roadway before coming to a complete stop, that other vehicles were in fact parked on the right side of the roadway similarly to the Buick and that traveling vehicles could easily pass by without being obstructed. Indeed, while Trooper Fishel was searching the driver-side compartment with the driver-side door opened, a traveling motorist passed by without any apparent difficulty. Finally, after processing the evidence and handling whatever additional responsibilities the troopers had at the scene, they returned to the patrol unit and exited the scene while traveling without any difficulty whatsoever past the stationary Buick.

Incidentally, the videotape clearly depicts other vehicles parked on the right side of the roadway similarly to the Buick on the block to the rear of the Buick as well as on the block to the front side of the Buick. The videotape is contrary to the

Court's prior conclusion that someone would have needed to get back into the vehicle to move it to a lawful parking spot.

Defendant further claims that the conclusion of the Court that the windows were "heavily tinted" (Opinion and Order, p. 5) is also contradicted by the videotape. In reviewing the videotape, the Court disagrees with this conclusion. In stopping the videotape at numerous different points, the Court easily concluded that the tinting on the windows was heavy.

In light of these clarified facts, the Court will now address Defendant's Motion to Reconsider the suppression denial. Specifically, given the "clarified" circumstances, Defendant submits that there were insufficient grounds for a wingspan search of the interior of the Buick.

As noted in the Court's original Opinion and Order, where a police officer possesses a reasonable belief, based on specific and articulable facts, which, taken together with the natural 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. (Opinion and Order, p. 5, citing Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469 (1983)). The central issue is whether a reasonably prudent man in the circumstances of the troopers would be warranted in the belief that his safety was in danger. (Opinion and Order, p. 5, citing Terry v. Ohio, 392 U.S., 88 S.Ct. 1868 (1968)).

Trooper Fishel testified that due to the knowledge he had of the driver's

criminal history as well as his alleged associations with the “Blood” street gang and his involvement in drug trafficking, the heavily tinted windows preventing his view into the passenger compartment, the high crime area and drug area where the stop was conducted and the time of night, he was of the opinion that for officer safety issues, both occupants should be removed, the persons checked for weapons and the interior of the vehicle be searched “as they were going to be put back into the vehicle so that a traffic citation for the window tint could be issued.” (Preliminary Hearing Transcript, p. 7).

Under the totality of the circumstances in this case, the Court is now of the opinion that the police officers were not justified in conducting the wingspan search of the driver and passenger compartments of the vehicle.

A closer review of the testimony and a review of the videotape leads the Court to the conclusion that the expressed belief of Trooper Fishel that he conducted the search for “safety issues” was not reasonable under the circumstances. More specifically, there does not appear to be an individualized, objective basis for concluding that the individuals, including the Defendant, were dangerous and would gain immediate control of weapons.

While this Court understands that the troopers were sincere in their belief that their safety may have been jeopardized, the Court cannot abandon the totality of the circumstances test and rely exclusively upon the perceptions of the police.

Numerous objective circumstances compel this result. First, it is clear from the videotape that while Defendant's vehicle was proceeding slowly after the troopers activated their lights and siren, because of the presence of parked vehicles and at least one structure abutting the road, the vehicle pulled over at the first available space whereby stopping, it would not block other traffic. There is nothing about how the vehicle slowed down or where it stopped that would reasonably lead to the belief that the occupants were either secreting or retrieving "possibly a weapon."

Next, Trooper Fishel's knowledge of the driver's criminal history of drug trafficking and being involved in a gang does not reasonably lead to the conclusion that guns were present. Indeed, the Supreme Court of Pennsylvania has specifically prohibited reliance by the Court on the preconceived notion that certain types of criminals regularly carry weapons. Grahame, 7 A.3d 810, 816-817 (Pa. 2010), citing Commonwealth v. Zhahir, 561 Pa. 545, 751 A.2d 1153 (Pa. 2000).

Further, Trooper Fishel's conclusion that the area of stop was a high crime area was based on a vague belief rather than particularized facts. He noted that he "believed" that the area was statistically a higher crime area than other parts of Lycoming County. These "statistics", according to the trooper, "would probably be Pennsylvania State Police or Williamsport Police statistics."

Also, the troopers did not know that the Defendant had provided a false name prior to Trooper Fishel deciding to search the vehicle.

Moreover, the videotape clearly shows that for the nearly five minutes

from the time the vehicle stopped until Trooper Fishel decided to enter and search the vehicle, the driver and Defendant were entirely cooperative. They obeyed the officer's directions, exited the vehicle without incident, complied with the respective pat down searches, kept their hands on the vehicle as instructed, walked to the rear of the vehicle as instructed and did not act in any manner whatsoever that would lead an objective person to believe that they posed a threat to the officers. Indeed, at the time that Trooper Fishel decided to enter the vehicle, the driver was in the far back driver's side of the vehicle with both hands on the trunk and the Defendant was at the rear of the vehicle behind the trunk. Both were in the immediate vicinity of Trooper Young. Nothing even remotely suggested that the individuals may have gained immediate access to guns possibly secreted in the car.

Finally, and as referenced previously, the vehicle was not parked in a manner which would have required either the driver or the passenger to return to it and move it. It clearly was not blocking traffic and the Commonwealth did not present any evidence upon which the Court could conclude that the vehicle was illegally parked. The traffic stop was effectuated for a violation of 75 Pa. C.S.A. § 4524 (e) (1). Since that section prescribes an individual from driving a vehicle with improper tinting, the police could not lawfully have allowed the driver or Defendant to return to the vehicle and drive away.

The reality of law enforcement in an age of gun proliferation amongst criminals mandates quick decisions based on an officer's experience and subjective

beliefs. Given the objective facts as depicted on the videotape, the Court cannot conclude that the troopers' testimony is credible. This finding does not, nor is it intended to imply improper intent by the troopers. Memory can be impacted by many factors. The mandates of the Constitution and its interpretation by our appellate courts, though, require that the balance between the needs of law enforcement and the privacy rights of citizens be judged on an objective standard. The application of that standard in this case requires that the Court grant Defendant's Suppression Motion. This conclusion results in the exclusion of the evidence against the Defendant. The officers' actions, however, resulted in the practical effect of deterring crime in that area and removing controlled substances from the street.

In connection with Defendant's Habeas Corpus Petition, the Court acknowledges that the suppression of the seized narcotics effectively precludes the Commonwealth from proceeding further on the case and accordingly will not address Defendant's Habeas Corpus Motion.

ORDER

AND NOW, this ____ day of February 2011 following a hearing and argument on Defendant's Motion and Supplemental Motion to Reconsider denial of Motion to Suppress and denial of Habeas Corpus, the Court **GRANTS** Defendant's Motion. In accordance with the foregoing Opinion, the Court **GRANTS** Defendant's Motion to Suppress. In light of this Order, Defendant's Motion for Habeas Corpus is deemed moot.

By The Court,

Marc F. Lovecchio, Judge

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