

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-385-2011
vs. :
:
CHRISTOPHER MULLEN, :
Defendant :

OPINION AND ORDER

This matter came before the Court for hearing and argument on July 1, 2011 on Defendant's Omnibus Pre-trial Motion, which sought suppression of the evidence obtained from Defendant's person and, if suppression was granted, habeas corpus relief. The basis for Defendant's motion to suppress was that the police lacked sufficient facts to justify a pat down of his person or, in the alternative, the police violated the plain feel doctrine.

The Commonwealth did not introduce any evidence at the hearing, but defense counsel introduced a transcript of the preliminary hearing held on March 15, 2011 as Defendant's Exhibit 1. Defense counsel also noted that she had just received a copy of a DVD from the on-board camera in the police cruiser and asked for an additional thirty days to file supplemental motions based on the DVD. By a stipulation entered July 11, 2011, the parties agreed the DVD would be marked as Defendant's Exhibit 2 and introduced into evidence.

The relevant facts follow. On November 14, 2010 at about 12:20 a.m. Trooper Kenneth Fischel, of the Pennsylvania State Police, and his partner Trooper Doebler were on patrol when they observed a blue Cadillac with a broken tail light. As a result, they effectuated a traffic stop. When Trooper Fischel approached the driver to ask for her license, registration and insurance information, he noticed a funky odor that he thought was "weed,"

but he wasn't quite sure due to all the cigarette smoke in the vehicle. Trooper Doebler approached the passenger, who identified himself as Christopher Mullen.

The troopers went back to their cruiser and ran both the driver and the passenger to check for any outstanding warrants. Trooper Fischel asked Trooper Doebler if he smelled anything. Trooper Doebler indicated he just smelled a cigarette. Although there were no outstanding warrants, Defendant had a criminal history that included multiple convictions for possessing and delivering controlled substances.

Trooper Fischel radioed Williamsport police to see if they could send over a canine unit. When Corporal Walmer arrived with his canine, Trooper Fischel first got the driver out of the vehicle and patted her down for weapons. After patting down the driver and finding nothing, Trooper Fischel told her that he smelled weed when he first approached the vehicle as asked her if she had smoked marijuana earlier. The driver said no. Trooper Fischel then asked if Defendant had been smoking marijuana earlier and the driver responded, "No, he's on probation."

Trooper Fischel had the driver stand a few feet away from the car with Trooper Doebler while he took Defendant out of the vehicle and patted him down. During the pat down of Defendant, Trooper Fischel felt something hard in Defendant's back pocket that felt like a few pills. Trooper Fischel asked Defendant what was in the pocket and Defendant said, "That's vitamins." Trooper Fischel pulled the pocket back a bit, shined his flashlight in the pocket and then exclaimed, "Your back pocket is full of weed, dude." Defendant's back pocket contained some Extends pills and less than two grams of marijuana.

Trooper Fischel arrested Defendant and placed him in his cruiser. Then he had Corporal Walmer run his drug dog around the vehicle. The dog alerted on the passenger side door area of the vehicle.

Trooper Fischel seized the vehicle and searched it, but no other contraband was found.

Trooper Fischel charged Defendant with possession of a small amount of marijuana.

At the preliminary hearing, Trooper Fischel testified that immediately upon making contact with the driver he could smell the odor of raw marijuana emanating from inside the vehicle. Preliminary Hearing Transcript (PHT), at 3. Upon removing Mr. Mullen from the vehicle, Trooper Fischel patted him down for weapons. PHT, at 4. He could feel a slight bulge in his rear pocket and again smelled the odor of raw marijuana. Id. When he felt the bulge in Defendant's rear jeans pocket, he did not believe it to be some sort of weapon; he believed it to be marijuana and pills. PHT, at 6. Trooper Fischel testified he shined his flashlight into Defendant's right rear jeans pocket and observed loose marijuana. PHT, at 4. He estimated the amount of marijuana to be about 2 grams, which would be about the size of a quarter. PHT, at 7. Trooper Fischel did not observe anything in plain view in the vehicle such as a blunt or a lighter. Id.

Defendant first argues that Trooper Fischel patted Defendant down without having sufficient facts to believe he was armed and dangerous. The Court agrees.

The Court notes that when a defendant files a motion seeking suppression of

evidence the Commonwealth has the burden “of establishing that the challenged evidence was not obtained in violation of the defendant’s rights.” Pa.R.Cr.P. 581(H). The Commonwealth did not call any of the troopers to testify as to what facts, if any, led them to believe Defendant may be armed and dangerous. Instead, the Commonwealth cited Commonwealth v. Lateef, 446 Pa. Super. 640, 667 A.2d 1158 (Pa. Super. 1995) and argued that Trooper Fischel smelling the odor of marijuana was enough to conduct a pat down of the occupants of the vehicle. The Lateef court relied on the Superior Court taking judicial notice that drug dealers are likely to be armed and dangerous in Commonwealth v. Patterson, 405 Pa. Super. 17, 591 A.2d 1075, 1078 (Pa. Super. 1991). Lateef, 667 A.2d at 1161. However, this presumption that “guns follow drugs” was specifically rejected by the Pennsylvania Supreme Court in Commonwealth v. Zhahir, 561 Pa. 545, 751 A.2d 1153, 1162 (Pa. 2000) when it stated: “as a general policy consideration, taking judicial notice that all drug dealers may be armed and dangerous 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 the safety of the officer must arise from the facts and circumstances of the particular case.”

Even if the troopers had sufficient facts to frisk Defendant, the facts of this case do not support the applicability of the plain feel doctrine. The plain feel doctrine was first announced when the United States Supreme Court in Minnesota v. Dickerson, 508 U.S. 366, 375-76, 113 S.Ct. 2130, 2137 (1993) held: “If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that

already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context."

The DVD from the on-board camera in the state police cruiser depicts Trooper Fischel patting down Defendant's outer garments. When he pats down Defendant's right rear jeans pocket, Trooper Fischel asks Defendant what's in the pocket. Initially, Defendant replies, "nothing." Trooper Fischel tells Defendant there is something hard in his pocket that feels like pills. Defendant then says, "It's vitamins." Trooper Fischel then pulls the pocket back a little bit, shines his flashlight into the pocket and exclaims, "Your back pocket is full of weed, dude."

There would be no need for Trooper Fischel to shine his flashlight into the Defendant's pocket if during the pat down it was immediately apparent that there was marijuana in the pocket. Furthermore, prior to shining his flashlight into the pocket, Trooper Fischel does not mention marijuana and his statement and tone of voice on the DVD indicate he was surprised when he saw the marijuana after he shined his flashlight in Defendant's pocket. Based on the forgoing, the Court finds it was not immediately apparent to Trooper Fischel that Defendant's back pocket contained marijuana; therefore, the plain feel doctrine does not apply in this case.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ___ day of July 2011, the Court **GRANTS** the Defendant's Omnibus Pre-Trial Motion. The evidence seized from Defendant's person, including the marijuana found in his right rear pocket, is hereby **SUPPRESSED**. Without this evidence, the Commonwealth cannot present a prima facie case for the sole charge of possession of a small amount of marijuana. Therefore, Defendant's request for habeas corpus relief is **GRANTED** and the charge of possession of a small amount of marijuana is **DISMISSED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Paul Petcavage, Esquire (ADA)
Trisha Hoover, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file