

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-123-2011**
:
RAYMOND DIAZ, :
Defendant :

OPINION AND ORDER

Defendant is charged with one count of Conspiracy to Possess with Intent to Deliver Cocaine and one count of Possession with Intent to Deliver Cocaine.

The charges arise out of an alleged December 23, 2010 incident in which the Defendant was stopped by law enforcement officers for suspicious activity. Defendant's car was eventually impounded and a search warrant was obtained. Upon the execution of the search warrant, illegal narcotics were discovered.

Defendant timely filed an Omnibus Pretrial Motion consisting of two Motions to Suppress and a Motion to Dismiss.

Defendant's first Motion to Suppress is conceded by the Commonwealth. Specifically, the Commonwealth admits that following Defendant's arrest, he should have been Mirandized prior to being asked certain questions about whether he used or was addicted to narcotics during his "routine booking." Accordingly, all incriminating statements made by the Defendant during his booking shall be suppressed.

Defendant raises three issues in connection with his second Motion to Suppress. First, Defendant contends that upon first being confronted by the South Williamsport Police, he was subjected to an investigatory stop without the requisite reasonable suspicion that criminal activity was afoot and accordingly all evidence obtained thereafter must be suppressed. Secondly, Defendant submits that the canine sniff of his vehicle was not supported

by the requisite reasonable suspicion and that all evidence obtained as a result of said allegedly illegal canine sniff must be suppressed. Third, Defendant argues that the subsequent obtaining of a search warrant does not cure any initial illegality.

Defendant also filed a Motion to Dismiss the conspiracy count alleging that there was no evidence to support an agreement between the parties to commit or attempt to commit a crime.

A hearing in this matter was held on May 2, 2011. Following a hearing and upon directive of the Court, the transcript of the preliminary hearing held on January 25, 2011 was admitted in evidence as Defendant's Exhibit 1. It was stipulated by the parties that the Court would consider the preliminary hearing transcript in deciding Defendant's Motion to Dismiss.

In connection with Defendant's Motion to Suppress, the Commonwealth presented the testimony of Harold Anthony, Officer Dockey of the Williamsport Bureau of Police (WBP), Corporal Finnerty of the South Williamsport Police Department (SWPD) and Officer Snyder of the WBP.

Harold Anthony is a resident of Williamsport who on December 23, 2010 noticed a black car parked on the street across from his residence on West Edwin Street. As Mr. Anthony went across the street to turn on lights at his place of employment, he saw an individual that he did not recognize standing on his neighbors' front porch and talking on a cell phone. Mr. Anthony noted that he had been friends with the neighbors for about 8 years and he knew their friends. When he returned from his place of employment, the person on the porch was gone, but there was someone sitting in the black car.

As a result of his observations, he called the Williamsport police station indicating that there was a suspicious vehicle in the neighborhood. He indicated that the vehicle it was a black car, it had dark tinting on the windows, there was at least one individual seated in it, and the engine was running. While Mr. Anthony was on the phone, one of the police cruisers drove by and the “suspicious vehicle” left. Mr. Anthony gave a description of the vehicle and the direction that it was traveling.

Officer Dockey testified that he was on patrol on December 23, 2010. He indicated that there were recent shootings in Williamsport and that he was specifically on the lookout for vehicles that were from “out of the area.” His concern was that there would be retaliation for the recent shootings.

While he was on patrol, he saw a black Lincoln Towncar parked on the 700 block of High Street in the area where a recent homicide took place. He had never seen the car before and he ran the registration. He did a U-turn in order that he would be traveling in the same direction as the vehicle. The vehicle turned out to be registered to Josie Banks from Scranton, PA.

He followed the vehicle “around a little bit.” It traveled through areas of the city that were known to Officer Dockey as high crime areas.

The vehicle subsequently pulled over in the 500 block of Edwin Street near Mr. Anthony’s house. In Officer Dockey’s experience, it was common for cars that were being followed by police units to pull over, stop and wait for the police to drive by. Although the rear windows were heavily tinted, when Officer Dockey drove past the vehicle he saw a male driver.

A minute or two later, Lieutenant Miller called Officer Dockey to report a suspicious vehicle in the West Edwin Street area. Officer Dockey did not see the vehicle leave the West Edwin Street area but upon driving to High Street, Officer Dockey again saw the vehicle in the 700 block of High Street. He again followed the vehicle traveling from High Street through the city of Williamsport and over the bridge connecting Williamsport with South Williamsport.

Officer Dockey had patrolled the “zone” of the city where the vehicle had been traveling for approximately eight years. He was familiar with the majority of the individuals and cars that frequented this zone. His suspicions were raised because he never saw the car before, it was in the area of the recent homicide, it was registered to an individual from out of the area and it traveled in the area of the city which was known to Officer Dockey as a high crime area where several “known drug houses” were located.

Corporal Finnerty testified that on December 23, 2010 he was on duty. He was monitoring the Williamsport Police radio transmissions. He knew that the Williamsport Police were following a suspicious vehicle from Williamsport into South Williamsport.

Corporal Finnerty pulled his vehicle into the Uni-Mart parking lot located on Market Street in South Williamsport to monitor the incident.

The black Lincoln Towncar pulled into the Uni-Mart at the gas pumps. Corporal Finnerty noticed that there were two male occupants that got out and were standing around the car.

At around this time, Officer Snyder had contact with Corporal Finnerty and explained that there was reasonable suspicion to stop the vehicle.

The vehicle started to pull away from the pumps back onto Market Street going in the opposite direction of Williamsport. Corporal Finnerty pulled his vehicle from the side of the Uni-Mart to the other side of the pumps in an attempt to exit on Market Street as well to follow the vehicle. Upon doing so, however, the vehicle stopped, backed up past the pumps and parked in a stall adjacent to the store.

The driver got out of the vehicle and went at a “fast pace” into the store. Corporal Finnerty immediately activated his emergency lights, pulled up to the car and instructed the passenger to stay in the car.

Shortly thereafter, the driver, who was subsequently identified as the Defendant, exited the store. Corporal Finnerty approached him, had him empty his pockets and patted him down for weapons.

Upon being questioned, the Defendant indicated that the vehicle was registered to his aunt who he lived with in Scranton. Corporal Finnerty remained on the scene while a canine sniff was conducted, while the driver was interviewed by the Williamsport Police and until the vehicle was impounded and towed from the scene.

Officer Snyder testified next on behalf of the Commonwealth. On December 23 of 2010 he was on duty in a marked cruiser. He was monitoring the police transmissions and was aware of Mr. Anthony’s report as well as Officer Dockey’s observations. He “fell in behind” Officer Dockey as Defendant’s vehicle was traveling southbound on Market Street in Williamsport toward South Williamsport.

He confirmed that there were four separate shootings in the city within two weeks of this date.

Officer Snyder explained that after Corporal Finnerty stopped the vehicle, he noticed some suspicious activity. First, he noticed that there were multiple air fresheners in the car which in his opinion was not uncommon where drugs might be secreted in the car. Furthermore, the answers to certain “detail” questions by the Defendant and his passenger did not match. There were inconsistencies in why they were in Williamsport, where they went and what they planned on doing. Officer Snyder decided to deploy his dog to do a canine sniff of the vehicle. Officer Snyder explained in detail the reason for conducting the sniff. In sum, Officer Snyder explained that he had a reasonable suspicion that drugs were being secreted in the vehicle. He based this reasonable suspicion on Mr. Anthony’s report, Officer Dockey’s observations, the fact that the vehicle was in a high drug crime area, the fact that the vehicle was from out of the area, the fact that the Defendant was not the owner of the vehicle yet operating it which he explained is very common in drug transaction situations, the fact that there were numerous air fresheners located in the car and the inconsistencies between the statements of the Defendant and his passenger.

Officer Snyder’s dog alerted to the front passenger area of the vehicle. As a result, Officer Snyder asked Defendant if he would consent to a search. Defendant consented to a search only of the front passenger area because that is the area as to where the dog alerted. Officer Snyder responded that he would not limit the search to the front passenger area because he believed he had probable cause to search the entire vehicle. As a result, the vehicle was subsequently impounded, a search warrant was obtained and illegal narcotics were found in the trunk.

At the preliminary hearing in this case, Lieutenant Timothy Miller of the WBP testified as an expert regarding whether the narcotics found in the vehicle were possessed with the intent to deliver. Lt. Miller testified that in his expert opinion the narcotics were possessed with the intent to deliver them based on the amount of cocaine found (almost 2 ounces), the amount of cash on Defendant and his passenger (approximately \$900 and \$400, respectively), the denominations of the cash, and the lack of personal use paraphernalia.

Lt. Miller also was the watch commander on December 23, 2010, who received the phone call from Mr. Anthony. Lt. Miller noted he had received credible information from Mr. Anthony in the past. Lt. Miller testified Mr. Anthony reported observing a vehicle pull up in front of his house that he didn't recognize, seeing an individual get out, going to a porch of a neighboring residence and knocking on the door. Mr. Anthony might have heard an apology like maybe the person had the wrong residence. The person then walked away towards a known drug house in the area and then he lost sight of the individual. Mr. Anthony then reported observing a patrol car drive by, the driver of the vehicle got on his cell phone, the cell phone lit up and moments later the passenger got back in the vehicle and the vehicle drove away. Lt. Miller then radioed this information out to the units and Officer Dockey advised him that he also observed suspicious activity with the same vehicle.

The Defendant was given until June 3, 2011 to submit any written Briefs in support of his Motion while the Commonwealth was given until June 17. The parties submitted their written Briefs and this matter is now ripe for a decision.

Defendant contends that when he was initially stopped by the police, they did not have reasonable suspicion that criminal activity was afoot. Police officers may detain

individuals for a brief investigation when they possess reasonable suspicion that criminal activity is afoot. Commonwealth v. Brown, 606 Pa. 198, 996 A.2d 473, 477 (Pa. 2010), citing Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884, 889 (Pa. 2000). The Court must review the totality of the circumstances possessed by the police. Brown, supra. “In order to justify the seizure, a police officer must be able to point to specific and articulable facts leading him to suspect criminal activity is afoot.” Brown, supra., citing Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 228 (Pa. 1996). The Court must consider the reasonable inferences drawn from the facts in light of the officer’s experience and recognize that innocent facts, when considered collectively, may permit the investigative detention. Brown, supra, citing Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 676 (Pa. 1999).

The Court concludes that the officers had reasonable suspicion to conduct an investigative detention of the Defendant under the circumstances. Four shootings had occurred in the Williamsport area in the past two weeks. The one that occurred in the 700 block of High Street resulted in a homicide. The police were justifiably concerned that retaliation may take place and were on the lookout for vehicles from out of the area. The Defendant was operating a vehicle twice in the area of where the homicide occurred. The vehicle was also registered to an owner from the Scranton area. Moreover, the vehicle was traveling in an area of Williamsport that was known to be a high crime area, which included several known drug houses. The vehicle actually had stopped in an area where an individual exited Defendant’s vehicle and mistakenly approached a residence then walked toward a known drug house. Furthermore, the Defendant appeared to be avoiding the police. The Defendant also did not appear to be conducting any normal activity such as visiting others or stopping at a business. Finally, there

appeared to be no logical reason why the Defendant in a short period of time traveled around suspect areas of Williamsport and upon being spotted and followed by the police essentially fled the City and their jurisdiction. Accordingly, Defendant's Motion with respect to his investigative detention will be denied.

Defendant next argues that there was insufficient reasonable suspicion to justify the canine sniff of the vehicle. The Court disagrees. In addition to all of the facts justifying the stop, the Defendant driver of the vehicle was not the owner, there were numerous air fresheners located in the vehicle and both the Defendant and the passenger gave different versions of where the vehicle was going, why they were in Williamsport and what they were planning on doing.

All of these facts coupled together along with the officer's experience constituted reasonable suspicion that criminal activity was afoot. Accordingly, the Defendant's Suppression Motion on this ground will be denied.

The Court need not address Defendant's argument that the obtaining of the search warrant did not cure any alleged illegality of the initial stop and subsequent dog sniff as the Court has concluded that said seizures and searches were constitutionally permissible.

A Petition for Habeas Corpus attacks the sufficiency of the evidence. 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 (1975). The evidence must demonstrate the existence of each of the material elements of the crimes charged. Commonwealth v. Wodjak, 502 Pa. 359, 466 A.2d 991, 996 (1983).

The Defendant contends that there was insufficient evidence to establish a prima facie case for the conspiracy charge.

The elements of criminal conspiracy are that the Defendant: (1) entered into an agreement to commit or aid in a criminal act with another person or persons; (2) with a shared criminal intent; and that (3) an overt act was done in furtherance of the conspiracy.

Commonwealth v. Bostick, 958 A.2d 543, 560 (Pa. Super. 2008). “In most cases of conspiracy, it is difficult to prove an explicit or formal agreement; hence, the agreement is generally established via circumstantial evidence, such as by ‘the relations, conduct, or circumstances of the parties or overt acts on the part of co-conspirators.’” Commonwealth v. Johnson, 604 Pa. 176, 985 A.2d 915, 920 (2009).

In reviewing the testimony from the preliminary hearing as well as the suppression hearing, the Court is satisfied that the Commonwealth has presented a prima facie case of conspiracy to possess with intent to deliver. Testimony presented at the preliminary hearing indicated an individual got out of the vehicle when it was parked on Edwin Street and went onto a porch of one of the residences. The individual then walked down the street toward a known drug house. When the police drove by the vehicle, the driver used his cell phone to call the individual to come back to the vehicle and they drove away. It appeared that the occupants of the vehicle were trying to avoid the police. After the vehicle was stopped, the police found almost 2 ounces of cocaine in the trunk, the driver had approximately \$900 in cash on his person and the passenger had about \$400 in cash on his person. All the cash was in small denominations (20s and 10s) that would typically be exchanged for cocaine in a street sale. The driver and the passenger gave the police different versions of where they had been

and what they had been doing. Although some of this evidence is arguably hearsay, the Commonwealth is permitted to introduce some hearsay evidence at a preliminary hearing to meet its burden of establishing a prima facie case. Considering the totality of the circumstances and the reasonable inferences to be drawn therefrom, the Court will deny the Defendant's request for habeas corpus relief. This ruling is without prejudice to the rights of the Defendant to assert this issue through an appropriate motion at trial.

ORDER

AND NOW, this ____ day of August 2011 following a hearing and argument, Defendant's Omnibus Pretrial Motion is granted with respect to his Motion to Suppress his answers to questions posed to him by the police during booking about whether he used or was addicted to narcotics. In all other respects, Defendant's Omnibus Pretrial Motion is **DENIED**.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File