IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	
vs.	**:**	**No. CR-8-2011**
	:	
COLIN POPHAL,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant is charged by Information filed on February 24, 2011 with two counts of DUI and various traffic summaries. The Commonwealth alleges that on October 30, 2010, Defendant utilized his vehicle to tow a wooden deck from his residence over the roadways approximately 3 ½ to 4 miles to another residence for the purpose of eventually burning the wooden deck. The Commonwealth alleges that Defendant was under the influence of alcohol at the time he towed the deck.

Defendant filed an Omnibus Pretrial Motion raising several issues. Defendant argues that when he was questioned by the State Police he was undergoing custodial interrogation and was not Mirandized. Defendant further argues that there was not probable cause to subsequently arrest him. Accordingly, Defendant argues that all of the evidence obtained against him should be suppressed. Defendant argues as well that the DUI charges against him should be dismissed because: (1) there was no proof that he was under the influence of alcohol at the time he was operating his vehicle, and (2) his blood was drawn more than two hours following his operation of the vehicle.

A hearing on Defendant's Motion to Suppress was held on May 16, 2011. Defendant was given an opportunity to advise the Court by May 23, if further testimony was requested. Defendant failed to request such. Both parties were extended an opportunity to

provide to the Court written Briefs or case citations. While the Commonwealth provided such to the Court on May 24, 2011, Defendant failed to do so.

Sergeant Weltmer is employed by the Pennsylvania State Police Troop F in Mansfield. On October 30, 2010, he was traveling home to Montoursville from Mansfield. He arrived home at approximately 8:05 p.m. The roadway was clear and did not have any debris on it.

At approximately 8:15 p.m., Sergeant Weltmer began watching a college football game on TV. About five minutes later, he heard a ruckus outside of his home. At approximately 8:30, his one daughter arrived home and told him that there were several large pieces of wooden boards and other debris on the roadway.

Sergeant Weltmer felt that the presence of boards and debris on the roadway was a threat to the safety of the traveling public and "activated" himself to perform duties as a law enforcement officer. He got into his marked patrol unit and followed scrape marks that he located on the roadway, which were caused by the apparent dragging of an item.

He determined that the scrape marks started at one of his neighbor's homes, that of the Defendant. He followed the scrape marks for approximately 3 ½ to 4 miles to a private residence located on a private lane known as Carey Hill Road. Over the 3 ½ to 4 miles he noticed that there were numerous boards and other debris on the roadway, that the pattern from the scrape marks zigzagged on portions of the roadway, and that for a large portion if not most of the roadway, scrape marks were on both lanes including the opposite lane of traffic.

When he arrived at the Carey Hill Road residence, he stopped near the side of the yard and started to walk around the residence. He saw a red jeep with a deck attached to it. He immediately recognized that the red jeep was one that he had seen before and which belonged to the Defendant who he knew.

He saw the Defendant come around the back of the house at which time he asked the Defendant to come to the front to an area that was lighted by his patrol vehicle. Sergeant Weltmer indicated that he did not need to identify himself as both the owner of the residence as well as the Defendant knew who he was.

Sergeant Weltmer began speaking to the Defendant and asked him what happened. The Defendant was never advised of his Miranda Rights by Sergeant Weltmer. He immediately noticed that the Defendant's eyes were red, glassy and bloodshot. He also immediately smelled the odor of an alcoholic beverage. The Defendant admitted to Sergeant Weltmer that he had been drinking alcoholic beverages but stated that he had not begun drinking until he arrived at the Carey Hill Road residence. The Defendant admitted as well to driving from his property to the residence.

At approximately 9:05 p.m., Sergeant Weltmer advised the Defendant to wait out front until another Trooper arrived. He called the Montoursville Barracks and shortly thereafter, Trooper Shipman arrived.

Trooper Michael Shipman of the Pennsylvania State Police next testified on behalf of the Commonwealth. He is employed as a Trooper at Troop F in Montoursville.

At approximately 9:10 p.m., he was dispatched to meet Sergeant Weltmer for a "possible DUI." He arrived at the Carey Hill Road residence between approximately 9:25 and 9:30 p.m.

Upon arriving at the residence, Trooper Shipman immediately spoke with Sergeant Weltmer. Sergeant Weltmer told Trooper Shipman what he observed, consistent with his testimony.

Trooper Shipman then took a quick look around the premises. He noticed the red jeep that had pulled behind the residence with a large deck attached to it. It was apparent that the deck had been dragged, in that it was not on a trailer.

Trooper Shipman then spoke with the Defendant. He noticed an odor of alcohol and bloodshot eyes. He also noted that the Defendant was unsure of his footing.

Trooper Shipman asked the Defendant what he was doing. Trooper Shipman admitted that when he spoke to the Defendant, he did not advise the Defendant of his Miranda Rights. The Defendant indicated that he had no more use for the deck and was taking it to the Carey Hill Road residence to be burned. Defendant admitted that prior to pulling the deck to Carey Hill Road with his jeep he had two beers at his residence and then had four drinks from a bottle while at the Carey Hill Road residence.

Trooper Shipman did not recall whether he asked the Defendant if he had been drinking.

Based upon his observations as well as what he was informed of by Sergeant Weltmer, Trooper Shipman took the Defendant into custody for a suspected DUI and transported him to the DUI Center for a blood test.

Although it is not entirely clear from Defendant's written Motion to Suppress or from the argument made by defense counsel at the hearing in this matter, Defendant first contends that his statements made to Trooper Weltmer must be suppressed because Defendant was not provided his Miranda Warnings.

Miranda safeguards, however, only apply when a person is subjected to custodial interrogation. Commonwealth v. Gaul, 590 Pa. 175, 912 A.2d 252, 255 (2006), cert denied, 128 S. Ct. 43, 169 L.Ed. 2d 242 (2007); Commonwealth v. DiStefano, 782 A.2d 574, 579 (Pa. Super. 2001).

The test for determining whether a suspect is in custody is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted. Commonwealth v. Eichinger, 591 Pa. 1, 915 A.2d 1122, 1133-34 (Pa. 2007). The standard is an objective one, which takes into consideration the reasonable impression of the person being interrogated. Commonwealth v. McCarthy, 820 A.2d 757, 760 (Pa. Super. 2003). The test "does not depend upon the subjective intent of the law enforcement officer interrogator", but instead "focuses on whether the individual being interrogated reasonably believes his freedom of choice is being restricted." Commonwealth v. Hayes, 755 A.2d 27, 33-34 (Pa. Super. 2000), quoting Commonwealth v. Gibson, 553 Pa. 698, 728 A.2d 473, 480 (Pa. 1998). The key difference between an investigative detention and a custodial one is that the latter involves such coercive conditions as to constitute the functional equivalent of an arrest. Commonwealth v. Pakacki, 587 Pa. 511, 901 A.2d 983, 987 (Pa. 2006).

In this particular case and in reviewing all of the circumstances, the Court concludes that when Sergeant Weltmer first approached and questioned the Defendant, the Defendant was not being subjected to custodial interrogation and accordingly, Miranda warnings were not required.

The Defendant could not reasonably argue that his freedom of choice was being restricted when he spoke to Sergeant Weltmer. Sergeant Weltmer displayed no show of authority, did not identify himself as a State Trooper and upon confronting the Defendant asked only that he come around to the front of the house in the light. Furthermore, the Defendant was never placed in restraints, was never instructed that he was unable to leave, his physical ability to leave was never impeded and the discussion was of a very, very brief duration. The Defendant was not told that he was under arrest or that he had any obligation whatsoever to answer any questions. The Defendant clearly expressed his willingness to speak and did not show any reluctance. There was nothing about the Defendant's demeanor upon which one could conclude that he reasonably believed that he was being subjected to custodial interrogation. Indeed, Sergeant Weltmer asked open-ended questions to which the Defendant responded apparently candidly and without any hesitation whatsoever.

Miranda warnings are required only when the Defendant is subject to custodial interrogation. Commonwealth v. Smith, 575 Pa. 203, 836 A.2d 5, 18 (Pa. 2003). Because the Defendant was not in custody, Miranda warnings were not required and accordingly, Defendant's Motion to Suppress with respect to the statements he made to Sergeant Weltmer will be denied.

Defendant next contends that his statements made to Trooper Shipman must be suppressed because he was not Mirandized. The circumstances involving Trooper Shipman were different than Sergeant Weltmer.

Following Sergeant Weltmer's interaction with the Defendant, Sergeant Weltmer told the Defendant to wait until another Trooper arrived. Following this statement by Sergeant Weltmer, it took Trooper Shipman approximately 20 to 25 minutes to arrive at the Carey Hill Road residence.

Upon arriving at the scene, Trooper Shipman first spoke with Sergeant Weltmer, then took a "quick look around" before speaking with the Defendant. At the time that Trooper Shipman first spoke with the Defendant, the Defendant was standing in front of Sergeant Weltmer's vehicle. According to Trooper Shipman, he asked the Defendant what he was "doing" after which the Defendant made some incriminating statements. Trooper Shipman indicated that he did not remember if he specifically asked the Defendant if he was drinking.

"Among the factors generally considered whether a detention is investigative or custodial are: the basis of the detention (the crime suspected and the grounds for suspicion); the duration of the detention; the location of the detention (public or private); whether the suspect was transported against his will (how far, why); the method of detention; the show, threat or use of force; and the investigative methods used to confirm or dispel suspicions." Commonwealth v. Kriner, 697 A.2d 262, 265 (Pa. Super. 1997); Commonwealth v. Gommer, 665 A.2d 1269, 1277 (Pa. Super. 1995).

The record fails to provide sufficient facts upon which the Court can conclude that the Defendant was subjected to custodial interrogation or reasonably believed that his freedom of action or movement was restricted. There is no evidence as to any display of force by Trooper Shipman, no evidence that Trooper Shipman told the Defendant whether he was under arrest, no evidence that Trooper Shipman instructed the Defendant that he was unable to leave, no evidence that the Defendant's physical ability to leave was impeded, no evidence that the Defendant was placed in restraints or that he was physically deprived of his freedom in any significant way.

Accordingly, the Court finds that Miranda warnings were not required and Defendant's Motion to Suppress his statements to Trooper Shipman will be denied.

Defendant next argues that Trooper Shipman lacked probable cause to arrest the Defendant on suspicion of DUI and that accordingly all of the evidence obtained thereafter must be suppressed.

Probable cause to arrest exists where the facts and circumstances within the police officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Commonwealth v. Gwynn, 555 Pa. 86, 723 A.2d 143, 148 (Pa. 1998); Commonwealth v. Smith, 979 A.2d 913, 916 (Pa. Super. 2009), quoting Commonwealth v. Dunlap, 596 Pa. 147, 941 A.2d 671, 674-75 (Pa. 2007); In the Interest of R.P., 918 A.2d 115, 121 (Pa. Super. 2007), quoting Commonwealth v. Valentin, 748 A.2d 711, 715 (Pa. Super. 2000).

In this case, it is clear that Trooper Shipman had probable cause to believe, based upon his own observations as well as the observations from Corporal Weltmer, that the Defendant committed the crime of Driving Under the Influence of Alcohol. The Defendant pulled a large wooden deck via a chain or a rope over 3 ½ to 4 miles of roadway without utilizing a trailer. While Defendant was pulling the deck, various debris from the deck including wooden planks broke or fell off into the traveling roadway endangering the traveling public. As well, the deck was pulled in a manner so as to obstruct traveling motorists on both sides of the roadway. Additionally, the deck actually zigzagged in portions of the roadway further endangering the traveling public.

Defendant smelled of the odor of an alcoholic beverage, was unsteady in his footing and had bloodshot eyes. Furthermore, the Defendant admitted to drinking alcoholic beverages prior to pulling the deck with his jeep.

Because Trooper Shipman had probable cause to arrest the Defendant for Driving Under the Influence of Alcohol, the evidence obtained following the arrest is admissible and Defendant's Motion to Suppress will be denied.

Defendant next argues that the Court must dismiss the Driving Under the Influence charges because arguably there was no evidence from which the Commonwealth could establish that when the Defendant operated his vehicle he was under the influence of alcohol, or that the blood draw was more than two hours after the Defendant would have operated his vehicle.

The Court disagrees with Defendant's contention that the Commonwealth could not establish that when he operated his vehicle he was under the influence of alcohol. To the

contrary, all of the facts supporting probable cause establish that when the Defendant operated his vehicle he was under the influence. It can reasonably be inferred that when Sergeant Weltmer heard the "ruckus" outside of his residence at 8:20, it was the Defendant pulling the deck. Following his daughter arriving home at 8:30 and advising Sergeant Weltmer of what she observed, Sergeant Weltmer immediately activated his status as a law enforcement officer and proceeded to investigate the matter. He followed the scrape marks to the Carey Hill Road address and immediately noticed signs of intoxication with respect to the Defendant. Clearly, a jury could infer that the Defendant was under the influence at the time he drove his vehicle shortly before being confronted by Sergeant Weltmer.

The two-hour issue raised by Defendant, however, has merit. The Commonwealth's evidence with respect to Count 2 of the Information must establish that Defendant's alcohol concentration in his blood or breath was .16% or higher within two hours after the Defendant had driven, operated or been in actual physical control of the movement of the vehicle. 75 Pa. C.S.A. § 3802 (c). If the Commonwealth cannot show that Defendant's blood was drawn within two-hours of his driving, it must satisfy the exception to the two-hour rule found in 75 Pa.C.S. §3802(g). Under this exception, evidence of an individual's blood alcohol concentration more than two hours after the individual drove, operated or was in physical control of the movement of the vehicle is sufficient if the Commonwealth shows the following: (1) good cause explaining why the chemical test sample could not be obtained within two hours; and (2) the individual did not imbibe any alcohol between the time the individual was arrested and the time the sample was obtained.

The Commonwealth argues in its written submission that the "lab report" indicates that the blood was drawn at 10:28 p.m. but said report was never referenced by testimony or admitted in evidence. The Commonwealth also concedes that this time is approximately 8 minutes outside the two-hour rule, but claims that the violation is de minimus or, in the alternative, the circumstances fall within the exception to the two-hour rule found in 75 Pa.C.S. §3802(g).

No evidence whatsoever was provided to the Court as to the time that Defendant's blood was drawn. Statements in briefs and memoranda do not constitute evidence. Without evidence to show when the blood was drawn, the Court cannot determine whether the Commonwealth satisfied the two-hour rule or whether there was good cause explaining why the chemical test could not be obtained within two hours. Accordingly, there is insufficient evidence upon which to hold Defendant for Court with respect to Count 2 and Defendant's Motion to Dismiss with respect to said count will be granted.

ORDER

AND NOW, this ____day of June 2011, following a hearing and argument, Defendant's Omnibus Pretrial Motion is granted in part and denied in part. Defendant's Motion to Dismiss Count 2 of the Information is **GRANTED.** In all other respects, Defendant's Omnibus Pretrial Motion is **DENIED.**

BY THE COURT,

_____
Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)
George Lepley, Esquire

Gary Weber, Esquire (Lycoming Reporter)
Work File