

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

**COMMONWEALTH**

**v.**

**TIMOTHY EILAND,  
Defendant**

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**CR: 234-2012  
CRIMINAL DIVISION**

**OPINION AND ORDER**

The Defendant filed a Motion to Suppress Evidence on April 27, 2012. A hearing on the motion was held on June 25, 2012. An additional hearing was scheduled on July 24, 2012 for more testimony and argument but was continued upon request of Defense Counsel to October 4, 2012.

***Background***

On January 25, 2012, Officer Thomas Bortz (Bortz) of the Williamsport Bureau of Police was conducting surveillance on 77 Eldred Street. Bortz had a felony arrest warrant for Ryan Smith (Smith) and had received an anonymous tip at the office that a person matching Smith's description was outside helping two other black males to change a tire on a blue Nissan sedan. The tip also stated that all three (3) males went into 77 Eldred Street. When Bortz arrived at the location he was able to locate the vehicle, which did have a donut spare on one of its tires, but none of the described males. Bortz set up surveillance across the street of 77 Eldred Street. While waiting, Bortz observed a Saturn sedan pull up to the residence. The driver was acting evasive and leaned over in his vehicle as if he was trying to hide. A white female exited the vehicle and ran into 77 Eldred Street. The driver of the vehicle continued to look around

suspiciously. The white female returned to the vehicle after a few moments and the vehicle took off.

Bortz contacted a confidential informant by phone to clarify the specific location within the building he observed the white female enter, and also to help confirm that he just witnessed a drug transaction. The informant told Bortz the location of the apartment and also that drug dealing was currently taking place at that specific apartment. Within moments of the phone conversation ending, the informant exited the apartment building. Bortz called the informant and picked her up around the block. Bortz then parked his vehicle so that he could keep the building under surveillance and asked the informant what was happening within the apartment. The informant stated that Steve Timlin, a white male in his sixties, was in the apartment along with three (3) black males. One of the black males had a black sweatshirt with Syracuse written in orange across it and that person had been actively selling cocaine.

The informant did not know the names of the three black males in the apartment but described their respective appearances to Bortz, who believed from those descriptions that Smith was in the apartment. An undercover officer was able to get a photo of Smith to Bortz and the informant. The informant was unable to rule out whether Smith was or was not in the apartment. Eventually three black males exited the residence and they were identified by the informant as the individuals that were in the apartment when the drug exchange occurred. The three black males entered the blue Nissan sedan. Timothy Eiland (Defendant) operated the vehicle while the man with the Syracuse sweatshirt sat in the front passenger side. The vehicle initially went around the block but then seemed to immediately return to 77 Eldred Street, as it appeared one or two of occupants in the vehicle forgot something. The occupants then returned to the vehicle

shortly and it began moving west. Bortz called for additional police support to stop the vehicle, which was ultimately stopped on Walnut Street.

When Bortz arrived at the scene, he observed that patrol officers were attempting to identify the occupants of the vehicle. Upon approaching the vehicle, Bortz immediately smelled a strong odor of marijuana coming from the vehicle, but was unable to identify Smith as an occupant of the vehicle. The Defendant was patted down for officer safety and no weapons were found. The vehicle was subsequently searched and in the center console was a scale on which it appeared to have cocaine residue. The center console was next to the Defendant's right elbow, arm, forearm, and hand. The Defendant was placed under arrest and the subsequent search incident to his arrest by police revealed in excess of one thousand dollars and two (2) cell phones on his person. The Defendant was charged with Possession with Intent to Deliver, Possession of a Controlled Substance, and Possession of Drug Paraphernalia.

### *Motion to Suppress*

The Defendant contends that the stop of the vehicle and any subsequent search should be suppressed because there was no search warrant or exigent circumstances to justify the police conduct. Generally, a search warrant is required before police may conduct any search. Commonwealth v. White, 669 A.2d 896, 900 (Pa. 1995). The Pennsylvania Courts, however, have created an automobile exception, which is different than the federal exception.<sup>1</sup> The basic standard, in Pennsylvania, is that police may search a vehicle without a warrant if: “(1) there is probable cause to believe that an automobile contains evidence of criminal activity; (2) unless the car is searched or impounded, the occupants of the automobile are likely to drive away and contents of the automobile may never again be located by police; and (3) police have obtained

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<sup>1</sup> Federal law allows law enforcement personnel to conduct a warrantless search of an automobile as long as probable cause exists, without exigent circumstances. Chambers v. Maroney, 399 U.S. 42 (1970).

this information in such a way that they could not have secured a warrant for the search, i.e., there are exigent circumstances.”<sup>2</sup> Id. The application of this rule “has unquestionably been difficult for the courts of this Commonwealth.” Commonwealth v. Gary, 29 A.3d 804, 807 (Pa. Super. 2011), *cert. granted*, 29 A.3d 804 (2012).

In support of their argument, the Defendant cites to McCree, which is a Pennsylvania Supreme Court decision. Commonwealth v. McCree, 924 A.2d 621 (Pa. 2007). In McCree, police observed a suspect receive more prescription pills for a controlled-buy by walking to a blue Pontiac vehicle. Id. at 623. The police officer in the controlled-buy notified back-up officers and while they approached the vehicle they saw the defendant shove an amber container under a seat cushion on top of the driver’s seat. Id. The police officers believed the container was a pill bottle, told the defendant to step out of the vehicle, and recovered the pill bottle. Id. The Pennsylvania Supreme Court stated that the police legally conducted the search because they had probable cause, even without the observations of the pill bottle and no advanced warning that the vehicle would be the target of the investigation. Id. at 631. The Pennsylvania Superior Court, however, has stated that “McCree has no precedential value with respect to the plurality’s explication of the status and parameters of the limited automobile exception generally.” Commonwealth v. Brown, 23 A.3d 544, 556 (Pa. Super. 2011).

The Pennsylvania Supreme Court, however, reaffirmed the standard used in McCree, and previous Pennsylvania cases. Commonwealth v. Hernandez, 935 A.2d 1275, 1280 (Pa. 2007). “Warrantless vehicle searches in this Commonwealth must be accompanied not only by probable cause, but also by exigent circumstances beyond mere mobility; ‘one without the other is

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<sup>2</sup> The Supreme Court has listed two reasons why exigent circumstances allow a warrantless search or seizure of a vehicle: “(1) a vehicle is mobile and its contents may not be found if the police could not immobilize it until a warrant is secure; and (2) one has a diminished expectation of privacy with respect to a vehicle.” Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978).

insufficient.” Id. (citing Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999)). Therefore, this Court will determine if police first had probable cause and second whether they had exigent circumstances to search the vehicle.

“The police have probable cause where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” Commonwealth v. Rogers, 849 A.2d 1185, 1192 (Pa. 2004). Probable cause is determined by considering all the relevant facts under the totality of the circumstances. Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985). Here, the Defendant and two other individuals were at a residence which was known for drug transactions. Bortz, while doing surveillance on the location, observed what appeared to him as a drug exchange within the residence. A Saturn sedan approached and a white female exited, entered the residence, and then returned after only a few moments. The driver of the vehicle acted suspiciously and was looking around while the female entered the residence. Moreover, Bortz contacted an informant who happened to be inside the apartment while the drug exchange took place.<sup>3</sup> The informant was able to identify three (3) black males that were in the apartment during the drug exchange leave the apartment and enter a blue Nissan. Bortz also received an anonymous tip that Smith, for whom he had an arrest warrant, had been helping to change a tire on a blue Nissan and was in the residence. At this point, the police had more than enough reasonable suspicion to stop the vehicle.<sup>4</sup> Once the vehicle was stopped and even though Smith was not identified, the scent of

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<sup>3</sup> “A determination of probable cause based upon information received from a confidential informant depends upon the informant’s reliability and basis of knowledge viewed in a common sense, non-technical manner. An informant’s tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity.” Commonwealth v. Luv, 735 A.2d 87, 90 (Pa. 1999) (citations omitted). Here, the informant had previously helped with the arrest of seven (7) separate individuals. In addition, the informant was corroborated by the observations of Bortz during his surveillance.

<sup>4</sup> Reasonable suspicion is decided by the court after a review of the totality of the circumstances and a finding that the facts support a reasonable belief that the law is being broken. Commonwealth v. Fulton, 921 A.2d 1239, 1243

burnt marijuana warranted a belief that a crime was being committed and therefore the police had probable cause to investigate.

As the Court finds probable cause to stop the vehicle, this Court must now determine whether there were exigent circumstances that would have justified a lawful search of the vehicle. As noted by the Pennsylvania Superior Court, this issue has created difficulties within the courts. “Exigent circumstances arise where the need for prompt police action is imperative, either because evidence is likely to be destroyed . . . or because there exists a threat of physical harm to police officers or other innocent individual.” Gary, 503 A.3d at 807. This Court believes that a review of past cases for guidance is warranted.

In White, police previously obtained search warrants based on the totality of the circumstances for only the defendant’s residence and person. Commonwealth v. White, 669 A.2d 896, 898 (Pa. 1995). Police then observed the defendant pick up another individual in his vehicle. Id. Subsequently, police stopped the vehicle, took both individuals into custody, and searched the vehicle finding marijuana and cocaine. Id. The Pennsylvania Supreme Court determined that there were no unforeseen circumstances and that police knew that the vehicle might have been involved and should have obtained a warrant. Id. at 901. The Supreme Court emphasized that a warrantless search of a vehicle requires unforeseen circumstances and probable cause. Id.

In Luv, police obtained a search warrant for the defendant’s residence based on an informant’s tip, neighbors, and surveillance. Commonwealth v. Luv, 735 A.2d 87, 89 (Pa.

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(Pa. Super. 2007). “In making this determination, we must give ‘due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience.’” Id. (citing Commonwealth v. Cook, 735 A.2d 673, 76 (Pa. 1999)). To establish reasonable suspicion the officer must be able to articulate specific observations that led him to reasonably conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. Commonwealth v. Little, 903 A.2d 1269, 1272 (Pa. Super. 2006).

1999). While waiting at the residence, Police were told by the informant that the defendant had changed his plans, was now at his girlfriend's residence, and would be transporting the drugs to a local nightclub from the residence. Id. Knowing that it would take at least an hour for a new warrant, police stopped and searched the defendant's vehicle, which revealed cocaine under the driver's seat. Id. The Pennsylvania Supreme Court found that the police did not have time to secure a new warrant and were forced to choose between a warrantless search and the loss of evidence. Id. at 95. The Supreme Court stated that exigent circumstances existed based on the totality of the circumstances. Id.

Finally, in Gary, police stopped a vehicle because it had heavily tinted windows. Gary, 29 A.3d at 805. While approaching the vehicle the police noticed a strong odor of unburnt marijuana emanating from the vehicle. Id. Police asked the occupants if they possessed anything they needed to be worried about to which the defendant responded that there was some "weed" in the vehicle. Id. Officers removed the defendant from the vehicle and searched the vehicle with the assistance of a K-9. Id. Before the search the defendant tried to escape the police vehicle but was apprehended. Id. The search resulted in two (2) pounds of marijuana being found underneath the hood of the vehicle. Id. The Superior Court of Pennsylvania stated no exigent circumstances existed since the defendant was in custody prior to the search, had admitted to possessing marijuana, and unsuccessfully attempted to escape. Id. at 808. The Supreme Court of Pennsylvania has granted a Petition for Allowance of Appeal in this case on May 14, 2012.<sup>5</sup>

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<sup>5</sup> The issues raised in the Petition include: (a) were the police permitted to conduct a warrantless search of defendant's SUV for marijuana where, during a traffic stop, they could smell marijuana emanating from the vehicle, defendant informed police that he had marijuana in the SUV, and the officers had not had the opportunity to obtain a warrant prior to stopping the vehicle; and, (b) should this Court adopt the federal automobile exception to the warrant requirement. Gary, 29 A.3d at 804.

Although distinguishable the aforementioned cases establish factors that the courts have used to determine if exigent circumstances exist: 1) whether police have sufficient advanced warning to obtain a search warrant; 2) whether police were placed in a position to choose either to conduct a warrantless search or lose evidence; and, 3) whether the defendant was in a position that would have eliminated exigent circumstances such as being arrested or already having admitted to the crime.

First, this Court finds that the police did not have advance warning to obtain a search warrant. Initially, police were investigating whether Smith, who had an arrest warrant, was at the residence. Only after conducting surveillance did police receive evidence of individuals selling drugs. Here, police were aware that the three black males may have been involved with the blue Nissan due to an anonymous tip but this was uncertain until they saw the donut spare on the vehicle and saw the Defendant and others access the vehicle. Further, police did not learn of the drug activity until they were at the location of 77 Eldred Street.

Second, this Court finds that the police were placed in a position to either conduct a warrantless search or lose evidence. The police had observed suspected drug activity by three black males out of 77 Eldred Street. The three males then drove away from the scene with the evidence of those drug transactions. If the police did not stop the vehicle and make contact with the occupants the evidence would have been lost. This Court finds that the police were placed in a situation that is factually similar to Luv. Commonwealth v. Luv, 735 A.2d 87, 89 (Pa. 1999).

Lastly, the Court must determine whether the Defendant was in a position that would have eliminated exigent circumstances. The facts in Gary, *supra* are very similar to the facts in this case but possess important distinctions. First, neither the Defendant nor any of the occupants admitted to having illegal drugs in the vehicle or participating in illegal conduct or



tried to escape from the police. Testimony presented at the hearing established the Defendant was placed under arrest only after the search of the vehicle. As Gary is distinguishable from this case, the Court finds that exigent circumstances were not eliminated by the position or behavior of the Defendant.

Therefore, because the police did not have advance warning and were forced to decide whether to conduct a warrantless search or lose the evidence, this Court finds that exigent circumstances existed to justify the warrantless search. As the police had both probable cause and exigent circumstances, the Court finds the search of the Defendant's vehicle was legal.

**ORDER**

AND NOW, this \_\_\_\_\_ day of November, 2012, based upon the foregoing Opinion, the Court finds that police had probable cause and exigent circumstances to conduct a search on the Defendant's vehicle. Therefore, the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

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