

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**KHALIL J. FULKS,
Defendant**

:

: No. CR-1578-2011

:

: Opinion and Order regarding

: Defendant's Omnibus Pretrial Motion

OPINION AND ORDER

This matter came before the Court for a hearing and argument on Defendant's Omnibus Pretrial Motion in which Defendant seeks the suppression of physical evidence and the suppression of statements he made to the police without having been read his Miranda warnings. The relevant facts follow.

On November 4, 2011 at approximately 8:00 p.m., Lee Williams was seated in his vehicle in front of his business, Lycoming Supply, located at 801 Beeber Street. Mr. Williams heard a helicopter circling overhead. Shortly thereafter, he saw a vehicle heading south on Beeber Street that unexpectedly backed up into the dead-end portion of Beeber Street, turned off its lights, and double parked about 150 feet in front of Mr. Williams' vehicle. Mr. Williams called 9-1-1 to report the suspicious vehicle, because it was dark outside, the business was closed and it appeared to him as if the occupants of the vehicle were trying to hide from the circling helicopter.

Officer Jonathan Deprenda and his partners were dispatched to the area to respond to Mr. Williams' 9-1-1 call. The officers parked their cruiser in a vacant lot south of the location of the suspicious vehicle, exited their cruiser and began walking north on Beeber Street toward Lycoming Supply and the suspicious vehicle. The map lights were on in the vehicle and the police could see a male and a female inside it. The male was reclined in the driver seat and a female was in the passenger seat. The police were approximately halfway to

the vehicle when the male occupant, who was later identified as the Defendant, realized that the police were approaching, leaned forward, and reached his hands toward the floor as if to grab something. Concerned that the Defendant may have been reaching for a weapon, the police drew their service revolvers and ordered him to stop. At that point, both occupants put their hands up.

When the police reached the vehicle, they holstered their weapons and “went into investigatory mode.” Officer Deprenda covered the passenger side of the vehicle while his partner went to the rear of the vehicle to check the vehicle’s registration plate. Officer Deprenda noticed that the Defendant’s pants and undershorts were down around his ankles and the female’s pants were halfway down.

When the police were running the registration plate and trying to determine who the occupants were and what they were doing there, the Defendant reached under the seat again and picked up a clear plastic baggie, which contained a white chunky substance. The Defendant ripped the baggie open with his mouth and started “chewing” or eating the white substance. The police ordered the Defendant to cease ingesting the substance and exit the vehicle. Instead, the Defendant grabbed the shifter on the steering wheel as if he was going to try to drive away. The police then ordered the Defendant to shut off the vehicle and directed the occupants to exit the vehicle.

The passenger exited the vehicle without incident. When the Defendant leaned across the passenger seat to exit from the passenger side because there was only about two feet of space between the driver’s side door and an immovable object next to the vehicle,¹ the

¹ Officer Deprenda testified that Defendant’s vehicle was “double parked” next to either cargo or another vehicle.

police asked the Defendant what was in his mouth. The Defendant then spit out four pieces of the white chunky substance. Officer Deprenda pulled the Defendant out of the vehicle and placed him under arrest.

During a search conducted incident to the Defendant's arrest, the police discovered marijuana in the Defendant's undershorts. Despite the fact that the Defendant was in custody and no Miranda warnings had been given, the police "investigated" the matter further for a few minutes by speaking to both the Defendant and the female. During these conversations, the Defendant told the police that he liked to lace his marijuana with crack and that there was a marijuana cigar and an empty wrapper on the back seat. When Officer Deprenda collected these items from the backseat, he observed in the driver's side door a bag containing a white chunky substance, which he also seized.

The suspected marijuana and the white chunky substances field tested positive for marijuana and cocaine, respectively.

The Defendant was transported to City Hall, where he was handcuffed to a wall while the police prepared the paperwork to file the criminal charges against him. When Officer Deprenda walked by the Defendant, the Defendant said "Can I ask you something?" The Defendant then stated that he was "back there to have sex" and he nodded at Officer Deprenda. Officer Deprenda said, "And?" The Defendant then made a statement to the effect that the female was performing oral sex on the Defendant in exchange for crack cocaine.

Defendant was charged with Possession with Intent to Deliver a Controlled Substance, two counts of Possession of a Controlled Substance and Possession of Drug Paraphernalia.

The Defendant, through counsel, filed an Omnibus Pretrial Motion seeking suppression on the basis that: (1) the police lacked probable cause to approach the vehicle, initiate contact with the defendant or to search his person; and (2) the police obtained statements from the Defendant in violation of his Miranda rights.

Interactions between citizens and the police are divided into three categories: a mere encounter; an investigative detention; and an arrest. A mere encounter, or request for information, need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. An investigative detention must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. An arrest or custodial detention must be supported by probable cause. Commonwealth v. Ellis, 541 Pa. 285, 662 A.2d 1043, 1047-48 (1995); see also Commonwealth v. Pakacki, 587 Pa. 511, 901 A.2d 983, 987 (2006).

The police did not need probable cause to approach Defendant's vehicle or initiate contact with him, as such an interaction would be a mere encounter, which does not need to be supported by any level of suspicion. See Commonwealth v. Au, 42 A.3d 1002 (Pa. 2012)(officer, who did not activate his emergency lights or siren and merely parked at an angle next to the vehicle parked in business lot in the early morning hours so that his headlights illuminated the passenger side of the vehicle, engaged in mere encounter with occupants of the vehicle, which did not rise to the level of an investigatory detention even when the officer asked occupants for identification). The police did not stop Defendant's vehicle; it was already

stopped and either standing or parked in the dead-end portion of Beeber Street with its headlights turned off.

Although the police drew their service revolvers in response to Defendant reaching toward the floor and ordered him to stop, these actions were a reasonable response to Defendant's actions and did not raise the level of the interaction to an arrest or the functional equivalent thereof. As soon as the police were close enough to the vehicle to see that Defendant had not retrieved a weapon, they holstered their service revolvers before making contact with the occupants. Therefore, the police were not required to have probable cause to approach Defendant's vehicle and initiate contact with him.

If the occupants of the vehicle would be considered the subjects of an investigatory detention once to the police briefly drew their service revolvers and ordered Defendant to stop reaching toward the floor, the police had reasonable suspicion for such a detention in this case. Officer Deprenda believed the dead-end portion of Beeber Street was a private drive. Therefore, he had reasonable suspicion to believe Defendant was trespassing.

Even if the roadway was not a private drive, the police had at least reasonable suspicion to believe Defendant was violating the Vehicle Code. Defendant backed the vehicle onto Beeber Street from High Street, turned off its headlights, and "double parked." The fact that Defendant was stopped, standing or parked on the roadway side of a vehicle or an obstruction (cargo) that was along the curb would give the police reasonable suspicion to investigate whether Defendant was violating the Vehicle Code. See 75 Pa.C.S.A. §3353(a)(1).² When one also considers the manner in which Defendant came to be double

² One could even argue that the police had probable cause to believe a violation of this statute was occurring.

parked on Beeber Street and the fact that it was nighttime and Lycoming Supply was closed for business, a reasonable person could even believe that the occupants of the vehicle were casing the business.

When Defendant retrieved the baggie from under his seat, ripped it open with his teeth and began “chewing” or ingesting the white chunky substance, the police had probable cause to believe that Defendant was in possession of a controlled substance, specifically crack cocaine. The white chunky substance also field tested positive for cocaine. The search of Defendant’s person was conducted incident to his arrest.

Since the officers’ contacts with Defendant were lawful, Defendant is not entitled to suppression of the physical evidence in this case.

Defendant also asserts that he is entitled to suppression of the various statements he made to the police because the police did not read his Miranda rights to him.

Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of his Miranda rights. Commonwealth v. DiStefano, 783 A.2d 574 (Pa. Super. 2001). Miranda safeguards come into play whenever a person in custody is subjected to either expressed questioning or its functional equivalent. Commonwealth v. Gaul, 912 A.2d 252 (Pa. 2006), cert. denied, 128 S. Ct. 43 (2007). Interrogation occurs “where the police should know that their words or actions are reasonably likely illicit an incriminating response from the suspect”. Commonwealth v. Ingram, 814 A.2d 264 (Pa. Super. 2002). In determining whether the police words and conduct are the functional equivalent of interrogation, the inquiry must look to the suspect’s perceptions rather than the intent of the police. Gaul, supra.

In discussing when an individual is “in custody” for Miranda purposes, the Pennsylvania Superior Court stated the following:

‘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, 915 A.2d (Pa. 2007); Commonwealth v. McCarthy, 2003 PA Super 115, 820 A.2d 757, 759-760 (Pa. Super. 2003). The standard is an objective one, which takes into consideration the reasonable impression on the person being interrogated. McCarthy, 820 A.2d at 759-760(citations omitted). 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, 2000 PA Super 173, 755 A.2d 27, 33-34 (Pa. Super. 2000), quoting Commonwealth v. Gibson, 553 Pa. 648, 728 A.2d 473, 480 (Pa. 1998). The fact that the police may have ‘focused’ on the individual being questioned or that the interviewer believes the interviewee is a suspect is irrelevant to the issue of custody. Commonwealth v. Smith, 575 Pa. 203, 836 A.2d 5, 18 (Pa. 2003). ‘A person is considered to be in custody for the purposes of Miranda when the officer’s show of authority leads the person to believe that he was not free to decline the officer’s request, or otherwise terminate the encounter.’ Hayes, 755 A.2d at 33-34.

Commonwealth v. Page, 965 A.2d 1212, 1217-1218 (Pa. Super. 2009).

The Court also notes that it is the Commonwealth’s burden to show that the statements were lawfully obtained.

The Commonwealth, relying on Commonwealth v. Grimes, 648 A.2d 538 (Pa. Super. 1994) argued that the statements at the scene were made in response to general on-the-scene questioning to determine whether a crime had been committed or was in progress; therefore, Miranda warnings were not required. The Court cannot agree.

Merely because the statements were made on the scene does not mean that Defendant was not in custody. Officer Deprenda testified that Defendant was arrested at the

scene and marijuana was discovered in his undershorts during a search incident to arrest. After a few more minutes of “investigation” and “conversation,” Defendant was transported to City Hall. Officer Deprenda also testified that he entered the vehicle after Defendant was in custody to retrieve additional controlled substances, because Defendant made a statement that he liked to lace his marijuana with crack and he told other officers that there was a marijuana cigar and an empty wrapper in the back seat.³ The testimony also established that Defendant was not read his Miranda rights before he made these statements.

Based on this testimony, the Court concludes that Defendant was in custody at the time he made these statements and the statements were not volunteered; they were made in response to “investigation” and “conversation” by police officers. Therefore, the statements made at the scene were obtained in violation of Defendant’s Miranda rights.

Defendant also made statements at City Hall. The testimony established that Defendant was handcuffed to a wall while the paperwork to charge him was being prepared. When Officer Deprenda walked by, Defendant either said, “Can I ask you something?” or “Can I say something?” Defendant then said that he was back there to have sex and he nodded. Officer Deprenda replied, “And.” Defendant then stated that the female was “sucking him off” in exchange for drugs.

The Court finds that Defendant’s statement that he was back there to have sex was spontaneous and not in response to any police questioning or conduct. See

³ It is not clear from evidence presented whether Defendant also spoke to other officers before he was arrested. It was the Commonwealth’s burden, however, to show that the statements were not the product of custodial interrogation. Moreover, it is highly unlikely that Defendant made any statements about marijuana before he was formally arrested, when all the marijuana was discovered subsequent to Defendant’s arrest.

Commonwealth v. Perez, 698 A.2d 640, 647 (Pa. Super. 1997). Therefore, this statement will not be suppressed.

The statement made after Officer Deprenda said the word “and” presents a more difficult issue. At first blush, a single word comment may not appear that significant. Custodial interrogation, however, is not limited to questioning; it also encompasses “police conduct calculated to, expected to, or likely to evoke admission.” Id., quoting Commonwealth v. Simala, 434 Pa. 219, 226, 252 A.2d 575, 578 (1969). Defendant only made an admission that he was going to deliver drugs to the female in exchange for sexual favors after he was prompted to provide more information by Officer Deprenda’s comment. If Officer Deprenda had asked what else was going on or what was in it for the female and Defendant made the statement, it clearly would be subject to suppression. Officer Deprenda’s comment, although more subtle and implicit, still was likely to evoke, and in fact did evoke, an admission by Defendant. Therefore, the Court finds that Defendant’s admission that the sexual conduct was in exchange for drugs is not admissible, because it too was obtained in violation of Miranda.

ORDER

AND NOW, this ____ day of July, 2012, it is ORDERED and DIRECTED as follows:

1. The Court GRANTS Defendant's Omnibus Pretrial Motion to the extent it seeks suppression of any statements Defendant made at the scene, including but not limited to Defendant's statements that he liked to lace his marijuana with crack and his statement that there was a marijuana cigar and an empty wrapper in the back seat of the vehicle. The Court finds that these statements were made in response to questions, conversations or other conduct likely to evoke an admission after Defendant was arrested or placed in custody.

2. The Court DENIES the motion to suppress the statement that Defendant volunteered while he was handcuffed to the wall to the effect that he was "back there to have sex", but GRANTS the motion with respect to the statement Defendant made that the sex was in exchange for crack or drugs after Officer Deprenda said "And?"

3. The Court DENIES Defendant's motion to suppress physical evidence.⁴

By the Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Jeana Longo, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file

⁴ The Court notes that defense counsel did not pursue any claim that the search of the vehicle was unlawful.