

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-701-2012**
:
AKEEM WRIGHT, :
Defendant : **Motion to Suppress**

OPINION AND ORDER

Defendant is charged with one count of Possession of a Small Amount of Marijuana and one count of Possession of Drug Paraphernalia. The charges arise out of an incident which occurred on March 25, 2012 when a vehicle in which the Defendant was a passenger was stopped and subsequently searched. The search resulted in a small marijuana cigarette being found on the seat where the Defendant had been sitting.

On July 3, 2012, Defendant filed a Motion to Suppress the marijuana cigarette contending that the stop of the vehicle was in violation of the Defendant's Federal and State Constitutional rights. More specifically, Defendant asserts that the stop of the vehicle was not supported by the requisite reasonable suspicion that criminal activity was afoot.

A hearing on the Suppression Motion was held on August 22, 2012. Officer Nathan Moyer of the Williamsport Bureau of Police first testified on behalf of the Commonwealth.

Officer Moyer has been employed as a law enforcement officer since August 2007. While on duty, on March 25, 2012 at approximately 3:00 a.m. he was traveling south on Locust Street in Williamsport and noticed a blue Chevrolet Cavalier automobile traveling north. The car passed and Officer Moyer decided to follow the Cavalier vehicle because it was "suspicious" in that it was traveling from a high crime area in the city "in the early morning."

Officer Moyer could not recall if the windows to the police cruiser were down but after turning around and catching up with the vehicle as it was stopped at a flashing red light, he smelled the odor of burnt marijuana. When initially passing the vehicle in the opposite direction, Officer Moyer did not smell anything. However, from first catching up with the vehicle and then following it north one block when the vehicle again stopped to turn in a westerly direction and then for two blocks in a westerly direction, he smelled the odor of burnt marijuana. He specified that he continued to smell the odor “the entire time” that the vehicle was followed. He testified that the odor “stayed the same.”

As a result of the smell of the burnt marijuana, Officer Moyer decided to stop the vehicle. He activated his emergency lights and pulled the vehicle over.

Upon stopping behind the vehicle and approaching it on foot, however, he could not recall if he smelled the odor of burnt marijuana. Upon approaching the vehicle, he noticed that the windows were up. “As soon as” the driver’s side window was rolled down, he smelled the odor of burnt marijuana.

During the following of the vehicle, other than the general smell of burnt marijuana, there was no evidence that the occupants were smoking marijuana. Officer Moyer did not see smoke coming from the vehicle or in the vehicle, did not see any passing of any smoking implement, did not see any lights or matches being used to light any smoking implement and did not see any movement in the vehicle that was indicative of individuals passing something or of one individual smoking anything.

Officer Moyer did not recall if the windows of the vehicle were up or down when it was being followed by his cruiser. While he recalled there being other vehicles parked along the route, he did not recall there being any other moving vehicles. Furthermore, he did not recall whether there were any individuals standing near the street.

Officer Aaron Levan of the Williamsport Bureau of Police next testified on behalf of the Commonwealth. He too has been in law enforcement for the past five years. In addition to echoing the testimony of Officer Moyer, he indicated that once the vehicle was stopped, he walked up to the front passenger side of the vehicle. He directed that the passenger roll the window down at which point he smelled the “strong odor” of burnt.

Both officers testified that they were familiar with the odor of burnt marijuana through not only making previous arrests but also when at the police academy they were involved in a controlled burn. They described the odor of burnt marijuana as being distinctive and different than that of burnt cigarettes or raw marijuana.

Both officers also testified that there was no other marijuana, paraphernalia, ashes or any other indicia of marijuana usage found on any of the occupants or in the car other than the one-half inch long and perhaps one-eighth inch in diameter burnt marijuana cigarette found on the back passenger seat where the Defendant had been sitting. Both officers confirmed that the only reason the vehicle was stopped was the distinctive odor of burnt marijuana which was smelled by them while following the vehicle over a three-block area.

The threshold of justification for a traffic stop is reasonable suspicion. Commonwealth v. Feczko, 10 A.3d 1285 (Pa. Super. 2010); Commonwealth v. Hendricks, 927 A.2d 289, 290 (Pa. Super. 2007).

Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. 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. In assessing the totality of the circumstances, the courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledgement that innocent facts, when considered collectively, may permit the investigative detention.

Commonwealth v. Brown, 606 Pa. 198, 996 A.2d 473, 477 (2010) (citations and quotation marks omitted); see also Commonwealth v. Washington, 2012 PA Super 177 (August 27, 2012).

More specifically, the Court must determine whether the officer who initiated the stop had a "particularized and objective basis" for suspecting the individual stopped. Commonwealth v. Ayala, 791 A.2d 1202, 1209 (Pa. Super. 2002), quoting In the Interest of D.M., 566 Pa. 445, 781 A.2d 1161, 1163 (2001).

Under some circumstances, the odor of marijuana has been held sufficient to establish the probable cause necessary to believe a crime is being committed to justify an arrest. Commonwealth v. Dean, 940 A.2d 514, 523 n.3 (Pa. Super. 2008), citing Commonwealth v. Pullano, 295 Pa. Super. 68, 440 A.2d 1226 (Pa. Super. 1982).

In Pullano, Reading city police officers were present at 927 North Ninth Street in Reading for the purpose of a valid search warrant for an apartment consisting of a second and third floor to the building. While there, one of the officers smelled a strong odor of marijuana which he determined to be emanating from the first floor apartment. He also heard voices which led him to believe that a party was in progress in the apartment.

In reviewing the legality of the subsequent search, the Superior Court held:

The officers at the scene had smelled a strong odor of burning marijuana and had heard noises suggesting that a party was then in progress. These were circumstances suggesting that criminal activity was under way within their presence. They were not required to ignore that activity. To ignore the obvious aroma of an illegal drug which [they were] trained to identify would have been a dereliction of duty.

440 A.2d at 1227 (citation and internal quotes omitted).

In Commonwealth v. Stainbrook, 324 Pa. Super. 410, 471 A.2d 1223 (Pa. Super. 1984), township police officers drove into a bowling alley parking lot while on patrol. Upon observing a truck parked in the lot, one of the officers approached the vehicle and while approaching, detected the odor of burning marijuana and observed an individual bend over abruptly as if to hide something under the seat.

In addressing the legality of the subsequent search, the Superior Court held that the officer was justified in conducting his search. In addition to observing furtive behavior of the Defendant who appeared to be stuffing something under his seat, the officer detected the odor of burning marijuana. The Court noted as well that it was part of the officer's training to be able to identify marijuana by its smell. 471 A.2d at 1225.

It is clear that reasonable suspicion is a lesser standard than probable cause. The issue to be determined in this case is whether the odor of burnt marijuana was not only articulable but also particularized to the vehicle. The Court is not satisfied that the totality of the circumstances establish such.

While the officers certainly identified the odor of burnt marijuana through smell based upon their training and experience and while the officers credibly testified that they smelled it while following the vehicle, there was no testimony whatsoever regarding how fast or how slow the officers were going or how close they came to the vehicle. Moreover, while

the windows on the patrol unit were down, there was no testimony as to whether the windows on the stopped vehicle were down while it was being followed. In fact, the reasonable inference is that the windows were up because when the vehicle was stopped and the officers approached the vehicle, they had to direct the occupants to put the windows down.

No loose marijuana, marijuana cigarettes, paraphernalia or anything else was located on any of the occupants or the driver or in the car, other than a small burnt marijuana cigarette found on the back seat of the vehicle. Moreover, this was a two-door vehicle with only two windows located adjacent to the front seat.

There was no evidence of smoking in the vehicle. There was no smoke coming from or in the vehicle, there were no visible lighters or matches, there was no visible paraphernalia, there were no furtive movements, there were no movements that would evidence either one individual or a group of individuals smoking, and there was no erratic driving.

Significantly, once the vehicle was stopped and the officers got out of their unit to approach the vehicle, neither one could recall whether there was an odor of marijuana. Indeed, both officers testified that there was no smell until the windows were rolled down. Furthermore, the officers did not smell an odor of marijuana when they initially drove past the vehicle. In fact, the officers testified that the only reason that they turned around and followed the vehicle was because it was traveling in a high crime area of the city early in the morning.

While the Court believes that the officers, based on their training and experience, are familiar with the odor of burnt marijuana and they smelled that odor while they were driving with their windows down in a high crime area of the city, the Court cannot

conclude based on the totality of the circumstances that the officers had reasonable suspicion to believe that the odor was sufficiently particularized to the vehicle. Accordingly, Defendant's Motion to Suppress will be granted.

ORDER

AND NOW, this ____ day of August 2012 following a hearing and argument, the Court **GRANTS** Defendant's Motion to Suppress. The evidence seized from the vehicle including, but not limited to the marijuana cigarette, shall not be utilized by the Commonwealth in the prosecution of the Defendant.

BY THE COURT,

Marc F. Lovecchio, Judge

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