

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 : No. CR-804-2013
 vs. :
 : Opinion and Order re Defendant's
 RICHARD MELVIN BUTLER, : Motion to Suppress and Motion to Dismiss
 Defendant : and Commonwealth's Motion to Amend

OPINION AND ORDER

Before the Court are Defendant's motion to suppress, which was designated as Count 1 in his omnibus pretrial motion, and the Commonwealth's motion to amend Information.

Defendant was charged with driving after imbibing a sufficient amount of alcohol such that he was rendered incapable of safe driving in violation of 75 Pa.C.S. §3802(a)(1), driving under the influence of a controlled substance in violation of 75 Pa.C.S. §3802(d)(1)(i), and the summary traffic offense of obedience to traffic control device, as a result of a traffic stop that occurred on March 10, 2013.

On July 16, 2013 Defendant filed an omnibus pretrial motion, which contained: (1) a motion to suppress evidence on the basis that the Trooper lacked a basis to stop his truck; (2) a motion in limine to preclude the Commonwealth from presenting testimony from or evidence about a Drug Recognition Expert (DRE) and his evaluation of Defendant; and (3) a motion to dismiss Count 2 because the Commonwealth failed to present evidence that "Morphine-Free" is a Schedule I controlled substance and it failed to present any expert testimony to establish a connection between the prescription medications in Defendant's system and his ability to safely operate a vehicle.

On July 19, 2013, the Commonwealth filed a motion to amend the Information to withdraw Count 1 and to amend Count 2 to allege a violation of 75 Pa.C.S. §3802(d)(2) because “Morphine-Free” is considered a Schedule II controlled substance.

The Court held a hearing and argument on these motions on September 4, 2013. At the hearing, the parties submitted a copy of the preliminary hearing transcript, and the Commonwealth called Trooper Adam Kirk as a witness. During Trooper Kirk’s testimony, the Commonwealth played a video recording made from the dashboard camera of Trooper Kirk’s service vehicle. The Commonwealth agreed to make a copy of the video recording and submit it as Commonwealth’s Exhibit 2. The parties also stipulated that Defendant had a valid prescription to take one 60 mg morphine tablet every twelve hours as needed for pain control.

Trooper Kirk testified that shortly after midnight on March 10, 2013 he was traveling north on Maynard Street in a marked vehicle and in full uniform. He was coming across the Maynard Street Bridge and approaching the traffic light when he observed a truck stopped in the right lane, which led to the I-180 East on-ramp. The truck then moved from the right lane into the left lane to proceed straight on Maynard Street. Trooper Kirk followed the truck on Maynard Street. As the truck approached the intersection with Third Street, the traffic light turned from yellow to red, and the truck turned right onto Third Street without stopping. Trooper Kirk activated his lights and stopped the truck for failing to stop at the red light and for making a right turn when there was a sign at the intersection which prohibited making a right turn when the light was red.

Trooper Kirk approached the driver, Defendant Richard Butler. In addition to asking for his license and registration, Trooper Kirk asked Defendant where he was coming from and where he was going. Defendant replied that he was coming from home and going to pick up his granddaughter. Trooper Kirk also asked Defendant about the red light; Defendant said he didn't notice it.

Trooper Kirk observed that Defendant's pupils were very constricted and they were not reactive to light. He asked Defendant if he was "on anything." Defendant told Trooper Kirk that he had prescriptions for oxycodone and morphine for issues he had with his legs. Defendant stated he had not taken any oxycodone that day but he had taken his morning morphine; he was not sure if he had taken his nighttime dose of morphine.

Based on Defendant's statement that he failed to notice the light turn red and his non-reactive, very constricted pupils, Trooper Kirk believed Defendant was under the influence of a controlled substance to a degree which rendered him incapable of safely operating a motor vehicle.

Trooper Kirk conducted a variety of field tests, with Defendant passing a horizontal gaze nystagmus (HGN) test, but failing the walk and turn, the one-leg stand, a convergence test, and a Romberg balance test. Thereafter, Trooper Kirk took Defendant into custody and transported him to the police barracks for an evaluation by a DRE. After the DRE conducted his evaluation and gave Trooper Kirk approval for a blood draw, Trooper Kirk transported Defendant to the Williamsport Hospital where his blood was drawn. The test results showed 23 ng/mL of "Morphine-Free" in Defendant's blood.

At the end of Trooper Kirk's direct examination, the Commonwealth played the video recording from his dashboard camera. The video showed Defendant's truck traveling down Maynard Street. As it approached the intersection, the light changed from green to yellow. When the light changed from yellow to red, it appears that the front of Defendant's truck was already in the intersection and the rear tires were at the stop line on Maynard Street.

Defense counsel argued that the stop of Defendant's vehicle was unlawful because Trooper Kirk did not have probable cause or reasonable suspicion to believe that Defendant was violating 75 Pa.C.S. §3112 (related to traffic control signals). The prosecuting attorney argued that Trooper Kirk only needed reasonable suspicion to conduct a vehicle stop and he had reasonable suspicion that Defendant failed to stop for the red light and he unlawfully made a right turn on red. In the alternative, she argued Trooper Kirk had reasonable suspicion that Defendant changed lanes without using his turn signal in violation of 75 Pa.C.S. §3334 or he violated his duty to drive on the right as required by 75 Pa.C.S. §3301.

Initially, and contrary to the prosecuting attorney's argument, the Court notes that the standard for conducting a traffic stop based on these alleged violations of the Vehicle Code is probable cause, not reasonable suspicion. The Pennsylvania Appellate Courts have held that:

[A] vehicle stop based solely on offenses not "investigatable" cannot be justified by a mere reasonable suspicion, because the purposes of a *Terry* stop do not exist – maintaining the status quo while investigating is inapplicable where there is nothing further to investigate.

An officer must have probable cause to make a constitutional vehicle stop for such offenses.

Commonwealth v. Feczko, 10 A.3d 1285, 1290 (Pa. Super. 2010), quoting Commonwealth v. Chase, 599 Pa. 80, 960 A.2d 108, 116 (2008).

Probable cause has been defined as those facts and circumstances which would justify a reasonably prudent man in the belief that a crime has been committed and the defendant was the probable perpetrator. Commonwealth v. Dickerson, 468 Pa. 599, 364 A.2d 677, 680-81 (1974). “The test is not one of certainties, but probabilities dealing with the considerations of everyday life.” Id. at 681.

Section 3112 states in relevant part:

- (a) General rule. – Whenever traffic is controlled by traffic-control signals exhibiting different colored lights, or colored lighted arrows, successively one at a time or in combination, only the colors green, red and yellow shall be used, except for special pedestrian signals carrying a word legend, and the lights shall indicate and apply to drivers of vehicles and pedestrians as follows:
 - (2) Steady yellow indication.
 - (i) Vehicular traffic facing a steady yellow signal is thereby warned that the related green indication is being terminated or that a red indication will be exhibited immediately thereafter.
 - (3) Steady red indication.
 - (i) Vehicular traffic facing a steady red signal alone shall stop at a clearly marked stop line, or if none, before entering the crosswalk on the near side of the intersection, or if none, then before entering the intersection and shall remain standing until an indication to proceed is shown except as provided in subparagraph (ii).
 - (ii) Unless signing is in place prohibiting a turn, vehicular

traffic facing a steady red signal may enter the intersection to turn right, or to turn left from a one-way highway onto a one-way highway after stopping as required by subparagraph (i). Such vehicular traffic shall yield the right-of-way to pedestrians lawfully within an adjacent crosswalk and to other traffic lawfully using the intersection.

75 Pa.C.S. §3112(a)(2)(i), (3)(i) and (ii).

The Court finds that Trooper Kirk had probable cause to believe that Defendant committed a violation of section 3112. There was a sign at the intersection that prohibited right turns when the light was red. The light changed from green to yellow well before Defendant's vehicle reached the intersection. The signal changed to red as Defendant's vehicle was entering the intersection. If one stops the video when the light turns red, one can see that the front half of Defendant's vehicle is already across the stop line. Trooper Kirk, however, did not have the luxury of stopping and reviewing the video before making a determination whether to conduct a traffic stop. While the video might preclude the trier of fact from concluding beyond a reasonable doubt that Defendant committed these traffic violations, such does not negate Trooper Kirk's reasonable belief that Defendant **probably** failed to obey a traffic control device or made an illegal right turn on red.

The Commonwealth filed a motion to amend the Information to withdraw Count 1 and to change Count 2 to a violation of section 3802(d)(2). Defendant was not opposed to these amendments, but he argued such would not render moot his motion to dismiss Count 2. Therefore, the Court will grant the Commonwealth's motion to amend.

Section 3802(d)(2) prohibits an individual from operating a motor vehicle when the individual is under the influence of a drug to a degree which impairs the

individual's ability to safely drive a vehicle. In order to sustain a conviction under section 3802(d)(2), the Commonwealth must present expert/medical testimony to establish that the level of prescription medications rendered Defendant incapable of safe driving. See Commonwealth v. Griffith, 985 A.2d 230, 236-37 (Pa. Super. 2009). At this stage of the proceedings, however, the Commonwealth is not required to prove its case beyond a reasonable doubt.

Trooper Kirk testified about Defendant's driving. He also testified about his training and experience with individuals who were under the influence of controlled substances. He stated that Defendant's pupils were very constricted, and they did not react to light all, which he had never seen. He asked Defendant about the red light, and Defendant said he didn't notice it. Defendant failed several field sobriety tests, and a blood test revealed that Defendant had 23 ng/mL of "Morphine-Free" in his blood stream. Trooper Kirk also testified that, in his opinion, Defendant was under the influence of a controlled substance to a degree which rendered him incapable of safely operating a vehicle. Although the cases cited by the defense require the Commonwealth to present medical or expert testimony about the amount of controlled substances in Defendant's blood stream and to establish a nexus between that amount and a defendant's erratic or poor driving at trial, there is nothing in those cases which require such testimony at the preliminary hearing. Therefore, the Court will deny the Defendant's motion to dismiss Count 2. This ruling is without prejudice to Defendant raising this issue at trial.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ____ day of October 2013, the Court GRANTS the Commonwealth's motion to amend. Count 1 is withdrawn and Count 2 is amended to a violation of 75 Pa.C.S. §3802(d)(2). The Court DENIES Defendant's motion to suppress and his motion to dismiss Count 2, which are contained in his omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Spring, Esquire (APD)
Nicole Ippolito, Esquire (ADA)
Suzanne Fedele, Prothonotary
Gary Weber, Esquire (Lycoming Reporter)
Work file