

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1426-2012  
:   
vs. :   
:   
ATAA COLEMAN, : Omnibus Motion  
Defendant :   
:

**OPINION AND ORDER**

This matter came before the court on March 4, 2013 for a hearing and argument on Defendant’s omnibus pretrial motion. The relevant facts follow.

At approximately 11:00 p.m. on May 19, 2012, Chief Jeffrey Gyurina and Officer Kurt Hockman, of the Montoursville Borough Police Department, were working as special county detectives on a DUI roving patrol.<sup>1</sup> As they were patrolling the Market Street area in Williamsport, Chief Gyurina noticed a silver SUV traveling at a high rate of speed southbound on Market Street. As the vehicle was crossing the Market Street Bridge, Chief Gyurina clocked the vehicle going 57.4 mph in a 35 mph zone with a V-Spec Unit. Once the vehicle reached the south side of the bridge, it made an abrupt lane change without signaling in order to go around another vehicle that was slowing down because the traffic light south of the bridge was changing color.

Chief Gyurina activated his lights, and the vehicle pulled over.<sup>2</sup> Chief Gyurina made contact with the driver of the vehicle. He immediately smelled an odor of both burnt

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<sup>1</sup> Upon the motion of the District Attorney and with the approval of the Lycoming County Salary Board, the President Judge entered an order on August 4, 2011 approving the members of every municipal police force in Lycoming County as special county detectives for the limited purpose of working sobriety checkpoints and DUI roving patrols. See Commonwealth’s Exhibit 1.

<sup>2</sup> The primary reason Chief Gyurina pulled the SUV over was because of the speeding. He conceded he did not

and raw marijuana coming from the vehicle. He could not tell how recently the marijuana had been smoked, but he estimated that it was within the last half-hour to hour based on the strong odor. Chief Gyurina also observed that the driver had red, glossy eyes. He asked the driver, who was subsequently identified as Defendant, for his license, registration and insurance. Defendant provided registration and insurance information, but he could not provide a license, because it was suspended.

Chief Gyurina asked Defendant to exit the vehicle and perform field sobriety tests. Based on his observations and the results of the field sobriety tests, Chief Gyurina told Defendant that he was going to be placed under arrest for suspicion for driving under the influence (DUI).

Officer Hockman handcuffed Defendant with his hands behind his back, and began to pat him down. Officer Hockman felt two suspicious packages in Defendant's buttocks area, and he called Chief Gyurina over. Defendant took off running towards Officer Devin Thompson of the South Williamsport Police, who had arrived as a back-up or cover officer and was standing about ten to twelve feet away. Officer Thompson dropped his shoulder, took a "bear hug stance," and attempted to stop Defendant. Defendant collided with Officer Thompson, knocking both of them off balance and causing Officer Thompson to drop to one knee. Officer Thompson reached out and grabbed Defendant, who broke free but was slowed enough that he was quickly apprehended and taken to the ground by Officer Hockman. Either during the collision or when Officer Thompson grabbed Defendant, Officer Thompson broke the middle finger on his right hand.

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charge the driver of the SUV with careless driving or improper turning.

While Defendant was on the ground, he was searched incident to arrest. The police cut Defendant's underwear to retrieve the suspicious packages they felt immediately before Defendant fled. The packages contained 22 packets of heroin.

Defendant was placed in the police cruiser and Chief Gyurina could smell the odor of raw marijuana coming from Defendant's person. He asked Defendant if he had any other narcotics on him, but Defendant did not respond.

Defendant was transported to the Lycoming County Prison. Once they pulled into the sallyport, Chief Gyurina again asked Defendant if he had any other drugs on him. Chief Gyurina told him that if he did and he did not let Chief Gyurina know, he would be charged with additional charges related to bringing drugs into the prison. Again, Defendant did not reply to the Chief's inquiries.

During intake, Defendant was taken to the back room and instructed to remove his clothing. A correctional officer searched Defendant's clothing and discovered money and marijuana in one of his socks.

Defendant was charged with possession with intent to deliver, an ungraded felony; escape, a felony of the third degree; contraband (controlled substances), a felony of the second degree; possession of a controlled substance, an ungraded misdemeanor; possession of drug paraphernalia, an ungraded misdemeanor; resisting arrest, a misdemeanor of the second degree; possession of a controlled substance contraband by inmate, a felony of the second degree; and two traffic summaries.

On December 12, 2012, Defendant filed an omnibus pretrial motion which

included a motion to suppress, motion for discovery, motion to disclose criminal history information, motion to disclose bad acts, petition for writ of habeas corpus and motion to reserve rights.<sup>3</sup>

Defendant first argues that there was an insufficient basis for Chief Gyurina to stop Defendant's vehicle, because Chief Gyurina failed to clock the Defendant's speed for three-tenths of a mile. Further, Defendant argues that Chief Gyurina lacked jurisdiction to arrest the Defendant.

The Commonwealth counters that Chief Gyurina was not required to clock Defendant's vehicle for three-tenths of a mile, because Chief Gyurina did not use his speedometer to determine Defendant's speed. Chief Gyurina had probable cause via the V-Spec to believe that Defendant was going 57 mph in a 35 mph zone, which was sufficient to stop Defendant's vehicle for speeding. With respect to Defendant's jurisdictional argument, the Commonwealth relied on the Order of President Judge Butts dated August 4, 2011.

Because this is a case where there is no further evidence that could be obtained from a subsequent stop and investigation, the stop of Defendant's vehicle for a violation of the Motor Vehicle Code must have been based on probable cause.

Commonwealth v. Feczko, 10 A.3d 1285, 1291 (Pa. Super. 2010). Probable cause is defined in Pennsylvania law as "those facts and circumstances available at the time of the arrest which would justify a reasonable prudent man in the belief that a crime has been committed and that the individual arrested was the probable perpetrator." Commonwealth v. Harper, 485 Pa. 572, 403 A.2d 536, 542 (1979) (citations omitted). Probable cause is present when there

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<sup>3</sup> Defendant was granted an extension to December 16, 2012 to file any omnibus pretrial motion.

is reasonably trustworthy information which warrants a reasonable person in the belief that the suspect has committed or is committing a crime. Commonwealth v. Thompson, 604 Pa. 198, 985 A.2d 928, 931 (2009), quoting Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988, 990 (1991). It is a “practical, non-technical conception.” Commonwealth v. Glass, 562 Pa. 187, 754 A.2d 655, 663 (2000), citing Illinois v. Gates, 462 U.S. 213, 231-232 (1983).

Defendant’s argument that Chief Gyurina was obligated to follow him for three-tenths of a mile is misplaced. Section 3368(a) of the Vehicle Code states, in relevant part: “In ascertaining the speed of a vehicle **by the use of a speedometer**, the speed shall be timed for a distance of not less than three-tenths of a mile.” 75 Pa.C.S. §3368(a)(emphasis added). Chief Gyurina was not estimating Defendant’s speed by utilizing the speedometer on his vehicle. Accordingly, the three-tenths of a mile statutory requirement is inapplicable. Instead, Chief Gyurina utilized a V-Spec device, which is an approved electronic speed-timing device. See 41 Pa. Bull. 7042 (December 31, 2011). There is no statutory requirement which mandates following a vehicle for three-tenths of a mile when an electronic speed-timing device is used.

Moreover, even if such requirement existed, Chief Gyurina clearly testified that speeding was the primary reason for him pulling the Defendant over but that the secondary reason included the Defendant changing lanes and not using his turn signal. The fact that Chief Gyurina did not charge the Defendant with careless driving or turning violation is of no moment. He was not required to do so. Accordingly, Defendant’s argument with respect to the lack of probable cause for the stop fails.

Defendant also contends that the stop was illegal because Chief Gyurina made the stop outside his primary jurisdiction in violation of the Statewide Municipal Police Jurisdiction Act, 42 Pa. C.S. § 8953 (a) (2). Again, however, Defendant's argument is misplaced. The Act permits an officer to act outside of his primary jurisdiction if he is acting pursuant to a court order. 42 Pa.C.S. § 8953 (a)(1). Chief Gyurina was acting pursuant to President Judge Butts' August 4, 2011 Order. Pennsylvania law permits the District Attorney and the Court of Common Pleas with the approval of the Salary Board to approve Special County Detectives for particular assignments as designated by the District Attorney. 16 P.S. §1441 The Order of Court dated August 4, 2011 consistent with the law appointed Chief Gyurina as a Special County Detective for the purpose of working, among other things, DUI roving patrols. In this particular case, the uncontradicted testimony was that Defendant was pulled over by Chief Gyurina while he was working a roving DUI patrol and while he was appointed as a Special County Detective.

The Court will next address Defendant's petition for habeas corpus in which he avers that the evidence is insufficient as a matter of law to establish a prima facie case on the charges of contraband, contraband by an inmate and resisting arrest. Defendant also argues that the escape charge is erroneously graded as a felony.

A criminal defendant may challenge the sufficiency of the evidence presented at a preliminary hearing by filing a petition for writ of habeas corpus. Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012), citing Commonwealth v. McBride, 528 Pa. 153, 595 A.2d 589 (1991). The Commonwealth must show "sufficient probable cause that the

defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury.” Commonwealth v. Winger, 957 A.2d 325, 328 (Pa. Super. 2008)(citations omitted).

When reviewing a motion for habeas corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. See Commonwealth v. Santo, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005). “A prima facie case exists when the Commonwealth presents evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant a belief that the accused committed the offense.” Id. quoting Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003). A prima facie case requires evidence of each element of the offense charged; not evidence beyond a reasonable doubt. See Commonwealth v. Patrick, 933 A.2d 1043, 1045 (Pa. Super. 2007) (en banc)(citations omitted).

Defendant contends that the Commonwealth failed to establish prima facie evidence with respect to count 3, contraband and count 9, possession of controlled substance contraband by inmate. In order to prove Count 3, contraband, the Commonwealth would need to prove that the Defendant brought into any prison any controlled substance. 18 Pa. C.S.A. § 5123 (a). With respect to count 9, possession of controlled substance contraband by inmate, the Commonwealth must prove that the Defendant had in his possession or in his control any controlled substance.

In support of his petition for habeas corpus, Defendant argues that he did not

voluntarily enter the prison, that he should not be punished for the fact that the police failed to fully search him prior to bringing him to the prison, and that the purpose of the statute was not to punish individuals under these circumstances. Defendant, however, fails to cite any legal authority whatsoever in support of his argument.

For prima facie purposes, there is no question that the Commonwealth presented sufficient evidence with respect to the contraband charges. At the time Defendant entered the prison, he had marijuana on his person. Chief Gyurina warned Defendant that if he had any other controlled substance on his person when he entered the prison, he would receive additional charges. Nevertheless, Defendant failed to advise Chief Gyurina of the fact that he had the marijuana on his person. Instead, he brought the marijuana into the prison knowing that it was on his person and knowing that he would be charged with additional charges if it was located on him.

While the purpose of the statute may have been to prevent the acquisition of controlled substances by persons confined in prisons, the express language of the statute prohibits anyone from bringing a controlled substance into a prison. Commonwealth v. Williams, 525 Pa. 216, 579 A.2d 869 (1990). Therefore, contrary to Defendant's argument, an individual such as the Defendant can still be found guilty even though there is no evidence that he intended to transfer the marijuana to other inmates.

With respect to Count 8, resisting arrest, the Commonwealth "must prove that a defendant, intending to prevent a public servant from effecting a lawful arrest, created a substantial risk of bodily injury to the public servant or another, or that the defendant

employed means of resistance which justified or required substantial force to overcome such resistance.” In interest of Woodford, 420 Pa. Super. 179, 616 A.2d 641, 643 (1992); 18 Pa. C.S.A. § 5104.

Defendant argues that he simply ran away from the police officers and that the collision with Officer Thompson was “merely incidental to his escape.” He also argues that he did not kick, hit or strike any of the officers.

In support of his argument, Defendant cited Commonwealth v. Rainey, 285 Pa. Super. 75, 426 A.2d 1148 (1981) and Commonwealth v. Eberhardt, 304 Pa. Super. 222, 450 A.2d 651 (1982). In Rainey, supra., the Court held that evidence consisting of the defendant wriggling, screaming and shaking himself violently in an attempt to free himself from the officer’s grasp was not sufficient to convict the defendant of resisting arrest. The Court noted that at no time did the defendant strike or kick anyone, he only tried to squirm and twist his way free from their grasp.

In Eberhardt, the Court noted that it could “hardly be said” that a substantial risk for bodily injury was created for anyone as a result of the defendant’s conduct. The defendant’s actions were only an attempt to escape and not an aggressive assertion of physical force by the Defendant against the officers.

The decisions cited by Defendant, however, no longer appear to be of precedential value. Indeed, in Commonwealth v. Miller, 327 Pa. Super. 164, 475 A.2d 145 (1984), the Court declined to follow either the Eberhardt or Rainey cases and specifically rejected the dictum in those cases from which it could be inferred that the aggressive use of

force such as striking or kicking of police officers was necessary for there to be a violation of the statute prohibiting resisting arrest. 475 A.2d at 146 n.4. While as a general rule it is not criminal to merely flee an arrest, where the circumstances of the flight expose the pursuing officers to substantial danger, a conviction for resisting arrest is proper. Miller, 475 A.2d at 146. Similarly, in Commonwealth v. Lyons, 382 Pa. Super. 438, 555 A.2d 920 (1989), the Court held that sufficient resistance is established if the arrestee's actions created a substantial risk of bodily injury to the arresting officer; neither severe bodily injury nor actual injury to the arresting officer is required to support a resisting arrest conviction. Id. at 925

There is no question that for prima facie purposes the circumstances of Defendant's flight exposed the pursuing officers to substantial danger. Defendant broke free from the officers and charged a third officer knocking that officer to one knee. While Defendant attempted to continue running, the officer grabbed him with one hand. Defendant attempted to run with such force that he actually pulled the officer down and caused the officer to break the middle finger on his one hand. While Officer Thompson slowed Defendant's pace, Defendant continued running after he broke Officer Thompson's grip until he was taken down by the two other officers present on the scene. The overall circumstances do not involve Defendant "merely fleeing." To the contrary, Defendant broke away from two officers, intentionally collided with another, knocked that officer down, broke free from that officer's grasp, causing the officer to sustain a broken finger and continued running until he was taken down.

Defendant argues further that the escape charge is improperly graded as a felony of the third degree. An escape is a felony of the third degree if, among other things, the actor employs force to effectuate the escape. 18 Pa. C.S. § 5121 (d) (ii). While force is not defined in the statute, it is best described as strength or energy exerted or brought to bear. Merriam-Webster Online Dictionary. For prima facie purposes, Defendant used force when he collided with Officer Thompson, causing him to go down to one knee and continued to run with such power so as to break free from Officer Thompson's grasp and to break his middle finger in the process.

Defendant's remaining motions as set forth in the omnibus motion were addressed at the argument and will be decided as set forth in the foregoing Order.

### **ORDER**

**AND NOW**, this \_\_\_ day of March 2013, following a hearing and argument on Defendant's Omnibus Pretrial Motion, the Court enters the following:

1. Defendant's motion to suppress physical evidence is denied.
2. Defendant's motion for discovery is denied in part and granted in part.

Within thirty (30) days of the date of this Order, the Commonwealth is directed to provide to Defendant copies of any and all video and/or audio recordings of the incidents involving Defendant; and the identity of each expert witness the Commonwealth intends to call at trial including that witness's full name, title, birthdate, professional address, professional telephone number, the field in which the witness is allegedly an expert and

the expert witness's CV or resume. As well, the Commonwealth must provide a summary of the opinion that the expert is expected to testify and the grounds for said opinion.

3. Defendant's motion for criminal history information is granted. Within thirty (30) days of the date of this Order, the Commonwealth shall provide criminal history information for all of the Commonwealth witnesses as well as identify those witnesses who have been offered immunity, favorable consideration, leniency or favorable treatment and the nature of said immunity, favorable consideration, leniency or treatment.
4. Defendant's motion for disclosure of Rule 404 (b) evidence is denied. The Commonwealth is reminded of its obligation pursuant to Rule 404 (b) to timely file any notice and to comply with the particulars as set forth in the Rules. No 404 (b) notice shall be filed later than the date of the pretrial unless the basis for said notice arose after the date of the pretrial.
5. Defendant's petition for writ of habeas corpus is denied.
6. Defendant's motion to reserve right is granted. Defendant has thirty (30) days from the date he receives additional discovery if any, to file pretrial motions related only to said discovery.

By The Court,

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Marc F. Lovecchio, Judge

cc: District Attorney (AB)  
Edward J. Rymza, Esquire  
Gary Weber, Lycoming Reporter  
Work File