IN THE COURIT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-799-2012**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
TED DYE, JR.,	**:**	
Defendant	**:**	

OPINION AND ORDER

This case came before the court on March 28, 2013 for a hearing and argument on Defendant's omnibus pretrial motion, which consisted of a motion to suppress, a motion to dismiss Count 2 DUI on the basis that the blood draw did not occur within two hours, a motion for discovery, and a motion to reserve right to file additional motions.[1]

At approximately 8:15 on January 14, 2012, Corporal Derron Farber's neighbor, Mrs. Harp, had her daughter call Corporal Farber, who was at home and off duty, about a one-vehicle crash that occurred diagonally across the road from her residence.[2] Defendant was the sole occupant of the vehicle.

Within ten minutes of receiving the phone call, Corporal Farber left his residence and drove toward the Harp residence. Corporal Farber was not in uniform and he was driving his personal vehicle. It was an extremely cold and snowy night. When he came upon the accident scene, which was about 50 to 100 feet past the Harp residence, he observed

[1] At the hearing on Defendant's motion, defense counsel essentially indicated that the discovery motion was moot when he stated he thought he was "fine with discovery." Since the motion to reserve right was based on the possibility of additional discovery, the court believes both the discovery motion and the motion to reserve the right to file additional motions are moot.

[2] The parties stipulated that if called to testify Mrs. Harp would testify that she observed a vehicle crash diagonally across the street from her home. She saw Defendant, who was the only occupant, exit the vehicle. Within five minutes or less after the crash, she had her daughter call Corporal Farber, because she could not due to a hearing disability. Corporal Farber also explained in his testimony that he was called because his daughter

a dark-colored pick-up truck down in a ditch off the side of the road with the driver's side door open. Corporal Farber exited his vehicle and looked around. He saw one set of footprints leading out of the ditch away from the truck, but no one was in or around the vehicle.

As Corporal Farber was heading back to his house to call in the accident, he came across Defendant walking in the roadway about two-tenths or three-tenths of a mile from the truck. Defendant was wearing a t-shirt and jeans, but he was not wearing a coat or any shoes; one foot was bare and the other foot just had a sock on it. There also was some blood on Defendant's hands. Corporal Farber asked Defendant if he was okay, where he was headed, and if he wanted a ride. Defendant indicated he was trying to get to a friend's house. Corporal Farber asked Defendant to stand in front of his vehicle's headlights to show him that he did not possess anything capable of causing injury before he got into the vehicle. Defendant stood in front of the headlights and pulled up his shirt. When Defendant got into the vehicle, Corporal Farber noticed that Defendant distinctly smelled of alcohol, he had bloodshot and glassy eyes, and his speech and mannerisms were very slow.

Although Corporal Farber believed Defendant had been driving under the influence of alcohol, he did not ask him for his license or registration.

While they were headed to Defendant's friend's house, Defendant told Corporal Farber that his fifteen year old daughter had died that day in Florida. Corporal Farber sympathized, but then made comments to Defendant that he needed to be careful and he should not compound things by driving while he was intoxicated. Corporal Farber

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was friends with Mrs. Harp's daughter.

admitted that he implied that Defendant had been driving, thinking that Defendant would give a statement. Defendant, however, indicated that his girlfriend had been driving. Corporal Farber then asked Defendant where his girlfriend was, and Defendant said she had gone home.

When they arrived at the friend's home, Corporal Farber went to the door with Defendant, but no one was home. They got back in the vehicle and drove to the Harp residence, where Corporal Farber used the phone to call the accident in to the State Police Barracks. Then he called Trooper Havens, who also lived in the area, for assistance because Corporal Farber did not have any handcuffs with him. Trooper Havens told Corporal Farber to bring Defendant to his house, because Defendant knew Trooper Havens. They waited at Trooper Haven's residence until uniformed State Police officers and an ambulance arrived.

When Trooper Christine Fye and Trooper Eric Barlett arrived at Trooper Havens' residence at approximately 8:50 p.m., Defendant was sitting in the rear of an ambulance in the driveway. Trooper Fye interviewed Defendant about the accident. Defendant claimed his wife was driving and crashed the vehicle. Like Corporal Farber, Trooper Fye asked Defendant where this woman was, because she was concerned for her well-being. Within ten minutes, however, Defendant admitted that he was driving the vehicle and he had hit a patch of ice. Defendant also admitted he had been drinking. He was crying, and he said his daughter died earlier in the day. Trooper Fye noticed a very strong odor of alcohol inside the ambulance. She also observed that Defendant's eyes were very bloodshot and his speech was slurred and confused. Trooper Fye did not ask Defendant to perform field sobriety tests due to the snow on the ground. She formed an opinion that Defendant

was under the influence of alcohol to a degree which rendered him incapable of safe driving. She told Defendant he was in custody or under arrest and she would follow him to the hospital and request a blood draw.

Trooper Barlett went to the scene of the crash to gather information for the accident report and to wait for a tow truck to pick up the vehicle. He saw a large truck in a ditch, with only one set of footprints leading away from it. He looked inside the vehicle for insurance and registration information. He saw an orange prescription bottle inside the truck, but he did not see any bottles or cans that would have contained alcohol.

Defendant was charged with DUI- incapable of driving safely, DUI- highest rate of alcohol, and two summary traffic offenses.

Defendant first argued that the evidence seized as a result of the investigation by the police should be suppressed because there was no probable cause or reasonable suspicion to believe Defendant was engaging in any criminal activity and there was no probable cause to request Defendant to submit to chemical testing. The Court cannot agree.

"To establish reasonable suspicion, the officer must 'articulate specific observations which, in conjunction with reasonable inferences derived from those observations, 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. Caban,60 A.3d 120 (Pa. Super. 2012)(citations omitted). The reasonable suspicion standard is less stringent than probable cause. Commonwealth v. Rogers, 578 Pa. 127, 849 A.2d 1185, 1189 (2004). In determining whether reasonable suspicion exists, the court must give due consideration to the reasonable inferences a police officer is entitled to draw from the

facts in light of his experience. Id. The court is not limited to considering only those facts that clearly indicate criminal conduct, because even innocent facts when taken together may warrant a police officer investigating further. Id., citing Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 676 (1999). In comparison,

> Probable cause is made out when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." The question is not whether the officer's belief was 'correct or more likely true than false.' Rather, we require only a 'probability, and not a prima facie showing, of criminal activity.' In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 604 Pa. 198, 985 A.2d 928, 931 (2009)(citations omitted).

The Court finds that the police had both reasonable suspicion and probable cause to believe that Defendant had committed the offense of driving under the influence of alcohol. There was a one-vehicle accident where a pick-up truck went off the roadway and into a ditch. There was only one set of footprints leading away from the truck. Within fifteen minutes or less of the accident, Corporal Farber came across Defendant walking in the roadway and Defendant's hands had blood on them. Defendant was only wearing jeans, a t-shirt, and one sock. In other words, Defendant looked as if he had been involved in some sort of accident.

Corporal Farber asked Defendant if he was okay and if he wanted a ride. Corporal Farber was not on duty and was merely being a Good Samaritan by trying to make sure Defendant was okay and to get him out of the extremely cold and snowy weather. When Defendant got into Corporal Farber's vehicle, Corporal Farber noticed that Defendant

distinctly smelled of alcohol, his eyes were bloodshot and glassy, and his speech and mannerisms were very slow. There were no empty alcoholic beverage containers in or around the truck.

Given the totality of the circumstances, the police clearly had reasonable suspicion to believe Defendant was the driver of the truck and to investigate whether he had been driving under the influence of alcohol.

After on-duty State Police Troopers arrived to investigate the accident, Defendant admitted that he was the driver of the truck and that he had been drinking.

In viewing the totality of these circumstances, a reasonable person would believe that Defendant had been the driver of the truck that went off the roadway and he was under the influence of alcohol, giving rise to both reasonable suspicion and probable cause that Defendant had committed a DUI offense. The police had ample basis to request Defendant to submit to chemical testing. Whether Defendant lost control of the truck due to the bad weather, his alcohol consumption, or both are issues for trial.

Defendant next asserted that Count 2, DUI- highest rate of alcohol should be dismissed because Defendant's blood was not drawn within two hours and no exception applies. The Court cannot agree.

Relying on this Court's decision in Commonwealth v. Pophal, Lyc. Cty No. CR-8-2011, Defendant first argued that his motion must be granted because the Commonwealth failed to present any testimony regarding when his blood was drawn. In his verified motion, however, Defendant states, "The police arrived at the scene at approximately 8:15 p.m. Blood was drawn at 10:35 p.m., more than two hours later."

Omnibus Motion, ¶ 16. Statements of material fact contained in pleadings constitute admissions. See Commonwealth v. Hanford, 937 A.2d 1094, 1098 (2007). Therefore, Pophal is distinguishable.

The Court also finds that the evidence presented at the hearing and the reasonable inferences to be drawn therefrom established both requirements for the statutory exception. Section 3802(g) of the Vehicle Code provides an exception to the two-hour rule, which states:

> Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:
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> (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours; and
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> (2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.

75 Pa.C.S. §3802(g).

Trooper Fye testified that she received the dispatch about this incident at approximately 8:19 p.m. Due to the location of the incident and the bad weather, she did not arrive at Trooper Havens' residence until 8:50 or 9:00 p.m. Therefore, it took Trooper Fye thirty (30) or forty (40) minutes to travel from the Montoursville State Police Barracks to Trooper Havens' residence.

Trooper Fye and Trooper Barlett investigated the accident for about twenty minutes before Defendant was placed in custody or arrested for DUI. Approximately ten minutes thereafter, Defendant was transported by

ambulance to the Williamsport Hospital. Therefore, the ambulance did not leave Trooper Havens' residence until about 9:30 p.m.

One can infer that it would take the ambulance a similar amount of time to drive back to the hospital as it took Trooper Fye to arrive at Trooper Havens' residence. Thus, it appears that Defendant did not arrive at the hospital until after 10:00 p.m.

Defendant was taken to the hospital as a precaution. It is likely that hospital personnel would make sure Defendant did not need any further medical treatment before they would conduct the blood draw. Defendant's blood was drawn at 10:35 p.m.

One can also infer that Defendant did not consume any alcohol following his arrest, because Defendant was in the back of an ambulance in the presence of EMS personnel on his way to the hospital and then actually at the hospital from the time he was placed in custody until his blood was drawn.

Based on the foregoing discussion, the Court finds that the evidence and the reasonable inferences that could be drawn therefrom are sufficient at this stage of the proceedings to deny Defendant's motion to dismiss Count 2. Whether the jury will actually draw those inferences will be an issue at trial.

O R D E R

AND NOW, this ___ day of May 2013, the Court DENIES Defendant's omnibus pretrial motion.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Anthony Cuica, Esquire (ADA)
Edward J. Rymsza, Esquire
Gary Weber, Esquire
Work file