

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1874-2013
v.	:	
	:	
KELLY ELIZABETH GORDON,	:	CRIMINAL DIVISION
Defendant	:	

OPINION AND ORDER

On April 30, 2014, the Defendant filed an Omnibus Pretrial Motion. A hearing on the motion was held on August 14, 2014.

I. Background

At approximately 11:20 P.M. on August 30, 2013, Police Chief William Solomon (Solomon) of the Old Lycoming Township Police Department was operating an unmarked car on Market Street in Williamsport, Pennsylvania. Solomon observed a vehicle travelling south on Market Street. The vehicle turned left and entered the left lane of East Third Street. Solomon noticed the vehicle move into the right lane of Third Street without a turn signal. Solomon described this movement as “drifting.” The vehicle stayed in the right lane and travelled at the appropriate speed before stopping at the traffic light at Mulberry Street. At the traffic light, Solomon noticed that the vehicle was not centered in the lane. Specifically, the vehicle’s right tires were close to the solid line to the right of the vehicle. When the light turned green, Solomon noticed the vehicle move slightly to the right before continuing on Third Street. Solomon described this movement as drifting. As the vehicle approached Basin Street, it jerked slightly to the left. With a turn signal, the vehicle then entered the left turn lane. Solomon saw that the vehicle’s right tires were on the solid line separating the turn lane from another lane of traffic. Using a turn signal, the driver of the vehicle turned left onto Basin Street. Solomon

described the turn as being wider than it needed to be. The vehicle maintained its lane on Basin Street and then stopped at a stop sign. Solomon noticed that about half of the vehicle was over the stop line on the pavement. With a turn signal, the vehicle turned left onto Fourth Street. At the motion hearing, Solomon testified that he did not think the turn onto Fourth Street was wide. On Fourth Street, Solomon noticed the vehicle brake and move to the right. Solomon testified that he thought the driver was going to park to the right. The driver did not park to the right. Without using a turn signal, the driver of the vehicle turned left into a parking lot. Solomon testified that the driver parked the vehicle between two lines without difficulty. Solomon then initiated a traffic stop.

Solomon asked for the driver's license and registration. The driver provided these items without difficulty. Solomon identified the driver as Kelly Gordon (Defendant). Solomon noticed that the Defendant's eyes were red and glassy. He also noticed that her actions were slow and methodical. Solomon noticed an odor of alcohol emitting from the vehicle.

Solomon asked the Defendant if she had been drinking, and the Defendant responded that she had been drinking. She did not have slurred speech. Solomon asked the Defendant to get out of the vehicle and perform field sobriety tests. The Defendant did not stumble as she exited the vehicle. The Defendant walked to the rear of the vehicle. Solomon described the walk as deliberate. He testified that people who have been drinking sometimes walk deliberately. Solomon believed that the Defendant was getting ready for the tests.

Solomon administered the horizontal gaze nystagmus (HGN) test. He observed nystagmus in the Defendant's eyes. He testified that the size of the Defendant's pupils was another indication of drinking. In total, Solomon noticed six indicators of impairment during the HGN test. He testified that if a person has four or more indicators on the HGN test, the person

likely has a BAC of 0.08 or greater. During the test, Solomon did not notice an odor of alcohol emitting from the Defendant.

After instruction from Solomon, the Defendant performed the walk-and-turn test. Solomon testified that the Defendant stepped off the line on her third step. He also testifies that the Defendant missed heel to toe on a step by about two inches, did not take small steps on the turn as instructed, and stopped momentarily. In total, Solomon noticed four indicators of impairment during the walk-and-turn. He testified that if a person has two or more indicators on the walk-and-turn, the person likely has a BAC of 0.08 or greater.

After instruction from Solomon, the Defendant performed the one-leg-stand test. Solomon noticed that the Defendant swayed during the test. The swaying was the only indicator of impairment that Solomon noticed during the test. He testified that if a person has two or more indicators on the one-leg-stand, the person likely has a BAC of 0.08 or greater. The Defendant was wearing boots with high heels. Solomon testified that he took the Defendant's footwear into consideration when determining her performance on the tests.

After the tests, Solomon gave the Defendant a preliminary breath test (PBT). The PBT was positive for alcohol. The Defendant was then arrested on suspicion of driving after imbibing enough alcohol so that she could not safely operate a vehicle (DUI).¹

In addition to other training regarding field sobriety tests, Solomon has completed the Advanced Roadside Impaired Driving program. Since 1996, he has been the director of the Lycoming County DUI Enforcement Project. Since 2006, he has managed the Lycoming County DUI Center. Solomon has been involved in hundreds of DUI arrests.

In her motion, the Defendant argues that Solomon did not have reasonable suspicion that she had violated a provision of the Motor Vehicle Code. She argues that the stop was, therefore,

¹ 75 Pa. C.S. § 3802(a)(1).

unlawful. The Defendant also argues that Solomon did not have the requisite probable cause to arrest her. She asks for the suppression of evidence obtained after Solomon initiated the traffic stop. The Defendant also argues that the “Commonwealth has not and cannot establish the foundation for admission of the HGN test.” She, therefore, requests the suppression of “the fact that the HGN test was administered [and] its results.” Additionally, the Defendant asks the Court to preclude the introduction of any evidence regarding the PBT because “the test is not admissible as substantive evidence of [blood alcohol content (BAC)].” Last, the Defendant argues that Solomon did not follow protocol for eliminating residual mouth alcohol because he did not observe the Defendant for fifteen to twenty minutes before administering the PBT. She asks that the Court, therefore, not consider the PBT.

II. Discussion

A. Reasonable Suspicion for Traffic Stop

“In Pennsylvania, a police officer has authority to stop a vehicle when he or she has reasonable suspicion that a violation of the Motor Vehicle Code is occurring or has occurred.” Commonwealth v. Farnan, 55 A.3d 113, 116 (Pa. Super. 2012). “[I]n order to establish reasonable suspicion, an officer must be able to point to specific and articulable facts which led him to reasonably suspect a violation of the Motor Vehicle Code. . . .” Commonwealth v. Holmes, 14 A.3d 89, 95-96 (Pa. 2011). “The determination of whether an officer had reasonable suspicion . . . is an objective one, which must be considered in light of the totality of the circumstances.” Id. at 96. A court must give “due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience.” Terry v. Ohio, 392 U.S. 1, 27 (1968).

Here, Solomon had reasonable suspicion that the Defendant had violated the Motor Vehicle Code. 75 Pa. C.S. § 3309(1) provides, “A vehicle shall be driven as nearly as practicable entirely within a single lane. . . .” When the Defendant was waiting to turn onto Basin Street, her vehicle’s right tires were on the line separating the turning lane from another lane. Therefore, Solomon had reasonable suspicion that the Defendant had violated 75 Pa. C.S. § 3309(1).

75 Pa. C.S. § 3323(b) provides, “[E]very driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line. . . .” When the Defendant stopped at the sign on Basin Street, about half of her vehicle was over the stop line. Therefore, Solomon had reasonable suspicion that the Defendant violated 75 Pa. C.S. § 3323(b).

75 Pa. C.S. § 3334(a) provides, “Upon a roadway no person shall turn a vehicle . . . without giving an appropriate signal.” The Defendant did not use a turn signal as she turned from Fourth Street into the parking lot. Therefore, Solomon had reasonable suspicion that the Defendant violated 75 Pa. C.S. § 3334(a).

Here, the totality of the circumstances shows that Solomon had reasonable suspicion that the Defendant was driving after imbibing enough alcohol so that she could not safely operate a vehicle. Although the Defendant drove at the appropriate speed and for the most part appropriately used her turn signal, the following facts led Solomon to reasonably suspect that the Defendant was driving while impaired. The Defendant’s vehicle drifted into the right lane on Third Street without a turn signal. The vehicle drifted to the right when the light turned green at the intersection of Third Street and Mulberry Street. The Defendant’s vehicle jerked slightly to the left on Third Street. While the Defendant was waiting to turn onto Basin Street, the vehicle’s right tires were on the line separating the turning lane from another lane. The turn that the

Defendant made onto Basin Street was wider than it needed to be. About half of the Defendant's vehicle was over the stop line at the stop sign on Basin Street. The Defendant turned into the parking lot without using a turn signal. Therefore, this Court finds that Solomon had reasonable suspicion.

B. Preliminary Breath Test

75 Pa.C.S. § 1547(k) provides, "A police officer, having reasonable suspicion to believe a person is driving or in actual physical control of the movement of a motor vehicle while under the influence of alcohol, may require that person prior to arrest to submit to a preliminary breath test" PBT's can be considered in determining whether a police officer had probable cause to arrest a person for DUI. See Commonwealth v. Semuta, 902 A.2d 1254, 1260 (Pa. 2006). However, "[i]t is clear . . . that the results of a PBT are not admissible at trial." Commonwealth v. Stanley, 629 A.2d 940, 941 (Pa. Super. 1993). PBT results "are inadmissible and any deliberate attempt to reveal to the jury the fact that the test was given, even without letting the jury know the result, is error." Id. at 942. Therefore, the Court will consider the results of the PBT in determining whether Solomon had probable cause to arrest the Defendant, but the Commonwealth is precluded from introducing evidence that the test was given.

C. Probable Cause to Arrest

"[A]n arrest or 'custodial detention' must be supported by probable cause." Commonwealth v. Ellis, 662 A.2d 1043, 1047 (Pa. 1995). "Probable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver has been driving under the influence of alcohol or a controlled substance." Commonwealth v. Kohl, 576 A.2d 1049, 1052 (Pa. Super. 1990).

Here, the facts known to Solomon are sufficient to warrant a prudent person to believe that the Defendant was driving after imbibing enough alcohol so that she could not safely operate a vehicle. All of the facts that led to reasonable suspicion contribute to probable cause. The following additional facts also contribute to probable cause. The Defendant's eyes were red and glassy. An odor of alcohol was emanating from the vehicle. The Defendant said that she had been drinking. The Defendant walked deliberately to the rear of her vehicle. The HGN test indicated that the Defendant likely had a BAC of 0.08 or greater. The walk-and-turn indicated that the Defendant likely had a BAC of 0.08 or greater. The PBT was positive for alcohol.

There are facts that do not contribute to probable cause,² but after viewing the totality of the circumstances, this Court finds that Solomon had probable cause to arrest the Defendant.

D. Admissibility of Horizontal Nystagmus Test

“Pennsylvania law requires that an adequate foundation be set forth establishing that HGN testing is generally accepted in the scientific community, including the medical science field of ophthalmology.” Commonwealth v. Stringer, 678 A.2d 1200, 1203 (Pa. Super. 1996). In Commonwealth v. Miller,³ “the trial court erred in admitting testimony regarding the results of the HGN test since the Commonwealth did not establish an adequate foundation for admission of the test results.” 532 A.2d at 1190. This Court has not found a case stating that the Commonwealth cannot establish a foundation for admission of the HGN test. Therefore, at this time, the Court will not preclude the introduction of evidence regarding the HGN test.

² The Defendant did not stumble when exiting the vehicle. The Defendant's speech was not slurred. Solomon did not notice an odor of alcohol when administering the HGN test. The Defendant was wearing boots with high heels. The one-leg-stand did not indicate that Defendant likely had a BAC of 0.08 or greater.

³ 532 A.2d 1186 (Pa. Super. 1987).

III. Conclusion

Solomon had reasonable suspicion to stop the Defendant and probable cause to arrest her. Any evidence regarding the PBT is not admissible. At this time, the Court will not preclude the introduction of evidence regarding the HGN test. However, should the Commonwealth attempt to introduce such evidence, it must establish an adequate foundation.

ORDER

AND NOW, this _____ day of October, 2014, based upon the foregoing Opinion, the Defendant's Omnibus Pretrial Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge