

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-1575-2013**
v. :
 :
WARREN HARDING III, : **CRIMINAL DIVISION**
Defendant :

OPINION AND ORDER

The Defendant filed an Omnibus Pretrial Motion on December 18, 2013. A hearing on the motion was held on March 27, 2014. During the hearing, the Defendant argued that certain evidence should be suppressed because it was unlawfully obtained by police.

I. Background

On August 28, 2013, Pennsylvania State Police (PSP) Trooper Jeremy Hoy (Hoy) and PSP Corporal Derek Pacella (Pacella) were working drug interdiction. Hoy and Pacella stopped a Dodge Charger because they observed it travelling 82 miles per hour in a zone that has a maximum speed limit of 55 miles per hour. As the troopers approached the car, they smelled a strong perfume odor coming from inside the car. When Hoy looked inside the car, he saw an air freshener hanging from the steering column. Hoy believed the car was a rental which was verified by the paperwork provided by the operator, Warren Harding (Defendant). Hoy noticed that the Defendant's hand was shaking as the Defendant handed Hoy his driver's license and renter's agreement. The troopers did a records check and discovered that in 2005 the Defendant was convicted of possession of a controlled substance with intent to deliver.¹ Hoy asked the Defendant to get out of the car, so Hoy could give the Defendant a warning for speeding.

After issuing a warning to the Defendant, Hoy told the Defendant that he was free to leave. A few seconds after saying that the Defendant was free to leave, Hoy began asking the

¹ 35 P.S. § 780-113(a)30.

Defendant more questions. Hoy asked for the Defendant's consent to search the car. The Defendant did not give consent.

Hoy contacted Trooper Aaron Tiracorda (Tiracorda) of the PSP K-9 Unit. With his canine named Tom, Tiracorda conducted a sniff of the exterior of the car. The canine alerted, indicating that it had detected the odor of a controlled substance coming from inside the car. Hoy applied for and received a search warrant from MDJ Jerry C. Lepley. The warrant authorized Hoy to search the car for any illegal contraband and / or packaging materials used to store contraband. Upon executing the warrant, Hoy found, among other things, a plastic bag containing two ounces of bulk heroin and 700 small clear plastic bags containing heroin.

In his pretrial motion, the Defendant argued that the evidence obtained during the search of the car should be suppressed because the stop and search was conducted without probable cause or the Defendant's consent. The Defendant also argued that there was not probable cause to issue a search warrant for the vehicle. Additionally, Defendant argued that the information contained in the warrant was incorrect and / or misleading. After the initial preparation of this opinion, Defense Counsel provided this Court with additional local case law in support of his position.

II. Discussion

Under Pennsylvania Rule of Criminal Procedure 581(H), the Commonwealth has the burden of establishing by a preponderance of the evidence that challenged evidence was not obtained in violation a defendant's rights. After a careful review of the evidence, the Court finds the Commonwealth has met its burden.

Police must have a reasonable suspicion of a violation of the motor vehicle code to stop a car. Commonwealth v. Chase, 960 A.2d 108, 112 (Pa. 2008). Here, the Court finds that Hoy

and Pacella had a legitimate reason to stop the Defendant because the Defendant was driving 82 miles per hour in a zone with a maximum speed limit of 55 miles per hour.

To ask the Defendant to get out of the car, Hoy did not need a reason besides the speeding. “[P]olice may request both drivers and their passengers to alight from a lawfully stopped car without reasonable suspicion that criminal activity is afoot.” Commonwealth v. Brown, 654 A.2d 1096, 1102 (Pa. Super. 1995).

“A police officer may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct. In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered.” Commonwealth v. Rogers, 849 A.2d 1185, 1189 (Pa. 2004). “[T]o establish grounds for 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. Reppert, 814 A.2d 1196, 1204 (Pa. Super. 2002). 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). “Also, the totality of the circumstances test does not limit [a court’s] inquiry to an examination of only those facts that clearly indicate criminal conduct.” Rogers, 849 A.2d at 1189. “Even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.” Commonwealth v. Cook, 735 A.2d 673, 676 (Pa. 1999).

For the second round of questioning to have been lawful, Hoy was required to have had reasonable suspicion at the moment the second round of questioning began. “[W]here the

purpose of an initial traffic stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest. In the absence of either reasonable suspicion to support the investigative detention or probable cause to support the arrest, the citizen is considered unlawfully detained.” Commonwealth v. Strickler, 757 A.2d 884, 890 (Pa. 2000). Here, a reasonable person would not have believed that he or she was free to leave. Hoy began questioning the Defendant just a few seconds after he told the Defendant that he was free to leave. Because of the short time in between the “free to leave” and the second round of questioning, a reasonable person would not have believed that he or she was free to leave. See Commonwealth v. Freeman, 757 A.2d 903, 907-08 (Pa. 2000).

At the moment the second round of questioning began, the troopers had reasonable suspicion that the Defendant was engaged in criminal activity. The following sentences lay out the specific observations and the reasonable inferences derived from the observations that led Hoy to reasonably conclude that the Defendant was engaged in criminal activity. The Defendant was driving a rental car; the troopers testified that people engaged in criminal activity sometimes use rental cars to distance themselves from the crime. The Defendant stopped the car on the line that separates the highway from the shoulder; Hoy testified that a person engaged in criminal activity may purposely stop on the line with the hope that as the trooper approaches the driver’s side, he or she will concentrate on the oncoming traffic instead of the person. The Defendant’s hand was shaking when he handed his driver’s license and renter’s agreement to Hoy; both troopers testified that sometimes people who are engaged in criminal activity are nervous when they encounter police officers. The Defendant had an air freshener in a rental car; Hoy testified that an air freshener in a rental car is rare because rental companies clean out cars before renting

them. Both troopers could smell the air freshener as they approached the car, and both troopers testified that people sometimes use masking agents to cover up the smell of drugs. Hoy did a records check of the Defendant and discovered that in 2005, the Defendant was convicted of a drug related offense. The Defendant was stopped on a stretch of highway that the troopers knew was frequented by drug traffickers, as the stretch connects Philadelphia (a drug source city) to Williamsport (a drug destination city). See United States v. Sharpe, 470 U.S. 675, 683 n.3 (1985). The foregoing facts, taken in their totality, led the troopers to have reasonable suspicion that the Defendant was engaged in criminal activity.

“[R]easonable suspicion is required to justify a canine sniff of the exterior of an automobile.” Rogers, 849 A.2d at 1197. As discussed in the paragraph above, the troopers already had reasonable suspicion at the moment they began the second round of questioning. The Defendant’s responses to the second round of questioning added to this suspicion. The troopers asked the Defendant a series of questions about whether there were drugs in the car. Each question in the series was the same except that after the Defendant responded to a question, the troopers changed the drug in the next question. Pacella testified that the Defendant gave a loud and distinct “no” to every question in the series except the question about heroin when he hesitated before responding. Pacella testified that the Defendant’s different response to the heroin question added to his suspicion that the Defendant was engaged in criminal activity.

A search warrant must be supported by probable cause. Pa. Const. Art. I, § 8. “The standard for evaluating whether probable cause exists for the issuance of a search warrant is . . . the ‘totality of the circumstances’ test.” Commonwealth v. Glass, 754 A.2d 655, 661 (Pa. 2000). “The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’

and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing] that probable cause existed.’” Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985) (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

Here, MDJ Lepley had a substantial basis for concluding that probable cause existed for the issuance of a search warrant to search the car that the Defendant was driving. There was a strong perfume odor coming from inside the car. There was an air freshener in the car. The defendant operated a rental car and was nervous during the stop. The Defendant had a prior contact with law enforcement for a possession with intent to deliver charge. PSP’s drug detection dog had alerted its handler of an odor of drugs coming from inside the car.

Defense Counsel submitted to this Court the decision in the case of Commonwealth v. Gilder (*Lovecchio, J., February 23, 2010*). Although it appears that the Commonwealth did receive a copy of the decision, nothing was offered in opposition to the Defense’s argument. Upon review, the Court finds that the facts of Gilder are quite different than those presented in this case, and the decision is not controlling. In Gilder, the Court found that there was no evidence of drug activity to justify the suspects’ continued detention. The Court also found that there was no justification for a Terry² frisk as police had no reason to believe that the suspects were armed and dangerous. Here, the evidence from the Commonwealth established the reasonable suspicion to justify their continued detention and utilization of the drug-detection dog.

² Terry v. Ohio, 392 U.S. 1 (1968).

III. Conclusion

At the moment the troopers began the second round of questioning, they had reasonable suspicion that the Defendant was engaged in criminal activity to justify his continued detention. Additionally, the MDJ properly found probable cause to issue a search warrant to search the car. Therefore, the troopers lawfully obtained the evidence.

ORDER

AND NOW, this _____ day of July, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Omnibus Pretrial Motion be hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Michael C. Morrone, Esquire
Anthony L. Ciuca, Esquire