

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH : No. CR-1686-2013
vs. :
JEREMY KANSKI, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s petition for omnibus pre-trial motion hearing nunc pro tunc.

Defendant was arrested and charged with driving under the influence with a high rate of alcohol and driving under the influence of alcohol when incapable of safely driving as a result of a stop at a sobriety checkpoint on July 5, 2013.

Defendant’s formal arraignment was January 6, 2014. A status conference was scheduled for April 25, 2014. Defense counsel requested a continuance of the status conference, because he realized that an omnibus pretrial motion had not been filed. He filed an omnibus pretrial motion nunc pro tunc on May 2, 2014. In the motion, defense counsel states that he drafted an omnibus pretrial motion on January 24, 2014 and believed that the motion was mailed out for filing. While preparing for the status conference, he noticed that his file did not contain a time-stamped copy of the motion. When he checked the online docket sheet, he discovered that there was no record of the motion being received. Counsel was unable to determine whether this was due to a breakdown in his office or in the mail.

Defense counsel asserted that the issues raised in his attached omnibus pretrial motion are meritorious and an injustice would be done if they were not heard. In the motion,

defense counsel asserted that the police officer lacked probable cause to arrest Defendant and the traffic stop was unlawful because the proper procedures were not taken in administering the roadblock for the sobriety checkpoint.

The attorney for the Commonwealth objected to the untimely filing of the motion. She noted that the motion was not filed until 183 days after formal arraignment and the receipt of discovery. The motion assumed the proper procedures for administering a roadblock were not taken, but the defense never requested any discovery related to the administration of the checkpoint. She argued that the officer's observations, Defendant's failure of standard field sobriety tests, and the results of two preliminary breath tests established ample probable cause to arrest Defendant for DUI. She also argued that defense counsel's failure to file the motion does not constitute "just cause" for the late filing of an omnibus pretrial motion.

Defense counsel admitted he did not specifically request discovery related to the establishment of the roadblock. He indicated that he would withdraw that portion of the motion. To him, the more important issue was the lack of probable cause. He noted that Defendant was stopped as the result of a sobriety checkpoint, and not because of any erratic driving. He also indicated that his interpretation of the video was that Defendant did not fail the field sobriety tests.

DISCUSSION

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs suppression motions and states, in relevant part:

(B) Unless the opportunity did not previously exist, or the interests of justice otherwise require, such motion shall be made only after a case has

been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of evidence shall be deemed to be waived.

Pa.R.Cr.P. 581(B).

Rule 579 requires the omnibus pretrial motion to be “filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.”

Pa.R.Cr.P. 579(A).

Clearly, the motion was not filed within 30 days after arraignment. By his own admission, defense counsel was aware of the grounds for the motion and he had the opportunity to file the motion in a timely manner. Thus, the only issues are whether there was cause shown for the court to extend the time for filing or whether the interests of justice would require the court to hear the motion despite its untimeliness.

While having formerly been a criminal defense attorney, the court is sympathetic to defense counsel’s situation, the court cannot say that there was “cause shown” to extend the time for filing in this case. In the court’s experience, when counsel mails a motion to the clerk of court’s office, it is typically accompanied by a cover letter. There was no mention of such a cover letter in this case. While defense counsel stated that he intended to file the omnibus motion in a timely manner, the court is not convinced that the motion was mailed in this case. The court also is concerned about the precedent that would be set if it held that negligence or mere inadvertence was sufficient to constitute “cause” to permit the untimely filing of suppression motions.

More importantly, however, the court is not convinced that an injustice would result if the motion was not heard. In the motion, the defense sets forth the following facts: Deputy Chief Bentley detected an odor of alcohol coming from Defendant's vehicle and requested Defendant to submit to a PBT; the PBT resulted in a reading of .133%; Defendant was asked to perform standardized field sobriety tests; the first test performed was the Horizontal Gaze Nystagmus (HGN) and Deputy Chief Bentley detected six clues; the Walk and Turn and the One Legged Stand tests were conducted; the officer indicated that Defendant failed both of these tests, but the defense avers that these tests did not indicate sufficient levels of probable cause to arrest; and a second PBT was administered by Chief Solomon that registered .125%.

The reasons why the defense argues that probable cause did not exist are: Deputy Chief Bentley did not see any open or closed alcoholic containers in the vehicle (paragraph 18); Deputy Chief Bentley's suspicion that an odor of alcohol came from Defendant's vehicle "is speculative at best and does not rise to the level of probable cause" (paragraph 19); and in concluding that Defendant did not pass the standardized field sobriety tests, Deputy Chief Bentley did not take steps to eliminate reasonable explanations for the perceptions he observed such as inquiring whether Defendant suffered from any physical deformities or abnormalities before administering the One Legged Stand or whether he even knew how to count to nine (9) before administering the nine-step Walk and Turn test.

The mere fact that Deputy Chief Bentley did not see any open or closed alcoholic containers in the vehicle does not render as speculative his perception that there was an odor of alcohol coming from Defendant's vehicle. Although a PBT result is not

admissible at trial, it can be used in determining probable cause. 75 Pa.C.S. §1547. There is nothing in the omnibus motion which challenges the PBT results. Here, Defendant took two PBTs, which resulted in readings of .133% and .125%. These PBT results are supportive of Deputy Chief Bentley's observation of an odor of alcohol. Defendant was sitting in his vehicle when Deputy Chief Bentley noticed the odor of alcohol. The PBT results suggest that not only was there an odor of alcohol coming from inside the vehicle, but that the odor was likely was coming from **Defendant** due to his ingestion of alcohol.

Deputy Chief Bentley also observed six clues on the HGN test. There is nothing in Defendant's omnibus motion which challenges the HGN test results. HGN results are admissible at a suppression hearing to support probable cause. *Commonwealth v. Weaver*, 76 A.3d 562 (Pa. Super. 2013), appeal granted, 86 A.3d 862 (Pa. 2014).¹

With respect to Defendant's complaints that Deputy Chief Bentley did not inquire about his capabilities to perform the walk and turn and the one legged stand, the court notes that there is no assertion in the omnibus motion that Defendant has any physical deformities or abnormalities or an inability to count to nine (9), which would impair his ability to perform the standard field sobriety tests or skew the results of such tests.²

¹ While the court recognizes that the Pennsylvania Supreme Court has accepted this case for appeal, it is obligated to abide by the decisions of the Pennsylvania Superior Court unless or until they are overturned on appeal. Therefore, even if the court granted Defendant a hearing in this matter, the HGN result would be admissible due to the Superior Court decision in *Weaver*.

² The court is not suggesting that Defendant has any burden of proof in a suppression hearing. The court fully recognizes that the Commonwealth bears the burden of proving to a preponderance of the evidence that the arrest was lawful. The alleged failure of Deputy Chief Bentley to ask these questions, though, would be more significant or weighty, and the need to grant an evidentiary hearing would be greater, if that Defendant actually suffers from a physical or mental infirmity that would affect his ability to perform field sobriety tests.

Moreover, it appears that the defense misapprehends the probable cause standard. Probable cause exists if the facts and circumstances within the knowledge of the police officer at the time of the arrest are sufficient to justify a person of reasonable caution in believing the suspect has committed or is committing a crime. *Commonwealth v. Goldsborough*, 31 A.3d 299, 306 (Pa. Super. 2011). The court must view the totality of the circumstances as seen through the eyes of a trained officer, and not as an ordinary citizen would view them. *Commonwealth v. Nobalez*, 805 A.2d 598, 600 (Pa. Super. 2002). It is only the probability, and not a prima facie showing, of criminal activity, that is the standard of probable cause. *Commonwealth v. Thompson*, 604 Pa. 198, 985 A.2d 928, 931 (2009). Probable cause exists when criminality is one reasonable inference; it need not be the only inference. *Commonwealth v. Burnside*, 625 A.2d 678, 681 (Pa. Super. 1993).

One does not have to be falling down drunk to fail standardized field sobriety tests. Some of the clues are subtle and would not be readily apparent to an ordinary citizen. For example, an individual can fail the walk and turn test before he even takes the first step if he fails to stand with one foot in front of the other heel to toe while the officer explains the test and if he raises his arms a few inches from his side. Other clues include not touching heel to toe on each step, not taking the correct number of steps, and not turning around in the manner demonstrated by the officer.

Given the odor of alcohol, the PBT results and the HGN test results, Deputy Chief Bentley would have had a basis to detain Defendant and ask him to submit to a blood test even if the video showed that Defendant performed fairly well on the one legged stand and the walk and turn tests.

Finally, even if the court does not hold an evidentiary hearing on Defendant's untimely omnibus pretrial motion, Defendant is not without recourse. If Defendant is convicted, he could allege in post-trial motions that the court erred in failing to permit the filing of the omnibus pretrial motion nunc pro tunc, which would give the court the opportunity to reconsider this decision after the evidence is disclosed at trial. Defendant also would have the opportunity to challenge defense counsel's failure to file a timely omnibus pretrial motion in a Post Conviction Relief Act (PCRA) petition at the conclusion of any direct appeal in this case.

Under all the facts and circumstances of this case, the court does not believe the interests of justice require the court to hold an evidentiary hearing on Defendant's untimely omnibus pretrial motion.

ORDER

AND NOW, this ___ day of August 2014, the court denies Defendant's petition for omnibus pre-trial motion hearing nunc pro tunc.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Timothy Barrouk, Esquire (APD)
3601 Vartan Way, 2nd Floor, Harrisburg, PA 17110
Work file
Gary Weber, Esquire (Lycoming Reporter)