

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1851-2014
v.	:	
	:	
ELLIOTT PAUL EISWERTH,	:	CRIMINAL DIVISION
Defendant	:	

OPINION AND ORDER

On December 30, 2014, the Defendant filed an omnibus pre-trial motion. A hearing on the motion was held on February 3, 2015.

I. Background

A. Jamie Diemer’s Testimony

On October 2, 2014, Jamie Diemer (Diemer) was driving her car and making a left turn into the left lane of the two southbound lanes of Lycoming Creek Road. At the same time that Diemer was turning, a maroon Durango (Defendant’s vehicle) was turning right onto the southbound lanes of Lycoming Creek Road. The Defendant’s vehicle made a wide turn and almost hit Diemer’s car in the left southbound lane. The Defendant’s vehicle sped up after it almost hit Diemer’s car. Diemer tried to stay behind the Defendant’s vehicle, but because of traffic and traffic lights, she was next to the vehicle at some point. The Defendant’s vehicle almost hit Diemer’s car three times as it was travelling on Lycoming Creek Road. The Defendant’s vehicle was “going fast,” “swerving into other lanes,” and “speeding up on cars.” At least once, the Defendant’s vehicle went into the northbound lanes of Lycoming Creek Road to pass cars.

Diemer saw a yellow truck make a left turn out of the parking lot of the Crippled Bear. The yellow truck began to travel in the northbound lanes of Lycoming Creek Road. The left

front part of the Defendant's vehicle hit the driver's door of the yellow truck. The impact caused the yellow truck to flip three times. The truck eventually stopped in the middle of the road. A boy got out of the Defendant's vehicle and said, "Daddy was driving too fast." Diemer told a police officer what she saw.

B. Corporal Timothy Repp's Testimony

Corporal Timothy Repp (Repp) has been a police officer with Pennsylvania State Police for over 10 years. On October 2, 2014, Repp responded to a crash on Lycoming Creek Road. The crash involved a maroon Durango, which belonged to the Defendant, and a yellow pick-up truck. When Repp arrived at the scene, both vehicles were in the center of the road and facing south.

Repp approached the Defendant, who was in the back of an ambulance. Repp did not recall seeing any blood on the Defendant, cuts on the Defendant, or injuries to the Defendant's head. Repp did notice that the Defendant's eyes were bloodshot. The Defendant was on a backboard and his head was secured, but Repp did not believe that the Defendant was too injured to answer questions. Repp asked the Defendant what happened, and the Defendant shook his head no. Repp noticed that the Defendant was holding his breath, which Repp believed was suspicious and an attempt to cover up an odor of alcohol.

Repp saw three beer cans on the passenger-side floor of the Defendant's vehicle. One of the cans was open, and Repp could smell alcohol inside the vehicle. Repp could not tell if the beer can had been opened before the crash or on impact.

Repp interviewed witnesses, including Diemer. He found Diemer to be a reliable witness but noted that Diemer was "off" on a few details. Repp testified that Diemer was incorrect in saying that the yellow truck had completely cleared the two southbound lanes of Lycoming

Creek Road. Repp cited the yellow truck's driver for pulling out in front of the Defendant's vehicle because the driver had a duty to yield to other vehicles even if the vehicles were in the wrong lane. Repp believed that the tires of the Defendant's vehicle were over the yellow line. Repp applied for and obtained a warrant to search the Defendant's medical records to discover the Defendant's blood alcohol content (BAC).

C. Defendant's Arguments

The Defendant argues that "[t]he search warrant is defective as there was no probable cause for Cpl. Repp to believe the Defendant was acting in any illegal manner." This argument seems to be a general attack on the validity of all of the statements in the affidavit of probable cause. During the hearing, the Defendant argued that Diemer was not credible and her observations should have made Repp question her credibility. The Defendant notes that Diemer testified that the Defendant almost hit her car three times, but she could specifically describe only one time when the Defendant almost hit her car. The Defendant argues that he could not have almost hit Diemer's car three times because, as Diemer testified, she was behind the Defendant. The Defendant contends that Diemer was not credible because she testified that the yellow truck was not at fault, but Repp cited the driver of the yellow truck. Finally, the Defendant argues that the trooper was incorrect in concluding that the Defendant not answering questions was suspicious. He argues that the Defendant may have been too injured to realize that Repp was asking him questions. The Defendant asks the Court to suppress the evidence found as a result of the search of the Defendant's medical records.

II. Discussion

“At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).”

Pa.R.Crim.P. 203(D). “[A] defendant at a suppression hearing has the right to test the veracity of the facts recited in the affidavit in support of probable cause.” Commonwealth v. James, 69 A.3d 180, 187 (Pa. 2013). “While the court [cannot] venture outside the four corners of the affidavit in deciding whether probable cause existed, it is still the Commonwealth’s burden to prove the validity of the statements contained in the affidavit and this can only be done by real, live witnesses who are subject to cross-examination by the defendant.” Id. at 189 (quoting Commonwealth v. Ryan, 407 A.2d 1345, 1348 (Pa. Super. 1979)).

The Court finds that the testimony of Repp and Diemer established the validity of the following facts in the affidavit in support of probable cause:

[Repp] attempted to interview [the Defendant] in the rear of an ambulance and [the Defendant] refused to say anything at all and appeared to be holding his breath.

Repp believed it was suspicious that the Defendant refused to say anything at all.

[Repp] then inspected [the Defendant’s] vehicle and noted that there were three Labatt Blue beer cans on the passenger side floor. One can was open and the inside of the vehicle smelled strongly of alcohol. [Repp] could not determine if the open beer can had been opened prior to the crash or if the can had ruptured in the collision.

Diemer observed that the Defendant was driving erratically and “all over the road.”

Diemer saw the Defendant drive into an oncoming traffic lane shortly before the crash.

During the hearing, Repp testified to the following:

He asked the Defendant what happened, and the Defendant shook his head no. Repp noticed the Defendant was holding his breath. Repp did not believe the Defendant was too injured to answer his questions; he noted that the Defendant shook his head no after being questioned about what happened. Repp saw three beer cans on the passenger-side floor of the Defendant’s vehicle. One of the cans was open, but Repp could not tell

whether the can had been opened before the crash or on impact. Repp could smell alcohol inside the vehicle.

Diemer testified to the following:

The Defendant's vehicle almost hit her car when she was turning onto Lycoming Creek Road. The Defendant was swerving into other lanes and speeding up on cars. At least once, the Defendant drove into the oncoming traffic lane to pass cars. Diemer told a police officer what she saw.

The testimony of Repp and Diemer established the validity of all but two facts in the affidavit. It did not establish that the Defendant was "up [Diemer's] tail." In addition, it did not establish that the Defendant went into the oncoming traffic lane *to pass Diemer's car*. "[I]f a search warrant is based on an affidavit containing deliberate or knowing misstatements of material fact, the search warrant is invalid." Commonwealth v. Clark, 602 A.2d 1323, 1325 (Pa. Super. 1992). "A material fact is one without which probable cause to search would not exist." Commonwealth v. Tucker, 384 A.2d 938, 941 (Pa. Super. 1978).

That the Defendant was "up Diemer's tail" and went into the oncoming traffic lane *to pass Diemer's car* are not material facts because probable cause to search the Defendant's medical records existed without those facts. "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010). Diemer told Repp that she observed the Defendant driving erratically and saw the Defendant drive into the oncoming lane of traffic. Diemer's observations were reasonably trustworthy because Diemer told Repp that she had seen the Defendant driving. Repp believed it was suspicious that the Defendant held his breath and did not answer questions. Repp saw three beer cans on the

passenger-side floor of the Defendant's vehicle. Such facts and circumstances established probable cause to search the Defendant's medical records to discover his BAC.

III. Conclusion

The Commonwealth established the validity of all but two facts in the affidavit. The two facts are not material because probable cause to search the Defendant's medical records existed without those two facts.

ORDER

AND NOW, this _____ day of April, 2015, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Omnibus Pre-Trial Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge