

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-1743-2014

:

vs.

:

: **Opinion and Order re**

: **Defendant's Omnibus Pretrial Motion**

HOLLY SCHON,

:

Defendant

:

OPINION AND ORDER

By Information filed on November 14, 2014, Defendant is charged with driving under the influence of alcohol and related traffic summaries. The charges arise out of an incident that allegedly occurred on August 23, 2014 after Defendant's vehicle was stopped by Trooper Scott Maskowski of the Pennsylvania State Police.

Defendant subsequently filed an omnibus pretrial motion which consisted of a motion to suppress. Defendant alleges that Trooper Maskowski had neither probable cause nor reasonable suspicion to stop her vehicle and accordingly, all evidence seized following such illegal stop should be suppressed.

A hearing on Defendant's omnibus pretrial motion took place on January 21, 2015. At said hearing, the court heard the testimony of Trooper Maskowski and also viewed the in-car video from his patrol unit which was marked as Commonwealth Exhibit 1.

The court will first note its observations with respect to the in-car video. The video starts with a time of 35:27. The trooper's vehicle is following another vehicle approximately seven to ten car lengths behind it. The vehicle is rounding a slight curve and appears to be driving on a portion of the center double yellow line. As the curve starts to straighten out and as the vehicles continue, the suspect vehicle clearly cuts the corner and

drives on the center double yellow line.

The vehicles continue down the roadway. After approximately 42 seconds, the subject vehicle drifts over to the right fog line and appears to touch the line. As the road straightens out, the suspect vehicle continues in the middle of the roadway.

Soon thereafter, the roadway turns to the right and while turning the suspect vehicle again touches the white fog line.

Approximately a minute and ten seconds into the video, the suspect vehicle passes a speed limit sign indicating a speed limit of 45 mph. A minute and 29 seconds into the video, the vehicle turns left onto an adjacent public roadway. The suspect vehicle properly utilized its turn signal and appears to have taken the turn in a proper manner. After entering the adjacent roadway, the suspect vehicle passes a speed limit sign indicating a posted speed of 40 mph. Approximately two minutes and 25 seconds into the video, the suspect vehicle appears to slow down markedly.

Two minutes and 40 seconds into the video, as the roadway curves left, the suspect vehicle clearly cuts the turn short and again drives on the center double yellow lines. Approximately 2 minutes and 53 seconds into the video as the road way curves to the right, the vehicle takes the curve wide and again appears to at least touch the center yellow double lines.

Approximately three minutes and 30 seconds into the video, the suspect vehicle's right turn signal comes on. Shortly thereafter, the suspect vehicle turns right onto an adjacent roadway. The right turn appears to have been proper but at a very slow rate. The posted speed limit on this roadway is 35 mph.

Approximately four minutes and 20 seconds into the video, a trooper is heard remarking about the suspect vehicle's driving. One trooper indicates at that time the "speed alone" is apparently reason enough to stop the vehicle. However, the trooper chooses to continue to follow the vehicle.

Approximately five minutes and nine seconds into the video while the roadway slightly turns right and uphill, the suspect vehicle appears again to travel over a portion of the center double yellow lines. Approximately five minutes and 14 seconds into the video, one can hear one of the troopers state "take it" at which time the troopers proceed with stopping the suspect vehicle.

Approximately five minutes and 45 seconds into the video, one can hear the troopers conversing with each other about Defendant's speed "earlier." The one trooper states "what was she doing back there?" The troopers remark that she was doing 25 in either a 40 or 45 mph zone.

The first roadway being traveled by the suspect vehicle had a speed of 45 mph as posted and as seen on the video. The second roadway had a posted speed of 40 mph as seen on the video. The third roadway had a posted speed limit of 35 mph as depicted on the video. Right when the troopers decide to "take" the suspect vehicle, the speed limit changes to 25 mph.

Trooper Scott Maskowski testified on behalf of the Commonwealth. He is employed by the Pennsylvania State Police as a trooper. He was on duty on August 28, 2014 and partnered with Trooper Daniel Switzer. Trooper Switzer was operating the patrol vehicle while Trooper Maskowski was sitting in the front passenger seat "observing."

At approximately 2:45 a.m., they were traveling north on Northway Road Extension in Lycoming County when they noticed a vehicle ahead of them. They noticed that the vehicle was traveling at a slow rate of speed and decided to follow it.

They followed the vehicle for approximately five minutes prior to deciding to stop it. According to Trooper Maskowski, he stopped the vehicle because it crossed the center double yellow lines on several occasions and it was driving at a low rate of speed, approximately 25 mph, in both a 45 and 40 mph zone.

Trooper Maskowski concluded that Defendant committed two traffic violations. The first consisted of driving on roadways laned for traffic and the second consisted of driving at an unsafe speed.

Additionally, Trooper Maskowski testified that prior to stopping the vehicle he became aware that the registered owner of the vehicle had her license suspended because of a prior DUI offense. According to Trooper Maskowski, the license was still under suspension. In considering this along with the above-referenced motor vehicle violations, Trooper Maskowski suspected that the driver of the vehicle may have been driving while impaired.

With respect to the conditions that evening, he testified that the incident happened at night, there was some mist in the air as well as a slight drizzle. As well, the roadway was a little “bit wet” although he had no problem with observing the lines on the roadway.

The preliminary hearing transcript includes testimony that Trooper Maskowski has been employed with the Pennsylvania State Police “for about 2 ½ years.” He

noted that Defendant's vehicle was "driving slow and crossed over the center line." He conceded that there were no other driving violations that he observed prior to the vehicle being stopped.

In recent years, the applicable standard for traffic stops has evolved. In order to make a constitutional vehicle stop for a violation of the Motor Vehicle Code, or a violation of the law to which further investigation is not warranted, an officer must have probable cause. Commonwealth v. Feczko, 10 A.3d 1285, 1290 (Pa. Super. 2010), citing Commonwealth v. Chase, 960 A.2d 108, 115-116 (Pa. 2008).

As stated by the Feczko Court: "Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, 'it is incumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, *which would provide probable cause to believe that the vehicle or driver was in violation of some provision of the Code.*'" Feczko, 10 A.3d at 1291(emphasis original).

Defendant argues that Trooper Maskowski did not have probable cause to believe that she was in violation of the provisions of the Vehicle Code requiring drivers to drive on roadways laned for traffic, to drive vehicles at a safe speed and to not engage in careless driving.

"Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent individual in believing that an offense was committed and the defendant has committed it." Commonwealth v. Griffin, 24 A.3d 1037, 1042 (Pa. Super. 2011). In determining whether probable cause exists, the court must

consider the totality of the circumstances as they appear to the arresting officer. “Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily even the most likely inference.” Commonwealth v. Lindbloom, 854 A.2d 604, 607 (Pa. Super. 2004), citing Commonwealth v. Stroud, 699 A.2d 1305, 1308 (Pa. Super. 1997).

Pursuant to 75 Pa. C.S.A. § 3309 (1), “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.”

Defendant argues that on the night in question even though the tires to Defendant’s vehicle may have touched the yellow center lines, it was night time, the roadways were narrow and winding, there were no other vehicles traveling on the roadway, there were no other vehicles parked on the side of the roadway, there were no pedestrians traveling on the roadway and the roadway presented particular hazards at night time including wild animals darting across it. Accordingly, Defendant argues that her vehicle was driven as nearly as practicable within a single lane.

In support of his argument, Defendant cites a few different cases including Commonwealth v. Gleason, 567 Pa. 111, 785 A.2d 983 (2001) and Commonwealth v. Enick, 70 A.3d 843 (Pa. Super. 2013).

In Gleason, the Supreme Court concluded that the trooper had no justifiable basis for stopping the defendant for an alleged violation of driving on roadways laned for traffic when the defendant’s vehicle crossed the berm line by six to eight inches on two occasions for a period of a second or two over a distance of approximately one-quarter of a

mile.

In Enick, the officer stopped the defendant's vehicle for failing to drive within a single lane, in accordance with § 3309 (1) of the Vehicle Code. The Superior Court concluded that the officer had probable cause to stop the defendant for a violation of said Vehicle Code provision because "half of Enick's vehicle crossed over the double yellow center line onto an oncoming lane of traffic and remained there for three seconds." 70 A.3d at 848. The Court further noted that "Enick's driving plainly posed a safety hazard, with half of her vehicle protruding into an oncoming lane as Rhyslop's vehicle approached from the opposite direction." Id.

Defendant urged the Court to thoroughly review the in-car camera videotape arguing that such was the best evidence as to Defendant's driving that evening.

When the video first starts, it is clear that Defendant's left tires are driving on the center yellow double line as the roadway turns left. At the time of this driving, it does not appear to be a safety hazard. It appears to last at least five to seven seconds. Approximately 44 seconds into the video while the roadway is turning to the left, Defendant's vehicle drives to the right and the right tires touch the edge of the white fog line. This lasts about four seconds. Again, it does not appear that there is a safety hazard by this driving.

Approximately one minute in, as the roadway turns to the right, the right tires of Defendant's vehicle again touch the white fog line. Although they do not cross it, the tires seem to be riding on the line. This lasts for approximately four to five seconds.

Approximately a minute and 58 seconds in, after the vehicle turns left onto an

adjacent roadway, it appears to be again driving on the center yellow double lines. The left tires of the vehicle are riding on the center double yellow lines. This is momentary, perhaps a few seconds. Again, this driving does not appear to constitute a safety hazard. Approximately three minutes in as the roadway turns left, it appears that the left tires of the vehicle again start to ride on the center double yellow lines. This appears to last for approximately three to four seconds. Yet again, this does not appear to be a safety hazard.

Finally, approximately five minutes and six seconds into it, as the roadway turns left, Defendant's vehicle again starts to ride on the yellow double lines. The left tires are on the yellow lines. Defendant seems to drive on the yellow line for at least five seconds at which time the one trooper states "take it" and the stop is initiated. The Defendant's driving at this time again does not present a safety hazard.

In total, there appear to be at least four occasions when the left tires of Defendant's vehicle touch or ride on the yellow center lines and at least two occasions when the right tires of Defendant's vehicle touch or ride on the right white fog line.

In evaluating the totality of the circumstances, the Court finds that they are more similar to Gleason than they are to Enick. There was no other traffic on the roadway, no safety hazards were created by Defendant with respect to other vehicles, there were significant distances and times within which Defendant did drive within her lane, and Defendant never fully crossed the center line or the right fog line.

Accordingly, the Court agrees with Defendant that there was insufficient probable cause to conclude that she violated 75 Pa. C.S.A. § 3309, driving on roadways laned for traffic.

Pursuant to 75 Pa. C.S.A. § 3361, no person is permitted to drive a vehicle at a speed greater than is reasonable and prudent under the circumstances. As well, every person must drive at a safe and appropriate speed when driving according to the conditions and hazards of the roadway. The court cannot conclude that Trooper Maskowski had sufficient probable cause to believe that Defendant violated this provision of the Vehicle Code.

Clearly, the vehicle was not driven at a speed **greater** than was reasonable or prudent. As well, there was no evidence that it was not driven at a safe and appropriate speed. Despite the trooper's conclusion that the vehicle was being driven below the speed limit, there is no evidence to suggest that driving at this slow of a speed somehow presented a safety hazard to other vehicles or pedestrians. Moreover, there was no evidence to conclude that the driving under the speed limit constituted a hazard of any kind under any circumstance.

The Commonwealth also contends that Trooper Maskowski had probable cause to stop Defendant's vehicle for violating the Vehicle Code provision regarding careless driving. In order for one to be convicted of careless driving, the Commonwealth must prove that the vehicle was driven with "careless disregard for the safety of persons or property." 75 Pa. C.S.A. § 3714. The Court cannot conclude that there was probable cause to stop Defendant's vehicle for careless driving. While careless driving does not require willful or wanton conduct, it requires more than ordinary negligence or the mere absence of care under the circumstances. Commonwealth v. Gezovich, 7 A.3d 300, 301 (Pa. Super. 2010). Moreover, and determinatively, none of Defendant's driving even remotely exhibited a careless disregard for the safety of persons or property.

In sum, the Court concludes and agrees with Defendant that Trooper Maskowski lacked probable cause to stop Defendant's vehicle for a violation of any of the motor vehicle violations charged against her. This does not however end the inquiry.

Trooper Maskowski testified and it is clear from both the preliminary hearing transcript and the statements made on the video from the in-car camera that he suspected that Defendant might have been impaired at the time she was driving. Trooper Maskowski's suspicions were based upon Defendant's driving, the time of night and the fact that the registered owner of the vehicle had a DUI-related suspension that was apparently still in effect.

If a police officer is making a traffic stop for an offense where he has a reasonable expectation of learning additional evidence related to the suspected activity, the stop needs to be supported by reasonable suspicion. Feczko, 10 A.3d at 1290-91.

In order to establish reasonable suspicion, the officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts that lead the officer to believe that criminal activity is afoot. See Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 677 (1999). Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest. Commonwealth v. Brown, 606 Pa. 198, 996 A.2d 473, 477 (2010). "In order to determine whether the police had a reasonable suspicion, the totality of the circumstances-the whole picture-must be considered. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the person stopped of criminal activity." In the Interest of D. M., 566 Pa. 445, 781 A.2d 1161, 1163 (2001) (citation omitted).

“Extensive case law supports the conclusion a vehicle stopped for DUI may be based on reasonable suspicion, as a post-stop investigation is normally feasible.” Commonwealth v. Chase, 960 A.2d 108, 116 (Pa. 2008). Reasonable suspicion is required in order that the individual’s privacy rights may not be violated but also to permit the officer to shed light on relevant matters that the stop would be expected to produce. Chase, 960 A.2d at 115 and 120-21.

Defendant argues that the Court must “peel away the layers” in determining reasonable suspicion. Defendant argues that if none of the layers are sufficient to establish reasonable suspicion then all of them collectively cannot be sufficient to establish reasonable suspicion. Defendant further argues that prior to stopping a vehicle the officer must establish an actual violation of the Vehicle Code.

Despite providing the Court with case citations which Defendant claimed supported her position as set forth above, there are in fact no cases that support Defendant’s position. First, it is clear that an officer need not establish an actual violation of the Vehicle Code before stopping a vehicle. Commonwealth v. Bowersox, 450 Pa. Super. 176, 675 A.2d 718, 721 (1996). A police officer need not establish a violation of the Vehicle Code; the police officer must only have reasonable suspicion to believe that a violation of the Motor Vehicle Code is occurring or has occurred. Commonwealth v. Holmes, 14 A.3d 89, 95 (Pa. 2011).

Furthermore, and directly contrary to what Defendant argues, “[A] combination of circumstances, none of which taken alone would justify a stop, may be sufficient to achieve reasonable suspicion.” Commonwealth v. Riley, 715 A.2d 1131, 1135

(Pa. Super. 1998). “Merely because a suspect’s activity may be consistent with innocent behavior does not alone make detention and limited investigation illegal.” Id. As stated earlier, in order to establish reasonable suspicion, the officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts that lead the officer to believe that criminal activity is afoot. Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 677 (1999).

A stop may be based on an officer’s observation of erratic driving. Commonwealth v. Starr, 739 A.2d 191, 195 (Pa. Super. 1999). Under the circumstances of this case, the Court concludes that Trooper Maskowski relayed specific and articulable facts giving rise to a reasonable suspicion that Defendant was driving under the influence. His reasonable suspicion was more than a hunch. The erratic driving by Defendant was more than slight, minimal or subtle. The driving misconduct of Defendant was not equivalent to a fleeting transgression or a momentary lapse.

At the time Trooper Maskowski decided to pull Defendant over, he had followed her for approximately five miles. During that time, Defendant’s vehicle not only occasionally weaved within its lane but actually drove on the center double yellow lines at least three if not on four occasions, drove on the white fog line on two occasions, drove between 10 to 15 miles slower than the posted speed limit when there was apparently no reason to do so and Trooper Maskowski was aware that the registered owner of the vehicle had a prior DUI related suspension.

Under these circumstances not only was Trooper Maskowski justified in stopping the Defendant’s vehicle to investigate further but was obligated to do so. While in

fact there were no vehicles on the roadway, Trooper Maskowski was not obligated nor should he have waited until a vehicle was approaching from the other direction and round a corner at which time the Defendant cutting the corner closely might have caused an accident.

“Because of the severe consequences of drunken driving in terms of roadway deaths, injuries, and property damage, both the United States Supreme Court and [the Pennsylvania Supreme Court] have recognized that the government has a compelling interest in detecting intoxicated drivers and removing them from the roads before they cause injury.” Commonwealth v. Beaman, 583 Pa. 636, 880 A.2d 578, 583 (2005)(citations omitted). Further, “[b]ecause a motorist’s extreme mobility may otherwise allow him to avoid police confrontation, the State has an equally strong interest in these cases in stopping the moving vehicle to freeze momentarily a situation of suspected criminality.” Commonwealth v. Murray, 460 Pa. 53, 331 A.2d 414, 418 (1975).

While the Court concedes that there are cases on both ends of the spectrum and that the facts in this case are not at such ends, the Court concludes that the facts of this case are more like those in which the Court has found reasonable suspicion than not. See, for example, Sands, 887 A.2d 261 (Pa.Super. 2005) (defendant drifted across a clearly visible fog line three times by approximately three feet and then slowly drifted back); Commonwealth v Baumgardner, 767 A.2d 1065 (Pa. Super. 2001), reversed on other grounds, 796 A.2d 965 (Pa. 2002) (defendant was followed for approximately two miles during which time defendant’s vehicle weaved from side to side in the right-hand lane “more or less for that entire distance”); Commonwealth v. Masters 737 A.2d 1229 (Pa. Super. 1999) (defendant made repeated, unwarranted lane changes); Commonwealth v. Montini 712 A.2d

761 (Pa. Super. 1998) (defendant was observed weaving within his lane of traffic and also crossed the double yellow center line of the roadway); Commonwealth v. Lawrentz, 683 A.2d 303 (Pa. Super. 1996) (defendant was weaving and swaying and crossed the center line of the road on two occasions).

ORDER

AND NOW, this ___ day of February 2015 following a hearing and argument, Defendant's Motion to Suppress is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Aaron Biichle (ADA)
William Miele, Esquire (PD)
Gary Weber, Esquire (Lycoming Reporter)
Work file