

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR- 941-2015
 :
 JAMES C. SWEETING, III, :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on June 26, 2015 with driving under the influence of alcohol, both incapable of safe driving and driving with an alcohol concentration in his blood of at least .10 %, as well as traffic summaries.

Defendant filed an Omnibus Pretrial Motion on August 17, 2015. The hearing on said motion was held before the Court on December 9, 2015.

Defendant raises two issues in his motion. First, Defendant contends that the stop of his vehicle was illegal in that there was insufficient reasonable suspicion or probable cause. Second, Defendant contends that after he was stopped and the incident was investigated, he was placed in custody and arrested. Defendant argues that his arrest was illegal in that there was insufficient probable cause.

Trooper Adam Kirk testified at the hearing. He was on duty in full uniform on February 26, 2015. He was patrolling with Trooper Tyler Morse.

Trooper Kirk has been employed by the Pennsylvania State Police for more than nine years. He has vast training and experience in DUI detection, apprehension, investigation and prosecutions. He has handled well over 200 DUI cases during his career.

At approximately 12:30 in the morning, he was traveling westbound on Interstate 180. He observed a vehicle in front of him driving erratically. Specifically, over a short distance, the vehicle swerved on the right fog line, drove at the very least on rumble strips on the right side of the roadway, and then traveled on the left dotted line.

The court had an opportunity to review Trooper Kirk's dash-cam video, which confirmed Trooper Kirk's observations. Trooper Kirk is heard on the dash-cam as being concerned that he did not want the driver to crash and in light of the poor driving, the driver should be pulled over.

As the lights on Trooper Kirk's vehicle were activated, the vehicle was traveling off of an exit ramp. The vehicle did not immediately pull over but continued to the intersection, took a right, and then parked in the Burger King parking lot.

Trooper Kirk spoke with the driver who was identified as Defendant. Defendant indicated that the vehicle's alignment was "out" which caused the vehicle "to jerk."

In conversing with Defendant, Trooper Kirk noticed Defendant's speech was somewhat slurred. He also smelled the odor of an alcoholic beverage coming from the vehicle. He asked Defendant if he had anything to drink. Defendant initially avoided answering the question and then eventually he claimed that he had nothing to drink. Shortly thereafter, however, Defendant admitted that he "had one."

Trooper Kirk conducted three standard field sobriety tests including the horizontal gaze nystagmus (HGN) test, the walk and turn, and the one-legged stand test.

There were clues on two of the tests indicating some level of impairment. The results of the one-legged stand test were “satisfactory.”

Trooper Kirk then administered a preliminary breath test (PBT). Trooper Kirk testified as to the make and/or model of the test equipment and the fact that it was listed as an approved testing device in the “PA Bulletin.” The PBT results confirmed Trooper Kirk’s suspicion of impairment.

In getting a chance to interact closely with Defendant, Trooper Kirk noted that Defendant had glassy and bloodshot eyes and that there was a moderate odor of an alcoholic beverage coming from Defendant.

Trooper Tyler Morse also testified. He confirmed Trooper Kirk’s testimony and specifically referenced Defendant’s erratic driving. He noted that in his opinion, Defendant violated the Vehicle Code provision requiring drivers to drive on roadways laned for traffic, 75 Pa. C.S.A. § 3309.

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 encumbent [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).

In this case, the Court concludes that the troopers had both probable cause to stop Defendant’s vehicle for a violation of section 3309, as well as reasonable suspicion to stop Defendant’s vehicle to further investigate whether Defendant was impaired.

“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)).

The Vehicle Code requires a vehicle to “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.” 75 Pa. C.S.A. § 3309 (1).

The court finds that the troopers had probable cause to stop Defendant’s vehicle and cite Defendant for violating this provision of the Vehicle Code. The totality of the circumstances as seen through the eyes of these two trained officers warranted them in

believing that Defendant committed the traffic offense.

Specifically, over a very short period of time and over a very short distance, Defendant drove partially out of his lane on three separate occasions. Defendant actually drove on the rumble strips. Obviously, this would have gotten Defendant's attention so as to cause him to drive far more carefully. Yet, in a matter of seconds, Defendant drove over the dotted line on the other side of the roadway. Clearly, Defendant was not driving his vehicle in his lane of traffic as reasonably practical. See *Commonwealth v. Mickley*, 846 A.2d 686 (Pa. Super. 2004)(officer had probable cause to stop vehicle that weaved within its lane for several miles and then crossed the fog line four times in three-quarters of a mile).

Alternatively, the court concludes that the officers had reasonable suspicion to stop Defendant for suspected driving under the influence.

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). "Merely because a suspect's activity may be consistent with innocent behavior does not alone make detention and limited investigation illegal." *Commonwealth v. Riley*, 715 A.2d 1131, 1135 (Pa. Super. 1998) (citation omitted). "[A] combination of circumstances, none of which taken alone would justify a stop, may be sufficient to achieve a reasonable suspicion." *Id.*

Certainly, Defendant's erratic and illegal driving in the early morning hours over a short distance and a short period of time justified the officers in believing that

Defendant may have been engaged in criminal activity, namely impaired driving. Defendant's conduct supported the limited investigation. In fact, the officers were required to act in order to determine what was causing Defendant's poor driving. Was it about alignment as Defendant eventually alleged? Was it some sort of medical problem Defendant was experiencing? Was it that Defendant was impaired from alcohol or controlled substances? The officers were not required to wait until Defendant endangered other motorists or himself further.

Accordingly, the court finds that the stop of Defendant's vehicle was justified and not in violation of Defendant's constitutional rights.

Defendant further submits that probable cause did not exist for his arrest. The Commonwealth contends that there were numerous factors which constituted sufficient probable cause to arrest Defendant for driving under the influence.

First, Defendant drove erratically and violated the Vehicle Code. Next, Defendant did not stop his vehicle when the police first activated their lights. Defendant drove a short distance, turned right and then stopped. Next, Defendant was evasive when answering the question on whether he had been drinking. Defendant lied initially and then eventually admitted to drinking one. There was a moderate odor of an alcoholic beverage on Defendant's breath and his eyes were glassy and bloodshot. While not determinative, there were indicators of impairment in connection with the field sobriety tests. Defendant's PBT result also corroborated the trooper's suspicion of impairment.

Taking into account the observations of Trooper Kirk along with his

experience and training related to DUI traffic stops, the court concludes that he had probable cause to arrest Defendant for driving under the influence. While Defendant may not have done particularly poorly on the field sobriety tests, and while at least some of the tests may not have been administered entirely properly, failing a standard field sobriety test is not a requirement for a determination for probable cause. *Commonwealth v. Slonaker*, 795 A.2d 397, 402 (Pa. Super. 2002). It is of no moment that the test could not ascertain with certainty a particular blood alcohol content or the degree to which Defendant may have been impaired; they are not meant to do so. They are meant only to provide the officer with information useful to determine whether the driver is impaired. *Commonwealth v. Ragan*, 652 A.2d 925, 928 (Pa. Super. 1995). With respect to the PBT results, both statutory and case law support the utilization of PBT results in determining probable cause. 75 Pa. C.S.A. § 1547 (k); *Commonwealth v. Semuta*, 902 A.2d 1254, 1260 (Pa. Super. 2006). The only condition of such is that the officer must use a device approved by the Department. 75 Pa. C.S.A. § 1547 (k). Trooper Kirk credibly testified that the device that he utilized was approved by the Department. Further, the court finds that the device used by the trooper, an Intoximeter, is an approved device. 45 Pa. Bull. 79 (January 3, 2015).

Given all of the observations and conclusions as set forth above, the court does not hesitate in finding sufficient probable cause to arrest Defendant. In fact, numerous cases have found probable cause under similar circumstances. See *Commonwealth v. Levesque*, 364 A.2d 932 (Pa. 1976) (evidence that the defendant was weaving and struck a parked car, had an odor of alcohol on his breath and a general lack of coordination

sufficient). *Commonwealth v. Slonaker*, supra. (erratic driving, odor of alcohol and bloodshot, glassy eyes sufficient); *Commonwealth v. Rehmeier*, 502 A.2d 1332, 1335 (Pa. Super. 1985) (officer noticed that the defendant drove through red light, had a heavy odor of alcohol on his breath and had difficulty locating his driver's license, all of which were sufficient to establish probable cause); *Commonwealth v. Monaghan*, 441 A.2d 1318 (Pa. Super. 1982) (vehicle accident, staggering gait, slurred speech and odor of alcohol sufficient).

ORDER

AND NOW, this ___ day of December 2015, the court DENIES Defendant's omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Anthony Ciuca, Esquire (ADA)
Timothy Barrouk, Esquire
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Work file