

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**ANTHONY MARCHESE,  
Defendant**

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**CR-712-2016**

**OPINION AND ORDER**

On June 21, 2016 Defendant's Counsel, filed an Omnibus Pretrial Motion in the form of a Petition for Habeas Corpus and Motion to Suppress. The Court heard argument on the Motion on August 16, 2016.

**Background**

Anthony Marchese (Defendant) is charged with Possession of a Small Amount of Marijuana<sup>1</sup>; Possession of Drug Paraphernalia<sup>2</sup>; Driving Under the Influence of a Controlled Substance<sup>3</sup> and various summary offenses. The charges stem from an incident that occurred on November 29, 2015.

**Testimony of Trooper Adam Kirk**

The Commonwealth's first witness at the Preliminary Hearing was Pennsylvania State Trooper Adam Kirk (Kirk).<sup>4</sup> On November 29, 2015, Kirk was driving westbound on Brandon Ave. N.T., 4/21/16, at 1. At approximately 12:39 a.m., the Defendant was operating a motor vehicle in the City of Williamsport when Kirk stopped his vehicle. He observed a white vehicle come out of an alley just east of Cherry St. The vehicle did

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<sup>1</sup> 35 P.S. § 780-113(a)(31)(i).

<sup>2</sup> 35 P.S. § 780-113(a)(32).

<sup>3</sup> 75 Pa.C.S. § 3802(d)(2).

<sup>4</sup> The Commonwealth submitted into evidence with no objection from the Defense as Commonwealth's Exhibit 1, a DVD of the traffic stop, and Commonwealth's Exhibit 2, a transcript of the Preliminary Hearing.

not stop at the intersection and made a right turn on Brandon Ave. The driver of the vehicle (Defendant) did not activate a turn signal before making the right turn onto Brandon Ave. Kirk and his partner followed Defendant's vehicle in their vehicle and pulled him over on Cherry St.

Kirk has been employed by the Pennsylvania State Police for 9.5 years. N.T., 4/21/16, at 1. Kirk testified that that he has been certified as an expert on the MDJ level but not on the Common Pleas level and that he has testified many times in Common Pleas Court as a Drug Recognition Expert (DRE). Id. at 4. Kirk testified that he has been trained in standard field sobriety tests. He testified that he has had Advanced Roadside Impaired Driving Enforcement (ARIDE) training and is certified to teach ARIDE. Id. at 6. ARIDE teaches what officers might see in seven (7) drug categories: 1. Central Nervous System (CNS) depressants, 2. CNS stimulants, 3. Dissociative Anesthetics 4. Narcotics 5. Analgesics 6. Inhalants and 7. Cannabis.

Kirk noted the tint of the window when he made vehicle stop. The tint was later determined to be 27%. When Defendant rolled down his window at the motor vehicle stop, Kirk explained the reason for the stop i.e. the failure to come to a complete stop and failure to signal turn onto Brandon Ave. Kirk immediately detected the odor of marijuana when Defendant rolled down his window.

At that time, Kirk, based on the smell of marijuana, asked Defendant if he could search the vehicle. Defendant declined; but, Kirk did search the vehicle. As a result of the search, Kirk recovered a large glass container with some residue. Id. at 2. The residue was field tested and tested positive as marijuana. Id. Kirk found no burnt marijuana in the car. Id. at 11.

Kirk stated that he arrested Defendant for Driving Under the Influence of a Controlled Substance based on the smell of the marijuana, from the lack of convergence<sup>5</sup>, the clues from the modified Romberg<sup>6</sup>, and the clues from the walk and turn and one leg stand. Id. at 7. Kirk testified that Defendant's eyes were glassy and bloodshot and his conjunctivae were red. Id. at 3. Defendant also had a green substance in his mouth. Id.

Kirk took Defendant to the Emergency Room. He testified that he took Defendant to the Emergency Room rather than the DUI center because he would be better able to perform a DRE evaluation at the ER. Id. at 12. Kirk asked Defendant to cooperate in a DRE evaluation and Defendant refused. Id. at 3.

## **Discussion**

### **I. Petition for Habeas Corpus**

Defendant argues that the Commonwealth failed to present prima facie evidence for Possession of a Small Amount of Marijuana, Possession of Drug Paraphernalia, and Driving under the Influence of a Controlled Substance at the Preliminary Hearing. Specifically, the Defense argues that evidence is insufficient to show that the Defendant exercised conscious dominion and control over the residue found inside the of the glass container located in the center console of the vehicle. Moreover, the Defendant submits that the evidence is insufficient on the charge of Driving under the Influence of a Controlled Substance because the evidence fails to

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<sup>5</sup> Convergence is the sign of impairment discovered through the administration of the HGN (horizontal Gaze Nystagmus) field sobriety test.

<sup>6</sup> The Romberg test is performed by tilting one's head back and, with eyes closed, estimating 30 seconds. The individual's estimate of time and degree of body sway are indicative of intoxication. Cole v. DOT, Bureau of Driver Licensing, 909 A.2d 900, 902 Pa. Commonwealth Ct. 2006)

show that the Defendant was under the influence of a drug or a combination of drugs to a degree which impaired his ability to drive safely.

The Controlled Substance, Drug, Device and Cosmetic Act Section 780-113(a)(31)(i) prohibits the possession of a small amount of marijuana only for personal use. At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a prima facie case of guilt. A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Karetny, 880 A.2d 505, 583 Pa. 514, 529 (Pa. 2005).

The Commonwealth is not limited to showing actual possession, but may also establish a prima facie case by establishing constructive possession. The purpose of the doctrine of constructive possession is to expand the scope of possession statutes to encompass cases in which actual possession at the time of arrest cannot be shown, but in which there is a strong inference that there has been actual possession. As defined by the Pennsylvania Supreme Court, constructive possession of contraband is conscious dominion over the illegal substance, the power to control it, and the intent to exercise the control. Commonwealth v. Mudrick, 510 Pa. 305, 507 A.2d 1212, 1213 (1986); Carroll, 507 A.2d at 820-21; Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132, 134 (1983). It is a legal fiction, "an inference arising from a set of facts that

possession of the contraband was more likely than not." Mudrick, 507 A.2d at 1213. Since determining whether a defendant had constructive possession of contraband is not amenable to "bright line" tests, Carroll, 507 A.2d at 821, the finder of fact may infer an intent to maintain a conscious dominion from the totality of the circumstances. Macolino, 469 A.2d at 134. Commonwealth v. Bolton, 2016 Pa. Dist. & Cnty. Dec. LEXIS 45, 3-4 (Pa. County Ct. 2016).

Defendant was the operator and lone occupant of his vehicle on the night in question. In the present case, the residue was located in a glass jar in the center console of the Defendant's vehicle. It is undetermined how long the residue was in the car; however, the officer could smell burning marijuana. Evidence in support of the Commonwealth's position is the smell of marijuana emanating from the vehicle, the marijuana recovered from the vehicle, and Kirk's interpretation of the results of the field sobriety tests. The Commonwealth provided the Court with a video recording of the traffic stop. The Court cannot evaluate Defendant's performance on the convergence test; however, it can see that the Defendant performed the heel to toe test and the one leg stand in a reasonable fashion, contrary to the narration of Kirk. From the video, the Court cannot evaluate Kirk's observations that Defendant's nostrils were red and that his eyes were glassy and bloodshot. Kirk also detected a green substance in Defendant's mouth.

Proximity to contraband, when supported by other circumstantial evidence, may be enough to infer constructive possession. Stembridge, 579 A.2d at 905. In Stembridge, the defendant was convicted of possession based not only on his proximity to the contraband, but also due to the furtive movements he was observed

making by officers. Defendant here was extremely nervous when questioned by the police and possibly attempted to conceal marijuana in his mouth. Accordingly, the Commonwealth has shown enough evidence to prove a prima facie case of possession. The glass jar recovered from the vehicle was being used to store a controlled substance so a prima facie case been established on possession of paraphernalia charge. The last charge, Driving under the Influence of a Controlled Substance, the Court finds that Commonwealth has also established a prima facie case:

An individual may not drive, operate or be in physical control of the movement of a vehicle when the individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(d)(2).

Evidence that Defendant was operating the vehicle under the influence of a controlled substance can be established by the officer's conclusion discussed above. The Court finds the same evidence that will establish that Defendant possessed a controlled substance and paraphernalia supports the officer's conclusion that Defendant was operating the vehicle under the influence of a controlled substance. Moreover, the odor of burnt marijuana alone has been held to be sufficient to charge a Defendant with Driving under the Influence of a Controlled Substance under statutory section 3802(d)(2). In Commonwealth v. Jones, 121 A.3d 524 (Pa. Super. 2015), the Superior Court found that that evidence presented that police officer smelled a strong, distinct odor of burnt marijuana emanating from a vehicle in which [defendant] was the only the only occupant sufficed to have allowed police to request a blood test. Jones

was issued before Birchfield but its finding still applies to the inquiry into the circumstances that give an officer probable cause to arrest, if not the authority to require a blood test.

## **II. Motion to Suppress Evidence**

Defendant argues that any evidence seized from his vehicle after the vehicle was stopped was seized in violation of his rights under Article 1 Section 8 of the Pennsylvania Constitution and under the Fourth Amendment to the United States Constitution. Defendant alleges because his vehicle was stopped without probable cause and/or reasonable suspicion to believe a crime was committed. Defendant argues in the alternative that even if the vehicle stop was legal, there was no probable cause to arrest the defendant for Driving under the Influence of a Controlled Substance. Defendant argues that a review of the video of the field sobriety tests will show that he performed the tests adequately.

The controlling case law on the required quantum of suspicion on behalf of a police officer to initiate a motor vehicle stop is Commonwealth v. Feczko, 10 A.3d 1285 (Pa. Super. Ct. 2010). In Feczko, the Supreme Court of Pennsylvania interpreted Title 75 Section 6308 that to make a motor vehicle stop based on a suspected violation of the Motor Vehicle Code, a police officer must have probable cause to stop the vehicle. Id. at 1291. Probable cause means the police officer has personal knowledge of facts and circumstances that would warrant a prudent man to believe that an offense has been committed. In other words, the police officer must observe the driver violating the motor vehicle code and once this observation is made, it is legal to stop the vehicle. Id.

In this case, Kirk observed Defendant fail to stop at the intersection of Brandon Ave and Cherry St. Kirk cited Defendant for a violation of Section 3324, which requires that the vehicles entering a roadway yield the right of way to all vehicles approaching on the roadway to be entered to be crossed. Additionally, Kirk observed a lack of signal required when making the turn from the alley east of Cherry St and onto Brandon Ave and cited Defendant for a violation of Section 3334, Turning Movements and Required Signals. A review of the video shows no turn signal indicator when Defendant made turn.

The Court finds that Kirk did have the probable cause required to stop Defendant for a violation of the Motor Vehicle Code. As to whether he had the probable cause to arrest Defendant for Driving under the Influence of a Controlled Substance, the Court finds that he did:

The existence of probable cause for an arrest is assessed by using the following principles: Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances. Commonwealth v. Williams, 2008 PA Super 6, 941 A.2d 14, 27 (Pa.Super. 2008) (internal citations and quotation marks omitted).

It is the facts and circumstances within the personal knowledge of the police officer that frames the determination of the existence of probable cause. See, e.g., Commonwealth v. Lawson, 454 Pa. 23, 27, 309 A.2d 391, 394 (1973) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been committed."). Commonwealth v. Galendez, 2011 PA Super 180, 27 A.3d 1042, 1046 (Pa.Super. 2011) (en banc) (emphasis in original).

Commonwealth v. Weaver, 76 A.3d 562, (Pa. Super. Ct. 2013).

The Court accepts the opinion of Kirk as to how Defendant performed on field sobriety tests. Kirk was able to make observations of the Defendant that are not observable by a review of the video from the stop. Kirk testified that Defendant's eyes were glassy and bloodshot and the conjunctiva was red. Defendant also had a green substance in his mouth. The Court finds the evidence presented gave Kirk the probable cause to arrest.

### **III. Motion in Limine**

Defendant alleges in his Motion in Limine that Kirk is not qualified to render an opinion as to whether the Defendant ingested a controlled substance, as to when Defendant may have ingested it; and as to whether Defendant's alleged ingestion impaired the Defendant's ability to safely drive a vehicle. Defendant seeks to preclude Kirk's testimony as he is not qualified to testify as an expert and even if he were there are insufficient facts available that no qualified expert could render such an opinion on the ingestion of a controlled substance and the impairment of the Defendant.

In Commonwealth v. Griffith, 32 A.3d 1231 (Pa. 2011), the Supreme Court of Pennsylvania held that expert testimony was not to be regarded as mandatory in every prosecution under 75 Pa.C.S.A. § 3802(d)(2) but, instead, the need for such testimony is to be evaluated on a case-by-case basis in light of all the other testimony. Commonwealth v. Claffey, 2013 PA Super 155, 80 A.3d 780 (Pa. Super. Ct. 2013) (citing Griffith II, 32 A.3d at 1239-40.) In Griffith II, the Supreme Court of Pennsylvania reasoned that a charge under subsection 3802(d)(1) requires a measurement to determine if any amount of a Schedule I, II or III controlled substance is detectable in the defendant's blood. Conversely, subsection 3802(d)(2), as Defendant is charged

here, does not require that a drug be measured in the Defendant's blood, nor does it specify any particular manner by which the Commonwealth is required to prove that the Defendant was under the influence of a drug. Subsection 3802(d)(2) does not limit, constrain, or specify the type of evidence that the Commonwealth can proffer to prove its case. Pursuant to our general standard, a need for expert testimony arises when "the jury is confronted with factual issues whose resolution requires knowledge beyond the ken of the ordinary laymen." Griffith II at 1240.

The Court finds that it is unnecessary that Kirk be a drug expert in order to testify to his observations that evening. In Commonwealth v. Yedinak, 676 A.2d 1217 (Pa. Super. 1996) the [defendant] made the same argument that Defendant makes here: that it would be improper to admit the arresting officer's testimony that Defendant was under the influence of marijuana to a degree that he was incapable of safe driving because the police officer is not an expert. In Yedinak, the Trial Court admitted the officer's testimony as non-expert testimony and the Superior Court affirmed.

Pennsylvania Rule of Evidence 701 allows lay witnesses to testify to their opinion if its (a) rationally based on the witnesses' perception; (b) helpful to clearly understanding the witnesses' testimony or to determining a fact in issue; and (c) not based on scientific knowledge, technical or other specialized knowledge within the scope of Rule 702. Kirk based his opinion that Defendant was under the influence of a controlled substance based upon specific and articulable observations of Defendant's physical appearance and behavior. Kirk's perceptions at the scene were informed by his narcotics training, prior drug arrests, and knowledge of the effects of marijuana.

Kirk's opinion is rationally based on his perceptions and helpful to the determination of a fact in issue and, therefore, his opinion testimony will be admitted.

#### **IV. Motion to Suppress Evidence of Defendant's Refusal to Submit to Chemical Test of Blood**

The Supreme Court of the United States, in Birchfield v. North Dakota, 136 S.Ct. 2160, 2162, 195 L. Ed. 2d 560 (2016) stated

Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply...there must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

As the criminal penalties for refusing to submit to a chemical test of the blood are increased, if found guilty of Driving under the Influence in Pennsylvania, the Court must suppress the results of the blood alcohol test. The Commonwealth agreed at the hearing that it would not be presenting evidence of the refusal in light of Birchfield.

**ORDER**

**AND NOW**, this 17th day of November, 2016, based upon the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. Defendant's Petition for Habeas Corpus is DENIED.
2. The Motion to Suppress Evidence is DENIED.
3. Defendant's Motion In Limine is DENIED.
4. Defendant's Motion to Suppress Evidence of Defendant's Refusal to Submit to a Chemical Test of Blood is GRANTED. The Defendant's refusal to submit to a chemical test of blood shall not be presented as evidence at trial.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: Melissa Kalas, ADA  
Pete Campana, Defendant's Counsel  
Gary Weber, Lycoming Law Reporter  
Work file (law clerk)