

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1778-2016
 :
 ANTHONY BARASKY, : Opinion and Order re Defendant's
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

This matter came before the court on June 27, 2017 for a hearing and argument on Defendant Anthony Barasky's omnibus pretrial motion. The relevant facts follow.

By way of background, on September 19, 2016, Trooper Tyson Havens of the Pennsylvania State Police, filed a criminal complaint against Defendant, charging him with possession with intent to deliver heroin, an ungraded felony; fleeing or attempting to elude a police officer, a felony of the third degree; possession of drug paraphernalia, an ungraded misdemeanor; accidents involving damage to vehicle or attended property, a misdemeanor of the third degree; criminal mischief, a felony of the third degree; two counts of recklessly endangering another person, misdemeanors of the second degree; two counts of tampering with physical evidence, misdemeanors of the second degree; and numerous summary traffic offenses.

After receiving extensions of time, Defendant, through his counsel, filed an omnibus pretrial motion on May 10, 2017, which consisted solely of a motion to suppress statements which Defendant made while being transported to the Lycoming County Prison after he had invoked his Miranda rights.

At the hearing on this motion, the Commonwealth relied on the testimony of Trooper Havens and a DVD with two video streams from Trooper Havens' vehicle. One stream is through the front windshield during the vehicle chase, Defendant's capture and return to the crash scene. The other stream is a view into the rear of the police vehicle during these events. Defense counsel submitted the transcript from Defendant's preliminary hearing.

At approximately 12:25 p.m. on September 19, 2016, Trooper Havens and Trooper Edward Dammer were traveling west on High Street when they observed a black Dodge Durango with heavily tinted windows. Trooper Havens recognized the driver as Defendant. Trooper Havens also was aware that Defendant did not possess a valid driver's license, his license was under suspension, or both. Trooper Havens turned his vehicle around and got behind the Durango to conduct a traffic stop. Defendant fled from Trooper Havens at a high rate of speed. He "blew through" numerous stop signs and traffic signals. Defendant was going so fast that Trooper Havens had to discontinue his pursuit of Defendant because it was too dangerous. Other officers, however, picked up the chase at various points based on Trooper Havens' description of the vehicle and its flight path, as well as information provided by citizens.

Ultimately, Defendant crashed the Durango into the concrete block, side wall of the K-Mart building, and he fled on foot through the shopping plaza. He was captured in the parking lot of Willard's leather store, taken into custody, and placed in the rear of Trooper Haven's police vehicle.

As Trooper Havens transported Defendant back to the crash scene, he read Defendant his Miranda rights. Defendant indicated that he understood those rights.

At the crash scene, Defendant told Trooper Havens that he was injured. Defendant, accompanied by other police officers, was transported to the Williamsport Hospital for evaluation and treatment. He was released from the hospital and transported to the Pennsylvania State Police (PSP) barracks.

Other officers retraced where Defendant had fled on foot. In a garbage can in front of Staples, Trooper Matthew Sweet and Trooper Joshua Bell found a Styrofoam cup which contained nine blue glassine bags of heroin marked with the word "Purge" and the symbol of a gun. About an hour later, Trooper Dammer received a phone call from the father of a twelve year old boy who found an additional 70 blue glassine bags of heroin, which were also marked with the word "Purge" and the symbol of a gun, near Loyalsock High School along Northway Road, one of the roads Defendant took during his flight in the Durango.¹

When Defendant was brought to the barracks, he was handcuffed to a bench in a room adjacent to the patrol room. Trooper Havens questioned Defendant for about a minute. Defendant admitted that he drove the vehicle, but he denied possessing any controlled substances. Defendant claimed Trooper Havens was harassing him because he did not have a license. After Defendant made these statements about driving but not possessing

¹ Trooper Havens found 140 blue glassine bags of heroin with those same markings in the void behind the climate controls of the Durango when he searched the Durango two days later.

any drugs, he said he wanted to exercise his right to remain silent.

Defendant was fingerprinted and photographed. Trooper Havens prepared the criminal complaint and affidavit of probable cause, which took about 45 minutes. He then transported Defendant to Magisterial District Judge (MDJ) Gary Whiteman's office. MDJ Whiteman conducted Defendant's preliminary arraignment. Trooper Havens then transported Defendant back to the barracks, because Trooper Havens wanted to obtain a warrant to search Defendant's hands for trace evidence. Trooper Havens obtained the warrant and conducted a "drug swipe" of Defendant's hand.

About two to three hours after Defendant was captured, Trooper Havens transported Defendant to the Lycoming County Prison.

Trooper Havens claimed that he had a one-sided, informational conversation with Defendant while transporting him to the prison. Trooper Havens initiated the conversation. He told Defendant that what he did was dangerous and "a bad move." He told Defendant how he could've hurt or killed people at that time of day and near Stevens Primary School. In response to Trooper Havens' comments, Defendant admitted that what he did was dangerous and someone could have gotten killed.

There were no recordings of Defendant's statements at the barracks or while he was being transported to the prison. Trooper Havens explained that the room he and Defendant were in at the barracks had video capabilities but not audio capabilities. No video was preserved; it was taped over already. Trooper Havens claimed that he did not take Defendant upstairs to the interview room that had both audio and video capabilities because,

based on his prior knowledge of Defendant, Trooper Havens never expected Defendant to “say what he did.” Instead, Trooper Havens said he thought Defendant would tell him to “beat it” and Trooper Havens did not want to waste his time.

Trooper Havens also testified that he did not have a recording of the statements Defendant made when he was transported to the prison. He admitted this could be due to an error on his part. He offered three possible explanations for the lack of a recording: (1) there were three videos and he might have only put in a request for two of them; (2) he may have relied on another trooper; or (3) there could have been issues transferring the data from his police cruiser to the computer inside the barracks.

DISCUSSION

The burden is on the Commonwealth to prove that Defendant’s statements were not obtained in violation of Defendant’s rights. Pa. R. Crim. P. 581 (H)(“The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant’s rights.”); see also *Commonwealth v. Enimpah*, 106 A.3d 695 (Pa. 2014). Miranda’s procedural safeguards only apply to custodial interrogation. *Commonwealth v. Yandamuri*, 159 A.3d 503, 520 (Pa. 2017)(Miranda warnings “are required only where a suspect is both taken into custody and subjected to interrogation.”). A defendant is in custody when he is under arrest or his detention is the functional equivalent of an arrest. *Commonwealth v. Pakacki*, 901 A.2d 983, 987-88 (Pa. 2006). Interrogation includes not only express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest

and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Commonwealth v. Gaul*, 912 A.2d 252, 255 (Pa. 2006); *Commonwealth v. DeJesus*, 787 A.2d 394, 402 (Pa. 2001). The court must focus on the suspect's perceptions and give relevance to the officer's constructive knowledge rather than the officer's intent. *Gaul*, 912 A.2d at 255. "Moreover, 'a practice that the police should know is likely to evoke an incriminating response... amounts to interrogation.'" *Id.* (citations omitted)

There was no question that Defendant was in custody. The Commonwealth argued, however, that Defendant was not questioned. Trooper Havens merely made statements or commentary, to which Defendant ultimately agreed. This argument misses the point. Interrogation is not limited to express questioning. It clearly encompasses any words, including statements or commentary, that the police should know are reasonably likely to elicit an incriminating response.

Trooper Havens' claims that his statements while transporting Defendant to the prison were merely informational and his way of being personable begs logic under the facts and circumstances of this case.

The conversation was not informational. It did not advise Defendant of the charges or the next steps in his case. Defendant already knew the charges against him because by the time Trooper Havens made these comments, Defendant had already been processed and had his preliminary arraignment. At his preliminary arraignment, the MDJ would have provided Defendant with a copy of the criminal complaint and read it to him. Pa.

R. Crim. P. 540 (C) and (F). Furthermore, merely because an officer's statements are intended to be informational, does not mean that they could not also have been reasonably likely to elicit an incriminating response. *Gaul*, 912 A.2d at 256.

The comments also were not merely being "personable." Trooper Havens did not talk to Defendant about the weather, sports, or his music preference for the radio on the drive to the prison. He spoke to Defendant about the facts of his case in a way likely to elicit an incriminating response.

Defendant had been in custody for two to three hours. The comments focused on the dangerousness of Defendant's actions with respect to the small children at the Stevens Primary School that Defendant could have injured or killed.² When Trooper Havens initially questioned Defendant and made comments about his driving at the barracks, Defendant made incriminating statements about driving the Durango, he denied possessing any drugs, and then he stated that he wished to exercise his right to remain silent. Regardless of whether Trooper Havens initially did not expect Defendant to make any statements, he knew or should have known that his comments on the way to the prison were likely to elicit an incriminating response because similar questioning and comments had elicited incriminating responses shortly after Defendant was brought to the barracks and before Defendant invoked his Miranda rights.

In short, regardless of Trooper Havens' intent, when the court views the comments from a suspect's perspective (as it must), Trooper Havens' "one-sided

² Stevens Primary School is a school for children in kindergarten through third grade.

conversation” was likely to induce Defendant into making another incriminating response in the form of an admission or an apology, which is exactly what happened in this case.

Accordingly, the following order is entered.

ORDER

AND NOW, this ___ day of August 2017, the court GRANTS Defendant’s omnibus pretrial motion and SUPPRESSES any and all statements that Defendant made to Trooper Havens during the drive to the prison. The court notes that this ruling does not preclude the Commonwealth from utilizing the statements to impeach Defendant if he elects to testify at trial. Pa. Const., Art. 1, §9 (“The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.”).

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Greta Davis, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File