IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-942-2016**
v.	:	
	:	
JOSEPH LONON,	:	**SUPPRESSION**
Defendant	:	

OPINION AND ORDER

On February 9, 2017, Defendant, Joseph Lonon, filed a Motion to Suppress requesting suppression of evidence, statements and identification of Defendant as a result of an allegedly illegal search and blood results in violation of Birchfield v South Dakota[1]. Hearings were held on March 23, 2017, and April 10, 2017. Prior to the hearing on March 23rd, Defense Counsel withdrew the challenge to the blood alcohol results. Prior to the start of the hearing on April 10th, Defense also withdrew the challenge to the search of the vehicle at the Pennsylvania State Police barracks as a valid inventory search. At the conclusion of the April 10th hearing, counsel requested the opportunity to submit briefs once the transcript of the hearing was prepared.

Background

Defendant is charged with two counts of Aggravated Assault (police officer), felony of the second degree[2]; Fleeing or Attempting to Elude a Police Officer, felony of the third degree[3]; Possession of a Small amount of Marijuana, an ungraded misdemeanor[4]; Possession of Drug Paraphernalia, an ungraded misdemeanor[5]; three

[1] The U.S. Supreme Court decided Birchfield v. **North** Dakota on June 23, 2016.
[2] 18 Pa.C.S § 2702(a)(3).
[3] 75 Pa.C.S. § 3733(a).
[4] 35 P.S. § 780-113(a)(31)(i).
[5] 35 P.S. § 780-113(a)(32).

counts of Driving Under the Influence of Alcohol, all ungraded misdemeanors[6]; two counts of Simple Assault, misdemeanors of the second degree[7]; two counts of Recklessly Endangering Another Person, misdemeanors of the second degree[8]; and, Accidents involving Damage to Attended Vehicle/Property, a misdemeanor of the third degree[9]. The charges were filed by the Pennsylvania State Police (PSP) as a result of a police chase that occurred in the early morning hours of May 17, 2016, within the City of Williamsport.

Findings of Fact

At approximately 1:16 am on May 17, 2016, Troopers Adam Kirk (Kirk) and Tyler Morse (Morse) were traveling eastbound on Third Street in full uniform and in a marked patrol vehicle. They observed a 2016 Silver Mazda turn on and off its headlights in the parking lot of Jersey Shore State Bank (located on the Northeast corner of Market Street and Third Street in the City of Williamsport). They proceeded to follow the vehicle onto State Street, Mulberry Street, and Via Bella, which is the access road to Interstate 180 that runs along the river on the southern edge of Williamsport. The Mazda was traveling at what they believed was a high rate of speed and was observed making a left going the wrong way onto the off-ramp from I-180 East to Hepburn Street. The vehicle then proceeded to enter and park in a parking area for the location known as the RiverWalk. Troopers activated their emergency lights and attempted to block the vehicle's exit from the parking lot. The vehicle struck

[6] 75 Pa.C.S. § 3802(a)(1), (d)(2), (d)(3).
[7] 18 Pa. C.S. § 2701 (a)(1).
[8] 18 Pa.C.S § 2705.
[9] 75 Pa.C.S. § 3743(a).

the patrol unit upon exiting the parking area. Morse was able to see the operator's face at the time of impact.

The vehicle then proceeded in a haphazard fashion through the streets of Williamsport, and eventually crashed at the intersection of Hepburn Street and Little League Boulevard. N.T. 4/10/2017, at 25. The driver fled from the vehicle and the vehicle was left with "its back end in a lane of traffic, the sidewalk blocked." Id. at 29. The officers searched the vehicle to ascertain the identity of the registered owner as it was their belief that it was possibly a stolen vehicle. As it was a newly purchased vehicle with only temporary registration tags displayed, the officers were unable to identify the registered owner via the PennDOT database. Id. at 26.

Kirk was able to use the Bluetooth navigation screen in the vehicle to continue the investigation into identifying the rightful owner of the vehicle. Id. at 31-32. After accessing the information first through Defendant's cell phone, Kirk testified that he called the Defendant's father, listed as "Dad" in the cell phone. Kirk told him that his son had been in a terrible accident and that the EMTs were working on him. "Dad" informed Kirk that his son's name was "Joseph". "Dad" then called the State Police barracks and the dispatcher was able to identify the family name of "Lonon" on the barrack's caller id. Troopers then searched the NCIC database and were able to view a photograph of "Joseph Lonon". Upon viewing the photo, Morse was able to identify Defendant as the operator of the vehicle that had hit the PSP cruiser, and who abandoned the vehicle on Hepburn Street just north of Little League Boulevard. Id. at 10.

Discussion

Motion to Suppress the Evidence, Statements, and Identification of Defendant

In order to challenge the actions of the troopers in this case under Pennsylvania law, the Defendant must establish two (2) threshold questions; does he have standing, and does he have a reasonable expectation of privacy in the property that was searched by PSP.[10] Attorney for the Commonwealth has stipulated with Defense Counsel to the Defendant's standing. Left for the Court to decide is whether Defendant, by leaving his car running and lights on in a location which could impede traffic after committing a number of traffic violations, retained a reasonable expectation of privacy in the automobile and the cell phone inside the car. In order to do so,

> he must demonstrate that he held such a privacy interest which was actual, societally sanctioned as reasonable, and justifiable in the place invaded that the warrantless entry of the police violated his right under the Constitution of this Commonwealth, Article 1, Section 8, to be 'secure . . . against unreasonable searches and seizures. See Commonwealth v. Brundidge, 620 A.2d 1115, 1118 (1993); Commonwealth v. Oglialoro, 579 A.2d 1288, 1290-1.

Commonwealth v. Peterson, 636 A.2d 615,617 (Pa. 1993).

Search of vehicle

The issue for the Court to determine is whether the Defendant maintained a reasonable expectation of privacy that was violated by the trooper's actions. The factors to consider in determining whether a reasonable expectation of privacy exists include: (1) whether, by his conduct, the person has 'exhibited an actual (subjective) expectation of privacy'; and (2) whether that expectation is 'one that society is prepared to recognize as reasonable'. Commonwealth v. Jones, 978 A.2d 1000 (Pa.

[10] See Commonwealth v. Peterson, 636 A.2d 615 (Pa. 1993).

Super. 2009) (citing Smith v. Maryland, 99 S.Ct. 2577, 2580 (1979)). The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances." Commonwealth v. Newman, 84 A.3d 1072, 1076-77 (Pa. Super. 2014), appeal denied, 99 A.3d 925 (Pa. 2014).

However, in determining the expectation of privacy in a motor vehicle, the Pennsylvania Supreme Court in Commonwealth v. Gary, 91 A.3d 102 (Pa. 2014) ruled [This Court's] determination that the reasonable and legitimate expectation of privacy is diminished in one's motor vehicle, as compared to one's residence or person, [and] is entirely consistent with federal Fourth Amendment jurisprudence. Furthermore, we discern no distinction between the rationale for the reduced expectation of privacy in a motor vehicle set forth by this Court and that set forth by the U.S. Supreme Court.

> See California v. Carney, 471 U.S. 386, 392, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985) (stating that "the reduced expectations of privacy [in motor vehicles] derive ... from the pervasive regulation of vehicles capable of traveling on the public highways"); South Dakota v. Opperman, 428 U.S. 364, 367-68, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (explaining that the diminished expectation of privacy in a motor vehicle stems from the "pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements" as well as "the obviously public nature of automobile travel"); Cardwell v. Lewis, 417 U.S. 583, 590, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (plurality) (explaining that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation ... [and it] has little capacity for escaping public scrutiny [as] it travels public thoroughfares"); Cady v. Dombrowski, 413 U.S. 433, 441-42, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (explaining that local and state police officers have "extensive, and often noncriminal contact with automobiles" due to the extensive regulation of motor vehicles, the frequency with which they can become disabled or involved in an accident on public roads, and the need for officers to investigate automobile accidents); Rogers, 849 A.2d 1191 (explaining that "the exterior of a vehicle is exposed to the public, and is not considered an intimate space");

> Holzer, 389 A.2d at 106 (citing Opperman, 428 U.S. at 367, to support the principle that the expectation of privacy is diminished in an automobile compared to a home or office); Commonwealth v. Timko, 491 Pa. 32, 417 A.2d 620, 623 (Pa. 1980) (citing United States v. Chadwick, 433 U.S. 1, 97 [**128] S. Ct. 2476, 53 L. Ed. 2d 538 (1977), when explaining that there is a diminished expectation of privacy in automobiles "because of their open construction, their function, and their subjection to a myriad of state regulations").

Gary, 91 A.3d at 102.

In Gary, officers executed a vehicle stop for a violation of the motor vehicle code. Upon approach, the officers smelled the odor of burnt marijuana, Gary acknowledged he had marijuana in the vehicle and so they placed him in their police vehicle while they searched his car. Gary ran from the scene but was brought back by officers who discovered a large quantity of marijuana in the vehicle. Philadelphia Municipal Court and Common Pleas upheld the search but the Superior Court reversed finding that the fact that Gary was in custody eliminated any exigency and found that although they had probable cause, officers needed to obtain a warrant. The Supreme Court found that no warrant was necessary as probable cause existed for a warrantless search of the automobile thereby adopting the Federal automobile exception to the warrant requirement.

Morse and Kirk's testimony establishes that the driver of the Silver Mazda had committed multiple motor vehicle violations. Therefore whether or not the Defendant may have had a reasonable expectation of privacy in the contents of his vehicle, the Court finds that the search of his vehicle was valid under Gary. Here, the officers searched the vehicle to determine whether the vehicle was stolen and the identity of the driver committing the motor vehicle violations. The Court further finds that the scope of the search of the vehicle was to only gather information on those two items

of information: was the car stolen and was there a way to identify the driver. Therefore the Court does not need to reach the question of whether the vehicle was abandoned or inventoried at the scene by the PSP to justify their entry into it.

Search of the cell phone

In Riley v. California, 134 S. Ct. 2473 (2014), the Supreme Court of the United States held that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. More recently in Commonwealth v. Santiago, 160 A.3d 814 (Pa. Super. 2017), a Commonwealth appeal of a grant of suppression, both the Commonwealth and Public Defender agreed that the search of Defendant's cell phone was unconstitutional with no legal argument on the issue.

In Santiago, Defendant was stopped for a violation of the motor vehicle code and when asked to produce his identification, he drove away from scene and ran over the officer's foot. After being treated at the hospital, the officer returned to the scene and found a cellphone. He conducted a warrantless search of cell phone and found only two contacts in the phone. He was able to identify a possible name for the operator and after searching the NCIC database, was able to match the photo information with the name to identify the driver that ran over his foot earlier in the day.

In reviewing Santiago, no exigent circumstances seemed to have existed to justify the warrantless search of the cellular phone. The Commonwealth presented no evidence that the cell phone was indeed abandoned by Santiago; the officer had not seen him in possession of a cellular phone. Given the location, anyone could have

lost their phone in the intervening hours between the encounter the officer had with Santiago and when he returned.

In determining if the cellular phone here was abandoned, the Court must review the definition of abandoned property as set forth in Commonwealth v. Shoatz. The Supreme Court of Pennsylvania stated

> The theory of abandonment is predicated upon the clear intent of an individual to relinquish control of the property he possesses. Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances at the time of the alleged abandonment should be considered. Police pursuit or the existence of a police investigation does not of itself render abandonment involuntary. The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

366 A.2d 1216, 1220 (Pa. 1976) (internal citations omitted).

Given the size and portability of cellular phones, it is clear to the Court that the Defendant in his haste to avoid the PSP abandoned his phone. Therefore the Defendant cannot have a reasonable expectation of privacy in the contents of the phone.

As an alternative theory to justify the search of the cellular phone, other case-specific exceptions may still justify a warrantless search of a particular phone:

> One well-recognized exception applies when "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment. Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.

Riley v. California, 134 S. Ct. 2473, 2494 (2014) (internal citations omitted).

In Riley, the defendant was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching the defendant incident to the arrest seized a cell phone from the defendant's pants pocket and, without a warrant, went through the phone and found information relating to gang activity. Gang unit officers then went back into the phone gathering more specific information which ultimately led to the defendant being arrested for murder. The United States Supreme Court ruled that to search a cell phone requires a warrant, and that the search incident to lawful arrest exception does not to apply to cell phones.

The purpose of the cell phone search here is squarely within one of the Supreme Court's examples when an exception to a warrant requirement may be made: to pursue a fleeing suspect. The search here was limited; it did not reach the personal data the Supreme Court was concerned about in Riley. In fact, Kirk did not really search the entire contents of the phone. He searched the in car dash panel that links to the phone through the blue tooth connection. He called Defendant's Mom and Dad. Although Defendant Kirk may have lied to the Defendant's father in order to further his investigation, while not condoning such misrepresentation the Court finds that this subterfuge is an appropriate police technique during the investigation and not a basis for suppression. The Court finds that Kirk's search of the cellular phone for an emergency contact was a constitutionally valid.

ORDER

AND NOW, this 11th day of September, 2017, for the foregoing reasons, the Motion to Suppress is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Brian Manchester, Esq.
Nicole Ippolito, Esq.
Gary Weber, Esq.