

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-1851-2015
	:
JOSEPH PINKERTON,	: Omnibus Pretrial Motion
Defendant	:
	<b><u>OPINION AND ORDER</u></b>

Before the Court is Defendant's omnibus pretrial motion filed on November 16, 2016. Defendant's motion includes a motion to suppress evidence, nunc pro tunc. Argument on Defendant's request for a nunc pro tunc hearing was held before the Court on December 20, 2016.

At the hearing and argument, on December 20, 2016, through the representations by counsel, the testimony of Defendant and a review of the record, the following facts are clear.

Defendant was charged with DUI and related offenses by criminal complaint filed on July 16, 2015. Defendant's preliminary hearing was scheduled for October 27, 2015. Defendant appeared with this attorney, Ronald Travis, Esquire. Defendant waived arraignment scheduled for November 16, 2015.

The arraignment having been waived, the case was scheduled for a pretrial conference on February 2, 2016 and call of the list on February 16, 2016. On or about December 7, 2015, Mr. Travis filed a motion to suppress on Defendant's behalf. The motion to suppress alleges that Defendant was stopped by Trooper Morse of the Pennsylvania State Police (PSP) on July 1, 2015 for allegedly failing to use a turn signal. Defendant alleged that

the video from the camera inside Trooper Morse's vehicle that was provided to Defendant depicted that Defendant used his left turn signal and did not commit any traffic violation justifying the traffic stop. Defendant, through Mr. Travis, requested that all of the evidence obtained against him following the traffic stop be suppressed.

A hearing on the motion to suppress was scheduled for February 23, 2016 in Courtroom No. 4 of the Lycoming County Courthouse.

On February 23, 2016, the Commonwealth was present with its witnesses to proceed with its witnesses to proceed with defending against the motion to suppress. Defendant appeared as well.

Defendant had been aware that Mr. Travis was "going to argue" that Defendant was pulled over "illegally." Mr. Travis had provided to Defendant a copy of the disc as well as the motion to suppress.

After arriving at the courthouse and being ready to proceed with the hearing, Mr. Travis and Defendant spoke outside of the courtroom. According to Defendant, Mr. Travis indicated to Defendant that they offered five days. Defendant told Mr. Travis that he would "take five days." According to Defendant, he "just wanted to get it over with."

In Defendant's presence, in the courtroom, the Court entered an Order dated February 23, 2016. The Court scheduled Defendant's guilty plea for May 6, 2016. The Court noted that the parties negotiated a plea agreement and that Defendant's motion to suppress would be marked withdrawn. The Court added, however, that if the plea offer by the Commonwealth was withdrawn, Defendant could reinstate his motion to suppress.

At some point after the scheduled hearing and after the Court dictated its February 23, 2016 Order, Defendant realized that he might be pleading guilty to the DUI. He subsequently called Mr. Travis and advised Mr. Travis that he was not willing to plead to the DUI.

While not entirely sure, Defendant believes that he spoke to Mr. Travis between May 6, 2016 and June 3, 2016 at least over the telephone. Defendant insisted that he did not wish to plead guilty to the DUI. Mr. Travis was trying to convince Defendant to plead guilty and to take what Mr. Travis believed to be a very favorable plea agreement.

Defendant appeared in court on June 3, 2016. At that time, Defendant indicated he did not wish to plead guilty but wanted to proceed to trial and defend against the charges. The case was listed for the August 16, 2016 pretrial and call of the list for August 30, 2016.

Additionally, the Court noted that the Commonwealth was withdrawing its plea offer in light of the Defendant's position in not accepting it. Furthermore, the Court granted the motion of Mr. Travis for leave to withdraw. Defendant indicated that he would be seeking the services of other private counsel or applying for services through the Public Defender's office.

At the August 30, 2016 scheduled call of the list, despite the Court's prior directive to Defendant, he did not retain the services of private counsel and had not applied for the Public Defender. He indicated that he would like to have an attorney. When asked why he had not done anything, Defendant said that he thought he was going to get an

attorney but he didn't have the money. Defendant confirmed that he went to the Public Defender's office that morning.

At Defendant's request, the case was continued to October 18, 2016 for call of the list. Furthermore, the Court modified Defendant's bail conditions and placed him on supervised bail. The Court had several concerns regarding Defendant's conduct and lack of action.

During the December 20, 2016 hearing, Defendant testified that he had not taken any action prior to August 30 in connection with seeking substitute counsel because he had been hoping to convince Mr. Travis to agree to again represent him. Defendant indicated that he and Mr. Travis had been friends for many years.

Matt Welickovitch of the Public Defender's office entered his appearance on behalf of Defendant on September 7, 2016. Mr. Welickovitch filed a request for pretrial discovery on September 13, 2016.

After Mr. Welickovitch entered his appearance on behalf of Defendant, he began his representation by attempting to contact the District Attorney's office to determine whether there were any plea offers. He did not speak to Mr. Travis except in passing in the courthouse and failed to request a copy of Defendant's file from Mr. Travis. Mr. Welickovitch received discovery from the District Attorney on September 15, 2016.

Mr. Welickovitch recalls meeting with Defendant in late September of 2016 and again in early October of 2016. They had discussed "resurrecting" the offer from the Commonwealth but Defendant wanted to pursue the suppression motion and Mr.

Welickovitch believed that the suppression motion had merit.

The motion to suppress *nunc pro tunc*, however, was not filed until November 16, 2016. In explaining why it was not filed until that date, defense counsel indicated that it took him some time to review the case materials and to get a better understanding of the case including the basis for the suppression motion. He further indicated that there was a “lack of communication with his client” regarding how Defendant wanted to proceed. Mr. Welickovitch and his client “really didn’t talk that much.” Apparently, Defendant had some medical procedures which rendered him unavailable.

Defendant argued that in the interests of justice, the Court should hear the motion to suppress. Defendant claimed that he was “not sophisticated” and that this contributed to why the matters were delayed for so long. He acknowledged that the motion was filed late but that the late filing was a direct result of Defendant’s inability to express his specific desires as to what he wanted.

The Commonwealth argued that the interests of justice would not be served by permitting the motion to be heard at this late date. In essence, the Commonwealth argued that Defendant has continued to delay these matters without justification in an attempt to avoid responsibility for his criminal misconduct.

The Pennsylvania Rules of Criminal Procedure govern the timeliness of suppression motions. Unless the opportunity did not previously exist, or the interest of justice otherwise require, a suppression motion must be made in an omnibus pretrial motion as set forth in Rule 578. Pa. R. Cr. P. 581. If a timely motion is not made, the issuance of

suppression is deemed to be waived. Pa. R. Crim. P. 581 (B). An omnibus pretrial motion must be filed within thirty (30) days after arraignment unless the opportunity therefor did not exist or the defendant, defense attorney or the attorney for the Commonwealth was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown. Pa. R. Crim. P. 579 (A). As the Rule states, a trial judge may excuse a defendant's tardy presentation of a suppression motion when required in the interests of justice. *Commonwealth v. Johonoson*, 844 A.2d 556, 561 (Pa. Super. 2004).

Under the circumstances, in this particular case, the Court declines to conclude that the interests of justice require that the suppression motion be heard at this time. Defendant's initial suppression motion was timely filed, set to be heard and then withdrawn on the date that it was scheduled to be heard. The Order withdrawing the motion to suppress specifically noted that it could be reinstated only if the plea offer by the Commonwealth was withdrawn.

On June 3, 2016, it was Defendant who decided not to accept the plea agreement but to proceed to trial to defend against the charges. On June 3, 2016, Defendant had been in possession of a copy of the car-camera video and a copy of the prior motion to suppress that had been filed by Mr. Travis on Defendant's behalf. Defendant was specifically advised to seek the services of other private counsel or the Public Defender. From June 3, 2016 until August 30, 2016, Defendant chose to do nothing. He did not obtain private counsel nor did he apply to the Public Defender's office. He chose to ignore the directive of the Court.

On September 7, 2016 when Mr. Welickovitch entered his appearance on behalf of Defendant, he became responsible for not only contacting Defendant but also protecting Defendant's rights. Mr. Welickovitch did not obtain the file from Mr. Travis, did not obtain the CD and did not obtain the motion to suppress that was previously filed by Mr. Travis. This statement is not intended to be critical of Mr. Welickovitch, however, because Mr. Welickovitch was attempting to determine how Defendant wished to proceed. It was not until early October of 2016 that Mr. Welickovitch was able to essentially pin Defendant down and determine that Defendant wanted to proceed with filing the suppression motion and not attempt to renegotiate a plea deal.

Even after they met in early October, Defendant again became essentially incommunicado. Mr. Welickovitch then took it upon himself to file the motion on November 16. The Rules require that the omnibus pretrial motion and in particular the suppression motion be filed within thirty (30) days of the date of arraignment. The arraignment was November 16, 2015. The motion filed on Defendant's behalf seeking *nunc pro tunc* relief was filed on November 16, 2016 approximately one (1) year later. This is well beyond the thirty-day requirement. Giving Defendant the benefit of the doubt, Defendant decided not to plead guilty on June 3, 2016. The *nunc pro tunc* motion was not filed until 166 days afterwards; again well beyond the 30 days. Giving Defendant even more of a benefit of the doubt, the call of the list was August 30, 2016. Defendant submitted an application to the Public Defender's office. The Public Defender entered his appearance on September 7, 2016. The *nunc pro tunc* motion was not filed until seventy (70) days after September 7, 2016, again well

beyond the thirty (30) days.

Defendant failed to take the necessary steps to preserve his right to proceed with the filing of a suppression motion. The Court does not accept Defendant's claims of ignorance. Defendant has delayed and manipulated these matters such that he is hoping that he can avoid accountability. Defendant withdrew his suppression motion previously knowing that he had accepted a plea deal. The Court does not accept Defendant's explanation that he thought he accepted a plea to some unknown charge but not the DUI. Defendant's "story" is not at all credible.

In a nutshell, Defendant cannot have his cake and eat it too. While represented by counsel, Defendant reviewed the discovery and decided to fight the charges through the filing of a motion to suppress. A hearing was scheduled and once Defendant was given an offer which appeared to be favorable he knowingly withdrew his motion to suppress and agreed to plead guilty. For whatever reason, he changed his mind, delayed and now wishes to circumvent the rules. This Court will not allow him to do so.

### **ORDER**

**AND NOW**, this 11<sup>th</sup> day of January 2017, following a hearing and argument, the Court **DENIES** Defendant's omnibus pretrial motion in the nature of a motion to suppress nunc pro tunc.

By The Court,

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Marc F. Lovecchio, Judge

cc: Anthony Ciuca, Esquire (ADA)  
Matthew Welickovitch, Esquire (APD)



Work File  
Gary Weber, Esquire (Lycoming Reporter)