

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**SHANE ANTHONY INDIVERO,
Defendant**

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CP-41-CR-0001011-2017

OMNIBUS PRETRIAL

OPINION AND ORDER

On October 9, 2017, Defendant's Counsel, filed an Omnibus Pretrial Motion. A hearing was held January 2, 2018.

Background

Shane Anthony Indivero (Defendant) is charged with three counts of Driving under the Influence of a Controlled Substance¹, first offense, an ungraded misdemeanor. The charges arise out of a motor vehicle stop of Defendant on Lycoming Creek Road on March 8, 2017.

Testimony of Robert E. Cochran

Defense Counsel stipulated to the authenticity of Commonwealth's Exhibit #1, the Motor Vehicle Recording (MVR) of the stop. Officer Robert E. Cochran, Jr.

¹ 75 Pa.C.S. § 3802(d)(2) 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)(1)(i) and (iii):

An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:

(1) There is in the individual's blood any amount of a:

(i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

...

(iii) metabolite of a substance under subparagraph (i) or (ii).

(Cochran) over the objection of Defense, narrated the MVR, which was without audio. Cochran is an officer with the Old Lycoming Police Department and has been employed there since March 1, 2010. He has had training in field sobriety testing at the police academy, and advanced roadside impairment (ARIDE) training. He has also made approximately 150 DUI arrests and has worked at the DUI Center where he has processed drivers suspected of DUI.

On March 8, 2017, Cochran was on patrol duty, in full uniform and in a marked unit, working alone. He received a dispatch regarding an erratic driver traveling southbound on State Route 15 in Lycoming County. The dispatch reported the vehicle as a black Cadillac SUV with a New York registration plate.

Cochran traveled to Foy Avenue to find the reported vehicle. Cochran saw a black Cadillac traveling towards him, and when he got behind it, he could see the registration plate and confirm that it was the reported vehicle.

The Court viewed the MVR of the motor vehicle stop on Lycoming Creek Road, which has four lanes of travel, two lanes north and two lanes south. A dotted white line separates the lanes and double yellow lines separate the directions of travel. On more than one instance, the suspect vehicle crosses the white dotted line and then crosses into the left lane, without signaling, and does not signal to move back into the right lane.

After the activation of Cochran's emergency lights, the vehicle starts to brake and immediately pulls over. Cochran identified Defendant in the courtroom as the operator of the vehicle on the evening in question.

Cochran testified that upon making contact with Defendant that the Defendant

had a slow, raspy voice and that his movements were slow and methodical. Cochran did not detect any odor of alcohol but did observe that Defendant's pupils were pinpoint though it was dark out. Cochran shined a flashlight into his eyes and Defendant's pupils did not react or reacted very slightly. Cochran believes Defendant was trying to meet up with his wife and that he believed he was in New York State. Defendant was lost and did not know he was in Pennsylvania.

Defendant denied drinking. Defendant admitted to taking four or five prescription medications. Cochran's refreshed his memory with his police report and remembered Defendant was taking prescribed Percocet, Zoloft, Klonopin and Baclofen. He stated "no" in response to the question of whether illegal drugs were taken. Cochran did not perceive that Defendant had difficulty understanding his questions. He performed all of the field sobriety tests.

The Court observed the recording of the field sobriety tests. Cochran testified that Defendant completed the tests but not the way an unimpaired person would. At 42:57, Defendant is unable to do walk and turn. Cochran saw seven (7) signs of impairment: unable to maintain balance; starts to soon; steps off line, stops walking, raises arms, and wrong number of steps. At 47:51, Cochran demonstrates the one leg stand to Defendant. Defendant's sign of impairment during the one leg stand is that he is swaying although Cochran testified that Defendant's hands were in the allowable distance. Based on the Defendant's erratic driving, the statements Defendant made about being on four or five prescription medications, Defendant not being oriented to place, as well as his performance on field sobriety tests, Cochran formed the opinion that Defendant was driving under the influence of a controlled

substance.

Cochran called for a Drug Recognition Expert (DRE) and took Defendant to the police department for evaluation. The DRE agreed with Cochran that the Defendant was under the influence of a controlled substance and so Cochran took Defendant to the hospital to request the chemical test of the Defendant's blood. The Commonwealth submitted as its Exhibit #2 the DL26B form signed by the officer and Defendant. Cochran testified that the Defendant signed and dated the form on his own. Cochran read into the record the Section 1547 warnings. Cochran denied supplementing the 1547 warnings in any way and said the Defendant did not ask him any follow up questions, including whether his driver license would be suspended in New York if he refused to have his blood drawn.

Cochran released the Defendant to the Williamsport Regional Medical Center. Defendant and his wife requested that he stay at the hospital. Cochran denies knowledge of the reason they requested an overnight hospital stay. Cochran denied threatening the Defendant or restraining him in any way in order for phlebotomist to draw blood. Cochran stated that Defendant appeared to understand him as much as someone who was under the influence of controlled substance would. Defendant responded appropriately to questions and did not eat or drink anything while in the custody of Cochran.

Testimony of Trooper Adam Kirk

Trooper Adam Kirk (Kirk) testified on behalf of the Commonwealth. He has been employed 11 years with the Pennsylvania State Police (PSP) at Troop F in Montoursville. At the PSP academy, he received training in how to perform and

evaluate field sobriety tests. He has also received the advanced roadside impairment (ARIDE). He went to Drug Recognition Expert (DRE) training and now is a DRE instructor and Regional Coordinator for central region. He has made 370 alcohol related DUI arrests, 70 drug related DUI arrests, and performed 119 drug evaluations.

Kirk testified that Cochran contacted him to evaluate the Defendant because Kirk has particularized training in drug impairment and drug detection. Defendant was in custody and Kirk was given Defendant's driver's license. Kirk identified Defendant as the person he evaluated that evening. He further testified that during the drug evaluation, Defendant answered questions and at only one time did his response not answer the question that was being asked (regarding the milligrams of oxycodone he was prescribed).

Kirk believed Defendant was impaired. Defendant had traveled from NY and did not realize he was in PA. Lycoming County is not immediately across the border from NY where this confusion might be reasonable for an unimpaired driver. Defendant's speech was slow, low and raspy. It was not slurred. Kirk described the voice has having a soft tone but also gravelly.

Kirk administered field sobriety tests – the first test was the modified Romberg balance. Defendant did not repeat what he was instructed to say, however Kirk testified that many people taking these tests do not say what they should. Kirk testified that the Defendant never indicated that he did not know why he was there. Kirk did not see the Defendant ingest any substance in his presence.

At 0147, Kirk performed the drug evaluation. The Defendant believed that he was still in New York. He had no idea that he was in Pennsylvania. Defendant was not oriented to place but was oriented to person and time. Kirk asked the Defendant about medications he was taking. One medication was for acid reflux, another was for neck and back pain due to an injury in 2014. Defendant reported memory loss since 2014. Kirk observed that Defendant was having a hard time keeping his eyes open which Kirk said is called being "on the nod". Defendant was also non-responsive to the amount of Percocet he was taking; Kirk testified that reaction is not out of ordinary for a person on a narcotic medication. Kirk testified that the majority of the time people do not remember what dose they are taking. Kirk formed the opinion the Defendant was under the influence of a narcotic analgesic and incapable of safe driving.

Discussion

I. Late Filing of Omnibus Motion

At the time set for hearing, the Commonwealth objected to the late filing of the Omnibus Motion (filed October 9, 2017, arraignment was set for July 3, 2017). Pa.R.Crim.P. 579 states in pertinent part

Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or 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.

Defense Counsel cites ongoing plea negotiations as the reason for late filing and his belief that if he had filed the motion earlier it would have

irrevocably damaged plea negotiations. When he determined that a plea agreement would not be reached, he filed the motion.

The Commonwealth did not present evidence of any interference in its ability to prosecute the case due to late filing. "...the Commonwealth's argument fails, as it does not claim nor argue that the delay of a few months in Defendant's filing of his motion to suppress prejudiced it in anyway." Commonwealth v. Baez, 21 A.3d 1280, 1282 (Pa. Super. 2011).

The Court denied the Commonwealth's motion finding that if there were legitimate issues raised and they were not litigated prior to trial this would be a basis to attack any conviction that may occur in the underlying criminal matter. See Commonwealth v. Jackson, 362 A.2d 324 (Pa. Super. 1976). Moreover, the Commonwealth did not present any evidence as to how it would be prejudiced if the Court did not decide that merits of the issues raised in the Omnibus Motion and thus the Court allowed the hearing to proceed as scheduled.

II. Motion to Suppress Physical Evidence

Defense Counsel argues that Cochran did not have reasonable suspicion or probable cause to stop Defendant's vehicle. The Court disagrees. Cochran was responding to a report of erratic driving. The report appears to have been anonymous which would be a basis for finding that the officer lacked reasonable suspicion², but

² Anonymous tips to police do not establish grounds even for an investigative detention in Pennsylvania or under the Fourth Amendment Commonwealth v. Jackson, 698 A.2d 571 (Pa. 1997); Commonwealth v. Kue, 692 A.2d 1076 (Pa. 1997); Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997); Commonwealth v. Goodwin, 750 A.2d 795 (Pa. 2000); Commonwealth v. Wimbush, 750 A.2d 807 (Pa. 2000); Florida v. J.L., 120 S. Ct. 1375, 146 L.Ed.2d 254 (2000).

the officer had probable cause stop the vehicle once he personally observed it operating on the roadway. The MVR shows multiple violations of the motor vehicle code.

Defense Counsel next argues that police lacked reasonable suspicion to request Defendant submit to field sobriety tests. Reasonable suspicion that criminal activity is afoot must be present when an officer asks a motorist to perform field sobriety tests. Commonwealth v. Cauley, 10 A.3d 321, 327 (Pa. Super. 2010). It is against the law to operate a motor vehicle when one is so under the influence of a controlled substance that one cannot safely operate a vehicle. The determination of whether an officer had reasonable suspicion that such criminality is afoot to justify an investigatory detention is an objective one, which must be considered in light of the totality of the circumstances. It is the duty of the suppression court to evaluate independently whether, under the particular facts of a case, an objectively reasonable police officer would have reasonably suspected criminal activity was afoot. Commonwealth v. Brown, 996 A.2d 473,477 (Pa. 2010).

In this case, Cochran first made contact with Defendant in regards to a report of erratic driving. Cochran sees Defendant driving and committing multiple motor vehicle code violations. After Cochran makes contact, the Defendant has a slow, raspy voice and uses slowed and methodical movements, consistent with drug ingestion rather than alcohol ingestion. Lastly, Defendant admits to being prescribed and currently under the influence of controlled substances. Under the facts presented here, Cochran's request that Defendant take field sobriety tests was supported by the sufficient amount of information required by the law.

Defense Counsel argues that Defendant's blood test results should be suppressed as they were obtained in violation of Defendant's right to be free from unreasonable searches and seizures under the United States Constitution and the Pennsylvania Constitution. Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016).

Any search conducted without a warrant is deemed *per se* unreasonable under the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Cleckley, 738 A.2d 427, 429 (Pa. 1999) (citing Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1997)). Therefore, the search of Defendant's blood was unreasonable unless an exception to the requirement that police obtain a warrant exists. Certain specifically established exceptions, one of which is valid consent may, however, render an otherwise illegal search permissible.

Id.

In determining the validity of a given consent, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice — not the result of duress or coercion, express or implied, or a will overborne — under the totality of the circumstances. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Evans, 153 A.3d 323, 328 (citing Commonwealth v. Smith, 77 A.3d 562, 573 (Pa. 2013) (internal citations, quotations, and corrections omitted).

Considering the totality of the circumstances, the Court finds that Cochran did not use deceit, misrepresentation, or coercion in seeking Defendant's consent for the blood draw and testing, thus not invalidating the blood draw or those results from those bases. The form that Cochran read to Defendant and both parties signed did

not mention criminal penalties for refusal that the Supreme Court of the United States found to be unconstitutional in Birchfield. The Court finds that the Defendant voluntarily signed the DL26B form and that the threat of civil penalties alone was not unduly coercive as a matter of law³.

Defendant was under arrest at the time he consented causing the Court to use heightened scrutiny in determining the voluntariness of his consent. However, based on the testimony of the officers, the Court finds that Defendant was conscious and effectively communicating with Cochran that he was able to consent to the blood draw. Defendant heard what the officers were asking and responded appropriately following directions. Though not oriented to place, Defendant demonstrated the wherewithal to take two field sobriety tests and engage in an evaluation. He provided his arm and signed the DL26B form after the warnings were read. He knew that he was being investigated, and he was able to agree to or deny what was being requested of him.

Regarding his later hospital admission, the Court would initially consider irrelevant to its determination of whether he voluntarily consented to the blood draw requested of him. However, if it were relevant, the Court believes that that it actually supports the Court's finding of voluntary consent in this case. Voluntariness "must be shown by a preponderance of the credible evidence." In order to meet this burden, "the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings." Commonwealth v.

³ The Commonwealth Court has already found that the civil penalties for refusal remain the law of Pennsylvania, Regula v. Commonwealth, 146 A.3d 836 (Pa. Comm. Ct. 2016),

Eichinger, 915 A.2d 1122, 1136 (Pa. 2007) (internal citations omitted). His later ability to request hospital admission establishes the Defendant was aware of what was happening and bolsters the finding that Defendant was able to consent earlier in the evening to the chemical test of his blood.

III. Motion for Discovery

In the Omnibus Motion, Defense Counsel requested further information, regarding the blood testing performed by NMS⁴. It was determined at the time set for hearing that the information Defense Counsel was requesting was equally accessible to the Defense as it is the Commonwealth and as such, the Court denied the request to order the Commonwealth to provide this information to Defense Counsel.

IV. Motion to Dismiss Counts 1-3 of the Information or Alternatively to Preclude the Introduction of any BAC Testimony at Trial

Exception to two-hour rule.

Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:

- (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours; and
- (2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.

75 Pa.C.S. § 3802 (g) (exception to two hour rule)

⁴ Blood is drawn at the hospital and sent for testing to National Medical Services (NMS) Labs in Willow Grove, PA.

The controlled substance concentration evidence collected by the Commonwealth more than two hours after the Defendant had driven his motor vehicle. Based on the uncontradicted facts presented at the hearing and in Defendant's motion, the initial stop of Defendant occurred at 12:20 am. The Defendant's was taken at 3:04 am, which is outside the two hour time period. The Commonwealth was able to establish number (2) *supra* (that the Defendant did not imbibe any alcohol or utilize a controlled substance between the time the Defendant was arrested and the time the sample was obtained) however there was no explanation provided as to why the chemical test sample could not be obtained within two hours. As such, the Court must preclude the entry into evidence of the controlled substance concentration evidence or any testimony regarding that information.

ORDER

AND NOW, this _____ day of March, 2018, based upon the foregoing Opinion, the Omnibus Pretrial Motion is GRANTED in part and DENIED in part.

Since the Court finds that the Commonwealth failed to present evidence to justify the delay in drawing the Defendant's blood within two (2) hours, the evidence of the Defendant's blood test is SUPPRESSED. The Commonwealth is therefore precluded from the introduction of any controlled substance blood concentration evidence at trial.

In all other respects, the Omnibus Pretrial Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Nicole M. Ippolito, Esquire, ADA
EJ Rymza, Esquire, Defendant's Counsel
Gary Weber, Esquire