

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-2141-2017
 :
 EUGENE CLAY, : Motion to Suppress
 Defendant :

OPINION AND ORDER

Before the court is Defendant's Motion to Suppress filed on April 9, 2018. A hearing and argument were held on June 27, 2018. Defendant is charged by Information filed on January 5, 2018 with possession with intent to deliver and related charges. The Commonwealth alleges that on December 6, 2017, Officer Clinton Gardner of the Williamsport Bureau of Police searched Defendant's vehicle and found controlled substances and related contraband. Prior to the search, a K9 unit was called and the canine "alerted" to the vehicle.

Defendant contends in his motion to suppress the following:

- (1) There was no reasonable suspicion for the canine search;
 - (2) There was insufficient probable cause to search the vehicle;
- and
- (3) Defendant's detention and arrest were without legally sufficient grounds.

In Pennsylvania, police are permitted to conduct a canine sniff/search of the air surrounding a vehicle if the police have reasonable suspicion that the vehicle contains illegal contraband. *Commonwealth v. Rogers*, 741 A.2d 813, 818 (Pa. Super. 1999), *aff'd*,

578 Pa. 127, 849 A.2d 1185 (2004); *Commonwealth v. Martin*, 534 Pa. 136, 626 A.2d 556, 559-560 (1993)(reasonable suspicion required for canine sniff of a place; probable cause required for a canine sniff of a person or an object being carried by a person).

Reasonable suspicion is something more than an inchoate or unparticularized suspicion or hunch. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). However, reasonable suspicion is a less stringent standard than probable cause. *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1189 (2004). In order to justify the sniff, the police must be able to point to specific and articulable facts leading the police to believe that the vehicle contains contraband. *Id.* at 1190. “Reasonable suspicion...depends on the information possessed by the police and its degree of reliability based on the totality of the circumstances.” *Commonwealth v. Brown*, 606 Pa. 198, 996 A.2d 473, 477 (2010). In assessing the totality of the circumstances, the courts must afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer’s experience and acknowledge, that innocent facts, when considered collectively, may permit the sniff. *Id.*; *Commonwealth v. Holmes*, 609 Pa. 1, 14 A.3d 89, 95 (2011).

On December 6, 2017, Officer Clinton Gardner of the Williamsport Bureau of Police was patrolling what he described as a “high drug trafficking area”, namely the 500 block of Memorial Avenue in the city of Williamsport. He had extensive experience in drug interdictions, arrests and prosecutions previously conducting over 200 drug related arrests. Officer Gardner was conducting surveillance on Defendant. He had conducted multiple narcotics investigations and arrests in the area. He knew as well that a “local gang” engaged

in “narcotics offenses,” and in which Defendant had an association, frequented the area.

In the spring of 2017, Cody Augustine provided information to Officer Gardner regarding Defendant. Specifically, he advised Officer Gardner that Defendant was “dealing heroin” to him. He described Defendant as associating with another black male who had dreadlocks with red coloring in them. He also indicated that Defendant operated a white Ford Escape. He advised Officer Gardner that Defendant kept the heroin in the center console of the vehicle. As well, in November of 2017, prior to Thanksgiving, Mr. Augustine made a controlled buy of heroin from Defendant.

Officer Gardner knew as well from another law enforcement officer, Detective Burns, that the controlled buys were made from Defendant in November of 2017. He knew that at least two controlled buys were made in that month prior to the date that he was conducting the surveillance in this case.

On the date in question, December 6, 2017, Gardner first observed Defendant outside of a white Ford Escape similar to that previously described by Detective Burns and Mr. Augustine. Defendant was talking with a black male with dreadlocks and red highlights. Gardner recognized the other black male as James Rooks with whom Gardner had “previous involvement.” The vehicle was at a Uni-Mart gas station.

Defendant drove the vehicle from the Uni-Mart to the Memorial Avenue Townhouses. Officer Gardner passed by the buildings, waited and then backed up to continue the surveillance. He saw Defendant reach or go to the center console several times. He also saw Defendant reach toward his stomach or pants area. When Defendant looked up and he

and Officer Gardner made eye contact, Defendant abruptly exited the vehicle and walked toward an apartment just north of the vehicle.

Officer Gardner drove past Defendant, at which time Defendant asked Gardner if there was a problem. Officer Gardner informed Defendant that he suspected him of drug trafficking and that if Officer Gardner called a police K9 unit, it would likely alert on his vehicle.

Defendant then started walking back to his vehicle but did not enter it. He walked passed it, got on the telephone and started walking toward apartment 302. Officer Gardner exited the parking lot and parked in another location. He saw another individual meet up with Defendant and they both went around the corner, presumably into the apartment.

Officer Gardner continued his surveillance. A few minutes later, Defendant reappeared, looked at Officer Gardner, and then walked out of sight back in the direction of the apartment. Officer Gardner repositioned his vehicle and waited several minutes. Defendant again came out of the area of the apartment, entered the vehicle, observed Gardner and then exited the vehicle and presumably returned to Apartment 302. Officer Gardner contacted Corporal Derr of the Williamsport Bureau of Police for backup and requested a K9 unit through county dispatch. After Corporal Derr arrived, Officer Gardner approached the vehicle and looked inside. On the driver's side floor, Officer Gardner noticed a black rubber band or "packaging band" which, based on his experience, is used to bundle together heroin packets. While Gardner was looking into the vehicle, Defendant again "came out" and yelled

“what you doing with my car?” Corporal Derr asked “your car?” and then Defendant responded “that car.” Defendant stayed away from the vehicle while Gardner continued to look inside through the windows.

Before the K9 unit arrived, Defendant proceeded to walk away from the area. He reached a “considerable distance from the vehicle, approximately 30 to 40 yards away.” Officer Gardner instructed the defendant to stop. Defendant kept walking. Officer Gardner was concerned that Defendant was going to flee so Officer Gardner un-holstered his Taser, and pointed it at Defendant while walking toward Defendant and telling him to stop. Defendant immediately stopped. Officer Garner directed Defendant to go to his knees and put his hands on his head. Defendant was handcuffed and directed back towards the vehicle. Defendant was then seated on a curb.

Officer Devin Thompson of the South Williamsport Police along with his K9, Dany, soon arrived. Officer Gardner stood near Defendant while Officer Thompson and Dany conducted a canine sniff of the air coming from in and around the vehicle.

Clearly, there was reasonable suspicion for this search. Defendant was a known heroin dealer. Defendant was known to have association with a local gang that trafficked in drugs. Defendant recently sold heroin to a confidential informant. When the recent transactions occurred, Defendant used the white vehicle that he was driving during the night in question. Defendant was associating that evening with two other known drug traffickers. Defendant was driving in a high drug trafficking area of the city. Defendant’s activity and continually distancing himself or avoiding a return to the vehicle while Officer

Gardner was present evidences consciousness of guilt. Defendant was nervous, evasive and confrontational. Once being informed that a K9 unit was called and observing backup arrive, Defendant attempted to leave the scene. Finally, the rubber band used for packaging was seen in plain view from a lawful vantage point.

The next issue concerns whether the search of the vehicle was legally reasonable. Clearly, the police did not have a warrant, nor did Defendant consent. In this Commonwealth, no search warrant is required to search a vehicle where probable cause exists to perform the search. *Commonwealth v. Gary*, 625 Pa. 183, 91 A.3d 102 (Pa. 2014).

Generally speaking, probable cause exists when “the facts and circumstances which are within the knowledge of the officer at the time, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime and that the item to be searched contains evidence of the crime.” *Commonwealth v. Thompson*, 614 Pa. 198, 203, 985 A.2d 928, 931 (2009). The question is not whether the officer’s belief was correct or more likely true than not. What is required is a probability of criminal activity. In determining whether probable cause exists, the courts apply a totality of the circumstances test. *Id.*

Clearly, once Dany alerted on the vehicle, the officers had probable cause to search it. It is critical to note that the evidence demonstrated Dany’s training and his proficiency in finding drugs. See *Florida v. Harris*, 568 U.S. 237, 133 S.Ct. 1050(2013); *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409 (2013).

Defendant’s final claim is that his detention was illegal. Following the search

of the vehicle which yielded heroin, paraphernalia and other contraband, Defendant was informed that he was “now in custody.” He was searched incident to arrest and on his person police found a cellular phone and \$236.00 in cash primarily in \$20.00 bills. The police also recovered a parking ticket issued to the white Ford Escape.

Defendant argues that he was in custody or arrested once he was placed in the sights of the Taser, handcuffed and brought back to the area of the vehicle. The Commonwealth contends that Defendant was only detained while the canine sniff was being conducted and the car was being searched. According to the evidence, Defendant was “detained” for approximately four to five minutes until he was informed that he was “in custody.”

The court agrees that Defendant was detained. A police officer may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct. *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185 (2004). Not every time an individual is placed in handcuffs is the functional equivalent of an arrest. See *Commonwealth v. Rosas*, 875 A.2d 341, 348 (Pa. Super. 2005); *Commonwealth v. Gillespie*, 745 A.2d 654, 660 (Pa. Super. 2000). Defendant was not immediately searched or placed into the back of a police vehicle. Instead, he was seated on the curb while his vehicle was subject to a canine sniff and then searched. After the controlled substances were found in his vehicle, the police formally arrested Defendant.

Even if Defendant believed he was being arrested when he was ordered to the ground and handcuffed, no evidence was derived as a result of his allegedly premature arrest.

The police were already in the process of getting a K9 unit to the scene to conduct a canine sniff of Defendant's vehicle before Defendant was handcuffed. As a result of the canine sniff, the police developed probable cause to search Defendant's vehicle that was independent of his detention or arrest. Within four or five minutes of the police placing handcuffs on Defendant, the police found several baggies of suspected heroin in Defendant's vehicle, not on his person. Finally, Defendant was not searched incident to arrest until after the controlled substances were found in his vehicle. Accordingly, Defendant's claim fails.

ORDER

AND NOW, this ____ day of July 2018, following a hearing and argument, Defendant's Omnibus Pretrial Motion is DENIED to the extent it seeks suppression of the items obtained from Defendant's vehicle or his person.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Mary Kilgus, Esquire,
Work file
Gary Weber, Esquire, Lycoming Reporter