

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-1888-2018
v.	:	
	:	
GREGORY GARMAN,	:	OMNIBUS PRETRIAL
Defendant	:	MOTION

OPINION AND ORDER

Gregory Garman (Defendant) was charged on September 2, 2018 with Possession of a Controlled Substance,¹ Possession of Drug Paraphernalia,² Driving under the Influence of a High Rate of Alcohol,³ Driving on Roadway Laned for Traffic,⁴ Careless Driving,⁵ and Driving under the Influence, General Impairment.⁶ The charges arise from a traffic stop that occurred on I-180 in Fairfield Township, of Lycoming County at the Lycoming Mall Exit. Defendant filed this Omnibus Pretrial Motion seeking the dismissal of count three, Driving under the Influence of a High Rate of Alcohol, and the suppression of evidence on February 6, 2019. A hearing on the Motion was held by this Court on March 18, 2019.

Background and Testimony

Trooper Mark McDermott (McDermott) of the Pennsylvania State Police testified on behalf of the Commonwealth and the Commonwealth submitted the video taken from the Motion Video Recorder (MVR) of McDermott's vehicle and the DL-26B form signed by Defendant as exhibits. Based on the evidence the following was established. On September 2,

¹ 35 P.S. § 780-113(a)(16).

² 35 P.S. § 780-113(a)(32).

³ 75 Pa. C.S. § 3802(b).

⁴ 75 Pa. C.S. § 3309(1).

⁵ 75 Pa. C.S. § 3714(a).

⁶ 75 Pa. C.S. § 3802(a)(1).

2018 approximately 10:45 p.m., McDermott was acting in his official capacity as a police officer when he witnessed a black sedan cross over the right fog line. McDermott then activated his MVR and followed the vehicle for approximately two and one half (2 ½) miles. On the MVR Defendant can be seen crossing the right fog line at :45. At :58 the vehicle is still over or on the fog line and continues to be through 1:14. Then at 1:43 the vehicle drifts left towards the center line and the vehicle can be observed weaving left to right within its lane of traffic consistently through 1:55. At this time McDermott activates his lights and conducts a stop. McDermott stated that he conducted the stop for violations of Roadway Laned for Traffic, Careless Driving, and his reasonable suspicion that the driver, Defendant, was intoxicated.

Analysis

At the hearing, the Court accepted the Commonwealth's withdrawal of count three, Driving under the Influence of a High Rate of Alcohol. *See* Order 3/18/19. At the outset, both parties agreed that only the stop of the vehicle and the voluntariness of consent based on the DL-26B form were at issue. Defense counsel and the Commonwealth additionally agreed that testimony regarding the DL-26B form would not be necessary as the factual situation was indistinguishable from this Court's prior determinations on the issue. This Court has previously determined:

Defendant was advised that if he did not consent to the blood draw, that his driver's license would be suspended for 12 months at least, if not more, depending on whether he had other driving under the influence convictions. He was also told that if he remained silent or asked for an attorney that it would be deemed to be a refusal. However, Defendant was not advised that there would be criminal consequences to his refusal, so those did not coerce him.

* * *

The Court also finds that the content of the revised DL26 form (e.g. the DL26B Form) does comply with the requirements of *Birchfield*. The Court looks to the executed DL26B Form to support [the officer]'s testimony that Defendant was able to fill out that form properly. Defendant was not advised that there would

be criminal consequences to his refusal, so those did not coerce him. In addition, the Court finds that is clear from the face of the document and the testimony of [the officer] that the choice to take the blood test was Defendant's and Defendant's alone. From an objective viewpoint, the Defendant was given an opportunity to decline the test and he did not. The Court does not believe that the Defendant was coerced and so therefore will not suppress the [] blood draw and the evidence obtained as a result.

Commonwealth v. Turner, CR-1482-2017, Opinion and Order 3/13/18, at 5-7.

Defense counsel agreed that the factual situation is similar and understands this Court denial of the suppression of evidence as a result of the current implementation of the DL-26B form. The Court finds, as it has in the past, the implementation of the DL-26B form and its warnings are not coercive, but Defendant wishes to preserve his claim.⁷ Therefore only one issue remains unaddressed: Whether the police had reasonable suspicion of a traffic violation to conduct a stop. Defendant contends any evidence obtained as a result of the stop should be suppressed.

Police officers are granted the authority to effectuate stops pursuant to violations of the motor vehicle code. 75 Pa. C.S. § 6308(b). “Whenever a police officer . . . has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle.” *Id.* “Traffic stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose.” *Commonwealth v. Feczko*, 10 A.3d 1285, 1291 (Pa. Super. 2010). In contrast, a vehicle stop that does not require further investigation to determine whether a violation has occurred requires an officer to “have probable cause to make a constitutional vehicle stop.” *Commonwealth v. Chase*, 960 A.2d 108, 116 (Pa. 2008). Under 75 Pa. C.S. § 3309(1), “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be

⁷ The Pennsylvania Superior Court has also recently determined “that *Birchfield* does not require suppression of [a defendant]’s blood draw” and that officers need only tell a defendant the current “legal consequences of refusing to consent to the blood-draw” in conjunction with the DL-26B form for him/her to give objectively valid consent. *Commonwealth v. Venable*, 200 A.3d 490, 497-98 (Pa. Super. 2018).

moved from the lane until the driver has first ascertained that the movement can be made with safety.” Additionally a violation of the Motor Vehicle Code occurs when a “person [] drives a vehicle in careless disregard for the safety of persons or property.” 75 Pa. C.S. § 3714(a). Both above offenses require no further investigation, therefore probable cause must be present to effectuate a stop. *Feczko*, 10 A.3d at 1292 (probable cause required for a stop pursuant to 75 Pa. C.S. § 3309(1)). “On the other hand, if an officer possesses sufficient knowledge based upon behavior suggestive of [driving under the influence], the officer may stop the vehicle upon reasonable suspicion of a Vehicle Code violation, since a stop would provide the officer the needed opportunity to investigate further.” *Commonwealth v. Salter*, 121 A.2d 987, 993 (Pa. Super. 2015). In *Commonwealth v. Smith*, the defendant made a “wide and dangerous turn onto Route 62 and traveled a significant distance in the center of a lined, two-way road, forcing [the officer], who was approaching from the opposite direction, to apply her brakes to avoid a collision.” 177 A.3d 915, 919 (Pa. Super. 2017). The officer believed based on her training and experience that the defendant “was intoxicated based on her driving at that time of the early morning.” *Id.* at 920. *See also Commonwealth v. Sands*, 887 A.2d 261, 272 (Pa. Super. 2005) (reasonable suspicion of driving under the influence to conduct a vehicle stop when the defendant crossed the fog line three times, was weaving on a straight road, and it was in the early morning hours).

Defendant argues that the vehicle was improperly stopped. This Court disagrees. Both the testimony and MVR demonstrate that Defendant crosses over the fog line and touches the fog line on multiple occasions. Defendant can be seen weaving back and forth within the lane and drifting left on slight turns. McDermott stated that he conducted the stop due to violations of Roadway Laned for Traffic, Careless Driving, and because he suspected that Defendant was

driving while intoxicated. The MVR clearly shows probable cause for violations of Roadway Laned for Traffic and Careless Driving throughout. Regardless of the probable cause present for motor vehicle violations enough evidence has been provided to demonstrate McDermott had the requisite reasonable suspicion that Defendant was driving under the influence. The MVR from :45 to 1:55 shows Defendant's erratic driving, the offense occurred at approximately 10:45 at night, and McDermott testified based on his training and experience the erratic driving indicated to him that Defendant was likely driving under the influence.

Conclusion

McDermott had the requisite reasonable suspicion to stop Defendant for a motor vehicle violation. The DL-26B implied consent form conforms to *Birchfield* and Defendant's consent was objectively voluntary. Therefore, Defendant's Omnibus Pretrial Motion shall be denied. There is no violation of Defendant's constitutional rights and the evidence resulting shall not be suppressed.

ORDER

AND NOW, this 28th day of March, 2019, based upon the foregoing Opinion, Defendant's Omnibus Pretrial Motion is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (NI)
Peter Campana, Esquire

NLB/kp