IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1649-2018**
v.	:	
	:	
BLAKE GETGEN,	:	**MOTION TO SUPPRESS**
Defendant	:	

OPINION AND ORDER

Blake Getgen (Defendant) was arrested on August 21, 2018 for Driving under the Influence.[1] The charges arise from police responding to a call from Emergency Medical Services (EMS) concerning a male asleep in his vehicle at the 7775 North Route 220 Highway Sheetz, in Lycoming County. Defendant filed this timely Motion to Suppress on February 19, 2019. A hearing on the motion was held by this Court on April 22, 2019.

In his Motion to Suppress, Defendant raises the issue of whether the police had the requisite probable cause to conduct the functional equivalent of an arrest or alternatively the reasonable suspicion to conduct an investigatory detention at the time Defendant was instructed to stay in the vehicle. Defendant also contends that the DL-26B form used for Defendant's implied consent to a blood draw is not a knowing, intelligent, and voluntary waiver of his rights and therefore the results should be suppressed. Based on the following reasoning this Court finds that the trooper effectuated an investigatory detention on Defendant by closing his door, and at the time did not have specific and articulable facts to give him reasonable suspicion that criminal activity was afoot, nor was his seizure permissible pursuant to the emergency aid exception of the community caretaking doctrine.[2]

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[1] 75 Pa. C.S. § 3802(a)(1), (c).

[2] The Court will not address the issue of whether Defendant's consent to a blood draw was knowing, voluntary, and intelligent as the issue is moot, since the evidence will be suppressed as a result of the illegal investigatory detention. *But see Commonwealth v. Garman*, CR 1888-

Background and Testimony

Troopers Nathan Birth (Birth) and Jason Kelley (Kelley) of the Pennsylvania State Police testified on behalf of the Commonwealth. Additionally the Commonwealth submitted a copy of the Motor Vehicle Recording (MVR) from the troopers' cruiser on the night of the incident and a copy of the DL-26B form that Defendant signed. This evidence established the following. On August 21, 2018, Birth and Kelley responded to a call from EMS requesting assistance at the 7775 North Route 220 Highway, Sheetz. Troopers were advised that an individual was passed out in a vehicle and was partially hanging out of the vehicle's window. Upon arrival EMS was still at the scene, Birth told Kelley to "just get their info" and EMS informed the troopers that they believed Defendant was intoxicated. MVR at :52. Kelley pulled the vehicle into a parking spot behind Defendant, which was not blocking in Defendant's vehicle in. *Id.* at 1:06. At the time Defendant was not hanging out the vehicle and the vehicle was off. *Id.* When Birth approached the vehicle Defendant's window was up and he was reclined back in his seat asleep. Birth attempted to get Defendant's attention vocally, before knocking on Defendant's window, waking him. *Id.* at 1:26. Defendant rolled down his window and Birth announced himself as Pennsylvania State Police before asking if Defendant had license and registration. *Id.* at 1:34. Defendant states "yes" and Birth replies "where is it at?" *Id.* at 1:44. Birth testified that Defendant was slow and sluggish and did not seem to know where his information was located. As Birth asks Defendant "where you coming from man?" Defendant can be seen opening the door, which Birth shuts and states "I didn't tell you to get out yet." *Id.* at 1:54. Birth stated that that he did not make any observations of Defendant's eyes, but could smell the strong odor of alcohol, when further questioning Defendant. Birth

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2018, at 2-3 (Lyco. Ct. Com. Pl. 2019) (this Court ruled that DL-26B form is a knowing, voluntary, and intelligent waiver of a defendant's rights).

testified that kept Defendant in his vehicle for his own well-being as Birth was not yet aware what kind of state Defendant was in. The Pennsylvania State Police also have a policy that if a defendant's portable breath test (PBT) results registers over .25% the troopers are required to take the defendant in for medical treatment.

Birth asks Defendant if he was drinking today, which Defendant replies "was." Birth questions Defendant for approximately ten minutes prior to stating he is going to administer a PBT to make sure he does not need medical attention. *Id.* at 10:30. Birth administers a PBT, which registered a .162%. *Id.* at 12:00. Then Birth administers a range of Standard Field Tests, which Defendant failed. Defendant was then placed under arrest for Driving under the Influence of Alcohol and he was read his *Miranda* rights on the way to the hospital for a blood draw. *Id.* at 19:17-22:58. Birth read Defendant the DL-26B form verbatim and Defendant consented to a blood draw. Results indicated Defendant's blood alcohol content was .178%.

Analysis

Defendant alleges that he was detained by the police in violation of his constitutional rights, therefore any evidence seized should be suppressed. There are three categories when dealing with interactions between citizens and law enforcement:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicions, but carries no official compulsion to stop or respond. The second, an "investigative detention," must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or "custodial detention" must be supported by probable cause.
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> *Commonwealth v. Gutierrez*, 36 A.3d 1104, 1107 (Pa. Super. 2012).

The Pennsylvania Supreme Court recently determined that an investigatory detention occurs when an officer shuts a defendant's car door and does not permit the individual to get out. *Commonwealth v. Adams*, -- A.3d --, 2019 WL 1339485 at *8 (Pa. 2019). The Court found that

the officer's act of closing the door transformed a mere encounter into an investigatory detention because at that point an ordinary defendant "would not have felt free to leave." *Id.* at *6. The Court additionally found that concern for officer safety, although legitimate and important, "does not overcome or replace the requirement of reasonable suspicion that criminal activity is afoot to support the seizure." *Id.*

As Birth approached Defendant's vehicle the interaction was a mere encounter. Kelley parked in a space behind the vehicle not blocking it in, the troopers did not turn on their overhead lights, and Birth did not approach the vehicle in a show of force. MVR at 1:06. But as soon as Defendant attempts to open his car door and Birth closes it stating "I didn't tell you to get out yet" the interaction transforms into an investigatory detention. *Id.* at 1:54; *Adams*, 2019 WL 1339485 at *6. Contrary to the Commonwealth's argument that the totality of the circumstances does not create an investigatory detention in this situation, this Court believes the factual situation is indistinguishable from that in *Adams*. The Pennsylvania Supreme Court was very clear in determining that an officer shutting a defendant's door is a show of force, which tells a defendant he/she is not free to leave, and therefore requires reasonable suspicion that criminal activity is afoot. *Id.* at *8. Since this Court has found an investigatory detention has occurred, it must next determine whether the Commonwealth has identified specific and articulable facts, which would lead a reasonable officer to believe criminal activity is afoot. *Id.*

The Pennsylvania Supreme Court has adopted the United States Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), permitting police to effectuate a precautionary seizure when there is reasonable suspicion criminal activity is afoot. *Commonwealth v. Matos*, 672 A.2d 769, 773-74 (Pa. 1996) (citing *Commonwealth v. Hicks*, 253 A.2d 276 (Pa. 1969)). The Court views a totality of the circumstances to determine whether "a reasonable person

would believe that he was not free to leave." *Commonwealth v. Collins*, 672 A.2d 826, 829 (Pa. Super. 1996). "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences he is entitled to draw from the facts in light of his experience." *Commonwealth v. Cook*, 735 A.2d 673, 676 (Pa. 1999) (quoting *Terry*, 392 U.S. at 27). Case law has established certain facts alone do not create reasonable suspicion, but a totality of the circumstances may create it. *See Commonwealth v. DeWitt*, 608 A.2d 1030 (Pa. 1992) (flight alone does not establish reasonable suspicion); *Commonwealth v. Kearney*, 601 A.2d 346 (Pa. Super. 1992) (mere presence in a high crime area alone does not create reasonable suspicion).

The facts here establish that the troopers responded to a call from EMS that an individual was hanging partially out of his car window passed out. When the troopers arrived EMS stated they believed Defendant was intoxicated, however Defendant was no longer hanging out of the window. Defendant was asleep with his seat reclined and the vehicle's windows were up. The vehicle was not on and Defendant was legally parked in a marked space. Defendant appeared slow and sluggish when first waking and responding to Birth. This is the extent of the facts from Birth's initial contact with Defendant until he shuts the door, which was a period of less than twenty seconds. Based on the totality of the circumstances, Birth initiated an investigatory detention without the proper reasonable suspicion of criminal activity being afoot. Defendant was legally parked and sleeping in his vehicle and the troopers were not contacted by Sheetz that Defendant was trespassing or loitering and their assistance was needed. Instead EMS requested assistance due to an individual passed out of hanging out his car window. EMS did not state they saw the vehicle driving erratically or whether it was there

prior to them arriving, but that they believed Defendant was intoxicated. When Birth and Kelley arrived the windows were up and Defendant was laid back in his seat sleeping. The only observations Birth had prior to initiating an investigatory detention were sluggish movements while Defendant was attempting to locate his registration and identification, which Birth admitted also mirrored that of someone just waking up. Based on the totality of the circumstances the situation does not rise past a mere hunch. *Cf. Commonwealth v. Davis*, 188 A.3d 454, 460 (Pa. Super. 2018) (reasonable suspicion existed when driver was asleep at the wheel of a running vehicle, parked completely on a sidewalk, and upon awaking had heavily slurred speech). Therefore the troopers did not have reasonable suspicion that criminal activity was afoot.

Commonwealth additionally alleges that the troopers' concern was for Defendant's safety and that was the purpose of this encounter. The Pennsylvania Supreme Court has recognized three exceptions to reasonable suspicion of criminal activity requirement for a seizure of a defendant under the community caretaking doctrine. *Commonwealth v. Livingstone*, 174 A.3d 609, 626-27 (Pa. 2017). The three exceptions are for emergency aid, automobile impoundment/inventory, and the public servant exception. *Id.* The Court in *Livingstone* outlined a three part reasonableness test to determine whether the community caretaking doctrine applies. *Id.* at 634-37. First, the officer "must be able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance." *Id.* at 634. Second, the police action "must be independent from the detection, investigation, and acquisition of criminal evidence." *Id.* at 635. The Court clarified that "an officer's contemporaneous subjective concerns regarding criminal activity" will not preclude a valid seizure, but courts analyzing the application of the doctrine "must

meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse." *Id.* at 636 (quoting *State v. McCormick*, 494 S.W.3d 673, 688 (Tenn. 2016)). Lastly, the level of intrusion employed by the officer "must be commensurate with the perceived need for assistance." *Id.* at 637.

An individual passed out in a vehicle at that time of night can be a valid reason for officers to approach and conduct a general welfare check, but at the time of the troopers arrival Defendant was not hanging out of the vehicle and they were already informed by EMS that they believed he was intoxicated. Making the issue whether Kelley and Birth were acting independent of an investigatory purpose, as required by *Livingstone*. *Livingstone*, 174 A.3d at 635. This Court finds that the troopers were not. Birth asked if Defendant if he "was doing a little drinking to today" and where he was coming from. MVR at 2:03. He asked where Defendant was headed to. *Id.* at 2:43. Defendant is then left alone in his vehicle as Birth runs his information, before Birth states that he is "going to do fields on him first." *Id.* at 4:03-6:53. Birth asks what he drank, where he drank it, where he was at different times during the day, and why he came down to Sheetz. *Id.* at 8:20. By 9:20 in the MVR it is clear that Defendant is not permitted to go anywhere and "he is under suspicion of a DUI." *Id.* at 9:42. At no point during the conversation does Birth asks if Defendant needs medical assistance. Additionally if true emergency aid was necessary, EMS, who would be better suited to handle the situation, were already on scene. But instead of rendering medical aid EMS made the determination to report it to the troopers, because they believed the individual was intoxicated. No true emergency existed that aid would have required justifying the community caretaking doctrine exception to a seizure of Defendant without reasonable suspicion that criminal activity was afoot.

Conclusion

The Court finds that the requisite reasonable suspicion of criminal activity did not exist at the time Birth shut Defendant's door, effectively creating an investigatory detention. Further no emergency that required immediate aid was present, which would be an exception to the requirement of reasonable suspicion and instead the troopers were acting in a criminally investigative fashion. *See Livingstone*, 174 A.3d at 635. Therefore, Defendant's constitutional rights were violated and the evidence resulting shall be suppressed.

ORDER

AND NOW, this 7th day of May, 2019, based upon the foregoing Opinion, the Defendant's Motion to Suppress Evidence is **GRANTED**. It is **ORDERED** and **DIRECTED** that any information gathered by the troopers after the closing of Defendant's car door shall be **SUPPRESSED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (NI)
Peter Campana, Esquire