

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-713-2019**
 v. :
 :
 JOSHUA KAPP, : **MOTION TO SUPPRESS**
 Defendant :
 :
 OPINION AND ORDER

Joshua Kapp (Defendant) was charged on April 5, 2019 with Driving under the Influence of a Controlled Substance,¹ Endangering the Welfare of Children,² Possession of Drug Paraphernalia,³ Operating a Vehicle following Registration Suspension,⁴ Driving while Operating Privilege is Suspended or Revoked,⁵ and Driving without a License.⁶ Defendant filed this Motion to Dismiss and, in the Alternative, to Suppress on August 8, 2019. A hearing on the Motion was held by this Court on September 16, 2019. Defendant raises two issues in his Motion: Whether police had obtained proper consent from either Defendant or Ms. Cristel Smith (Smith) to search the vehicle; and whether as a result of that search the obtaining of a blood draw was sufficiently tainted as to require suppression of the evidence. Based on the following Opinion this Court denies in part and grants in part Defendant’s Motion to Dismiss and, in the Alternative, to Suppress.⁷

¹ 75 Pa. C.S. § 3802(d)(3).

² 18 Pa. C.S. § 4304(a)(1).

³ 35 P.S. § 780-113(a)(32).

⁴ 75 Pa. C.S. § 1371(a).

⁵ 75 Pa. C.S. § 1543(a).

⁶ 75 Pa. C.S. § 1501(a).

⁷ As for portion of Defendant’s Motion asking this Court to Dismiss his charges, this Court has no authority to do so. Defendant’s Motion is simply a Motion to Suppress Evidence, but with the additional request to dismiss the charges predicated on a finding that the evidence should be suppressed. The Pennsylvania Superior Court has previously found that if a trial court were to do so, it would be a legal error. *See Commonwealth Micklos*, 672 A.2d 796, 800-01 (Pa. Super. 1996).

Background and Testimony

Officer Ryan Travepiece (Travepiece) of the Hughesville Borough Police Department testified on behalf of the Commonwealth. The Commonwealth also submitted the Application for a Search Warrant used to obtain the blood results taken from Defendant as an exhibit. Based on this evidence the following was established. On March 14, 2019 at approximately 7:22 p.m., Travepiece was acting in his official capacity as a law enforcement officer when he came upon a black station wagon stopped in the area of State Route 220 and Reservoir Road. Defendant was being assisted by emergency personnel. Travepiece approached the vehicle as Defendant was still in the driver's seat being assisted. Travepiece was familiar with Defendant and aware that he was not licensed to be operating a vehicle. When Defendant was asked why he was driving when he knew he was not supposed to, he stated "huh?" and muttered unintelligibly. Travepiece observed that Defendant was lethargic, slurring his speech, and had blood coming from his mouth. Travepiece also observed two young children sitting in the back of the vehicle. After some time, Travepiece asked Defendant if he could look inside the vehicle. Travepiece stated Defendant was answering emergency personnel's questions more definitively, but was still lethargic. However in the Affidavit of Probable Cause in the Application for a Search Warrant (Affidavit), Travepiece noted "[Defendant's] heart rate was still 155, his pupils were still very constricted, and he did not know what day it was. [Defendant] was still very lethargic, and had very low speech" before he was taken away by emergency personnel. Affidavit 3/26/19, at 2-3. Travepiece requested emergency personnel to have the hospital take a blood draw from Defendant. On cross examination, Travepiece admitted he does not know if the responses emergency personnel were receiving from Defendant were factually accurate. After Travepiece spoke with Smith, who stated Defendant

never had seizures before, he asked Smith for the keys, at first she refused, but then finally gave him the keys and consented. A search of a jacket in the vehicle yielded prescription bottles with Defendant's name on them and Bic straw pen with white residue on it. A field test of the residue came back positive for Methamphetamine. Based on Travepiece's observations, experience, and conversing with Patrolman Andrew Stevens, a drug recognition expert, regarding the incident, Travepiece secured a search warrant to retrieve the results of Defendant's blood test on March 26, 2019.

Whether Travepiece Received the Appropriate Consent to Search Defendant's Vehicle

For a search of an individual's home, person, and/or possessions to satisfy the requirements of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, "police must first obtain a warrant, supported by probable cause, from a neutral and detached magistrate. A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies." *Commonwealth v. Valdivia*, 195 A.3d 855, 861 (Pa. 2018). One such exception is voluntary consent given during a lawful police interaction. *Id.* In addition to consent being voluntary, it must also be given knowingly and intelligently, such that a reasonable defendant would "possess at least a minimal sense of awareness of what was going on . . . such a minimal sense of awareness would undoubtedly include an apprehension of some relatedness to a criminal investigation." *Commonwealth v. Smith*, 77 A.3d 562, 569 (Pa. Super. 2013) (internal citation omitted). Whether consent is voluntarily, knowingly, and intelligently given is based on a totality of the circumstances. *Commonwealth v. Danforth*, 576 A.2d 1013, 1022 (Pa. Super. 1990). Courts have found that "intoxication by use of drugs or alcohol [is] insufficient, in and of itself, to render consent involuntary." *Commonwealth v. Rickabaugh*, 706

A.2d 826, 835 (Pa. Super. 1997) (the defendant was found to have voluntarily consented because he was “able to contemplate the situation and clearly communicate his thoughts and suggestions”). The Pennsylvania Supreme Court has found that an unconscious or unresponsive individual may never give voluntary consent. *See Commonwealth v. Myers*, 164 A.3d 1162, 1181 (Pa. 2017). Additionally, the Pennsylvania Superior Court has found that an individual may be too incoherent after an automobile accident to give voluntary, knowing, intelligent consent. *See Commonwealth v. Thompson*, 436 A.2d 1028, 1032 (Pa. Super. 1981) (the defendant being in a “state of shock” and incoherent made “voluntary consent improbable”).

An officer may also satisfy the consent exception by obtaining third party consent. *Commonwealth v. Strader*, 931 A.2d 630, 634 (Pa. 2007). “Third party consent is valid when police reasonably believe a third party has authority to consent . . . [this exception] turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises.” *Id.* Even if the person does not have the purported authority the search is still permissible if “police reasonably believed the consenter had such authority and police acted on facts leading sensibly to their conclusions of probability.” *Id.*; *but see Commonwealth v. Perel*, 107 A.3d 185, 193 (Pa. Super. 2014) (when officers knew that a bag belonged to the defendant prior to the search of girlfriend’s apartment, they could not rely on girlfriend’s third party consent to search her apartment to allow them to circumvent obtaining Defendant’s consent to view the contents of the bag).

The Commonwealth contends the consent given by Defendant was voluntary, knowing, and intelligent based on the fact he became more coherent during Travelpiece’s second interaction with him. Additionally, Travelpiece testified that he was answering emergency

personnel's questions effectively. This Court finds Defendant's consent was not voluntary, intelligent, and knowing. The Affidavit clearly states that even as Defendant was loaded up to be taken to the hospital "his heart rate was still 155, his pupils were still very constricted, and he did not know what day it was. [Defendant] was still very lethargic, and had very low speech." Affidavit 3/26/19, at 2-3. Although drug use does not automatically invalidate consent, based on that representation, Defendant was too incoherent to provide voluntary, knowing, and intelligent consent.

Alternatively, the Commonwealth argues Smith gave valid third party consent. Without delving into the totality of the circumstances surrounding Smith's alleged consent, the Commonwealth has failed to raise the preliminary showing of Smith's purported authority over the vehicle. No testimony was provided and nothing in the Affidavit explains why Smith would have authority over the vehicle, if she stated she had authority over the vehicle, or what facts would have lead Travelpiece to believe she had such apparent authority to consent to the search of the vehicle. Since the Commonwealth failed to meet their burden this Court finds the search of the vehicle was unconstitutional and the evidence seized as a result of the search should be suppressed.

Whether the Invalid Search of the Vehicle Taints the Search Warrant

Pertaining to this issue, Defendant only raises one argument. Defendant contends that "[s]ince the search of the vehicle and Defendant's personal belongings was unlawful, the evidence recovered as a result of the blood draw should be suppressed under the 'Fruit of the Poisonous Tree' doctrine." Motion to Dismiss and, in the Alternative, to Suppress 8/8/19, at 3. A review of the Affidavit reveals Defendant's allegation is unfounded. The search of Defendant's vehicle and the contents located within the vehicle are not raised in the Affidavit.

See Affidavit 3/26/19, at 2-4. Therefore the finding of probable cause by Magistrate Jon Kemp to issue the search warrant was independent from the illegal search of the vehicle and the blood draw results obtained as a result thereof shall not be suppressed.

Conclusion

Defendant was not coherent, based on the Affidavit, to give Travelpiece voluntary, knowing, and intelligent consent to search the vehicle. Similarly the Commonwealth failed to demonstrate that Smith had actual authority or apparent authority such that her consent was valid to search the vehicle. Therefore, the evidence gathered as a result of the search of the vehicle shall be suppressed. Lastly, the search warrant for the blood draw results of Defendant was not tainted by the search of the vehicle and was based on independent information. Therefore the evidence acquired as a result of the search warrant shall not be suppressed.

ORDER

AND NOW, this 24th day of September, 2019, based upon the foregoing Opinion, Defendant's Motion to Dismiss and, in the Alternative, to Suppress is **GRANTED** in part and **DENIED** in part. As for the portion of Defendant's Motion pertaining to the search of the vehicle, that portion of the Motion is **GRANTED** and the physical evidence obtained as a result of the search of Defendant's vehicle **SHALL BE SUPPRESSED**. As for the portion of the Motion requesting suppression of the blood draw results, that portion of the Motion is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (AG)
Matthew Zeigler, Esquire

NLB/kp