

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-1904-2018**
 v. :
 :
 :
 COLIN SMITH, : **OMNIBUS PRETRIAL**
 Defendant : **MOTION**

OPINION AND ORDER

Colin Smith (Defendant) was arrested on November 23, 2018, on one count of Possession of a Controlled Substance with the Intent to Deliver,¹ Possession of a Controlled Substance,² and Possession of Drug Paraphernalia.³ The charge arises from a police search of a vehicle at the Timberland Estates on West Edwin Street in Williamsport, PA 17701. Defendant filed this timely Omnibus Pretrial Motion on February 13, 2019. A hearing on the motion was held by this Court on March 21, 2019. An additional hearing was scheduled to be held on June 7, 2019 for the purposes of addressing the remainder of Defendant's Motion for Writ of Habeas Corpus.⁴ Defendant then filed a Motion to Admit Testimony asking the Court to take into consideration the testimony from March 21, 2019 and June 7, 2019 in making its determination on both the Motion for Writ of Habeas Corpus and Motion to Suppress. At this time, as the Commonwealth has indicated it does not object to Defendant's Motion to Admit Testimony, the Motion will be granted.

In his Omnibus Pretrial Motion, Defendant Motions for Writ of Habeas Corpus claiming there was insufficient evidence to establish Defendant possessed the contents of the vehicle to satisfy the charge of Possession of Drug Paraphernalia. Defendant also raises a

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

³ 35 P.S. § 780-113(a)(32).

⁴ No additional witnesses were called on June 7, 2019 and the Commonwealth merely submitted a copy of the transcript from the Preliminary Hearing on December 11, 2018.

Motion to Suppress arguing his initial detention and the search of the vehicle were impermissible, and therefore the evidence seized as a result of the impermissible search and seizure should be suppressed.

Background and Testimony

Officer Clinton Gardner (Gardner) of the Williamsport Bureau of Police testified on behalf of the Commonwealth at the Omnibus Pretrial Hearing and additionally a transcript of the Preliminary Hearing where Gardner testified was submitted. The evidence established the following. On November 23, 2018, Gardner was working near the Timberland Estates, which he knew to be a high crime area. He witnessed Defendant and two other individuals get out of a vehicle. Defendant got out of the driver's side rear of the vehicle. Gardner testified that he and Defendant knew each other from previous interactions. Gardner indicated he did not witness any traffic violations. The individuals would not make eye contact and hastily exited the vehicle. Defendant waved at Gardner as he walked away from the vehicle towards the apartments. Gardner, based on past interactions and his training and experience, found the brief interaction to be suspicious. Gardner approached the vehicle and when looking in the window saw a piece of copper mesh, or chore boy, which was pulled apart in a manner Gardner knew, was consistent with the smoking of crack cocaine. N.T. 12/11/18, at 4. Gardner then located the driver and front seat passenger of the vehicle and retrieved the keys to search the vehicle, while other officers attempted to locate Defendant. *Id.* at 5-6. In the vehicle found along with the piece of copper mesh were plastic baggies and baking soda. *Id.* at 3-4. The driver and front passenger denied ownership of anything located within the car. *Id.* at 4. They also stated Defendant had sole possession of the vehicle for a period of fifteen to twenty minutes previously and had paid them to use the car. *Id.* at 5. Defendant was arrested and then searched

incident to arrest. Police found two cellphones and \$785 in mainly twenty dollar denominations on him. *Id.* at 2. Defendant was strip searched back at headquarters and was found to have a distribution bag with nine individual bags of crack cocaine in his underwear. *Id.*

Whether a *Prima Facie* Case has been established for Possession of Drug Paraphernalia

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove Defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed. While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Commonwealth v. Ripley*, 833 A.2d 155, 159-60 (Pa. Super. 2003). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003). For a *prima facie* case of Possession of Drug Paraphernalia to be established against Defendant the Commonwealth must show he used or possessed to use an item for the “purpose of planting, propagating, cultivating,

growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act.” 35 P.S. § 780-113(a)(32).

Defendant claims that the items inside the car, which Gardner testified were the basis of the paraphernalia charge, were never possessed or constructively possessed by Defendant. Gardner testified as to his expert opinion regarding the evidence collected from the vehicle. He testified that there was packaging bags in the vehicle along with baking soda, which Gardner stated is a common cutting agent for crack cocaine. N.T. 12/11/18, at 3-4. Additionally both the driver and passenger of the vehicle stated that the items in the car did not belong to them and Defendant paid them for sole possession of the vehicle for fifteen to twenty minutes prior. *Id.* at 4-5. Finally Defendant was found with crack cocaine on his person at headquarters. *Id.* at 2. As weight and credibility of testimony is not at issue at this stage and all reasonable inferences are to be drawn in favor of the Commonwealth, the testimony of Bell is sufficient to establish that the evidence shows the items were possessed for the purpose of cutting and packaging crack cocaine.⁵

Whether the Initial Detention and Subsequent Arrest of Defendant was Permissible

Defendant submits that his initial detention was not permissible and further/in the alternative the subsequent arrest was impermissible. There are three categories when dealing with interactions between citizens and the police:

⁵ It need not be addressed because this Court finds that there was enough evidence linking Defendant to the baking soda and baggies, the packaging of the crack cocaine on his person is also sufficient to satisfy the charge although it is not what Gardner specifically indicated was why Defendant was charged with Possession of Drug Paraphernalia.

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.

Commonwealth v. Gutierrez, 36 A.3d 1104, 1107 (Pa. Super. 2012).

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). Reasonable suspicion is evaluated as an objective assessment; the officer’s subjective intent is irrelevant. *Commonwealth v. Foglia*, 979 A.2d 357, 361 (Pa. Super. 2009) (citing *Scott v. United States*, 436 U.S. 128, 136 (1978)).

When Gardner approached the vehicle he was legally permitted to be where he was when he viewed the suspected drug paraphernalia in plain view through the window. Gardner testified as an expert and stated that the manner in which the copper mesh was manipulated and twisted was consistent with the smoking of crack cocaine. This in conjunction with Gardner's observations of the individuals leaving the car, the area being a high crime area, and Gardner's prior knowledge of Defendant led him to believe the copper mesh was drug paraphernalia. At this point Gardner went to locate the occupants of the vehicle and contacted other officers to do the same. Defendant at this point was subject to investigatory detention, to determine who the paraphernalia belonged to. Once Gardner found additional paraphernalia following a search of the vehicle and the other two individuals claimed the items did not belong to them, Defendant was paying them to use the vehicle, and he alone had the vehicle for fifteen to twenty minutes prior was sufficient evidence to establish probable cause that Defendant possessed the paraphernalia and for Gardner to conduct a valid arrest.

Whether the Search of the Vehicle was Permissible

Defendant claims the evidence seized as a result of the search of the vehicle should be suppressed because the search of the vehicle was unconstitutional. The Pennsylvania Supreme Court in a plurality opinion stated that there is

no compelling reason to interpret Article I, Section 8 of the Pennsylvania Constitution as providing greater protection with regard to warrantless searches of motor vehicles than does the Fourth Amendment. Therefore, we hold that, in this Commonwealth, the law governing warrantless searches of motor vehicles is coextensive with federal law under the Fourth Amendment. The prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required.

Commonwealth v. Gary, 91 A.3d 102, 138 (Pa. 2014).

The Pennsylvania Superior Court adopted the holdings of *Gary* in subsequent opinions. *See Commonwealth v. Runyan*, 160 A.3d 831, 836 fn. 2 (Pa. Super. 2017) (“*Gary* was a plurality opinion announcing the judgment of the Supreme Court. However, this Court has adopted the holdings of *Gary* in subsequent Opinions.”). In *Commonwealth v. Hoffman*, the court found that a visible water pipe or bong gave officers enough probable cause to search the vehicle for areas where marijuana could be hidden. 589 A.2d 737, 743-44 (Pa. Super. 1991); *see also Commonwealth v. Johnson*, 2019 WL 2714807 at *4 (Pa. Super. June 28, 2019) (unpublished recent opinion by Pennsylvania Superior Court citing *Hoffman* with approval in determining that the odor of marijuana created sufficient probable cause to search a vehicle).

Gardner in his testimony at the Omnibus Pretrial Hearing as well as at the Preliminary Hearing stated that the copper mesh, or chore boy, was manipulated in a way he knew to be consistent with the smoking of crack cocaine. He testified the area he was in was a high crime area and that the individuals acted suspiciously. Lastly, Gardner testified that Defendant’s brief interaction was inconsistent with their past interactions, which was also suspicious. Based on the totality of these facts Gardner had probable cause to believe that additional contraband was located within the vehicle. As in *Hoffman*, the presence of what an officer knows to be common drug paraphernalia is sufficient to have probable cause to search a vehicle for additional contraband.⁶

⁶ Defendant at the Omnibus Pretrial hearing argued this would open the door for an officer to conduct a search based on seeing something as simple as a straw or a plastic bag, because those items are commonly used as drug paraphernalia. This Court disagrees. Gardner’s testimony was clear that copper mesh was not in packaging or intact, but instead manipulated in a way that in his experience he had only seen for the purposes of smoking crack cocaine.

Conclusion

This Court finds the Commonwealth has provided sufficient evidence to establish a *prima facie* case of Possession of Drug Paraphernalia, therefore Defendant's Motion for the Writ of Habeas Corpus is denied. Additionally, this Court finds that the search of the vehicle and detention of Defendant was proper and therefore the evidence found as a result of shall not be suppressed.

ORDER

AND NOW, this 11th day of July, 2019, based upon the foregoing Opinion, Defendant's Motion to Admit Testimony is hereby **GRANTED** and the Court without objection of the Commonwealth will consider the testimony from the prior hearings to be admitted for use in considerations of the pretrial motions.

Based upon the reasons set forth in this Opinion the Defendant's Omnibus Pretrial Motion is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (KO)
Michael Morrone, Esquire