

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JOSHUA KAPP,
Defendant

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CP-41-CR-713-2019

MOTION TO DISMISS

OPINION AND ORDER

The following is a result of Defendant's Motion to Dismiss filed on July 13, 2020.

Based on this Opinion Defendant's motion is denied. Defendant's case has a lengthy procedural history as outlined below.

Procedural History

On September 24, 2019, this Court entered an Opinion and Order granting in part and denying in part Joshua Kapp's (Defendant) Motion to Dismiss and, in the Alternative, to Suppress. That Opinion and Order effectively suppressed the physical evidence obtained as a result of a search of Defendant's vehicle and denied suppression of the results of Defendant's blood draw. That Opinion and Order additionally denied the portion of Defendant's motion requesting dismissal of the charges predicated on the suppression of evidence. Defendant subsequently filed a Motion for Reconsideration asking this Court to suppress the results of Defendant's blood draw. As the issue was not raised in Defendant's original Motion but subsequently arose during testimony at the suppression hearing, this Court scheduled another hearing to allow the Commonwealth to present additional testimony. *See* Order 12/2/19; Order 1/7/20. On February 21, 2020, the time scheduled for additional testimony, the Commonwealth rested upon evidence already presented. This Court then granted Defendant's Motion for Reconsideration on March 5, 2020, effectively suppressing the results of Defendant's blood draw. The Commonwealth then filed a Motion to Amend Information on May 22, 2020,

requesting to withdraw the appropriate counts based on this Court's suppression of physical evidence and adding an additional count of Endangering the Welfare of Children, Recklessly Endangering Another Person, and Driving under the Influence of a Controlled Substance. Judge Marc Lovecchio then granted that motion on June 15, 2020, following a hearing. *See* Order 6/15/20. Defendant then filed this current Motion to Dismiss requesting dismissal of all charges pending against Defendant. This Court held a hearing on the motion on July 28, 2020, at which time both parties presented argument.

Factual Background

As no additional testimony was presented by the Commonwealth, the Court must rely solely upon the facts presented up until this point. The underlying facts presented at the suppression hearing on September 16, 2019, as previously stated by this Court are:

Officer Ryan Travelpiece (Travelpiece) 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., Travelpiece 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. Travelpiece approached the vehicle as Defendant was still in the driver's seat being assisted. Travelpiece 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. Travelpiece observed that Defendant was lethargic, slurring his speech, and had blood coming from his mouth. Travelpiece also observed two young children sitting in the back of the vehicle. After some time, Travelpiece asked Defendant if he could look inside the vehicle. Travelpiece 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), Travelpiece 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. Travelpiece requested emergency personnel to have the hospital take a blood draw from Defendant. On cross examination, Travelpiece admitted he does not know if the responses emergency personnel

were receiving from Defendant were factually accurate. After Travelpiece 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 Travelpiece's observations, experience, and conversing with Patrolman Andrew Stevens, a drug recognition expert, regarding the incident, Travelpiece secured a search warrant to retrieve the results of Defendant's blood test on March 26, 2019.

Opinion and Order 9/25/19, at 2-3.

The pending charges against Defendant are two counts of Endangering the Welfare of Children, Operating a Vehicle Following Suspension of Registration, Driving While Privilege is Suspended/Revoked, Driving Without a License, Recklessly Endangering Another Person, Driving under the Influence of a Controlled Substance. At the hearing Defendant conceded the main issue is whether there exists sufficient evidence to support the count of Driving under the Influence of a Controlled Substance.

Discussion

At the outset there is an issue presented by the Commonwealth as to whether Defendant has waived his claims to a writ of *habeas corpus* action as to any charges pre-amendment of information. This argument arises from a discussion on the record in front of Judge Marc Lovecchio where he granted the Commonwealth's Motion to Amend the Information. N.T. 6/15/20, at 11-18. Judge Lovecchio seems to indicate that the motion as to the pre-amendment charges should be denied as this Court originally denied the portion of Defendant's Motion to Dismiss and, in the Alternative, to Suppress seeking dismissal of the charges, which was simultaneously predicated on Defendant's request to suppress evidence. *Id.* at 11. The Pennsylvania Superior Court has held that a trial court lacks the power to grant a writ of *habeas corpus* before allowing the Commonwealth an opportunity to appeal an adverse suppression

ruling. *Commonwealth v. Micklos*, 672 A.2d 796, 801 (Pa. Super. 1996). In *Micklos*, the trial court by entering an order granting suppression and concurrently dismissing Defendant's DUI charge, had "deprived the Commonwealth from any opportunity to exercise its absolute right to appeal from adverse suppression rulings." *Id.*

The last Opinion and Order granting suppression of evidence in Defendant's case was entered on March 5, 2020. Then, under the holding in *Micklos*, the Commonwealth had thirty days to file an appeal making the last possible date of appeal April 6, 2020. Therefore, Defendant had until May 6, 2020, thirty days from the opportunity existing, to file an omnibus pretrial motion to dismiss the information relating to the original charges. *See* Pa. R. Crim. P. 578(5); Pa. R. Crim. P. 578(A) ("omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist"). Defendant's claims against Counts 2, 4, 5, and 6 are therefore untimely. As for the remainder of the counts, the Commonwealth was granted the right to amend the information to add Counts 7 through 9 on June 15, 2020, and Defendant filed his Motion to Dismiss Charges on July 13, 2020. Defendant's claims against Counts 7 through 9 are therefore timely.¹

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a 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

¹ As discussed below although Defendant's motion as to the previous counts is untimely, it is irrelevant as the substantive argument of Defendant's motion is also incorrect. Additionally, defense counsel seemingly conceded the timeliness of Counts 2, 4, 5, and 6 at the hearing on the motion held on July 28, 2020.

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). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. *Commonwealth v. Wojdak*, 466 A.2d 991, 997 (Pa. 1983); *see also Commonwealth v. Kohlie*, 811 A.2d 1010, 1014 (Pa. Super. 2002). 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).

“An individual may not drive, operate or be in actual physical control of the movement of a vehicle . . . under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.” 75 Pa. C.S. § 3802(d)(2). When evaluating 3802(d)(2), the Pennsylvania Supreme Court “decline[d] to hold that the need for expert testimony is inherent in the statutory provision and thus mandatory in all cases.” *Commonwealth v. Griffith*, 32 A.3d 1231, 1238 (Pa. 2011). Additionally, the Court found that “subsection 3802(d)(2) does not limit, constrain, or specify the type of evidence that the Commonwealth can proffer to prove its case.” *Id.* at 1239.

This Court finds that based on Travelpiece’s observations and the circumstantial evidence, the evidence presented was sufficient enough to satisfy a *prima facie* standard of

probable cause. Travelpiece, who was familiar with Defendant, observed Defendant who was not supposed to be driving as he was in the driver's seat. "[Defendant] again looked around, moaned, and had very slurred speech, and mumbled deep unintelligible utterances." Affidavit of Probable Cause 5/16/19, at 1. Travelpiece also noticed that Defendant had constricted pupils in a dark environment, was lethargic, and had a hoarse voice, which in his training and experience was typical of an individual using a depressant. Travelpiece testified based on his previous interactions and observations of Defendant and his training and experience, he believed Defendant was under the influence of a controlled substance. Lastly, Defendant's paramour indicated to Travelpiece that Defendant had not had any seizures in the past. Defendant's actions as observed by Travelpiece, Defendant's lack of history with seizures, and Travelpiece's belief based on his training and experience, is at least enough to demonstrate that Defendant was generally impaired due to the use of a controlled substance to demonstrate a *prima facie* showing pursuant to 3802(d)(2). As conceded by Defendant at the hearing on July 28, 2020, since the Commonwealth has demonstrated probable cause for Driving under the Influence of a Controlled Substance, the other counts are also satisfied. If Driving under the Influence of a Controlled Substance can be demonstrated, it logically follows that the two counts of Endangering the Welfare of Children, for the two children in the vehicle, and Recklessly Endangering Another Person, based on Defendant's paramour who was present in the vehicle, would be satisfied by this finding. Lastly the remainder of the charges can be satisfied by Travelpiece's observations prior to the impermissible search of the vehicle and the blood draw, and therefore can be satisfied just through the knowledge that Defendant was operating the vehicle.

ORDER

AND NOW, this 10th day of August, 2020, based upon the foregoing Opinion, Defendant's Motion to Dismiss is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (MS)
Matthew Zeigler, Esquire

NLB/kp