

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-767-2020**
 v. :
 :
 DEVON MOORE, : **OMNIBUS MOTION**
 Defendant :

OPINION AND ORDER

Devon Moore (Defendant) was arrested by the Williamsport City Police on May 19, 2020 for one count of Firearm Not to be Carried Without a License,¹ one count of Possession of a Small Amount of Marijuana for Personal Use,² and one count of Possession of Drug Paraphernalia³. The charges arise from police pulling over the car Defendant was travelling in for running a red light and having expired tags. Defendant filed this timely Omnibus Pre-trial Motion on September 10, 2020. This Court held a hearing on the motion on October 13, 2020.

In his Motion, Defendant raises two issues. The first issue Defendant asserts is that the Commonwealth did not have sufficient evidence to establish the *prima facie* burden to hold the firearm charge for court so Count One should be dismissed. Defendant's second issue is that the police did not have the requisite reasonable suspicion to order Defendant to exit the vehicle and submit to a search. As such, Defendant believes all evidence found because of this search should be suppressed.

Background and Testimony

Officer William Badger (Badger) of the Williamsport City Police Department testified on behalf of the Commonwealth. On May 19, 2020 at approximately 6:30 p.m., Badger witnessed a silver Dodge Caliber run through a red light. This car also had an expired

¹ 18 Pa. C.S. § 6106(a)(1).

² 35 Pa. C.S. § 780-113(a)(31).

³ 35 Pa. C.S. § 780-113(a)(32).

inspection sticker and expired insurance. Badger pulled the Dodge Caliber over and found Jesse Tillison (Tillison) driving the vehicle and Defendant sitting in the passenger seat. Badger returned to his patrol car and ran the names of the two men through a search. This search confirmed that Defendant was on probation for Carrying a Firearm without a License. Badger indicated that the area where he stopped the vehicle was a high-crime area of Williamsport known for experiencing shootings and that Defendant, at twenty (20) years of age, was still not permitted to legally possess a firearm. Badger re-approached the vehicle on the passenger side in order to speak with Defendant. Badger testified that Defendant's breathing was rapid and shallow and he was sweating profusely. Badger noted that he saw sweat beading on Defendant's forehead and a pool of sweat where the Defendant's left arm had been resting on the center console. Badger testified he believed that Defendant appeared unusually nervous for a passenger on a routine traffic stop. Badger stated that, because of Defendant's behavior, the area where he had stopped the car, and Defendant's prior offense, he asked Defendant to step out of the vehicle and submit to a pat-down search for weapons. Defendant complied and stepped out of the car. Upon doing so, Badger said he was able to observe what looked like the grip of a revolver protruding out from under the front passenger seat where Defendant had been sitting. Badger knelt down to look under the seat and confirmed that the object was a silver revolver with a black grip. Following this exchange, Defendant was transported to police headquarters and strip-searched, where police found a small amount of marijuana in a plastic bag in Defendant's underwear.

Analysis

Motion for Writ of Habeas Corpus

The first issue presented is whether the Commonwealth established the *prima facie* burden on the charges against Defendant. 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 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 may also submit additional proof. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). “The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence.” Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001); *see also* Commonwealth v. Jones, 874 A.2d 108, 120 (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).

In Pennsylvania, “any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.” 18 Pa. C.S. § 6106(a)(1). When contraband is not found on a defendant's person, the Commonwealth must establish “constructive possession,” that is, the “power to control the contraband and the intent to exercise that control.” Commonwealth v. Valette, 613 A.2d 548, 550 (Pa. 1992); *see also* Commonwealth v. Gutierrez, 969 A.2d 584, 590 (Pa. Super. 2009). As with any other element of a crime, constructive possession may be proven by circumstantial evidence. Commonwealth v. Macolino, 469 A.2d 132, 134-35 (Pa. 1983). The requisite knowledge and intent necessary for constructive possession may be inferred from a totality of the circumstances. Commonwealth v. Parker, 847 A.2d 745, 750 (Pa. Super. 2004).

Defendant argues that the Commonwealth failed to show that he was aware of or should have been aware of the presence of a firearm under the seat of a vehicle that did not belong to Defendant. Defendant asserts that his DNA was not found on the seized weapon, the gun was not concealed on Defendant’s person, and Defendant made no movements to indicate he was hiding a firearm. On the other hand, the Commonwealth argues that the firearm was within the control of Defendant because it was located under the passenger seat and it was out of the driver’s reach and as a result, Defendant had constructive possession of it despite the firearm being located in someone else’s vehicle. The Commonwealth asserts that they are entitled to any reasonable inferences at the preliminary hearing stage and have satisfied their burden of proof. Based on the totality of the circumstances, this Court believes that the Commonwealth has established their *prima facie* burden of demonstrating the Defendant’s constructive possession of the firearm. As noted by the Commonwealth, the location of the gun provided

Defendant with sole control over the weapon. Defendant had the ability to have actual possession of the firearm within seconds and his nervousness is circumstantial evidence of his consciousness of guilt: knowledge of the weapon and his inability to possess it due to his age and the fact that he is on supervision for a similar offense. Therefore, Defendant's claim fails on this issue.

Motion to Suppress

The remaining issue presented is whether the police had the proper reasonable suspicion to ask Defendant to step out of the vehicle in order to be searched. The Fourth Amendment to the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; P.A. Const. art. 1, § 8. Warrantless searches are unreasonable per se, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). As articulated in Terry v. Ohio, the "stop and frisk," exception allows a police officer to detain someone briefly for an investigatory detention if the officer sees "unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30 (1967). Additionally, "protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." Michigan v. Long, 463 U.S. 1032, 1049 (1983). To determine if police had the proper reasonable suspicion, "the totality of the circumstances must be considered." Commonwealth v. Rogers, 849 A.2d 1185, 1189 (Pa. 2004).

Defendant asserts that reasonable suspicion was lacking in this case and, as a result, he should not have been asked to exit the vehicle for a pat-down search. Defendant argues that nervousness coupled with a prior conviction are not enough to give rise to reasonable suspicion. The Commonwealth argues that the totality of the circumstances supports their argument of proper reasonable suspicion for the search in question. As for the gun that was found, the Commonwealth notes that the firearm was in the officer's plain view and was therefore legally seized. Nevertheless, at the hearing for this motion, Defendant's counsel pointed to Commonwealth v. Cartagena to articulate his belief that nervousness and a prior conviction do not give rise to proper reasonable suspicion and asked the Court to treat the case at hand similarly. Commonwealth v. Cartagena, 63 A.2d 294 (Pa. Super. 2013)(holding that defendant's tinted windows, nervous behavior, and traffic stop occurring at night were not enough to give rise to reasonable suspicion to search defendant's center console). Defendant believes that the case at hand is synonymous with Cartagena.

For the following reasons, this Court disagrees with Defendant's argument on this issue. To begin, this Court does not think the case *sub judice* is analogous to Cartagena. Though both began with a routine traffic stop, this fact is where the similarities between these cases end. Most importantly, Cartagena dealt with a challenge to police searching a closed center console of defendant's car, whereas the firearm in this case was plainly visible without opening any container in the vehicle. The facts of this case more closely resemble Pennsylvania v. Mimms instead. Pennsylvania v. Mimms, 434 U.S. 106 (1977). In Mimms, the defendant was pulled over by two officers for a routine traffic stop for having an expired license plate. Id. at 106. One officer approached the defendant and asked him to step out of the car and produce his driver's license and registration. Id. After defendant did so, the officer noticed a bulge under

defendant's sport jacket and surmised that it was most likely a firearm. Id. Due to his fear of a hidden weapon, the officer conducted a search of the defendant and discovered a loaded revolver where the bulge had been. Id. Mimms did not contest the initial stop of his car but challenged the foundation of the officer's request for the defendant to step out of his car and the subsequent search. Id. at 107. The United States Supreme Court noted that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Id. at 108-09 (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)). Such reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Id. at 109 (internal quotations omitted). The Court then held that when balancing the officer's order for defendant to get out of his car against the safety of the officer, even with no unusual or suspicious behavior on the part of the defendant, this intrusion is "*de minimis*" and as such, "a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Id. at 111. Additionally, "[o]ur constitutional safeguards do not require an officer to gamble with his life." Commonwealth v. Morris, 644 A.2d 721, 742 (Pa. 1994). In this case, the officer had more justification for having Defendant exit the vehicle than the officer in Mimms. Defendant appeared disproportionately nervous for a passenger in a routine traffic stop that manifested in excessive sweating, he had a prior firearms charge on his record for which he was on probation, and the area where the vehicle was pulled over was a high crime area known for frequent gun violence. Based on these factors, the *de minimis* intrusion into Defendant's personal security, and the importance of officer safety, the Court holds that this search was supported by reasonable suspicion.

The Supreme Court continued their discussion of the constitutionality of the search of the defendant's person that yielded the weapon found in Mimms, but that discussion is not necessary here because the firearm was in the officer's plain view. "The plain view exception to the warrant requirement allows the police to seize objects that are viewed from a lawful vantage point where the incriminating nature of the object is immediately apparent." Commonwealth v. McCree, 924 A.2d 621, 625 (Pa. 2007) (citing Commonwealth v. Petroll, 738 A.2d 993, (Pa. Super. 1999); *see also* Horton v. California, 496 U.S. 128, 136-37 (1990). "This standard...contains three prongs: (1) the police must be at a lawful vantage-point; (2) the incriminating character of the object must be immediately apparent; and (3) the police must have a lawful right of access to the object. McCree, 924 A.2d at 625. The legality of the traffic stop is not questioned in this case, therefore Badger arrived at his position to see into the car without violating the Defendant's rights. It is undoubtedly clear that the incriminating character of the firearm was immediately apparent because of the nature of the gun itself and Defendant did not meet the requirements to lawfully own a firearm. Furthermore, since this Court has already determined that Badger was lawfully able to have Defendant step out of the vehicle, it is clear that the officer had lawful access to the object when it's location was in Badger's plain view. Thus, Defendant's claim on this issue is unsuccessful.

Conclusion

The Court finds that the Commonwealth did establish their *prima facie* burden at the preliminary hearing and Count One against Defendant will not be dismissed. The Court also finds that the requisite reasonable suspicion of criminality did exist to justify a search of the Defendant and the vehicle he was travelling in. Therefore, the evidence obtained shall not be suppressed.

ORDER

AND NOW, this 4th day of February, 2021, based upon the foregoing Opinion, Defendant's Motion for Writ of Habeas Corpus is **DENIED**. The Defendant's Motion to Suppress Evidence is **DISMISSED**. It is **ORDERED** and **DIRECTED** that the firearm seized from the vehicle and the marijuana found on Defendant's person shall not be **SUPPRESSED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Andrea Pulizzi, Esquire
Law Clerk (JH)