IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1325-2020**
v.	:	
	:	
BRIAN WILLIAMS,	:	**OMNIBUS MOTION**
Defendant	:	

OPINION AND ORDER

Brian Williams (Defendant) was charged with Possession with Intent to Deliver a Controlled Substance[1] and Criminal Use of a Communication Facility[2]. The charges arise from an interaction between law enforcement and Defendant. Defendant filed a timely Omnibus Pretrial Motion on November 18, 2020. This Court held a hearing on the motion on March 1, 2021. In his Omnibus motion, Defendant challenges law enforcement's search of his vehicle and two (2) phones found in the car, arguing that the police had no probable cause to do so and that any consent given by Defendant permitting a search was not knowing, intelligent, or voluntary. As such, Defendant believes all evidence found because of this search should be suppressed.

Background and Testimony

Detective Tyson Havens (Havens) and Officer Joshua Bell (Bell) of the Lycoming County Narcotics Enforcement Unit (NEU) testified on behalf of the Commonwealth. On July 8, 2020, at approximately 12:56pm, Havens and Bell were patrolling in an unmarked unit. They observed a green Ford Taurus park in a parking lot on Hepburn Street in the city of Williamsport. Havens pulled alongside the Taurus and parked approximately fifteen (15) feet away. The driver, confirmed to be Defendant, exited the Taurus at the same time Bell exited the patrol car's passenger side closest to Defendant's vehicle. Bell testified that he was able to see

[1] 35 Pa.C.S. § 780-113(a)(30).
[2] 18 Pa.C.S. § 7512(a).

a plastic bag sticking out of Defendant's front pants pocket that appeared to contain marijuana. As Defendant walked past Havens, Havens smelled the odor of marijuana. Havens asked Defendant to stop and relayed to Defendant that he smelled marijuana. At that point, Defendant pulled a plastic bag containing marijuana out of his front pocket. Defendant informed Havens and Bell that more marijuana was located inside the car. Havens testified that Defendant produced a medical marijuana card and showed it to him and Bell. However, the marijuana on Defendant's person was not stored in the correct container designated for marijuana used for medical purposes. For this reason, Havens and Bell searched Defendant's car and did not ask for Defendant's consent. Bell seized a bag under the driver's seat that contained additional marijuana. Bell also observed two (2) phones on a seat in the car and seized those as well. Defendant gave consent for both phones to be searched but never mentioned to either officer that any of the phones did not belong to him. The only other person in the vehicle was Defendant's four (4) year old son, who was sitting in the back seat during this exchange. Havens and Bell admitted that Defendant did not commit any traffic violations or other criminal activity before they engaged with him.

The Commonwealth submitted video footage of part of the encounter filmed with Defendant's permission, marked Commonwealth's Exhibit No. 1. In this video, Havens gave Defendant two (2) options regarding the search of the phones. Havens told Defendant that without Defendant's consent, the only way he can look through the phones is with a search warrant issued by a judge. However, Havens noted that an application for a search warrant does not guarantee the issuance of a search warrant. Havens said that Defendant's first option is to give Havens permission to search the phones immediately. If Defendant chose that option, Havens would take photos of any evidence that may be on the phone and then return the

devices to Defendant instantaneously upon the conclusion of the search. The second option Havens gave Defendant was for Havens to seize the phones, place them into evidence and have them sent off for analysis following the issuance of a search warrant. Havens told Defendant that this process could take months. After this exchange, Defendant consents to the immediate search of the phones without a search warrant.

Analysis

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). One such exception arises when consent is given for the search to take place.

> The central Fourth Amendment inquiries in consent cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent; and, ultimately, the voluntariness of consent. Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus. Where, however, a consensual search has been preceded by an unlawful seizure, the exclusionary rule requires suppression of the evidence obtained absent a demonstration by the government both of a sufficient break in the causal chain between the illegality and the seizure of evidence, thus assuring that the search is not an exploitation of the prior illegality, and of voluntariness.

Commonwealth v. Strickler, 757 A.2d 884, 888-89 (Pa. 2000). Therefore, our first inquiry is to address the Defendant's initial challenge of whether the police were justified in detaining Defendant and conducting a search.

Legality of Search and Seizure

Three levels of interactions between citizens and police officers exist. "A mere encounter can be any formal or informal interaction between an officer and a citizen, but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it 'carries no official compulsion to stop or respond.'" Commonwealth v. DeHart, 745 A.2d 633 (Pa. Super. 2000) (quoting Commonwealth v. Allen, 681 A.2d 778, 782 (Pa. Super. 1996). "In contrast, an investigative detention, by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest." DeHart, 745 A.2d at 636. "An investigative detention constitutes a seizure of the person and must be supported by reasonable suspicion that those detained are engaged in criminal activity." Commonwealth v. Phinn, 761 A.2d 176, 181 (Pa. Super. 2000). "A court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429 (1991); *See also* Commonwealth v. Lewis, 636 A.2d 619, (Pa. 1994). "A custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest." Id. A custodial detention must be supported by probable cause. Commonwealth v. Ellis, 662 A.2d 1043, 1047 (Pa. 1995).

In the case *sub judice*, Defendant contends that the police lacked probable cause to detain him and claims that the only reason he was stopped by police was because of the smell of marijuana. Defendant argues that, once he provided law enforcement with a valid medical marijuana card, there was no basis to search his vehicle or seize the cellphones inside the car.

Defendant believes there was no probable cause to justify the search of the car and no probable cause or nexus to the cellphones to substantiate any examination of the phones. As a result, Defendant thinks the evidence seized from the car ought to be suppressed. The Commonwealth argues that the entire exchange with Defendant was a mere encounter that did not need to be supported by any level of suspicion. However, the smell of marijuana and Bell's observance of the plastic bag sticking out of Defendant's pocket provided law enforcement with reasonable suspicion to stop Defendant and investigate. The Commonwealth further argues that once it was confirmed that Defendant had marijuana in his pocket, police had probable cause to search the car.

The question that the Court must first answer is what type or types of encounters Defendant was subjected to during the interaction with Havens and Bell. In Commonwealth v. DeHart, two (2) officers on patrol received a radio report of a suspicious vehicle reported for driving slowly but were not informed of the source of information that brought the vehicle to law enforcement's attention. Commonwealth v. DeHart, 745 A.2d 633, 634 (Pa. Super. 2000). After locating the car in question, the officers watched the car stop in front of a house and then pulled up next to the stopped car and rolled down their windows, prompting the suspect individuals to do the same. Id. An officer asked what was going on and when one of the individuals responded quietly and avoided eye contact, the officer's suspicions were aroused and he exited the police cruiser to investigate further. Id. After getting closer to the car, police were able to smell alcohol even though the occupants of the vehicle did not appear to be of legal drinking age. Id. at 635. One of the officers instructed the defendant to get out of the passenger seat and then subjected him to a pat-down search that yielded a marijuana pipe and a bag of suspected marijuana. Id. On appeal by the Commonwealth, the Superior Court stated

that "the key to analyzing the within case is a determination of the point in time when Appellees were subjected to an investigative detention and whether, at that time, there existed sufficient justification for that classification of a detention." Id. The Court held that, at the time the officers exited their cruiser and began questioning the car's occupants, they "lacked a reasonable suspicion of criminal activity such as would support an investigative detention." Id. at 637. "[T]he tip received over the police radio was too vague, and unsupported by indicia of reliability…the initial questioning of Appellees yielded no tangible information to provide reasonable suspicion of criminal activity…." Id. Ultimately, the Court held that police lacked reasonable suspicion to escalate the encounter to an investigative detention. Id. at 638. The Court wrote, "in our case the Appellees were not 'stopped' for search and seizure purposes, the perception remains essentially the same. Once subjected to questioning by police officers, the overwhelming majority of lay people do not feel free to simply ignore a police officer's questions." Id. at 639 (internal citations omitted).

It is clear from the facts of the case *sub judice* that Defendant and law enforcement were engaged in a mere encounter when Havens and Bell approached him initially. The facts of this case are similar to DeHart, however, law enforcement did not have the benefit of an anonymous tip of suspicious activity. Testimony revealed that the officers saw Defendant pull into a parking lot and exited their police cruiser to initiate contact with Defendant prior to Bell's observation of the plastic bag in Defendant's pocket. Neither officer saw Defendant participate in criminal activity nor violate any traffic regulations at the time they saw him enter the parking lot. Much like the appellee in DeHart, Defendant had already stopped his car when Havens and Bell parked near him, got out of their cruiser wearing vests marked with "Police", and advanced toward Defendant as he started to walk across the parking lot. Once they got

closer to him while on foot, only then did they begin asking Defendant about the smell of marijuana. Since a mere encounter requires no level of suspicion to justify it, up to this point, a mere encounter was occurring because there was nothing to support law enforcement's contact with Defendant and Defendant was under no obligation to stop or respond.

However, the Court notes that it is likely Defendant felt as though he had no choice but to respond to law enforcement's questions regarding marijuana. The facts show that two (2) officers suddenly approached Defendant and instantaneously began asking him about marijuana. As a citizen, Defendant most likely believed that he was obligated to respond and could not decline the officers' request to answer questions by walking away from the police. Once subjected to questioning by police officers, the overwhelming majority of lay people do not feel free to simply ignore a police officer's questions." Commonwealth v. DeHart, 745 A.2d 633, 639 (Pa. Super. 2000). Based on the conduct of the police, it is abundantly clear that Havens and Bell intended to speak to and investigate Defendant regardless of Defendant's conduct. A reasonable person in Defendant's position would not feel free to leave after police started to question them about the presence of marijuana. The Court does not have the benefit of examining a transcript or recording of what law enforcement asked Defendant after they approached him. Nevertheless, considering all the circumstances, once Havens and Bell continued to interrogate Defendant about marijuana, the interaction became an investigative detention. This detention was not supported by proper reasonable suspicion that Defendant was involved in criminal activity for the reasons stated above and therefore violated Defendant's constitutional rights.

Yet, the continued investigation into Defendant revealed Defendant possessed marijuana in the pocket of his pants. Notably, Defendant was able to produce a valid medical

marijuana card. The Court recognizes that Defendant did not have the marijuana stored in a proper container as required by the Medical Marijuana Act (MMA). However, Defendant's failure to do so should have resulted in disciplinary action for that specific offense and not an exploratory examination into Defendant's car. Testimony showed that Defendant's car and phones were searched as a direct result of the lack of proper storage of Defendant's medical marijuana, but this is not enough to justify the warrantless search. In Commonwealth v. Alexander, the Pennsylvania Supreme Court held that "the Pennsylvania Constitution requires both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile." Commonwealth v. Alexander, 243 A.3d 177, 181 (Pa. 2020).

> The basic formulation of exigencies recognizes that in some circumstances the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. That inquiry is not amenable to *per se* rules and requires a consideration of the totality of the circumstances.

Id. at 208. Furthermore, "the odor of marijuana does not *per se* establish probable cause to conduct a warrantless search of a vehicle. [C]ourts have routinely held that the odor of marijuana is a factor for consideration in a determination of the existence of probable cause…." Commonwealth v. Barr, 240 A.3d 1263, 1269, 1275 (Pa. Super. 2020). Following the passage of the MMA, additional circumstances are needed to support the totality of the circumstances consideration for the formulation of probable cause. Id.

Defendant argues that police cannot rely on the smell of marijuana alone to justify a search and this Court agrees. Defendant admitted to having marijuana on his person and more in the car, but that did not guarantee that whatever was in the car was also necessarily stored improperly simply because the marijuana found on him was not. Defendant possessed a valid medical marijuana card, which he was able to show to police. Whatever interaction police were

having with Defendant should have concluded after the violation of the MMA was addressed. No exigent circumstances were cited as validation for the immediate search of the vehicle. It is clear that the NEU targeted Defendant the moment they saw him in the parking lot and were determined to search his belongings. Additionally, the Commonwealth believes that the marijuana found in the car was essentially in plain view of the officers on scene. Based on the testimony presented to the Court, this is patently false. The marijuana under the driver's seat was not discovered until a search of the car, without Defendant's consent, took place. Bell was the officer to search the car and could not remember whether the driver door to the vehicle was open during the conversation with Defendant prior to the search. No such testimony was offered indicating that Havens or Bell could see the marijuana inside the car from their vantage point in the parking lot. Since this assertion is not supported by any evidence or testimony, this argument is unsuccessful. Therefore, this Court agrees with Defendant that the police had no justification for detaining him or sufficient probable cause to search Defendant's vehicle and the evidence seized as a result of this search shall be suppressed.

Consent Exception

Defendant argues that the consent he gave for the search of the cell phones was not knowing, intelligent or voluntary. Under Fourth Amendment jurisprudence, evidence obtained as the result of an unlawful search or seizure must be suppressed regardless of the voluntariness of an individual's consent. Commonwealth v. Strickler, 757 A.2d 884, 888-89 (Pa. 2000). This Court has found that the seizure of Defendant's person and the search of his vehicle was unlawful, and so, Defendant's consent to the search of the phones found pursuant to the search of the car is moot because of the illegality of the police's conduct in this case. If, alternatively, the search of the car were justified, the Court still finds that Defendant's consent was not

voluntary. "The burden of proving a valid consent to search, since it represents a waiver of a substantial constitutional right, rests with the Commonwealth." Commonwealth v. Griffin, 336 A.2d 419, 421 (Pa. Super. 1975). To establish a voluntary consensual search, the Commonwealth must prove that a consent is the product of an essentially free and unconstrained choice – not the result of duress or coercion, express or implied, or a will overborne – under the totality of the circumstances." Commonwealth v. Randolph, 151 A.3d 170, 179 (Pa. Super. 2016) (citation and internal quotation marks omitted). "[D]espite the fact that the voluntariness of a custodial consent is suspect, no one fact has talismanic significance, and voluntariness may be established by the Commonwealth if all the facts and circumstances indicate that the consent was voluntarily given." Commonwealth v. Dressner, 336 A.2d 414, 415 (Pa. Super. 1974).

Upon review of the video footage of Defendant's consent to the search, it is clear that Havens' "explanation" of Defendant's options regarding the search was coercive. Essentially, Havens told Defendant that his only options were to allow the search to happen and get his phones back immediately or refuse the search and not get his phones returned for months on end. What may appear to be a simple clarification is coercion. This Court understands that what Havens articulated to Defendant about the process for searching the phones if he did not consent may be the typical procedure, but we cannot ignore the implied compulsion on Defendant to consent to the search. In the footage provided to the Court, Defendant sounds hesitant and wary, finally conceding to the search of the phones. The facts of this case demonstrate that Defendant did not feel that he could decline to oblige the officers' requests and this instance was no exception.

In the alternative, Defendant states that he did not have authority to authorize a search of the phone because it was not his. The Commonwealth states that a reasonable person believes that a person in possession of a phone is the owner of that phone. Defendant gave consent for the phones to be searched and never articulated that someone else owned either phone. In this particular situation, the Court agrees with the Commonwealth that it is reasonable to assume that an individual in possession of a phone is the owner unless they state otherwise. However, since Defendant's consent to the search of the phones was not voluntary, the evidence the search of the cell phones produced shall also be suppressed.

Conclusion

The Court finds that the seizure of Defendant was not justified by reasonable suspicion and the search of Defendant's vehicle was not supported by probable cause or exigent circumstances. Therefore, the evidence obtained from the search of the car shall be suppressed. The Court also finds that Defendant's consent to search the cell phones was not voluntary and any evidence discovered from that search shall be suppressed.

ORDER

AND NOW, this 16th day of July, 2021, based upon the foregoing Opinion, Defendant's Motion to Suppress Evidence is **GRANTED**. Evidence seized from the search of both the motor vehicle and cell phones are hereby **SUPPRESSED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (EW)
Robert A. Hoffa, Esq.
Law Clerk (JMH)