IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-917-2021**
v.	:	
	:	
KYLE SCOTT,	:	**OMNIBUS MOTION**
Defendant	:	

OPINION AND ORDER

Kyle Scott (Defendant) was charged on July 15, 2021 with Possession with Intent to Deliver[1], Possession of a Controlled Substance[2], Driving under the Influence of a Controlled Substance[3], and two (2) summary offenses under the Motor Vehicle Code. The charges arise from a traffic stop conducted on Defendant on June 16, 2021. Defendant filed a timely Omnibus Pretrial Motion on September 8, 2021. This Court held a hearing on the motion on November 19, 2021. In his Omnibus motion, Defendant first argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing and the DUI charge against him should be dismissed. Second, Defendant submits that law enforcement did not have the requisite reasonable suspicion to conduct a canine search of his vehicle and the evidence seized because of the search should be suppressed.

Preliminary Hearing and Background

Defendant provided a transcript of the preliminary hearing at the hearing on this motion, marked Defendant's Exhibit 1. Corporal William MacInnis (MacInnis) of the South Williamsport Police Department testified on behalf of the Commonwealth at the preliminary hearing. MacInnis testified that he became familiar with Defendant on June 16, 2021 because of a traffic stop he effectuated on a vehicle Defendant was operating. N.T. 7/12/2021, at 3.

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[1] 35 Pa.C.S. § 780-113(a)(30).
[2] 35 Pa.C.S. § 780-113(a)(16).
[3] 75 Pa.C.S. § 3802(d)(2).

MacInnis stated that the reason for the traffic stop was because the vehicle's windows had a heavy tint. Id. Upon stopping the vehicle for the window tint, MacInnis told Defendant the reason for the stop and Defendant admitted to smoking marijuana within the last thirty (30) minutes. Id. at 4. MacInnis also noted that he could smell raw marijuana emitting from the car. Id. Defendant initially told MacInnis that he was in the area visiting his aunt, but then later stated he was visiting his cousin. Id. at 5. MacInnis asked Defendant to exit the vehicle to perform field sobriety tests. Id. at 4.MacInnis further testified that Defendant had glassy eyes, chalky lips, and his tongue was white and dry. Id. Defendant never actually performed field sobriety tests. Id. at 7. After patting Defendant down, MacInnis believed he felt a glassine baggy and something hard in the crotch of Defendant's pants, so Defendant was detained. Id. at 4. MacInnis admitted that Defendant was not advised of his *Miranda*[4] rights while at the scene of the traffic stop. Id. at 7. MacInnis also acknowledged that Defendant did not commit an additional traffic violation other than the improper window tint. Id. at 10.

Later, Defendant was brought back to the police station and MacInnis performed another search of Defendant's person wherein a key fob and a key were hidden in his underwear and more than 2,000 dollars in cash were in Defendant's pocket. Id. at 4-5. MacInnis had arranged for Defendant's vehicle to be towed after the traffic stop because it occurred on Route 15 and no parking was available. Id. at 5. MacInnis applied for a search warrant for the vehicle following his interaction with Defendant. Id. After searching the vehicle, MacInnis located seventeen (17) ounces of marijuana in a large glassine bag, "five bags or glassine bags of small various colored cups, brown, green, pink used traditionally for storing crack cocaine and a few other items of paraphernalia. There was some wrappers, guava

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

juice wrappers, the foiled Ziploc sealed wrappers you use for packaging and distributing marijuana." Id. at 5-6. All these items were located in the trunk of Defendant's car. Id. at 9.

MacInnis also determined that, following a search on JNet, Defendant's driver's license was expired. Id. at 6. Defendant refused to consent to a blood draw. Id. MacInnis testified that, based on his training and experience, he believed Defendant to be engaged in the act of dealing drugs. Id. MacInnis formed this belief based on the amount of drugs seized, the paraphernalia, and the large amount of currency found on Defendant's person. Id. MacInnis stated that he had placed Defendant in custody in the back of his patrol car to take him to the police station. Id. MacInnis' patrol unit was not searched immediately after Defendant was in the backseat until approximately three (3) days later. Id. at 7. MacInnis noted that no one had gotten into his vehicle after Defendant was transported and a glassine bag with crack cocaine was found on the back seat. Id. MacInnis believed this baggy was the same one that was discovered in the initial pat-down search. Id. at 8. MacInnis also stated that a canine search was conducted on Defendant's vehicle based on the odor of marijuana. Id. at 9. The car Defendant was driving was registered under someone else's name. Id. at 10.

MacInnis also testified on behalf of the Commonwealth at the hearing on this motion similarly to his testimony at the preliminary hearing. Additionally, MacInnis stated that a woman who resided in Philadelphia owned the vehicle Defendant was driving. Defendant initially pulled into the middle lane for the traffic stop and MacInnis testified this was not normal for someone to park in a turning lane instead of the shoulder of the road. At the time of the traffic stop, the vehicle Defendant operated had numerous air fresheners such as air sprays and powder carpet cleaner. MacInnis believed this was an attempt to mask the smell of the marijuana. Defendant gave consent for the search of his person after MacInnis asked him to

exit the vehicle. MacInnis also stated that he did not personally observe the canine search of the vehicle in question.

The Commonwealth presented the MVR footage of the traffic stop, marked Commonwealth's Exhibit 1. This footage shows the following events. The police vehicle is behind a white car in the left lane of Route 15. The back window of this vehicle has a dark tint on it that prevents seeing through the car. Shortly thereafter, the patrol unit activates its emergency lights to initiate a traffic stop on the white car. The white vehicle pulls over into the turning lane and MacInnis attempts to use an intercom to tell this vehicle to pull over to the side of the road. MacInnis eventually gets out of the patrol vehicle and approaches the car from the passenger side. Their conversation is not audible on the recording but presumably, MacInnis instructed the driver to move his vehicle out of the turning lane. The driver, later identified as Defendant, moves his vehicle to the shoulder of the road, MacInnis follows and approaches again from the passenger side and makes contact with the driver. Defendant and MacInnis have a conversation for a few minutes before MacInnis returns to his patrol unit.

MacInnis runs a search of the Defendant's license on JNet and determines that his license is suspended. Both officers exit the patrol vehicle and ask Defendant to get out of his vehicle. Defendant exits the car and goes to the rear of his vehicle where he is subjected to a pat-down search. Defendant is handcuffed and placed in the back of the police car. Defendant is upset over being taken into custody and starts multiple conversations with the officers regarding their encounter. A tow truck arrives and removes Defendant's vehicle, then the officers transport Defendant to the South Williamsport Police station.

Discussion

Habeas corpus Motion

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).

Defendant challenges the sufficiency of the Commonwealth's evidence on one of the charges brought against him. Defendant asserts that the Commonwealth failed to establish their *prima facie* burden on Count 3: Driving under the Influence of a Controlled Substance. This

offense occurs when an "individual is 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). Defendant argues that the Commonwealth failed to establish a *prima facie* burden on this count for several reasons. First, Defendant was pulled over for impermissible window tint and not based on a violation of Defendant's driving. Defendant never actually performed field sobriety tests and Defendant refused a blood draw. Defendant pulled over safely after MacInnis asked him to move out of the turning lane. Defendant's position is that his admission to smoking marijuana approximately thirty (30) minutes prior to operating his vehicle did not in fact show that Defendant was unable to safely operate his vehicle as the statute requires.

The Commonwealth argues that the totality of the circumstances establishes a *prima facie* case against Defendant. The Commonwealth asserts that Defendant's car had heavily tinted windows, which is a traffic violation on its own. The Commonwealth also contends that it was suspicious and not reasonable for Defendant to pull over in the turning lane for a traffic stop. MacInnis smelled raw marijuana emitting from the car when he made contact with Defendant and Defendant admitted to smoking marijuana within the last thirty (30) minutes.

This Court agrees with the Defendant on this issue. Other than MacInnis' testimony regarding Defendant's confession to smoking marijuana and Defendant's physical appearance, the Commonwealth has failed to present evidence that would support the assertion that Defendant was high on marijuana or that he was unable to drive safely or be in control of the vehicle's movements. The evidence the Commonwealth reiterates may establish a *prima facie* case on separate charges, but does not support the count at issue. Defendant never underwent field sobriety tests to determine his functionality and no blood draw was conducted to ascertain

the Defendant's inebriation. Therefore, the Commonwealth has failed to meet their burden on this charge and Count 3: Driving under the Influence of a Controlled Substance, shall be dismissed.

Motion to Suppress

Defendant also challenges the canine search of his vehicle, arguing that the police lacked reasonable suspicion that would warrant the canine sniff. Pursuant to the Constitution of Pennsylvania, a canine sniff is considered a search. Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987). However, a canine sniff is treated differently than other searches because it "is inherently less intrusive upon an individual's privacy than other searches…." Id. Since this type of search is less invasive when it is property to be searched, law enforcement merely need reasonable suspicion "for believing that narcotics would be found in the place subject to the canine sniff." Commonwealth v. Rogers, 849 A.2d 1185, 1190 (Pa. 2004); *see also* Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993). Defendant argues that no reasonable suspicion existed because police only found money on his person, which is not criminal to possess. Defendant also argues that it is not a crime to have air fresheners and carpet cleaner in a vehicle. Additionally Defendant believes the smell of marijuana alone is not enough to justify the canine search. On the other hand, the Commonwealth asserts that Defendant admitted to smoking, had glassy eyes, chalky lips and tongue, and had various air fresheners in the car, which MacInnis testified in his experience in drug investigations is a common tactic to mask the smell of illicit substances. Defendant also had a significant amount of currency in cash on his person.

Based on the totality of the circumstances, this Court is of the opinion that law enforcement did possess reasonable suspicion to justify a canine sniff of Defendant's vehicle.

The totality of the circumstances analysis "does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather even a combination of innocent facts, when taken together, may warrant further investigation by the police officer." Rogers, 849 A.2d at 1189 (internal citations omitted). The noncriminal components of this encounter between Defendant and police, in conjunction with his confession to smoking marijuana and aspects of Defendant's appearance consistent with marijuana usage satisfies a reasonable suspicion in support of a canine sniff to locate additional drugs. Therefore, Defendant's argument on this issue fails and suppression of evidence shall not be granted on these grounds.

Defendant further asserts that the search warrant obtained after the canine sniff is invalid. When evaluating the probable cause of a search warrant this Court's determination is whether there was "substantial evidence in the record supporting the decision to issue a warrant" by giving deference to the issuing magistrate's probable cause determination and "view[ing] the information offered to establish probable cause in a common-sense, non-technical manner." Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010). Probable cause is established by a "totality of the circumstances." Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985) (adopting U.S. v. Gates, 462 U.S. 213 (1983)). The Court "must limit [its] inquiry to the information within the four corners of the affidavit submitted in support of probable cause when determining whether the warrant was issued upon probable cause." Commonwealth v. Arthur, 62 A.3d 424, 432 (Pa. Super. 2013). It is "not require[d] that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location." Commonwealth v. Forster, 385 A.2d 416, 437-38 (Pa. Super. 1978). A magistrate must simply find that "there is a fair probability

that contraband or evidence of a crime will be found in a particular place." Commonwealth v. Manuel, 194 A.3 1076, 1081 (Pa. Super. 2018).

At the hearing on this motion, defense counsel requested this Court to conduct a four corners review of the search warrant. At the time of the hearing, defense counsel had only received a report of what was seized by police, but nothing else. This Court retrieved a copy of the search warrant in this matter from the office of Magisterial District Judge Whiteman shortly after the hearing on this motion. Additional copies were provided to defense counsel and counsel for the Commonwealth. The search warrant for Defendant's vehicle was obtained by MacInnis on June 17, 2021. The pertinent portion of the search warrant outlining the events leading up to the application of the search warrant states:

> On June 16th 2021 at approximately 1935 hours I, Corporal William MacInnis, was in full uniform, on patrol in an unmarked police unit, in the 200 block of RTE 15 HWY in South Williamsport when I observed a white in color Chevrolet Malibu, with Heavy window tint. This constituted a vehicle equipment violation…
> I then made contact with the driver who identified himself as Kyle R. Scott. Upon speaking with Scott, I could smell an odor of raw marijuana coming from the vehicle, which I immediately recognized through my training and experience…J-NET showed Scott's driving privilege as suspended and that he had an address listed from Philadelphia…I also ran the vehicle registration which came back to a female, also from Philadelphia…Scott admitted that he had smoked in the last half hour…Scott stated that he had been in Williamsport for approximately 3 days, I did not see any clothes, luggage or indications that Scott has spent a few days away from his home in Philadelphia…Philadelphia has long been well known as a source city for illegal narcotics which are transported to the Williamsport area and sold in Williamsport and the surrounding communities.
> Upon searching Scott, I felt in his right front pants pocket, what I believed was a large sum of currency…which was later counted and found to be $2354. Also during the search, I felt a hard object in his groin area. Scott was detained and placed in my patrol unit…The hard object was a key fob and key.
> The Malibu was towed by Freedom Towing to their impound lot at, 410 E. 2nd Ave., and secured. Hughesville P.D. Chief Smith and his K9 were contacted and responded to perform a "sniff" of the exterior of the vehicle. The K9 demonstrated a positive alert on the drivers door of the Malibu.

> Through my training and experience, I know that those who traffic in illegal narcotics will frequently travel in pairs, and will often use vehicles registered to third parties who are not with them at the time. I am also aware through training and experience, that those who traffic in illegal narcotics will frequently hide their controlled substances and money within the vehicle they are using. I am aware that these hiding places can be very difficult to find with a mere cursory search of the vehicle. The Chevrolet Malibu was not registered to the occupant. Scott had stopped the vehicle in the 500 block of RTE 15 HWY, and because…he was detained, he was unable to move the vehicle to a safer location. Furthermore, I have reason to believe that the vehicle will contain further evidence of drug trafficking.

Defense counsel notified the Court that, after reviewing the search warrant application, the affidavit of probable cause, and the receipt/inventory, the documents noted that the search warrant was applied for on June 17, 2021 and signed by the affiant on June 16, 2021. However, defense counsel also stated that the seized property was dated June 15, 2021 at 1:20 p.m., which would insinuate that the items were seized before the search warrant was issued. Regardless, pursuant to Rule 203, while making a determination of whether probable cause was established, the court "may not consider any evidence outside the affidavits." Pa.R.Crim.P. Rule 203. Since this likely typographical error occurs outside the affidavit, the Court cannot consider this information in its four corners determination of sufficient probable cause.

Defendant asserts that the smell of raw marijuana is not enough to justify the issuance of a search warrant. He also argues that there was no reason to tow Defendant's vehicle, particularly when Defendant repeatedly asked the officers if one of his family members could retrieve the vehicle. Defendant further contends that the safety issue of leaving Defendant's vehicle on Route 15 was manufactured by police and could have been easily remedied without the use of a tow. Defendant also believes that it is impermissible to rely on the canine sniff because MacInnis did not personally observe the search and no report of the sniff was created. The Commonwealth's position is that the totality of the circumstances creates sufficient

probable cause in the application of the search warrant. Namely, that Defendant initially pulled over into a turning lane, MacInnis smelled raw marijuana emitting from the vehicle, Defendant admitted to smoking and had red and glassy eyes and chalky lips and tongue, Defendant's license was suspended, he could not give MacInnis straight answers, the alert by the canine, the amount of cash found on Defendant's person, and the various air fresheners in the vehicle. This Court believes that the application for the search warrant is sufficient to establish probable cause to search for controlled substances and drug paraphernalia as requested in the search warrant. Therefore, suppression of evidence shall not be granted on this issue.

Conclusion

The Court finds that the Commonwealth did not present enough evidence at the preliminary hearing to establish a *prima facie* case for Count 3 against Defendant. Therefore, Defendant's Petition for Writ of Habeas Corpus is granted. This Court also finds that law enforcement established reasonable suspicion to conduct a canine search of Defendant's vehicle. As a result, Defendant's Motion to Suppress the evidence seized pursuant to the canine search is denied. Additionally, this Court finds that the affidavit of probable cause in the search warrant for Defendant's vehicle did provide sufficient evidence to establish probable cause to substantiate the issuance of a search warrant. As such, the evidence seized pursuant to the warrant shall not be suppressed.

ORDER

AND NOW, this 28th day of February, 2022, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Motion to Suppress Evidence is hereby **DENIED**. The Defendant's Petition for Writ of Habeas Corpus is **GRANTED**. The Commonwealth failed to present sufficient evidence on Count 3: Driving under the Influence, and therefore, Count 3 is hereby **DISMISSED**.

By the Court,

Nancy L. Butts, President Judge

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