

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :

:

:

:

Vs. :

No. CR-381-2019

:

BRAD BOWMAN,

:

:

Defendant :

Cynthia Hatton, Esquire

Counsel for Commonwealth

Assistant District Attorney

Matthew Rapa, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - December 10, 2020

Before this Court is an "Omnibus Pre-Trial Motion" consisting of a Motion to Suppress Evidence and a Writ of Habeas Corpus along with an addendum to Omnibus Pre-Trial Motion filed six (6) months thereafter. After a thorough review and analysis of the facts and law, this Court denies the Petitioner's original Motion to Suppress and Writ of Habeas Corpus but grants the Addendum and suppresses the blood results obtained as a result of a blood draw from petitioner at St. Luke's Hospital, Lehighton.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of January 25, 2019, Officer Adam Shimer (hereinafter "Shimer") of the Palmerton Police Department was on routine patrol in the Borough of Palmerton. While travelling on Delaware Avenue, he came upon a Ram pickup truck that he was

[FM-51-20]

familiar with, having seen it recently in another jurisdiction. Shimer also testified that he had information, obtained within the last thirty (30) days<sup>1</sup> that Defendant, Brad Bowman's (hereinafter "Bowman") driving privileges were suspended. Shimer also possessed information that the vehicle Bowman was driving had an altered inspection sticker affixed to it.<sup>2</sup>

As Shimer drove past this vehicle, he looked at the driver and had "seen a male resembling Mr. Bowman, who, I mean, I would believe to be Mr. Bowman, yes."<sup>3</sup> Upon making these observations and armed with information regarding the inspection sticker and the registered owner's license status, Shimer effectuated a traffic stop. No other vehicle code violations were noted by Shimer.

Upon approaching the vehicle, Shimer once again observed the altered inspection sticker.<sup>4</sup> At that point he removed Bowman from the vehicle to remove this altered sticker. In the process of doing so, Shimer also observed a straw on the floor of the vehicle.

---

<sup>1</sup> Shimer testified that while he did not know the exact date of when he obtained this information, he stated it was a week or two after Christmas, thus placing that occasion within thirty (30) days of the date of this incident.

<sup>2</sup> Shimer claimed he saw this altered inspection sticker within the week before the stop when he drove past it in Bowmanstown. Additionally, Shimer also learned from Officer Brian White, who resides next to Bowman, that he too had recently observed the altered inspection sticker on this same truck.

<sup>3</sup> Notes of Testimony July 25, 2020 hearing. p. 10.

<sup>4</sup> Shimer testified that upon closer observation he can see that there were some alterations made to the sticker with a sharpie that appeared to extend the inspection period and that the sticker was affixed to the window with box tape, a process not utilized for inspection stickers.

This straw had white residue on it causing Shimer to suspect it was used for illegal narcotic use. In addition to observing those items, Shimer also observed the butt of a handgun protruding from the back seat of this vehicle. Shimer questioned Bowman about the gun whereupon Bowman stated he forgot it was there. Bowman told Shimer he was the owner of this firearm.<sup>5,6</sup>

At this point, Shimer engaged Bowman in a conversation about the prospects of his driving under the influence of controlled substances. Bowman acknowledged that he had taken a few prescription drugs, namely oxycodone and adderall. As a result, Shimer had Bowman perform several field sobriety tests, which in the opinion of Shimer, he believed Bowman showed signs of impairment. At that point Shimer placed Bowman under arrest for driving under the influence of a controlled substance and transported him to St. Luke's Hospital in Lehighton for a blood draw.

According to Shimer, Bowman consented twice to this blood draw, however at no time did Shimer provide any O'Connell or implied consent warnings to Bowman prior to any consents.<sup>7</sup> After

---

<sup>5</sup> Through the course of further investigation, he would learn that this gun was not owned by this Bowman, but by a Richard Bowman. Also, Shimer learned that the Defendant did not possess a permit to carry a firearm in his vehicle or otherwise.

<sup>6</sup> On cross-examination, Shimer indicated that he observed a "crack on it somewhere", but never tested it to see if it were operable.

<sup>7</sup> There was no testimony presented suggesting that Shimer complied with 75 Pa. C.S.A. §1547(b)(1) and advised Bowman of these warnings prior to the first

the blood draw, Bowman was returned to a residence in Bowmanstown.

Shortly thereafter, Shimer received the results of the blood draw which indicated that Bowman had both amphetamines and methamphetamine in his system. As a result, the Defendant was charged with: 1) FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE [18 Pa.C.S.A. §6106(a)(1)]; 2) ALTERED, FORGED OR COUNTERFEIT DOCUMENTS AND PLATE [75 Pa. C.S.A. §7122(3)]; 3) 2 COUNTS OF DUI OF CONTROLLED SUBSTANCE [75 Pa. C.S.A. §3802(d)(2)(i) and (d)(i)(iii)]; 4) POSSESSION OF DRUG PARAPHERNALIA [35 P.S. §780-113(a)(32)]; and 5) OPERATION OF A VEHICLE WITHOUT AN OFFICIAL CERTIFICATE OF INSPECTION [75 Pa. C.S.A. §4703(a)]. Bowman filed his original Omnibus Pre-Trial Motion on June 13, 2019 and an addendum to that motion on December 16, 2019. After a hearing held on July 25, 2020 and the lodging of briefs by both parties, this matter is ripe for disposition.

#### **LEGAL DISCUSSION**

Bowman has raised a number of alleged violations of his due process rights under both the fourth amendment of the U.S. Constitution and Article 1, §8 of the Pennsylvania Constitution, said rights that are to be protected from unreasonable searches and seizures by the government. In the case *sub judice*, Bowman

---

consent. Nor is there any indication that Bowman was given any consents prior to him executing the hospital's form for the blood draw (Commonwealth Exhibit #8).

claims that the police lacked reasonable suspicion to effectuate a stop on his vehicle and that the drawing of his blood was one accomplished without the recitation by Officer Shimer of the requisite implied consent warnings. Additionally, Bowman alleges that the Commonwealth's case does not rise to the requisite *prima facie* standard for the charges filed against him.

**I. Reasonable Suspicion to Effectuate a Stop of Defendant's Vehicle.**

It is well settled that the purpose of both the 4<sup>th</sup> Amendment of the U.S. Constitution and Article 1, §8 of the Pennsylvania Constitution is to protect individuals from searches and seizures which are unreasonable. The U.S. Supreme Court held that the police may stop an individual and frisk that person where there is a reasonable suspicion that criminal activity is afoot. *Terry v Ohio*, 392 U.S. 1 (1968). Under a totality of the circumstances test, in determining whether police do in fact have reasonable suspicion to stop someone, the whole picture must be considered. *U.S. v. Cortez*, 449 U.S. 411 (1981). "Based upon the whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id* at 417-418. Pennsylvania Courts have consistently followed *Terry* including where it involved the protections of Article I, §8. *In Re: D.M.*, 781 A.2d 1161, 1163 (Pa. 2001). This Court also notes that investigative detentions under both the

Fourth Amendment and Article I, §8 are coterminous [See *Commonwealth v. Revere*, 888 A.2d 694 (2005)] and accordingly, vehicle stops that are constitutional under *Terry*, are also constitutional under Article I, §8. Those investigative detentions must be supported by reasonable suspicion. "Reasonable suspicion has been defined as a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the seizure, a police officer must be able to point to specific and articulable facts leading him to suspect criminal activity is afoot." *Commonwealth v. Farvan*, 55 A.3d 113, 116 (Pa. Super. Ct. 2012).

In Pennsylvania, the Appellate Courts have addressed the issue of the quantity of evidence necessary in order for the police to stop a person suspected of driving with a suspended license. In the case of *Commonwealth v. Andersen*, 752, A.2d 1289 (Pa. Super. Ct. 2000), Police encountered two individuals seated in a black Camaro owned by the female. Both individuals had suspended driver's license. The female was arrested and the male, the defendant, was told not to drive his vehicle, which was also at the scene, because of his suspended license. Later, the police officers had an occasion to be in contact with these same two individuals and the same vehicles. One of the officers stopped the female's vehicle

while the other officer observed the defendant's vehicle. Without knowing who was driving or without a reason for stopping that vehicle he did in fact effectuate a traffic stop on the defendant's vehicle. Andersen was arrested for D.U.I. On appeal, the Anderson Court, in overturning the trial Court's denial of the defendant's Motion to Suppress, reasoned that

the knowledge a vehicle is owned by an individual whose driving privileges are suspended coupled with the **mere assumption** that the owner is driving the vehicle, does not give rise to articulable and reasonable grounds to suspect that a violation of the Vehicle Code is occurring every time this vehicle is operated during the owner's suspension. Therefore, based on the totality of the circumstances, we cannot find that officers Clark and Hillias had articulable and reasonable grounds to suspect that a violation of the Vehicle Code had occurred. *Id.* at 1294 (emphasis in original).

The *Andersen* Court also noted that:

[I]n reviewing the facts set forth by the Commonwealth, we note that neither [Officer] specifically observed [the defendant]'s vehicle violate the Vehicle Code prior to the traffic stops. In addition, we fail to recognize the significance of the fact that [the defendant]'s vehicle was being driven near a location where the police previously had encountered [the defendant]. The only relevant information possessed by [the Officers] prior to the traffic stops was that [the defendant]'s driving privileges were suspended and that the Camaro registered to [the defendant] was being operated. Thus, both traffic stops were based on the **mere assumption** that [the defendant] was driving the black Camaro. *Id.* at 1293. (emphasis in original).

In the case of *Comm. v. Hilliar*, 943 A.2d 984 (Pa. Super. Ct. 2004), the Court recited the facts as summarized by the Trial Court as follows:



The arresting police officer's attention was called to the defendant's vehicle as he proceeded east on Market Street in West York Borough. The police officer ran the defendant's license plate, and determined that the owner of the vehicle's license was under suspension. The officer also discovered the owner's age and that he was a male. From his observation of the driver the officer believed that the defendant was male, and was about the same age as the owner. Based on the officer's conclusion that it was likely that the person operating the vehicle was the owner because he was a male of the same age as the owner and had possession of the owner's vehicle, the police officer decided to stop the vehicle for suspicion of driving on a suspended license. *Id* at 978-988.

*Hilliar* was convicted of D.U.I. and Driving Under Suspension. Although the *Hilliar* Court was decided on a Municipal Police Jurisdiction Act issue, the court noted:

[U]nder the facts of this case, the officer's suspicion that the driver of the vehicle was also the owner was a reasonable one because the driver matched the description of the owner as a middle-aged man. Consequently, had the officer initiated a traffic stop while in his primary jurisdiction it would have been entirely legal.

*Hilliar* was distinguished from *Andersen* because in *Andersen* the officer made no mention of any physical description or characteristics of the driver. *Id.* at 990 N.1.

Lastly, in the case of *Commonwealth v. Farnan*, 55 A.3d 113 (Pa. Super. Ct. 2012), the Court was tasked with determining the freshness of information to support reasonable suspicion. The facts were as follows: 1) Officers appeared at the caller's home in reference to a custody dispute; 2) when they arrived, they spoke with the Mother who advised that she felt there was going to be a



problem with a custody exchange; 3) while the officers were speaking with her, she noticed the defendant's car arriving and exclaimed, "Here he comes" as he drove his vehicle towards her house and continued past without stopping; 4) one of the officers was able to identify the driver as the defendant; 5) that same officer learned from the defendant within the past 30 days, that he had a suspended license; 6) at that time the officer confirmed that information; 7) upon seeing the defendant drive by and armed with this information as well as what was going on at the scene, the officer chased the defendant's vehicle; and 8) the defendant was arrested for among other things, driving with a suspended license. *Id* at 114-115. The Court there concluded that "under the totality of the circumstances . . ., the 30-day delay between the time the [officer] learned that [the defendant's] license was suspended and the date the officer conducted the stop was not so lengthy that it rendered the officer's information stale." *Id*. The court further determined that the officer "articulated sufficient facts to support a reasonable belief that appellant was in violation of the motor vehicle code at the time of the traffic stop." *Id*.

Reading all three of these cases together allows one to conclude that knowing that the owner of a vehicle had a suspended license, in and of itself cannot justify a traffic stop. *Andersen* at 1294. In order to justify a stop to investigate whether the

suspended owner is operating the vehicle in question there must be additional evidence produced by the Commonwealth to show that the driver is the owner whose license is suspended. *Id*; *Farnan* at 114-115, 118, *Hilliar* at 990.

At the Omnibus Hearing, the Commonwealth called Officer Adam Shimer (hereinafter "Shimer"), the affiant in this case. Shimer testified on direct examination that on the evening of January 25, 2019, he had occasion to stop the vehicle driven by Bowman.<sup>8</sup> Shimer testified that while driving on Delaware Avenue in the Borough of Palmerton, he "seen a male resembling Mr. Bowman, who I mean, I would believe to be Mr. Bowman, yes" pass me in his Ram pick-up truck.<sup>9</sup> Shimer also testified that he was familiar with the vehicle in question as having a "distinct roof rack and [] some collision and damage around it with which [he was] familiar with from previous encounters with the vehicle."<sup>10</sup>

Shimer also testified that previous to January 25, 2019, he had observed this vehicle with what appeared to be an altered inspection sticker. Shimer claimed he, "can't put a date but

---

<sup>8</sup> Shimer testified that a week or two after Christmas, 2018, he (and Patrolman White) checked Bowman's driver's license status and learned that it was under a D.U.I. related suspension.

<sup>9</sup> Notes of Testimony July 28, 2020 hearing, p. 10.

<sup>10</sup> Notes of Testimony July 28, 2020 hearing, p. 10.

recently prior to that," passed Bowman's vehicle outside of his jurisdiction when he observed the altered inspection sticker.<sup>11</sup>

On cross-examination, Shimer acknowledged that prior to the actual stop, he did not verify that Bowman's license was still under suspension. Shimer also acknowledged that there were no other vehicle code violations that he observed before he stopped Bowman's vehicle. Shimer also confirmed that he observed Bowman's vehicle one week prior when he passed him on Bank Street, in Bowmanstown. As to identification, when asked by defense counsel if he had observed Bowman driving on the evening in question, Shimer responded, "I observed a male who was consistent or similar to Mr. Bowman's outline."

In an attempt to impeach and discredit, defense counsel began to question Shimer about his preliminary hearing testimony.<sup>12</sup>

The following answer was given by Shimer to a question posed to him by the Assistant District Attorney:

---

<sup>11</sup> Shimer's comment with regard to "recently prior to that" appears to mean before the vehicle stop on January 25, 2019.

<sup>12</sup> Attorney Hatton objected to defense counsel playing audio snippets of the preliminary hearing which was recorded by defense counsel claiming that by allowing these snippets to be played without the Commonwealth having access to a full copy of this audio recording was prejudicial to the Commonwealth. This Court allowed defense counsel to utilize these audio recordings as proposed but informed counsel that we would keep the record open to give the Commonwealth the opportunity to obtain a copy of the recording, review it, and determine if the Commonwealth needed to re-direct Shimer. While the record was kept open and another date scheduled for a hearing, the Commonwealth advised the Court that it was not necessary and this hearing was canceled and the record closed.

Shimer: So, I see Mr. Bowman's vehicle driving. It was in the vicinity of the police department, well lit area. Any time I see a vehicle I am going to look at it very specifically. I seen what appeared to be a male driving a vehicle. He is the registered owner of the vehicle. I was able to positively identify it was his vehicle. I spun around and based on previously running the license on that vehicle . . .

At that point, defense counsel stopped the audio and engaged in the following colloquy with Shimer:

Q. . . . So you indicated there that you confirmed it was Mr. Bowman's vehicle, correct?

A. Yes.

Q. And then your testimony was that you saw what appeared to be a male driving the vehicle, correct?

Q. You did not testify that you actually observed Mr. Bowman or someone that looked like him, correct?

A. Okay.

Q. Not in that snippet, correct?

A. Yes.

Defense counsel then played another portion of the audio recording from the preliminary hearing as follows:

Q. . . . Before stopping the vehicle you recognize this vehicle as being Mr. Bowman's, correct?

A. Correct.

Q. And I believe it was your testimony that the driver appealed (sic) to be a male?

A. Correct.

Q. So that was only information you had at that point?

A. Correct.

The audio recording was again stopped and defense counsel and Shimer engaged in the following:

Q. So my question to you there was that you had responded that the driver appeared to be a male, correct?

A. Yes.

Q. And then I asked you that was the only information you had at that point, correct?

A. That's what the audio reflects.

Q. You did not offer any testimony it appeared to look like Mr. Bowman?

A. It appears that way, yes.

Q. So you did not provide any testimony to that effect?

A. I am confused here.

Q. Office Shimer, I will make it simple. On April 25 of 2018, when we had a preliminary hearing on this matter, I asked you if you had observed anything other than it being a male driver.

A. Okay.

Q. And you indicated no, correct?

A. Yes.

Q. But today you testified you observed that it looked like Mr. Bowman, correct?

A. Yes.

Shimer was then questioned about information in his affidavit of probable cause and his police report, specifically related to identifying Bowman as the driver before the vehicle stop. Shimer stated that his police report is prepared "as soon as possible" after an incident because that is when knowledge of the incident is freshest in his mind. Shimer agreed that he did not include anything in either of his reports or probable cause affidavit that identified Bowman as the driver of the vehicle prior to the actual stop itself.

Lastly, defense counsel played yet another question-and-answer snippet from the preliminary hearing as follows:

Q. Before stopping the vehicle you recognized the vehicle as being Mr. Bowman's, correct?

A. Correct.

Q. And I believe it was your testimony that the driver appeared to be a male?

A. Correct.

Q. So that was the only information you had at that point?

A. Correct.

Q. So you weren't sure whether or not this was, in fact, Mr. Bowman driving the vehicle, correct?

A. Correct.

Q. It could have been another male driving the vehicle?

A. I would assume, I guess.

Shimmer was then questioned about that testimony as follows:

Q. So in that question I had asked you whether or not it was actually Mr. Bowman driving the vehicle and you indicated you were not sure, correct?

A. Yes.

Q. Why different in your testimony today as opposed to at the preliminary hearing?

A. I don't recall being any different. I am just a little tired, that's all.

Q. But you heard the questions and you heard the responses there, correct?

A. Yes.

Q. That's your voice?

A. Yes.

Q. Those are your responses?

A. Yes.

Q. And at that point you indicated you were not sure if it was Mr. Bowman?

A. Yes.



All in all, throughout Shimer's testimony at the omnibus hearing and that which was presented through the preliminary hearing audio recording, Shimer never actually identified Bowman as the driver of the vehicle. The closest Shimer got to actually identifying Bowman was his initial direct testimony at the omnibus hearing when he stated "I seen a male resembling Mr. Bowman who, I mean I would believe to be Mr. Bowman, yes."

Following the line of cases beginning with *Andersen* and ending with *Farnan* along with other cases interpreting *Farnan*, this lack of positive identification could be a challenge to the concept of "reasonable suspicion". As previously noted, reasonable suspicion deals in specific and articulable facts. "Resembling Bowman" is not "it is Bowman"; "believ[ing] it to be Mr. Bowman" is not "it is Bowman". These distinctions only create assumptions that the driver of the vehicle was in fact Bowman. Pursuant to *Hilliar*, under the facts of that case, the court stated "the Officer's suspicion that the driver of the vehicle was also the owner was a reasonable one because the driver matched the description of a middle-aged man." *Hilliar* at 990. Under *Farnan*, knowledge that Shimer possessed with regard to Bowman's driving privilege status, obtained within thirty (30) days of the stop begins the process of establishing reasonable suspicion. Add to that the fact that the Officer possessed knowledge of the type of vehicle that Bowman drives and owns and the fact that the vehicle in question was that

vehicle. This coupled with the fact that both Shimer and White, in the week or so prior to this stop were aware that this particular vehicle had affixed to it what appeared to be an altered inspection sticker, provides additional articulable facts that do establish reasonable suspicion that criminal activity is afoot with that vehicle. Notwithstanding the lack of a complete positive identity of the driver as Bowman, Shimer possessed sufficient specific and articulable facts: 1) identification of a vehicle which has distinct characteristics known to be owned by Bowman; 2) observed twice within the last week by two different officers that the vehicle had affixed to it an altered inspection sticker to establish reasonable suspicion to stop this vehicle. It is inconsequential that the identity of the driver was not one-hundred percent known here: resembling Bowman, and believing the driver is Bowman, is a permissible assumption under *Hilliar*. Accordingly, this Court finds that Officer Shimer possessed information that establishes a reasonable suspicion that criminal activity is afoot and therefore we deny Bowman's motion to suppress as not violative of the 4<sup>th</sup> Amendment of the U.S. Constitution nor Article I, §8 of the Pennsylvania Constitution.

## **II. Failure to Read DL26 Form Prior to Blood Draw**

Bowman next contends that the consent he gave for a blood draw was not knowingly and voluntarily given in light of the fact

that Shimer failed to read to him the implied consent warnings as required by 75 Pa. C.S.A. §1547.

Pursuant to 75 Pa. C.S.A. §1547,

(a) General rule - Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood of the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock).

(b) Civil penalties for refusal. -

(1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person[.]

. . .

(b)(2) It shall be the duty of the police officer to inform the person that:

(i) the person's operating privilege will be suspended upon refusal to submit to chemical testing and the person will be subject to a restoration fee of up to \$2,000; and

(ii) if the person refuses to submit to chemical breath testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties.)

"Under this statutory scheme, a motorist placed under arrest for DUI has a critical decision to make. The arrestee may submit to a chemical test and provide the police with evidence that may be used in a subsequent criminal prosecution, or the arrestee may invoke the statutory right to refuse testing, which: (i) results in

a mandatory driver's license suspension under 75 Pa. C.S.A. §1547(b)(i); (ii) renders the fact of refusal admissible as evidence in a subsequent DUI prosecution pursuant to 75 Pa. C.S.A. §15479(e); and (iii) authorized heightened criminal penalties under 75 Pa. C.S.A. §3804(c) if the arrestee later is convicted of DUI. In very certain terms, [the Supreme] Court had held that, in requesting a chemical test, the police officer must inform the arrestee of the consequences of refusal and notify the arrestee that there is no right to consult with an attorney before making a decision. See [Com., Dept. of Transp., Bureau of Traffic Safety v.] O'Connell [521 Pa 242], 555 A.2d [873,] 877-878 [919890]. "An arrestee is entitled to this information so that his choice to take a chemical test can be knowing and conscious." *Id* at 878. The choice belongs to the arrestee, not the police officer." *Comm. v. Myers*, 164 A.3d 1162, 1171 (2017). "Notwithstanding [75 Pa. C.S.A. §1547 (a)], Subsection 1547(b)(1) confers upon all individuals under arrest for DUI and explicit statutory right to refuse chemical testing, the invocation of which triggers specific consequences." *Id* at 1170.

Bowman contends that Shimer never provided these statutorily required warnings to him and accordingly the consent Bowman provided for the blood draw was not voluntary. In *Commonwealth v. Venable*, 200 A.3d 490, 497 (Pa. Super. Ct. 2018), the court stated,

"In determining the validity of a given consent, the Commonwealth bears the burden of establishing 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. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or

instead the product of coercion, deceit, or misrepresentation." (citations omitted).

Additionally, "while there is no hard and fast list of factors evincing voluntariness, some considerations include: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) **the defendant's knowledge of his right to refuse to consent**; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel." *Commonwealth v. Robinson*, 186 A.3d 440, 447 (Pa. Super. Ct. 2018) (citations omitted) (emphasis ours).

In this case, despite Bowman's consent, Shimer did not provide Bowman with any of the requisite 1547(b)(1) warnings. Because Shimer was statutorily obligated to inform Bowman of the right to refuse chemical testing and the consequences should he exercise that right, yet failed to provide these precautions, Bowman did not make a knowing and conscious choice of whether to submit to the blood draw.<sup>13</sup> *Commonwealth v. Krenzel*, 209 A.3d 1024, 1032 (Pa. Super. 2019).

As a result, this Court is constrained to suppress the results of the chemical testing of Bowman's blood and any references thereto for purposes of trial.

---

<sup>13</sup> The Commonwealth seeks to rely upon Commonwealth Exhibit #8 which is a "request for legal blood and/or urine testing" utilized by the hospital. It is a request by the Officer for the hospital to draw the blood. The fact that this document may show further evidence of Bowman's consent to the blood draw is of no consequence. It has no bearing on the voluntariness of that consent in light of this ruling.

**III. Lack of Prima Facie Case on Charge of Firearms Not to be Carried Without a License (18 Pa.C.S.A. §6106)**

In his Omnibus Pre-Trial Motion, Bowman alleged that "The Commonwealth cannot offer any evidence that would support a finding of *prima facie* showing that defendant committed the crimes currently filed against him."<sup>14</sup> However, since the hearing and after the lodging oh his post-hearing brief, Bowman has abandoned this issue except for the charge of FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE (18 Pa. C.S.A. §6106), as the other charges were not addressed in his brief.

In this case, the Commonwealth charged Bowman with a violation of 18 Pa. C.S.A. §6106, FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE. Bowman challenges the sufficiency of the Commonwealth's *prima facie* case. "It is [ ] well-settled in our jurisprudence that a preliminary hearing is not a trial, that the principal function of a preliminary hearing is to 'protect an individual's right against an unlawful arrest and detention', and that the Commonwealth bears the burden at the preliminary hearing of establishing a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it." *Commonwealth v. Montgomery*, 234 A.3d 523, 533 (Pa. 2020) (internal citations omitted). It is inherent in this obligation that the Commonwealth "provides evidence of each of the material elements

---

<sup>14</sup> Bowman's Omnibus Motion filing under the heading "Writ of Habeas Corpus."

of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense." *Comm. v. Karetny*, 880 A.2d 505, 514 (2005). The charge of "FIREARMS NOT TO BE CARRIED WITHOUT A LICENSE" (18 Pa. C.S.A. §6106(a)) as filed in this case reads in pertinent part as follows: ". . . any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, . . . without a valid and lawfully issued license . . . commits a felony of the third degree. The evidence as presented by the Commonwealth shows that Shimer found, protruding from the rear seat of the vehicle operated by Bowman, a revolver that was owned by someone other than Bowman himself, who did not possess a license to carry it. There does not appear to be any dispute as to this evidence and its ability to establish the *prima facie* case. Bowman, however, argues that the firearm's operability is part of the consideration of the establishment of these elements.

In determining whether the evidence establishes the elements of a *prima facie* case, the court is permitted to draw reasonable inferences from that evidence. *Commonwealth v. Barnes*, 14 A.3d 120 (Pa. Super. Ct. 2011).

In *Commonwealth v. Gainer*, 7 A.3d 291, 298 (Pa. Super. Ct. 2010), the court stated that "[i]n order to sustain convictions under [this] section, the firearm in question must have been operable or capable of being converted into an object that could



fire a shot." (citing *Commonwealth v. Stevenson*, 894 A.2d 759, 775 (Pa. Super. Ct. 2006)). The only evidence presented in the case sub judice suggesting inoperability was a "crack in it somewhere".<sup>15</sup> No other testimony on the possibility of the weapon being incapable of firing was presented. Further, Commonwealth Exhibit #5, which was a photo of the firearm in question fails to show where this crack may be, how big/small it might be or how it might impact its operability. "A reasonable fact finder may, of course, infer operability from an object which looks like, feels like, sounds like or is like, a firearm. Such an inference would be reasonable without direct proof of operability." *Commonwealth v. Layton*, 307 A.2d 843, 854 (1973). In the instant case, based upon the limited yet sufficient evidence and testimony, this Court draws necessary and appropriate inferences that this firearm was operable. Why otherwise would it be in Bowman's vehicle?

#### CONCLUSION

Based on the foregoing, this Court enters the following:

---

<sup>15</sup> Notes of Testimony, July 25, 2020 hearing, p. 57)

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
	:	
Vs.	:	No. CR-381-2019
	:	
BRAD BOWMAN,	:	
	:	
Defendant	:	

Cynthia Hatton, Esquire	Counsel for Commonwealth
	Assistant District Attorney
Matthew Rapa, Esquire	Counsel for Defendant

ORDER OF COURT

AND NOW, this ~~10th~~ day of December, 2020, upon consideration of the "Omnibus Pre-Trial Motion" and the "Addendum to Omnibus Pre-Trial Motion" filed by the Defendant, Brad Bowman, the brief lodged in support thereof, the Commonwealth's brief lodged in opposition thereto and after hearing thereon, it is hereby **ORDERED and DECREED** as follows:

1. The Motion to Suppress Evidence based upon a lack of reasonable suspicion for the vehicle stop is **DENIED**;
2. The Motion to Suppress based upon the failure of Officer Shimer to comply with 75 Pa.S.C.A. §1547 is **GRANTED**. All evidence related to the blood draw and resultant reports regarding Defendant's blood tests are **SUPPRESSED**; and

3. The Writ of Habeas Corpus is **DENIED**.<sup>16</sup>

BY THE COURT:

  
\_\_\_\_\_  
Joseph J. Matika, J.

---

<sup>16</sup> As noted in the corresponding opinion, Bowman abandoned his claim regarding all charges except for 18 Pa.C.S.A. 6106. Notwithstanding, the Commonwealth did present sufficient prima facie evidence as to all charges.