

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	NO. 1432-CR-2019
vs.	:	
	:	
TERANCE JAMES OSENBACH,	:	
Defendant	:	
	:	
Brian B. Gazo, Esquire		Counsel for Commonwealth
Assistant District Attorney		
Jeffrey G. Velander, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – June 21, 2023

Herein, Defendant, Terance James Osenbach, challenges the legality of the traffic stop of his vehicle by the Pennsylvania State Police on May 31, 2022, and seeks to suppress all incriminating evidence gained as a result thereof. Specifically, Defendant claims the Commonwealth lacked reasonable suspicion to stop the vehicle to determine whether the owner was the driver where the driving license of the vehicle's owner was expired and further, that no violation of Section 3309(1) of the Vehicle Code, which requires the driver of a motor vehicle on a laned roadway to drive as nearly as practicable entirely within its lane of traffic, occurred so as to justify the stop.

## PROCEDURAL AND FACTUAL BACKGROUND

On May 31, 2021, at approximately 4:00 a.m., Pennsylvania State Troopers, Charles Inserra and Mark Bower, were on duty sitting in a stationary patrol vehicle watching traffic along Lizard Creek Road in East Penn Township, Carbon County, Pennsylvania. As they prepared to exit the parking lot where they were located, Trooper Inserra caught a brief glimpse of Defendant and his passenger traveling west on Lizard Creek Road. Upon entering Lizard Creek Road from the parking lot, Trooper Inserra headed west, driving behind Defendant's vehicle. Lizard Creek Road is a two-lane highway marked by a double yellow median line and a white fog line.

While following Defendant, as part of their routine practice, the Troopers entered the Defendant's vehicle's license plate number into the state registry database (*i.e.*, the Commonwealth Law Enforcement Assistance Network (CLEAN) System), which indicated the driver's license of the registered owner of the vehicle was expired. This search also displayed a copy of the owner's driver's license containing a photograph of the owner, with the owner appearing as a white male, 58 years of age. Trooper Inserra had estimated the age of the driver as between 40 and early 50 years old. Trooper Inserra testified that the picture appearing on the owner's driver's license "reasonably matched" the individual he observed earlier driving the vehicle they were following, noting also that the driver was slouched down in the driver's seat and wearing a hat.

The Troopers followed Defendant's vehicle for approximately four to five miles before initiating a traffic stop by activating the lights on the patrol vehicle. During the time

the Troopers were behind Defendant, Defendant did not exceed the speed limit, however, the Troopers observed Defendant's vehicle weaving within his lane of traffic, touching but not crossing the center and fog lines multiple times. The section of Lizard Creek Road traveled by Defendant before he was stopped is relatively straight, however, there are some slight curves and some hills. At no time during the distance Defendant was followed did the Troopers observe any oncoming traffic or Defendant drive onto the berm or pose a danger to himself or others.

When Trooper Inserra activated his vehicle's overhead lights, Defendant, after some hesitation, turned on his right turn signal and pulled off of the road. At the Troopers' request, Defendant provided requested documentation. It was at this time that the Troopers learned Defendant was not the owner of the vehicle, but the owner's 39 year old son. At the same time, the Troopers detected the odor of marijuana emanating from the interior of the vehicle and later emanating from Defendant's person. Defendant's pupils failed to respond normally to variations in light and his eyes were glassy and slightly red. Defendant was unable to perform standard field sobriety tests and a pat-down search of his person led to the discovery of a pipe used by Defendant to smoke marijuana. Defendant admitted using marijuana the previous afternoon. The results of a blood draw showed the presence of Delta-9 THC, 11-Hydroxy Delta-9 THC, Delta-9 Carboxy THC, methamphetamine and amphetamine in Defendant's blood.

On July 19, 2021, Defendant was charged with four counts of driving under the influence of a controlled substance<sup>1</sup>, possession of a small amount of marijuana,<sup>2</sup> possession of drug paraphernalia,<sup>3</sup> and three moving violations under the Vehicle Code: Section 3309(1) (Driving within single lane),<sup>4</sup> 3714(a) (Careless driving)<sup>5</sup> and 3736(a) (Reckless driving).<sup>6</sup> Following a preliminary hearing, all charges were bound over to court.

On August 22, 2022, Defendant filed an Omnibus Pretrial Motion in the nature of a motion for suppression asserting, *inter alia*, that any suspicion that the operator of a motor vehicle is driving with an expired license because the license of the vehicle's owner is expired is not a "reasonable" one, and that the Troopers' contention that Defendant was driving in a reckless or careless and unsafe manner was belied by the motor vehicle recording which failed to support a "reasonable suspicion" upon which to stop the vehicle. A hearing on Defendant's Omnibus Pretrial Motion was held on January 31, 2023.

### DISCUSSION

Because a vehicle stop by police constitutes a seizure of the vehicle and its occupants under both our federal and state constitutions, the stop must be supported either by reasonable suspicion or probable cause that a crime has been or is being committed. Probable cause is required if, as to the Vehicle Code violation in question,

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<sup>1</sup> 75 Pa.C.S.A. §3802(d)(1)(i), (ii) and (iii) and 3802(d)(2).

<sup>2</sup> 35 P.S. §780-113(a)(31)(i).

<sup>3</sup> 35 P.S. §780-113(a)(32).

<sup>4</sup> 75 Pa.C.S.A. §3309(1).

<sup>5</sup> 75 Pa.C.S.A. §3714(a).

<sup>6</sup> 75 Pa.C.S.A. §3736(a).

detaining the driver will serve no investigatory purpose (*i.e.*, no further investigation is required to establish the violation). In contrast, where a traffic violation is suspected, but a stop is necessary to further investigate and corroborate the existence of the violation, reasonable suspicion is necessary to justify the stop. Commonwealth v. Salter, 121 A.3d 987, 992-93 (Pa.Super. 2015).<sup>7</sup> “In a Terry stop, ‘the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions’”. Commonwealth v. Mistler, 912 A.2d 1265, 1277 (Pa. 2006) (Eakin, J., dissenting) (quoting Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

Here, because further investigation was required by the police to determine whether the driver of the vehicle was the owner whose driving privileges had expired, this reason for conducting a stop of Defendant's vehicle needed to be supported by

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<sup>7</sup> In further explanation of this difference, the Salter court offered the following:

Illustrative of these two standards are stops for speeding and DUI. If a vehicle is stopped for speeding, the officer must possess probable cause to stop the vehicle. This is so because when a vehicle is stopped, nothing more can be determined as to the speed of the vehicle when it was observed while traveling upon a highway. On the other hand, if an officer possesses sufficient knowledge based upon behavior suggestive of DUI, the officer may stop the vehicle upon reasonable suspicion of a Vehicle Code violation, since a stop would provide the officer the needed opportunity to investigate further if the driver was operating under the influence of alcohol or a controlled substance.

Commonwealth v. Salter, 121 A.3d 987, 993 (Pa.Super. 2015). A stop for suspicion of DUI presents “a scenario where further investigation almost invariably leads to the most incriminating type of evidence, *i.e.*, strong odor of alcohol, slurred speech, and blood shot eyes. This type of evidence can only be obtained by a stop and investigation.” Commonwealth v. Sands, 887 A.2d 261, 270 (Pa.Super. 2005).

reasonable suspicion. As such, Defendant was the subject of an investigative detention, which, to be constitutionally valid, requires the Commonwealth to point to specific and articulable facts known by Troopers Inserra and Bower before the stop for suspecting Defendant was driving his vehicle at a time when his driving privileges had expired. See also 75 Pa.C.S.A. §6308(b) (codifying the "reasonable suspicion" standard for vehicle stops involving investigatory violations of the Vehicle Code); Commonwealth v. Feczko, 10 A.3d 1285, 1291 (Pa.Super. 2010) (en banc) ("Traffic stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose."), appeal denied, 25 A.3d 397 (Pa. 2011).

Where, however, the basis of the stop is a violation of the Vehicle Code which is not investigable, the officer must have probable cause for the stop.<sup>8</sup> Such is the case with regard to the Commonwealth's claim that Defendant was operating his vehicle in an unsafe manner in violation of Section 3309(1) of the Vehicle Code. Feczko, 10 A.3d

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<sup>8</sup> Probable cause is a practical, non-technical concept which requires consideration of the totality of the circumstances. Probable cause to arrest exists "when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." Commonwealth v. Weaver, 76 A.3d 562, 565 (Pa.Super. 2013) (quoting Commonwealth v. Williams, 941 A.2d 14, 27 (Pa.Super. 2008)), aff'd, 105 A.3d 656 (Pa. 2014). "Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily even the most likely inference." Commonwealth v. Lindblom, 854 A.2d 604, 607 (Pa.Super. 2004), appeal denied, 868 A.2d 1198 (Pa. 2005). "[Probable cause] does not demand any showing that such a belief be correct or more likely true than false." Commonwealth v. Kendrick, 490 A.2d 923, 927 (Pa.Super. 1985).

1287-1292 (summarizing the development of Pennsylvania's law and changes to Section 6308(b) concerning the applicable quantum of cause necessary for a traffic stop and finding probable cause existed to support defendant's stop for a violation of Section 3309(1)); Commonwealth v. Chase, 960 A.2d 108, 115-16 (Pa. 2008).<sup>9</sup>

REASONABLE SUSPICION – EXPIRATION OF  
OWNER'S DRIVING PRIVILEGES

In Kansas v. Glover, - U.S. -, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020), the United States Supreme Court held that "the inference that the owner is the driver of a vehicle by itself provides reasonable suspicion to permit a Terry stop under the Fourth Amendment, assuming, of course, that the police have reason to believe that the registered owner is involved in criminal conduct." Commonwealth v. Jefferson, 256 A.3d 1242, 1250 (Pa.Super. 2021) (en banc), appeal denied, 268 A.3d 1071 (Pa. 2021). As stated by Justice Thomas, the Opinion's author, "when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable." 140 S.Ct. at 1186. Explaining further, Justice Thomas wrote that "[t]he fact... the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of [the officer]'s inference" and that "[t]he reasonable suspicion inquiry falls considerably short of 51% accuracy." Id at 1188 (citation and quotation marks omitted). This same

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<sup>9</sup> See also Commonwealth v. Landis, 89 A.3d 694, 703 (Pa.Super. 2014) (noting that where trooper stopped motorist for failing to drive within a single lane - and not to investigate possible DUI - he needed probable cause to stop). At the hearing on Defendant's Omnibus Pretrial Motion, Trooper Inserra expressly testified that the stop was not because of suspicion of driving under the influence.

quantitative observation relative to reasonable suspicion has been made by our Superior Court which noted “[i]t is well[-]settled that to justify their decision to stop and briefly detain [an individual], the police need not establish their suspicions to a level of certainty, a preponderance, or even a fair probability.” Commonwealth v. Epps, 608 A.2d 1095, 1096 (Pa.Super. 1992). The quantum of cause required of a police officer under Article I, Section 8 of the Pennsylvania Constitution to justify a vehicle stop to verify the identity of the driver under the circumstances presented here is no different than that under the Fourth Amendment to the federal constitution. Jefferson, 256 A.3d at 1260, recognizing the overruling of Commonwealth v. Andersen, 753 A.2d 1289 (Pa.Super. 2000), by Glover as to the applicability of the Fourth Amendment.<sup>10,11</sup>

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<sup>10</sup> In Commonwealth v. Andersen, 753 A.2d 1289 (Pa.Super. 2000), the Pennsylvania Superior Court held 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 operating during the owner’s suspension.” Id. at 1294. (emphasis in original).

<sup>11</sup> When a defendant claims the Pennsylvania Constitution affords greater protection than do the provisions in the federal constitution – here, that Article I, Section 8 of the Pennsylvania Constitution provides greater protection than the Fourth Amendment – to preserve the issue and avoid waiver, since “Pennsylvania courts treat the protections of the two constitutions as co-extensive unless the defendant contends otherwise,” defendant must effectively advocate by reference to caselaw and legal reasoning that the Pennsylvania Constitution provides a distinct, independent grounds of protection; otherwise, only a federal analysis is required. Commonwealth v. Jefferson, 256 A.3d 1242, 1260-61 (Pa.Super. 2021) (Bowes, J., concurring opinion). An analysis pursuant to the Pennsylvania Supreme Court decision in Edmunds requires consideration of (1) Article 1, §8’s text; (2) its history and caselaw interpreting it; (3) related caselaw from other states; and (4) policy considerations. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).



Here, the evidence of record does not rebut the inference that the owner was the driver. Although we recognize the difference in age between Defendant and his father might militate to the contrary, we also believe it necessary to consider that Trooper Inserra had only a brief glimpse of Defendant as Defendant drove past where Trooper Inserra was parked along Lizard Creek Road, that this occurred during the early morning hours when it was dark outside, that Defendant was wearing a hat and slouched down in the driver's seat at the time, that Defendant appeared older in age than his actual age, and that Defendant bore familial features to his father, all which support the reasonableness of Trooper Inserra's characterization of the comparison between his observation of Defendant on May 31, 2022, before the stop and the picture appearing on Defendant's father's driver's license as a "reasonable match."

#### PROBABLE CAUSE – MANNER OF OPERATING VEHICLE

As regards the second basis for the stop, that Defendant's vehicle was weaving and did not remain within its lane of traffic,<sup>12</sup> Section 3309(1) of the Vehicle Code on its face and under precedential caselaw is a safety provision concerned with the safe operation of a motor vehicle.<sup>13</sup> Although we found at the time of the omnibus pretrial

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<sup>12</sup> On this point, Trooper Inserra opined that a "lane" consisted of the space between the fog line and the center line.

<sup>13</sup> In relevant part, Section 3309(1) provides as follows:

§ 3309. Driving on roadways laned for traffic

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:

- (1) Driving within single lane. - A vehicle shall be driving as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

hearing that Defendant's vehicle touched both the center line dividing the two lanes of traffic and the fog line, at no time did the vehicle cross either the fog line or center line or enter into the opposing lane of traffic. Further, at no time during the distance Defendant was followed by the Troopers was there any approaching traffic.

In Commonwealth v. Cook, 865 A.2d 869, 874 (Pa.Super. 2004), appeal denied, 880 A.2d 1236 (Pa. 2005), applying probable cause as the legal standard needed to stop a vehicle for a suspected violation of the Vehicle Code under the prior version of Section 6308(b), in a case where the trooper observed the defendant "drive over the right fog line to the extent of half the vehicle width, three times, and then rapidly jerk back into his lane of travel" over a distance of approximately one mile, the Court in finding the existence of probable cause held that whether or not there is a violation of Section 3309(1) depends largely on whether the driver's movement from his lane is done safely. In Commonwealth v. Gleason, 785 A.2d 983, 989 (Pa. 2001), superseded by statute, Act of Sept. 30, 2003, P.L. 120, No. 24, §17 (amending 75 Pa.C.S.A. §6308(b)), effective Feb. 1, 2004, the Supreme Court held that the officer did not possess probable cause to stop the vehicle because no safety hazard was created where the vehicle crossed the fog line by six to eight inches for a period of one to two seconds two or three times over a quarter of a mile, but no other vehicles were on the highway. In Feczko, 10 A.3d at 1292, the Court concluded probable cause existed to find a violation of Section 3309(1) where, in addition to the vehicle crossing the fog line two to three times and crossing the center line twice,

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75 Pa.C.S.A. §3309(1) .

there was oncoming traffic and "Appellant's deviations from his lane of traffic created a significant safety hazard on the roadway." Finally, in Commonwealth v. Malone, 19 Pa.D.&C. 4<sup>th</sup> 41 (Cumb. Co. 1993), the Court found that the officer did not have probable cause to find a violation of Section 3309(1) where Defendant was seen crossing onto the berm once and over the center line once – each time by approximately one foot - and no other vehicles were driving near the Defendant, noting that this Section, a safety provision, does not require "perfect adherence to driving entirely within a single marked lane on all occasions." Id at 44.

### CONCLUSION

While we have found the facts insufficient to meet the constitutional threshold of probable cause for stopping Defendant due to the manner in which he was operating his vehicle, Troopers Inserra and Bower did have reasonable suspicion, as measured by what they knew before the stop, to detain Defendant for further investigation. The inference that the owner of a vehicle is its driver combined with the Troopers' knowledge that the owner's driving privileges were expired provided a sufficient basis to justify the stop. Accordingly, Defendant's Omnibus Pretrial Motion is DENIED.

BY THE COURT:

  
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P.J.