

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

COMMONWEALTH OF PENNSYLVANIA, :

:

v. :

No. CR-383-2019

:

EDWARD W. HENDERSHOT, JR., :

Defendant :

Gary F. Dobias, Esquire
Special Assistant District Attorney

Counsel for the Commonwealth

Kim M. Gillen, Esquire

Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. - December 30, 2020

Edward W. Hendershot, Jr. (hereinafter "the Defendant") is charged with Criminal Use of a Communication Facility (18 Pa. C.S.A. § 7512(a)); two (2) counts of Manufacture, Delivery, or Possession with the Intent to Manufacture or Deliver (35 P.S. § 780-113(a)(30)); Intentional Possession of a Controlled Substance by a Person Not Registered (35 P.S. § 780-113(a)(16)); and Use/Possession of Drug Paraphernalia (35 P.S. § 780-113(a)(32)). The Defendant's counsel has filed an "Omnibus Pre-Trial Motion" based on challenges to the search of the Defendant's vehicle. Upon consideration of the evidence presented during a suppression hearing before the undersigned and for the reasons set forth hereinafter, we are constrained to grant Defendant's motion.

FACTUAL AND PROCEDURAL BACKGROUND

On December 27, 2018 at 11:20 p.m., Patrolman Bruce Broyles (hereinafter "Officer Broyles") of the Lehighton Borough Police Department was on routine patrol on State Route 443 when he observed a black Lexus sedan with a non-illuminated tail light exit the Sunoco parking lot. Officer Broyles passed the vehicle while travelling in the opposite direction and confirmed that the tail light was not illuminated. Officer Broyles then turned his patrol vehicle around to follow the Lexus sedan. The vehicle made a left turn onto State Route 209 and then a right turn onto the Weissport Bridge. Officer Broyles then activated his overhead lights and effectuated a traffic stop of the vehicle.

Upon exiting his patrol vehicle, Officer Broyles noticed the strong odor of marijuana. He then made contact with the driver of the vehicle, who was identified as Amber Thomas. She was recognized by Officer Broyles from previous encounters. It was later discovered that the vehicle was owned by the Defendant, who was in the passenger seat at the time of the incident.

Officer Broyles questioned Miss Thomas about the non-illuminated tail light. Miss Thomas stated that she was aware of the issue with the tail light and had been stopped for it on prior occasions. Officer Broyles noted, however, that despite previously detecting the odor of marijuana, he did not detect the odor on the interior of the vehicle from the driver's side window.

Officer Broyles returned to his patrol vehicle. While he was doing a record check on the subject vehicle and occupants, Officer Kennedy arrived on scene. Officer Broyles asked Officer Kennedy to make contact with the occupants of the vehicle while taking note of any marijuana odor. Officer Kennedy complied and reported that he was able to detect the odor of marijuana and that he believed it to be emanating from the Defendant's vehicle.

The officers then ordered the Defendant and Miss Thomas to exit the vehicle. They were both placed in police cruisers. Officer Broyles asked the Defendant for his consent to search the vehicle, but he refused. Despite the Defendant's refusal, Officer Broyles decided to search the Defendant's vehicle based on both officers' detection of the odor of marijuana. The Defendant warned Officer Broyles that there was a firearm in the center console. It was later verified that the Defendant had a proper permit for a concealed firearm.

Officer Broyles and Officer Kennedy began searching the vehicle from front to back. Other than the firearm, the officers found blunt cigar wrappers in the vehicle. However, they noticed that the odor of marijuana was much stronger in the area of the backseat. For that reason, they decided to search the vehicle's trunk.

The officers did not immediately observe any contraband upon opening the trunk. However, the odor of marijuana was still very

strong. The officers then removed some items from the trunk of the vehicle, including the cloth liner to the tail light. Once the liner was pulled back, the officers were able to recover a plastic bag containing one hundred and seventeen (117) grams of marijuana.

Officer Broyles then reported to the Defendant what had been recovered from the vehicle and told him that the vehicle would be searched more thoroughly. The Defendant then admitted that there was heroin located in the vehicle's compact disk player and in the glove compartment. The officers opened both compartments and found a plastic bag containing six-and-one-half (6 1/2) grams of light brown powder, which they suspected to be heroin, in the compact disk player. The Defendant then told the officers to remove more items from the trunk of the car. After doing so, the officers recovered a bag containing smaller plastic bags which are consistent with drug packaging. The officers also found unopened blunt cigar wrappers and United States currency during their second search.

The Defendant was taken to the Lehighton police station, where he was read his Miranda rights. The Defendant waived his Miranda rights and agreed to speak with Officer Broyles. The Defendant informed Officer Broyles that he had intended to sell the drugs found in his vehicle and intended to smoke any leftover marijuana.

ISSUES

- A. Did the officers' detection of the odor of marijuana near the Defendant's vehicle constitute probable cause to search the vehicle without a warrant?
- B. If the officers had probable cause to search the vehicle, did it extend to their search of the vehicle's trunk area?

DISCUSSION

Through his pre-trial motion, the Defendant argues that the search of his vehicle was unconstitutional. First, he asserts that the officers' detection of the odor of marijuana near his vehicle did not constitute probable cause to perform a warrantless search of the vehicle. Second, the Defendant asserts that even if the officers had probable cause, it was nonetheless unlawful for them to search the trunk of the vehicle. Therefore, the Defendant asks this Court to suppress all evidence resulting from the search of his vehicle.

A. Officer Broyles did not have probable cause to perform a warrantless search of the Defendant's vehicle based solely on the odor of marijuana emanating from the vehicle.

Officer Broyles immediately detected the odor of marijuana upon exiting his patrol vehicle during the traffic stop of the

Defendant's vehicle. Officer Kennedy confirmed that the odor was present, and that he believed the odor to be coming from the Defendant's vehicle.

"[P]olice may search an automobile without a warrant so long as they have probable cause to do so, as an automobile search 'does not require any exigency beyond the inherent mobility of a motor vehicle.'" Commonwealth v. Harris, 176 A.3d 1009, 1022-23 (Pa. Super. 2017) (citing Commonwealth v. Gary, 91 A.3d 102, 104 (Pa. 2014)).

"With respect to probable cause to search, our Supreme Court instructs us that:

[p]robable cause exists where the facts and circumstances within the officers' knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. With respect to probable cause, this [C]ourt adopted a "totality of the circumstances" analysis in Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921, 926 (1985) (relying on Illinois v. Gates, 462 U.S. 213, [103 S.Ct. 2317, 76 L.Ed.2d 527] (1983)). The totality of the circumstances test dictates that we consider all relevant facts, when deciding whether [the officer had] probable cause."

Id. at 1023 (citing Commonwealth v. Luv, 735 A.2d 87, 90 (Pa. 1999)).

In determining whether the plain smell of marijuana meets the above-stated standards, we look to the Superior Court of Pennsylvania's decision in Commonwealth v. Stoner. The Court

reasoned that because "an odor may be sufficient to establish probable cause for the issuance of a search warrant [*citing United States v. Ventresca*, 380 U.S. 102, 111 (1965)] ... the rationale used to establish probable cause applies equally well when determining the validity of a search of a movable vehicle." Commonwealth v. Stoner, 344 A.2d 633, 635 (Pa. Super. 1975).

The Defendant argues, however, that since the Pennsylvania General Assembly has passed the Medical Marijuana Act, the "plain smell" of marijuana can no longer constitute probable cause for a search warrant or a warrantless search of a vehicle.

There are currently two conflicting statutes concerning the possession and use of marijuana in Pennsylvania. The first is the Controlled Substance, Drug, Device, and Cosmetic Act (hereinafter "the CSA"). The CSA provides that:

§ 780-104. Schedules of controlled substances

(1) Schedule I—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule:

(iv) Marihuana.

35 P.S. § 780-104(1)(iv).

The second statute is Pennsylvania's Medical Marijuana Act (hereinafter "the MMA"). The MMA provides that:

§ 10231.102. Declaration of policy

The General Assembly finds and declares as follows:

(1) Scientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life.

(2) The Commonwealth is committed to patient safety. Carefully regulating the program which allows access to medical marijuana will enhance patient safety while research into its effectiveness continues.

(3) It is the intent of the General Assembly to:

(i) Provide a program of access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety.

(ii) Provide a safe and effective method of delivery of medical marijuana to patients.

(iii) Promote high quality research into the effectiveness and utility of medical marijuana.

(4) It is the further intention of the General Assembly that any Commonwealth-based program to provide access to medical marijuana serve as a temporary measure, pending Federal approval of and access to medical marijuana through traditional medical and pharmaceutical avenues.

35 P.S. § 10231.102(1-4).

The MMA provides that "[t]he growth, processing, distribution, possession and consumption of medical marijuana permitted under [the MMA] shall not be deemed a violation of the [CSA]" and "[i]f a provision of the [CSA] relating to marijuana conflicts with a provision of [the MMA], [the MMA] shall take precedence." Commonwealth v. Barr, 240 A.3d 1263, 1278 (Pa. Super. 2020) (*citing* 35 P.S. § 10231.2101.)

Following the enactment of the Medical Marijuana Act, Pennsylvania courts have decided various cases concerning its

impact on probable cause to search a residence or vehicle. First, in Commonwealth v. Batista, the police officer searched the Defendant's residence based on probable cause that was established by a report that the residence was being used as a "grow house" and the officer's detection of a strong odor of marijuana coming from an exhaust pipe. Commonwealth v. Batista, 219 A.3d 1199, 1201 (Pa. Super. 2019). Upon a challenge to the officer's reliance on the odor of marijuana, the Superior Court of Pennsylvania ruled that "[g]iven the extremely limited number of permits [to legally grow marijuana] that the Department has issued, we hold that, when an officer smells fresh marijuana emanating from a building that is a reported grow-house there still exists a fair probability that the marijuana inside is illegal. Law enforcement still holds the power and the duty to investigate that probability." Id. at 1205.

In Commonwealth v. Williams, the Superior Court of Pennsylvania ruled that the officer's detection of the odor of marijuana during a vehicle stop was sufficient to establish reasonable suspicion to prolong the traffic stop. Commonwealth v. Williams, 2019 WL 6899855 at *2. Additionally, the court held that probable cause to search the vehicle had been established due to both the odor of marijuana and the inconsistencies in the occupants' accounts of their destination. Id.

The Defendant in the instant case argued that the recently decided case of Commonwealth v. Barr renders the search of his vehicle unconstitutional. In Barr, the Superior Court of Pennsylvania ruled that "here, 'many people' are licensed to consume marijuana under the MMA, and 'violate no law' by doing so. The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity when hundreds of thousands of Pennsylvanians can lawfully produce that odor. What it does provide to police is a general, probabilistic suspicion of criminal activity based on the fact that most citizens cannot legally consume marijuana. Thus, it is a factor that can contribute to a finding of probable cause, consistent with prior precedent discussed above, assuming some other circumstances supply more individualized suspicion that the activity is criminal." Commonwealth v. Barr, 240 A.3d at 1287.

The defendant in Barr was stopped while driving near the Liberty Park Apartment Complex in Allentown, Pennsylvania, where the officers observed the driver commit multiple traffic violations. Id. at 1269. Upon approaching the vehicle, the officers conducting the stop detected the odor of marijuana emanating from the vehicle. Id. at 1270. The defendant presented the officers with a medical marijuana card bearing his name. Id. at 1271. The subsequent search of the vehicle recovered both marijuana and a loaded handgun. Id. at 1272.

The Pennsylvania Superior Court ultimately ruled that the "plain smell" of marijuana alone, without anything else, is not sufficient to provide officers with probable cause to justify a warrantless search of a vehicle under the Fourth Amendment. However, the case was remanded to the trial court with instructions to determine whether the officers possessed probable cause based upon the totality of the circumstances. Id. at 1291. According to the Superior Court, the trial court should have considered the odor of marijuana to be a factor, among others, in determining the totality of the circumstances. Id. at 1287. Other factors present in the case were "1) [the officer's] training and experience with regard to narcotics investigations; 2) [the officer's] identification of the area where [a]ppellee's vehicle was stopped as a high crime area; 3) [a]ppellee's numerous statements prior to the search; and 4) [a]ppellee's change in demeanor upon the arrival of more police officers." Id. at 1288.

In the instant matter, we must apply the law established by our Superior Court in Commonwealth v. Barr, which constrains us to find that Officer Broyles did not have probable cause to search the Defendant's vehicle without a warrant. Unlike the officers in Barr and other precedent cases, the only suspicious element that Officer Broyles observed and articulated was the odor of marijuana. The area where the Defendant's vehicle was stopped is not considered to be a "high crime area." Officer Broyles did not

testify as to any conversations that he had with the Defendant prior to searching the vehicle, except for the Defendant denying him consent to search. Lastly, while this Court recognizes that Officer Broyles is an experienced police officer, he did not testify in this case as to any specific training in narcotics investigations or similar fields. Therefore, the totality of the circumstances standard was not met in this case and Officer Broyles did not have probable cause to search the vehicle without a warrant.

This court recognizes that the automobile exception no longer applies in Pennsylvania as per the very recent decision of the Pennsylvania Supreme Court in Commonwealth v. Alexander. In overturning its previous decision in Commonwealth v. Gary, the Supreme Court explained that "[t]he Gary result is impossible to uphold if Article I, Section 8 and its unshakable link to privacy requires greater protections when an automobile search is at issue. The federal bright-line rule must be consistent with Pennsylvania norms and standards and must account for our constitutional text and precedents interpreting it. It does not serve to simply point to the federal model, which weighs, as we shall explain, the cost and benefits of police action versus citizens' rights differently." Commonwealth v. Alexander, 2020 WL 7567601 at *19.

As a result of the Pennsylvania Supreme Court's ruling in Alexander, justification for warrantless automobile searches will

now require that law enforcement officers demonstrate both probable cause and exigent circumstances. "'[O]ne without the other is insufficient.' 'This dual requirement of probable cause and exigency is an established part of our state constitutional jurisprudence.'" Id. at 24 (citing Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999) and Commonwealth v. Hernandez, 935 A.2d 1275, 1280 (Pa. 2007)).

However, we find it unnecessary to analyze this case under the new standard established in Alexander, as the vehicle search in the instant matter fails to meet even the more lenient standard of the previously recognized automobile exception. In making this determination, we do not attempt to disregard the Supreme Court's decision in Alexander. Rather, we aim to apply the settled law and then-pending higher court decisions that were argued by counsel at the time of the evidentiary hearing in this matter.

Finally, because Officer Broyles did not possess probable cause to perform a warrantless search of the interior of the vehicle based solely on his detection of the odor of marijuana, it logically follows that he would not be permitted to search the trunk of the vehicle. Therefore, we need not further address the Defendant's second issue in this matter.

CONCLUSION

For the reasons set forth hereinabove, the Defendant's "Omnibus Pre-Trial Motion" will be granted and we will enter the following

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ORDER OF COURT

AND NOW, to wit, this 30th day of December, 2020, upon consideration of "Defendant's Omnibus Pre-Trial Motion" and following an evidentiary hearing held thereon, and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

ORDERED and DECREED that the aforesaid motion is GRANTED and that all evidence obtained in the search of the Defendant's vehicle shall be SUPPRESSED.

BY THE COURT:



Steven R. Serfass, J.