

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

COMMONWEALTH OF PENNSYLVANIA

vs.

DANIELLE THERESA BAUER

Defendant

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No. CR 1506-2015

Cynthia Ann Dyrda Hatton, Esquire

Matthew J. Mottola, Esquire

Counsel for Commonwealth
Assistant District Attorney
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - December 28 , 2016

Before this Court is a Motion to Suppress filed by Defendant, Danielle Theresa Bauer. Defendant seeks to suppress the blood drawn from her at St. Luke's Miners Memorial Hospital, as well as the toxicology report analyzing that blood. For the reasons stated within this Opinion, upon consideration of Defendant's "SUPPRESSION MOTION," and after a hearing held thereon, and after reviewing Defendant's Brief in Support,¹ Defendant's Petition is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

At 11:33 p.m. on September 7, 2015, Patrolman Carl Breiner of the Nesquehoning Police Department was on patrol. He was dispatched to West Columbus Avenue in response to a report of a female passed

¹ The Commonwealth failed to file a timely Brief in Opposition.

out behind the wheel of a minivan. Upon his arrival to that area, he observed a Dodge minivan with a single female occupant, later identified as Defendant, who appeared to be sleeping in the driver's seat with her head resting against the window. The vehicle was safely parked on the right side of the road, though Patrolman Breiner observed that it may have been parked too near a fire hydrant and crosswalk. The vehicle's engine was not running, nor was it turned on.

Patrolman Breiner parked behind the vehicle and activated his emergency lights. He approached the vehicle and knocked on the window several times, attempting to wake Defendant. When she awoke, she seemed startled and confused. He gestured for her to roll down the window, but she kept hitting the door lock instead. While this was occurring, he noticed Defendant moving her right hand near the steering column, though he could not see precisely what she was doing or attempting to do. Defendant eventually opened the door. Patrolman Breiner asked Defendant if she was alright and what was she doing there, to which she responded that she had been at the house of someone named Josh, but she had left Josh's house to go to another friend's house, which was located nearby. While questioning Defendant, Patrolman Breiner observed that her eyes appeared glassy and bloodshot, and he detected an odor of alcohol. He did not see any alcoholic beverages in Defendant's vehicle, but when questioned whether she had been drinking, Defendant did admit

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that she had drunk a small amount of alcohol six hours earlier. Patrolman Breiner asked Defendant how long she had been in her vehicle at that location, and she replied approximately four hours.

After running a check on Defendant's license and vehicle documents, Patrolman Breiner requested that Defendant perform field sobriety tests, based on what he had seen and smelled. Defendant performed three field sobriety tests,² all of which, in his opinion, she failed. Patrolman Breiner subsequently placed Defendant under arrest for suspicion of Driving Under the Influence. He asked Defendant where the keys to her vehicle were, and she answered that they were in her purse. He returned to Defendant's vehicle to retrieve her purse, but rather than finding the keys in her purse, he found them lying on the floor beneath the steering column. Patrolman Breiner transported Defendant to St. Luke's Miners Memorial Hospital in Coaldale, where she consented to a blood draw after being read the DL-26 form warnings.³ Her blood was drawn at approximately 12:34 a.m. The results

² Specifically, Defendant was asked to touch the tip of her nose, do a one-legged stand, and walk heel-to-toe for a number of steps.

³ Included in these warnings is the following passage: "If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. In addition, if you refuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. **These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of \$1,000.00, up to a maximum of five years in jail and a maximum fine of \$10,000.**"

indicated Defendant had a BAC of 0.026% and 13 ng/mL of morphine in her system.

Defendant was charged with three different counts of Driving Under the Influence of Alcohol or Controlled Substance-Controlled Substances.⁴

DISCUSSION

Defendant has filed a Suppression Motion arguing that Patrolman Breiner did not possess the requisite probable cause to arrest Defendant and request a blood draw. Specifically, Defendant avers that Patrolman Breiner did not have probable cause to believe Defendant was in actual physical control of her vehicle while intoxicated.⁵ Additionally, Defendant argues that the warrantless blood draw was an unconstitutional search because an exigent circumstance did not apply and Defendant did not grant valid consent.

I. PROBABLE CAUSE AND ACTUAL PHYSICAL CONTROL

In a motion to suppress evidence, the burden is placed upon the Commonwealth to establish that the allegedly suppressible evidence was not obtained in violation of a defendant's rights. *Commonwealth v. Ryan*, 407 A.2d 1345, 1348 (Pa. Super. Ct. 1979).

⁴ 75 Pa.C.S.A. § 3802 (d)(1)-(d)(3).

⁵ 75 Pa.C.S.A. § 3802 (d) states "An individual may not drive, operate or be in actual physical control of the movement of a vehicle under [various specified circumstances]." Neither party has argued that Defendant's vehicle was ever witnessed in motion or that she was operating it when Patrolman Breiner arrived on the scene. Thus, the issue turns only on whether Defendant was in actual physical control of the movement of the vehicle.

"The Fourth Amendment of the United States Constitution and Article I, Section VIII of the Pennsylvania Constitution guarantee individuals freedom from unreasonable searches and seizures." *Commonwealth v. El*, 933 A.2d 657, 660 (Pa. Super. Ct. 2007). It cannot be disputed that an arrest is a seizure that normally requires a warrant. *Commonwealth v. Clark*, 735 A.2d 1248, 1251 (Pa. 1999). However, 75 Pa.C.S.A. § 3811 expressly authorizes a warrantless arrest for a DUI violation when a police officer has probable cause to believe that an individual has committed such a violation. Probable cause exists when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." *Commonwealth v. Thompson*, 985 A.2d 928, 931 (Pa. 2009) (citation omitted).

With regard to what constitutes "actual physical control" of a motor vehicle within the meaning of the DUI statutes, the determination is based on the totality of the circumstances. When making this determination, relevant factors include the location of the vehicle, whether the engine was running, and whether there was other evidence indicating that the defendant had driven the vehicle prior to the arrival of the police. *Commonwealth v. Wolen*, 685 A.2d 1384, 1385 (Pa. 1996) (citing *Commonwealth v. Byers*, 650

A.2d 468, 469 (Pa. Super. Ct. 1994)). Further, "[a] driver has actual physical control of his car when he has real bodily restraining or directing influence or dominion or regulation over its movement or the movement of its machinery." *Wolen*, 685 A.2d at 1387 (citation omitted).⁶

The facts in the case *sub judice* bear some similarity to the facts of *Commonwealth v. Price*, 610 A.2d 488 (Pa. Super. Ct. 1992). In that case, the defendant was found sitting in the driver's seat of an automobile with the keys in his hand. *Id.* at 490. The vehicle was not running, and in fact had been rendered inoperable after striking a pothole, causing a flat tire and breaking the wheel rim. *Id.* at 489. The Superior Court found that those facts fell "far short of the degree of control required." *Id.* at 490.

Likewise, this case is similar to *Banner v. Comm. Dept. of Transp.*, 737 A.2d 1203 (Pa. 1999). In that case, the defendant was found sleeping in a reclined position in the passenger seat of his safely parked vehicle on a rural road. *Id.* at 1204, 1208. The vehicle's keys were in the ignition, but the lights were not on and the engine was not running. *Id.* at 1207. When the officer tapped on the window, the defendant awoke and reached for the keys in the ignition in order to activate the vehicle's power windows.

⁶ The Court in *Wolen* was quoting a jury instruction given by the trial court in that case. Neither party disputed that this was a proper definition of "actual physical control."

Id. at 1204, 1208. The Pennsylvania Supreme Court found that the officer did not have reasonable grounds⁷ to believe that the defendant was in actual physical control of his vehicle. *Id.* at 1207. It further noted that the defendant reaching for the keys in the ignition "merely demonstrated his need to activate the power windows in order to hear the officer's directives." *Id.* at 1208.

Conversely, this case is dissimilar to cases where actual physical control was found. Most notably, in those other cases, either the engines of the defendants' vehicles were running, or the vehicles were found parked in a manner that clearly evidenced they had been driven by an intoxicated driver. See, e.g., *Commonwealth v. Bobotas*, 588 A.2d 518 (Pa. Super. Ct. 1991) (Defendant had been drinking at a different location and was later found intoxicated behind the wheel of his running vehicle in an alleyway); *Commonwealth v. Trial*, 652 A.2d 338 (Pa. Super. Ct. 1994) (Defendant was found passed out in his vehicle, which was turned on but the engine was not running, and which was parked diagonally across a two-lane residential road);⁸ *Commonwealth v.*

⁷ *Banner* was a civil case involving a license suspension appeal. The *Banner* Court cited its decision in *Comm. Dept. of Transp. v. Wysocki*, 535 A.2d 77 (Pa. 1987), wherein it had interpreted the plain language of 75 Pa.C.S.A. § 1547 (b)(1) to mean that a request for chemical testing must be supported by "reasonable grounds" for the officer to have believed the licensee was operating the vehicle while under the influence of alcohol. "Reasonable grounds" has been interpreted to mean "probable cause." *Commonwealth v. Urbanski*, 627 A.2d 789, 792 n. 2 (Pa. Super. Ct. 1993). Thus, probable cause is the proper standard for both arresting an individual for DUI and requesting a blood draw.

⁸ In his Brief, Defendant cites a passage from *Price*, 610 A.2d at 490, which reads "at a very minimum, a parked car should be started and running before a finding of actual physical control can be made." Def.'s Br. 8. In *Trial*, the

Woodruff, 668 A.2d 1158 (Pa. Super. Ct. 1995) (Defendant had been drinking beer he purchased from a convenience store but was found passed out behind the wheel of his running vehicle a distance away from the convenience store); *Commonwealth v. Wolen*, 685 A.2d 1384 (Pa. 1996) (Defendant became intoxicated earlier and was found passed out behind the wheel of his running vehicle in a fast food parking lot); *Commonwealth v. Saunders*, 691 A.2d 946 (Pa. Super. Ct. 1997) (Defendant was found passed out behind the wheel of his running vehicle in the parking lot of a convenience store where he could not have purchased alcoholic beverages); *Commonwealth v. Williams*, 871 A.2d 254 (Pa. Super. Ct. 2005) (Defendant was found passed out behind the wheel of his running vehicle in the parking lot of a restaurant that did not serve alcoholic beverages); *Commonwealth v. Brotherson*, 888 A.2d 901 (Pa. Super. Ct. 2005) (Defendant was found passed out behind the wheel of his running vehicle parked on a playground basketball court); *Commonwealth v. Toland*, 995 A.2d 1242 (Pa. Super. Ct. 2010) (Defendant was found passed out behind the wheel of his running vehicle in front of a store that did not sell alcoholic beverages).

In the present case, Patrolman Breiner first approached Defendant because he had been dispatched pursuant to a report of

Pennsylvania Superior Court acknowledged this statement from *Price*, but found that a running engine is not always dispositive in finding actual physical control. *Trial*, 652 A.2d at 340. Moreover, as stated in *Wolen, supra*, whether the engine was running has become merely a single factor of the actual physical control analysis.

a female passed out behind the wheel of a vehicle. Upon spotting Defendant's vehicle, he noted that the vehicle was safely parked, notwithstanding the fact that it may have been too close to a fire hydrant and crosswalk. Upon approaching the vehicle, Patrolman Breiner saw that Defendant was indeed asleep behind the wheel, with her head resting against the window. The lights were not on, nor was the engine running. Patrolman Breiner later found the vehicle's keys on the floor beneath the steering column. Given these facts, he did not have the requisite probable cause to believe Defendant was in actual physical control of her vehicle when he came upon the scene. Further, even though Defendant admitted she had driven her vehicle to that location four hours earlier, there was no evidence that indicated she was intoxicated when she did so. And while it is possible, as argued by the Commonwealth,⁹ that the keys were in the ignition immediately prior to the encounter, notwithstanding the fact that this Court cannot and will not speculate as to the unknown, that point would not affect this Court's analysis. As the Pennsylvania Supreme Court noted in *Banner, supra*, Defendant fumbling about the ignition would merely demonstrate that she was attempting to activate her power

⁹ The Commonwealth argued in its untimely lodged brief that "the Defendant fumbled around the ignition and the keys were located directly on the floor which could possibly mean that the keys were in the ignition and her fumbling caused them to be removed from the ignition." Commw.'s Br. at 8.

windows¹⁰ in accordance with Patrolman Breiner's instructions. This is further evidenced by the fact that she kept mistakenly hitting the door lock switch. Accordingly, it was this response to Patrolman Breiner's request to open the window that could have conceivably caused Defendant to reach for the keys in the ignition, but in failing to open the window, caused them to fall to the floor.

Therefore, based on the totality of the circumstances in this case drawn from the available evidence, this Court finds that Patrolman Breiner did not possess probable cause to believe Defendant was in actual physical control of her vehicle, did not possess probable cause to arrest her, and did not possess probable cause to request a blood draw. As such, Defendant's arrest was unlawful, and the blood draw and its resulting toxicology report must be suppressed as fruits of the poisonous tree. See *Commonwealth v. Johnson*, 68 A.3d 930, 946 (Pa. Super. Ct. 2013).

II. BLOOD DRAW AS UNCONSTITUTIONAL SEARCH

Because this Court has determined that Defendant's arrest was unlawful, and the subsequent blood draw and its resulting toxicology report must be suppressed under the probable cause analysis *supra*, it need not address the merits of Defendant's second argument.

¹⁰ Patrolman Breiner testified that Defendant's vehicle had power windows and locks during the August 25, 2016 hearing on this motion.

Accordingly, the Court enters the following order:

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Matthew J. Mottola, Esquire

Counsel for Commonwealth
Assistant District Attorney
Counsel for Defendant

ORDER OF COURT

AND NOW, this 28th day of December, 2016, upon consideration of Defendant's Suppression Motion and accompanying brief in support thereof, and after a hearing held on this matter, it is hereby **ORDERED** and **DECREED** that Defendant's Suppression Motion is **GRANTED**. The Commonwealth is precluded from introducing into evidence at trial the toxicology report outlining the results of the blood drawn at St. Luke's Miners Memorial Hospital or any other evidence related to that blood draw or its results.

BY THE COURT:



Joseph J. Matika, J.