

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
Vs.	:	No. CR-902-2016
	:	
BREEZE JOHNSON,	:	
Defendant	:	

Cynthia Hatton, Esquire	Counsel for Plaintiff
Jennifer Rapa, Esquire	Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 13 , 2018

In this criminal case, the Court is called upon to rule on the validity of a warrantless search of a vehicle. However, as a precursor to that ruling, the Court must first determine if the Defendant, Breeze Jirell Johnson (hereinafter "Johnson") has standing and a reasonable expectation of privacy such that he could challenge the legality of that warrantless search. For the reasons that follow, while Johnson has standing, he does not have a reasonable expectation of privacy in that vehicle and as a result, no matter the legality of that search, he cannot contest the same. Accordingly, the Court denies his motion to suppress and accompanying motion for habeas corpus.

FINDINGS OF FACT

On June 13, 2016, Trooper Mark Conrad (hereinafter "Conrad")

of the Pennsylvania State Police was monitoring traffic on Interstate 80 westbound near mile marker 277 in Kidder Township, Carbon County when he observed a silver Hyundai sedan pass his location at a high rate of speed. This vehicle was also observed to be travelling in the left lane less than one car length behind another vehicle. Conrad then observed the Hyundai slam on its brakes and swerve from the left lane into the right lane almost striking another vehicle. Conrad pursued this vehicle and eventually effectuated a traffic stop.

Upon approaching the passenger side of the vehicle, Conrad indicated that the driver, Breeze Johnson appeared nervous. Conrad requested the "required documents"¹ and in response, Johnson provided a Pennsylvania I.D. card stating that he did not have a driver's license. Johnson also produced a rental agreement for the vehicle and nothing else. Upon review of this rental agreement, Conrad noticed that it was expired, that Johnson was not an authorized operator of this vehicle, and that the vehicle could only be driven in Pennsylvania.²

¹ Presumably by this, Conrad meant, driver's license, vehicle registration and proof of insurance.

² The rental agreement, Commonwealth Exhibit #6, was between Enterprise, acting as agent for the owner, Penrac, LLC and Deborah Johnson, sister of this defendant. This agreement noted that "no other drivers permitted" besides Deborah Johnson and that the vehicle could be driven in "Pennsylvania only." Most importantly, as noted on this agreement, this vehicle was to be returned by Deborah Johnson no later than 8:00 A.M. on June 10, 2016, three (3) days prior to the date of this incident.

Conrad inquired of Johnson's travel plans to which Johnson responded that he was coming back from an overnight stay in Brooklyn, New York, and was returning to Scranton.³ Conrad also ran a criminal history on Johnson and found that Johnson had convictions for drug distribution on his record. When questioned by Conrad why Johnson was driving this vehicle, he stated, according to Conrad, that his sister rented it for him.

Based upon this information and his training and experience, Conrad believed that criminal activity was afoot and requested that Johnson exit the vehicle, which he did. At this point, Trooper Kreidler appeared and Conrad conducted a search of the vehicle.⁴ During the course of this search, Conrad located, behind the glove box door, two plastic bags of a powdery substance which were located in a brown paper bag.

Johnson was then placed under arrest and taken back to the Fern Ridge Barracks. The substances seized were eventually tested at the Wyoming Regional Laboratory of the Pennsylvania State Police which revealed the identity and quantity of two (2) different controlled substances, to wit: 19.81 +/- grams of a schedule I

³ Conrad advised Johnson that his direction of travel was "off route" to which Johnson responded that he missed his turn.

⁴ There was no testimony presented either as contained in the notes of testimony in the preliminary hearing transcript (Commonwealth Exhibit #4) nor at the hearing before this Court as to the circumstances surrounding this search on whether it was consensual, the product of a warrant or as an exception to the warrant requirement. Since this Court's decision in this matter prevents Johnson from challenging the search itself, it will neither speculate nor address the issue of the legality of that search.

controlled substance known as pentylone and 30.06 +/- grams of a schedule I controlled substance known as heroin.⁵

Conrad filed the following charges against Johnson: 1) Possession with Intent to Deliver [35 P.S. §780-113(A)(30)]; 2) Simple Possession [35 P.S. §780-113(A)(16)]; 3) Possession of Drug Paraphernalia [35 P.S. § 780413(A)(32)]; 4) Following too Closely [75 Pa.C.S.A. §3310(A)]; 5) Disregard Traffic Lane [75 Pa.C.S.A. §3309(1)]; 6) Careless Driving [75 Pa.C.S.A. §3714(A)] and 7) Driving Without a License [75 Pa.C.S.A. §1501(A)]. As the result of a preliminary hearing on June 29, 2016, a prima facie case was made and all charges were bound over.

On February 8, 2018, Johnson filed his Omnibus Motion. In that motion, he seeks to suppress the evidence obtained, i.e. pentylone and heroin, as fruits of an illegal search and seizure on the basis that Conrad had neither the requisite reasonable suspicion nor probable cause to conduct such a search; and 2) should this evidence be suppressed, the Commonwealth cannot establish the elements of the drug charges filed against Johnson or alternatively, if the evidence is not suppressed, the Commonwealth cannot establish that Johnson "possessed" these controlled substances found in the glove compartment of the rental vehicle.

⁵ See Commonwealth Exhibit #3.

LEGAL DISCUSSION

I. MOTION TO SUPPRESS - REASONABLE SUSPICION

Johnson first contends that the totality of the circumstances present do not rise to the requisite "reasonable suspicion" that criminal activity was afoot and accordingly, Conrad's search was not justified under the 4th Amendment to the United States Constitution and/or Article I, Section VIII of the Pennsylvania Constitution.

Trooper Conrad testified to a number of facts which raised his suspicion suggesting that criminal activity was indeed occurring. He testified that Johnson appeared overly nervous and claimed to be travelling on an overnight trip from New York City to Scranton, yet he was on I80 nowhere near the route to get back to Scranton. Conrad also testified that Johnson was travelling in a third party rented vehicle from a source city for drugs, New York City, that he, Conrad smelled alcohol and that Johnson had a criminal history for drug distribution. Based upon Conrad's experience this information suggested that Johnson may have been involved in some sort of drug activity.

"To establish grounds for reasonable suspicion, the officer must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him

reasonably to conclude in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. The question of whether reasonable suspicion existed at the time [the stop was conducted] must be answered by examining the totality of the circumstances to determine whether the officer who initiated the stop had a particularized and objective basis for suspecting the individual stopped." *Commonwealth v. Postie*, 110 A.3d 1034, 1039-40 (Pa. Super. Ct. 2015) (quoting *Commonwealth v. Muhammed*, 992 A.2d 897, 900-01 (Pa. Super. Ct. 2010)).

Based upon the testimony of Trooper Conrad, this Court finds that he had reasonable suspicion that criminal activity was afoot that may justify a search of the vehicle.^{6 7}

II. MOTION TO SUPPRESS - SEARCH/SEIZURE/REASONABLE EXPECTATION OF PRIVACY

Pursuant to Pennsylvania Rule of Criminal Procedure 581, in relevant part:

- (A) The defendant's attorney, or the defendant if unrepresented, may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights.
- (D) The motion shall state specifically and with particularity the evidence sought to be suppressed, the

⁶ For the reasons expressed later in this opinion, the Court foregoes any further analysis of the search conducted by Trooper Conrad.

⁷ Defendant also argued a lack of probable cause for the search, however, again, it is unnecessary to address this issue as well.

grounds for suppression, and the facts and events in support thereof.

- (E) A hearing shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). A hearing may be either prior to or at trial, and shall afford the attorney for the Commonwealth a reasonable opportunity for investigation. The judge shall enter such interim order as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

- (H) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the Defendant's rights. The defendant may testify at such hearing, and if the defendant does testify, the defendant does not thereby waive the right to remain silent during trial.

Pa.R.Crim.P. 581.

In a motion to suppress evidence, it is the Commonwealth's burden to establish that the evidence in question was not obtained in violation of the defendant's rights. *Commonwealth v. Ryan*, 407, A.2d 1345, 1348 (Pa. Super. Ct. 1979). "The Fourth Amendment of the United States Constitution and Article I, Section VIII of the Pennsylvania Constitution guarantee individual freedom from unreasonable searches and seizures." *Commonwealth v. El*, 933 A.2d 657, 660 (Pa. Super. Ct. 2007).

Accordingly, the Commonwealth has both the burden of production and the burden of persuasion otherwise known as the "burden of proof" to prove to the Court that the evidence seized was legally obtained. Upon receipt of this evidence, the Court may then address the motion.

In the context of a suppression motion, "The concept of standing in a criminal search and seizure context empowers a defendant to assert a constitutional violation and thus seek to exclude or suppress the government's evidence pursuant to the exclusionary rules under the Fourth Amendment of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution." *Commonwealth v. Hawkins*, 553 Pa. 76, 718 A.2d 265, 266 (1988). Additionally, the Defendant must have a privacy interest in the area being searched. *Commonwealth v. Perea*, 791, A.2d 427, 429 (Pa. Super. Ct. 2002).

As outlined in *Commonwealth v. Burton*, 973 A.2d 428, 435 (Pa. Super. Ct. 2009) (*en banc*) "the law relating to a defendant's standing and expectation of privacy in connection with a motion to suppress has been explained by our courts. A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy. Standing requires a defendant to demonstrate one of the following: (1) his presence on the premises at the time of the search and seizure; (2) a possessory interest in the evidence improperly seized; (3) that the offense charged includes as an essential element the element of possession; or (4) a proprietary or possessory interest in the searched premises. A defendant must separately establish a legitimate expectation of privacy in the area searched or thing seized." *Commonwealth v. Hawkins*, 553 Pa. 76, 718 A.2d 265, 267

(1998); *Commonwealth v. Black*, 758 A.2d 1253, 1256-1258 (Pa. Super. Ct. 2000); *Commonwealth v. Torres*, 564 Pa. 86, 764 A.2d 532, 542 (2001); *Perea*, 791 A.2d at 429. "Whether defendant has a legitimate expectation of privacy is a component of the merits analysis of the suppression motion. See *Commonwealth v. Millner*, 585 Pa. 237, 888 A.2d 680, 691 (2005)."

The determination as to whether a defendant has met this initial burden will be made after the presentation of any evidence by the Commonwealth and the defendant.

In the case *sub judice*, Johnson has been charged with "possession crimes." As a general rule, when a defendant is charged with those types of crimes, standing is automatic insofar as challenging the search. *Perea*, at 429. But a defendant must still establish that he has a reasonable expectation of privacy in the area to be searched. *Commonwealth v. Strickland*, 707 A.2d 531, 534 (Pa. Super. Ct. 1998), appeal denied, 727 A.2d 130 (1998); *Commonwealth v. Peterson*, 636 A.2d 615, 617-618 (1993).

"An expectation of privacy is present when the individual, by his conduct, exhibits an actual (subjective) expectation of privacy and that the subjective expectation is one that society is prepared to recognize as reasonable. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the

surrounding circumstances." *Burton*, 973 A.2d at 435 (quoting *Commonwealth v. Jones*, 874 A.2d 108, 118 (Pa. Super. Ct. 2005) (citations omitted).)

Here, the vehicle in question was owned by Penrac, LLC and leased to the Defendant's sister, Deborah Johnson, through Enterprise. According to the rental agreement, this vehicle was rented for the period of time through June 10, 2016 at 8:00 A.M. by Ms. Johnson. This rental agreement also indicates that Ms. Johnson was to be the only driver and the vehicle was to be operated only in Pennsylvania (emphasis ours). Testimony presented through Trooper Conrad on direct and cross-examination intimated that Johnson had travelled out of state (New York) with this vehicle and that Johnson claimed he received permission from his sister to drive this vehicle. However, even if the latter is true, Johnson's expectation of privacy was not reasonable for several reasons: 1) the rental agreement was expired; 2) no other drivers were permitted per the rental agreement; 3) Deborah Johnson could not have given authority to her brother to drive this vehicle to New York or anywhere because of the foregoing.

In *Commonwealth v. Enimpah*, 106 A.3d 701-702 (Pa. 2014), the court explained:

[. . .] under our jurisprudence, the defendant bears the burden of persuasion with respect to his privacy interest.... The Commonwealth may concede the privacy interest, choosing to contest only the legality of police conduct; if it does so, the defendant's

"reasonable expectation of privacy" need not be established. However, if the evidence of the Commonwealth, the party with the burden of production, shows the defendant lacked such a privacy interest, the burden of establishing the contrary is on the defendant.

. . .[I]t is worth noting that in analyzing the merits of a suppression motion, the trial court may, indeed, treat the defendant's privacy interest as a "threshold" or "preliminary" matter. That is to say, if the evidence shows there was no privacy interest, the Commonwealth need prove no more; in terms of the court's review, it need go no further if it finds the defendant has not proven a reasonable expectation of privacy ... [A]s it relates to the parties' presentation of evidence, our cases and the Rules of Criminal Procedure make clear that the Commonwealth has the burden of production, to give the court evidence allowing that conclusion. Once it places the issue before the court, as a basis for denying suppression, the defendant may prove the contrary"

We find that Johnson did not prove to the contrary and accordingly, has not satisfied his burden of establishing a privacy interest in the vehicle he was driving and specifically the area (glove compartment) searched. Consequently, the Court's analysis of the merits of the search and seizure of the controlled substances ends here.

III. HABEAS CORPUS

Lastly, Johnson moves that, whether or not the motion to suppress is granted, the Commonwealth cannot make out a prima facie case against him on the three (3) possession counts. Notwithstanding that we are denying the two bases to suppress the controlled substance seized, Johnson would argue that the

Commonwealth could still not show a prima facie case that Johnson "possessed" this substance or the paraphernalia. The Commonwealth counters that Johnson could be found to be in "constructive possession" thereof.

A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of the crime and that the accused is the probable perpetrator of that crime. *Commonwealth v. Fountain*, 811 A.2d 24, 25-6 (Pa. Super. Ct. 2002), *abrogated on other grounds by Commonwealth v. Dantzler*, 135 A.3d 1109 (Pa. Super. Ct. 2016). The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt; rather, the Commonwealth must show sufficient probable cause that the defendant committed that offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury. *Commonwealth v. Keller*, 823 A.2d 1004, 1010-11 (Pa. Super. Ct. 2003), *abrogated on other grounds by Dantzler*, 135 A.3d 1109. "In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. Ct. 2001), *abrogated on other grounds by Dantzler*, 135 A.3d 1109.

In this case, Trooper Conrad testified that based on his training and evidence, the totality of the circumstances was indicative of Johnson's possession of these controlled substances. He is travelling from a source city, New York, in a third-party vehicle.⁸ Additionally, Conrad testified that the drugs were located in the glove compartment and in his experience, a drug dealer would not allow his "product" to be left unattended or in a high place of mobility. The significance of this testimony would be a repudiation of Johnson's claim that the drugs found could have belonged to his sister's boyfriend. In order to establish a prima facie case regarding possession charges, the Commonwealth must prove that a defendant knowingly or intentionally possessed the controlled substance and paraphernalia. *Commonwealth v. Brown*, 48 A.3d 426, 430 (Pa. Super. Ct. 2012).

However, "When contraband is not found on the defendant's person, the Commonwealth must establish 'constructive possession,' that is, the power to control the contraband and the intent to exercise that control . . . As with any other element of a crime, constructive possession may be proven by circumstantial evidence . . . The requisite knowledge and intent may be inferred from examination of the totality of the circumstances." *Commonwealth v. Haskins*, 677 A.2d 328, 330 (Pa. Super. Ct. 1996).

In *Haskins*, 677 A.2d at 330 and *Commonwealth v. Bentley*, 419 A.2d 85, 87 (Pa. Super. Ct. 1980), the Superior Court has stated that contraband located in a portion of a vehicle that is not readily accessible to passengers is sufficient to support an inference that

⁸ In *Commonwealth v. Kemp*, 961 A.2d 1247 (Pa. Super. Ct. 2008), the defendant had been operating a third-party vehicle and was ultimately sentenced for drug trafficking. The Court noted that operating a third-party vehicle is specifically a marker of a drug courier. *Id.* at 1254.

the driver placed it there or knew of its presence, and thus had possession.

Since Johnson was the driver and only occupant of this vehicle and the totality of the other circumstances point to criminal activity of drug possession, the Court finds that the Commonwealth has established that Johnson had "construction possession" of the heroin and pentylone. Further, the Court finds that the Commonwealth has established a prima facie case, not only on the possession charges, but on all charges.

CONCLUSION

Based upon the following analysis, the Court enters the following order:

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Cynthia Hatton, Esquire	Counsel for Plaintiff
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ORDER OF COURT

AND NOW, this 13TH day of SEPTEMBER, 2018 upon consideration of the Omnibus Motion filed by the Defendant, Breeze J. Johnson, the brief lodged in support thereof, the Commonwealth's brief lodged in opposition thereto and after hearing, it is hereby **ORDERED** and **DECREED** that the Motion to Suppress and the Habeas Motion are **DENIED**.

BY THE COURT:



Joseph J. Matika, J.