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

COMMONWEALTH OF PENNSYLVANIA	:	
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	:	
Vs.	:	**No. CR-1094-2017**
	:	
ANN LUTZ,	:	
Defendant	:	

Brian Gazo, Esquire — Counsel for Commonwealth
Matthew Mottola, Esquire — Counsel for Defendant

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MEMORANDUM OPINION

Matika, J. - May 1, 2020

The question before this Court today is "When is a metal pipe not considered drug paraphernalia?" The answer to this question can conceivably impact not only the charge of possession of drug paraphernalia filed by the Commonwealth, but also taint a subsequent search by the police of a defendant's vehicle.

FACTUAL AND PROCEDURAL BACKGROUND

In the morning hours of May 5, 2017, Officer Shawn Nunemacher (hereinafter "Nunemacher") received a call for a suspicious vehicle parked on Edgemont Road in the Borough of Lansford, an area where drug users are known to congregate. Upon arriving in the vicinity, Nunemacher observed a silver vehicle from which he could hear loud music emanating with the driver still inside that vehicle. Upon noticing Nunemacher, the driver exited the vehicle and walked to the officer with, what Nunemacher described as a slow, staggered walk. The driver identified herself as the

Defendant, Ann Lutz (hereinafter "Lutz"). Upon asking for identification, Nunemacher and Lutz walked back to her car to retrieve it. While there Nunemacher did not notice any marijuana smell coming from inside the car once Lutz opened it to retrieve her identification. While speaking with Lutz, Nunemacher detected the smell of an alcoholic beverage coming from Lutz, but he did not smell any marijuana on her. At that point, Lutz was given three basic coordination tests, which, in the opinion of Nunemacher, led him to believe that Lutz was showing signs of impairment. As a result, he contacted officers from neighboring Summit Hill Police Department to conduct a preliminary breath test commonly referred to as a "P.B.T. test" to ascertain the level of alcohol on Lutz' breath. Upon arrival, and during the course of the Summit Hill officers conducting the P.B.T. test, they were initially unable to get a reading due to Lutz either not blowing into the P.B.T. device or providing "small, pulsing breaths" which could not be registered. Nunemacher told Lutz that unless she gives him something to show that she is not impaired, he was going to place her under arrest.

At that time Nunemacher returned to the Lutz vehicle. Upon doing so, he noticed a "metallic, metal pipe[1]" on the driver's seat. Nunemacher picked up this item and immediately detected a

[1] Nunemacher further described this pipe as a cylinder with a cone on the end, one which, in his experience, is used for smoking marijuana although he agreed it could be used to smoke other substances.

smell of burnt marijuana on it. He seized this item and returned to where Lutz was located, conducting no further search of the vehicle at that time.

Upon returning to Lutz, Nunemacher advised her that he was placing her under arrest for suspicion of DUI. Nunemacher read Lutz the Miranda warnings and then asked her if there was anything illegal in her car to which she replied that there may be marijuana in the car. Nunemacher returned to the car and conducted a search of the vehicle.[2] As a result of this search, Nunemacher seized an open can of beer in the center console, found an eyeglass case under the driver's seat, in which he found a bag of green leafy substance[3] inside and also located a cut straw and blue pill inside a bag found near the driver's seat.

Lutz was subsequently charged with two counts of Driving Under the Influence of a Controlled Substance[4], Possession of a Small Amount of Marijuana[5], Possession of a Controlled Substance[6], and Possession of Drug Paraphernalia.[7]

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[2] Nunemacher testified that this search was not one in which he did or needed to ask consent to conduct, but rather one he was conducting incident to the lawful arrest of Lutz for DUI.

[3] This green leafy substance "NIK tested" positive as marijuana.

[4] 75 Pa.C.S.A. §3802 (D1)and (D2).

[5] 35 Pa.C.S. §780-113(A)(31).

[6] 35 Pa.C.S.§780-113(A)(16).

[7] 35 Pa.C.S. §780-113(A)(32).

On May 23, 2019, Lutz filed the instant suppression motion. In that motion Lutz argues that Nunemacher's search of her vehicle was unreasonable, and unconstitutional, conducted without a warrant or as an exception to warrant requirements and accordingly, violated both the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution. As a result, Lutz argues that the metal pipe, eyeglass case containing marijuana, and the open can of beer should be suppressed as a result of the searches and seizures.[8]

An omnibus hearing was held on December 10, 2019 and counsel was given the opportunity to brief the issues before the Court. That motion is now ripe for disposition.

LEGAL DISCUSSION

This case centers on the police officer's ability and authority to seize an item that is in "plain view" during a traffic stop. As so aptly stated by the Defendant, both the Fourth Amendment of the United States Constitution and Article I, §8 of the Pennsylvania Constitution "guarantee individual's freedom from unreasonable searches and seizures." *Comm. v. Kane*, 210 A.3d 324, 331 (Pa. Super. 2019) citing *Comm. v. Bostick*, 958 A.2d 543, 530

[8] While Lutz identifies a singular search in her motion, there were actually (2) searches conducted. In her brief, Lutz argues that the resulting illegal search and seizure of the metal pipe should also lead to the inseparable conclusion that the other items searched for and seized, i.e., the marijuana and open can of beer, should be suppressed as "fruits of the poisonous tree" from that first search and seizure. For reasons stated herein, this Court will address both searches and seizures separately.

(Pa. Super. 2008). "As a general rule, a search or seizure without a warrant is deemed unreasonable for constitutional purposes." *Comm. v. Holtzer*, 389 A.2d 101, 106 (Pa. 1978) citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). "Warrantless searches and seizures are . . . unreasonable *per se*, unless conducted pursuant to a specifically established and well-delineated exception to the warrant requirement." *Comm. v. Duke*, 208 A.3d 465, 471 (Pa. Super Ct. 2019) citing *Bostick*, supra at 556.

> "Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution generally prohibit the police from searching a person or his or her property and seizing personal items without a search warrant. A search warrant indicates that the police have convinced a neutral magistrate upon a showing of probable cause, which is a reasonable belief, based on the surrounding facts and totality of circumstances, that an illegal activity is occurring or evidence of a crime is present. *See Commonwealth v. Jones*, 542 Pa. 418, 424, 668 A.2d 114, 116-117 (1995). A search without a warrant may be proper where an exception applies and the police have probable cause to believe a crime has been or is being committed. *See Commonwealth v. Riedel*, 651 A.2d 135, 139 & n. 1, 539 Pa. 172, 179 & n.1 (1994) (noting that exceptions include actual consent, implied consent, search incident to arrest, exigent circumstances); *Commonwealth v. Gibson*, 536 Pa. 123, 129-30, 638 A.2d 203, 206 (1994)."

Commonwealth v. Petroll, 738 A.2d 993, 998-999 (Pa. 1999) "Among the enumerated exceptions to the warrant requirement in the "plain view doctrine." *Comm. v. Whitlock*, 69 A.3d 635, 637 (Pa. Super. 2013).

In *Horton v. California*, 496 U.S. 128 (1990), the United States Supreme Court held that the Fourth Amendment did not

prohibit the warrantless seizure of evidence in plain view. In doing so, the Court also stated that not only must the suspect item be in plain view but its incriminating character must be "immediately apparent" and the officer must have a "lawful right of access to the object itself" *Id.* at 136-137.

While both the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, the language in the Fourth Amendment and Article I, §8 is similar in nature, they

> "do not demand identical interpretation of the two provisions. *Commonwealth v. Waltson*, 555 Pa. 223, 724 A.2d 289, 291 (1998). Article I, §8 can provide no less protection than what the Fourth Amendment requires, but it may establish greater protections than the Fourth Amendment. *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769, 771-72 (1996). Article I, §8 has been held to create an implicit right to privacy which extends to areas where one has a "reasonable expectation of privacy." *Commonwealth v. Blystone*, 519 Pa. 450, 549 A.2d 81, 87 (1988). The notion of privacy in Article I, §8 is greater than that of the Fourth Amendment. *Waltson*, at 292 (citing *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 899 (1991) ("Article I, [§] 8 . . . may be employed to guard individual privacy rights against unreasonable searches and seizures more zealously than the federal government does under the [Unites States] Constitution . . ."") (emphasis in original)). Thus, Pennsylvania courts, in comparison to federal courts, have given greater weight to an *individual's privacy* interests when balancing the importance of privacy against the needs of law enforcement. *Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896, 902 (1995); see also *Commonwealth v. Sell*, 504 Pa. 46, 471 A.2d 457, 468 (1983) ("Article I, [§] 8 . . ., as consistently interpreted by [Pennsylvania courts], *mandates greater recognition of the need for protection from illegal*

government conduct offensive to the right of privacy.") (emphasis in original)."

Commonwealth v. McCree, 924 A.2d 621, 626-627 (2007).

Pennsylvania ultimately adopted the Horton standard which contained three prongs that must be met when addressing an item seen by a police officer in plain view: (1) the police must be at a lawful vantage point; (2) the incriminating character of the object must be readily apparent; and (3) the police must have a lawful right of access to the object. *Comm. v Graham*, 721 A.2d 1075 (1998); *Comm. v. McCullum*, 602 A.2d 313 (1992). While there have been several cases which appeared to eliminate the third prong [See *Comm. v. Petroll*, 738 A.2d 993 (1999); *Comm v. Ellis*, 662 A.2d 1043 (1995)], the *McCree* Court re-affirmed the necessity of all three prongs being satisfied by stating that "the standard for the plain view exception to the warrant requirement requires a determination of whether the police have a lawful right of access to the object seen in plain view", and that this prong is equally applicable to both the Fourth Amendment and Article I, §8.

In the case at bar, Lutz argues that Nunemacher did not have a lawful right of access to the item itself, nor was the incriminating character of the metal pipe immediately apparent to Nunemacher. As a result, its seizure was illegal.

I. Incriminating Character - Readily Apparent

Lutz first contends that even though the metal pipe that Nunemacher observed in plain view looked like something someone

would use to smoke marijuana, that does not prove that it is and thus, that observation alone does not makes it readily apparent that the metal pipe is of such an incriminating character that Nunemacher had the right to seize it as drug paraphernalia. In support of this argument, Lutz cites to the case of *Commonwealth v. Phillips*, 310 A.2d 290 (Pa. Super. Ct. 1973). In that case, the appellate court held that a smoking pipe is not *per se* contraband and that the "significant questions in this case is whether the mere observation of an ornate pipe in the Appellant's car constituted probable cause for an arrest and search." *Id* at 291 (emphasis ours). This Court notes that the *Phillips* court also referenced rulings from other courts[9] "that found that 'mere possession' of an ornate pipe 'standing by itself' does not provide sufficient grounds for a subsequent search or an arrest for possession of illegal drugs." *Id.*

This Court agrees with Lutz, insofar as the mere observation of the metal pipe in the mere possession of the defendant in her vehicle in and of itself is not sufficient to establish probable cause. However, in the case *sub judice*, this Court also has testimony from Nunemacher that the area to which he was called to was known to be frequented by drug users and that the pipe itself smelled like burnt marijuana. Thereafter, Nunemacher seized the metal pipe and returned to the area where Lutz was being detained.

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[9] *See People v. Ortiz*, 726 CAL. APP. 2d 1, 80 CAL. RPTR 469 (1969) and *State v. Parks*, 5 OR. APP. 601, 485 P2d 1246 (1971).

In *Comm v. Dakacki*, 901 A.2d, 983, 989-990 (2006), the court stated that where the officer, based on his experience, "felt" a pipe on the defendant during a pat down search and smelt marijuana coming from the defendant, was well within his rights to seize this object. "Under the totality of the circumstances, the incriminating nature of the pipe was immediately apparent to Trooper Keppel, who had a lawful right of access to it." *Id* at 990.

While in the case at bar, Nunemacher "observed first, smelt second," we do not believe we need to engage in a "what came first, the chicken or the egg" argument giving rise to when and under what circumstances Nunemacher had to right to seize this pipe. "To judge whether the incriminating nature of an object was immediately apparent to the police officer, reviewing courts must consider the totality of the circumstances." *Petroll, Supra* at 999 (citations omitted). Here, in considering the totality of the circumstances, we look to Nunemacher's observation of the metal pipe, his sense of smell in describing the odor emanating from this pipe, his experience as a police officer and the fact that this incident occurred in an area frequented by drug users, all coupled with his investigation into a possible DUI[10] to conclude

[10] While Nunemacher only detected the smell of alcohol emanating from Lutz, that obviously did not preclude him from considering that his observations of Lutz and her responses to the tests excluded the possibility that she may have been under the influence of controlled substances as well.

that the incriminating nature of this object was immediately apparent to Nunemacher. As a result, we find that the Commonwealth has met this prong of the plain view doctrine test.

II. Lawful Right of Access

Lutz next contends that Nunemacher did not have the right of access to the pipe located on the driver's seat of Lutz' vehicle. Lutz characterizes this as a "pre-intrusion"[11] type of plain view doctrine scenario which "invokes situations where the view takes place before an intrusion into a constitutionally protected area." *Comm. v. Welk*, 521 A.2d 44, 46 (Pa. Super. 1987). In this type of case, the officer must be able to rely upon exigent circumstances or obtain a warrant before he seizes any evidence from within. *Id.*

"A warrantless search of a vehicle is reasonable under the Fourth Amendment because of the mobility of the vehicle . . . and the reduced expectation of privacy an individual has in a vehicle's contents. *McCree* at 629, citing *Carroll v. United States*, 267 U.S. 32, 153 (1925).

While Pennsylvania has not adopted the full federal automobile exception, it has adopted a limited one under Article I, §8. In *McCree,* the court identified two reasons why an officer would be permitted to conduct a warrantless search or seizure of

[11] There are two types of cases that fall under the general category of plain view doctrine cases. The other type of case not involved here are the "post-intrusion" type of cases. In those cases, "if the original intrusion is justified, such as by consent, hot pursuit, warrant or other, objects in plain view will be admissible . . . ." *Comm. v. Adams*, 341 A.2d 206, 208 (Pa. Super. Ct. 1975).

a vehicle where exigent circumstances exist. They are: (1) because a vehicle is mobile and its contents may not be found if the police could not immobilize it until a warrant is secure; and (2) one has a diminished expectation of privacy with respect to a vehicle. *McCree* at 630. One such case where a warrantless seizure was allowed was "where police do not have advance knowledge that 'a particular vehicle carrying evidence of crime would be parked in a particular locale, . . . the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search [without a warrant] proper.' *Id* (citations omitted).

" . . . [A] warrantless search of an automobile may be conducted 'when there exists probable cause to search and exigent circumstances necessit[ate] a search. Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent individual in believing that an offense was committed and that the Defendant has committed it.'" *Comm. v. Copeland*, 955 A.2d 396, 400 (Pa Super. Ct. 2008)(internal citation omitted). In sum, in order for Nunemacher to have the legal right to access the metal pipe, the Commonwealth must show that probable cause exists and through exigent circumstances, i.e. without a warrant, Nunemacher had the right to seize that pipe.

We now turn to the facts that the Commonwealth can rely upon to satisfy this prong of the test. Notwithstanding Nunemacher's

observation or the pipe itself, additional information was available to Nunemacher to establish probable cause to search the interior of the vehicle, if in fact that is what he intended when he returned to the vehicle the first time. Based upon his observations of the Defendant herself and the smell of an alcoholic beverage, and as previously noted, without a P.B.T. to negate his belief that Lutz was not driving under the influence, he was going to charge her accordingly. Thus, this probable cause was sufficient to create a right to access the interior of the vehicle for evidence of a D.U.I. Additionally, as Nunemacher simply came upon this vehicle without any *indicia* that it would be the target of a police investigation for DUI, the limited automobile exception pursuant to Article I, §8 applies.

Summarizing, access to the Lutz vehicle was authorized by the limited automobile exception and the seizure of the metal pipe was authorized by the plain view doctrine.[12]

III. Seizure of Other Evidence

Lutz next argues that the "tainted seizure of this metal pipe requires that suppression of other items found in the subsequent search of the vehicle as evidence constituting poisonous fruit.[13] Even assuming arguendo, Lutz' position on the

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[12] Under the broader Fourth Amendment automobile exception, Nunemacher had the right to search the vehicle without a warrant as well and seize the pipe. *Chambers* at 51.

[13] This Court agrees with Lutz' assertion that illegally obtained information or evidence cannot form the basis for a subsequent search, if standing alone, that is the only factual support for that subsequent search.

original seizure is correct, that does not taint Nunemacher's subsequent search of the vehicle nor seizure of the open can of beer, plastic cut straw and marijuana.

There are several exceptions to the warrant requirements pertaining to automobile searches, provided there is probable cause to do a search. *Comm. v. Gary*, 91 A.3d 102, 138 (Pa. 2014).

> [T]he law governing warrantless searches of motor vehicles is coextensive with federal law under the Fourth Amendment. The prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required. The consistent and firm requirement for probable cause is a strong and sufficient safeguard against illegal searches of motor vehicles, whose inherent mobility and the endless factual circumstances that such mobility engenders constitute a *per se* exigency allowing police officers to make the determination of probable cause in the first instance in the field." Id at 138.

One such exception to the warrant requirement for searching automobiles provided there is probable cause, is a search incident to a lawful arrest. *Preston v. United States*, 376 U.S. 364 (1964); *Comm. v. Williams*, 568 A.2d 1281, 1283 (Pa. Super. Ct. 1990). Evidence seized from such a search based upon probable cause is admissible.

Turning to the facts here, we find that Nunemacher had probable cause for this search. In the course of investigating the loud noise complaint, Nunemacher upon arriving in the area, observed Lutz slowly walking towards him with a staggered gait. While speaking to Nunemacher, Lutz, in the opinion of Nunemacher,

spoke with a slurred speech. He smelled alcohol on her resulting in him requesting that she perform several basic coordination tests.[14] Based upon his observations of how she perfomed these tests, he concluded that there were signs of impairment present. Additionally, a P.B.T. reading of .06 was generated. We find that this evidence alone would be sufficient to establish the requisite probable cause to arrest Lutz for suspicion of driving under the influence.[15]

CONCLUSION

In sum, this Court finds no violation of either the Fourth Amendment to the U.S. Constitution nor Article I, §8 of the Pennsylvania Constitution and declines to suppress any of the evidence seized by Sargent Nunemacher as a result of the May 5, 2017 incident.

BY THE COURT:

Joseph J. Matika, J.

[14] Nunemacher testified that he gave Lutz three (3) basic coordination tests: the walk and turn, the one-legged stand and the finger to nose test.

[15] At no time was Nunemacher ever asked if it was his intent to arrest Lutz for an alcohol related DUI, a controlled substance DUI or a combination of alcohol or controlled substances/drugs. It was only established that Nunemacher was arresting Lutz for DUI. Ultimately, after obtaining the lab results, Nunemacher charged Lutz with violations of the vehicle code related to controlled substance/drug DUI.