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

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

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

MEMORANDUM OPINION

Matika, J. - June 28, 2021

This opinion addresses the appeal of the Defendant, Ann Lutz (hereinafter "Lutz"). That appeal complains of this Court's Opinion and Order in which we denied her suppression motion. For the reasons stated herein we seek affirmance to that decision from the Appellate Court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2017, Officer Shawn Nunnemacher (hereinafter "Nunnemacher") of the Lansford Borough Police Department received a call for a suspicious vehicle parked on Edgemont Road in the borough. Upon arriving on scene, Nunnemacher encountered the Defendant, Lutz.[1] As a result of this encounter, Nunnemacher filed

[1] Attached to this opinion is this Court's May 1, 2020 Memorandum Opinion which outlines the facts surrounding this incident leading up to the search of Lutz' vehicle, the seizure of items found therein, and subsequent arrest of the Defendant.

Driving Under the Influence charges and drug related offenses against Lutz.[2]

A preliminary hearing was held on August 23, 2017 at which time all charges were bound over for Court. Thereafter, on May 23, 2019, Lutz filed a suppression motion challenging Nunnemacher's search and seizure of various items which included a metal smoking pipe, an eyeglass case containing marijuana and an opened can of beer. On May 1, 2020, this Court denied Lutz' motion.

On January 25, 2021, Lutz filed a "Motion to Reconsider Order Denying Suppression" based upon the Pennsylvania Supreme Court's decision in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020). Finding that the *Alexander* decision did not impact our previous decision, we denied that motion.

On April 5, 2021, a jury trial commenced. On April 6, 2021, a jury found Lutz guilty of Possession of a Controlled Substance and Possession of Drug Paraphernalia. Inasmuch as the D.U.I. charges and Possession of a Small Amount of Marijuana were ungraded misdemeanors carrying maximum sentences of less than one year, the Court determined the verdict as to these charges. Based on the evidence presented, the Court found Lutz not guilty on the D.U.I.

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[2] These offenses included two (2) counts of Driving Under the Influence [75 Pa.C.S.A. §3802(D1) and (D2)], Possession of a Small Amount of Marijuana, [35 Pa.C.S. §780-113(A)(31)], Possession of a Controlled Substance, [35 Pa.C.S. §780-113(A)(16)], and Possession of Drug Paraphernalia [35 Pa.C.S. §780-113(A)(30)].

charge but guilty on the Possession of a Small Amount of Marijuana offense. Sentencing was thereafter scheduled for May 18, 2021.

On April 15, 2021, a "Stipulation for Extraordinary Relief" was filed seeking a vacating of the conviction for Simple Possession in light of the Court's conviction of Lutz for Possession of a Small Amount of Marijuana. An order approving this stipulation was issued on April 16, 2021.[3]

On May 18, 2021, Lutz was sentenced. On the Possession of Drug Paraphernalia charge, she received a one (1) year probationary sentence with numerous other conditions and a fine of $150.00 for the Possession of a Small Amount of Marijuana conviction.

On May 25, 2021, Lutz filed a timely appeal. As a result, this Court issued an order on May 26, 2021 directing Lutz to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P.1925(b). Such concise statement was filed on May 27, 2021. In that concise statement, Lutz alleges that:

1. The Trial Court erred by denying Ms. Lutz's Suppression Motion by finding that Sergeant Nunemacher of the Lansford Police Department lawfully seized a metal pipe from Ms. Lutz's vehicle pursuant to the plain view exception; and
2. The Trial Court erred by denying Ms. Lutz's Suppression Motion by finding that Sergeant Nunemacher of the Lansford

[3] See *Commonwealth v. Tisdale*, 100 A.3d 216 (Pa. Super. Ct. 2014).

Police Department lawfully searched Ms. Lutz's vehicle as a search incident to arrest.

LEGAL DISCUSSION

In reviewing Lutz' two matters complained of, this Court believes that its May 1, 2020 Memorandum Opinion, attached hereto for ease of reference, clearly, succinctly and adequately addresses these issues. Therefore, this Court sees no reason to burden the Appellate Court with its rationale here. Additionally, this Court has attached a copy of its March 16, 2021 Order of Court addressing the Motion to Reconsider the May 1, 2020 decision in light of *Alexander*. That Order further explains and supports our decision to deny the suppression motion.

CONCLUSION

For the reasons stated herein, this Court seeks from the Appellate Court, an affirmance of our decision denying Lutz' suppression motion.

BY THE COURT:

Joseph J. Matika, J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
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COMMONWEALTH OF PENNSYLVANIA	:	
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ANN LUTZ,	:	
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Brian Gazo, Esquire — Counsel for Commonwealth
Matthew Mottola, Esquire — Counsel for Defendant

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 he1d 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

[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.

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

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

Brian B. Gazo, Esq. — Counsel for Commonwealth
Assistant District Attorney

Matthew Mottola, Esq. — Counsel for Defendant
Assistant Public Defender

ORDER OF COURT

AND NOW, this 16th day of March, 2021, upon consideration of

- The "Motion to Reconsider Order Denying Suppression" ("Defendant's Motion") filed by Defendant Ann Lutz ("Defendant") on January 25, 2021; and
- The "Answer of Commonwealth to Defendant's Second Omnibus Pre-Trial Motion" filed on January 26, 2021;

and after determining that the December 22, 2020 Pennsylvania Supreme Court decision in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020) does not impact this Court's May 1, 2020 Memorandum Opinion in this matter in which this Court found "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 Sergeant Nunemacher as a result of

the May 5, 2017 incident[,]" it is hereby **ORDERED** and **DECREED** that Defendant's Motion is **DENIED.**[1]

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[1] I. **Warrantless Vehicle Searches under the Fourth Amendment to the United States Constitution.**

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *See* U.S. Const., Amdt. 4.

Under prevailing federal jurisprudence, an automobile exception exists whereby warrantless vehicle searches may be undertaken by law enforcement where probable cause exists to do so. *See*, e.g., *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 80, 69 L.Ed. 543 (1925) (first recognizing the automobile exception); *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (holding that probable cause to search an automobile extended to all parts of the vehicle and its contents that may conceal the object of the search); *Wyoming v. Houghton*, 526 U.S. 295, 302, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) holding that *Ross* extends to objects owned by passengers and noting that "[p]assengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transported in cars...").

II. **Warrantless Vehicle Searches under the Pennsylvania Constitution and the Pennsylvania Supreme Court Holding in *Commonwealth v. Alexander*.**

Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from the unreasonable searches and seizures, and no warrant to search any place or to seize any persons or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant." *See* Pa.Const. Art. I, §8.

In *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), the Pennsylvania Supreme Court held that the federal automobile exception to the warrant requirement of the Fourth Amendment applies in Pennsylvania but did ***not*** settle whether the federal automobile exception proved consistent with Article I, Section 8 of the Pennsylvania Constitution.

In *Commonwealth v. Alexander*, the Pennsylvania Supreme Court held that warrantless vehicle searches under the Pennsylvania Constitution - as opposed to the United States Constitution - require both (1) probable cause and (2) exigent circumstances. *See, generally, Commonwealth v.*

Alexander, 243 A.3d 177 (Pa. 2020). Specifically, the Pennsylvania Supreme Court announced a:

> "limited automobile exception under Article I, Section 8 of our [Pennsylvania] Constitution, pursuant to which ***warrantless vehicle searches require both probable cause and exigent circumstances***; 'one without the other is insufficient.' This dual requirement of probable cause and exigency is an established part of our state constitutional jurisprudence."

See Id. at 207 (emphasis added) (internal citations omitted).

III. This Court's May 1, 2020 Memorandum Opinion.

A. Application of the Plain View Exception to the Warrant Requirement.

This Court's May 1, 2020 Memorandum Opinion stands unimpacted by the Pennsylvania Supreme Court's *Commonwealth v. Alexander* decision and its addition of an "exigent circumstances" requirement to the automobile exception. This Court's May 1, 2020 Memorandum Opinion did not at its core rest upon the analytical underpinnings of the automobile exception to the warrant requirement, but rather upon an application of the plain view and search incident to arrest exceptions to the warrant requirement.

This Court's May 1, 2020 Memorandum Opinion analyzed the search and seizure of the metal pipe at issue in this case as an application of the plain view exception to the warrant requirement and not an application of the automobile exception. The plain view exception – prior to the issuance of the Pennsylvania Supreme Court's *Commonwealth v. Alexander* decision – ***already contained an "exigent circumstances" requirement.***

With respect to the plain view doctrine, this Court noted that "Pennsylvania ultimately adopted the Horton [*Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)] 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 the lawful right to access the object." *See* May 1, 2020 Memorandum Opinion at 7 (internal citations omitted).

With respect to the third prong of the *Horton* standard, the Pennsylvania Supreme Court directly has equated "lawful right of access" with "exigent circumstances," holding:

> "*Horton*" established the standard for evaluating the constitutionality of seizures made pursuant to the plain view

exception to the warrant requirement under the Fourth Amendment. *See id.* at 136-37, 110 S.Ct. 2301; *see also Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). That test includes a determination of whether the police have a lawful right of access to the object in plain view. *Horton at 137, 110 S.Ct. 2301; Dickerson*, at 375, 113 S.Ct. 2130. *Horton* explained the determination regarding whether there is a lawful right of access:

> 'This is simply a corollary of the familiar principle... that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances...''

See Commonwealth v. McCree, 924 A.2d 621, 627 (Pa. 2007) citing *Horton v. California*, 496 U.S. 128, 137 n.7, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

In evaluating the *Horton* lawful right of access / exigent circumstances third prong, the Pennsylvania Supreme Court further noted that "[w]e have allowed warrantless seizures '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.'" *See Commonwealth v. McCree*, 924 A.2d at 630.

This Court in its May 1, 2020 Memorandum Opinion accordingly engaged in an exigent circumstances analysis when applying the plain view exception in concluding that Sergeant Nunemacher appropriately seized the metal pipe at issue in this case. *See* May 1, 2020 Memorandum Opinion at 4-12.

B. Application of the Search Incident to a Lawful Arrest Exception to the Warrant Requirement.

Subsequent to arresting Defendant, Sergeant Nunemacher conducted a search of Defendant's vehicle which resulted in the seizure of items not in plain view - including an open can of beer in the center console, marijuana found in an eyeglass case under the front seat, and a cut straw and blue pill inside a bag found near the driver's seat. This search and seizure stands justified under the exception to the warrant requirement for searching automobiles ***incident to a lawful arrest***. *See Preston v. United States*, 376 U.S. 364 (1964); *Commonwealth v. Williams*, 568 A.2d 1281, 1283 (Pa.Super. 1990). *See also* May 1, 2020 Memorandum Opinion at 13 ("Evidence seized from such a search based on probable cause is admissible.").

The Court does not find this portion of Sergeant Nunemacher's search and seizure, and this Court's "search incident to arrest

BY THE COURT:

Joseph J. Matika, J.

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exception" analysis thereof, to be impacted by the Pennsylvania Supreme Court's "automobile exception" analysis set forth in *Commonwealth v. Alexander*.

For the foregoing reasons, the Court shall **DENY** Defendant's Motion.