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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
vs.	:	**No. CR-155-2021**
	:	
ALEJANDRO MANUEL ROMAN,	:	
Defendant	:	
	:	

Robert Frycklund, Esquire — Counsel for Plaintiff
Assistant District Attorney

Robert Goldman, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - February 7, 2022

The doctrine known as "Fruit of the Poisonous Tree" was first described in *Silverthorne Lumber v. United States*, 251 U.S. 385 (1920), however the use of the term itself did not occur until 1939 when U.S. Supreme Court Justice Felix Frankfurter coined it in the case of *Nardone v. United States*, 308 U.S. 338 (1939). This doctrine stands for the proposition that an illegal and unconstitutional search ("the poisonous tree") bears evidence ("fruit"), that evidence must be excluded from use at trial. Such is the claim here made by the defendant. For the reasons stated herein, this Court **GRANTS** the motion in part and **DENIES** the motion in part.

FILED IN OFFICE
2022 FEB 7 A 9:18
CARBON COUNTY
CLERK OF COURTS

FACTUAL AND PROCEDURAL BACKGROUND

On December 8, 2020, around 12:00 P.M., Officer Edward Kubert

(hereinafter "Kubert") of the Weatherly Police Department was on Plane Street in the borough running speed enforcement when he clocked a white Hyundai travelling at 52 miles per hour in a 35 mile per hour zone. Kubert immediately began to pursue this vehicle and eventually effectuated a traffic stop. Upon approaching the vehicle Kubert asked the operator, later identified as the defendant, Alejandro Manuel Roman (hereinafter "Roman"), for his driver's license, registration and proof of insurance. As Roman provided these documents, Kubert detected a strong odor of marijuana emanating from the interior of the vehicle. At that point, Kubert returned to his police vehicle to check the status of the defendant's license, registration and insurance. Additionally, Kubert contacted Sergeant Michael Bogart (hereinafter "Bogart") to assist him in this traffic stop.

Shortly thereafter, Bogart arrived on scene and Kubert re-approached the driver side of the vehicle.[1] Upon doing so, Kubert commented that he smelled a strong odor of marijuana coming from inside the vehicle. According to Kubert, on direct examination at the suppression hearing, it was at that time, without any prompting or inquiry on either officers' part, that Roman reached into the back seat area of the vehicle, retrieved a back pack, removed from it a small bag with green leafy material in it and handed it to

[1] At this time, Bogart was on the passenger side of the vehicle.

the officer. Kubert, based upon his experience of seeing and smelling marijuana during his police career, identified this substance as marijuana. However, later on cross examination, Kubert stated, "I merely stated if you wish to turn over the marijuana, you can, or I can obtain a search warrant." (N.T., Suppression Hearing, September 20, 2021, page 11, lines 13-15).

It was at that point, according to Kubert that both Roman and his passenger were asked to exit the vehicle. Inquiry was made as to whether either individual possessed medical marijuana cards to which each answered in the negative. It was at or near that moment when Kubert made the determination that he intended to arrest Roman on charges of possession of marijuana and that Roman was not free to leave.

After making these determinations, Kubert and Bogart asked both individuals if there was anything illegal in the car. In response, Roman provided additional marijuana, paraphernalia, and other THC based items. (N.T. pp. 13-14).

After the production of these "fruits" Bogart began to search[2]

---

[2] When Kubert testified at the hearing, he consistently acknowledged that consent was never obtained from either Roman nor his passenger by either himself nor Bogart. Conversely, when Bogart testified on direct examination, he stated that on numerous occasions verbal consent was given by both individuals. When pressed by defense counsel for the details surrounding these purported consents, Bogart then could not recall any specific details. When pressed even further on cross-examination, Bogart could no longer recall if and how consent may have been given. The following exchange took place between defense counsel and Bogart:

> Q. Okay. Now, I have to just -- you now perhaps are testifying to something different. You asked if there was anything else in the car, and they said no. Is that what you are saying was the consent?

the passenger compartment of the car. In doing so, he observed "crumbs" of marijuana in the backseat carpet area. He then turned his attention to the trunk of the vehicle. According to Bogart, "[I]n the trunk of the vehicle, I opened the trunk, and there was two paper bags that stand up on their own. Inside those bags were Priority U.S. mail packages. They were sitting right in the middle of the trunk, nothing else in the trunk. Then I specifically asked both occupants; whose are these? And they both said they weren't there, that they were left in the vehicle. When they rented the vehicle, they were there. I slid the bags back. All the boxes were similar. One of the boxes, the tape was open on it. I started to open that box and saw inside there was another bag inside of there that was partially open, and what I saw to recognize was narcotics. So at that point, I stopped the search, put the box back in, closed the trunk, and then we applied for a search warrant." (N.T. pp 28-29).

Or did you specifically ask them; may I have your consent to search the car? Is it the first or the latter? Remember, this is under oath.

A. I remember that. I am going to have to say I don't recall.

Q. So you may have just simply said; is there anything else in the car?

A. I don't recall.

Q. That might have been it?

A. My official statement is I don't recall.

Q. So you don't recall whether or not you specifically asked for consent, and you now don't specifically recall that anybody exactly gave you consent, correct? You don't recall?

A. I am going to say I don't recall, yes. That's what I am going to say. (N.T. pp 36-37).

After receiving the search warrant[3], a further search of the vehicle and specifically the trunk of that vehicle, was conducted. Found as a result of the trunk search were "300 individual (sic) pre-wrapped marijuana cigars in glass tubing with labels saying medical marijuana" along with labels for retailing the marijuana.

Thereafter, the Defendant and his passenger were taken to the Weatherly Police Department and eventually charged with numerous drug related offenses.

Roman filed the instant Motion to Suppress on May 17, 2021 and a hearing was held on September 20, 2021. Post hearing briefs were lodged and this matter is now ripe for disposition.

LEGAL DISCUSSION

A Motion to Suppress is the vehicle used by a defendant to challenge the use of evidence at trial claiming that the questioned evidence was illegally obtained and done so in violation of a defendant's constitutional rights. In this case, Roman argues that all evidence obtained should be suppressed as the Weatherly Police engaged in multiple violations of Roman's federal and state constitutional rights during the December 8, 2020 traffic stop. Here, Roman argues that police questioning of him without first providing Miranda warnings, coupled with a failure to obtain

[3] In this search warrant application, Sergeant Bogart made no mention of either the Defendant nor his passenger providing any consent to search any part of this vehicle. That supposed consent is what is claimed to have allowed Bogart to search the interior of the vehicle and to open the trunk and to search in there before applying for the warrant.

consent to search the vehicle, forms the basis for the illegalities claimed in seizing this subject evidence. The warrant sought, received, and executed upon by Bogart, Roman claims, was also defective in violation of his constitutional rights.

Pursuant to Pa.R.Crim.P. Rule 581(H), "[T]he Commonwealth has the burden of going forward with the evidence of establishing that the challenged evidence was not obtained in violation of the defendant's rights." Thus, as to the issue of Miranda warnings, it is incumbent on the Commonwealth to present evidence that either: 1) Miranda warnings were given prior to any questioning of Roman or alternatively, Miranda warnings were not required to be given prior to the "questioning" at issue here. Additionally, the Commonwealth is tasked with, on the issue of consent to search, that either: 1) consent to search the vehicle was given; or 2) a properly sought warrant was obtained or an exception to the warrant requirement was applicable. We will now analyze the Commonwealth's evidence *vis-à-vis* its burden.

I. MIRANDA WARNINGS

For purposes of this analysis, both parties agree that neither Kubert nor Bogart provided Miranda warnings to Roman until Roman was arrested and taken back to the Weatherly Police Station. Therefore, the issue here is whether Miranda warnings were required at the time Kubert questioned Roman regarding drugs in the vehicle. Pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), two

requirements must be present in order for the warnings against self-incrimination issue: custody and interrogation. (*See* also *Comm. v. Schwing*, 964 A.2d 8,11 (Pa. Super. Ct. 2008)). The resolution of this turns on two things: 1) was Roman in custody and subject to interrogation when he turned over the marijuana and paraphernalia on the two occasions in question; and 2) did Kubert actually "question" Roman resulting in Roman's responses of turning over this evidence?

A. Was Roman In "Custody" When Kubert Questioned Him?

"Interactions between citizens and police officers, under search and seizure law, is varied and requires different levels of justification depending upon the nature of the interaction and whether or not the citizen is detained." *Commonwealth v. Stevenson*, 832 A.2d 1123, 1126-27 (Pa. Super. 2003). In Pennsylvania, three types of interactions between police officers and citizens are recognized: mere encounter, investigative detention and custodial detention. *Id.*

> The first category, a mere encounter or request for information, does not need to be supported by any level of suspicion, and does not carry any official compulsion to stop or respond. The second category, an investigative detention, derives from Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) [;] and its progeny: such a detention is lawful if supported by reasonable suspicion because, although it subjects a suspect to a stop and a period of detention, it does not involve such coercive conditions as to constitute the functional equivalent of an arrest. The final category, the arrest or custodial detention, must be supported by probable cause.

Commonwealth v. Gonzalez, 979 A.2d 879, 884 (Pa. Super 2009) (quoting *Commonwealth v. Moyer*, 954 A.2d 659, 663 (Pa. Super. 2008) (*en banc*) (quoting *Commonwealth v. Smith*, 836 A.2d 5, 10 (Pa. 2003))).

The *Stevenson* Court has explained the distinction between the various categories of detention as follows:

> A "mere encounter" can be any formal or informal interaction between an officer and a citizen, but will normally be an inquiry by the officer of a citizen. The hallmark of this interaction is that it carries no official compulsion to stop or respond.
>
> In contrast, an "investigative detention," by implication, carries an official compulsion to stop and respond, but the detention is temporary, unless it results in the formation of probable cause for arrest, and does not possess the coercive conditions consistent with a formal arrest. Since this interaction has elements of official compulsion it requires "reasonable suspicion" of unlawful activity. In further contrast, a custodial detention occurs when the nature, duration and conditions of an investigative detention become so coercive as to be, practically speaking, the functional equivalent of an arrest.
>
> *Stevenson*, 832 A.2d at 1127-29

> "The key difference between an investigative detention and a custodial one is that the latter 'involve[s] such coercive conditions as to constitute the functional equivalent of an arrest.'" *Commonwealth v. Pakacki*, 901 A.2d 983, 987 (Pa. 2006) (quoting *Commonwealth v. Ellis*, 662 A.2d 1043, 104 (Pa. 1995)). To determine whether an encounter with the police is custodial, the court considers the totality of the circumstances and applies an objective standard "with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the troopers or the person being seized." *Id.* (quoting *Commonwealth v. Edmiston*, 634 A.2d 1078, 1085-86 (Pa. 1993)).

When a suspect is "in custody" the police are required to provide Miranda warnings. (*See* e.g. *Pakacki* at 987). In Pennsylvania, the Supreme Court has determined that a person is in custody for Miranda purposes when he "is physically denied his freedom of action in any significant way or is placed in a situation in which he believes that his freedom of action or movement is restricted by the interrogation." *Id.* at 987-98 (quoting *Comm. v. Johnson*, 727 A.2d 1089, 1110 (Pa. 1999)). Also, the U.S. Supreme Court has held that in order to determine whether an individual was in custody the "ultimate inquiry is . . . whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest" *Id.* (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994).

As a result of this analysis of the three types of police interactions, we must now determine which applies to the Kubert/Roman encounter. Kubert testified that the vehicle driven by Roman was pulled over for speeding. Thus, probable cause[4] existed to make this traffic stop. Upon approaching this vehicle, Kubert immediately detected an odor of marijuana emanating from within the passenger compartment. At that point, Kubert was well within his authority to conduct an investigatory detention." To

---

[4] "For a stop based on the observed violation of the vehicle Code or otherwise non-investigable offense, an officer must have probable cause to make a constitutional vehicle stop." See *Commonwealth v. Calabrese*, 184 A.3d 164, 166 (Pa. 2018) (emphasis added) citing *Commonwealth v. Harris*, 176 A.3d 1009, 1019 Pa. Super. 2017).

maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion." *Comm. v. Strickler*, 757 A.2d 884, 889 (2000). Whether an officer has reasonable suspicion is an objective determination made in consideration of the totality of the circumstances. *Comm. v. Kemp*, 961 A.2d 1247, 1258 (Pa. Super. 2008). An officer's belief that criminal activity is afoot is reasonably warranted based upon the specific and articulable fact that the smell of marijuana is emanating from a person's vehicle. *Comm. v. Trenge*, 451 A.2d 701, 708 (Pa. Super. 1982).

Upon approaching the vehicle to engage Roman and inquire into his driver/vehicle information, Kubert detected the strong odor of marijuana. Upon re-approach once Bogart arrived, Kubert stated "I smell a strong odor of marijuana coming from the vehicle."[5] This "smell" appears to be that relied upon by Kubert to believe that criminal activity was afoot converting any mere encounter into a more "restrictive" investigatory detention. As the smell of marijuana heightened Kubert's belief that criminal activity was afoot, an investigative detention to pursue suspected illegal

[5] In the affidavit of probable cause for the search warrant, Bogart wrote "Officer Kubert explained that he could smell the marijuana and asked if they would be willing to turn it over." This would be consistent with answers provided on cross-examination by Kubert that he asked "questions" of Roman.

activity now resulted.[6] The question now is whether this engagement rose to a custodial detention.

Roman argues that because Kubert intended to arrest him merely because of the smell of marijuana this now became a custodial detention.

> "In determining whether an encounter with the police is custodial, "[t]he standard . . . is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the troopers or the person being seized . . ." and "must be determined with reference to the totality of the circumstances." *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078, 1085-86 (1993). Miranda warnings are required only when a suspect is in custody. *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433, 439 (1994)."

At no time did Kubert ever tell Roman, while he was still seated in the vehicle, that it was Kubert's intent to arrest him. Thus, without Roman being aware that this was Kubert's intent, it follows that Roman could not "reasonably believe[s] that his freedom of action or movement is restricted by the interrogation." (*Comm. v. Johnson*, 727 A.2d 1089, 1100 (1999)). The initial detention to which Roman was subjected was not so coercive "as to constitute the functional equivalent of an arrest." *Pakacki* at 519 (quoting *Comm. v. Ellis*, 662 A.2d 1043, 1047 (1995)). Therefore, this Court finds that at this point in the interaction Kubert was not required to provide Miranda warnings before inquiring about

---

[6] This Court notes that in order for an officer to obtain information to either confirm or dispel his belief regarding criminal activity he may ask a moderate number of questions. *Comm. v. Chase*, 960, A.2d 108, 115-116(2008).

the prospect of Roman turning any such substance over. There was no "custodial detention" . . . at that time.

Once Roman turned over the marijuana that was located in his backpack, the characterization of this encounter changed. Both he and the passenger were asked to exit the vehicle and were taken to the back of that vehicle. At that point it appears that Roman was asked if there was anything illegal in the vehicle. (N.T. p.9). In response to this question, where no Miranda warnings were given, Roman supplied the officers with additional marijuana, marijuana based products and other paraphernalia.

Having determined that once Roman turned over the initial marijuana and he and the passenger were removed from the vehicle, their movements were restricted and their freedom of action were physically denied in a significant way. Thus, at that point in time, before any further questioning could occur, this defendant was entitled to be given Miranda warnings. Absent those warnings, any questioning regarding the existence of other illegal substances in the vehicle is improper and any evidence turned over as a result impermissibly seized.

II. CONSENT OR NO CONSENT - THAT IS THE QUESTION

This Court next turns to the issue of whether either Roman or his passenger ever gave consent to Bogart to search either the passenger compartment or the trunk area of this vehicle.

The Fourth Amendment to the United States Constitution and Article 1, § 8 of the Pennsylvania Constitution require that searches be conducted pursuant to a warrant issued by a neutral and detached magistrate." *Commonwealth v. Copeland*, 955 A.2d 396, 399 (Pa. Super. 2008). "A warrantless search or seizure is *per se* unreasonable unless it falls within a specifically enumerated exception." *Commonwealth v. Wright*, 961 A.2d 119, 137 (Pa.2008). One such exception is when voluntary consent to search is given. *Comm. v. Strickler*, 757 A.2d 884, 888 (2000).

In the case *sub judice*, testimony elicited from Kubert, showed that neither Roman nor his passenger gave consent to search the passenger compartment or the trunk of this vehicle. Conversely, on direct examination, Bogart testified that both individuals gave consent. (N.T. p.27). However, when pressed further on cross-examination, Bogart indicated, apparently after contemplation, that he could not recall not only details surrounding the giving and receiving of consent, but even if consent was actually given. (N.T. pp. 36-37).

As previously noted, Pa.R.Crim.P. Rule 581(h) requires the Commonwealth to put forth evidence to establish that what was found as a result of the search, supposedly predicated upon consent, was not illegally obtained. We are constrained to believe that consent was given as originally testified to by Bogart since that testimony is diametrically opposite to that testified to by Kubert, i.e.

that consent was not given. Further, we are convinced that consent was never given to search either the passenger compartment nor the trunk in light of Bogart's changed testimony, i.e. "that he does not recall if consent was given." Since credible testimony lends itself to our conclusions that consent was not given, neither Kubert nor Bogart had the right to search this vehicle, claiming that the search was pursuant to an exception to the warrant requirement. Since consent was not given and the search was not an exception, it follows that anything found and seized would be illegal and in violation of Roman's constitutional rights under both the Federal and State Constitutions.

III. SEARCH WARRANT

Upon observing what he believed to be illegal controlled substances in the trunk of the vehicle, Bogart applied for a search warrant[7] from Magisterial District Judge Joseph Homanko. Bogart wrote in his probable cause affidavit that the request for the warrant was based upon the small amount of marijuana originally turned over to Kubert, additional marijuana, marijuana based products and paraphernalia also turned over by Roman as a result of the improper questioning conducted without Miranda warnings evidence determined by this Court to have been illegally obtained, the locating of "marijuana shake" in the passenger compartment and

[7] Defendant's Exhibit #1.

the observations of what he (Bogart) saw in the trunk which we opine herein resulted from his warrantless, "without consent" search. Thus, the majority of the information utilized by Bogart in his affidavit of probable cause to support his search warrant application was illegally obtained. The question we must now decide is this: Can a search warrant, based upon both legally and illegally obtained evidence/information, withstand constitutional scrutiny, such that the resultant seized evidence can be characterized as legally obtained?

> "[t]he law is settled that the 'inclusion of illegally obtained evidence does not vitiate a search warrant which is otherwise validly issued upon probable cause reflected in the affidavit and based on proper sources.' *United States v. Sterling*, 369 F.2d 799, 802 (3d Cir. 1966); *Commonwealth v. Thomas*, 444 Pa. 436, 447, 282 A.2d 693, 699-700 (1971). The converse is equally well settled: if illegally obtained evidence is included in an affidavit for a search warrant, it must not be considered in determining probable cause, and the affidavit must contain valid allegations - other than those prompted by official illegality - sufficient to establish probable cause. *United States v. Stoner*, 487 F.2d 651 (6th Cir. 1973); *United States v. Nelson*, 459 F.2d 884 (6th Cir. 1972)". *Commonwealth v. Knowles*, 327 A.2d 19, 24 (1974) *See also, Commonwealth v. Hernandez*, 594 Pa. 319, 334, 935 A.2d 1275, 1283 (2007) (holding that so long as there is some competent evidence set forth in the search warrant affidavit establishing probable cause the warrant will be considered valid).

The only legally obtained evidence from any aspect of this encounter was the initial bag of marijuana[8] provided by Roman to

[8] There was no testimonial nor evidence as to the weight of this bag alone. There is reference to the fact that the total weight of the marijuana in all three (3) bags was 36.5 grams. Kubert testified that in his opinion the quantity in that first bag is consistent with personal use.

Kubert from his backpack. Therefore, this should be sufficient to establish the necessary probable cause to support the search warrant application and allow for this Court to make a determination that the controlled substances and paraphernalia found in the trunk were properly found and seized. Or is it?

As previously noted, when Bogart initially searched the trunk area of the vehicle, he did so he claimed, with consent and also based upon seizure of other evidence. But as we have determined, *infra,* neither consent nor Miranda warnings were given. Since the items found in the trunk were located as a result of a search that was never consented to, these items are fruits of the poisonous tree. To now conclude that the seizure of these same tainted items was legally permissible under the *Knowles* case, would be to ignore the "taint" associated with these items and somehow ignore that this evidence was located in the first instance. Also, had Bogart and Kubert truly believed that a search warrant was an appropriate mechanism to search the vehicle, they would have and should have, once the first evidence of marijuana was turned over, applied for it then. This they did not do. Rather, they engaged in numerous activities violative of Roman's constitutional rights. Accordingly, we are constrained to grant defendant's request as to the legality of the search warrant results.

CONCLUSION

Based on the foregoing, we enter the following Order:

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
vs.	:	**No. CR-155-2021**
	:	
ALEJANDRO MANUEL ROMAN,	:	
Defendant	:	
	:	

Robert Frycklund, Esquire — Counsel for Plaintiff
Assistant District Attorney

Robert Goldman, Esquire — Counsel for Defendant

ORDER OF COURT

AND NOW, this 7TH day of February, 2022, upon consideration of the "Defendant's Motion to Suppress Search of Motor Vehicle and Statements", the Memorandum of Law lodged in support thereof, the Commonwealth's brief lodged in opposition thereto and after hearing thereon, it is hereby **ORDERED and DECREED** that said Motion is **GRANTED in part and DENIED in part** as follows:

1. The Motion to Suppress the marijuana/paraphernalia provided by Roman to Kubert during the course of the investigative detention is **DENIED**; and
2. The Motion to Suppress any statements made by Roman, or marijuana or paraphernalia turned over by Roman or located during searches conducted by Bogart is **GRANTED**. Said

statements, marijuana and paraphernalia are suppressed for purposes of trial.

BY THE COURT:

Joseph J. Matika, J.

FILED IN OFFICE
2022 FEB -7 A 9:20
TYRA L. BONI
CARBON COUNTY
CLERK OF COURTS