IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 717 CR 2016
	:	
JESSE GLENN HARRELL, III,	:	
Defendant	:	

Criminal Law - DUI - Traffic Stop - Investigatory Detention - Requirement of Reasonable Suspicion - Search of a Motor Vehicle - Requirement of Probable Cause – Necessity of a Search Warrant - Custodial Interrogation - Applicability of Miranda - Suppression - Doctrine of Inevitable Discovery - Birchfield - Requested Blood Draw - Refusal - Evidentiary Consequences

1. To support a finding of reasonable suspicion for an investigatory detention, the detaining officer must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led the officer reasonably to conclude, in light of his experience, that criminal activity was afoot.

2. Where the original purposes of a lawful traffic stop have been concluded, continued detention requires reasonable suspicion founded upon additional information gained during the stop.

3. Where police have probable cause to believe an illegal controlled substance - here, marijuana - is present in a motor vehicle which is the subject of a lawful traffic stop, the officers may conduct a search of the motor vehicle without the necessity of obtaining a search warrant; no exigency beyond the inherent mobility of the motor vehicle is required.

4. Probable cause means a fair probability that contraband or evidence of a crime will be found. Probable cause exists when criminality is one reasonable inference, not necessarily even the most likely inference.

5. If probable cause justifies the search of a lawfully stopped vehicle, it justifies a search of every part of the vehicle and its contents that may conceal the object of the search.

6. An investigatory detention of the driver of a motor vehicle involved in an ordinary traffic stop becomes "custodial" for Miranda purposes if the driver is physically deprived of his freedom of action in any significant way, i.e., whether under the totality of the circumstances, the conditions and duration of the detention become the functional equivalent of arrest.

7. Among the factors to be considered in determining whether an investigatory detention has evolved into a custodial interrogation are: the basis for the detention; the duration; the location; whether the subject was transferred against his will, how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions.

8. Statements made during a custodial interrogation are presumptively involuntary, unless the accused is first advised of his Miranda rights. In contrast, inculpatory statements made by a suspect during the course of an investigatory detention need not be preceded by Miranda warnings to be admissible in evidence against the accused.

9. Defendant's detention by the police following a valid traffic stop during which time the police investigated and questioned Defendant with respect to their reasonable and objectively based suspicions that he was driving under the influence of a controlled substance and that marijuana was located in his vehicle was, under the totality of the circumstances, an investigative rather than a custodial detention where the conditions and the duration of the detention continued only so long as the police were conducting an investigation into suspected criminal activity, and where Defendant was not transported from the scene or physically restrained or otherwise subjected to coercive conditions constituting the functional equivalent of arrest.

10. Field sobriety tests administered to assist police in determining whether a person who they suspect of driving under the influence is in fact under the influence of alcohol or a controlled substance, even if conducted after the suspect has been arrested or placed in custody, need not be preceded by Miranda warnings. Such tests are non-testimonial in nature and, thus, not within the protective sphere of the privilege against self-incrimination.

11. The doctrine of inevitable discovery provides that evidence that ultimately or inevitably would have been recovered by

lawful means should not be suppressed despite the fact that its actual recovery was accomplished through illegal actions. Consequently, where the police had probable cause to search Defendant's vehicle for the presence of controlled substances and intended to do so before Defendant admitted that marijuana was in his vehicle, whether Defendant's consent to search the vehicle was in response to police questioning of him while he was in custody and without the benefit of Miranda warnings, or was not knowingly and voluntarily given, will not support suppression of the marijuana and smoking device found in the vehicle.

12. In Birchfield, the United States Supreme Court held that an individual arrested for driving under the influence and who refused to submit to a requested blood draw could not be punished criminally for such refusal absent the existence of a search warrant or the applicability of an exception to the requirement for a search warrant.

13. The admissibility in evidence at a defendant's trial for driving under the influence of a controlled substance of the defendant's refusal to submit to a validly requested blood test is not a criminal sanction and was not affected by the decision in Birchfield.

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JESSE GLENN HARRELL, III, Defendant	:	

Joseph D. Perilli, Esquire — Counsel for Commonwealth
Assistant District Attorney

Bradley Warren Weidenbaum, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 11, 2017

At issue in this case is whether what began as a traffic stop escalated into a custodial interrogation such that any inculpatory statements given by the defendant driver needed to be preceded by Miranda warnings, and whether the United States Supreme Court's decision in Birchfield prohibits the driver's refusal to submit to a requested blood test from being introduced as evidence in his criminal prosecution for driving under the influence of a controlled substance.

PROCEDURAL AND FACTUAL BACKGROUND

On January 31, 2016, at approximately 10:23 P.M., Pennsylvania State Police Trooper Gary Fedor stopped a white Dodge pickup truck driven by the Defendant, Jesse Glenn Harrell, III, for failing to stop at a stop sign at the intersection of

Covered Bridge Road with Little Gap Road in Lower Towamensing Township, Carbon County, Pennsylvania. (N.T., p.4).[1] Defendant was the sole occupant in the vehicle.

When Trooper Fedor first approached Defendant's vehicle, he noticed that Defendant's eyes were glassy and bloodshot, and his pupils dilated. Trooper Fedor asked to see Defendant's driver's license, proof of insurance and the vehicle registration. Defendant responded that he did not have a driver's license, that it was DUI suspended. (Defense Exhibit No.2, p.2).[2] When questioned for how long, Defendant said, "It's been a while," and added that he had just maxed out of state parole. (Defense Exhibit No.2, p.4). Defendant did however provide his name, date of birth and an identification card which Trooper Fedor queried into the CLEIN[3] and NCIC databases using the computer in his patrol car. (N.T., pp.6, 33). With this information, Trooper Fedor was able to confirm Defendant's identity and that his driving privileges were suspended, DUI related.

After completing this check and returning to Defendant's vehicle, Trooper Fedor requested that Defendant exit the vehicle

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[1] "N.T." refers to the notes of testimony of the hearing on Defendant's Omnibus Pretrial Motion held on May 5, 2017. Troopers Gary Fetter and Matthew Borger were the only witnesses. In addition, the Defendant played Trooper Fedor's front dash cam recording of the incident.

[2] Defense Exhibit No.2 is a transcript prepared from the Mobile Video Recording (MVR) of the traffic stop on January 31, 2016, taken from Trooper Fedor's vehicle. This transcript was prepared by defense counsel and admitted in evidence at the hearing held on Defendant's Omnibus Pretrial Motion.

[3] CLEIN stands for the "Commonwealth Law Enforcement Information Network."

for field sobriety tests. At this time, Trooper Fedor advised Defendant that he smelled marijuana in the vehicle and inquired if there was any in the vehicle. Defendant said, "No." (N.T., p.15; Defense Exhibit No.2, p.5). As this was occurring, a second trooper, Trooper Bower, arrived on the scene. Trooper Bower parked his vehicle behind Trooper Fedor's patrol car, which was parked behind Defendant's truck. (N.T., p.34).

Trooper Fedor administered five standard field sobriety tests to Defendant with Trooper Bower present. (N.T., pp.7, 14). These were conducted on the shoulder of the road in front of Trooper Fedor's patrol car. (N.T., p.10). As to each test, Trooper Fedor detected clues consistent with Defendant being impaired.

At the conclusion of these field sobriety tests, Trooper Fedor told Defendant he was showing all the signs of marijuana impairment, including glassy and bloodshot eyes, a green tongue, dilated pupils which did not constrict when light was shown into his eyes, and abnormal balance and time perception. (N.T., p.35; Defense Exhibit No. 2, pp.7, 10). Faced with this information, Defendant denied that he had been smoking marijuana earlier in the day. Trooper Fedor then informed Defendant that he had contacted another trooper with more extensive training and experience with drug impairment than he had who was on his

way to assess Defendant's condition. (Defense Exhibit No.2, p.7). As they waited for this other trooper to arrive, Defendant told Troopers Fedor and Bower he had been convicted of multiple driving under the influence charges within the past ten years, indicated he was familiar with taking field sobriety tests, and appeared to acknowledge that the reason he had been confined in a state correctional institute was because of his past driving under the influence convictions. (Defense Exhibit No.2, pp.8, 11).

Soon after, Troopers Borger and Shandra arrived on the scene and parked their vehicle behind Trooper Bower's. (N.T., pp.12, 47). Trooper Borger was the officer Trooper Fedor had contacted to assist in his evaluation of Defendant. (N.T., p.14). In contrast to Trooper Fedor who had been a trooper for approximately one and a half years at the time of the stop, Trooper Borger had approximately ten years' experience in the field. (N.T., pp.24, 42).

After conferring with Trooper Fedor and walking up to Defendant's truck where he detected a pronounced odor of marijuana, Trooper Borger questioned Defendant whether marijuana was in the truck or if he had recently been smoking marijuana while in the truck. (N.T., p.43). When Defendant denied either, Trooper Borger expressed disbelief in Defendant's

answers, told Defendant the truck reeked of marijuana, and asked Defendant for consent to search. Defendant initially refused this request. Trooper Borger then advised Defendant that his consent was not required and that the odor of marijuana emanating from the vehicle provided sufficient probable cause to support a search, but that it would be easier if Defendant cooperated and admitted where the marijuana was so the truck would not need to be ransacked. (N.T., p.50; Defense Exhibit No.2, pp. 12-15). Being so advised, Defendant consented to the search and admitted where the marijuana was located. (N.T., pp.15, 43; Defense Exhibit No.2, pp.15-16). In giving his consent, Defendant begged Trooper Borger not to charge him with driving under the influence and insisted that he had not been smoking marijuana earlier in the day. (Defense Exhibit No.2, pp.15-16).

Troopers Fedor and Borger next searched the vehicle and found a glass jar containing marijuana behind the front seat as well as a smoking device with marijuana residue on the front passenger seat. (N.T., p.17; Defense Exhibit No.2, pp.16-17). When questioned about this evidence, Defendant admitted that he smoked marijuana almost every day. (Defense Exhibit No.2, p.19).

Following this search, Trooper Borger conducted several additional field sobriety tests of Defendant focusing on marijuana impairment. (N.T., pp.44-46). Clues were observed, and Trooper Borger recommended that Defendant be taken for a blood test. (N.T., pp.46, 51). At this point, approximately 45 to 50 minutes after the stop was made, Trooper Fedor formally arrested Defendant for suspicion of driving under the influence and possession of a controlled substance. (N.T., pp.18-20; Defense Exhibit No.2, p.29). Defendant was read the implied consent warnings contained in DL-26 and refused the requested blood test. (Defense Exhibit No.2, pp.29-30). Defendant was subsequently charged with driving under the influence - drug related,[4] driving under suspension - DUI-related,[5] possession of a small amount of marijuana,[6] possession of drug paraphernalia,[7] failure to stop at a stop sign,[8] and careless driving.[9]

In Defendant's Omnibus Pretrial Motion filed on September 2, 2016, Defendant seeks to suppress his statement admitting to the presence of marijuana in the vehicle as having been made in response to questions asked by the police after he was in custody and before he was given the benefit of Miranda warnings,

[4] 75 Pa.C.S.A. § 3802(d)(2).
[5] 75 P.S. 1543 § (b)(1.1)(i).
[6] 35 P.S. § 780-113(a)(31).
[7] 35 P.S. § 780-113(a)(32).
[8] 75 Pa.C.S.A. § 3323(b).
[9] 75 Pa.C.S.A. § 3714(a).

to suppress the marijuana and smoking device located in his pick-up truck as fruits of the poisonous tree, and to dismiss the driving under the influence charge and evidence of his refusal under Birchfield v. North Dakota, – U. S. –, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). A hearing on Defendant's Motion was held on May 5, 2017. For the reasons which follow, with one exception, we deny Defendant's Motion.

DISCUSSION

Applicability of Miranda

Preliminarily, the legality of the traffic stop of Defendant's vehicle for failing to stop at the intersection of Covered Bridge and Little Gap Roads is not in question, nor should it be. This stop is supported by probable cause as evidenced by Trooper Fedor's testimony regarding Defendant's failure to stop at a properly posted stop sign. *See* 75 Pa.C.S.A. § 3323(b) (stop signs and yield signs). At the outset of this stop, Defendant further acknowledged that his license was suspended for driving under the influence, a fact Trooper Fedor was able to confirm through the use of the computer in his vehicle.

During this initial stop, in addition to the current suspension of Defendant's license for driving under the influence, Defendant's appearance - his glassy and bloodshot

eyes, Defendant's failure to stop at the intersection, and Defendant's vehicle emitting an odor of marijuana provided Trooper Fedor with reasonable suspicion to believe that Defendant was driving under the influence sufficient to support Defendant's continued detention for further investigation. *See* United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."); Commonwealth v. Smith, 917 A.2d 848, 852 (Pa.Super. 2007) (To support a finding of reasonable suspicion, "the officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot. . . ."); and In Interest of A.A., 149 A.3d 354, 361 (Pa.Super. 2016) (holding that where the purposes of a lawful traffic stop have been concluded, the officer cannot rely solely upon the initial traffic violations to continue a detention but needs additional information gained during the stop or otherwise to support reasonable suspicion to continue the detention beyond its

original purpose), *appeal granted*, 169 A.3d 1026 (Pa 2017). This suspicion was strengthened with the observations Trooper Fedor made during the field sobriety tests he conducted of Defendant before Troopers Borger and Shandra arrived on the scene.

When Trooper Borger arrived on the scene, Trooper Fedor updated him on what had transpired before his arrival. Aware of this background, Trooper Borger approached Defendant's vehicle where he detected a strong odor of marijuana coming from within the vehicle. At this point, Trooper Borger was convinced marijuana was in the vehicle and so informed Defendant. When confronted by Trooper Borger about the odor of marijuana coming from his vehicle and after being told that the police had probable cause and intended to search his vehicle, Defendant granted permission to search his truck, admitted that marijuana was in the vehicle, and told the police where it was.

As Trooper Borger testified at the suppression hearing, once probable cause existed to believe marijuana was in Defendant's vehicle, no warrant was required for the police to conduct a search. Commonwealth v. Gary, 91 A.3d 102, 124, 138 (Pa. 2014) (plurality) (holding that under both the federal and state constitutions, police officers may search a motor vehicle if they have probable cause for the search; no exigency beyond

the inherent mobility of a motor vehicle is required). That probable cause existed was apparent from the signs of impairment observed by Trooper Fedor, from the order of marijuana reeking from Defendant's vehicle, and from Trooper Borger's experience in the field and familiarity with traffic stops involving controlled substances. By the time Trooper Borger asked permission to search Defendant's vehicle, probable cause to search existed (*i.e.*, that there was a fair probability that contraband or evidence of a crime would be found in Defendant's vehicle).

In describing the "somewhat elusive concept of probable cause," the Superior Court in Commonwealth v. Freeman, stated:

> "[P]robable cause does not involve certainties, but rather 'the factual and practical considerations of everyday life on which reasonable and prudent men act.'" Commonwealth v. Wright, 867 A.2d 1265, 1268 (Pa.Super.2005) (quoting Commonwealth v. Romero [449 Pa.Super. 194], 673 A.2d 374, 376 (Pa.Super.1996)). "It is only the probability and not a prima facie showing of criminal activity that is a standard of probable cause." Commonwealth v. Monaghan [295 Pa.Super. 450], 441 A.2d 1318 (Pa.Super.1982) (citation omitted); *see also* Illinois v. Gates, 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527] (1983) (holding that probable cause means "a fair probability that contraband or evidence of a crime will be found."); Commonwealth v. Lindblom, 854 A.2d 604, 607 (Pa.Super.2004) (reciting that probable cause exists when criminality is one reasonable inference, not necessarily even the most likely inference). To this point on the *quanta* of evidence necessary to establish probable cause, the United States Supreme Court

> recently noted that "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable cause decision." Maryland v. Pringle, 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769] (2003) (citations omitted).

128 A.3d 1231, 1242-43 (Pa.Super. 2015) (citation and quotation marks omitted). Consequently, even if we were to determine that Defendant's consent was coerced and not voluntarily given under the totality of the circumstances, or that the scope of the consent given was exceeded, *see* Commonwealth v. Valdivia, 145 A.3d 1156, 1166 (Pa.Super. 2016) (weighing a mixture of both coercive and non-coercive factors before concluding that the non-coercive elements outweighed the coercive elements), *appeal granted*, 165 A.3d 869 (Pa. 2017), Defendant's consent was not necessary.[10] *See also* United States v. Ross, 456 U.S. 798, 102

[10] "[T]he central inquiries in consensual search cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent, and the voluntariness of the consent given. Cleckley, 738 A.2d at 433. To establish a valid consensual search, the Commonwealth must first prove that the individual consented during a legal police interaction. Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884, 889 (2000). Where the interaction is lawful, the voluntariness of the consent becomes the exclusive focus. Id.; Commonwealth v. Acosta, 815 A.2d 1078, 1083 (Pa.Super.2003) (*en banc*). Commonwealth v. Randolph, 151 A.3d 170, 177 (Pa.Super. 2016), *appeal denied*, 168 A.3d 1284 (Pa. 2017). "When a consensual search is preceded by an illegal detention, the government must prove not only the voluntariness of the consent under the totality of the circumstances, but . . . must also establish a break in the causal connection between the illegality and the evidence thereby obtained." Commonwealth v. Tam Thanh Nguyen, 116 A.3d 657, 669 (Pa.Super. 2015) (citation and quotation marks omitted). As discussed in the succeeding text, at the time Defendant's consent to search his vehicle was given, Defendant was subject to a valid investigatory detention - one where a reasonable person in Defendant's position would not have believed

S.Ct. 2157, 72 L.Ed.2d 572 (1982) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

Nevertheless, Defendant argues that his admission that marijuana was in the vehicle was made while he was in custody, before any Miranda warnings were given, and should therefore be suppressed, together with the marijuana and smoking device found in the vehicle.

> Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of [his] Miranda rights. Commonwealth v. DiStefano, 782 A.2d 574, 579 (Pa.Super.2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way." *Miranda*, supra at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Commonwealth v. Gaul, 590 Pa. 175, 180, 912 A.2d 252, 255 (2006), cert. denied, 552 U.S. 939, 128 S.Ct. 43, 169 L.Ed.2d 242 (2007). Thus, "Interrogation occurs where the police should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v. Ingram, 814 A.2d 264, 271 (Pa.Super.2002), appeal denied, 573 Pa. 671, 821 A.2d 586 (2003). "[I]n evaluating whether *Miranda* warnings were necessary, a court must consider the totality of the circumstances. In conducting the inquiry, we must also keep in mind that not every statement made by an individual during a police

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that he was free to leave - which does not *per se* preclude a voluntary consent. *See* In Interest of A.A., 149 A.3d 354 (Pa.Super. 2016).

encounter amounts to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without *Miranda* warnings." Gaul, supra.

> Whether a person is in custody for Miranda purposes depends on whether the person is physically denied of [his] freedom of action in any significant way or is placed in a situation in which [he] reasonably believes that [his] freedom of action or movement is restricted by the interrogation. Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes [his] freedom of action is being restricted.

Commonwealth v. Clayton Williams, 539 Pa. 61, 74, 650 A.2d 420, 427 (1994) (internal citations omitted).

Commonwealth v. Williams, 941 A.2d 14, 30-31 (Pa.Super. 2008) (en banc).

In Commonwealth v. Mannion, the Pennsylvania Superior Court stated:

> The usual traffic stop constitutes an investigative rather than a custodial detention, unless, under the totality of the circumstances, the conditions and duration of the detention become the functional equivalent of arrest. Commonwealth v. Haupt, 389 Pa.Super. 614, 567 A.2d 1074, 1078 (1989). Since an ordinary traffic stop is typically brief in duration and occurs in public view, such a stop is not custodial for *Miranda* purposes. Commonwealth v. Leib, 403 Pa.Super. 223, 588 A.2d 922 (1991).
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> *** * * ***
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> An ordinary traffic stop becomes "custodial" when the stop involves coercive conditions, including, but not limited to, the suspect being forced into a patrol car and transported from the scene or being physically restrained. [ ]. Such coercive

> conditions constitute "restraints comparable to arrest" so as to transform the investigative nature of an ordinary traffic stop into custodial interrogation.

725 A.2d 196, 202 (Pa.Super. 1999) (en banc) (footnote omitted).

At the time Troopers Borger and Shandra arrived on scene, Defendant was the subject of an "investigative detention" being conducted by Trooper Fedor. Trooper Fedor was investigating whether Defendant was driving under the influence and, to a lesser extent, whether Defendant was in possession of an illegal controlled substance. Defendant was not free to leave, a fact of which Defendant would have been acutely aware. *See* Commonwealth v. DeHart, 745 A.2d 633, 637 (Pa.Super. 2000) ("The test [for whether a suspect is in detention] is whether, considering all the circumstances surrounding the encounter, the police conduct would communicate to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter.").

Whether this detention had become custodial by the time Defendant admitted that marijuana was in his vehicle depends on whether, under the totality of the circumstances, "the conditions and/or duration of the detention [had] become so coercive as to constitute the functional equivalent of arrest." Williams, 941 A.2d at 31 (citation and quotation marks

omitted).[11] Such an evaluation takes into account the totality of the circumstances. Among the factors to be considered are: "the basis for the detention; the duration; the location; whether the suspect was transferred against [his] will, how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions." Williams, 941 A.2d at 31 (citation and quotation marks omitted). Moreover, during a traffic stop, an officer

> "may ask the detainee a moderate of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). "[I]f there is a legitimate stop for a traffic violation ... additional suspicion may arise before the initial stop's purpose has been

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[11] Under *Miranda*, "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). In comparison, Pennsylvania's test is more restrictive.

> [T]his jurisdiction's test of 'custodial interrogation' examines more than actual deprivation of freedom. Pennsylvania's test for custodial interrogation is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by said interrogation....

Commonwealth v. Gonzalez, 546 A.2d 26, 29 (Pa. 1988) (citation and quotation marks omitted). After citing to both tests, and perhaps with an eye to distinguishing a "custodial detention" from an "investigatory detention," an *en banc* panel of the Superior Court concluded in Commonwealth v. Williams that

> Police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest.

941 A.2d 14, 31 (Pa.Super. 2008).

> fulfilled; then, detention may be permissible to investigate the new suspicions." Commonwealth v. Chase, 599 Pa. 80, 960 A.2d 108, 115 n. 5 (2008).

Valdivia, 145 A.3d at 1162. "Indeed, routine constitutional analysis requires courts to utilize facts gathered during each escalating phase of a police investigation in determining whether police acted properly as the interaction between police and citizen proceeded towards an arrest." In Interest of A.A., 149 A.3d at 360 (citation and quotation marks omitted).

Here, Defendant was first detained following the traffic stop for suspicion of driving under the influence, which rapidly encompassed suspicion of the presence of marijuana in his vehicle. Although the entire stop lasted approximately eighty to ninety minutes, more than twenty to thirty minutes appears to have passed after the Defendant admitted to marijuana being in the vehicle and while the Defendant waited with the police for a tow truck to arrive to tow his vehicle. (N.T., p.20; Defense Exhibit No.2, p.33). Further, part of the reason why the detention was longer than normal was Trooper Fedor's call for another trooper with more training and experience in drug-related driving under the influence offenses to evaluate Defendant, who insisted he had not smoked marijuana and was under its influence. This request by Trooper Fedor for a second opinion was reasonable and was explained to Defendant.

The location of the detention was on a public street and not at a police station or in a confined area. Defendant was not transported during the period he was in detention and no restraints were placed on him. (N.T., p.20). Nor was any show, threat or use of force involved. Further, no unfounded or false accusations were made by the police who conducted standard field sobriety tests and asked Defendant questions intended to confirm or dispel their suspicions based upon their observations of Defendant and the odor of marijuana emanating from his vehicle.

The fact that Trooper Borger told Defendant that he doubted Defendant's denial of using marijuana and having marijuana in his vehicle, that things would go easier for Defendant if he cooperated with the police, and that Defendant's consent was not necessary for Defendant's vehicle to be searched, does not evidence any threat of force or coercion. *See* Commonwealth v. Mannion, 725 A.2d at 203 (finding trooper's statement to suspect that he believed she was lying, that things were not looking good for her, and that she was going to be arrested at some point in time, following which suspect broke down and confessed, did not evidence any threat of force or coercion; rather, under the totality of the circumstances, such statements were consistent with a willing and cooperative witness, and were not the product of custodial interrogation); *cf.* Commonwealth v.

Mack, 796 A.2d 967, 970 (Pa. 2002) (holding that consent given by a suspect while in custody was knowingly and voluntarily made notwithstanding police representation that if suspect refused consent, they would apply for a warrant; police statement of intent to secure a warrant merely a factor, not a dispositive one, under the totality of the circumstances test).

Instead, Defendant evaluated his situation - that he had just maxed out on state parole, that he had multiple recent driving under the influence convictions, that he was likely facing jail time for another conviction, that the field sobriety tests taken by Trooper Fedor revealed he was under the influence of marijuana, and that a strong odor of marijuana was detected coming from his vehicle - and concluded it was time to cooperate and fall on the mercy of the troopers. This conclusion is borne out by the transcript of the stop: while Defendant was uncooperative in the beginning, by the end, Defendant acknowledged that the troopers had treated him fairly and professionally and that he had attempted to conceal his violations. (Defense Exhibit No.2, pp.4, 8-9, 15, 27-28, 39, 41-42, 47).

Considering the totality of the circumstances we do not find that Defendant's detention was so coercive as to constitute the functional equivalent of arrest. Rather, from the time of

the traffic stop and Trooper Fedor's first observations of Defendant until the search of Defendant's vehicle was completed, Defendant was subject to a continuous investigatory detention to which *Miranda* does not apply. Commonwealth v. Kondash, 808 A.2d 943, 948 (Pa.Super. 2002). This detention was temporary in the sense that it continued only so long as the police were conducting an investigation into suspected criminal activity.[12]

This investigation, however, was concluded by the time the police completed their search of Defendant's vehicle. When the police approached Defendant with the marijuana and smoking device found in his truck, they were no longer investigating suspected criminal activity. Their suspicions had been confirmed, and it was clear that Defendant was in possession of a controlled substance and all information necessary to charge Defendant with this offense had been obtained.

It is at this point that we find Defendant's investigatory detention ripened into custodial detention such that police questioning of Defendant or its functional equivalent was required to be preceded by Miranda warnings. When the police

[12] Further, given the existence of probable cause and the troopers' expressed intent to search Defendant's vehicle whether or not consent was given, the doctrine of inevitable discovery shields the marijuana and smoking device found in Defendant's vehicle from suppression, even were we to determine that Defendant was in custody when admitting to the marijuana in his vehicle or that the consent to search his vehicle was not knowingly and voluntarily given by the defendant. Commonwealth v. Gonzalez, 979 A.2d 879, 890 (Pa.Super. 2009) ("[E]vidence that ultimately or inevitably would have been recovered by lawful means should not be suppressed despite the fact that its actual recovery was accomplished through illegal actions.").

approached Defendant with the fruits of their search and asked him when he was smoking and whether he smoked every day, they knew such questions were "reasonably likely to elicit an incriminating response." By this point, the purpose of the detention and the objective of the questions had changed such that Miranda warnings were required. Since Defendant's admission that he smoked marijuana almost every day was not preceded by this constitutional safeguard, Defendant's statement will be suppressed.[13]

Applicability of Birchfield

In Birchfield, the United States Supreme Court held that a driver suspected of driving under the influence and arrested for that offense could not be subjected to enhanced criminal penalties for refusing a requested blood draw where no search warrant was obtained to allow the search and no exception existed to the requirement for a search warrant. In Commonwealth v. Evans, 153 A.3d 323 (Pa.Super. 2016), the Pennsylvania Superior Court held that the statutory scheme set forth under the driving under the influence laws of this

[13] Our conclusion that Defendant's dentition was custodial following the search of his vehicle does not require that the results of the field sobriety tests taken by Trooper Borger be excluded, the same being "non-testimonial in nature and, thus, . . . not . . . within the protective sphere of the privilege against self-incrimination." Commonwealth v. Hayes, 674 A.2d 677, 681 (Pa. 1996). Moreover, since Defendant has not questioned the legality or admissibility of this second round of field sobriety tests, the issue has been waived. Commonwealth v. Freeman, 128 A.3d 1231, 1241-42 (Pa.Super. 2015).

Commonwealth which increase the grade of the offense and severity of the penalty for a driver who legitimately exercises his constitutional right to refuse to submit to a blood test imposes enhanced criminal penalties in contravention of the Birchfield decision. Nevertheless, Birchfield is of no assistance to Defendant in this case.

First, the driving under the influence offense with which Defendant has been charged has not been enhanced because of Defendant's refusal to submit to a blood draw. As a person charged with driving under the influence, drug related, the penalty applicable to this offense and to which Defendant is subject if convicted is set forth in 75 Pa.C.S.A. § 3804(c). Second, since Defendant refused to submit to a blood draw, none was taken, and there is no physical evidence or test results to be suppressed. Third, Birchfield left unaffected the civil and evidentiary consequences of a refusal such as the suspension of operating privileges or the admissibility of Defendant's refusal in a criminal proceeding. *See, e.g.*, 75 Pa.C.S.A. §§ 1547(b), (c). In this regard, the Birchfield Court specifically noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refused to comply" with chemical tests and emphasized that "nothing we

say here should be read to cast doubt on them." *Id.* at 2185; *see also* Commonwealth v. Ennels, 167 A.3d 716, 721 (Pa.Super. 2017) ("[Birchfield] upheld the implied-consent exception to the warrant requirement for blood tests, as long as such consent is based on the prospect of only civil and evidentiary consequences, and not criminal penalties.").

CONCLUSION

Having examined the nature of the interaction between Defendant and the police and the level of his detention as this interaction evolved, and having concluded that the evidence Defendant seeks to suppress, with one exception, was obtained during a valid investigative detention and that the dictates of Birchfield will not be violated by allowing in evidence Defendant's refusal to submit to a blood test, the relief requested in Defendant's Omnibus Pretrial Motion will be denied, excepting only suppression of Defendant's statement after being placed in custody and without the benefit of Miranda warnings that he smoked marijuana almost every day.

BY THE COURT:

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P.J.