

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 550 CR 2011
	:	
ADAM JOHN DOYLE,	:	
Defendant	:	
Michael S. Greek, Esquire		Counsel for Commonwealth
Assistant District Attorney		
George Twardy, Jr., Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - May 14, 2012

We address here Defendant's Omnibus Pretrial Motion in the nature of a motion to suppress. In this Motion, Defendant seeks to suppress all evidence obtained as the result of a traffic stop of his motor vehicle by the police. Specifically, Defendant contends that he was stopped for alleged summary violations under the Motor Vehicle Code - Obedience to Traffic Control Devices (75 Pa.C.S.A. § 3111 (a)) and Careless Driving (75 Pa.C.S.A. § 3714 (a)) - and that for neither did probable cause exist to support the stop. In consequence, Defendant argues that all subsequently obtained evidence must be suppressed. Defendant also argues that the test results from a breathalyzer machine should be excluded for failure to follow required testing and certification procedures.

### FACTUAL AND PROCEDURAL HISTORY

On March 13, 2011, at approximately 6:40 P.M., Defendant was operating a pickup truck driving north on State Route 209 at or near its intersection with Broadway in Jim Thorpe, Carbon County, Pennsylvania. Defendant was stopped at a red light waiting to make a left-hand turn. At the location where Defendant was stopped, two restricted lanes existed: one for traffic headed straight onto Broadway and one for traffic intending to turn left to continue on Route 209 north. Defendant's truck was straddling both lanes, with approximately half of his vehicle in the right lane and half in the left lane.

Trooper Michael Walsh of the Pennsylvania State Police was driving south on Route 209. Upon observing the position of Defendant's stopped vehicle, he immediately made a U-turn and pulled behind Defendant's vehicle. When the light turned green, Defendant turned left. As he did so, Trooper Walsh observed the right-hand portion of Defendant's vehicle come within inches of striking the sidewalk curb. At this location, Route 209 has one lane proceeding north and there is no adjacent shoulder. At the time of the incident, a St. Patrick's day parade was concluding and people were in the area. However, there was no evidence that any pedestrian was startled or in danger of being harmed.

At this point, Trooper Walsh initiated a traffic stop. Defendant responded appropriately and pulled over at a safe location. As Trooper Walsh spoke with Defendant, he smelled an odor of alcohol, administered a PBT test, and conducted an HGN assessment, all of which indicated intoxication.

Defendant was arrested and transported to the Pennsylvania State Police barracks in Lehighton. At 7:17 P.M., Defendant was given and acknowledged his implied consent warnings. At 7:32 P.M., he performed the requested breathalyzer test. The results revealed a blood alcohol content of 0.105 percent.

Defendant was charged with Driving Under the Influence (75 Pa.C.S.A. § 3802 (a)(1), (b)), Obedience to Traffic Control Devices, Careless Driving, and Failure to use a Seat Belt (75 Pa.C.S.A. § 4581 (a)(2)). Defendant's Omnibus Pretrial Motion was filed on September 8, 2011. Therein, Defendant alleges that Trooper Walsh "had no prior notice or reasonable suspicion as to the existence of [motor vehicle] violations prior to stopping Defendant" and that "all fruits of the illegal stop . . . , including his arrest by Trooper Walsh must be suppressed, as no reasonable suspicion or probable cause existed warranting the traffic stop at issue and as such, the stop was unconstitutional." (Omnibus Pretrial Motion, paragraphs 8 and 9). At the hearing held on this Motion, Defendant also argued

that Trooper Walsh failed to observe him for twenty consecutive minutes immediately preceding the administration of the breath test as required by 67 Pa.Code § 77.24, and that the Commonwealth failed to present independent evidence that the simulator solution or ampoules used in testing the breathalyzer machine met testing standards, both of which require suppression of the breathalyzer test.

### DISCUSSION

#### a) Legality of Stop

As to Defendant's primary argument, the legality of the stop, the initial question presented is whether probable cause must support Defendant's traffic stop for the suspected motor vehicle code violations observed by Trooper Walsh, or whether reasonable suspicion is sufficient. This question concerns the quantum of proof required to support Defendant's stop for alleged violations of the Vehicle Code.

In 1995, this question was answered by the Pennsylvania Supreme Court based upon its interpretation of the language contained in Section 6308 (b) of the Vehicle Code, 75 Pa.C.S.A. § 6308 (b), as it then existed. At the time, Section 6308 (b) provided that an officer must have "articulable and reasonable grounds to suspect a violation of [the Vehicle Code]" before effecting a vehicle stop. Finding the term "articulable

and reasonable grounds" to be the equivalent of "probable cause," the Supreme Court held probable cause was a statutory prerequisite for a traffic stop of a motor vehicle premised upon a perceived belief by an officer that the vehicle or its driver was in violation of some provision of the Vehicle Code. Commonwealth v. Whitmyer, 668 A.2d 1113, 1116 (Pa. 1995).

The holding in Whitmyer was dictated by the Court's construction of the standard set by statute, not that set by either the federal or state constitutions. From a constitutional perspective, a traffic stop for Vehicle Code offenses is reasonable and constitutionally sound under both the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution, when an objective review of the facts underlying the stop shows that the officer possessed specific, articulable facts that the driver was violating a traffic law at the time of the stop. Under this standard, either probable cause or reasonable suspicion with the intent of conducting an investigation, will support the stop. The rationale for an investigatory stop upon reasonable suspicion is just that, the totality of the circumstances forming the basis of reasonable suspicion must be such that a stop under such circumstances supports an investigatory purpose. "Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion

will allow the stop - if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop can not be constitutionally permitted on the basis of mere suspicion." Commonwealth v. Chase, 960 A.2d 108, 115 (Pa. 2008).

A stop based on reasonable suspicion requires that there be something to investigate. Therefore, if the only basis for the stop is reasonable suspicion that the detained motorist is presently involved in criminal activity, the violation being investigated must be such that evidence from the investigation will either confirm or negate the violation. "[A] vehicle stop based solely on offenses not 'investigatable' cannot be justified by a mere reasonable suspicion, because the purposes of a *Terry* stop do not exist - maintaining the *status quo* while investigating is inapplicable where there is nothing further to investigate. An officer must have probable cause to make a constitutional vehicle stop for such offenses." Chase, 960 A.2d at 116.

The Act of September 30, 2003, P.L. 120, No. 24, § 17, effective February 1, 2004, amended Section 6308 (b) of the Vehicle Code to set the standard for a vehicle stop at the constitutional level, thus replacing the higher statutory threshold presented in Whitmyer. Chase, 960 A.2d at 112; Commonwealth v. Fulton, 921 A.2d 1239, 1240 n.2 (Pa.Super.

2007), *appeal denied*, 934 A.2d 72 (Pa. 2007). Specifically, Section 6308 (b) was amended to permit an officer with reasonable suspicion to believe that a violation of the Vehicle Code is occurring or has occurred to make an investigatory stop. Chase, 960 A.2d at 112, 115-16. Under this statute, "in order to establish reasonable suspicion, an officer must be able to point to *specific* and *articulable facts* which led him to reasonably suspect a violation of the Motor Vehicle Code." Commonwealth v. Holmes, 14 A.3d 89, 95-96 (Pa. 2011). This standard is conceptionally the same as for a *Terry* stop. Chase, 960 A.2d at 116.

In the instant case, Trooper Walsh acknowledged that Defendant was not stopped because he suspected Defendant was driving under the influence. Cf. Commonwealth v. Sands, 887 A.2d 261 (Pa.Super. 2005) (holding that "reasonable suspicion" to believe that a driver is operating a motor vehicle while under the influence of alcohol will normally support a stop of that vehicle for further investigation). Rather, Defendant was stopped because of Trooper Walsh's belief that Defendant had violated Sections 3111 (a) and 3714 (a) of the Vehicle Code. Therefore, the question of whether probable cause or reasonable suspicion must support the stop hinges on whether at the time of the stop Trooper Walsh had a legitimate expectation of investigatory results. Cf. Commonwealth v. Whitmyer, 668 A.2d

1113 (Pa. 1995) (holding that where the offense forming the basis of the stop was such that no additional evidence to establish a violation of the Vehicle Code could be obtained from a subsequent stop and investigation, the stop must be supported by probable cause). In Whitmyer the Court found that determination of the violation at issue, driving at an unsafe speed (75 Pa.C.S.A. § 3361), would not be furthered by a post-stop investigation.

With respect to the offenses of both careless driving and obedience to traffic control devices, each, under the circumstances here present, is of that type that is not "investigatable" after a stop. For each of these offenses, there was nothing to be gained by Trooper Walsh subsequent to the stop to either confirm or negate the alleged violations. Consequently, for Defendant's stop to be valid, what Trooper Walsh observed must support a finding of probable cause to believe that Defendant was in violation of the Vehicle Code.

Applying the requisite standard of probable cause to Defendant's stop, this standard was not met as it pertains to Defendant's stop premised on careless driving. The offense of careless driving is defined as follows: "Any person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary offense." 75 Pa.C.S.A. § 3714. "The *mens rea* requirement applicable to §



3714, careless disregard, implies less than willful or wanton conduct[,] but more than ordinary negligence or the mere absence of care under the circumstances.” Commonwealth v. Gezovich, 7 A.3d 300, 301 (Pa.Super. 2010) (quoting Matter of Huff, 582 A.2d 1093, 1097 (Pa.Super. 1990) (*en banc*), *aff’d per curiam*, 604 A.2d 1026 (Pa. 1992)) (quotation marks omitted). That Defendant’s vehicle, a pickup truck, may have momentarily come within several inches of striking a curb while Defendant made a left-hand turn from a stopped position into a single lane of traffic with no shoulders, after traveling the width of an intersection, without more does not establish probable cause to believe Defendant was guilty of careless driving.

However, as to the claimed violation of Section 3111(a), we believe probable cause supports the stop. The relevant provision of this section provides that “the driver of any vehicle shall obey the instructions of any applicable official traffic-control device placed or held in accordance with the provisions of this title.” 75 Pa.C.S.A. § 3111 (a). The traffic-control devices existent here are the markings on the pavement which designated a left-turn lane for traffic turning left and a separate right lane for traffic continuing straight ahead. These devices are presumed to be legal and correctly placed, absent evidence to the contrary, of which there was none. 75 Pa.C.S.A. § 3111 (c), (d). Defendant’s

truck, as observed by Trooper Walsh, was half in one lane and half in the other. Having found a legitimate stop (based on probable cause), all evidence which was subsequently obtained by Trooper Walsh is admissible, unless required to be suppressed on some other basis. In this respect, Defendant contends that 67 Pa.Code § 77.24 was violated.

b. Administration of Breathalyzer Test

Section 77.24 (a) of Title 67 of the Pennsylvania Code requires that a person who is administered a breathalyzer test be kept under continuous observation by a police officer or certified breath test operator for at least twenty consecutive minutes immediately preceding the administration of the test. On this issue, Trooper Walsh testified that Defendant was arrested on location, transported to the Pennsylvania State Police Lehighton barracks, and held in custody during administration of the breathalyzer test. Although Trooper Walsh left the room where Defendant was being detained during a portion of the twenty-minute period immediately preceding administration of the BAC test in order to obtain materials to input into the machine, while Trooper Walsh was absent, Defendant remained under the custody of another trooper present in the same room with Defendant. There is no evidence that during the time Trooper Walsh was absent, the Defendant ingested

alcoholic beverages or other fluids, regurgitated, vomited, or ate or smoked anything which would effect the test results. Under these circumstances, we find the observation requirements of 67 Pa.Code § 77.24 (a) have been met.

As to Defendant's final argument raised at the time of hearing, that the simulator solution and/or ampoules used in the breath testing process were not independently tested and certified by the police, absent a suggestion that these products were in some manner tainted or defective, the Commonwealth does not bear the burden of proving independent testing. Commonwealth v. Little, 512 A.2d 674, 678 (Pa.Super. 1986); see also Commonwealth v. Starr, 739 A.2d 191, 195 (Pa.Super. 1999). Certification of these products by the manufacturer is required by 67 Pa.Code § 77.24 (d) and (e), and their placement in the market is deemed certification to the user that the product will produce the intended results per statutory requirement. Little, 512 A.2d at 678.

*Little* establishes a rebuttable presumption that placing the solution or ampoules on the market, after independent testing, constitutes certification that the products will operate as intended. Defendants are permitted to rebut that presumption with some evidence of a product defect. Instantly, appellant failed to offer evidence of a defect and the Commonwealth was therefore entitled to rely on the presumption of accuracy.

Starr, 739 A.2d at 197. Here, Defendant has presented no evidence to suggest that the manufacturer's product was defective.<sup>1</sup>

#### CONCLUSION

Having concluded that Defendant's traffic stop was valid and that no reason has been shown to suppress the results of Defendant's breathalyzer test, Defendant's Omnibus Pretrial Motion will be denied.

BY THE COURT:

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P.J.

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<sup>1</sup> At the suppression hearing, the Commonwealth offered into evidence certificates of accuracy and calibration for the breathalyzer machine used in testing Defendant. With reference to these certificates, the Vehicle Code provides that "[a] certificate . . . showing that a device was calibrated and tested for accuracy and that the device was accurate shall be presumptive evidence of those facts . . . ." 75 Pa.C.S.A. § 1547 (c) (1); see also Commonwealth v. Mongiovi, 521 A.2d 429, 432 (Pa.Super. 1987).