

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-189-2014

:

vs.

:

: **Opinion and Order re**

: **Defendant's Omnibus Pretrial Motion**

**JEREMY GOODEN,**

:

**Defendant**

:

**OPINION AND ORDER**

This matter came before the court for a hearing and argument on Defendant Jeremy Gooden's omnibus pre-trial motion. The relevant facts follow.

At approximately 6:45 p.m. on January 12, 2014, Officer Eric Derr of the Williamsport Bureau of Police was patrolling the center part of the city when he observed a silver Chevy sedan facing north sitting stationary in the lane of traffic on Court Street, which is an alley that runs between Rite Aid and Aspen Square Plaza. Officer Derr went around the block to come up behind the vehicle. The driver of the vehicle failed to bring the vehicle to a complete stop before he turned right from Court Street onto Seventh Street. Officer Derr followed the vehicle to Market Street, where again the driver failed to bring the vehicle to a complete stop. The driver drove around the block. When he reached the intersection of Court Street and Seventh Street, he again failed to come to a complete stop at the stop sign. Officer Derr activated his lights and sirens to conduct a traffic stop. Unfortunately, the driver did not stop, but accelerated and a pursuit ensued, which did not end until the driver crashed the vehicle into a line of pine trees on Grove Street. Officer Derr exited his vehicle and drew his firearm. Officer Derr ordered the driver out of the vehicle and onto the ground, but Officer Derr had to help him open the door because it was smashed. Officer Williamson

arrived and handcuffed the driver, who was later identified as Defendant Jeremy Gooden. Officer Derr got closer to the vehicle and observed a small, square, transparent purple bag with blue paper or wax paper in it, which Officer Derr recognized as drug paraphernalia commonly used to package heroin, inside the still open driver's door. The police searched Defendant incident to his arrest and seized \$1900 in cash from his front pants pockets.

The vehicle was not capable of being driving and the back end was sticking out into Grove Street. The vehicle was towed to Cochran's Garage, which is a public business and not a secure facility, because the police impound lot was full. The police sealed the vehicle with evidence tape before leaving to obtain a warrant to search it.

The police requested and obtained a nighttime search warrant due to the risk of any evidence being tampered with or removed from the public business. The warrant was executed at 2209 hours or 10:09 p.m. In addition to the bag in the driver's side door, the police seized cell phones from the floorboards, seat and trunk; a Ziploc bag containing approximately 140 bags of heroin that were rubber banded together in 14 bundles, and roughly 11 grams of loose powder heroin that was packaged in a sandwich bag from behind the headlight switch on the dash; and rubber bands from the center console of the vehicle.

Defendant was charged with possession with intent to deliver a controlled substance,<sup>1</sup> possession of drug paraphernalia,<sup>2</sup> fleeing or attempting to elude a police officer,<sup>3</sup> recklessly endangering another person,<sup>4</sup> and three summary traffic offenses.

Defendant filed an omnibus motion raising issues related to this case and

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<sup>1</sup> 13 P.S. §780-113(a)(30).

<sup>2</sup> 13 P.S. §780-113(a)(32).

<sup>3</sup> 75 Pa.C.S. §3733(a).

<sup>4</sup> 18 Pa.C.S. §2705.

another drug case.<sup>5</sup> The issues relating to this case involve: a motion to suppress; a motion for disclosure of other crimes, wrongs or acts pursuant to Pa.R.E. 404(b); a motion for discovery related to expert witnesses; and a motion to reserve the right to file additional pre-trial motions.

Defendant first contends that the evidence against him must be suppressed on three grounds: (1) the traffic stop was not supported by reasonable suspicion or probable cause; (2) the nighttime search was improper and unsupportable under the circumstances; and (3) the police made an initial warrantless entry of the vehicle which was not supported by reasonable suspicion, probable cause or any exception to the warrant requirement.

When a defendant files a motion to suppress challenging the constitutionality of the stop of his vehicle, the Commonwealth bears the burden of proof to show that the defendant's rights were not violated. Pa.R.Cr.P. 581(H); Commonwealth v. Graham, 554 Pa. 472, 721 A.2d 1075, 1077(1998); Commonwealth v. Enimpah, 62 A.3d 1028, 1031-1032 (Pa. Super. 2013).

If a police officer is making a traffic stop for an offense where he has a reasonable expectation of learning additional evidence related to the suspected criminal activity, the stop needs to be supported by reasonable suspicion. A vehicle stop solely on offenses not "investigatable," however, must be supported by probable cause.

Commonwealth v. Chase, 599 Pa. 80, 960 A.2d 108, 115-16 (2008); Commonwealth v. Feczko, 10 A.3d 1285, 1290-91 (Pa. Super. 2010).

Here, the basis for the traffic stop was one or more stop sign violations. Stop

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<sup>5</sup> Prior to the hearing in this matter, Defendant reached a plea agreement with the Commonwealth in the other drug case; therefore, the issues asserted in the omnibus motion relating to that case became moot.

sign violations are governed by section 3323(b) of the Vehicle Code, which states in relevant part:

“Except when directed to proceed by a police officer or appropriately attired persons authorized to direct, control or regulate traffic, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line or, if no stop line is present, before entering a crosswalk on the near side of the intersection or, if no crosswalk is present, then at the point nearest the intersecting roadway where the driver has a clear view of approaching traffic on the intersecting roadway before entering.

75 Pa.C.S. §3323(b). Officer Derr’s credible testimony established that Defendant failed to bring his vehicle to a complete stop before entering the intersection at Court and Seventh Street and the intersection at Seventh and Market Street. Therefore, he had probable cause to stop Defendant’s vehicle.

Defendant next contends that the evidence must be suppressed because a nighttime search was improper and unsupportable under the circumstances. Again, the court cannot agree.

Rule 206 provides that if a “nighttime” search is requested (i.e., 10 p.m. to 6 a.m.) the affidavit supporting the search warrant application shall state additional reasonable cause for seeking permission to search in the nighttime. Pa.R.Crim.P. 206(7).

The affidavit requested a nighttime search warrant. In support thereof, Officer Robert Williamson specifically stated in the affidavit: “Due to our WBP impound being full, the Chevrolet Impala was sealed with evidence tape, doors were locked, and secured in Cochran’s Garage. Cochran’s Garage is a business, which is open to the public during regular business hours. I would respectfully request a nighttime search warrant be issued for the Chevrolet Impala, due to the risk of any/all evidence being tampered with and/or

removed from the public business.” Commonwealth’s Exhibit 2.

Officer Derr also explained at the suppression hearing that the basis for the nighttime search was the fact that Cochran’s Garage was not a secure facility. Cochran’s employees would be in and out of there, and the police had no idea who had keys or access to Cochran’s facility. In comparison, the police impound was secured by a fence, steel doors and concrete block. Officer Derr also could not recall if the driver’s door of the vehicle was securable. No police officers, however, remained with the vehicle at Cochran’s Garage before the search occurred.

In his letter brief, defense counsel argues that a one-line, conclusory allegation that Cochran’s Garage is a public business and there was a risk that potential evidence could be tampered with or removed was insufficient to justify a nighttime search, especially since the only evidence in the vehicle that the police were aware of was an innocuous, clear single bag with unknown contents located in the driver’s door.

In his response, the prosecutor contends sufficient cause was shown to authorize a nighttime warrant given Cochran’s status as a public business. The police did not know who had keys to the garage, they could not guard the garage all night, and the risk of evidence being tampered with was too great. If the police had waited and the garage had been broken into during the night, Defendant would be the first to assert that the evidence had been planted.

The court does not accept either argument in its entirety. More than just “an innocuous, clear single bag” led the officers to believe that additional controlled substances would be discovered inside the vehicle. The clear single bag was a small Ziploc bag with a

blue waxen bag visible inside of it. Officer Williamson specifically stated in the affidavit of probable cause that, based on his training and experience, he knew this type of packaging to be consistent with heroin. The affidavit also states that: officers could clearly view at least two cellular phones inside the vehicle; officers located a large amount of currency in Defendant's front pants pockets; and Defendant had previously been charged with possession with intent to deliver heroin and criminal use of a communication facility. Thus, the totality of the circumstances set forth in the affidavit of probable cause certainly gave the officer a basis to believe there was a reasonable probability that the vehicle contained additional drugs.

On the other hand, with respect to the request for a nighttime search warrant, the affidavit does not state any information related to who may or may not have keys to Cochran's Garage. Instead, it notes that the vehicle was sealed with evidence tape, the doors were locked, and the vehicle was secured in Cochran's Garage. Although Cochran's is a public business, the affidavit specifically notes that it is "open to the public at normal business hours." It is common knowledge that normal business hours are **not** between 10:00 p.m. and 6 a.m.

The court also does not fully accept the prosecutor's argument related to the police inability to guard the garage all night and the risk of evidence tampering being "too great". Apparently, the police did not think there was too great of a risk of evidence tampering because they did not have anyone guarding the garage during the two to three hours after the vehicle was towed from the crash scene and before the search warrant was

obtained and executed.<sup>6</sup> The court also does not think it is very likely that an employee of Cochran's would risk losing his or her job or being charged with evidence tampering by removing evidence tape and breaking into Defendant's vehicle while it was being held at Cochran's overnight.

Nevertheless, the court does not find that the nighttime search was unreasonable or inappropriate in this case. The affidavit suggests a risk from someone from the public, not an employee of Cochran's garage. Although the court does not believe it would be a great risk, there is some small risk that someone from the public, such as a burglar or someone associated with Defendant, would try to break into the vehicle while it was inside Cochran's Garage overnight. Furthermore, under the facts and circumstances of this case, it would make little or no difference whether the warrant was executed during the daytime or at night. This is not a situation where the search would inconvenience sleeping family members or any other individuals in the middle of the night.

Even if there wasn't a reasonable basis for a nighttime search, however, Defendant is not entitled to suppression. A violation of the nighttime search rule does not result in per se suppression. Commonwealth v. Johnson, 462 A.2d 743, 748 (1983). Instead, a violation of the rule will only result in suppression "if the defendant's constitutional rights have been otherwise violated by the search." Id. Here, there has been no such constitutional violation. The affidavit sets forth probable cause to justify the issuance of the search warrant.

Defendant requests disclosure of promises of leniency, immunity or

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<sup>6</sup> The crash occurred shortly after 6:47 p.m. The Magisterial District Judge authorized the search warrant at 9:45 p.m. and the search began at 10:09 p.m.

preferential treatment, as well as complete criminal history information, for all of the Commonwealth's witnesses. The court believes that this request primarily relates to Defendant's other case, as it appears that all of the Commonwealth's witnesses in this case are law enforcement personnel. If, however, there are any witnesses in this case for whom such material exists, the Commonwealth shall provide it to defense counsel within thirty (30) days.

Defendant next requests that the court issue an order requiring the Commonwealth to disclose any evidence which may be admissible at trial pursuant to Pa.R.E. 404(b). In accordance with the court's prior practice, the court will grant this motion and require the Commonwealth to provide such notice no later than the date of the pre-trial, unless the reason for such was discovered afterwards.

Defendant also requests expert discovery. The Court will grant this request in part. The Commonwealth shall provide an expert report and information regarding the expert as set forth in Pa.R.Crim.P. 573(B)(2)(b) and 574(E).

Defendant also requests that the court grant him the right to file additional pre-trial motions since there may be additional discovery that has not been received. The court will grant this request, provided any such motion could not have been filed previously due to the receipt of new or additional discovery.

### **ORDER**

**AND NOW**, this \_\_\_ day of January 2015, upon consideration of Defendant's omnibus pre-trial motion, it is ORDERED and DIRECTED as follows:

1. Defendant's motion to suppress is DENIED.



2. The court believes that Defendant's request for criminal history information and promises of immunity, leniency and preferential treatment related to his other drug case and is moot, since it appears that the witnesses in this case are law enforcement personnel. Nevertheless, if there are any witnesses in this case for whom such material exists, the Commonwealth shall provide this information to defense counsel within thirty (30) days of the date of this order.
3. The court GRANTS Defendant's motion to enter an order requiring the Commonwealth to provide notice of any Pa.R.E. 404(b) evidence. The Commonwealth shall provide such notice no later than the date of the pre-trial, unless the reason for such was discovered afterwards.
4. The Commonwealth shall provide an expert report and any information about its expert witness as would comport with Rules 573(B)(2)(b) and 574(E).
5. The court grants Defendant's motion to reserve the right to file additional pre-trial motions, provided any such motion could not have been filed previously due to the receipt of new or additional discovery.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Edward J. Rymysza, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file