

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA	
COMMONWEALTH	: No. CR-926-2017
	: :
vs.	: :
	: Opinion and Order re Defendant's
	: Motion to Dismiss and/or Suppress
KYLE VICKERS,	: :
Defendant	:

OPINION AND ORDER

This matter came before the court on August 30, 2017 for a hearing and argument on the defendant's Motion to Dismiss and/or Suppress.

By way of background, the police charged the defendant with three counts of driving under the influence of a controlled substance and one count of possession of drug paraphernalia as a result of his vehicle being stopped by the police on January 22, 2017.

The defendant contends that the police lacked reasonable suspicion to stop his vehicle and lacked probable cause to arrest him due to the insufficient basis for the stop.

At the hearing on the defendant's motion, the Commonwealth presented testimony from Officer Clinton Gardner and Officer Nikita Bonnell of the Williamsport Bureau of Police.

On January 22, 2017 at approximately 8:48 p.m., Officer Gardner and Officer Bonnell were on duty and patrolling the area of Williamsport near the Sheetz store located on Maynard Street. Officer Gardner was driving their patrol vehicle with his window cracked open an inch or so.

There were numerous vehicles in the Sheetz parking lot. As the officer drove past a red Ford Focus at the gas pumps, they noticed an odor of burnt marijuana. Officer

Gardner drove to an area close to the adjacent Wendy's. After its passengers exited the Sheetz store and entered the vehicle, the red Ford Focus was driven out of the Sheetz parking lot and it turned right onto Maynard Street. The police officers pulled out of the Wendy's lot to follow the red Ford Focus.

The officers caught up to the red Ford Focus when it was stopped at a traffic light before crossing the Maynard Street Bridge. There were no vehicles between the police and the red Ford Focus, and no one was standing on the bridge.

The officers again noticed the odor of burnt marijuana. The odor continued and did not dissipate while the officers followed the vehicle as it traveled over the Maynard Street Bridge and turned right onto Riverside Drive in South Williamsport. While traveling over the bridge, the speed of both vehicles was "not very fast;" it was approximately 35 miles per hour or less. The officers decided to stop the vehicle to further investigate.

The officers admitted that there were no traffic violations, and the sole basis for stopping the vehicle was to investigate the odor of marijuana.

Officer Gardner approached the driver's side of the vehicle, and Officer Bonnell took a secondary position on the passenger side. As Officer Gardner approached the vehicle, the smell of burnt marijuana became more pronounced. Although he was not certain, Officer Gardner believed that the driver's window was down when he approached the vehicle.

There were four occupants in the vehicle. The driver was identified as the defendant, Kyle Vickers. According to Officer Gardner, the defendant displayed conduct indicative of having smoked marijuana. The defendant's pupils were dilated, his movements

were lethargic, and his responses to questions were delayed.

All of the occupants were investigated. It appeared that the odor of burnt marijuana was consistent amount all of the occupants and was coming from the vehicle. The odor of marijuana never dissipated.

Officer Gardner searched the occupants and the vehicle. He observed marijuana flakes in plain view on the rear floor of the vehicle. A grinder was also found on the rear floor, and a blunt roller was found in the jacket of one of the occupants. Two backpacks were found in the trunk of the vehicle. The defendant claimed one of the backpacks. Inside the defendant's backpack, Officer Gardner found a bong and cigars, as well as bottles and jars with marijuana seeds, stems and residue in them.

None of the items seized from the vehicle, its occupants, or the trunk appeared to the officers to the have been recently used to smoke marijuana.

DISCUSSION

The defendant contends that the officers lacked reasonable suspicion to stop the vehicle that defendant was driving. The defendant's argument is simple. The defendant claims that the officers did not and could not have smelled the odor of burnt marijuana. The defendant claims that the officers are not credible and that their reason for stopping the vehicle was a pretext to illegally stop the vehicle on the hunch or a witch hunt to possibly find evidence of criminal activity because there were "a bunch of young kids" in the vehicle.

Among other things, defense counsel argued that the smelling of the burnt marijuana under the circumstances was "quite outstanding." According to defense counsel, there were other vehicles both parked and in the roadway, it was 45 degrees, it was

nighttime, the windows were in all likelihood closed, there was nothing found in the vehicle showing recent smoking, and it's highly likely that the smell would have dissipated.

The prosecutor argued that the officers had reasonable suspicion to stop the vehicle. Although there were numerous vehicles in the Sheetz parking lot, the officers noticed the odor when they went by the defendant's vehicle. When they parked near the Wendy's, they did not smell the odor of burnt marijuana. They smelled the odor again when they pulled up directly behind the defendant's vehicle. They continued to notice the odor the whole time they were following the vehicle. They were not traveling past residences from which the odor could be emanating; they were on the bridge, crossing over water. No one was standing on the bridge at the time. Therefore, the odor could not have been coming from other houses, pedestrians, or vehicles.

The prosecutor also argued that the odor of burnt marijuana was strong and distinctive. Like the smell of a skunk, the odor was so pervasive that the officers could clearly smell it even if their window was only "cracked" open.

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. Crim. P. 581 (H); *Commonwealth v. Enimpah*, 630 Pa. 357, 106 A.3d 695, 703 (Pa 2014)("A criminal defendant with standing to pursue a motion to suppress in this Commonwealth has a right to compel the prosecution to prove its evidence was not obtained in violation of his constitutional rights, without having to present evidence of his own.").

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. *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).

In order to establish reasonable suspicion, the officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts that lead the officer to believe that criminal activity is afoot. *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673, 677 (1999).

The reasonable suspicion standard is less stringent than probable cause. *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1189 (2004). In determining whether reasonable suspicion exists, the court must give due consideration to the reasonable inferences a police officer is entitled to draw from the facts in light of his experience. *Id.* Because the burden is on the Commonwealth, it must establish by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Bryant*, 866 A.2d 1143, 1145 (Pa. Super. 2005) (quoting *Commonwealth v. DeWitt*, 608 A.2d 1030, 1031 (Pa. 1992)).

This court concludes that the officers' testimony was credible and that they smelled the odor of burnt marijuana coming from the defendant's vehicle, which gave them reasonable suspicion to stop the vehicle. The odor of marijuana is sufficient to establish reasonable suspicion, and even probable cause. See *Commonwealth v. Stoner*, 236 Pa. Super. 161, 344 A.2d 633, 635 (1975)(an odor may be sufficient to establish probable cause).

Both officers testified that they knew and recognized the odor of burnt

marijuana. Both come in contact with it on a weekly, if not daily, basis. While patrolling the area of the Sheetz, they recognized the odor immediately. They drove by at least two different sides of the defendant's vehicle while it was at the Sheetz gas pumps, and the odor of burnt marijuana was pronounced. As they drove away from defendant's vehicle, the odor dissipated.

Once the defendant's vehicle left the parking lot and the officers got closer to it, they again smelled the same odor of burnt marijuana. They continued to smell the odor the entire time that the vehicle traveled on Maynard Street, crossed the bridge and turned on Riverside Drive. Following the stop of the vehicle, the police officers approached the vehicle on foot and the odor became even more pronounced.

The fact that no items were found in any portion of the vehicle to show that the occupants used marijuana immediately prior to their arrival at Sheetz is not dispositive. According to the officers, the drug had a distinctive odor or smell, which came from the vehicle. According to the officers, marijuana could have been smoked in the vehicle hours earlier. This court can and does infer that the strong smell coming from inside the vehicle can, in fact, be long lasting and can emanate from a vehicle even with closed windows. Furthermore, the court cannot accept the argument from the defense that these officers simply made up the story. There was no evidence that these officers knew any of the occupants, no evidence of any profiling, no evidence that the officers had an ulterior motive and no evidence that the officers would risk their relatively short careers for a relatively minor "pot bust."

Clearly, in this case, the officers were doing their job, responded accordingly

and legally stopped the vehicle.

ORDER

AND NOW, this ____ day of September 2017, the defendant's motion to dismiss or, in the alternative, to suppress, is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Matthew Zeigler, Esquire
Gary Weber, Lycoming Reporter
The Honorable Marc F. Lovecchio