

Commonwealth v. Truax
Commonwealth v. Hess

COMMONWEALTH OF PENNSYLVANIA
v. GARY DAVID TRUAX, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action, No. 168 of 2004
and
COMMONWEALTH OF PENNSYLVANIA
v. MARTIN ALBERT HESS, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action, No. 169 of 2004

Search and seizure; Investigative detention; Authority of Wildlife Conservation Officers

1. Three levels of contact between law enforcement officers and citizens are recognized according to their degree of intrusiveness pursuant to the United States Constitution and Article I, Section 8, of the Pennsylvania Constitution: a mere encounter or request for information (which does not constitute a seizure), investigative detention, and custodial detention or arrest.
2. An investigative detention must be supported by reasonable and articulable suspicion that criminal activity is afoot.
3. A Wildlife Conservation Officer has the authority, when acting within the scope of his employment, to pursue, apprehend or arrest any person suspected of violating the Crimes Code or any other offense classified as a misdemeanor or felony if that offense occurs in the officer's presence.
4. A Wildlife Conservation Officer who approached a car parked on State Game Lands and saw inside an open beer can near the front seat between two adults and a person in the back seat who appeared to be under the drinking age, had reasonable suspicion to believe that the crime of corruption of a minor (a misdemeanor) was in progress and therefore his investigative detention of the car and its occupants while awaiting the arrival of a State Forestry Officer was constitutional.

Appearances:

Dwight C. Harvey, Esq., *District Attorney*

Tamela Mellott Bard, Esq., *Counsel for Defendant Gary David Truax*

Travis L. Kendall, Esq., *Counsel for Defendant Martin Albert Hess*

OPINION

Herman, J., April 15, 2005

Introduction

Before the court are motions to suppress filed by each defendant. The defendants are to be tried together because the charges against them arose from the same incident and have the same factual underpinnings. The court held a hearing on the motion and directed counsel to submit written argument. These have been received by the court and the matter is ready for decision.

Background/Undisputed Facts

At 9:02 p.m. on September 11, 2004, while on routine patrol on state forest lands in Fulton County, Wildlife Conservation Officer Travis Pugh of the Game Commission saw a car parked along an unmarked lane in the woods near a communications tower approximately 50 meters off Fire Tower Road. Officer Pugh knew that, although Fire Tower Road is open to vehicle traffic, the state game lands through which the road passes are not open to traffic unless posted otherwise under Title 17 of the Pennsylvania Code governing state forests. Officer Pugh also knew from personal experience that the area had been the site of underage drinking, vandalism, poaching, trespassing, drug activities and the dumping of a human body.

Officer Pugh, who was in uniform, approached the car and identified himself. He asked the driver (later identified as Gary Truax) if everything was okay. Both Truax and the front seat passenger, Martin Hess, told Officer Pugh that everything was okay. Truax and Hess appeared to be in their late 20's or early 30's. Officer Pugh saw an open beer can between the two front seats. He also noted a male seated in the rear who appeared to be well below the drinking age. Hess told Officer Pugh he was having relationship problems with his wife and simply needed some time to think about things.

Officer Pugh found this explanation for the car's unauthorized presence in the wooded area unconvincing. He asked the occupants for identification, license, registration and insurance information. The male in the rear seat had no identification, but gave a birth date indicating he was 15 years old. Hess, the front seat occupant who was also the car's owner, had no insurance information with him, but did produce a license and registration information. When Officer Pugh did a computer check on the vehicle registration, he learned it had been suspended for lapsed insurance. Truax, the driver, produced a driver's license. Officer Pugh learned from checking the license that it was suspended.

Officer Pugh concluded that the occupants must have arrived at the game lands by way of a public highway, despite the fact that none of them would have been legally able to drive there. Officer Pugh did not smell alcohol or marijuana during his discussion with the occupants, nor did he note any signs of intoxication or furtive movements. The open beer can in the presence of a juvenile was a matter of concern to him. At 9:10 p.m., Officer Pugh contacted Forestry Officer Robert Shawn Lynn of the Forestry Bureau, the law enforcement officer with primary jurisdiction over offenses committed on state forest lands.

Officer Pugh returned to the subject vehicle and told the occupants that he had learned of Truax's suspended license and the car's invalid registration and that Forestry Officer Lynn would be arriving shortly. Officer Pugh did not return either Hess's license and registration nor Truax's license. He did not tell them they were free to leave, and in fact testified that it was his intention to keep the occupants in his presence until Officer Lynn's arrival.

Officer Lynn arrived at approximately 9:26 p.m., 16 minutes after Officer Pugh's call. He was in uniform. After discussing the situation with Officer Pugh, he introduced himself to the occupants and asked them to exit the car one at a time for a weapons check. The juvenile began to exit first. At that point, both officers saw an open beer can containing beer between his feet on the floor. Officer Lynn asked him if the beer was his and he answered "yes." Officer Lynn asked him where he obtained the beer and the juvenile answered that he had stolen it from the two adults and had drank only a sip.

Hess was the next occupant to exit the car. As he left the front passenger seat, the officers saw a pipe stuck between the front seat and the open passenger side door. The officers recognized it as the type of pipe used to smoke marijuana. (Commonwealth exhibit #2: two photographs of the pipe as observed in the car.) Without giving Hess *Miranda* warnings, Officer Lynn asked him if he knew what the pipe was.¹ Hess answered that he did. Officer Lynn then asked Hess if it belonged to him and Hess said yes. Officer Lynn asked Hess if there were any drugs in the vehicle and Hess replied that there was a container with a small amount of marijuana under the passenger seat. Upon request, Hess consented to having the officers search the car and signed a consent form provided to him by Officer Pugh. (Commonwealth exhibit #3.) Officer Lynn found the container of marijuana under the passenger seat. Neither defendant was formally placed under arrest that evening. Because neither Hess, Truax nor the juvenile were legally able to drive, it was eventually necessary for them to arrange for a ride home from other persons.

Two days later, Officer Lynn asked Hess to come to his office to talk about the incident. Hess was given *Miranda* warnings and signed a written confession in which he admitted to smoking marijuana with Truax on the night in question. (Commonwealth exhibit #4.) Officer Lynn spoke with Truax by phone three days later. Truax admitted that he smoked marijuana in the car on the night in question. He made this admission without having received *Miranda* warnings.

Hess was charged with possession of a small amount of marijuana, possession of drug paraphernalia, and operating a motor vehicle without the required financial responsibility. Truax was charged with possession of a small amount of marijuana, possession of drug paraphernalia, and driving while operating privilege is suspended or revoked. Both defendants were also charged with corruption of a minor, a misdemeanor of the first degree.

Discussion

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures. Article I, Section 8 states: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

The Pennsylvania Supreme Court has held that, for purposes of determining whether a seizure of the person has occurred under the United States Constitution or Article I, Section 8, three levels of contact between law enforcement officers and citizens are recognized according to their degree of intrusiveness. Commonwealth v. Ellis, 662 A.2d 1043 (Pa. 1995); Florida v. Bostick, 501 U.S. 429 (1991); Florida v. Royer, 460 U.S. 491 (1983). The first level of interaction is a "mere encounter" or request for information which need not be supported by any amount of suspicion and imposes on a citizen no compulsion to stop or respond. In other words, a mere encounter does not constitute a "seizure."

The second level of interaction is an "investigative detention." This contact subjects a citizen to a stop and a period of detention, but does not entail the kind of coercive conditions which are equivalent to an arrest. An investigative detention must be supported by reasonable suspicion. Ellis, supra; Berkemer v. McCarty, 468 U.S. 420 (1984); Terry v. Ohio, 392 U.S. 1 (1968). The highest level of contact is a "custodial detention" or an arrest which must be supported by probable cause. Ellis, supra; Dunaway v. New York, 442 U.S. 200 (1979). The Commonwealth has the burden of proving by a preponderance of the evidence that a warrantless seizure was not an unconstitutional intrusion. Pa.R.Crim.P. 323(h); Commonwealth v. DeWitt, 608 A.2d 1030 (Pa. 1992).

First we note both defendants concede Officer Pugh had the legal authority to approach the car to inquire about the occupants' welfare. This initial contact constituted a mere encounter and, as such, required no level of suspicion. The court and the Commonwealth agree with this perspective.

Second we note that there is no dispute that the contact between Officer Pugh and the car's occupants rose to the next level of intrusiveness -- an investigative detention -- when he retained their documentation while awaiting Officer Lynn. The Commonwealth concedes that the circumstances surrounding Officer Pugh's requests would have caused a reasonable person to believe he was not free to refuse Officer's Pugh's requests or to leave the area. Officer Pugh was in uniform and approached the car after nightfall in a secluded area. Once he obtained their documents and walked to his vehicle to run a computer check on the information, the defendants were unable to leave. Certainly the defendants remained seized for purposes of the Fourth Amendment and Article I, Section 8 when Officer Pugh retained their documents, told them that another officer was on the way and did not tell them they were free to leave. The question for the court is whether this investigative detention was constitutional.

The defendants argue that once the occupants told him that everything was okay, Officer Pugh had no authority to continue the contact by requesting identification, registration and proof of insurance, or by retaining those documents until Officer Lynn's arrival. They point out that Officer Pugh did not smell either alcohol or drugs, no one in the car appeared to be under the influence, nor did he observe furtive movements or the instrumentality of a crime. Therefore they contend the detention illegal because it was not supported by a reasonable and articulable suspicion that criminal activity was afoot. Commonwealth v. Dales, 820 A.2d 807 (Pa.Super. 2003); Commonwealth v. Phinn, 761 A.2d 176 (Pa.Super. 2000). The defendants also argue that, as a wildlife conservation officer, Officer Pugh lacked the authority to conduct any investigative detention.

The Commonwealth maintains that the detention was indeed supported by a reasonable and articulable suspicion of criminal activity. We certainly agree with the Commonwealth that Officer Pugh had reasonable suspicion that one or more of the occupants had committed one or more **summary** offenses. The Motor Vehicle Code prohibits the driver or occupant of a vehicle from possessing an open alcoholic beverage container. This is a summary offense under the Motor Vehicle Code. 75 Pa.C.S.A. §3809. Also, the car was parked in the woods approximately 50 meters off a roadway, an area which was not posted to allow access by traffic. Officer Pugh had reason to suspect that this was a violation of 17 Pa.Code

§21.21(b)(2) which sets out rules and regulations promulgated by the Department of Conservation and Natural Resources pertaining to state forests. "...Operation of motor vehicles on State Forest land in the following manners is prohibited: ...Driving on roads, trails or other areas not specifically designated and posted for motor vehicle traffic unless authorized in writing by the District Forester or a designee." Although Fire Tower Road is open to traffic, state game lands are not open to vehicle traffic unless posted otherwise. It is a summary offense to violate rules regarding conduct on Commonwealth property, specifically rules promulgated by the Game Commission, if those rules are posted in a reasonably visible manner. 18 Pa.C.S.A. §7506.

Game and Wildlife Code enforcement officers have specific powers set forth in 34 Pa.C.S.A. §901. Such officers can "demand and secure identification from any person." §901(a)(14). They can also "enforce all the laws of this Commonwealth and regulations promulgated thereunder relating to fish, boats, parks and forestry and other environmental matters, under the direction of those agencies charged with the administration of these laws." §901(a)(15). In addition, "when acting within the scope of the officer's employment, pursue, apprehend or arrest any individual suspected of violating any provision of Title 18 (relating to crimes and offenses) or any other offense classified as a misdemeanor or felony..." §901(a)(17). "A wildlife conservation officer may arrest for...misdemeanors or felonies when the offenses occur in the officer's presence and while acting within the scope of the officer's employment." 58 Pa.Code §131.6.

We agree with the defendants that section 901 does not authorize a game enforcement officer to stop, investigate, apprehend or arrest persons for **summary** offenses under the Motor Vehicle Code. The case authority has interpreted such an officer's authority as being that which is necessary and germane to carrying out duties within the scope of his employment for the Game Enforcement Commission. Commonwealth v. Carlson, 705 A.2d 468 (Pa.Super. 1998); Commonwealth v. Palm, 462 A.2d 243 (Pa.Super. 1983). Our agreement with the defendants on this point does not win the day for them, however. That is because, even in Carlson, the Superior Court recognized that a wildlife conservation officer has the authority to **arrest** (not just detain) a person for a misdemeanor, as long as the officer is acting within the scope of his employment. Id. at 470. There is no allegation here that Officer Pugh was acting outside the scope of his employment with the Game Commission when he approached the car off Fire Tower Road.

The case of Commonwealth v. Schatzel, 724 A.2d 362 (Pa.Super. 1998) cited by the Commonwealth further undercuts the defendants' position. In Schatzel, game officers came upon an apparent drunk driver, asked him for his license, registration and keys, immediately called the state police and waited (without taking the driver into custody or threatening force) until the state police arrived. The court held that the game officers acted properly in conducting an investigative detention because drunk driving is a misdemeanor, thereby giving the game officers specific authority under section 901(a)(17).

Officer Pugh saw an open beer can between the two front seats where the adults were situated, and a back seat passenger whom he had probable cause to believe was below the drinking age. Although possessing the open alcohol container is merely a summary offense, the juvenile's presence in the car with the open alcohol container under the adults' control formed the basis for concluding that probable cause existed for the charge of corruption of a minor, which is a **misdemeanor of the first degree**. 18 Pa.C.S.A. §6301(a)(1). The open beer can possessed by adults in the presence of a juvenile is indeed, contrary to the defendants' contention, the "instrumentality of a crime." These three pieces of evidence gave Officer Pugh not just a reasonable suspicion that a crime is being committed, but probable cause, with that crime being the corruption of a minor. This gave Officer Pugh the authority to initiate an investigative detention by asking for identification and documentation. Schatzel, supra. See also Commonwealth v. Campbell, 862 A.2d 659 (Pa.Super. 2004) [all vehicle passengers, as well the driver, who are the subject of a legal traffic stop have no reasonable expectation of privacy to their names or identities, regardless of whether there is reasonable suspicion that the passengers are engaged in criminal activity; 75 Pa.C.S.A. §6308(b)]. Officer Pugh likewise had the authority to continue the status quo by retaining the occupants' documentation until Officer Lynn's arrival no more than 16 minutes after receiving Officer Pugh's call. Officer Pugh was aware that his jurisdiction was secondary and acted properly in immediately contacting Officer Lynn for further investigation. Schatzel, supra; Carlson, supra. We are satisfied that the Commonwealth has proven by a preponderance of the evidence that Officer Pugh had probable cause to believe that the defendants had committed the crime of corruption of a minor.

Having concluded that Officer Pugh acted properly in initiating and maintaining the investigative detention until Officer Lynn's arrival, we next examine Officer Lynn's actions at the scene. After introducing himself to the car's occupants, Officer Lynn ordered them out of the car. His purpose was to conduct a weapons search in order to ensure the safety of himself, Officer Pugh, and the occupants. Even if he lacked articulable grounds for believing they might be armed and dangerous, Officer Lynn had the authority to order the occupants from the car for safety purposes. Commonwealth v. Rodrigue, 695 A.2d 864 (Pa.Super. 1997); Pennsylvania v. Mims, 434 U.S. 106 (1977). The defendants do not raise any constitutional challenges to Officer Lynn's actions in this regard.

Next we address the defendants' contention that Hess's consent to the vehicle search was not voluntary. A consent is valid if given freely, specifically, unequivocally and voluntarily. This is determined on a case-by-case basis by examining the totality of the circumstances surrounding the giving of consent. Commonwealth v. Washington, 651 A.2d 1127 (Pa.Super. 1994).

The defendants contend that Hess did not give the officers consent to search his car in a manner which satisfies Washington, *supra*. The defendants point to the following factors: Hess signed the consent form after exiting the car as requested and his license and (invalid) registration had not yet been returned to him. Truax was still without his (suspended) driver's license. Obviously the 15-year-old juvenile had no driver's license at all. It was nighttime in a wooded area and both officers were in uniform. Only after the officers searched the car and found the beer can in the back seat, the pipe and marijuana were the defendants and the juvenile given a phone to obtain transportation home. The defendants argue that the totality of these circumstances rendered Hess's consent involuntary. We disagree.

There is no evidence that these defendants were subjected to any measurable level of duress or coercion. The officers used no unusual force, nor did they draw their guns, shine bright lights in the defendants' eyes, or display other instruments of coercion designed to compel Hess's consent. In addition, the consent form which Hess signed that evening was brief and contained plain, non-technical language as to his right to refuse consent to the search, and stated that any evidence seized might be used against him in any legal proceeding. The form also states that the consent is being given voluntarily and without threats or promises of any kind. The Commonwealth has met its burden of proving by a preponderance of the evidence that Hess's consent was given freely, specifically, unequivocally and voluntarily.²

Finally the defendants argue that their subsequent confessions were the ultimate result of the initial illegal detention by Officer Pugh and therefore must be suppressed under the fruit-of-the-poisonous-tree doctrine. Wong Sun v. United States, 371 U.S. 471 (1963). Their argument fails for two reasons. First and foremost, we have already found that Officer Pugh had reasonable suspicion or probable cause to detain the defendants. Secondly, Hess, who was not even arrested on the night in question, went to Officer Lynn's office at his request two days later and gave a written statement after receiving *Miranda* warnings. Truax made an incriminating statement to Officer Lynn a few days later. Although he made his statement without receiving *Miranda* warnings, his conversation with the officer was made over the telephone, not while he was in custody, and therefore *Miranda* does not apply.

The court will deny the defendants' motions to suppress. An appropriate Order of Court is attached.

ORDER OF COURT

Now this 15th day of April 2005, the Court hereby denies the motions to suppress filed by defendants Gary David Truax and Martin Albert Hess.

¹Miranda v. Arizona, 384 U.S. 436 (1966).

²Neither defendant's brief directly addresses the fact that Officer Lynn did not give the defendants Miranda warnings at the scene. That issue is raised only tangentially, with the focus instead being the alleged illegality of Officer Pugh's conduct. We therefore find that the defendants have waived the Miranda issue as to the events of the night in question.