COMMONWEALTH V. WILSON, C.P. Franklin County Branch, No. 382 of 1989

Driving under Influence - Warrantless Search - Vehicle Plain Smell Doctrine — Trafficway

1. The Courts recognize a different standard for a warrantless search of an automobile compared to a house.
2. The deciding factor in determining whether a warrantless search of a vehicle is constitutionally permissible is the existence of probable cause.
3. Where a police officer is justified in being where he is , his detection of an odor is sufficient to establish probable cause.
4. If a parking lot is open to the public, even if restricted by signs marked private, if it is used by members of the public, it is a trafficway for purposes of DUI charges.

David W. Rahauser, Assistant District Attorney, Counsel for the Commonwealth
E. Franklin Martin, Esq., Counsel for the Defendant

OPINION AND ORDER

KELLER, P.J., November 9, 1989:

The defendant, Jerry L. Wilson, was charged with driving under the influence. A preliminary hearing was held before Justice of the Peace James Campbell on May 25, 1989, and the matter was bound over for court. The defendant waived arraignment on August 16, 1989, and entered a plea of not guilty. The case is scheduled for trial at the November Term of Court which commences on November 14, 1989.

On September 15, 1989 the defendant filed an Omnibus Pre-Trial Motion to suppress evidence on the grounds that the defendant's arrest was illegal. On the same date an order was entered directing the issuance of a rule upon the District Attorney to show cause why the prayer of the petition should not be granted. The rule was made returnable October 10, 1989 at 1:30 o'clock p.m. Hearing was held as scheduled. Counsel for the defendant explained to the Court that the sole issue raised by the defendant's motion to suppress was whether the law-enforcement officers' entry into the defendant's truck parked upon a private parking lot with public

OWNER OR REPUTED OWNER	DESCRIPTION	UPSET PRICE
RESSLER, Percy A. & Mary Kay	23 Q-8-91 10208 Calimer Drive	360.74
ROWE, Jerry A. & Cathy L.	23 Q-19-287 13858 Lowr Edgemont Rd.	1,441.44
ROWLAND, Raymond S. Jr. & Brenda	23 Q-19F-88A 12041 Snyder Ave.	145.59
TAYLOR, John & Diane	23 Q-20-176 14090 Old Rte. 16	2,003.16
THARP, Ronald E.	23 Q-19F-27-LO TR 1978 Witchcraft	834.71
THARP, Ronald E. & Grace V.	23 Q-19F-27 13564 Waterloo Road	197.68
TOMS, Phyllis	23 Q-19F-79-LR TR 1980 Bristol	610.27
TRIESH, John	23 Q-5-14-48 TR 1982 Derose	947.55
	WAYNESBORO BORO.	
BAKER, William B.	25 5B-49-56 311 N. Potomac Street	286.72
CROSS, Edith J.	25 5B-49-67 255 Wayne Avenue	109.41
CROSS Edith J.	25 5B-49-68 253 Wayne Avenue	724.55
GUYER, Larry Gene & Mary Lou	25 5B-57-41 121 N. Potomac Street	1,183.33
HENSON, Joseph E. Jr. & Sylvia M.	25 5B-57-115 3 W. King Street	2,145.77
KENNEDY, Jerome L. Sr. & Cherly C.	26 5C-15-101 212 W. Fourth Street	859.22
KING, George W. Jr. & Nancy M.	26 5C-38-5 905 Fairview Ave.	3,263.61
KOONTZ, George C. & Gladys	25 5B-57-88A 110 N. Church Street	753.79
MCINTIRE, Charles II & Beverly	26 5C-23-41 132 W. Fifth St.	2,119.28
OWENS, William C. & Charla Y	25 5B-49-87 232 Wayne Ave.	1,003.14
REDMAN, Albert III	26 5C-7-91 314 Cleveland Avenue	462.83
SHADE, Travis L. & Angela S.	26 5C-39-17 551 Maple Street	1,683.77
SMITH, Terry L. & Dawn M.	25 5A-56-18 222 N. Grant Street	2,808.75
SNADER, David E.	24 5D-17-58 150 E. Second Street	1,111.49
WAGAMAN, Paul L.	26 5C-14-85 420 W. Fifth Street	1,614.20
WEST, Harvey D. Jr. Elizabeth A.	26 5C-7-87 226 Ridge Avenue	230.86
WEST, Harvey D. Jr. & Elizabeth A.	26 5C-7-88 228 Ridge Avenue	1,666.20
WISHARD, Daniel	25 5A-56-115A 46 N. Franklin Street	462.28
WYCKD, James W.	26 5C-8-79 139 W. Second Street	549.86
ZENTMYER, M. Steven & Paula K.	24 5C-24-31 220 Ringgold Street	892.33
	ORRSTOWN BORO.	
DIEHL, Gary S. & Cathy L.	28 7A-13-21 3599 Orrstown Rd.	1,016.25

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 11th day of June, 1990, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, as amended, is R.J.H. Investment Group, Inc. The purpose for which the corporation has been organized is to engage in and do andy lawful acts concerning any or all lawful business for which corporations may be incorporated under the Commonwealth of Pennsylvania Business Corporation Law.

Patrick J. Redding
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Chambersburg, PA 17201

7/27/90

access did not constitute an illegal search without probable cause, rendering the arrest of the defendant illegal and requiring the suppression of all evidence secured as a result of that arrest. The Court was assured that the defendant was not challenging the existence of probable cause for arrest, subsequent to the time the officers opened the window of the defendant's pickup truck.

FINDINGS OF FACT

1. Officers Jeffrey R. Lingle and Gerald Worthington of the Borough of Shippensburg Police Department were on routine patrol in the Borough of Shippensburg at about 3:45 a.m., April 9, 1989.

2. The officers received a radio call from County Control advising that firemen from the fire station opposite the parking lot of Affiliated Industries had observed a vehicle with its lights on and motor running on the parking lot when they were dispatched from the fire station and quite some time later when they returned they observed the same vehicle in the same position and condition was still there. The police officers were directed to investigate that vehicle.

3. The police officers found a Datsun pickup truck located on the Affiliated Industries parking lot with its engine running and all lights on. They observed a full, unopened can of beer lying on its side outside the pickup truck and directly below the door handle, and several inches toward the rear of the truck there was a less than half full 12 oz. cup which was determined to contain beer.

4. The officers pulled up behind the pickup truck and called County Control to report the registration plate number, and that they were going to approach the vehicle.

5. Both officers observed that there was a white male seated on the driver's side of the pickup truck behind the wheel. He was sitting up but with his head "Cocked" to the left and appeared to be asleep. The officers shouted, knocked on the window, banged on the top of the truck, and shook the truck numerous times while yelling "hey", "wake up", "unlock the door", and "police".

6. Both doors to the vehicle were locked and the windows closed. The officers observed that two or three times the occupant appeared to open his eyes; rather feebly wave and then close his eyes again. They observed that his eyes were glassy, he was slobbering, his fly

was open, and his clothing was in disarray.

7. The officers were in uniform and when they attempted to arouse him they would shine their flashlights on the interior of the truck cab, and when they called that they were police would flash their lights on themselves so that the occupant could see that they were in uniform.

8. The officers observed a sliding window in the back of the cab of the pickup truck, and discovered that it was not locked. When the sliding window was opened, both officers detected the strong odor of alcohol coming from the cab of the truck.

9. Office Lynch got in the bed of the pickup truck and reached through the rear window in an effort to unlock the passenger door. The occupant of the vehicle grabbed his arm; they struggled and the officer pulled the occupant's arm through the rear window. When the occupant swung at him several times, he placed a handcuff on that arm. The occupant then attempted to come out of the cab through the rear window. but couldn't fit. Officer Worthington held the occupant's arm while Officer Lingle reached through the rear window and unlocked the door on the passenger side of the truck.

10. Both officers assisted the occupant out of the truck. They had to support him to get him to the police cruiser. They observed that he had the odor of alcohol on his breath, that he had urinated in his pants, and was incoherent.

11. Officer Worthington turned off the engine of the truck; removed the keys; turned off the lights and secured the vehicle.

12. After the officers placed the occupant in the police cruiser, they advised him they were arresting him for driving under the influence.

13. The occupant was identified as the defendant, Jerry L. Wilson.

14. The parking lot of Affliated Industries is a private parking lot not open to the public. However, there is public access to the parking lot from the public streets, and people do use the parking lot as a means of approaching the rear of houses fronting on Lurgan Avenue in the Borough of Shippensburg.

The courts have long recognized that a different standard is to be applied when examining the propriety of a warrantless search of an automobile as compared to the standard for a warrantless search of a

house. The primary concern prompting the dual standard is that since a motor vehicle is mobile, evidence may often be transported out of reach if the police are required to secure a warrant before they are permitted to search. *Commonwealth v. Stoner*, 236 Pa. Super. 161, 344 A.2d 633 (1975).

The deciding factor in determining whether a warrantless search of a motor vehicle is constitutionally permissible is the existence of probable cause. *Id.*

In *Stoner*, when the officer reached into the car to get the gun out of the glove box, he smelled a strong odor of marihuana coming from inside the car. The Supreme Court of the United States has held that an odor may be sufficient to establish probable cause. *Id.*

The government touched upon the theory sometimes advanced that the courts should acknowledge a "plain smell" concept analogous to that of plain view doctrine, and hold where an officer is justified in being where he is, his detection of an odor is sufficient to establish probable cause. *Commonwealth vs. Stainbrook*, 324 Pa. Super. 410, 471 A.2d 1223 (1984), *Stoner* at 161.

The Superior Court of Pennsylvania has adopted the "plain smell" doctrine. *Stoner* at 161. Before the officer could rely upon his olfactory sense for probable cause, he would have to justify his presence at the place where he detected the odor, just as he would have to justify his presence at the place from which he saw the contraband in order to rely on the doctrine of plain view. We find no distinction of substance between leaning down and turning the head to view articles inside an automobile which would come within the plain view doctrine, and leaning down and sniffing to detect an odor of alcohol by the use of ordinary senses while standing in a place where the officer had a right to be.

In the present case, it is undisputed that the police officers' presence in the parking lot was justified as part of their routine patrol. They were justified in approaching the vehicle. When the police tried to wake up the defendant, he would only briefly open his eyes then would lapse into whatever state he had been in. The officer had a duty to investigate, to make sure the driver was physically alright. That duty entailed getting into the truck to check on the defendant. Defendant admits the officers were acting as good

samaritans, he also admits they had a duty to make sure that the defendant didn't have a medical problem, and had they just left when they couldn't arouse the defendant, there might have been civil liability. Therefore, the officers were justified in being there and also for opening up the window to the truck since the doors were locked and defendant appeared to be unconscious. Once they opened the window the plain smell doctrine came into being, and it would have been a dereliction of duty for the officers to ignore the obvious aroma of an alcoholic beverage which they are trained to identify.

It would be totally unreasonable to expect the police to determine that the defendant was not ill, but was under the influence; and then lock the truck, back up and leave an individual who appeared intoxicated in a position where he could wake up and drive away. Under the circumstances the officers reacted in a positive manner to the evidence plainly before them. Therefore, we find there was probable cause to search the truck and arrest him for driving under the influence.

In *Commonwealth vs. Kriner,* 234 Pa. Super. 230, 338 A.2d 683 (1975), the facts of the case are similar to the present case. In *Kriner,* an officer of the Chambersburg Police Department was ordered to proceed to investigate a vehicle which was parked a short distance beyond the borough line. He observed the motor was running, the lights were on, and a person was seated behind the wheel. The person appeared unconscious so the officer opened the door to see if the individual was breathing. He detected a strong odor of alcohol. As a safety measure he turned off the motor and then radioed the State Police. The State Police came, determined the operator was under the influence and arrested him. The Superior Court held the arrest invalid. Their reasoning was the officer knew he was outside his jurisdiction and unable to arrest the defendant, but he felt compelled for safety reasons to turn off the motor with the result that the arresting trooper was unable to see the defendant operate his automobile. The court held the arrest invalid because a misdemeanor, such as drunk driving, must be committed in the officer's presence for him to have probable cause. From the Superior Court's comments we can conclude that if the Chambersburg officer had been within his jurisdiction, the arrest would have been valid. *Id.*

The second problem is whether Affiliated Industries' private parking lot is a "highway or trafficway".

Driving under the influence of alcohol is defined as a "serious traffice offense", which must be committed on a highway or a trafficway.

A highway is defined as:

> The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. The term includes a roadway open to the use of the public for vehicular travel on grounds of a college or university or public or private school or public or historical park. 75 Pa. C.S.A. §102 (Purdon 1977).

A trafficway is defined as:

> The entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom: 75 Pa. C.S.A. §102 (Purdon 1977).

Common Pleas Courts have generally held that a party may be convicted of driving while under the influence while in a parking lot. If a parking lot is open to the public and vehicular traffic does occur on it, it then falls within the definition of trafficway. *Commonwealth vs. Wilson,* Pa. Super. , 553 A.2d 452 (1989). The rationale is, of course, to afford protection to the public from serious traffic offenses.

In *Commonwealth Department of Transportation vs. Bendik,* 112 Pa. Commw. Ct. 591, 535 A.2d 1249 (1988), the Commonwealth Court determined a motel parking lot was a trafficway. The Legislature obviously intended parking lots to be included in the definition of trafficway. A statutory construction that parking lots, in which vehicular traffic is encouraged and occurs, are "DWI-free-zones", in which drunk driving is tolerated from entrance to exit, would seriously undermine the effectiveness of any drunk driving prohibitions. *Id.*

If a parking lot is open to the public, even if restricted by signs

marked private, if it is used by members of the public, it is a trafficway for purposes of drunk driving. *Wilson* at 452

The parking lof of Affiliated Industries is a private parking lot not open to the public, but there is public access to the lot from the street. People do use this parking lot as a means of approaching their houses. The parking lot is used for vehicular traffic by the public. Therefore, we find it is a trafficway within the definition as stated in 75 Pa. C.S.A. §102.

ORDER

NOW, this 9th day of November, 1989, the Omnibus Pre-Trial Motion to Suppress is denied.

Exceptions are granted the defendant.

MYERS V. MYERS, C.P. Franklin County Branch, Eq. Doc. Vol. 7 Page 510

Equity - Jurisdiction - Arbitration Clause

1. The Court does not have jurisdiction in a case requesting a partnership accounting where the partnership agreement provides for arbitration to resolve any controversy or claim arising out of or relating to the agreement.

William S. Dick, Esquire, Attorney for Plaintiff
J. McDowell Sharpe, Esquire Attorney for Defendant

OPINION AND ORDER

WALKER, J., October 13, 1989:

STATEMENT OF FACTS

Defendant, John Richard Myers, and plaintiff's husband, Eugene G. Myers, were partners engaging in the business of the Lehmaster Elevator Company, under and pursuant to the written agreement