

**Commonwealth of Pennsylvania v. Megan Fickes, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action  
No. 1403 - 2013

HEADNOTES

*Criminal Law; Sheriffs' Scope of Authority*

1. Sheriffs have the same arrest authority as private citizens, meaning they have the common law authority to make warrantless arrests for felonies and for breaches of the peace committed in their presence.
2. Sheriffs can arrest for violations of the vehicle code committed in their presence that amount to breaches of the peace as long as the arresting sheriff has had the same type of training as a municipal police officer.
3. Sheriffs can issue summonses for summary offenses based on information received from witnesses.

*Criminal Law; Probable Cause to Conduct a Warrantless Arrest*

1. A warrantless arrest is constitutional if the arresting officer had probable cause at the time of the arrest.
2. To determine whether probable cause exists, the totality of the circumstances must be examined.

*Criminal Law; Public Drunkenness*

1. A defendant is guilty of public drunkenness if he appears in a public place manifestly under the influence of alcohol, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.
2. A defendant is manifestly under the influence if he is exhibiting some aberrant behavior.

*Criminal Law; Disorderly Conduct*

1. The mens rea requirement for the crime of disorderly conduct is that a defendant intentionally or recklessly created a risk or caused a public inconvenience, annoyance or alarm.

**Appearances:**

Zachary Mills, Esquire., *Assistant District Attorney*

Scott Arnoult, Esquire., *Attorney for Defendant*

OPINION AND ORDER OF COURT

Before Van Horn, J.

**STATEMENT OF THE CASE**

The above captioned Defendant, Megan Fickes, was arrested on June 21, 2013 by Deputy Sheriff Jonathan Nalewak and charged with two counts of Driving Under the Influence (DUI).<sup>1</sup> The matter now comes before the Court upon Defendant's October 11, 2013, Omnibus Pretrial Motion for Suppression of Evidence and Dismissal of Charges. In her Motion, Defendant argues that her arrest was illegal because Deputy Sheriff Nalewak did not have the authority to arrest her; therefore, all subsequently obtained evidence should be suppressed.

**BACKGROUND**

The issue of a sheriff's authority to arrest comes before us now under a unique set of circumstances. On June 21, 2013, Deputy Sheriff Jonathan Nalewak was accompanied by Deputy Sheriff Jeffrey Sarver (hereinafter "Sheriffs/Deputies"). The two were travelling south on Letterkenny Road in an unmarked blue vehicle. They were returning to the Courthouse after dropping off prisoners at the Franklin County Jail. It is important to note that Deputy Sarver

<sup>1</sup> 75 Pa. C.S. § 3802(b); 75 Pa. C.S. § 3802(a)(1).

had served as a Pennsylvania State Police Officer for twenty-one years before becoming a Sheriff in January, 2013.

As the Deputies were driving, they approached a crest in the road and observed a Jeep Cherokee straddling the fog line of the southbound lane with its four-way flashers on. There was limited room on the road's shoulder, and consequently most of the vehicle remained in the southbound lane. The Deputies noticed Defendant standing at the rear of the Jeep. As they approached her, Deputy Sarver rolled down his window and asked if she needed assistance. Defendant informed them that she was out of gas and did not have a cellphone. Deputy Sarver asked Defendant if she would like to use his cell phone and she said "fine." Defendant then sat in her vehicle to have a cigarette and use Deputy Sarver's phone. While Defendant was in her vehicle, Deputy Sarver leaned in and smelled a strong odor of alcohol. He also noticed her bloodshot eyes and slurred speech. Defendant told him that she had gone to the Jolly Cork and had two double gin and tonics before going to the Franklin County Jail to visit her boyfriend. She was now on her way home. Deputy Sarver concluded that Defendant had been driving under the influence and instructed her to wait in the car.

By this time, Deputy Nalewak had turned on his emergency lights for safety purposes as Defendant's Jeep was in a dangerous location. Deputy Nalewak then made contact with Defendant and agreed that she was under the influence of alcohol. He also took Defendant's driver's license and ran her information. Both Deputy Nalewak and Deputy Sarver determined that the terrain and the surrounding circumstances were not appropriate for conducting field sobriety tests. Although both Deputies agreed that Defendant had bloodshot eyes, slurred speech and smelled like alcohol, neither of them recalled Defendant staggering.

Eventually, Defendant's Mother ("Mother") and Step-Father arrived at the scene with gasoline for her Jeep. Mother testified that when she arrived she observed the Deputies talking and laughing with Defendant. The Deputies told Mother to put gas in her car. An argument ensued between Defendant and Mother, and Mother asked the Deputies repeatedly to take Defendant into custody. Mother testified that she was very angry with Defendant, but Defendant did not raise her voice, threaten anyone, or create any unreasonable noise. Deputy Nalewak also testified that Defendant stepped backwards a few times to maintain her balance when she was speaking with Mother. After the Deputies talked with Mother, they arrested Defendant and took her to the hospital for a blood test.

## DISCUSSION

### I. Sheriffs' Authority to Arrest Generally

This case represents the continued struggle of our Supreme Court to define with clarity our county sheriffs' scope of the authority. *See Commonwealth v. Marconi*, 64 A.3d 1036 (Pa. 2013); *Commonwealth v. Dobbins*, 934 A.2d 1170 (Pa. 2007); *Kopko v. Miller*, 892 A.2d 766 (Pa. 2006); *Commonwealth v. Lockridge*, 810 A.2d 1191 (Pa. 2002); *Commonwealth, Dept. of Transp. Bureau of Driver Licensing v. Kline*, 741 A.2d 1281 (Pa. 1999); *Commonwealth v. Leet*, 641 A.2d 299 (Pa. 1994). The specific issue here is the sheriffs' authority to arrest which ultimately, is "no different from that of a private citizen." *Dobbins*, 934 A.2d at 1174 (citing *Kopko*, 892 A.2d at 774)). It has been determined that sheriffs have the common law authority to make warrantless arrests "for felonies and for breaches of the peace committed in [their] presence." *Leet*, 641 A.2d at 303; *see also Dobbins*, 934 A.2d at 1172. Sheriffs can also arrest for violations of the vehicle code committed in their presence that amount to breaches of the peace as long as they have "the same type of training as municipal police officers." *Kline*, 741 A.2d at 1284 (internal quotations omitted); *see also Dobbins*, 934 A.2d at 1172 n.2; *Lockridge*, 810 A.2d at 1194; *Leet*, 641 A.2d at 303. Sheriffs can also issue summonses for summary offenses "based on information received from a witness." *Lockridge*, 810 A.2d at 1196.

First, we note that Defendant relies primarily on the most recent addition to the above line of cases, *Commonwealth v. Marconi*, to support her argument that the Deputies did not have authority to arrest her. This reliance is misguided because *Marconi* addressed the sheriffs' power to conduct suspicionless investigations at roadside checkpoints and held that sheriffs' do not have such powers because "suspicionless stops are not made based on an in-presence breach of the peace or commission of a felony; rather, they are inherently investigatory." *Marconi*, 64 A.3d at 1043. Although ultimately limiting the scope of sheriffs' authority overall, *Marconi* is inapplicable here because Defendant does not argue that the Deputies' conducted a suspicionless stop; she argues that they made an illegal arrest.

Defendant's brief also references *Leet*, which serves as better support for her argument. The *Marconi* court even states:

Since *Leet*, majority decisions of this Court have repeatedly confined sheriffs' non-statutory arrest

powers to those for in-presence breaches of the peace or felonies. . . . Accordingly, the *Leet* rationale – which defines sheriff’s common-law arrest powers for present purposes – in no way authorizes the independent establishment and conduct of suspicionless roadside checkpoints by sheriffs or sheriffs’ deputies.

*Id.* In *Leet*, the sheriff observed the defendant “pass a line of traffic stopped in a no passing zone.” *Leet*, 641 A.2d at 300. The sheriff pulled the defendant over and noticed an open can of beer on the car’s front seat. *Id.* The sheriff administered field sobriety tests and upon asking the defendant for his driver’s license and checking on its status, discovered that the defendant’s license had been suspended. *Id.* The defendant was issued vehicle code citations for driving on a suspended license, driving with an open container, and passing in a no passing zone. *Id.* at 300-1. The defendant moved to suppress the evidence obtained as a result of the stop, arguing that the sheriff lacked authority to stop him. *Id.* at 301. After discussing the authority sheriffs have historically held, the Supreme Court of Pennsylvania determined, “that the common law powers of the sheriff include the power to enforce the motor vehicle code,” and that “it is clear that a sheriff (and his deputies) may make arrests for motor vehicle violations which amount to breaches of the peace committed in their presence.” *Id.* at 301, 303. The court conditioned its holding upon the fact that any sheriff enforcing the vehicle code “would be required to complete the same type of training that is required of police officers.” *Id.* at 303.

## II. Probable Cause for Public Drunkenness and Disorderly Conduct

As *Leet* demonstrates, sheriffs have the authority to enforce vehicle code offenses that amount to breaches of the peace occurring in their presence; however, the instant case turns on the threshold issue of what exactly occurred in the Deputies’ presence.<sup>2</sup> The only vehicle code violations Defendant was arrested and charged with were two counts of DUI. However, Defendant asserts and the Commonwealth concedes that the crime of DUI did not occur in the presence of the Deputies. It is undisputed that Defendant was standing outside at the rear of her vehicle when the Deputies came upon her. Ultimately, the Deputies did not observe Defendant driving, and Defendant is correct that an arrest by the Deputies based upon probable cause that Defendant was driving under the influence would be illegal because the crime did not occur in their presence.

At the hearing on Defendant’s Omnibus Motion, the Commonwealth instead offered the novel argument that the Deputies had “probable cause to arrest the Defendant for two offenses committed in their presence: Public Drunkenness and Disorderly Conduct.” Commonwealth’s Br. at 3. The Commonwealth asserted that these offenses constitute breaches of the peace under Pennsylvania jurisprudence.<sup>3</sup> Commonwealth’s Br. at 3. As discussed above, the Commonwealth is relying on the sheriff’s traditional common law authority to make warrantless arrests for “for felonies and for breaches of the peace committed in [their] presence.” *Dobbins*, 934 A.2d at 1172; *Leet*, 641 A.2d at 303.

Addressing the Commonwealth’s argument, we must determine whether the Deputies did in fact have probable cause to arrest Defendant without a warrant for Public Drunkenness and/or Disorderly Conduct, and if so, whether these offenses are considered breaches of the peace.<sup>4</sup> See *Leet*, 641 A.2d at 305 (Pa. 1994) (Nix, C.J., *dissenting*) (“[t]he closest offense to a breach of peace that can be found in the statute is disorderly conduct. . . . The Commonwealth did not establish the elements of disorderly conduct at the suppression hearing.”). If it is established that the Deputies had probable cause to arrest Defendant for Public Drunkenness and/or Disorderly Conduct, and they constitute breaches of the peace, Defendant’s arrest would be legal and all subsequently obtained evidence would be admissible. It is irrelevant that Defendant was not charged with these crimes because “once probable cause is established, it does not dissipate simply because the suspect is not charged with the particular crime which led to the finding of probable cause.” *Commonwealth v. Canning*, 587 A.2d 330, 332 (Pa. Super. 1991). “[P]robable cause is based on the facts and circumstances known at the moment of the arrest.” *Id.* (citation omitted).

### **a. Probable Cause to support a warrantless arrest**

A warrantless arrest is constitutional if, at the time of the arrest, the officer had probable cause. *Commonwealth v. Powers*, 398 A.2d 1013, 1014 (Pa. 1979) (citation omitted). The totality of the circumstances must be examined

<sup>2</sup> We note that here, Deputy Sarver was a new Sheriff after serving as a Pennsylvania State Police Officer for more than twenty years. There is no doubt he had the necessary training and expertise to enforce the vehicle code.

<sup>3</sup> While the Commonwealth acknowledges sheriffs’ limited arrest authority under Pennsylvania Law, it also argued that the sheriffs’ have common law authority to arrest for “very minor criminal offenses committed in their presence.” Commonwealth’s Br. at 3. Commonwealth supported its argument by citing Supreme Court of the United States cases addressing the Fourth Amendment, which hold that an officer has authority to arrest if he has probable cause that even a minor offense has been committed in his presence. Commonwealth’s Br. at 2. Commonwealth’s argument misses the threshold issue of Pennsylvania sheriff’s arrest authority. All of the cases it cites involve police officers making arrests. Pennsylvania sheriffs are not police officers, and Defendant is not disputing a police officer’s authority to arrest for minor offenses with probable cause.

<sup>4</sup> Public Drunkenness and Disorderly Conduct are not felonies

to determine whether probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 233 (1983). “[P]robable cause exists where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Commonwealth v. Evans*, 685 A.2d 535, 537 (Pa. 1996). “Probable cause must be ‘viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his experience and training.’” *Commonwealth v. Clark*, 558 Pa. 157, 165, 735 A.2d 1248, 1252 (Pa. 1999) (citations omitted). “The Commonwealth bears the burden of establishing, with reasonable certainty, facts sufficient to establish that probable cause for the arrest existed.” Powers, 398 A.2d at 1014 (citing *Commonwealth v. Jones*, 322 A.2d 119, 123 (Pa. 1974)).

#### **b. Public Drunkenness**

Turning first to Public Drunkenness, 18 Pa. C.S. § 5505 states, in pertinent part:

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol or a controlled substance . . . to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

18 Pa. C.S. § 5505. The Superior Court addressed the purpose and requirements of the offense of public drunkenness in *Commonwealth v. Meyer*. “We find that the statute was enacted to deal with the problem of chronic alcoholics who voluntarily appear on our streets, in our parks, in our neighborhoods, on a routine basis, shouting and cursing at real or imagined foes, causing disruption and annoyance.” *Commonwealth v. Meyer*, 431 A.2d 287, 290 (Pa. Super. 1981). The court held that being “manifestly under the influence” requires “some aberrant behavior before arrest is authorized.” *Id.* (citations omitted).

In *Commonwealth v. Canning*, the Superior Court found that probable cause existed to arrest the defendant for public intoxication. The arresting officer came upon the defendant after receiving complaints from the neighbors, and found him pacing back and forth on a stranger’s porch. *Canning*, 587 A.2d at 331. The defendant was shirtless, shoeless, and sockless. *Id.* The defendant “told the officer that he was looking for his car. The officer noticed an odor of alcohol on his breath and testified that [the defendant] appeared both confused and intoxicated.” *Id.* at 332.

Alternatively, in *Commonwealth v. Bullers*, the defendant was walking down the street at 2:45 a.m. when the arresting officer recognized him as a juvenile and stopped to ask him some questions. *Commonwealth v. Bullers*, 637 A.2d 1326, 1327 (Pa. 1994). The officer smelled the odor of alcohol on the defendant’s breath and arrested him for underage drinking. *Id.* The court ultimately determined that the arrest was unlawful because, absent some showing of public drunkenness, disorderly conduct, or breach of the peace, the officer had no statutory authority to arrest for underage drinking. *Id.* at 1330. The defendant “was not engaging in any conduct which would cause the officer to believe that he was a danger to himself or others.” *Id.* at 1328 n.2.

In the instant case, looking at the totality of the circumstances, the facts testified to at the hearing are sufficient to show that Defendant was intoxicated, but not enough to establish probable cause for public drunkenness. Evidence of Defendant’s alcohol consumption consisted of her slurred speech, bloodshot eyes, and the odor of alcohol on her breath, yet she exhibited no “aberrant” or abnormal behavior to show she was “manifestly under the influence.” *Meyer*, 431 A.2d at 290 (citations omitted). The instant case is more synonymous to *Canning* than *Bullers*. Like *Canning*, we have evidence Defendant consumed alcohol, but little evidence to indicate Defendant was staggering anywhere or that she was engaging in conduct that was a danger to herself or others. The only danger she created was stopping her vehicle precariously along the side of the road. Yet, testimony established that this conduct was predicated upon Defendant running out of gas, not necessarily from her intoxication. Also similar to *Canning*, the Deputies found the Defendant unexpectedly.

Comparatively, in *Bullers*, the officer arrested the defendant after responding to neighbor complaints so he was clearly annoying persons in his vicinity. The defendant in *Bullers* was also exhibiting very “aberrant” or unusual behavior. *Meyer*, 431 A.2d at 290 (citations omitted). He was pacing a porch of a house that did not belong to him while looking for his car, and he was not wearing any shirt, shoes, or socks. Here, there is no evidence show Defendant was lacking any clothing or acting in a similarly strange manner. There is evidence that Mother started arguing with Defendant once she arrived on the scene, but Mother’s testimony does not establish that Defendant acted unruly or unusually. In fact, Mother testified that Defendant did not raise her voice, threaten anyone, or create any unreasonable noise. It was Mother who was very angry. If anything, the evidence only suggests that Mother may have been acting unreasonably, not Defendant. The Commonwealth simply has not established, with reasonable certainty, sufficient facts to conclude the Sheriffs had probable cause to arrest Defendant for public intoxication.

#### **c. Disorderly Conduct**

Next, we will determine whether the Sheriffs had probable cause to arrest Defendant for disorderly conduct. 18 Pa. C.S. §5505 states:

(a) Offense defined.--A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior; (2) makes unreasonable noise; (3) uses obscene language, or makes an obscene gesture; or (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

18 Pa. C.S. § 5503. “The offense of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people . . . . It has a specific purpose; it has a definite objective, it is intended to preserve the public peace.” *Commonwealth v. Maerz*, 879 A.2d 1267, 1269 (Pa. Super. 2005) (citing *Commonwealth v. Hock*, 728 A.2d 943 (Pa. 1999)). “The mens rea requirement of [section 5503] demands proof that appellant by his actions intentionally or recklessly created a risk or caused a public inconvenience, annoyance or alarm.” *Commonwealth v. Troy*, 832 A.2d 1089, 1094 (Pa. Super. 2003) (citing *Commonwealth v. Gilbert*, 674 A.2d 284, 286 (Pa. Super. 1996)). Without going into great detail, the only evidence we have that could reasonably establish probable cause to arrest Defendant for disorderly conduct is the argument that occurred between her and Mother. The only evidence we have about Defendant’s actions during the argument is Mother’s testimony, and Mother testified that Defendant did not raise her voice, threaten anyone, or create any unreasonable noise. In fact, Mother was very angry and wanted the Sheriffs to arrest Defendant. Looking at the totality of the circumstances and the elements of disorderly conduct, there is no evidence to show that the argument escalated to a physical fight or that Defendant engaged in violent or tumultuous behavior. Nor is there any evidence to show that Defendant used obscene language or an obscene gesture. Defendant may have created a hazardous physical condition by precariously pulling her car over to the side of the road, but that action served a legitimate purpose: Defendant had run out of gas and could not move her car any further. The Commonwealth has failed to show that probable cause existed to arrest Defendant for disorderly conduct.

#### **d. Breaches of the Peace**

As discussed above, the Deputies would have authority to arrest Defendant for public drunkenness or disorderly conduct if they had probable cause *and* the offenses are breaches of the peace. As we have concluded that no probable cause existed for either offense, we need not address whether they constitute breaches of the peace.

### **CONCLUSION**

As the Supreme Court of Pennsylvania has aptly stated:

The members of this Court maintain great respect and express gratitude for sheriffs and their deputies in the performance of indispensable public services within their realm. We reiterate, however, that they are not police officers—nor are they invested with general police powers beyond the authority to arrest for in-presence breaches of the peace and felonies—in the absence of express legislative designation.

*Marconi*, 64 A.3d at 1043-44. The Court by no means intends to disrespect or undervalue the services our sheriffs perform. However, we must recognize that sheriffs have relatively limited common law arrest authority. Examining the evidence admitted at the hearing, Defendant did not commit a felony, there was no probable cause for any offenses that would qualify as breaches of the peace, and the Defendant did not violate the vehicle code in the presence of the Deputies. Therefore, Defendant’s arrest was illegal and her Motion is granted.

### **ORDER OF COURT**

**AND NOW THIS** 20th day of December, 2013, the Court having reviewed Defendant’s October 11, 2013 Omnibus Pretrial Motion for Suppression of Evidence and Dismissal of Charges, Commonwealth’s Answer, supporting briefs, and having held hearing thereupon and reviewed the applicable law;

**IT IS HEREBY ORDERED THAT** the Motion is **GRANTED**.

*Pursuant to the requirements of Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.*