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Barton v. Beavers

SHEILA R. BARTON, Plaintiff,
v. CHRISTOPHER A. BEAVERS, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action – Law, No. 00064-2001 DR

Child Out-Of-Wedlock; Status in General; Estoppel or Waiver. Fraud; Deception Constituting Fraud; Elements of Actual Fraud; Fraudulent Concealment; Duty to Disclose Facts.
Child Out-Of-Wedlock; Status in General; Formalization of Parental Relation in General; Legitimation; Recognition or Acknowledgement.

1. In support matters, the standard of review is for an abuse of discretion.

2. Though in the case of a child born out of wedlock the presumption of paternity does not apply, a parent may not challenge the paternity of a child once the father has acknowledged paternity.

3. Paternity may be acknowledged by conduct: a putative father holding himself out as a child's sire, or assuming the role of father, by a recognition and fulfillment of the duty of support, or by execution of an acknowledgment of paternity.

4. If such document is executed, and is not rescinded within sixty (60) days, paternity is also conclusively established. Thereafter, such an acknowledgment may only be challenged on the basis of "fraud, duress, or material mistake of fact" established by the challenger by clear and convincing evidence. See 23 Pa. C.S.A. §5103(g)(2).

5. The doctrine of paternity by estoppel embodies the fiction that regardless of biology a person who has cared for a child will be deemed a "parent" of that child for legal purposes.

6. Fraud regarding questions of paternity has been described in this Commonwealth by the traditional legal test, requiring: (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result.

7. A misrepresentation need not be an actual statement; it can be manifest in the form of silence or failure to disclose relevant information when good faith requires disclosure.

8. Where the acknowledged father of the child caught the mother having intercourse with another man prior to the birth of the child, he has notice that such other man could potentially have fathered the child. Following the revelation, having continued his relationship with the mother and following the birth took the child into their home as his own, the actual knowledge on the part of the father precludes a finding of fraud.

9. Under the Domestic Relations Code, the father of a child born out of wedlock may file with the Department of Public Welfare an acknowledgement of paternity of the child, which grants such individual all the rights and duties as to the child as if he had been married to the mother of the child at birth. See 23 Pa. C.S.A. §5103(a).

10. As the language of the statute contemplates such a document being executed at a hospital following the birth, the fact paternity was acknowledged at a support conference, outside of court, absent a record, does not implicate its validity. The statute does not mandate consultation with counsel prior to execution of an acknowledgment.

Appearances:

Sheila R. Barton, *Plaintiff, Pro Se*

David M. Axinn, Esq., *Counsel for Defendant*

OPINION *sur* Pa. R.A.P. 1925(a)

Van Horn, J., June 28, 2011

Statement of the Case

This matter comes before the Court upon the Petition of Christopher A. Beavers (hereinafter "Beavers"), filed December 27, 2010, for paternity testing to determine whether he is the biological father of Kelsey R. Beavers (hereinafter "Child"), born to Sheila R. Barton (hereinafter "Mother" or "Barton"), on September 9, 1998. By the same Petition, Defendant requested the Court set aside an Order of Court entered November 6, 2001, approving the Acknowledgment of Paternity signed by the Defendant. The Court held hearing upon the Petition May 10, 2011, continued at the request of the Defendant from March 15, 2011, by motion filed March 3, 2011. Following hearing, the Court denied the Petition. Notice of Appeal and a Concise Statement of Matters Complained of On Appeal were filed June 10, 2011.

Beavers and Barton never married, but resided together at the time of the Child's birth, and for several years thereafter. Both admit the relationship was troubled, with Barton calling it a "work in progress" and Beavers testifying he caught Barton in bed with another man prior to the birth of the Child. Indeed, Barton testified to having a romantic, sexual relationship with Gary Miller, who she had known since approximately 1990, during the spring and summer of 1998. At the time, Barton was employed as a baby sitter for Mr. Miller. Beavers testified that Mother and Miller were very close friends, and spent a lot of time together during the time when he was involved with Barton. Presumably, it was Miller whom Beavers caught having intercourse with Barton.

Despite such infidelity, and the fact that Miller purportedly continued to "pop up" in their lives, Beavers and Barton remained a couple for the first three (3) years of the Child's life, and continued to reside together. Sometime prior to the first support conference in September of 2001, the parties separated. Beavers appeared at the conference and signed an Acknowledgment of Paternity, accepted by the Court on November 6, 2001. At hearing upon the Petition for Paternity Testing, Beavers testified he was under the impression he was required to sign the acknowledgment, had no choice or option to request paternity testing, and if he did not sign, there would be "consequences." Beavers also asserted at hearing that at the time, he believed himself the father of the Child.

According to his testimony, as the Child grew older, Beavers perceived her appearance becoming more and more akin to that of Miller, and less like himself. Asserting "strong family genes," Beavers testified at hearing that the light hair, skin, and body tone seen in his relatives were not present in the Child, who is dark-haired with a dark complexion. At hearing, Beavers asserted the Child resembles Miller and his children, even presenting as an exhibit a picture of Miller, his uncle, and the Child, one among many he purportedly found after the parties separated in 2001.

Beavers testified that he and the Child were only "a little bit" close, and never developed a strong bond. According to Beavers, after he separated from Barton, he "visited" the Child "for a little while," but eventually the Child did not wish to see him. Indeed, Beavers testified to last seeing the Child sometime in 2007, further relaying that in May of 2009, when he married his current wife, he asked the Child to attend and she refused. According to his testimony, the Child has said she never wishes to see him again. Beavers testified to concluding four (4) to five (5) years ago that the Child is not his biological issue. Barton, on the other hand, testified she does not believe Miller is the Child's father, and maintains her belief that despite the affair, Beavers is her daughter's sire.

Issues Raised

Beavers raises four (4) issues in his Concise Statement. First, he claims the Court erred in failing to find Barton guilty of fraud in failing to disclose, either to him or to the Court, the nature and extent of her relationship with another individual at the time of the acknowledgment of paternity. (See Concise Statement, ¶1.) Second, he claims the Court erred in failing to find the Acknowledgment sufficient to waive his right to paternity testing, and valid to confer parental rights and duties, "where he was un-counseled, did not understand his right to request DNA testing, and the acknowledgment was executed outside of court, without any record being made." (See Id. ¶2.)

Beavers further claims error by the Court in failing to find genetic testing appropriate, whether or not he has proven fraud, where there is a "substantial question" as to paternity, and "no parent-child relationship exists" between himself and the Child. (See Id. at ¶3.) Finally, Beavers claims that to the extent the Court found his knowledge of the affair

between Barton and Miller negates any fraud by Barton, it erred in failing to consider the "effect of fraud on other parties, including the [C]hild, the biological father, and the Court." (See Id. at ¶4.) For convenience, the Court will address the issues raised in Paragraphs 1, 3, and 4 together, separately addressing the issue of the validity of the Acknowledgment of Paternity.

Discussion

1. Standard of Review

In support matters, the standard of review is for an abuse of discretion. See J.C. v. J.S., 826 A.2d 1 (Pa. Super. Ct. 2003). Abuse of discretion is more than an error of judgment, but involves a misapplication of the law, or an exercise of discretion in a manner that is "manifestly unreasonable." Id. In reaching a conclusion, if the trial court has overridden the law, or if the decision is a result of "partiality, prejudice, bias, or ill-will, as shown by the evidence of record," discretion has been abused. Bowser v. Bloom, 807 A.2d 830, 834 (Pa. 2002).

2. Paternity by Estoppel and Allegations of Fraud

When a child is born out of wedlock, the presumption of paternity does not apply, as there is no intact family in need of protection. See Gebler v. Gatti, 895 A.2d 1, 3 (Pa. Super. Ct. 2006). However, the settled policy of this Commonwealth dictates that a parent may not challenge the paternity of a child once the father has acknowledged paternity. See B.O. v. C.O., 590 A.2d 313, 315 (Pa. Super. Ct. 1991). This acknowledgment may be by conduct, in a putative father holding himself out as a child's sire, or assuming the role of father, or by a recognition and fulfillment of the duty of support. See Ellison v. Lopez, 959 A.2d 395, 397 (Pa. Super. Ct. 2008) (citing 23 Pa. C.S.A. §5102(b)). A putative father may also execute an acknowledgment of paternity, pursuant to 23 Pa. C.S.A. §5103. If such document is executed, and is not rescinded within sixty (60) days, paternity is also conclusively established. Thereafter, such an acknowledgment may only be challenged on the basis of "fraud, duress, or material mistake of fact" established by the challenger by clear and convincing evidence. See 23 Pa. C.S.A. §5103(g)(2).

This result arises from the doctrine of paternity by estoppel, described by our Supreme Court as:

> [M]erely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father ... [T]he doctrine ... is aimed at achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child.

Glover v. Severino, 946 A.2d 710, 712-13 (Pa. Super. Ct. 2008) (quoting Freedman v. McCandless, 654 A.2d 529, 532-33 (Pa. 1995)). Indeed, the doctrine embodies the fiction that "regardless of biology a person who has cared for a child will be deemed a 'parent' of that child for legal purposes." McConnell v. Berkheimer, 781 A.2d 206, 210 (Pa. Super. Ct. 2001). It is based on the public policy that a child should be secure in knowing the identity of their parent, and should not be required to suffer the "damaging trauma" which arises from being told the father they have known is not in fact her father. See J.C. v. J.S., 826 A.2d 1, 4 (Pa. Super. Ct. 2003).

As with a statutory acknowledgment, where fraud is alleged, the analysis of whether the doctrine of paternity by estoppel should apply must proceed differently than in normal cases. Indeed, where paternity is acknowledged only by reason of fraud, outside the context of an intact family, the policy interests underlying the doctrine are not served. See Glover, 946 A.2d at 713. Rather, to hold a party to an acknowledgment procured through misrepresentation or purposeful omission on the basis of equitable principles "defies both logic and fairness." Id. Indeed, to apply the doctrine would be punishing "the party that sought to do what was righteous" and rewarding "the party that has perpetrated the fraud." Id. Thus, proof of fraud by clear and convincing evidence can preclude application of the doctrine of paternity by estoppel. See Ellison v. Lopez, 959 A.2d 395, 398 (Pa. Super. Ct. 2008).

Fraud regarding questions of paternity has been described in this Commonwealth by the traditional legal test, requiring:

> (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result.

R.W.E. v. A.B.K., 961 A.2d 161, 167 (Pa. Super. Ct. 2008). Where challenge is made to an acknowledgment of paternity, the Superior Court has provided added guidance:

> A misrepresentation need not be an actual statement; it can be manifest in the form of silence or failure to disclose relevant information when good faith requires disclosure. Fraud is practiced when deception of another to his damage is brought about by a misrepresentation of fact or by silence when good faith required expression. Fraud comprises anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.

Id. at 167-68 (quoting Glover, 946 A.2d at 713).

Appellant claims error in the Court's determination that Mother did not commit fraud such as to preclude application of paternity by estoppel or provide sufficient challenge to the acknowledgement confirmed in November of 2001. In the main, the Court's determination arose from the fact that no justifiable reliance on the part of Beavers could be shown. Indeed, Beavers caught Barton having intercourse with another man prior to the birth of the Child, and was therefore on notice that such other man could potentially have fathered the Child. He was aware Barton was having a romantic, sexual relationship with another man. Even following this revelation, Beavers continued in his relationship with Barton, and following the birth of the Child took her into their home as his own. Despite the fact Miller allegedly continued to "pop up" in their lives, Beavers continued to live as an intact family with the Child and Barton, acting as the Child's father by providing her emotional and financial support until the parties separated. Cf. 23 Pa. C.S.A. §5102 ("[P]aternity shall be determined ... if, during the lifetime of the child, it is determined by clear and convincing evidence that the father openly holds out the child to be his and either receives the child into his home or provides support for the child.").

Indeed, Beavers watched the Child grow and harbored suspicious due to her appearance that she was not his biological issue, but did not challenge his paternity or demand answers from Barton. Even if Barton knew Miller to be the biological father, and affirmatively misrepresented this fact, or by silence omitted to disclose the possibility of his parentage, Beavers had actual knowledge of their affair. Beavers was certainly aware that sexual intercourse can result in pregnancy, and was aware that Barton had intercourse with another man. After Beavers and Barton separated, he continued to exercise partial custody, continued to support the Child, and continued to hold himself out as her father. He cannot claim to have justifiably relied on a misrepresentation by Barton, if, in fact, any was made. Rather, he had actual knowledge of any disclosure Barton could have made, but did not act to demand proof of his paternity, rather continuing to act as a parent to the Child.

Beavers further asserts that despite his failure to prove fraud on the part of Barton, the Court should nonetheless find DNA testing appropriate. Appellant offers no legal authority for the proposition that suspicion regarding paternity, and a fraying parent-child bond alone, merit allowing a parent who has for years accepted a parental role to now question it. The file in the instant matter is thick, with numerous requests to modify support resulting in conferences with Plaintiff, Defendant, and the Court, during which the question of paternity was not raised. (See Orders of Court for Modification Conference, 8/2/02, 6/2/04, 8/16/06, 2/28/08.) The Court has found the acknowledgment of paternity validly executed, and further found that Beavers is estopped from denying the role he has undertaken. When estoppel applies, "paternity tests may well be irrelevant, for the law will not permit a person to challenge the status which he or she has previously accepted." Buccieri v. Campagna, 889 A.2d 1220, 1224 (Pa. Super. Ct. 2005) (quotation and citation omitted).

In his concise statement, Beavers maintains that even if his knowledge "negates the fraud committed by the Plaintiff," that the Court erred in failing to consider the effect of Miller's possible parentage on "other parties." First, Miller has not appeared to allege fraud perpetrated upon him which would merit challenge to the acknowledgment of paternity. *Contra* R.W.E. v. A.B.K., 961 A.2d 161, 168-69 (Pa. Super. Ct. 2008). Further, the Court did consider, in the main, the effect on the Child of allowing Beavers to now dispute and disavow the role of father he has undertaken for so long. Indeed, the policy of the law in this Commonwealth arises from a focus upon the well-being of the child. See B.O. v. C.O., 590 A.2d 313, 315 (Pa. Super. Ct. 1991). Beavers brought the Child home from the hospital. He watched her first steps, her first words. He lived with the Child and her mother as an intact family for more than two (2) years following her birth, and exercised custodial rights thereafter. He has supported the Child financially. The fact that in recent years he has allowed his relationship with the Child to sour does not alter the fact that for the initial years of her life, and today, he is the only father she has known.

Rather than possible parentage in Miller, the Court infers that Beavers' lack of involvement in recent years, following his move from Fulton County, is the more likely source of any acrimony between them. Indeed, this acrimony has likely occurred not because the Child does not see him as her father, but because he is the only father she has ever known,

and his commitment to her and involvement in her life has waned and left her feeling abandoned. The Court will not allow Beavers to totally abandon the Child and the role he voluntarily undertook, knowing the possibility existed he was not her biological father, and exacerbate the harm this Child has likely already experienced.

3. Acknowledgment of Paternity

Under the Domestic Relations Code, the father of a child born out of wedlock may file with the Department of Public Welfare an acknowledgement of paternity of the child, which grants such individual all the rights and duties as to the child as if he had been married to the mother of the child at birth. See 23 Pa. C.S.A. §5103(a). The statute provides that such an acknowledgment "shall constitute conclusive evidence of paternity without further judicial ratification in any action to establish support." Id. at (d). The statute also deals with rescission:

> [A] signed, voluntary, witnessed acknowledgment of paternity subject to 18 Pa.C.S. §4904 shall be considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of the following:
>
> (i) sixty days; or
>
> (ii) the date of an administrative or judicial proceeding relating to the child, including, but not limited to, a domestic relations section conference or a proceeding to establish a support order in which the signatory is a party.

Id. at (g)(1).

Beavers complains the Court should not have found his execution of such an acknowledgment valid, where he was "un-counseled, did not understand his right to request DNA testing, and the acknowledgment was executed outside of court, without any record being made." (Concise Statement, ¶2.) The statute clearly contemplates such an acknowledgment being executed in a hospital, or in another non-judicial venue. See, e.g., 23 Pa. C.S.A. §5103(a) ("The hospital or other person accepting an acknowledgment"). Thus, the fact that Beavers' acknowledged paternity at a support conference, outside of court, and absent a record, does not implicate its validity. The statute does not mandate consultation with counsel prior to execution of an acknowledgment, and the Court does not believe the fact Beavers was uncounseled bears upon its weight. Indeed, most of such acknowledgments are likely done without the benefit of legal representation. Further, Beavers admits to executing the acknowledgment at a support conference, at which he appeared after being given due notice of the proceedings instituted for support against him. Such notice provides that counsel may be obtained, and is given sufficiently in advance of the hearing date that an individual can take action to consult with and hire an attorney prior to appearing. (See Complaint for Support and Order to Appear, 8/13/01, Order at 2 ("YOU HAVE THE RIGHT TO A LAWYER, WHO MAY ATTEND THE CONFERENCE AND REPRESENT YOU.") (emphasis in original)).

Nor did the Court credit Beavers' assertions that he was unaware of the consequences of executing the acknowledgment, or of his right to request paternity testing. (See Acknowledgment of Paternity, filed 11/6/01 ("I have been advised of and do hereby waive my rights to (1) genetic tests on the issue of paternity.)) Aside from providing such notice on the acknowledgment, directly above the signature line, by statute "written and oral notice" of "the alternatives to, the legal consequences of and the right and responsibilities that arise from, signing the acknowledgment" is required. 23 Pa. C.S.A. §5103(a). No evidence was presented to prove, and no assertion made, that such notice was not given in the instant case. Indeed, the domestic relations division, seasoned in facilitating the execution of such acknowledgments, is aware of the statutory requirements, and the forms in the file show such notice was indeed given.

Finally, Beavers was an adult at the time the acknowledgment was executed, and presented no evidence that he was unable due to some mental defect to understand its terms. Beavers has not asserted he was intoxicated or impaired at the time of execution. It is axiomatic that where an adult individual with the capacity to understand a written document signs such document, they will be bound by the terms therein. See, e.g, Denlinger, Inc. v. Dendler, 608 A.2d 1061, 1069-70 (Pa. Super. Ct. 1992) (citations and quotations omitted). Beavers testified to "skimming" through the documents he was given at the support conference. If such is the case, he must bear the brunt of his own failure to diligently read and ascertain the nature of the documents he elected to sign.

Conclusion

Both by his action in taking the Child into his home, providing her support, and exercising custodial rights, as well as by his statutory acknowledgment, the Appellant has accepted the role of father. Having failed by reason of his actual knowledge of Mother's affair to provide clear and convincing proof of fraud, the Court determined he must be estopped

from denying the paternity of the Child. As demonstrated by the foregoing discussion, any allegations of error on the part of the Court are without merit. As such, this Court respectfully requests the Superior Court dismiss the instant appeal.

ORDER OF COURT

June 28, 2011, pursuant to Pa. R.A.P. 1931(c), it is hereby ordered that the Prothonotary of Fulton County shall promptly transmit to the Superior Court of Pennsylvania the record in this matter along with the attached Opinion *sur* Pa. R.A.P. 1925(a) and Order of Court.

In the early morning hours of December 31, 2010, Defendant William Stanley Burriss [hereinafter "Burriss" or "Defendant"] was a passenger in the vehicle of Seth Alan Hoffman [hereinafter "Hoffman"], a grey Jeep Cherokee, driving on Route 30 towards McConnellsburg, Fulton County. That night, Pennsylvania State Police (PSP) Troopers Gary Hibner and Matt Wadsworth were acting as roving patrol in the McConnellsburg borough. Sighting the Cherokee, the officers began to follow the vehicle, typed in the license plate number, and found the Jeep was registered to a Chambersburg, Pennsylvania address.[1] Trooper Hibner testified at hearing this fact struck him as "a little bit" unusual, but "not at that point so much." (T.P. at 8:11-13.)

The officers continued to follow the vehicle, closely tailing the Jeep as it made a left hand turn onto Fifth Avenue, a small alley that is rarely travelled except by residents of the homes situated along it. Trooper Hibner testified at hearing the officers thought the turn "could be kind of suspicious." (Id. at 9:4.) The officers continued to follow as the vehicle came to a full stop at the intersection of Fifth Avenue with Pine Street, and then continued straight ahead. At the next stop, executed in compliance with applicable traffic law, the Jeep turned right onto East Maple Street, and the troopers continued to follow. After another full stop at a stop sign at the intersection of East Maple and Fourth Street, the vehicle turned right onto Fourth Street, and the officers continued their pursuit.

Thereafter, the Jeep made a right hand turn onto East Pine Street, doubling back in the direction from which it had come. The officers found it "really suspicious a vehicle from Chambersburg with a Chambersburg address [was] driving around in a circle late at night in a McConnellsburg back alley." (Id. at 11:5-7; Commonwealth Exhibit Number 1.) The Affidavit of Probable Cause recounts that such action would make little sense unless the driver were lost, though at hearing Hibner testified he never considered at any time the possibility the driver was lost. (See Id. at 38.) Hibner also testified that in order to get to the driveway, it would be necessary to back-track down at least one street perpendicular to Lincoln Way in such a manner. (See Id. at 36.) On Pine Street only a moment, the driver made a left-hand turn into a long driveway, and omitted to use a turn signal. The Jeep halted at the end of the driveway, at the top of which was a garage with a residence situated behind, and turned off its headlights. The troopers moved down Pine Street, past the driveway, following the road up a hill and over the crest, pulling far enough down the other side so that the driveway and the Jeep were no longer visible. The officers pulled off the road and turned off the headlights of the cruiser.

After executing a three point turn, the troopers returned over the hill. Trooper Hibner estimated at hearing the maneuver took about twenty (20) seconds. Approximately twenty (20) seconds later, the vehicle pulled out of the driveway and began travelling back the way it had come. The Jeep turned onto Fourth Street without using a turn signal, and the troopers activated the overhead lights of their vehicle and initiated a traffic stop near the intersection of Fourth Street and East Maple. The stop is logged as having begun at 12:25 a.m., though it may have occurred five (5) minutes earlier.

After the Jeep came to a halt, Trooper Hibner approached from the driver's side while Wadsworth approached on the side of the passenger. Hibner advised the driver, Hoffman, he had pulled the vehicle over due to the failure to signal, and requested his drivers' license, registration, and proof of insurance. The officer testified that he immediately noticed the driver was "extremely nervous," stating his "heart was beating fast," his "breathing was hard," and his "chest was moving at a high pace." (See T.P. at 15:12-16.)

The driver searched for the requested documents in the glove box, handing them to Trooper Hibner. Hibner testified Hoffman's hands were shaking "bad," and that he "never seen hands shake that much," describing them as "trembling." (T.P. 15:19-23.) At that time, the officer asked why the Jeep was "traveling around in a circle," to which Hoffman replied that he was dropping off a friend, Ryan Knepper, at his home. (Id. at 15:23-24.) At this point, the officer asked Hoffman if Knepper lived at the home, to which the answer was affirmative, after which Hibner asked the question again in a tone the officer described as hinting that he knew no one by that name resided in the residence. Hoffman, stating he was "pretty sure" Knepper resided there, explained the home belonged to Knepper's father, and that his mother lived in Franklin County. The officer asked why the trip was made so late, to which Hoffman replied the three had been at his home "hanging out" when Knepper asked for a ride to his father's. Hibner testified Hoffman seemed to grow more nervous after answering.

The trooper then requested identification from the Defendant, to which Burriss replied he did not have any forms of ID, and had never possessed a driver's license. As requested by Hibner, Burriss told the officer his name and date of birth. The trooper returned to his vehicle and used his computer to request information on both individuals. No information was available on Burriss. However, the officers found that Hoffman had a drug arrest for a small amount of marijuana in August of 2010. There was no obvious discrepancy regarding any information provided to Hibner by Defendant or Hoffman.

At this point, Hibner and Wadsworth returned to the vehicle and asked both men to step outside the Jeep, walking them to the rear of the vehicle in front of the police patrol car. Hibner patted each down, feeling nothing he suspected was a weapon. He did feel a square object in the pocket of Burriss' hooded sweatshirt, which the Defendant told him was a cellular phone. The officer testified he did not believe at that time that the object was drug paraphernalia or a weapon.

Hibner, retaining Hoffman's license, registration and insurance card, then requested permission from Hoffman to search the vehicle, which Hoffman gave, signing a consent form. (See Commonwealth Exhibit Number 2.) While the officer could not recall the light source available in the alley, he did recall the overhead lights of the police cruiser remained lit, and that he and Wadsworth were standing near the Defendant and Hoffman by the bumper of the Jeep. Hibner then searched the vehicle, opening the center console of the Jeep in the process, and finding the end of a cigar that contained marijuana, commonly referred to as a "blunt."

Thereafter, having decided first that the two would be charged with the crime of possession of a small amount of marijuana, and having formed the intention to release them at the scene, Hibner conducted a second pat down of both men. This time, the officer removed the square object from Burriss' pocket, discovering it was a digital scale containing marijuana residue. The officer then asked Burriss what the scale was used for, to which Defendant replied he used it while purchasing marijuana to avoid being cheated. Though the officer stated the search was "incident to arrest," due to his intention to charge the two men, there was no testimony the officer issued any *Miranda* warning prior to asking the question.

Hoffman and Burriss were charged with Possession of a Small Amount of Marijuana[3] Burriss for the cigar piece and the digital scale, and Hoffman for the cigar piece. No traffic citation was issued at the time, and indeed, the trooper testified it is not his practice to issue citations for failure to signal, but rather to issue warnings. The summary offense of Turning Movements and Required Signals, under Section 3334(a) of the Vehicle Code, was charged against Hoffman in the criminal complaint.

Issues for Decision

In his Omnibus Pre-Trial Motions, Defendant filed a Motion to Suppress the marijuana, cigar wrapper, digital scale, and any statements, alleging the evidence was obtained as a result of an illegal search and seizure. Burriss alleges the officers had no articulable, reasonable grounds to suspect criminal activity was afoot, such that the detention was an unlawful seizure. The Commonwealth responds that grounds for reasonable suspicion were indeed present, that the search of the both men was legal, and the evidence therefore admissible.

Discussion

I. Legal Principles

Courts have identified three (3) levels of interaction between citizens and police officers. The first, a mere encounter, occurs where there is any formal or informal interaction between the two, but most often occurs in the form of questioning by the officer of the citizen. See Commonwealth v. Coleman, 19 A.3d 1111, 1115 (Pa. Super. Ct. 2011) (citation omitted). In such an encounter, there is no obligation on the part of the citizen to stop or respond. See Id. The second level, an investigative detention, carries an official compulsion both to stop and to respond, but the detention is temporary absent formation of probable cause for an arrest. See Commonwealth v. Jones, 874 A.2d 108, 116 (Pa. Super. Ct. 2005). Here, the coercive conditions attendant a formal arrest are absent, but due to the elements of official compulsion, the Fourth Amendment guarantee against unreasonable searches and seizures is activated, requiring reasonable suspicion of unlawful activity. See Id. An investigative detention occurs where police conduct would communicate to a reasonable person that they were not free to decline an officer's request or leave and terminate the encounter. See Commonwealth v. Strickler, 757 A.2d 884, 889-90 (Pa. 2000). Finally, a custodial detention occurs where the "nature, duration, and conditions of an investigative detention become so coercive" as to constitute the "functional equivalent" of a formal arrest. Jones, 874 A.2d at 116.

Reasonable suspicion is a standard "less stringent than probable cause," demonstrated where, considering the totality of

the circumstances, an officer "reasonably suspects an individual is engaging in criminal conduct." Commonwealth v. Rogers, 849 A.2d 1185, 1189 (Pa. 2004). The officer must have a reasonable and articulable belief that criminal activity is occurring linked to observations of suspicious or irregular behavior by the individual detained. See Commonwealth v. Lopez, 609 A.2d 177, 180 (Pa. Super. Ct. 1992). In determining whether reasonable suspicion exists, the Court must give "due weight to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience." Id. Indeed, even a "combination of innocent facts, when taken together, may warrant further investigation by the police officer." Id. However, if the officer's observations do not demonstrate, or even suggest, illegal activity, or where law enforcement is unable to articulate a basis for their suspicions, the detention is unlawful, and any evidence obtained as a result must be suppressed. See Commonwealth v. Sierra, 723 A.2d 644, 647 (Pa. 1999).

II. Application

The Defendant concedes the initial stop of the vehicle was valid, based upon probable cause to believe a violation of the Pennsylvania Vehicle Code had occurred. See 75 Pa. C.S.A. §6308 (b). Indeed, Hoffman failed to signal when turning from East Pine Street onto Fourth Street. However, Defendant argues that following the stop, after obtaining Hoffman's driver's license and registration, checking the information and discovering no outstanding warrants or suspensions, no reasonable suspicion existed to justify their continued detention.

The Commonwealth admits the officers' questioning did constitute an investigative detention, and both sides agree the initial questioning was lawful. However, under the law, after a vehicle has been stopped, license and registration requested, and a computer check completed, if the documents are valid the driver must be allowed to proceed without further delay. See Lopez, 609 A.2d at 181-82. To justify any further detention, the officer must have reasonable suspicion of an illegal drug transaction or another serious crime. See Id. at 182.

In order to justify the continued detention, the Commonwealth points to several facts asserted to give rise to a reasonable suspicion of criminal activity. First, it is argued the mere fact the Jeep was driving late at night is suspicious. Second, the Chambersburg registration is dubbed suspect, as the vehicle was driving in Fulton County. Third, the turn down Fifth Street, a small alley, is also put forth as creating a reasonable suspicion, as the alley contains mostly businesses. Fourth, the route of the Jeep, proceeding down Fifth Street as it curves around, and then making the turn onto East Pine, is dubbed extremely suspicious, as the route doubled back briefly pending the turn into the driveway. Finally, the Commonwealth points to the nervousness of the driver.

Even taken together, the Court does not find these facts created a reasonable suspicion of criminal activity. The citizens of this Commonwealth are not subject to curfew, and may drive on any streets they chose, at any time, if they follow applicable traffic laws. The mere fact of late night driving cannot be called suspicious. Nor can the fact the Jeep was registered in Chambersburg, less than a thirty (30) minute drive from McConnellsburg, be deemed suspicious. Numerous members of Franklin and Fulton Counties commute back and forth for work and pleasure daily, have family in one county while living in the other, or reside in one place but visit friends in the other. Indeed, the two counties are part of the same judicial district. A person from Chambersburg driving in McConnellsburg late at night does not create a reasonable suspicion of criminal activity.

Nor does the Court find that the turn into a seldom travelled alley constitutes suspicious or even irregular activity, especially given the explanation that a resident of a street off the alley was being driven home. Hibner initially asserted that the alley was flanked by businesses, but later admitted in his testimony it also contains residences. As such, that a car would turn down the alley after business hours is understandable, as a resident could be returning home. Nor is the route taken suspect or indicative of criminal activity, despite the fact the Jeep retraced its route briefly before turning into the alley. All these facts combined were clearly explained by Hoffman during the initial interview, and the Court can find no reason the situation should have aroused suspicion in the officers that criminal behavior was occurring.

Finally, having been followed for several blocks by a police cruiser, at close range, and having been stopped, the driver's nervousness was understandable. Hibner obviously had a hunch the two were involved in criminal activity based on the late hour and the Chambersburg registration, and treated Hoffman accordingly in the initial interview. His tone when asking whether Hoffman was "certain" he had dropped off Knepper and if Knepper lived at the residence up the driveway likely increased the driver's unease. So too, the positions of the officers each on one side of the vehicle likely contributed to the nerves Hoffman was feeling, and his reaction was neither irregular nor suspicious. Nervousness may indeed be a relevant factor to consider, but absent further indicia of criminality, cannot alone establish reasonable suspicion. See Commonwealth v. Wilson, 927 A.2d 279, 285 (Pa. Super. Ct. 2007). Here the officers' actions and demeanor could very reasonably induce a driver to feel nervous. Nerves coupled with a late night drive and a turn into a seldom travelled alley still do not create the requisite reasonable suspicion.

Our appellate courts have found that where a motorist is stopped for violation of the Motor Vehicle Code, the officer may request the person to step out of the vehicle. See Commownealth v. Parker, 957 A.2d 311, 314-15 (Pa. Super. Ct. 2008). Further, a Terry frisk may be conducted during such investigatory stop where the officer believes, based on "specific and articulable facts" the individual is "armed and dangerous." Id. The scope of such a search must be strictly limited to acts required to discover weapons presenting a danger either to the officer or to individuals nearby. See Id. Here, even for the Terry frisk, the Court did not hear Hibner articulate any facts to support the idea either man was armed and dangerous. Rather, the officer merely testified that he asked the two to step out of the vehicle, and then patted them down for safety reasons. Hibner gave no explanation for such safety concerns.

Finally, the officers cannot rely solely upon Hoffman's arrest for possession of a small amount of marijuana several months prior to justify the Defendant's continued detention after the information gleaned in the initial discussion yielded no irregularities. Indeed, a prior criminal record, without more, does not give law enforcement carte blanche to stop and detain an individual for questioning. Further, unparticularized suspicions or an officer's hunch or gut feeling does not satisfy the Fourth Amendment test. See Lopez, 609 A.2d at 182 (citing Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed.2d 890 (1980)). Nor is the fact the officers did not see a person exit the Jeep, when they were admittedly out of sight for a period of more than twenty seconds, sufficient to demonstrate reasonable suspicion.

The Commonwealth points to several cases as justification for the continued detention of the Defendant after no irregularities appeared in the documentation submitted to the officers based upon the above-recounted facts characterized as "suspicious." Yet in each cited case, there was far more indicia of criminal activity than instantly. In Rogers, the Defendant's severe trembling, in combination with conflicting, incomplete and plainly fraudulent paperwork, as well as his inability to answer simple questions regarding his origin, was sufficient to find reasonable suspicion for an investigative detention. Rogers, 849 A.2d at 1189. Here, the license, registration and insurance given to Hibner contained nothing abnormal or suspicious, no suspicious cargo was present in the car, and Hoffman's answers were reasonable and provided a complete explanation for his actions. In Coleman, the Defendant matched the description of a robbery suspect, and fumbled in his pockets suspiciously upon the officers' initial questioning. Coleman, 19 A.3d at 1116-17. Here, Hibner testified neither man behaved suspiciously during the initial encounter, nor did they fumble in the vehicle before, during, or after the stop, and the Jeep came to the troopers' attention on roving patrol, rather than due to a call from dispatch describing like-appearing individuals.

The subsequent consent by the driver does not vitiate or ameliorate the illegal nature of the continued detention of the Defendant. To establish a valid consensual search, the Commonwealth must show the consent was given during a legal police interaction. See Commonwealth v. Acosta, 815 A.2d 1078, 1083 (Pa. Super. Ct. 2003). Because the detention was illegal, the consent to search the Jeep is tainted and thus cannot justify the search. *Cf*. Lopez, 609 A.2d at 182. At the time the consent was requested, the officer had no grounds to reasonably suspect drug activity or a serious crime, such that there was not justification for a continuing detention of the Defendant. *Cf*. Commonwealth v. Helm, 690 A.2d 739, 742 (Pa. Super. Ct. 1997). The evidence gleaned as a result of the search of the Jeep, and thereafter, in the second search of the Defendant,[4] being the "fruit of the poisonous tree" shall be suppressed. *Cf*. Wong Sun v United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963).

Conclusion

The Courts of this Commonwealth have been vigilant in the protection of the privacy of our citizens guaranteed by Article I Section 8 of our Constitution. See Commonwealth v. Beasley, 761 A.2d 621, 624 (Pa. Super. Ct. 2000). This Court must be equally watchful. While the Court does not approve of the use of illegal substances, it cannot condone an equally illegal invasion of privacy by law enforcement. Because the investigative detention of the Defendant was not supported by reasonable suspicion, the attached Order of Court grants the Defendant's request for suppression.

ORDER OF COURT

July 15, 2011, the Court having reviewed the Omnibus Pre-Trial Motion filed by the Defendant May 6, 2011, having held hearing thereupon and received written argument from the parties, and reviewed the applicable law; it is hereby ordered that the Motion to Suppress is granted and the marijuana, cigar/cigar wrapper, the digital scale, and any statements made during the course of the illegal detention of the Defendant are hereby suppressed.