

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
ADAM NICHOLAS HITZ	:	
	:	
Appellant	:	No. 713 MDA 2023

Appeal from the Judgment of Sentence Entered April 17, 2023
In the Court of Common Pleas of Adams County Criminal Division at
No(s): CP-01-CR-0001534-2021

BEFORE: BOWES, J., LAZARUS, J., and STEVENS, P.J.E.*

MEMORANDUM BY LAZARUS, J.:

FILED: JANUARY 18, 2024

Adam Nicholas Hitz appeals from the judgment of sentence, imposed in the Court of Common Pleas of Adams County, after he was convicted, following a stipulated bench trial, of two counts of driving under the influence ("DUI") of a controlled substance¹ and one count of exceeding maximum speed limits.² On appeal, Hitz challenges the denial of his pre-trial suppression motion. After our review, we affirm.

The trial court set forth the factual history of this case as follows:

Trooper Brandon Black [] is employed with the Pennsylvania State Police and stationed at the Gettysburg Barracks. Trooper Black has been a Pennsylvania State Police Trooper for approximately three and a half years. During his training as a Pennsylvania State

* Former Justice specially assigned to the Superior Court.

¹ 75 Pa.C.S.A. §§ 3802(d)(1)(i) & (iii).

² **Id.** at § 3362(a)(3).

Police Trooper, Trooper Black learned to recognize and distinguish the odors of both burnt and raw marijuana. Trooper Black also received training in conducting standard field sobriety tests. Furthermore, Trooper Black received [Advanced Roadside Impaired Driving Enforcement ("ARIDE")] training approximately three years ago. While performing his duties as a State Trooper, Trooper Black often encounters individuals under the influence of drugs. Trooper Black has participated in approximately 100 DUI arrests involving drugs.

On August 11, 2021, at approximately 12:13 p.m., Trooper Black was on patrol with Trooper Gary Carneiro [] in a Pennsylvania State Police vehicle on U.S. Route 15 in Straban Township, Adams County[.] Although this area had a posted speed limit of 65 miles per hour, Trooper Black noticed a black Subaru crest a hill at 77 miles per hour. Trooper Black and Trooper Carneiro [] quickly caught up to the black Subaru, activated the lights of their police vehicle, and initiated a traffic stop at the York Street exit of U.S. Route 15 in Straban Township[.]

The Troopers approached the Subaru on foot after stopping it. At this point, the police vehicle's emergency lights were still activated, and [Hitz] was not free to leave the scene. Trooper Black immediately detected the strong odor of both burnt and raw marijuana as he approached the Subaru.

Trooper Black identified [Hitz] as the driver of the Subaru. [Hitz's] girlfriend was a passenger in the Subaru. When the stop began, [Hitz] was wearing sunglasses that covered his eyes. At Trooper Black's request, [Hitz] produced his driver's license. Trooper Black then noticed that [Hitz] also had a medical marijuana card in his wallet. Trooper Black asked [Hitz] if he had any marijuana in the vehicle, and [Hitz] produced a gym bag containing a grinder and a small amount of marijuana. [Hitz] also admitted to smoking marijuana 45 to 60 minutes prior to the traffic stop.

[Hitz] had a mellow affect at the time of the traffic stop, which is typical of individuals who have recently [used] marijuana. Trooper Black asked [Hitz] to exit the Subaru to participate in standard field sobriety testing. After [Hitz] exited the Subaru, Trooper Black detected an odor of marijuana emanating from [Hitz's] person. [Hitz] removed his sunglasses before beginning sobriety testing, and Trooper Black noticed marked redness at the bottom of [Hitz's] eyes. In Trooper Black's training and

experience, such ocular redness is consistent with impairment from marijuana [use].

During sobriety testing, [Hitz] stood on a smooth, paved area between the rear bumper of the Subaru and the front bumper of the police vehicle. Trooper Black made the following observations after conducting the horizontal gaze nystagmus test, the walk and turn test, the one-leg stand test, and the modified Romberg test:

- a. [Hitz's] performance on the walk and turn test indicated impairment. [Hitz] could not maintain his balance while receiving instructions regarding the walk and turn test, which requires participants to count nine steps while walking heel-to-toe in a straight line. In addition, [Hitz] missed a step; he also paused and asked a question before turning to complete the remaining steps.
- b. [Hitz's] performance on the one-leg[-]stand test, which required him to stand on one foot and count aloud, also indicated impairment. While standing on one foot as instructed, [Hitz] swayed and used his arms for balance.
- c. [Hitz's] eyelids fluttered as he performed the modified Romberg test, which required him to tilt his head, close his eyes, and count silently. This fluttering also indicated impairment.

After [Hitz] performed field sobriety tests, Trooper Black asked him how impaired he was on a scale of one to ten, with ten representing the greatest impairment. [Hitz] stated his impairment level was "four" but was decreasing. Trooper Black arrested [Hitz] after concluding [Hitz] was under the influence of a controlled substance to the point that he was incapable of safely driving.

Trial Court Opinion, 7/12/22, at [1-4] (paragraph numbers omitted; some paragraphs combined).

In addition to the above-cited offenses, Hitz was charged with possession of drug paraphernalia³ and possession of a small amount of

³ 35 P.S. § 780-113(a)(32).

marijuana.⁴ On March 4, 2022, Hitz filed a motion to suppress evidence on the basis that “he was unlawfully questioned, detained, and required to perform field sobriety tests in violation of his [c]onstitutionally protected right against unlawful search and seizure.” Motion to Suppress, 3/4/22, at ¶ 6. Following a hearing held on June 23, 2022, the court denied Hitz’s motion. A stipulated bench trial was held on December 20, 2022. Prior to trial, the Commonwealth withdrew the possessory charges. The court convicted Hitz of the remaining counts and sentenced him to 60 months of probation, with nine months of restrictive DUI conditions.

Hitz filed a timely notice of appeal, followed by a court-ordered Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Hitz raises the following claim for our review:

Whether the trial court abused its discretion or committed an error of law when, against the weight of the evidence, the court denied [Hitz’s] motion to suppress evidence, when the primary basis for reasoning by law enforcement to remove [Hitz] from his vehicle was that [Trooper Black] smelled the odor of marijuana, [Trooper Black] noticed [Hitz] lawfully possessed a medical marijuana card when [Hitz] was providing his driver’s license to [Trooper Black], and the only basis for the stop was because [Hitz] was traveling 12 miles over the speed limit.

Brief of Appellant, at 13 (unnecessary capitalization omitted).

Preliminarily, we are mindful of the following standard of review:

An appellate court’s standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court’s factual findings are supported by the record and whether the legal conclusions drawn from those

⁴ **Id.** at § 780-113(a)(31)(i).

facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, the appellate court is bound by those findings and may reverse only if the court's legal conclusions are erroneous. Where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to plenary review.

Commonwealth v. Jones, 121 A.3d 524, 526-27 (Pa. Super. 2015) (citation, brackets, and ellipses omitted).

Hitz argues that the suppression court erred in denying his suppression motion because Trooper Black lacked reasonable suspicion to question him about things unrelated to the reason for the initial traffic stop and “force [him] out of his vehicle to engage in field sobriety tests[.]” Brief of Appellant, at 20. Hitz asserts that, once Trooper Black effectuated the traffic stop, he did not have “sufficient, reasonable, or articulable facts to credibly believe that [Hitz] was driving impaired or involved in other criminal activity to seize him longer than necessary to effectuate the traffic stop for speeding.” ***Id.*** Rather, Trooper Black “only used the alleged odor of marijuana and his observation that [Hitz] possessed a valid medical marijuana card to assume that [Hitz] had some level of THC⁵ in his system.” ***Id.*** at 20-21. Hitz argues that, because it is no longer *per se* illegal to possess marijuana, the mere odor of

⁵ THC is short for tetrahydrocannabinol, the active ingredient in cannabis.

marijuana is insufficient to establish reasonable suspicion to justify detention for sobriety testing. Because the inference of illegality stemming from mere odor of marijuana is significantly diminished as a result of the Medical Marijuana Act⁶ (“MMA”), Hitz argues that Trooper Black’s questioning of him, and subsequent administration of sobriety tests, based solely on odor and Hitz’s possession of a medical marijuana card, was improper. ***Id.*** at 28.

Hitz further asserts that Trooper Black lacked probable cause to arrest him and require him to submit to a blood draw. ***Id.*** at 30. Hitz argues that Trooper Black

subjected [him] to an illegal seizure and investigation, by way of interrogating [him] about his lawful use of marijuana and forcing him out of his vehicle after a minor traffic infraction to perform field sobriety tests. [Trooper Black] then used those investigative tools to illegally establish the requisite suspicion to demand [Hitz] submit to a drug test, knowing that he had [] lawfully possessed medical marijuana and would likely have any level of THC in his blood.

Id. at 32. As such, “[t]he physical evidence (including the blood test) obtained from [Hitz’s] body[] was the product of [an] illegal detention and arrest of [Hitz] and is therefore tainted.” ***Id.*** at 33. Hitz is entitled to no relief.

The following principles govern our review of an order denying a motion to suppress:

An appellate court’s standard of review in addressing a challenge to the denial of a suppression motion is limited to determining

⁶ **See** 35 P.S. §§ 10231.101-2110.

whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, the appellate court is bound by [those] findings and may reverse only if the court's legal conclusions are erroneous. Where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to plenary review.

Commonwealth v. Ford, 175 A.3d 985, 989 (Pa. Super. 2017), quoting ***Commonwealth v. P. Jones***, 121 A.3d 524, 526-27 (Pa. Super. 2015).

We categorize police interactions with members of the public into three general tiers of increasing intrusiveness, which require increasing levels of suspicion on the part of an officer who initiates them: (1) mere encounters, which require no suspicion; (2) investigative detentions, which require reasonable suspicion; and (3) custodial detentions, which require probable cause. ***See Commonwealth v. Beasley***, 761 A.2d 621, 624 (Pa. Super. 2000).

"In determining whether police had reasonable suspicion to initiate an investigative detention, the fundamental inquiry is an objective one, namely, whether the facts available to police at the moment of the intrusion warrant a [person] of reasonable caution in the belief that the action taken was appropriate." ***Commonwealth v. Jefferson***, 256 A.3d 1242, 1248 (Pa. Super. 2021) (citation and quotation marks omitted). Demonstrating

reasonable suspicion requires that the detaining officer “articulate something more than an inchoate and unparticularized suspicion or hunch.” **Id.** (citation omitted). “[W]e must look to the totality of the circumstances to determine whether the officer had reasonable suspicion that criminal activity was afoot.” **Commonwealth v. Cauley**, 10 A.3d 321, 326 (Pa. Super. 2010) (citation omitted).

Additionally,

[d]uring a traffic stop, the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. [I]f there is a legitimate stop for a traffic violation[,], additional suspicion may arise before the initial stop’s purpose has been fulfilled; then, detention may be permissible to investigate the new suspicions.

Commonwealth v. Harris, 176 A.3d 1009, 1020 (Pa. Super. 2017) (citations and quotation marks omitted). “Reasonable suspicion of DUI can arise where an officer observes ‘classic signs’ of intoxication, such as the odor of intoxicants, slurred speech, and glassy eyes.” **Commonwealth v. Cauley**, 10 A.3d 321, 327 (Pa. Super. 2010). When an officer possesses good reason to believe that a driver is intoxicated, he is justified in asking the driver to perform sobriety tests. **See Commonwealth v. Ragan**, 652 A.2d 925, 929 (Pa. Super. 1995).

In **Commonwealth v. Barr**, 266 A.3d 25 (Pa. 2021), our Supreme Court recognized that, although “the MMA makes abundantly clear that marijuana no longer is *per se* illegal in this Commonwealth[,],” the possession of marijuana is still illegal under the Controlled Substance, Drug, Device and

Cosmetic Act⁷ for those not qualified under the MMA. **Barr**, 266 A.3d at 41. Accordingly, the Court held that “the odor of marijuana may be a factor, but not a stand-alone one, in evaluating the totality of the circumstances for purposes of determining whether police had probable cause to conduct a warrantless search.” **Id.** In so holding, the Supreme Court explained:

We emphasize that the realization that a particular factor contributing to probable cause may involve legal conduct does not render consideration of the factor *per se* impermissible, so long as the factor is considered along with other factors that, in combination, suggest that criminal activity is afoot. [T]he totality-of-the-circumstances analysis encompasses the consideration of factors that may arguably be innocent in nature.

Id. at 41-42.

Subsequently, in **Commonwealth v. Dabney**, 274 A.3d 1283, 1289 (Pa. Super. 2022), we assumed, *arguendo*, that **Barr** applies to a determination of reasonable suspicion for an investigative detention, and we held that the officer could consider the odor of raw marijuana, as well as other factors, in making that determination. Additionally, in **Commonwealth v. Mercedes**, 1275 MDA 2021 (Pa. Super. filed Sept. 23, 2022) (unpublished memorandum decision), we recognized the MMA does not permit the smoking of marijuana. **See** 35 P.S. § 10231.304(b) (“It is unlawful to: (1) Smoke medical marijuana.”). Accordingly, we held that the police had reasonable suspicion that marijuana was being illegally smoked when they smelled burnt marijuana and observed the defendant or his companion smoking a cigarillo.

⁷ **See** 35 P.S. §§ 780-101-144.

Finally, and critically in this case, although a medical marijuana patient may legally possess marijuana, the DUI statute specifically prohibits driving with the presence of any amount of a Schedule I controlled substance,⁸ or a metabolite thereof, in the driver's blood, regardless of the driver's status as an authorized user. **See** 75 Pa.C.S.A. §§ 3802(d)(1)(i) & (iii).

Here, the record reflects that Trooper Black pulled Hitz over for a valid traffic stop, having clocked his speed at 12 miles over the posted limit. Prior to the fulfillment of the initial stop's purpose, additional suspicion arose. **See Harris, supra.** Specifically, when Trooper Black approached Hitz's vehicle, he immediately detected the strong odor of both burnt and raw marijuana. **See** N.T. Suppression Hearing, 6/23/22, at 10. As Hitz opened his wallet to obtain his driver's license, Trooper Black noticed that he was in possession of a medical marijuana card. **See id.** at 11. Suspecting that Hitz was in possession of marijuana based on the smell, Trooper Black asked Hitz if he had any marijuana in the vehicle. **See id.** Hitz pulled out a gym bag that held a grinder containing marijuana. **See id.** Trooper Black asked Hitz when he had last smoked marijuana and Hitz admitted to having done so "45 minutes to an hour" previously. **Id.** at 12. Trooper Black noted that Hitz had a "mellow, laid back" affect, which he knew to be typical of individuals who have recently ingested marijuana. **Id.**

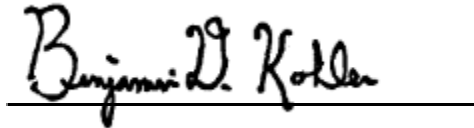
⁸ Marijuana is classified as a Schedule I controlled substance. **See** 35 P.S. § 780-104(1)(iv).

Based on all the foregoing observations, Trooper Black asked Hitz to exit his vehicle. Once at the rear of Hitz's vehicle, Hitz removed his sunglasses and Trooper Black observed that his eyes "had . . . marked reddening of the conjunctiva[,] . . . which is consistent with marijuana usage." ***Id.*** at 13. As a result, Trooper Black proceeded to administer Hitz field sobriety tests, the results of which indicated intoxication. ***See id.*** at 15-17. Thereafter, Trooper Black asked Hitz to rank his level of intoxication on a scale of one to ten; Hitz placed himself at "a four[,] but . . . coming down." ***Id.*** at 17. Based on the foregoing, and in light of his training and experience, Trooper Black made a determination that Hitz was "under the influence of a controlled substance to a degree which impaired his ability to safely operate a motor vehicle." ***Id.*** at 18. Accordingly, Trooper Black placed Hitz under arrest and took him to Gettysburg Hospital for a blood draw. ***See id.***

In consideration of the above, it is clear that Trooper Black possessed reasonable suspicion, based on more than the mere odor of marijuana and Hitz's possession of a medical marijuana card, to detain Hitz to conduct field sobriety tests. Likewise, we discern no error of law in the suppression court's conclusion that Trooper Black had probable cause to arrest Hitz for suspicion of DUI and subject him to a blood draw following the failed field sobriety tests. ***See Commonwealth v. Salter***, 121 A.3d 987, 996-98 (Pa. Super. 2015) (finding probable cause to arrest under suspicion of DUI based on field sobriety tests).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a solid horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024