

COLSCAN3 10.28.201508:2818597



Defendant-Name:  
**Brendan L. Ward**



Case Number



OTN:  
**L 928927-6**

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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

Commonwealth of Pennsylvania : CP-67-CR-0002371-2015  
: :  
vs. : :  
: :  
Brendan Ward :

OPINION IN SUPPORT OF ORDER GRANTING, IN PART, DEFENDANT'S  
OMNIBUS PRE-TRIAL MOTION

The Defendant, Brendan Ward, was charged with Count 1, Driving Under the Influence of Alcohol or Controlled Substance<sup>1</sup>; and Count 2, DUI: Highest Rate of Alcohol (BAC .16+) 2<sup>nd</sup> Offense.<sup>2</sup> On June 8, 2015,<sup>3</sup> the Defendant, through counsel, filed an omnibus pre-trial motion. In that motion, the Defendant argued that the stop of his vehicle was unlawful, and therefore, the evidence that flowed from that unlawful stop should be suppressed. The Defendant also argued, in the alternative, that if the stop was lawful, his statements should be suppressed because he was not *Mirandized* despite being in custody. Finally, the Defendant sought to compel the Commonwealth to turn over the dash-cam video from the night of the incident. The Defendant filed another pre-trial motion on September 18, 2015, wherein he requested that this Court preclude Officer Reimers from testifying at trial.

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

<sup>2</sup> 75 Pa. C.S.A. § 3802(c).

<sup>3</sup> The Defendant also filed an omnibus pre-trial motion on September 18, 2015.

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**Factual and Procedural History:**

On March 17, 2015, Officer Joshua Reimers of Northern York County Regional Police Department was assisting Springettsbury Township Police with a DUI checkpoint. N.T. 10/2/2015 at 4-5. During that patrol, Officer Reimers observed a Toyota Corolla stop in the middle of the road, reverse, and then turn down another road. Id. at 7. At that time, Officer Reimers was able to see the car had an inoperable rear brake light as well as an inoperable front marker light. Id. at 7-8. Officer Reimers initiated a traffic stop at which point he observed the Defendant had bloodshot and glassy eyes along with slurred speech and an odor of alcoholic beverage emanating from his person. Id. at 8, 10.

Officer Reimers asked the Defendant to step out of his vehicle and if he would consent to the HGN test, and the Defendant agreed. N.T. 10/2/2015 at 10-11. Officer Reimers observed that the Defendant was unsteady and needed to brace himself while stepping out of the vehicle. Id. at 10. Officer Reimers held a pen approximately 6 inches from the Defendant's face and judged his response. Id. at 11-12. In Officer Reimers's opinion, the Defendant performed poorly on the test, so he made the decision to handcuff the Defendant and transport him to the DUI checkpoint for more field sobriety tests.<sup>4</sup> Id. at 11.

Officer Jennifer Kennedy was the officer that conducted the field sobriety tests with the Defendant at the scene of the checkpoint. N.T. 10/2/2015 at 32. She indicated that the weather was chilly, but otherwise there were no adverse weather conditions. Id. at 33. Officer Kennedy asked the Defendant if he had any medical conditions that would affect his ability to perform the tests, and he replied that he did not. Id. at 35. Officer Kennedy administered the HGN test first, and she testified

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<sup>4</sup> Officer Reimers testified that he decided to transport the Defendant back to the DUI checkpoint because it was not his jurisdiction and "Springettsbury Township requested that any testing for field sobriety and any arrests would take place by a member of their department." N.T. 10/2/2015 at 11.

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that the Defendant exhibited all 6 clues.<sup>5</sup> Id. at 35-36. Next, the Defendant performed the walk and turn test. Id. at 36. He exhibited four of the eight clues of impairment. Id. at 37. Finally, the Defendant was asked to perform the one leg stand. Id. Officer Kennedy observed the Defendant had three of the four clues of impairment. Id. at 38.

Based on her observations and the Defendant's performance on the field sobriety tests, Officer Kennedy believed the Defendant was impaired to the point where he could not safely operate a motor vehicle. N.T. 10/2/2015 at 38-39. She arrested him and took him for a blood draw. Id. at 39. The Defendant was read his implied consent warnings and he agreed to submit to the blood draw. Id. The Defendant's BAC was 0.235%. Id. at 40.

Issues:

- I. When was the Defendant placed under arrest – at the time Officer Reimers transported him to the DUI checkpoint, or at the conclusion of Officer Kennedy's field sobriety testing?  
--At whatever point an arrest occurred, was there probable cause to arrest at that point?
- II. Should the Commonwealth be sanctioned under *Brady v. Maryland* for Officer Reimers's failure to preserve the dash-cam video after an express request for such by defense counsel?

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<sup>5</sup> There are a total of 6 clues, three for each eye: lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and nystagmus prior to 45 degrees. N.T. 10/2/2015 at 35.

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**Discussion:**

*Arrest:*

The Defendant argues that he was under arrest at the time Officer Reimers placed him in handcuffs, put him in the back of the patrol car, and transported him to the DUI checkpoint. The Commonwealth, on the other hand, argues that at this point the Defendant was merely subject to an investigative detention, and therefore, the Defendant was not under arrest.

Our appellate courts have determined there are three levels of police/citizen encounters:

‘The first of these is a “mere encounter” (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an “investigative detention” must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or “custodial detention” must be supported by probable cause.’

*Commonwealth v. Lyles*, 54 A.3d 76, 79 (2012) *aff’d*, 626 Pa. 343, 97 A.3d 298 (Pa. Super. Ct. 2014) (quoting *Commonwealth v. Phinn*, 761 A.2d 176, 181 (Pa. Super. Ct. 2000)).

The evidence clearly supports the stop made by the officer as being lawful. Officer Reimers testified that the rear brake light, as well as the front marker light, of the Defendant’s vehicle were inoperable. These were Motor Vehicle Code violations which needed no further investigation and therefore, Officer Reimers had probable cause to stop the Defendant.

However, for the following reasons we agree with the Defendant that he was under arrest at the time Officer Reimers handcuffed him and transported him to the DUI checkpoint.

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In order to assist us in determining whether the detention of the Defendant “became so coercive as to constitute the functional equivalent of a formal arrest,” we are permitted to consider the following factors:

the basis for the detention; the duration; the location; whether the suspect was transferred against [her] will, how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions”; fact that defendant was focus of investigation is relevant for determination of whether defendant was in “custody” but does not require per se Miranda warnings.

*Commonwealth v. Williams*, 941 A.2d 14, 31 (Pa. Super. Ct. 2008). We will discuss each factor.

First, the Defendant was detained in order to confirm Officer Reimers’s suspicion that the Defendant was intoxicated. N.T. 10/2/2015 at 13, 27. Second, Officer Reimers testified that the car ride to the DUI checkpoint took less than five minutes. *Id.* Third, the Defendant was detained in a residential area outside of the City of York. *Id.* at 13-14. In our opinion, the fourth and fifth factors go hand in hand, so we will discuss them together. Officer Reimers testified that he placed the Defendant in handcuffs, and on cross-examination, he further indicated that the Defendant was not free to leave if he did not wish to be subjected to further testing. *Id.* at 13, 16. Furthermore, Officer Reimers took the Defendant’s keys. *Id.* at 17. Sixth, Officer Reimers was in full uniform with his duty belt equipped with “handcuffs, firearm, extra magazines, pepper spray, and an expandable baton.” *Id.* at 14. Although Officer Reimers did not remove any of those items, there was also another officer present. *Id.* at 14-15. Finally, Officer Reimers testified that he made the decision to handcuff the Defendant and transport him to the DUI checkpoint because it was not his jurisdiction and Springettsbury Township Police had requested they do any and all field sobriety testing. *Id.* at 11.

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Despite the Commonwealth's argument that the Defendant was only subject to an investigative detention, we conclude that, based on the totality of the circumstances, the Defendant was under arrest at the time Officer Reimers placed him in handcuffs and transported him to the DUI checkpoint. Placed in the same situation, any reasonable person would not have felt that they were free to leave. Since Defendant's *Miranda* rights were not read at that time, anything Defendant said until such time as he was later read his rights would have to be excluded from evidence.

Was there probable cause to arrest?

The next question we must ask ourselves is whether Officer Reimers had the requisite probable cause to arrest the Defendant.

An officer needs probable cause in order to affect a constitutionally valid arrest. *Commonwealth v. Smith*, 979 A.2d 913, 916 (Pa. Super. Ct. 2009). Our courts have defined "probable cause" as follows:

The existence or non-existence of probable cause is determined by the totality of the circumstances. The totality of the circumstances test requires a Court to determine whether the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.

Id. at 916-917 (quoting *Commonwealth v. Dunlap*, 941 A.2d 671, 674-75 (Pa. 2007)).

Officer Reimers first noticed the Defendant's car, not for swerving, excessive speed, or erratic driving, but for turning around and driving away from the DUI checkpoint, an action which is not unlawful in itself. N.T. 10/2/2015 at 7. There could be many reasons for one to avoid a checkpoint, including that one believes he is under

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the influence, or that one simply wants to avoid the apparent traffic delay. There was no evidence that the Defendant knew he came upon a DUI checkpoint.

Upon approaching the Defendant's vehicle, Officer Reimers noted the Defendant had bloodshot/glassy eyes, slurred speech, and an odor of alcoholic beverage emanating from his person. Id. at 10. The Defendant also admitted to having five beers while playing pool. Id. However, on cross examination, Officer Reimers testified that he had no idea of the time frame in which the Defendant consumed alcohol, nor the size of the beers. Id. at 24. He also testified that when the Defendant turned around in the middle of the road, he did not endanger himself or anyone else. Id. at 18. Finally, the Defendant was non-confrontational and cooperative during his encounter with Officer Reimers. Id. at 24.

Based on those observations, Officer Reimers asked the Defendant to submit to one field sobriety test – the horizontal gaze nystagmus (HGN) test. N.T. 10/2/2015 at 11. According to Officer Reimers, the Defendant was unsteady while getting out of his vehicle and needed to use the car to brace himself. Id. at 10-11. Officer Reimers testified that he instructed the Defendant on how to perform the HGN test, and that he held the pen approximately 6 inches from the Defendant's face. Id. at 11-13. Officer Reimers opined that the Defendant had all six clues of impairment. Id. at 12.

The HGN test relies on “the automatic tracking mechanisms of the eyes [being] affected by alcohol.” *See generally* Busloff, Stephanie E., *Can Your Eyes be Used Against You? The Use of the Horizontal Gaze Nystagmus Test in the Courtroom*, 84 J. CRIM. L. & CRIMINOLOGY 203, 203 (Spring 1993) (analyzing the pros and cons of the HGN testing methods and its reliability in everyday use). According to the research, “[a]lcohol slows down the eyes' ability to rapidly track objects and causes the eyes to oscillate, or 'jerk,' before they normally would in a sober person.” Id. at 204. Because of the nature of the test, Pennsylvania courts, along with several other jurisdictions,



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have concluded that the results of the HGN test are scientific, and therefore, only admissible if the proper foundation is laid. *Commonwealth v. Stringer*, 678 A.2d 1200, 1201-02 (Pa. Super. Ct. 1996). However, our appellate courts have held that we can consider the results of the HGN test in order to determine whether an officer had probable cause to arrest. *Commonwealth v. Weaver*, 76 A.3d 562, 567 (Pa. Super. Ct. 2013).

In the present case, on cross-examination, Officer Reimers admitted that he incorrectly administered the HGN test, and he further agreed with defense counsel that that would invalidate the results. N.T. 10/2/2015 at 23. Because the HGN test is scientific in nature and Officer Reimers admitted to incorrectly administering the test, we give the HGN results little weight in our analysis.

The other factors observed by Officer Reimers are as follows: the Defendant's admission to drinking, an odor of alcoholic beverage, bloodshot and glassy eyes, slurred speech, the Defendant's alleged act of bracing himself against his vehicle as he got out to perform the HGN test,<sup>6</sup> and the results of the HGN test. *Id.* at 10-12. Aside from the light violation, the Defendant committed no other traffic infractions and his driving was normal. *Id.* at 20-21.

We conclude that, especially given Defendant's admission, Officer Reimers had probable cause to arrest the defendant.

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<sup>6</sup> This seems to be a new factor that Officer Reimers noted for the first time at pre-trial hearing. As strenuously argued by defense counsel, this fact was never mentioned at the Defendant's preliminary hearing. We further note that the officer indicates this was included in his police report. This report was not provided to the Commonwealth or defense counsel until October 8, 2015.

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*Brady Violation:*

Lastly, we must consider whether the Commonwealth has committed a violation under *Brady v. Maryland*, 373 U.S. 83 (1963) for its failure to preserve the dash-cam video from Officer Reimers's patrol car.

Our Supreme Court has held that,

in order to establish a *Brady* violation, a defendant must show that: (1) evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence was favorable to the defendant, either because it was exculpatory or because it could have been used for impeachment; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant.

*Commonwealth v. Willis*, 46 A.3d 648, 656 (Pa. 2012). This rule applies even if the Commonwealth's failure to disclose was neither intentional or in bad faith.

*Commonwealth v. Santiago*, 822 A.2d 716, 731-32 (Pa. Super. Ct. 2003). Furthermore, the rule applies even to those pieces of evidence that are not in the possession of the attorney for the Commonwealth; the rule "extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution."

*Commonwealth v. Burke*, 781 A.2d 1136, 1142 (Pa. 2001).

The Commonwealth concedes that the first factor of the *Brady* test has been proven since Officer Reimers testified that he simply did not preserve the dash-cam, even after it had been requested. *See* Com. Mem. 10/9/2015. The Commonwealth agrees with defense counsel that bad faith does not have to be shown; inadvertently failing to preserve the dash-cam is sufficient for the first factor.

The crux of the Commonwealth's argument is that the Defendant has failed to show that the dash cam video is favorable and material to the Defendant's position. The Commonwealth argues that the Defendant only argues that the dash-cam *could* reveal information that would be inconsistent with Officer Reimers's testimony. For

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the following reasons we disagree with the Commonwealth, and under the circumstances we conclude that we can presume the dash-cam is exculpatory.

We note the practical difficulty that one seeking to raise a *Brady* to demonstrate that the evidence is exculpatory or favorable to a defendant when the very evidence is, in fact, missing. In this case, we have a specific request made of the police to preserve the evidence, made within the time during which it could be preserved. Therefore, we conclude that we can presume the dash-cam is exculpatory because of Officer Reimers's failure to preserve the video after an explicit request. At the August 21, 2015, hearing, Officer Reimers was asked if he remembered defense counsel requesting the dash-cam video at the preliminary hearing. N.T. 8/21/2015 at 17-18. Officer Reimers indicated that he did not specifically remember, so defense counsel provided him with a page of the preliminary hearing transcript. *Id.* Officer Reimers acknowledged that defense counsel did ask him to preserve the dash-cam video at the preliminary hearing, which was held on April 14, 2015. *Id.* at 18. The following exchange then occurred:

Attorney Gothie: Did you preserve the video after that?

Officer Reimers: I was not currently on duty that day. I had come in specifically for that hearing. I don't recall when I would have returned to duty to submit that form.

Attorney Gothie: Well, my question is, did you take any attempt – make any attempts to preserve that video after I asked you to do it?

Officer Reimers: I don't believe I did.

Attorney Gothie: And did you have any question at all about what I asked you to do when I said I will be asking you to preserve that video?

Officer Reimers: No.

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Attorney Gothie: No doubt in your mind I wanted you to preserve it and save it for later use at trial, right?

Officer Reimers: I would assume, yes.

Attorney Gothie: And you will agree with me that the April 14th preliminary hearing was 27 days after the March 13 - strike that - the March 18 vehicle stop, correct?

Officer Reimers: That is correct.

Attorney Gothie: And you did not make any reports about this vehicle or MVR not working after your checkpoint shift?

Officer Reimers: I previously answered that, but yes.

Attorney Gothie: There were no reports about it failing, correct?

Officer Reimers: None that were made to me. If it - if you are specifically asking me if that specific camera failed, I was not aware of any failures. I was not made aware of any failures.

Attorney Gothie: And you did your pre-patrol check, right?

Officer Reimers: Yes.

Attorney Gothie: And you are not aware of any work orders related to that MVR subsequently, correct?

Officer Reimers: To be honest, we as officers don't handle those incidents. Those are handled by our supervisors.

Attorney Gothie: Understood.

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Officer Reimers: I would not be aware of any specific camera that would have been taken in or out of service because of issues.

Attorney Gothie: And just one last question. Why didn't you take any steps to preserve that video even after I requested it when it was still available after 27 days?

Officer Reimers: I have no answer for that, sir.

Id. at 18-20.

Frankly, we disagree with the Commonwealth's argument that Officer Reimers simply forgot to put in the request to preserve the dash-cam video. The above exchange not only shows that Officer Reimers understood defense counsel's request, but also shows that Officer Reimers had no explanation for not submitting the request. Had he simply forgot, he could have said as much.

Second, because the dash-cam was not preserved there is no practical way for the Defendant to prove that it is exculpatory since he has not seen the video. We understand the Commonwealth's argument that Officer Reimers was not the only person present at the time this incident occurred; the Defendant was also there. However, the Commonwealth seems to forget that it bears the burden of proving its case beyond a reasonable doubt at the trial. It is the Defendant's constitutional right not to take the stand and testify in his own defense, which is why having the dash-cam video is helpful to all involved; it is an unbiased observer.

Finally, we believe we can presume the dash-cam is exculpatory because Officer Reimers has provided conflicting testimony about what he observed on the night of the incident. Despite defense counsel specifically asking what factors led him to believe the Defendant was impaired, at the preliminary hearing Officer Reimers made no mention of the Defendant having to lean on his car to steady

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himself. See Def. Mot. 10/9/2015, Ex. A. The transcript indicates Officer Reimers paused to look at his report and then stated, "I noted in my report that Mr. Ward did have slurred speech while I was speaking to him." *Id.* When asked if there was anything else, Officer Reimers replied "Nothing else that I noted in my report, sir." *Id.* However, at the October 2<sup>nd</sup> hearing, Officer Reimers was adamant that he noted in his report the Defendant having to brace himself while getting out of his vehicle. N.T. 10/2/2015 at 10, 21-22.

We find Officer Reimers's conflicting testimony about his fact rather curious in light of the fact that on October 9, 2015, days after the October 2<sup>nd</sup> hearing, we received a Motion to Supplement Record from defense counsel. It appears Officer Reimers had written a police report on the night of the Defendant's arrest, but it was not turned over to either the attorney for the Commonwealth or defense counsel until October 8, 2015. Had the dash-cam been preserved it could have been used to either corroborate Officer Reimers's version of events or impeach them.

Since the Defendant has shown all three prongs of the *Brady* test, we must next decide to what extent we must sanction the Commonwealth for Officer Reimers's failure to preserve the dash-cam video.

Rule 573 of the Pennsylvania Rules of Criminal Procedure gives the trial court broad discretion in determining the proper remedy for a discovery violation. PA. R. CRIM. P. 573(E). Remedies range from an adverse inference jury instruction all the way to outright dismissal of the charges. However, dismissal of the charges should be reserved for only the most egregious cases. *Commonwealth v. Woodell*, 496 A.2d 1210, 1213 (Pa. Super. Ct. 1985). We note that in the Defendant's September 18<sup>th</sup> motion he suggests that we sanction the Commonwealth by prohibiting Officer Reimers from testifying at the Defendant's trial.

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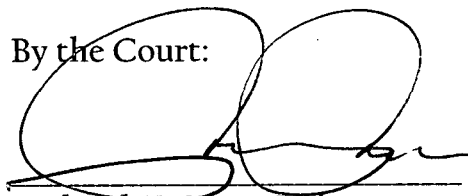
We agree with the Defendant that an adverse inference instruction to the jury would do little to remedy the situation. The testimony of Officer Reimers shows a blatant disregard for defense counsel's request to have the dash-cam preserved. Not only did Officer Reimers acknowledge that he completely understood defense counsel's request, but he offered absolutely no explanation as to why he did not preserve the dash-cam. As previously mentioned, this effectively forces the Defendant to testify in his own defense, which flies in the face of his constitutional rights. Therefore, we think the proper middle ground is to prohibit Officer Reimers from testifying at the Defendant's trial.

**Conclusion:**

For the abovementioned reasons, we hereby conclude that the Defendant was under arrest at the time Officer Reimers transported him to the DUI checkpoint. But, Officer Reimers did have probable cause to effectuate that arrest. We further conclude that the Commonwealth has committed a *Brady* violation, and we therefore prohibit Officer Reimers from testifying at the Defendant's trial.

Date: 10/26/15

By the Court:



Richard K. Renn, Judge