CAPTION:	Commonwealth of Pennsylvania Vs. Albert Andrew Seruga
DOCKET NO.:	3036-1998
JUDGE:	McFadden
DECISION DATE:	March 16,1999
ATTORNEYS:	A. Beltrami B. Zelechiwsky
DISPOSITION:	Denied
NATURE OF ACTION:	Omnibus Pretrial Motion
DIGEST TOPIC:	Automobiles Criminal Law Searches and Seizures
KEY NO.:	Automobiles 355(6); 419 Criminal Law 412.2(3) Searches and Seizures 47; 48; 49; 51

DESCRIPTION OF DECISION

The totality of the circumstances indicates that actual physical control of a vehicle existed in the prosecution of a driving under the influence charge where officers approached Defendant in response to a dispatch, the officers detected an odor of alcohol coming from the Defendant standing next to a car, the hood of the car was warm to the touch and the Defendant himself stated that he had just driven to the scene.

Defendant's statements that he drove to the scene will not be suppressed for failure of the officers to give Miranda warnings where Defendant was not in custody and could not have reasonably believed that he was in custody.

Defendant's motion to suppress a gun found in Defendant's car is denied where the Defendant was lawfully stopped, the officer inadvertently observed the gun in Defendant's vehicle and the officer possessed probable cause to believe that the gun was linked to criminal activity.

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

COMMONWEALTH OF PENNSYLVANIA	:	
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	:	**No. 3036-1998**
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	:	
v.	:	
	:	
	:	
ALBERT ANDREW SERUGA,	:	
Defendant	:	

OPINION OF THE COURT

This matter is before the Court pursuant to Albert Andrew Seruga's (Defendant's) Omnibus Pretrial Motion in the nature of a Motion to Suppress a chemical test, statements and physical evidence. Additionally, Defendant seeks to Quash the Information. On November 8, 1998, Defendant was arrested and charged with Driving Under the Influence of Alcohol or Controlled Substance and possession of Firearms Not to be Carried Without a License. A Preliminary Hearing was held before District Justice Barbara A. Schlegel on November 18, 1998. As a result of the Preliminary Hearing, the charges were bound over for trial. Following a review of the testimony taken at the February 5, 1999 hearing, and the letter briefs submitted

by the parties, we hereby make the following:

FINDINGS OF FACT

1. On November 8, 1998, Officer Kevin Spano, patrolman with the Bethlehem Police Department, was dispatched to the 1500 block of Chelsea Street. (N.T. 2/5/99, at 5).

2. Specifically, Officer Spano testified "the dispatch was that Ann Perez [hereinafter Perez] wanted an escort out of her house. She was in fear for her life from an Albert Seruga. She believed him to have weapons." (N.T. 2/5/99, at 6).

3. Officers Spano and Feliceangeli arrived at Chelsea Avenue at approximately 6:00 p.m.; Officer Spano went to speak to Ms. Perez, while Officer Feliceangeli checked the perimeter of the residence for the Defendant. (N.T. 2/5/99, at 7).

4. Officer Feliceangeli testified that as he approached the scene, he observed a white Cadillac as well as a male and female standing toward the front of the Cadillac. (N.T. 2/5/99, at 22).

5. Thereafter, Officer Feliceangeli radioed Officer Spano indicating that he had a white Cadillac in the rear of the Perez residence on 1500 Long Street. (N.T. 2/5/99, at 7).

6. Officer Spano learned from Perez that the person with the white Cadillac was the Defendant and that the Defendant had just driven to the scene. (N.T. 2/5/99, at 9).

7. According to Officer Spano, he patted down the Defendant for weapons; at that time, he detected an odor of alcohol coming from the Defendant, had to hold onto the Defendant during the pat down and noted that the Defendant's eyes were very blood shot, watery and glassed over. (N.T. 2/5/99, at 9).

8. Officer Spano also indicated that the hood of Defendant's car felt warm to the touch. (N.T. 2/5/99, at 9).

9. Officer Spano then asked the Defendant how the car got to 1500 Long Street to which the Defendant replied that he had driven it a short distance from Collins to the 1500 block of Long Street. (N.T. 2/5/99, at 10).

10. According to Officer Spano, at that point, the Defendant was not in custody and was free to leave. (N.T. 2/5/99, at 11).

11. While Officer Spano interviewed the Defendant and Perez, Officer Feliceangeli used a flashlight to look inside of Defendant's vehicle. (N.T. 2/5/99, at 23).

12. Officer Feliceangeli indicated to Officer Spano that he found a gun in Defendant's car; immediately thereafter, the Officers placed the Defendant under arrest. (N.T. 2/5/99, at 11).

13. The Officers did not read the Defendant his Miranda Rights at any time. (N.T. 2/5/99, at 18).

14. The Officers later learned that the Defendant did not have a license to carry a gun. (N.T. 2/5/99, at 12).

15. Both at the scene and at headquarters the Defendant repeated several times that he drove the car a few block from Collins to Long Street. (N.T. 2/5/99, at 19).

16. At headquarters, the Defendant asked what he was being charged with, to which Officer Spano replied "driving under the influence and having an unregistered gun in the vehicle." (N.T. 2/5/99, at 33).

17. Thereafter, the Defendant stated that he only drove from Collins to the current location. (N.T. 2/5/99, at 33).

DISCUSSION

Defendant Seruga makes the following arguments in support of his pretrial motions: 1) the results of a blood alcohol test performed upon Defendant following his arrest should be suppressed because the Officers did not have probable cause to believe that the Defendant was driving under the influence; 2) statements made by the Defendant should be suppressed because the Defendant was not advised of his Miranda rights; 3) the gun found in the car was obtained as the result of an illegal search; and 4) the testimony is insufficient to establish that the Defendant committed the offenses as charged.

Defendant first contends that the Officers did not

have sufficient basis to perform the blood alcohol test. In support thereof, Defendant avers that there was no evidence that the Defendant drove the motor vehicle while intoxicated and as such, the chemical test must be suppressed. We disagree.

It has been held that there are three categories of interaction between citizens and the police. 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 to respond. The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. An investigatory stop is a seizure where "the police conduct would have communicated to a reasonable person that the person was not free to leave." Com. v. Lewis, 636 A.2d 619, 623 (Pa. 1994). Because a stop triggers constitutional concerns, the officer must have reasonable suspicion based on specific facts that the person is involved in criminal activity. Id. Finally, an arrest or "custodial detention" must be supported by probable cause. Com. v. Ellis, 662 A.2d 1043, 1047-48 (Pa. 1995). It is well-settled that police must have probable cause to effect a

lawful arrest or custodial detention. Com. v. Rodriguez, 614 A.2d 1378 (Pa. 1992).

The Commonwealth bears the burden of proving by a preponderance of the evidence that a seizure did not violate the defendant's constitutional rights. Com. v. Comacho, 625 A.2d 1242 (Pa.Super. 1993). The United States Constitution and the Pennsylvania State Constitution protect citizens against unreasonable searches and seizures by the government. U.S. Const. amend. IV; Pa. Const. art. 1, sec. 8; Com. v. Stubblefield, 605 A.2d 799 (Pa.Super. 1992). Additionally, it has been held that an officer must have reasonable grounds to require a blood test to determine blood alcohol content. Com. v. Aiello, 675 A.2d 1278 (Pa.Super. 1996). Accordingly, an officer must have knowledge of specific facts to warrant a prudent man to believe that a crime has been committed. Id.

Under the Vehicle Code, a person may not "drive, operate or be in actual physical control of the movement of any vehicle." 75 Pa.C.S.A. § 3731(a). The most recent Superior Court cases reveal that in order to establish actual physical control of the vehicle, there must be evidence to support an inference indicating that the vehicle had been driven by the

defendant while he was intoxicated. Com. v. Saunders, 691 A.2d 946, 949 (Pa.Super. 1997) citing Com. v. Byers, 650 A.2d 468 (Pa.Super. 1994). A determination of actual physical control of a vehicle is based upon the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was additional evidence indicating that the defendant had driven the vehicle prior to the arrival of the police. Saunders, 691 A.2d at 949. Our courts have focused on the danger that a defendant poses to society in determining what constitutes actual physical control. Com. v. Huffman, 2527-1995, Northampton County, April 4, 1996 (Panella, J.).

We find that the Officers had sufficient evidence to support an inference indicating that the vehicle had been driven by the defendant while he was intoxicated. Saunders, 691 A.2d at 949. It is important to note that the Officers did not initially approach the Defendant for purposes of testing his sobriety. Instead, their purpose was to question the Defendant as to the dispatch they received regarding Perez. A police officer may stop and briefly detain a person upon specific and articulable facts which, in conjunction with the natural inferences arising therefrom, reasonably warrant the intrusion.

Com. v. Prengle, 437 A.2d 992 (Pa.Super. 1981).

In the case before us, Officer Spano testified that he was dispatched to the residence of Ann Perez. He further testified that according to the dispatch, Perez wanted an escort out of her house, she was in fear for her life from an Albert Seruga and she believed him to have weapons. (N.T. 2/5/99, at 6). Officer Feliceangeli, also dispatched to the Perez residence, testified that as he approached the scene, he observed a white Cadillac as well as a male and female standing toward the front of the Cadillac. (N.T. 2/5/99, at 22).

Thereafter, Officer Spano learned from Perez that the person with the white Cadillac was the Defendant and that the Defendant had just driven to the scene. (N.T. 2/5/99, at 9). According to Officer Spano, he patted down the Defendant for weapons; at that time, he detected an odor of alcohol coming from the Defendant, had to hold onto the Defendant during the pat down and noted that the Defendant's eyes were very blood shot, watery and glassed over. (N.T. 2/5/99, at 9). Officer Spano also indicated that the hood of Defendant's car felt warm to the touch. (N.T. 2/5/99, at 9). Officer Spano then asked the Defendant how the car got to 1500 Long Street to which the

Defendant replied that he had driven it a short distance from Collins to the 1500 block of Long Street. (N.T. 2/5/99, at 10).

Although the Officers did not see the Defendant drive the car, as noted, a determination of actual physical control of a vehicle is based upon the totality of the circumstances, including the location of the vehicle, whether the engine was running and whether there was additional evidence indicating that the defendant had driven the vehicle prior to the arrival of the police. Saunders, 691 A.2d at 949. The totality of the circumstances indicates that the hood of the car was warm to the touch, suggesting that the car had just been driven. Com. v. Wilson, 660 A.2d 105, 107 (Pa.Super. 1995). Additionally, when they arrived at the scene, the Officers learned that the Defendant had just driven to the scene. (N.T. 2/5/99, at 9). The Defendant himself admitted to the Officers that he had driven the car. (N.T. 2/5/99, at 10). Said evidence is sufficient to support an inference that the Defendant drove the vehicle to the alley. Based upon the aforementioned facts, we find that the Officers had probable cause to suspect that Defendant had been driving while under the influence of alcohol. Com. v. Crum, 523 A.2d 799 (Pa.Super. 1987). Their decision to subject the Defendant to blood tests to determine blood alcohol

content was therefore appropriate. Aiello, 675 A.2d at 1278. Accordingly, Defendant's Motion to Suppress said test results is hereby denied.

Next, Defendant argues that statements made by the Defendant must be suppressed. In Pennsylvania, Miranda warnings must be given when the individual is subject to "custodial interrogation." Miranda v. Arizona, 86 S.Ct. 1602 (1966). The test for determining custodial interrogation is "'whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he believes that his freedom of . . . movement is restricted by such interrogation.'" Com. v. Meyer, 412 A.2d 517, 521 (Pa. 1980).

Furthermore, the police need only give Miranda warnings while detaining a suspect by the side of a public highway when the suspect is actually placed under arrest or when the questioning of the suspect is so prolonged or coercive as to approximate the atmosphere of a station house interrogation. Com. v. Toanone, 553 A.2d 998, 1003 (Pa.Super. 1989). Thus, in the typical situation in which a motorist is temporarily ordered to remain by the side of his car, Miranda warnings are not essential. Id.

In the case before us, at the time that Defendant was approached by the Officers, Defendant was not in custody, nor could he have reasonably believed he was in custody for purposes of Miranda. Id. citing Berkemer v. McCarty, 546 A.2d 29-30 (Pa.Super. 1988). Furthermore, the Defendant was not under arrest and he has not shown that he was subjected to restraints comparable to those associated with an arrest. Id. Finally, it does not appear that Defendant's freedom of movement was restricted by the questioning of Officers Spano and Feliceangeli. See, Com. v. Gonzalez, 546 A.2d 26, 29 (Pa. 1988). The Defendant was asked a minimal number of questions at the scene and said questions cannot be characterized as "custodial interrogation." Id. at 30.

Finally, Defendant seeks to suppress evidence obtained from within Defendant's car. In support thereof, Defendant argues that there was no probable case to justify a search of the vehicle.

It has been held that no search triggering the protection of the Fourth Amendment is conducted where an officer observes the plainly viewable interior of a vehicle. Com. v.

Milyak, 493 A.2d 1346 (Pa. 1985). In order for the plain view doctrine to apply, three requirements must be met: (1) the initial intrusion must be lawful; (2) observation of the item must be inadvertent; and (3) there must be probable cause to link the observed property or item with criminal activity. Com. v. Parker, 619 A.2d 735, 739 (Pa.Super. 1993).

The first requirement is easily satisfied. As previously stated, the Defendant was lawfully stopped. Second, the observation was inadvertent. Under the facts of this case, Officer Feliceangeli used his flashlight to peer inside the window of the Defendant's car and observed a gun. Such action by the officer from a point outside the vehicle did not infringe on any legitimate expectation of privacy of the Defendant. See, Com. v. Merkt, 600 A.2d 1297 (1992) (an officer is permitted to use a flashlight during a plain view search); Com. v. Dunstan, 2221-1997, Northampton County, January 12, 1998 (Panella, J.). Finally, Officer Feliceangeli's sighting of the gun, combined with his experience as a police officer, gave Officer Feliceangeli probable cause to believe that the gun was linked to criminal activity. Id. Accordingly, Defendant's Motion to Suppress must be denied.

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

COMMONWEALTH OF PENNSYLVANIA	:	
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	:	**No. 3036-1998**
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	:	
v.	:	
	:	
	:	
ALBERT ANDREW SERUGA,	:	
Defendant	:	

ORDER OF COURT

AND NOW, this day of March, 1999, Albert Andrew Seruga's Omnibus Pretrial Motion in the Nature of a Motion to Suppress is hereby DENIED and DISMISSED.

BY THE COURT:

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,J
F.P. KIMBERLY McFADDEN, Judge