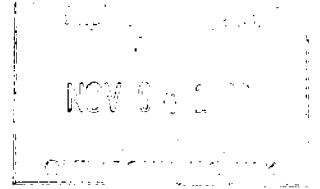


20-6740
IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

Darnell Peak, Pro se,
(Petitioner)



V.
Commonwealth of Pennsylvania
(Respondent)

ON PETITION FOR A WRIT OF CERTIORARI TO
SUPERIOR COURT, WESTERN DISTRICT, PENNSYLVANIA

Darnell Peak, Pro se, (LU4614)
1600 WALTERS MILL RD.
SOMERSET, PA 15510

Dec 14, 2020

Questions Presented

1. Whether the inventory search was illegal under 75 Pa.C.S. § 6309.2(a)(1) as no public interest was threatened as Defendant's vehicle was on private property & police failed to comply with the Monhall Police Department inventory policy by failing to make a written list of items found?
2. Whether the impoundment of Defendant's vehicle was illegal as Defendant was permitted, under 75 Pa.C.S. § 3353(b), to leave the vehicle on private property until a licensed driver arrived to retrieve it?

APPENDIX

- A1. Sept 30, 2020 Order Supreme Court Denied 106 WAL 2020
- A. March 30, 2020 Opinion & Judgment at 1056 WDA 2019
- B. Feb 19 & July 8 (filed July 16) 2019 & Nov. 17, 2018 Orders
- C. Court of Common Pleas October 22, 2019 Opinion
- D. 75 Pa.C.S. § 6109 (specific powers of... local authorities)
- E. 75 Pa.C.S. § 6309.2 (Immobilization, towing & storage of...)
- F. Monhall Borough Code §§ 1-1 & 1-15
- G. Monhall Borough Code §§ 415.79, 415-80, & 415.86
- H. Monhall Borough Code Disposition List
- I. Monhall Police Department Inventory Search... Policy
- J. November 25, 2020 Time extension (60 days)

OPINIONS BELOW

The October 22, 2019 Opinion of the Court of Common Pleas at CP-02-CR-07543-2017, attached hereto as exhibit C.3 is unreported, Superior Court's March 30, 2020 Opinion at 1056 WDA 2019, attached hereto as Exhibit A, is reported at ---A3D---, 2020 Pa.Super 78, 2020 Pa.Super.Lexis 259. Supreme Court's September 30, 2020 denial of Appeal at 106 WAL 2020, attached hereto as Exhibit A-1. U.S. Supreme Court November 25, 2020 of (60 day) time extension, attached hereto as Exhibit J.

TEXT OF THE ORDER(S) IN QUESTION

Judgement of Sentence affirmed.

Judgement Entered.

/s/ Joseph D. Seletyn

Joseph D. Seletyn, ESQ.
Prothonotary

Date: 03/30/2020

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STATEMENT OF THE CASE (A. Procedural History)

On March 3, 2017, petitioner, Darnell Peak ("Defendant") was arrested & charged at CP-02-CR-0007543-2017 with committing on that date: P.W.I.D. (herion & fentanyl), possession of a controlled substance (herion & fentanyl), Driving without a license, & failure to signal. On May 11, 2018, he filed a motion to suppress claiming the search of the vehicle violated Article I, Section 8 of the Pennsylvania Constitution & Fourth Amendment to the United States Constitution for the following reasons:

1.) The inventory search was illegal under 75 Pa.C.S. §6309.2 (a)(1) as no public interest was threatened as petitioner's vehicle was on private property & police failed to comply with the Monhall Police Department's inventory policy by failing to make a written list of items found.

2.) The impoundment of Defendant's vehicle was illegal as Defendant was permitted, under 75 Pa.C.S. §3353(b), to leave the vehicle on private property until a licensed driver arrived to retrieve it.

On August 8, 2018, a hearing was held. Thereafter, the parties filed brief. On November 27, 2018, suppression was denied & Defendant proceeded to stipulated non-jury trial & was found guilty on all counts. February 19, 2019, Defendant was sentenced to 3-6 yrs. incarceration & consecutive 7 yrs probation (credit for March 4, 2017 to February 12, 2018). See Ex.B. In a timely commenced PCRA proceeding, the right to appeal was reinstated. On July 18, 2019, Defendant appealed & asserted the questions presented in this petition. On October 22, 2019, the Court of Common Pleas filed

an opinion. Ex. C.

By opinion & judgement dated March 30, 2020 Superior Court (at 1056 WDA 2019) held the first question was waived in part but otherwise meritless & as an alternate basis for the search, the second question did not need to be reviewed because the search was lawful under 75 Pa.C.S. §6309.2. See Ex. A.

On April 6, 2020, petitioner filed a petition for Allowance of Appeal with the PA Supreme Court which they denied on September 30, 2020 (106 WAL 2020).

B. Factual History

In Suppression, Munhall Police Officer Timothy Stoler testified that on March 3, 2017, he was on general patrol in a marked police car heading south on West Street in Munhall when he approached a 3 way intersection when a buick sedan operated by defendant was traveling west on East 22nd Ave (approaching Officer Stoler from the left) & without signaling, turned right on West Street & passed Officer Stoler; Officer Stoler made a U-turn behind the vehicle & followed it into the Buy & Fly lot & gas station, activated his overhead lights & at 8:16 pm, stopped the vehicle. (Supp trans., 6/1/18, at 4, 9-13, 24, 30-31.) The Buy & Fly is less than 100 yards from said intersection & has a medium size building (which also house a Subway sandwich shop) & 4 gas pumps. (Supp trans., at 13-14, 31.) The size of the lot was described as exceeding the area of, & the hallway outside of, the courtroom. (S.T., at 31-32).

Defendant parked his vehicle at the gas pump closet to the building & attempted to exit the vehicle when Officer Stoler ordered Defendant, who was the sole occupant of the vehicle, to get back into the vehicle. (S.T., at 13-14, 31-34.) Up to this point,

Officer Stoler saw no one else in the vehicle or approached or exit the vehicle. (S.T., at 28). He approached the vehicle, detected a faint smell of burnt marijuana (like it had been smoked in the vehicle at some point) BUT DID NOT ACKNOWLEDGE IT AT THAT TIME. He asked for § obtained identification from Defendant, returned to his police car, §, checking the driver's license, determined it was under suspension. (S.T., at 14-16).

Stoler: I then went up. I advised him that he does not have a driver's license. He is going to have to exit the vehicle. Asked if he had any belongings, phone charger so on, § so fourth, wallet. He grabbed whatever he needed to grabbed. He was back by my vehicle at this time. I believed I asked who the vehicle belong to. I think he said it was his sister's. I explained to him we are going to have to tow the vehicle....

I told him we have to tow the vehicle, pick the vehicle up... It was blocking the flow of traffic through the business parking lot. It had to be removed.

¹(S.T., at 15, 16, 26, 40, 42 (Defendant was not under arrest at this point)).

Officer Stoler decided to conduct an inventory search of the vehicle because:

Per my policy, we hire a private tow company to retrieve valuables left in the car to safeguard from any wrongdoing after we return the car to the towing company. (S.T., at 17).

Additionally, the vehicle was parked on private property § illegally parked because it was not in a parking spot.

(S.T., at 32, 34-35).

Munhall Borough Police Department has an inventory policy (Cmwlth. EX 1 § 3). (S.t., at 19-20, 28-29).

Officer Stoler construed the policy to allow officers to:

Search the entire vehicle for anything of value that was to be documented on our inventory sheet or tow record for the sake of protecting the bureau for any legality of missing property, damaged property & so on.

(S.t., 20, 21, 22). Officer Stoler decided to impound the vehicle because:

For the businesses in our community. Anything that is involving us in towing the vehicle, they don't want it left on their property.

The vehicle was parked in front of the gas pump impeding the business right to do business & utilize their equipment on their property.

Once I realized that the defendant wasn't able to move the vehicle & the vehicle was impeding the flow of traffic through the parking lot in front of these pumps, it had to be removed from the private area for the business to conduct its business in the proper manner.

Based on it being illegally parked & it's on private property, these things are giving me reasons to remove that vehicle from the property. (S.t., at 17, 38, 39.)

Officer Stoler did not note these reasons in his report

for having defendant's vehicle towed. (S.T., at 34, 38-39).

Officer Stoler had called a tow truck & begin to conduct an inventory search of the car. (S.T., at 19). On the floor behind the back passenger seat was a somewhat transparent gray & white shopping bag which, upon illumination, he determined contained bundles of stamped bags of heroin. (S.T., at 23-24). At that point, he, out of concern for Officer safety, told another Officer on the scene Defendant had to be handcuffed, searched (and more than \$1700 in cash was recovered from his person), & placed in a patrol vehicle & taken to the Munhall Police Station. (S.T., at 24, 26-28).²

There is no sign on the lot stating a limit or duration a vehicle may be parked at a gas pump. (S.T., at 39-40). Officer Stoler did not speak to the owner of the lot on that day on whether to have defendant's vehicle towed. (S.T., at 40). Rather, he was acting based on conversations he had with the owners on prior occasions. (S.T., at 39).

Defendant told Officer Stoler he was going to try to find someone to remove the vehicle & Officer Stoler saw Defendant on his cellphone (S.T., at 40-41). The tow truck took 10-15 minutes to arrive. (S.T., at 41). The plastic bag & another cellphone were the only items removed from the vehicle & they were noted listed on an evidence sheet & no inventory sheet was completed because the only items he recovered from the vehicle was evidence & there was no other items of value to list on a inventory (S.T., at 42, 43-46). The tow company completes an inventory card & Officer Stoler only notes what he takes from the vehicle. (S.T., at 44-45).

Defendant's mother Darlene Russell testified on March 3, 2017, she received a call from his sister Yvonne Jones, with Defendant on the same line & Ms. Russell heard Defendant

tell Yvonne he was stopped by the police & he needed someone to pick up the car; Defendant said where the car was & Ms. Russell told Yvonne she could pick up the car & be there within 5-10 minutes - she crossed the bridge into Homestead & was at Ann Street. (S.t., at 48-51). Ms. Russell was working as a Uber driver at the time. (S.t., at 51). Ms. Russell went to the Buy & Fly lot but did not stop & park there - she drove through it to get to the Monhall Police Station (S.t., at 51-52).

Defendant testified he went to the Buy & Fly on March 3, 2017 to get gas & parked before he realize Officer Stoler was pulling him over. (S.t., at 53, 55-56). The vehicle was registered to his sister Yvonne but he paid for it & used it. (S.t., at 55-57). The vehicle was situated as follows:

At the gas station, it is set up just like the cop said. The gas station got 4 pumps right there. I know it's right next to the door. You got the little opening to where you go right there. It's not going to block anything if a car is parked right there in the front of the gas station. At the gas pump on either side, cars can go right through. I was at the first one.

I was at the first one, & he pulled in. He came & blocked me in from the front... I was trying to get out. That is when he was talking about getting back in the car. I got back in the car. (S.t., at 53).

Where Defendant was parked, other cars could get around the vehicle & it was not blocking entry or exit from the store.

(S.t., at 54, 55-57).³ Officer Stoler police vehicle was parked in front of, & another officers police vehicle was parked at another pump behind Defendant's vehicle & a third police vehicle was parked at a gas pump on the other side of the gas pump at which defendant was parked. (S.t., at 56-57). Vehicles could also get around the third police vehicle as well (S.t., at 56-57).

Defendant was permitted to get his phone from the vehicle; he called, Yvonne, who called their mother on a separate phone & Yvonne told him their mother would get the car because she was in the area. (S.t., at 54-55). Officer asked Defendant who he was talking to & Defendant said his sister; Defendant told Officer Stoler his mother would be there to pick up the car & Officer Stoler said "she better hurry up & get it before it gets towed," (S.t., at 55, 57-58).

Officer Stoler did not call the tow truck until after he found the contraband & Defendant was arrested; Defendant did not see a tow truck arrive because Defendant was taken to the police station. (S.t., at 58-59). Once at the station, Defendant was told his mother arrived at the station to pick up the vehicle; this was 10-15 minutes after Defendant was arrested. (S.t., at 58).

The transcript of the suppression hearing - & Commonwealth's suppression exhibits 1, 2 & 3 - were incorporated into the stipulated non-guilty trial which was supplemented with Commonwealth exhibit 4 (crime lab report) & a summary of Pittsburgh Police Det. Duane Schick's proffered testimony the amount of the narcotics was consistent with intent to distribute the controlled substance. (S.t., at 8-9).

Reasons for granting the Writ
A. Illegal Inventory Search of Vehicle

This question addresses the lawfulness of an inventory search of the vehicle & the statutes of focus is 75 Pa.C.S. §6309.2. Whether impoundment was lawful in this matter is addressed in the second question presented (&, if not, then the inventory search is unlawful). The statute on which that question focuses is 75 Pa.C.S. § ~~6309~~ 3353.

Article I, section 8 of the Pennsylvania Constitution provides:

The people shall be secured in there persons, houses, papers & possessions from unreasonable searches & seizures, & no warrant to search any place or to ~~the~~ seize ~~any~~ person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const., Art. I, § 8 (Security from searches & seizures).⁴

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secured in there persons, houses, papers, & effects against unreasonable searches & seizures, shall not be violated, & no warrants shall issue, but upon probable cause, supported by oath or affirmation, & particularly describing the place to be searched & ~~the~~ persons or things to be seized.

U.S. Const., amend. IV (Unreasonable searches & seizures):

B. Applicability of 75 Pa.C.S. § 6309.2

The Supreme Court addresses the distinction between immobilization & impoundment (or towing & storage) under Section 6309.2 as follows:

"Immobilization" generally is defined as "to prevent freedom of movement or effective use of". A vehicle may be immobilized in place by means of a... locking device. "Impound" is defined as "1a: to shut up in or as if in a pound: Confine to: to seize & hold in the custody of law"... for purposes of section 6309.2... we discern no distinction between a vehicle which had been "impounded" & one that has been "towed & stored."

The question before us is whether Corporal Wealand had authority pursuant to section 6309.2 to do anything other than immobilize Appellant's vehicle under the circumstances of the instant case.

Com v. Lagenella 623 Pa. 434, 443-434, 83 A3D 94, 100-101 (2013)
(The vehicle was not on private property).⁵

a vehicle which has simply been immobilized in place is not in the lawful custody of the police for an inventory search.

... the language of section 6309.2(b) regarding the procedure following immobilization of a vehicle further suggest such a vehicle is not in police custody. When a person is found operating a vehicle while the person's license is suspended (towing is not

necessary) Section 6309.2(a)(1) requires that "law enforcement officer shall immobilize the vehicle" & then notify "the appropriate judicial authority". 75 Pa.C.S.A. §6309.2(a)(1). When a vehicle is immobilized pursuant to section 6309.2(a)(1), the operator of the vehicle has 24 hrs from the time of immobilization to appear before the appropriate judicial authority, who may issue a certificate of release upon presentation of the necessary paperwork. §6309.2(b). If a certificate of release is not obtain within 24 hrs, the appropriate judicial authority shall notify the appropriate law enforcement officer of the county in which the violation occurred, & that officer shall then contact the appropriate towing & storage agent to tow the vehicle. §6309.2(c). Thus upon immobilization, the vehicle's operator may seek release of the vehicle from the judicial authority, not the police; & only upon the vehicle operator's failure to obtain a certificate of release within 24 hrs will the judicial authority notify law enforcement, who, at the time shall arrange for the towing & storage of the vehicle. These procedures indicate that a vehicle is simply immobilized is not in the lawful custody of police.

a warrantless inventory search of a vehicle is permissible only when the police have lawfully towed & stored, or impounded. To the extent Com v. Thompson, 999 A2D 616 (Pa. Super 2010) holds otherwise, that decision is disapproved....

We do not suggest that Corporal Wealand commenced the inventory search... in bad faith, or with an investigatory

motive... Nevertheless, because there was no basis for Corporal Wealand to tow Appellant's vehicle in the first instance the inventory search... was improper, & the fact that Corporal Wealand performed the vehicle inventory search in accordance with a standard inventory policy is immaterial.

Lagenella, ~~600~~ 632 Pa. 450, 451-452, 453, 83 A3D at 104, 105, 106.⁶

The Commonwealth, in its October 2, 2018 Brief filed in the Court of Common Pleas, argued section 6309.2 was inapplicable because it was not adopted by municipal ordinance & Lagenella did not disapprove of the holding to that effect in Com. v. Henley, 909 A2D 352 (Pa. Super. 2006), appeal denied, 592 Pa. 786, 927 A2D 623 (2007). While Thompson was explicitly disapproved in part, Lagenella in the last portion of the immediate quote thereof, clearly overrules the holding/theory advanced by the Commonwealth when Lagenella holds conducting an inventory search of a vehicle when section 6309.2 only authorizes immobilization is unconstitutional (because an officer does not have custody of a vehicle unless impoundment is authorized) & the fact that the officer "performed the vehicle inventory search in accordance with a standard inventory policy is immaterial" Lagenella, 623 Pa. at 453, 83 A3D at 106.

There was nothing in Lagenella on whether the municipality adopted section 6309.2 by ordinance but the adoption of an inventory policy suggest section 6309.2 was not so adopted.⁷ Lagenella certainly holds that a municipalities inventory policy does not override section 6309.2's provisions on when a vehicle may be impounded & hence, until then, a

vehicle is not in police custody to allow an inventory search.

The Commonwealth, for the October 2, 2018 Brief, represented the following:

In the case at hand, there is simply no evidence of record that Monhall has adopted §6309.2. Undersigned counsel is not necessary representing that Monhall has or has not adopted §6309.2. Undersigned counsel has not inquired or investigated this matter. However, there was no evidence of record establishing Monhall has adopted §6309.2. Moreover, Monhall Police Department official policy on inventory searches fails to mention §6309.2 for the purposes of this hearing, §, therefore, Officer Stoler was within his rights to conduct an immediate inventory search § tow Defendant's vehicle even though there was no public safety interest in doing so. The vehicle was taken into lawful police custody of the Monhall Police Department.

First, the Commonwealth bears the burden of production § proof of suppression § if it fails to discharge those burdens, suppression must be denied. Com v. Enimpah, 630 Pa. 337, 371, 106 A3D 695, 703 (2014).

There is no question defendant had a reasonable expectation of privacy in the vehicle he was driving § the failure of the Commonwealth to provide any evidence on whether the Borough of Monhall adopted 75 Pa.C.S. §6309.2 must be determined against the Commonwealth - to wit: adoption thereof must be presumed. §

Second, Article VII of Chapter 415 of the Monhall Borough Code. EX.G., indicates police must comply with section 6309.2.

Third, any adoption of 75 Pa.C.S. §6309.2 would be by

municipal ordinance & not by the inventory or other policy / procedure issued by a police department.

75 Pa.C.S. §6109(a)(1)(b) (specific powers of department & local authorities),⁹

It is clear sections 415-79 & 415-80 of the Monhall Borough Code requires compliance with the vehicle Code before impounding a vehicle. Of course, section 6309.2 is a provision of the vehicle Code & thus, is applicable here.

Fourth, no ordinance or police order / policy can limit the provisions of 6309.2:

A municipality has no right to exercise any power contrary to, or in limitation or enlargement of, powers granted by ~~some~~ statutes which are applicable in every part of this Commonwealth. (53 Pa.C.S. §2962(c)(2). Section 6309.2 is applicable throughout the Commonwealth. Thus, Norristown cannot enact either a local ordinance or issue a general order that limits the terms of the generally applicable §6309.2. Specifically, Norristown has no authority to withdraw or alter any of the various Due Process provisions provided.... in section 6309.2 but which are not found in general order.

Finally,... under 53 Pa.C.S. §2962(c), any uniform statute applicable in every part of the Commonwealth shall supersede any municipal ordinance or resolution on the same issue. Therefore, even if general order 2000-23 has properly been adopted in every other way, it would still be unenforceable as section 6309.2 specifically addresses the same subject & therefore supersedes the general order. Section 6309.2 does not allow impoundment

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§ towing in the matter in which it was done in this circumstance.

Thurman, 872 A2D at 842

Accordingly, Lagenella is controlling & requires suppression of evidence.^{to}

Furthermore, this case is peculiar & rather unique in that the vehicle was stopped on private property & not on a road.

Without a recognized basis for the impoundment of the Defendant's car, the inventory search cannot be justified. There is no general power for a police department to seize a car, ... Thurman, 872 A2D 838, 839, Additionally, even if the inventory policy had been followed, the mere existence of a police department inventory policy, without enabling legislative authorization from the General Assembly or the subject municipality, cannot authorize impoundment of a vehicle

Com v. Barlow, 2006 Pa. Dist. & Cnty. Dec. Lexis 318, 17-18 (Chester co) (Vehicle parked in private parking lot) (Sunoco gas station).¹¹

Instantly, the Court of Common Pleas believed, incorrectly, Defendant's vehicle had to be towed merely because he was unlicensed & no licensed driver was present at the scene to move it regardless of whether a public safety interest existed -

The Court: I mean, the stop was the fact he made the turn without a turn signal. Whether the car is parked legally or illegally has nothing to do with the suppression. At that point he is left with the choice of abandoning the car or getting it ready to be towed. If it is going to be towed, he is going to do an inventory.

The Court: Based upon the testimony that has been presented, there was only one person in this car, & that was Mr. Peak. He is disqualified from driving the car.

The Court: Tell me why if the car is parked legally or illegally it deals with the issue of suppression.

The Court: Ask your question. It is totally irrelevant. (S.t., at 36, 37-38).

As further discussed in the argument on the second question presented, section 6309.2 does not authorize police to take custody of the vehicle except in the interest of public safety. The only public interest identified here was complaints by unidentified motorists complaining about all of the vehicles around the gas pumps - Defendant's vehicle & three police vehicles - which occupied three of the four available gas pumps. (S.t., at 41, 53, 56-57). Nonetheless, it is uncontradicted that vehicles could still get around those four vehicles. With less or no police vehicles on that lot, there would even be more room for vehicular traffic. Hence, Defendant's vehicle, alone, did not cause or present any issue of public

Safety,

The interest advanced by Officer Stoler was the burden on the Business owner ability to use his property & equipment - to wit: if Defendant's vehicle was merely immobilized at the gas pump at which it was parked, the business owner can't use one pump but three others remain available. (S.t., at 17, 38, 39, 56). In addition, Officer Stoler believed Defendant's vehicle had to be removed as it wasn't parked in a designated parking spot in that lot. (S.t., at 32, 34-35). Apparently, Officer Stoler recognized the vehicle could be immobilized on the lot depending on where the vehicle was situated. Given the short immobilization period set forth in section 6309.2 (discussed further with respect to the second Question), the fact that Defendant's vehicle was parked at a gas pump which shared a common tank with the pump immediately adjacent to it or with all four pumps provides an insignificant marginal burden on a private owner's use of his private property than does leaving the vehicle elsewhere on that same business which also used in conjunction with the business.

Accordingly, no public safety interest existed - & a private pecuniary interest is, or an exist thereof under the circumstances of this case was insufficient - to authorize any action by police other than immobilization of the vehicle & due to the lack of custody of the vehicle, an inventory search was not authorized. On the contrary, Defendant was properly parked near a gas pump at which he intended to refuel the vehicle but was prevented to do so by Officer Stoler intervention. In

the absence of such a prevention, Defendant would have been advancing the business interest of the business owner by purchasing fuel. Further, in light of the short period of time which elapsed, there is no record support for a contention that Defendant would have overstayed at the gas pump - in relation to when a license driver (mother, Darlene) actually arrived at the scene - if defendant was permitted to refuel the vehicle & provided payment for the fuel & complete any other business he intended to conduct at the establishment such that the extended stay would cause any safety issue. Thus, Officer Stoler unsupported prognostication of a potential future threat to the safety of others does not support or authorize the search of Defendant's ~~vehicle~~ vehicle.

Alternatively, an ordinance provides no vehicle shall be removed even under the authority of the Vehicle Code, "if, at the time of the intended removal, the.... person for the time being in charge of the vehicle is present & expresses a willingness & intention to remove the vehicle immediately." Monhall Borough Code § 415-86. While there is a discrepancy as to when Officer Stoler called for a tow truck - & hence, when he intended to remove the vehicle - Defendant was allowed to get his phone & immediately thereafter (before the inventory search started) Officer Stoler was informed by Defendant of his intentions to get someone to immediately remove the vehicle. Hence, such ~~intention~~ expression of intent by Defendant was sufficient to preclude the removal of the vehicle by police per said ordinance & the impoundment of that vehicle, & search thereof pursuant thereto, was unauthorized & thus, illegal.

While Defendant could not drive the vehicle, he was not prohibited by law from conducting activity with respect to the vehicle other than driving - such as refueling the vehicle. Hence, the vehicle was properly situated for that purpose where it was stopped at § would not have been subject to immobilization or tow/impoundment until after the re-fueling transaction was completed. Therefore, to the extent immediacy, for purpose of construing, is assessed in relation to the actual time in which the vehicle could have been moved by a licensed driver (rather than by the immediacy of the expression of the intention to move the vehicle), Officer had jumped the ~~gun~~ gun by proceeding to tow/impound the vehicle § search the same before Defendant could re-fuel the vehicle. The search violates this ordinance as well.

C. Search of Vehicle was Investigatory

An Inventory Search is not design to uncover criminal evidence. Rather, its purpose is to safeguard the seized items in order to benefit both the police § the Defendant. We have recognized inventory search in the two areas of automobiles § booking procedures....

Four goals underlie ~~such~~ such searches. First, to protect the Defendant's property while he is in custody; second, police are protected against theft claims when Defendants are given their property upon release; third, they serve to protect the police from physical harm due to hidden weapons; § fourth, when necessary they ascertain or verify the identity of the defendant.

Intrusions into impounded vehicles... are reasonable where the purpose is to identify & protect the seized items.

As long as the search is pursuant to the caretaking functions of the police department, the conduct of the police will not be viewed as unreasonable under the Constitution,...

"two factors must be present in order to justify the reasonableness of an inventory search in the absence of probable cause. The Commonwealth must show: (1) that the vehicle... was lawfully within the custody of police, & (2) that the search was in fact an inventory search pursuant to the objectives laid down in South Dakota v. Opperman, 429 U.S. 364 (1976)."

In the interest of M.W., 194 A3D 1094, 1100-01 (Pa. Super 2018), appeal denied --- Pa ---, 202 A3D 687 (2019).¹²

The record shows that the search was investigatory & not a good faith inventory search. The inventory search policy here provides, in pertinent part, as follows:

1. Purpose

B. Any vehicle towed or impounded at the direction of a Monhall Police Officer from public or private property within or outside of Monhall Borough is to be inventory searched for valuables. Whenever a vehicle is taken into custody for the purpose of storage & safekeeping until the owner is identified, located or released from custody, it is to be searched. Custody

of the vehicle must be lawful & necessary.

11. Impoundment

A. Officers are authorized to impound a motor vehicle under a variety of circumstances. These circumstances include, but are not limited to the following situations:

1. The operator is no longer physically or mentally competent to decide what actions to be taking in order to safeguard the motor vehicle & its contents.

2. The motor vehicle is illegally parked or obstructing or impeding the normal & safe movement of traffic & must be towed.

3. The operator of the motor vehicle has been lawfully arrested & taken into custody for a criminal or motor vehicle law violation & he/she is unable or unwilling to provide for a reasonable & immediate alternative arrangement for the safety & security of the motor vehicle & its contents.

B. Typical examples when police may take custody of a motor vehicle:

2. Operating a motor vehicle while under suspension or revocation of privilege or the operator is unlicensed.

III. Inventory Procedures

A. Items or personal property that are of greater than ordinary value & items of a potentially dangerous nature must be removed from the vehicle, & secured, pending transmittal to the ~~Detective~~ or office of the Chief of Police for the purpose of safekeeping & return to the owner.

B. A locked vehicle may be opened.... Locked trunks are not to be forced open.... but may be inventory searched if a key is available....

C. A Munhall Police Department vehicle inventory card is to be completed with each vehicle inventory. This record is to be as complete as possible. The OIC & the impound supervisor shall also sign the form. This form will accompany the incident/case file when completed.

D. Items of personal luggage which are closed but unlocked must be inventory searched for valuables....

E. Vehicles are not to be unnecessarily searched, that is, seats removed, headliners ripped open, or the vehicle damaged....

F. Containers may be examined during an inventory search of the vehicle or its trunk. Containers that are sealed should not be opened unless....

G. Items of contraband &/or potential evidentiary value are to

be removed from the vehicle & secured. If found while conducting the inventory custodial search, they are to be transported to the Detective or Chief of Police for the purpose of safekeeping & storage. They are to be listed on the inventory search record.

H. The items taken from a motor vehicle are to be listed on the Monhall Police Department's Vehicle Report, filling in all available information....

IV. Method

A. The inventory search should be conducted immediately before the vehicle is towed. If this is impractical, the inventory search can be conducted at a later time but as soon as possible. This is to be noted on the inventory search record.

B. All items of suspected value are to be taken & placed into protective custody by the officer conducting the inventory search. All seized items are to be inventoried & listed on the inventory search record. The inventory record must be completed in all aspects, listing the incident number, owner / operator, license number, time, date, etc, & a list of property seized. A copy of this report is to be left with the vehicle to alert the owner as to what property was taken & where to claim it at a later time.

The search of Defendant's vehicle did not comply with this

policy in several respects. First, the vehicle was not unlawfully parked or impeding the normal/safe flow of traffic when a car is stopped for re-fueling.

Second, no inventory card was completed.

"...there was no evidence that an inventory was actually done in this case." The State introduced neither an inventory sheet nor any testimony that the Officer actually inventoried the items found in respondent's car. Rather, the testimony at suppression hearing suggest that the Officers used the need to "inventory" as an excuse to search for drugs. (Florida v. Wells, 109 LED2D 1,495 US1, 4-12(1990).) (Luggage)

Third, while contraband may have been described in a report, it was not also reported on an inventory search record.

Notably, Officer Moss did not list on that form several valuable items in the vehicle. He also failed to record the presence or absence of preprinted items listed on the inventory form, like a spare tire, a jack, & lug wrench. (Com v. Richardson 215 A3D 693(2019).) (Drug investigation)

Fourth, the search of the vehicle was not completed at the scene or at a later date after the contraband was discovered & no reason was noted as to why completion of the search was impractical.

The above-described circumstances reveal the inventory search was a pretext for an unlawful investigatory search & therefore, the search is unconstitutional—

".... We recognized that the police officer is assumed to know how to recognize the odor of marijuana: "it would have been a dereliction of duty for the arresting officer to ignore the obvious aroma of an illegal drug which he was trained to identify." (Com v. Thomas 190 A3D 722 (2018).)
(Drug odor)

Barlow, 2006 Pa. Dist. & Cnty. Dec. Lexis 318*, 21 (C.P. Chester Co).

The conclusion that the search of the Defendant's was not a bona fide inventory search is further indicated by the fact that the purported inventory search was never completed & in violation of the inventory policy, an Inventory Property Report not made. State v. Badgett, 200 Conn. 412, 512 A2D 160, 71 (1986); State v. Hygh, 711 P2D 264, 270 (Utah, 1985); State v. McDaniel, 156 N.J. Super 347, 383 A2D 1174, 1180 (1978). Additionally, the sequence of events does not support a conclusion that this was a search merely to secure & inventory items in the car. The search was conducted after Officer Massey should have known Ms. Harper was on her way & prior to Officer Massey's call to the towing company.

Com v. Burgwin, 254 Pa. Super. 417, 421, 386 A2D 19, 21 (1978)
(opinion in support of Affirmance).

The lower court found that there was a search of a locked trunk, the... occupants... were in custody &... not asked about disposition of the automobile, or... whether an inventory was necessary, ... police had indicia sufficient... to believe... incriminating evidence may well be discovered by a search of his

car, &... there was no valuable... property in plain view. Taking all of this... into consideration... the search... was an investigatory search & not... incident to the police's caretaking function.

Similarly, as further evidence of pretext, Officer Stoler was aware of Defendant's intention to obtain, & conducting in seeking a licensed driver to move the vehicle. Accordingly, the Court of Common Pleas erred in denying suppression.

D. Illegal Impound of Vehicle

These are two theories advanced by the Commonwealth for impounding Defendant's vehicle. The first is the "in the interest of public safety" provisions of 75 Pa.C.S. §6309.2(1)(a). The second is the following provision of the vehicle code:

(b) Unattended Vehicle on private property.

(1) No person shall park or leave unattended a vehicle on private property without the consent of the owner or the other person in control or possession of the property except in the case of emergency or disablement of the vehicle, in which case the operator shall arrange for the removal of the vehicle as soon as possible.

(2) The provisions of this subsection shall not apply to the private parking lots unless such lots are posted to notify the public of any parking restrictions & the operator of the vehicle violates such posted restrictions. For the purposes of this section "private parking lot" means a parking lot open to the public or used for the parking without charge; or a

parking lot used for parking with charge. The Department shall define by regulation what constitutes adequate posting for public notice.

75 Pa.C.S. § 3353(b) (Prohibitions in specified places).

Regarding "in the interest of public safety" provisions of 75 Pa.C.S. § 6309.2(a)(1), the record shows the vehicle was parked at a gas pump as though it was going to get fuel. Hence, any vehicle stopped at that particular fuel pump is a hazard subject to removal. Such a argument presented by the Commonwealth is untenable by imbuving § authorizing arbitrariness § unfettered discretion on the part of the police § eroding constitutional protections § statutory restrictions. In this circumstances, Section 6309.2's 24 hrs immobilization provisions applied § had to be observed.

Regarding, section 3353, that provision authorizes the property owner to effect - § does not authorize police to order - the tow of the vehicle on private property -

As to Officer Massey's purported concern that the Defendant's car would be left in a location that the Sunoco manager/proprietor would not favor Vehicle Code section 3353 specially empowers that person to remove such a vehicle at a reasonable expense of the vehicle owner. 75 Pa.C.S.A. § 3353 (b). This section does not authorize the police to remove or impound such a vehicle on their own initiative. Other jurisdictions have specifically rejected police initiated impoundments undertaken pursuant to similar laws. See Commonwealth v. Brinson, 440 Mass. 609, 800 N.E.2D 1036-1037 (2003); State v. Thirdgill, 46 Or. App. 595, 613 P2D 44, 46 (1980) §

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Dixon v. State, 23 Md. App. 19, 327 A2D 516, 527 (1974).

Barlow, 2006 Pa. Dist & Cnty. Dec. Lexis 318*21 (C.P. Chester Co.)¹⁴

Without authority to impound Defendant's vehicle under the circumstances, the existence of or compliance with a police department inventory policy is immaterial.

Finally, Section 415-86 further restrains police authority to impound a vehicle by prohibiting any exercise of impound powers when the owner or the person at the time being in charge of the vehicle is present & expresses a willingness & intention to remove the vehicle immediately—

"We also observed that the police did not abide by standard policies. Officer Moss failed to inform Richardson of the Ross Township Police Department Policy to allow unlawful drivers 20 minutes to find a substitute driver to avoid having their car towed & inventory. Richardson had voluntarily asked Officer Moss if Richardson's girlfriend could remove his car from the berm. Officer Moss asked if she was at the apartment... Richardson said no. Without advising Richardson that he had 20 minutes to find someone else. Officer Moss decided that whomever Richardson could possibly call would not be there in time. Officer Moss then ordered the tow & proceeded with the search. (Richardson, 215 A3D. 693 (2019).)

Defendant expressed such an intention & (mother, Darlene) had that intention too. While the Court of Common Pleas & the Commonwealth dismiss the contention Officer Stoler had to allow the opportunity for removal by Defendant as not

required by statute or constitutional law, it was, nonetheless required by ordinance. Again, this ignorance was caused by the Commonwealth failing to meet its burden of production. Consequently, that failure must inure to Defendant's benefit & the denial of suppression must be reversed.

Footnotes

1. As far as actual obstruction of traffic, Officer Stoler testified several unidentified patrons complained "because of the several police vehicles & because of Defendant's car blocking the area, in that tight area right there." (S.t., at 41)

2. While Officer Stoler's usual practice is to search the passenger compartment then the trunk compartment of the vehicle, he did not testify ~~that~~ he completed the search of the passenger compartment or search the trunk area of the vehicle once he obtained the contraband, left the vehicle, & approached Defendant & told him he was under arrest. (S.t., at 22-28).

3. Defendant acknowledged that if the car was left there, no one would be able to use that particular gas pump at which the vehicle was parked. (S.t., at 56).

4. See Commonwealth v. Hughes, 575 Pa. 447, 459 n.5, 836 A2d 893, 899 n.5 (2003) ("The Fourth Amendment... is applicable to the states through the Fourteenth Amendment"). See also U.S. Const., amend. XIV § 1 ("All persons born or naturalized in the United States & subject to the jurisdiction thereof,

are citizens of the United States & of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States nor, shall any State deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the law.")

5. While Lagenella was cited for operating vehicle without a valid inspection, Corporal Wealand did not cite the lack of a valid inspection as a basis for towing his vehicle.
"Lagenella, 623 Pa. at 437-438 & n1, 83 A3D at 96 & n1.

6. See Lagenella, 623 Pa. at 450, 83 A3D at 104 (construing Colorado v. Bertine, 79 U.S. 367 (1987) to suggest a vehicle is in a officers possession for purposes of conducting a lawful inventory search under the Fourth Amendment when the vehicle is impounded but not when the vehicle is merely immobilized).

7. While section 6309.2 contains special provisions for cities of the first class (where Philadelphia is the only such City), Lagenella involved Harrisburg, Henley involved the City of Pittsburgh, & this matter involves the Borough of Monhall.

8. Superior Court observed the provisions of Chapter 415 of the Monhall Borough Code included in the record were dated August 16, 2019 & there was no evidence these

12. See Commonwealth v. Livingstone, 644 Pa. 27, 57, 174 A3D 609, 626-627 (2017). "The community caretaking doctrine has been characterized as encompassing three specific exceptions: the emergency aid exception; the automobile impoundment/inventory exception; and the public servant exception, also sometimes referred to as the public safety exception.... Each of the exceptions contemplates that the police officers' actions may be motivated by a desire to render aid or assistance, rather than the investigation of criminal activity".

13. Section 6309.2(a)(1) uses the term "Highway" & "Trafficway". While private property is not a highway, it can constitute a trafficway even if use restrictions are posted thereon.

Commonwealth v. Cozzone, 406 Pa. Super. 42, 46, 593 A2D 860, 862 (1991); Commonwealth v. Wilson, 381 Pa. Super. 253, 257, 553 A2D 452, 454, appeal denied, --- Pa. ---, 562 A2D 826 (1999). See Commonwealth v. Ansell, 143 A3D 944 (Pa. Super. 2016).

Conclusion

For the foregoing reasons, Defendant petitioner respectfully request that this Honorable Court grant relief as follows:

1.) Allowance of the Appeal from Superior Courts March 30, 2020 judgement at 1056 WDA 2019 on one or both questions presented in this petition;

2.) Vacate the February 19, 2019 judgement of sentence of the Court of Common Pleas of Allegheny County, Criminal ~~Division~~ Division, at CP-02-CR-0007543-2017;

3.) Reverse the November 27, 2018 Order denying suppression;

4.) Such other relief as the Court deems appropriate.

Respectfully Submitted,

Darnell Peak

Darnell Peak LU8614