No. 23-_____

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA

Respondent,

V.

ALFREDO SANCHEZ BARBOZA

Petitioner.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

APPENDIX

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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALFREDO SANCHEZ BARBOZA	:	
Appellant	:	No. 1303 WDA 2021

Appeal from the Judgment of Sentence Entered August 6, 2021
In the Court of Common Pleas of Washington County Criminal Division at No(s): CP-63-CR-0000002-2020

BEFORE: DUBOW, J., MURRAY, J., and PELLEGRINI, J.*

MEMORANDUM BY DUBOW, J.: **FILED: DECEMBER 9, 2022**

Appellant, Alfredo Sanchez Barboza, appeals from the judgment of sentence entered on August 6, 2021, after a jury convicted him of Possession with Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, and Possession of Drug Paraphernalia.[1] Appellant challenges the trial court's denial of his pre-trial motion to suppress evidence. After careful review, we affirm.

On December 24, 2019, Pennsylvania State Trooper Brian Rousseau conducted a traffic stop of Appellant's vehicle. During the stop, Trooper Rousseau determined that Appellant did not own the vehicle and was driving

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* Retired Senior Judge assigned to the Superior Court.

[1] 35 P.S. §§ 780-113(a)(30), 780-113(a)(16), and 780-113(a)(32), respectively.

with a suspended license.[2] At some point, Trooper Rousseau requested that Appellant exit the vehicle. Shortly thereafter, Trooper Rousseau obtained Appellant's consent to search the vehicle.

Trooper Rousseau found a duffle bag behind the driver's seat. Inside, he discovered a grocery bag containing an unknown white substance. Subsequent testing revealed that the substance was 219 grams of fentanyl. Trooper Rousseau placed Appellant under arrest. The search also uncovered three cellphones. Based primarily on the fentanyl, police obtained a warrant to search the phones.[3]

On July 21, 2020, Appellant filed an omnibus pretrial motion seeking, *inter alia*, to suppress evidence derived from the vehicle search. Appellant argued that his consent to search his vehicle resulted from an illegal detention and, therefore, the court must suppress any evidence derived from the search.

The court held a suppression hearing beginning on August 18, 2020, and continuing on October 5, 2020. Trooper Rousseau was the only witness to testify regarding suppression.[4] Trooper Rousseau testified, in relevant part, that when police conduct a traffic stop in which none of the occupants of the vehicle are licensed, and the vehicle is stopped at an unsafe location, State

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[2] There were two passengers in the vehicle with Appellant. Neither passenger was licensed nor owned the vehicle.

[3] The phones contained evidence that Appellant was "trafficking in drugs[.]" N.T. Hr'g, 8/18/20, at 74.

[4] Appellant testified at the hearing, limited to a request for bail.

Police protocol is to tow the vehicle. Before towing the vehicle, the police must conduct an inventory search to account for items in the vehicle.

After receiving post-hearing briefs, the court denied Appellant's motion.[5] It agreed that Appellant's consent resulted from an illegal detention.[6] The court found, however, that the police would have inevitably discovered the fentanyl because, pursuant to protocol, the police would have towed Appellant's vehicle and conducted an inventory search. The court, thus, deemed the evidence discovered in the vehicle search to be admissible at trial.

Appellant's jury trial took place on May 3 and 4, 2021. At the conclusion of trial, the jury convicted Appellant of the above charges. On August 6, 2021, the court sentenced Appellant to an aggregate term of 7½ to 15 years' incarceration. Appellant timely filed a Notice of Appeal and both he and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review.

> 1. Did the trial court err in concluding that [Appellant's] right to be free from unreasonable searches and seizures under the United States and Pennsylvania Constitutions was not violated when it refused to suppress a controlled substance and drug paraphernalia on the basis that they would have been inevitably discovered

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[5] The court granted Appellant's request to suppress a statement he made to police regarding ownership of the bag in question. That decision is not before us on appeal.

[6] The court found that Trooper Rousseau subjected Appellant to an investigative detention when he removed Appellant from the vehicle and requested consent to search. Trial Ct. Op., 12/15/20, at 7. The court found that the detention was not supported by reasonable suspicion of criminal activity and, therefore, Appellant's consent was not freely given. ***Id.*** At 9-10.

> through an inventory search that was explicitly motivated by a purpose of searching for contraband?
>
> 2. Did the trial court err in concluding that [Appellant's] right to be free from unreasonable searches and seizures under the United States and Pennsylvania Constitutions was not violated when it refused to suppress the data received from the cellular telephones and SIM card found in the vehicle driven by [Appellant] as "fruit of the poisonous tree" of the controlled substance and drug paraphernalia illegally found in and seized from that same vehicle?

Appellant's Br. at 4.

A.

Both of Appellant's issues challenge the suppression court's denial of his motion to suppress evidence derived from Trooper Rousseau's search. As a result, we address the issues together.

When we review the denial of a motion to suppress, we are "limited to considering only the Commonwealth's evidence [adduced at the suppression hearing,] and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole." ***Commonwealth v. Yorgey***, 188 A.3d 1190, 1198 (Pa. Super. 2018) (*en banc*) (citation and internal quotation marks omitted). We are highly deferential to the suppression court's factual findings and credibility determinations. ***Commonwealth v. Batista***, 219 A.3d 1199, 1206 (Pa. Super. 2019). If the record supports the suppression court's findings, we may not substitute our own. ***Id.*** We give no deference to the suppression court's legal conclusions, however, and review them *de novo*. ***Id.***

B.

Appellant's issues involve the application of the inevitable discovery rule where the inventory search exception to the general warrant requirement applies. The following precepts inform our review.

Upon lawfully impounding a vehicle, the police may conduct an inventory search of the vehicle pursuant to reasonable, standard protocols. ***Commonwealth v. Hennigan***, 753 A.2d 245, 255 (Pa. Super. 2000). Because the search is intended to safeguard seized items, and not for investigatory purposes, the search does not need to be authorized by a warrant or supported by probable cause. ***Id.***

Under the inevitable discovery rule, "evidence that ultimately or inevitably would have been recovered by lawful means should not be suppressed despite the fact that its actual recovery was accomplished through illegal actions." ***Commonwealth v. Gonzalez***, 979 A.2d 879, 890 (Pa. Super. 2009) (citation omitted). The rule applies where "the prosecution [establishes] by a preponderance of the evidence that the illegally obtained evidence ultimately or inevitably would have been discovered by lawful means[.]" ***Commonwealth v. Bailey***, 986 A.2d 860, 862 (Pa. Super. 2009) (citation omitted).

This Court has explained that at the intersection of these rules, even where police perform an illegal search of a vehicle before it is impounded, if they would have inevitably discovered the seized evidence during a routine inventory search of the impounded vehicle, the evidence is admissible under the inevitable discovery rule. ***See Bailey***, 986 A.2d at 863.

In the instant case, the suppression court determined that because the police were legally permitted to impound Appellant's vehicle, and State Police protocol would have resulted in an inventory search of the vehicle upon towing, the police would have inevitably discovered the fentanyl. Thus, regardless of the legality of Appellant's consent to search the vehicle, the evidence is admissible under the inevitable discovery rule. Trial Ct. Op., 12/15/20, at 10-16. ***See also*** Trial Ct. Op., 2/25/22, at 15.

The record supports the trial court's factual findings. Trooper Rousseau testified at the suppression hearing that when police "conduct a traffic stop in which all of the occupants of the vehicle are unlicensed drivers, [t]he protocol is to have the vehicle towed[.]" N.T. Hr'g, 8/18/20, at 18-19. Moreover, Appellant's car posed a hazard to other drivers, and required towing for safety. ***Id.*** at 64.[7]

Regarding the inventory search, Trooper Rousseau explained that "any time that a vehicle is towed, [State Police protocol] is to have an inventory search performed. The purpose of the inventory search is to make sure any valuables are accounted for[.]" ***Id.*** At 19.

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[7] Appellant does not challenge the legality of the State Police's impoundment of his vehicle. We note that where "a person operates a motor vehicle . . .while the person's operating privilege is suspended," the police may "in the interest of public safety, direct that the vehicle be towed[.]" 75 Pa.C.S. § 6309.2(a)(1). Here, Trooper Rousseau testified that Appellant was driving with a suspended license, and his stopped vehicle posed a traffic hazard because it was parked on a highway off-ramp, near a sharp curve, and on an evening where increased fog reduced visibility. N.T. Hr'g, 8/18/20, at 64.

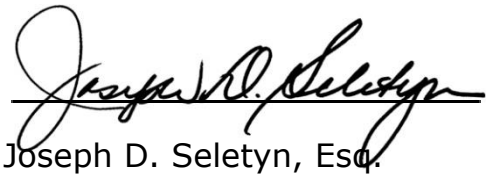
Since the record supports the suppression court's factual findings, we defer to them. Further, we agree with the suppression court's application of the law to these facts. Since the State Police were legally permitted to tow Appellant's vehicle, State Police protocol would have resulted in an inventory search of the vehicle. In inventorying the contents of the vehicle, the police would have discovered the fentanyl.[8] We discern no error of law.

C.

In conclusion, we affirm the trial court's order denying Appellant's motion to suppress evidence derived from Trooper Rousseau's search of Appellant's vehicle.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/9/2022

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[8] Appellant argues solely that Trooper Rousseau's investigatory motive in requesting consent to search Appellant's vehicle precludes application of the inevitable discovery rule. Appellant's Br. at 17-36. Trooper Rousseau's motive in conducting the *actual* search is not relevant, however, since the inevitable discovery rule asks only whether, in the absence of the illegal search, the police *would have* inevitably discovered the fentanyl through an inventory search. ***See Gonzalez***, 979 A.2d at 890. Appellant's argument has no merit.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
vs.	)	
ALFREDO BARBOZA	)	No. CR 2 of 2020
LETICIA LOPEZ	)	No. CR 3 OF 2020
Defendants.	)	

ORDER

AND NOW, this 14th day of December, 2020, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendants' omnibus pre-trial motion suppression motions are DENIED with regard to contraband found in a duffle bag and the data found on cellphones. The motion to suppress is GRANTED regarding Mr. Barboza's statement concerning ownership of the duffle bag. There shall be a Pretrial Conference on **March 5, 2021, at 1:00 p.m.** in Courtroom No. 1 before the undersigned.

By way of further explanation, the Pennsylvania State Police (PSP) charged the Defendants with Possession with Intent to Deliver a Controlled Substance (F), Criminal Conspiracy to Deliver a Controlled Substance (F), Possession of a Controlled Substance (M), and Possession of Drug Paraphernalia (M) on December 24, 2019. The Magisterial District Judge (MDJ) held a preliminary hearing on the charges on December 31, 2019. The Defendants waived their hearing. On July 20, 2020, counsel for Alfredo Barboza filed an Omnibus Pre-Trial Motion requesting that the Court suppress the evidence located in the vehicle the defendants were riding, including the controlled substances found in a duffle bag, as well as the cellular telephones and SIM cards, and any statements made to the PSP. Counsel for Leticia Lopez joined Mr. Barboza's request.

The Court scheduled a hearing for August 18, 2020. The parties were unable to conclude the hearing on that date. The Court rescheduled the hearing for September 11, 2020. Unfortunately, Court had to reschedule the hearing to October 5, 2020 due to a Covid outbreak in the District Attorney's office.

FACTS

Shortly after 9:00 p.m. on December 24, 2019, PSP Trooper Brian Rousseau was at the PSP Washington barracks when he received a phone call from a fellow trooper, Corporal Eric Bartlett. Corporal Bartlett was off-duty and traveling on Interstate 70 westbound toward the city of Washington. Corporal Bartlett informed Trooper Rousseau that a van immediately behind him was driving erratically and tailgating at times. This included the turning off and on of headlights. Trooper Rousseau, therefore, decided to investigate. He got into his PSP cruiser and headed to the Eight-Four interchange on-ramp as the mini-van and Corporal Bartlett were approaching. Trooper Rousseau was able to locate the car based upon the description given by Corporal Bartlett in real-time when passing the on-ramp. Corporal Bartlett described the vehicle as a van with an Arizona registration and a burned out driver-side headlight.

Trooper Rousseau entered Interstate 70 West and followed the van. Soon after entering the highway, the Trooper was unable to immediately effectuate a traffic stop because he came upon the mini-van in a construction zone. Once out of the construction zone, Trooper Rousseau turned on his flashing lights. The van pulled off the highway via an exit ramp to Interstate 79 and came to a stop on the shoulder of the ramp. Trooper Rousseau approached the driver's door and noticed that Mr. Barboza was driving while Ms. Lopez was in the front passenger seat. Trooper Rousseau asked Mr. Barboza for his driver's license, but he had none. He was only able to produce a photo identification card issued by the state of Arizona. *See* Transcript, August 18, 2020, p. 12. Mr. Barboza informed the Trooper that he was coming from New Jersey and headed to Arizona. *Id.* at 13.

Trooper Rousseau then returned to his police cruiser to call PSP dispatch to gather additional information regarding Mr. Barboza. He learned that Mr. Barboza had a suspended driver's license from the state of Arizona. Additionally, he learned that the van was registered to a third person, but it was not stolen. *Id.* at 47. After obtaining this information, Trooper Rousseau requested assistance. *Id.* at 13.

Trooper Rousseau waited for backup. When backup, Trooper Hill, arrived, Trooper Rousseau approached Mr. Barboza. From the driver's door, Trooper Rousseau noticed luggage in

the car and a third passenger in the second row of seats.[1] Trooper Rousseau requested that Mr. Barboza exit the vehicle, which he did. After stepping out, Mr. Barboza, with Troopers Rousseau and Hill, proceeded to the front of the Honda. At this time, Trooper Hill inquired about the person seated in the front passenger seat. Mr. Barboza identified his girlfriend, Leticia Lopez. *Id.* at 14. Trooper Rousseau asked Mr. Barboza if she had a valid driver's license; Mr. Barboza said she did not. The Trooper then inquired about the second row passenger, but he did not have a valid driver's license either. *Id.* at 15. [2]

Trooper Rousseau then asked Mr. Barboza if he could search the mini-van. Mr. Barboza consented to the search without any delay. *Id.* at 17. Ms. Lopez and the back seat passenger were then directed to exit the min-van. *See* Transcript, October 5, 2020, p. 17. Trooper Rousseau started the search at the left side of the vehicle. *See* Transcript, August 18, 2020, p. 19. He found a duffle bag behind the driver's seat that was zipped shut. Mr. Barboza acknowledged that the duffle bag was his. *Id.* at 25. Therein, the Trooper discovered male toiletries and a plastic grocery bag covering a second plastic grocery bag. In the grocery bag, Trooper Rousseau discovered an unknown white substance. He asked Mr. Barboza to identify the substance, but Mr. Barboza said that he did not know. Concerned that this substance could very well be cocaine, heroin, or fentanyl, and inhaling such substances when in close contact on a windy evening, the officers placed the two Defendants and the third person under arrest. *Id.* at 19-20. Concerned that Ms. Lopez may have contraband in her body cavities, the officers transported her to the Washington Hospital for a female nurse to conduct a search. *Id.* at 22. Mr. Barboza and the third person were transported to the PSP barracks.

At the PSP barracks, Trooper Rousseau read Mr. Barboza his *Miranda* rights at 11:19 p.m. *See* Exhibit 1. Additionally, Mr. Barboza signed a consent to search the Honda mini-van. *See* Exhibit 2. Thereafter, the PSP conducted a full vehicle search which included the assistance of trained dog. The dog indicated at the spot where Trooper Rousseau previously discovered the

[1] Trooper Rousseau thought that the amount of luggage (one duffle bag) was not "typical" for the number of persons in the car (3) for a short trip from Arizona to New Jersey and back. *See* Transcript, August 18, 2020, p. 14, LL. 2-5.

[2] This person did not speak English. After all three were taken to the P.S.P. barracks, the P.S.P. learned that this person was in the United States illegally and that he had no identification documents. *Id.* at 22-24.

duffle bag, but no other contraband was found.[3] Additionally, the PSP found three cellular phones in the center console. They secured a search warrant for the three cellphones. *See* Exhibit 4.

ANALYSIS

The Defendants contend that the traffic stop was illegal because Trooper Rousseau made it without reasonable suspicion of any wrongdoing. This Court finds otherwise. According to the Trooper, he had parked himself on the Eighty-Four on-ramp for Interstate 70 West. Through his driver's side-mirror, he recognized the mini-van with a burned out drivers-side headlight currently passing the on-ramp that Corporal Bartlet was describing in real-time. As Trooper Rousseau pulled onto Interstate 70 West, he was able to confirm that the mini-van had an Arizona license plate.

To conduct a vehicle stop, the police must have a "reasonable basis for his or her belief that the Vehicle Code was being violated in order to validate the stop." *Commonwealth v. Andersen*, 753 A.2d 1289, 1293 (Pa. Super. Ct. 2000). "This reasonable basis must be linked with his observation of suspicious or irregular behavior on behalf of the particular ... persons stopped." *Commonwealth v. Espada*, 528 A.2d 968, 970 (Pa. Super. Ct. 1987). "Moreover, the reasonable basis necessary to justify a stop is less stringent than probable cause, but the detaining officer must have more than a mere hunch as the basis for the stop." *Commonwealth v. Bowersox*, 675 A.2d 718, 721 (Pa. Super. Ct. 1996).

Although Trooper Rousseau did not charge Mr. Barboza with any traffic violation, he testified credibly that the Honda mini-van was be operated without a functioning front left headlight. For this reason, Trooper Rousseau had probable cause to stop Mr. Barboza's vehicle pursuant to 75 Pa. C.S.A. §§ 4302, 4303.[4] "Pennsylvania law makes clear that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense." *Commonwealth v. Brown*, 2019 WL 409647 (Pa. Super. Ct. 2019) (quoting *Commonwealth v. Harris*, 176 A.3d 1009, 1019 (Pa. Super. Ct. 2017)).

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[3] The PSP sent the white substance to the PSP crime lab for an analysis. The result was 219 grams of fentanyl. *See* Exhibit 5.

[4] Section 4302 is entitled, "Period for Requiring Lighted Lamps," and Section 4303 is entitled, "General Lighting Requirements."

The first piece of information that Trooper Rousseau learned when speaking with Mr. Barboza was that he did not have a valid driver's license. Before Trooper Rousseau asked for consent to search the mini-van, he also learned from Mr. Barboza that Ms. Lopez did not have a valid driver's license either, and the person in the second row seat had no valid identification, was not a U.S. citizen, and could not speak English. Trooper Rousseau also testified that he had no contact information to reach the registered owner of the mini-van at the time of traffic stop. Consequently, the mini-van needed to be impounded. Trooper Rousseau, however, asked Mr. Barboza if he had his consent to search it before the mini-van towed. Mr. Barboza consented. To search the van without Mr. Barboza's consent, the law requires more: Trooper Rousseau would have to articulate circumstances that equal probable cause of criminal activity afoot.

Police may search an automobile without a warrant so long as they have probable cause to do so, as an automobile search "does not require any exigency beyond the inherent mobility of a motor vehicle." *Commonwealth v. Gary*, 91 A.3d 102, 104 (Pa. 2014). The Pennsylvania Supreme Court has concluded that Article I, Section 8 of the Pennsylvania Constitution is co-extensive with the Fourth Amendment to the United States Constitution, which has long supported a warrant exception for automobile searches so long as probable cause to search exists. *See id.* at 108–13; *see also Carroll v. United States*, 267 U.S. 132, (1925) (establishing federal automobile exception to warrant requirement under Fourth Amendment). With respect to probable cause to search, our Supreme Court instructs us that:

> [p]robable cause exists where the facts and circumstances within the officers' knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. With respect to probable cause, this [C]ourt adopted a "totality of the circumstances" analysis in *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921, 926 (1985) (relying on *Illinois v. Gates*, 462 U.S. 213 [103 S.Ct. 2317, 76 L.Ed.2d 527] (1983)). The totality of the circumstances test dictates that we consider all relevant facts, when deciding whether [the officer had] probable cause.

Commonwealth v. Luv, 735 A.2d 87, 90 (Pa. 1999) (some citations and quotations omitted).

This Court does not believe that Trooper Rousseau had probable cause to conduct a warrantless search based upon the aforementioned facts. In fact, Trooper Rousseau acknowledged this in his testimony. Therefore, he needed Mr. Barboza's voluntary consent to search the mini-van. To determine whether Mr. Barboza gave voluntary consent, the Court must first determine the type of encounter Mr. Barboza had with Trooper Rousseau at the time consent was given.

There are three categories of interaction between police officers and citizens. The first is a "mere encounter." This encounter does not need to be supported by any level of suspicion. *Commonwealth v. Acosta*, 815 A.2d 1078, 1082 (Pa. Super. Ct. 2003). The next category is an "investigative detention," which must be founded upon reasonable suspicion. *Id.* This interaction "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." *Commonwealth v. Phinn*, 761 A.2d 176, 181 (Pa. Super. Ct. 2000). The third type of interaction is a "custodial detention," and it must be supported by probable cause. *Id.* "The police have probable cause where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *Commonwealth v. Hernandez*, 935 A.2d 1275, 1284 (Pa. 2007).

A traffic stop constitutes a seizure within the meaning of the Fourth Amendment, but it entails an investigative detention as opposed to an arrest. *Commonwealth v. Sadvari*, 752 A.2d 393, 399–400 (Pa. 2000) (citations omitted). Once the reason for conducting the traffic stop in resolved, there must be articulable reasons to continue the detention. *Commonwealth v. Lopez*, 609 A.2d 177, 182 (Pa. Super. Ct. 1992). In *Commonwealth v. Strickler*, the Pennsylvania Supreme Court examined how a police intervention can evolve from a mere encounter following a traffic stop where police continue to interrogate a person after the reason for the traffic stop has terminated. *Id.*, 757 A.2d 884 (Pa. 2000). The Supreme Court opined that after police finish processing a traffic infraction, the determination of whether a continuing intervention constitutes a mere encounter or a constitutional seizure focuses upon whether the individual would objectively believe that he or she was at liberty to end the encounter and refuse a request to answer questions. The Court implemented a totality-of-the-circumstances construct and articulated a non-exclusive list of factors to be considered when making this assessment. These factors include 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location and time of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including its degree of coerciveness; 8) "the degree to which the transition between the traffic stop/investigative detention and the subsequent encounter can be viewed as seamless, ... thus suggesting to a citizen that his movements may remain subject to police

restraint," and 9) whether there was an express admonition to the effect that the citizen-subject is free to depart. *Id.* at 898-99. With regard to the last two factors, the *Strickler* Court observed:

> '[F]ew motorists would feel free ... to leave the scene of a traffic stop without being told they might do so.' While recognizing ... that the admonition to a motorist that he is free to leave is not a constitutional imperative, the presence or absence of such a clear, identified endpoint to the lawful seizure remains a significant, salient factor in the totality assessment. ... This observation is even more appropriate in the context of a post-detention interaction.

Id. at 898–99 (citations omitted).

The Court finds that there was no mere encounter when consent to search was given by Mr. Barboza. Rather, the Defendants were still seized by the P.S.P. Trooper Rousseau who never expressly or implicitly informed the Defendants that they were free to leave. In fact, Trooper Rousseau's request to search the vehicle was immediately after learning from Mr. Barboza that he had a suspended license, and that Ms. Lopez and the back seat passenger were unlicensed. *See* Transcript, August 18, 2020, pp. 16, LL. 18-25; p.17, LL. 1-4. Effectively, there was no break in time after the reasons for the traffic stop concluded. Additionally, Trooper Rousseau testified that he believed there was "potential" criminal activity afoot and that he would not have let Ms. Lopez leave the scene until he got a consent to search the vehicle. *See* Transcript, August 18, 2020, p. 48, LL. 13-20; Transcript, October 5, 2020, p. 17, LL. 16-9. The sum total of these facts do indicate that there was not a mere encounter between the P.S.P. and the Defendants; rather, there was a continuous seizure of the Defendants throughout the encounter.

This Court must now determine whether the police had reasonable suspicion to detain Defendant after the purpose of the initial traffic stop was achieved. The Pennsylvania Supreme Court in *Commonwealth v. Freeman* acknowledged that a properly obtained consent to search from a valid investigative detention requires that "the seizure must be justified by an articulable, reasonable suspicion that [the person seized] may have been engaged in criminal activity independent of that supporting her initial detention" (the reason for being pulled over) and this question must be answered "by examining the totality of the circumstances[.]" *Id.*, 757 A.2d 903, 908 (Pa. 2000). Reasonable suspicion requires that the officer "articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him to reasonably conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity." *Commonwealth v. Reppert*, 814 A.2d 1196, 1204 (Pa.

Super. Ct. 2002). Otherwise, the consent to search would have been "given during an illegal detention and suppression was warranted." *In Interest of A.A.*, 195 A.3d 896, 910 (Pa. 2018).

This Court finds the case of *Commonwealth v. Lopez*, 609 A.2d 177 (Pa. Super. Ct. 1992) instructive. Therein, the appellant was driving on Interstate 90 westbound in Erie County. A P.S.P. Corporal noticed that the appellant was driving a rental truck and towing an automobile. The tow chains between the truck and the towed car did not have its tow chains properly crossed pursuant to 75 Pa.C.S.A. § 4905(d). The Corporal signaled for the appellant to pull over. After showing the appellant the towing violation, the Corporal then started questioning the appellant about the origin, destination, purpose, and duration of his trip from New Mexico. While retaining the license and rental agreement, the Corporal asked the appellant if he could look into the back of his truck. The appellant obliged the Corporal and opened the rear door to the rental van, but observed nothing suspicious. The Corporal then instructed the appellant to go back into the van and sit, which he did. The Corporal then radioed for assistance. After assistance arrived, the Corporal asked the appellant if he had any drugs, weapons or alcohol in the vehicles; the appellant responded he had none. Nevertheless, the Corporal then asked the appellant if he would sign a voluntary consent form so that P.S.P. could search his two vehicles. The appellant consented and signed the form. The search turned up approximately seventy- six pounds of marijuana.

The appellant filed several pre-trial motions, including a suppression motion arguing that the P.S.P. had "no reasonable grounds to suspect him of drug related activity, the continued detention and questioning about the destination, and purpose of renting the Ryder truck, was unreasonable." *Id.* at 181. The trial court denied the suppression motion, but the Superior Court agreed with the appellant and reversed the trial court's decision, noting that the P.S.P. merely had "policeman intuition" that there was criminal activity afoot. *Id.* at 182.

> Absent reasonable grounds to suspect an illegal transaction in drugs or other serious crime, the officer had no legitimate reason for detaining Lopez or for pursuing any further investigation of him, hence, the detention ceased to be lawful at this point. Thus, in accord with *Guzman*, we find that Corporal Martin's continued detention and investigation of Lopez constituted an unreasonable seizure in violation of the Fourth Amendment; consequently, the evidence seized should have been suppressed.

Id.; See *Commonwealth v. Arch*, 654 A.2d 1141, 1144 (Pa. Super. Ct. 1995), *citing Terry v. Ohio*, 392 U.S. 1, 27 (1968) (a police officer may not reach a conclusion that criminal activity is afoot based upon an "unparticularized suspicion" or "hunch.").[5]

Herein, the Court finds that Trooper Rousseau was unable to articulate reasonable suspicion that there was criminal conduct other than the apparent traffic violations, including driving with a suspended license. To justify his suspicions of criminal conduct, Trooper Rousseau said, "Just that traveling -- in my head – traveling cross country with three occupants and only two bags and then traveling back to your original destination on Christmas Eve raises suspicion to me." *See* Transcript, August 18, 2020, p. 48, LL. 15-18.[6] None of the Trooper's observations demonstrate, or even suggest, any illegal activity other than the vehicle code violations observed. Trooper Rousseau never even coupled this concern with the Defendants exhibiting nervous behavior, making furtive movements, sweating, or fumbling their speech. Additionally, the Trooper never testified about observing any contraband in plain sight, or any suspicious smell imitating from the vehicle. Moreover, Trooper knew he had no reasonable suspicion to believe criminal activity was afoot because he acknowledged that he would have had to let the Defendants leave the scene if Mr. Barboza refused his request to search the van.[7]

In its brief, the Commonwealth noted that Mr. Barboza had suspended driver's license, the two passengers had had no driver's license, one passenger did not speak English, noticing only one bag of luggage from outside the van, and "two of them had differing stories as to who they were to each other." *See* Commonwealth Brief, p. 5. This Court is unable to find any testimony about differing stories prior Trooper Rousseau requested consent to search the van. This Court does not believe that all of the aforementioned calculate to reasonable suspicion of criminal activity other than the broken headlight and a suspended driver's license. *Compare Commonwealth v. Rogers*, 849 A.2d 1185 (Pa. 2004) (reasonable suspicion where driver was so nervous and

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[5] The essential inquiry is whether "the facts available to the officer at the moment of the [intrusion] warrant a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, 392 U.S. at 21-2 (citations omitted).

[6] The Court questions how Trooper Rousseau would know with certainty that the Defendants only had two bags of luggage in the van. During cross-examination, the Trooper acknowledged that he could not recall if there were any in the back hatch area. *Id.* at p. 53.

[7] Q: At that point, if [Mr. Barboza] never said, "Okay to search" in this traffic stop, would you still have let him go?
A: I would have had no reason to continue this traffic stop. I would have issued my traffic citations, and the traffic stop would have been terminated. *See* Transcript, August 18, 2020, p. 52, LL. 4-9.

trembling that he had difficulty producing the requested paperwork; paperwork contained omissions and falsehoods; boxes of open fabric softener, laundry detergent in backseat, and packing tape which P.S.P. testified from his experience was commonly used in the packaging and distribution of controlled substances); *see also Commonwealth v. Benitez*, 218 A.3d 460, 477 (Pa. Super. Ct. 2019) (reasonable suspicion where car ignition had only one key, and none others attached, which P.S.P. testified is indicia of drug trafficking because which means there are no personal keys attached to ensure no personal information of any kind associated with that car and the driver; registration of vehicle not in driver's name; driver fumbled his answer of whom the car belonged).

The consequence of an illegal seizure is usually the suppression of evidence:

> [W]here the purpose of an initial traffic stop has ended and a reasonable person would not have believed that he was free to leave, the law characterizes a subsequent round of questioning by the police as an investigative detention or arrest. In the absence of either reasonable suspicion to support the investigative detention or probable cause to support the arrest, the citizen is considered unlawfully detained. Where a consensual search has been preceded by an unlawful detention, the exclusionary rule requires suppression of the evidence obtained absent a demonstration by the commonwealth both of a sufficient break in the causal chain between the illegality and the seizure of evidence. This assures of the search's voluntariness and that the search is not an exploitation of the prior unlawful detention.

Commonwealth v. By, 850 A.2d 1250, 1255–56 (Pa. Super. Ct. 2003); *see also Strickler*, 757 A.2d at 896.

The Commonwealth also argued that the P.S.P. would have discovered the fentanyl even if the Defendant's consent to search the van was not given voluntarily. More specifically, the Commonwealth averred that the P.S.P. conducted a proper inventory search because none of the occupants had current driver's licenses. The inevitable discovery doctrine provides:

> [E]vidence which would have been discovered was sufficiently purged of the original illegality to allow admission of the evidence....[I]mplicit in this doctrine is the fact that the evidence would have been discovered despite the initial illegality.
>
> If the prosecution can establish by a preponderance of the evidence that the illegally obtained evidence ultimately or inevitably would have been discovered by lawful means, the evidence is admissible. The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.

Commonwealth v. Bailey, 986 A.2d 860, 862 (Pa. Super. Ct. 2009) citing *Commonwealth v. Gonzalez*, 979 A.2d 879, 890 (Pa. Super. Ct. 2009).

The Pennsylvania Supreme Court addressed the role and legal underpinnings of inventory searches under Pennsylvania law in *Commonwealth v. Nace*, 571 A.2d 1389 (Pa. 1990). There, our Supreme Court explained:

> inventory searches are a well-defined exception to the warrant requirement of the Fourth Amendment and are a recognized part of our law:
>
> ... it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect. The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search. Indeed, we have previously established that the inventory search constitutes a well-defined exception to the warrant requirement. *See South Dakota v. Opperman*, [428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)].
>
> An inventory search is not designed to uncover criminal evidence. Rather, its purpose is to safeguard the seized items in order to benefit both the police and the defendant. We have recognized inventory searches in the two areas of automobiles and booking procedures. *See* [*Commonwealth v. Scott*, 469 Pa. 258, 365 A.2d 140, 144 (1976).]; *Commonwealth v. Daniels* [474 Pa. 173], 377 A.2d 1376 (Pa.1977).
>
> Four goals underlie such searches. First, they 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; and fourth, when necessary they ascertain or verify the identity of the defendant. Intrusions into impounded vehicles or personal effects taken as part of the booking process are reasonable where the purpose is to identify and 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. *See Scott*, 365 A.2d at 144.

Nace, 571 A.2d at 1391 (parallel citations omitted, emphasis added). Additionally,

> [this] Court has observed that "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: (i) that the vehicle in question was lawfully within the custody of the police, and (2) that the search was in fact an inventory search pursuant to the objectives laid down in [Opperman]" *Commonwealth v. Germann* [423 Pa.Super. 393], 621 A.2d 589, 594 (Pa.Super.1993), *citing Commonwealth v. Brandt* [244 Pa.Super. 154], 366 A.2d 1238 (Pa.Super.1976). The Court, in

> *Commonwealth v. Germann*, *supra*, observed further that " 'motive' is the sole factor which distinguishes a criminal investigatory search from a noncriminal inventory search of an automobile." *Id.* at 595, *citing United States v. Abbott*, 584 F.Supp. 442 (W.D.Pa.1984).

Commonwealth v. Collazo, 654 A.2d 1174, 1177 (Pa. Super. Ct. 1995).

"If, after weighing all the facts and circumstances, the court is of the opinion that [a search] was an inventory search of an automobile lawfully in police custody, then any evidence seized as a result of this 'reasonable' inventory search is admissible." *Commonwealth v. Brandt*, 366 A.2d 1238, 1242 (Pa. Super. Ct. 1976). Furthermore, as our Court explained in *Brandt*,

> [t]he term 'reasonable' inventory search like the term 'legal' contract is verbose. If the search is, in fact, an inventory search, it must be reasonable. For example, if while taking inventory of the contents of the car, the police remove the seats, rip open the upholstery and find contraband, the evidence must be suppressed—not because the inventory [search] was unreasonable but rather because it is apparent that the police were not conducting an inventory pursuant to the objectives laid down in Opperman, but were searching for incriminating evidence.

Id. at 1242, n. 7. Stated differently, "the inventory search must be pursuant to reasonable police procedures, and conducted in good faith and not as a substitute for a warrantless investigatory search." *Commonwealth v. Hennigan*, 753 A.2d 245, 255 (Pa. Super. Ct. 2000).

In conjunction with the aforementioned case law, the Court is mindful of certain statutory parameters regarding vehicle inventory searches. The motor vehicle codes states the following:

> Removal to garage or place of safety.--Any police officer may remove or cause to be removed to the place of business of the operator of a wrecker or to a nearby garage or other place of safety any vehicle found upon a highway under any of the following circumstances:
> (1) Report has been made that the vehicle has been stolen or taken without the consent of its owner.
> (2) The person or persons in charge of the vehicle are physically unable to provide for the custody or removal of the vehicle.
> (3) The person driving or in control of the vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before an issuing authority without unnecessary delay.
> (4) The vehicle is in violation of section 3353 (relating to prohibitions in specified places) except for overtime parking.
> (5) The vehicle has been abandoned as defined in this title. The officer shall comply with the provisions of Chapter 731 (relating to abandoned vehicles and cargos).
>
> 75 Pa. C.S.A. § 3352 (c).

This statutory power is over and above the traditional caretaking function of the police which allowed them at common law to tow cars which present some hazard to the public or impair the movement of traffic. *Commonwealth v. Bailey*, 986 A.2d 860, 863 (Pa. Super. Ct. 2009). The Defendants, however, stress that Trooper Rousseau had a nefarious purpose for searching the van. They emphasis that P.S.P. had a singular purpose, that being to search the van, regardless of whether they had probable cause or reasonable suspicion. They point to Trooper Rousseau's own testimony on cross-examination:

> Q: Okay. And you'd agree that after making that initial contact with Barboza, pulling the vehicle over, getting the ID card and asking his travel plans, and seeing inside the vehicle because your -- it was your goal -- it was your intent to search the vehicle because you suspected there might be some sort of contraband in there?
> A: I suspected that there was some type of criminal activity afoot.
> Q. Okay. And you had indicated, as we saw on the video, when Trooper Hill arrived to assist you, your goal was to get in and search the vehicle?
> A. That's correct.
> Q. Okay.

See Transcript, October 5, 2020, p. 9, LL. 18-25; p. 10, LL. 1-4. *Brandt*, 366 A.2d at 1242, n.7. Additionally, the Defendants point out that they could have removed the van from the highway ramp by allowing them to retrieve their cellular phones from the car and calling a towing service. Trooper Rousseau testified that P.S.P. policy prohibited the Defendants from retrieving their telephones from the van.[8]

The Defendants' concern that Trooper Rousseau intended to search the vehicle must be tempered by P.S.P. protocol for vehicle inventory searches. Trooper Rousseau testified:

> Q. Okay. In your training and experience through the Pennsylvania State Police, if you conduct a traffic stop in which all of the occupants of the vehicle are unlicensed drivers, what is the typical protocol at that point in time for the vehicle that is then there at the scene?
> A. The protocol is to have the vehicle towed, and that vehicle held either at the providing tow's [sic] impound lot or at the state police barracks impound lot until a licensed -- a licensed driver can obtain possession and operate that vehicle.

[8] Q. And it would be your protocol to not let individuals take their personal belongings like telephones or luggage or bags in the vehicle prior to searching on an inventory search?
A. Correct. Not until I could confirm that there was nothing of threat, whether that be weapons inside the vehicle. Whenever somebody gets out of a vehicle, that person is not allowed back into the vehicle until either my search is completed for officer safety reasons. *See* Transcript, October 5, 2020, p. 13, LL. 6-14.

See Transcript, August 18, 2020, p. 18, LL. 22-25; p. 19, LL. 1-6. Further, 75 Pa. C.S.A. § 3352 allows for removal for safety purposes if one of five conditions are met. Motor vehicles that "are left unattended on the highway, there are public safety concerns or traffic control concerns." *Commonwealth v. Hennigan*, 753 A.2d 245, 258 (Pa. Super. Ct. 2000).[9] Therein, section (c)(2) permits authorities to remove a vehicle from road when "[t]he person or persons in charge of the vehicle are physically unable to provide for the custody or removal of the vehicle." A plain reading of this section requires a driver to be "physically unable" to ensure the vehicles custody or removal. Herein, none of the three persons who were detained were physically able to remove or care for the vehicle because neither of them possessed a valid driver's license. "Section (c)(2) addresses situations where the person or persons in charge of the vehicle are incapable of providing custody or removal of the vehicle." *Bailey*, 986 A.2d at 863.[10]

As for the search itself, it does not appear to be one digging for contraband. The P.S.P. did not rip open upholstery or remove seats as noted in *Brandt*. The search was of luggage, a place where people are likely to place important or valued personal belongings.[11]

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[9] The term "highway" is defined as "the entire width between the boundary lines or every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." 75 Pa.C.S.A. § 102. Trooper Rousseau described the evening as "extremely foggy" and the highway ramp had a "very narrow shoulder." *See* Transcript, August 18, 2020, p. 45, LL. 10-12.

[10] The Defendants also contend that the P.S.P. has failed to sufficiently prove that it is their police to tow cars under these circumstances. The Court finds this claim to have not merit and finds *Commonwealth v. Phillips*, 2016 WL 4703077, at *1 (Pa. Super. Ct. 2016) to be instructive. Therein, a P.S.P. Trooper determined that the appellant's vehicle would have to be removed from the side of the highway and towed to a secure location after arresting the appellant on the outstanding warrant, **and discovering that his passenger did not have a valid driver's license**, in accordance with the written policies of the P.S.P. Further, those policies also required the P.S.P. to perform an inventory search of the car before the tow truck removed it. *Id.* (emphasis added). As Trooper Rousseau testified, "[T]hat inventory search would have taken place before we would have cleared the traffic stop." This is to ensure that a tow truck operator does not pilfer valuable. *See* Transcript, October 5, 2020, p. 10, LL. 3-4; p. 12, LL. 23-25; p. 13, L. 1, 17-19.

[11] Whether the duffle bag was locked would be material pursuant to *Florida v. Wells*, 495 U.S. 1 1990). There was no testimony on the matter. No questions were asked about how Trooper Rousseau got into the duffle bag, except that he could not remember whether he unzipped it. *See* Transcript, October 5, 2020, p. 7, LL. 5-11. Therefore, the Court can only assume that the bag was not locked. Further, Trooper Rousseau was asked about "state police protocol for a towed vehicle." He testified, "So any time that vehicle is towed, that vehicle is to have an inventory search performed. The purpose of the inventory search is to make sure any valuables are accounted for in case there is something of value in that vehicle that comes up missing between custody exchange with either the tow company or the impound lot." *See* Transcript, August 18, 2020, p. 19, LL. 7-14. "Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the

Compare Commonwealth v. Anderl, 477 A.2d 1356, 1360 (Pa. Super. Ct. 1984) (officer's warrantless "inventory search" behind the back seat cushions exceeded police "care-taking functions" and was a search to uncover incriminating evidence); *with South Dakota v. Opperman*, 428 US. 364, 366 (1976) (upholding inventory search of an impounded automobile which recovered marijuana from a closed, but unlocked, glove compartment); *Commonwealth v. Woody*, 679 A.2d 817, 818–19 (Pa. Super. Ct. 1996) (a loaded handgun was found underneath the passenger's seat during the inventory search of the vehicle); *Phillips, supra* (Trooper opened the center console located between the driver and passenger seats and discovered approximately 190 packets of heroin in plain view during inventory search).

This Court finds that the facts in *Bailey, supra,* are similar to those herein. The police recognized the appellant as he was driving his car, and stopped him because there was an outstanding warrant for his arrest. The officers asked the appellant to get out of his car; he did and was then handcuffed. The appellant's passenger was then asked to exit the car; he did and was also handcuffed. A backup officer claimed an informant told him that the appellant was known to carry a gun. The arresting officer then asked the appellant if they could search his car; he consented. The appellant, however, was not read his *Miranda* rights until he was taken to the police station. The 9 mm handgun in question was found in the center console. Neither the appellant nor his passenger claimed to have any knowledge of the gun.

In a pre-trial suppression motion, the appellant averred that his permission to search the car was not given freely and that there were no other reasons for the police to search his car. The Commonwealth argued that the permission to search was proper but in any event, the police would have inevitably discovered the gun since the car was towed. According to police testimony, when a car is towed it is the policy of their department to conduct an inventory search. In response, the appellant claimed that the Commonwealth had not shown that it had a policy in place concerning towing and that the search was clearly not an inventory search.

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opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment. *Wells*, 495 U.S. at 4.

The trial judge agreed with appellant that the permission to search the car was coerced and, therefore, invalid. The court also ruled that the search itself was not an inventory search. At the time of the search, the police were operating under the belief they had permission to search. Consequently, there was no reason for the search to be considered an inventory search. The suppression court, however, also concluded that the Commonwealth established that even absent the "permissive search," the car was properly subject to impoundment. Further, the police demonstrated that it was their custom to perform a routine inventory search, a search that would have invariably led them to discover the gun in the center console. *Bailey*, 986 A.2d at 861–62.

> The Superior Court sustained the trial court's ruling and stated:
> Because the police would have been able to tow Bailey's car pursuant to his arrest and because the police conduct routine inventory searches whenever a car is towed, and an inventory search includes looking into obvious storage places such as the center console, we must agree that the gun would have inevitably been discovered absent police error or misconduct.

Id. at 863; *see also Phillips,* 2016 WL 4703077, at *8 (relying upon *Bailey*, the Court concluded that assuming the search of the car was for the improper purpose to locate contraband, the evidence found was nevertheless admissible because it inevitably would have been discovered pursuant to a lawful inventory search.).

For these reasons, the Court denies the Defendants' motions to suppress the contraband located in the duffle bag.

The Defendants also moved to suppress the evidence seized from the cellular telephones. They argued that suppression must be granted because the basis of the traffic stop was "without no probable cause or reasonable suspicion, or alternatively, the consent to search was the product of an illegal seizure." *See* Barboza's Omnibus Pre-Trial Motion, p. 13-4.

Trooper Rousseau drafted an affidavit of probable cause stating he found a "duffle bag" that had a "plastic bag" therein of "suspected cocaine" and that "a NIC test was positive for cocaine and an approx. weight of suspected cocaine was 230 grams. *See* Exhibit 4, p. 2. His testimony was consistent with his affidavit.[12] Therefore, it is apparent

[12] Q: Okay. Besides the white, powdery substance was anything else seized from the defendant or the vehicle?

that a warrant to search the cellular telephones was subsequent to the discovery of the contraband. The Court has already determined that the P.S.P. would have inevitably discovered the contraband in the duffle bag via the inventory search. Consequently, the Court concludes that the P.S.P. acquired the information in the cellular telephones lawfully and denies this request.

The Commonwealth conceded that Mr. Barboza was in custody when Trooper Rousseau asked him if he owned the duffle bag. Further, the P.S.P. had yet to provide Mr. Barboza his *Miranda* warnings.

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Miranda v. Arizona, 384 U.S. 436, 444 (1966). Therefore, Mr. Barboza's statement that he owed the duffle bag must be suppressed.

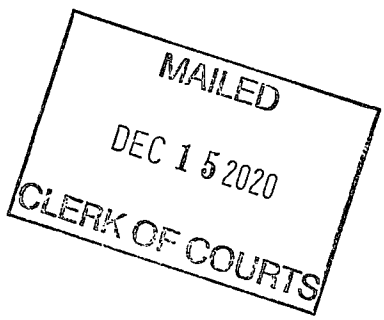
In conclusion, the contraband located in the duffle bag and the data retrieved from the cellphones are not suppressed, but Defendant Barboza's statement concerning ownership of the duffle bag is suppressed.

BY THE COURT:

Gary Gilman J.

A. Yes. There were, I believe, a total of four cell phones -- three or four cell phones that were located inside the cup holder of the vehicle. Those were seized, and later, a search warrant was seized [sic] for the data contained on those cell phones. *See* Transcript, August 18, 2020, p. 35, LL. 22-5; p. 36, LL. 1-3.

DA
dept Barboza
dept Lopez
Egers, Esq
Gottron, Esq



IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. No. 1303 WDA 2021
CP-83-CR-0000002-2020

ALFREDO BARBOZA,

Defendant.

Opinion

This matter comes before the Superior Court upon the direct appeal of the defendant from the judgement of sentence entered on August 6, 2021, and amended following post-sentence motions and made final by order dated October 18, 2021.

On November 1, 2021, John Egers, Esquire, acting on behalf of defendant Alfredo Barboza (hereinafter "defendant") filed a timely notice of appeal from the judgement of sentence made final by order dated October 18, 2021.

Factual Background

The underlying charges arose out of a traffic stop on December 24, 2019, in Washington County, after which defendant was found in possession of a significant quantity of controlled substances. Pennsylvania State Trooper Brian Rousseau, while on routine patrol that evening, received a call from his Corporal, who was then off duty traveling westbound on I-70, reporting that there was a vehicle traveling behind him and acting in a suspicious manner. The Corporal reported that the vehicle would repeatedly tailgate his vehicle and then drop back away, would repeatedly turn its lights on and off to have the Corporal move from the lane of travel, and that

the vehicle had an inoperable headlight.[1] As the Corporal's location was approximately one mile from the barracks, Trooper Rousseau proceeded in his vehicle to the onramp of I-70 westbound at the Eighty-Four, Pennsylvania exit.[2]

After taking a position just off the ramp of I-70, the Trooper noticed the vehicle as it passed, that the Corporal described as having "an Arizona Registration with a burned out driver's side headlight."[3] The Trooper pursued the vehicle and, after it had cleared a construction zone, initiated the traffic stop at the split between I-79 and I-70 westbound in South Strabane Township. After stopping the vehicle, a blue Honda Odyssey van with an inoperable driver's side headlight, Trooper Rousseau encountered defendant Alfredo Barboza, who was driving the vehicle. Defendant provided a photo ID from the state of Arizona, but could not produce a valid driver's license. After being informed that he had been stopped for a burned out headlight,[4] defendant told the Trooper that he was visiting family in New Jersey and was on his way home to Arizona. This statement seemed inconsistent as the Trooper noticed only a limited amount of luggage for defendant and his two passengers, co-defendant Leticia Lopez in the passenger's seat, and an unidentified male occupant in the backseat. During the stop, the Trooper was informed by dispatch that defendant had a suspended driver's license.[5] Trooper Rousseau requested a second vehicle at this time and initiated a second contact upon the arrival of a second trooper on the scene.[6]

Once the second trooper arrived on scene, Trooper Rousseau expressed his concern that there were three occupants in the vehicle, but only one duffle bag which seemed unusual for a

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[1] Suppression Hearing Transcript, dated August 18, 2020 ("SHT") at 7-8.
[2] *Id.* at 9.
[3] *Id.* at 10.
[4] *Id.* at 12.
[5] *Id.* at 12-13; Defendant admitted that his driver's license was suspended, *Id.* at 78.
[6] *Id.* at 12-13.

trip across the country. The Trooper then reinitiated contact with defendant and asked him to exit the vehicle to which he complied. Defendant informed the Trooper that the front seat passenger, co-defendant Leticia Lopez, was his girlfriend,[7] and that she did not have a valid driver's license either. Ms. Lopez was asked to exit the vehicle as well.[8] Trooper Rousseau learned that the owner of the vehicle was not currently present.[9] The Trooper could not communicate with the third occupant of the vehicle as this individual did not speak English and had no form of identification.[10]

It was at this time that Trooper Rousseau requested consent from defendant, the driver, to search the vehicle, which defendant granted.[11] Having obtained his consent, the Trooper began the search and discovered a gym-style duffle bag which contained male clothing, male toiletries, and a plastic grocery bag encased in a second grocery bag.[12] Inside these two plastic bags, the Trooper found an unknown white powdery substance, [13] at which time he placed all three occupants under arrest.[14] The powdery substance discovered in the vehicle was later identified by lab analysis to be 219 grams of fentanyl.[15]

Procedural History

On December 24, 2019, the Washington County District Attorney's Office filed a criminal information charging the Defendant as follows:

Count 1: Manufacture/Delivery/Possession with Intent to Manufacture or Deliver—35 P.S. §

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[7] SHT at 14.
[8] *Id.* at 15.
[9] *Id.* at 15-16.
[10] *Id.* at 16. This individual was later identified as Carmelo Tlatemohue, who was born on July 16, 1983 in Veracruz, Mexico. This gentleman indicated that he was in the United States illegally for work purposes. He was being transported by defendant and Ms. Lopez to a dairy farm in Wisconsin. *Id.* at 24-25.
[11] *Id.* at 18.
[12] *Id.* at 19.
[13] *Id.* at 19-20.
[14] *Id.* at 20.
[15] *Id.* at 40.

780-113(a)(30)—Felony

Count 2: Criminal Conspiracy to Manufacture/Delivery/Possession with Intent to Manufacture or Deliver—18 Pa. C.S.A. § 903(a)(1) to 35 P.S. § 780-113(a)(30)—Felony

Count 3: Intent to Possess Controlled Substance by Person Not Registered—35 P.S. § 780-113(a)(16)—Misdemeanor

Count 4: Use/Possession of Drug Paraphernalia—35 P.S. § 780-113(a)(32)—Misdemeanor.[16]

On July 20, 2020, court-appointed counsel, John Egers, Esquire, filed an omnibus pretrial motion by which defendant sought to suppress the controlled substances seized, the data discovered on cell phones and a SIM card seized from the vehicle, and statements defendant made to police.[17] On December 14, 2020, having conducted a suppression hearing on August 18, 2020 and October 15, 2020, and having considered the briefs submitted by the parties, the court denied in part and granted in part the omnibus pretrial motion: the court granted the motion to suppress his statements, but denied the motion to suppress the controlled substances seized or the data retrieved from the cell phones and SIM card.[18]

On May 3rd and 4th of 2021, the court held a jury trial at the conclusion of which the jury found the Defendant guilty of Possession with Intent to Deliver a Controlled Substance—Fentanyl, Possession of a Controlled Substance—Fentanyl, and Possession of Drug Paraphernalia.[19] Having been found guilty, the court revoked the Defendant's bond pending sentencing and ordered that the Washington County Adult Probation Office conduct a Presentence Investigation.[20] On August 6, 2021, in consideration of the Presentence

[16] Docket Entry 16.
[17] Docket Entry 17.
[18] Docket Entry 34.
[19] Docket Entry 44.
[20] Docket Entry 47.

Investigation and other evidence presented, the court sentenced the Defendant as follows:

> On the charge of Violation of the Drug Act, § 780-113(a)(30), Possession with Intent to Deliver Fentanyl in the quantity of 219 grams, an ungraded Felony, the Defendant is sentenced to pay the costs of prosecution, including any laboratory fees, and be confined to an appropriate state correctional institution for a period of no less than seven and a half (7 ½) years to no more than fifteen (15) years, with credit for time served as calculated by the Department of Corrections.
>
> The court directs that the Department of Corrections assess the Defendant for any alcohol and other drug-related issues and treat him accordingly.
>
> On the charge of Violation of the Drug Act, § 780-113(a)(16), Possession of Fentanyl in the quantity of 219 grams, an ungraded Misdemeanor, the court finds that this charge merges with the Possession with Intent to Deliver charge above, and, therefore, the court imposes no further sentence.
>
> On the charge of Violation of the Drug Act, § 780-113(a)(32), Possession of Drug Paraphernalia, an ungraded Misdemeanor, the Defendant is sentenced to be confined to an appropriate state correctional institution for a period of no less than six (6) months to no more than twelve (12) months. This shall run consecutively to the sentences imposed above and under the same terms and conditions.
>
> As special conditions of the Defendant's sentence, he shall have no contact with Leticia Lopez, either directly, indirectly, or by any means; have no contact with any other victims or witnesses; follow all terms and conditions or the Pennsylvania Board of Probation and Parole, including abstaining from drugs and alcohol, be of good behavior, reporting his residence on parole, maintaining an appropriate residence, and all other conditions of state parole.
>
> The court further finds that the Defendant is eligible for the Recidivism Risk Reduction Incentive Program, which will reduce his minimum sentence accordingly.[21]

On August 13, 2021, defendant filed a Post-Sentence Motion requesting the court modify

[21] Docket Entry 54.

his sentence for Possession of Drug Paraphernalia.[22] On October 18, 2021, the court granted the motion and modified defendant's sentence as follows:

> On the charge of Violation of the Drug Act, § 780-113(a)(32), Possession of Drug Paraphernalia, an ungraded Misdemeanor, the Defendant is sentenced to pay the costs of prosecution and be placed on probation for twelve (12) months. This sentence shall run consecutively to his sentence imposed for Possession with Intent to Deliver Fentanyl and under the same terms and conditions. All other provisions of the judgment of sentence of August 6, 2021 shall remain in full force and effect.[23]

On November 1, 2021, defendant filed a notice of appeal from the judgment of sentence entered on August 6, 2021 and made final by order dated October 18, 2021.[24] On December 8, 2021, defendant filed his concise statement of matters complained of on appeal raising the following issues:

1. The Court committed an error in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in denying the Defendant's motion to suppress the controlled substance and drug paraphernalia contained within the duffel bag found in the vehicle driven by the Defendant when it concluded that these items would have been inevitably discovered through an inventory search of that vehicle.
2. The Court committed an error in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in denying the Defendant's motion to suppress the controlled substance and drug paraphernalia contained within the duffel bag found in the vehicle driven by the Defendant when it concluded that these items would have been inevitably discovered through an inventory

[22] Docket Entry 52.
[23] Docket Entry 58.
[24] Docket Entry 59.

search of that vehicle, despite Trooper Rousseau's testimony in the suppression hearing that his goal or motivation in that inventory search would be to search for contraband.

3. The Court committed an error in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in denying the Defendant's motion to suppress the controlled substance and drug paraphernalia contained within the duffel bag found in the vehicle driven by the Defendant when it concluded that these items would have been inevitably discovered through an inventory search of that vehicle, despite the failure of the Commonwealth to introduce into the record of the suppression proceedings the Pennsylvania State Police policy and procedures concerning inventory searches.
4. The Court committed an error in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution in denying the Defendant's motion to suppress the data received from the cellular telephones and SIM card found in the vehicle driven by the Defendant because the data was obtained through a warrant that was based upon "fruit of the poisonous tree," i.e. the controlled substance and drug paraphernalia illegally found and seized from the vehicle and likewise, the Defendant's statement(s) providing passcodes to the cellular telephones were also fruit of the poisonous tree that should have been suppressed.

Legal Analysis

The standard of review for the denial of a defendant's suppression motion is as follows:

> Our 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 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, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. 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 our plenary review.
>
> Moreover, appellate courts are limited to reviewing only the evidence presented at the suppression hearing when examining a ruling on a pre-trial motion to suppress.

Commonwealth v. Freeman, 150 A.3d 32, 34–35 (Pa. Super. 2016) (citation omitted).

The Defendant alleges that the court erred in denying his suppression motion and ruling that the controlled substance and drug paraphernalia would have been inevitably discovered as part of an inventory search of the vehicle. Before reaching the doctrine of inevitable discovery, the Defendant's consent to search the motor vehicle in question must be discussed.

> A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies. One such exception is consent, voluntarily given. The central Fourth Amendment inquiries in consent cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent; and, ultimately, the voluntariness of consent. Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus.

Commonwealth v. Strickler, 757 A.2d 884, 888-889 (2000).

Furthermore, the Supreme Court of Pennsylvania established the following analysis:

> In connection with [the inquiry into the voluntariness of a consent given pursuant to a lawful encounter], the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances....[W]hile knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent....Additionally,

> although the inquiry is an objective one, the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will), are to be taken into account....
>
> Since both the tests for voluntariness and for a seizure centrally entail an examination of the objective circumstances surrounding the police/citizen encounter to determine whether there was a show of authority that would impact upon a reasonable citizen-subject's perspective, there is a substantial, necessary overlap in the analyses.

Id. at 901–02. The following factors are pertinent to a determination of whether consent to search is voluntarily given: 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including its degree of coerciveness; 8) whether the person has been told that he is free to leave; and 9) whether the citizen has been informed that he is not required to consent to the search. *Commonwealth v. Strickler*, *Id.* at 898–99.

At the suppression hearing, Trooper Rousseau testified that he initiated the traffic stop with defendant due to his driving a vehicle with a burned out headlight. This burned out headlight was a violation of the Vehicle Code[25] which gave the Trooper sufficient grounds to stop the vehicle. During the course of the traffic stop, the Trooper discovered that defendant did not possess a valid driver's license. Ultimately, the Trooper asked defendant to exit the vehicle as none of the occupants had a valid driver's license, and were not permitted to be driving the vehicle.

After defendant exited the vehicle, Trooper Rousseau requested his consent to search the

[25] Title 75 Pa.C.S.A. § 4303 (General Lighting Requirements).

vehicle as he was the driver. Trooper Rousseau recounted the conversation as follows:

> ASSISTANT DISTRICT ATTORNEY RACHEL WHEELER: Okay. At the moment that you asked [the Defendant] for consent to search that vehicle, who all was on the scene? Were there other officers, or was it just you and Officer Hill?
>
> TROOPER BRIAN ROUSSEAU: I believe at the time consent was asked, it was myself and Trooper Hill.
>
> ADA WHEELER: Okay. So yourself and Trooper Hill. And were any of the three individuals that were in the vehicle in handcuffs?
>
> TROOPER ROUSSEAU: No. Not when consent was asked.
>
> ADA WHEELER: At any point in time, prior to the request for consent to search the car, did you or Trooper Hill show any force—
>
> TROOPER ROUSSEAU: No.
>
> ADA WHEELER: --to these individuals?
>
> TROOPER ROUSSEAU: None.
>
> ADA WHEELER: Did you at any point in time or Trooper Hill, for that matter, have any conversations that were in any way more than asking whether the individuals in the vehicle had driver's license and general identification information?
>
> TROOPER ROUSSEAU: No.
>
> ADA WHEELER: So at the time that you asked consent, you directed that to whom at the scene?
>
> TROOPER ROUSSEAU: [the Defendant].
>
> ADA WHEELER: Okay. And he was the driver of the vehicle when you stopped it; correct?
> TROOPER ROUSSEAU: Correct. He was the operator.
>
> ADA WHEELER: Did [the Defendant] answer you?
>
> TROOPER ROUSSEAU: Yes.
>
> ADA WHEELER: What did he say?

> TROOPER ROUSSEAU: He granted consent to search the vehicle.
>
> ADA WHEELER: Was there any delay in his granting consent? In other words, did he, kind of him-haw or debate about whether he was going to give you consent?
>
> TROOPER ROUSSEAU: No. There was no delay.
>
> ADA WHEELER: Do you recall the words he actually used when you asked?
>
> TROOPER ROUSSEAU: I don't. It wasn't a yes. It wasn't a no. It was, like, "whatever you need" or "whatever you need to do." Something along those lines. I can't remember explicitly the verbiage he used. But it was—in other words, it was verbal consent to search the vehicle.[26]

Based on the circumstances, it is clear that defendant voluntarily gave permission to search the vehicle.[27] The Defendant was legally stopped for a vehicle code violation. After the initial stop, only one other trooper joined Trooper Rousseau on the scene of the stop. Having discovered that defendant did not have a valid driver's license, defendant was asked to exit the vehicle. Prior to asking for consent to search the vehicle, Trooper Rousseau had not engaged in any discussion or questioning beyond general background information. Furthermore, there was no physical contact with defendant and he was not in handcuffs at the time he was asked to consent to the search. Additionally, there was no evidence that Trooper Rousseau, or the assisting Trooper exhibited any aggressive or coercive behavior toward defendant in seeking his consent to search the vehicle.[28] Thus, it was appropriate to deny the Defendant's motion to suppress the controlled substance and the drug paraphernalia as it was discovered as part of a

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[26] SHT at 17-18.

[27] Defendant also executed a written consent form to search the vehicle, signed after stop at the State Police barracks. SHT at 31-33.

[28] Although defendant testified at the Suppression hearing, he offered no testimony that he was coerced, felt pressured or otherwise was compelled to consent to the search.

search consented to by the Defendant.

Nevertheless, looking beyond the effectiveness of defendant's consent to the search, the controlled substance and the drug paraphernalia would have been found by inevitable discovery, upon the impoundment and inventory search of the vehicle. Under the inevitable discovery doctrine, "if the prosecution can establish by a preponderance of the evidence that illegally obtained evidence ultimately or inevitably would have been discovered by lawful means, the evidence is admissible." *Commonwealth v. Gatlos*, 76 A.3d 44, 60 n.13 (Pa. Super. 2013) (citation omitted). The inevitable discovery doctrine, or independent source rule, states that illegally seized evidence may be admissible, "if the prosecution can demonstrate that the evidence in question was procured from an independent origin[.]" *Commonwealth v. Melendez*, 676 A.2d 226, 230 (1996). Moreover,

> Application of the "independent source doctrine" is proper only in the very limited circumstances where the "independent source" is truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered.

Id. (quoting *Commonwealth v. Mason*, 637 A.2d 251, 257–258 (1993)).

The doctrine of inevitable discovery is applicable here because the contraband was found as part of a reasonable inventory search of the vehicle. "If, after weighing all the facts and circumstances, the court is of the opinion that [a search] was an inventory search of an automobile lawfully in police custody, then any evidence seized as a result of this 'reasonable' inventory search is admissible." *Commonwealth v. Brandt*, 366 A.2d 1238, 1242 (Pa. Super. 1976). Furthermore, as the Superior Court explained in *Brandt*,

> [t]he term 'reasonable' inventory search like the term 'legal' contract is verbose. If the search is, in fact, an inventory search, it must be reasonable. For example, if while taking inventory of the contents of the car, the police remove the seats, rip open the

> upholstery and find contraband, the evidence must be suppressed—not because the inventory [search] was unreasonable but rather because it is apparent that the police were not conducting an inventory pursuant to the objectives laid down in [*South Dakota v.*] *Opperman*, but were searching for incriminating evidence.

Id. at 1242 n.7. A police department's written policy for inventory searches is not required to be presented to the court for a warrantless search to be found to be a lawful inventory search; rather, there must be evidence that the inventory search was conducted pursuant to standard police procedure, and in good faith. *Commonwealth v. Gatlos*, 76 A.3d 44 (Pa. Super. 2013).

The Superior Court reviewed the jurisprudence on warrantless inventory searches recently in *In Interest of M.W.*, 194 A.3d 1094 (Pa. Super. 2018):

> An inventory search is not designed to uncover criminal evidence. Rather, its purpose is to safeguard the seized items in order to benefit both the police and the defendant. We have recognized inventory searches in the two areas of automobiles and booking procedures.
>
> Four goals underlie such searches. First, they 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; and fourth, when necessary, they ascertain or verify the identity of the defendant. Intrusions into impounded vehicles or personal effects taken as part of the booking process are reasonable where the purpose is to identify and 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.

Specifically, the Court utilizes a two-factor test to determine whether a warrantless inventory search is justifiable in the absence of probable cause. An inventory search of an automobile is permissible when:

(1) The police have lawfully impounded the vehicle; and

(2) The police have acted in accordance with a reasonable, standard policy of routinely securing and inventorying the contents of the impounded vehicle.

See Commonwealth v. Lagenella, 83 A.3d 94, 102 (Pa. 2013) (citing *South Dakota v. Opperman* 428 U.S. 364, 375 (1976)). Regarding the second prong, the Supreme Court explained:

> The second inquiry is whether the police have conducted a reasonable inventory search. An inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation.

Lagenella, 83 A.3d at 103 (quoting *Commonwealth v. Henley*, 909 A.2d 352, 359 (Pa. Super. 2006) (*en banc*)).

The facts of this case are unrefuted and support the conclusion that a reasonable inventory search was conducted which resulted in the discovery of the contraband. A legal traffic stop was initiated when Trooper Rousseau observed defendant driving with an inoperable headlight. During the course of the stop, police discovered that defendant not have a valid driver's license, and likewise, his two passengers did not have a valid driver's license.[29] In fact, the third occupant was not legally in the United States, undocumented, and spoke no English.[30] Thus, there was no one available to drive the vehicle. The vehicle was stopped on the berm of I-70 on a foggy night and presented a traffic hazard.[31] Trooper Rousseau testified to Pennsylvania State Police protocol:

> ADA WHEELER: Okay. In your training and experience through the Pennsylvania State Police, if you conduct a traffic stop in which all of the occupants of the vehicle are unlicensed drivers, what is the typical protocol at that point in time for the vehicle that is then there at the scene?
>
> TROOPER ROUSSEAU: The protocol is to have the vehicle

[29] SHT at 13, 15-16.
[30] SHT 24-25. Defendant, in his written statement to police, admitted that he transporting several undocumented persons across the country prior to the stop. SHT at 25-27, 34.
[31] SHT at 51, 64.

> towed, and that vehicle held either at the providing tow's impound lot or at the state police barracks impound lot until a licensed—a licensed driver can obtain possession and operate that vehicle.
>
> ADA WHEELER: Is there additional state police protocol for a towed vehicle?
>
> TROOPER ROUSSEAU: Yes. So any time that vehicle is towed, that vehicle is to have an inventory search performed. The purpose of the inventory search is to make sure any valuables are accounted for in case there is something of value in that vehicle that comes up missing between custody exchange with either the tow company or the impound lot.[32]

As no one was available to move the vehicle, it was protocol to have the vehicle towed.[33] As part of this process, it was necessary to conduct an inventory search of the vehicle before the vehicle was towed to ensure that the contents of the vehicle were not disturbed.

Ultimately, the two-factor test set forth to determine the legality of a warrantless inventory search was met. The vehicle was lawfully impounded and rightfully within the possession of the police, as there were no drivers available to move the vehicle. Furthermore, as the vehicle had to be towed, it was necessary to inventory the contents of the vehicle before it was towed. As the legality of the warrantless inventory search was established, the contraband in question was admissible.

The Defendant further argues that the contraband should be suppressed because the inventory search was motivated by investigatory intent. While Trooper Rousseau suspected that

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[32] SHT at 18-19. Suppression Hearing Transcript, October 5, 2020 ("SHT II") at 9, 29-30.

[33] Trooper Rousseau elaborated that towing the vehicle was necessary because it was deemed a traffic hazard. On the night in question, the vehicle was located on an off-ramp near a sharp curve and there was increased fog. The Trooper expressed concern for the safety of other motorists and deemed it appropriate to tow the vehicle. SHT at 64.

there was criminal activity afoot,[34] this does not negate the legality of the search. In the case of *Commonwealth v. Woody*, the Superior Court ruled as follows:

> Instantly, we find the search of appellant's automobile fell clearly within the parameters of an inventory search. As noted by the trial court, appellant had no license to drive and his passenger had been arrested. Since no one was available to move the car, which was blocking the street, the police were required to take custody of the vehicle and an inventory search was proper. Thereafter, the challenged evidence was recovered from the floor of the vehicle, a place where belongings are likely to be found. On this basis, the search was clearly reasonable and did not go beyond the formalities of an inventory search into a criminal investigation.

679 A.2d 817, 819 (Pa.Super. 1996); See also, *Commonwealth v. King*, 259 A.3d 511, 522-23 (Pa.Super. 2021) (Tamaqua police officers properly impounded and towed Appellant's vehicle, as it posed a public safety risk. The vehicle blocked the access road to a car dealership and neither Appellant nor anyone acting on his behalf was available to move the car in a timely manner as required under police department policy).

Similarly, in the instant case there were no occupants on scene who could drive the vehicle. It was unsafe to leave the vehicle along I-70 due to the fog and low visibility and it had to be towed. Prior to the vehicle being towed, as per State Police policy, Trooper Rousseau conducted an inventory search of the vehicle in order to secure the contents of the vehicle.[35] During the course of the search, the contents of the duffle bag were discovered to include the contraband in question. The Trooper followed State Police policy and procedure in conducting the inventory search and did not exceed those parameters.

Defendant further argues that the Commonwealth failed to introduce into the record the

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[34] SHT II at. 8.

[35] Trooper Rousseau testified that the inventory search was necessary to secure any valuable items that may have been located in the vehicle, including from the tow truck operator or any others who may attempt to enter and remove items from the vehicle. SHT II at 13.

Pennsylvania State Police policy and procedures concerning inventory searches. As stated in *Commonwealth v. Gatlos*, cited above, it is not necessary for the Commonwealth to introduce the actual written police policy and procedure for inventory searches for the search to be deemed valid. All that must be demonstrated is that the inventory search was conducted in conformance with standard procedure and that it was done in good faith. Trooper Rousseau testified to the standard operating procedure for the Pennsylvania State Police in conducting an inventory search under the circumstances, and established that the search was done in good faith in an effort to secure the contents of the vehicle.

Defendant's final argument is that the data retrieved from the cell phones and SIM card that were seized from the vehicle should have been suppressed because the search warrant issued for this data was the product of an illegal search and seizure. In fact, four cell phones were retrieved from the front seat cup holder of the vehicle.[36] Defendant provided the Trooper with the passwords to all of the cellphones.[37] Nevertheless, as discussed above, the controlled substance and drug paraphernalia were lawfully seized. Defendant freely gave his consent to search the vehicle. Once at the State Police barracks, defendant executed a written consent to search the vehicle.[38] Regardless of the Defendant's consent, the contraband would have inevitably been discovered as the vehicle had to be impounded in light of there being no occupants able to drive the vehicle. As the vehicle had to be impounded, it was subject to an inventory search which resulted in the discovery of the controlled substance and the drug paraphernalia. The lawful seizure of this contraband provided sufficient probable cause for a search warrant to be issued for the data contained within the cell phones and SIM card seized

[36] SHT at 36.
[37] SHT II at 24-25.
[38] SHT at 31-33.

from the vehicle.

Wherefore, for the reasons set forth above, the trial court respectfully submits that the Superior Court affirm the Defendant's judgment of sentence.

By the Court,

Date: 2/24/2022

_____, P.J.

John F. DiSalle

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 1303 WDA 2021
	:	
v.	:	
	:	
ALFREDO SANCHEZ BARBOZA	:	
	:	
Appellant	:	

ORDER

IT IS HEREBY ORDERED:

THAT the application filed December 22, 2022, requesting reargument of the decision dated December 9, 2022, is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. ALFREDO SANCHEZ BARBOZA, Petitioner	: : : : : : : : : :	No. 58 WAL 2023 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 14th day of August, 2023, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Nicole Traini
As Of 08/14/2023

Attest: Nicole Traini
Chief Clerk
Supreme Court of Pennsylvania