



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 23, 2017

LETTER OPINION

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RE: *Commonwealth v. Grecia Burgoa*
Case No. MI-2017-1134

Dear Counsel:

This cause raises two distinct questions in the context of a motion to suppress considered as a part of a trial, namely: 1) whether a civilian emergency medical technician ("EMT") tending to the defendant, Ms. Burgoa, by his words, became an "agent of the police" and effected an arrest of Ms. Burgoa; and 2) whether the arresting police officer had probable cause to arrest Ms. Burgoa for operating a vehicle while intoxicated. For the

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reasons as more fully stated herein, this Court concludes that the EMT's words coupled with the acquiescence of the police officer did not make the EMT an agent of the police or by such conduct, effectuate an arrest of Ms. Burgoa. The Court nevertheless finds the police officer lacked probable cause to arrest Ms. Burgoa for operating her vehicle while intoxicated, inasmuch as no evidence was adduced *the police officer* was in possession of knowledge, whether directly or by hearsay, that Ms. Burgoa's vehicle engine had been on at the time she was found therein.

FACTS¹

This matter came to be heard on the 19th day of October, 2017. The parties agreed the case would be tried in a single evidentiary hearing as both a motion to suppress and on the merits of guilt of Ms. Burgoa. After hearing the evidence, the Court continued the matter for ruling to consider the parties' trial and supplemental briefs, and also review audio of the evidence presented at trial.

Two witnesses were called at trial: an EMT employed by the Fairfax County Fire Department and a Fairfax County police officer. The EMT testified first. He arrived on the scene of the offense alleged on February 5, 2017, around 9:00 p.m. to 10:00 p.m., in response to a complaint about a person sleeping in an automobile. He observed the car was parked in front of a house on a public roadway, with the engine running and the lights on. He encountered Ms. Burgoa either sleeping or passed out in her vehicle. Ms. Burgoa

¹ The facts adduced at trial reflect a somewhat sparse testimonial record as opposed to all which may have actually happened at the scene. The police officer testified very professionally, but appeared somewhat hampered by having worked the entire night prior to his testimony and consequently being sleep deprived. The Court's analysis is constricted to the record rather than to speculation the officer may have been in possession of additional facts not adduced at trial.

had her seat belt on and was awakened when the EMT shook her, to which she responded within a few seconds. Ms. Burgoa stated she was “coming from a Super Bowl party” and admitted to “drinking”. The arresting police officer arrived within minutes thereafter.

The EMT assisted Ms. Burgoa from her vehicle and moved her to the ambulance, where he had the equipment and lighting to assess whether anything was wrong with her physical condition. The EMT held on to one of Ms. Burgoa's arms based on his prior experience, but not because of any then-apparent observations about Ms. Burgoa's balance or gait. He seated Ms. Burgoa onto a cot stationed next to the car. Ms. Burgoa was well dressed and did not appear disheveled. The EMT did not remember what Ms. Burgoa stated in response to his questions at that point, other than that her answers were “not clear”. Ms. Burgoa was moved into the back of the ambulance. She then questioned why she was being detained, and was told by the EMT that he and his colleague were not the police, but rather, were there to assist her and assess if there was anything wrong. Ms. Burgoa said she was “fine” and did not wish to be transported to the hospital. She started removing a blood pressure cuff that had been affixed to her arm and was asked by the EMT cease doing so in order to be evaluated. Ms. Burgoa appeared “alert and oriented.” Ms. Burgoa emitted an odor consistent with having consumed an alcoholic beverage. Ms. Burgoa signed the refusal of medical treatment form and the police officer then “took her.”

On cross examination the EMT did not remember if Ms. Burgoa's vehicle had a key-less ignition. He did not recall who turned the vehicle off, but stated the lights were

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on and the vehicle was running when he first encountered Ms. Burgoa behind the wheel of the vehicle. The EMT denied telling Ms. Burgoa her options were that she would be taken to the hospital and then to jail, or directly to jail. The EMT stated he did not tell Ms. Burgoa such a thing because he is not a police officer. He instead claimed he only said he would release her to the police officer if she chose not to go to the hospital. The EMT stated he would never advise a person to whom he was tending their options were to go to the hospital or to jail, as that was a police function and he was not a police officer. The police officer was inside the ambulance during the entire interaction between the EMT and Ms. Burgoa. The EMT stated it was "possible" the police officer deferred to him as to the options given Ms. Burgoa.

The arresting police officer testified as the Commonwealth's second and final witness. When he arrived, the EMT was tending to Ms. Burgoa inside the driver side of a parked vehicle on a public highway in Fairfax County, Virginia. Ms. Burgoa seemed "disoriented", slow to respond, and was not answering the questions of the EMT with clarity. He observed the EMT assist Ms. Burgoa onto the cot and she was wheeled to the ambulance. The officer did not see Ms. Burgoa slumped over the steering wheel of the car. Ms. Burgoa had a heavy odor of alcohol, bloodshot glassy eyes, and slurred speech. Her focus was "off". She stated she was "possibly at a Super Bowl party but not really", and gave too many digits for her home address zip code. She admitted consuming some alcoholic beverages a few hours earlier. Ms. Burgoa declined to be transported to the hospital. The officer allowed Ms. Burgoa to use his arm as leverage to step out of the vehicle. Her balance upon stepping onto the street was "off".

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Upon cross-examination, the police officer stated the conversation between the EMT and Ms. Burgoa occurred with the vehicle ambulance door closed and the officer inside. The officer did not remember the specifics but did recall the EMT addressing the topic that Ms. Burgoa could go to the hospital or could go with the officer. He recalled Ms. Burgoa explaining she had been at a bar that was showing the Super Bowl telecast.

The Commonwealth then rested the evidence presented in support of defeat of Ms. Burgoa's motion to suppress. For reasons of judicial economy and in order to allow the police officer who had worked the previous night to depart, the Assistant Commonwealth's Attorney introduced the remainder of her evidence. The facts presented were in support of the foundation for the later taking of a breath alcohol test once Ms. Burgoa was placed into custody. The officer testified that once Ms. Burgoa was out of the vehicle he began to ask his investigative questions, including why she would have been passed out at the wheel. Ms. Burgoa had no response to the question but did admit consuming a shot of liquor at a bar about an hour earlier. She was advised she was being investigated for possible drunk driving and was offered field sobriety tests. Ms. Burgoa declined the tests, became belligerent, and walked towards her vehicle whereupon she was taken into custody. The officer later performed a breath alcohol test on Ms. Burgoa. The Commonwealth laid the proper foundation for the admissibility of the test in terms of the officer's compliance with all the steps required of a breath test operator conducting such an exam. Upon cross-examination, the officer admitted not knowing when the machine was last certified for accuracy by the Department of Forensic Science. The defense objected to the admissibility of the test as a result but the Court conditionally

admitted the breath certificate subject to the motion to strike. The Court ruled the lack of certification evidence went to the weight to be given to the test not to its admissibility, inasmuch as the General Assembly moved the certification requirement out of the criminal code to a separate statutory section, which had the effect of removing it as an element of admissibility.

At the conclusion of the evidence the parties stipulated the officer's audio recording of the scene of the arrest reflected that the EMT told Ms. Burgoa in the ambulance, and in the presence of the officer, her options were that she could "go to jail or go to the hospital and then to jail", prior to turning Ms. Burgoa over to the police officer.

I. Whether the EMT became an agent of the police and effected an arrest

Ms. Burgoa alleges the EMT in this cause acted as an agent of the police in stating to her while in his care that she had the option to "go to jail or go to the hospital and then to jail" with the officer acquiescing to the statements by his presence and silence. The Court disagrees with this conclusion.

"Whether a person acted privately or as an agent of the state is a question of fact that must be decided on the circumstances of each case. Resolution of the agency issue 'necessarily turns on the degree of the Government's participation in the private party's activities.'" *Id.* (quoting *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 614 (1989)). See also *United States v. Koenig*, 856 F.2d 843, 847 n.1 (7th Cir. 1988) (holding that question is essentially one of fact, based on the particular circumstances, but the factual inquiry is one guided by common law agency principles). Of critical importance, for an agency relationship between a private citizen and the government to exist, both parties must have manifested their consent to that relationship, either expressly or by necessary implication from their conduct. *Id.* While government knowledge of the private person's conduct obviously is critical, it is not enough, standing alone, to establish the requisite agency. See *United States v. Kinney*, 953 F.2d 863, 865 (4th Cir. 1992).

Sabo v. Commonwealth, 38 Va. App. 63, 74, 561 S.E.2d 761, 766 (2002).

The central question thus turns not merely on the words of the EMT but on how they interrelate, if at all, with the police officer's conduct. The statement of the EMT was not one of mere opinion of an idle bystander. The EMT had Ms. Burgoa in his care in the enclosed space of an ambulance. His statements were made in the context of Ms. Burgoa's verbal and physical expressions that she desired to exit the ambulance. The officer allowed the exchange between the EMT and Ms. Burgoa to play out without material interference. At the same time he did not dispel the statements of the EMT by informing Ms. Burgoa she was not necessarily going to jail or even being then-placed in investigative detention. There was however no express consent by the officer to an agency relationship with the EMT, so the analysis must turn to whether the agency relationship can be implied from the facts.

The officer had knowledge of the conduct of the EMT but that alone as is made clear by precedent, is insufficient to establish agency. In this cause though, after the EMT made clear he would turn Ms. Burgoa over to the officer to be taken to jail, the officer helped Ms. Burgoa out of the vehicle. The parties stopped at this point with respect to presentation of the evidence they wished to be considered for the motion to suppress as to the issue of whether Ms. Burgoa had been placed under arrest by means of the words of the EMT. The Court is therefore restricted in its analysis of the issue by the evidence adduced to this point.

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The Court of Appeals of Virginia has guided under what conditions an individual becomes an agent of the police in a search context which is equally applicable to this cause implicating detention or arrest.

Relying on *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987), we adopted in *Mills* “a two-part test for determining whether an individual was acting as an agent of the state while conducting a search.” *Mills*, 14 Va. App. at 463, 418 S.E.2d at 720. Under that test, a trial court looks at “(1) whether the government knew of and acquiesced in the search, and (2) whether the search was conducted for the purpose of furthering the private party's ends.”² *Id.* at 463-64, 418 S.E.2d at 720 (citing *Feffer*, 831 F.2d at 739). “These [two] criteria help focus the trial court's attention on the significance and impact of the government involvement in a search.” *Id.* at 464, 418 S.E.2d at 720. The United States Court of Appeals for the Ninth Circuit has referred to the second prong or factor relating to “the purpose of furthering the private party's ends” as “the intent of the party performing” the activity. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (challenging search by alleged agent). However, these two criteria or factors “should not be viewed as an exclusive list of relevant factors.” *Mills*, 14 Va. App. at 464, 418 S.E.2d at 720. “Other factors include whether the private party acted at the request of government and whether the government offered a reward.” *United States v. Smith*, 27 F. Supp. 2d 1111, 1115 (C.D. Ill. 1998) (involving search); see also *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir. 1994) (defendant must show “the government exercised such coercive power or such significant encouragement that it is responsible” for the individual's conduct); *Stone v. Wingo*, 416 F.2d 857, 860 (6th Cir. 1969) (actions of private party are attributed to the state where “parties act . . . together in pursuance of some design or in accordance with some scheme”). The determination of a private party's status, however, “can only be resolved ‘in light of all the circumstances.’” *Skinner*, 489 U.S. at 614 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

Sabo, 38 Va. App. at 74-75, 561 S.E.2d at 766-67. Under the *Mills* test, the police officer here not only knew of, but apparently by his silence acquiesced in the statements of the EMT, which amounted to the assertion that Ms. Burgoa was in custody and not free to

² The complete language of the second element as stated in *Mills* is “whether the search was conducted for the purpose of assisting law enforcement efforts or for the purpose of furthering the private party's ends.” *Mills v. Commonwealth*, 14 Va. App. 459, 463-464, 418 S.E.2d 718, 720 (1992).

leave. The statements further could not be interpreted to have been made for a private purpose, even in the light most favorable to the Commonwealth. Clearly, the statements were made for the governmental purpose of informing Ms. Burgoa that her end destination no matter what would transpire in the interim, was the County jail. The analysis cannot however end there for as the Court stated in *Mills*, the test is not bright line in application but instead helps bring focus on the significance of the governmental action claimed.

Of significance is that here, the private actor is also a governmental actor as a member of the Fairfax County Fire Department, who although disclaiming a role as a police officer, certainly went beyond the typical role of an EMT in accusing Ms. Burgoa of violating the law respecting her vehicle registration not being in order. He further did not recall the statements he made to her accurately. He was unequivocal in denying he ever told Ms. Burgoa she was going to jail, yet the police officer and the Assistant Commonwealth's Attorney, laudably discharging their lawful duties, provided Ms. Burgoa with an audio recording to the contrary which formed the basis of a stipulation by the parties. It is inferable from the evidence that the EMT sought to minimize his role as an agent of the police, which has the opposite effect of heightening the likelihood he did believe he overstepped his function into that which is more appropriately the province of a police officer. It is clear that whether institutionally or intentionally, the EMT acted for common purpose or design with the acquiescence of the police officer to effect the detention of Ms. Burgoa. The officer's subjective intent, inasmuch as it was unmanifested, is thus of no consequence to whether his silence in dispelling that Ms. Burgoa

was under his detention, was motivated by polite non-interference with the duties of the EMT or with the intent to benefit the investigative detention of a suspect. His silence alone leads to the evidentiary inference of common investigative design.

Superficially, the *Mills* test for the establishment of the EMT as an agent of the police is thus seemingly met. Of distinction however, is that the EMT uttered only words rather than engaging in conduct such as detaining Ms. Burgoa himself. He did not physically interfere with her removing EMT equipment from her body and exiting the ambulance. The Court holds that when police agency is ascribed to a civilian through the mere utterance of words, the present police officer then has to engage in some conduct or statement which confirms the words uttered by the purported agent reflect the intent of the police. The utterance by a civilian that a police officer will detain a suspect does not amount to the assertion of agency unless the police confirms those mere words through their action.

Ms. Burgoa asserts that the words of the EMT in the enclosed space of the ambulance amounted to her arrest. Ms. Burgoa points to *Young v. Commonwealth*, asserting that the touch requirement was an “insignificant formality, reminiscent of the medieval livery of seisin”, and therefore not a prerequisite in this cause. *Young v. Commonwealth*, 57 Va. App. 731, 741, 706 S.E.2d 53, 58 (2011). Ms. Burgoa thus asserts both the agency of the EMT and the arrest are established. Ms. Burgoa misapprehends the import of *Young*. Under common law, “mere words of an officer stating to a suspect that he is ‘under arrest’ are not sufficient to constitute an arrest.” *Bristol v. Commonwealth*, 272 Va. 568, 573, 636 S.E.2d 460, 463 (2006) (citing *California v. Hodari D.*, 499 U.S.

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621, 627 (1991)). It follows that the mere words of an agent of the police are also insufficient to cause an arrest at common law. In *Young* the touch requirement was not implicated as the Court explained, in the context of a non-custodial arrest pursuant to the statute on issuance of a summons.

It is the act of arrest itself that “brings into consideration the issuance of a summons,” which thereafter “makes provision for the expeditious release of an arrested person without appearance before an issuing authority and a bail determination.” *Davis*, 17 Va. App. at 671, 440 S.E.2d at 430 (emphasis added); cf. *Rhodes v. Commonwealth*, 29 Va. App. 641, 645 n.6, 513 S.E.2d 904, 907 n.6 (1999) (*en banc*) (holding a search incident to arrest is not authorized “where by statute a state has ‘abjured the authority to execute custodial arrests’” for minor offenses (citation omitted) (emphasis added)); *People v. Bland*, 884 P.2d 312, 318 (Colo. 1994) (noting that a statute that “mandates the issuance of a notice or summons, however, is consistent with a non-custodial arrest”).

In this case, the trooper declared Young under arrest for violating Code § 18.2-266. After doing so, the trooper informed Young of his *Miranda* rights as an arrestee. The trooper also read Young the statutory implied consent notice, see Code § 18.2-268.3(B), which expressly reaffirmed that Young had been “arrested” by an “arresting officer.” Declaration and Acknowledgment of Refusal — Breath/Blood Test (Form DC-233).⁶ Young submitted to a blood test. The [Page 740] trooper later released Young from the arrest under Code § 19.2-73(B). The summons signed by Young and the arresting officer identified the “Arrest Location” as Mary Washington Hospital and the “Arrest Date” as October 24, 2008. The summons was not an arrest warrant. It did not *cause* Young to be arrested. To the contrary — it *released* Young from arrest. The issuance of the summons under Code § 19.2-73(B), releasing Young from arrest, served as a statutory marker confirming Young's ongoing submission to the arresting officer's authority. By signing the summons, Young acknowledged his continuing submission to the arrest and his promise to appear in court as a condition for being released from arrest.

Young, 57 Va. App. at 739-740, 706 S.E.2d at 57-58.

In the instant case there is no police officer conduct at all other than silence in the face of the EMT's statements coupled with helping Ms. Burgoa out of the ambulance. The officer did not under the evidence offered in consideration of the motion to suppress, tell

Ms. Burgoa she was detained, or even under arrest. "It is axiomatic that where the officer does not make any assertion of authority, a suspect cannot submit to him and, therefore, there can be no arrest." *Young*, 57 Va. App. at 736, 706 S.E.2d at 55. Consequently, the mere words of the EMT coupled with the limited conduct of the officer in helping Ms. Burgoa out of the ambulance do not constitute the establishment of the EMT as agent of the police nor of an arrest of Ms. Burgoa.

II. Whether the police officer had probable cause to arrest Ms. Burgoa

Having established Ms. Burgoa was not under arrest at the time she exited the ambulance, the Court turns to consideration of the full record as to whether the officer had probable cause to arrest Ms. Burgoa at the scene of the offense alleged. Ms. Burgoa's fall back legal position is that her motion to suppress should still be granted because the police officer lacked sufficient knowledge that a crime had been committed when he arrested Ms. Burgoa. The Commonwealth counters the police officer need not have witnessed the offense but need only have probable cause to believe the offense had been committed. Virginia Code Ann. § 19.2-81(D). The police officer thus could by statute, rely on hearsay to effect an arrest for drunk driving. At trial however, whether by oversight or otherwise, no witness testified that the police officer was ever made aware that Ms. Burgoa was found inside her vehicle *with the engine on or the keys in the ignition*.

"[P]robable cause exists when the facts and circumstances *within the officer's knowledge*, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." *Taylor v. Commonwealth*, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981), *cert. denied*, 456 U.S. 906 (1982).

Jones v. Commonwealth, 18 Va. App. 229, 231, 443 S.E.2d 189, 190 (1994) (emphasis added). While the testimony of the EMT establishes operation of the vehicle in the context of the merits case, when testing probable cause, Ms. Burgoa is correct that it is the knowledge of the officer at the time of arrest which controls whether he had probable cause to arrest her for the crime charged. Consequently, the Court is compelled to grant the Defendant's motion to suppress for lack of probable cause to arrest her in the absence of any evidence the officer knew, whether directly or through hearsay, that Ms. Burgoa had operated the motor vehicle.

CONCLUSION

After full consideration of the relevant facts and law, in assessment of the credibility of the witnesses presented, and for the reasons already stated herein, this Court concludes that the EMT's words coupled with the acquiescence of the police officer did not make the EMT an agent of the police or by such conduct, effectuate an arrest of Ms. Burgoa. The Court nevertheless finds the police officer lacked probable cause to arrest Ms. Burgoa for operating her vehicle while intoxicated inasmuch as no evidence was adduced that the police officer was in possession of knowledge that Ms. Burgoa's vehicle engine had been on at the time she was found therein. The Court shall therefore enter a separate order dismissing this cause.

Sincerely,


David Bernhard
Judge, Fairfax Circuit Court

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