

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 99-10,617
	:	
JEFFREY A. McKISSICK,	:	
	:	
Defendant	:	1925(a) OPINION

**OPINION IN SUPPORT OF THE ORDER OF JULY 13, 1999 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

The Defendant has appealed his conviction by this Court in a summary *de novo* trial of the offense of Driving Under Suspension, DUI Related, a violation of §1543(b) of the Motor Vehicle Code, 75 Pa.C.S. §1543(b). On this appeal, the Defendant's Concise Statement of Matters Complained of on the Appeal filed August 23, 1999, questions first whether the evidence was legally sufficient to sustain his conviction; secondly, whether the Court's verdict of guilt was against the weight of the evidence and third, whether a new trial should have been granted because the Court permitted the Commonwealth's witness to testify (over objection) that the Defendant had acknowledged driving the vehicle at the time of the summary trial before the District Justice.

Defendant's conviction and sentence occurred on July 13, 1999. At the trial of that date, the Commonwealth presented testimony of one witness, the Chief of Police of the Borough of Montoursville, Chris Miller. Chief Miller testified that on July 31, 1999, Super Bowl Sunday, between 8:15 and 8:30 a.m. he encountered the Defendant inside a store in the Borough. The Chief was off duty. The Chief had brief eye contact with the Defendant inside the store after which the Chief, knowing the Defendant for some twenty years and knowing that his license was under suspension, purposely observed the Defendant's activities as the Defendant left the store.

The Defendant entered the driver's door of a sport utility vehicle, which had no other occupants. The Chief watched as the Defendant drove out of the parking lot onto a street at the rear of the market. The Chief then, getting into his own car, proceeded to drive away on the street in front of the market, stopping at the next intersection for a red light. While stopped at the red light, he again observed the Defendant driving the S.U.V. as it crossed through the intersection directly in front of the Chief's vehicle. Chief Miller also testified he followed the Defendant approximately six blocks as the Defendant drove through the borough, at all times making the observation that the Defendant was alone in the vehicle. The Chief was unable to contact the on-duty officers at that time. He subsequently filed the citation against the Defendant for the driving under suspension violation, once he had confirmed the violation through the Department of Transportation records.

The Defendant testified at the trial on his own behalf that he did not drive his S.U.V. on the date and time in question; instead, it was operated at that time and place by his first cousin. The Defendant also called his first cousin, who testified to the same effect.

There was no issue in the case that in fact, on January 31, 1999, the Defendant's operating privileges were under suspension for a DUI-related offense. The issue presented to the Court at the trial was whether to accept the testimony of the Commonwealth's witness, Chief Miller, or to accept the Defendant's testimony and that of his first cousin, as to whom the operator of the Defendant's vehicle was at the time and place in question. After arguments by counsel, the Court made a determination of credibility and, in resolving the conflicting testimony, found the evidence offered by the Commonwealth through Chief Miller to be more

credible. The Court's reasoning and remarks in that regard appear in the proceedings at pages 42-44.

Clearly, the testimony of one individual may be sufficient to establish the necessary facts to prove the Defendant violated §1543(b) of the Motor Vehicle Code, if that evidence is persuasive. The testimony in this case presented a distinct issue of credibility for the Court to resolve as the trier of fact. The Court did resolve those credibility issues in favor of the Commonwealth, after having had a chance to listen and observe witnesses for both parties. The Court particularly noted that in the facts presented to it, the Commonwealth's witness had several and ample opportunities to observe who was driving the S.U.V. and also the number of its occupants. The Court also noted it was not able to ascertain from the testimony any reason or motive that would have adversely affected the credibility of the Commonwealth's witness. In considering the defense testimony in light of the relationship of the Defendant's witness to the Defendant (his first cousin) and the self-interest and motivation of the Defendant, this Court resolved the issues of credibility against the Defendant. This Court believes that its determination as to credibility of the witnesses should not now be disturbed on appeal.

The Defendant asserts on appeal the Defendant's statement which acknowledged that he was driving the vehicle at the time and place in question made before the District Justice, was made at a time that he was "in custody," that it was made at a time when he was not represented by counsel, and that there was no record the Defendant had knowingly, intelligently, and voluntarily waived his right to counsel and his right to remain silent. The relevant testimony and objection to the admission of the testimony appears in the transcript at pages 11-13. The

Defendant did not testify at his initial trial before the District Justice, but rather made the incriminating acknowledgement in a statement related to sentencing.

This Court does not believe that any legitimate argument can be advanced by the Defendant that he was “in custody” at the time he appeared at the initial trial before the District Justice. Nor is this Court aware of any requirement that requires the Defendant in those circumstances to be advised by the District Justice that during the course of trial anything he chooses to say could be used against him, either during testimony or in making statements after the testimony has been completed, as occurred in this case. Furthermore, this Court cannot say that the statement made in front of the District Justice was not in its mind when choosing which testimony to accept in this case. However, the admission played little, if any, weight in the Court’s determination of credibility, as can be seen through the Court’s discussion on the record at pages 42-44 above referenced.

Accordingly, this Court recommends the Defendant’s conviction and sentence be upheld upon appeal.

BY THE COURT,

Date: September 24, 1999

William S. Kieser, Judge

cc: Court Administrator
District Attorney
Peter T. Campana, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

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