

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 99-10,900**
:
:
vs. : **CRIMINAL DIVISION**
:
:
TROY CORTRIGHT, :
Defendant : **1925(a) Opinion**

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

This opinion is written in support of this Court's Order dated September 5, 2000 and docketed September 6, 2000. The relevant facts are as follows: On April 4, 1999, at approximately 3:25 a.m., the police observed Defendant driving his pickup truck in Old Lycoming Township. The vehicle crossed the white line on the right side of the road several times within a distance of one-half mile. The last time the vehicle crossed the line, it nearly struck the guard rail. At that point, the police stopped the vehicle. Defendant was the driver. He had a strong odor of alcohol, red and glassy eyes, and slurred speech. The police asked Defendant to perform field sobriety tests. When Defendant failed these tests, he was arrested and taken to the State Police Barracks in Montoursville. At the barracks, the police conducted a breath test on Defendant. Defendant's alcohol level was .177%.

Defendant was charged with driving under the influence of alcohol to a degree which rendered him incapable of safe driving, driving under the influence of alcohol with an alcohol level of .10% or greater, careless driving, and driving on roadways laned for traffic.

Defense counsel filed a formal discovery request on or about June 14, 1999. On August 11, 1999, Defense counsel filed a motion for discovery which sought written material

such as logs and certifications regarding the device used to test Defendant's breath. On December 17, 1999, the Honorable Nancy L. Butts granted Defendant's motion and ordered the Assistant District Attorney involved in this case to contact the Pennsylvania State Police at the Montoursville barracks with regard to the Intoxilyzer 5000 used in this case. The order also directed the police to cooperate in furnishing written material regarding the device. On January 13, 2000, defense counsel sent a letter to the District Attorney's office in which he asked for the certification of the troopers who performed the accuracy and calibration tests on the device.

A jury was selected on June 2, 2000 and trial was held June 9, 2000. At the beginning of trial, defense counsel noted the Commonwealth did not provide the certification for the troopers involved in the accuracy and calibration tests and made an oral motion to prohibit the introduction of the breath test results because the Commonwealth violated the discovery order. N.T. at pp. 3-15. The prosecutor argued that defense counsel's remedy was not to wait until trial to raise this issue, but to file motion for sanctions. He also argued that defense counsel agreed he was going to allow the trooper to testify to business records and the Commonwealth would not have to have the other individuals present to testify. If the Court was going to require the Commonwealth to obtain the certificates, it would request a continuance. N.T. at pp. 15-21. The prosecutor also noted that the troopers who signed the certificates of accuracy and calibration were no longer at the Montoursville barracks. N.T. at p.21.

The Court gave both counsel two options: (1) the Court could continue the case to allow defense counsel to file a written motion because the Court did not want to dismiss the case or preclude the evidence without a further understanding of the information requested and the regulatory requirements; or (2) the case could proceed to trial and, if there was a verdict adverse to Defendant, the court would hold a further hearing or argument to determine whether

the failure to provide the information requested was grounds for dismissal of the case or preclusion of the evidence. N.T. at pp. 25-26. Defense counsel wanted the Court to preclude any testimony regarding the breath test result. N.T. at p.26. Neither counsel really wanted to continue the case, so the Court denied Defendant's motion and told defense counsel to raise the issue in post verdict motions if there was a guilty verdict. N.T. at p.27.

The jury found Defendant guilty of both driving under the influence charges. The Court convicted Defendant of careless driving, but acquitted on the lane violation. Immediately after the verdict, defense counsel made an oral motion for extraordinary relief. Defense counsel requested the Court to dismiss the charges because of a violation of the discovery rules and order issued by Judge Butts or, in the alternative, grant a new trial because the test results should not have been admitted without the Commonwealth first having to prove that the troopers who performed the calibration and accuracy tests were certified operators. In an order dated September 5, 2000, the Court granted defense counsel's request for a new trial, but denied the request for dismissal of all the charges with prejudice.

On September 27, 2000, Defendant filed a notice of appeal. The sole issue on appeal is whether the Court erred in refusing to dismiss the charges.

Initially, the court notes it does not believe Judge Butts order regarding discovery was violated because it dealt with the certificates for the device itself and not whether the persons who calibrated the equipment and tested it for accuracy were certified to do so. The Court granted a new trial in this case because, after argument and a brief from defense counsel following trial, the Court believed its ruling permitting the introduction of the breath test result without evidence that the trooper who performed the calibration and accuracy tests were certified operators was erroneous. It did not seem appropriate or just to dismiss the charges

when the Court initially denied the defense motion and did not require the Commonwealth to produce such information at trial. If defense counsel had made the motion before the first day of trial and the Court had the opportunity to review the regulations and case law submitted by defense counsel, the Court would have prohibited the introduction of the breath test results unless the Commonwealth could prove the troopers were certified operators. The Court would not have dismissed the charges.

Even if there was a discovery violation, the Court has broad discretion in choosing the appropriate remedy. Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (1995). The appropriate remedy in this case was a new trial at which the Commonwealth must produce evidence that the operators were certified or the breath test results would be inadmissible. It was not appropriate to dismiss the charges in this case, because the charge of driving under the influence-incapable of safe driving and the summary offenses do not require evidence of Defendant's alcohol level to obtain a conviction. Defendant's alcohol content is one factor among many that the jury can consider when determining whether Defendant was incapable of safe driving. Since the jury could have considered that evidence in reaching its verdict on the incapable charge, it was appropriate to grant a new trial. However, it is inappropriate to dismiss this charge and the summary offenses because the other evidence in this case (such as Defendant's driving over the white line, odor of alcohol, slurred speech, glassy eyes and failed field sobriety tests) would be sufficient to sustain the convictions if it is accepted by the jury. Furthermore, it would be unfair to the Commonwealth to dismiss the charges when the Court erroneously denied Defendant's motion to preclude the breath test result and ruled that the Commonwealth did not have to present evidence that the troopers who performed the calibration and accuracy tests were certified operators.

For the forgoing reasons, the Court denied Defendant's oral motion for extraordinary relief to the extent it was seeking dismissal of the charges with prejudice.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Michael Dinges, Esquire (ADA)
Peter Campana, Esquire
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work file