IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 99-10,526**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
JEFFREY O'DELL,	**:**	
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 Judgment of Sentence issued February 9, 2000. The relevant facts are as follows. On November 1, 1998, the defendant was arrested and charged with driving under the influence of alcohol to a degree which rendered him incapable of safe driving, driving under the influence of alcohol while the amount of alcohol in his blood was .10% or greater, and failing to obey a traffic control device. A jury trial was held on December 7-8, 1999. The Commonwealth's evidence established that Officer O'Connell of the South Williamsport Police Department was in his cruiser with the engine running in the Sovereign Bank parking lot at the intersection of Market Street (Route 15 South) and Southern Avenue (Route 654) on November 1, 1998 at approximately 2:30 a.m. when he heard a vehicle traveling across the Market Street bridge. Officer O'Connell looked at the traffic signal and noticed it was red for traffic proceeding south on Market Street. The vehicle proceeded through the red light without slowing down or stopping. Officer O'Connell pulled out of the bank parking lot and

activated his emergency lights.

When the vehicle stopped approximately three (3) blocks later, Officer O'Connell exited his cruiser and approached the driver of the vehicle, the defendant Jeffrey O'Dell. Officer O'Connell asked the defendant for his license and registration. The defendant appeared confused and had difficulty retrieving his license from his wallet. Officer O'Connell noticed an overpowering odor of alcohol emanating from the vehicle. He also observed that the defendant's speech was slurred and he had watery, bloodshot eyes.

Officer O'Connell asked the defendant to exit his vehicle. When the defendant complied with this request, he had difficulty with his balance. Officer O'Connell then asked the defendant how much he had to drink and the defendant replied "about six beers." Officer O'Connell asked the defendant to perform field sobriety tests. The defendant attempted the tests, but failed them. Officer O'Connell arrested the defendant for driving under the influence of alcohol and transported him to the DUI Processing Center at the Williamsport Hospital.

The defendant arrived at the DUI Processing Center at approximately 3:00 a.m. His blood was drawn between 3:50 and 4:00 a.m.[1] The blood was tested and the results showed the defendant's blood alcohol content (BAC) was .14%. The interview of the defendant at the DUI Center was videotaped. After viewing the videotape when it was played in open Court, Officer O'Connell testified that the defendant's speech and abilities

[1]There was a delay in drawing the defendant's blood because the DUI Processing Center was busier than normal because the police were also operating a DUI checkpoint on this night.

were worse when he stopped the defendant's vehicle than they were at the DUI Center.

The defendant testified in his defense. The defendant testified that he arrived at a friend's house at about 9:30 p.m. and began drinking at approximately 10:00 p.m. Between 10:00 p.m. and approximately 2:15 a.m., the defendant had about six beers and a double-shot of whiskey. The double-shot of whiskey was consumed immediately prior to leaving the friend's residence. The defendant acknowledged he told the officer he had about six beers and did not mention the double-shot of whiskey. However, he explained that he thought the officer was only asking him how many beers he had and the officer did not ask if he had anything other than beer.

With regard to the defendant's driving and whether he exhibited signs of intoxication, the defendant's testimony contradicted Officer O'Connell's in nearly every aspect. The defendant stated that the light was green for him when he was on the bridge, it changed to yellow when he was four car lengths away from the intersection and he thought he could make it through, but the light changed to red as he was proceeding underneath it. The defendant also claimed: (1) he did not have any difficulty finding his license or exiting his vehicle; (2) he did not have slurred speech or talk as if he had a thick tongue; and (3) he passed the field sobriety tests. The defendant further asserted that it was not until he sat at the DUI Center for approximately an hour that he began to feel the effects of alcohol.

The defense also called Dr. Lawrence Guzzardi, an expert in the field of medical toxicology and alcohol absorption. Dr. Guzzardi testified that, based on the defendant's testimony, the defendant's BAC was below .10% when he was driving, being in the range of .07-.09%. N.T., December 7, 1999, at pp. 164-165. Dr. Guzzardi noted that

the defendant's testimony was somewhat different from the information he had been given prior to trial; the previous information was exact, whereas the trial testimony went back and forth regarding the amount of alcohol consumed and the timing of its consumption. Dr. Guzzardi further testified that a BAC of .14% was consistent with the consumption of six beers and a double-shot of whiskey, but not consistent with only five or six beers. In other words, if the defendant told the officer he only had five or six beers, that wasn't true. N.T., at p. 165.

On cross-examination, Dr. Guzzardi acknowledged that his opinion was dependent on the defendant's testimony regarding the timing and amount of alcohol consumption. N.T., at pp.167-168. If Mr. O'Dell was not telling the truth, everything Dr. Guzzardi testified to would be faulty. Giving every benefit to the Commonwealth, the highest the defendant's BAC could be at the time of driving was .17%. N.T., at p. 168. Even at .07-.09%, the average person would be impaired to some degree. N.T., at p. 170.

On redirect, Dr. Guzzardi stated that it was possible, but not likely, that an individual with a BAC of .17% could drive seven blocks without weaving or perform the finger-to-nose field sobriety test without falling down. N.T., at p. 172-173.

On recross, Dr. Guzzardi indicated his testimony was based on the average person; if Mr. O'Dell were atypical, he wouldn't know how he would be affected or what his BAC would be at the time he was driving. N.T. at p. 175.

The defendant was convicted of all the charges. On February 9, 2000, the Court sentenced the defendant to undergo incarceration in the Lycoming County prison for 45 days to two years less one day, pay the costs of prosecution, pay fines totaling $650,

and perform 75 hours of community service. On February 10, 2000, the defendant filed a notice of appeal.

The defendant asserts the evidence was insufficient to prove beyond a reasonable doubt that the defendant's blood alcohol level was above the legal limit at the time of driving when the defendant presented expert testimony regarding alcohol absorption and extrapolation and the Commonwealth did not present an expert.

In reviewing the sufficiency of the evidence, the Court must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190, 195 (1997), cert. denied, 523 U.S. 1082, 118 S.Ct. 1534, 140 L.Ed.2d 684 (1998).The trier of fact, in passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence presented. Commonwealth v. Valette, 531 Pa. 384, 388, 613 A.2d 548, 549 (1992).

In order to establish the offense of driving under the influence with a blood alcohol content of .10% or greater, the Commonwealth must prove two elements: (1) the defendant drove, operated or was in actual physical control of a motor vehicle; and (2) he did so while his blood alcohol content was .10% or greater. 75 Pa.C.S. §3731(a)(4). It is prima facie evidence that the defendant's blood alcohol content was .10% or greater at the time he was driving if a chemical test obtained within three hours after the person drove shows the amount of alcohol by weight in the blood of the person is equal to or greater than

.10% at the time the chemical test is performed. 75 Pa.C.S. §3731(a.1).[2]

The evidence when viewed in the light most favorable to the Commonwealth established the following: the defendant was driving a vehicle and his blood alcohol content was .14% within three hours after he drove his vehicle. From this evidence alone, the jury could find the defendant guilty of violating §3731(a)(4). Moreover, the defense expert testified that, giving every benefit to the Commonwealth, the defendant's blood alcohol content could have been as high as .17% at the time he was driving.

Basically, the defendant argues that once he presents expert testimony, the Commonwealth is required to present its own expert to rebut the defense expert. This Court cannot agree. It is the function of the jury to weigh the evidence in reaching a verdict. Furthermore, if the defendant's assertion was accurate, the decisions of the appellate courts would state that the Commonwealth shall or must present expert testimony in response to the defendant's expert instead of using words such as may or permitted. See Commonwealth v. Yarger, 538 Pa. 329, 648 A.2d 529, 531 (1994); Commonwealth v. Zugay, 745 A.2d 639, 650 (Pa.Super. 2000). Moreover, the Pennsylvania Superior Court recently addressed this issue and held "the Commonwealth enjoys the benefit of its prima facie evidence whether or not the defense presents expert testimony." Commonwealth v. Greth, 2000 Pa.Super. 238, 214 MDA 2000 (August 17, 2000)

The defense also contends that the evidence was insufficient to prove beyond a reasonable doubt that the defendant was under the influence of alcohol to a

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[2]This statute was found constitutional in Commonwealth v. Murray, 749 A.2d 513 (Pa.Super. 2000)(en banc).

degree which rendered him incapable of safe driving. Again, the Court cannot agree. In order to establish this offense, the Commonwealth must prove: (1) the defendant drove, operated or was actual physical control of a motor vehicle; and (2) the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa.C.S. §3731(a)(1); Commonwealth v. Mattis, 686 A.2d 408, 411 (Pa.Super. 1996).

When viewed in the light most favorable to the Commonwealth, the evidence established the following: the defendant drove a motor vehicle; he had an odor of alcohol about his person; he had slurred speech; he had watery, bloodshot eyes, he failed field sobriety tests; his blood alcohol content was .14% within three hours after he drove; and his abilities were worse at the time his vehicle was stopped than at the DUI Processing Center. Although the defense expert testified that he estimated the defendant's blood alcohol content was between .07% and .09% at the time the defendant was driving, the expert acknowledged that at that level it would impair an individual to some degree. This evidence is more than sufficient to prove the defendant drove his vehicle while he was under the influence of alcohol to a degree which rendered him incapable of safe driving.

DATE: _____ By The Court,

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Kenneth D. Brown, J.

cc: Michael Dinges, Esquire (ADA)
Kyle Rude, Esquire