IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 00-10,206**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
LYNN E. KYLE,	**:**	
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 dated September 6, 2000 and docketed September 9, 2000. The relevant facts are as follows: The defendant, Lynn Kyle, 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 while his blood alcohol content was .10% or greater, careless driving and accidents involving damage to property. These charges arise out of an accident on October 11, 1999 in which the defendant struck a pole along Matthews Boulevard near Sauer's Trading in the borough of South Williamsport.

A jury trial was held on June 5-6, 2000. At trial, the Commonwealth and defense each presented several witnesses. The Commonwealth presented three witnesses who were not members of law enforcement: Kathy Rooker, John Copen and George Hakes. In the afternoon of October 11, 1999, Ms. Rooker was in her backyard mowing the grass and Mr. Copen and Mr. Hakes were at Sauer's Trading in South

Williamsport. An alley that is an extension of Matthews Boulevard runs between the rear of Ms. Rooker's property and Sauer's Trading. Ms. Rooker, Mr. Copen and Mr, Hakes each testified that they heard a loud crash and went to see what happened. Near the alley they observed a blue conversion van with its right front bumper against a light pole. They also saw broken glass all over the alleyway. The driver of the van backed into a parking spot near the pole and got out of the vehicle to look at the damage. These witnesses described the driver's manner of walking as unsteady, staggering and hardly able to walk. Both Mr. Copen and Mr. Hakes testified the driver had a smell of alcohol on him. Mr. Hakes also stated the driver had glassy eyes and was not in good shape. Mr. Hakes believed the man was drunk and he was concerned the man would leave the scene.

Mr. Copen and Mr. Hakes also testified that an off-duty police officer, Larry Wilcox, came out of Sauer's and spoke to the driver. These witnesses heard Officer Wilcox identify himself as an off-duty officer and tell the individual not to drive the vehicle but stay right where he was. When Officer Wilcox went in to telephone the South Williamsport police, the driver got in the van and drove away. As he was driving, there was a loud squealing noise from the bumper rubbing against the front right tire.

The Commonwealth also called three law enforcement officers as witnesses. Larry Wilcox, a Montgomery police officer, testified that on the date in question he was off-duty. He was in Sauer's Trading when he heard a loud crash that sounded reasonably close by. He went outside and saw a blue conversion van against a pole. The van had damage to the right front, there was glass in the roadway and the pole had moved four to six inches from the impact. Officer Wilcox made contact with the driver of the van and

asked if he was injured. The driver responded, “No, I didn’t hit anything.” Officer Wilcox smelled a strong odor of alcoholic beverages on the individual. The individual also was staggering and had somewhat slurred speech. Officer Wilcox told the driver he was an off-duty police officer, and it was obvious he (the driver) was involved in an accident. Officer Wilcox then said something to the effect of “please wait right here and do not drive the van.” Officer Wilcox then went back into Sauer’s to call the South Williamsport police. Officer Wilcox had to wait two to three minutes before he could use the phone because Mr. Sauer’s was using it for a gun check. When the phone became free, he called in a possible DUI. When he went back outside, the blue conversion van was leaving. Officer Wilcox ran over, pounded on the window and yelled for the driver to stop, but the van continued and turned into an alley that went into the Bi-Lo parking lot. Smoke was pouring off the right front tire because the bumper was right up against it. Officer Wilcox watched the area of the Bi-Lo parking lot to make sure the vehicle did not leave that area. Two to three minutes later, Corporal Rexford Lowmiller of the South Williamsport Police Department arrived.

Corporal Lowmiller testified he received the dispatch at 3:40 p.m. He arrived near Sauer’s at 3:43 p.m. When he drove up he saw Officer Wilcox. Corporal Lowmiller stopped his vehicle and rolled down his passenger window to speak to Officer Wilcox. Officer Wilcox told Corporal Lowmiller that the individual drove the van toward the Bi-Lo parking lot. Officer Wilcox then got into the cruiser and Corporal Lowmiller drove to the Bi-Lo parking lot. They arrived at the Bi-Lo parking lot at 3:45 p.m. There they saw the blue conversion van, with an individual outside near the van. Corporal Lowmiller made

contact with the individual and noticed a very strong odor of alcohol emanating from his person. Corporal Lowmiller asked the individual for his driver's license and registration. The individual walked over to the van to get these items. He was very unstable when he walked. He handed Corporal Lowmiller his license and a credit card, instead of his registration. Corporal Lowmiller repeatedly asked the defendant if he would submit to field sobriety tests, but the defendant did not respond. Eventually, Corporal Lowmiller told the defendant he was under arrest. Officer Sim then placed the defendant in his (Sim's) cruiser. While Officer Sim was transporting the defendant, Corporal Lowmiller went to examine the van. He noticed glass on the roof and windshield that was thicker than glass from a bottle. He also saw two empty beer cans in the van. Corporal Lowmiller took a piece of glass from the van back to the scene and compared it to the glass in the alley. The glass found on the van matched the glass from the broken street light.

Officer Andrew Sim also testified for the Commonwealth. He stated he also went to the Bi-Lo parking lot. He was present when Corporal Lowmiller made contact with the individual. Corporal Lowmiller was asking the individual about the accident at Sauer's and the individual said he didn't hit anything. Officer Sim noticed the defendant had problems with his balance. The defendant did not respond to several requests to perform field sobriety tests. When the police told him he was being arrested for DUI, the defendant asked them to write him a ticket for reckless driving and drop him off at the corner. Officer Sim placed the defendant in his cruiser and took him to the Williamsport Hospital for a blood test. They arrived at the hospital at 4:05 p.m. Blood was drawn at 4:25 p.m. The blood was tested and the defendant had a blood alcohol content of .20%.

The defendant, his fiancé, her brother, and a friend of the defendant testified for the defense. The defendant stated he had gone to the Dewart livestock market and purchased, among other things, four boxes of peppers. He arrived at St. Anthony's where his fiancé worked between 2:00 and 2:15p.m. He talked to her about having dinner with him that evening and then left between 2:20 and 2:30 p.m. to try to sell some of the peppers he bought. One of the places he tried to sell peppers was the Southern Grill, a bar and restaurant in South Williamsport. He arrived at the Southern Grill around 3:00 p.m. He was there about fifteen or twenty minutes. He sold some peppers, but did not have anything to drink. As he was traveling down the Matthews Boulevard (alley), he stopped at the stop sign. His stereo was not working properly so he was messing with it as he pulled out from the stop sign and struck the pole. He got out of the van to see what damage was done to his vehicle and the pole. The van's bumper had been damaged approximately one month earlier when he hit a deer along Route 44 near Pine Creek.[1] The defendant claimed his was not going fast when he hit the pole. He noticed a rubbing noise when he backed up, but he did not notice a noise when he was going forward. The defendant did not think it was a reportable accident so he left to try and sell more peppers. When he started to leave, he noticed the rubbing noise more than he remembered so he took the van to Bi-Lo to park. He then walked from Bi-Lo to the Southern Grill. He called his fiancé to pick up his son from daycare and then pick him up. He was upset about hitting the pole,

[1]The defense introduced a paper from the Game Commission giving the defendant permission to use the deer he hit along Route 44. Defendant's Exhibit 10.

so he drank Robert Barger's shot of whiskey, then drank two double shots and two beers.[2] He started to feel sick because he hadn't eaten since 10 a.m so he walked back to the van. It was too hot in the van, so he stood outside. Lowmiller and Wilcox arrived two to three minutes later.[3]

Tim Kinley, the brother of the defendant's fiancé, testified that he went to the Southern Grill to drink some beers around 2:00 p.m. At approximately 3:00 p.m., the defendant arrived to sell peppers. The defendant was there about twenty minutes. Mr. Kinley did not believe the defendant drank while he was there. The defendant came back to the Southern Grill approximately fifteen to twenty minutes after he left.[4] He bought himself and Mr. Kinley a double shot and he was talking that he just hit a telephone pole. The defendant said he had to make a phone call and walked to the other end of the bar. He was talking to another guy and drinking. The defendant tried to make a call to his fiancé about picking up his son, but Mr. Kinley did not know if he reached her.

Judy Liach, the defendant's fiancé testified that the defendant stopped at St. Anthony's around 2:00 p.m. They talked for approximately ten minutes about he items he bought at Dewart and discussed having dinner together. At about 3:30 p.m., Ms. Liach received a telephone call from the defendant. The defendant stated he hit a pole and the van wasn't driving well. He asked Ms. Liach to pick up his son and then meet him at the

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[2]He also ordered double shots for Robert Barger and Tim Kinley.

[3]The defendant testified that he never denied hitting the pole. Instead he told the police he hit the pole but did not think it was a reportable accident.

[4]According to Mr. Kinley's testimony the defendant would have left the Southern Grill around 3:20 p.m. and returned at about 3:35 or 3:40 p.m.

van. Ms. Liach arrived at the Bi-Lo parking lot around 4:25 or 4:30 p.m. She saw the van, but the defendant was not there, so she left a note on the windshield. She didn't think there was any more damage to the van than it already had from the deer. When she got home there was a message that the defendant had been arrested and was at his friend Dave's house.

Robert Barger testified he has known the defendant for fifteen or sixteen years. He stated the defendant came into the Southern Grill selling peppers. He did not see him drink anything. About fifteen minutes later, the defendant went outside. Mr. Barger thought he was going to get more peppers. The defendant came back into the Southern Grill and was slamming beers and shots and said he hit a telephone pole. When the defendant came in, he picked up Mr. Barger's glass and drank its contents. Mr. Barger testified that he was drinking ginger brandy, though, and not whiskey. During cross-examination, the prosecutor noticed Mr. Barger smelled of alcohol. He asked him if he drank before coming to court and Mr. Barger admitted having a beer and a shot about a half hour earlier.

The defendant was found guilty of all the charges. He filed a timely notice of appeal. The only issues raised on appeal are that the evidences was insufficient to sustain the verdict and the verdict was against the weight of the evidence due to the fact that the defendant proved he consumed alcohol after he last drove, operated or was in actual physical control of a vehicle.

When reviewing a sufficiency claim, the court is required to view the evidence in the light most favorable to the verdict winner, here the Commonwealth, and

give it the benefit of all reasonable inferences to be drawn therefrom. Commonwealth v. Widmer, 560 Pa. 308, 319, 744 A.2d 745, 751 (2000); Commonwealth v. Chambers, 528 Pa. 558, 565, 559 A.2d 630, 633 (1991). Evidence is sufficient to support the verdict "when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." Commonwealth v. Widmer, 560 Pa. at 319, 744 A.2d at 751.

The material elements for the charge of driving under the influence to a degree which rendered him incapable of safe driving are: (1) the defendant drove, operated or was in actual physical control of a motor vehicle; and (2) while he was under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa.C.S.A. §3731(a)(1); Commonwealth v. Griscavage, 512 Pa. 540, 544, 517 A.2d 1256, 1258 (1986); Commonwealth v. Mattis, 454 Pa.Super. 605, 611, 686 A.2d 408, 411 (1996). At trial, the defendant admitted that he was driving the van when it struck the pole. The only issue was whether he was intoxicated at that time. Based on the testimony of Ms. Rooker, Mr. Copen, Mr. Hakes and Officer Wilcox, all of whom observed the defendant within seconds after the accident, the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving. These witnesses testified the defendant smelled of alcohol, he was staggering and unsteady to the point he could hardly walk, his eyes were glassy and his speech was slurred. Therefore, the Court finds the evidence was sufficient to sustain the verdict for DUI-incapable of safe driving.

The elements for DUI-.10% or greater are: (1) the defendant drove, operated or was in actual physical control of a motor vehicle; and (2) while his blood alcohol content

was .10% or greater. 75 Pa.C.S.A. §3731(a)(4); Commonwealth v. Adams, 406 Pa.Super. 493, 496-497, 594 A.2d 727, 729 (1991). Again, the only issue was whether the defendant's blood alcohol content was above the legal limit while he was driving. Section 3731(a.1) of the Vehicle Code provides that it is prima facie evidence that an adult individual's blood alcohol content was above .10% at the time he was driving if the amount of alcohol by weight in the blood of the person is equal to or greater than .10% at the time a chemical test is performed on a sample the person's breath, blood or urine taken within three hours after the person drove, operated or was in actual physical control of the vehicle. 75 Pa.C.S.A §3731(a.1). A sample of the defendant's blood was taken within one hour of the accident. The defendant's blood alcohol content was .20%. Therefore, the Court finds the evidence was sufficient to sustain the verdict.

Although the defendant testified he did not drink until after the accident and Mr. Kinley and Mr. Barger stated they did not see him drink the first time he was in the Southern Grill, the Commonwealth witnesses testified the defendant was intoxicated at the time of the accident. Therefore, this issue was one of credibility which is in the sole province of the finder of fact who is free to believe all, part or none of the evidence presented. Commonwealth v. Ahearn, 543 Pa. 174, 670 A.2d 133, 136 (1996); Commonwealth v. Brown, 538 Pa. 410, 437-38, 648 A.2d 1177, 1190-91 (1994); Commonwealth v. Vesel, 751 A.2d 676, 682 (Pa.Super. 2000).

The defendant also contends the verdict was against the weight of the evidence. "An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." Commonwealth v. Widmer, 560 Pa. at 319,

744 A.2d at 751-52. However,

> [a] trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight will all the facts is to deny justice.'

Id. at 320, 744 A.2d at 752. The trial court will only be overturned upon an abuse of discretion. "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." Id. at 322, 744 A.2d at 753.

The facts testified to by the defense witnesses were not so clearly of greater weight that to ignore them or give them equal weight would deny justice. Although there were some minor inconsistencies in the testimony of the Commonwealth witnesses, the inconsistencies did not concern the defendant or his conduct. For example, the witnesses were inconsistent on how Officer Wilcox got to Sauer's Trading. Ms. Rooker thought there was a marked Montgomery police car in Sauer's lot, Mr. Copen thought Officer Wilcox's wife dropped him the officer off that day, and Officer Wilcox testified he drove his personal vehicle, which was an unmarked former police car. N.T. at 21, 53, 103. There was also some inconsistency between Mr. Hakes' testimony and Officer Wilcox's. Mr. Hakes testified that, after he initially came out of Sauer's to see what was going on, he went back in to get Officer Wilcox to come outside because Mr. Hakes thought the driver was going to leave. N.T. at 67, 75-76. Officer Wilcox stated that Mr. Copen and Mr. Hakes were the

first people from Sauer's out to the accident scene, but Officer Wilcox went out shortly after they did and no one had to come in and get him to go outside. N.T. at 100. The witnesses' testimony was entirely consistent that the driver of the vehicle was intoxicated when he exited the vehicle immediately after the accident.

There were also inconsistencies in the testimony of the defense witnesses. For example, Mr. Barger said he was drinking ginger brandy, but the defendant testified he took Mr. Barger's shot of whiskey and drank it then bought them both a double shot of whiskey. Also, the defendant's fiancé testified she received a phone call from the defendant at 3:30 p.m., but Mr. Kinley's testimony did not put the defendant back in the Southern Grill until 3:35 or 3:40 p.m. and the defendant allegedly drank at least one double shot and a beer before he called his fiancé. Furthermore, the defense witnesses had an interest in the outcome of the case or a bias toward the defendant and against the Commonwealth. The defendant would want to stay out of jail and his friends (Mr. Barger) and future relatives (his fiancé Judy Liach and her brother Tim Kinley) would not want to see the defendant go to jail. Mr. Kinley and Mr. Barger were cross-examined about their potential bias against the Commonwealth because each had been convicted of DUI. Additionally, Mr. Barger admitted he consumed alcohol about one-half hour before he came to court to testify for the defense. In comparison, none of the Commonwealth witnesses knew the defendant; therefore, they did not have any bias against him. Similarly, the Commonwealth witnesses would not derive any benefit from a conviction; therefore, they did not have any interest in the case. Since there were some inconsistencies in the witnesses' testimony from both sides and the Commonwealth witnesses did not have the

bias or interest that the defense witnesses did, the Court cannot say that the facts to which the defense witnesses testified were entitled to greater weight than the testimony of the Commonwealth witnesses. Therefore, the verdict is not against the weight of the evidence and the defendant is not entitled to a new trial.

DATE: _____ By The Court,

_____
Kenneth D. Brown, J.

cc: District Attorney
G. Scott Gardner, Esquire
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work file