IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 00-10,787

VS :

ALLEN STACKHOUSE :

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

Defendant appeals this Court's Sentencing Order of February 5, 2002, wherein the Defendant was placed under the supervision of the Adult Probation Office for a period of twenty four (24) months under the Intermediate Punishment Program, with the first twenty one (21) days to be served at the Pre-Release Center for the charge of Driving Under the Influence. The Defendant was also sentenced to undergo incarceration for a period of 90 days for the charge of Driving Under Suspension, DUI related. This sentence was imposed after he was found guilty following a jury trial held April 20, 2001. [1]

The following is a summary of the evidence presented at the trial. On March 24, 2000, Mr. Warren Fenstermacher called the State Police after he observed a vehicle parked in the roadway near his residence.[2] (N.T. 4/20/01, p. 6) He testified that his attention was drawn to the vehicle because it sat for a length of time in the roadway with the lights on and engine running. (Id., p. 7) Corporal Scott Hunter was dispatched to respond to Mr. Fenstermacher's call that evening. (Id., p. 14) He arrived at the location of Defendant's vehicle at 11:25 p.m..

[1] The Court notes that Defendant's sentencing was continued several times due to the Defendant's work commitments after the September 11, 2001 terrorist attack in New York City.
[2] On cross-examination Mr. Fenstermacher admitted that there is no berm on the roadway. In order to pull off the roadway, one would have to pull into a field or into a wooded area. (Id., p. 11-12)

As Corporal Hunter approached the vehicle, a Ford F-150 truck, he noticed the lights were on, and the driver's door was wide open, extending into the lane for oncoming traffic. He saw legs hanging out the driver's door. (Id., p. 15) As he approached the door of the truck he saw the Defendant lying flat on his back across the bench seat. With his flashlight, Corporal Hunter surveyed the inside of the cab, looking for weapons, or any other clues as to why the Defendant lay in this position. He also shined the light on the Defendant's face, to determine whether he was breathing. The Defendant appeared to be sound asleep.

Corporal Hunter turned the vehicle off, took the keys, and yelled to wake the Defendant. (Id., p. 24) When the Defendant did not respond, he grabbed him by the arms and shook him until he woke up. As the Defendant sat up and started speaking, Corporal Hunter detected a very strong odor of alcohol on the Defendant's breath. (Id., p. 25) The Defendant did not have a driver's license, so Corporal Hunter asked him for his name and date of birth. The Defendant stated his name, and told Corporal Hunter that he was 34 years old. He gave his date of birth as May 31, 1961. Corporal Hunter immediately knew that the Defendant had given the wrong age for the date of birth he had given.

The Defendant tried to stand up in the open doorway of the truck, but was unable to do so. (Id., p. 27) Corporal Hunter stated "[he] was hanging on to the door and I actually had to hold the man up. His speech was slurred, when he was walking he was very slow." (Ibid) At that time, Corporal Hunter informed the Defendant that he was under arrest for DUI, placed him in handcuffs, and assisted him to the patrol car. Corporal Hunter assisted the Defendant because the Defendant had difficulty walking,

and he feared that the Defendant would fall to the ground. Corporal Hunter testified that when he went to move the Defendant's truck, the Defendant expressed concern about tools that were in the back of the truck. Corporal Hunter moved the tools to the cab of the truck, locked the vehicle, and transported the Defendant to the DUI Processing Center.

They arrived at the DUI Processing Center at approximately 12:15 a.m.. Corporal Hunter testified that during the trip to the processing center, the Defendant leaned his head back, and fell asleep. Upon dropping him off at the center, he felt that the Defendant seemed to be more alert, although he believed the Defendant to be intoxicated, and incapable of safe driving. (Id., p. 30) The Commonwealth presented the stipulation, that if called to testify, Mark Vanderlin, a forensic chemist employed by the Susquehanna Health System, would testify that blood drawn from the Defendant at 12:35 a.m. had a BAC of .16.

The Defense presented the video tape from the DUI Processing Center. The Defendant also testified on his own behalf. The Defendant testified that prior to the date of this incident, he had not slept in four days, and had not had anything to eat in three days. (Id., p. 40) Early that morning, he and a friend had taken their foxhounds and rabbit hounds to the area where his truck was found that evening. When two of the dogs had not returned by 6:00 p.m., he and his friend purchased some burgers and a six-pack, and went back to the vicinity where the dogs were last seen. The Defendant claimed that his friend, who was not drinking, was driving the truck.

At approximately 8:30 p.m., his friend had to leave. The Defendant called his cousin, who came to take his friend home. (Id., p. 42) At some point after his friend left,

the Defendant fell asleep in the truck. He testified that, after not having slept for days, he fell into a deep sleep. He was in such a deep sleep that when the trooper arrived, he had trouble waking up. (Id., p. 42) The Defendant claimed that he never drove the truck that evening. The Defendant also claimed that the truck was pulled off the road as far as possible without running over crops. (Id., p. 51)

STATEMENT BY PROSECUTOR DURING CLOSING ARGUMENT

Defendant first alleges that the Court erred in permitting the Assistant District Attorney to argue in her closing statement that the Defendant never mentioned his concern about his dogs at the time of his arrest. The statement referred to was stated in the following context:

> "What is the Defendant concerned about when he talks to the Corporal? Is he concerned about his dogs? He's sitting there he's worried about $3000.00 worth of property that's the reason he's out there that night waiting for the dogs to come in from the woods. What does he say to the Corporal? He doesn't say I can't leave I'm worried about my dogs. What happens if my $3000.00 worth of property comes back and there's no truck here."
>
> [Defense Counsel]: May we approach, Your Honor.
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> (N.T. 4/20/01, p. 6)

At that time, Defense counsel objected to the Assistant District Attorney's reference to what the Defendant had not said at the time he was arrested. Defense counsel argued that the Commonwealth is not permitted to comment about the fact that the Defendant invoked his right to remain silent at the time of arrest.

The law is clear that questions or comments by a prosecutor concerning a defendant's post-arrest silence constitute a clear violation of the defendant's Fifth

Amendment right to remain silent. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976). In addition, the court in Commonwealth v. Williams, 296 Pa.Super. 97, 442 A.2d 314, 316 (1982) held: "An accused's Fifth Amendment right to remain silent is unequivocal. Any mention of the fact that a defendant availed himself of that protection must be scrupulously avoided."

In the instant case, the Court overruled Defense Counsel's objection, because it appeared that the Defendant had not invoked his right to remain silent at the time of his arrest, and he had made statements, specifically voicing his concern about tools that were in the back of his truck. The Assistant District Attorney was merely pointing out that the statements he had made at the time of his arrest seemed inconsistent with the statements and explanation he had made during the trial. The Court therefore rejected this argument.

SUFFICIENCY – DRIVING UNDER SUSPENSION

Defendant next challenges the sufficiency of the evidence for the offense of Driving under Suspension, DUI related in violation of 75 PA.C.S.A. § 1543(b). The standard for reviewing the sufficiency of the evidence in a criminal case is whether, viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the crime charged beyond a reasonable doubt. Commonwealth v. Passarelli, 789 A.2d 708 (Pa.Super. 2001), *citing* Commonwealth v. Vining, 744 A.2d 310, (Pa.Super., 2000).

Applying the foregoing standard, in order to have found the Defendant guilty of driving under suspension, the Commonwealth must have proven beyond a reasonable doubt that the Defendant drove a motor vehicle on any highway or trafficway at a time when their operating privilege is suspended or revoked for a DUI violation. 75 Pa.C.S.A. 1543 (b)(1). In the instant case, Defendant's license suspension was evidenced at trial by his certified driving record. Notice was mailed to his current address. Further, Defendant failed to produce a license when the officer found him, and he stated that he did not have a driver's license.

Defendant specifically argues that the Defendant's previous DUI suspension had expired prior to this incident. 75 Pa.C.S.A. 1543 (b)(2) provides, however, that this section applies to "any person against whom one of these suspensions has been imposed whether the person is currently serving this suspension or whether the effective date of suspension has been deferred under any of the provisions of any of the provisions of section 1544 (relating to additional period of revocation or suspension). *This provision shall also apply until the person has had the operating privilege restored*." . . . (emphasis added) In the instant case, it was evident from the records produced that the Defendant's license had been revoked in 1990, and he had not had his operating privilege restored since that time. (*See N.T. 4/20/01, p. 81)* The Court therefore rejects Defendant's argument.

SUFFICIENCY – DRIVING UNDER THE INFLUENCE

Defendant next argues that the evidence was insufficient to establish that crime of driving under the influence of alcohol. Under 75 Pa.C.S.A. 3731(a)(1) a person shall

not drive, operate or be in actual physical control of the movement of a vehicle while under the influence of alcohol to a degree which renders the person incapable of safe driving. Alternatively, under 75 Pa.C.S.A. 3731(a)(4)(i) a person shall not drive, operate or be in actual physical control of the movement of a vehicle while the amount of alcohol by weight in the blood of an adult is 0.10% or greater.

The evidence produced in the instant case, when taken in the light most favorable to the Commonwealth, was that the Defendant's truck was found on a rural road with the engine running and lights on. The Defendant was the only occupant of the vehicle when it was found. Upon waking the Defendant, Corporal Hunter found him smelling heavily of alcohol, slurring his speech, and almost unable to walk. A blood test taken at the DUI processing center revealed that the Defendant had a BAC of .16. The Court finds this evidence sufficient to establish beyond a reasonable doubt the elements of the offenses as defined. The Court therefore rejects this argument.

WEIGHT OF THE EVIDENCE

The Defendant next alleges that the verdict was against the weight of the evidence. The Court does not agree. The test for determining whether the verdict is against the weight of the evidence, is not whether the Court would have decided the case in the same way, but whether the verdict of the jury is so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative so that right may be given another opportunity to prevail. Commonwealth v. Whiteman, 336 Pa.Super. 120, 485 A.2d 459 (1984).

Instantly, the Court cannot conclude that the verdict was so contrary to the evidence that the award of a new trial is imperative so that right may be given an opportunity to prevail. The Defendant smelled strongly of alcohol, his speech was slurred, he was almost unable to walk, and had to be assisted to the police cruiser. Under the facts of this case, the Court could not find that the verdict was so contrary to the evidence so as to shock one's sense of justice. The Court therefore rejects this argument.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: George E. Lepley, Jr., Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges