IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 01-11,599

VS :

CHARLES A. VOGT :

OPINION AND ORDER

Before the Court is Defendant's Motion for (sic) Aquittal and Motion for New Trial. The Defendant has been charged with the offense of Driving Under the Influence (2 counts) and a number of related summary offenses. After trial on May 3, 2002, the Defendant was convicted of one count of Driving Under the Influence (incapable of safe driving) and four summary offenses. After reviewing the procedural history of the case as well as the transcript of the trial, the Court finds the following facts relevant to the motion.

On July 14, 2001 at approximately 2105 hours the Defendant was involved in a one-car accident in Lycoming Township, Lycoming County. Trooper Kevin Scott arrived on the scene and witnessed the Defendant being extricated from his motor vehicle. While on scene, the Trooper interviewed witnesses to the Defendant's driving. They testified that the Defendant was traveling westbound on Beauty's Run Road and during the time they were behind him, he was having trouble driving. They told the Trooper that for most of the time, the Defendant was traveling westbound in the eastbound lane of traffic. The witnesses estimated that just before his accident the Defendant was traveling 50 in a posted 40 MPH zone.

Once the Defendant was extricated from his vehicle, he was placed into an ambulance for transport to the Williamsport Hospital. Before the Defendant was

transported to the hospital, he spoke with the Trooper. During this time, the Trooper noticed that the Defendant's eyes were bloodshot and glassy and his speech was slurred. He also detected the strong odor of alcohol on the Defendant. At the hospital, the Defendant consented to the Trooper's request to having blood drawn for the purpose of determining blood alcohol level. The Defendant's blood was drawn at 2253 hours. After testing, the results showed the Defendant's blood alcohol was .18 %.

Defense Counsel filed two (2) motions on behalf of the Defendant: Motion for Pretrial Discovery and Inspection as well as an Omnibus Pretrial Motion. Both of these hearings were scheduled late in the day on November 9, 2001. Defense Counsel met with the Commonwealth on that day and resolved the outstanding discovery issues. By this Court's Order disposing of the Discovery issues, the Court reset the date for the Omnibus Pretrial Motion. Both counsel were advised the motion was scheduled for Tuesday, January 29, 2002 at 9:00 a.m.

The Omnibus Pretrial Motion filed by Defendant was in the form of a Motion to Suppress. The Defendant alleged that when the Trooper spoke to the Defendant at the hospital while being treated, he did not knowingly and voluntarily consent to having blood drawn for testing. At the time scheduled for the hearing, the Commonwealth was not prepared to proceed and requested a continuance. The Court denied the Commonwealth's request and granted the Defendant's Motion to Suppress the blood alcohol results. As a result, the Commonwealth was prohibited from using those results in its case in chief. The Commonwealth did not file an appeal of this Order to the Superior Court.

On May 3, 2002 the Defendant was tried before a jury. During the Defense case, the defendant testified on his own behalf. On direct, he told the jury he had consumed "a few drinks…nothing excessive" while in Bloomsburg with his father and some of his buddies. N.T. 5/3/02, p.4. He had been drinking rum and cokes from about 10 to three, and he hadn't had anything to drink after he left Bloomsburg before the accident. Id. He further testified that after the accident he had a broken left tibia, which took six screws to repair and a concussion. (Id., p.9.) He further testified that he didn't know what caused the accident, but he felt that he had control of his vehicle. (Id., p.11)

On cross, the Defendant clarified that he had his 2-3 rum and cokes after lunch. (Id., p.13). He would have left Bloomsburg around 3-3:30 pm and returned home to Jersey Shore around 4-4:30 pm. (Id., p.16) The Defendant would have traveled from Jersey Shore to his buddy's house on old Route 15, and when he found his friend was not home, the Defendant left around 7:30-8 pm. While out driving around after leaving his buddy's house, the Defendant had his accident. (Id., p.17)

During the cross-examination by the Commonwealth, the Defendant refused to directly answer the question as to whether he was under the influence of alcohol. (Id., p. 18) As a result of the Defendant attempting to minimize his drinking, the Commonwealth requested a sidebar conference to ask that the evidence of the suppressed results be allowed on rebuttal. Completing the Commonwealth's cross, the Defendant spoke about the size and strength of the drinks he had. On rebuttal, the Commonwealth called Mark Vanderlin, a lab technician from the Williamsport Hospital to testify as to the level of alcohol in Defendant's blood. Even though the evidence of the Defendant's blood alcohol was presented, the Court instructed the jury only on the

incapable of safe driving charge. The Jury convicted the Defendant on the single charge of Driving Under the Influence of Alcohol.

The admissibility of evidence is a matter directed to the sound discretion of the trial court, and an appellate court may reverse only upon a showing that the trial court abused its discretion. Commonwealth v. Robinson, **554 Pa. 293, 304, 721 A.2d 344, 350 (1998).** Based upon a review of the applicable case law, the Court affirms its prior ruling allowing the suppressed blood alcohol evidence to be presented on rebuttal.

In 1984, Article 1, Section 9 of the Constitution of Pennsylvania was amended to provide: "The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself." This amendment was designed to follow the ruling by the United States Supreme Court in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). "Every criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... The shield provided by [the suppression of evidence] cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Id. The Supreme Court of Pennsylvania has also concluded that there is no constitutional right to commit perjury. *Commonwealth v. Jermyn*, 533 Pa. 194, 620 A.2d 1128 (1993). Therefore, if found trustworthy and relevant by the trial judge, the suppressed information may be used for the limited purpose of impeachment.

In the instant case, the evidence was suppressed because of the Commonwealth's failure to present testimony, not on the merits. Therefore, no

constitutional violations were determined. Based upon existing case law, had this Court granted the request to suppress on the merits, the information would have still been admissible to impeach the Defendant's testimony on rebuttal.

Although not specifically pled, Defendant also moves for a new trial, presumably due to the admission of the evidence on rebuttal. As the Court finds that law supported its admission of the evidence, the motion for a new trial is denied.

ORDER

AND NOW, this 21st day of November 2002, it is ORDERED and DIRECTED that the Defendant's Motion for Acquittal and Motion for New Trial are DENIED. Accordingly, the Defendant shall be scheduled for sentencing on **December 3, 2002 at 10:00 a.m.**

By The Court,

Nancy L. Butts, Judge

xc: William Simmers, Esquire, ADA
Frederick Lingle, Esquire
Honorable Nancy L. Butts
Judges
Gary Weber, Esquire