IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 01-11,886**
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	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
JAMES R. HUEY, III,	:	
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 docketed November 4, 2002. The relevant facts follow. On September 7, 2001, the Waterville fire company received a call to respond to a vehicle stopped or parked in the eastbound lane of State Route 4001 with an individual slumped behind the wheel. N.T. at 16-17, 70-71, 75. The individual was the defendant, James R. Huey, III. Id. at 26, 60, 111. Robert DiMassimo was the first member of the fire company to arrive at the scene. Id. at 17, 70. As he approached the vehicle, Mr. DiMassimo noticed the engine was running and the headlights were on. Id. at 17. He asked the defendant if he was all right, but the defendant did not respond. He asked again and the defendant still did not respond. Id. at 17. Mr. DiMassimo smelled alcohol. Id. at 18. He reached into the vehicle, turned it off and pulled the keys out, because he figured the defendant would wake up,

drive away and hurt himself or somebody else. Id. at 17, 19. When other members of the fire company arrived, Mr. DiMassimo handed the keys to the Fire Chief and went home. Id. at 17. The other members of the fire company also noticed an odor of alcohol. Id. at 72, 77. At one point the defendant got out of his vehicle to look for his keys. As he did this, he had slurred speech and stumbled around. Id. at 71, 77. The members of the fire company believed the defendant was intoxicated. Id. at 71, 78. They called for the state police on their radio. Id. at 71.

Troopers Brad Eisenhower and Douglas Hoffman arrived on the scene at approximately 11:49 p.m. Id. at 25. Both Troopers noticed that the defendant had a strong odor of alcohol about his person, his eyes were bloodshot, and his speech was slurred. Id. at 27, 61. Trooper Eisenhower asked the defendant to perform field sobriety tests. The defendant attempted to perform the one leg stand and the walk and turn tests, but completely failed them. Id. at 27, 30-32, 62. Both Troopers believed the defendant was under the influence of alcohol to a degree, which rendered him incapable of safe driving, so they placed him under arrest and Mirandized him. Id. at 32-33, 62-63. They asked him whether he had been drinking and the defendant stated he had two beers. Id. at 33. He also stated he had taken Viox, a pain medication, for a sore hand. Id. Before transporting the defendant to the

DUI Processing Center, Trooper Hoffman moved the vehicle from the middle of the eastbound lane to an area off the roadway. Id. at 96-97.

The defendant arrived at the DUI Processing Center at approximately 1:00 a.m. Id. at 67. Officer Mark Lindauer of the Williamsport Police Department processed the defendant at the DUI Processing Center. Id. at 64. Officer Lindauer noticed the defendant had a strong odor of alcohol and a thick tongue. Id. at 65. Officer Lindauer asked the defendant to perform field sobriety tests. Id. at 65, 81. The defendant again failed the tests. Id. Officer Lindauer asked the defendant to submit to a blood test, but the defendant refused. Id. at 67.

The defendant was charged with driving under the influence of alcohol and the summary offenses of driving under suspension (DUI related) and stopping or parking outside a business/residential district. A jury trial was held on October 9, 2002.

At trial, the defendant testified that he arrived home on September 7, 2001 around 10:30 p.m. N.T. at 104, 108. His mother, with whom he resides, left him a note that her car had broken down near Waterville. Id. at 104-105. He walked approximately 9 miles from his residence to the location where the car was. Although it was dark out, he did not take a flashlight with him. Id. at 105, 107-108. When he got to the

vehicle, he thought the car had a fuel delivery problem. Id. at 106. He crawled underneath the vehicle, pulled the fuel line off and turned the key on. Id. The fuel pump seemed to pump a little bit. Id. The defendant then slid the fuel line back on and tried to start the vehicle. Id. The vehicle started, and he left it running because he was cold. Id. Although he intended to move the vehicle to the side of the road without driving it, he claimed he couldn't because the vehicle was on a hill, so he didn't move the vehicle. Id. at 111. Instead, he intended to sit in the car until the next day when he could get his neighbor or mother to drive the car. Id. at 114. He couldn't drive the car because he didn't have a license. Id. at 106, 111. The defendant admitted he was under the influence of alcohol when he got into the car. Id. at 111. Although the Troopers testified the defendant told them he only had 2 beers, he admitted on cross-examination that he had at least 8-9 beers. Id. at 113. The defendant also admitted that he didn't think he had his emergency flashers on, but he wasn't even sure the car had emergency flashers. Id. at 112.

The jury convicted the defendant of driving under the influence of alcohol. The Court convicted the defendant of driving under suspension, but acquitted him of the summary offense of stopping in a residential district.

The Court sentenced the defendant to undergo incarceration at a state correctional institution for a

minimum of 18 months and a maximum of 5 years on the DUI conviction, a concurrent 90 days for driving under suspension, and to pay fines and the costs of prosecution. The Court also ordered the defendant to install an approved ignition interlock device on each vehicle that he owned pursuant to 42 Pa.C.S.A §7002. The defendant filed a timely notice of appeal.

The first issue raised by the defendant is that the jury's finding that the defendant had operated a motor vehicle was against the weight of the evidence. The Court cannot agree. Initially, the Court notes that it believes the defendant has waived this issue by failing to raise it with the trial judge in either an oral or a written motion for a new trial. Pa.R.Crim.P. 607(A) and the comment thereto. Even assuming that the issue is not waived, the Court believes this claim lacks merit. "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of witnesses." Commonwealth v. Begley, 566 Pa. 239, 263, 780 A.2d 605, 619 (2001), citing Commonwealth v. Johnson, 542 Pa. 384, 394, 668 A.2d 97, 101 (1995). "[A] new trial can only be granted on a claim that the verdict is against the weight of the evidence in the extraordinary situation where the jury's verdict is so contrary to the evidence that it shocks one's sense of justice. Commonwealth v. Drumheller, 808 A.2d 893,

908 (Pa. 2002); see also Commonwealth v. Begley, supra. All the evidence presented by the Commonwealth and the reasonable inferences deducible therefrom supported the jury's finding that the defendant drove, operated or was in physical control of the vehicle. The defendant was behind the wheel of a car in the middle of a rural state route. The engine was running and the lights were on. This evidence supported the jury's verdict. See Commonwealth v. Yaninas, 722 A.2d 187 (Pa.Super. 1998); Commonwealth v. Woodruff, 447 Pa.Super. 222, 668 A.2d 1158 (1995); Commonwealth v. Leib, 403 Pa.Super. 223, 588 A.2d 922 (1991). The only evidence to support a finding that the defendant did not drive, operate or physically control the vehicle was the defendant's testimony, which utterly lacked credibility for numerous reasons. First, the defendant asserted he crawled underneath the car and fixed a fuel delivery problem, but it was dark out and he did not have a flashlight. Second, the defendant claimed he could not push or otherwise move the vehicle off the roadway because it was on a hill, which was contradicted by the rebuttal testimony of Trooper Eisenhower (N.T. at 117). Third, the defendant's statement to the police about the amount of alcohol he consumed was inconsistent with his trial testimony. Fourth, the defendant claimed he turned the headlights on so another vehicle would not hit him; however, he did not turn on his emergency flashers. He attempted to explain this

inconsistency away by claiming he didn't think the vehicle had emergency flashers, but what vehicles aren't equipped with flashers in this day and age?[1] Given all these reasons to reject the defendant's version, the jury's verdict does not shock one's sense of justice.

The defendant asserts the Court erred in "allowing the testimony of Officer Hoffman as an expert, over the objection of the defendant, without requiring the Commonwealth to lay a foundation for the Officer's qualifications as an expert in the relevant field." This assertion does not specify what testimony defendant is challenging. In light of the defendant's third assertion of error, the Court assumes the defendant is challenging Trooper Hoffman's testimony that he drove the vehicle off the roadway after the defendant was arrested. The Court believes this assertion lacks merit for several reasons. First, the defense never objected to Trooper Hoffman's testimony on the basis that he was not qualified. The only objection made by the defense was that the information had not been disclosed in discovery and therefore Trooper Hoffman's testimony on this topic should be excluded. Since the defense never objected to Trooper Hoffman's qualifications, this issue is waived. Second, Trooper Hoffman did not testify as an expert; he testified as a fact witness.

The defendant next contends the Court erred in

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1 The Court believes emergency flashers have been required equipment on automobiles since the late sixties or early seventies. See 49 CFR 571.108.

admitting Trooper Hoffman's testimony because the Commonwealth failed to disclose this evidence prior to trial and/or failed to provide an expert report detailing the substance and basis of the proffered expert testimony. As previously stated, Trooper Hoffman testified as a fact witness, not an expert witness. He did not do any testing on the vehicle, nor did he examine the vehicle to determine if the fuel line had recently been removed. He simply got into the vehicle and drove it a short distance so that it was no longer in the middle of the eastbound lane of travel. Apparently, the defense believes Trooper Hoffman's testimony would fall within the purview of Rule 573(B)(1)(e). The Court, however, did not agree. See N.T. at 86-93. Subparagraph (e) applies to "any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth." Trooper Hoffman did not conduct any scientific tests on the vehicle and he did not testify as an expert. The Court also notes this information was not contained in any report. Thus, there was no document in the Commonwealth's possession or control that it failed to disclose to the defense. The reports, however, did contain information that the vehicle was running when Mr. DiMassimo arrived at the scene. Therefore, the defense should not have been surprised that the

Commonwealth intended to present evidence that the vehicle was operable.[2]

The Court also notes the defense never made a specific request for information regarding the operability of the vehicle. The only subsection of the discovery rule which would authorize disclosure of this type of information would be Rule 573(B)(2)(a)(iv). To avail himself to this Rule, however, the defendant had to file a motion for discovery with the Court and **specifically** identify this evidence. The defense never filed such a motion.

The defendant's remaining issues concern the constitutionality of the Ignition Interlock Law, 42 Pa.C.S.A. §7001, et seq. The defendant contends this law violates the Equal Protection Clause and the separation of powers doctrine. The Pennsylvania appellate courts have rejected such challenges. Commonwealth v. Turner, 805 A.2d 671 (Pa.Commw.Ct. 2002); Commonwealth v. Etheredge, 794 A.2d 391 (Pa.Super. 2002).

DATE: _____ By The Court,

_____
Kenneth D. Brown, Judge

2 The defense also argued it was fundamentally unfair to allow the Commonwealth to present this evidence. The Court cannot agree. What would have been fundamentally unfair and contrary to the interests of justice would have been to allow the defense to present the misleading, if not outright perjured, statements of the defendant without permitting the Commonwealth to respond to it.