IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No.: 01-11,599**
	:	
CHARLES A. VOGT,	:	
Defendant	:	

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

Defendant appeals this Court's Order of January 7, 2003, which sentenced him to a period of twenty-four months of intermediate punishment with ninety days to be served at the Lycoming County Pre-Release Center following his jury conviction on the charge of Driving Under the Influence of Alcohol and related offenses in the above-captioned case. The Defendant raises a number of issues for appeal, all of which are connected to this Court's decision to permit the Commonwealth to present and argue to the jury information concerning the Defendant's blood alcohol concentration. Procedurally, the Court notes that Defendant filed a timely motion to suppress the blood alcohol results in this case which was granted without any hearing on the merits after the Commonwealth appeared at the suppression hearing without any witnesses and unprepared to proceed. The Commonwealth did not appeal this decision to the Superior Court.

Trial in this case was held on May 3, 2002, during which Defendant testified on his own behalf. On cross-examination, the Defendant testified that although he had been drinking he was not under the influence of alcohol at the time

that he was driving. (N.T. 5/3/02, partial transcript filed 8/19/02, p. 18) The Court then permitted the Commonwealth to use the blood alcohol evidence which had previously been suppressed for the purpose of impeaching the testimony of the Defendant.

Defendant now asserts in his Statement of Matters Complained of on Appeal that this Court erred in permitting the admission of the blood alcohol test results because it allowed for the jury to speculate as to the meaning and relevance of the evidence. Further, the Defendant asserts that the blood alcohol evidence is irrelevant. He next contends that the blood alcohol evidence was not impeachment evidence since he had admitted to drinking. He additionally contends that this Court erred in ruling that because there was no hearing on his Motion to Suppress, the Court would not make a finding that the blood test was suppressed because of the Defendant not being able to knowingly waive his right to refuse the test.

In answer to these assertions, the Court relies upon the Opinion and Order previously filed in this case on November 25, 2002 in response to Defendant's Motion for Acquittal and Motion for New Trial, which raised these same issues.

Additionally in his 1925(b) Statement, the Defendant asserts that this Court erred in allowing the Commonwealth to argue to the jury that the Defendant had misled the jury and obviously had been drinking more than he admitted because of the blood alcohol level evidence. He contends that this argument allowed the jury to speculate, although he does not expressly state about what he contends they would be speculating. Initially, the Court notes that at the time of the argument, Defendant and his attorney did not object to the

prosecutor's comments, either during his closing remarks or following them, while the parties were at sidebar discussing another issue about closing raised by the Defendant. A defendant "cannot sit silently at trial only to object on appeal once a guilty verdict has been entered." Commonwealth v. Robinson, 543 Pa. 190, 670 A.2d 616 (1995). See also Commonwealth v. Marlin, 452 Pa. 380, 305 A.2d 14 (1973) ("A party may not remain silent and take chances on a verdict, and then if it is adverse complain afterwards of a matter which, if an error, would have been immediately rectified and made harmless"), quoting Commonwealth v. Razmus, 210 Pa. 609, 60 A.2d 264 (1905). The Court therefore finds that the Defendant waived his opportunity to object to the Assistant District Attorney's closing statement.

However, in an overabundance of caution, the Court notes that if in fact such an objection had been made in a timely manner, it would have been overruled. The standard for reviewing such claims is well settled. Generally, a prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict. Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996), citing Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991). "The arguments advanced must, however, be based upon matters in evidence and/or upon any legitimate inferences that can be drawn therefrom." Id., citing Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991) *cert. den.*502 U.S. 959, 116 L.Ed.2d 442, 112 S.Ct. 422 (1991). The Court

has reviewed the transcript of the Commonwealth's closing argument and believes that the argument set forth by the Assistant District Attorney is a fair representation of the admitted evidence, presented in a way that promotes the position he advocated. In his closing, the prosecutor argues to the jury that the Defendant had consumed to much alcohol so close in time to the accident that he was incapable of safe driving. He specifically says, "(w)ho knows where it (the blood alcohol level) was at the time of the accident, but it's .18 . . . when the blood was drawn." (N.T. 5/3/02 p. 84) He then uses the blood alcohol information to argue to the jury that the Defendant misled them during his testimony when he recounted his whereabouts and whether he had been drinking after he returned to his home in mid-afternoon, which is an inference that could be reasonably drawn from the evidence presented. Accordingly, the Court rejects the Defendant's assertion that this Court erred in permitting the Assistant District Attorney to argue the clear inferences of the blood alcohol test result to the jury.

By the Court,

_____ J.

xc: Craig P. Miller, Esquire
DA
Honorable Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire