

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

COMMONWEALTH

v.

**DURAN ALMESTICA,
Defendant**

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No.: 03-10,375

OPINION AND ORDER

Before the Court is the Defendant's Motion for a New Trial and a Directed Verdict filed May 18, 2004 and heard before this Court on July 9, 2004. The Defendant asserts that this Court improperly instructed the jury when clarified when the Defendant's blood was drawn. Defendant contends that the instruction given was that it is prima facie evidence that the Defendant's blood alcohol level was .10 or greater at the time of driving if the Commonwealth proved that the Defendant's blood was drawn within three hours of the time that he drove and that it was .10 or greater at the time it was drawn. The Court failed to inform the jury that it must find beyond a reasonable doubt that the blood alcohol of the Defendant was .10 or greater at the time that he drove. The Defendant further asserts that the Commonwealth is required to present relation-back testimony to prove the Defendant's blood alcohol level at the time that he was driving and that in the absence of such relation-back testimony, the Court should have dismissed the DUI charge against the defendant. In support of his position, he cites

Commonwealth v. Modaffare, 529 Pa. 101, 601 A.2d 1233 (Pa. 1992), and Commonwealth v. Jarman, 529 Pa. 92, 601 A.2d 1229 (Pa. 1992).

The pertinent facts of this case show that while the jury was deliberating, they sent a written note to the Court. In response to that note, the jury was returned to the courtroom and, in the presence of all parties, the following exchange took place:

THE COURT: I received a note from the jury, What is the law pertaining to when the blood alcohol level is taken, what is the time limit for the blood test? We don't understand that.

So, specifically, let me just give you the first part of our answer and then if you need more, you're going to have to send me a note, I guess, basically, because maybe we can discuss it here.

Under the statute, that's the law, it says; and this was part of what I read to you, for the purposes of this section the chemical test of the sample of the person's breath, blood or urine shall be from a sample obtained within three hours after the person drove, operated or was in actual physical control of the vehicle.

THE FOREPERSON: Okay. I think that was –

THE COURT: That answers it?

THE FOREPERSON: Yes.

Notes of Trial, March 11, 2004, pp. 2 – 3.

After the jury left again to deliberate, Defendant's counsel placed on the record his concern that "the jury's going to listen to that answer and say, well, it was drawn within three hours and it's .01 (sic) or greater, guilty. Which is not correct, I contend." Id. @ p. 3. The Court noted the objection for the record, but explained to the Defendant and his attorney, "(t)he nature of the question being very ambiguous, in my perspective, it speaks to time

limit. That's the only time limit in the law that I know of. It doesn't say [in] the question. And as you heard me indicate to the foreperson, if you need more information, you're certainly welcome to ask for it." Id. at p. 4.

The Court finds that no error was committed when the Court responded to a specific jury question about the three-hour time limit by repeating that portion of the instructions already given to the jury that specifically referenced the time limit. The jury was given the opportunity to ask for additional information if they felt they needed it, but told the Court that the information already provided answered their question. They then returned with a verdict, without asking for any further clarification. The Defendant's motion must therefore fail on this issue.

The Defendant next contends that the Court should have dismissed the DUI charge against the Defendant because the Commonwealth failed to offer relation-back testimony with respect to the blood alcohol level of the Defendant. He cites Modaffare, supra., and Jarman, supra., in support of his position. The holdings of the Modaffare and Jarman decisions have since been replaced by the holding in Commonwealth v. Yarger, 538 Pa. 329, 648 A.2d 529 (Pa. 1994) and its progeny, which specifically set forth that the Commonwealth is not required to present expert relation-back testimony at any time. Instead, the DUI statute as it existed at the time of the offense in the Defendant's case, provided that a blood alcohol result of .10% or greater at the time of driving is prima facie evidence of guilt. The Defendant is then free to rebut that presumption if he believes that his blood alcohol level was

less than .10% at the time he drove. When a Defendant chooses to present his own expert to relate back his blood alcohol level, the Commonwealth may then choose to rebut the Defendant's expert with its own expert testimony, but it is not required to do so. See Commonwealth v. MacPherson, 561 Pa. 571, 752 A.2d 384 (Pa. 2000) (declining to declare unconstitutional 75 Pa.C.S. §3731(a.1), which codified the holding in Yarger providing that the Commonwealth does not need to present expert relation-back testimony to prove its case); Commonwealth v. Murray, ___ Pa.Super. ___, 749 A.2d 513 (Pa.Super. 2000); Commonwealth v. Zugay, ___ Pa. Super.___, 745 A.2d 639 at 648 (Pa.Super. 2000); Commonwealth v. Greth, ___ Pa.Super. ___, 758 A.2d 692 (Pa.Super. 2000); Commonwealth v. Weir, ___ Pa.Super. 210, 738 A.2d 467 (Pa.Super. 1999); Commonwealth v. Downing, ___ Pa.Super. ___, 739 A.2d 169 (Pa.Super. 1999). The jury is free to decide whether a Defendant had a blood alcohol level over .10% at the time he was driving based upon the available evidence, whether or not either the Commonwealth or the Defendant choose to present relation-back testimony. Defendant's contention that this Court should have dismissed the DUI charge because the Commonwealth failed to present relation-back testimony must also fail.

ORDER

AND NOW, this ____ day of August, 2004, based upon the reasoning set forth above, the Court ORDERS and DIRECTS that the Defendant's Motion for a New Trial and a Directed Verdict is DISMISSED.

By the Court,

Nancy L. Butts, Judge J.

xc: DA
PD (Poplaski)
Court Administrator
Judges
Hon. Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire