

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 1940-05  
 :  
 FRANK BERNARD SCARFO, :  
 :  
 Defendant : 1925(a) OPINION

Date: June 21, 2006

**OPINION IN SUPPORT OF THE ORDER OF APRIL 26, 2006 IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

In an April 26, 2006 order, this court denied in part and granted in part the Omnibus Pre-trial Motion of Defendant Frank Scarfo filed March 15, 2006. The court granted the motion in part and dismissed Count 2 of the Information, Driving Under the Influence with High Rate of Alcohol, 75 Pa.C.S.A. § 3802(b), because the evidence presented by the Commonwealth failed to establish when Scarfo last drove, operated, or was in actual physical control of a motor vehicle on October 10, 2005. On May 3, 2006, the Commonwealth filed a notice of appeal. The Commonwealth contends that this court erred in dismissing Count 2.

On May 9, 2006, the Commonwealth filed a Concise Statement of Matters complained of on Appeal. The Commonwealth raised two issues in the statement of matters. They are:

- (1) The Court erred in granting the defendants (sic) habeas Corpus Petition on the basis that the circumstantial evidence was insufficient to establish a prima facie case that the defendants (sic) blood alcohol was at least .10% but less than .16% within two hours after he drove, operated or was in physical control of the movement of the vehicle.
- (2) The Court erred in holding that if the defendant had last driven, operated or been in actual physical control of the movement of the vehicle more than two hours before the blood test was

performed, that good cause was not established why a chemical test could not have been performed within two hours.

The court will address the issues *in seriatim*.

In order to establish a violation of 75 Pa.C.S.A. § 3802(b), the Commonwealth must prove that: (1) the defendant drove, operated, or was in actual physical control of the movement of a motor vehicle, (2) the defendant did so after imbibing alcohol; and (3) the amount of alcohol the defendant imbibed was sufficient to result in an alcohol concentration in his blood or breath of 0.10% but less than 0.16% within two hours after he drove, operated, or was in actual physical control of the movement of the vehicle. The third element requires that the Commonwealth prove that a defendant's alcohol concentration was at least 0.10% but less than 0.16% within two hours after the defendant drove, operated, or was in actual physical control of the movement of a motor vehicle. Thus, in order to establish this element, it is incumbent upon the Commonwealth to establish when a Defendant last drove, operated, or was in actual physical control of the movement of a motor vehicle.

The evidence presented failed to establish that Scarfo's blood alcohol content (hereafter "BAC") was at least .10% but less than .16% within two hours of Scarfo having driven, operated, or been in actual physical control of the movement of his vehicle. The Commonwealth presented evidence that Scarfo's blood was drawn to determine his BAC at 3:20 a.m. Notes of Testimony, 16, 19 (4/20/06). As such, the latest Scarfo could have been driving, operating, or been in actual physical control of the movement of a motor vehicle was 1:20 a.m. in order to have violated Section 3802(b). The evidence presented does not establish that Scarfo operated his vehicle within the 1:20 a.m. to 3:20 a.m. time frame.

Trooper Franklin Harvey testified that he approach Scarfo's vehicle shortly after he and Trooper Jason Terwilliger arrived on scene at 2:20 a.m. N.T., 6, 28, 29. Trooper Harvey touched the vehicle to see if the engine was warm, and it was. Id. at 29. While heat given off by the engine of a vehicle is evidence of its operation, it does not establish when that operation occurred. The court is unaware, and no evidence was presented, of an equation whereby feeling a certain amount of heat from the engine area equals a certain amount of time having elapsed since the vehicle was operated. The evidence presented was insufficient to establish a violation of Section 3802(b) of the Motor Vehicle Code.

As to the Commonwealth's second issue, Section 3802(g) of the Motor Vehicle Code provides:

Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:

(1) where the Commonwealth shows good cause explaining why the chemical test could not be performed within two hours; and

(2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.

75 Pa.C.S.A. § 3802(g). The exception does not apply to this case. It applies where the police were prevented from performing the chemical test for BAC within two hours of the individual having driven, operated, or been in actual physical control of the movement of a motor vehicle. For instance, a defendant crashes his vehicle into a utility pole at 12:00 a.m. Police arrive on

scene and take the defendant into custody at 1:00 a.m. The police and the defendant arrive at the DUI center at 1:15 a.m. The defendant's blood could not be drawn and the chemical tests performed until 3:00 a.m. because no technicians were available. In this case, the exception to the two hour rule would apply so as not to penalize the police who would have had the chemical test performed within two hours of the defendant having driven, operated, or been in actual physical control of the movement of his vehicle but for circumstances beyond their control. The situation in Scarfo's case is different.

It was not that the Troopers were unable to have the chemical tests performed on Scarfo's blood within two hours of him having driven, operated, or been in actual physical control of the movement of his vehicle. The situation here is that the evidence fails to establish when Scarfo last drove, operated, or was in actual physical control of the movement of a motor vehicle so as to start the two hour clock. The exception applies to deal with delays in the performance of the test, not to excuse a failure to establish when a defendant last drove, operated, or was in physical control of the movement of a motor vehicle.

Accordingly, the order of April 26, 2006 should be affirmed and the appeal denied.

BY THE COURT,

William S. Kieser, Judge

cc: Peter T. Campana, Esquire  
District Attorney(KO)  
Judges  
Christian Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)