

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1292 - 2006
:
vs. : CRIMINAL DIVISION
:
KENNETH K. McLAUGHLIN, JR., :
Defendant : Motion to Suppress

OPINION AND ORDER

Before the Court is Defendant’s Motion to Suppress, filed October 30, 2006. A hearing on the motion was held December 6, 2006.

Defendant has been charged with two counts of Driving Under the Influence and three summary offenses, as a result of a traffic accident on or about April 25, 2006. Police were alerted by County Communications and responded to the scene of the accident at 1:18 a.m. Defendant was unconscious and was transported to Geisinger Medical Center in Danville, where blood was drawn at 4:15 a.m. The time of the accident was not established.

In the instant motion to suppress, Defendant contends the results of the blood test should be suppressed because the “blood sample was taken in excess of approximately three hours after” the trooper arrived at the scene. In argument following the hearing, Defendant further contended that the Commonwealth’s failure to establish when the Defendant last drove requires that the Court suppress the blood test results, relying on a case out of this Court, Commonwealth v. Scarfo, Lycoming County No. CR – 1940 – 2005 (Kieser, J., June 21, 2006). The Court does not agree, for two reasons.

First, the Vehicle Code provides, in pertinent part, as follows:

(c) Highest rate of alcohol.—An individual may not drive, operate or be in actual physical control of the movement of a motor vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual’s blood or breath is 0.16% or higher *within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.*

...

(g) Exception to two-hour rule.—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. Section 3802 (emphasis added). Thus, the “two-hour rule”, which requires the Commonwealth to show that the blood was drawn within two hours of the defendant’s having driven, addresses an element of the offense of DUI, rather than the admissibility of the results. Indeed, in the case relied upon by Defendant, Commonwealth v. Scarfo, because the Court found the evidence insufficient to establish when the defendant last drove, it dismissed the charge of DUI/High Rate of Alcohol. Whether the test results should have been suppressed was not an issue in that case.

Second, suppression does not appear to be an appropriate remedy in this instance. In addressing the excludability of particular evidence, the Court looks to whether the exercise of police powers exceeds statutory parameters, Commonwealth v. Eisenhart, 611 A.2d 681 (Pa. 1992), or whether such violates a rule of criminal procedure and implicates fundamental constitutional concerns, is conducted in bad faith or has substantially prejudiced the defendant. Commonwealth v. Means, 614 A.2d 220 (Pa. 1992). None of these issues is involved here. Defendant has not provided, nor has the Court discovered, any case where blood test results were suppressed as a result of the Commonwealth having failed to establish when the defendant last drove so as to start the “two-hour clock”.

Accordingly, the blood test results in this matter will not be suppressed. It remains for the Commonwealth to prove when Defendant last drove, however, as well as meet the two

additional requirements of Section 3802(g). Defendant may challenge the sufficiency of the evidence in this regard at trial, by way of a demurrer to the charge.¹

ORDER

AND NOW, this 11th day of December 2006, for the foregoing reasons, Defendant's Motion to Suppress is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Brad Hillman, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

¹ Since Defendant waived his right to a preliminary hearing, he may not challenge the sufficiency of the evidence through a habeas petition.