IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 579-2007
	:	
MICHAEL R. POLK,	:	
	:	
Defendant	:	1925(a) OPINION

Date: March 18, 2007

OPINION IN SUPPORT OF THE ORDER OF DECEMBER 7, 2007 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Michael R. Polk, (hereafter "Polk") has appealed from this court's order of December 7, 2007 in which he was found guilty beyond a reasonable doubt of the offense of Driving Under the Influence of Alcohol, Incapable of Safe Driving and Refusal to submit to blood alcohol testing under the Motor Vehicle Code § 3802(a)(1). On appeal, Polk asserts that five errors were committed by the trial court. The court denies that it committed the alleged errors. Accordingly Polk's appeal should be denied.

I. PROCEDURAL BACKGROUND

On February 4, 2007 Polk was arrested on the charge of Count 1 with Driving Under the Influence with a Refusal in violation of 75 § 3802(a)(1) following a traffic accident that date, in which he was the driver of one of the two cars involved.

Polk's formal court arraignment was waived on May 7, 2007. On June 26, 2007 Ms. Jeana Longo, Esquire, with the Public Defender's Office and counsel for Polk, filed a Motion in Limine to Extend Time for Filing an Omnibus Motion on the grounds that discovery had not yet been completed on the case and the Commonwealth had not answered Defendant's Request for Discovery. On June 27, 2007, William Miele, Esquire, Chief Public Defender, filed a Petition

for Permission to Withdraw the Public Defender's Office as Counsel because of Defendant's dissatisfaction with his representation by Ms. Longo, Polk's allegedly abusive conduct toward Ms. Longo and the Public Defender's Office in general, and, Polk's insistence that Ms. Longo file unnecessary motions. On July 3, 2007 a hearing on both of these matters was held before the Honorable Judge Dudley N. Anderson. Judge Anderson granted the Defendant's motion for an extension of time to file an omnibus motion. Judge Anderson denied the petition to withdraw as counsel finding that while Polk expressed a lack of faith in Ms. Longo's abilities, the court could not find that Ms. Longo in any way deviated from the standards the court expected in this matter.

On July 9, 2007 Polk, through Ms. Longo as counsel, filed a Motion in Limine to Suppress Officer Hetner's video of the accident scene, the audio from the tape taken while Polk was in custody in Officer Hetner's police cruiser, as well as the video taken at police headquarters. Polk argued the tape should be suppressed on the grounds that (1) its contents are more prejudicial than probative, (2) he never consented to be video-taped, and (3) that his actions within the video may be mistaken by a finder-of-fact as being alcohol induced rather that the result of his PTSD. A suppression hearing was conducted on this matter before the Judge Anderson on September 5, 2007. Judge Anderson denied the motion and set forth his reasoning in an order and opinion filed September 10, 2007.

On October 15, 2007 a non-jury criminal trial was held before this court. At the close of the Commonwealth's case counsel for Polk made a motion for judgment of acquittal which was denied. An order was issued to that effect on the same date. At the conclusion of the trial on October 15, 2007, the court found Polk guilty beyond a reasonable doubt under Count 1, Driving Under the Influence of Alcohol, Inability to Drive Safely with a Refusal for Blood Alcohol Testing. On December 7, 2007 Polk was sentenced under Count 1 to six months Intermediate

Punishment under the supervision of the Adult Probation Office of Lycoming County, with ten of those days being served under house arrest and electronic monitoring if such was available. The sentence was to become effective January 9, 2008, at 9:00 a.m. at which date Polk was to report to the Adult Probation Office. Polk was also directed to pay a fine of $1,000 and perform 75 hours of community service. Bail was terminated. The court then ordered that should Polk file an appeal, the effective date of the sentence would be stayed pending the appeal.

On January 4, 2008, Polk filed his Notice of Appeal to the Superior Court from the Judgment of Sentence dated December 7, 2007 and filed on January 4, 2008. Also on January 4th, Polk filed a Motion for Bail Pending Appeal under the mistaken belief that there was no stay provision in the sentence pending an appeal. On January 14, 2008 this court entered an order clarifying the bail status of Polk. That order directed that the provisions concerning bail on appeal set forth in the sentencing order of December 7, 2007 and January 4, 2008 be vacated and that the following provisions should be applied to Polk: Polk shall be on ROR supervision bail during the pendency of his appeal with the provision that he make immediate application for admission into the supervised bail program and gain admittance into that program no later than January 25, 2008. The order also provided that Polk shall not consume alcohol or unlawful controlled substances, that he not be in a location were alcohol or controlled substances are present, that he not operate a motor vehicle unless properly licenses, that he refrain from assaultive behavior, and that he not possess a firearm or deadly weapon.

On January 7, 2008 this court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Polk to file a concise statement of matters complained of an appeal within fourteen days of the order. On January 14, 2007, Polk filed his Concise Statement of Matters Complained of on Appeal.

In his statement of matters, Polk raises the following five issues:

(a) Whether the verdict of guilt was against the weight of the evidence;
(b) Whether there was insufficient evidence to support a finding of guilt of driving under the influence charge;
(c) Whether the trial court committed a reversible err in failing to suppress the video tape of the DUI stop because the tape was unduly prejudicial;
(d) Whether the trial court committed a reversible err in failing to suppress the audio portion of the video tape of the DUI stop;
(e) Whether the trial court's denial of the Defendant's request for a jury trial was a violation of his constitutional right to a trial by jury.

Polk's Concise Statement of Matters Complained of on Appeal Pursuant to Rule 1925(B) Order. Issues (c) and (d) of Polk's Statement of Matters deal with suppression issues that were before the Honorable Judge Anderson during the Suppression hearing on September 5, 2007. After consultation with Judge Anderson regarding issues (c) and (d), both judges of this court are satisfied in relying on the reasoning and ruling contained in the Suppression Opinion filed by Judge Anderson on September 10, 2007 as to those matters. Therefore only issues (a), (b) and (e) of the matters complained of on appeal, which were before this court during the non-jury trial, will be the only matters discussed in this 1925(a) Opinion.

II. FACTS

The evidence introduced at Polk's non-jury trial established the following facts.

On February 4, 2007, Officer Corporal Robert F. Hetner of the South Williamsport Police Borough Police Department was on routine patrol at 2:45 a.m. While on patrol he came across a vehicle accident at the intersection of West Mountain Avenue and Market Street, Route 15, Southbound. In the middle of the intersection facing eastbound, Officer Henter observed a vehicle with severe frontal damage with airbags deployed and the driver, Maile Hino, still in the driver's seat. The scene of the accident and the Officer's contact with the drivers was recorded on Officer Hetner's police vehicle video camera. Ms. Hino told Officer Hetner that she was

traveling eastbound on West Mountain Avenue through the intersection when she was struck by Polk's vehicle. At the time of the accident, the traffic signal was set to a flashing red light which causes the intersection to operate as a four way stop. Officer Hetner testified that the traffic light was working properly at the time of the crash.

After Officer Hetner ensured Ms. Hino was not seriously injured, he approached Polk who was standing in the middle of the intersection. Upon being approached by Officer Hetner, Polk repeatedly stated that Ms. Hino ran the red light and "hit him" as he was driving southbound on Market Street. Officer Hetner and Ms. Hino testified that Polk was visibly upset and angry and would not stop yelling at Ms. Hino for hitting him. Officer Hetner stated that he repeatedly tried to calm Polk down but was unsuccessful in his attempts to either calm him or reason with him. Both Ms. Hino and Officer Hetner testified that Polk was inconsolable and that they could not reason with him to calm him. Officer Hetner testified that during Polk's angry statements, his speech was slurred and the volume of his voice loud. Polk was also observed by the Officer to be staggering on his feet as he walked. Hetner testified at the hearing that it was an unusually cold night that night, close to zero degrees, yet the Officer could not persuade Polk to cooperate with his requests to return to his vehicle to stay warm.

When Officer Hetner was speaking to Polk, Polk would not stop arguing with the Officer. Polk insisted that there was no need for Officer Hetner to call a tow truck, and if his fender could just be pulled away from his tire he could drive home. Officer Hetner testified that Polk's breath smelled strongly of alcohol and that his eyes were red and glassy. When the tow truck operator asked for Polk's keys, Polk refused to hand over his keys and became combative with the tow truck driver as to why his vehicle needed to be towed. During this argument, Officer Hetner observed that Polk continued to slur his words.

During the argument over the keys, Officer Hetner asked Polk whether he had been drinking alcohol that night. Officer Hetner testified, and Polk admitted at the hearing, that he was coming home from a bar when he got into the accident with Ms. Hino. Upon this admission and Officer Hetner's perception as Polk's belligerent conduct, Hetner requested that Polk submit to a field sobriety test. Officer Hetner directed Polk to the parking lot of the Sunoco gas station which was on the corner of the intersection where the crash occurred. Polk was asked to the do the one leg stand, but was only able to slightly raise one foot off the ground before stating to the Officer that he could not do a field sobriety test but would submit to a breathalyzer. At this point Polk began to argue again with the tow truck driver and Officer Hetner that he did not believe his car should be towed. Polk accused the police and the tow truck driver of working together to make money off of him by unnecessarily towing his car. Polk accused the police of getting a kickback from tow truck proceeds of such operations. Polk repeatedly stated to the Officer that he was arresting the wrong person, and that Hino and not himself should be taken into custody as the true cause of the accident. At the hearing Officer Hetner testified that he believed Ms. Hino did not come to a proper complete stop at the intersection and was the more at fault of the two drivers.

At approximately 3:30 a.m., Officer Hetner placed Polk into custody to transport him to the DUI center for testing. Polk agreed to submit to blood alcohol testing. During the ride to the DUI center, Officer Hetner's police vehicle video camera was still recording. The video recorded the words spoken by Polk to Officer Hetner while in the back of the police vehicle. Officer Hetner refrained from asking Polk any questions, however Polk continuously spoke to the Officer during the ride using foul language against the Officer, accusing him of being in league with the tow truck drivers to make money for his own personal gain, and using curse

words to describe them both. Officer Hetner again denied working with the tow truck driver, and otherwise stayed silent during Polk's monologue.

When Polk arrived at the Williamsport hospital, he continued his uncooperative attitude. Officer Hetner testified that Polk repeated his same arguments from the scene of the accident but now incorporated the lab technicians of the hospital into his comments, making fun of their uniforms. Polk then refused to allow the lab technicians to take his blood for the test. Polk testified at the hearing that he had a fear of needles and that his mental condition of Post Traumatic Stress Disorder caused healing problems in his skin when injected by needles. Upon Polk's refusal, Officer Hetner read the chemical testing warnings to him. Polk persisted in his refusal. Officer Hetner then sent a copy of the refusal to PennDot.

At about 4:15 a.m., Officer Hetner transported Polk back to Police Headquarters to perform field sobriety tests because by that time the DUI center was closed. Polk failed all three field sobriety tests. These tests were video taped by the camera in police headquarters and shown at the trial. From the tape as well as Officer Hetner's and Polk's testimony, it can be seen that Polk not only failed the tests, but hopped and twirled around in dancing motions, taking bows after each attempt. On the one leg stand he raised his arms, hopped around, danced in circles and generally refused to follow directions. On the finger to nose test he missed his nose twice and did not close his eyes nor tilt his head back as directed. On the walk and turn Polk raised his arms as if to balance and failed to walk heel to toe without loosing his balance, turned improperly and again danced around taking dramatic bows after his test. Officer Hetner then gave Polk a PBT reading which rated positive well above the legal intoxication limit.

At the trial, Polk explained that the reason for his admittedly bazaar behavior during the sobriety tests and combative behavior during his interactions with Officer Hetner was due to his

suffering from Post Traumatic Stress Disorder (PTSD). Polk testified that during a mission trip to South Africa he sustained a serious head wound and suffered traumatic police brutality and abuse by South African police. He testified that the experience left him incapacitated and incapable of caring for himself.

He stated that he lost everything after his head wound and does not know how he returned to the United States. He stated that when he arrived back in the United States he was taken to his family's home where he remained for seven years under constant care and unable to take independent charge of his most basic needs including hygiene. Polk explained that at the time of the accident with Ms. Hino, he had recently regained his capacity to function on his own and was beginning his life anew by starting to work, living in his own apartment and driving his own new car.

Polk explained that his actions toward the Officer and the tow truck driver at the scene of the accident was part of the "startle response" and "fight or flight" response he had toward police after his incident in South Africa and his resulting PTSD. Polk testified that his uncooperative attitude and combativeness toward the officer was part of the startle response associated with his PTSD and sparked by incidents of high stress. Polk explained that being in police custody, being transported by the police alone to an unknown location, and entering the police headquarters alone with the police, was reminiscent of his traumatic experience in South Africa and was therefore an incident sparking extreme stress/agitation and a corresponding PTSD "startle response." Polk testified that during the field sobriety tests he acted absurdly because he felt like a "dancing bear" and such absurd responses were due to his condition.

Polk was able to substantiate his condition by producing a report from his physician, Dr. Richard Dowell, Jr., Ph.D., Clinical Neuropsychologist for the Susquehanna Health System

Department of Psychology. Dr. Dowell sent clinical assessments of Polk from August 17, 2007 and March 13, 2007 confirming the existence of Polk's PSTD and explaining the disorder's manifestations in individuals who suffer from it. Polk's outward actions both at the scene of the accident, the hospital and the police headquarters were consistent with Dr. Dowell's report. It was Polk's contention at the hearing that his behavior was purely the result of his PTSD and not due to the consumption of alcohol.

At no time during his interactions with Officer Hetner did Polk speak of his PTSD or of his experience in South Africa. At approximately 4:30 a.m., Officer Hetner drove Polk to his residence and obtained his registration and insurance information. At this time Officer Hetner found Polk to be cooperative.

III. DISCUSSION

Polk claims that the guilty verdict for the charge of driving under the influence of alcohol was against the weight of the evidence. The court disagrees with Polk's assertion and finds the evidence is in accordance with the verdict.

A claim that the verdict was against the weight of the evidence is addressed to the sound discretion of the trial court. ***Commonwealth v. Snyder***, 870 A.2d 336, 345 (Pa. Super. 2005). A weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict, but questions which evidence is to be believed. ***Commonwealth v. Hunzer***, 868 A.2d 498, 507 (Pa. Super. 2005). What weight to accord to 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. Small***, 559 Pa. 423, 741 A.2d 666, 672 (Pa. 1999), cert. denied, 531 U.S. 829, 121 S. Ct. 80, 148 L. Ed. 2d 42 (2000). In reviewing a weight of the evidence challenge, the trial court is not required to view the evidence in the light most favorable to the verdict winner.

Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa. Super. 2003). A verdict may be reversed only when the verdict is so contrary to the evidence as to shock one's sense of justice. ***Commonwealth v. Keaton***, 556 Pa. 442, 729 A.2d 529, 540 (Pa. 1999), cert. denied, 528 U.S. 1163, 145 L. Ed. 2d 1087, 120 S. Ct. 1180 (2000).

Given the evidence presented at the trial contained in the traffic accident video, the video audio from the police cruiser, the video from police headquarters, Officer Hetner's testimony, Ms. Hino's testimony, and the testimony of Polk himself, it is evident that the verdict does not shock one's sense of justice. The before mentioned evidence supports a finding beyond a reasonable doubt that Polk was intoxicated at the time of the accident to the point where he was unable to safely operate a motor vehicle.

The video from the traffic accident shows Polk unsteady on his feet and confrontational toward the officer and the tow truck driver. Polk is also unable to demonstrate his sobriety through completion of a field sobriety test, only barely lifting one of his feet for a one leg stand. The audio portion of the video from inside the police cruiser and which was heard at trial indicates that Polk was intoxicated as well. During the video he is cursing at the officer, and repeating at length the same allegations toward the officer and the tow truck driver that they are working together to the public's detriment. Polk's speech in the audio is slurred and "mushed mouthed" as described by Officer Hetner, indicating that Polk was under the influence of alcohol. The audio also shows that Polk's behavior is uncooperative and belligerent demonstrative of intoxicated behavior.

The video from the police headquarters shows that Polk is unable to complete the field sobriety tests. Polk cannot complete any of the tests and in his attempt of each he dances around in circles with his arms above his head, makes grand bowing gestures and generally makes a

mockery of the exercise. The video also shows he is unable to follow Officer Hetner's instructions in any of the tests. The video shows that he is unsteady on his feet and lacks significant balance for the walk and turn test and holds his arms out to the side to gain his balance. The court finds that such behavior is indicative of one who is under the influence of alcohol.

Officer Hetner's testimony at the trial supports the court's observations of both the video from the scene of the accident and police headquarters as well as the audio portions of the video. Officer Hetner described Polk's behavior at the scene of the accident as uncooperative, confrontational and angry. Officer Hetner testified that although he believed the accident to have occurred because of Ms. Hino's failure to make a complete stop at the intersection, it was Polk's outrageous behavior which made the Officer suspicious that he was under the influence of alcohol. Officer Hetner stated that despite the freezing temperatures, Polk would not return to his car, preferring instead to argue with the officer and the tow truck driver. This argumentative behavior coupled with his disregard for the freezing temperatures again roused the Officer's suspicion that Polk was intoxicated.

Further sparking Officer Hetner's suspicion that Polk was intoxicated was the fact that no matter how much Officer Hetner tried to reason with Polk, Polk refused to "let go" of the idea that the accident was completely Ms. Hino's fault. Polk also refused to "let go" of the idea that the tow truck driver needed his keys in order to tow his car. This unreasonableness on the part of Polk lead Officer Hetner to take note of Polk's other behavior. Officer Hetner testified that Polk was unsteady on his feet and that he smelled a strong odor of alcohol emanating from his breath when he engaged in further conversation with Polk. Officer Hetner also noted that Polk's speech was slurred and "mushed-mouth", and within Hetner's experience he recognized such speech as

indicative of an individual under the influence of alcohol. Finally, Officer Hetner testified that Polk's PBT reading rated positive and was well above the legal intoxication limit.

Ms. Hino's testimony also corresponds to Officer Hetner's testimony regarding Polk's behavior. Ms. Hino testified that Polk would not let go of the idea that the accident was her fault and that she and the Officer were unable to calm him down. Ms. Hino also stated that Polk continued to unnecessarily berate her and yell at her after she apologized for the accident. Finally, Ms. Hino noted that Polk's speech was slurred.

At trial Polk testified in his defense that his behavior after the accident was a result of his PTSD and not due to his being under the influence of alcohol. To support this argument Polk testified to his experience in South Africa and the psychological ramifications of that experience. Polk also entered into evidence a psychological assessment from Dr. Dowell, Ph.D. The court considered this evidence in light of the videos and testimony from the other witnesses and found that while Polk's behavior could be considered consistent with the explanation in Dr. Dowell's report, the court found the evidence proved he was under the influence of alcohol as well.

The court found certain elements of Polk's testimony to weigh against his defense of PTSD induced behavior. First, Polk could not produce any evidence that he was ever in South Africa on a mission trip. However, the court generally viewed the report given by Dr. Dowell as credible and instructive on the behaviors and psychosis of PSTD, whether such condition was caused in the manner Polk alleged is unknown. Secondly, Polk testified that he was returning from a bar where he had been drinking when he got into the accident with Ms. Hino. Polk stated that he had two vodka tonics before driving.

Under the totality of the evidence produced, the court found Polk's slurred speech, his lack of balance and unsteadiness at the accident scene and police headquarters, his inability to

complete the field sobriety tests, his apparent lack of discomfort given the freezing temperatures at the accident scene, the fact that he was coming home from a bar and that he admitted to having two vodka tonics before driving, and his persistent combative and accusatorial behavior, prove that he was under the influence of alcohol. Given the weight of the evidence produced, such a finding supports the verdict.

Finally, Polk argues that the court's refusal to allow him a trial by jury was an impermissible violation of his state and federal constitutional rights. The court did not violate Polk's constitutional rights by denying him a jury trial. In ***Commonwealth v. Kerry***, 2006 Pa. Super 223, 906 A.2d 1237, 1239 (2006), the court held that a maximum incarceration for a first offense under 75 Pa.C.S.A. § 3802(a)(1), with a refusal to submit to chemical testing, is not serious in the constitutional sense, and as such the Defendant is not entitled to a jury trial. The court in that case quoted established case law on the subject noting that "[t]he test is clear. The decision of the Supreme Court of the United States 'have established a fixed dividing line between petty and serious offenses: those crimes carrying [a sentence of] more than six months [] are serious [crimes] and those carrying [a sentence of six months or] less are petty crimes." ***Kerry***, 906 A.2d at 1239 quoting ***Commonwealth v. Mayberry***, 459 Pa. 91, 98, 327 A.2d 86, 89 (1974) (quoting ***Codospoti v. Pennsylvania***, 418 U.S. 506, 512 (1974)). It is well-settled that a legislature's determination that an offense carries a maximum prison term of six months or less indicates its view that an offense is "petty." ***Blanton v. North Las Vegas***, 489 U.S. 538, 543, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989).

In ***Blanton*** the court stated that,

> It has long been settled that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision. In determining whether a particular offense should be categorized as petty, our early decisions focused on the nature of the offense and on whether it was triable by a jury at common law. In recent

> years, however, we have sought more objective indications of the seriousness with which society regards the offense. [W] e have found the most relevant such criteria in the severity of the maximum authorized penalty. In fixing the maximum penalty for a crime, a legislature include[s] within the definition of the crime itself a judgment about the seriousness of the offense. The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.

Id. at 541 at 542 (internal quotation marks and citations omitted).

A court determines, therefore, whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. In our case, by setting the maximum authorized prison term at six months,[1] the Legislature categorized the violation of § 3802(a)(1) as petty for purposes of a defendant's jury trial rights. This categorization is not affected by the potential for a defendant to be subject to increased incarceration for a subsequent DUI offense. Much like a defendant charged with multiple petty offenses, the fact that the potential exists for an aggregate sentence exceeding six months' incarceration does not entitle such a defendant to a jury trial. ***See Lewis v. United States***, 518 U.S. 322, 327, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996) (stating "The fact that petitioner was charged with two counts of a petty offense[, and therefore faced an aggregate potential prison term greater than six months,] does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.").

The rule that petty crimes do not receive jury trials is held under both the Pennsylvania and Federal constitutions. Despite any difference in the language of the United States and Pennsylvania constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. ***Kerry***, 906 A.2d at

[1] See 75 Pa.C.S.A. § 3804(c)(1) (Relating to penalties).

1239-1240. Thus, there is no constitutional right to trial by jury for "petty" offenses. It was not error, therefore, to deny Polk a jury trial.

The sentence of December 7, 2007 contains no reversible errors. Accordingly, Polk's appeal should be denied and the order of December 7, 2007 affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Jeana Longo, Esquire
District Attorney
Judges
Rebecca Polk, Esquire (Law Clerk)
Gary L. Weber, Esquire (Lycoming Reporter)