IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1175-2008**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
MARK CAMPBELL,	**:**	
Defendant	**:**	**1925(a) Opinion**

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

This opinion is written in support of this Court's judgment of sentence dated March 13, 2009. The relevant facts follow.

On April 26, 2008, shortly after 10:00 p.m. while Kurt Kane was working at his pizza shop, he observed a vehicle pull into the parking lot of the carpet store across the street. An individual later identified as the defendant in this case got out of the vehicle, went to the rear passenger side and began kicking the tire. About five minutes later, Defendant staggered across the parking lot and street and entered Mr. Kane's pizza shop. Defendant said he thought he hit something and asked to use Mr. Kane's telephone to call a tow truck. From Defendant's staggering and the odor of alcohol emanating from his breath, Mr. Kane believed Defendant was drunk, so he asked his delivery driver to go outside and use his cell phone to call the police. When Defendant left the pizza shop fifteen or twenty minutes later, Mr. Kane watched him stagger back across the street to his vehicle.

John Fritz came into the pizza shop a few minutes after Defendant first arrived and ordered a Stromboli to go. After he left the pizza shop, he flagged down Officer

McClain and told him there was a vehicle in the lot of the carpet store with two flat tires. Officer McClain went to investigate the situation.

When Officer McClain arrived at the carpet store, he observed a Toyota Tacoma truck with two flat passenger side tires in the parking lot, but not in a parking stall. The vehicle was registered to Defendant. Officer McClain shined a light towards the truck to see if there were any occupants, but he did not see any. As Officer McClain was getting out of his vehicle, he observed Defendant walking from the pizza shop towards the truck. Officer McClain asked Defendant if the truck was his and he indicated it was. The officer also asked Defendant if he had been driving the truck and he said yes he was. The officer detected an odor of alcohol emitting from Defendant's breath. He also noticed Defendant's slurred speech and poor balance. Based on his observations, the officer believed Defendant was intoxicated. Officer McClain asked Defendant if he had been drinking; Defendant said he had two beers. Officer McClain asked Defendant to perform the following field sobriety tests: the walk and turn, the finger-to-nose, and the one-leg stand. Defendant failed all of them. Officer McClain arrested Defendant for driving under the influence.

Officer McClain transported Defendant to the Williamsport Hospital DUI Center. Defendant consented to a blood test and his blood was drawn at approximately 11:30 p.m. Tests performed on Defendant's blood showed he had a blood alcohol content (BAC) of .18%.

Defendant was charged with driving after imbibing a sufficient amount of alcohol such that he was incapable of safe driving (hereinafter "DUI-incapable of safe driving") and driving after imbibing a sufficient amount of alcohol such that the alcohol concentration in his blood was 0.16% or higher within two hours after he drove, operated or

was in actual physical control of the movement of the vehicle (hereinafter "DUI-.16% or greater").

A jury trial was scheduled for January 22, 2009. At 4:37 p.m. on January 21, 2009, defense counsel filed a motion in limine seeking to preclude the Commonwealth from introducing Defendant's statements under the *corpus delicti* rule.

On the morning of trial before bringing the jury into the courtroom, the Commonwealth made an offer of proof regarding its evidence, other than Defendant's statements that he was the driver, to show Defendant drove, operated or was in actual physical control of the truck. The Commonwealth indicated Officer McClain would testify that a motorist flagged him down about a truck with two flat tires in the parking area of Loudenslager's carpet store and the driver may be intoxicated. It was approximately 10:30 p.m. and the carpet store was closed. The officer went to investigate. Both passenger side tires were flat. It looked like an object had been hit, because there was damage to both the tires and the rims. The truck was registered to Defendant. As Officer McClain was getting out of his vehicle, Defendant was walking from the pizza store across the street toward the vehicle. In his investigation of the situation, Officer McClain noticed Defendant's speech was slurred, his balance was poor and his breath smelled of alcohol. Defendant was asked to perform field sobriety tests and failed them all.

The Commonwealth also indicated Kurt Kane would testify that shortly after 10 p.m. Defendant came into the pizza shop to use the telephone to call a tow truck. Mr. Kane noticed Defendant smelled of alcohol and had difficulty pronouncing his words. At the time of the offer of proof, the Commonwealth's attorney did not know Mr. Kane would testify at trial that he also saw the truck pull into the carpet store and Defendant get out of the

truck, kick the rear passenger tire, and stumble over to the pizza shop.

Based on the offer of proof, the Court found when all the circumstances were considered as a whole the Commonwealth could show by a preponderance of the evidence that Defendant drove, operated or was in control of the vehicle. N.T., at pp. 21-22.

The jury found Defendant guilty of both counts of DUI. On March 13, 2009, the Court sentenced Defendant to five years on the Intermediate Punishment program with the first five months to be served at the Pre-Release Center (PRC).

Defendant first asserts the Court erred in allowing the Commonwealth to present in its case in chief the statement of Defendant, in violation of the *corpus delicti* rule based on the pretrial proffer. The Court cannot agree.

Before introducing an extra-judicial inculpatory statement of the accused, the Commonwealth must establish by a preponderance of independent evidence that a crime has in fact been committed; the Commonwealth is not required to prove the existence of a crime beyond a reasonable doubt. ***Commonwealth v. Reyes***, 545 Pa. 374, 381, 681 A.2d 724, 727 (Pa. 1996); ***Commonwealth v. Zugay***, 2000 PA Super 15, 745 A.2d 639, 652 (Pa. Super. 2000); ***Commonwealth v. Ahlborn***, 441 Pa. Super. 296, 301, 657 A.2d 518, 520-21 (Pa. Super. 1995). The identity of the individual responsible for the criminal conduct is not part of the *corpus delicti*. ***Commonwealth v. McMullen***, 545 Pa. 361, 367, 681 A.2d 717, 720 (Pa. 1996); ***Zugay***, *supra*. "The *corpus delicti*, like other facts, may be shown by circumstantial evidence, as long as the circumstances are more consistent with a crime than with an accident. ***Reyes***, *supra*.

Here, the totality of the circumstances showed the crime of driving under the influence. Both passenger side tires of the truck were flat, rendering the truck inoperable.

The truck was registered to Defendant. Defendant entered the pizza shop and the owner Mr. Kane immediately noticed that Defendant was having difficulty pronouncing his words and there was an odor of alcohol emanating from his person. Defendant used the telephone and then went back out to the truck. Officer McClain saw Defendant walking toward the truck. He also noticed Defendant's poor balance, his slurred speech and his breath smelled of alcohol. No one else was seen at or near the truck. Defendant failed standard field sobriety tests. This evidence and the reasonable inferences that can be drawn it showed that Defendant was the driver of the vehicle and he was under the influence of alcohol.

Furthermore, even if the proffer was insufficient, Defendant would not be entitled to relief in this case, because the evidence actually presented by the Commonwealth clearly established the crime of driving under the influence without considering Defendant's statement that he was the driver. In addition to the evidence contained in the proffer, Mr. Kane testified at trial that he saw the vehicle pull into the parking lot of the carpet store. He saw Defendant get out of the driver's side, walk to the rear of the vehicle and kick the rear passenger tire. Then Defendant stumbled across the parking lot and street, and entered the pizza shop to use the phone.

The only other issue raised by Defendant is "whether the evidence was sufficient to secure a conviction of driving under the influence when no credible evidence was presented that Defendant was in actual physical control of the movement of a motor vehicle." Again, the Court cannot agree.

When reviewing a challenge to the sufficiency of the evidence, the court must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the Commonwealth as verdict winner. ***Commonwealth v. Fisher***, 564 Pa. 505,

515, 769 A.2d 1116, 1122 (Pa. 2001). As previously stated, Mr. Kane testified that he saw the vehicle pull into the parking lot and he saw Defendant get out of the driver's side of the vehicle. Officer McClain also testified that he asked Defendant if he was the driver of the vehicle and Defendant said he was. This evidence was sufficient to prove beyond a reasonable doubt that Defendant drove, operated or was in actual physical control of his truck. Although Defendant testified that James Follmar was the driver and he raised issues about his ability to kick the tires while wearing flip flops and Mr. Kane's ability to see what was occurring in the parking lot of the carpet store, it is the "fact finder's province to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted." ***Commonwealth v. Cooper***, 596 Pa. 119, 130, 941 A.2d 655, 662 (Pa. 2007). The jury apparently did not find Defendant's testimony credible and accepted the testimony of Officer McClain and Mr. Kane, which was within their province as fact finder.

DATE: _____ By The Court,

_____
Kenneth D. Brown, President Judge

cc: Paul Petcavage, Esquire (ADA)
Kyle Rude, Esquire (counsel for Defendant)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)