IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No. 1182-2009**
	:	**CRIMINAL**
NATHAN POUST,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant filed an Omnibus Pre-Trial Motion on September 14, 2009. A hearing on the Motion was held on October 12, 2009. At the time of the hearing, Defense Counsel withdrew his Motion for Discovery and notified this Court that he did not intend on filing any supplemental Omnibus Motions. Defense Counsel did however, without objection by the Commonwealth, orally amend the motion to include a Motion to Dismiss Count 1 of the Information. The main issues remaining before the Court at this time will be addressed in the order in which they were raised in the motion.

Background

The following is a summary of the facts presented at the Suppression Hearing. Daniel Mordan (Mordan) testified that he was traveling eastbound on State Route 44 on May 31, 2009 around 2:00 to 2:20 a.m., when he came upon an accident. Mordan explained that he was driving along when he saw debris all over the road and a sheered off telephone pole on the westbound side. Mordan testified he got out of his vehicle and could see headlights and hear something, which at the time he believed was someone talking. He went to the side of the road where he saw an overturned vehicle down the embankment and then called 911 at 2:08 a.m. Mordan explained that the vehicle's engine was not running, but from 25 feet away he could see the headlights and

hear the radio. He went down to the vehicle where he could see the driver moving his foot, but was unable to open the door to free him.

Mordan related that he is a mechanic and agreed that a vehicle's headlights and radio can remain on for thirty to forty five minutes and would be bright for at least fifteen minutes. Therefore, Mordan agreed the crash could have happened somewhere between 1:37 a.m. and 2:07 a.m., due to the brightness of the lights and the fact that the radio was still on.

Counsel stipulated that if called to testify, Muncy Creek Assistant Fire Chief Scott Delaney would testify that he was dispatched at 2:11 a.m. and arrived on the scene at 2:25 a.m. He would have also testified that the extrication took approximately thirty minutes.

The Affidavit of Probable Cause shows that the Defendant's blood was not taken until 3:57 a.m.

Discussion

Petition for Writ of Habeas Corpus

Defendant alleges the Commonwealth's evidence is insufficient to establish a prima facie case of DUI under 75 Pa.C.S. § 3802(c). Specifically, the Defendant alleges the testimony shows that the accident could have occurred between 1:37 a.m. and 2:07 a.m. and since his blood was not taken until 3:57 a.m., outside of the two hour time period, that Count 2 should be dismissed. Defendant also acknowledges that he waived the Preliminary Hearing, but did so based on inaccurate information as the supplemental police report regarding Mordan's 911 call was not provided until October 6, 2009.

The burden the Commonwealth bears at the Preliminary Hearing is they must establish a prima facie case; the Commonwealth must present sufficient evidence that a crime has been

committed and that the accused is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975). See also Commonwealth v. Prado, 393 A.2d 8 (Pa. 1978). The evidence must demonstrate the existence of each of the material elements of the crimes charged and legally competent evidence to demonstrate the existence of the facts which connect the accused to the crime. See Commonwealth v. Wodjak, 466 A.2d 991, 996-97 (Pa. 1983). Absence of any element of the crimes charged is fatal and the charges should be dismissed. See Commonwealth v. Austin, 575 A.2d 141, 143 (Pa. Super. 1990).

A person violates 75 Pa.C.S. § 3802(c) and is guilty of Driving Under the Influence of Alcohol if the person drives, operates or is

> in actual physical control of the movement of a 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.

The Exception to the two-hour is

> where alcohol . . . concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol . . . 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:
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> (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained 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. § 3802.

In Commonwealth v. Segida, the Commonwealth failed to show when the Defendant last drove his vehicle, his capacity to drive, and when the Defendant's blood alcohol content was taken. The Pennsylvania Superior Court in reversing the Defendant's conviction, held that it is

critical for the Commonwealth to prove when the Defendant last drove and when the blood was drawn in order to convict under § 3802(c). 912 A.2d 841, 845-46 (Pa. Super. Ct. 2006).

The Court finds the evidence is insufficient to show the Defendant's blood was taken within two hours after driving, operating, or in actual physical control of the movement of the vehicle. Mordan testified that he came upon the accident scene where he found the Defendant's vehicle over an embankment and called 911 at 2:08 a.m. Mordan, who is a mechanic, testified the vehicle's headlights and radio were on and explained that either could remain on for thirty to forty five minutes. Therefore, he agreed the crash could have happened somewhere between 1:37 a.m. and 2:07 a.m., due to the brightness of the lights and the fact that the radio was still on. Further, the evidence shows the Defendant's blood was not taken until 3:57 a.m, which could have been more than two hours after the accident. The Court finds that the Commonwealth presented insufficient evidence as to the time of the accident to show when the vehicle was last driven and therefore, failed to meet its burden.

The Commonwealth has also failed to show good cause as to why the blood was not taken within two hours. The good cause exception applies when there is a delay in the performance of the chemical test, not for the inability to establish when the Defendant last drove, operated, or was in physical control of the vehicle. See Commonwealth v. Segida, 912 A.2d at 845-46. In this case, the evidence presented fails to establish when the Defendant last drove, operated, or was in physical control of the vehicle in order to start the two hour clock. As such, Count 2 of the Information shall be dismissed.

Motion to Dismiss Count 2

The Defendant's second argument is that Count 2 should be dismissed as § 3802(c) is violative of the due process and equal protection clauses of the State and Federal Constitutions.

The Court finds this argument moot as it has already dismissed Count 2 for lack of evidence.

Oral Motion to Dismiss Count 1

Defendant's final argument is that Count 1 of the Information, the Incapable of Safe Driving Count, should also be dismissed.

A person violates 75 Pa.C.S. § 3802(a)(1) and is guilty of Driving Under the Influence of Alcohol if the person drives, operates or is "in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle."

The Court finds based upon the testimony at the Suppression Hearing and the Affidavit of Probable Cause that there is sufficient evidence for the Incapable of Safe Driving count. The testimony presented to the Court was that it was clear the Defendant was involved in an accident; based upon the fact that he was found in the driver's seat of the vehicle. The Affidavit of Probable Cause shows that when the Defendant was in the rear of the ambulance, the Officer observed the Defendant's eyes to be blood shot and glassy in appearance and smelled a strong odor of alcohol emitting from his person. The Defendant also told the Officer he had "quite a bit to drink." See Commonwealth v. McCurdy, 735 A.2d 681, 686 (Pa. 1999) (holding that the Commonwealth presented sufficient evidence the Defendant was "incapable of safe driving by

virtue of his speeding, his failure to control his vehicle on the highway, the resulting accident**,** his physical instability, and his admission of drinking). Therefore, the Court finds the Commonwealth presented sufficient evidence as to Count 1 of the Information, the Incapable of Safe Driving charge.

ORDER

AND NOW, this 4th day of November 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Omnibus Pre-Trial Motion is GRANTED in part and DENIED in part.

The Motion is GRANTED as to Count 2 as the Commonwealth has presented insufficient evidence as to the time of the accident to show when the vehicle was last driven and therefore, failing to show the blood alcohol content was at least .16 within two hours after the Defendant last drove, operated, or was in physical control of the movement of the vehicle. Therefore, Count 2 of the information, charging the Defendant with DUI: Highest Rate of Alcohol Charge, 75 Pa.C.S. 3802(c) in the above-captioned matter is hereby DISMISSED without prejudice.

The Motion is DENIED as to Count 1 of the Information. The Commonwealth has presented sufficient evidence that the Defendant was incapable of safe driving.

By the Court,

Nancy L. Butts, Judge

xc: DA (HM)
Marc F. Lovecchio, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)