IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No. 2036-2008**
	:	**CRIMINAL**
NICOLE WILSON,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant filed an Omnibus Pre-Trial Motion on February 19, 2009. A hearing on the Motion was held on March 13, 2009.

Background

The following is a summary of the facts presented at the Suppression Hearing. Patrol Officer Morris Sponhouse, II (Sponhouse) of the Old Lycoming Township Police Department testified that on October 23, 2008, around 5:00 p.m., he was dispatched for a domestic disturbance at the northbound off-ramp of Route 15 in the area of the stop sign at Beauty's Run Road. When Sponhouse arrived at the scene, he observed numerous vehicles parked around the off-ramp and blocking traffic was a red Chevy Blazer. Sponhouse observed both a male, later identified as Jeffrey Askey (Askey) and a female, later identified as Nicole Wilson (Defendant) near the driver's side of the vehicle. When Sponhouse approached the vehicle, Defendant was holding the keys to the vehicle. Defendant gave Sponhouse the keys and gave him instructions to start the vehicle and get it out of the way; however, Sponhouse was unable to start the vehicle and found it to be inoperable. Sponhouse also testified that when he approached the Defendant, he detected a strong odor of alcohol emitting from her breath. Sponhouse proceeded to ask the Defendant and Askey who drove and after glancing at each other, the Defendant responded "I

did." Sponhouse related the Defendant explained that she had been driving when she and Askey, who is her boyfriend, got into a verbal confrontation, whereupon she stopped, ripped the keys out, and both exited the vehicle. Later, Defendant tried to allude a third person drove the vehicle and left when it would not move. However, when Sponhouse said he knew that no male had left the scene, Defendant responded "I did drive it here."

Defendant was then taken to the side of the road and processed for DUI in front of the in-car camera. Defendant failed all field sobriety tests. She was arrested and taken to the Lycoming County DUI Processing Center. At the DUI Processing Center, Defendant was advised of her rights, whereupon she refused to submit to chemical testing. Sponhouse also testified that the vehicle was registered to the Defendant.

Discussion

Petition for Writ of Habeas Corpus

Defendant alleges the Commonwealth's evidence is insufficient to establish a prima facie case of DUI against her. Specifically, Defendant asserts the Commonwealth does not have sufficient evidence to prove that at the time she was under the influence of alcohol she drove, operated or was in actual physical control of the movement of a motor vehicle.

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(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." To establish the corpus delecti for the crime of Driving Under the Influence, the Commonwealth only has to "show that someone operated a motor vehicle while under the influence of alcohol." Commonwealth v. Zelosko, 686 A.2d 825, 826 (Pa. Super. Ct. 1996). It is axiomatic that circumstantial evidence alone may be used to prove the corpus del[e]cti." Zelosko, 686 A.2d at 827. According to the Pennsylvania Superior Court, under the corpus delecti rule there is "no requirement that the accused be identified with the crime as a prerequisite to offering and having received in evidence statements made by him." Commonwealth v. Palmer, 402A.2d 530, 532 (Pa. Super. Ct. 1979).

The Court finds the evidence sufficient to show the Defendant was under the influence of alcohol while driving, operating, or in actual physical control of the movement of the vehicle. Sponhouse testified that the vehicle owned by the Defendant was blocking the off-ramp to the highway, the Defendant, along with a male individual were near the driver's side of the vehicle, and the Defendant had the keys in her hand. Sponhouse also noticed an odor of alcohol emitting from the Defendant's breath. When first asked who drove, the Defendant freely admitted, "I did." Therefore, the Court finds the Commonwealth presented sufficient evidence as to the Driving Under the Influence charge.

Motion to Suppress Evidence

Defendant also alleges that her alleged refusal to submit to chemical testing of her blood should not be admitted into evidence as the refusal was not knowing, voluntary, or intelligent. Defendant contends that she had a right to counsel at the time that she allegedly refused and was denied that right. Defendant further alleges that she was not properly advised of the consequences of her refusal.

According to the Pennsylvania Supreme Court, '"where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible.'" Commonwealth v. Bryant, 866 A.2d 1143, 1145 (Pa. Super. Ct. 2005) (quoting Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992)).

Under Pennsylvania Law, arresting officers are required to advise the motorist that in making the decision whether to submit to chemical testing or refuse that

> 'he does not have the right to speak with counsel, or anyone else, before submitting to chemical testing, and further, if the motorist exercises his right to remain silent as a basis for refusing to submit to testing, it will be considered a refusal and he will suffer the loss of his driving privileges . . ..'

Witmer v. DOT, Bureau of Driver Licensing, 880 A.2d 716, 720 (Pa. Commw. Ct. 2005) (quoting Department of Transportation, Bureau of Driver Licensing v. Scott, 684 A.2d 539, 544 (Pa. 1996)). After an officer has provided the motorist with those warnings, '"the officer has done all that is legally required to ensure that the motorist has been fully advised of the consequences of refusing to submit to chemical testing,' and a refusal to submit to chemical testing will not be excused as unknowing . . .." Witmer, 880 A.2d at 720 (quoting Scott, 684 A.2d at 546).

Sponhouse testified he read to the Defendant the Chemical Test Warnings from the Pennsylvania Department of Transportation form as authorized by Section 1547 of the Pennsylvania Motor Vehicle Code. The relevant portions of the document provide as follows:

> 3. If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. In addition, if your effuse to submit to the chemical test, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle code, then, because of your refusal, you will be subject to more sever penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. **These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail** and a minimum fine of $1,000.00 up to a maximum of five years in jail and a maximum fine of $10,000.
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> 4. "You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to speak with an attorney or anyone else after being provided these warnings or you remain silent when asked to submit to chemical testing, you will have refused the test, resulting in the suspension of your operating privilege and other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

PennDot From DL-26 (5-08) (emphasis in original).

Based upon the testimony presented, the Court finds that Defendant's refusal was knowing, intelligent, and voluntary. Both the Pennsylvania Motor Vehicle Code and Pennsylvania case law provides that the Defendant does not have the right to speak to an attorney prior to submitting to chemical testing. Sponhouse provided Defendant with those warnings. Therefore, as she was aware that she was not entitled to speak to an attorney first and aware of the consequences of refusal, the Court finds her refusal was knowing, intelligent and voluntary. Although Defense Counsel may believe Defendant has a right to counsel before being requested to comply with chemical testing, the Commonwealth has complied with the law as it currently exists.

ORDER

AND NOW, this ____day of March 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED that Defendant's Omnibus Pre-Trial Motion to Suppress is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: DA (KO)
Peter T. Campana, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)