IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	
vs.	**:**	**No. 1020-2009**
	:	
ZAID ALI,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant was charged by Information filed on July 17, 2009 with two counts of DUI, two counts of possession of marijuana, one count of possession of paraphernalia and two traffic summaries. By Order of Court dated April 13, 2010, Counts 1, 3, 4 and 5 of the Information were dismissed. A non-jury trial was held before this Court on June 16, 2010. Before the Court for determination on whether the Commonwealth has proved the Defendant guilty beyond a reasonable doubt are Count 2, driving under the influence of a controlled substance (metabolite) in violation of 75 Pa.C.S.A. § 3802(d)(1)(iii); Counts 6, 7 and 8, different versions of driving while operating privileges are suspended or revoked; and Count 9, a traffic summary relating to a license violation.

With respect to Count 2, the Commonwealth must prove that the Defendant drove, operated or was in actual physical control of the movement of a vehicle when there was in the Defendant's blood any metabolite of a Schedule I controlled substance as defined in the Controlled Substance, Device and Cosmetic Act. 75 Pa.C.S.A. § 3802(d)(1)(iii).

In support of this Count, the Commonwealth first presented the testimony of Trooper Tyson Havens of the Pennsylvania State Police. Trooper Havens testified that on the night in question he started following a vehicle being driven on the streets of Williamsport. The vehicle eventually parked at which time he recognized the Defendant exiting from the

driver's side door. Following a brief conversation with the Defendant, Trooper Havens contacted the Lycoming County Adult Probation Office.

Adult Probation Officer James Schriner soon came to the scene, confronted the Defendant inside his residence and secured a urine sample. According to Trooper Havens, the urine tested positive at 250 nanograms per milliliter of "delta-9-carboxy-THC" which was stipulated by the parties to be a metabolite for marijuana, a Schedule I drug.

The parties stipulated to a report of Kroll Laboratory Specialists, Inc. verifying that Defendant's urine tested positive for the marijuana metabolite as testified by Trooper Havens. Said report was marked and admitted into evidence as Commonwealth's Exhibit 2.

Mr. Schriner also testified. He noted that he arrived on the scene with Agent John Stahl, also of the Lycoming Count Adult Probation Office.

Agent Schriner made contact with the Defendant at Defendant's residence. Agent Schriner secured a urine sample from the Defendant, which field tested positive for "THC." The Defendant, Agent Schriner and Agent Stahl returned to the Adult Probation Office. The urine sample was packaged and sent to "the lab" for confirmation.

In order to prove the Defendant guilty, the Commonwealth must first prove that the Defendant drove, operated or was in actual physical control of the movement of a motor vehicle. The Court finds Trooper Havens' testimony credible with respect to this fact and concludes that the Commonwealth has proved beyond a reasonable doubt that the Defendant drove a motor vehicle on the date in question.

The Commonwealth must then prove that at the time the Defendant drove the vehicle there was in his blood a metabolite of a Schedule I controlled substance. The Court

concludes that the Commonwealth has failed to meet this burden for several reasons. First, no credible evidence was presented which proves that the Defendant drove with any quantity of certain illegal metabolites in his bloodstream. The only evidence produced related to metabolites in the Defendant's urine. See Commonwealth v. DiPanfilo, 2010 Pa. Super. 59, P12 n.6 (April 16, 2010)("Subsection 3802(d)(1) prohibits driving with any quantity of certain illegal drugs (or metabolites thereof) in one's **bloodstream.** If the person refuses to submit to a blood test, that subsection is clearly inapplicable."); see also Commonwealth v. Etchison, 916 A.2d 1169, 1174 (Pa. Super. 2007)(A conviction under § 3802(d)(1)(iii) does not require that the driver be impaired; rather it prohibits the operation of a motor vehicle by any driver who has any amount of specifically enumerated metabolites of a controlled substance in his blood, regardless of impairment.)

The Commonwealth argues that the amount and/or presence of a metabolite in the Defendant's blood can be proven by chemical testing of the Defendant's urine pursuant to 75 Pa.C.S.A. § 1547(c). Section 1547(c), however does not permit the introduction of urine testing to verify the amount of a controlled substance metabolite in a Defendant's blood. The clear language of § 1547(c) permits urine testing only to verify the amount of alcohol or controlled substances in the Defendant's blood. The Court can only conclude that if the legislature intended to allow a finding of a metabolite in urine to be evidence of a metabolite in blood, it would have said so.[1]

[1] Adult Probation Officer Schriner testified that there was no standard minimum level for marijuana metabolites. Each company had their own minimum for a positive result, and Kroll Laboratory Specialists Inc.'s minimum was 3 nanograms/milliliter. Although the laboratories may not have a standard minimum for a positive result, the Pennsylvania Department of Health has established minimum controlled substance metabolite levels that must be present for the test results to be admissible in a prosecution for a violation of section 1543(b)(1.1), 3802(d)(1), (2) or (3), or 3808 of the Vehicle Code. See 34 Pa.Bull. 919 (2004). The minimum level for THC is 5

With respect to Count 6, Defendant conceded that he was driving under suspension and accordingly, will be found guilty of such.

The next counts for determination by the Court are Counts 7 and 8, driving while operating privilege is suspended or revoked (DUI related). With respect to Count 7, any person who drives a motor vehicle on a highway at a time when that person's operating privilege is suspended or revoked as a condition of acceptance of an Accelerated Rehabilitative Disposition (ARD) for a violation of § 3802 (relating to driving under influence of alcohol or a controlled substance) or because of a violation of § 3802 is guilty of a summary offense. 75 Pa. C.S.A. § 1543(b)(1).

With respect to Count 8, a person who has in his blood any amount of a Schedule I metabolite and who drives a motor vehicle on any highway or traffic way of this Commonwealth at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of ARD for a violation of § 3802 or because of a violation of § 3802 is guilty of a summary offense. 75 Pa.C.S.A. § 1543(b)(1.1)(i).

With respect to Count 8 and for the reasons set forth above, the Court concludes that the Commonwealth has failed to present sufficient evidence upon which the Court could conclude beyond a reasonable doubt that the Defendant had in his blood a Schedule I metabolite at the time he was driving a motor vehicle.

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nanograms/milliliter. If the defense had not stipulated to the admissibility of the report from Kroll, the Commonwealth would have needed to request the Court take judicial notice of page 919 of volume 34 of the Pennsylvania Bulletin, as well as establish that Kroll was a licensed and approved testing facility and that it utilized the procedures and equipment proscribed by the Pennsylvania Department of Health. See 75 Pa.C.S.A. §1547(c).

In support of Count 7, Trooper Havens testified that upon recognizing the Defendant, he suspected the Defendant was driving under suspension because of "prior knowledge" regarding such. Upon confronting the Defendant and in particular asking the Defendant if his license was "good," the Defendant indicated it was "as far as" he knew.

The Commonwealth presented a certified copy of the Defendant's driver history with the Pennsylvania Department of Transportation Bureau of Driver's Licensing (Commonwealth's Exhibit 1). Defendant was seen by Trooper Havens driving his vehicle on April 21, 2009. The certified record verifies the fact that Defendant's license was suspended effective August 19, 2008 for one year as a result of a possession of marijuana conviction, for one year effective August 19, 2009 as a result of a driving under suspension conviction, and for one year effective August 19, 2010 for a DUI conviction.

Agent Schriner testified that when he first made contact with Defendant, he asked the Defendant if he was driving and "believed" the Defendant indicated "no." The testimony of the Commonwealth also confirmed that the Defendant parked his car and entered his residence located at 844 High Street in Williamsport. This is the same address as indicated on Defendant's certified driver history.

The first issue concerns whether the Commonwealth proved beyond a reasonable doubt that the Defendant had actual notice of his suspension. The Commonwealth must establish actual notice of the license suspension. Commonwealth v. Vetrini, 734 A.2d 404, 407 (Pa. Super. 1999). Proof of such notice may consist of circumstances that allow the fact finder to infer that Defendant had knowledge of the suspension. Vetrini, supra.

The Court concludes that the Commonwealth has met its burden. First, the Defendant clearly resided at 844 High Street in Williamsport. This was where he parked his car and the residence where he entered. This is the same address set forth in Defendant's certified driving history. Notice of Defendant's suspension for his DUI was mailed to Defendant's address at 844 High Street. Moreover, the Court can infer that the Defendant was aware that his license was suspended and he should not have driven by the fact that he denied driving to his Adult Probation Officer even though he clearly had been driving.

The next issue concerns whether Defendant can be determined to have been driving under a DUI related suspension when his specific DUI suspension would not become "effective" until August 19, 2010.

Section 1543 notes that it applies to any person against whom one of the suspensions has been imposed whether the person is currently serving the suspension or whether the effective date of the suspension has been deferred. 75 Pa. C.S.A. § 1543(b)(2). The statute further notes that it applies until the person has had his operating privilege restored. 75 Pa. C.S.A. § 1543(b)(2).

The cases of Commonwealth v. Nuno, 559 A.2d 949 (Pa. Super. 1989) and Commonwealth v. Yetsick, 587 A.2d 788 (Pa. Super. 1991) are controlling as well. These cases clearly hold that a Defendant's conviction for driving under suspension DUI related is not precluded due to the fact that the Defendant has incurred prior suspensions and revocations that need to run before the DUI suspension and revocation begin.

Accordingly, the Court concludes that the Commonwealth has met its burden of proving Defendant guilty of Count 7.

ORDER

AND NOW, this ____ day of June, 2010, the Court, for the reasons set forth in the foregoing Opinion, finds the Defendant **NOT GUILTY** on Counts 2, 8 and 9* of the Information. The Court finds the Defendant **GUILTY** on Counts 6 and 7. The Court notes that said counts will merge for sentencing purposes. Sentencing is scheduled for **August 4, 2010 at 1:30 p.m. in Courtroom No. 4** of the Lycoming County Courthouse.

BY THE COURT,

_____
Marc F. Lovecchio, Judge

cc: Jeana A. Longo, Esquire
Mary Kilgus, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File

** The Commonwealth failed to present any evidence whatsoever that the Defendant exhibited or caused or permitted to be exhibited or had in his possession any recalled, cancelled, suspended, revoked, disqualified, fictitious or fraudulently altered drivers license.*