

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-238-2010

:

:

vs.

: CRIMINAL DIVISION

:

:

**JOEY TEMPLE,
Defendant**

:

:

OPINION AND VERDICT

Defendant is charged by Information filed on March 5, 2010 with one count of Driving Under the Influence with High Rate of Alcohol, an ungraded misdemeanor and one count of Driving Under the Influence (incapable of safely driving) also an ungraded misdemeanor.

A non-jury trial was held before the Court on March 3, 2011.

At the trial, the Commonwealth presented the testimony of Chief Jason Gill of the Hughesville Police Department. In summary, Chief Gill testified that on November 26, 2009 at approximately 1:00 a.m. he came in contact with a vehicle being driven north on Railroad Street. Chief Gill observed the vehicle being driven near or over the edge of the pavement and accordingly turned around and followed the vehicle.

The vehicle eventually turned right from Railroad Street onto Route 220 and pulled into the parking lot of a nearby gas station that was closed. According to Chief Gill, he saw the Defendant standing outside of the driver's side door, which was open. Upon Chief Gill's vehicle approaching the vehicle, the Defendant walked behind his vehicle and got into the passenger side. Chief Gill confronted the individual seated in the driver's seat, who at first said she was driving but subsequently "agreed" that the Defendant got out of the driver's side. Chief Gill then made contact with the Defendant, who subsequently admitted to driving.

Chief Gill administered standard field sobriety tests which the Defendant failed. Chief Gill then arrested the Defendant and took him to the Muncy Valley Hospital. Blood was drawn at 1:22 a.m. Testing of the Defendant's blood showed his blood alcohol content (BAC) was .13%.

The defense presented the testimony of the Defendant; his friend, Jeremy Waltman; and his fiancé, Kim Walburn. In summary, that evening the Defendant and Ms. Walburn picked up Mr. Waltman, who had called for a ride. All three went to the Angus Inn. The Defendant and Mr. Waltman were drinking alcoholic beverages. Ms. Walburn did not drink.

Upon leaving the Angus Inn, Ms. Walburn was driving, the Defendant was in the front passenger seat, and Mr. Waltman was in the back seat. They drove to Mr. Waltman's residence at 341 South Railroad Street. They dropped Mr. Waltman off, turned around and started driving toward Route 220 when they started arguing.

Upon turning right on Route 220, the Defendant told Ms. Walburn he wanted out of the vehicle. Ms. Walburn decided to pull into the parking lot of the closed gas station so that the Defendant could get out of the car and walk back to Mr. Waltman's. Defendant admitted that he was intoxicated, but denied that he was driving and denied that he admitted to Chief Gill that he was driving. Defendant explained that he admitted to Chief Gill that he was driving earlier in the evening. Ms. Walburn denied ever telling Chief Gill that the Defendant was driving or that Defendant got out of driver's side of the vehicle.

The first and primary issue to be determined by the Court as the factfinder is whether the Commonwealth has proven beyond a reasonable doubt that the Defendant was driving the vehicle.

While the Court is well aware of the reasonable doubt standard, it merits recitation. A reasonable doubt is the kind of doubt that would restrain a reasonable man or woman, from acting in a matter of importance to himself or herself. Commonwealth v. Pearson, 450 Pa. 467, 474, 303 A.2d 481, 484 (1973), citing Commonwealth v. Burns, 409 Pa. 619, 187 A.2d 552 (1963). It cannot be a doubt fancied or conjured up in the mind of the factfinder to escape an unpleasant verdict. Id.

Defendant properly asserts that Chief Gill's testimony does not merit any advantage because of his status as a police officer.

Clearly, there was conflicting testimony in this case and the Court, as the factfinder, has the duty of deciding what testimony to believe. However, two or more persons witnessing an incident may see or hear it happen differently and it is not uncommon for witnesses to be innocently mistaken in their recollection of how something happened.

The factfinder can obviously believe all, part or none of the testimony of a witness. Commonwealth v. Pitts, 486 Pa. 212, 215, 404 A.2d 1305, 1306 (1979), citing Commonwealth v. Rose, 463 Pa. 264, 268, 344 A.2d 824, 826 (1975). In considering what testimony to find credible, the Court has taken into consideration the following factors: the Court's understanding of human nature; the Court's common sense; the Court's observation of each witness as they testified; the contradictions in testimony; whether the witness was able to see those things about which the witness testified; how well the witness could remember and

describe things; whether the witness testified in a convincing manner; whether the witness had any interest in the outcome of the case or any other motive; and how well the testimony of the witness squared with the other evidence in the case including but, not limited to, the testimony of other witnesses.

In applying all of these factors, the Court is convinced beyond a reasonable doubt that the Defendant was, in fact, driving the vehicle. While the Defendant's version of the events has plausibility, there are inescapable facts which point to guilt.

Chief Gill's testimony at trial was entirely consistent with his testimony at the preliminary hearing. The Court notes that the preliminary hearing transcript was introduced and made part of the record and marked as Defendant's Exhibit 1. No explanation was argued or offered as to why Chief Gill would either lie or be mistaken about Ms. Walburn admitting that the Defendant was in fact driving, walked out of the car and walked around to the passenger seat.

In considering all of the circumstances, the Court concludes that the testimony of the Defendant and Ms. Walburn was not credible. When they testified, they did so with a flat affect, made no eye contact with the Court, answered the questions in large part prior to the questions being finished, and mimicked each other's versions of the event leading the Court to conclude that their testimony was rehearsed and not believable.

Moreover, the premise of their version rests on the assumed fact that they started arguing shortly after they dropped Mr. Waltman off at his home on Railroad Street. Ms. Walburn specifically testified that she waited at the stop sign at the intersection of Railroad Street and Route 220 determining whether to turn left to go home or turn right in order to

return the Defendant back to Mr. Waltman's residence. She testified that she then decided to stop, let the Defendant out of the vehicle and let him walk back to Mr. Waltman's.

The objective evidence fails to support her version. If in fact she was intending to stop and let the Defendant walk back to Mr. Waltman's residence, she clearly could have done so by pulling into the parking lot at Dugan's Gun Shop, which was located on Route 220 within approximately 10 feet of the stop sign (see Defendant's Exhibit 3).

Moreover, the physical facts support the version of Chief Gill. By the time the police vehicle turned around, the Defendant's vehicle was at the stop sign turning right on Route 220. The police vehicle was approximately 75 to 100 yards away. Obviously, the police vehicle was accelerating in order to follow the Defendant's vehicle.

By the time the police arrived at the intersection, however, the Defendant's vehicle was pulling into the gas station. By the time the vehicle was stopped, Chief Gill was within 20 to 30 yards. During the entire route from the stop sign at Route 220 to the gas station, Chief Gill did not lose sight of Defendant's vehicle.

Not only did Chief Gill not see anyone get out of the passenger side of the vehicle, walk around the rear of the vehicle, have a conversation and then return around the rear toward the passenger side, but the Court fails to see how these alleged events as testified to by the Defendant and Ms. Walburn could have occurred in such a short time frame. Defendant testified that upon pulling into the gas station where Ms. Walburn testified she "went to let Joey out," the parties first argued, the Defendant got out of the passenger side, he walked up to the driver's side, they argued "for a while" and then the police pulled in at which time the Defendant returned to the passenger side. A car traveling as slow as 30 miles per hour

would take approximately seven seconds to travel 75 yards. The events as described by the Defendant and Ms. Walburn clearly could not have occurred in seven seconds.

The Court also notes that Chief Gill testified that as soon as the vehicle entered the parking lot of the gas station, the vehicle's lights were turned off as if the occupants were trying to avoid detection. The Court does not believe any of the defense witnesses contradicted this testimony. The Court agrees with the Commonwealth that this evidence shows consciousness of guilt.

The Court also finds that this evidence makes the Defendant's and Ms. Walburn's version less credible. If Ms. Walburn had been driving the entire time and merely stopped in the gas station parking lot to let the Defendant out of the vehicle, there would be no reason for her to turn the lights off, as she would only be stopping momentarily then proceeding home. If anything, one would think Ms. Walburn would keep the lights on to ensure that she would not strike the Defendant with the vehicle, because both acknowledged the parking lot was dark and the Defendant was drunk.

The Court credits the testimony of Chief Gill as believable. The Court's determination is not based on his status as a police officer but on other factors including his demeanor while testifying, the fact that his testimony was substantially similar to his testimony at the preliminary hearing, the objective facts, and the fact his version made sense and was internally consistent.

Ms. Walburn claimed that Chief Gill yelled and used profane language after he approached the driver's side of the vehicle and she told him she was the driver. While this type of conduct is not unheard of by members of the public including police officers, Chief Gill

credibly testified that he did not utilize profane language. Clearly, Ms. Walburn was embellishing the version of events in order to garner sympathy towards her version.

Finally, the Court cannot ignore the motive for the Defendant and his fiancée to provide a version of events that, if believed, would result in Defendant's acquittal. The Defendant testified that he had a prior driving under the influence offense. Clearly, a second or subsequent offense carries a much greater penalty and provides a far greater incentive for lying.

While the Court may have some doubt as to the version of events, it is not a reasonable doubt. The Court credits the testimony of the Commonwealth.

From Chief Gill's testimony, one can readily conclude that the Defendant was driving the vehicle as late as 1:00 a.m. on November 26, 2009, and the Defendant and his fiancé switched seats after they pulled into the gas station parking lot. Defendant's blood was drawn at 1:22 a.m. The Defendant admitted he drank alcoholic beverages at the Angus Inn prior to the vehicle being stopped by the police. The parties stipulated his blood alcohol content was .13%. Thus, the evidence proves beyond a reasonable doubt that the Defendant drove a motor vehicle after imbibing a sufficient quantity of alcohol such that his blood alcohol content was at least .10% but less than .16% within two hours after he drove the vehicle in violation of 75 Pa.C.S. §3802(b).

On the other hand, the Court cannot find beyond a reasonable doubt that the amount that the Defendant drank was such a sufficient amount that rendered him incapable of safely driving. There was absolutely no testimony whatsoever regarding improper or unsafe driving conduct by the Defendant. Indeed, the Commonwealth's testimony was that the

Defendant drove “near or over the edge of the pavement” when the Defendant’s vehicle was approaching the police vehicle traveling in the opposite direction. Driving near the edge of the roadway or even over the edge of the roadway as viewed in defense Exhibit No. 2 is not even remotely unsafe.

There was no testimony presented at trial regarding the Defendant’s demeanor such as speech, conduct, eyes, response to questions or attitude. Indeed, it appears from the testimony that the Defendant spoke clearly, listened to the instructions and cooperated. This includes the Defendant’s conduct both on the scene and at the hospital. There was no testimony that the Defendant could not understand questions or comply with directives.

While there was testimony that the Defendant did not do well with the standard field sobriety tests, the “clues” were vague and minor.

The Court concludes that the Commonwealth has failed to prove beyond a reasonable doubt that Defendant drank a sufficient amount of alcohol such that he was rendered incapable of safely driving.

Accordingly, the Court will enter the following verdict:

Guilty on Count 1, Driving Under the Influence with High Rate of Alcohol, an ungraded misdemeanor; and **Not Guilty** with respect to Count 2, Driving Under the Influence of Alcohol- incapable of safely driving, an ungraded misdemeanor.

ORDER

AND NOW, this ____ day of March 2011 following a non-jury trial and based upon the verdict of the Court, the Defendant is adjudicated **GUILTY** on Count 1. Sentencing is scheduled for **May 18, 2011 at 1:30 P.M. in Courtroom No. 4** of the Lycoming County

Courthouse. The Defendant is directed to contact Valley Prevention Services and West Branch Drug and Alcohol Abuse Commission for the purposes of a CRN and assessment.

The Court finds the Defendant **NOT GUILTY** with respect to Count 2.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA (AMK)
PD (WM)
APO
CA
Valley Prevention Services
West Branch Drug and Alcohol Abuse Commission
Gary Weber, Esquire (Lycoming Reporter)
Work File