IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
v.	**:**	**No. 612-2011**
	:	
EDWIN A. PRECHTL,	**:**	**CRIMINAL DIVISION**
Defendant	**:**	**APPEAL**

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

On April 20, 2011 at approximately 2:30 a.m., Trooper Paul McGee (McGee) of the Pennsylvania State Police observed a vehicle with its headlights on and its engine running parked in a shopping plaza. McGee was concerned that someone was in need of assistance or that criminal activity was being directed towards one of the stores nearby. McGee then drove his marked police vehicle behind the vehicle and approached. McGee first observed Edwin Prechtl (Defendant) in a reclined position in the driver's seat and knocked on the window. The Defendant rolled down the window after a few moments of confusion and McGee proceeded to talk to the Defendant. During the conversation McGee noticed that the Defendant had red eyes, slurred speech, and a strong odor of alcohol emanating from his person. McGee asked the Defendant to perform field sobriety tests. The Defendant initially agreed but then eventually declined. The Defendant was then arrested and transported to the DUI Center at the Williamsport Hospital and Medical Center were a blood sample was collected and revealed that the Defendant had a blood alcohol content (BAC) of 0.126%. The Defendant was charged with Driving Under Influence of Alcohol or Controlled Substance (1st) and Driving Under the Influence With Highest Rate of Alcohol (1st). On March 27, 2012, the Information was amended for Count 2 to be Driving Under the Influence of Alcohol, 75 Pa.C.S.A. § 3802.

On September 8, 2011, the Defendant filed a Motion to Suppress. The Defendant alleged that McGee did not have reasonable suspicion to initiate a vehicle stop. On September 23, 2011, the Honorable Judge Lovecchio denied the Defendant's Motion to Suppress finding that the interaction was a mere encounter. On March 27, 2012, after a non-jury trial, the Defendant was found guilty of both Courts of Driving Under the Influence of Alcohol. The Defendant argued that he drove to the Loyal Plaza mall and parked his vehicle, crossed a four lane road, and met friends at the Harley Davidson store. The friends then drove the Defendant to a bar where he proceeded to drink. His friends then drove him back to his vehicle at the Loyal Plaza mall where he slept in his vehicle with the engine and lights on, using a keyless remote. The Court found the Defendant's testimony not to be credible and found him guilty based upon the location of his vehicle and the statements of the trooper in combination with the Defendant's own inconsistent statements, in which the Court found likely and credible. The Court found beyond reasonable doubt that the Defendant was operating his vehicle under the influence of alcohol to a degree which would have rendered him incapable of safe driving. The Defendant was sentenced to thirty (30) days to six (6) months incarceration. On July 6, 2012, the Defendant filed a Petition for Reconsideration/Modification of Sentence, which was denied by the Court on the same day.

On July 18, 2012, the Defendant filed a Notice of Appeal in regards to the Sentencing Order dated June 28, 2012. On July 24, 2012, this Court requested a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). The Defendant raises four (4) issues in his concise statement: 1) the Court erred, as a matter of law, in refusing to dismiss the case at the close of all the evidence because the weight of evidence did not support the case being presented to the jury; 2) the Court erred, as a matter of law, as the weight of the evidence does not support he verdict of guilty; 3) the Court erred in failing to grant the Defendant's Omnibus Pre-Trial Motion; and 4) the Court erred in permitting the Commonwealth

to introduce evidence of alleged conversations between the Defendant and the arresting trooper as they did not appear on any video and audio recordings.

The Court erred, as a matter of law, in refusing to dismiss the case at the close of all the evidence because the weight of evidence did not support the case being presented to the jury

The Defendant contends that the Court erred in not dismissing the case before it was presented to the jury. It should be noted that there was no jury in this case and that the trial was a non-jury trial held in front of the Honorable Judge Nancy L. Butts. Also, challenges to the weight of evidence may occur either before sentencing or in a post-sentence motion. Pa.R.Crim.P. 607(A). It is likely that the Defendant is challenging the sufficiency of evidence in what would have been a Motion for Judgment of Acquittal at the close of all the evidence. Pa.R.Crim.P. 606(A)(2). Further, the record indicates that the Defendant did not move for Judgment of Acquittal or make any kind of motion at the close of all evidence and therefore the Defendant has waived this issue.

In addition, the Court finds that the Defendant's case did have sufficient evidence. A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Commonwealth v. Karkaria, 625 A.2d 1167 (Pa. 1993). A court is required to review the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991). For the charge of Driving Under the Influence of Alcohol or Controlled Substance "an individual may not drive, operate or be 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." 75 Pa.C.S.A. § 3802(a)(1).

When viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the Court finds it is clear that the evidence was sufficient for a Motion for Judgment of Acquittal to be denied. First, the Court did not find much credibility in the Defendant. The Defendant's account of the events severely changed while he was testifying. The Defendant stated he was in his vehicle four and a half (4 ½) hours to five (5) hours and then changed it to seven (7) to seven and a half (7 ½) hours. N.T., March 27, 2012, p 51-52, 64. The Defendant also said once that he was dropped off at his vehicle at 5:30 PM and then changed it to 7 PM. Id. at 51-52, 59. Further, the Defendant once stated that he parked his car at Loyal Plaza Mall and then met his friends at a Harley Davidson store across the street and then later said he met his friends at the Loyal Plaza Mall. Id. at 55, 60. Finally, the Defendant contradicted most of his testimony by stating once that he drove directly to the Harley Davidson store. Id. at 56. The Court found that if the Defendant did in fact go to the Harley Davidson store he would have likely parked at the store and not parked at a mall across the street and crossed a busy four lane road.

In addition to the Defendant's contradicting and inconsistent testimony the Court felt that the Defendant was not credible for other reasons. During cross-examination it appeared that the Defendant had changed his version of events due to a conversation he had with another person or his attorney.

> COMMONWEALTH: Mr. Prechtl, you had at one point when I asked you a question stated that you – well, actually you had stated on direct examination that you had got back to your car at 5:30. Is that correct?
>
> DEFENDANT: Yes, I did say that, but it wasn't – it wasn't – it was in accurate when I said there.

COMMONWEALTH: And you gave the more accurate time after the break, when you came back into court after the break this afternoon?

DEFENDANT: Well, we clarified it, yes, it was later.

COMMONWEALTH: And when you say we clarified it, who clarified it? Who's we?

. . . .

DEFENDANT: Between you and I.

Id. at 98-99. It was also apparent to the Court that the Defendant looked at his attorney before answering many questions. Id. at 106.

Second, the Court was able to find sufficient evidence for all the elements of the crime. The Defendant was found in his vehicle while it was running and the lights on. Id. at 10. The vehicle was located in a shopping center where all the stores were closed at the time McGee approached his vehicle, which was around 2:23 AM. Id. The vehicle was the only vehicle around it and near a closed bank and pharmacy. Id. at 11. The Defendant argued that his keys were not in the ignition and that he activated his ignition with a keyless remote while sleeping. The Court did not find this credible as McGee stated that he saw the keys in the ignition when he told the Defendant to turn the vehicle off. Id. at 32, 33. Further, the vehicle automatically shut off after at most twenty (20) minutes and the Defendant testified that he was in the vehicle for seven (7) to seven and a half (7 ½) hours and only hit the button twice. Id. at 101.

A combination of factors is required to determine whether a person had "actual physical control" of a vehicle: 1) the motor running; 2) the location of the vehicle; and 3) additional evidence showing that the defendant had driven the vehicle. Commonwealth v. Williams, 871 A.2d 254 (Pa. Super. 2005). In Williams, the defendant was found sleeping in his vehicle with the headlights and stereo on. The vehicle was parked near a restaurant and it took up two parking spaces. The Court found that the evidence supported an inference that the vehicle was

driven. In addition, the trial court found that the defendant's testimony that the driver was inside the restaurant to not be credible. Similarly here, the Defendant was parked in a shopping center with no stores open at such an early time in the morning. Specifically, the Defendant was parked by a closed bank and pharmacy and there were no other vehicles parked in his general area. There was no location nearby that the Defendant could have purchases alcohol.[1] The vehicle's engine was running and its lights were on. McGee specifically stated that he saw keys in the ignition and based off of the trial the Defendant never tried to explain to McGee that he did not in fact drive his vehicle. Lastly, because the Defendant constantly changed his story and at one point admitting to driving directly to the Harley Davidson store, the Court believes the Defendant did in fact drive his vehicle based on his testimony. See also Commonwealth v. Lehman, 820 A.2d 766 (Pa. Super. 2003) (determining that a defendant sleeping outside of a closed store with the vehicle running was in actual physical control); Commonwealth v. Yaninas, 722 A.2d 187 (Pa. Super. 1998) (finding actually physical control where a driver was found sleeping while his car was running and there was an open can of beer between his legs). Therefore, the Court found that the Defendant was in "actual physical control" of his vehicle.

Finally, the Defendant was found with signs of intoxication and admitted to drinking four (4) to five (5) beers and a couple mixed drinks. Id. at 58. The Defendant's eyes were red, his speech was slurred, and he smelled of alcohol. Id. at 12-13, 16. The Defendant refused to perform field sobriety tests and his BAC was later determined to be 0.126%. Id. at 13-16. The Court properly found that the Defendant was incapable of safely driving. Therefore, the Court had sufficient evidence to deny the Defendant's Motion for Judgment of Acquittal, if it was raised.

[1] See Commonwealth v. Byers, 650 A.2d 468 (Pa. Super. 1994) (finding that a defendant that was asleep in his car outside an establishment he purchased beer and did not move his vehicle so he was not a threat to public safety).

The Court erred, as a matter of law, as the weight of the evidence doest not support her verdict of guilty

The Defendant alleges that the verdict of guilty was not supported by the weight of evidence. Where issues of credibility and weight of the evidence are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. Commonwealth v. Paquette, 301 A.2d 837, 841 (Pa. 1973). The weight to be according conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. Commonwealth v. Zapata, 290 A.2d 114 (Pa. 1972). "A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice." Id.

The evidence in the light most favorable to the Commonwealth, was discussed above and determined to have sufficient weight to deny the Defendant's Motion for Judgment of Acquittal. In addition, this Court finds that the same evidence supports a verdict of guilty and is not against the weight of evidence. The Defendant was in "actual physical control" of his vehicle and incapable of safely driving.

The Court erred in failing to grant the Defendant's Omnibus Pre-Trial Motion

For purposes of this Opinion, the Court will rely on Judge Lovecchio's Opinion and Order dated September 23, 2011, which determined that McGee approaching the Defendant's vehicle was a mere encounter.

The Court erred in permitting the Commonwealth to introduce evidence of alleged conversations between the Defendant and the arresting trooper as they did not appear on any video or audio recording

The Defendant alleges that the Court should not have allowed the Commonwealth to admit conversations between the Defendant and the arresting trooper because they did not appear on any video or audio recording. First, the Defendant did not initially object to any statements made by McGee of conversations made prior to the video/audio recording. N.T., March 27, 2012, p 12-13. Therefore, the Court finds that the Defendant waived this objection even though he may have made it at a later time. Second, the Court is unaware of any rule in the Pennsylvania Rules of Evidence that does not allow a statement or conversation to be introduced at trial just because it was not on a video or audio recording. This Court, however, will discuss why the conversation was allowed at trial.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). "When an extrajudicial statement is offered for a purpose apart from proving the truth its contents, it is not hearsay and is not excluded under the hearsay rule." Commonwealth v. Darden, 457 A.2d 549, 551 (Pa. Super. 1983). Here, the Defendant does not state exactly which statements he believes were improperly admitted. In general, however, the statements the Defendant made were not considered for the truth of the matter asserted. The interaction between the Defendant and McGee was relevant to whether the Defendant had signs of intoxication. Further, any observations made by McGee would not be considered hearsay as they are not statements made by a declarant.[2]

[2] Observations by McGee that the Defendant's vehicle had a key in the ignition or that the Defendant had multiple signs of intoxication would not be considered statements applicable to the hearsay exception.

In addition, McGee discussed why the video/audio was not playing when he initially approached the vehicle. McGee did not know whether there was anything wrong or criminal occurring and therefore he did not activate the video/audio. N.T., March 27, 2012, p 23-24. After approaching the vehicle and shortly talking with the Defendant, McGee determined that there was a possible DUI and only then activated the video/audio. These facts corroborate what was said by McGee at the Suppression and the determination by the Court that the interaction was a mere encounter.

DATE: _____ By the Court,

Nancy L. Butts, President Judge

xc: DA
Jarett R. Smith, Esquire
109 N Main Street
Coudersport, PA 16915