IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 427 - 2012
	:	
vs.	:	
	:	
KEVIN ANDRE ARMSTRONG,	:	
Defendant	:	

OPINION IN SUPPORT OF ORDER OF May 29, 2013,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant was found guilty of Driving Under the Influence of Alcohol, Public Drunkenness and two summary traffic offenses following a bench trial on March 18, 2013. He was sentenced on May 15, 2013, to five days to six months incarceration and ordered to pay fines totaling $1,150.00. Defendant filed a Motion for Reconsideration and Extraordinary Relief on May 23, 2013, which apparently was in the nature of a Post-Sentence Motion as it asserted that the sentence was excessive, the evidence was insufficient and the verdict was against the weight of the evidence. In the motion, Defendant indicated that no hearing was requested at that time and the motion was therefore denied without hearing or argument, by Order dated May 29, 2013.

The instant appeal raises two issues: whether the verdict was against the weight of the evidence and whether the suppression court erred in denying Defendant's Motion to Suppress. It appears both issues focus on the same necessary finding of fact: that Defendant was driving the vehicle.[1]

At trial, it was established that police were called to the Giant Food Store in Loyalsock by the manager of the store after Defendant knocked over a display, engaged in an argument with the manager and would not leave when requested to do so. As it appeared to the troopers that Defendant was intoxicated, a surveillance tape of the parking lot where Defendant's

---

1 Defendant testified at trial that he was "so intoxicated that night I do not know which door I got out of." N.T., March 18, 2013 at p. 129. Defendant also did not dispute the evidence that his BAC was .239. Therefore, the court assumes that only whether Defendant drove, and not whether he was intoxicated such that he was incapable of safe driving, or had a BAC over the legal limit, is the focus of the weight-of-the-evidence argument. With respect to the suppression issue, the suppression court noted in his opinion that "following the hearing, Defendant argued only that there was insufficient probable cause to believe that the Defendant was operating a vehicle", and that "Defendant abandoned any argument relating to the Defendant being under the influence of alcohol", See Opinion and Order filed July 26, 2012, at p. 3, and in his Statement of Matters Complained of on Appeal, Defendant

vehicle was parked was reviewed by one of the troopers;[2] he concluded that Defendant had exited the driver's side front door of the vehicle. After Defendant was unable to perform field sobriety tests, Defendant was arrested and taken to the DUI Center.

At trial, to support the contention that Defendant had driven the vehicle, the Commonwealth presented the surveillance video, as well as the testimony of the officer who interviewed defendant at the DUI Center, the testimony of the troopers who responded to the scene, and the testimony of Defendant's godson. The surveillance video shows Defendant exiting the vehicle from the front driver's door. The officer who interviewed Defendant at the DUI Center testified that he asked Defendant whether he had driven the vehicle and he answered "yes". One of the troopers at the scene testified that he obtained a set of keys from Defendant's pocket and handed them to the person who had been called by Defendant's daughter to come take her and Defendant's godson home. Finally, Defendant's godson testified that Defendant had driven from the bar to the Giant store.[3]

To counter the Commonwealth's evidence, Defendant presented the testimony of his daughter, his son's mother, and his own testimony. Defendant's daughter testified that Defendant's godson drove from the bar to the Giant store and that Defendant had been in the back seat of the vehicle. The court found her testimony conflicting and confusing, however. For example, she stated on direct examination that when the two of them came out of the store, Defendant's godson "got in the driver's seat", N.T., March 18, 2013, at p. 86, but then on cross-examination, when confronted with the surveillance video, admitted that it appeared he was exiting the middle, sliding door rather than the driver's front door when he got back out of the vehicle. Id. at p. 101. The testimony of Defendant's son's mother, that Defendant's godson had told her that "he was driving all through the time that they left out the house, him, Karema and Kevin, that he was driving because they was dropping Kevin off at the bar, sitting in the car waiting for him", Id. at p. 113, conflicted with Defendant's testimony that he himself, and

---

focuses on the suppression court's finding of fact that Defendant was the driver.

2 Whether Defendant had driven to the store was in question as Defendant's daughter and his godson had also come into the store with him and apparently no one in the store had seen who was driving the vehicle when it pulled into the parking lot.

3 The testimony established that Defendant, his daughter and his godson had been at a bar on Washington Boulevard for about two hours prior to arriving at Giant. Defendant had been in the bar while his daughter and godson waited in the vehicle.

not his godson, had driven from the house to the bar. Id. at p. 116. And, Defendant's testimony is itself conflicting, as he stated at one point that "when I came outside [of the bar] I was sitting in the front seat smiling, and I was, like, all right, man, it's cool, so I got in the back seat", Id. at p. 117, but at another point stated that, when he came out of the bar, he "had to cross the street to get in. I slid the door open and I got in the back seat behind Tyler." Defendant's insistence that he knows for a fact that he was not driving from the bar to Giant thus rang hollow.

A "weight of the evidence" claim contends the verdict is a product of speculation or conjecture, and requires a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice. Commonwealth v. Dougherty, 679 A.2d 779 (Pa. Super. 1996). As explained at the time of the verdict, *see* N.T. at pp. 170-173, the court was not required to engage in speculation or conjecture, and was persuaded beyond a reasonable doubt that Defendant was driving the vehicle.

With respect to the suppression claim, as such was addressed by the Honorable Marc F. Lovecchio, this court will defer to Judge Lovecchio's Opinion issued in support of his decision, filed July 26, 2012, wherein he explains why he concluded the troopers had probable cause to believe Defendant had been driving the vehicle.

Dated: September 16, 2013

Respectfully submitted,

Dudley N. Anderson, Judge

cc: District Attorney
Brian Zeiger, Esq., Levin & Zeiger, LLP
123 South Broad Street, Suite 1200, Philadelphia, PA 19109
Gary Weber, Esq. (Lycoming Reporter)
Hon. Dudley N. Anderson