

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	DOCKET NO. CR-799-2012
vs.	:	
	:	CRIMINAL
TED EUGENE DYE, JR.,	:	
Defendant.	:	1008 MDA 2014

**OPINION AND ORDER**

**Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)**

This Court issues the following Opinion and Order pursuant to Pennsylvania Rule of Appellate Procedure 1925(a). This is an appeal from the Court’s Order dated May 21, 2014, sentencing defendant on a verdict of guilty of DUI following a non-jury trial held on January 23, 2014.<sup>1</sup>

The Defendant filed his concise statement of matters complained of on appeal raising the following 2 issues for appeal.

1. The Suppression Court erred in finding that the arresting officers had sufficient legal cause to arrest Defendant for driving under the influence. Viewing the facts in the best light for the Commonwealth indicates that the information available to the arresting officers at the time of the contact with Defendant was not sufficient to establish probable cause. Defendant was not found in actual physical control of the motor vehicle. The evidence presented was consistent with Defendant being the passenger in the vehicle.
2. The evidence to support a finding of guilt for Count 2 of the information, Driving under the Influence, middle tier, was insufficient in that the Commonwealth was unable to produce admissible evidence regarding Defendant’s blood alcohol level. The State Police did not demonstrate sufficient good cause for not drawing Defendant’s blood within two (2) hours of Defendant being in actual physical control of the movement of a motor vehicle.

The Court will address defendant’s issues in turn.

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<sup>1</sup> The trial was presented on a case stated basis. The non-jury verdict was dated January 24, 2014, and filed January 29, 2014. The Court found beyond a reasonable doubt that defendant violated 75 Pa.C.S.A. § 3802(a)(1) under Count 1, an ungraded misdemeanor, and that defendant violated §3802(b), high rate (middle tier), an ungraded misdemeanor under count 2.

**1. The Suppression Court Correctly Found Probable Cause.**

In support of the first issue raised by the defendant, whether the Suppression Court correctly found probable cause, this Court respectfully relies upon the Opinion and Order entered by the Honorable Marc F. Lovecchio, dated May 6, 2013 and filed May 7, 2013. Upon review of the transcript from the suppression hearing, it is further noted that Trooper Fye testified that defendant was placed into custody *after* defendant told Fye that **defendant** had been driving the vehicle. Notes of Transcript from Suppression Hearing on 3/28/13, (N.T. 3/28/13, at 49, l. 11-17).(emphasis added) Therefore, the evidence was not consistent with the defendant being a passenger and this issue appears to be without merit.

**2. The State Police Demonstrated good cause for not drawing Defendant's blood within two (2) hours of Defendant being in actual physical control of the movement of a motor vehicle.**

The second issue raised on appeal is whether the Commonwealth demonstrated good cause under 75 Pa.C.S. § 3802 (g)(1) for drawing the defendant's blood 35 minutes in excess of 2 hours from the time defendant was operating the vehicle.<sup>2</sup> In support of this Court's determination that good cause existed, this Court respectfully relies upon its Verdict on January 24, filed January 29, 2014, the Opinion and Order entered by the Honorable Marc F. Lovecchio,

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<sup>2</sup> A conviction under 75 Pa.C.S. § 3802(b) requires the Commonwealth to prove that the defendant drove, operated or was in physical control of the movement of "a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% **within two hours** after the individual has driven, operated or been in actual physical control of the movement of the vehicle." (emphasis added). It is undisputed in this case that the blood was drawn 35 minutes in excess of the 2 hours from when the defendant was operating the vehicle. Therefore the question is whether the circumstances fall within the exception to the two hour rule as provided in 75 Pa.C.S. § 3802 (g). 75 Pa.C.S. § 3802 (g) provides an exception to the two-hour rule where 1) the Commonwealth establishes good cause and 2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained. Defendant has not raised any issue with respect to the second prong requiring the Commonwealth to establish that the defendant did not imbibe alcohol between the time he was arrested and the time the sample was obtained pursuant to 75 Pa.C.S. § 3802 (g)(2). This Court believes that defendant concedes that he did not imbibe alcohol or use controlled substances between the time of arrest and the time the sample was obtained. As the defendant has not raised an issue under the second prong, it has not been addressed in this Opinion and the Court believes it has been waived. *See, e.g., Dollar Bank v. Swartz*, 657 A.2d 1242, 1245 (Pa. 1995).

dated May 6, 2013, and filed May 7, 2013, specifically at 6-9, and the following supplemental opinion.

This Court believes that the Commonwealth has shown good cause for explaining why the chemical sample could not be obtained within two hours. 75 Pa.C.S. § 3802 (g) (1) provides a good-cause exception to the two-hour rule as follows.

[W]here alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:

- (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours[. \*\*\* ] 75 Pa.C.S. § 3802 (g) (1)

There has not yet been appellate authority directly on point, however, some trial courts have opined that good cause exists where the Commonwealth has established a specific time-frame context for the blood draw and where distance and investigations explain the delay in getting the defendant's blood drawn. For example, in Commonwealth v. Hill, No. 3281/06 (C.P. Berks June 8, 2007), [2007 Pa. D & C. Dec. LEXIS 181], *aff'd* 953 A.2d (Pa. Super. 2008), the trial court concluded that the Commonwealth established good cause for collecting the blood sample 17 minutes after the two-hour period. In Hill, the trooper was 20 minutes away from the accident scene when dispatched. It took her 47 minutes to travel to the processing center. At the accident scene, the trooper interviewed the victim and performed field sobriety tests. The accident scene was 34 miles from the processing center and it took 47 minutes to travel to processing center.

Similarly, in Commonwealth v. McNair, 8 Pa. D. & C.5th 262 (C.P. Fayette 2009), the Court concluded that the Commonwealth established good cause where the blood test occurred at 12:14 a.m. when the time of the accident was estimated to be between 8 and 10 p.m. The police

received a dispatch and responded around 11:04 p.m. There was a delay because the parties left the scene of the accident and waited ten to fifteen minutes before contacting the police.

When the Commonwealth fails to establish the time frames involved, however, courts have dismissed the charges. For example, in Commonwealth v. Segida, 2006 PA Super 296; 912 A.2d 841, 848 (Oct. 24, 2006), the Superior Court concluded that the evidence presented was insufficient to support a conviction for DUI. The Commonwealth failed to produce any evidence as to the time of the blood being drawn at the hospital, of drinking by the driver, of driving or of the accident. Segida, 912 A.2d at 845-846. There was no evidence presented from which those times could have reasonably been inferred. Id. The Commonwealth also “failed to preclude the possibility that Appellant ingested alcohol **after** the accident occurred.” Segida, 912 A.2d at 847. (emphasis in the original) Similarly, in Commonwealth v. Pophal, No. 8-2011 (C.P. Lycoming June \_ 2011), the Court concluded that, without any evidence whatsoever as to when the defendant’s blood was drawn, the Court could not determine whether the blood draw was within the 2 hours or “whether there was good cause explaining why the chemical test could not be obtained within two hours.”

In the instant case, the Commonwealth established a very specific timeline of pertinent events. The Commonwealth’s witness, Tracy Harp, observed the accident from her kitchen window at approximately 8:00 p.m. N.T. 1/23/14 at 5, l. 18-23. Ms. Harp checked on the vehicle which was stuck in a ditch, and asked the defendant whether he wanted her to call 911 and defendant said no. N.T. 1/23/14 at 6, l. 2-9. After about ten minutes, Ms. Harp’s daughter contacted Corporal (Corp.) Farber who lived nearby. N.T. 1/23/14 at 6, l.7-9. While off duty, Corp. Farber received the unexpected phone call at about 8:15 p.m. while watching football. Corp. Faber left his home at about 8:25 p.m.to check on the crash and arrived at the accident

scene at 8:30 p.m., which was approximately three quarters of a mile from his residence. N.T. 1/23/14 at 5, l. 1-3, and at 7, l. 7, 17-21.

At approximately 8:20 p.m. Pennsylvania State Trooper Christine Fye received a call that an off duty corporal had picked up a gentleman who he believed had crashed a vehicle and ultimately taken him to Trooper Haven's home. N.T. 1/23/14 at 9, line, 15-19. Given the weather and distance, Trooper Fye took 30 to 40 minutes to arrive at Trooper Havens' residence. N.T. 1/23/14 at 9, lines, 1, 15-19. and at 10, line 1. *See also*, Commonwealth Exhibit 1 (40 minutes between dispatch time and arrival time.) Shortly after Corp. Faber arrived, Trooper Fye arrived at Trooper Haven's residence at approximately 8:50 to 9:00 p.m. N.T. 1/23/14 at 9, line 1, at 10, line 1. When Trooper Fye arrived, the defendant was seated in the rear of the ambulance with EMS personnel. N.T. 1/23/14 at 10, line 4-5.

The ambulance left Trooper Havens' residence at approximately 9:30 p.m. N.T. 1/23/14 at 11, line, 10-11. The defendant "was taken by EMS to the Williamsport Hospital for possible hypothermia/frostbite where he received treatment." *See, Commonwealth Exhibit 1*, Police Crash Report, page 4. There is no information as to what time the ambulance pulled into the E.R. which is located in the same building as the DUI Processing Center. N.T. 1/23/14 at 15. However, defendant arrived at the DUI Center for processing at approximately 10:15 p.m. N.T. 1/23/14 at 11, line 13. At the DUI Center, defendant answered general intake booking questions and received the Section 1547 Chemical Testing Warnings. N.T. 1/23/14 at 13, line 3-6. Defendant appeared confused about the warnings and asked a lot of questions before signing the form DL 26 and agreeing to submit to a blood sample. N.T. 1/23/14 at 13, line 6-10. Defendant submitted a blood sample at 10:35 p.m. N.T. 1/23/14 at 13, l, 13.

In addition to providing ample evidence of a specific timeline of events, the Commonwealth also established several variables that led to the blood draw occurring outside

the 2-hour window: the inclement weather, the distances travelled, the off duty nature of the encounter with defendant, and defendant's own actions. As to the inclement weather, the snowy, icy and slippery roads<sup>3</sup> slowed travel for all involved with investigating the scene of the accident and in transporting the defendant that evening. Furthermore, the severe cold and icy weather created an added concern for the medical needs of the defendant, as well as any other potential driver, passenger or victim. In the extreme cold, snowy weather and on the icy road, the off duty Corp. Farber encountered the defendant walking, with blood on his hands and shirt, "in a tee shirt, blue jeans, one foot was barefoot, and one just had a sock on[.]" N.T. 3/28/13 at 8, l. 25; at 9, l. 16-23. Therefore, Corp. Farber's priority was getting the defendant to a warm place and securing defendant's safety. N.T. 3/28/13 at 19.

Another variable was the fact that the Corp. Farber became involved in this matter while off duty. Corp. Faber had to get ready, warm up his private vehicle and clear the snow accumulation from his vehicle before going to the scene of the accident upon receiving the unexpected request. Since Corp. Farber was off duty, Corp. Farber had no handcuffs, no Taser, no way to subdue the defendant if needed. After encountering the defendant, Corp. Farber did not know how long defendant would remain cooperative, especially once he realized that Corp. Farber suspected defendant of DUI. This impacted the decision about how and when to report the DUI, and where to take the defendant. Seeing the way defendant was dressed in the extreme cold, Corp. Faber's priority was to get defendant inside a warm place without risking his own safety. N.T. 3/28/13 at 19. Being off duty and alone, Corp. Farber took extra-time to check the defendant before allowing him into his personal vehicle. N.T. 3/28/13 at 10, 13-15. In addition, Corp. Faber attempted to drop defendant off at defendant's friend's house with the intent of reporting the accident once he dropped defendant off, depending upon the level of

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<sup>3</sup> It should be noted that the accident occurred on a rural secondary road. See, Commonwealth's Exhibit 1.

resistance exhibited by the defendant. N.T. 3/28/13 at 13. Since no one was home at defendant's friend's house, Corp. Faber drove back to Ms. Harp's residence and reported the accident from there and contacted Trooper Havens for assistance. N.T. 3/28/13 at 14. Corp. Faber then brought defendant to Trooper's Havens' nearby residence. N.T. 3/28/13 at 15. From there defendant was taken by ambulance to the E.R.

Another significant variable was defendant's own actions which delayed the blood draw. The defendant refused to call 911 and left the scene of the accident. N.T. 1/23/14 at 6, lines 5-9. The defendant falsely stated to police that another individual had been driving the vehicle. N.T. 3/28/13 at 11, l. 20; N.T. 1/23/14 at 8, line 7-8, at 10, lines 7-8. As a result, there was a concern that someone else could be injured or in need of assistance or abandoned in the extreme cold. N.T. 3/28/13 at 11, l. 20; N.T. 1/23/14 at 10, lines 7-15. In addition, the defendant walked from the scene of the accident without shoes and wearing only a t-shirt, despite the extreme cold. N.T. 3/28/13 at 8, l. 25; at 9, l. 16-23. Consequently, the defendant required immediate attention to ensure his well-being and required medical treatment at the ER. At the DUI center, defendant's responses were slow. Defendant required repeated questioning prior to understanding and providing consent to draw his blood. N.T. 1/23/14 at 13, line 6-10. Thus, extra time was necessary to ensure proper and informed consent.

Given the timelines established and all of the variables at play, the Court believes the Commonwealth established good cause for obtaining the blood sample 35 minutes outside the 2 hour time period. With the benefit of hindsight, defendant speculates that if Trooper Fye had followed behind the ambulance, rather than observing the crash site to which she was assigned, the two-hour time window could have been met. No doubt, one could conceive ways that it may have been possible to secure a blood draw within the two-hour window. However, the Court does not believe that the Commonwealth is required to show that the first responders and

arresting officers did absolutely everything possible to get the defendant to submit to a blood draw within the two-hour window to establish good cause. This is especially true where the defendant's own actions, in addition to a confluence of variables, caused delay and where it is conceded that defendant did not imbibe in alcohol or use controlled substances between the time of the accident and the blood draw. The Court believes the Commonwealth established good cause and that all responders acted with due diligence in the midst of many variables in order to properly and promptly attend to all urgent needs arising from a DUI crash on an extremely cold, snowy and icy night.

**Conclusion**

For these reasons, and those provided in this Court's non-jury verdict and those provided in the Opinion of the Suppression Court, this Court respectfully requests that the verdict and sentence be affirmed.

BY THE COURT,

Date September 3, 2014

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Richard A. Gray, J.

cc: District Attorney's Office (AC)  
Kyle W. Rude, Esq.  
Superior Court (& 1)