IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-370-2014**
v.	:	
	:	
TRACY LYNN HEATON,	:	**CRIMINAL DIVISION**
Defendant	:	

OPINION AND ORDER

I. Background

On December 15, 2014, the Court found the Defendant guilty of DUI under 75 Pa.C.S. § 3802(d)(1)(ii) and DUI under 75 Pa.C.S. § 3802(d)(2). On March 3, 2015, the Court sentenced the Defendant. On March 12, 2015, the Defendant filed a timely post-sentence motion. Argument on the motion was held on April 6, 2015.

A. Trooper James Doane's Testimony

James Doane (Doane) is a trooper in the Pennsylvania State Police. At the time of the Defendant's trial, Doane had been a trooper for more than ten years. Doane is not a drug recognition expert, but he has training in the detection of impaired drivers. He has been involved in 75 to 100 suspected DUI traffic stops.

On November 2, 2013, Doane responded to a single vehicle crash on State Route 118. When he arrived at the crash scene, he saw a heavily damaged vehicle on its roof. He also noticed damage to the guardrail and a tree. The road was wet, and although there may have been slight curves in the area of the crash, there were no sharp curves. Doane saw a pill bottle in the vehicle.

At Muncy Valley Hospital, Doane spoke with the Defendant, who was the vehicle's driver. Doane noticed that the Defendant's pupils were constricted and her speech was "a little

bit sluggish, little bit slurred." The Defendant told Doane that, earlier in the day, she had taken one morphine pill, two hydrocodone pills, two Soma pills, and three Lorazepam pills. The Defendant said that she had prescriptions for the pills but she may have taken more than she was prescribed. The Defendant also told Doane that she had been crying and distraught before the crash because her son had recently died. Doane believed that the Defendant was under the influence of drugs to a degree that she could not safely operate a vehicle. The Defendant agreed to have her blood drawn for testing.

B. Ayako Chan-Hosokawa's Testimony

Ayako Chan-Hosokawa is the forensic toxicologist who screened the Defendant's blood. The blood had 16 nanograms per milliliter of morphine and 18 nanograms per milliliter of hydrocodone. Both levels are consistent with somebody who has a prescription. Chan-Hosokawa did not screen for Soma, so she "could not rule out the presence or absence of [Soma] in [the Defendant's] blood." N.T., 12/15/14, at 28. It is "possible" that Lorazepam was in the Defendant's blood. N.T., 12/15/14, at 29.

Chan-Hosokawa believes that 60 milligrams of morphine sulfate every 12 hours is a common prescription. A person who has been taking morphine for more than three years can have a tolerance to it. A person with a tolerance would be less likely to experience the effects of morphine. A person can develop a tolerance to hydrocodone. A person with a tolerance to hydrocodone would be less susceptible to the drug's effects than a first-time user. Constricted pupils is a sign of opiate intoxication.

C. Defendant's Testimony

Since 2011, the Defendant has had prescriptions for morphine sulfate, hydrocodone, and Lorazepam. She is supposed to take one 60-milligram morphine sulfate pill twice a day. She is supposed to take one hydrocodone pill three to four times a day. The Defendant may have been directed to take two Lorazepam pills at a time. She usually took Lorazepam at night. The Defendant took these medications and operated a vehicle on a regular basis. The Defendant once had a prescription to Soma but did not have the Soma prescription when the crash occurred. She usually took Soma at night and took it only if she "had a real bad muscle spasm." She may have taken Soma and Lorazepam on the night before the crash. The Defendant testified about the drugs she took on November 2, 2013:

> **Court**: Okay. And that when you went to the doctor and you got the prescriptions for [morphine sulfate, hydrocodone, and Lorazepam], all three were prescribed at the same time?
>
> **Defendant**: Yes.
>
> **Court**: And they were prescribed to be taken in a certain way?
>
> **Defendant**: Yes.
>
> **Court**: That night were you taking them that way or had you been taking them that way?
>
> **Defendant**: Yeah.
>
> **Court**: Except for the fact that you had Soma on top of it?
>
> **Defendant**: Yeah.

N.T., 12/15/14, at 51. The Defendant's son died on October 25, 2013. She testified about the crash:

> I remember starting down. I was crying. I'm sorry you all. I was starting down Lairdsville Hill and I was crying so hard that I could not get control and alls I kept thinking about was my son and then the next thing I know I guess I blacked out, I don't know what happened, and then the next thing I know I was on the floorboard and I was

> mashing the brake trying to stop the car and I hit my head and I was – I didn't know what was going on."

N.T., 12/15/14, at 46.

D. Arguments

In her motion, the Defendant argues that the evidence was insufficient to prove DUI under 75 Pa.C.S. § 3802(d)(1)(ii) and DUI under 75 Pa.C.S. § 3802(d)(2). Specifically, she argues that the evidence was insufficient for DUI under 75 Pa.C.S. § 3802(d)(1)(ii) because the Commonwealth failed to prove that she did not have a valid prescription for the controlled substances in her blood. In addition, the Defendant argues that the verdicts are against the weight of the evidence. Lastly, the Defendant alleges after-discovered evidence and asks for a new trial. The alleged after-discovered evidence is different testimony from the Defendant. The Defendant alleges that a head injury sustained in the crash caused "memory impairment and insufficient memory recall." According to the Defendant, she knew that she had a head injury at the time of trial but did not discover the extent of the impairment caused by the injury until after trial. She argues that she exercised reasonable diligence and her different testimony would have changed the trial's outcome. The Commonwealth notes that the Defendant saw a doctor on September 25, 2014, more than two months before the trial.

II. Discussion

A. The Evidence was Sufficient to Prove DUI under 75 Pa.C.S. § 3802(d)(1)(ii).

The following is the standard courts apply when reviewing the sufficiency of the evidence:

> The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime

> beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
>
> However, the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Commonwealth v. Slocum, 86 A.3d 272, 275-76 (Pa. Super. 2014).

75 Pa.C.S. § 3802(d)(1) "requires a measurement to determine if any amount of a Schedule I, II, or III controlled substance is detectable in the defendant's blood." Commonwealth v. Griffith, 32 A.3d 1231, 1239 (Pa. 2011). 75 Pa.C.S. § 3802(d)(1)(ii) requires that the controlled substance in the defendant's blood not be medically prescribed. Here, the Commonwealth presented evidence that the Defendant had morphine and hydrocodone in her blood. The Defendant testified that, at the time of the crash, she had prescriptions for morphine and hydrocodone. The Court did not find this testimony credible. Therefore, the evidence was sufficient to prove DUI under 75 Pa.C.S. § 3802(d)(1)(ii).

B. The Evidence was Sufficient to Prove DUI under 75 Pa.C.S. § 3802(d)(2).

75 Pa.C.S. § 3802(d)(2) "prohibits driving if one is 'under the influence of a drug or combination of drugs to a degree which impairs [one's] ability to safely drive.'" Griffith, 32 A.3d at 1239. Here, the Defendant testified that she took morphine, hydrocodone, and

Lorazepam. She drove a vehicle that, after hitting the guard rail and a tree, came to rest on its roof. The Defendant testified that she did not know what happened and guessed she "blacked out." Trooper Doane testified that the Defendant's speech was "a little bit sluggish, little bit slurred." He also testified that the Defendant's pupils were constricted, which is a sign of opiate intoxication. Such evidence is sufficient to find beyond a reasonable doubt that the Defendant was under the influence of drugs to a degree which impaired her ability to safely drive.

C. The Verdicts are not Against the Weight of the Evidence.

The following is the standard courts apply when reviewing weight of evidence claims:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
>
> [A] new trial [should be granted] only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when 'the figure of Justice totters on her pedestal,' or when 'the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.'

Commonwealth v. Boyd, 73 A.3d 1269, 1275-76 (Pa. Super. 2013).

Here, the Defendant testified that she had prescriptions for morphine and hydrocodone. The Court did not find this testimony credible. Therefore, the verdict for DUI under 75 Pa.C.S. § 3802(d)(1)(ii) does not shock this Court sense of justice.

To counter the Commonwealth's evidence that the Defendant was incapable of safe driving, the Defendant testified that she had been taking prescription morphine, hydrocodone, and Lorazepam since 2011. Chan-Hosokawa testified that a person with a tolerance to drugs would be less susceptible to the drugs' effects. She also testified that the levels of morphine and hydrocodone in the Defendant's blood were consistent with levels that somebody with prescriptions would have. The Court considered the Defendant's evidence, but with the evidence

discussed in Section II. B., the verdict for DUI under 75 Pa.C.S. § 3802(d)(2) does not shock this Court's sense of justice.

D. A New Trial is not Warranted on After-Discovered Evidence Ground.

"A trial court should grant a motion for new trial on the ground of after-discovered evidence where producible and admissible evidence discovered after trial (1) could not have been obtained prior to the end of trial with the exercise of reasonable diligence; (2) is not merely corroborative or cumulative evidence; (3) is not merely impeachment evidence; and (4) is of such a nature that its use will likely result in a different verdict on retrial." Commonwealth v. Lyons, 79 A.3d 1053, 1068 (Pa. 2013).

"The test is conjunctive; the defendant must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." Commonwealth v. Padillas, 997 A.2d 356, 363 (Pa. Super. 2010). "To obtain a new trial based on after-discovered evidence, the petitioner must explain why he could not have produced the evidence in question at or before trial by the exercise of reasonable diligence." Id. "[A] defendant who fails to question or investigate an obvious, available source of information, cannot later claim evidence from that source constitutes newly discovered evidence." Id. at 364.

"[B]efore granting a new trial, a court must assess whether the alleged after-discovered evidence is of such nature and character that it would likely compel a different verdict if a new trial is granted. In making that determination, a court should consider the integrity of the alleged after-discovered evidence, the motive of those offering the evidence, and the overall strength of the evidence supporting the conviction." Id. at 365 (citations omitted).

Initially and most importantly, the Defendant has not presented any medical evidence that she had impaired memory at the time of the trial. Assuming that the Defendant did have

impaired memory at the time of trial, she has not explained why she could not have discovered this before trial by the exercise of reasonable diligence. Furthermore, given the great strength of the evidence supporting the convictions, it is unlikely that different testimony of the Defendant would compel a different verdict.

III. Conclusion

The evidence was sufficient to prove DUI under 75 Pa.C.S. § 3802(d)(1)(ii) and DUI under 75 Pa.C.S. § 3802(d)(2). The verdicts are not against the weight of the evidence as they do not shock this Court's sense of justice. A new trial is not warranted on after-discovered evidence ground.

ORDER

AND NOW, this __________ day of July, 2015, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Post-Sentence Motion is hereby DENIED. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

By the Court,

Nancy L. Butts, President Judge