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| COMMONWEALTH | : No. CR-1686-2013 |
| | : |
| vs. | : |
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| JEREMY KANSKI, | : |
| Defendant | : Post-Sentence Motion |

OPINION AND ORDER

On October 28, 2014, following a non-jury trial before the Honorable Dudley N. Anderson, Defendant was found guilty of driving under the influence with a high rate of alcohol. On April 22, 2015, Judge Anderson sentenced Defendant to six (6) months of intermediate punishment with thirty (30) days to be served in work release.

On May 4, 2015, Defendant filed a post-sentence motion which included a motion in arrest of judgment and motion for a reversal and remand for a suppression hearing. Argument on Defendant’s post-sentence motion was held before Judge Anderson on May 28, 2015.

At the argument, Defendant indicated that his weight of the evidence claim was “just to preserve” it for the record. Defense counsel argued that the “essential issue” concerned this court’s denial of Defendant’s omnibus pretrial motion *nunc pro tunc*.

Judge Anderson deferred a decision in connection with the *nunc pro tunc* issue and requested that this Court review the argument transcript and submit a supplemental opinion.

In an opinion and order dated August 5, 2014, this court denied Defendant’s petition for omnibus pretrial motion hearing *nunc pro tunc*. The court concluded that under all of the facts and circumstances of the case, it did not believe that the interests of justice

required the court to hold an evidentiary hearing on Defendant's untimely omnibus pretrial motion.

In his post-sentence motion, Defendant argues that the court erred because it did not have "the benefit of seeing the dash-camera video" which depicted the standard field sobriety tests, and because the PBT device was not calibrated.

The court cannot agree. First and with respect to the standard field sobriety tests, the court reviewed the dash-camera video. While the court at the time of its initial decision did not have the benefit of reviewing the video, Deputy Chief Bentley testified that he detected six clues on the horizontal gaze nystagmus (HGN) test and that Defendant failed both the walk and turn and the one-legged stand test.

The video does not depict how well Defendant performed on the HGN. The court credits the testimony of Deputy Chief Bentley. With respect to the walk and turn test, although Defendant did fairly well, the court noted several clues. For example, Defendant stepped off the line a few times and swayed somewhat. With respect to the one-legged stand test, the court noted additional clues. For example, Defendant counted the number "20 one-thousand" twice.

With respect to the PBT test, Defendant waived any claim that it was not calibrated. In Defendant's omnibus pretrial motion *nunc pro tunc*, Defendant failed make any claim that the PBT results were inadmissible, because the device was not calibrated. Therefore, even if the court had held a hearing on Defendant's omnibus motion, it would not have permitted Defendant to challenge the admissibility of the PBT results because the motion did not put the Commonwealth on notice of such a claim.

Although a PBT result is not admissible at trial, it can be used in determining

probable cause. 75 Pa. C.S. § 1547(k). As the court noted in its initial opinion and order, there is nothing in the omnibus motion which challenges the PBT results. The motion states that Defendant took two PBT's, which resulted in readings of .133% and .125%. The court found that those PBT results were supportive of Deputy Chief Bentley's observations of an odor of alcohol. The PBT results suggest that not only was there an odor of alcohol coming from inside the vehicle, but that the odor was likely coming from Defendant due to his ingestion of alcohol.

As well, the only statutory or case law condition with respect to utilizing PBT results in determining probable cause is that the officer must use a device approved by the Department. 75 Pa. C.S.A. § 1547 (k); *Commonwealth v. Semuta*, 902 A.2d 1254, 1260 (Pa. Super. 2006). Defendant has not provided any legal authority whatsoever which supports his position that in order to be considered for probable cause, the PBT needs to be calibrated. To the extent that Defendant relies on *Commonwealth v. Brigidi*, 6 A.3d 995, 999 n.9 (Pa. 2010), Defendant's reliance is misplaced. The question in that case was whether the PBT test results could be utilized at trial in a prosecution for underage drinking, which is a violation of the Crimes Code. The dicta regarding calibration in footnote 9 relates to that issue and not whether PBT results can be used to determine probable cause for a Vehicle Code violation in accordance with 75 Pa.C.S.A. §1547(k). As Justice Scalia recently noted: "Dicta on legal points, however, can do harm, because though they are not binding they can mislead." *Ohio v. Clark*, No. 13-1352, slip opn. (June 18, 2015)(Scalia, J., concurring). Moreover, Defendant submitted to a blood test that revealed he had a blood alcohol content (BAC) of .14%, which supports the PBT results in this case.

Given the above, the court remains of the opinion that the petition for

omnibus pretrial motion *nunc pro tunc* was properly denied. Accordingly, Defendant's post-sentence motion in the nature of a request to reverse and remand for a suppression hearing is denied.

ORDER

AND NOW, this ___ day of July 2015 for the reasons set forth in the foregoing opinion, Defendant's post-sentence motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: The Honorable Dudley N. Anderson
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